



Thesis

By

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of the University of
the Western Cape,
South Africa**

**LIFE IMPRISONMENT IN
INTERNATIONAL CRIMINAL TRIBUNALS
AND SELECTED AFRICAN
JURISDICTIONS – MAURITIUS, SOUTH
AFRICA AND UGANDA**

13 May 2009

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TRIBUNALS AND SELECTED AFRICAN JURISDICTIONS—
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BY

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degree Doctor of Law in the Faculty of Law of the University of
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Promoter:

Professor Lovell Fernandez

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13 May 2009

DECLARATION

I, Jamil Ddamulira Mujuzi, declare that **Life Imprisonment in International Criminal Tribunals and Selected African Jurisdictions – Mauritius, South Africa and Uganda** is my work and that it has not been submitted for any degree or examination in any other university or institution. All the sources used, referred to or quoted have been duly acknowledged.

Jamil Ddamulira Mujuzi

Signed.....

13 May 2009

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DEDICATION

To my beloved mother, Mukyala Sarah Namakula Ddamulira, who did all she could, sometimes in the most challenging of circumstances, for me to attain an education.

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CHAPTER I

INTRODUCTION AND OVERVIEW OF THE STUDY

1. Background to the study

It is rare in law and in other disciplines for a word or a phrase to appear to mean what it does not. This is, however, true when it comes to life imprisonment or life sentence.¹ Unlike sentences like the death penalty, there have been instances where even those who are expected to know the meaning of the sentence of life imprisonment have misunderstood it.² This misunderstanding is compounded by the fact that even dictionaries that have always helped us to understand the meaning of the words are of little help when it comes to the definition of life imprisonment. The Oxford Advanced Learner's Dictionary, for example, defines life sentence to mean 'the punishment by which [some body] spends the *rest of their life* in prison.'³ It goes ahead to define a 'lifer' as 'a person who has been sent to prison for their *whole life*.'⁴

The ambiguity of life imprisonment could partly explain why the campaign to abolish the death penalty and substitute it with life imprisonment has been successful in many parts of the world. When people are given the option to choose between the death penalty and life-imprisonment, many

¹ The words 'life imprisonment' and 'life sentence' are used interchangeably in this thesis.

² It has been argued that the misunderstanding of the meaning of life imprisonment led to the jurors in the United States to impose a death penalty in a situation where they would have done otherwise. See Marder 2006: 457-458.

³ Oxford Advanced Learner's Dictionary 2005: 853. (Emphasis mine).

⁴ Oxford Advanced Learner's Dictionary 2005: 853. (Emphasis mine).

would oppose the former and favour the latter for various reasons.⁵ This is because, *inter alia*, many people think that an offender sentenced to life imprisonment will be detained for the rest of his natural life. This is of course not true in some cases, and, as Lord Mustil held,

[t]he sentence of life imprisonment is also unique in that the words, which the judge is required to pronounce, do not mean what they say. Whilst in a very small minority of cases the prisoner is in the event confined for the rest of his natural life, this is not the usual or intended effect of a sentence of life imprisonment ... But although everyone knows what the words do not mean, nobody knows what they do mean, since the duration of the prisoner's detention depends on a series of recommendations ... and executive decisions ...⁶

The two tribunals that were established after the World War III, the Nuremberg Tribunal and the International Military Tribunal for the Far East, the Tokyo Tribunal, were empowered to impose the death penalty and indeed, as will be discussed later in detail, some offenders were sentenced to death.⁷ Although these tribunals were not expressly empowered to sentence offenders to life imprisonment, they did sentence some of the offenders to life imprisonment. However, the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC) all have jurisdiction to sentence offenders to life imprisonment.⁸ At the time of writing, the ICC had not completed any case and therefore had no

⁵ McCord 1998: 11-16, outlines the common 21 reasons why various people oppose capital punishment.

⁶ *R v Home Secretary, Ex parte Doody* [1994: 549H-550B) as quoted in Van Zyl Smit 2002: 2-3.

⁷ Chapter III, 3.1 and 3.2.

⁸ Chapter III, 3.3.1, 3.4.1, and 3.6.

jurisprudence on life imprisonment.⁹ The ICTR has sentenced more offenders to life imprisonment and imprisonment for the remainder of their lives than the ICTY. This thesis reviews cases on life imprisonment in international criminal tribunals in order to examine the theories of punishment that these tribunals considered in sentencing offenders to life imprisonment. There are cases where the ICTR has sentenced offenders to imprisonment for the rest of their natural lives. From a human rights perspective the thesis argues that imprisonment for the remainder of the offender's natural life is inhuman punishment. The statutes of the ICTY, ICTR and ICC provide for circumstances where an offender sentenced by any of those tribunals could be released before the completion of his or her sentence. It is on that basis that it is argued that even offenders sentenced to imprisonment for the remainder of their lives by the ICTR could be released.

At the national level, the study focuses on three countries of South Africa, Mauritius and Uganda. The first reason for comparing the practice and law relating to life imprisonment in these three countries is that the author would like to investigate whether life imprisonment is approached differently in countries where the death penalty was abolished (Mauritius and South Africa) and in Uganda where the death penalty is still imposed. Secondly, Mauritius and South Africa both of which abolished the death penalty were chosen for this study for the author to illustrate that countries can take different approaches to the abolition of the death penalty and that

⁹ For information on the number of accused before the ICC and the indictments issued, see <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/> (accessed 8 March 2009).

those different approaches could also impact on the sentence of life imprisonment differently. South Africa abolished the death penalty in 1995 after the Constitutional Court held that it was unconstitutional for being a cruel, inhuman and degrading. The government then enacted a law, the Criminal Law Amendment Act,¹⁰ to give effect to the Constitutional Court's ruling. Since the abolition of the death penalty in South Africa, there have been different changes regarding the sentence of life imprisonment. This study highlights those changes and the relevant legal developments that accompanied those changes in South Africa.

The study also discusses the manner in which courts in South Africa dealt with the sentence of life imprisonment prior to and after the abolition of the death penalty. In Mauritius, the death penalty was abolished in 1995 when Parliament passed a law to that effect. Since then, there have been several changes in law and practice relating to the sentence of life imprisonment. These developments are discussed in detail in this study. In Uganda, the death penalty still exists. However, there have been calls that it be abolished and be substituted with life imprisonment 'until death.' This study discusses the legal developments relating to the death penalty and the calls for its abolition. The thesis highlights the challenges associated with life imprisonment 'until death.'

2. Statement of the problem

There can be little doubt about the importance of the sentence of life imprisonment in the modern penal systems. In most countries that have abolished the death penalty it is the most severe sanction at the disposal of

¹⁰ Act 105 of 1997.

the state. Yet ...while there have been major studies on almost every aspect of penal policy, there has been very little analysis of the ideas underpinning life sentences...in the English speaking world at least, “no comprehensive attempt has ...been made to address the penological, moral, legal and constitutional issues raised by life imprisonment.”¹¹

The above observation applies with equal force to the sentence of life imprisonment before international criminal tribunals as well as in Mauritius, South Africa and Uganda. Life imprisonment has different meanings in Uganda, South Africa and Mauritius. This study discusses the different meanings of life imprisonment in the above three jurisdictions. Practice from both international criminal tribunals and national jurisdictions indicates that life imprisonment has been seen as the appropriate substitute for the death penalty in cases where offenders have been convicted of heinous offences. Although books have been written on sentencing and punishment before international criminal tribunals, none of them deals in detail with the question of how the international tribunals have applied theories of punishment in sentencing offenders to life imprisonment.¹² Therefore, there is a need for a detailed discussion of the law and practice relating to life imprisonment so that one understands the salient features of the most severe penalty that could be imposed in international criminal law. The author is also not aware of any book or article that examines in detail the sentence of life imprisonment in South Africa,¹³ Mauritius, and Uganda. In particular, the author is not aware of

¹¹ Sheleff 1987: 17. As quoted in Van Zyl Smit 2002: 1.

¹² See for example, Cassese 2008; Schabas 2006; Kittichaisaree 2008; Bantakes and Nash 2007; Beigbeder 1999; Morris and Scharf 1995: (Vol.2); Fischer *et al* 2004; and McGoldrick 2004.

¹³ Although life imprisonment is dealt with briefly in Terblanche 2007: 232 – 236; Joubert (ed) 2007: 290 – 291; and du Toit *et al* 2007: Chapter 28, 28 – 18D-4.

any study addressing the following issues in detail relating to life imprisonment: the history of life imprisonment, offences that carry life imprisonment, the major legal developments relating to life imprisonment, the jurisdiction and discretion of courts in sentencing offenders to life imprisonment, the legal representation for offenders charged with offences that carry life imprisonment, the theories of punishment that courts have emphasised in sentencing offenders to life imprisonment, and the law and procedure governing the release of prisoners sentenced to life imprisonment. This research examines all the above aspects.

3. Aims of the study

The study has three major aims:

1. To give a detailed discussion of the question of punishment and the three major theories or objectives of punishment – retribution, deterrence and rehabilitation, from a philosophical point of view;
2. To discuss the law and jurisprudence relating to life imprisonment in the international criminal tribunals of Nuremberg, Tokyo, the Former Yugoslavia, Rwanda, International Criminal Court and the Special Court for Sierra Leone (SCSL). The emphasis will be on the theories of punishment these tribunals have stressed in sentencing offenders to life imprisonment;
3. To discuss the history and major legal developments relating to life imprisonment in three African countries, viz, Mauritius, South Africa and Uganda. The study will also discuss: the offences that

carry life imprisonment; the courts with jurisdiction to impose life imprisonment; legal representation for accused facing life imprisonment on conviction; the theories of punishment that courts have emphasised in sentencing offenders to life imprisonment; and the law and mechanisms governing the release of offenders sentenced to life imprisonment in the above three countries.

4. Methodology

Two research methodologies were employed to conduct this study: informal interviews/discussions and desk research. Informal interviews were conducted in Uganda with 14 offenders serving life imprisonment at Luzira Maximum Security Prison in January 2008 (when the author visited the prison). The aims of the interview were to find out what the offenders understood by the sentence of life imprisonment; whether they received legal representation during their trial; and whether they had appealed against their respective sentences. Face-to-face and telephonic interviews/discussions were also conducted or held with senior Uganda Prisons Services officials in order to clarify various issues relating to the sentence of life imprisonment. The date and means of the interviews/discussions appear in the relevant footnotes of this study. Informal discussions were also held with judges and former judges, prosecutors and defence lawyers of the International Criminal Tribunal for Rwanda, and the International Criminal Court at a seminar on international

criminal law in Africa.¹⁴ The author was particularly interested in knowing the difference the the judges and prosecutors especially those of them from the ICTR, attached to the sentence of life imprisonment on the one hand, and imprisonment for the remainder of the offenders' natural life on the other hand.

This research was substantially desk-based. The author analysed the law, jurisprudence and literature on life imprisonment in international criminal tribunals and the selected three countries.¹⁵ Given the fact that this thesis attempts to clarify how the tribunals and the courts have approached the sentence of life imprisonment, a substantial part of this thesis analyses legislation and case law on life imprisonment.

5. Limitation of the study

The study of case law on life imprisonment in South Africa was a big challenge in the sense that at the time of writing there were over 8,000 offenders serving life sentences. It was thus practically impossible for the author to review all the cases. For the analysis of the theories of punishment that courts emphasise in sentencing offenders to life imprisonment, the author reviewed all the cases reported in the *South African Criminal Law Reports* and *South African Law Reports* on life imprisonment between 1995 (immediately after the abolition of the death

¹⁴ The seminar titled 'Developments in International Criminal Justice in Africa', was organised by the Institute for Security Studies and took place in Cape Town (19 – 20 March 2008, Villa Via Hotel, Gordon's Bay). The author attended the seminar.

¹⁵ Some of the sections in this study are based on the author's published work in the *African Human Rights Law Journal* (2008); *South African Journal of Criminal Justice* (2008 and 2009); and *African Yearbook on International Humanitarian Law* (2007). The author is grateful to Juta Publishers for permitting him to reproduce those articles in this study.

penalty) and January 2009. At the time of writing, there were 43 offenders serving a life sentence in Uganda. The author was unable to obtain all the 43 judgments because most of the offenders had been sentenced by courts located hundred of kilometres away from the capital city where the author conducted the research. The author was able to get only 23 judgments, most of which were in the Court of Appeal Criminal Registry. The majority of the cases were also unreported. The bulk of the cases on life imprisonment in Mauritius were available on the Supreme Court of Mauritius online library in electronic format. The author was unable to gain access the law reports for reported cases. The discussion of Röder's views on rehabilitation is based on secondary sources because the author was unable to gain access to the primary sources, which are in German, a language the author does not understand.

6. Outline of the study

This study is divided into seven chapters. Chapter I is the introduction and covers the following issues: background to the study, statement of the problem, aims of the study, methodology, limitations of the study and outline of chapters. Chapter II focuses on the discussion of punishment from a philosophical perspective. The author relies on European philosophers to discuss the question of punishment because it is still disputable whether or not one can refer to an African philosophy. The definition of punishment is given and the three major objectives of punishment – deterrence, rehabilitation and retribution are discussed in detail. The merits and demerits of each of these three objectives of

punishment are also highlighted. Chapter III deals with life imprisonment before the international criminal tribunals of Nuremberg, Tokyo, ICTY, the ICTR, the Special Court for Sierra Leone and the ICC. Two issues are focused on: the law relating to life imprisonment and the theories of punishment that these tribunals have emphasised in sentencing offenders to life imprisonment.

Chapter IV discusses in detail the major legal developments relating to the sentence of life imprisonment in Mauritius, South Africa and Uganda. This chapter also highlights the relationship between the death penalty and life imprisonment. Chapter V deals with: offences that carry life imprisonment; courts with jurisdiction to impose life imprisonment; the discretion of courts in imposing life imprisonment; legal representation for accused facing life imprisonment on conviction; and the theories of punishment that courts have emphasised in sentencing offenders to life imprisonment in Mauritius, South Africa and Uganda. Chapter VI examines the law and mechanisms that govern the release of offenders sentenced to life imprisonment in Mauritius, South Africa and Uganda. Although each chapter, where necessary, includes inbuilt recommendations, Chapter VII draws the general conclusion and brings together all the major recommendations made in the study.

CHAPTER II

APPRAISING PUNISHMENT FROM A PHILOSOPHICAL PERSPECTIVE

2. Introduction

It is impossible to trace the origin of punishment. It appears to be a well developed social institution in the most primitive societies and at the dawn of known history. Much speculation has been made as to its origin, but in the main rather narrow definitions have tended to justify special concepts.¹⁶

This chapter deals with the philosophical arguments that underpin the issue of punishment. I illustrate that although some philosophers have indicated that there is an African philosophy, there are those who argue that there is no African philosophy. It shows that the issue of punishment has not been sufficiently dealt with by African philosophers and this is the reason why I rely on Western philosophers to discuss the three theories of punishment: retribution, deterrence and rehabilitation. I point out the strengths and weaknesses of each theory without necessarily taking a position on which to be adopted when one is dealing with the question of life imprisonment. This chapter forms the background to a detailed discussion of how international criminal tribunals and international human rights bodies have looked at the theories of punishment in relation to life imprisonment. I also deal with the philosophical definitions of punishment.

¹⁶ Stearns 1936: 219.

2.1. 'African philosophy' and punishment

It is beyond the scope of this thesis to go into the highly contested meaning or definition of philosophy,¹⁷ but suffice it to say at the outset that western philosophy, which forms a substantial part of the discussion of philosophy and punishment in this thesis, was born over twenty-five centuries ago in the commercial cities of ancient Greece.¹⁸ The word 'philosophy' in this thesis is understood as the ideas that were put forward by thinkers, who either regarded themselves as philosophers, or who were regarded by other people, whether philosophers or not, as philosophers. The reader might ask, and rightly so, why I should put more emphasis on Western philosophy to discuss the concept of punishment, when this thesis is substantially concerned with life imprisonment as a form of punishment in African countries.

¹⁷ Philosophers disagree on the definition of philosophy and this has been one of the reasons why some have argued that African philosophy is not philosophy. It has been observed that '...the question "What is philosophy?" is very broad...because of the widespread disagreement among philosophers as to its answer. Almost every philosopher has a view as to what constitutes philosophy...' see Wright in Wright 1984: 44. Devaraja 1959: 319 - 20 has argued that '... philosophy is properly concerned with "concepts," with modes of conceiving, rather than with words or things. Philosophy concerns itself with words only insofar as they are instruments of conceiving and with things inasmuch as they figure in our conception. Further, philosophy does not concern itself with *all* concepts or all modes of conceiving, but only with those which are regarded as being *intrinsically* interesting and valuable.' He adds that '[a] definition of philosophy is proved or justified to the extent to which it enables us to picture, in terms of a definite plan or purpose, the general divisions or areas of a man's cognitive enterprise. The total aim and purpose of philosophy...is to achieve a comprehensive and consistent description of all the (general) forms of the value-bearing consciousness of man.' (326). It has been observed with regard to the definition of philosophy that '...every serious student of philosophy is aware [that], various different answers have been offered by philosophers, answers which have been described as stipulative definitions or as recommendations that we should conceive the nature of philosophy in this or that particular way or that we should lay emphasis on this or that particular aspect or function' Copleston 1992:358. It has been suggested that it is doubtful whether experts will ever agree on one definition of philosophy, see Schmidt 1909: 241. See also Pepper 1946: 29-36 who distinguishes between a nominal and descriptive interpretation.

¹⁸ Walsh 1985: 1.

2.1.1. The concept of punishment in ancient Africa

It is true that punishment existed in all human societies from the time human beings started living in organised communities.¹⁹ However, it is the thinkers from the Western world, especially from the present day Europe, who first, as far as my research has been able to establish, wrote and taught about the role of the state; and consequently how that state should deal with those people who acted against the interests of the state and of the community. The discussion of the relationship between the state and the individual would result in a debate of how such a state should treat the individual who had broken the laws; hence the thinking and writing about, and discussion of, the issue of punishment came into focus. This does not mean that in the present day Africa there were no thinkers who taught or talked about punishment. The problem is that, apart from painstakingly gathering their thought and teachings from folk-tales, poems, sayings and proverbs, amongst other things, it is extremely difficult to come across any source of what one can refer to as an ancient African philosophical perspective on punishment.²⁰

¹⁹ Some Bantu tribes, such as the Bechuana of Central South Africa (Tswana of Southern Africa), believed that punishment began when men who were living in a cave killed a chief's innocent son. The chief was annoyed and punished them by ordering them to leave their caves. After leaving the caves, the sun burnt them and some became black, others red, and other different races. Much as this discussion looks at the origin of races according to the Tswanas, we also see that it deals with the origin of punishment. This is because before the cave people murdered the chief's son, they had lived happily, and it is only after they committed murder that they were ordered to go out of the cave as a punishment. See Brown 1926: 135-136.

²⁰ Temples 1959: 91-108 attempts to clarify how the Bantu understood the concept of justice in the clan system. According to him, there was compensation in cases of injury or damage to property, and the Bantu never found it a problem paying in compensation more than the value of what they had damaged or injured (94-97). He also argues that in case a young Muntu disobeyed his or her elders' or ancestors' orders, he/she was required to undergo a purification exercise (98). The Bantu also believed that natural calamities and epidemics were punishments that God inflicted on people for disobeying his orders (98).

Those who have read Chinua Achebe's famous novel *Things Fall Apart* should have realised that punishment, and actually the concepts of justice and fair trial, existed in ancient African societies in a manner that is akin to the systems that existed in ancient Greek cities.²¹ We also find in some, if not all, African tribes, not only the concept of punishment,²² but also the moral justification for punishment. Even before colonialism, Africans knew that punishment was evil or unpleasant and its infliction on any individual had to be justified. The Fantis of Ghana, for example, combined the contemporary three major theories²³ of punishment in their understanding of punishment. Oguah explains the rationale for punishment as follows:

Why should a person be punished for wrongdoing? To this question western philosophers have given various answers [deterrence and retribution]. Both of these theories of punishment appear in the Fanti penal system; but there is a third theory which is more dominant in the system. For the Fanti

They also believed that punishment could be in form of a curse, such as a father cursing his son when the latter disobeyed him (100-101).

²¹ Alumona 2003: 10-11 at <<http://www.africanphilosophy.com/issue3/alumona.pdf>> accessed 7 May 2007. For a discussion of criminal law in ancient Greece see Calhoun 1977.

²² For example, the notion of collective responsibility was known in both Togoland and the Limpopo region. The ordeal procedure was commonly used to determine guilt or innocence. A suspect would, for instance, be asked to put his arm in boiling palm oil or water to prove his innocence. If his arm got scalded, which was always the case unless the 'judge' – who was in most cases a witchdoctor, colluded with the suspect and did not make the water or oil hot enough, that person would be guilty. See Lowie 1921: 404-411.

²³ Hart argues that the so-called '...theories of punishment are not theories in the normal sense. They are not, as scientific theories are, assertions or contentions as to what is or is not the case; the atomic theory or the kinetic theory of gases is a theory of this sort. On the contrary, those major positions concerning punishment which are called deterrent or retributive or reformative "theories" of punishments are moral *claims* as to what justifies the practice of punishment – claims as to why, morally, it *should* or *may* be used.' See Hart 1968: 72. (Emphasis in the original). It has been suggested that 'in order to have a theory of punishment, one must develop and defend systematic answers to at least the following intimately related five questions: A. What is the nature of crime and punishment? B. What is the moral justification of punishment? C. What is the political justification of punishment? D. What are the proper principles of criminal liability? E. What are the appropriate punishments?' see Murphy 1987: 87: 510-512. But Armstrong would not agree with Murphy, because for Armstrong the theory of punishment is made up of three questions that one has to answer: (1) the definition of punishment; (2) the moral justification of the practice of punishment; and (3) the question relating to penalty fixing. See Armstrong 1961: 473-474.

punishment is not only a deterrent or means of exacting restitution but also a means of reforming ‘purifying’ the offender. The offender, in committing adultery, for example, not only wrongs his neighbor but also brings upon himself and his own a curse, *mbusu*. To punish him he is not only made to pay damages to the offended but also he is asked to bring a sheep to be slaughtered in the court, which consists of the chief and his councillors, the offended party, a traditional priest and the inquisitive citizen. The priest performs certain rituals with the blood of the sheep to remove the curse from the offender, thereby purifying him. This ritual practice serves as a psychological therapy, freeing the offender of the feeling of guilt. The western judge pronounces the offender guilty, but does not have the means of ridding the offender of the guilt-feeling, which modern psychiatry shows is responsible for many nervous conditions that psychiatrists have to treat. The ritual is not only psychologically therapeutic but also its very solemnity is often enough to reform the offender.²⁴

Other African tribes, such as the Akamba in Kenya, also had different forms of punishment for various offences. For example, if a person committed ‘unnatural offences’, they would be punished by a fine of an ox which would be killed, and the offender would be purified by his body being smeared with the contents of the animal’s stomach. A coward would be punished by not receiving any portion of the loot captured in the fight. In case of assault, damages were assessed according to the amount of injury inflicted on the victim and the payment capabilities of the offender. The nominal damages in some cases were as follows:

For loss of one finger	1 bull and 1 goat or sometimes even a cow
For loss of two fingers	1 bull and 3 goats
In case of a hand damaged beyond use	1 cow
For the loss of an arm	5 cows and 1 bull
For the loss of both arms	10 cows and 1 bull

²⁴ Oguah in Wright 1984: 221-222.

For the loss of one leg	5 cows and 1 bull
For the loss of both legs	10 cows and 1 bull
For damage to the head	1 goat
For accidental death	10 cows and 1 bull

Kidnapping was not considered a punishable offence but the kidnapped child had to be returned. Adultery was punished by a fine of a bull and a goat, but in some cases only a goat had to be paid as a fine. The goat would be:

[K]illed and the contents of the stomach...smeared on the ground at the door of the house occupied by the offending wife, the husband rub[bed] his feet in this and formally enter[ed] the house and this ceremony purge[d] the offence and normal relations [were] resumed between the couple.²⁵

The abduction of a wife was compensated for 'by the guilty party paying over to the husband the amount of livestock he [had] paid for the woman.'²⁶

A person found guilty of arson or malicious burning of a house had to build a new house 'and make good any property lost in the fire.' The Akamba tribe never resorted to flogging or imprisonment as forms of punishment but in 'the old days [before 1910 when the book was written] an habitually obstinate and disobedient wife was sometimes hanged.'²⁷ In some instances, where it was thought that an Akamba man had become a 'thoroughly bad character' and deserved public punishment, he would be punished as follows:

²⁵ Hobley 1971: 79.

²⁶ Hobley 1971: 80.

²⁷ Hobley 1971: 80.

During the night his village [would be] surrounded by a party of men, all of his clan, and a guard [would be] placed on the door of his hut while others seize[d] one of his oxen and [slew] it. If the offence [was] very serious, even a cow or more than one [could] be killed. If there [were] no cattle the party would kill a number of sheep or goats. The culprit [would] then be dragged forth from his hut and beaten with fists, clubs, and anything handy and thrown down and trampled on. His wives [would] also be brought out and slapped and scratched; the children [were] not harmed.²⁸

Such forms of punishment clearly had their shortcomings from various perspectives, such as human rights violations, but such a discussion is beyond the scope of this work.

2.1.2 Is there African philosophy?

It appears that the development of what one may call ‘African philosophy’ started in the last days of colonialism. This is because ‘[i]n colonial times, African philosophy, at least in the British colonies, was not investigated in philosophy departments in Africa – it was left to departments of religion and anthropology to study African thought as best as they could’, and this explains why ‘the resulting literature was not critical of foreign categories of thought that people were required to employ in Africa.’²⁹ Some concepts such as ‘punishment’ were also used and employed in Africa by colonialists and later western-educated African intellectuals in a manner that did not critically examine whether they had the same meaning, not only between the Africans and the colonisers, but also between different ethnic groups with different cultures in Africa. The task of a contemporary African philosopher is therefore to scrutinise Western concepts, such as punishment

²⁸ Hobley 1971: 80.

²⁹ Wiredu 2003: 91.

and justice, that have 'been used or implied in the characterization of African thought' to establish if their interpretation by western scholars is applicable to Africa.³⁰

It should be mentioned that it is still debatable in the philosophical world whether there is anything that one can correctly philosophically call 'African philosophy.'³¹ In answering the question of whether there is African philosophy, Maurier argues that '[t]he answer must surely be: No! Not Yet!' though there are some groundbreaking writings on various issues that are of relevance to a philosophical investigation in various African communities.³² According to Maurier, philosophy is a discipline that has at least three characteristics: it has to be reflective, rational and systematic; and that all of which are lacking in what some people call African philosophy. However, some African intellectuals, such as the former Ghanaian president, Kwame Nkrumah, held that there is African philosophy and that it has to be found in the African ways of life.³³ Hallen, after studying the language and culture of the Yoruba people in Nigeria, concluded that there is something that could properly be called African philosophy.³⁴ Odera Oruka argues that it is wrong to define African

³⁰ Wiredu 2003: 93-94.

³¹ Bondunrin in Wright 1984: 1-24, has argued that African philosophy is still in its infancy and that politicians should not try to influence the route it should take, lest they confuse philosophy with political ideologies. RA Wright in the same book writes that although '[t]here have been a number of recent studies' with the question of whether or not there is African philosophy, 'there seems to be considerable concern as to whether or not African philosophy somehow "exists".' (Footnotes omitted), 41-56, 41.

³² Maurier (Translated by McDevitt) in Wright 1984: 25.

³³ See McClendon 2003: 1-39 at <<http://www.africanphilosophy.com/issue3/alumona.pdf>> accessed 7 May 2007.

³⁴ See Bello 2003: 1-14, at <<http://www.africanphilosophy.com/issue3/bello.pdf>> accessed 7 May 2007.

philosophy in ‘opposition to philosophy in other continents’, such as Western or European philosophy.³⁵ He argues that defining African philosophy in a manner that is opposed to philosophy from other continents perpetuates the thinking that there is an African thinking which is ‘radically unEuropean.’³⁶ He proposes that philosophy as a discipline should be free from racial and regional biases and therefore ‘...the talk of a uniquely African conceptual framework or way of thinking (African mentality) with respect, at least, to the discipline of philosophy is not entertained.’³⁷

As mentioned earlier, the discussion of the meaning of philosophy, which would lead us to either agree or disagree on the issue of whether there is African philosophy or not, is beyond the scope of this thesis. What is clear is that in Africa, unlike in the present day Europe, it is difficult to find philosophers who wrote extensively on the issue of punishment, and in particular the justification of punishment. This leaves us with no option but to deal with some of the philosophers from the Western world who wrote about punishment in a detailed manner. However, one is aware of the fact that Egyptian philosophy was instrumental in influencing the growth of early Greek philosophy but not of African philosophy in general.³⁸

³⁵ Oruka in Diemer (ed) 1978: 1.

³⁶ Oruka 1978: 1.

³⁷ Oruka 1978: 1.

³⁸ Olela in Wright 1984: 77-92. For a discussion of the history of philosophy in India, see Dasgupta 1961: Vol. III. While discussing the philosophy of the *Ahirbudhnya-samhitā*, he illustrates that they believed that God was responsible for creation, maintenance and destruction and also punishment (51). See also pages 92 and 415. For the influence that Indian philosophy could have had on Greek philosophy, see Conger 1952: 127 who argues that ‘...[w]hat once may have been plains of transmission were broken long ago in the catalysms which befell the ancient world. The fragments which remain are scanty and tenuous to encourage doubt that they ever were connected. There is no place for bold assertions, but when the fragments are viewed in their setting – geographical, commercial,

2.2. The punishment debate

The ‘punishment debate’ has attracted the attention of legal philosophers, criminologists, penal reformers, and judges, among others, for generations. It has also recently attracted human rights activists. What is obvious is that each group approaches this debate from a different perspective since each group has different objectives that it aims to achieve from this debate. Put differently, each group has its own interests in the debate. What makes the debate complicated is that even in one group, such as that of legal philosophers or criminologists or human rights activists, there are sub-groups that approach this issue or debate from different angles. Hart observed as early as 1959 that the ‘[g]eneral interest in the topic of punishment has never been greater than it is at present and I doubt if the public discussion of it has ever been more confused.’³⁹ That statement, though made almost half a century ago, is of equal or probably greater force today. The debate has been mostly dominated by three schools of thought: retribution, utilitarianism (deterrence), and rehabilitation (reform). All these schools of thought attempt to answer basically three philosophical questions (though there are other related questions) in relation to punishment. The first question is ‘What justifies the general practice of punishment?’ The second question is ‘To whom may punishment be applied?’ And the third question is ‘How severely may we punish?’⁴⁰ Attempts to answer these questions have for generations fuelled and

and, we may add, logical, the arguments for at least indirect Indian influence on Greece acquires some support.’ (127). For a discussion of the history of philosophy in the United States, see Flower and MG Murphey 1977: Vol. 1.

³⁹ See Hart 1968: 1.

⁴⁰ Hart 1968: 3.

continue to fuel the debate and confusion surrounding punishment. Bean states as follows:

The great theories of punishment, retribution, deterrence and reform stand in open and fragrant contradiction. Each side has arguments that are used to demonstrate the consequences of the rival theories. Supporters of retribution accuse the utilitarians of opportunism and the reformist of vicious paternalism. The utilitarians accuse the retributivists of vindictiveness and the reformists of failing to justify punishment by an insistence on treatment. The reformists see the retributivists as cruel, and utilitarians as inadequate when they attempt to control action. To complicate matters further, each theory has splinter groups offering rival or amended arguments. It is no easy task to pick one's way through the variety of positions adopted in this debate.⁴¹

The purpose of this discussion is not to propose which school of thought is more appropriate but rather to examine the arguments and weaknesses of each school and determine how they relate to life imprisonment as a punishment. It should also be mentioned that these arguments are recaptured throughout this thesis especially in the analysis of the jurisprudence and practice of life imprisonment at the national and international levels.

2.3 Punishment defined

Throughout this thesis I refer to the sentence of life imprisonment as a 'punishment.' What does punishment mean? Some people may simply answer that something is punishment because it is imposed on those who break the law. However, it is important to look at the philosophical 'definition' of punishment. I put definition in quotation marks because what the philosophers offer is more of a description as opposed to a definition of

⁴¹ Bean 1981: 11.

punishment. Mabbott rightly observes that '[t]he word "punishment" is used in a variety of ways and one cannot lay down rules to determine where its use becomes appropriate. Thus it is *impossible* to give a precise definition of the word as ordinarily used.'⁴² Armstrong is of the view that

[T]he meaning of the word 'punishment'...is a definitional or logical issue. We examine the way the word is used in ordinary language, the things to which it is applied, and try to produce some rule which covers these cases and only these cases. Applying the same technique to many other words we would get a single unequivocal answer on which all users of the language would agree – in short, the definition of the term – but in the case of 'punishment' there is no such universally accepted answer ...⁴³

Grotius was of the view that punishment is '[a]n evil of suffering which is inflicted on account of ...an evil of doing.'⁴⁴ In other words, according to Grotius, punishment must be inflicted on those who have done what is considered to be an 'ill.' Bean has suggested that Grotius's definition entails 'some essential features...although ... [it] is not entirely adequate.'⁴⁵ Bean identifies the following as some of the features that form Grotius's definition of punishment: In the first place, Grotius sees punishment as an inflicted ill and he thus links punishment to the deed. Secondly, Grotius 'shows that punishment is intentionally inflicted, and not a random imposition of pain' or ill. Thirdly, that 'Grotius implies, although he does not say so, that punishment is given to someone who is supposedly answerable for his wrongdoings, that is as opposed to someone not in possession of his reason' and finally that 'Grotius implies that punishment

⁴² Mabbott 1955: 256.

⁴³ Armstrong 1961: 473.

⁴⁴ Grotius (*Abridged Translation* by Whewell) 1853: 222. See also Bean 1981: 4.

⁴⁵ Bean 1981: 4.

is a social act produced by those claiming the right to punish and imposed on those deemed to deserve it.’⁴⁶

Hart, while referring to the works of Benn and Flew, defines ‘...the standard or central case of “punishment” in terms of five elements:

- (i) It must involve pain or other consequences normally considered unpleasant;
- (ii) It must be for the offence against legal rules;
- (iii) It must be of an actual or supposed offender for his offence;
- (iv) It must be intentionally administered by human beings other than the offender; [and]
- (v) It must be imposed and administered by an authority constituted by a legal system against which the offence is committed.⁴⁷

Hart, in trying to broaden the meaning of punishment, illustrates that there are other situations under which a person can be ‘punished’ which do not exactly possess all the above five elements. Under those circumstances, although the consequences are more or less the same as on the person being punished in terms of a situation where all the above five ingredients are present, Hart is of the view that such should be relegated ‘to the position of sub-standard or secondary cases.’ He outlines some of the examples as:

- (a) Punishments for breaches of legal rules imposed or administered otherwise by officials (decentralised sanctions);
- (b) Punishments for breaches of non-legal rules or orders (punishments in a family school);
- (c) vicarious or collective punishment of some members of a social group for actions done by others without the former’s authorisation, encouragement, control or permission;
- (d) punishments of persons (otherwise than under (c)) who neither are in fact nor supposed to be offenders.⁴⁸

⁴⁶ Bean 1981: 5.

⁴⁷ Hart 1968: 4-5.

⁴⁸ Hart 1968: 5.

As mentioned earlier, Hart ‘borrows’ his definition of punishment from both Flew and Benn. In explaining why we should look at Flew’s definition as more attractive than that of Grotius, Bean contrasts the two definitions and observes that ‘the value of Flew’s definition over Grotius is that Flew compels us to see punishment in terms of a system of rules.’⁴⁹ Bean, like Hart, argues that punishment is not only the prerogative of the judiciary but that parents and teachers punish their children and students respectively. Mabbott is not ‘so sure’ if expelling people from clubs or unions, ‘chastisement of children by parents or teachers’ and the penalties in games, are to be included as examples of the standard use of ‘punishment’,⁵⁰ but he does ‘not think anything serious depends on it.’⁵¹

Ross has indicated that Hart’s definition of punishment looks at punishment from a juridical point of view, and that defining punishment from a purely juridical point of view hardly gives a satisfactory definition. He adds that Hart’s definition

[I]s essentially deficient in not including a requirement to the effect that the punitive measure must be an expression of *disapproval* of the violation of the rule, and consequently of censure or *reproach* directed to the violator. It is ...simply a logical impossibility to enforce a normative system, that is, give effect to its normative requirements, without at the same time giving expression to disapproval.⁵¹

⁴⁹ Bean 1981: 6.

⁵⁰ Mabbott 1955: 258.

⁵¹ Ross 1975: 36-37. (Emphasis in the original).

Ross, while referring to the above ingredients of punishment given by Hart, suggests that ingredient (iv) is included in (v) and, because of that, (iv) 'seems redundant'.⁵² He adds while attacking ingredient (iii), that

[T]he requirement that for a legal response to crime to amount to punishment, it must be directed upon the person who in fact or allegedly committed the crime. Accepting this condition prevents us from talking of vicarious responsibility in other words criminal liability for the actions, as indeed we do, not only in everyday life but also in juridical contexts.⁵³

Ross concludes that

In accordance with [the above] amendments, the concept of punishment could be defined in terms of four components. Punishment is that social response which: (1) occurs where there is a violation of a legal rule; (2) is imposed and carried out by authorised persons on behalf of the legal order to which the violated rule belongs; (3) involves suffering or at least other consequences normally considered unpleasant; and (4) expresses disapproval of the violator.⁵⁴

Ross's definition of punishment, and in particular his attack on Hart's, raises some problems, and Ross concedes that he is not convinced that his definition is 'satisfactory'.⁵⁵ It is argued that Ross's definition of punishment is unsatisfactory in at least three major ways.

In the first place, Ross's argument that Ingredient (iv) in Hart's definition is redundant because it is included in Ingredient (v) raises some interpretation problems. It has to be recalled that Hart adopts part of Flew's definition of punishment and an interpretation of Flew's definition of punishment applies to the interpretation that should be given to Hart's. In other words,

⁵² Ross 1975: 36.

⁵³ Ross 1975: 39.

⁵⁴ Ross 1975: 39.

⁵⁵ Ross 1975: 39.

Flew's interpretation is the parent of Hart's, and the strengths or weaknesses Flew's interpretation affects that of Hart. Bean's interpretation of Flew's definition of punishment shows that Ross's claim that ingredient (iv) is redundant because it is included in Ingredient (v) is not convincing. Bean explains in reference to ingredient (iv) that

[Punishment] must be the work of personal agencies...Punishment must not be the natural consequences of an action, for Flew [and therefore Hart] wants to argue that evils occurring to people as the result of misbehaviour but not by human actions are not punishments but penalties. Thus unwanted children and venereal disease are penalties of, but not punishment for, sexual promiscuity.⁵⁶

In explaining Ingredient (v), Bean puts it that

[E]vil inflicted by anyone, even a public authority acting without preceding condemnation, is not to be styled by the name of punishment but as a hostile act...Similarly, direct action by an aggrieved person with no pretensions to special authority is not properly called punishment. It may be revenge, as in vendetta, or it may be...an act of hostility, but it is not punishment.⁵⁷

The above explanation of Flew's, and by implication Hart's, definition of punishment shows, as mentioned earlier, that Ross's argument that ingredient (iv) is implied in (v) is not satisfactory.

In the second place, Ross's argument that Hart's definition of punishment ignores the fact that people can be held criminally vicariously liable for the acts or omissions of others also raises some problems. Much as Ross's argument may hold water if Hart's essay on the definition of punishment titled 'Prolegomenon on the Principles of Punishment' in which he defines punishment as discussed above is viewed in isolation of Hart's other works,

⁵⁶ Bean 1981: 5.

⁵⁷ Bean 1981: 6. (Footnotes omitted).

a critical reading of Hart's later writings on punishment that did not dispute his earlier definition of punishment, shows that his definition if read together with his other works, includes a recognition of vicarious liability as a form of punishment. In his essay titled 'Responsibility and Retribution' which is a postscript to his 1968 book titled, '*Punishment and Responsibility: Essays in the Philosophy of Law*', Hart recognises vicarious liability as a form of punishment when he explains the differences that underpin the following classifications of responsibility: (a) role-responsibility (where an individual is responsible for something for, example, parents responsible for the upbringing of their children); (b) causal-responsibility (where, for example, something may be said to have caused or led to the existence or otherwise of a certain thing or event; for instance, the drought may be said to have been responsible for the famine); (c) legal liability-responsibility (when someone is 'made to pay' for breaking the legal rules. This could be in the form of imprisonment or compensating the victim or any other form of punishment. According to Hart, this category of responsibility may be divided into three classes: (i) mental or psychological conditions; (ii) causal or other forms of connection between act and harm; and (iii) personal relationships rendering one man liable to be punished or pay for the acts of another); and (d) capacity-responsibility (Hart arguing that the capacities in question 'are those of understanding, reasoning, and control of conduct').⁵⁸ While expounding on the circumstances under which a person may be punished for the actions or omissions of another, Hart observes that

⁵⁸ See Hart 1968: 210-237.

Normally in criminal law the minimum condition required for liability for punishment is that the person to be punished should himself have done what the law forbids, at least so far as outlawed conduct is concerned; even if liability is 'strict' ; it is not enough to render him liable for punishment that someone else should have done it. This is often expressed in the terminology of responsibility (though ...too, "liability" is frequently used instead of "responsibility") by saying that, generally, vicarious responsibility is not known to the criminal law. *But there are exceptional cases; an innkeeper is liable to punishment if his servants, without his knowledge and against his orders, sell liquor on his premises after hours. In this case, he is vicariously responsible for the sale, and of course, in the civil law of tort there are many situations in which a master or employer is liable to pay compensation for the torts of his servant or employee and he is said to be vicariously responsible*

It appears, therefore, there are diverse types of criteria of legal liability-responsibility: the most prominent consist of certain mental elements, but there are also causal or other connections between a person and harm, or the presence of some relationship, such as that of master and servant, between different persons... [In conclusion] though in certain general contexts legal responsibility and liability have the same meaning, to say that a man is legally responsible for some act or harm is to state that the connection with the act or harm is sufficient according to law for liability. Because responsibility and liability are distinguishable in this way, it will make sense to say that because a person is legally responsible for some action he is liable to be punished for that.⁵⁹

The above quotations are illustrative of the fact that although Hart did not expressly include vicarious liability in his definition as a form of punishment, the explanation of his definition of punishment recognises vicarious liability, and that should be interpreted to mean that Hart recognises vicarious liability as a form of punishment.

Thirdly, Ross argues that it is essential to link punishment to disapproval in the sense that a person can only be punished because they have behaved in a manner that is disapproved by members of a community, and that

⁵⁹ Hart 1968: 221-222. (Emphasis mine).

‘punishment is at once suffering and disapproval, and the two are ...closely bound up with one another. Hart overlooks this connection when he explains punishment as suffering but makes no room for disapproval.’⁶⁰ Ross’s interpretation of Hart’s definition and explanation of punishment in this respect is doubtful in at least two ways. In the first place, when Hart says that punishment should, among other things, be understood as imposed for an offence against legal rules, and that it must be imposed and administered by an authority constituted by a legal system against which the offence is committed, this, in my view, means that people in a particular country or society will find some conduct, such as murder or theft, unacceptable and devise legal rules to put in place punishments that would be visited on people who behave in a manner that they (the community) disapprove of or find unacceptable. Put differently, logically there is no society that will impose punishments for conduct that such a society approves of or finds acceptable. Hart, by not using the word ‘approve’ or ‘disapprove’, cannot be said to have meant that the punishment could be imposed even for conduct of which people approve.

In the second place, Ross seems to ignore, in this regard, the relevant answers that could be given to the three questions that Hart highlights. As mentioned earlier, Hart argues that we should always attempt to answer the following questions: What justifies the general practice of punishment? To whom may punishment be applied? How severely may we punish? In answering the first of the above three questions (which are more relevant to Ross’s disapproval argument), we could say, depending on which school of

⁶⁰ Ross 1975: 38.

thought we subscribe to in the punishment debate, that the general practice of punishment is justified by the fact that people in a given society disapprove of certain conduct and therefore enact legal rules that stipulate the punishments to be imposed on those who behave in that unacceptable or disapproved manner. In answering the second question we may argue that punishment may be applied to whoever behaves in a manner that is unacceptable to, or disapproved of, by members of a given community. Answering Hart's questions in a broad manner clearly puts to rest Ross's worry that Hart overlooked the disapproval aspect of punishment. In the same vein, Rabie and Strauss have stated that

Moral disapproval is not an inherent characteristic of criminal punishment, but that it is attached rather to the particular conduct itself, and that the conduct should be made criminal only in order to endorse a society's moral disapproval symbolically through the infliction of punishment upon offenders.⁶¹

Mabbott finds it unacceptable to include the element 'unpleasantness', which Flew, Hart, and Ross adopt, in the definition of punishment. He suggests that '... "disliked" would be a better word than ..."unpleasant".'

Mabbott is of the view that

"unpleasant" has its dangers. Most punishments nowadays are not afflictions of suffering, either physical or mental. They are the deprivation of the good...Imprisonment and fine are deprivations of liberty and property. The death sentence is a deprivation of life and in this extreme case every attempt is made to exclude suffering.⁶²

⁶¹ See Rabie and Strauss 1985: 9.

⁶² Mabbott 1955: 257.

Mabbott agrees with Flew's second and third criteria, that 'punishment must be *for* an offence and *of* the offender', but only on condition that '... "offence" and "offender" mean offence and offender against laws and not merely "sin" and "sinner".'⁶³ Mabbott also agrees with both the fourth and fifth elements of Flew's definition, that punishment should be the work of personal agencies and that it must be inflicted by the authority whose rule has been broken.⁶⁴ Bean, after citing Flew's definition of punishment with approval, is of the view that other scholars, that is, Benn and Peters in 1959, also added one other element to the definition of punishment: 'that the unpleasantness should be an essential part of what is intended and not merely coincidental to some other area.'⁶⁵

Another definition of punishment is given by Pincoffs who is of the view that "[l]egal Punishment"...refer[s] to an institution having the following three characteristics:

1. There must be a system of threats, officially promulgated, that should given legal rules be violated, given consequences regarded as unpleasant will be inflicted upon the violator;
2. The threatened unpleasant consequences must be inflicted only upon persons tried and found guilty of violating the rules in question, and only for the violation of those rules and
3. The trial, finding of guilt, and imposition and administration of the unpleasant consequences must be by authorised agents of the system promulgating the rules.⁶⁶

Pincoffs explains that threats may be either categorical or hypothetical.

They may be directed to particular nameable individuals, or to individuals

⁶³ Mabbott 1955: 258.

⁶⁴ Mabbott 1955: 258.

⁶⁵ Bean 1981: 6.

⁶⁶ See Pincoffs 1966: 56-57.

who meet a particular anonymous description. He adds that it is an essential element of the definition of punishment that there is a clear understanding of what is being threatened.⁶⁷ He states that rules, the breach of which leads to the infliction of punishment, may be promulgated by a king, dictator, tribal leader, governor, council of elders, legislature, among others. And that

Promulgation may be by verbal edict, town cryers, posting on the door of the Palace, or publication in official journals; and the rule promulgated may or may not already have been in common use. Authority may be derived from appointment, descent, designation by a supernatural being, election, or any other source. All that is necessary is that the source of authority and the derivation process be generally accepted as genuine.⁶⁸

What matters, according to Pincoffs, is that the source of authority and the derivation process be generally accepted as genuine. It is irrelevant that punishment is being imposed by a dictator. The legitimacy or democratic nature of the authority in question is not an issue when it comes to the punishment of the violator of the legal rules in place. Otherwise the most dictatorial and autocratic regimes would not have the moral authority to impose punishments. Pincoffs adds that '[t]he unpleasant consequences threatened must be such that almost everyone wishes to avoid them as involving pain, suffering, embarrassment, inconvenience, or loss; even though some eccentric may regard them as sources of pleasure, pride, salvation, or public recognition.'⁶⁹

⁶⁷ Pincoffs 1966: 57.

⁶⁸ Pincoffs 1966: 57.

⁶⁹ Pincoffs 1966: 58.

Armstrong tries to devise ‘a theory of punishment’ by focusing on the three major theories of punishment, and their understanding and use of the term ‘punishment.’ He then formulates three different definitions, each suiting a different theory of punishment and suggests that this shows the difficulties that arise, especially for retributivism in this area. He says that he should not be understood to be ‘urging the acceptance of any one of these three definitions in preference to the others.’ He contends that

[i]rrespective of which problem or problems it sets out to solve, a theory of punishment can usually be put under one of three headings: Retributive, Deterrent, or Reformatory. When the problem is to define punishment these theories provide roughly the following answers:

1. *Retributive*: Punishment is the infliction of pain, by an appropriate authority, on a person because he is guilty of a crime, i.e. *for* a crime that he committed.

2. *Deterrent*: Punishment is the infliction of pain on a person in order to deter him from repeating a crime or to deter others from imitating a crime which they believe him to have committed...here...deterrence of the person punished is not reform. Reform means that the man intends to avoid repeating the crime, not from fear of punishment but because he sees that it was wrong.

3. *Reformatory*: Punishment is the infliction of pain on a person in order to reduce his tendency to want to committ crimes or to commit crimes of a particular sort.⁷⁰

Don Locke gives what he calls ‘[a] workable definition of ‘punishment’ in a wide sense of that word’, as: ‘Punishment: the infliction of pain/or penalties, or the deprivation of privileges, by an authorised person or persons on a person or persons believed to be guilty of having broken the

⁷⁰ Armstrong 1961: 478-479. However, Armstrong argues later that ‘[m]ost of those who have examined the difficulty raised by the currency of the phrase “He was punished for something he did not do” rightly conclude that the Retributive definition is more or less immune, even if their reasons for so concluding are faulty. That able philosophers should accept such unsatisfactory solutions to the apparent problem bears witness to the strength of their conviction that a Retributive definition is the right one.’ 488.

law or, more generally, of having done wrong.’⁷¹ He argues that what distinguishes this definition from other definitions is that it ‘immediately avoids the spurious logical puzzles about the punishment of innocent people.’⁷² Paradoxically Locke, in his attempt to give an explanation of his ‘workable’ definition which he suggests to be free of the ‘spurious logical puzzles about punishment of innocent people’, also finds himself arguing that ‘the innocent can, and sometimes do, get declared guilty and so punished’ and that ‘it may be wrong or unjust to punish the innocent but it can happen (otherwise what would be the point of declaring it wrong or unjust?), and if a punished person is later found to have been innocent this does nothing to prove that he has not been punished.’⁷³ Locke’s explanation is problematic in at least one major respect: He approaches the issue of punishment, not from a moral point of view, but rather from a logical one. He argued that ‘[w]hat is *logically* necessary for punishment is not that the person *be* guilty, but that he be *believed to be* guilty.’⁷⁴ Here he attempts to justify a moral issue from a logical point of view and falls into the same trap as the utilitarians who resort to what Hart calls the ‘definitional stop’ as an escape route when pressed by the retributivist to explain why their theory should not be objected to for justifying the infliction of pain on innocent people (a detailed discussion of this argument is given later). Bentham defines punishment as ‘an evil resulting to an individual from the

⁷¹ Locke 1963: 568.

⁷² Locke 1963: 568.

⁷³ Locke 1963: 567.

⁷⁴ Locke 1963: 569.

direct intention of another, on account of an act that appears to have been done, or omitted.’⁷⁵

What is clear from the above discussion is that there is no universal consensus on the definition of punishment. This is partly attributable to the fact that each of the three major theories of punishment defines punishment in a manner that suits its interests. As Armstrong rightly observes, retributivists will always define punishment from a backward-looking approach, whereas utilitarianists and reformers will always adopt a forward-looking approach, but with different objectives. The utilitarianists aim at deterring people from committing crime by severely punishing the offender, whereas the reformers aim at treating the offenders so that they are cured of the ailments that cause them to commit crimes. The definition of punishment is likely to keep on evolving from time to time to suit the interests of a given generation depending on both that generation’s understanding of punishment and on the purpose such a generation anticipates punishment to serve. In fact, practice has taught us, as it is illustrated in Chapters III and V, that judges presiding over international criminal tribunals and as well as judges in Uganda, South Africa, and Mauritius in some cases consider all the three theories of punishment to be objectives of punishment, and impose a sentence to suit the objective they think punishment should achieve in a particular case, depending on the facts of that case and the law that has to be followed in sentencing. This explains why I have not attempted to provide what I consider to be the most

⁷⁵ Bentham 1830: Book I, Chapter I (para 5) available at <<http://www.la.utexas.edu/research/poltheory/bentham/rp/index.html>> accessed 17 April 2007.

appropriate definition of punishment. Neither have I attempted to suggest what major elements a proper or correct definition of punishment should entail.

2.4 The three major theories in the punishment debate

As mentioned earlier, the three major theories in the punishment debate are the: retributive, deterrent and rehabilitation theories. We now examine some of the arguments underlying each theory, and look to see how such arguments can be used in cases of life imprisonment sentences. In Chapters III and V the author demonstrates the extent to which these theories of punishment have been invoked in cases where offenders have been sentenced to life imprisonment.

2.4.1 Retribution

‘The theory of retribution has had a long and distinguished history.’⁷⁶ There ‘is no single theory of retribution.’⁷⁷ Walker, for example, mentions the following as some of the theories of retribution – repayment theory, desert theory, penalty theory, rule theory, and satisfactory theory.⁷⁸ Traditional retributionist arguments are traceable to the writings of Kant (*Rechtslehre* of 1887), Hegel (though some scholars argue that Hegel was not a retributivist but rather a reformist),⁷⁹ Bradley,⁸⁰ Mabbott and Armstrong.

⁷⁶ Bean 1981: 12. For a detailed definition of retribution see Perry 2006: 179-183.

⁷⁷ Bean 1981: 12.

⁷⁸ Walker 1999: 595 – 605. See also Cottingham 1979: 238 – 246.

⁷⁹ Pincoffs 1966: 9-12, for example, classifies Hegel as a retributivist. Bean 1981: 46, on the other hand, argues that ‘[a]t first sight it appears that Hegel supported retribution, and many commentators have agreed. I think this is wrong; Hegel was a reformist offering a specific type of reform in which the offender was reformed through the punishment. It was

This discussion will be limited to the ideas expounded by Kant, Hegel, Mabbott and Armstrong, although those of other philosophers will be mentioned where necessary. The reason for the focus on the three philosophers is that Kant represents the views of the early retributivists whereas Armstrong those of the later ones.

2.4.1.1 Moral justification of punishment

Kant has been classified as a retributivist because of the following detailed observation that he made:

Juridical punishment can never be administered merely as a means for promoting another good either with regard to the criminal himself or to civil society, but must in all cases be imposed only because the individual on whom it is inflicted *has committed a crime*. For one man ought never to be dealt with merely as a means subservient to the purpose of another, nor mixed up with the subjects of real right. Against such treatment his inborn personality has a right to protect him, even although he may be condemned to lose his civil personality. He must first be found guilty and *punishable* before there can be any thought of drawing from his punishment any benefit for himself or his fellow-citizens. The penal law is a categorical imperative; and woe to him who creeps through the serpent-windings of utilitarianism to discover some advantage that may discharge him from the justice of punishment, or even from the due measure of it, according to the Pharisaic maxim: "It is better that *one* man should die than the whole people should perish." For if justice and righteousness perish, human life would no longer have any value in the world....

But what is the mode and measure of punishment which public justice takes as its principle and standard? It is just the principle of equality, by which the pointer of the scale of justice is made to incline no more to the one side than the other. It may be rendered by saying that the undeserved evil which any one commits on another, is to be regarded as perpetrated on himself. Hence it may be said: "If you slander another, you slander yourself; if you steal from another, you steal from yourself; if you strike another, you strike yourself; if you kill another, you kill yourself." This is the right of RETALIATION (*jus talionis*); and properly understood, it is

never clear how this was to occur, for pain is a sensation and reform is a moral condition...'. For Kant and Hegel's contribution to retribution, see Brooks 2001: 561-580.

⁸⁰ Pincoffs 1966: 2.

the only principle which in regulating a public court, as distinguished from mere private judgment, can definitely assign both the quality and the quantity of a just penalty. All other standards are wavering and uncertain; and on account of other considerations involved in them, they contain no principle conformable to the sentence of pure and strict justice.⁸¹

There are various conclusions one could draw from the above statement. Kant is referring to ‘judicial punishment’, that is, punishment that is imposed by a judicial officer and, we can also say, a quasi-judicial body. According to Kant, such punishment ‘can never’ be inflicted on a person unless that person has committed a crime. He makes it clear that punishment must not be administered for the purpose of promoting good for the society or for the individual. Before you punish any person, you must morally justify the reason for that punishment. That person must have committed an offence. This is the moral justification of punishment as a practice, and it is this justification which distinguishes punishment from other practices that do cause pain or distress. Jacobs has argued that retribution is ‘not properly an *aim* of punishment’ but rather a justification of punishment.⁸² In this regard Armstrong observes that:

[One of the]...problem[s] that a theory of punishment may be trying to solve is ‘What, if anything, is the moral justification of punishment as such?’ why should it be felt that this particular practice requires moral justification, when in the case of so many other practices – from warning to washing-up – we do not feel that the question even arises? Clearly because punishment involves the deliberate infliction of pain, *i.e.* distress of some sort, normally against the wishes of the recipient, and this is something to which there is a *prima facie* moral objection, the overriding of which requires justification.

⁸¹ As quoted in Pincoffs 1966: 2-3.

⁸² Jacobs 1999:535. (Emphasis in original).

It is important to notice that the moral justification of punishment is not the same thing as its general point or purpose, except in the eyes of those who have travelled the so far down the Utilitarian road that they never question the means if the end is desirable.⁸³

Kant and, needless to say, Armstrong are in contrast to the utilitarian who maintains, as the discussion below will illustrate, that the punishment should be imposed to protect society, or to the reformist who would argue that punishment should be imposed for the sole purpose of reforming or rehabilitating the offender. The utilitarian points out that if there is no good that would accrue to society as a result of punishing an individual or individuals, then that is revenge and not punishment. They contend that

since the retributivist explicitly ignores the consideration of the question whether any good consequences may be expected from punishment, and yet insists on the right to punish where a crime has been committed, his position is morally indistinguishable from that of a man who simply insists on revenge for crime.⁸⁴

2.4.1.2 **Guilt and punishment: why punish the innocent**

Kant adds that a person must first be found guilty and be punishable before punishment is imposed. Here Kant introduces one of the principles of the right to a fair trial: that only the guilty should be punished. The ‘punish – the – only – guilty’⁸⁵ stand has been used by the retributivist to discredit the utilitarian theory. The former maintains that if the objective of punishment is to deter people from committing crimes, the latter would punish an

⁸³ Armstrong 1961: 473-474.

⁸⁴ Pincoffs 1966: 43.

⁸⁵ For a detailed discussion of the circumstances under which the phrase to ‘punish the innocent’ can be used and misused, see Armstrong 1961: 480-481. See also Phillips 1985: 389 – 391; Smilansky 1994: 50 – 53; and Lyons 1974: 346 – 348. In this thesis it is used in the ordinary sense, which is, inflicting pain on a person who has not committed the offence, even if the judge might have declared him to be guilty.

innocent person in cases where crime is rampant to in order send a clear message to other members of the society that whoever breaks the law will be severely dealt with.⁸⁶ It has been observed that:

[t]he utilitarian is committed to doing whatever, in any given situation, is likely to promote public happiness; or if it impossible to promote happiness, in the circumstances, at least to minimize unhappiness, and thus he is committed to the minimization of the mischief, which is merely any state of affairs that brings about unhappiness. This means, so far as punishment is concerned, that he will punish when, and only when, and in such a way, and to the extent that, there is likely to be less mischief than if he did not punish, or punished in some other way. But sometimes the best way to minimize mischief would be to punish the innocent.⁸⁷

Armstrong would add that

of course a deterrent will deter as long as the person on whom the pain is inflicted is *believed* to be guilty by those we wish to deter. It really wouldn't matter, if deterrence is our aim in fixing penalties, whether he was in fact guilty or not; as long as we kept his innocence a secret we could make a very effective example of him. This conclusion has been acted on by more than one government in our own times.⁸⁸

The utilitarians deny that their theory calls for the punishment of the innocent. They argue that, when we look at the definition of punishment, it does not include punishing the innocent, but rather punishing the offender. Hart disagrees with this reasoning on the ground that resorting to the definition of punishment to justify punishing an individual is not a satisfying reason to explain why one has to punish that person. Hart calls this 'the definitional stop', which means that whenever utilitarians are hard-pressed to explain why their theory would not lead to punishing innocent

⁸⁶ Pincoffs 1966: 33-42.

⁸⁷ Pincoffs 1966: 33.

⁸⁸ Armstrong 1961: 484.

people, where it has not been possible for the authorities to arrest the criminal, if that will be sufficient to send a deterrent message to the public that such an offence should not be committed again, and that those found guilty of committing it will be dealt with severely, they would say: 'but the definition of punishment does not include punishing an innocent person.'⁸⁹ Armstrong argues that for the utilitarians to invoke the retributivists' definition of punishment as their evidence (the utilitarians) that their theory of punishment does not contemplate punishing the innocent 'is to give an answer which is technically correct (for those who subscribe to a Retributive definition of punishment) but which misses the point behind the question.'⁹⁰

The 'punishing the innocent' argument has been part of the punishment debate for generations, and philosophers from both the retribution and deterrence theories of punishment, have expressed their views in support of or against the possibility that the deterrence theory of punishment justifies punishment of the innocent. This debate cannot be resolved here. What is clear is that utilitarianists cannot resort to the 'definitional stop' to explain satisfactorily why their theory should not be labelled as supporting punishing the innocent if that will deter potential criminals.

2.4.1.3 Punishing the punishable

An important aspect of Kant's statement is that punishment must be imposed on a person who is *punishable*. This word, like many others, can be subjected to several interpretations. It is argued that a people are

⁸⁹ Hart 1968: 5-6.

⁹⁰ Armstrong 1961: 485.

punishable if it can be established that they can be held responsible for the offences which they are alleged to have committed. ‘Responsibility’ can also be interpreted in various ways.⁹¹ A person may be said to be ‘responsible’ for the death of another. A person may be said to be ‘responsible’ for his/her children. A person may be said to be ‘responsible’ because he/she is taken to be earnest.⁹² There are various forms of responsibilities, and therefore various contexts in which this term can be used. However, here we are concerned with criminal responsibility. Not responsibility the way Flew understood it ‘as a prevalent psychiatric-psychological security-risk – that crime being a sort of disease the criminal should be absolved of his responsibility.’⁹³

Criminal responsibility in the sense that although some people might be said to have broken the law, they cannot be held criminally liable because of factors such as age and cognitive capacity (e.g. insanity). In the latter case I should not be seen to be looking at criminals the way a reformist would, that is, by assuming that all criminals have mental disorders which are attributable to society and the environment in which they were brought up, but rather from the literal understanding of insanity. Children who have not reached the age of criminal responsibility and the insane have no

⁹¹ We were warned that ‘general theories of responsibility based on philosophical speculation alone can get us nowhere for the practical purposes of criminal law; that in studying the causative factors of the criminal act of the individual offender...we are not only finding the causes of the trouble in the individual case and the means to be employed to remove them, but, from the point of view of pure ethics alone, we are actually getting nearer to estimating the measure of the offense in terms of moral responsibility than has ever been achieved by pure speculation, unrelated to scientifically acquired data as of hereditary, developmental and environmental influences and unrelated to any problem of the individual case.’ Glueck 1923: 245.

⁹² Hart 1968: 186-237.

⁹³ Flew as quoted in Stott 1954: 366.

‘freedom of will’, as opposed to ‘determinism’,⁹⁴ which is the basis of criminal responsibility. Therefore they are not punishable.

2.4.1.4 Freedom of will versus determinism

The principle of ‘freedom of will’ is underpinned by the argument ‘that confronted by two or more alternative courses of action, the criminal is he who has deliberately chosen the illegal course, and who, by the same token, could deliberately have chosen the path of virtue.’⁹⁵ Bradley would ask:

How in the world is it possible to say what relieves a mad man of responsibility unless you know what makes a sane man responsible? Unless a man is agreed with us as to our main beliefs as to a sane man’s responsibility, how can we receive his evidence as to anyone’s non-responsibility?⁹⁶

The answer to Bradley’s question is provided by Glueck, when he writes that ‘[t]he truth is that the law, following common sense and common morality, assumes a certain degree of freedom of conscious, purposive

⁹⁴ The distinction between ‘freedom of will’ and ‘determinism’ is described by Hones as follows “[c]an a man do differently from what he does do? Could any different thing ever have been done by anybody than that which they did do? Is the future of each individual already written in the nature of things, or ‘in his forehead’ as the Mohammedans say? Is some such force as fate, or predestination, or necessity, or hereditary, or environment, or any or all of these an adequate explanation of the events of an individual’s life without reference to any ability of his own to do otherwise than he does do?...To all these questions the determinists answer [is that] man and society are determined by efficient causes working out but one inevitable; the free-willists answer man and society co-operate with the efficient causes in shaping themselves partly at least toward their own ends... To the free-willist the possible is one of several things that may be made to happen, and the actual is the one thing that did happen or was made to happen. To the determinist the future is as fixed as the past, to the free-willist the future is not fixed, but is in process of being fixed by the choices men make in the present. To the determinist the sense of th [sic] evitable is delusory, to the free-willist the sense of the inevitable is delusory ... Both cannot be right. Either all events are determined or some events are not determined, there is no middle ground...Determinism holds the former position; libertarianism the latter. The issue could not be more sharply drawn”. Hones 1912: 64-66, as quoted in Glueck 1923: 212-213.

⁹⁵ Glueck 1923: 208. See pages 209-210 for criticism of ‘freedom of will’ or ‘determinism’ or ‘scientific determinism.’

⁹⁶ As quoted in Glueck 1923: 210.

activity possessed by the “normal” mind.’⁹⁷ Glueck adds that ‘[f]or the commission of crime there must be an illegal act with “criminal intent”’.⁹⁸ This means two things: one, ‘the existence in the offender of a state of mind which is declared by law to be consistent with criminality’ and, two, ‘[t]he *voluntary* commission of an act declared by law to be criminal, as a result of, or contemporaneous with, that state of mind.’⁹⁹ Glueck holds that: ‘[i]f there is such a thing as criminal responsibility, based on moral responsibility, it must take account of the instinctive nature of man and his capacity to modify the impulsive, primitive power of instinct by the ejection of some degree of intelligence.’¹⁰⁰ He concludes that the ‘requirement of a union of act and intention which is necessary to constitute a criminal act is a recognition of the fact of conscious, purposive activity in man and of the fact that this capacity may be weakened or destroyed by mental disease.’¹⁰¹ For a retributivist, a person should only be punished for violating the law and for no other reason, such as, to protect society or to reform him or her and if the person is punishable.

2.4.2 Retribution and distribution of punishment: how much should we punish?

The question that we have to answer is: how much punishment should be inflicted on the offender? In other words, how much can we punish? Kant

⁹⁷ Glueck 1923: 210.

⁹⁸ Glueck 1923: 223.

⁹⁹ Glueck 1923: 223.

¹⁰⁰ Glueck 1923: 233.

¹⁰¹ Glueck 1923: 234.

posed the same question in different words and at the same time gave an answer:

But what is the mode and measure of punishment which public justice takes as its principle and standard? It is just the principle of equality, by which the pointer of the scale of justice is made to incline no more to the one side than the other. It may be rendered by saying that the undeserved evil which any one commits on another, is to be regarded as perpetrated on himself. Hence it may be said: "If you slander another, you slander yourself; if you steal from another, you steal from yourself; if you strike another, you strike yourself; if you kill another, you kill yourself." This is the right of RETALIATION (*jus talionis*); and properly understood, it is the only principle which in regulating a public court, as distinguished from mere private judgment, can definitely assign both the quality and the quantity of a just penalty. All other standards are wavering and uncertain; and on account of other considerations involved in them, they contain no principle conformable to the sentence of pure and strict justice.¹⁰²

Kant is of the view that the principle of equality should form the basis for the imposition of punishment. By that principle he means that 'the pointer of the scale of justice is made to incline no more to the one side than the other.' He adds that '...the undeserved evil which any one commits on another, is to be regarded as perpetrated on himself.' By adopting this view, Kant justified the principle of 'an eye for an eye.' This principle has been criticised widely on the ground that it is barbaric because it encourages and institutionalises revenge.

2.4.2.1. Is retribution the same as revenge?

Some scholars have argued that retribution is the same as revenge.¹⁰³

Oldenquist, for example, is of the view that 'there is no doubt that

¹⁰² See 2.4.1.1 above.

¹⁰³ Revenge has been defined as 'any deliberate injurious act against another person which is motivated by resentment of an injurious act or acts performed by that other person against the revenger, or against some other person or persons whose injury the revenger represents.' See Rosebury 2009: 4.

retribution is revenge, both historically and conceptually.’¹⁰⁴ According to Nygaard, ‘[r]etribution is revenge plain and simple. We punish offenders who violate the law because we are angry and want to get even. Retribution is about power. It is about force. It is about repression.’¹⁰⁵

Kant insists that there has to be equality in punishment, in the sense the people who kill should also be killed, and that those who slander should also be ready to be slandered. Pincoffs argues that ‘[t]he suspicion is confirmed that retributivism is revenge-taking in disguise when we note how naturally revenge-taking assumes the form of the “principle of equality”’: ambush the ambusher, blackball the blackballer.’¹⁰⁶ Like Pincoffs, Nygaard and Oldenquist, Archbishop Desmond Tutu also equated retribution with revenge.¹⁰⁷ However, Nozick, like Armstrong in 1961,¹⁰⁸ disputes that retribution is revenge. His reasons are that

- (a) retribution ends cycles of violence, whereas revenge fosters them;
- (b) retribution limits punishment to that which is in proportion to the wrongdoing, whereas revenge is limitless in principle;
- (c) retribution is impartially administered by the state, whereas revenge is often personal;
- (d) retributivists seek the equal application of the criminal law, whereas no

¹⁰⁴ Oldenquist 2004: 339.

¹⁰⁵ Nygaard 1998: 363.

¹⁰⁶ Pincoffs 1966: 45.

¹⁰⁷ The South Africa Archbishop Tutu is quoted to have said that ‘... (i) [p]unishment is retribution; (b) retribution is vengeance; and (c) vengeance is morally wrong.’ See Crocker 2002: 512. For the criticism of Tutu’s observations, see 513-524. For a detailed analysis of South Africa’s Truth and Reconciliation Commission and arguments against retribution, see Markel 1999: 389-445.

¹⁰⁸ Armstrong argued that ‘[r]etributive punishment is not revenge...Revenge is private and personal, it requires no authority of one person or institution over another; [p]unishment requires a whole system of authorities given a right to secure justice. As members of the State, we surrender the right to secure justice ourselves to the authorities that the State appoints (though retaining, for example, our right to punish our own children). It is these State-appointed authorities, not ourselves, who must both punish malefactors and recover for us, by force where necessary, what a reluctant debtor owes us.’ Armstrong 1961: 487.

generality attaches to the avenger's interest; and (e) retribution is cool and unemotional, whereas revenge has a particular emotional tone of taking pleasure in the suffering of another.¹⁰⁹

It is clear that Pincoffs errs, in my opinion, when he suggests that 'the retributivist has not yet met the gravamen of the revenge argument. It is that the very theorizing about justice, freedom, and human dignity is what lies on the surface: that these are but glosses over the demand for revenge.' and that '[t]he retributivist has been challenged to produce a criterion by means of which we can say that A is punishing from motives of justice, but that B is punishing from motives of revenge.'¹¹⁰ Without unnecessarily repeating what Nozick says, he proposes a clear criterion upon which a distinction can be drawn between revenge and punishment. It is revenge, according to Nozick, when it has no institutional backing, and it is punishment when it has institutional backing. A person carries out revenge to satisfy his/her personal desires and such a person will not be required to think about issues of proportionality before he or she takes any action. But punishment is imposed because justice has to be done and has to be seen to be done, and proportionality is an integral element of punishment. Whether proportionality takes the retaliatory approach, or another approach, is a different matter. What is vital is a distinction between revenge and punishment can, in my opinion, be drawn from Nozick's arguments.

¹⁰⁹ Nozick 1981: 366-68 as quoted in Markel 2005: 438. However, Rosebury has argued that 'Nozick, in an otherwise convincing account of differences between retribution and revenge, is surely wrong to claim that, as a matter of definition, "revenge involves a particular emotional tone, pleasure in the suffering of another"'. While this emotional character may sometimes be present, counter examples can be imagined, and they provide some of the most interesting cases. A revenger – for example, a person whose child has been murdered – may aim simply to end her victim's intolerably continuing existence, and may feel no pleasure in the act of doing so; and if suffering is inflicted in the process, she may derive no pleasure whatever from contemplating it.' see Rosebury 2009: 3.

¹¹⁰ Pincoffs 1966: 47.

In the same vein, Locke tries to illustrate that revenge and retribution are distinct theories of punishment but that they are ‘closely connected.’¹¹¹ His argument is that the revenge theory takes that approach that ‘punishment should make the guilty person suffer the same evil as he has created, whereas the retributive theory is that punishment should make the guilty person atone for or compensate for the evil he has done. The two are connected but different’ and that ‘on the Retributivist theory, if a man steals £500 then he must pay it back, whereas the Revenge theory holds that £500 should be extracted from him.’¹¹²

It is argued that very few people, if any, would argue that there is a theory of punishment called revenge. Although Locke maintains that his explanation draws a clear distinction between retribution and revenge, my interpretation is that he has bisected retribution and is thus looking at it from two levels: the one part is what Kant calls for, the ‘an eye for an eye’ theory of retribution; the other is what Armstrong calls for; the ‘liberalised’ theory of retribution at the penalty -fixing level. Consequently Locke calls Kant’s theory ‘Revenge’ and Armstrong’s ‘Retribution.’ In Kant’s own understanding of retribution, he who kills another person kills himself. This is the argument that even Armstrong refers to as the source of all the accusations that retribution is barbaric, and this is what Locke calls revenge. In Armstrong’s understating of retribution, there is not any harm done to retribution if the ideals underpinning the deterrence and reformatory theories are integrated into retribution at the penalty-fixing

¹¹¹ Locke 1963: 568.

¹¹² Locke 1963: 570.

stage, provided that the limit of the punishment that is to be imposed is set on retributive grounds.¹¹³

Armstrong succinctly summarises for us the attacks that have been directed against retribution in the light of the arguments that are given in support of other theories of punishment. He says that the attack unfolds as follows:

Retributive punishment is only a polite name for revenge; it is vindictive, inhumane, barbarous, and immoral. Such an infliction of pain-for-pain's-sake harms the person who suffers the pain, the person who inflicts it, and the society which permits it; every body loses, which brings out its essential pointlessness. The only humane motive, the only possible moral justification for punishment is to reform the criminal and/or to deter others from committing similar crimes. By making the punishment of wrongdoers a moral duty, the Retributive theory removes the possibility of mercy. The only people who today defend the Retributive theory are those who, whether they know it or not, get pleasure and a feeling of virtue from seeing others suffer, or those who have a hidden theological axe to grind. In any case, the theory is not only morally indefensible but completely inadequate in practice to determine what penalty the criminal should suffer in each case. Finally, the theory can be shown to be wrong by such simple facts of language usage as, for instance, that it makes sense to say 'He was punished for something he did not do,' because, *inter alia*, the theory demands that to say a man was punished for a crime logically necessitates that he committed it. Historically, morally, and logically the theory is discredited.¹¹⁴

In addition to Nozick's correct distinction between revenge-taking and retribution, Armstrong's response to the above criticisms of retributivism is that '...they are all mistaken – either because they are based on confusions about what the theory is or else because they spring from erroneous moral judgments.'¹¹⁵ He does not deal with the attack that the proponents of retribution are sadists or have a hidden religious interest, but nevertheless

¹¹³ Wilson also argued that a retributive punishment could also serve deterrent and rehabilitative objectives. Wilson 1983: 525.

¹¹⁴ Armstrong 1961: 471-472.

¹¹⁵ Armstrong 1961: 472.

mentions that 'it could be true.' However, he cautions that 'philosophers, of all people, should surely be above using the ploy of analysing a man's motive instead of meeting his arguments.'¹¹⁶ To the objection, that 'the theory is out of date i.e, unfashionable', Armstrong replies with a non-satisfying statement that that objection '...seems so ridiculous philosophically that [he] would not have mentioned it at all if it were not for the unfortunate fact that it is the most common objection of all' and that he certainly does not bother '...with it any further, giving the reader credit for being free from what Belloc called "[t]he degrading slavery of being a child of one's time".'¹¹⁷ This reply is unconvincing, because it would have been an opportunity for Armstrong to give his reason or reasons why the theory could still be defended in modern times in the light of other theories which claim to be the best in the circumstances. This being the 'most common objection of all', it should have been one of the central issues of his paper to point out the weakness of that objection, and thereby prove the strength of his theory.

2.4.2.2 Is retribution inhumane?

On the charge that retribution is inhumane, Armstrong argues that this charge, if correct, cannot be directed against the definition of punishment by the retributivist nor against their moral justification of punishment, but can only be against the penalty-fixing aspect of retribution. Put differently, Armstrong contends that the definitional and moral justification aspects of retribution are free from the charge of being inhumane, but that the penalty-

¹¹⁶ Armstrong, 1961: 472.

¹¹⁷ Armstrong 1961: 472.

fixing aspect is one that could be attacked as being inhumane. Armstrong, understandably so, reacts to this criticism not by directly showing the humane nature of the penalty-fixing aspect of retribution, but by indicating that, in the light of the penalty-fixing aspects of Deterrence and Reformation, retribution is more humane. He argues that if the aim of deterrence is to punish the offender severely so as to deter others from committing crime, '[l]et [somebody] be whipped to death, publicly of course, for a parking offence; that would certainly deter *me* from parking on the spot reserved for the Vice-Chancellor' and that with rehabilitation, an offender could be detained 'until he is sufficiently changed for the experts to certify him as reformed. On this theory, every sentence ought to be indeterminate ... "You stole a loaf of bread? Well, we'll have to reform you, even if it takes the rest of your life".'¹¹⁸

Surely if utilitarianists were to whip people to death for minor offences, it would be both inhumane and would ignore the aspect of proportionality. The same applies to rehabilitationists if they were to detain a person for the rest of his/her life for stealing a loaf of bread. What Armstrong provides are hypothetical examples, though they clearly illustrate the weaknesses of both deterrence and rehabilitation.

2.4.2.3 Can retribution be freed of the 'eye for an eye' approach?

Unlike Kant, Armstrong is of the view that the 'an eye for an eye' approach to punishment is not justifiable, and therefore inapplicable, in some circumstances. He holds that there is no reason why retributivists should

¹¹⁸ Armstrong 1961: 484.

not look at other theories of punishment, in particular deterrence and reformatory, and use them at the penalty -fixing level of punishment, after the 'permissible limit' of how much punishment should be imposed in a given case has been determined by retributive principles. In this case, Armstrong concedes that although retribution adopts a non-compromising stand on the definitional and moral justification components of punishment,¹¹⁹ the three theories can merge at the penalty-fixing level, and that at that stage retribution borrows from deterrence and rehabilitation. He argues that there are circumstances where reliance on retribution does not help, for example, '[w]hat would *lex talionis* prescribe for a blind man who blinded someone else?'¹²⁰

As the discussion of punishment under international criminal tribunals and national courts illustrates in chapters III and V respectively, international criminal tribunals and courts in countries such as South Africa, Uganda (in some cases) and Mauritius do not sentence people to death because of the

¹¹⁹ Armstrong 1961: 487.

¹²⁰ Armstrong 1961: 486. See also 487, where Armstrong argues that justice does not mean that a man should be punished to the limit of the punishment, but that, depending on other considerations, such as reformatory considerations, a man can be punished less than justice requires but should not be punished more than justice requires. He therefore opines that 'The Retributive theory is not, therefore, incompatible with mercy. Quite the reverse is the case – it is only the Retributive idea that makes mercy *possible*, because to be merciful is to let someone off all or part of a penalty which he is recognized as having deserved.' Armstrong concludes on this point that 'When the problem is to find the best system of penalty-fixing there is no doubt that a purely Retributive theory would have serious weaknesses, both practically, because it may be very difficult to decide which of the two crimes is the more serious and thus deserving the severer punishment, and morally, because if Deterrent and Reformatory considerations are all together ignored when the list of penalties is drawn up a great social good might be sacrificed in order to achieve a small improvement in the accuracy of the punishment from a Retributive standpoint. But, on the other hand...the charge that Retributive theories of penalty-fixing are barbarous is based on the mistaken assumption that the only such theory is the *lex talionis*, and that a modified Retributive theory is perfectly possible, one which only uses Retributive considerations to fix some sort of upper limit to penalties and then looks to other factors to decide how much and what sort of pain shall be inflicted. Purely Reformatory or Deterrent theories of penalty-fixing, which lack that limit, run the risk of becoming far more inhumane than even a purely Retributive theory.' 489.

murder they committed, although retribution as an objective of punishment is still observed by these judicial bodies.

Mabbott, like Kant, would disagree with Armstrong's views stated above. He maintains that '[t]he truth is that while punishing a man and punishing him justly, it is possible to deter others, and also to attempt to reform him, and if these additional goods are achieved the total state of affairs is better than it would be with just punishment alone. But reform and deterrence are not modifications of the punishment and, still less reasons for it.'¹²¹ Mabbott emphasises that 'the punishment *itself* seldom reforms the criminal and never deters others. It is only "extra" arrangements which have any chance of achieving either result.'¹²²

Another argument that has been advanced to link retribution and punishment generally to revenge is that retribution originates from the 'an eye for an eye' argument and thus, by implication, there is no way in which it can be free of revengeful elements. Pincoffs suggests that the fact that punishment has its origin in revenge does not make it revenge itself.¹²³ Punishment evolves, and during this evolution the revenge elements that formed part of it during its 'infancy' disappear as punishment approaches 'maturity'. Weber elaborates this point as follows

The argument that punishment is bad because it is brutal and medieval in its origin only illustrates a fallacy which besets the human mind in every

¹²¹ Mabbott 1939: 153.

¹²² Mabbott 1939: 154. (Emphasis in original). He argues later that 'I completely agree that while punishing a man we ought to make every effort to use this opportunity [for instance when he is in prison] in order to try *in addition* to reform him and to deter others.' See Mabbott 1955: 262. (Emphasis in original).

¹²³ Pincoffs 1966: 46.

sphere of thought. The root of this fallacy is the notion that *a thing can be defined in terms of its origin*. Thus, the revolt against Darwinism is moved in part by the notion that if man originated from apes, he is essentially an ape...In short, *things which evolve* are what they *are*, not what they *were*. So with punishment.¹²⁴

2.4.2.4 The principle of equality as viewed by Mabbott

Mabbott, like Kant, agrees that the principle of equality should govern the imposition of any punishment, but he takes this principle to another level by suggesting that those who commit the same crimes should be visited with the same punishment. Mabbott is against laws that allow judges discretion to determine which sentence is to be imposed on a particular criminal. Laws that give the judge a wide discretion in deciding which punishment to inflict on the offender are common in many jurisdictions. For example, in the case of robbery a judge may have a discretion to impose a sentence depending on the circumstances under which the robbery was committed. Such a law may read ‘a person found guilty of aggravated robbery shall be sentenced to a term of imprisonment of not less 10 years or to life imprisonment depending on the circumstances under which such robbery was committed.’ Another law may provide that ‘a person found guilty of murder is liable to be sentenced to life imprisonment.’ According to Mabbott such laws permit judges to take into consideration other factors, such as deterrence, in sentencing, and that this brings about inequality and defeats the purpose of punishment, and the theory of retribution in particular. He calls for laws that provide for ‘fixed penalties.’ In Glueck’s words this is ‘the cut-to-the-same-pattern view of all criminals committing

¹²⁴ Weber 1928: 184-185. (Emphasis in original).

the same offense.¹²⁵ Such laws should provide, for example, that a person found guilty of murder ‘shall be imprisoned for 25 years.’ This would mean that all those who commit murder get the same sentence. He puts it clearly that:

If the laws do include their own penalties then the judge has no option...The danger of allowing complete freedom to the judicature in fixing penalties is not merely that it lays too heavy a tax on human nature but that it would lead to the judge expressing in his penalty the degree of his own moral aversion to the crime. Or he might tend on deterrent grounds to punish more heavily a crime which was spreading and for which temptation and opportunity were frequent...The death penalty for sheep-stealing might have been defended on such deterrent grounds. But we should dislike equating sheep-stealing with murder. Fixed penalties enable us to draw these distinctions between crimes. It is not that we can say how much imprisonment is right for a sheep-stealer. But we can grade crimes in a rough scale and penalties in a rough scale and keep our heaviest penalties for what are socially the most serious wrongs regardless of whether these penalties will reform the criminal or whether they are exactly what deterrence would require.¹²⁶

A critical reading of Mabbott’s views above in the light of Armstrong’s position mentioned earlier, which is to the effect that at the penalty-fixing level retribution can borrow a leaf from deterrence and rehabilitation where appropriate, shows that although both Armstrong and Mabbott agree that issues of equality and proportionality are indispensable if punishment is to be imposed on retributive grounds, they disagree on how to approach these issues at a penalty fixing-level. Whereas Armstrong would disagree with a law which provides that ‘any person who is found guilty of blinding another person shall also be blinded’, on the ground that practically nothing would happen to a blind person who blinded another person, Mabbott

¹²⁵ Glueck 1923: 235.

¹²⁶ Mabbott 1939: 162.

seems to have no problem with such a law, provided that offenders who commit similar offences are punished uniformly. Although Mabbot's argument looks meritorious theoretically, it is argued that there are two reasons why it is difficult to defend in practice when evaluated in the light of Armstrong's theory. The first is that it would lead to some offenders escaping punishment because the law is inflexible in accommodating their special circumstances for punishment purposes. To use Armstrong's example, it would mean that blind people who blind others, in cases where the punishment for blinding another person is the blinding of the perpetrator, escape punishment. But if the law allowed the judge, for example, to impose another sentence in cases where the stipulated sentence would be inappropriate, such offenders may either be imprisoned or fined. The second problem with fixed penalties is that they fly in the face of the principle of separation of powers. In effect it is the legislature which passes the law and also determines the sentence, irrespective of the circumstances under which the offence was committed. The judge's discretion is not just limited, but rather eliminated.

2.4.2.5 Does retribution justify torture?

Ruben has suggested that '[u]nlike utilitarian notions of incapacitation, which at least suggest incarceration, or rehabilitation, which virtually requires it, retribution could be achieved by virtually any means of inflicting pain or suffering on the offender, and most obviously, by physical torture' and that '...the first thing that retribution brings to mind is that the

offender should be tortured while in prison.’¹²⁷ He, however, adds quickly that ‘[m]odern retributivists, of course reject torture as a mode of punishment...’¹²⁸ Ruben does not define ‘torture.’ I will take it that he understood torture as it is defined under Article 1 of the United Nations Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment (CAT).¹²⁹ In my opinion Ruben errs when he says that retribution supports torture. As early as 1955, Mabbott, a convinced retributivist, argued that ‘[w]hen a man is sentenced to imprisonment he is not also sentenced to partial starvation, to physical brutality, to pneumonia from damp cells and so on.’¹³⁰ This should be interpreted to mean that Mabbott supports the view that prisoners should be detained in humane conditions, and surely torture cannot be part of that. From a human rights perspective, the right to freedom from torture is recognised in international human rights law and international law as a peremptory norm, a *jus cogens*.¹³¹ This means that every country has, amongst other things, an obligation to eradicate torture in all places of detention and severely punish

¹²⁷ Ruben 2003: 69.

¹²⁸ Ruben 2003: 70.

¹²⁹ Adopted and opened for signature, ratification and accession by General Assembly Resolution 39/46 of 10 December 1984 and entered into force on 26 June 1987. Under Article 1 of CAT torture is defined as ‘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, 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 capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.’

¹³⁰ Mabbott 1939: 166.

¹³¹ For a detailed discussion of torture as a norm of *jus cogens*, see Ranganathan 2008: 381. For a detailed discussion of the concept of *jus cogens* in international law see Fry 2009: 118; von Bogdandy and Dellavalle 2009: 27.

officials who have been found guilty of torturing prisoners.¹³² Therefore, any theory of punishment that would support a violation of international law and international human rights law should be classified as something other than a theory of punishment. It is true that prison warders torture prisoners and that some government officials inflict torture on inmates, but this does not mean that this is done because retribution as an objective of punishment approves of torture. The argument applies with equal force to rehabilitation and deterrence. Any attempt to argue that they support torture should not be supported.

2.4.2.6 The right to be punished

There are some circumstances where, even if a person has committed a heinous offence, they should be pardoned. A pardon can only be granted by the executive arm of government, and in most cases by the head of state or government. Different countries have different laws that govern the circumstances under which a person can be pardoned. A person can be pardoned either before conviction or after. Kant does not seem to support the idea of pardon, especially after conviction. He states that

Even if a civil society resolved to dissolve itself with the consent of all its members – as might be supposed in the case of a people inhabiting an island resolving to separate and scatter themselves throughout the whole world - the last murderer lying in prison ought to be executed before the resolution was carried out. This ought to be done in order that every one may realise the desert of his deeds, and that bloodguiltiness may not remain upon the people; for otherwise they will all be regarded as participants in the murder as a public violation of justice.¹³³

¹³² Mujuzi 2006: 425-427.

¹³³ As quoted in Pincoffs 1966: 4.

Kant was of the view that a person found guilty of a crime must be punished. His argument presents one of the strongest points of retribution: deserts. Retribution is partly based on the fact that a person is punished because he/she deserves to be punished for his/her conduct.¹³⁴ According to Fisher and Rosen-Zvi the principle of just desert is founded on the fact that ‘punishment cannot be inflicted for further social ends, but rather solely because the punished individual deserves it.’¹³⁵ In fact Hegel, like Kant,¹³⁶ has argued that a man is punished because he has a right to be punished.¹³⁷

In his words:

The injury (the penalty) which falls on the criminal is not merely *implicitly* just – as just, it is *eo ipso* his implicit will, an embodiment of his freedom, his right; on the contrary, it is also a right established in the criminal himself, i.e. in his objectively embodied will, in his action. The reason for this is that his action is the action of a rational being and this implies that it is something universal and that by doing it the criminal has laid down a law which he has explicitly recognized in his action and under which in consequence he should be brought under his right.¹³⁸

¹³⁴ Lee 2009: 621; and Kolber 2009: 199.

¹³⁵ Fisher and Rosen-Zvi 2008: 910.

¹³⁶ It has been suggested that ‘Kant is right in declaring that criminals have a right to be punished.’ See Weber 1928: 195.

¹³⁷ It has been suggested that the doctrine that ‘a man has a right to be punished’ originated from difficulties that faced states during the Enlightenment period. During this period Enlightenment reformers’ trust in the common man’s equal rationality was not quite as solid as they claimed’ and therefore it was clear that the state had to ensure that errant members of the society obeyed the law. But states were imposing harsh sentences such as ‘whipping, hanging, burning and mutilating offenders in market places. This meant that the condemned man on whom such punishments were to be inflicted could not see the state as an instrument of his self-realization.’ On the one hand some people were harming others and therefore needed to be punished but the state that was punishing such members used harsh measures. ‘This dilemma was resolved by simultaneously assaulting existing punishment practices and calling for their radical reconception and reform on the grounds of autonomy. The offender, it was said, had in fact consented to his punishment. This consent was found either in his signature to the social contract (which, as it turned out, contained a punishment clause) or in his very act (which, after all, was universalizable as the act of a rational being). The more daring among punishment apologists of the time went so far as to argue that the offender not only had consented to his punishment, but that he had a *right to be punished*.’ Dubber 1998: 115.

¹³⁸ Hegel as quoted in Pincoffs 1966: 12.

It is important to mention that some modern scholars who have written about the right to be punished erroneously assume that Hegel was the ‘father’ of this right. Deigh, for example, says that though this right was ‘[b]orn of Hegelian social philosophy, it still finds adherents and sympathizers long after the death of its progenitor.’¹³⁹ Some writers, such as Pincoffs,¹⁴⁰ also only look at the right to be punished from a retributive perspective, as if it is exclusive to retribution. Dubber argues that the concept of the right to be punished was coined by the early 19th – century scholar, Fichte, a year ‘before Kant’s *Metaphysics of Morals* appeared’ and that ‘Hegel ... merely put a sharp dialectical point on a Kantian idea.’¹⁴¹

Hegel assumes that the criminal exercises his freedom of will as a rational human being and decides to commit a crime. In other words, a criminal, as a rational human being chooses to follow the ‘criminal route’ and ignores the ‘non-criminal route’, and thereby invites punishment himself. It thus becomes his/her right to be punished because he has chosen his/her conduct well aware of, and ‘intends the natural consequences of his act’ as criminal lawyers would put it. Here Hegel, though he does not explicitly say so, rejects the determinism argument and adopts the free-will argument. It has been argued that

[T]he moral right to be punished derives from a more fundamental natural right, inalienable and absolute: the right to be treated as a person. Persons are entitled to have their choices respected; therefore, when one chooses responsibly to engage in morally reprehensible conduct prohibited by a

¹³⁹ Deigh 1984: 191.

¹⁴⁰ Pincoffs 1966: 12.

¹⁴¹ Dubber 1998: 116.

just system of criminal law, one chooses also the consequences of his offense: punishment. That choice is to be respected.¹⁴²

Parry has argued that in ‘the Kantian world...the citizen claims punishment as an equal moral right. But the right to be punished itself depends upon being normal. Deviants are not entitled to punishment precisely because they are not equal.’¹⁴³ Whether a person has a right to be punished is a controversial issue. Deigh is of the view that the doctrine that a criminal has a right to be punished has outlived the system of philosophy that gave birth to it, and that the ‘reason for its independent life...’ is that ‘the doctrine captures for many the uplifting thought that human society owes even its most inimical members respect as responsible, moral agents’ and that ‘punishment is part of institution of social control that treats persons as responsible, moral agents, and thus punishment becomes a sign of respect.’¹⁴⁴ Deigh asks: ‘what manner of right is this? A right to suffer the deprivation of some good or to be visited with some evil? What could ever possess a person to want to assert such a right?’¹⁴⁵ He adds that ‘[l]ooked at it one way, the doctrine is appealing; looked at it in another, it is a morass of confusion.’¹⁴⁶ He maintains that one of the standard objections to this doctrine is that ‘...a right to be punished is otiose; no one would ever have good reason to assert it. Punishment, because it is an evil, is not

¹⁴² Gardner 2008: 480.

¹⁴³ Parry 2007: 219-220.

¹⁴⁴ Deigh 1984: 191.

¹⁴⁵ Deigh 1984: 191.

¹⁴⁶ Deigh 1984: 192.

something a person of sound mind would want to claim as his due.¹⁴⁷

Binder argues that ‘despite paradoxical claims of Kant and Hegel that offenders had a “right to be punished,” the offender is hoping neither for punishment nor for frustration.’¹⁴⁸

What if those who support the concept of the right to be punished put it that this is a unique right, in the sense that people do not have to claim it. It is a right that society thinks that you deserve to enjoy because you broke the law. And, therefore, being a right of this kind, it should be distinguished from other rights that ordinarily people claim. They could also strengthen their argument further by suggesting that even with regard to those rights that Deigh thinks that people of sound mind are entitled to claim, there are different principles that govern these different rights. For example, they may argue, that civil and political rights require immediate implementation, whereas socio-economic rights require progressive realisation depending on, amongst other things, the availability of resources. But the mere fact that there are different principles at the implementation level of civil and political rights, on the one hand, and socio-economic rights, on the other, does not make either less than rights. Therefore, they may add, the mere fact that the right to be punished involves some pain and deprivation and is forced upon you by the state, does not make it less of a right.

One of the arguments that have been put forward to support the right to be punished goes like this:

¹⁴⁷ Deigh 1984: 192.

¹⁴⁸ Binder 2008: 734.

a criminal concerned to maintain his dignity as a human being would have reason to demand that he be punished in circumstances in which relieving him of that punishment would constitute an affront to his dignity, would insultingly convey to him that he was regarded as less than a person.¹⁴⁹

In support of the above contention, defenders of the right to be punished argue that in a system where a person commits an offence and the authorities think that he deserves to be treated and not punished, on the ground that he is suffering from a curable illness which made him/her commit that offence, such system treats that person with indignity. Such system assumes that that person is sick and that he is not responsible for his actions or omissions. This is an affront to human dignity and therefore should be resisted. Many convicted criminals, if asked to choose between being treated as sick and subjected to therapy, and being punished to show that they were responsible for their acts, would choose the latter, hence claiming their right to be punished because such a right would come with dignity.¹⁵⁰ It is also contended that pardoning a criminal violates his dignity; this is so because by committing the offence he wanted to enjoy his right to be punished.¹⁵¹

But this contention is rejected on the ground that a criminal does not choose to be punished; it is the authorities which arrest, try and convict the criminal. Therefore he cannot say that, by committing an offence, he chooses to be punished.¹⁵² It may also be added that many people who

¹⁴⁹ Deigh 1984: 192.

¹⁵⁰ Deigh 1984: 194-196.

¹⁵¹ Deigh 1984: 198-199.

¹⁵² Deigh 1984: 197.

commit offences do not get arrested.¹⁵³ Such people hardly, if ever, unless there are compelling indications that they will be arrested hand themselves over to the authorities so that they will be able ‘to enjoy’ their right to be punished. Another objection to the assertion that when a criminal is pardoned this amounts to a violation of human dignity, is that, in such cases, no substantive wrong is done to the right, and therefore there can be no claim that the right has been violated.¹⁵⁴ However, the difficulty with this objection is that it is subjective, depending on the angle from which it is being approached. The criminal would say that by ‘pardoning me the authorities have treated me like a kid or a person incapable of serving my sentence.’ Surely to him this would be a substantive wrong, because he has been treated in a derogatory manner.

Another view that supports the doctrine that a criminal has a right to be punished, is grounded in the reformatory theory of punishment. This view holds that:

punishment renders a criminal benefits in that it provides him with the means necessary for his moral regeneration. The criminal’s guilt implies diminished stature, and by submitting to punishment he expiates that guilt and so regains the stature he lost...the harm that a criminal would suffer if he remained in his diminished condition, if, in particular, he were denied the means necessary for expiation, suffices to establish his right to be punished much as the harm a diseased person would suffer if he were denied medicine that would cure him suffices to establish his right to medical treatment.¹⁵⁵

¹⁵³ In *State v Makwanyane and another* 1995 (3) SA 391 para 120 the Constitutional Court of South Africa heard that only between 30 and 40 percent of people who commit violent crimes get arrested.

¹⁵⁴ Deigh 1984: 199-200.

¹⁵⁵ Deigh 1984: 202.

The first objection in principle to this theory, by a retributivist adhering to Kant's position, is that it is based on reformatory theory. Kant would argue that '[t]he penal law is a categorical imperative; and woe to him who creeps through the serpent-windings of utilitarianism to discover some advantage that may discharge him from the justice of punishment.' But Armstrong would concede that if there is something good that retribution could learn from rehabilitation at the penalty-fixing level, it should be emulated. However it has to be shown that 'a criminal can regain a well-integrated moral personality only by submitting to punishment.'¹⁵⁶ Deigh holds that, in cases of serious offences, for a criminal to regain a well-integrated moral personality, he has to be punished, but that for less serious crimes this may not be the case. He also maintains that punishing a criminal does not in itself change people's perceptions towards him.¹⁵⁷

One of the questions that arise with regard to the right to be punished is whether someone would argue that this right is applicable in capital punishment cases. Could it be argued that an individual has a right to be killed by the state? Beccaria argued, almost two and a half centuries ago, that when we talk about the right to be punished as a contractual obligation between an individual and the state (arising out of the social contract – in the sense that an individual to that contract consents to be punished if he breaches that agreement), there is no way that capital punishment can be justified. This is because no one could consent 'to his own extinction, be it through state punishment or suicide, no matter how great a consideration he

¹⁵⁶ Deigh 1984: 207.

¹⁵⁷ Deigh 1984: 207-209.

might receive in return...'¹⁵⁸ He, like many modern reformers, considered life imprisonment without the possibility of release as no better than the death penalty.¹⁵⁹ He therefore viewed consenting to 'lifelong incarceration...as a state of perpetual slavery, a fate worse than death.'¹⁶⁰

The above discussion shows that for a retributivist, punishment must be linked to the crime. He looks at the conduct of the criminal in the past. He takes a 'backward –looking' approach and not a 'forward –looking' one.¹⁶¹ In other words, the retributivist will argue that when, punishing a criminal, the punisher should not concern himself or herself with issues such as the likely benefit to society from the punishment inflicted on the individual, and the likely benefit to the individual from the punishment inflicted on him. The former underpin the utilitarian theories and the latter the rehabilitation theories, while retribution opposes such theories and questions their legitimacy. The retributivist is not concerned with the psychological and social functions of punishment. However, Rabie and Strauss have argued that courts, in deciding whether to adopt a retributive, reformative or deterrent approach to punishment will rely on the offence committed. If the offence is heinous and the law provides that it should be punished severely, then courts will adopt a retributive approach. They add that in such cases the court will not separate retribution from deterrence, but will impose a sentence to reflect both. In other words:

¹⁵⁸ Beccaria 1764 as paraphrased by Dubber 1998: 120.

¹⁵⁹ See Appleton and Grover 2007: 605-606.

¹⁶⁰ Dubber 1998: 120.

¹⁶¹ Harding and Ireland 1989: 117.

Where the court has to do with a crime which threatens the public well-being, such as dealing in drugs, and which is expressly branded by the law giver as a major evil, personal circumstances and rehabilitation make way for retribution and deterrence as the stronger elements in sentencing.¹⁶²

The retributivist will disagree with the above observation. First of all, he will argue that what matters when the court imposes a sentence is not that the offence 'threatens the public well-being', for this would be punishing an individual for the benefit of the public at large, but that the individual has committed the offence. In fact this is what Mabbott warns against when he argues that the reason why it is necessary for the law to provide the same punishment for the same type of crime, is to avoid the possibility of judicial officers sentencing people who have committed similar crimes to different sentences. The second reason why a retributivist will disagree with the above observation, is that, for him to be convinced that because the offence is heinous and that therefore rehabilitation and the circumstances of the criminal should 'make way for retribution and deterrence', is like telling him that both schools of thought approach the issue of punishment from the same angle. The utilitarian would also disagree because both theories of punishment aim at achieving different ends. Reformers will also disagree with the above observation, on the ground that the more heinous the offence, the more rehabilitative the programmes should be to which the offender is subjected, and that punishing such an offender in a manner that aims at achieving deterrence and retribution objects will not reform them, but rather harden them and hence lead to recidivism.

¹⁶² Rabie and Strauss 1985: 273.

2.4.3 Utilitarianism/deterrence

The deterrence theory of punishment has been part of the punishment debate for centuries, although the ‘formal emergence of this theory is often identified with Cesare Beccaria.’¹⁶³ In the eighteenth century, Beccaria ‘espoused the general proposition that human behaviour can be influenced by variations in punishment.’¹⁶⁴ He argued for ‘the general prevention of crime through intimidation or deterrence...’¹⁶⁵ Beccaria opined that ‘[t]o be just, a punishment must not exceed that degree of intensity which will deter other men from crime’.¹⁶⁶ His ideas influenced legislation in different countries such as England, France, Russia, Germany, and Denmark,¹⁶⁷ and many scholars, politicians and philosophers including Bentham.¹⁶⁸ After Bentham’s death, Mill ‘was recognised as the leader, or at least the exponent, of the philosophical radicals.’¹⁶⁹ The three early great philosophers of the deterrence theory of punishment are Beccaria, Bentham and Mill. Their arguments would form the backbone of the deterrence theory.

Deterrence can be categorised into two: specific deterrence and general deterrence. According to Christopher, specific deterrence aims at ‘deterring the offender from committing future crimes’, whereas general deterrence

¹⁶³ Archer *et al* 1983: 992.

¹⁶⁴ Archer *et al* 1983: 992-993.

¹⁶⁵ Cantor 1935: 217.

¹⁶⁶ Manzoni 1964: 47.

¹⁶⁷ Farrer 1880: 29-68.

¹⁶⁸ Coughlin 1975: 248.

¹⁶⁹ Mill 1957: vii.

aims at ‘detering others in society from committing’ crime in the future.¹⁷⁰

In this discussion I use the words ‘deterrence’ and ‘utilitarianism’ interchangeably because they are often used interchangeably in the punishment debate.

2.4.3.1 Utilitarianism and justification of punishment

As alluded to earlier, protecting society from crime is what the utilitarianists consider to be the moral justification of punishment. Their justification of punishment was succinctly¹⁷¹ put by Hospers when he observed as follows:

[T]hat an act or rule of punishing, like every other act or rule, is justified only if the act or the adoption of the rule produces good. Punishment involves an intrinsic evil, for it is the deliberate infliction of pain, discomfort, frustration, and other forms of unhappiness upon the person punished. Punishment is justified however, by the effects it has; where its effects are not good, there is no excuse for indulging in it. Punishment should always be future-looking, not past-looking; always in order that, never simply because of it. If some one has committed a crime, that is unfortunate, but punishment should be strictly *in order to* produce good consequences (which, again, includes the prevention of bad ones) in the future.¹⁷²

The above quotation entails important elements and features of punishment.

One is, that punishment is evil or unpleasant. Retributivists agree with this in principle. The second element is that punishment is only justified when it

¹⁷⁰ Christopher 2002: 856. For the same distinction see Bene 1991: 935-937.

¹⁷¹ This does not mean that he was the first person to talk about this justification. His work is quoted because I believe that it clearly summarises the justification.

¹⁷² Hospers 1961: 454, quoted in Strong 1969: 188-189. It has been observed that ‘[b]riefly stated, deterrence theory holds that there is an effective relationship between specific *qualities* of punishment (for example, its certainty, celerity, or severity) and the likelihood that a punishable offence will be committed. A corollary of deterrence theory is that increasing the penalty for an offence will decrease its frequency while decreasing the penalty will cause infractions to multiply. Deterrence theory therefore envisions potential offenders as rational actors who weigh the qualities of potential punishment before acting.’ See Archer et al 1983: 991.

is aimed and bringing good or happiness to society. The retributivists do not agree with this argument. Finally, that punishment should always be future-looking in order to prevent crime. The retributivist will disagree and state that it should backward –looking and that the offender should only be punished because he/she broke the law.

2.4.3.2 Ethical arguments underpinning utilitarianism: the principle of utility

A brief look at the ethical argument for utilitarianism will help us to understand the arguments underpinning this theory of punishment. Every action or omission that utilitarianism advocates is for the purpose of promoting the principle of utility. According to Bentham, this principle ‘approves or disapproves of every action whatsoever according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question.’¹⁷³ Mill is of the view that utility consists of both the pursuit of happiness and the mitigation of unhappiness.¹⁷⁴ He would add that ‘[t]he whole force ...of ...punishment, whether physical or moral ...is to enforce the utilitarian morality...’¹⁷⁵ To a utilitarian, if there are two choices, one yielding five benefits to a majority of the population, and the other yielding six, the latter should be preferred because the choice that yields the greatest benefit to the most people is the one that is ethically correct.

¹⁷³ Bentham 1982: 12.

¹⁷⁴ Mill 1957: 11-12.

¹⁷⁵ Mill 1957: 26.

2.4.3.2.1 Act and rule utilitarianism

There are generally two types of utilitarianism: act utilitarianism and rule utilitarianism.¹⁷⁶ It is beyond the scope of this study to enter into a detailed philosophical and ethical discussion of what should be the criterion to determine what amounts to act-utilitarianism or rule-utilitarianism.¹⁷⁷ However, a simple illustration of what should guide us to have an elementary understanding of the features differentiating between these two types of utilitarianism is warranted. If a person who subscribes to rule-utilitarianism was asked for the criterion applied to distinguish between what is right and what is wrong, he would answer that '[a]n act is right if and only if it is permitted or recommended by the moral code whose acceptance in the agent's society would maximise utility.'¹⁷⁸ Put differently, '...an action is right if and only if its performance is required by a set of rules the satisfaction of which would have at least as good consequences as the satisfaction of any other set of rules.'¹⁷⁹ On the other hand, if the same question were posed to those who subscribe to act-utilitarianism, their answer would be that '...an action is right if and only if

¹⁷⁶ Though Regan argues that there is another type of utilitarianism known as 'co-operative utilitarianism.' For the discussion and criticism of co-operative utilitarianism see Conee 1983: 415-424. There are also other types of utilitarianism such as '...extended act utilitarianism, extended rule- utilitarianism, hedonistic utilitarianism, ideal utilitarianism, pluralistic and monistic utilitarianism, utilitarianism Kantian in form and ...deontological utilitarianism.' Kerner 1971: 37.

¹⁷⁷ For some of the advanced philosophical arguments on the classification of some thinkers' works as either act-utilitarianism or rule- utilitarianism see, Brown 1974: 67-68.

¹⁷⁸ See Trianosky 1978: 416.

¹⁷⁹ Haynes 1983: 252.

its performance by an agent would lead to consequences at least as good as those of any other action available to the agent.¹⁸⁰

Both act –utilitarianism and rule- utilitarianism have different features and both have been criticised widely in that neither can solve society's problems.¹⁸¹ However, those criticisms, if explored, would lead us into a detailed discussion of each of these theories of utilitarianism, which is beyond the scope of this thesis. That notwithstanding, both theories agree on some principles: any act should be done for the good of society, and the ultimate good of society is to achieve happiness or pleasure and avoid pain; that if there are two competing actions or desires, the one that brings more pleasure or happiness should be followed. Common to both theories is that all desires, like virtue, are a means to an end and not ends in themselves, and that they all facilitate humankind to reach his only and ultimate desire: Utility or the Greatest Happiness. As Benatar observes that utilitarianism is '...a goal- based theory that seeks to maximise utility.'¹⁸² Mill opines that 'Utility, or the Greatest Happiness Principle, holds that actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness. By happiness is intended pleasure, and the absence of pain; by unhappiness pain, and the privation of pleasure.'¹⁸³

It is with this approach in mind that the question of punishment is looked

¹⁸⁰ Haynes 1983: 251.

¹⁸¹ For some of the criticisms and defences of act utilitarianism, see Bales 1972: 203-205, who argues that 'probably utilitarians have been more persistent than non-utilitarians in their attempts to provide an account of moral obligatoriness in terms of the right alternative (or alternatives) open to an agent in given circumstances. They may take comfort, however, in the observation that utilitarianism fares no worse than does a deontological theory which proposes such an account of obligatoriness'. See 205.

¹⁸² Benatar 1992: 66.

¹⁸³ Mill 1957: 6.

at. Punishment is looked at as a means to bring happiness to society by either deterring potential criminals or by punishing those who commit crime. This is because crime is thought to reduce or diminish happiness. Crime is regarded at as a source of pain and it has to be prevented at any cost.

2.4.3.3 Forward-looking approach

Those who subscribe to the deterrence theory of punishment maintain that punishment can only be justified by a forward-looking approach: deterring people from committing crime, which consequently reduces delinquency. This means that the authorities must do whatever is possible to bring it to the attention of members of society that punishment has been imposed for breaking the law, because ‘to achieve general deterrence, the appearance or publicity of punishment is crucial. Actual punishment, without society’s awareness generates no general deterrent effect.’¹⁸⁴ They argue, in comparison to retribution, that the:

deterrence theory does not rest on anything metaphysical like justice. Retributionism does. Deterrence theory suggests that punishments are justified by reducing the crime rate and should be determined by the amount of deterrence people are willing to pay for in money (for police, judiciary, prisons, etc.) and in the cost (“moral and financial) paid by the persons punished.¹⁸⁵

Van Den Haag suggests that rehabilitation does not reduce the crime rate.¹⁸⁶ Like Armstrong, who objectively realises that sometimes both retribution and deterrence could be reconciled especially at the penalty-

¹⁸⁴ Christopher 2002: 856.

¹⁸⁵ Van Den Haag 1982: 795.

¹⁸⁶ Van Den Haag 1982: 794.

fixing stage, van Den Haag suggests that ‘the punishments by deterrence and by retributionist theories coincide more often than is realized. But neither theory is a proxy for the other and the punishments may differ since...punishments required by retributionism are arbitrary’¹⁸⁷ The issue of whether the retribution theory of punishment is arbitrary or not has been discussed above. The deterrence theory is based on the assumption that the punisher imposes and administers punishment for the wellbeing of the community, and by implication knows what the community wants. In most cases it would be argued that the community wants happiness, which is, utility, and that by preventing and punishing crime, the community achieves utility. As Mill would put it,

Utility, or the Greatest Happiness, holds that actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness. By happiness is intended pleasure, and the absence of pain; by unhappiness, pain, and the privation of pleasure.¹⁸⁸

One of the criticisms levelled against Mill’s explanation of utility is that it is difficult, if not impossible, for one to measure happiness, and be able to ascertain that a given community is happy because of the actions taken against an offender. This issue is dealt with later in this chapter. Bentham, like Beccaria, held the view that punishment should be administered for the purpose of deterring people from committing crime.¹⁸⁹ Bentham argued further that punishment is evil and that ‘it ought only to be admitted in as

¹⁸⁷ Van Den Haag 1982: 794.

¹⁸⁸ Mill 1957: 6.

¹⁸⁹ Bentham 1982: 70-71.

far as it promises to exclude some greater evil.¹⁹⁰ He explains four cases where punishment ought not to be inflicted:

(1) Where it is *groundless*; where there is no mischief for it to prevent; the act not being mischievous upon the whole; (2) where it must be *inefficacious*: where it cannot act so as to prevent the mischief; (3) where it is *unprofitable*, or too *expensive*; where the mischief it would produce would be greater than what it prevented (4) where it is *needless*: where the mischief may be prevented, or cease of itself, without it: that is, at a cheaper rate.¹⁹¹

2.4.3.3.1 Where punishment is groundless

Bentham is of the view that punishment would be groundless if a person freely and fairly consented to the mischievous act, which ordinarily would have attracted punishment, to be performed on him or her. This is because ‘no man can be so good a judge as the man himself, what it is that gives him pleasure or displeasure.’¹⁹² An example would be of a person who consents to be injected with medicine. The injection itself would cause him or her pain but he would have consented to it. Another instance where the infliction of punishment would be groundless, according to Bentham, is where the mischief was outweighed by the benefit. In other words, ‘although a mischief was produced by that act, yet the same act was necessary to the production of a benefit which was of a greater value than the mischief.’¹⁹³ This would be the case where some mischievous measures are taken to avert an instant calamity, for example, in the case of necessity.

¹⁹⁰ Bentham 1982: 158.

¹⁹¹ Bentham 1982: 159.

¹⁹² Bentham 1982: 159.

¹⁹³ Bentham 1982: 159.

Bentham also argues that punishment is groundless ‘where there is a certainty of an adequate compensation.’ He adds that for punishment to be groundless on this ground, two factors must exist: one is that ‘the offence is such as admits of an adequate compensation’ and that ‘such compensation is sure to be forthcoming.’¹⁹⁴ One example is where A negligently damages B’s car and gives him all the money he needs to have his car repaired.¹⁹⁵ In this case it would be groundless to punish A. However, should A negligently damage B’s car but refuse to give B the amount of money needed for the repairs, then A should be punished, and such punishment cannot be classified as groundless. The second example is where A, in his capacity as a police officer, tortures B with the intention of extracting a confession from him, and B suffers severe bodily injuries as a result of the torture. In such a case A must be ordered to pay B’s medical bills and income lost as a result of arrest, detention and hospitalisation. However, torture being crime (in some countries), A should also be punished by imprisonment and dismissal from the police force so that he serves as an example to other police officers to refrain from engaging in torture.

2.4.3.3.2 Where punishment is inefficacious

Bentham is of the view that punishment should not be inflicted when it is inefficacious. The first instance in which punishment would be inefficacious is ‘where the penal provision is not established until after the act is done.’ Two examples are given to illustrate this point: first, where the

¹⁹⁴ Bentham 1982: 160.

¹⁹⁵ The assumption is that it is not a case where the damage results from a criminal conduct which is punishable, for example, drunken driving.

law under which the accused is being charged was not enacted until the accused committed the alleged offence; and secondly 'where the judge, of his own authority, appoints a punishment which the legislator had not appointed.'¹⁹⁶ In my opinion, if the objective of punishment is to deter people from committing crime, it would indeed be impossible to achieve that objective if there was no law specifying the prohibited act and no punishment is stipulated for the prohibited act. This explains why in cases where a judge has a discretion to impose the sentence, the law would normally provide either the minimum or the maximum punishment that should be imposed on the offender.¹⁹⁷

Related to the above, Bentham suggests that punishment would be inefficacious 'where the penal provision, though established, is not conveyed to the notice of the person on whom it seems intended that it should operate.'¹⁹⁸ In this case, Bentham implies, for example, that in countries such as South Africa where a person convicted of murder has to be sentenced to life imprisonment unless there are compelling and substantial circumstances, the government should make sure that such a fact is known to all potential murderers, so that they do not commit murders lest they be sentenced to life imprisonment. The effectiveness of this measure seems to be doubtful because of the fact that many criminals

¹⁹⁶ Bentham 1982: 160.

¹⁹⁷ However, there are situations where the law does not provide for a minimum or maximum punishment that the judge could impose. Legislation may provide that a person found guilty of defilement, for example, is 'liable' to suffer death. The judge has discretion to impose any sentence which could include caution, imprisonment or death.

¹⁹⁸ Bentham 1982: 160.

commit offences in the expectation that they will not be caught.¹⁹⁹ Thus, the fact that the law is widely disseminated is not a guarantee that crimes would not be committed. Bentham adds that punishment would be inefficacious even if the penal provision were brought to the potential criminal's notice but such notification 'could produce no effect on him, with respect to the preventing him from engaging in any act of the sort in question.' People who fall in this category, according to Bentham, include infants, the insane and those who are intoxicated.²⁰⁰

According to Bentham, punishment would also be inefficacious if the person, to whom the legal provision prohibiting any act has been conveyed, erroneously believes that such provision does not prohibit the act that that person is about to engage upon, although indeed such act is prohibited by the legal provision. One important element of this argument is the assumption that the person who has broken the law would have refrained from taking the forbidden action had they understood that the law, of whose existence they are aware, prohibited such action. Bentham argues that this scenario may arise in three circumstances: where a person engages in the prohibited act unintentionally; where a person engages in the prohibited act unconsciously; and 'in the case of mis-supposal.'²⁰¹ The first two circumstances are self-explanatory but a detailed account of what Bentham calls 'mis-supposal' it worth reproducing verbatim. 'Mis-supposal' arises in cases

¹⁹⁹ As already illustrated, the Constitutional Court of South Africa observed that only between 30 and 40 percent of violent criminals are arrested. See *S v Makwanyane* 1995.

²⁰⁰ Bentham 1982: 161.

²⁰¹ Bentham 1982: 161-162.

where, although he may know of the tendency the act has to produce that degree of mischief, he supposes it, though mistakenly, to be attended with some circumstance... which, if it had been attended with, it would either not have been productive of that mischief, or have been productive of such a greater degree of good, as has determined the legislator in such a case not to make it penal.²⁰²

In addition, punishment would be inefficacious if a person is in the predicament of having to choose between committing an act forbidden by the law, which imposes a less severe sentence, and executing an order whose disobedience would result into a severer punishment. This, according to Bentham, may happen in the case of physical danger and in the case of threatened mischief.²⁰³ This could be illustrated as follows: the Traffic law in Country W provides that ‘any person who drives on any pavement in the city will be imprisoned for a period not exceeding 2 weeks. A, a physician, who is aware of the law, is driving his car on street B in the city. He realises that a child has been knocked down by a car, which now blocks the road, and that unless he drives on the pavement, he will not be able to save the child’s life, by first administering first-aid and then driving him to his clinic for treatment. The Medical Code in that country provides that ‘any physician who fails to help any person involved in a road accident in circumstances that were not beyond the control of the said physician shall have his/her practising certificate withdrawn for a period of not less than 10 years.’ The possibility that A will be imprisoned for a period not exceeding two weeks, which could even be a mere caution depending on the circumstances of the case, will not deter A from driving on the

²⁰² Bentham 1982: 162.

²⁰³ Bentham 1982: 162.

pavement to save the child's life, because failure to do so could lead to A's certificate being cancelled for a period of not less than 10 years.

Related to the foregoing is the situation where a person, though fully aware that the action he is about to engage in is against the law, will go ahead and break the law, because of the 'physical compulsion or restraint, by whatever means brought about.' This is the case, for instance, 'where a man's hand... is pushed against some object which his will disposes him not to touch; or tied down from touching some object which his will disposes him to touch.'²⁰⁴

2.4.3.3.3 Where punishment is unprofitable

Bentham argues that punishment should not be imposed where it is unprofitable. This includes cases where punishment would produce more evil than the offence for which the offender is being punished. Examples in this category include: 'the extraordinary value of the services of some one delinquent; in the case where the effect of punishment would be to deprive the community of the benefit of those services;' or, where the community conceives that '...the offence or the offender ought not to be punished at all, or at least ought not to be punished in the way in question.'²⁰⁵ There are at least two problems with Bentham's argument in this regard. The first, is that it appears to perpetuate unequal treatment of people before the law. He appears to suggest that people who are of 'more value' to the community than others should not be punished when they break some law, because of

²⁰⁴ Bentham 1982: 162.

²⁰⁵ Bentham 1982: 164

the likely consequences that the community will suffer as a result of their being punished. This would, for example, mean, that in a community where parking on pavements is an offence punishable by two days imprisonment on conviction, and where there is one cardiologist who attends to all patients with heart problems, such cardiologist, even if found guilty of parking on the pavement, should not be detained for the stipulated two days because, according to Bentham, his service is of extraordinary value, and the effect of such detention would deprive the community of the benefit of his services.

Another problem arises in that Bentham suggests that punishment would be unprofitable where the community conceives that the 'offence or the offender ought not to be punished at all, or at least ought not to be punished in the way in question.' This would only apply in cases, for instance, where the judge has discretion to determine how great a sentence is to be imposed on the convicted criminal. In cases where the judge does not have that discretion, for example, where the law provides for a mandatory sentence, even if the community feels that the person should not be punished as the law stipulates, the judge has no alternative but to impose the stipulated sentence. This also brings into the equation the issue of public opinion and its likely influence or impact on the independence of the judiciary. Bentham's argument seems to support the view that public opinion should be one of the factors that courts should take into account when sentencing offenders. This is highly debatable.

2.4.3.3.4 Where punishment is needless

Bentham points out that punishment is needless ‘where the purpose of putting an end to the practice may be attained as effectually at a cheaper rate.’ This, according to Bentham, may be achieved: ‘by instruction...as well as by terror: by informing the understanding, as well as by exercising an immediate influence on the will.’²⁰⁶ In this regard Bentham is emphasising the need for the authorities not to resort to expensive and time consuming measures to prevent crime, when cheaper avenues could be invoked. He also implies that it is not only the sovereign that has the responsibility to prevent crime. Members of the community also have such a duty. He states that ‘if it be the interest of *one* individual to inculcate principles that are pernicious, it will as surely be the interest of *other* individuals to expose them. But if the sovereign must needs take part in the controversy, the pen is the proper weapon to combat error with, not the sword.’²⁰⁷

2.4.3.4 Challenges to measuring happiness

As mentioned earlier, utilitarianists argue that punishing offenders is meant to bring happiness to the community, by deterring potential criminals from committing crime. One problem that the utilitarianists have had to grapple with, is to justify the criterion they use to determine what the community or society wants. Den Haag concedes that ‘there are problems in finding out what the community wants and whether the best way to gratify its demand is to increase apprehension rates, or conviction rates, or severity of

²⁰⁶ Bentham 1982: 164.

²⁰⁷ Bentham 1982: 164.

punishment.²⁰⁸ These are legitimate concerns. If we are talking about happiness as that which the community wants, how do we measure desire or want when it comes to punishment? Would the community be happy if the police apprehended more criminals? Would it be happy if the police apprehended more criminals, but the prosecution secured fewer convictions? Would it be happy if the police apprehended less criminals, but the prosecution secured a higher rate of convictions? Would the community be happy if the police apprehended many criminals, but courts imposed lenient punishments? Or would the community be happy if less criminals were apprehended, but severe punishments imposed on those convicted?

Various answers could be given to the above questions. Bentham concedes that it is not always easy to determine the community's interests. To determine this, Bentham argues one has to combine the interests of 'several' individuals in that community.²⁰⁹ Bentham realises that each individual in a community has different interests, and that it is impossible to take into consideration each and every individual's interests in the search for happiness for the community. That could be the reason why he carefully uses the word 'several' instead of 'all.' This means that some members of the community will be happy with the action taken by the government to deal with crime, but others will not.

However, Van Den Haag suggests that '...these empirical problems [which question the criterion used to determine what makes a community happy]

²⁰⁸Van Den Haag 1982: 795.

²⁰⁹ Bentham 1982: 12.

arise only after one accepts deterrence as a criterion for punishment and seem solvable...'²¹⁰ In my opinion, the problem with Van Dan Haag's answer is that it ignores the fact that many people would need to have those questions answered to their satisfaction before they would accept 'deterrence as a criterion for punishment.' Put differently, the reason why one would reject deterrence as a theory of punishment is that the above-stated problems have not been answered convincingly enough to disregard the retributive and rehabilitative theories of punishment. Utilitarianists have to devise a more convincing answer than that provided by van Den Haag.

2.4.3.5 Does deterrence reduce crime?

In addition to the 'punishment of the innocent' criticism directed against deterrence, and the failure to provide a convincing criterion for determining what the community wants, in 1928 Weber criticised deterrence by arguing that 'whether or not the infliction of punishment will deter from crime is answerable in only two ways - psychologically and statistically.'²¹¹ He continued to cast doubt on the effectiveness of the deterrence by arguing that there was no statistical evidence that deterrence reduced crime and added that most crimes were concealed and that 'mostly the stupid offenders are caught.'²¹² 68 years later, Weber's view was also upheld in the South African Constitutional Court decision of *State v*

²¹⁰ Van Den Haag 1982: 795.

²¹¹ Weber 1928: 184.

²¹² Weber 1928: 188. Mocan and Gittings are of the view that '[a]n inherent difficulty in uncovering the impact of deterrence on crime is to find appropriate data sets to overcome the issue of simultaneity between criminal activity and deterrence measures.' See Mocan and Gittings 2003: 455.

Makwanyane,²¹³ in which the state, amongst other things, argued that the death penalty was a greater deterrent than life imprisonment. The Court held that:

The statistics presented in the police *amicus brief* show that most violent crime is not solved, and the Attorney-General confirmed that the risk of a criminal being apprehended and convicted for such offences is somewhere between 30 and 40 per cent.²¹⁴ [The Court has] referred ...to the figures provided by the Attorney-General which show that between...1990, and January 1995, 243 death sentences were imposed, of which 143 were confirmed by the Appellate Division. Yet, according to the statistics placed before us by the Commissioner of Police and the Attorney-General, there were on average approximately 20 000 murders committed and 9 000 murder cases brought to trial, each year during this period. Would the carrying out of the death sentences on these 143 persons have deterred the other murderers or saved any lives?²¹⁵

Research carried out over a period of 25 years in the United States of America concluded that ‘sentence severity has no effect on the level of crime in society.’²¹⁶ Tonry has also argued that there is no evidence that severe punishments reduce crime.²¹⁷ Garfield argued that ‘[a]lthough uncommon, contracts to conceal a crime do exist. These contracts occasionally arise when the victim of a crime receives compensation from either the crime’s perpetrator or the perpetrator’s relative in exchange for a promise not to report the crime.’²¹⁸ In the light of the above discussion, it is clear that apologists for the deterrence theory of punishment have yet to convince retributivists and reformers that deterrence, with its severe punitive approach aimed at making the offender serve as an example to

²¹³ *State v Makwanyane* 1995: 391.

²¹⁴ *State v Makwanyane* 1995: para 120.

²¹⁵ *State v Makwanyane* 1995: para 126.

²¹⁶ Doob and Webster 2003: 143.

²¹⁷ Tonry 2008: 279.

²¹⁸ Garfield 1998: 306.

potential criminals, really works. The deterrence theory would be more compelling if its apologists abandoned the *status quo* and focused on promoting the idea that the greater the likelihood of the offender being arrested has a more deterring effect than imposing severe punishments on the few individuals who have been unlucky enough to be arrested. As the South African Constitutional Court put it, '[t]he greatest deterrent to crime is the likelihood that offenders will be apprehended, convicted and punished. [I]t is at this level and through addressing the causes of crime that the State must seek to combat lawlessness.'²¹⁹

2.4.3.6 Attempts to resolve the antinomy between retribution and deterrence

Quinton has suggested that 'the traditional antinomy [between retribution and deterrence] can be resolved' because 'the two theories answer different questions: retribution, the question [being], when logically can we punish? Utilitarianism, the question [being], when morally may we or ought we to punish?'²²⁰ Quinton's suggestion was criticised by both retribution and deterrence scholars,²²¹ but the discussion here is limited to Armstrong's criticism. Armstrong argued that Quinton misunderstood retributivism in at least two ways: 'first he says that it is a logical and not a moral doctrine.' According to Armstrong, all the three theories of punishment look at the definition of punishment from a logical point of view, and that therefore Quinton's argument that it is exclusive to retribution does not hold water.

²¹⁹ *State v Makwanyane* 1995: para 122.

²²⁰ Quinton 1954: 134, as cited in Bean 1981: 41-42.

²²¹ Bean 1981: 41-43.

But when retribution, deterrence and reformation deal with the moral question of justification of the practice of punishment and fixing of penalties, they all become moral doctrines. He adds that the reason why Quinton could have missed this point is that many retributivists concern themselves with the definition of punishment.²²²

Armstrong adds that

Secondly, Quinton misunderstands retributivism when he says that it regards punishment as trying to bring about “A state of affairs in which it is as if the wrongful act had never happened”... He criticizes this doctrine as only applicable to a restricted class of cases: “Theft and fraud can be compensated but not murder”. Here he is confusing *retribution* with *restitution*. If we recover stolen property, or if a confidence man repays the money he got by fraud, then although restitution has been made the retributivists would say that punishment was still due, *i.e.* the *loss* has been annulled but the *crime* has not. Only physically are things as they were before the crime. In the case of murder, restitution is clearly impossible – we cannot get back the life that was taken – but Retributive punishment is still possible. Further, the *lex talionis* is not an *extension* of retributivism, as Quinton claims..., but a particular Retributive theory dealing with...(penalty – fixing), and in my view a poor Retributive theory...²²³

With the above illustration from Armstrong, it is submitted that Quinton’s attempt to reconcile retribution with deterrence by arguing that retribution approaches punishment from a logical point of view, and deterrence from a moral point of view must fail.

2.4.4 Rehabilitation

Simply defined, rehabilitation is ‘any planned intervention that reduces an offender’s further criminal activity’ and ‘the focus of rehabilitation remains

²²² Armstrong 1961: 482-483.

²²³ Armstrong 1961: 483.

on the psychological causes of crime-excluding deterrence strategies.²²⁴ During the late eighteenth and early nineteenth centuries, when imprisonment emerged as the dominant form of punishment, ‘the problem of punishment became the problem of imprisonment.’²²⁵ During this period retributivists spent most of their time justifying the existence of punishment, but not *how* punishment should be administered. Rehabilitationists were the first to address in detail the issue of *how* punishment should be administered.²²⁶ By introducing the system of trial by jury, the Enlightenment had moved the practice of imposition of punishment into the public domain. At the same time, the Enlightenment moved the system of the infliction of punishment from marketplaces and other public areas, to prisons, which were always established in rural and remote areas.²²⁷

It therefore became almost impossible for members of the public to access prisons and scrutinise the way punishment was being inflicted on prisoners by the state, because such prisons were made ‘impenetrable to the general public.’²²⁸ Thus the public lost control over the state’s treatment of offenders during the infliction of punishment. The practical consequence was that the state, without public scrutiny, could do anything to the prisoners in the name of punishment. As Dubber puts it: ‘Its privacy and duration dramatically distinguished imprisonment from all previous

²²⁴ Welch 1995: 3. Footnotes omitted.

²²⁵ Dubber 1998: 122.

²²⁶ Dubber 1998: 122.

²²⁷ Dubber 1998: 122.

²²⁸ Dubber 1998: 122.

methods of punishment infliction and therefore posed new and difficult questions of legitimacy. Most immediate, the seclusion of imprisonment meant that it carried an enormous potential of abuse.²²⁹ Unlike other punishments, such as corporal punishment, that would last for a few minutes depending on the justification for their infliction, '[p]rolonged imprisonment could be seen as the continuous daily reinfliction of punishment, each reinfliction requiring rejustification.'²³⁰

Rehabilitation challenged the Enlightenment view that punishment was based on the autonomy of the offender. It also challenged the view that punishment was painful. For the rehabilitationist punishment was for the benefit of the offender, and therefore the state, in imposing punishment, had to ensure that it suited the rehabilitative interests of a particular offender. As the discussion below illustrates, it is not easy to determine the interests of each offender. These two challenges, Dubber observes, 'help account for the disappearance of any serious effort to continuously assess the legitimacy of [the] system of state punishment after the middle of the nineteenth century and the resulting degeneration of that system into the heteronomous imposition of punishment onto others.'²³¹

Rehabilitation supported painful methods of punishment, such as solitary confinement. But the support for this type of punishment was based on the assumption that, if pain resulted from any form of punishment, such pain was incidental because punishment was not painful. This was a very

²²⁹ Dubber 1998: 122.

²³⁰ Dubber 1998: 122-123.

²³¹ Dubber 1998: 123.

difficult position to defend, and ‘in the end, when the rehabilitationists recognized that it was impossible to drain punishment of its painful connotations, no matter how incidental, they discarded the concept of punishment all together and insisted that incarceration was treatment not punishment.’²³² However, Dubber illustrates that reformers such as Bentham and the early prisoner reformers in the United States stressed the fact that punishment was painful and evil, and argued that ‘rehabilitative imprisonment meant a cosy life of leisure.’²³³

One of the early writers and founders of the rehabilitation theory of punishment was the early nineteenth century German philosopher Karl David August Röder. According to Dubber, Röder ‘developed what comes closest to a principled defense of rehabilitative treatment.’²³⁴ Dubber is of the view that:

Röder’s account of adult punishment follows directly from his account of juvenile punishment. Certain youths required “supplementary education” in reform houses, to which they could be committed not only upon the commission of a crime, but also upon parental request or judicial determination. Adult criminal offenders, however, were very much like disobedient children. Criminal punishment was “rational supplementary education” of those persons who “by illegal word or deed” had proven themselves so morally diseased as to be incapable of rational self-determination. It now fell upon the state literally to serve as their guardian and to provide them with pedagogic treatment to nurse them back to moral health. Punitive treatment as supplementary education must focus on the “inner man,” so that it may generate and foster those good thoughts, feelings, and resolutions that determine behaviour. Punishment, as Röder put it, was “effective but bitter medicine.”²³⁵

²³² Dubber 1998: 125. Footnotes omitted.

²³³ Dubber 1998: 123-124.

²³⁴ Dubber 1998: 126.

²³⁵ Dubber 1998: 126-127.

The quotation above entails one of the ideas that has been criticised widely: offenders are sick and should be treated until they are free of the ailment that made them commit offences.

According to Dubber, Röder attempted to distinguish pain that is inflicted on the offender for rehabilitation purposes from that inflicted on him for retributive or deterrent purposes. He argued that the retributive theory of punishment inflicted punishment for the purpose of causing pain, but that ‘any pain resulting from reformative punishment was purely incidental to its educative function.’²³⁶ Dubber suggests that when one looks at punishment the way Röder understood it, what mattered was not the pain that was inflicted on the offender, but the intention of the punisher. In his words, ‘the punisher’s intent therefore could distinguish two punishment practices that had the same pain impact on the offender and were generally indistinguishable to the offender and any nonexpert outside observer.’²³⁷ This meant that a panel of experts had to establish what the punisher had said or written to know that the punishment inflicted on the offender represented either retributive or rehabilitative purposes. But the purpose of the punishment inflicted could not be identified solely by relying on the pain that punishment would cause or caused the offender.

In my opinion, this must have been very difficult for the offender and the so called non-experts to understand. For instance, how would one tell offender A., who had committed a robbery, that he was being sentenced to 10 years’ imprisonment, and that the only reason for the sentence was that he had

²³⁶ Dubber 1998: 127.

²³⁷ Dubber 1998: 127.

violated the law (retributive theory, and its retrospective or backward-looking approach as the moral justification of punishment). At the same time one tells offender B, who has also committed a robbery and is being sent to the same prison for the same period of time as A, that he is serving the 10 years because the state thinks that he is sick, and that therefore the punishment is aimed at rehabilitating him (rehabilitative theory, and its prospective or forward-looking approach as the moral justification of punishment). Dubber argued that

This disregard for the offender's experience is troubling in its own right, but is particularly disturbing given that rehabilitationists...placed great emphasis on the actual effect of punishment on the offender's mind and often chided their opponents for failing to do so.²³⁸

2.4.4.1 Offender has a right to be punished

Röder also argued that punishment accorded the offender rights, and that 'the offender was entitled to have the state facilitate the pursuit of his rational life plans, so that punishment turned out to be in the offender's ultimate interest, even if he might not realise it immediately.'²³⁹ As discussed above, Kant and Hegel also regarded punishment as being the right of the offender. Although Röder also examined punishment in that context, he criticised Kant and Hegel, stating that they had "uttered the assertion, or rather the delusion...that one honors the offender by treating

²³⁸ Dubber 1998: 130.

²³⁹ Dubber 1998: 127.

him entirely according to the principle that he himself had postulated and that he had followed in his offense.”²⁴⁰

Unlike the retributivists who argued that the state had an obligation to justify the practice of punishment, Röder’s view was that the state was required to justify its failure to punish those who had broken the law. This was because failure on the part of the state to punish lawlessness disregarded ‘its duty to educate its constituents by whatever means necessary.’²⁴¹

2.4.4.2 Indeterminate incarceration

By regarding punishment not as pain but as treatment, rehabilitation has supported indeterminate incarceration.²⁴² In other words, the offender should be incarcerated as long as it takes for him or her to be cured of the disease that made him or her break the law.²⁴³ However, one needs to ask the question: what watertight measures are in place for the rehabilitationists to conclude that a prisoner has been rehabilitated and is therefore ready for release? Put differently, is it not possible for a prisoner to pretend that he has been rehabilitated so as to secure an early release? The rehabilitationists would argue that professionals, such as social workers, psychologists and psychiatrists stationed at prisons, would be able to assess, with a certain

²⁴⁰ Röder as quoted by Dubber 1998: 127-128).

²⁴¹ Dubber 1998: 128.

²⁴² Dubber 1998: 129-130.

²⁴³ Vitiello argued in relation to the United States that ‘...by the 1960s, a growing faith in psychiatry and science had strongly influenced penology. Based on a perception of the criminal as sick and in need of treatment or rehabilitation, legislatures entrusted to judges wide latitude in imposing indeterminate sentences: if the offender is ill and in need of treatment, his sentence had to be conditioned on his cure. Parole boards, in effect, helped to administer indeterminate sentences by determining when the “patient” was cured.’ See Vitiello 1991: 1016. (Footnotes omitted).

degree of accuracy, that a prisoner has been rehabilitated and is therefore ready for release. This would mean that the prison authorities have to employ as many such professionals as possible in order to assess whether prisoners have been sufficiently rehabilitated. This has to be seen in the light of the fact that many African countries lack a sufficient number of such professionals.

As illustrated in chapter VI, prison authorities in Africa have insufficient numbers of professional such as social workers. They therefore may find it difficult to attract such professionals as a result of low salaries paid by prison authorities. Where they do attract them, many resign from prison jobs for better employment opportunities elsewhere. The result is that, with overcrowding being the norm in most prisons in Africa, coupled with the unavailability of enough professionals to assess the extent to which prisoners have been rehabilitated, rehabilitation remains a very challenging objective to achieve. It is not a guarantee that, where rehabilitation programmes are being implemented in prisons, prisoners do not easily exploit the loopholes in the system and secure early releases. As one prisoner reportedly put it: "If they ask if this yellow wall is blue, I'll say, of course it's blue. I'll say anything they want me to say if they're getting ready to let me go".²⁴⁴ This could be one of the reasons that explains recidivism and parole violations in many African countries, irrespective of

²⁴⁴ Hampton 1984: 233.

the implementation of various rehabilitation programmes in almost all prisons.²⁴⁵

Related to the above is the issue of the financial and human resources required to rehabilitate prisoners. Prisoners have different problems which require different solutions. Some people commit offences because they lack the necessary skills to acquire jobs. Should prisons then be turned into colleges to train such people in different job skills in order to make them employable upon release and therefore less likely to re-offend? Another problem is that many employers are reluctant to employ ex-offenders.

2.4.4.3 **Punishment incompatible with rehabilitation**

Rehabilitationists believe that punishment is incompatible with rehabilitation. One of their major arguments is that if indeed punishment, for example imprisonment, was capable of reducing crime, we would not have high recidivism rates.²⁴⁶ Toby argues that ‘the compatibility of punishment and rehabilitation could be clarified...if it were considered from the point of view of the *meaning* of punishment to the offender.’ He opines that there are offenders who think that they deserve to be punished for breaking the law, and offenders who believe that punishment is a ‘misfortune bearing no relationship to morality.’ He suggests that punishment should be distinguished from bowing before the superior order. When a child is physically punished for misbehaving is a state of affairs different from that of a person imprisoned for car theft. According to Toby,

²⁴⁵ This issue is dealt with below in Chapter VI in the examination of rehabilitation programmes in prisons.

²⁴⁶ Toby 1964: 336.

whereas the child example is a demonstration of bowing before the superior order and not of punishment, the thief's incarceration is punishment which therefore would have rehabilitative effect on the robber. He therefore recommends, that if rehabilitation is to be achieved, it is essential for the correctional officials to convince 'the prisoner that his punishment is just before they motivate him to change.'²⁴⁷ However, for prisoners to be convinced that punishment is for their rehabilitation, they must also be convinced that their punishment is just. Where the prisoner believes that there was no fair trial he/she would question the rehabilitative value of incarceration.²⁴⁸

Toby's attempt to distinguish punishment from rehabilitation needs critical examination. One should ask whether it is possible for a judge at the time of sentencing to look at punishment as a form of rehabilitation and rehabilitation as a form of punishment. In most cases judges think that punishment is meant to send a message to the criminal that what they did was wrong, which is why they are being punished.²⁴⁹ On the other hand, judges who think that a person should not be punished but rehabilitated, would in most cases express in their judgments which measures they think are appropriate for the proper rehabilitation of the offender. This is because rehabilitation ordinarily involves education and training. In other words, a

²⁴⁷ Toby 1964: 336.

²⁴⁸ Toby 1964: 336-337.

²⁴⁹ A study was carried out in England about the attitude of magistrates towards sentencing and the researchers established that 'magistrates in England are likely to become less oriented to the goals of reform and do regard the possibility of rehabilitation of offenders with great skepticism as a consequence of their experience on the bench. Under such circumstances, it seems inevitable that their sentencing philosophies will reflect the need to deter, to protect society, and to punish, and that they should take a less sympathetic view of defendants.' See Bond and Lemon 1981: 135-136.

judge in most cases will have to choose either a rehabilitative approach or a 'punishment' approach, and that will be reflected in the language of the judgment. As Jeffery and Woolpert rightly observed, '...judges often find it impossible to impose punishment and to prescribe rehabilitary measures at the same time. They must choose one at the expense of the other or strike a compromise which serves neither goal satisfactory.'²⁵⁰ This could explain the reason why alcohol and drug abusers are not sent to prisons but to rehabilitation centres, and those who commit crimes, even petty ones, are sent to prisons and not rehabilitation centres.

However, this argument does not seek to undermine the fact that many prisons and correctional institutions in Africa are now leaning towards combining punishment and rehabilitation. Countries such South Africa, Uganda, and Mauritius have enacted pieces of legislation and adopted policy documents which expressly indicate that the major objective of prisons or corrections in these countries is to rehabilitate offenders.²⁵¹ Is this achievement attributable to rehabilitationists? This would have been the case if one stopped at reading these beautifully written pieces of legislation and policy. However, if one looks at how they are implemented, one realises that the rehabilitation of offenders is more a myth than a reality. This is underscored by human rights reports and media accounts depicting that prisoners are detained in inhumane prison conditions which are far below the internationally required standards. Inhumane prison conditions, needless to say, are not favourable for rehabilitation. Prisons are

²⁵⁰ Jeffrey and Woolpert 1974: 405.

²⁵¹ For a brief discussion of rehabilitation in Uganda, Mauritius and South Africa see Chapter VI.

overcrowded, and prison authorities in many African countries lack sufficient resources to introduce, or implement, rehabilitation programmes for all inmates.

If one examines the training that many prison warders receive, it is evident that it is more militaristic. Prison warders perceive prisoners not as people who need to be rehabilitated, but rather as people who are in prison to be punished. In other words, they think that people are in prison to be punished, rather than being in prison as a punishment. This explains why prison officials torture prisoners in cases where they commit prison offences; the existence of rampant corruption in prisons; and why some prison have failed to put strict measures in place to eradicate prison gangs. Rehabilitation is impossible to achieve if two state institutions that deal with offenders communicate mixed messages to offenders. Courts often communicate with offenders in retributive or deterrent language, and prison officials communicate to the same offenders in a rehabilitative language. This sends a mixed and confusing message to the offender. He is not sure whether his being in prison is meant to deter him from committing further crimes, for example, or to rehabilitate him/her.

2.4.5 Towards reconciling retribution, deterrence and rehabilitation

It has already been noted that Armstrong agrees that it is possible for the three theories of punishment to be reconciled at the penalty-fixing level. Taylor, after identifying the weaknesses of retribution, rehabilitation and deterrence,²⁵² suggests that we should adopt a Christian approach to

²⁵² Taylor 1981: 52-65.

punishment so that we can be able to solve the dilemma between punishment and treatment. He argues that:

...I believe that the Christian view alone solve the secular humanist dilemma of punishment versus treatment. If neither the punitive nor the therapeutic ideologies or models of crime control can provide us with a valid basis for public policy on the handling of criminals, it seems that we are either left with the “Rethinking Method”²⁵³ or the biblical-reformatory approach. The ‘Rethinking’ advocates of crime control fail to address the crucial question: How can both requirements be combined so that both the individual criminal and his society each make proper expiation and restitution for the crime committed? The Christian answer is to arrange for society also to help expiate the wrong done in the method of punishing the criminal, and to admit its own share of responsibility. The idea of both expiation and responsibility must be cultivated afresh so that every member of society recovers a sense of his or her own personal responsibility for the original sinfulness of society, the sinfulness of the criminal, and his or her own need to make expiation for the wrong doing. This must be done in such a way that it does not foster a spirit of self-righteousness, nor a sadistic enjoyment of cruel punishment, but in such away that the sacrifice of time and money which the punishment imposes upon the society as well as upon the criminal, society will be reminded of its own guilt. This means that in practice the Christian will agree with those modern penologists who press for individualising and humanising of the administration of criminal justice and the penal law, while in theory he or she will support the adherents of the theory of expiation and just retribution for wrong doing. The guilty person must expiate his crime: this means that *all* who are guilty must offer expiation – society as a *whole* by means of the taxes imposed to support the costs of maintaining prisons and rehabilitation centres, police, prisons guards, lawyers and judges.²⁵⁴

He adds that this would be achieved by adopting various strategies, such as, tempering justice with mercy; restoring a proper hierarchy of penalties, in the sense that the more serious the offence, the more serious should the

²⁵³ The ‘rethinking model’ was suggested by Fersch and according to him it is based on three assumptions “the first assumption of the rethinking method is that man’s behavior is the product of his free will, that he is generally free to act in conformity with laws or defy them...The second assumption is that some men are evil, or bad, or wicked, or not to be trusted, or destructive, or whatever; and that those men need to be sequestered or removed from the company of those on whom they would prey”. Fersch 1980: 41-42 as quoted in Taylor 1981: 76.

²⁵⁴ Taylor 1981: 79. (Emphasis in the original).

penalty be; much greater use of fines rather than probation or imprisonment; much greater use of probation, and reserving of prisons for the most hardened criminals and recidivists; and creative restitution where society should ensure that the victim of crime is compensated in monetary value, and, in cases of murder, the deceased's relatives should be compensated.²⁵⁵

One could say that, from a Christian point of view, Taylor's arguments and recommendations appear impressive for a couple of reasons, the major one being that they are based on the Bible. That notwithstanding, his arguments and recommendations have inherent problems that make their implementation difficult. In short, they are more theoretical than practical in the modern world. In the first place, his argument that we should look to the Bible and Christian teaching for principles that should guide our criminal justice system has two inherent shortcomings: one, that it will be an attempt to justify the interference or re-interference by the Church in the way the state should administer its criminal justice system; and secondly, that Taylor assumes that all people should be subjected to laws and principles originating from the Bible. This would be problematic, because people in Muslim countries and atheists will find it difficult to follow such an approach, in the same way that non-Muslim countries have found it barbaric that some countries impose punishments based on Sharia law which originates from the Quran and Prophet Mohammed's teachings. Related to the above, one of the reasons why retribution has been criticised widely is because its 'eye for an eye' policy originates from biblical

²⁵⁵ Taylor 1981: 79 -82.

teachings.²⁵⁶ There is no assurance that a combination of retribution, rehabilitation and deterrence, based on Christian values, will not resurrect the ‘eye for an eye’ approach to punishment. He observes that:

By turning our backs on God’s Word and Law revealed in creation and in the Holy Scriptures, we shall discover that all defense against the exercise of arbitrary power has vanished at the same time. If we refuse to accept the God of the Bible as the source of all legal norms and principles of justice and law, we shall finish up having tyrants as our masters; since experience has proved that only the God and Father of the Lord Jesus Christ can subject the power of rulers, judges, of police as well as the ordinary citizen to conscience.²⁵⁷

Another problem with Taylor’s view relates to his recommendation for the greater use of fines instead of imprisonment. This recommendation fails to take into consideration the fact that many criminals in Africa are low income earners, and would not ordinarily be able to afford to pay fines on conviction. Many awaiting-trial prisoners even fail to post bail fees and stay in prisons until such a time that they stand trial. Implementing Taylor’s recommendation would mean that many criminals would either have to be imprisoned for failure to pay fines on conviction, or will have to be pardoned for failure to pay such fines, and hence effectively would not be punished. This would result in a public outcry as the government will be seen as being soft on crime.

²⁵⁶ Greene has pointed out that ‘... “An eye for an eye,”...and “a tooth for a tooth,” embody the notion of retribution. The concept of retribution as a punishment tool has existed for a long time, “run[ning] deep in English criminal law from at least the year 1200.” Its origins go back even further. From the Old Testament’s eye for and eye, to the nineteenth –century ...[conceptual idea] that it is right to hate and hurt criminals, to the modern idea of “lock ‘em up and throw way the keys,” the desire for retribution has run strong and deep in both religion and criminal justice.’ See Greene 1998: 180. It has been observed that ‘the retributive theory...has its roots in savagery and primitive religion’. See Weber 1928: 181.

²⁵⁷ Taylor 1981: 75.

Taylor's recommendation that prisons should be reserved for hardened criminals and recidivists is also not without its own problems. First, he does not give us a threshold above which a person should be considered a hardened criminal. This means that every government will have discretion to determine who is to be regarded as a hardened criminal. If a government adopts a wide definition, then any criminal, including those who would pass as petty offenders in some jurisdictions, could be categorised as hardened and sentenced to prison. This will not reduce, but rather increase, the use of imprisonment. Another problem with Taylor's recommendation relates to the imprisonment of recidivists. Some offenders may commit minor offences over a period of time, for example, a pupil might steal sweets from different school canteens every month and get caught on each occasion. Does that mean that such pupil should be imprisoned or sent to a probation officer? Or should the canteen staff be encouraged to improve their security, so that pupils are unable to reach the sweets, and thereby discouraged from stealing?

The recommendation that society should create a system to ensure that victims of crime are compensated in monetary value, and that the relatives of a murdered victim should also be compensated in monetary terms, raises some problems. The first problem is how to deal with people who negligently expose their belongings in a manner that ordinarily would attract thieves? For example, a person leaves his very expensive new state of the art cellphone on the driver's seat in an unlocked vehicle in a nightclub's parking yard and it gets stolen. Should the community also be made to pay for such a person's negligence? Secondly, does not the

community have other pressing needs, such as welfare and medical demands that should be catered for instead of compensating victims of crime? On the issue of compensating relatives of a murdered person, should the authorities enact law to the effect that ‘each and every relative of any murdered person irrespective of whether that murdered person was making any monetary contribution to his or her family shall be compensated US\$400. Funding for such payments shall be approved by Parliament.’ Whether this is practical is highly doubtful.

2.5 Conclusion: going beyond Taylor

Bradley states that although retribution is the ‘central aim of punishment’, one cannot underestimate the ‘relation between and among retribution and legitimate secondary purposes of punishment such as deterrence and rehabilitation.’²⁵⁸ Thorn proposes an interesting view that ‘...retribution justification is insufficient unless it relies on deterrence justification; the two theories are not mutually exclusive...retribution justification requires a specific empirical finding from deterrence research, and thus, retribution does not focus solely on the past criminal act.’²⁵⁹ Schopp has suggested that ‘[t]he Supreme Court [of the United States] has identified deterrence and retribution as the two primary social purposes of capital punishment.’²⁶⁰ Bradley is of the view that ‘if the goal of retribution is to reestablish the balance of political society...it is at least as forward looking as deterrence, in that both theories attempt to positively affect society after

²⁵⁸ Bradley 1999: 105.

²⁵⁹ Thorn 1983: 202.

²⁶⁰ Schopp 1991: 1005.

the incidence of criminal activity.’²⁶¹ The above scholars attest to the fact that it is not impossible for the three theories on punishment to be brought together. Notwithstanding the shortcomings in Taylor’s recommendations, we should not lose sight of the fact that courts of law including international criminal tribunals, have in some instances combined the three theories of punishment and considered them to be the objectives of punishment. This has been so both in cases in which life sentences have been imposed, as well as and where they have not been imposed. In the next chapter, I deal with life imprisonment in international law, and how international criminal tribunals have interpreted and applied the three theories on punishment.

²⁶¹ Bradley 2003: 29-30.

CHAPTER III
INTERNATIONAL CRIMINAL TRIBUNALS AND LIFE
IMPRISONMENT

3. Introduction

Chapter II has dealt with the purposes/objectives of punishment from a philosophical perspective. In this Chapter the author examines the following issues relating to life imprisonment before international criminal tribunals: the use of life imprisonment, laws governing the sentence of life imprisonment and the jurisprudence of the international criminal tribunals to establish the importance that the tribunals have attached to the purposes/objectives of punishment in cases where offenders have been sentenced to life imprisonment. The discussion interrogates in detail the relevant judgments of the Nuremberg and Tokyo Tribunals which were established immediately after World War II; the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY); and that of the International Criminal Tribunal for Rwanda (ICTR). Attention is also paid to the founding documents or cases of the Special Court for Sierra Leone (SCSL) and the International Criminal Court (ICC) to establish how they have dealt, or likely to deal, with the three theories of punishment when imposing or likely to impose sentence. Much emphasis is placed on the jurisprudence of the ICTR because the manner in which it has dealt with the question of life imprisonment raises many interesting and challenging issues. The author does not deal with other factors, such as the seriousness of the offence, aggravating and mitigating factors that these

tribunals have emphasised in imposing life imprisonment because of the fact that almost every text book on the tribunals' jurisprudence deals with these factors.

3.1 The Nuremberg Tribunal: Establishment and punishment

The detailed history of, and circumstances under which, the International Military Tribunal at Nuremberg, the Nuremberg Tribunal (the Tribunal), was established have been a subject of academic discussion for many years and thus fall beyond the scope of this study. The London Agreement of 8 August 1945, to which the Charter of the International Military Tribunal, the Nuremberg Charter (the Charter), was annexed, made it clear in its Preamble that the 'United Nations have from time to time made declarations of their intention that war criminals shall be brought to justice.'²⁶² The Charter provided that the Nuremberg Tribunal 'shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organisations committed...' crimes against peace, war crimes and crimes against humanity.²⁶³ The Charter added that the official position of defendants, whether as Heads of State or responsible officials in government, was not to be considered as freeing them from responsibility or mitigating punishment.²⁶⁴ The Charter further stated that the fact that the defendant had acted pursuant to an order of his government or of a superior

²⁶² See Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland, and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis.

²⁶³ Article 6.

²⁶⁴ Article 7.

could not free him from responsibility, but could be considered in mitigation of punishment, if the Tribunal determined that justice so required.²⁶⁵

The Charter and the Rules of Procedure²⁶⁶ required the Tribunal to hear and determine cases expeditiously²⁶⁷ but at the same time to protect the defendants' rights, such as the rights to counsel,²⁶⁸ to have documents translated in a language that the defendant understood,²⁶⁹ to cross-examine witnesses,²⁷⁰ and to have access to all the documents upon which he was being charged.²⁷¹ Article 27 empowered the Tribunal 'to impose upon a defendant on conviction, death or such other punishment as shall be determined by it to be just.' In addition to any punishment it could impose, Article 26 empowered the Tribunal to 'deprive the convicted person of any stolen property and order its delivery to the Control Council for Germany.'²⁷² What should perhaps be noted here is that the Tribunal was

²⁶⁵ Article 8.

²⁶⁶ Rules of Procedure of the International Military Tribunal, adopted 29 October 1945.

²⁶⁷ Article 18. Because of the fact that thousands of witnesses wanted to testify before the Tribunal on both sides, the Tribunal said that it was 'necessary to limit the number of witnesses to be called, in order to have an expeditious hearing, in accordance with Article 18(c) of the Charter.' See International Military Tribunal (Nuremberg), Judgment and Sentences 1947: 173.

²⁶⁸ Articles 16 (d) and (e). The Tribunal observed that '[i]n accordance with Articles 16 and 23 of the Charter, Counsel were either chosen by the defendants in custody themselves, or at their request were appointed by the Tribunal. In his absence, the Tribunal appointed Counsel for the Defendant Bormann...' International Military Tribunal (Nuremberg), Judgment and Sentences 1947: 172-333.

²⁶⁹ Article 16 (c). The Tribunal noted that '[c]opies of all the documents put in evidence by the Prosecution ... [were] supplied to the Defense in the German language' International Military Tribunal (Nuremberg), Judgment and Sentences 1947: 174.

²⁷⁰ Article 16 (e).

²⁷¹ Article 16(a).

²⁷² Article 28.

expressly authorised to impose the death penalty.²⁷³ The Nuremberg Trial was conducted in four languages – English, Russian, French and German. It began on 20 November 1945 and the hearing of evidence and speeches by counsel on both sides ended on 31 August 1946. Judgment was delivered on 1 October 1946.²⁷⁴ Indeed the Tribunal imposed death penalties on 12 defendants and 10 of them were executed by hanging. Two could not be hanged because one committed suicide just minutes before his execution²⁷⁵ and another has never been apprehended.²⁷⁶

Article 27 also authorised the Tribunal to impose ‘such other punishment as shall be determined by it to be just.’ It is upon this that the Tribunal sentenced three defendants to life imprisonment: Rudolf Hess (Deputy to Hitler in the Nazi Party until May 1941); Walter Funk (Reich Minister of Economics and President of the Reichsbank); and Erich Raeder (Commander-in-Chief of the Germany Navy).²⁷⁷ It is also on the basis of Article 27 that the Tribunal sentenced two defendants to twenty years imprisonment; one defendant to ten years imprisonment; and one defendant to fifteen years imprisonment.²⁷⁸ Thus the heaviest punishment the Tribunal imposed was death by hanging; the second heaviest was life imprisonment; followed by 20 years’ imprisonment, 15 years’ imprisonment and 10 years’

²⁷³ It has been rightly observed that ‘...the Nuremberg Tribunal imposed death sentences for the most culpable instigators of the Holocaust...[w]hen the Allies announced their decision to apply the death penalty at Nuremberg, few objected or suggested that executions would violate international human rights law.’ See Ohlin 2005: 747. Footnotes omitted.

²⁷⁴ See International Military Tribunal (Nuremberg), Judgment and Sentences 1947: 173.

²⁷⁵ Sprecher 1999: 1383-1435.

²⁷⁶ Kress and Sluiter in Casese 2002: 1761

²⁷⁷ Sprecher 1999: 1415.

²⁷⁸ Sprecher 1999: 1415.

imprisonment. It is common knowledge that some of the accused before the Nuremberg Tribunal were convicted under circumstances which many academics agree were against the principles of a fair trial, and justice done by that the Tribunal came to be popularly know as ‘victors’ justice.²⁷⁹ Apart from the fact the three defendants who were sentenced to life imprisonment were found guilty of heinous crimes, as were all the convicted accused, one needs to establish which of the three purposes/objectives of punishment (retribution; deterrence; and rehabilitation) the Tribunal took into consideration in sentencing the defendants to life imprisonment.

3.1.1 The Nuremberg Tribunal and the purposes/objectives of punishment in cases of life imprisonment

Before the London Agreement was signed, the ‘Allies in the anti-Hitler coalition were fully agreed that inevitable retribution must be visited upon the guilty parties.’²⁸⁰ However, different opinions were expressed ‘on the subject of how the decision on this responsibility should be reached, what

²⁷⁹ It has been observed that ‘[t]he crimes with which the Nuremberg defendants were charged – including murder, torture, and enslavement, carried out on an enormous scale – were so clearly criminal under every domestic legal system in the world that it could hardly be said that the prospect of criminal liability was unpredictable...the criticism of the Nuremberg judgments for violating the legality principle was directed primarily to crimes against peace, and...to crimes against humanity.’ See Meron 2005: 830. Buchanan is of the view that ‘...a strong case has been made by a number of respected commentators that the “Victor’s Justice” at Nuremberg was illegal under existing international law. In particular, it has been argued that there was no customary norm or treaty prohibiting what the Tribunal called “crimes against humanity” at the time World War II occurred...it can be argued that at least some of the punishments meted out at Nuremberg were illegal.’ Buchanan 2001: 681. Charney is of the view that ‘...despite the charge that the Nuremberg and Tokyo Tribunals reflected victors’ vengeance over the vanquished, they promoted the development of international criminal law.’ See Charney 1999: 464. Abbott also suggests that ‘[t]he Nuremberg and Tokyo trials have been criticized as victors’ justice, condemning Axis leaders for atrocities Allied forces also committed.’ See Abbott 1999: 371.

²⁸⁰ Larin in Ginsburgs and Kudriavtsev (eds) 1990: 76.

complexion it should assume, different opinions were expressed.’²⁸¹ The quotation below is illustrative of what those behind the establishment of the Tribunal thought was to be achieved by punishing the defendants:

[T]he Prime Minister of Great Britain, W. Churchill, and Lord Chancellor, D. Simon, the U.S. Secretary of State, C. Hull, and the Secretary of the Treasury, H. Morgenthau, advocated a “political” or “administrative” solution which attracted by its speed and low cost. In their opinion, the leaders of the Allied Powers should draw up a list of fifty to one hundred or more major war criminals who, in the event of their capture, would be executed without trial or investigation. However, there was also another point of view. Having set out not only to punish war criminals, but likewise to expose the anti-human essence of fascism, establish the causes and conditions from which it sprang, the Soviet leadership invariably considered a public trial the most suitable means for achieving this goal. [This view was also supported by various leaders in the United States including President Truman].²⁸²

From the above quotation one realises that those who were behind the establishment of the Tribunal clearly placed retribution and deterrence as priorities above any other objective of punishment. Churchill, for example, and some of those who followed his line of reasoning, advocated a political or administrative approach to punishing war criminals. If that had happened, our history of dealing with post-war situations would have been different. It would have set a precedent that people suspected of committing war crimes and crimes against humanity do not enjoy the protection of the law, and the criminal justice system in particular. Although one should be thankful for the foresightedness of the Soviet leadership that even war criminals should stand trial for their atrocities, sight should not be lost of the reason the Soviet leadership had in mind for the trial of these war criminals. The Soviet Union wanted such a public trial ‘to expose the anti-

²⁸¹ Larin in Ginsburgs and Kudriavtsev (eds) 1990: 76.

²⁸² Larin in Ginsburgs and Kudriavtsev (eds) 1990: 76.

human essence of fascism' and 'establish the causes and conditions from which it sprang.' In essence, it wanted the offenders convicted by the Tribunal to be punished in such a manner that would send a clear message to the international community that committing war crimes and crimes against humanity had serious consequences.

As mentioned earlier, retribution is premised on the backward-looking approach, that is, offenders should only be punished because they broke the law. Thus the offence for which the offender is being punished must have been provided for under the law before the offender broke the law. The defence at Nuremberg argued in relation to the crime of aggression that:

a fundamental principle of all law – international and domestic – is that there can be no punishment of crime without a pre-existing law. "*Nullum crimen sine lege, nulla poena sine lege.*" It was submitted that *ex post facto* punishment is abhorrent to the law of all civilized nations, that no sovereign power had made aggressive war a crime at the time that the alleged criminal acts were committed, that no statute had defined aggressive war, that no penalty had been fixed for its commission, and no court had been created to try and punish offenders.²⁸³

By suggesting that their clients had been charged with an offence that was created after they had behaved in a particular manner, the defence lawyers were indirectly invoking the argument that their clients were innocent, but that they were being charged and punished to serve as examples to other people who might be tempted to engage in such activities. In other words, the drafters of the Charter had given deterrence priority over justice. However, the Tribunal did not agree and held that

[i]n the first place, it is to be observed that the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of

²⁸³ See International Military Tribunal (Nuremberg), Judgment and Sentences 1947: 217.

justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished. Occupying the positions they did in the Government of Germany, the defendants or at least some of them must have known of the treaties signed by Germany, outlawing recourse to war for the settlement of international disputes, they must have known that they were acting in defiance of all international law when in complete deliberation they carried out their designs of invasion and aggression. On this view of the case alone, it would appear that the maxim has no application to the present facts.²⁸⁴

The Tribunal's ruling above could be interpreted to mean that violators of international law are punished, and should be punished, because international law must be protected against violations. In other words, those who violate international law principles should be punished not only because they deserve to be punished, but also to send a message to other members of the international community that violating international law principles has serious consequences. Thus the Tribunal held that '[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.'²⁸⁵

In its 163 page document, which combined both the judgment and the sentence, the Tribunal did not mention which theory or theories of punishment it had relied on to impose the various sentences on all the 19 defendants, including the three who were sentenced to life imprisonment. Put differently, the Tribunal did not mention the purposes/objectives that the punishments imposed were meant to achieve. However, when one looks

²⁸⁴ See International Military Tribunal (Nuremberg), Judgment and Sentences 1947: 217.

²⁸⁵ See International Military Tribunal (Nuremberg), Judgment and Sentences 1947: 221.

at the language of the judgment in other respects, one is able to realise that the Tribunal considered the sentences to serve retribution and deterrence objectives. We should recall that Article 9 of the Charter provided that '[a]t the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization.' Relying on this provision, the Tribunal declared various Nazi groups criminal groups and ordered that some groups of people who had been members of these organisations should also be tried for the offences that they had committed during their membership.²⁸⁶

It is noteworthy that the Prosecution asked the Tribunal to use its powers under Article 9 of the Charter to declare the 'General Staff and High Command of the German Armed Forces' a criminal organisation. The Tribunal rejected the Prosecution's demand²⁸⁷ in this regard but held:

Many of these men have made a mockery of the soldier's oath of obedience to military orders. When it suits their defense they say they had to obey; when confronted with Hitler's brutal crimes, which are shown to have been within their general knowledge, they say they disobeyed. The truth is they actively participated in all these crimes, or sat silent and acquiescent, witnessing the commission of crimes on a scale larger and more shocking than the world has ever had the misfortune to know. This must be said. Where the facts warrant it, these men should be brought to

²⁸⁶ See International Military Tribunal (Nuremberg), Judgment and Sentences 1947: 252-272.

²⁸⁷ For the reasons why the Tribunal refused to so declare the General Staff and High Command of the German Armed see International Military Tribunal (Nuremberg), Judgment and Sentences 1947: 270-271.

trial so that those among them who are guilty of these crimes should not escape punishment.²⁸⁸

The above is representative of the manner in which the Tribunal understood the objective of punishment. Those who committed heinous offences or who turned a blind eye when such offences were being committed when it was within their power to prevent the commission of such offences ‘should not escape punishment.’ They deserved to be punished for what they did. By punishing them the world would know that the international community was not to entertain the commission of such atrocities any more. In short, punishment should serve both the retributive and deterrent objectives. This could also be deduced from the time those who were sentenced to life imprisonment were supposed to spend in prison. The impression one gets is that those sentenced to life imprisonment were supposed to be in prison for the ‘whole of their lives.’ Two of the prisoners, Funk and Raeder, were released after serving a considerable number of years, not because they were considered to have been reformed or rehabilitated, but because their health had deteriorated.²⁸⁹ However, even though Hess’ health also deteriorated and there was support from other Allied members²⁹⁰ that he should have been released as well, the Soviet Union disagreed all the time, until Hess committed suicide in prison at the age of 92.²⁹¹

²⁸⁸ See International Military Tribunal (Nuremberg), Judgment and Sentences 1947: 271-272.

²⁸⁹ Kress and Sluiter in Casese 2002: 1762.

²⁹⁰ Spandau Prison in Berlin, Germany where the prisoners were serving their sentences ‘was administered and guarded jointly by the four allied powers: the Soviet Union, France, the United Kingdom and the United States.’ See Kamchibekova 2007: 124.

²⁹¹ Kress and Sluiter in Casese 2002: 1762.

3.2 The Tokyo Tribunal: Establishment and punishment

The Tokyo Tribunal (the Tribunal) was established by the International Military Tribunal for the Far East Charter, the Tokyo Tribunal Charter (the Charter), for the purpose of ‘just and prompt trial and punishment of the major war criminals in the Far East’, with its permanent seat in Tokyo.²⁹² Members to the Tribunal were to be appointed by the Supreme Commander for the Allied Powers and they had to number not less than six and not more than eleven.²⁹³ All the decisions of the Tribunal had to be by majority vote.²⁹⁴ The Tribunal had ‘the power to try and punish Far Eastern war criminals who as individuals or as members of organisations’ were charged with offences which included crimes against peace, conventional war crimes, and crimes against humanity.²⁹⁵ The Charter, like the Nuremberg Charter, provided for fair trial guarantees. The indictments upon which the charges against the accused were based had to ‘consist of a plain, concise, and adequate statement of each offence charged.’²⁹⁶ A copy of the indictment, in a language understood by the accused, had to be made available to the accused.²⁹⁷ The trial and related proceedings had to be conducted in English and in the language understood by the accused. All documents in a language that the accused did not understand had to be

²⁹² Article 1 of the Tokyo Charter. See also article 12 of the Tokyo Charter. See Rule 9 of the Rules of Procedure of the International Military Tribunal for the Far East, of 25 April 1946 (the Tokyo Tribunal Rules of Procedure).

²⁹³ Article 2.

²⁹⁴ Article 4(b).

²⁹⁵ Article 5.

²⁹⁶ Article 9(a).

²⁹⁷ Article 9(a). See Rule 1 of the Tokyo Tribunal Rules of Procedure.

translated and made available to him.²⁹⁸ The accused also had a right to be represented by counsel of their choice subject to some exceptions such as, the right of the Tribunal to disapprove of any of such counsel at any time during the proceedings.²⁹⁹ The accused, either personally or through their counsel, had the right to conduct their defence, including the right to examine any witness, subject to such reasonable restrictions as the Tribunal might determine.³⁰⁰ The accused also had the right to apply to the Tribunal to allow them to produce any witnesses or documents.³⁰¹

Under Article 16 of the Charter, the Tribunal was empowered ‘to impose upon an accused, on conviction, death or such other punishment as shall be determined by it to be just.’ Article 17 required that judgment was to be announced in open court and the reasons upon which such judgment was based had to be given. Under Article 17, a sentence imposed by the Tribunal was to ‘be carried out in accordance with the order of the Supreme Commander for the Allied Powers, who may at any time reduce or otherwise alter the sentence except to increase its severity.’

Wanhong identifies two major challenges that confront whomever attempts to study the jurisprudence of the Tokyo Tribunal: ‘the Nuremberg Trials dwarfed the Tokyo Trial. The scant availability of the Trial’s records along with the apathy of scholars have resulted in the public’s appalling

²⁹⁸ Article 9(b). See Rules 2 and 6 of the Tokyo Tribunal Rules of Procedure.

²⁹⁹ Article 9(c).

³⁰⁰ Article 9(d). See Rule 4 of the Tokyo Tribunal Rules of Procedure.

³⁰¹ Article 9(e). See Rule 5 of the Tokyo Tribunal Rules of Procedure.

ignorance of the Tokyo Trial.³⁰² The 28 Class “A” defendants at the Tokyo Trial included the majority of government and military officers who had occupied some of the highest offices in Japan during World War II. The trial lasted almost two years – 3 May 1946 to April 16 1948. The judgment was delivered on 4 November 1948. Apart from one defendant who was found to be unfit to stand trial due to psychological problems and the two others who died during the trial, the Tribunal found all the defendants guilty and imposed various sentences: seven defendants were sentenced to death by hanging; sixteen defendants were sentenced to life imprisonment; one was sentenced to 20 years imprisonment; and one to seven years imprisonment.³⁰³ Those who were sentenced to death were executed on 23 December 1948.³⁰⁴ The sixteen defendants who were sentenced to life imprisonment were: Araki, Hashimoto, Hata, Hiranuma, Hoshino, Kaya, Kido, Koiso, Minami, Oka, Oshima, Sato, Shimada, Shiratori, Suzuki, and Umezu.³⁰⁵

3.2.1 The Tokyo Tribunal and justification of punishment in cases of life imprisonment

Like the Nuremberg Tribunal, in its majority judgment and sentence, the Tribunal does not expressly mention the theory of punishment it relied on to punish the defendants.³⁰⁶ This could be attributed to the fact that, as Judge Röling put it in an interview in 1982, ‘[i]n Tokyo it took an

³⁰² Wanhong 2006: 1674.

³⁰³ Wanhong 2006: 1675.

³⁰⁴ Futamura 2006: 473.

³⁰⁵ Kress and Sluiter in Casese 2002: 1762.

³⁰⁶ Röling and Rüter 1977: Vol. 1, 439-464.

unexpected short time to determine the penalties.³⁰⁷ Put differently, judges did not have time to discuss which theory of punishment should be relied on to impose a particular sentence. However, in his separate opinion, the President of the Tribunal, Sir William Webb, clearly states the objective that the punishment the Tribunal imposed was meant to achieve

as to the punishment of war crimes and crimes against humanity: it is universally acknowledged that the main purpose of punishment for an offence is that it should act as a deterrent to others. It may well be that the punishment of imprisonment for life under sustained conditions of hardship in an isolated place or places outside Japan – the usual conditions in such cases – would be a greater deterrent to men like the accused than the speedy termination of existence on the scaffold or before the firing squad. Another consideration is the very advanced age of some of the accused. It may prove revolting to hang or shoot such old men.³⁰⁸

It is clear that Sir William Webb thought that the punishments imposed on the defendants should serve both as general and specific deterrents: general deterrence in the sense that ‘the main purpose of punishment for an offence is that it should act as a deterrent to others’; and specific deterrence in the sense that life imprisonment under ‘sustained conditions of hardship in an isolated place or isolated places outside Japan...would be a greater deterrent to men like the accused.’ Webb opposed the death penalty which he considered to be “purely vindictive.”³⁰⁹ He ‘argued that the highest sentence that should be imposed on an accused was life in prison and that the maximum penalty should be the same.’³¹⁰

³⁰⁷ Brackman 1989: 427.

³⁰⁸ Röling and Rüter 1977: Vol. 1, 478.

³⁰⁹ Brackman 1989: 410.

³¹⁰ Brackman 1989: 410.

Bassiouni and Hanna argue that, whereas the German people accepted the legitimacy of the Nuremberg Tribunal, the Japanese never accepted the Tokyo Tribunal, and considered its proceedings as another way to humiliate them after they had just been defeated in World War II.³¹¹ This would later affect the manner in which the punishments imposed on the defendants would be served. Thus,

when the Tokyo trials prematurely ended in 1949, the government of Japan insisted that all persons sentenced to imprisonment by the IMTFE as well as other allied forces be transferred to a central prison in Tokyo. This was accomplished in 1953 before the signature of the armistice between the United States and Japan. Within months, every convicted person was released, and the following year, two of the major defendants at the Tokyo trials had become members of the Japanese cabinet in the capacity of Prime Minister and Minister.³¹²

With regard to those sentenced to life imprisonment, it has been observed that '[n]ot a single Tokyo defendant imprisoned at Sugamo actually served his life sentence "unless he died of natural causes within a very few years. They were all paroled and pardoned by 1958".'³¹³ It is vital to note that unlike the Nuremberg Tribunal prisoners who could be detained for the whole of their lives, prisoners sentenced to life imprisonment by the Tokyo Tribunal could not be detained for the whole of their lives even if they had not been released with the other prisoners in 1958. This was because '[t]he Supreme Commander, General MacArthur, did lay down criteria for early release: ...offenders sentenced to life imprisonment were to be considered

³¹¹ Bassiouni and Hanna 2006-2007: 93. See also Bassiouni 2000: 225-226 who explains the circumstances under which the Japanese defendants at the Tokyo trial were released.

³¹² Bassiouni and Hanna 2006-2007: 93-94. Footnotes omitted.

³¹³ Penrose 2000: 564-565. Footnotes omitted.

for parole after they had served 15 years.’³¹⁴ It is not clear whether the Tokyo Tribunal could have imposed more death sentences or lengthy prison terms had it been aware that those it had sentenced to life sentences could be paroled after 15 years. But the Tribunal was aware that under Article 17 of the Tokyo Charter the Supreme Commander for the Allied Powers might at ‘any time reduce or otherwise alter the sentence except to increase its severity.’

3.3 The International Criminal Tribunal for the Former Yugoslavia (ICTY): Establishment and punishment

The ICTY was established by United Nations Security Council Resolution 827 on 25 May 1993 with the ‘power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.’³¹⁵ Unlike the Nuremberg and Tokyo Charters, the ICTY Statute (the Statute) specifically prohibits the imposition of the death penalty. Article 24(1) of the Statute provides that ‘[t]he penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Tribunal shall have recourse to the general practice regarding prison sentences in the Courts of the Former Yugoslavia.’ This is clearly a very big departure from the provisions of both the Nuremberg and Tokyo Charters in at least two respects. First, as mentioned earlier, the Tribunal is prohibited from imposing the death penalty. The penalty imposed shall be limited to

³¹⁴ Van Zyl Smit 2005: 359.

³¹⁵ Article 1 of the Statute of the International Criminal Tribunal for the Former Yugoslavia (as last amended on 28 February 2006 by Resolution 1660). See also O’Brien 1993: 639. See also Schabas 2006: 13-24.

imprisonment. Secondly, the Tribunal is empowered to refer to the general practice regarding prison sentences in the territory of the former Yugoslavia. However, as the Trial Chamber mentioned in the *Prosecutor v Milomir Stakić*, '[i]t is settled jurisprudence of this Tribunal that the Trial Chamber...is obliged to take into account the sentencing practice of the former SFRY³¹⁶ as guidance in sentencing. This practice will accordingly be considered, although in itself it is not binding.'³¹⁷ The Nuremberg and Tokyo Tribunals were not required to refer to the general practice on sentencing that prevailed in Germany or Japan, respectively, at the time the Tribunals imposed their sentences. The Tribunals' only sources of reference were their Charters and Rules of Procedure, the latter of which were very unhelpful as far as sentencing was concerned because they did not guide the Tribunals in that regard.

Another important difference between the ICTY Statute and the Nuremberg and Tokyo Charters relates to the manner in which the sentences imposed were to be served. Article 27 of the Statute provides: 'Imprisonment shall be served in a State designated by the ...Tribunal from a list of States which have indicated to the Security Council their willingness to accept convicted persons. Such imprisonment shall be in accordance with the applicable laws of the State concerned, subject to the supervision of the ...Tribunal.' The Nuremberg and Tokyo Charters and Rules were silent as to the manner in which those sentenced to imprisonment would serve their sentences. This left it to the enforcing bodies, in the case of the Nuremberg Tribunal the

³¹⁶ Socialist Federal Republic of Yugoslavia.

³¹⁷ *Prosecutor v Milomir Stakić*, Case No. IT-97-24-T, (Judgment of 31 July 2003): para 887 (Trial Chamber). Footnote omitted.

Control Council, and in the case of the Tokyo Tribunal the Supreme Commander for the Allied Powers to determine where people sentenced to imprisonment would serve their sentences. The result was, as already discussed above, that those who were convicted by the Nuremberg Tribunal served their sentences in Germany and those convicted by the Tokyo Tribunal ‘served’ their sentences in Japan. I have put ‘served’ with respect to the Tokyo Tribunal in quotation marks because, as we have already seen, the majority of those prisoners were released before they could even serve a substantial part of their sentences.

Another provision that relates to punishment is Article 24(2) of the Statute which provides that ‘[i]n imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.’ This means that before the Trial Chamber imposes any sentence, it has to look at the kind of crime of which the accused has been found guilty in the light of the individual circumstances of the convicted person. That test, it is submitted, guides the Trial Chamber in determining which objective of punishment should be achieved by imposing a given sentence depending on the individual circumstances of the accused. If the accused, for example, committed heinous crimes, refused to cooperate with the prosecution³¹⁸, and did not show remorse for his actions,³¹⁹ then it is more likely that the Tribunal will

³¹⁸ Under Rule 101(B)(ii) of the Rules of Procedure and Evidence of the ICTY, IT/32/Rev.40 (last amended 12 July 2007), in determining the sentence, the Trial Chamber shall take into consideration factors such as ‘any mitigating circumstances including the substantial co-operation with the Prosecutor by the convicted person before and after conviction.’

³¹⁹ However, the Trial Chamber, in the case in which it sentenced the accused to life imprisonment, held that it ‘...does not accept that the absence of a potential mitigating

impose a deterrent or retributive punishment or both. However, on the other hand, if the accused committed less heinous offences, co-operated with the prosecution, and showed remorse for his acts or omissions,³²⁰ the Tribunal is more likely to impose a sentence based on the rehabilitative objective of punishment. This issue is dealt with later when the jurisprudence of the Tribunal on life imprisonment is assessed.

Article 24(3) provides that '[i]n addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.' This means that, for instance, when a person has been sentenced to life imprisonment, and that person acquired property and proceeds by criminal conduct, for example, through theft, robbery or extortion, the Tribunal, in addition to the life sentence imposed, may order that person to return such property or proceeds to their rightful owner. Thus, the rightful owner of such property is restored, in proprietary terms, to the position he was in before his property was unlawfully taken away.

3.3.1 The ICTY and life imprisonment

Article 24(1) of the Statute is buttressed by Rule 101(A) which provides that, '[a] convicted person may be sentenced to imprisonment for a term up to and including the remainder of the convicted person's life.' This provision unambiguously empowers the Trial Chamber to impose a life

factor such as remorse can ever serve as an aggravating factor.' See *Prosecutor v Milomir Stakić* 2003: para 918. Footnotes omitted.

³²⁰ The Trial Chamber observed that, '[m]itigating circumstances may include those not directly related to the offence such as co-operation with the Prosecution or true expressions of remorse.' See *Prosecutor v Milomir Stakić* 2003: para 920.

sentence. This is again a major departure from the Nuremberg and Tokyo Charters and Rules of Procedure. They did not expressly state that the Military Tribunals could impose life sentences. These Tribunals interpreted their discretion broadly under the relevant Charters and Rules of Procedure to justify the imposition of life sentences. We need to look at the language used in Rule 101(A) in the light of the language used by the ICTY Tribunal where it has dealt with the question of life imprisonment.

Rule 101(A) stipulates that the Tribunal may imprison the convicted person ‘for a term up to and including the remainder of the convicted person’s life.’ The Trial Chamber, on the other hand, in the only case in which it imposed a life sentence, the *Stakić* case,³²¹ does not use the ‘remainder of the life’ language. Instead, after citing Rule 101(A), it states that, ‘[t]he maximum sentence that may be imposed by the Tribunal is life imprisonment.’³²² This means that the Trial Chamber in *Stakić* considered the sentence in Rule 101(A) of imprisoning the convicted person ‘for the remainder of his life’ to be synonymous with the sentence of ‘life imprisonment.’

The question that needs to be answered is: to what extent has the ICTY utilised its powers under Rule 101(A) by sentencing the convicted person or persons to imprisonment for the remainder of their lives? Unlike its counterpart the ICTR, the ICTY has been parsimonious with imposing life

³²¹ It has been noted that ‘[i]n *Jelisić*, the ICTY Appeals Chamber stated that “it falls within the Trial Chamber’s discretion to impose life imprisonment”. Perhaps this was a message to the Trial Chambers, as none of them had previously seen fit to pronounce such a sentence.’ See Schabas 2006: 550.

³²² *Prosecutor v Milomir Stakić* 2003: para 890.

sentences. At the time of writing, July 2008, only two offenders, *Milomir Statić* and *Stanislav Galić*³²³ had been sentenced to life imprisonment by the Trial Chamber; and on appeal *Statić's* sentence was changed to 40 years imprisonment by the Appeals Chamber. Unlike in the *Statić* case, in the *Galić* case although the ICTY mentions that the sentence it imposed would serve both deterrent and retributive objectives,³²⁴ it does not enter into a detailed discussion of those objectives of punishment. It is upon that basis that a conscious decision has been made to exclude the discussion of the *Galić* decision.

3.3.2 The ICTY and the objectives of punishment in case of life imprisonment

In *Statić* the Prosecution recommended ‘a sentence of life imprisonment “in order to give due consideration to the victims of [Stakić’s] crimes and to make clear the determination of the international community to deter ethnic cleansing.’³²⁵ The Defence on the other hand submitted that Stakić should be acquitted ‘because this will serve the goal of deterrence both generally and specifically...because when ...Stakić returns to Bosnia and Herzegovina he will be a productive law-abiding citizen and a loving and responsible parent like before the war.’³²⁶ Thus the Defence deemed ‘deterrence and

³²³ *Prosecutor v Stanislav Galić* Case No. IT-98-96-A (Appeals Chamber Judgment of 30 November 2006).

³²⁴ *Prosecutor v Stanislav Galić* 2006: para 441.

³²⁵ *Prosecutor v Milomir Stakić* 2003: para 895.

³²⁶ *Prosecutor v Milomir Stakić* 2003: para 896.

retribution to be the primary principles underlying sentencing.³²⁷ In responding to the above submissions the Tribunal observed that

it is universally accepted and reflected in judgments of this Tribunal and the Rwanda Tribunal that deterrence and retribution are general factors to be taken into account when imposing sentence. Individual and general deterrence has a paramount function and serves as an important goal of sentencing. An equally important goal is retribution, not to fulfil a desire for revenge but to express the outrage of the international community at heinous crimes like those before this Tribunal.³²⁸

The Tribunal is impliedly telling us that rehabilitation is not universally accepted and reflected in its judgments and those of the ICTR as a general factor to be taken into account when imposing sentence. It is deterrence and retribution which have to be emphasised. The Tribunal is aware that there are people who hold the view that retribution is the same as revenge, and thus observes that retribution is not meant 'to fulfil a desire for revenge but to express the outrage of the international community at heinous crimes like those' committed by the accused. Much as the Tribunal at first, as seen above, considered retribution and deterrence to be equally important, it appeared to lean more towards deterrence when it observed that

[t]he Tribunal is mandated to determine the appropriate penalty, often in respect of persons who would never have expected to stand trial. While one goal of sentencing is the implementation of the principle of equality before the law, another is to prevent persons who find themselves in similar situations in the future from committing crimes. Therefore, general deterrence is substantially relevant to the case before this Chamber.³²⁹

It is worth noting how the Tribunal at this stage narrows the scope of the purpose/objective that the punishment it was about to impose was meant to

³²⁷ *Prosecutor v Milomir Stakić* 2003: para 897.

³²⁸ *Prosecutor v Milomir Stakić* 2003: para 900. Footnotes omitted.

³²⁹ *Prosecutor v Milomir Stakić* 2003: para 901. See also para 909.

achieve. From emphasising that deterrence and retribution were equally important in the case before it, and thereby excluding rehabilitation, the Tribunal zeros down to deterrence. We have to recall that it is the Defence which submitted that acquitting the accused would serve the objectives of both general and specific deterrence.³³⁰ The Prosecution, on the other hand, wanted the sentence to achieve the objective of general deterrence. As the above quotation indicates, the Tribunal disregarded specific deterrence and favoured general deterrence because it was ‘substantially relevant to the case’ under consideration. The Tribunal went on to explain what it meant by general deterrence and why it preferred it over specific deterrence.

In the context of combating international crimes, deterrence refers to the attempt to integrate or to reintegrate those persons who believe themselves to be beyond the reach of international criminal law. Such persons must be warned that they have to respect the fundamental global norms of substantive criminal law or face not only prosecution but also sanctions imposed by international tribunals. In modern criminal law this approach to general deterrence is more accurately described as deterrence aiming at reintegrating potential perpetrators into the global society.³³¹

The Trial Chamber emphasised that, in as much as life imprisonment was the maximum sanction it could impose, its imposition was ‘not restricted to the most serious imaginable criminal conduct.’³³² It thus found Stakić guilty of extermination, murder (both a violation of the laws and customs of war and as a crime against humanity) and deportation, and sentenced him to ‘life imprisonment.’ The Trial Chamber also issued various orders that

³³⁰ In the alternative it argued that, should the Tribunal convict the accused, it should impose shorter sentences ranging between five and nine years, and that sentences in that range would fulfil both the deterrence and retribution objectives of punishment. See para 933.

³³¹ *Prosecutor v Milomir Stakić* 2003: para 902. Footnotes omitted

³³² *Prosecutor v Milomir Stakić* 2003: para 931.

accompanied the sentence, the most relevant to this discussion being that Stakić was to serve 20 years before he could be considered for early release.³³³ However, because in its judgment the Trial Chamber indicated that its order did not affect the relevant provisions of the Statute and Rules of Procedure and Evidence relating to early release, this meant that in practice Stakić could be released before serving all the 20 years imposed, depending on the laws in the Host state.³³⁴ However, the Appeals Chamber held that the ‘... “20 year review obligation” on the Host State’...’ was ‘inconsistent with the regime set forth in the Statute and Rules’ because it, amongst other things, imposed on the ‘Host State ...the date of review...thereby supplanting applicable municipal laws.’³³⁵ It found that

³³³ After sentencing Stakić to life imprisonment, the Trial Chamber imposed the following conditions: “The then competent court (Rule 104 of the Rules) shall review this sentence and if appropriate suspend the execution of the remainder of the punishment of imprisonment for life and grant early release, if necessary on probation, if:

(1) **20 years** have been served calculated in accordance with Rule 101(C) from the date of Dr.Stakić’s deprivation of liberty for the purposes of these proceedings, this being the “date of review”.

(2) In reaching a decision to suspend the sentence, the following considerations, *inter alia*, shall be taken into account:

- The importance of the legal interest threatened in case of recidivism;
- The conduct of the convicted person while serving his sentence;
- The personality of the convicted person, his previous history and the circumstances of his acts;
- The living conditions of the convicted person and the effects which can be expected as a result of the suspension.” (Emphasis in original).

³³⁴ The Trial Chamber wished to ‘emphasize that Rules 123-125 of the Rules, and the Practice of Direction on Pardon, Commutation of Sentence and Early Release’ remained unaffected by the disposition it made. See para 937. See also para 391 of the Appeals Chamber decision.

³³⁵ *Prosecutor v Milomir Stakić* (Appeals Chamber, Judgment of 22 March 2006), para 392.

‘...the Trial Chamber acted *ultra vires* in imposing a review obligation on the Host State and therefore committed a discernable error.’³³⁶

The ruling of the Appeals Chamber clarifies that, whereas the Tribunal can impose a life sentence on the accused, it should not ‘dictate’ to the Host State the minimum period the prisoner should serve before being considered for early release or parole. His early release should be governed by the laws of the Host State and the agreement of internment between the Host State and the Tribunal. Imposing a minimum sentence also meant that the courts of the Host State had the power to determine whether the prisoner should be released after serving the minimum period of 20 years, and hence fettered the powers of the President of the Tribunal. As the Appeals Chamber observed, ‘...by vesting the courts of the Host State with the power to suspend the sentence, the Trial Chamber effectively removes the power from the President of the Tribunal to make the final determination regarding the sentence.’³³⁷

The *Stakić* judgment should be contrasted with the position of those sentenced to life imprisonment by the Nuremberg Tribunal, who were meant to serve their ‘whole life’, and those by the Tokyo Tribunal, who could serve 15 years imprisonment. This distinction is important in the sense that it reminds us that since the Tokyo Tribunal, and actually in two of the three cases of Nuremberg prisoners who were sentenced to life imprisonment; life imprisonment has never meant ‘whole life’ in international criminal law. On the issue of the objectives of punishment, the

³³⁶ *Prosecutor v Milomir Stakić* 2006: para 393.

³³⁷ *Prosecutor v Milomir Stakić* 2006: para 393.

conclusion that one draws from the *Stakić* case is that the Tribunal emphasised general deterrence as the purpose/objective that was to be achieved by the punishment it imposed.

Stakić appealed both his conviction and sentence. For the purposes of this discussion the author examines only the arguments relating to the sentence, and then establishes the position of the Appeals Chamber on the issue of life imprisonment. On appeal *Stakić*'s lawyer argued that the maximum sentence 'of life in prison should be reserved for situations where an individual is found to have personally committed the most serious crime possible, namely genocide.' The justification for his argument was that 'imposing the maximum sanction for lesser offences than genocide may undermine deterrence, leading to the commission of graver crimes because the sanctions would be the same.'³³⁸ The Appeals Chamber did not agree with the appellant. It held that 'the sentence of life imprisonment can be imposed in cases other than genocide'³³⁹ and that the Trial Chamber had not 'committed a discernible error in the imposition of a life sentence.'³⁴⁰

It is true that Article 24(1) and Rule 101(A) do not prohibit the imposition of a sentence of life imprisonment on convicted persons who have committed offences less serious than genocide. It is within the discretion of the Tribunal, depending on the circumstances of a particular case, to determine whether the convicted person should be sentenced to life imprisonment or not. However, this being the first case in which the

³³⁸ *Prosecutor v Milomir Stakić* 2006: para 373.

³³⁹ *Prosecutor v Milomir Stakić* 2006: para 375.

³⁴⁰ *Prosecutor v Milomir Stakić* 2006: para 376.

Tribunal had imposed a life sentence, the appellant was justified in his belief that such a sentence, being the maximum sentence, should surely have been reserved for those who had committed the most heinous of the offences.

The appellant argued further that the Trial Chamber should have given greater weight to ‘other important sentencing factors, including rehabilitation, reintegration into society, proportionality and consistency...’, instead of relying so much on deterrence and retribution.³⁴¹ After mentioning that the Trial Chamber when sentencing the appellant had considered some of the factors pointed out by the appellant, the Appeals Chamber noted that ‘the jurisprudence of the Tribunal and the ICTR consistently points out that the two main purposes of sentencing are deterrence and retribution. Other factors, such as rehabilitation, should be considered but should not be given undue weight.’³⁴² Interpreting the Tribunal’s approach of giving ‘undue weight’ to retribution and deterrence means that, if the Appeals Chamber were to impose a life sentence, being the maximum sentence that could be imposed, it would be more inclined towards deterrence and/or retribution. The Appeals Chamber imposed ‘a global sentence of 40 years’ imprisonment, subject to credit being given under Rule 101(C) of the Rules for the period the Appellant has already spent in detention.’³⁴³

³⁴¹ *Prosecutor v Milomir Stakić* 2006: para 400. Footnotes omitted.

³⁴² *Prosecutor v Milomir Stakić* 2006: para 402.

³⁴³ *Prosecutor v Milomir Stakić* 2006: Disposition.

3.4 The International Criminal Tribunal for Rwanda (ICTR): Establishment and punishment

The ICTR was established to ‘prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994.’³⁴⁴ Like the Statute of the ICTY, the Statute of the ICTR provides that the ‘penalty imposed by the [ICTR] shall be limited to imprisonment.’³⁴⁵ Rule 101(A) of the Rules of Procedure and Evidence of the ICTR is to the effect that ‘a person convicted by the Tribunal may be sentenced to imprisonment for a fixed term or the remainder of his life.’³⁴⁶ Rule 101(A) which ‘operationalises’ Article 23 of the Statute of the ICTR does not mention ‘life imprisonment’ but ‘imprisonment ...for the remainder of [the convicted person’s] life.’ From the outset it is vital to note this distinction because the Tribunal has sentenced offenders to both life imprisonment and imprisonment for the remainder of their lives. In comparison with the Nuremberg Tribunal and the ICTY, the ICTR is on record for having sentenced the largest number of offenders to life imprisonment and/or imprisonment for the whole of their natural lives.³⁴⁷ An analysis follows of the objectives of punishment that the Tribunal relies

³⁴⁴ Article 1 of the Statute of the International Criminal Tribunal for Rwanda (as amended by Resolution 1534 of 26 March 2004). For a detailed history of the ICTR Schabas 2006: 24-34. For all the relevant documents relating to the establishment of the ICTY, see Morris and Scharf 1995: Vol, 2.

³⁴⁵ Article 23(1).

³⁴⁶ Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda (Adopted on 29 June 1995; as amended on 15 June 2007).

³⁴⁷ At the time of writing, July 2008, the ICTR had sentenced 14 offenders to life imprisonment or to imprisonment for the remainder of their lives. The Tokyo Tribunal sentenced 16 offenders to life imprisonment.

on to sentence offenders either to life imprisonment or to imprisonment for the remainder of their life.

3.4.1 The ICTR and life imprisonment

As will be illustrated shortly, the Tribunal has drawn a distinction between life imprisonment and imprisonment for the remainder of the offender's life – although whether it is entitled to draw this distinction remains a matter of controversy. There are cases where it is difficult to establish exactly which theory of punishment the Tribunal relied on when it sentenced the offender to life imprisonment. These are cases where the Tribunal mentioned two or more objectives of punishment without homing in on any of them when imposing sentence. Rather, the Tribunal will spend most of its time emphasising other factors that influenced it to sentence the accused to life imprisonment, such as, the nature of the offence and the circumstances under which it was committed, the personal characteristics of the offender, and whether there were any mitigating or aggravating circumstances. In *Prosecutor v Jean-Paul Akayesu*, for example, the Trial Chamber, before sentencing the offender to life imprisonment, referred to Security Council Resolution 955 of 8 November 1994 which stipulates that the Tribunal was established with the aim of prosecuting and punishing those people who participated in the genocide, and thereby to promote national reconciliation and restoration of peace through putting an end to impunity.³⁴⁸ The Tribunal added that the

³⁴⁸ *Prosecutor v Jean-Paul Akayesu* ICTR-96-4-T (Trial Chamber, Judgment of 2 October 1998) Sentence.

penalties imposed on accused persons found guilty by the Tribunal must be directed on the one hand at the attribution (sic) of said accused who must see their crime punished and on the other hand as deterrence, namely dissuading for good those who will be tempted in future to perpetrate such atrocities by showing them that the International community was no longer ready to tolerate serious violations of International humanitarian law and human rights.³⁴⁹

Obviously in the above statement the Trial Chamber invokes both retribution and deterrence as the philosophical justifications for sentencing the offender to life imprisonment. After observing that the sentence it was about to impose had to be proportionate to the offences committed for it to be just, the Trial Chamber commented that '[j]ust sentences contribute to the respect for the law and the maintenance of a just, peaceful and safe society.'³⁵⁰ It is argued that the above statement also indirectly shows that the Tribunal emphasises retribution and deterrence in its explanation of the aim or purpose of a just sentence. In the first place, there has to be a law in place, and people can only be said to be punished justly if they are being punished for breaking that law – retribution and the backward approach to punishment. In the second place, just punishment should be able to 'contribute to the respect for the rule of law and the maintenance of a just, peaceful and safe society.' In other words, just punishment of offenders sends a clear message to potential criminals that should they behave the way the offender who has just been punished behaved, they would also be punished. The result is that they avoid behaving in a manner that would

³⁴⁹ *Prosecutor v Jean-Paul Akayesu* 1998: Sentence. In its earlier judgment in *Prosecutor v Jean Kambanda*, ICTR 97-23-S (Trial Chamber, judgment of 4 September 1998) the Trial Chamber also followed the same reasoning as in the *Akayesu* decision. It emphasised both retribution and rehabilitation when sentencing the offender to life imprisonment. See paras 28 and 58. Also in *Prosecutor v Georges Rutaganda*, ICTR-97-32 (Trial Chamber judgment of 6 December 1999) the Trial Chamber relied on both retribution and deterrence to sentence the offender to life imprisonment. See para 456.

³⁵⁰ *Prosecutor v Jean-Paul Akayesu* 1998: Sentence.

attract punishment, for this lowers the crime rate and consequently, ensures that peace and safety are maintained in society – deterrence and its forward looking approach to punishment.

On Appeal in the *Akayesu* case the Appeals Chamber, in dismissing the appeal against the sentence, did not clarify which theory of punishment it approved of in upholding the sentence that was imposed by the Trial Chamber. The Appeals Chamber just ‘corrected’ the Trial Chamber by holding that it should not have held that the appellant had been sentenced to ‘life imprisonment’, but rather to ‘imprisonment for the remainder of his life’ as provided for in Rule 101(A) of the Rules of Procedure and Evidence.³⁵¹ The failure by the Appeals Chamber to discuss whether the punishment was properly grounded on retribution and deterrent objectives could be attributed to the fact that the appellant did not raise as one of his grounds of appeal that the Trial Chamber should have taken into consideration other objectives of punishment, such as the possibility of rehabilitation, before sentencing him to such a lengthy prison term. However, one has to recall that, at both the pre-sentencing stage before the Trial Chamber and during the appeal, the appellant, who was not a lawyer, waived his right to legal representation³⁵² despite the fact that he told the Trial Chamber that he was not ‘well conversant with the law.’³⁵³ One could argue that perhaps if Mr. Akayesu had had legal representation, he would

³⁵¹ *Prosecutor v Jean-Paul Akayesu* ICTR-96-4-T (Appeals Chamber, judgment of 1 June 2001) Sentence, para 422.

³⁵² *Prosecutor v Jean-Paul Akayesu* 2001: Sentence, para 397.

³⁵³ *Prosecutor v Jean-Paul Akayesu* 2001: Sentence, para 395.

have raised issues relating to the objectives of punishment and the Tribunal would have expressed its opinion on them.

However, it should also be recalled that even in *Jean Kambanda v The Prosecutor*, where the Trial Chamber invoked retribution and deterrence to sentence the appellant to life imprisonment, the appellant's counsel on Appeal did not ask the Appeals Chamber to rule on the issue of whether the appellant, who had pleaded guilty to, amongst others, the crimes of genocide and conspiracy to commit genocide, should have been sentenced on the basis of an objective of punishment other than retribution and deterrence.³⁵⁴ In dismissing the appeal the Appeals Chamber indirectly referred to retribution by holding that a 'sentence imposed should reflect the inherent gravity of the criminal conduct.'³⁵⁵ Thus, it appears that the Appeals Chamber would only take the discussion of the objectives of punishment 'seriously' if the appellant or his counsel invoked such issues either as one of the grounds of appeal or as one of the reasons to support any of the grounds of appeal especially in relation to sentencing. In *Stakić*, for example, the appellant's counsel argued before the Appeals Chamber that the Trial Chamber should have taken into consideration other objectives of punishment apart from retribution and deterrence. It is upon this basis that the Appeals Chamber dealt with the objectives of punishment and gave satisfactory reasons why it emphasised retribution and deterrence

³⁵⁴ *Jean Kambanda v The Prosecutor*, ICTR 97-23- A (Appeals Chamber, judgment of 19 October 2000). See also *Georges Rutaganda v The Prosecutor*, ICTR-96-3-A (Appeals Chamber, judgment of 26 May 2003) where the appellant's appeal against his life sentence was dismissed but the Appeals Chamber did not refer to any objective of punishment. The defence lawyers also did not appeal against the Trial Chamber's reliance on retribution and deterrence to sentence the accused to life imprisonment.

³⁵⁵ *Jean Kambanda v The Prosecutor* 2000: para 125.

as the major objectives that punishments imposed by international criminal tribunals seek to achieve.

3.4.2 The ICTR and imprisonment for the remainder of the offender's life

As mentioned earlier, Rule 101(A) of the Tribunal's Rules of Procedure and Evidence expressly authorises the Tribunal to sentence the convicted person 'to imprisonment for a fixed term or the remainder of his life.' In the judgments discussed above, the Tribunal uses the phrase 'life imprisonment' and not imprisonment 'for the remainder of the convicted person's life.' However, in its judgments (as will be illustrated shortly) the Tribunal has sentenced more people to imprisonment for 'the remainder' of their lives than it has to life imprisonment. Curiously, in most of its judgments the Tribunal does not expressly state the practical or theoretical differences between life imprisonment on the one hand, and imprisonment for the remainder of the offender's natural life, on the other.

For those who are not well acquainted with the jurisprudence of life imprisonment, the impression would be that there is no practical difference between life imprisonment and imprisonment for the remainder of the offender's life. This is because, they might argue, and perhaps justifiably, in both cases the prisoner will remain in prison for the whole of his life. As will be discussed in chapter IV, life imprisonment in some African countries does not really mean that the prisoner will be in prison for the rest of his life. However, there are countries where life imprisonment means that the prisoner will be in prison for life unless pardoned by the head of state. The questions that should be answered is: which of the two

aforementioned scenarios does the Tribunal have at the back of its mind in deciding to sentence an offender to life imprisonment or to imprisonment for the remainder of his life?

It should be stressed that a survey of the Tribunal's jurisprudence is of less relevance in finding answers to that question. This is because, as mentioned earlier, such jurisprudence does not expressly give reasons as to why, for practical purposes, life imprisonment should be considered as different from imprisonment for the remainder of the prisoner's life. However, in *Ferdinand Nahimana, Jean-Bosco Barayagwiza, and Hassan Ngeze v The Prosecutor*³⁵⁶ the Tribunal appears to hold the view that offenders sentenced to life imprisonment may be released after completing the number of years that that country regards as equal to life imprisonment and that the period spent in detention awaiting trial should be taken into consideration at the time of the prisoner's release. The Appeals Chamber held that

The Appeals Chamber notes that, pursuant to Rule 101(D) of the Rules, the Chambers are obliged to give credit for any period during which a convicted person was held in provisional detention. Even though the sentence imposed here was life imprisonment, the Trial Chamber should have made it clear that the Appellant... would be credited with the time spent in detention between his arrest and conviction, as this could have an effect on the application of any provisions for early release.³⁵⁷

³⁵⁶ *Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze v The Prosecutor*, Case No. ICTR-99-52-A (Appeals Chamber, Judgment of 28 November 2007)

³⁵⁷ *Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze v The Prosecutor* 2007: para 1112. One has to note that in fact the Trial Chamber had not sentenced the appellant to 'life imprisonment' but rather to 'imprisonment for the remainder of his life.' Nonetheless, the Appeals Chamber's holding is vital in the sense that it clarifies that the Tribunal is of the view that an offender sentenced to life imprisonment has the prospect of being released in line with the laws and policies of the detaining country provided the Tribunal is notified thereof and consents thereto.

The reasoning behind the above ruling, that offenders sentenced to life imprisonment have the prospect of being released, was also confirmed by the informal interviews the author conducted among some judges, prosecutors and defence counsel of the ICTR. When asked to clarify their understanding of the difference between the two sentences, all opined that life imprisonment meant, and was understood to mean, that the offender could be released on parole or could be entitled to remissions depending on the laws and policies relating to the release of prisoners serving life sentences in the detaining country provided the Tribunal was notified in advance and consented to such release.³⁵⁸ In other words, judges, prosecutors and defence counsel of the ICTR understand life imprisonment to mean life imprisonment as stipulated in the law of the detaining state. Which means, for example, that a prisoner sentenced to life imprisonment and who serves his sentence in Mali would have been sentenced to a different prison term compared to the one sentenced to life imprisonment but serves his sentence in Swaziland, as life imprisonment could mean something different in case of those countries.³⁵⁹

³⁵⁸ Personal informal conversations with some judges, prosecutors and defence counsel of ICTR (who preferred to remain anonymous) 19 -20 April 2008 Villa Via Hotel, Summerset West, Gordon's Bay, Cape Town, South Africa (at a workshop on 'Developments in International Criminal Justice in Africa' organised by the Institute for Security Studies).

³⁵⁹ As of 5 May 2008, statistics from the website of the ICTR indicated that some the prisoners had been transferred to Mali from the ICTR detention facility to serve their sentences there. The author could not acquire the relevant laws relating to life imprisonment in Mali and in other countries with agreements of enforcement with the ICTR to establish what life imprisonment means in those countries. However, it is worth noting that the ICTR signed agreements of enforcement with countries like: Rwanda (see Press Release ICTR/INFO-9-2-557-EN, 5 March 2008); Swaziland, Mali, and Benin. See Kress and Sluiter in Casese 2002:1774.

On the other hand, judges, prosecutors and defence counsel of the ICTR understand imprisonment ‘for the remainder’ of the offender’s life, which is the ‘maximum sentence’³⁶⁰ that the Tribunal could impose, to mean that such an offender shall never be released from prison. Put differently, an offender sentenced to imprisonment for the remainder of his life is meant to be in prison forever. This view is supported by the Appeals Chamber’s holding in *Jean de Dieu v Kamuhanda* to the effect that:

Domestic courts in some countries have held that an accused should be given the possibility of release, even if he is sentenced to imprisonment for the remainder of his life. As the German Federal Constitutional Court stated the argument: “One of the preconditions of a humane penal system is that, in principle, those convicted to life sentences stand a chance of being freed again.” The Appeals Chamber considers that, whatever its merits in the context of domestic legal systems, where it may apply “in principle”, this view is inapplicable in a case such as this one which involves extraordinary egregious crimes [genocide and crimes against humanity].³⁶¹

In *Prosecutor v Clément Kayishema and Obed Ruzindana* the Trial Chamber found the first accused guilty of four counts of genocide and sentenced him to ‘four remainder-of-life sentences concurrently.’³⁶² The Prosecution had asked that the accused be sentenced to ‘concurrent sentences of “life imprisonment” for each of the [four] counts’³⁶³ but because of the gravity of the offences that he had committed, which the Tribunal considered to have constituted ‘offences beyond human

³⁶⁰ See *The Prosecutor v Athanase Seromba*, Case No. ICTR-2001-66-A (Appeals Chamber Judgment of 12 March 2008): para 227.

³⁶¹ *Jean de Dieu Kamuhanda v The Prosecutor*, Case No. ICTR-99-54A-A (Appeals Chamber, Judgment of 19 September 2005) para 357.

³⁶² *Prosecutor v Clément Kayishema and Obed Ruzindana*, ICTR-95-1-T (Trial Chamber, Judgment of 21 May 1999).

³⁶³ *Prosecutor v Clément Kayishema and Obed Ruzindana* 1999: Sentence, para 24.

comprehension and of most extreme gravity’,³⁶⁴ the accused was sentenced to ‘four remainder-of-life sentences concurrently.’ The Trial Chamber drew the distinction between life imprisonment on the one hand and imprisonment for the remainder of the offender’s life on the other in the following terms:

Rule 101(A) authorises the Trial Chamber to sentence a convicted person “to imprisonment for a fixed term or the remainder of his life.” This Chamber, in imposing four concurrent remainder-of-his-life sentences for Kayishema, finds that the “remainder of his life” sentence is distinct from a “life sentence” under the laws of most national jurisdictions. This Chamber gives the phrase “remainder of his life” under Rule 101(A) its plain meaning.³⁶⁵

Whereas the Tribunal appears to reason that a person sentenced to imprisonment for the remainder of his life should be detained until his death, it is argued that, in the light of the right to human dignity issues surrounding imprisonment in contemporary debates, one wonders whether in practice it would be possible for the offender to remain in prison for the rest of his biological life. The Tribunal does not have its own prison and, therefore, its sentences have to be enforced in domestic prisons. There is room for arguing that if enforcing countries, both in Africa and other parts of the world, as well as international and regional human rights bodies, are of the view that imprisonment without the possibility of release is inhumane, the Tribunal would find it difficult to maintain its position of supporting such imprisonment. One cannot expect the Tribunal to develop

³⁶⁴ *Prosecutor v Clement Keyishima and Obed Ruzindana* 1999: Sentence, para 9.

³⁶⁵ *Prosecutor v Clement Keyishima and Obed Ruzindana* 1999: Sentence, para 31. The Trial Chamber recalled that ‘[r]elying on the gravity of the crimes committed, the Prosecution request[ed] the Chamber to impose the most severe sentence upon the Accused, that is, imprisonment for the remainder of his life.’ See *The Prosecutor v Eliézer Niyitegeka* 2003: para 489.

sentencing jurisprudence that is not in accord with international human rights law, even if the offenders committed some of the worst offences known to humankind.

It thus appears that the Tribunal's reasoning that an offender could be detained in perpetuity is unlikely to stand the test of time. This is because there is emerging jurisprudence from African countries, such as South Africa and Namibia, to the effect that imprisonment without the possibility of release is inhuman.³⁶⁶ The European Court of Human Rights has also held that life imprisonment without the possibility of release is inhuman.³⁶⁷ As will be discussed later, the Rome Statute of the International Criminal Court, which gives the Court jurisdiction over crimes, such as genocide and crimes against humanity, does not anticipate that a person could be detained for the rest of his life.

In *The Prosecutor v Eliézer Niyitegeka* in reaction to the Prosecution's submission that the Tribunal should sentence the offender to imprisonment for the remainder of his life,³⁶⁸ the Defence submitted that an 'excessively long sentence can amount to cruel and inhumane punishment.'³⁶⁹ Unfortunately the Trial Chamber did not find it relevant to rule on the

³⁶⁶ See *Bull and another v The State* Case No. 221/2000 (decided on 21 and 23 August 2001), where the Supreme Court of Appeal of South Africa held that it is the possibility of release which saves the punishment of life imprisonment from being inhuman and cruel. In *S v Tcoeb* 1996 (1) SACR 390, the Supreme Court of Namibia held that life imprisonment without the possibility of release is unconstitutional because it amounts to the violation of the prisoner's right to human dignity.

³⁶⁷ See for example, *The Republic of Cyprus v. Andreas Costa Aristodemou* Case No. 31175/87 cited in *Case of Kafkaris v Cyprus* (Application No. 21906/04) European Court of Human Rights, Judgment of 12 February 2008.

³⁶⁸ *The Prosecutor v Eliézer Niyitegeka* 2003: para 489.

³⁶⁹ *The Prosecutor v Eliézer Niyitegeka* 2003: para 491.

Defence's argument that excessive long sentences amounted to cruel and inhumane treatment. It went ahead and sentenced the offender to imprisonment for the remainder of his life. One would have expected the Tribunal to justify why imprisonment for the remainder of the offender's life, though expressly recognised by the Statute read together with the Rules of Procedure and Evidence, did not amount to cruel and inhumane punishment. It is also regrettable that the Defence did not continue to pursue this argument on appeal; probably the Appeals Chamber would have adopted the same opinion as that of the Trial Chamber on that point.³⁷⁰ It should be stressed that as much as the judges of the ICTR are of the view that a person sentenced to imprisonment for the remainder of his life shall remain in prison forever, it is very unlikely, at least in some countries, that that will in fact happen. Some of the prisoners might be released on medical grounds or old age or for humanitarian reasons. This is what happened in the two cases at Nuremberg.³⁷¹

However, in the light of the fact that Rwanda signed an agreement with the Tribunal to enforce some of the sentences, the issue of prisoners sentenced to imprisonment for the remainder of their lives and also to life imprisonment becomes critical.³⁷² This is because the likely influence of the politics of the day, as was the case with the Tokyo Tribunal prisoners, should not be underestimated. Article 3(1) of the sentences enforcement

³⁷⁰ *Eliézer Niyitegeka v The Prosecutor* Case No. ICTR-96-14-A (Appeals Chamber, Judgment of 9 July 2004) paras 263 - 269.

³⁷¹ See Chapter III, 3.1.1.

³⁷² See Agreement between the Government of the Republic of Rwanda and the United Nations on the Enforcement of Sentences of the International Criminal Tribunal for Rwanda, 4 March 2008 (on file with the author).

agreement³⁷³ provides that ‘in enforcing the sentences pronounced by the Tribunal ... the Government of Rwanda shall be bound by the duration of the sentence so pronounced...’ However, Article 8 of the same agreement contemplates that a prisoner may be paroled or pardoned.³⁷⁴ One has to recall that detainees at the ICTR facility reportedly protested against being transferred to Rwanda.³⁷⁵ This could be interpreted to mean that they suspected that the politics of the day could influence not only the manner in which they were likely to serve their sentences but could also impact on the possibility of their release. This could be attributed to the fact that all the offenders belonged to the ousted government, and the new government was perceived as less likely to protect their rights and, most importantly, less likely to favour their early release.

In 2007 Rwanda abolished the death penalty. The Organic Law Relating to the Abolition of the Death Penalty provides that a person convicted of ‘crimes of genocide and crimes against humanity’ shall be sentenced to ‘life imprisonment with special provisions.’³⁷⁶ Article 4 defines ‘life imprisonment with special provisions’ to mean:

³⁷³ Agreement between the Government of the Republic of Rwanda and the United Nations on the Enforcement of Sentences of the International Criminal Tribunal for Rwanda, 4 March 2008 (on file with the author).

³⁷⁴ Article 8 of the Agreement between the Government of the Republic of Rwanda and the United Nations on the Enforcement of Sentences of the International Criminal Tribunal for Rwanda, 4 March 2008 (on file with the author).

³⁷⁵ See ‘Most of the ICTR Prisoners on Hunger Strike to Denounce Transfers to Country [Rwanda]’ *Hirondelle News Agency* 8 October 2007, at <http://allafrica.com/stories/200710090398.html> (accessed 23 May 2008).

³⁷⁶ See Article 5 of Organic Law No. 31/2007 of 25/07/2007 Relating to the Abolition of the Death Penalty.

1. A convicted person is not entitled to any kind of mercy, conditional release or rehabilitation, unless he/she has served at least twenty (20) years of imprisonment;
2. A convicted person is kept in isolation.

It is more likely that an offender sentenced to imprisonment for the rest of his life by the ICTR and who serves his sentence in Rwanda may not be released even after serving 20 years of imprisonment, for the reason that he was not sentenced to life imprisonment but to imprisonment for the remainder of his life. There were concerns at the ICTR that offenders sentenced to life imprisonment who happen to serve their sentences in Rwanda could to be treated as prisoners sentenced to life imprisonment with special provisions. The result was that the ICTR declined to order the transfer of cases to Rwanda on, amongst other grounds, that offenders could be sentenced to life imprisonment with special provisions. As a result in November 2008 Rwanda amended the Organic Law on the Abolition of the Death Penalty to make it clear that offenders sentenced by the ICTR and transferred to serve their sentences in Rwanda or those transferred from the ICTR to stand trial in Rwanda were not to be sentenced to life imprisonment with special provisions.³⁷⁷

In the light of the above difference between life imprisonment and imprisonment for the remainder of the prisoner's life, the question that one needs to answer is: what theory of punishment does the Tribunal take into consideration to sentence a person to imprisonment for the rest of his life instead of life imprisonment? We now turn to the Tribunal's case law to answer that question. In *Prosecutor v Gacumbitsi Sylvester*, the Trial

³⁷⁷ Mujuzi 2009(a).

Chamber found the accused guilty of genocide, crimes against humanity and rape.³⁷⁸ He was sentenced to 30 years imprisonment because the Tribunal ‘deeme[d] it appropriate to impose an exemplary sentence.’³⁷⁹ It appears that the Tribunal expressly recognised general deterrence as the major objective that the sentence it imposed was to achieve. The accused appealed against the Trial Chamber’s decision arguing, inter alia, that the sentence imposed on him was too severe and should be reduced to 15 years ‘in light of his advanced age and the normal life expectancy in Africa.’³⁸⁰

On the other hand, the Prosecution argued that the sentence was too lenient and that had the Trial Chamber paid sufficient attention to ‘the gravity of the crimes and the degree of the Appellant’s criminal responsibility’, it would have sentenced the appellant to ‘life imprisonment’ which was the ‘maximum sentence.’³⁸¹ While agreeing with the Prosecution, the Appeals Chamber noted that the appellant had committed various crimes such as genocide, murder and rape and that he deserved to be sentenced to a punishment that was ‘commensurate with the gravity of the offences.’³⁸² The Appeals Chamber concluded that it ‘consider[ed] that the maximum sentence [was] warranted in the Appellant’s case and that there [were] no

³⁷⁸ *Prosecutor v Gacumbitsi Sylvester* ICTR -2001- 64. (Trial Chamber)

³⁷⁹ *Prosecutor v Gacumbitsi Sylvester* 2001: para 355. He was born in 1943.

³⁸⁰ *Sylvester Gacumbitsi v The Prosecutor* ICTR-2001-64-A (Appeals Chamber), para 109.

³⁸¹ *Sylvester Gacumbitsi v The Prosecutor* 2001: para 188. The Trial Chamber has considered life imprisonment to be ‘the highest sanction’ see *The Prosecutor v Théoneste Bagosora, Gratién Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva* Case No. ICTR-98-41-T (Trial Chamber, Judgment of 18 December 2008): para 2267. Mr. Kibiligi was acquitted and the rest were sentenced to life imprisonment for genocide and crimes against humanity.

³⁸² *Sylvester Gacumbitsi v The Prosecutor* 2001: para 204.

significant mitigating circumstances that would justify imposing a lesser sentence than imprisonment for the remainder of his life.³⁸³ Consequently it quashed the sentence of 30 years and ‘entere[d] a sentence of imprisonment for the remainder of the Appellant’s life, subject to credit being given under Rule 101(D) ... for the period already spent in detention...’³⁸⁴

The *Gacumbitsi* decision on appeal raises three interesting points in relation to punishment. In the first place, the deterrence argument on which the Trial Chamber based its 30 year sentence was not raised on appeal by either the prosecution or the appellant. We have to recall that, in sentencing the accused to 30 years imprisonment, the Trial Chamber noted that the sentence was supposed to be exemplary. The failure by both parties to emphasise the purpose/objective which the punishment that was to be imposed by the Appeals Chamber was to achieve should be seen as regrettable. This is because, while they both argued against the sentence imposed by the Trial Chamber, they did not justify, from a philosophical point of view, why the Appeals Chamber should impose a new sentence. One would have expected the prosecution to argue that life imprisonment would have been a more deterrent sentence than 30 years’ imprisonment. On the other hand, one would have expected the appellant, because of his advanced age and also because of the fact that his family members were living in Rwanda, to try to convince the Appeals Chamber to emphasise

³⁸³ *Sylvester Gacumbitsi v The Prosecutor* 2001: para 206.

³⁸⁴ *Sylvester Gacumbitsi v The Prosecutor* 2001: para 207 (Disposition).

reconciliation or any other objective of punishment apart from deterrence and retribution, and thus impose a 15 year sentence.

The second aspect to note is that the prosecution never asked the court to sentence the accused to imprisonment for the remainder of his life. They instead asked the Tribunal to sentence him to life imprisonment which they argued was the maximum sentence. The Tribunal reacted by sentencing the appellant, not to life imprisonment as asked by the prosecution, but to imprisonment for the remainder of his life. This shows that, whereas the Tribunal in *Prosecutor v Clément Kayishema and Obed Ruzindana* held that life imprisonment meant something different from imprisonment for the rest of the offender's life, with the latter being more severe than the former, in *Gacumbitsi* the prosecution and the Tribunal seemed to have thought that life imprisonment was the same as imprisonment for the remainder of the appellant's life. This is so because the Tribunal did not justify why it did not sentence the accused to life imprisonment, as requested by the prosecution, but decided to sentence him to imprisonment for the remainder of his life.

The aforementioned point is further buttressed by the third interesting aspect of the case: the Tribunal held that the appellant would be entitled to credit for the time he had spent in prison awaiting trial and the finalisation of his appeal. If the Tribunal indeed thought that imprisonment for the remainder of the appellant's life had to be given its natural meaning, that is, that the appellant was to be detained for the remainder of his biological existence, one could argue that the order that he was entitled to credit for the time he had spent in prison awaiting trial and the finalisation of his

appeal would be of no practical relevance. It thus appeared that, whereas the Tribunal sentenced the appellant to imprisonment for the remainder of his life, it meant life imprisonment, in the sense that, if the appellant were to be detained in a country where prisoners serving life imprisonment could be released on parole, the period spent in prison awaiting trial and finalisation of the appeal would be considered in assessing his period of detention before his release on parole. One appellant argued recently that a sentence of imprisonment for the remainder of his life ‘deprived him of any credit based on the period already spent in detention.’³⁸⁵

The Trial Chamber judgment in *Prosecutor v Jean de Dieu Kamuhanda*³⁸⁶, in which the accused was found guilty of genocide and extermination as a crime against humanity and sentenced to imprisonment for the remainder of his life, also illustrates the difficulty one encounters in an attempt to establish the purpose/objective of punishment that the Tribunal emphasises in sentencing offenders to imprisonment for the remainder of their lives. In the first place, the prosecution, although it called on the Tribunal to consider several aggravating factors, such as the offender’s leadership role during the genocide, ‘in its deliberations on sentencing’³⁸⁷, preferred to remain silent on the sentence it thought should be imposed on the offender.

³⁸⁵ In *François Karera v The Prosecutor* Case No. ICTR-01-74-A (Appeals Chamber, Judgment of 2 February 2009): para 397, the Appeals Chamber dismissed ‘the Appellant’s claim that the sentence [of imprisonment for the remainder of his life] deprived him of the benefit of any credit based on the period already spent in detention. Rule 101(C) of the Rules states that ... This provision does not affect the ability of a Chamber to impose the maximum sentence, as provided by Rule 101(A) of the Rules.’ The appellant was convicted of instigating and committing genocide and aiding and abetting murder as a crime against humanity.

³⁸⁶ *Prosecutor v Jean de Dieu Kamuhanda* Case No. ICTR-99-54A-T (Appeals Chamber, Judgment of 22 January 2004).

³⁸⁷ *Prosecutor v Jean de Dieu Kamuhanda* 2004: para 762.

One would have expected the prosecution, after leading evidence that led to the conviction of the accused, to have asked the Tribunal to sentence the offender, let us say, to life imprisonment because he had played a leading role in the genocide. The prosecution thus left it to the Tribunal to determine which sentence, in the circumstances, was appropriate for the offender. This meant that the Tribunal could sentence the offender to a determinate term of imprisonment, life imprisonment or imprisonment for the remainder of his life.

Another curious aspect of the judgment was that the defence refused to address the Tribunal on sentencing, on the ground that it was convinced that their client was to be acquitted. However, ‘when pressed on the matter, the Defence submitted that in the event Kamuhanda is found guilty, his sentence should be limited to the time period he ha[d] already spent in custody at the behest of the Tribunal.’³⁸⁸ Had both parties taken the sentencing issue seriously, the Tribunal would probably have paid sufficient attention to it. The result was that, in sentencing the offender to imprisonment for the remainder of his life, the Tribunal, as was later argued on appeal, pretentiously referred to Security Council Resolution 955 (1994)³⁸⁹ whose preamble stressed the following as the ‘themes’ to guide the Tribunal in imposing punishment: ‘deterrence, justice, reconciliation,

³⁸⁸ *Prosecutor v Jean de Dieu Kamuhanda* 2004: para 756. In *The Prosecutor v François Karera*, Case No. ICTR-01-74-T (Trial Chamber, judgment of 7 December 2007) the offender was sentenced to imprisonment for the remainder of his life for genocide and crimes against humanity. Although the prosecution submitted that in the light of the gravity of the offences the offender had been convicted of ‘life sentence’ was the ‘adequate penalty’, the ‘Defence did not make submissions on sentencing. See para 573.

³⁸⁹ *Prosecutor v Jean de Dieu Kamuhanda* 2004: para 753

and the restoration and maintenance of peace.³⁹⁰ In the light of that, it disturbingly concluded:

In considering the appropriate sentence to be passed upon Kamuhanda, the Chamber weighs heavily the factors which will contribute towards the realisation of these objectives [deterrence, justice, reconciliation and the restoration and maintenance of peace]. In view of the grave nature of the crimes committed in Rwanda in 1994, it is essential that the international community condemn them in a manner that carries a substantial deterrent factor against their reoccurrence anywhere, whether in Rwanda or elsewhere. Reconciliation amongst Rwandans, towards which the processes of the Tribunal should contribute, must also weigh heavily in the Chamber's mind when passing sentence.³⁹¹

The above quotation clearly illustrates that the Tribunal considered both general deterrence and reconciliation as factors that were essential in sentencing the accused to imprisonment for the remainder of his life.³⁹² There is room for arguing that it is difficult to understand how imprisonment for the remainder of the offender's life could simultaneously further the process of reconciliation of the offender with the victims of his atrocities. For reconciliation to take place the offender, after serving his sentence, should be able to meet face to face with his victims and apologise for his deeds. This is almost impossible in cases where the offender is sentenced to prison for the remainder of his life.³⁹³ The inevitable

³⁹⁰ *Prosecutor v Jean de Dieu Kamuhanda* 2004: para 753.

³⁹¹ *Prosecutor v Jean de Dieu Kamuhanda* 2004: para 754.

³⁹² In *The Prosecutor v Eliézer Niyitegeka* 2003, the Trial Chamber, before sentencing the offender to imprisonment for the remainder of his life, held that it placed 'specific emphasis' on 'general deterrence' but 'also considered the likelihood of the Accused's rehabilitation.' See para 487. The offender appealed against the sentence on, amongst others, the ground that imprisonment for the remainder of his life was contrary to the spirit of rehabilitation. However, his appeal on this ground was dismissed. See *Eliézer Niyitegeka v The Prosecutor* 2004: para 267. One wonders how rehabilitation could be achieved when a person has been sentenced to imprisonment for the remainder of his life. Such a person has no hope of being released and consequently has no incentive to participate in rehabilitation programmes.

³⁹³ In *The Prosecutor v Eliézer Niyitegeka* 2003, when the Prosecution asked the Tribunal to sentence the offender to imprisonment for the remainder of his life, the Defence

conclusion is that, although the Tribunal did not expressly state it, this was a clear case where it based its sentencing on general deterrence. If it had indeed given sufficient weight to reconciliation as it claimed, it would not have sentenced the offender to the severest sentence at its disposal. It would have imposed a sentence that would have enabled him to get out of prison and reconcile with his victims, and also rebuild his country. As Judge Maqutu succinctly put it in his dissenting judgment on sentence:

Despite the Accused's lack of physical and moral courage at a crucial time, the heinousness of the Accused's act, the hundreds or thousands that died, that the Accused should not be given the highest sentence of life imprisonment. The Accused must in my view be given a chance to reflect, and if possible learn from his mistakes and teach others – if he becomes so minded. Many people have done a lot of good in prison by writing for [sic] those outside prison. Rwandans are his people, perhaps he will be able to add his voice to the many voices that say Rwandans should recognise their common humanity, nationality and destiny.³⁹⁴

The language of the Tribunal also testifies to the fact that, in circumstances where the offender is sentenced to imprisonment for the rest of his life, it is more likely that he will be in prison until he dies. For example, after announcing that Kamuhanda had been sentenced to imprisonment for the remainder of his life '[t]he Chamber [found] that Kamuhanda [was] entitled to credit for time served of four years and fifty eight days, *if applicable*.'³⁹⁵

submitted that '[t]he heavier the sentence imposed [on the offender] the more difficult his reintegration into society will be, especially considering that there is little or no prospect that the Accused will be able to return to his home and country of birth.' See para 491. Footnotes omitted. However, the Tribunal sentenced the offender to imprisonment for the rest of his life.

³⁹⁴ *Prosecutor v Jean de Dieu Kamuhanda* 2004: (Judge Maqutu's dissenting opinion on sentence) para 14. Judge Maqutu imposed 25 years.

³⁹⁵ *Prosecutor v Jean de Dieu Kamuhanda* 2004: para 769. Emphasis added. In *Prosecutor v Clement Keyishima and Obed Ruzindana* 1999: Sentence paras 30 – 31, where the Trial Chamber sentenced the first offender to four concurrent sentences for the remainder of his life and the second offender to 25 years imprisonment, it was held that the second offender was entitled to credit for the time he had spent in detention whereas in the case of the first offender the Tribunal was silent. This could be attributed to the fact that the Tribunal knew

One could argue that by qualifying its order, the Tribunal was aware that this was one of the cases in which credit for the period spent in prison awaiting trial could not be earned. The prisoner was to be in prison for the rest of his life.³⁹⁶ The Tribunal just wanted, as a formality, to refer to Rule 101(4) which provides, in mandatory terms, that ‘credit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending his surrender to the Tribunal or pending trial or appeal.’ It is argued that if Rule 101(D) had not required the Tribunal, regardless of the sentence imposed, to mention that the convicted person shall be entitled to credit for the years spent in detention awaiting trial or the finalisation of his appeal, cases where the convicted person was sentenced to imprisonment for the rest of his life would have been cases where the Rule is clearly inapplicable. It is thus recommended that Rule 101(D) should be amended to require the Tribunal to only order that the convicted person shall be entitled to credit for the time spent in

that, practically, a person sentenced to imprisonment for the remainder of his life could not benefit from credits earned while in detention awaiting trial. In *The Prosecutor v Mikaeli Muhimana*, Case No. ICTR-95-1B-T (Judgment of 28 April 2005) paras 618-621, the offender was convicted of one count of genocide and two counts of rape and murder as crimes against humanity and sentenced to imprisonment for the remainder of his life on all the three counts. The Trial Chamber was silent on whether he was entitled to credit for the period he had spent in detention awaiting trial. This could be attributed to the fact that the Trial Chamber knew that had it made such an order it would be of no practical importance and opted not to make it. In *Prosecutor v Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze* 2003: paras 1105 -1109, the Trial Chamber sentenced the two offenders, Nahimana and Ngeze, to imprisonment for the remainder of their lives and did not even mention that they were entitled to credit for time spent in detention awaiting trial.

³⁹⁶ In *The Prosecutor v Athanase Seromba* 2008, where the offender was convicted of genocide and crimes against humanity, the Appeals Chamber imposed a ‘sentence of imprisonment for the remainder of Athanase Seromba’s life, subject to credit being given under Rule 101(D) of the Rules for the period already spent in detention from 6 February 2002.’ See para 240 (Disposition). However, Judge Liu, while recognising that the offences of which the accused was convicted were callous, and also ‘in principle’ supported an increase of the sentence, dissented from the sentence imposed by the majority and held that the sentence imposed on the offender should have been ‘short of a term of imprisonment for the remainder of his life.’ See Dissenting Opinion of Judge Liu, para 17.

detention awaiting trial or awaiting the finalisation of his appeal in cases where a determinate sentence or life imprisonment has been imposed.

The Appeals Chamber's judgment in *Kamuhanda* indicates how the Tribunal's approach to questions regarding sentencing makes it very difficult for one to be convinced that the Tribunal thinks that a particular objective of punishment should be stressed in cases where a person is sentenced to imprisonment for the remainder of their life. One of the appellant's grounds of appeal was that although the Trial Chamber referred to reconciliation as one of the purposes/objectives that the punishment it imposed was to achieve, it 'nevertheless sentenced him to life imprisonment' which indicated, in the appellant's view, that the Trial Chamber 'ostentatiously...purported to have' been mindful of the reconciliatory role that the punishment was to play, but that it "gave no explanation whatsoever...as to what extent...the sentence it imposed would help restore...national reconciliation".³⁹⁷ The Appeals Chamber in dismissing the appellant's argument reasoned that:

The Appeals Chamber first notes that while national reconciliation and the restoration and maintenance of peace are important goals of sentencing, they are not the only goals. Indeed, the Trial Chamber correctly referred to "deterrence, justice, reconciliation, and the restoration and maintenance of peace" as being among the goals consistent with Security Council Resolution 955 of ...1994 which set up the Tribunal. These goals cannot be separated but are intertwined, and, in any case, nothing in Resolution 955 indicates that the Security Council intended that one should prevail over another...The Trial Chamber was free to conclude that any advantage in terms of national reconciliation gained by the Appellant's

³⁹⁷ *Jean de Dieu Kamuhanda v The Prosecutor* 2005: para 350. In *Prosecutor v Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze* 2003: para 1095, the Trial Chamber, in sentencing all the offenders to imprisonment for the remainder of their lives, also just outlined the objectives of punishment (retribution, deterrence, rehabilitation and protection of society) without even attempting to explain what each of them meant, let alone how one or more of them was applicable to the case in question.

eventual release was either minimal or was outweighed by the harms to both general deterrence and national reconciliation that would be created by a lenient sentence that was not perceived to reflect the gravity of the crimes committed... The Appellant has neither demonstrated that the Trial Chamber committed any error in its assessment of the goals behind the creation of the Tribunal, nor that the Trial Chamber improperly exercised its discretion in determining the appropriate sentence.³⁹⁸

There are at least three problems with the Appeals Chamber's observation.

First, it is not true that the Trial Chamber assessed the goals behind the creation of the Tribunal. What the Trial Chamber did, as already mentioned, was to merely mention Security Council Resolution 955 and thereafter outlined what it called the 'themes' that guided the sentencing discretion of the Tribunal. This explains why on appeal the appellant argued that the Trial Chamber "ostentatiously...outlined the rules it purported to have applied. However, it did not apply those rules".³⁹⁹

Secondly, the Appeals Chamber erroneously concluded that the Trial Chamber had emphasised all the 'themes' of punishment mentioned in Security Council Resolution 955 (1994) when it sentenced the appellant to imprisonment for the remainder of his life. The true position is that though the Trial Chamber referred to Security Council Resolution 955 (1994), it singled out general deterrence and reconciliation as the bases on which it sentenced the appellant to imprisonment for the rest of his life. It is partly because of that, that Judge Maqutu wrote a dissenting opinion to the effect that, if the Tribunal really took the reconciliation aspect seriously, it should not have sentenced the appellant to imprisonment for the remainder of his life but rather to 25 years imprisonment. It could be argued further that by

³⁹⁸ *Jean de Dieu Kamuhanda v The Prosecutor* 2005: para 351.

³⁹⁹ *Jean de Dieu Kamuhanda v The Prosecutor* 2005: para 350.

singling out general deterrence and reconciliation, the Tribunal was itself making some goals prevail over the other.

The third problem with the Appeals Chamber's judgment is that most of the time it erroneously referred to the fact that the appellant had been sentenced to 'life imprisonment' by the Trial Chamber and not that he had been sentenced to 'imprisonment for the remainder of his life', as if both sentences meant the same thing. Much as the equating of imprisonment for the remainder of the appellant's life with life imprisonment did not prejudice the appellant's appeal, one would have expected the Appeals Chamber to refer to the correct sentence to which the appellant had been sentenced, against which he was appealing, and which it confirmed later.⁴⁰⁰

However, most importantly for sentencing and the theories of punishment, the Appeals Chamber clearly demonstrated that the purposes/objectives of

⁴⁰⁰ The equating of life imprisonment with imprisonment of the remainder of the offender's life could also be found in *Prosecutor v Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze* 2003, in which the Trial Chamber, after convicting the accused of genocide and other serious war crimes, held that 'Rule 101 of the Rules states that upon conviction, an Accused may be sentenced to imprisonment for a fixed term or the remainder of his life. The Chamber considers that *life imprisonment, being the highest penalty permissible at the Tribunal*, should be reserved for the most serious offenders...' para 1097. Emphasis in original. The manner in which the Tribunal equated life imprisonment with imprisonment for the remainder of the accused's life is clear with regard to the sentence imposed on Jean-Bosco Barayagwiza. The Tribunal held that '[h]aving considered all the relevant factors, the Chamber considers that the appropriate sentence for Jean-Bosco Barayagwiza in respect of all the counts on which he has been convicted is *imprisonment for the remainder of his life*.' However, in its decision dated 31 March 2000, the Appeals Chamber decided: '[T]hat for the violation of his rights the Appellant is entitled to a remedy, to be fixed at the time of judgment at first instance, as follows:

- a) If the appellant is not found guilty, he shall receive financial compensation;
- b) If the Appellant is found guilty, his sentence shall be reduced to take account of the violation of his rights.

The Chamber considers that a term of years, being by its nature a reduced sentence from that of *life imprisonment*, is the only way in which it can implement the Appeals Chamber decision...' see paras 1106 – 1107. (Emphasis added). Even on Appeal, the Tribunal mistakenly observed that '...the Trial Chamber imposed on each Appellant a single sentence of life imprisonment.' See *Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze v The Prosecutor* 2007: para 1039. Footnotes omitted.

punishment mentioned in Security Council Resolution 955 (1994) are equally important, intertwined, and that none prevails over another. However, one could argue that, as much as that is the position, it is not of general application and that some ‘themes’ should be expected to override others depending on the objective that is sought to be achieved by the sentence imposed. If the Tribunal intends to emphasise reconciliation, one would expect it not to sentence the offender to imprisonment for the rest of his life. However, if it intended to stress deterrence, one would expect it to impose a severe sentence which could be life imprisonment or imprisonment for the remainder of the offender’s life.

In some cases an appeal against a sentence of imprisonment for the remainder of the appellant’s life does not attempt to convince the Appeals Chamber to revise the sentence on the ground that it was based on a wrong purpose/objective of punishment; but rather focuses on whether the Trial Chamber addressed the issues of aggravating or mitigating factors properly. In *Prosecutor v Clément Kayishema and Obed Ruzindana*,⁴⁰¹ for example, where the Trial Chamber sentenced the first appellant to imprisonment for the remainder of his life on each of the four counts of genocide, on appeal the appellant argued that the Trial Chamber erred in law and fact when, at sentencing, it emphasised the seriousness of the offence committed, his individual circumstances and the aggravating factors but ignored the mitigating factors.⁴⁰² In upholding the sentence imposed by the Trial Chamber the Appeals Chamber held that the sentence of imprisonment for

⁴⁰¹ *Prosecutor v Clément Kayishema and Obed Ruzindana* 2001.

⁴⁰² *Prosecutor v Clément Kayishema and Obed Ruzindana* 2001: para 363.

the remainder of the appellant's life on each of the counts of genocide was 'appropriate' as the aggravating factors outweighed the mitigating factors.⁴⁰³ The Appeals Chamber also held that the sentence imposed on the first appellant was appropriate because '[t]he crimes for which he was convicted were of the most serious nature, and a sentence imposed must reflect the inherent gravity of the criminal conduct.'⁴⁰⁴

The Appeals Chamber clearly ignored any discussion of the objectives or purposes of punishment as justification for upholding the sentence imposed by the Trial Chamber. It rather emphasised the nature of the offence committed and the individual circumstances of the appellant. In my opinion this is attributable to two factors: one, that both the Prosecution and the Defence did not mention what purpose/objective the revised punishment should serve; and two, the Trial Chamber did not base its sentence on purposes/objectives of punishment but rather on the seriousness of the offences, the individual characteristics of the offender, and that the aggravating factors outweighed the mitigating factors. Consequently both the Prosecution and the Defence did not find it relevant to base their arguments on appeal on issues that were not emphasised by the Trial Chamber, which meant that the Appeals Chamber could also not rule on issues not raised in the arguments on Appeal. This was regrettable because one would have expected both the Trial Chamber⁴⁰⁵ and the Appeals

⁴⁰³ *Prosecutor v Clément Kayishema and Obed Ruzindana* 2001: para 363.

⁴⁰⁴ *Prosecutor v Clément Kayishema and Obed Ruzindana* 2001: para 370.

⁴⁰⁵ The Trial Chamber mentioned in passing that it was mindful that in sentencing the accused for crimes such as genocide, such a sentence was to serve the objectives of retribution, deterrence, rehabilitation and the protection of society. See *Prosecutor v Clément Kayishema and Obed Ruzindana* 1999: (Sentence) paras 1 – 2.

Chamber to seriously discuss the objective or objectives to be achieved by such a serious sentence as the one that was imposed.

It could be argued that there are cases in which the Tribunal has sentenced offenders to imprisonment for the remainder of their lives by unconsciously relying on retribution. In *The Prosecutor v Mikaeli Muhimana*, for example, the accused was convicted of genocide and rape and murder as crimes against humanity and sentenced to imprisonment for the remainder of his life on each of the three counts, which sentences were to run concurrently. In imposing the sentences the Trial Chamber underscored that the ‘Preamble to the Security Council Resolution 955 establishing the Tribunal ... emphasized the need to further the goals of deterrence, justice, reconciliation, and restoration and maintenance of peace.’⁴⁰⁶ The Trial Chamber added that, for it to impose ‘a just sentence’, such sentence had to reflect the above five goals of punishment.⁴⁰⁷ In justifying the imposition of heavy sentences on the offender, the Tribunal held that ‘[g]enocide and murder and rape as crimes against humanity rank amongst the gravest of crimes. The Chamber has no doubt that the perpetrators of such crimes *deserve* a heavy sentence.’⁴⁰⁸

As discussed in Chapter II, retribution is based on the just desert principle with the underlying argument being that an offender is punished because he deserves to be punished for breaking the law. It could also be argued that in this case the Tribunal understood ‘deserve’ to have its dictionary or

⁴⁰⁶ *The Prosecutor v Mikaeli Muhimana* 2005: para 588.

⁴⁰⁷ *The Prosecutor v Mikaeli Muhimana* 2005: para 588.

⁴⁰⁸ *The Prosecutor v Mikaeli Muhimana* 2005: para 603. (Emphasis mine).

ordinary meaning and did not intend it to be construed in the way punishment specialists would. What the intention of the Tribunal was in choosing to use the word ‘deserve’ in this context could be debatable. But, in my opinion, the Tribunal should be understood to have intended ‘deserve’ to mean what it means in the punishment debate, that is, that the offender is punished severely because of the offences he committed and for which he deserves to be punished. This is because ‘deserve’ was used at the sentence stage of the judgment where any court or tribunal would invoke it if it were to rely on retribution. This interpretation is also supported by the Tribunal’s later observation which stated as follows:

The Chamber recalls the incident where the Accused used a machete to cut the pregnant woman Pascasie Mukaremera from her breasts down to her genitals and remove her baby, who cried for some time before dying. After disembowelling the woman, the assailants accompanying [the Accused] then cut off her arms and stuck sharpened sticks into them. This savage attack upon a pregnant woman *deserves* condemnation in the strongest possible terms and constitutes a highly aggravating factor.⁴⁰⁹

The Appeals Chamber judgment in *Ferdinand Nahimana, Jean-Bosco Barayagwiza, and Hassan Ngeze v The Prosecutor*⁴¹⁰, in which the appellants successfully appealed against their sentences of imprisonment for the remainder of their lives, demonstrates how the vague ruling by the Trial Chamber on the purposes/objectives of punishment could lead to the appellants raising different grounds of appeal against the same sentence. As mentioned earlier, although the Trial Chamber, had outlined the four goals of punishment as being retribution, deterrence, rehabilitation and the protection of society, it did not point out which of the four goals it

⁴⁰⁹ *The Prosecutor v Mikaeli Muhimana* 2005: para 612. (Emphasis added).

⁴¹⁰ *Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze v The Prosecutor* 2007.

emphasised in sentencing all the accused to imprisonment for the remainder of their lives.⁴¹¹ In his appeal against sentence Nahimana contended, *inter alia*, ‘that the Trial Chamber imposed a clearly excessive sentence having regard to international jurisprudence’, and to other mitigating factors.⁴¹² Barayagizwa argued that the ‘sentence [was] excessive and disproportionate in view of’ the various mitigating circumstances.⁴¹³ Barayagizwa added that ‘in determining his sentence, the Trial Chamber placed too much emphasis on the objectives of retribution and deterrence, and not enough on those of national reconciliation and rehabilitation.’⁴¹⁴ Ngeze argued that ‘the sentence imposed on him by the Trial Chamber [was] too harsh.’⁴¹⁵

It is indisputable that, indeed, imprisonment for the remainder of the offender’s life is an excessive sentence by all standards. This explains why there was unanimity among all the three appellants on that ground of appeal and the Appeals Chamber agreed with them and reduced the sentences.⁴¹⁶ However, it is only Barayagwiza who, in addition to arguing that the sentence was excessive, also argued that the Trial Chamber erred in

⁴¹¹ See *Prosecutor v Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze* Case No. ICTR-99-52-T (Trial Chamber, Judgment of 3 December 2003): para 1095.

⁴¹² *Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze v The Prosecutor* 2007: para 1044.

⁴¹³ *Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze v The Prosecutor* 2007: para 1053.

⁴¹⁴ *Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze v The Prosecutor* 2007: para 1056. Footnotes omitted.

⁴¹⁵ *Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze v The Prosecutor* 2007: para 1098.

⁴¹⁶ Ngeze was sentenced to 35 years’ imprisonment (see para 1115); Barayagwiza to 32 years’ imprisonment (see para 1097); and Nahimana to 30 years’ imprisonment (see para 1052). Judge Theodor Meron dissented from Nahimana’s sentence on the ground that it was ‘too harsh’. See Partly Dissenting Judgment of Judge Theodor Meron (XXII): para 22.

emphasising retribution and deterrence instead of rehabilitation and reconciliation. In dismissing his appeal on this ground the Appeals Chamber was of ‘the opinion that in view of the gravity of the crimes in respect of which the Tribunal has jurisdiction, the two main purposes of sentencing are retribution and deterrence; the purpose of rehabilitation should not be given undue weight.’⁴¹⁷ The Appeals Chamber concluded that it could not ‘find that the Trial Chamber committed an error by giving undue weight to the purposes of retribution and deterrence.’⁴¹⁸

It is submitted that both the Appeals Chamber and the appellant were wrong when they held the view that the Trial Chamber emphasised retribution and deterrence. What the Trial Chamber did was to mention the four goals of punishment, thereafter consider the mitigating and aggravating circumstances, and then sentenced all three offenders to imprisonment for the remainder of their lives. However, despite that oversight the Appeals Chamber should be credited for emphasising that retribution and deterrence were the major goals of punishment for cases within its jurisdiction. It should naturally follow from that holding that it is those two objectives of punishment that are emphasised even in cases of imprisonment for the remainder of the offender’s life.

⁴¹⁷ *Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze v The Prosecutor* 2007: para 1057.

⁴¹⁸ *Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze v The Prosecutor* 2007: para 1057.

3.5 Life imprisonment under the Special Court for Sierra Leone (SCSL)

Unlike the ICTY and the ICTR the SCSL is a hybrid court that was established by an agreement between the United Nations and the government of Sierra Leone pursuant to UN Security Council Resolution 1315 (2000) of 14 August 2000.⁴¹⁹ Proceedings of the SCSL are governed by the Court's Statute and its Rules of Procedure and Evidence.⁴²⁰ The Statute empowers the SCSL to prosecute persons who bear the greatest responsibility⁴²¹ for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.⁴²² The Statute specifically empowers the SCSL to prosecute persons responsible for certain crimes against humanity, certain violations of Article 3 Common to the 1949 Geneva Conventions and of 1977 Additional Protocol II, other serious violations of international humanitarian law, and some crimes under Sierra Leonean law.⁴²³

⁴¹⁹ *The Prosecutor of the Special Court v Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu* Case No. SCSL-04-16-T (Judgment of 20 June 2007): para 2. In Cambodia, in 2004 the government and the United Nations established the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of the Crimes Committed during the Period of Democratic Kampuchea. The Extraordinary Chambers is allowed to impose life imprisonment. See Articles 3 and 39 of the Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006). For the background to the establishment of the Extraordinary Chambers see *Report of the Group of Experts for Cambodia* established pursuant to General Assembly Resolution 53/135 (18 February 1999).

⁴²⁰ *The Prosecutor of the Special Court v Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu* 2007: para 2.

⁴²¹ For a detailed discussion of the Trial Chamber's interpretation of the notion of 'greatest responsibility' see *The Prosecutor of the Special Court v Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu* 2007: paras 640-458.

⁴²² Article 1 of the Statute of the Special Court for Sierra Leone.

⁴²³ *The Prosecutor of the Special Court v Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu* 2007: para 3.

Article 19(1) of the Statute of the SCSL provides that ‘the Chamber shall impose upon a convicted person...imprisonment for a specified number of years.’ This should be contrasted with Articles 24(1) and 23(1) of the ICTY and ICTR Statutes, respectively, which provide that ‘the penalty imposed by the Trial Chamber shall be limited to imprisonment.’ It is argued that ‘imprisonment’ is wide enough and could mean anything from one year or less to imprisonment for the remainder of the offender’s life. This explains why the judges of both the ICTY and the ICTR interpreted the relevant Articles as empowering them to impose life imprisonment and imprisonment for the remainder of the offender’s life, respectively, and included such punishments in their Rules of Procedure and Evidence. However, the position is different with the Statute of the SCSL. Whereas the Statutes of both the ICTY and the ICTR allow the Tribunals to impose ‘imprisonment’, that of the SCSL allows it to impose ‘imprisonment for a specified number of years.’ This means that the SCSL cannot impose a life sentence or imprisonment for the remainder of the offender’s life because the years to be served by offenders sentenced to either of the two sentences cannot be ‘specified.’

The SCSL’s Rules of Procedure and Evidence provide that ‘a person convicted by the Special Court...*may* be sentenced to imprisonment for a specific number of years.’⁴²⁴ One could argue that, unlike the Statute which makes it obligatory for the SCSL to sentence the offender to specified number of years, the Rules of Procedure and Evidence gives the SCSL

⁴²⁴ Rule 101(1) of SCSL Rules of Procedure and Evidence (As Amended on 27 May 2008). (Emphasis added).

wider discretion. By providing that the offender ‘may be sentenced to imprisonment for a specified number of years’ the Rules of Procedure could be interpreted to mean that the Tribunal may in some circumstances also sentence the offender to a non-specific number of years. However, such an interpretation of the Rules of Procedure would be in conflict with the Statute which uses mandatory language that the SCSL ‘shall’ impose imprisonment for a specified number of years. In practice the SCSL has not sentenced any offender to life imprisonment although it has in one case sentenced the offenders to lengthy terms of imprisonment ranging from 45 – 50 years.⁴²⁵ On 20 March 2009, the SCSL signed an enforcement agreement with the Republic of Rwanda, according to which, ‘former Sierra Leonean rebel and militia leaders convicted by the Special Court for Sierra Leone could serve their sentences in Rwanda.’⁴²⁶ The SCSL has held that because of the nature of the offences committed by the individuals falling under its jurisdiction, the punishment imposed should serve the purposes/objectives of retribution and deterrence.⁴²⁷ These two goals seem to be the dominant considerations of international criminal tribunals. One wonders why, given the growth of the human rights ethic in the international sphere, the goals of rehabilitation and reconciliation are not taken into account in view of the emergence of transitional justice considerations such as Truths Commissions.

⁴²⁵ *The Prosecutor of the Special Court v Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu* Case No. SCSL-04-16-T (Sentence of 19 July 2007).

⁴²⁶ See Special Court Concludes Enforcement Agreement with Rwanda, at <http://www.scsl.org/LinkClick.aspx?fileticket=3VejdLwAIPk%3d&tabid=214> (accessed 25 March 2009). As at the time of writing, the author was unable to access a copy of the agreement.

⁴²⁷ *The Prosecutor of the Special Court v Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu* 2007: Sentence.

3.6 Life Imprisonment under the International Criminal Court (ICC)

The ICC has had a very long history. As far back as August 1951 the Committee on International Criminal Jurisdiction, which was appointed by the General Assembly of the United Nations, met in Geneva and wrote a report and a Draft Statute of the International Criminal Court.⁴²⁸ This report and the Draft Statute were submitted to Member States for comments before June 1952.⁴²⁹ Wright, who wrote within a year after the Committee on International Jurisdiction adopted its report and the Draft Statute of the ICC in 1951, clearly demonstrated the early challenges faced in the process of establishing the ICC. He stated as follows:

The report and draft raise[d] questions concerning (1) the purpose of an international criminal court, (2) the appropriate procedures for establishing it, (3) the proper scope of its jurisdiction, and (4) the law which it will apply. Indecision on these points was exhibited by the closely divided votes and numerous abstentions on many articles of the draft and by the fact that its detailed provisions tend to nullify its apparent purpose. Indecision on these points ... [was] also ... manifested in the discussions of more than a dozen official and unofficial proposals and drafts of the subject of the international criminal court during the past thirty years.⁴³⁰

It is beyond the scope of this discussion to deal with all the important historical developments that preceded the adoption of the Statute of the ICC. There is an avalanche of literature on that subject.⁴³¹ However, it should be mentioned that in 1994 the International Law Commission adopted the Statute for an International Criminal Court (the ICC Statute).⁴³²

⁴²⁸ Wright 1952: 60.

⁴²⁹ Wright 1952: 60.

⁴³⁰ Wright 1952: 60.

⁴³¹ See for example Schabas 2004; and Lee (ed) 1999.

⁴³² Crawford 1995: 404-416.

The drafters of the ICC Statute ‘benefited from important previous experiments – the Nuremberg Tribunal and the International Criminal Tribunals for the Former Yugoslavia and for Rwanda.’⁴³³ Following lengthy, and at times heated, negotiations, deliberations, lobbying, and compromise, the ICC Statute was adopted and entered into force on 1 July 2002.⁴³⁴ The ICC has jurisdiction over serious crimes, such as genocide, war crimes and crimes against humanity.⁴³⁵ At the time of writing, June 2008, the ICC had not finalised even a single case although some African war criminals had been indicted, but were still at large, and others were in detention awaiting trial.⁴³⁶

In relation to punishment, Article 77 of the Statute empowers the ICC to impose ‘imprisonment for a specified number of years, which may not exceed a maximum of 30 years.’⁴³⁷ The ICC is also empowered to sentence the offender to ‘a term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.’⁴³⁸ However, Article 110(3) provides that ‘when a person has served ... 25 years in the case of life imprisonment, the Court shall review

⁴³³ Arsanjani and Reisman 2005: 385.

⁴³⁴ Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by process-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002. For the negotiations preceding the adoption of the Rome Statute of the ICC see generally Lee (ed) 1999. For the history of the International Criminal Court, see Ellis and Goldstone (eds) 2008: 7 – 26.

⁴³⁵ Articles 6-8.

⁴³⁶ See <http://www.icc-cpi.int/cases.html> (accessed 2 July 2008).

⁴³⁷ Article 77(1)(a) of the ICC Statute.

⁴³⁸ Article 77(1)(b) of the ICC Statute. See also Article 78(3). Rule 145(3) of the Rules of Procedure and Evidence provides that ‘[l]ife imprisonment may be imposed when justified by the extreme gravity of the crime and the individual circumstances of the convicted person, as evidenced by the existence of one or more of the aggravating circumstances.’

the sentence to determine whether it should be reduced.’ If after review the ICC decides that the prisoner does not qualify for the reduction of the sentence, the prisoner’s sentence shall be reviewed (by the ICC) at later intervals as provided for under the Rules of Procedure and Evidence.⁴³⁹

Several observations can be made in relation to the ICC Statute’s provisions on punishment in the light of the Nuremberg and Tokyo Tribunals, the ICTY, the ICTR and the SCSL. In the first place, as in the case of the ICTY, the ICTR and the SCSL, but in contrast to the Nuremberg and Tokyo Tribunals, the ICC is not allowed to impose the death penalty. This shows that the international community is committed to moving away from the death penalty even in the most serious of offences. Secondly, unlike the ICTY and the ICTR Statutes, the ICC Statute specifically provides for life imprisonment. One has to recall that both the ICTY and the ICTR Statutes only allow the relevant Tribunals to impose imprisonment and that it is the Rules of Procedure and Evidence which empower those Tribunals to impose a sentence of imprisonment for the remainder of the convicted person’s life. It is argued that the ICC does not have jurisdiction to sentence a convicted person to imprisonment for the remainder of his life. Another observation to be made is that the minimum number of years to be served by a person sentenced to life imprisonment has been defined by the ICC Statute. Such a person should have the possibility of release evaluated after serving a minimum of 25 years. This is not the case with offenders sentenced to life imprisonment by the ICTR. The minimum number of years they are to serve will depend on two

⁴³⁹ Article 110(5).

factors: the law relating to life imprisonment in the country in which the prisoner is serving his sentence, and the willingness of the ICTR to accept that such a prisoner should be pardoned or paroled under the relevant laws. By setting the minimum number of years a person sentenced to life imprisonment should serve before his sentence is revised, the ICC Statute not only creates uniformity with regard to the meaning of life imprisonment in relation to its prisoners, but also ensures that life imprisonment cannot amount to a cruel and inhumane punishment, because the prisoner at least has the prospect of being released.

Another observation about the penalty regime provided under the ICC Statute and the Rules of Procedure and Evidence is that, unlike the SCSL Statute which empowers the SCSL to impose imprisonment for a specified number of years thus leaving it to the judges to determine for how many years depending on the circumstances of the case, the offender should be sentenced, the ICC Statute limits the number of years that could be imposed to 30 years imprisonment. Worth noting is that a person sentenced to, say 30 years, is required to serve two-thirds of the sentence and could qualify to have his sentence reduced. This ensures that judges do not hide behind the veil of retribution and deterrence to impose sentences that would be far beyond the life expectancy of offenders. The last observation is that, under the ICC Statute, life imprisonment is reserved for the most heinous of offences. As discussed already, this is not the case with the ICTR and ICTY. Both the ICTY and the ICTR can impose life imprisonment on a person convicted of any offence under the Statute. However, practice has shown that life imprisonment and imprisonment for the remainder of the

offender's life have only been imposed in cases where the offender has committed heinous offences.

3.7 Conclusion

The above discussion has illustrated not only the meaning of life imprisonment before the Nuremberg Tribunal, the Tokyo Tribunal, the ICTY, the ICTR, the SCSL and the ICC, but also the purposes/objectives of the punishment which each international tribunal, where applicable, thinks the sentence of life imprisonment should achieve. The following conclusions should be drawn from the discussion of the jurisprudence or the relevant documents of the international tribunals with regard to life imprisonment: retribution and deterrence are emphasised more than any purpose of punishment; the Nuremberg and Tokyo Tribunals did not state the purpose the punishments they imposed were to serve; the Tribunals generally pay scant attention to the discussion of the objectives of punishment; the ICTR in some cases erroneously equates life imprisonment with imprisonment for the remainder of the offender's life; and the ICC Statute approaches punishment in a manner that is more human rights friendly than the statutes of the ICTY, the ICTR and the SCSL. It is recommended that international tribunals should always engage in a robust discussion of the objectives/purposes of punishment at the sentencing stage so that the offenders and their counsel know whether the sentence imposed reflects the objectives that the Tribunal intends to achieve.

CHAPTER IV

LIFE IMPRISONMENT IN SOUTH AFRICA, MAURITIUS AND UGANDA: HISTORY AND MAJOR LEGAL DEVELOPMENTS

4. Introduction

This chapter deals with the history and major legal issues or developments relating to life imprisonment in South Africa, Mauritius and Uganda and where applicable, the jurisprudence and legislation of other African countries in Eastern and Southern Africa. In Uganda, where the death penalty is still lawful and where there have not been major developments in case law regarding life imprisonment, the historical analysis of life imprisonment will emphasise how the respective laws and constitutions have dealt with the right to life. The chapter will examine how these various enactments have led to the retention of the death penalty instead of substituting it with life imprisonment, as some have suggested. Before discussing the history and legal developments relating to life imprisonment in South Africa, Mauritius and Uganda, the different approaches that countries have adopted with regard to the sentence of life imprisonment will be described.

4.1 The different approaches to the sentence of life imprisonment in domestic jurisdictions

The sentence of life imprisonment is probably the most confusing sentence in some countries. Many people, including some lawyers, hold the view that a person sentenced to life imprisonment will spend the rest of his or her life in prison or, as the Nicozia Assize Court of Cyprus in the case of *The Republic of Cyprus v. Andreas Costa Aristodemou* put it, ‘the sentence

“imprisonment for life” means exactly what is stated by the simple Greek words, that is, imprisonment for the remainder of the biological existence of the convicted person.⁴⁴⁰ It is true that in some countries a person sentenced to life imprisonment spends the rest of his life in prison. But in other countries this is not the case. One can generally say that there are five major approaches that countries have adopted in regard to life imprisonment. The first approach is that adopted by countries such as Costa Rica, Columbia, El Salvador,⁴⁴¹ Brazil and Portugal, where the Constitutions prohibit the imposition of a sentence of life imprisonment on any person.⁴⁴² The second approach is to be found in countries such as Croatia, Norway, Portugal, Slovenia and Spain, which ‘make no legislative provision for life imprisonment at all.’⁴⁴³ The third category is to be found in countries such as Kenya, Zimbabwe, Ghana, and Tanzania⁴⁴⁴ where prisoners sentenced to life imprisonment cannot be considered for parole or their sentences cannot be remitted.⁴⁴⁵ The fourth category is to be found in

⁴⁴⁰ *The Republic of Cyprus v. Andreas Costa Aristodemou* 1987 cited in *Case of Kafkaris v Cyprus* 2008: para 47.

⁴⁴¹ Van Zyl Smit 2006: 410.

⁴⁴² The Constitution of Brazil (of 5 October 1988) prohibits the imposition of life imprisonment on any person. Article XLVII (b) provides that ‘there may be no sentence of life imprisonment.’ In Extradition 855, Decision of 26 August 2004, the Supreme Federal Tribunal of Brazil ruled that it could not order the extradition on a Chilean citizen to Chile unless Chile commuted the defendant’s sentence to 30 years imprisonment because ‘Brazilian law establishes that 30 years is the maximum of actual serving time.’ See <http://www.stf.gov.br/jurisprudencia/abstratos/documento.asp?seq=70&lng=ingles> accessed 16 August 2007. It has been observed that ‘[i]t is noteworthy that life imprisonment is not considered everywhere as an essential form of social control. In countries such as *Brazil* and Portugal it is constitutionally outlawed...’ See van Zyl Smit and Dünkel (eds): (2001) 814. See also van Zyl Smit 2002: 189.

⁴⁴³ Appleton and Grøver 2007: 601.

⁴⁴⁴ Mujuzi 2008(a): 174.

⁴⁴⁵ For a detailed discussion of the sentence of life imprisonment without the possibility of parole in the United States of America and England and Wales, see generally see van Zyl Smit 2002: 20-131.

countries such as Uganda, South Africa, Mauritius, Botswana,⁴⁴⁶ Liberia,⁴⁴⁷ Swaziland,⁴⁴⁸ Namibia,⁴⁴⁹ Sudan⁴⁵⁰ and Ethiopia⁴⁵¹ where the law allows prisoners sentenced to life imprisonment to be considered for parole or to have their sentence remitted after serving a specified number of years. The last category is to be found in countries such as Mexico and Peru, where the respective Constitutional Courts have ‘declared life imprisonment to be unconstitutional.’⁴⁵² With respect to the fourth category, courts in South Africa have held that life imprisonment is only constitutional if the offenders have a prospect of being released. Within this category of countries, the Constitutional Court of Uganda held that if life imprisonment is to substitute the death penalty, it should mean that the offender sentenced to life imprisonment should spend the rest of his life in prison.

⁴⁴⁶ Mujuzi 2008(a) 174.

⁴⁴⁷ Section 15:34(3) Act to Amend Chapters 14 and 15 Sub-Chapter (C), Title 26 of the Liberian Code of Laws Revised, Known As the New Penal Law of 1976, by Adding Thereto Four New Sections Thereby Making the Crimes of Armed Robbery, Terrorism and Hijacking , Respectively, Capital Offenses, and Providing Punishment Thereof, Approved 22 July 2008 and Published by Authority Ministry of Foreign Affairs Monrovia, Liberia, 30 July 2008 (where a person sentenced to life imprisonment for those offences is eligible for parole at the age of 90 years old). For a detailed discussion of the Liberia’s law on life imprisonment, see Mujuzi 2009(c).

⁴⁴⁸ Section 43(2) of the Prisons Act, 1964.

⁴⁴⁹ In Namibia the release policy provides that ‘prisoners sentenced for life (for which the minimum period of detention is regarded as twenty (20) years for administrative purposes) may be considered for parole ... after having served at least half of the minimum period of detention of twenty (20) years, irrespective of whether it was his first offence or not.’ See *Release of Prisoners on Parole* (Department of Justice, Directorate of Prisons, File No. 10/8/B, of 4 August 1986) para 4.3.1(h)(i). On file with the author.

⁴⁵⁰ Section 66 of the Penal Code of Sudan (2003) provides that ‘[i]n calculating fractions of terms of punishment, imprisonment for life shall be reckoned as equivalent to imprisonment for twenty years.’

⁴⁵¹ Section 202(1) of the Criminal Code of the Federal Democratic Republic of Ethiopia, Proclamation No.414/2004, provides that ‘[w]here a prisoner has served two-thirds of a sentence of imprisonment or twenty years in case of life imprisonment, the Court may, on the recommendation of the management of the institution or on the petition of the criminal, order conditional release.’ In Ethiopia, a prisoner serving a life sentence and granted conditional release is required to be on probation for a period of not less five years and not more than seven years. See section 204 of the Criminal Code.

⁴⁵² Van Zyl Smit 2006: 410.

4.2 History of life imprisonment in South Africa, Mauritius, and Uganda

South Africa, Mauritius and Uganda have had interesting but different developments in relation to the sentence of life imprisonment. In South Africa, life imprisonment became the severest sentence when the Constitutional Court declared the death penalty to be unconstitutional. Since then, the sentence of life imprisonment has gone through different stages, and the time that an offender sentenced to life imprisonment has to spend in prison has increased in comparison to that required when the death penalty was still lawful.⁴⁵³ The analysis focuses on those cases when the death penalty was discretionary and when courts could impose the death penalty instead. It also deals with cases where courts would have imposed a lesser sentence but opted for a life sentence. The discussion focuses, too, on life as a minimum sentence for some offences. In Mauritius, the government abolished the death penalty by enacting a law to that effect. The discussion will deal with the major legal developments relating to life imprisonment after the abolition of the death penalty. In the case of Uganda life imprisonment in relation to the death penalty is discussed. This is because the death penalty is still lawful in Uganda. The excursus on Uganda will address the measures taken to include the capital punishment provision in the Constitution. The discourse here will look, too, at the major constitutional and legal developments that have taken place in an effort to replace the death penalty with life imprisonment.

⁴⁵³ The release of prisoners serving life sentences is dealt with under Chapter VI.

4.2.1 South Africa

Life imprisonment in South Africa has never meant that the offender would spend the rest of his life in prison.⁴⁵⁴ Whereas life imprisonment has never meant life imprisonment in the literal sense in South Africa, its meaning has changed substantially in the past decades. This section investigates the meaning and use of life imprisonment in South Africa in four major legal historical eras: (i) at the time when the death penalty was still lawful in South Africa (including life imprisonment as early as 1906); (ii) immediately after the abolition of the death penalty (1994-1998); (iii) following the introduction of the minimum sentences legislation (1998-2007); and (iv) after December 2007, when the sentencing jurisdiction of the regional courts was extended to include life imprisonment. In assessing the meaning and use of life imprisonment during these four historical periods, the focus falls on the law in place at the time and how courts interpreted it to justify the imposition of life imprisonment. The relevant statistics are brought into play to illustrate the incidence of cases in which life imprisonment was imposed. The section shows that despite its evidently simple meaning life imprisonment in South Africa has evolved in meaning over time, particularly in the last 20 years. These changes,

⁴⁵⁴ Diemont JA held in *S v Qeque and another* 1990 (2) SACR 654 (CkA) at 659 that '[d]oes a "life sentence" mean that the appellants must remain incarcerated in prisons until they die? The answer is no. It has been widely accepted for many years [in the former Ciskei] that a life sentence will not exceed 25 years and that even 25 years is an exceptionally long sentence... [section] 18(1)(b) of the Police and Prisons Act 36 of 1983 (Ck) provided that any person sentenced under the provisions of any law to imprisonment for life, shall be detained in a prison for a period not less than 10 years and not more than 25 years.' In *S v Siluale en ander* 1999 (2) SACR 102 (SCA) at 103 the Court stated that '[i]f the circumstances of a case require that an offender should receive a sentence which for all practical purposes removes him permanently from society, life imprisonment is the only appropriate sentence. It is intended to be the most severe sentence that can be imposed, although there are acknowledged procedures which make parole possible in appropriate circumstances, eg where the offender (contrary to all expectations) genuinely reforms.'

especially since the early 1990s, were the result of two macro political forces. On the one hand was the democratisation of South Africa with the enactment of a new constitution, a progressive Bill of Rights with its provisions protecting the right to life and the right not to be subjected to inhumane and degrading punishment or treatment. Pulling in the other direction was the government's reaction to spiralling incidence of crime, characterised by its over-emphasis on punishment and retribution. By 31 December 2008, South Africa's prisons were home to 8,764 prisoners serving life sentences.⁴⁵⁵ In the last 10 years South African courts sentenced more people to life imprisonment than they had done in the previous century.⁴⁵⁶ The meaning of life imprisonment has also changed significantly during this period. The increase in the number of prisoners serving life sentences and the consequent changes in the meaning of life imprisonment are traceable to issues that this section will interrogate.

4.2.1.1 Life imprisonment during the imposition of the death penalty (1906 – 1994)

Life imprisonment has been part of the South African legal system for many decades. South African case law indicates that as early as the beginning of the 20th century, courts started granting divorce decrees where one spouse could prove that the other was serving a life sentence. In *Nefler v Nefler*⁴⁵⁷ the High Court of the Orange Free State was petitioned by Mrs Nefler for a divorce decree on the ground that her husband had been found

⁴⁵⁵ See <http://www.dcs.gov.za/WebStatistics/> (accessed 19 February 2009).

⁴⁵⁶ In 1995 there were 443 prisoners serving life sentences in South Africa. See Giffard and Muntingh 2006: 10.

⁴⁵⁷ *Nefler v Nefler* (1906) ORC 7.

guilty of assault with intent to cause grievous bodily harm and ‘sentenced to be imprisoned and kept to hard labour for the term of his natural life.’⁴⁵⁸ The Court held that ‘[e]quity will demand that ... in this case where the man is imprisoned for life’ it necessitated the granting of ‘a divorce on the ground of imprisonment for life.’⁴⁵⁹ The reasoning in *Nefler* would later be followed in the cases of *Jooste v Jooste* (1907),⁴⁶⁰ *Van Broemsen v Van Broemsen* (1933)⁴⁶¹ and *Smith v Smith* (1943).⁴⁶² From these cases it is also clear that in the early 20th century courts rarely imposed life imprisonment. In all the cases cited above, except in *Nefler* the defendants had been sentenced to death and their sentences commuted to life imprisonment. Life imprisonment in South Africa in the late 19th century and the early 20th century was not as long as the terms would later become by the first decade of the 21st century. In the early 20th Century a prison officer reported that the longest period he had known a person to have served life imprisonment was 20 years, and that in one case, a prisoner who had been sentenced to life imprisonment had served only one year and two months.⁴⁶³ In *R v Mzwakala* the Court observed that there were ‘two *Government Notices*...in terms of which a sentence of imprisonment for life [was] deemed for the

⁴⁵⁸ *Nefler v Nefler* 1906: 7.

⁴⁵⁹ *Nefler v Nefler* 1906: 12.

⁴⁶⁰ *Jooste v Jooste* (1907) 24 SA 329 (Supreme Court of the Cape of Good Hope).

⁴⁶¹ *Van Broemsen v Van Broemsen* (1933) SR 58 (High Court of Southern Rhodesia, Bulawayo).

⁴⁶² *Smith v Smith* (1943) CPD 50 (Cape of Good Hope Provincial Division).

⁴⁶³ *Jooste v Jooste* 1907: 330.

purposes of remission to be a sentence of imprisonment for twenty years.⁴⁶⁴ However, a Court observed in 1968 that

[T]he provisions of those *Government Notices* were, however, subsequently repealed. No such provision [was] to be found in the consolidated regulations issued under sec. 94 of the Prisons Act of 31st December 1965 (published under *Government Notice* R 2080 in Regulation Gazette 604 of that date) which repealed all prior regulations governing remission of sentences or release of prisoners on parole or on probation.⁴⁶⁵

It appears that even before 1965, when the above mentioned government notices were repealed, the meaning and length of life imprisonment was determined by the Executive. For example, a person sentenced to life imprisonment (or whose death sentence was commuted to life imprisonment) or another term of imprisonment under section 41(2) of the Prisons and Reformatories Act,⁴⁶⁶ was required to serve both the life sentence, which was always fixed, and the additional sentence of imprisonment imposed for another offence unless the court ordered otherwise. For example, in *Attwood v Minister of Justice and Another*, the applicant was sentenced to death in addition to 10 years imprisonment in November 1945. The Governor-General-in-Council commuted his death sentence to life imprisonment in terms of which, according to the Prisons Board, 'the Executive Council had decided that the life imprisonment

⁴⁶⁴ *R v Mzwakala* 1957 (4) SA 273(A): 278. The Government notices referred to by the Court were G.N. 1551 of 8th September 1991, and G.N. 286 of 28th February 1986.

⁴⁶⁵ *S v Masala* 1968 (3) SA 212 (A): 216-217.

⁴⁶⁶ Act 13 of 1911. Section 41(2) provided that 'when a person receives more than one sentence of imprisonment or additional sentences while serving a term of imprisonment, each such sentence shall be served the one after the expiration, setting aside, or remission of the other in such order as the Director may determine, unless the court specifically direct otherwise, or unless the court direct that such sentences shall run concurrently.' As reproduced in *Viljoen v Minister of Justice and Another* 1948(3) SA 994(T): 997.

sentence should be determined as imprisonment for a period of 30 years.⁴⁶⁷ After serving 14 years and 2 months of the 30-year sentence, the prison authorities did not release him as they opined that he was supposed to serve 40 years, as the 10- year sentence had to run consecutive to the life sentence (30 years). He applied to the court and argued that he was entitled to be released as the 10-year sentence ran concurrently with the life sentence. The Court dismissed his application, holding that this was not the legal position.

The *Attwood* case shows, amongst other things, that in practice it was up to the Governor to determine what life imprisonment meant and that the prison authorities had to await the decision of the Executive Council on the meaning of life imprisonment; that life imprisonment was a fixed sentence; and a person sentenced to life imprisonment was entitled, through earning credits as a result of good industry, to the remission of his sentence like any other prisoner serving a fixed sentence (which meant that he could serve less than half of the equivalent prison term). Further, a person sentenced to life imprisonment could be sentenced to another imprisonment term or terms and the sentences would run consecutively.

However, the 1959 Correctional Services Act,⁴⁶⁸ under section 32(2) read together with section 97(2), provided that any determinate sentence imposed had to run concurrently with a life sentence. Nevertheless, the Act still did not stipulate what a life sentence meant in practical terms. This led

⁴⁶⁷ *Attwood v Minister of Justice and Another* 1960(4) SA 911(T): 912.

⁴⁶⁸ Act 8 of 1959.

courts to conclude that the 1955 Criminal Procedure Act,⁴⁶⁹ which provided for the sentence of life imprisonment ‘containe[d] no indication that the duration of such a sentence [was] to be anything other than that conveyed by the plain meaning of the words “imprisonment for life”.’⁴⁷⁰ Thus, by 1968, persons sentenced to life imprisonment were released in line with section 64(1) of the Prisons Act⁴⁷¹ in terms of which the Prison Board submitted a report to the Commissioner of Prisons recommending the release of the prisoner. The Commissioner would submit such a report to the Minister of Prisons who had the discretion to authorise the release of the prisoner on parole. The practice at the time was that such a report was submitted after a prisoner had served ten years.⁴⁷² Effectively this meant that a person sentenced to life imprisonment could be released after 10 years.

The 1960s saw South African courts becoming increasingly punitive due, presumably, to political instability. This punitive attitude was evident in the manner in which courts approached sentencing. Dugard, a celebrated South African legal scholar, observed that ‘since the early 1960’s [sentences in general] have been more severe than those imposed in other periods of South African history.’⁴⁷³ He adds that during this period, ‘the number of sentences of life imprisonment imposed has been great.’⁴⁷⁴ After giving a

⁴⁶⁹ Act 56 of 1955.

⁴⁷⁰ *S v Masala* 1968: 216.

⁴⁷¹ Act 8 of 1959.

⁴⁷² *S v Masala* 1968: 216-218.

⁴⁷³ Dugard 1978: 239.

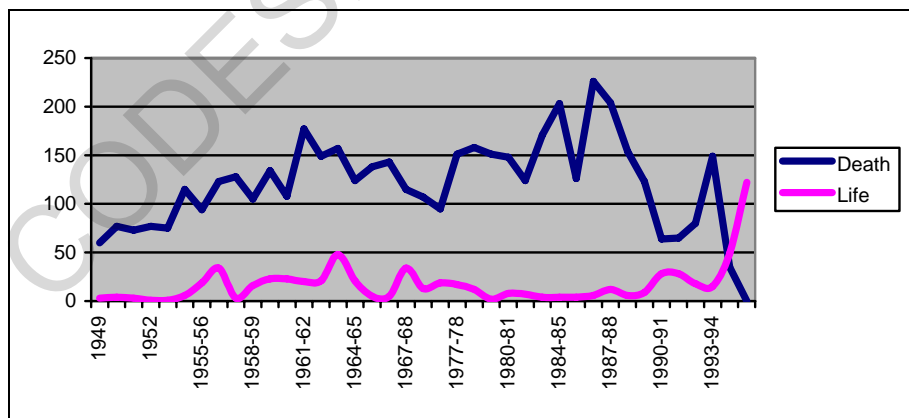
⁴⁷⁴ Dugard 1978: 239-240.

summary of prisoners sentenced to life imprisonment in South Africa, Dugard cites one case which shows that some South African judges did not want prisoners sentenced to life imprisonment to be released.

In *S. v. Tuhadeleni and others*⁴⁷⁵ the trial judge, Ludorf J., sought to emphasize that such sentences were really “for life” when he sentenced the prisoners to “imprisonment for the rest of their natural lives,” but on appeal it was held that such a formulation could only mean imprisonment for life and could not exclude the power of the authorities, acting on recommendation from a prison board, to release a person serving a sentence of life imprisonment.⁴⁷⁶

The punitive nature of the South African courts in the 1960s is also evidenced in the statistics on people sentenced to both death and life imprisonment before and after that, as shown in Chart 1.

Chart 1⁴⁷⁷: The annual incidence of (i) the imposition of death sentences (represented by the black line) and (ii) the imposition of sentences of life imprisonment (represented by the grey line) between 1949 and 1996



⁴⁷⁵ *S v Tuhadeleni and others* 1969 (1) S.A. 153 (A.D.).

⁴⁷⁶ Dugard 1978: 240.

⁴⁷⁷ The data presented in Chart 1 are based on numerous government reports dating back to 1949. For detailed statistics, see Appendix 1.

Chart 1 shows that between 1947 and 1970 courts consistently imposed more death penalties than life sentences. From 1949 until 1994 there was in no one year more than 50 offenders sentenced to life imprisonment. It also appears that the number of offenders sentenced to death and the number sentenced to life imprisonment seem to mirror each other in broad terms, often with a few years delay. This could be a result of death penalty sentences being commuted to life imprisonment. Both sentences saw a spike in the early 1960s but then declined until the early 1970s. Different to the previous spike, death penalties imposed climbed sharply from the early 1970s but the number of life sentences imposed remained stable and low for the next 20 years. It was only from 1990 onwards that the number of offenders sentenced to life imprisonment started to increase and in 1994/5 shot through the historical ceiling of 50 cases per year as a result of the abolition of the death penalty in 1995/6. It is also interesting to note that despite the democratisation of South Africa since 1990 that there was an initial drop in the number of death sentences imposed, but that it quickly climbed back to the historical average of 150 cases per year until it was finally abolished.

Before section 277 of the Criminal Procedure Act⁴⁷⁸ was amended by the 1990 Criminal Law Amendment Act⁴⁷⁹, 'where an accused had been convicted of murder and the court found no extenuating circumstances, it

⁴⁷⁸ Act 51 of 1977.

⁴⁷⁹ Amendment to section 277 of the Criminal Procedure Act by section 4 of the Criminal Law Amendment Act, Act 107 of 1990.

was obliged to impose the death penalty.⁴⁸⁰ Put differently, before the aforementioned amendment, the death penalty, as an ultimate sentence, was obligatory for murder.⁴⁸¹ Terblanche argues that the ‘final major overhaul’ of the death penalty before it was abolished in 1995 ‘was effected through the Criminal Law Amendment Act, 1990.’⁴⁸² Du Toit *et al* illustrate that although the death penalty could still be imposed after the 1990 amendment to the Criminal Procedure Act, in cases of murder courts were now not required to establish whether there were no ‘extenuating circumstances’ but rather whether there were ‘mitigating or aggravating factors.’⁴⁸³ This was a positive development in ensuring that many offenders who would otherwise have been sentenced to death in the absence of extenuating circumstances could now be sentenced to lesser sentences such as life imprisonment because ‘the term “mitigating factor” ha[d] a wider connotation than an extenuating circumstance and [could] include factors unrelated to the crime, such as the accused’s behaviour after the crime he ha[d] committed or the fact that he ha[d] a clean record.’⁴⁸⁴ In other words, after the 1990 amendment to the Criminal Procedure Act, the death penalty for murder became discretionary and could only be imposed when it was ‘the only proper sentence.’⁴⁸⁵

⁴⁸⁰ Du Toit *et al* 1993: 277. The death penalty could, and was indeed, also imposed and offenders executed for other serious offences such as rape. See Dugard 1978: 124-130.

⁴⁸¹ Du Toit *et al* 1993: 277 (28-11).

⁴⁸² Terblanche 2007: 434.

⁴⁸³ Du Toit *et al* 1993: 277.

⁴⁸⁴ Du Toit *et al* 1993: 277. Footnotes omitted.

⁴⁸⁵ Du Toit *et al* 1993: 277 (28 -14 A). Footnotes omitted.

Much as the government was tough on crime and courts were very punitive before the 1990s, Terblanche argues that ‘life imprisonment was expressly inserted into section 276 of the [Criminal Procedure] Act by the Criminal Law Amendment Act, 1990’ but that even before then, the ‘supreme courts’ had ‘always been empowered to impose it.’⁴⁸⁶ Du Toit *et al* are of the view that the reason why ‘[s]ection 276(1)(b) was amended to read imprisonment, *including imprisonment for life*,’ was to ensure that ‘where the court imposed the sentence of life imprisonment, it would be the manifest intention that the offender should be removed from society for the rest of his life...’ unless released by the Minister of Correctional Services.⁴⁸⁷ However, it should be recalled that as early as 1955, life imprisonment was expressly recognised in the Criminal Procedure Act.⁴⁸⁸ Much as the Divisions of the Supreme Courts had the discretion to impose life sentences during the time of the death penalty, and indeed some offenders were sentenced to life imprisonment, Terblanche reminds us that:

[u]ntil the early 1990s more than 25 years’ imprisonment was rarely imposed in South Africa, and it was a basic principle that such longer sentences should be imposed only in cases of exceptional severity. At that stage the death penalty was still regularly imposed for the most serious crimes and life imprisonment almost non-existent.⁴⁸⁹

⁴⁸⁶ Terblanche 2007: 232. Footnotes omitted. It has also been argued that ‘life imprisonment was expressly inserted into section 276 of the Criminal Procedure Act by the Criminal Law Amendment Act 107 of 1990, although it was available to the High Courts before that as well.’ See Joubert (ed) 2007: 290.

⁴⁸⁷ Du Toit *et al* 1993: 277 (28 -14A). Footnotes omitted. (Emphasis in original).

⁴⁸⁸ Act 56 of 1955. Section 334(1) of the Criminal Procedure Act, 1955 provided that ‘[a] person liable to a sentence of imprisonment for life or for any other period, may be sentenced to imprisonment for any shorter period...’ as reproduced in Lansdown *et al* 1957: Vol. 1, 877; see also Lansdown 1960: 284. In *S v Masala* 1968: 216, the Court observed that ‘[a] sentence of imprisonment for life [was] referred to in sec.334 of the Criminal Procedure Act, 56 of 1955.’

⁴⁸⁹ Terblanche 2007: 222. However, as early as 1960, when the Court was confronted with the question of the meaning of life imprisonment, it was observed that ‘[t]he Chairman of the Transvaal Prison Board informed the Court that, generally speaking, his board would

Joubert *et al* argue that during the period when the death penalty was still lawful in South Africa, ‘life imprisonment was considered to be a valuable alternative to the death sentence and was imposed in cases of extreme seriousness ... but where the death penalty was not considered to be the only proper sentence.’⁴⁹⁰

The following survey of case law in which life imprisonment was imposed during this period demonstrates some of the factors that courts took into consideration in ‘cases of extreme seriousness’ to impose life imprisonment instead of the death penalty: where the court thought that the accused was ‘to be imprisoned for the rest of her life’ in the sense that like the death penalty, life imprisonment would permanently remove him from society;⁴⁹¹ where the appellant was young, had no previous criminal record, and committed murder while intoxicated;⁴⁹² and where there was a ‘reasonable

only make a recommendation for release on a parole [of a prisoner serving a life sentence] after the prisoner had completed at least ten years of his sentence, while a recommendation for release on probation might only be given after he had completed 12 years of his sentence. Certain statistics covering the last five years, furnished to the Court by the Commissioner [of Prisons], indicate[d] that, while releases during that period [had] – in contrast with former years – some times occurred before the prisoner [had] served ten years, the majority [had] been required to serve at least ten years before being released on parole or probation and, in a number of cases, considerably longer.’ See *S v Masala* 1968: 218. One has to recall that as at 31st December 1947, there were 204 prisoners serving life sentences in South Africa. See *Statistics of Criminal and other Offences and of Penal Institutions for the Year ended 31st December, 1947, Special Report No. 178*, (Government Printer, Pretoria) Table 34(c) – *Race and Sex of Sentenced Offenders in Penal Institutions According to the Nature of Sentence, as at 31st December 1947*.

⁴⁹⁰ Joubert (ed) 2007: 290-291. In *S v Shabalala and others* 1991 (2) SACR 478 (A) the accused murdered an elderly recluse and mutilated and partially burnt his body and occupied his house. The court in sentencing them to death held that even life imprisonment was not an appropriate sentence in the circumstances.

⁴⁹¹ *S v Phillips and another* 1985 (2) SA 727(N): 747.

⁴⁹² *S v Masala* 1968: 215.

prospect' of the appellant's rehabilitation.⁴⁹³ Courts also imposed life imprisonment because the appellant was unlikely to commit murder again as the circumstances that led him to commit such murder were unlikely to happen again;⁴⁹⁴ because the appellant was immature;⁴⁹⁵ the offender had no previous record for 'serious' convictions and none of the victims of his rapes suffered severe or prolonged psychological effects.⁴⁹⁶ Courts also considered the fact that the interests of justice demanded the imposition of a life sentence instead of a death penalty for example, where the prisoner's detention would enable the prison authorities to treat him for his mental condition;⁴⁹⁷ and because the murder had not been accompanied by cruel and humiliating acts.⁴⁹⁸

In cases of murder, the circumstances under which it was committed and the accused's level of participation were important factors to determine

⁴⁹³ *S v Sampson* 1987 (2) SA 620 (A).

⁴⁹⁴ See *S v Cele* 1991(1) SACR 627(A) in which the appellant, a 40 year old man, had paid two young men to murder his former employee who had caused trouble for his business which led him to lose his customers.

⁴⁹⁵ *S v Cotton* 1992(1) SACR 531(A).

⁴⁹⁶ *S v D* 1991(2) SACR 543(A). Where the accused was found guilty of various crimes, including six counts of rape (in which some of his victims contracted sexually transmitted diseases), one count of attempted rape and one count of indecent assault. See also *S v P* 1991 (1) SA 517 (A) where the court set aside the death penalty that had been imposed on the appellant and substituted it with life imprisonment on, amongst other grounds, that the women the appellant had raped were not virgins, they had not experienced serious psychological problems as a result of rapes, and that the appellant could be rehabilitated during his long term of imprisonment. In *S v W* 1993 (2) SACR 74 (A) the Court substituted the appellant's death sentence into life imprisonment on amongst other grounds that the victim of his rape had suffered no serious physical injuries.

⁴⁹⁷ *S v Lawrence* 1991(2) SACR 57(A) where the appellant, a psychopath with previous convictions, murdered a 19-year-old girl, the court in sentencing him to life imprisonment held that there was 'no doubt that if the Court sentences a person suffering from severe psychopathy to life imprisonment the prison authorities would take active and adequate steps to ensure that he was appropriately detained and treated. In any event the failure to do so, for whatever cause, does not commend itself...as a reason, in itself, for imposing the [death] penalty.' At 59.

⁴⁹⁸ *S v Mdau* 1991 (1) SA 169(A).

whether he should be sentenced to life imprisonment or to death. Where the circumstances were not cruel and the accused had not directly participated in the murder, he was sentenced to life imprisonment;⁴⁹⁹ where the accused, though found guilty of murder with no extenuating circumstances, was close to 80- years old the court held that society did not expect such an old man to be sentenced to death and sentenced him to life imprisonment even though his two co-accused who were younger than he, were sentenced to death.⁵⁰⁰ The fact that a dangerous accused may be released on parole if sentenced to life imprisonment did not justify the imposition of a death penalty on him.⁵⁰¹ However, it should be stressed that in most cases where the accused were sentenced to life imprisonment instead of death, the youthfulness of the accused was highlighted. For example, in *S v Bosman*, although the court observed that the ‘nature and circumstances of the murder ... [were] so heinous’ and that retributive and deterrent elements were decisive and the death penalty was the only appropriate sentence, the accused was sentenced to life imprisonment.⁵⁰²

The above cases show that one factor alone, for example, the youthfulness of the offender was normally not sufficient for the court to depart from imposing the death penalty. Courts had to consider other factors such as the prospect of rehabilitation, whether the accused had previous criminal records, and the nature of the crime. A closer examination of the cases

⁴⁹⁹ *S v Mthembu* 1991 (2) SACR 144 (A).

⁵⁰⁰ *S v Munyai and others* 1993 (1) SACR 252 (A).

⁵⁰¹ *S v Oosthuizen* 1991 (2) SACR 298 (A).

⁵⁰² *S v Bosman* 1992 (1) SACR 115 (A) at 116.

above in which the accused were sentenced to life imprisonment instead of death, also shows that most of these were decided in the early 1990s. As mentioned earlier, the amendment to the Criminal Procedure Act in 1990 gave courts the discretion to impose life sentence in some cases that would otherwise have attracted the death penalty. In all the cases from the 1990s cited above, courts, before sentencing the accused to life imprisonment, referred to section 4 of the Criminal Law Amendment Act.⁵⁰³

For example, the court observed:

[The] provisions [of the Criminal Law Amendment Act 107 of 1990] brought about a radical change in the law relating to death sentences. The effect thereof has been considered in a number of judgments... Broadly speaking the following principles have emerged from these judgments. The imposition of the death sentence is no longer, as in the past, mandatory in certain circumstances, but rests entirely in the discretion of the trial Judge. This discretion is exercised with due regard to the presence or absence of any mitigating or aggravating factors (as found by the trial Court). The death sentence is only authorised where the trial Judge is satisfied that it is 'the proper sentence', which has been interpreted to mean 'the only proper sentence'. Its imposition is therefore to be confined to exceptionally serious cases - cases where the death sentence 'is imperatively called for'.⁵⁰⁴

What should also be noted about the above cases is that the accused had either committed murder combined with robbery with aggravating circumstances or rape. After 1990, even in cases where the accused was found guilty of murder with no extenuating circumstances, courts held that they could not sentence the offender to death because the death penalty was not the only appropriate sentence. This was mostly after courts had considered factors such as the manner in which, and the purpose for which, the murder was committed, the age of the accused, whether he was capable

⁵⁰³ Act 107 of 1990.

⁵⁰⁴ *S v Mthembu* 1991: 145.

of rehabilitation and whether the objectives of punishment would be achieved and the interests of society protected by imposing a life sentence instead of the death penalty. In cases of rape, on the other hand, an accused was more likely to be sentenced to life imprisonment instead of death when in the opinion of the court the victim did not sustain serious physical or psychological injuries as a result of the rape!⁵⁰⁵ A conscious decision has been made to exclude the discussion of the circumstances under which prisoners serving life sentence were being released before 1995. This is because Van Zyl Smit has dealt with this question exhaustively.⁵⁰⁶

4.2.1.2 Life imprisonment in the aftermath of the abolition of the death penalty (1995 -1997)

For a clear discussion on life imprisonment in the aftermath of the *Makwanyane* decision, in which the Constitutional Court declared the death penalty to be inconsistent with the Constitution, the discussion is divided into two parts. The first part deals with what is called the ‘Constitutional Court supervised life sentences’ and the second part with the ordinary life sentences. The first part deals with the death sentences imposed prior to 1994 but not executed and consequently commuted to various prison sentences, including life imprisonment. The second part analyses cases in which courts imposed life imprisonment as it was the severest sentence available following the abolition of the death penalty in 1995.

⁵⁰⁵ Statements and sentiments of this nature would in due course, rightly, attract the ire of gender rights activists.

⁵⁰⁶ D Van Zyl Smit 1992: 378 – 380; and also 135 – 139. See also *S v Bull and another; S v Chavulla and others* 2002 (1) SA 535 (SCA): para 23.

4.2.1.2.1 The Constitutional Court supervised sentences

On 6 June 1995, in the famous *Makwanyane* case,⁵⁰⁷ the Constitutional Court declared the death penalty to be unconstitutional on the grounds that it violated the right to life and the right not to be subjected to cruel, inhuman and degrading treatment or punishment.⁵⁰⁸ The Court ordered, amongst other things, that all death sentences be ‘set aside in accordance with the law, and substituted by appropriate and lawful punishments.’⁵⁰⁹ In dismissing the Attorney-General’s argument that the death penalty was the most deterrent sentence, the Court emphasised that life imprisonment was an equal deterrent to the death penalty.⁵¹⁰ However, it took Parliament another two years to pass the Criminal Law Amendment Act⁵¹¹ whose objectives included ‘to make provision for the setting aside of all sentences of death in accordance with the law and their substitution by lawful punishments.’

Under section 1(1) of the Criminal Law Amendment Act,⁵¹² the Minister of Justice was obliged to ‘as soon as possible after the commencement of the Act, refer the case of every person who [had] been sentenced to death and [had] in respect of that sentence exhausted all the recognised legal procedures pertaining to appeal or review, or no longer [had] such

⁵⁰⁷ *S v Makwanyane* 1995.

⁵⁰⁸ *S v Makwanyane* 1995: 344.

⁵⁰⁹ *S v Makwanyane* 1995: 150.

⁵¹⁰ *S v Makwanyane* 1995: para 128.

⁵¹¹ Act 105 of 1997.

⁵¹² Act 105 of 1997.

procedures at his or her disposal, to the court in which the sentence of death was imposed.’ The court had to consist of the judge who had imposed the death sentence upon the prisoner and if that was not possible the Judge President of the court in question was required to designate any other judge of that court to deal with the matter.⁵¹³ The court was required to consider arguments and evidence from, or on behalf of, the prisoner before converting the sentence and based upon that evidence and arguments ‘advise the President, with full reasons ... of the need to set aside the sentence of death, of the appropriate sentence to be substituted in its place and if, applicable, of the date to which the sentence shall be antedated.’⁵¹⁴

The President was required to set aside the sentence of death and substitute it with the punishment advised by the court.⁵¹⁵ All appeals pending before the Supreme Court against the sentence of death were to be heard by the full bench of the division which would have heard the appeal had the Supreme Court directed such a division to hear the appeal.⁵¹⁶ The full bench was empowered to set aside the sentence of death and to substitute it with the appropriate sentence.⁵¹⁷ On the other hand, all appeals that had been partly heard or were pending before the Supreme Court of Appeal were to be disposed of by that court in terms of section 322(2) of the

⁵¹³ Section 2.

⁵¹⁴ Section 1(3).

⁵¹⁵ Section 1(4).

⁵¹⁶ Section 1(7).

⁵¹⁷ Section 1(9).

Criminal Procedure Act⁵¹⁸ with the powers to substitute death sentences for appropriate sentences.⁵¹⁹ Courts were required to antedate the sentence of imprisonment substituted with the one of death to a specified date which was not to be earlier than the date on which the sentence of death was imposed.⁵²⁰

Despite the existence of the legal framework for substituting death sentences with lawful sentences, the process of dealing with these cases made slow progress and eventually gave rise to another constitutional challenge in the case of *Sibiya and others v The Director of Public Prosecutions and others*.⁵²¹ The Constitutional Court lamented the fact that for the preceding 10 years, since the *Makwanyane* decision, all the death sentences had not yet been converted to other sentences. It thus ordered the Department of Justice, which was one of the respondents, to update it, within a stipulated time, on the measures it had taken to convert all the death sentences and in cases where such sentences had not been converted, to provide reasons thereto.⁵²² Table 1 below shows the number death sentences converted to life sentences in the light of the *Makwanyane* decision enabled by the above outlined provisions of the Criminal Law

⁵¹⁸ Act 51 of 1977. Section 322(2) provides that ‘upon appeal...against any sentence, the court of appeal may confirm the sentence or may delete or amend the sentence and impose such punishment as ought to have been imposed at the trial.’

⁵¹⁹ Section 1(10).

⁵²⁰ Section 1(11).

⁵²¹ *Sibiya and others v the Director of Public Prosecutions and others* 2006 (1) SACR 220 (CC).

⁵²² *Sibiya and others v Director of Public Prosecutions and others* 2006: para 64.

Amendment Act.⁵²³ The new sentences are also categorised according to the six different mechanisms for conversion.

Table 1: Death sentences converted to other sentences by different courts

Category	Same judge	Different judge	SCA to Court a quo	SCA	Full bench	SCA s 322
Nr. of prisoners on death row	123	108	49	68	64	6
Converted to life imprisonment	74	90	26	63	60	6
Converted to other terms of imprisonment	49	18	23	5	4	0
	%	%	%	%	%	%
Converted to life imprisonment	60.2	83.3	53.1	92.6	93.8	100.0
Converted to other terms of imprisonment	39.8	16.7	46.9	7.4	6.3	0.0

Table 1 illustrates that the majority of prisoners who had been sentenced to death had their sentences converted to life imprisonment (including those who were sentenced to more than one life sentence) and those who were not sentenced to life imprisonment were sentenced to prison terms ranging from 15 to 50 years. However, a prisoner whose sentence was reviewed by

⁵²³ As at 5 June 2005, 465 prisoners were on death row in South Africa. As of October 2005, 378 sentences had been converted to other sentences, seven prisoners had died and 80 prisoners were waiting for their sentences to be converted. The author relies on the statistics available as of October 2005 because attempts to get the statistics from the Constitutional Court on what sentences were imposed on the 80 prisoners who were waiting the conversion of the sentences were not successful. The statistics are based on the submissions of the Department of Justice to the Constitutional Court for the October 2005 judgment.

the same judge who had sentenced him to death or by the lower court at the order of the Supreme Court of Appeal, stood a better chance of being sentenced to another sentence other than life imprisonment compared to a prisoner whose sentence was reviewed by the other four mechanisms.

This raises a question that needs to be examined: what reasons did the courts consider to be relevant in converting most of the death sentences to life imprisonment? The author was unable to access the High Court decisions in this respect as they were not reported. However, those of the Supreme Court of Appeal were accessible and these were used to establish the factors the courts considered when they converted death sentences to life imprisonment. The following trends were noted in the cases reviewed: In all cases the Court reviewed the facts of the case, that is, the nature of the offence committed by the accused, the personal circumstances of the accused, for example whether he was capable of rehabilitation or not, the aggravating and the mitigating factors. When the aggravating factors outweighed the mitigating factors, which was generally the case, the death penalty was converted to life imprisonment.⁵²⁴ In the few cases where the

⁵²⁴ In *Khaba v S* [1999] JOL 5758(A) the Supreme Court of Appeal, before converting the appellant's death sentence to life imprisonment, held that '[i]t had been noted ... that the aggravating circumstances were such that only the maximum sentence [of life imprisonment] was appropriate.' See page 1 of 5758; in *Kruger and another v S* [1999] JOL 5341(A), the Court observed that '[i]n prior proceedings, mitigating and aggravating factors had been considered and Court had concluded that death penalty was the only appropriate sentence. For these reasons the Court considered that life imprisonment was an appropriate sentence.' See page 1 of 5341; see also *Mafumo and another v S* [1999] JOL 5342(A); *Mashego v S* [1999] JOL 5525(A); *Motshwedi v S* [1999] JOL 5511(A); *Ndungweni and another v S* [2001] JOL 7324(A); *Ngcobo v S* [1999] JOL 5731(A); *Nkala en 'n ander v S* [1999] JOL 5515(A); *Nortje v S* [1999] JOL 5756(A); *Pekeer v S* [1999] JOL 5528(A); *Rasmeni v S* [1999] JOL 5510(A); *Shabalala and another v S* [2000] JOL 7270(A); *Smith v S* [1999] JOL 5730(A); *Stotenkamp v S* [1999] JOL 5753(A); *Swartbooi v S* [1999] JOL 5509(A); *Van Der Merwe v S* [1999] JOL 5524 (A); *Walus and another v S* [2001] JOL 7629(A); in *Mhlongo v S* [2000] JOL 5891(A) the Court held that 'the facts and circumstances of the case warranted the imposition of the most extreme

death penalty was converted to a short prison term, like 16 years, the court held that the mitigating factors outweighed the aggravating factors. For example, in *Musingadi and others v S*, the Court held that the first appellant's death sentence had to be converted to 16-years imprisonment because the following mitigating factors existed: the appellant was relatively young (31 years old), he was a first offender, he had a wife and a child whom he supported, his level of education was low (Standard 5), and he had not played a leading role in the murder and robbery.⁵²⁵

In some cases the Court gave particular attention to the character of the accused. For example, in *Boy and another v S*, the sentence of death was converted to life imprisonment because the Court was of the view that the appellants 'were irretrievably beyond any possibility of rehabilitation.'⁵²⁶ In *December v S*, the Court justified the imposition of life sentence on the ground that 'the appellant's removal from society should be permanent and

sentence available to the courts. The substitute sentence now had to be likewise. The Court imposed life imprisonment. See page 1 of 5891; in *Naidoo v S* [1999] JOL 5340(A) the Court held that 'the offence was so heinous that this was a case in which the destruction of the appellant was imperatively called for. In view of this it follows that his removal from society should be permanent and accordingly the possibility of rehabilitation is not a relevant factor...[T]he proper sentence in this case would be one of life imprisonment.' Page 4 of 5340; in *Phaleng en andere v S* [1999] JOL 4629(A) the Court in, converting the appellant's sentence from death to life imprisonment held that its decision had been influenced by 'constitutional developments regarding the death penalty' see page 1 of 4629.

⁵²⁵ *Musingadi and others v S* [2004] 4 SA 274(SCA): para 52. However, in *Nogqala v S* [1999] JOL 5527(A), the Court held that even though the accused was young (30 years old), was a first offender, came from an impoverished background, and had the prospect of rehabilitation, his death sentence had to be converted to life imprisonment because of the callous nature of the murder he had committed. The Court held that in such a case of heinous murder (the murder of an elderly man in the most brutal of circumstances) the retribution and deterrence objectives of punishment outweighed the prospect of rehabilitation. See also *Plaatjies and another v S* [1999] JOL 4626(A) where the appellant's death sentence was converted to 30 years' imprisonment.

⁵²⁶ *Boy and another v S* [1999] JOL 5392(A): 1 of 5392.

that life imprisonment [was] the only fitting sentence.⁵²⁷ In *Mokoena v S*, the court converted the death penalty into life imprisonment because, in addition to the offence of which the appellant was found guilty, a particularly violent murder, the Court also ‘took into account the fact that the accused also had previous convictions.’⁵²⁸

One could argue that in cases where the Supreme Court of Appeal dismissed the appellants’ appeal against the sentence and ordered the lower courts to impose a ‘competent’ or ‘appropriate’ sentence, such courts had to ensure that the offenders were sentenced to the penalty that the Supreme Court of Appeal would have imposed had it not referred the matter to the lower court. This could explain why in such cases, as illustrated in Table 1 above, the majority of the death penalties were converted to life imprisonment and in cases where they were not converted to life imprisonment, lengthy prison terms were imposed. In *Malefane and others v S*, for example, the Supreme Court of Appeal after dismissing the appellants’ appeal against their conviction for murder, in substituting their death sentence to life imprisonment on the ground that the trial judge who would have been ordered to resentence them had died during the pending of the appeal, held that it imposed life imprisonment because that was the ‘sentence that the court *a quo* would have imposed’ for the purpose of rendering the accused ‘incapable of endangering law and order in the community ever again.’⁵²⁹

⁵²⁷ *December v S* [1999] JOL 5508(A): 3 of 5508.

⁵²⁸ *Mokoena v S* [1999] JOL 5396(A): 1 of 5396.

⁵²⁹ *Malefane and others v S* [1998] JOL 2431(A): 1 and 26 of 2431.

One also realises that, like the Supreme Court of Appeal, the full bench of the High Court also weighed the mitigating factors against the aggravating factors in determining the appropriate sentence that should be substituted with the death penalty. In *Lukhele v S*, the full bench of the Transvaal, before converting the appellant's sentence from death to life imprisonment, took into consideration the 'overwhelming' aggravating circumstances and said that it had 'little sympathy with the appellant' and sentenced him to life imprisonment which it understood to mean that the prisoner was to be 'detained in prison for as long as [the authorities] considered reasonable.'⁵³⁰

4.2.1.2.2 Life sentences not directly supervised by the Constitutional Court in the aftermath of the abolition of the death penalty but prior to the Criminal Law Amendment Act of 1998

After the abolition of the death penalty, courts that imposed life sentences considered different factors ranging from the nature of the offences and the character of the accused for the purpose of life imprisonment as a sentence. This was because the Criminal Procedure Act⁵³¹ gave courts wider discretion with regard to the imposition of life sentences. Section 283(1) of the Criminal Procedure Act provides that 'a person liable to a sentence of imprisonment for life or for any other period, may be sentenced to imprisonment for any shorter period...' However, section 283(2) puts a proviso to section 283(1) to the effect that 'the provision of subsection (1) shall not apply with reference to any offence for which a minimum penalty is prescribed in the law creating the offence or prescribing a penalty

⁵³⁰ *Lukhele v S* [2001] JOL 8647(T): 5 of 8647.

⁵³¹ Act 51 of 1977.

therefore.’ Before 1998 courts had wide discretion in deciding who was to be sentenced to life imprisonment. This explains why, when the minimum sentences legislation was introduced in 1998 directing courts to sentence persons convicted of specified scheduled offences to life imprisonment unless there were substantial and compelling circumstances for not doing so, some courts felt that their discretion to determine who was to be sentenced to life imprisonment, or not, had been eliminated.⁵³²

How did the courts exercise their discretion before 1998? In the first place, courts considered the offence that the accused had committed. If it was a serious offence, such as multiple murders, courts were more likely to sentence the accused to life imprisonment.⁵³³ In *Martin v S*, where the appellant was convicted of four counts of murder and two counts of attempted murder, the Supreme Court of Appeal held that life imprisonment ‘must be accountable to the reality that as equal increments are added to duration of sentence, there comes a point where the marginal value of a further increment tends to be less than that of every previous increment. A law of diminishing returns operates.’⁵³⁴ The Court cautioned that ‘the court must hesitantly exceed the optimum point for the sake of striving for more or for guaranteed effectiveness. So it is that in this case

⁵³² See for example *S v Dodo* 2001 (3) BCLR 279 (E): 292, where the judge was of the view that under section 51(1) of the Criminal Law Amendment Act, ‘an accused convicted of a serious charge before the High Court, unless the Court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence, faces a life sentence which was decided upon before the commencement of the trial, not by the Court itself, but by the Legislature...In my view, this is not a trial before an ordinary court. It is a trial before a court in which, at the imposition of the prescribed sentence, the robes are the robes of the judge, but the voice is the voice of the Legislature.’

⁵³³ See *Martin v S* [1998] JOL 268 (SCA).

⁵³⁴ *Martin v S* 1998: 13.

long imprisonment, but for less than a lifetime, may not be left out of consideration.⁵³⁵ The Court was also alive to the fact that one-size-fits - all life sentences may cause discrepancies between offenders and that before a life sentence was imposed, factors such as the age of the offender and his likely future contribution to society could not be ignored. The court held that:

An approach that life imprisonment is what is appropriate for a bad man committing a bad crime disregards that such a norm tends to create disparity. *Life sentence imposed upon a lively man of 30 imposes a much longer and harsher sentence than the nominally identical sentence when imposed on a man of 65 who has lost interest in everything around him. Little else but the established need to use detention as a means of preventing repetition of crime by the accused can justify ignoring such discrepancies. But there is also an aspect of cruelty to a life sentence ...the man who is incarcerated for life does not have a curtain drawn on awareness. There is no dividing date which ends his subjective suffering and renders him unaware of the past, or of the futility of the future. What he is subjected to is an unending punishment, day after day. It is life without future hope, coupled with a permanence of suffering. It is extremely unpleasant while it lasts – which is interminable.*⁵³⁶

From the above comment one observes that the Supreme Court of Appeal considered life imprisonment to be a sentence so severe that before its imposition the court had to weigh various factors. These factors, as mentioned earlier, included the heinous nature of the offence committed, the age of the accused,⁵³⁷ and most importantly all these factors must be balanced against the cruel nature of the sentence of life imprisonment – a

⁵³⁵ *Martin v S* 1998: 14.

⁵³⁶ *Martin v S* 1998: 14. (Emphasis in original).

⁵³⁷ In *S v M* 1994 (2) SACR 24 (A) the appellant had been sentenced to death for the rape of an 8- month old baby leading to her death. On appeal, the court substituted his death sentence to life imprisonment on the grounds that though the offence was callous, the accused was of young age (20 years old) and committed the offence under the influence of alcohol.

sentence by which the offender was being punished in ‘an unending’ manner ‘day after day’ which was also ‘coupled with a permanence of suffering.’ This meant that courts had wider discretion to determine whether, irrespective of the heinous nature of the offence committed, the circumstances, not only of the accused, but also of justice, required the imposition of such a severe sentence. Thus in *S v Matolo en ‘n ander* the High Court, before sentencing the accused to life imprisonment for the offence of murder, made it clear that ‘it had a very wide discretion with regard to the passing of sentence’ but that discretion had ‘to be exercised in a legal or judicial manner at all times.’⁵³⁸ The Court considered life imprisonment to be the ‘appropriate sentence’, and it gave ‘particular attention’ to the following factors: ‘(i) the seriousness of the crime; (ii) the personal circumstances of the accused; and (iii) the interests of the community at large.’⁵³⁹

One could conclude that courts considered the following variables or a combination thereof in deciding whether to impose life imprisonment or not: the seriousness or otherwise of the offence; the need to protect the community from the accused;⁵⁴⁰ the fact that life imprisonment would achieve the objectives of punishment such as retribution, deterrence and

⁵³⁸ *S v Matolo en ‘n ander* [1997] 4 All SA 225 (0): 225-226.

⁵³⁹ *S v Matolo en ‘n ander* 1997: 226. In *S v Stonga* 1997 (2) SACR 497 (O) where the appellant was found guilty for the rape and murder of an 8-year old girl in a gruesome manner, that is, he choked her until she was lifeless, raped her and dumped her, head first, in a toilet. The court in sentencing him to life imprisonment held that although the appellant was young (aged 25 years old), cooperated with the prosecution and had shown remorse after his conviction, his personal characteristics had to be ‘subordinated to the interests of society’ and the latter required that he had to be effectively and permanently removed from society and that to achieve that life imprisonment was the only available sentence. At 498.

⁵⁴⁰ *S v Ngcongco and another* 1996 (1) SACR 557 (N).

protection of the society;⁵⁴¹ the extent to which the crime the accused committed was prevalent in society in that, where the offence was serious and prevalent the accused was more likely to be sentenced to life imprisonment;⁵⁴² the conduct of the accused in committing the offence and ‘whether the conduct of an accused in, during and preceding the commission of the offence was of so grave and repulsive a nature, that the community has to be protected against the onslaughts of such an unscrupulous aggressor by his removal from society for the rest of his life.’⁵⁴³

In some cases, even if the accused committed offences such as murder and robberies and was vengeful, courts avoided sentencing them to life imprisonment or ‘extremely long sentences’ such as 60 years imprisonment because of the ‘law of diminishing returns.’⁵⁴⁴ In *S v De Kock* the court sentenced the accused to life imprisonment because, amongst other grounds, he was not susceptible to rehabilitation.⁵⁴⁵ Life imprisonment was also imposed in cases that were so serious that demanded the imposition of the ‘heaviest sentence permissible’ and these were cases where, for example, the accused played a leading role in the commission of a heinous offence, and there were no mitigating factors for the court to impose a

⁵⁴¹ *S v Ngcongco and another* 1996.

⁵⁴² *S v Matolo en ‘n ander* 1998 (1) SACR 206 (O) 208.

⁵⁴³ *S v Matolo en ‘n ander* 1998.

⁵⁴⁴ *S v Naryan* [1998] JOL 4132 (W) : 47. Where the accused was sentenced to 27 years for various offences which included murder, car robberies and unlawful possession of a firearm and ammunition.

⁵⁴⁵ *S v De Kock* 1997 (2) SACR 171 (T).

lesser sentence.⁵⁴⁶ In the same vein, life imprisonment was avoided if the imposition of a lesser sentence would accord with the ‘notions of fairness and equity.’⁵⁴⁷

Another important factor that influenced sentencing in the aftermath of the abolition of the death penalty was the manner in which some courts imposed excessively long prison terms on the offenders to prevent them from being considered for parole on the basis that, because of the callous nature of the offences they had committed, they would have been sentenced to death had it not been declared unconstitutional. Put differently, courts were aware that if they sentenced offenders to life imprisonment, they would be considered for parole after serving a certain number of years in prison. In an effort to prevent their release, courts imposed sentences that were longer than actual life sentences.⁵⁴⁸ In reacting to this sentencing trend, the High Court observed in *S v Smith*, where the accused was found guilty of murdering his employer, his employer’s wife and daughter, that it was ‘inappropriate, when considering a proper sentence, to take into account that the death penalty would be the appropriate sentence if it had

⁵⁴⁶ *S v Magoro and others* 1996 (2) SACR 359 (A) at 365. Where the accused were found guilty of burning to death an old woman whom they suspected to be a witch, one was sentenced to life imprisonment because he had played a leading role in the murder. In *S v Van Wyk* 1997 (1) SACR 345 (T) where the accused, aged 21-years old, was found guilty of committing various murders and sentenced to life imprisonment, the court in justifying the imposition of the sentence, placed emphasis on the heinous nature of the offences committed and the fact that ‘the appellant had not shown any real remorse, particularly in respect of the murders.’ See page 347.

⁵⁴⁷ *S v Magoro and others* 1996: 365.

⁵⁴⁸ For example, in *Mhlakaza and others v S* [1997] 2 All SA 185(A) the accused were convicted of a number of offences including the murder of a police officer. The first accused was sentenced to an ‘effective’ sentence of 47 years’ imprisonment and the second to 38 years’ imprisonment. The reason the court gave for the sentences was that they would serve as deterrent to potential criminals.

been available as a sentencing option’ and the court added that it was ‘similarly inappropriate for the court to impose lengthy, non-concurrent periods of imprisonment in an attempt to eliminate any possibilities of parole.’⁵⁴⁹

4.2.1.3 Life imprisonment in the minimum sentences legislation era (imposed by High Courts) 1998-2007

The Criminal Law Amendment Act,⁵⁵⁰ or the minimum sentences legislation (MSL), as it became popularly known, has been a subject of various studies and reports.⁵⁵¹ It requires courts to sentence an offender convicted of the offence of murder or rape under Part 1 of Schedule 2 to life imprisonment unless there are substantial and compelling circumstances.⁵⁵² Its drafting history and impact on the prison population in general are beyond the scope of this discussion. It was meant to be short-lived as a ‘response to a situation which was hoped would not persist indefinitely’ but that the ‘situation does and remains notorious.’⁵⁵³ The situation was and still is the ‘alarming burgeoning in the commission of the crimes of the kind specified [in the MSL] resulting in the government, the

⁵⁴⁹ *S v Smith* 1996 (1) SACR 250: 251.

⁵⁵⁰ Act 105 of 1997.

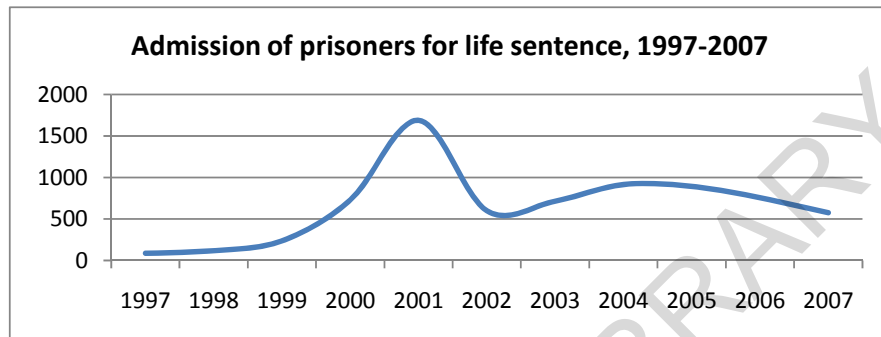
⁵⁵¹ See for example O’Donovan and Redpath 2006. Giffard and Muntingh 2006.

⁵⁵² For the offences under Part 1 of Schedule 2 to the Criminal Law Amendment Act, see Appendix 1.

⁵⁵³ *S v Malgas* 2001 (2) SA 1222 (SCA): para 7. Under section 53(1) of the Criminal Law Amendment Act, the Act was to cease to be law after two years but the President has the powers to extend its operation. Since its coming into force on 19 December 1997, the applicability of the Act has been annually renewed and in December 2007 the Act was amended to amongst other things give jurisdiction to regional courts to impose life sentences (this aspect is discussed in detail below). Also, the requirement of biannual extension has been removed, so that the MSL now assumes a permanent place on the statute book.

police, prosecutors and the courts constantly being exhorted to use their best efforts to stem the tide of criminality which threatened and continues to threaten to engulf society.⁵⁵⁴

Chart 2⁵⁵⁵: Admission of prisoners for life sentence, 1997 - 2007



The impact the MSL has had on the number of prisoners sentenced to life sentences is evident in Chart 2 above. Since the coming into force of the MSL in 1998, the number of prisoners serving life sentences has increased dramatically. The skyrocketing in the numbers of prisoners admitted to life imprisonment between 2000 and 2001 is attributable to the fact that it was during that period that the majority of death sentences were commuted to life imprisonment. As mentioned earlier, by end of December 2008, 8764 prisoners were serving life sentences. The wide discretion that courts had before the coming into force of the MSL was affected. The Supreme Court

⁵⁵⁴ *S v Malgas* 2001: para 7.

⁵⁵⁵ Statistics acquired from the Judicial Inspectorate of Prisons, Cape Town (2006). For the exact number of prisoners serving life sentences in each year between 1996 and 2007 see Judicial Inspectorate of Prisons, *Annual Report for the period 1 April 2007 to 31 March 2008* (2008) at 23 at <http://judicialinsp.pwv.gov.za/Annualreports/Annual%20Report%202007-2008.pdf> (accessed 30 November 2008).

of Appeal acknowledges this fact and explains why this is the case in the following terms:

It was, of course, open to the High Courts even prior to the enactment of the [minimum sentences] legislation to impose life imprisonment in the free exercise of their discretion. The very fact that [the MSL was]...enacted indicate[d] that Parliament was not content with that and that it was no longer to be “business as usual” when sentencing for the commission of the specified crimes.⁵⁵⁶

The coming into force of the MSL meant that courts did not have their hitherto wide discretion of imposing life sentences when they deemed it suitable. Put differently, the MSL ensured that ‘court was not to be given a clean slate on which to inscribe whatever sentence it thought fit.’⁵⁵⁷ The law requires courts to approach sentencing in respect of some of the scheduled offences with the mindset that life imprisonment should be the starting point upon conviction unless there are ‘substantial and compelling’ circumstances to justify the imposition of a lesser sentence.

Before proceeding to discuss the various ways in which the MSL-era substantially transformed the institution of life imprisonment in South Africa, it should also be noted that since 1993 South Africa passed a range of laws the violation of which empowers courts to sentence the offender to life imprisonment. These laws are discussed in detail in Chapter V⁵⁵⁸ and they include: the Non-Proliferation of Weapons of Mass Destruction Act

⁵⁵⁶ *S v Malgas* 2001: para 7.

⁵⁵⁷ *S v Malaga* 2001: para 8.

⁵⁵⁸ Chapter V, 5.2.1.

(1993);⁵⁵⁹ the Defence Act (2002);⁵⁶⁰ the Nuclear Energy Act (1999);⁵⁶¹ the Implementation of the Rome Statute of the International Criminal Court Act (2002);⁵⁶² the Protection of Constitutional Democracy against Terrorist and Related Activities Act (2004);⁵⁶³ the Preventing and Combating of Corrupt Activities Act (2004);⁵⁶⁴ and the Prevention of Organised Crimes Act (1998).⁵⁶⁵ However, as at the time of writing, February 2009, there has been no known case in which an offender has been sentenced to life imprisonment other than in cases of murder and rape. One could argue that whereas under all the aforementioned pieces of legislation a court could sentence an offender to life imprisonment, in practice it is the MSL which has been enforced.

4.2.1.4 The constitutional challenge to the MSL

South African case law attests to the fact that as early as 1943 some accused, or to be correct, the accused generally, have challenged the provisions of minimum sentencing legislation. Their arguments have, among other things, been that minimum sentences interfere with the judiciary's powers to exercise its discretion when it comes to sentencing.⁵⁶⁶

⁵⁵⁹ Act 87 of 1993, section 26(1)(k)(v).

⁵⁶⁰ Act 42 of 2002, section 24(3).

⁵⁶¹ Act 46 of 1999, section 56(2)(d).

⁵⁶² Act 27 of 2002, section 4(i).

⁵⁶³ Act 33 of 2004, section 18(1)(a).

⁵⁶⁴ Act 12 of 2004, section 26(1)(a).

⁵⁶⁵ Act 121 of 1998, section 3.

⁵⁶⁶ See *Rex v Beyers* [1943] AD 404 in which the accused unsuccessfully challenged the reasonableness of his conviction and sentence under the regulations that imposed a minimum sentence of five years on a person found in possession of unauthorized

The 2001 case of *S v Dodo*⁵⁶⁷ challenged the imposition of life sentence as a minimum and also maximum sentence in cases where the accused has been found guilty of one or more of the scheduled offences in circumstances that do not allow the court to impose a lesser sentence. In *Dodo* the issue was whether section 51(1) of the Criminal Law Amendment Act,⁵⁶⁸ which allows a judge to sentence an accused, found guilty of one or more scheduled offences, to life imprisonment unless there are substantial and compelling circumstances, was unconstitutional. It was alleged to violate the right of everyone to be tried by an ordinary court and also to be inconsistent with the separation of powers principle. The Constitutional Court held that '[t]he construction of the phrase 'substantial and compelling circumstances' in section 51(3)(a) goes to the heart of these issues. The existence of these circumstances permit the imposition of a lesser sentence than the one prescribed. Establishing their true meaning has proved to be intractably difficult and has led to a series of widely divergent constructions in the High Courts.'⁵⁶⁹

This ambiguity was settled by the Supreme Court of Appeal in *S v Malgas* (discussed below). The Court held that courts still have a limited discretion whether to impose a life sentence or not and that such a discretion depended on whether or not substantial and compelling circumstances exist

explosives, the Court (Appellant Division) held that '...it cannot be regarded as unreasonable in existing circumstances to make a regulation imposing a minimum penalty for the possession of unauthorised explosives under a power to provide "for the defence of the Union, the safety of the public, the maintenance of public order and the effective prosecution of the war".' See page 410.

⁵⁶⁷ *S v Dodo* 2001 (1) SACR 594 (CC).

⁵⁶⁸ Act 105 of 1997.

⁵⁶⁹ *S v Dodo* 2001: para 10.(CC).

and that in view of this consideration the MSL was not unconstitutional. On the question of separation of powers, the Constitutional Court held that even though the Constitution recognises this principle, it does not envisage a strict separation of powers but rather one in which one arm of government, through checks and balances, would check but not cripple the functions and powers of the other and that South Africa will develop its own understanding of separation of powers principles in due course.⁵⁷⁰ The MSL therefore remained on the statute books through the periodical renewals by Parliament.

4.2.1.5 Life imprisonment after December 2007 and beyond

The 1997 MSL provided, *inter alia*, that if the Regional Court found the accused guilty of an offence that required the imposition of a life sentence, it was to commit the accused to the High Court for sentencing.⁵⁷¹ But if the High Court thought that the accused had been incorrectly convicted, it was empowered to re-try the accused and establish his guilt or innocence and impose the relevant sentence where applicable.⁵⁷² This meant that the accused had to adduce evidence and the witnesses had to be summoned again to testify against the accused. This process had its obvious problems.

⁵⁷⁰ *S v Dodo* 2001: paras 15-33. (CC).

⁵⁷¹ Section 52(1). It was held in *Direkteur van Openbare Vervolgings, Transvaal v Makwetsja* 2004 (2) SACR 1(T) that regional courts did not have the discretion to determine whether the offence with respect to which the accused was found guilty justified the imposition of life imprisonment when such an offence was one listed under Part I of Schedule 2 or whether substantial and compelling circumstances existed. If the accused pleaded guilty or was found to have committed the offence under Part I of Schedule 2, the regional court was supposed to commit the accused to the High Court for sentencing.

⁵⁷² Section 52(2) - (3).

First of all, it created a backlog of cases in the High Courts⁵⁷³ and secondly, and most importantly, witnesses had to repeat evidence given in the Regional Court. This was especially traumatising for rape victims. It was observed in *S v Gqamana* where the High Court before sentencing the accused for the rape of a minor had to call the rape victim and her mother to give the same evidence they had adduced before the Regional Court that:

It is, incidentally, an unfortunate consequence of this legislation that, as happened in this case, it will often be necessary to put the complainant in a rape case yet again through the unpleasant experience of having to go into the witness box and re-live the trauma of the crime by testifying on matters which are relevant to sentence. Sometimes ... the complainant will have to travel a long way in order to do so. However, this is an inevitable result of the apparent determination of the legislature to achieve a situation where a man is to be convicted in one court and sentenced in another. The latter court cannot reasonably be expected, without having been steeped in the atmosphere of the trial, to decide whether or not to pass a sentence of imprisonment for life on a man without making some attempt to immerse itself in that atmosphere. No doubt that was an unintended consequence which did not occur to Parliament when it passed the Act.⁵⁷⁴

Other criticisms were also levelled against the legislation by some courts, holding that it violated the accused's right to a fair trial. This was because the accused was subjected to 'a two-stage-trial' when he appeared before the High Court for the sentencing hearing after his trial before the Regional Court. The High Court also held that the MSL violated the accused's right to be tried within a reasonable time because of the delays that took place between the time when the accused was convicted by the Regional Court and when sentenced by the High Court.⁵⁷⁵ After realising the shortcomings

⁵⁷³ See O'Donovan and Redpath 2006.

⁵⁷⁴ *S v Gqamana* 2001 (2) SACR 28 (C): 33-34.

⁵⁷⁵ See *S v Dzukuda*; *S v Tilly*; *S v Tshilo* 2000 (2) SACR 51 (W).

of the MSL, Parliament embarked on a process of amending it. The Criminal Law (Sentencing) Amendment Bill was introduced in 2007.⁵⁷⁶ It was passed into law later that year and became the Criminal Law (Amendment) Act.⁵⁷⁷

The amendment introduced four fundamental changes with regard to life imprisonment. The first was that it extended the jurisdiction of the Regional Courts to empower them to impose a sentence of life imprisonment.⁵⁷⁸ The aims of increasing the jurisdiction of the Regional Courts, according to the *Memorandum on the Objects of the Criminal Law (Sentencing) Amendment Bill*, were ‘...to expedite the finalisation of serious criminal cases, punish offenders of certain serious offences appropriately, and to avoid secondary victimisation of complainants, which, *inter alia*, happens when vulnerable witnesses have to repeat their testimony in more than one court’⁵⁷⁹ and endure cross examination.

The second major amendment relates to the applicability of the minimum sentences to juvenile offenders. Section 51(1) and (2) provides that ‘any person’ who commits one or more of the scheduled offences shall be sentenced, where applicable, to life imprisonment unless there are substantial or compelling circumstances. Section 51(6) provides that section 51(1) and (2) do ‘not apply in respect of an accused person who

⁵⁷⁶ Criminal Law (Sentencing) Amendment Bill (B 15 – 2007).

⁵⁷⁷ Act 38 of 2007 (came into force 31 December 2007).

⁵⁷⁸ Section 51 (1)(a-b).

⁵⁷⁹ See para 2.1.

was under the age of 16 years at the time of the commission of an offence...’ This means that as from the date the Amendment Act came into force, children above the age of 16 years, that is, for example, 16 years and one day old, who commit the offences under section 51 have to be sentenced to the prescribed minimum sentences, including life imprisonment, unless there are substantial and compelling circumstances. The amendment is inherently flawed because it is an affront on the children’s rights and it was challenged in the Transvaal High Court Division on, *inter alia*, the following grounds: ‘that subjecting children to ...life imprisonment, is in breach of children’s constitutional rights and in breach of South Africa’s international law obligations.’⁵⁸⁰ In agreeing with the applicant, Potterill AJ of the Transvaal High Court held that the impugned provision violated section 28 of the South African Constitution (which requires that a child should only be detained as a measure of last resort and for the shortest time possible) because it effectively eliminated the ‘clean slate approach’ which is fundamental in sentencing children in conflict with the law. In Potterill AJ’s words:

...with a clean slate approach the Court has many sentencing options to consider, although imprisonment is conceivable it is an option of last resort, but with the Amended Act the Court must start with the minimum sentence of life imprisonment ... as an option of first resort and then look to compelling and substantial circumstances and proportionality. The result will not always be the same and it is not purely academic. The Amended Act must adhere to the principles enshrined in the Constitution...⁵⁸¹

⁵⁸⁰ See Founding Affidavit in *Centre for Child Law v Minister of Justice and Constitutional Development and others* paragraph 8. See also paragraph 35 of the Affidavit for the detailed arguments relating to the impugned provisions and why they violate the Constitution and international law. On file with the author.

⁵⁸¹ *Centre for Child Law v Minister of Justice and Constitutional Development and others* (Case No. 11214/08, judgment of 4 November 2008): para 20.

The third significant change was that of an automatic right to appeal in cases where a person is sentenced by a Regional Court to life imprisonment.⁵⁸² The fourth regards the manner in which courts interpret substantial and compelling circumstances in cases of rape. The discussion above illustrated that some courts have held that the fact that a victim of rape had not sustained serious physical injuries or psychological effects amounted to substantial and compelling circumstance to justify the imposition of a lesser sentence. The amendment expressly provides, *inter alia*, that when imposing a sentence in respect of the offence of rape ‘any apparent lack of physical injury to the complainant’ shall not constitute a substantial and compelling circumstance.⁵⁸³ One needs to ask whether these amendments will address some of the inherent problems associated with the implementation of the MSL, such as the case delays and backlogs in courts and the unlikely possibility that minimum sentences will reduce the violent crime rate in South Africa.⁵⁸⁴ One would also need to investigate the likely effect of the amendments on the size of the South Africa prison population. It is more likely that the number of prisoners sentenced to life imprisonment will increase further when Regional Courts also impose life sentences. In this scenario the quality of legal representation of persons facing life imprisonment becomes critical. The

⁵⁸² Section 6 (ii).

⁵⁸³ Section 51(3)(a A)(ii). The amendment also provides that that courts should not consider the following as substantial and compelling circumstances in cases of rape: (i) the complainant’s previous sexual history; (iii) an accused person’s cultural or religious beliefs about rape; or (iv) any relationship between the accused person and the complainant prior to the offence being committed.

⁵⁸⁴ For a detailed discussion of the problems associated with the minimum sentence legislation see O’Donovan and Redpath 2006.

question of legal representation, especially legal aid, to persons charged with offences that attract life imprisonment is examined in Chapter V.⁵⁸⁵

4.2.2 Mauritius

As indicated above,⁵⁸⁶ in many jurisdictions in Africa life imprisonment is probably the most confusing sentence, primarily because, as the House of Lords observed, ‘the words, which the judge is required to pronounce, do not mean what they say.’⁵⁸⁷ Many of us should be forgiven if we thought that life imprisonment meant that a person would be imprisoned for the remainder of his life. Put differently, the sentence of life imprisonment, like any other criminal penalty, should be understood literally. However, as discussed above, legislation in many African countries points in the opposite direction. As illustrated above, in Uganda, Swaziland, and Sudan, for example, a person sentenced to life imprisonment is required to serve a maximum of 20 years.⁵⁸⁸ In South Africa, an offender sentenced to life imprisonment is expected to be considered for parole after serving 25 years,⁵⁸⁹ and in Botswana a prisoner sentenced to life imprisonment is expected to serve at least seven years before being considered for parole.⁵⁹⁰ However, as shown earlier, there are countries, such as, Kenya, Ghana,

⁵⁸⁵ Chapter V, 5.5.

⁵⁸⁶ See 4.1 (above).

⁵⁸⁷ *R v Secretary of State for the Home Department, Ex parte Doody* 1994: 549H-550B, as quoted in van Zyl Smit 2002: 2-3.

⁵⁸⁸ See 4.1 (above).

⁵⁸⁹ Section 73(6)(b)(iv) of the Correctional Services Act, Act 111 of 1998. See generally Terblanche 2007: 234 – 235.

⁵⁹⁰ Section 85(c) of the Prisons Act, 1980.

Tanzania and Zimbabwe, where life imprisonment is given its literal meaning.⁵⁹¹ In these countries people sentenced to life imprisonment are aware from the first day of their sentence that they will spend the rest of their life behind bars unless pardoned by the State President. The judge who imposes the life sentence knows that it means life imprisonment. Members of the public also know, or are presumed to know, that life imprisonment does not have any other meaning.

Unlike in the two categories above (where offenders sentenced to life imprisonment either know that they will serve a certain number of years before their release or that they can only be released by the State President), in Mauritius, before 9 July 2008,⁵⁹² there were two types of life imprisonment (known as penal servitude for life). The first was where persons sentenced to penal servitude for life were to spend the rest of their lives in prison unless pardoned by the President. These were offenders sentenced under the Criminal Code for the offences of murder and infanticide,⁵⁹³ inciting officers to mutiny,⁵⁹⁴ taking command of the armed forces,⁵⁹⁵ and manslaughter.⁵⁹⁶ The second, which still applies, is where the courts have the discretion to determine what penal servitude for life should mean. In this case it could mean anything between 3 (three) and 60 (sixty)

⁵⁹¹ See 4.1 (above).

⁵⁹² On the 9 July 2008 the Privy Council held in *De Boucherville v The State of Mauritius* [2008] UKPC 37 that a mandatory sentence of life imprisonment without the possibility of release was arbitrary, disproportionate, and unconstitutional for violating the right to a fair trial under section 10 of the Mauritius Constitution.

⁵⁹³ Section 222(1) of the Criminal Code, RL 2/59, 1982.

⁵⁹⁴ Section 61 of the Criminal Code.

⁵⁹⁵ Section 64 of the Criminal Code.

⁵⁹⁶ Section 223(1) of the Criminal Code.

years.⁵⁹⁷ It is noteworthy that all offenders, apart from those found guilty of manslaughter, who were sentenced to penal servitude for life before 2007, are allowed to apply to the Supreme Court for their sentences to be reviewed.⁵⁹⁸ This means that different legal regimes apply to people sentenced to what appears to be the same sentence (penal servitude for life), and at the same time the supposedly same sentence could mean something different depending on the circumstances at the time of its imposition. However, before 2006 offenders who were serving penal servitude for life were being released after 20 years imprisonment. But in 2006 the Supreme Court held that a penal servitude for life should mean that the prisoner should spend the rest of his life in prison.

The Supreme Court's ruling in this regard was overturned by the Privy Council in *De Boucherville v The State of Mauritius*⁵⁹⁹ in which it was held that a mandatory sentence of penal servitude for life where a prisoner was to spend the rest of his life in prison was arbitrary and disproportionate, and thus unconstitutional for violating the offender's right to a fair hearing under section 10 of the Constitution. However, the Privy Council declined to rule whether penal servitude for life without the possibility of release also violated the right not to be subjected to inhumane punishment under section 7 of the Constitution.⁶⁰⁰ This section looks at the developments that

⁵⁹⁷ Section 150A of the Criminal Procedure (Amendment) Act 2007.

⁵⁹⁸ Section 5 of the Criminal Procedure (Amendment) Act 2007. See also *De Boucherville v The State of Mauritius* 2008: para 6.

⁵⁹⁹ *De Boucherville v The State of Mauritius* 2008.

⁶⁰⁰ The Supreme Court of Mauritius held that the Privy Council 'considered it unnecessary, in the circumstances, to decide whether there might have been a violation of section 7 of the Constitution... We also understand that the Judicial Committee, before which the effect of sect.75 of our constitution was not fully explored, refrained from deciding whether a

surrounded the abolition of the death penalty and how the abolition of the death penalty affected the sentence of life imprisonment, the change of penal servitude for life from 20 years to ‘penal servitude proper’, and later to the Privy Council’s ruling that penal servitude for life where the prisoner was to spend the rest of his life in prison was unconstitutional.

Although the Privy Council came to the correct conclusion, it is regrettable that it did not hold that penal servitude for life, where the offender is to spend the rest of his life in prison, amounted to inhumane punishment. It is also lamentable that the Privy Council did not mention, even in passing, Mauritius’ international obligations under the African Charter on Human and Peoples’ Rights⁶⁰¹ and under the International Covenant on Civil and Political Rights⁶⁰² to substantiate its finding that a mandatory sentence of penal servitude for life, where the prisoner could not be released, violated the right to a fair trial. Drawing on the jurisprudence of other African

sentence of penal servitude for life in Mauritius would amount to degrading and inhuman treatment within the meaning of section 7 of the Constitution.’ *De Boucherville Roger FP v The State of Mauritius* 2009 SCJ 5, 8. While referring to the European Court of Human Rights decision in *Kafkaris v Cyprus* 2008, in which the Court held that life imprisonment in Cyprus where the offender had the possibility of being released however slim that possibility was not inhuman and degrading treatment within the meaning of Article 3 of the European Convention on Human Rights, the Supreme Court of Mauritius held that ‘[w]e understand that the applicant ... did apply on several occasions to the Commission on the Prerogative of Mercy pursuant to section 75 of the Constitution to review his sentence albeit without success. [The Court then mentions one case in which an offender applied to the Commission on the Prerogative of Mercy and his death sentence was commuted to 20 years’ sentence] ... Our system has also the singular advantage that any convicted person may, on his own initiative, petition the Commission to exercise its prerogative of mercy. The petition may be presented at any time and there does not appear to be any limitations as to the number of times it can be presented. We believe that on the reasoning adopted by the European Court in **Kafkaris**, section 75 of our Constitution would be amply sufficient to ensure that a sentence of penal servitude for life in Mauritius is not an irreducible life sentence with no possibility of early release and would thus not amount to inhuman or degrading treatment or punishment in breach of section 7 of the Constitution.’ See *De Boucherville Roger FP v The State of Mauritius* 2009: 7 – 8. (Emphasis in original).

⁶⁰¹ Which Mauritius ratified on 19 June 1992. Article 7 of the African Charter protects the right to a fair trial.

⁶⁰² Which Mauritius acceded to on 12 December 1973. Article 14 of the ICCPR protects the right to a fair trial.

countries such as South Africa and Namibia, the author argues that there is evidence that imprisonment without a real prospect of release is a cruel, degrading and inhumane punishment.

Mauritian courts are also given jurisdiction, in lieu of penal servitude for life for offences under the Criminal Code, to impose sentences of up to 60 years of imprisonment where there are substantial and compelling circumstances to do so. As the discussion in Chapter V shows, there is only one known case where the Supreme Court has invoked substantial and compelling circumstances to impose a lesser sentence. It is argued that the requirement that a court must impose a penal servitude for life unless there are substantial and compelling circumstances raises two issues which are resolved by drawing on the experience of South African jurisprudence. The first issue relates to the constitutionality of such lengthy sentences. The second issue relates to the likely challenges that courts will encounter in their attempt to define what amounts to substantial and compelling circumstances.⁶⁰³

4.2.2.1 The abolition of the death penalty and its impact on life imprisonment

One could argue that the abolition of the death penalty is the main reason why penal servitude for life has attracted overwhelming attention in Mauritius. Before 1995 when the death penalty was abolished an offender sentenced to penal servitude for life was required to spend the rest of his life in prison, at least theoretically. This is because, whereas the penalty of

⁶⁰³ Sections 61, 64, 222, and 223 of the Criminal Procedure Act as amended by section 3 of the Criminal Procedure (Amendment) Act 2007.

penal servitude for life was provided for under the law, sections 50 to 52 of the Reform Institutions Act⁶⁰⁴ and the regulations accompanying it⁶⁰⁵ were silent on the remission of the sentence of penal servitude for life.⁶⁰⁶ This could be interpreted to mean that the legislature thought that a sentence of penal servitude for life meant that the prisoner was to spend the rest of his life in prison unless pardoned by the President. However, the practice was different. When prisoners were admitted to prison to serve a sentence of penal servitude for life, the prison authorities notified them of their ‘E.D.R’, that is, ‘Earliest Date of Release’, as being after serving 30 years imprisonment, as shown in Table 2 below.

Table 2: Offenders sentenced to penal servitude for life in Mauritius 1986 - 2005⁶⁰⁷

Year	Number of offenders	Earliest date of release
1986	3	2016
1988	2	2018
1993	2	2023
1995	3	2025
1996	3	2026
1997	2	2027
1998	8	2028
1999	4	2029
2000	2	2030
2002	1	2032

⁶⁰⁴ Reform Institutions Act 1988.

⁶⁰⁵ Regulations made by the Minister under section 66 of the Reform Institutions Act 1988, Government Notice No. 19 of 1989.

⁶⁰⁶ See *De Boucherville v The State of Mauritius* 2008: para 23.

⁶⁰⁷ Statistics acquired from the Prisons Headquarters, June 2008 (original on file with the author). The author was unable to ascertain whether there were any prisoners sentenced to penal servitude for life between 2006 and early 2008 when the statistics were acquired.

2003	1	2033
2004	2	2034
2005	4	2035

Table 2 illustrates that by 2005 there were 37 offenders serving penal servitude for life in Mauritius.⁶⁰⁸ The table also demonstrates that when the death penalty was still lawful very few offenders were being sentenced to penal servitude for life. This is evidenced by the fact that in the last three years preceding the abolition of the death penalty in Mauritius, only seven offenders were sentenced to penal servitude for life. On the other hand, in the first seven years subsequent to the abolition of the death penalty, 21 offenders were sentenced to penal servitude for life. However, caution should be exercised here, because during this period all the death penalties were converted to penal servitude for life. However, what is clear, is that since the abolition of the death penalty the total number of offenders sentenced to penal servitude for life has increased. This is attributable to the fact that life imprisonment is now the severest sentence that a court may impose.

It is also important to note that before 2007, every prisoner admitted to prison to serve a sentence of penal servitude for life was notified that his or her earliest date of release would be after serving 30 years' imprisonment. This explains the existence of the last column in Table 1. However, in practice prisoners were released after serving 20 years. Another important feature to note about prisoners serving penal servitude for life in Mauritius

⁶⁰⁸ 13 were Indians; 2 Ugandans; 1 Taiwanese; 1 Congolese (DRC); 1 Malagasy; 1 Kenyan; and the rest were Mauritian nationals. Three prisoners had been transferred to serve their sentences in their countries of nationality (2 to Tanzania and 1 to Holland).

is the manner in which they are categorised, which ultimately determines their dangerousness, which is used as a yardstick to assess whether they should be considered for early release or not. Of the 37 prisoners in Table 1, 22 were categorised as A prisoners, six as B and 9 as C on the security scale, where A represented the most dangerous category of prisoners who should not be released even if their time for release had come.

As mentioned earlier, even though the law did not provide for the release of prisoners serving penal servitude for life and, also, the prison records indicated that such prisoners' earliest date of release was after they had served 30 years of imprisonment, in practice the position was different. Prisoners sentenced to penal servitude for life were being released after 20 years. This is evidenced by the Supreme Court ruling in *Dwarkamathsing Jeetun v the Commissioner of Police and others in the presence of the Attorney General*,⁶⁰⁹ in which the applicant, Mr. Jeetun, who had been sentenced to penal servitude for life, applied successfully to the Court to order his release after serving 20 years. His application was not opposed by the respondents, one of whom was the Commissioner of Prisons. In *State of Mauritius v Jeetun*⁶¹⁰ the government, following the Supreme Court's decision in *De Boucherville v Commissioner of Prisons and others*⁶¹¹, in which it was held that penal servitude for life should be given its literal meaning (this case is discussed in detail later), argued that Mr. Jeetun

⁶⁰⁹ *Dwarkamathsing Jeetun v The Commissioner of Police and others in the presence of the Attorney-General* SCR/263/02, cited in *State of Mauritius v Jeetun* [2006] Mauritius Reports 140,142.

⁶¹⁰ *State of Mauritius v Jeetun* 2006: 140

⁶¹¹ *De Boucherville v Commissioner of Prisons and others* [2006] Mauritius Reports 20.

should be re-arrested so that he spend the rest of his life in prison. In dismissing the government's application, the Supreme Court held that the principles of 'finality in legal proceedings and of the non-deprivation of the benefit of the judgment which a litigant had lawfully obtained'⁶¹² prevented it from ordering the re-arrest of Mr. Jeetun. Most importantly, the Court also noted that every prisoner who had been sentenced to penal servitude for life before the abolition of the death penalty 'had a legitimate expectation of being released after serving a term of penal servitude of twenty years for manslaughter⁶¹³ and this legitimate expectation grew stronger' after witnessing the release of other prisoners serving the same sentence.⁶¹⁴ It thus concluded that

it would be appropriate in the particular circumstances of this case to order the [Commissioner of Prisons] to treat all detainees who have been sentenced to a penal servitude for life, both before and after the coming into operation of the [Abolition of the Death Penalty] Act as if they had been sentenced to the maximum term of 20 years penal servitude the more so as the respondent [Mr. Jeetun] has benefited from such an interpretation of the law which cannot now be denied to others who are either in the same situation or have subsequently been sentenced to penal servitude for life for manslaughter.⁶¹⁵

One observation should be stressed from the above discussion. The meaning of penal servitude for life varied depending upon the perspective from which it was viewed and the time at which it was imposed. To a prisoner who had just been sentenced in court it meant that he or she was to spend the rest of his life in prison. However, on the day he or she arrived in

⁶¹² *State of Mauritius v Jeetun* 2006: 141.

⁶¹³ Manslaughter was punishable by penal servitude for life whereas murder was punishable by death.

⁶¹⁴ *State of Mauritius v Jeetun* 2006: 153.

⁶¹⁵ *State of Mauritius v Jeetun* 2006: 153.

prison he or she was told that the earliest date of release was actually after 30 years. This meant that such prisoners entertained the hope of being, at least, released. After they spent more time in prison they learnt that actually many prisoners who were serving the same sentence were being released after 20 years. One, therefore, knew that release would take place after 20 years. To the prison authorities it appeared that, although they knew that a prisoner serving a penal servitude for life was to be released after 20 years, they had to wait for such a prisoner to petition the court for release, and did not oppose the application. For the court, penal servitude for life meant 20 years and thus it found no difficulty in ordering the prison authorities to release a prisoner sentenced to penal servitude for life after serving 20 years. Was this not a confusing penal regime? Indeed it was. But what caused it?

4.2.2.2 The root of the confusion and the solution

The reason why prisoners serving a penalty of penal servitude for life were being released after 20 years, and, also, the reason why their earliest date of release was set at 30 years, was attributable to a misinterpretation by the courts and the prison authorities of the applicability of section 11 of the Criminal Code before and after 1985. Prior to 1985 section 11 of the Criminal Code provided:

'11. Penal servitude

- (1) The punishment of penal servitude is imposed for life or for a minimum term of 3 years.
- (2) Where in any enactment the punishment of penal servitude is imposed without a term being specified, the maximum term for which the punishment may be imposed is 20 years.⁶¹⁶

⁶¹⁶ As cited in *De Boucherville v Commissioner of Prisons and others* 2006: 21-22.

Section 11(2) of the Criminal Code was amended in 1985⁶¹⁷ by replacing ‘20 years’ by ‘30 years’. The prison authorities thought that a life sentence was one of the sentences whose term had not been specified within the meaning of section 11(2) of the Criminal Code. The result was that a prisoner sentenced to penal servitude for life for an offence committed before 1984 was understood to have been sentenced to 20 years, and the one sentenced to the same sentence for an offence committed after 1985 was understood to have been sentenced to 30 years. This explains why, under Table 2 above, all prisoners sentenced to penal servitude for life after 1985 have their ‘Earliest Date of Release’ projected to take place after 30 years. Consequently, in the two cases of *Dwarkamathsing Jeetun v the Commissioner of Police and others in the presence of the Attorney General*,⁶¹⁸ and *Ramdin v Commissioner of Police and others*⁶¹⁹ when the prisoners who had been sentenced to penal servitude for life before 1985 applied to the Supreme Court to order their release after serving 20 years,

⁶¹⁷ Criminal Code (Amendment) Act No. 1 of 1985.

⁶¹⁸ *Dwarkamathsing Jeetun v The Commissioner of Police and others in the presence of the Attorney General* 2002, cited in *State of Mauritius v Jeetun* 2006: 142. It is reported that ‘*Jeetun*’s application [to the Supreme Court] was preceded by a letter dated 4 April 2002 from [the Commissioner of Prisons], addressed to the Secretary, Mauritius Bar Association, apparently in response to a letter dated 1 April 2002. The letter from the [Commissioner of Prisons] stated that *Jeetun* had been sentenced on 14 February 1986 to “life imprisonment” as was due for release on or about 13 February 2016. In the same way, two letters dated 5 March 2004 and 23 April 2004 from [the Commissioner of Prisons] and addressed to Mr. Rex Stephen, barrister-at-law, in which it was stated that [the] applicant will be due for release on 20 February 2016...’ see *De Boucherville v Commissioner of Prisons and others* 2006: 23. (Emphasis in original).

⁶¹⁹ *Ramdin v Commissioner of Police and others* Record No. 89034 1985, lodged on 11 April 2005, cited in *De Boucherville v Commissioner of Prisons and others* 2006: 22.

the prison authorities never opposed the applications and the Chief Justice ordered the release of those prisoners.⁶²⁰

A literal interpretation of section 11 of the Criminal Code should lead to the inevitable conclusion that the sentence of penal servitude for life (under section 11(1)) was distinct from the sentence of imprisonment contemplated under section 11(2). This is because section 11(2) of the Criminal Code anticipated cases where the term had not been specified. But life imprisonment was a specified sentence. Thus, the Supreme Court rightly held that '[t]he very wording of section 11(1)... that "the punishment of penal servitude is imposed for life or for a minimum term of 3 years" indicates that penal servitude for life is a punishment for a specified term viz for life.'⁶²¹ The Court succinctly concluded that:

The proposition that penal servitude for life means 20 years in relation to a crime committed before 16 March 1985, the date (Act No. 1 of 1985) became operative, and 30 years in relation to a crime committed after that date is therefore wrong.⁶²²

4.2.2.3 Substituting penal servitude for life for death sentences

There is universal agreement, at least among human rights advocates, that the death penalty is a cruel, inhumane and degrading punishment.⁶²³

Therefore, one could argue that one of the reasons that may have influenced

⁶²⁰ In *Ramdin v Commissioner of Police and others* 2005, 'the applicant ...had moved for "an order declaring and decreeing that the penal servitude for life imprisonment (*sic*) pronounced against him on 14 February 1986 for an offence committed in June 1983 should be 20 years.'

⁶²¹ *De Boucherville v Commissioner of Prisons and others* 2006: 24.

⁶²² *De Boucherville v Commissioner of Prisons and others* 2006: 24.

⁶²³ See Chenwi 2007.

the legislature in Mauritius to remove the death penalty from the statute books was that it was a cruel and inhumane punishment which offended the Constitution.⁶²⁴ When the death penalty was abolished in 1995, the Abolition of the Death Penalty Act⁶²⁵ contained two fundamental provisions that related to life imprisonment. Section 2(2) provided that ‘where under an enactment a Court is empowered to impose a sentence of death the Court shall instead of the sentence of death impose a sentence of penal servitude for life.’ Section 2(3) provided that ‘where any person has been sentenced to death, and at the commencement of this Act, the sentence has not been executed, the person shall be deemed to have been sentenced to penal servitude for life and shall undergo that sentence.’

Section 2(2) was clear in the sense that it required the courts, from the coming into force of the Abolition of the Death Penalty Act, to impose a sentence of penal servitude for life in cases in which they would have imposed the death penalty. However, the problem was that the Act’s definitions section was silent on the meaning of ‘penal servitude for life.’ Arguably, the legislature thought that ‘penal servitude for life’ had to be given its natural meaning, or left it to the courts or the prison authorities to determine what it meant. Section 2(3), like section 2(2), was also clear in the sense that its coming into force automatically substituted all death sentences with sentences of penal servitude for life. However, the problem

⁶²⁴ Section 7(1) of the Constitution of Mauritius prohibits inhuman or degrading punishment. One also has to note that executions were rare in Mauritius. For example, from 1980 – 1995 only two death row inmates, who had been convicted of murder, were executed: Louis Leopold Myrtille, executed on 23 November 1984, and Essan Nanyeck alias Alexandre, executed on 10 October 1987. Statistics from the Office of the Mauritius Commissioner of Prisons, June 2008 (on file with the author).

⁶²⁵ Act 31 of 1995.

was that it did not expressly stipulate whether such penal servitude for life had been antedated to the day when the death penalty had been imposed or commenced on the date the Abolition of the Death Penalty Act came into force.

As a result of that ambiguity, prisoners, prison authorities and the Supreme Court all understood the drafters of the Abolition of the Death Penalty Act to have intended that penal servitude for life as a substitute for the death penalty had been antedated to the date the death penalty was imposed. This explains why in *De Boucherville v Commissioner of Prisons*⁶²⁶ the applicant, who had been sentenced to death in 1986 for murder, unsuccessfully petitioned the Supreme Court for his early release in 2002. However, the order for his release, was indirectly secured by the Supreme Court's judgment in *State of Mauritius v Jeetun* in which the Court held that all the detainees who had been sentenced to penal servitude for life before or after the coming into force of the Abolition of the Death Penalty Act were to be presumed to have been sentenced to 20 years' imprisonment.⁶²⁷ Therefore, it is submitted that when on 27 February 2007 the prison authorities told Mr. De Boucherville that he was to be imprisoned for the remainder of his life, their interpretation of the Supreme Court's jurisprudence was incorrect and was justifiably challenged before the Privy Council.⁶²⁸

⁶²⁶ *De Boucherville v Commissioner of Prisons* 2006: 20.

⁶²⁷ *State of Mauritius v Jeetun* 2006: 140.

⁶²⁸ *De Boucherville v The State of Mauritius* 2008: para 5.

One vital observation should be made in the light of the procedure by which penal servitude for life was directly substituted for all the death sentences in Mauritius. Mauritius adopted a different approach to that adopted in South Africa which also abolished the death penalty at around the same time. In South Africa, as discussed above, when the Constitutional Court declared the death penalty to be unconstitutional in *Makwanyane*, the government responded by enacting the Criminal Law Amendment Act⁶²⁹ which empowered the courts to assess the case of each prisoner on death row and to determine the appropriate sentence that should be imposed depending on the circumstances of each case. The result was that prisoners were sentenced to varying sentences, which included terms of 15 years, 25 years, 30 years, 40 years, and 50 years, but the majority were sentenced to life imprisonment.⁶³⁰ Had Mauritius adopted the same approach as South Africa (by giving courts the discretion to determine the appropriate sentence that should be substituted for the death penalty), some prisoners would probably not have been sentenced to penal servitude for life. The automatic conversion of all death penalties into penal servitude for life meant that prisoners were denied an opportunity to prove to courts as a mitigating factor that they were not as dangerous in 1995 as they had been at the time the death penalty was imposed. This omission, as was rightly held by the Privy Council, rendered the sentences imposed arbitrary and disproportionate.⁶³¹

⁶²⁹ Act 105 of 1997.

⁶³⁰ See *Mujuzi* 2008(b): 18 -19.

⁶³¹ See *De Boucherville v The State of Mauritius* 2008: para 18.

4.2.2.4 The Supreme Court finally defines penal servitude for life: but was it right?

As illustrated earlier, there was confusion with regard to the meaning of a sentence of penal servitude for life. It was through legal battles that the prisoners, who were serving penal servitude for life sentences before the coming into force of the Abolition of the Death Penalty Act, won the victory of ascertaining the exact meaning of the sentence they were serving. This was achieved especially through the Supreme Court ruling in *State of Mauritius v Jeetun* in which the Court held that all the prisoners who had been sentenced to penal servitude for life before and after the coming into force of the Abolition of the Death Penalty Act were to be deemed to have been sentenced to 20 years because they had the legitimate expectation to that effect.⁶³²

However, that victory came at a higher cost especially for the prisoners who were sentenced to penal servitude for life after that judgment. In *De Boucherville v Commissioner of Prisons and others*, where, as mentioned earlier, the applicant whose death sentence was commuted to penal servitude for life under section 2(3) of the Abolition of the Death Penalty Act applied to the Supreme Court for his release after serving 20 years. The Court, in dismissing his application, held, amongst other things, that

[t]he golden rule of interpretation remains that when a text is clear, a word must be given its ordinary dictionary meaning so that penal servitude for

⁶³² *State of Mauritius v Jeetun* 2006: 153.

life can but mean that the penalty is “*for life*”.⁶³³ In Mauritius, therefore, penal servitude for life means that the penalty is to be served for life.⁶³⁴

In *State of Mauritius v Jeetun*, the applicant, basing its arguments on the aforementioned ruling in *De Boucherville* to the effect that penal servitude for life should be given its literal meaning, asked the Supreme Court to order the arrest of the respondent who had been serving a sentence of penal servitude for life but released by order of the Chief Justice of the same Court after he had served 20 years. The applicant contended that the decision on which the respondent’s release was based was wrong. The Full Bench of the Court, in dismissing the application, held that the *De Boucherville* decision was right that penal servitude for life should be given its literal meaning, but added that those who had been sentenced to penal servitude for life ‘before and after the coming into operation of the’ Abolition of the Death Penalty Act should be treated ‘as if they had been sentenced to the maximum term of 20 years penal servitude.’⁶³⁵ This was because they had ‘strong legitimate expectations of being released.’⁶³⁶

The above ruling in *Jeetun* remained unclear, and therefore, susceptible of at least two irreconcilable interpretations in relation to the part which reads ‘after the coming into operation’ of the Abolition of the Death Penalty Act. The first possible interpretation is that the Court meant those prisoners who had been sentenced to penal servitude for life before the abolition of the death penalty and those whose death sentences were commuted to penal

⁶³³ *De Boucherville v Commissioner of Prisons and others* 2006: 26. (Emphasis in original).

⁶³⁴ *De Boucherville v Commissioner of Prisons and others* 2006: 27.

⁶³⁵ *State of Mauritius v Jeetun* 2006: 153.

⁶³⁶ *State of Mauritius v Jeetun* 2006: 153.

servitude for life under section 2(3) of the Abolition of the Death Penalty Act. The second possible interpretation is, that the ruling covered three categories of inmates serving penal servitude for life: those who were serving penal servitude for life sentences before the abolition of the death penalty; those whose death sentences were converted into penal servitude for life; and those prisoners who were directly sentenced to penal servitude for life after the abolition of the death penalty but immediately before the ruling in *Jeetun*. These would be prisoners who were sentenced to penal servitude for life on or after 14 December 1995 when the Abolition of the Death Penalty Act came into force but before 16 March 2006 after the *Jeetun* decision was handed down. As a result, those who, for example, were sentenced to penal servitude for life on or after 16 March 2006 were to be in prison for the rest of their lives. Had the Privy Council not declared penal servitude for life, where the prisoner would spend the rest of his life in prison, to be unconstitutional⁶³⁷, and a choice would have to be made between the above two possible interpretations, the second interpretation would have been preferable, because it would accommodate many prisoners, and one would know with a degree of certainty when exactly penal servitude for life, which means a prisoner being imprisoned for the rest of his life, started to operate in Mauritius.

One important question that needs to be answered is whether the Supreme Court was right in ruling that penal servitude for life should mean ‘for life’. The Court adopted a literal interpretation of ‘penal servitude for life’ because the phrase was not defined in any law in Mauritius. Had the Court

⁶³⁷ *De Boucherville v The State of Mauritius* 2008.

adopted a historical interpretation of the Abolition of the Death Penalty Act, which would have been the best approach, it would have arrived at the conclusion that the legislature never intended penal servitude for life to mean ‘for life’. This argument is based on two developments, both of which were not addressed by the Privy Council in *De Boucherville v The State of Mauritius*.⁶³⁸ One relates to the deliberations that took place in the National Assembly when the Abolition of the Death Penalty Bill was tabled and debated; and the other relates to the penalty that was to be imposed for murder after the abolition of the death penalty.

4.2.2.5 Deliberations in the National Assembly: a recipe for confusion?

At the time the National Assembly debated the issue of substituting penal servitude for life for the death penalty, the intention was clear that it was of the view that penal servitude for life should mean 20 years. This is evidenced by the Abolition of the Death Penalty Bill⁶³⁹ to which the President refused his assent unless clause 5 were revised. In its initial form clause 5 provided for the repeal of section 222 of the Criminal Code and replaced with the following:

“Section 222 (1) Any person who is convicted of:

- (a) murder or murder of a newly born child shall be sentenced to penal servitude for life;
- (b) attempt at murder or attempt at murder of a newly born child, shall be liable to penal servitude for life or for a term not exceeding 20 years”

The Bill also added a new subsection (4) which reads-

⁶³⁸ *De Boucherville v The State of Mauritius* 2008.

⁶³⁹ Bill No. XXVI of 1995

“(4) A person sentenced to penal servitude for life under subsection (1)(a) shall not be released before the expiry of 20 years from the commencement of his sentence.”⁶⁴⁰

It is evident that the National Assembly wanted the sentence of penal servitude for life, for the most serious of offences, to mean at least a minimum of 20 years. When presenting the Bill to the National Assembly, the Prime Minister stated that

“[t]he purpose of the present Bill is to abolish the death penalty. This is in line with government policy and with the provisions of the Dangerous Drugs Act. The House will recall that it is intended that the death penalty should no longer apply for drug trafficking...It is therefore but natural that now Government should come forward with a proposal to abolish it for other criminal offences as well...We are substituting penal servitude for life whenever the death penalty was applicable. However, in aggravated crimes like murder where there are no mitigating circumstances the punishment has to be adequate. This is why we are providing that in case of murder or murder of a newly born child a person sentenced to penal servitude for life shall not be released until he has served at least 20 years of his sentence.”⁶⁴¹

The Prime Minister’s statement shows that the National Assembly never intended penal servitude for life to mean that the offender was to be detained for the rest of his life. The problem with the Bill, together with the accompanying explanation, was that it had the potential of breeding confusion with regard to offenders who had been sentenced to penal servitude for life. In the first place, whereas those who had not committed murder knew that their sentence of penal servitude for life could mean anything less than 20 years’ imprisonment, they would not know exactly what their sentence meant. This means that either the court would have had

⁶⁴⁰ *De Boucherville v Commissioner of Prisons and others* 2006: 25.

⁶⁴¹ *De Boucherville v Commissioner of Prisons and others* 2006: 25-26.

to impose a minimum period to be served before the offender could be released or the prison authorities had to devise a policy that prisoners sentenced to penal servitude for life were not to be released unless they had served a specified number of years. Either way, the court or the prison authorities had to devise a uniform policy applicable to all prisoners sentenced to penal servitude for life in cases other than murder to avoid a constitutional challenge, for example, on the ground that the policy was discriminatory.

A second challenge would have resulted had the Bill been passed, setting 20 years as the minimum for offenders sentenced to penal servitude for life for the serious offences, in the sense that some prisoners were likely to serve more years in prison than others. Whereas the Bill had proposed 20 years as the minimum, it had not provided the maximum. That would have resulted in some prisoners being sentenced to a sentence of penal servitude for life which meant 20 years and others to a sentence of penal servitude for life which meant more than 20 years, and probably their whole life. This would have raised the constitutional issue of non-discrimination and would probably have been challenged in the courts. It should be underscored that the deliberations in the National Assembly showed that the legislature never intended penal servitude for life to mean 'for life.' As will be illustrated shortly, the reason why the President refused to assent to the Bill was not because he thought that penal servitude for life should mean that the prisoner must be detained for the rest of his life but because he thought that penal servitude for life which meant 20 years was a lenient sentence for murderers and those who attempted to murder. He probably wanted them to

be in prison for longer than 20 years. This explains why the mandatory term of 45 years for murder was introduced in the Bill and the President assented to it.

4.2.2.6 The new sentence for murder: Mandatory 45 years

When the President refused to assent to the Bill, it was revised by the National Assembly⁶⁴² ‘with the avowed objective that the new clause 5 would provide heavier penalties in respect of persons convicted of murder, attempt at murder, murder of a newly born child or an attempt thereof.’⁶⁴³ The result was that section 222⁶⁴⁴ of the Criminal Code was amended to empower courts to impose a sentence of 45 years’ imprisonment for offenders found guilty of murder. Curiously, section 223⁶⁴⁵ of the Criminal Code, which provided for a penalty of penal servitude for life for offenders found guilty of manslaughter was not amended at the time section 222 was amended. The result of these two developments was the two inherent challenges: one, that the sentence of 45 years’ imprisonment was mandatory for murder; and two, murder attracted 45 years’ imprisonment whereas manslaughter, which was a lesser serious offence, attracted penal servitude for life, which was arguably a heavier sentence than that imposed

⁶⁴² The revised Bill was the Abolition of Death Penalty (No. 2) (Bill No. XXXIV of 1995) see *De Boucherville v Commissioner of Prisons and others* 2006: 26.

⁶⁴³ *De Boucherville v Commissioner of Prisons and others* 2006: 26.

⁶⁴⁴ Section **222 Penalty for murder and infanticide**

- (1) Any person who is convicted of –
 - (a) Murder or murder of a newly born child, shall be sentenced to penal servitude for 45 years;

⁶⁴⁵ Section **223 Penalty for manslaughter**

- (1) Any person guilty of manslaughter preceding, accompanying or following another crime shall be liable to penal servitude for life.

for murder! It was clear that both of the above flaws could not survive the court's scrutiny.

After realising that the Criminal Code provided for a heavier penalty for manslaughter than it did for murder, the Supreme Court held that it believed that it was 'more a matter of fine tuning which was obviously lacking at the time the law was amended and which ought to be remedied by the relevant authority in due course.'⁶⁴⁶ In its later decision the Supreme Court held that the law that provided for a heavier sentence for manslaughter than for murder was an 'absurdity' and that it could never have been the intention of the legislator to punish manslaughter more severely than murder.⁶⁴⁷ It concluded that the law had to be construed to mean that a person who had been convicted of murder had to be sentenced to 45 years' imprisonment and that one convicted of manslaughter to 20 years' imprisonment.⁶⁴⁸ One could argue that had the Court not declared penal servitude for life to mean that the offender was to be detained for the rest of his life, the amendment to section 222 would not have resulted in an absurdity even if section 233 had been left intact. This is because a person convicted of murder would have to be sentenced to 45 years' imprisonment and one convicted of manslaughter would have to be sentenced to penal servitude for life, which in effect meant 20 years' imprisonment. The result would be that a person convicted of manslaughter served a lesser sentence than one convicted of murder.

⁶⁴⁶ *De Boucherville v Commissioner of Prisons and others* 2006: 25.

⁶⁴⁷ *State of Mauritius v Jeetun* 2006: 148.

⁶⁴⁸ *State of Mauritius v Jeetun* 2006: 151.

As alluded to earlier, section 222 of the Criminal Code was amended to require courts to impose a sentence of 45 years' imprisonment on offenders found guilty of murder. This meant that the sentencing court's discretion to impose any sentence it thought fit in such cases was eliminated. Even if there were mitigating or extenuating circumstances that would have persuaded the court to impose a lesser sentence in cases of murder, they were irrelevant. This clearly would have to be challenged sooner or later. The constitutionality of section 222 was challenged in the case of *Philibert and 6 others v The State*⁶⁴⁹ in which it was argued that sections 222(1) of the Criminal Code and 41(3)⁶⁵⁰ of the Dangerous Drugs Act offended sections 1, 3, 5, 7 and 10 of the Constitution, in the sense that they, *inter alia*, infringed the doctrine of separation of powers⁶⁵¹ and were also incompatible with the concept of a fair trial. The Supreme Court held that '...the problem relating to mandatory sentences in Mauritius ... [was] one of "proportionality" not of "separation of powers".'⁶⁵² The Court added that the issue to be resolved was 'whether the imposition of a mandatory

⁶⁴⁹ *Philibert and 6 others v the State* (Supreme Court of Mauritius) Record No. 163 Judgment of 19 October 2007 (unreported).

⁶⁵⁰ Section 41(3) of the Dangerous Drugs Act provided that '...any person convicted of an offence under section 30 [drug dealing offences] shall be sentenced to penal servitude for 45 years where it is averred and proved that, having regard to all the circumstances of the case the person was a drug trafficker.' As quoted in *Philibert and 6 others v the State* 2007: 4.

⁶⁵¹ The applicants argued that '...the mandatory sentence offend[ed] section 1 of the Constitution as it infring[ed] the doctrine of separation of powers, viz. the separation of legislative, executive and judicial powers implicit in the declaration that "*Mauritius shall be a sovereign democratic state.*" It was submitted that in fixing the penalty, Parliament had unjustifiably assumed judicial powers, that this was an interference with judicial power which was outside the competence of the legislature and was inconsistent with the principle of separation of powers ordained in section 1 of the Constitution.' See *Philibert and 6 others v the State* 2007: 4.

⁶⁵² *Philibert and 6 others v the State* 2007: 8.

minimum sentence would be startlingly or disturbingly inappropriate...’ in the circumstances.⁶⁵³ It concluded thus:

A law which denies an accused party the opportunity to seek to avoid the imposition of a substantial term of imprisonment which he may not deserve, would be incompatible with the concept of a fair hearing enshrined in section 10 of our Constitution. A substantial sentence of penal servitude like in the present situation cannot be imposed without giving the accused an adequate opportunity to show why such sentence should not be mitigated in the light of the detailed facts and circumstances surrounding the commission of the particular offence or after taking into consideration the personal history and circumstances of the offender or where the imposition of the sentence might be wholly disproportionate to the accused’s degree of criminal culpability. We hold and declare that section 222(1) of the Criminal Code and section 41(3) of the Dangerous Drugs Act 2000 ...contravened section 7(1) of the Constitution inasmuch as the indiscriminate mandatory imposition of a term of 45 years penal servitude in all cases contravened the principle of proportionality and amounted to “*inhuman or degrading punishment or other such treatment*” contrary to section 7(1) of the Constitution.⁶⁵⁴

In its 2007 Annual report the Mauritius National Human Rights Commission recommended that all the prisoners who were sentenced to 45 years’ imprisonment under the Dangerous Drugs Act, before it was declared unconstitutional, should have their sentences either reviewed by a specially constituted panel of Supreme Court judges, or Parliament should amend the law to stipulate how such prisoners’ sentences should be dealt with, or the prisoners may apply to the Commission on the Prerogative of Mercy. The Human Rights Commission also recommended that the Attorney – General should work hand in hand with the Minister of Justice and Human Rights to devise ‘the way forward out of this dilemma’ and ensure that the prisoners who were sentenced to the mandatory 45 years

⁶⁵³ *Philibert and 6 others v the State* 2007: 12.

⁶⁵⁴ *Philibert and 6 others v the State* 2007: 15 - 16. (Emphasis in original).

had their sentences revised.⁶⁵⁵ The Privy Council ruled that the Supreme Court has the jurisdiction to review the sentences of all prisoners who were sentenced to a mandatory 45 years or to mandatory penal servitude for life.⁶⁵⁶

4.2.2.7 Penal servitude for life ranging between 3 and 60 years: Different standards

Section 150A of the 2007 Criminal Procedure (Amendment) Act provides that '[w]here under any enactment other than the Criminal Code a Court is empowered or required to pass a sentence of penal servitude for life, the sentence may, at the discretion of the Court, be for a term of not less than 3 years and not exceeding 60 years.' Section 150A raises at least one interesting point: With respect to offences other than those under the Criminal Code that attract life sentences, the court has the discretion to determine, depending on the circumstances, the length of penal servitude for life. This means that, depending on, for example, the circumstances under which the offence was committed, the individual circumstances of the accused, the issue of proportionality, and what the court thinks should be the objective that will be attained by imposing a particular sentence, the court has the discretion to impose either of the following sentences: penal servitude for life, which meant being imprisoned for life before such a sentence was declared unconstitutional by the Privy Council⁶⁵⁷; or penal servitude for life, which means either 3 years' imprisonment or something

⁶⁵⁵ Mauritius National Human Rights Commission, Annual Report for the Year 2007 (published 27 March 2008): paras 133 – 134.

⁶⁵⁶ *De Boucherville v The State of Mauritius* 2008.

⁶⁵⁷ *De Boucherville v The State of Mauritius* 2008.

between three years' imprisonment and 60 years' imprisonment; or to impose 60 years' imprisonment. It is argued that this provision is likely to cause confusion with regard to the meaning of penal servitude for life in Mauritius, in the sense that different courts or different judges of the same court might give a different meaning to a sentence of penal servitude for life. Consequently, probably the sentence will lose its meaning and members of the public and some policy makers will, in some cases, question the court's reasoning in imposing a sentence of penal servitude for life. This is more likely to happen when newspapers report that an offender has been sentenced to penal servitude for life but will be released after three years.

Another problem that is likely to be caused by the application of section 150A relates to longer sentences. As mentioned earlier, courts have the discretion to determine what penal servitude for life should mean provided that, if they intend to impose a specified number of years, the sentence should not exceed 60 years. This means that some courts, depending on the nature of the offence committed by the offender and other aggravating circumstances, may decide to impose a sentence as long as 50 years or more. The Privy Council, though questioning the constitutionality of a mandatory sentence of penal servitude for life, did not question the constitutionality of lengthy prison terms.⁶⁵⁸ This means that Mauritian courts can still legally impose lengthy prison terms. If this were to happen, it would raise some human rights issues. It would mean, as the Constitutional Court of Namibia held, that such offenders have just been

⁶⁵⁸ *De Boucherville v The State of Mauritius* 2008.

reduced to numbers behind bars because their release would be very unlikely.⁶⁵⁹

This analysis should be viewed in the light of the fact that the Mauritius Reform Institutions Act has no provision under which a person sentenced to penal servitude for life may have his sentence remitted.⁶⁶⁰ The South African Constitutional Court has also held that sentences that effectively deny offenders the prospect of being released amount to cruel and inhumane punishment.⁶⁶¹ The European Court of Human Rights has also held that for a sentence of life imprisonment to pass the human dignity test, the prisoner should have a real prospect of being released.⁶⁶² International human rights law and international criminal jurisprudence are evidence that the international community has moved away from sentences where the offender may be detained until his death.⁶⁶³ It is, therefore, argued that if any court in Mauritius imposed a determinate sentence that could amount to the prisoner spending the rest of his life in prison, it may amount to a violation of section 7(1) of the Constitution which prohibits inhumane

⁶⁵⁹ *S v Tcoeb* 1996: 399. However, one has to recall that prisoners sentenced to lengthy prison terms qualify for early release under sections 50 – 51A of the Reform Institutions Act, 1988. The problem, as will be discussed below, is that some of these prisoners, in particular those sentenced under the Dangerous Drugs Act, do not qualify for remission or parole under the Reform Institutions Act. This means that they will have to serve the imposed prison term in full unless pardoned by the State President.

⁶⁶⁰ See sections 50 – 51A of the Reform Institutions Act, 1988. The Privy Council rightly held that ‘[t]he provisions of the Reform Institutions Act 1988 relating to parole and remission both depend for their operation on the serving of a specified fraction of a determinate sentence, and so have no application where a prisoner is subject to a lifelong incarceration.’ See *De Boucherville v The State of Mauritius* 2008: para 23.

⁶⁶¹ *Bull & Another v The State* 2001: para 23.

⁶⁶² See generally *Case of Kafkaris v Cyprus* 2008.

⁶⁶³ Statutes of the International Criminal Tribunals for Rwanda and Former Yugoslavia and the Rome Statute of the International Criminal Court make provision for the release of offenders sentenced to life imprisonment. See Mujuzi 2008(a): 180 -185. See also van Zyl Smit 2002: 183-185.

punishment.⁶⁶⁴ Mauritius would also be in violation of its international obligations under some of the treaties to which it is a State Party.⁶⁶⁵

4.2.2.8 Penal servitude for life under the Criminal Code

Section 4(1) of the Criminal Procedure (Amendment) Act amended sections 61, 64, 222(1) and 223(1) Criminal Code by providing that an offender sentenced under any of the above sections should be sentenced to imprisonment “for life or, where the Court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence and has entered those circumstances on the record of the proceedings, for a term not exceeding 60 years.” This provision should be read together with section 150A discussed above. The combined effect was that a person sentenced to penal servitude for life under the relevant provisions of the Criminal Code was meant to remain in prison for the rest of their life. The human rights arguments raised above with regard to lengthy prison terms apply with equal force to the type of penal servitude contemplated under the Criminal Code. The Privy Council also held that penal servitude for life, where the offender was to be imprisoned for the rest of his life without being given a chance to plead in mitigation, is ‘manifestly disproportionate and arbitrary and so contrary to section 10 [on the right to a fair trial] of the Constitution of Mauritius.’⁶⁶⁶

⁶⁶⁴ Section 7(1) of the Constitution provides that ‘[n]o person shall be subjected to torture or to inhuman or degrading punishment or other such treatment.’

⁶⁶⁵ Article 5 of the African Charter on Human and Peoples’ Rights and Article 7 of the International Covenant on Civil and Political Rights prohibit cruel and inhumane punishment.

⁶⁶⁶ *De Boucherville v The State of Mauritius* 2008: para 23.

In some countries, like the United States of America, this type of life imprisonment is called life imprisonment without the possibility of parole.⁶⁶⁷ Courts in South Africa, Namibia and Germany, have held that life imprisonment without the possibility of parole is a cruel and inhumane punishment.⁶⁶⁸ As already mentioned, the Constitution of Mauritius expressly prohibits inhumane punishment as do the international human rights treaties to which Mauritius is party and, therefore, under an obligation to promote and protect the rights and freedoms thereunder.⁶⁶⁹ Therefore, penal servitude for life, as contemplated in the Criminal Code and as supported by the Supreme Court in its jurisprudence, is a cruel and inhumane punishment which contravenes the Constitution. It is unfortunate that the Privy Council did not express its opinion on whether a sentence of penal servitude for life, where the offender has no real and tangible prospect of being released, did not contravene section 7 of the Constitution of Mauritius, which prohibits inhuman and cruel punishment.⁶⁷⁰

It could be argued that offenders sentenced to penal servitude for life could still be pardoned by the State President in terms of section 75(1) of the Constitution.⁶⁷¹ The Privy Council also declined to release the appellant,

⁶⁶⁷ D van Zyl Smit 2002: 54-58.

⁶⁶⁸ See generally Mujuzi 2008(a): 163 – 186.

⁶⁶⁹ The African Commission on Human and Peoples' Rights stated that '[w]hen countries ratify or sign international instruments, they do so willingly and in total cognisance of their obligation to apply the provisions of these instruments.' See *African Institute for Human Rights and Development (on behalf of Sierra Leonean Refugees in Guinea) v Republic of Guinea* Communication No. 249/2002. Para 68. 20th Annual Activity Report of the African Commission on Human and Peoples' Rights (January – June 2006), Annex IV.

⁶⁷⁰ *De Boucherville v The State of Mauritius* 2008: para 23.

⁶⁷¹ Under section 75(1) the President may:

whose sentence of penal servitude for life it declared unconstitutional for violating his right to a fair trial, on the ground that he had not fully explored the possibility of his release under section 75 of the Constitution.⁶⁷² This could be interpreted to mean that the Privy Council believed that offenders serving a sentence of penal servitude for life have a real and tangible prospect of being pardoned by the President under section 75 of the Constitution.⁶⁷³ Indeed, the Supreme Court in *Jeetun*, after concluding that penal servitude for life should be given its literal meaning, was quick to add:

[W]e agree with the National Human Rights Commission that “the sentence of penal servitude for life does not mean that the detainee has to spend the rest of his life in prison” - vide paragraph 54 of its 2004 Report *et sequitur*. It goes without saying that any person sentenced for any term of penal servitude or imprisonment may also have his sentence reviewed from time to time by the Commission and the Parole Board in an appropriate case – vide sections 51 and 51 A of the Reform Institutions Act. In determining the sentence which a detainee has yet to serve, various factors might be taken into consideration, including pure retribution, expiation, expressions of the moral outrage of society, maintenance of public confidence in the administration of justice, deterrence, the interests of victims, rehabilitation and, last but not least, mercy.⁶⁷⁴

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- (a) Grant to any person convicted of any offence a pardon, either free or subject to lawful conditions;
 - (b) Grant any person a respite, either indefinite or for a specified period, of the execution of any punishment imposed on that person for any offence;
 - (c) Substitute a less severe form of punishment for any punishment imposed on any person for any offence; or
 - (d) Remit the whole or part of any punishment imposed on any person for an offence or any penalty or forfeiture otherwise due to the State on account of any offence.

⁶⁷² *De Boucherville v The State of Mauritius* 2008: para 23.

⁶⁷³ The Supreme Court commuted the appellant’s penal servitude for life to an effective 25 years’ imprisonment following the Privy Council ruling. See *De Boucherville Roger FP v State of Mauritius* 2009.

⁶⁷⁴ *State of Mauritius v Jeetun* 2006: 154.

Two important observations need to be made with regard to the Supreme Court's observation above. In the first place, one doubts whether the Court should have relied on the 2004 Report of the National Human Rights Commission to which it referred to support its position that offenders sentenced to penal servitude for life were in practice not to be detained for the rest of their lives. At the time when the Report was written the National Human Rights Commission believed genuinely that a person sentenced to penal servitude for life was not to spend the rest of his life in prison. It is argued that its belief was rooted in two factors: one, that the prison records indicated that a person who had been sentenced to life imprisonment was at most required to serve a term of 30 years imprisonment; and secondly, and perhaps most importantly, there was a practice, as alluded to earlier, that offenders who had been sentenced to penal servitude for life were being released by the Supreme Court after serving 20 years. However, in 2006 the position had changed. The Supreme Court had held that penal servitude for life had to be given its literal meaning, although this ruling was reversed by the Privy Council in July 2008.

The second point to be noted from the above observation relates to the Court's reference to sections 51 and 51A of the Reform Institutions Act. These two provisions do not expressly mention that a person who has been sentenced to penal servitude for life shall have his case reviewed after some period of time. Section 51⁶⁷⁵ refers to other prison terms. This could be

⁶⁷⁵ Section 51(1) establishes the Parole Board and empowers it to recommend to the Minister responsible for Reform Institutions, amongst other things, under section 51(2), the 'release on parole a convicted detainee who has served not less than one half of his sentence or at least 16 months thereof, whichever expires the later.' Under Section 50 (1)

interpreted to mean that the legislature excluded prisoners serving penal servitude for life from the benefit of having their sentences reviewed after a certain period of time.⁶⁷⁶ As mentioned earlier, in jurisdictions like Uganda, Botswana, Swaziland and South Africa, where the legislature never intended life imprisonment to mean that the offender will be detained for the rest of his life, the legislative framework is in place that specifically governs the circumstances under which prisoners serving life sentences may be released. In fact Section 51A of the Reform Institutions Act excludes the following offenders from being granted parole or having their sentences remitted: ‘a person who has been convicted of (a) an offence under the Dangerous Drugs Act... [and] (b) a sexual offence on a child or handicapped person.’ The implication is that those sentenced to penal servitude for life under the Dangerous Drugs Act do not qualify for parole or to the remission of their sentence. This issue has also been emphasised by the Mauritius Human Rights Commission.⁶⁷⁷ Therefore, the Court’s interpretation of the ambit of sections 51 and 51A remained debatable, to say the least. This issue is dealt with in detail under Chapter VI.⁶⁷⁸

4.2.3 Uganda

4.2.3.1 Life imprisonment versus the death penalty

Unlike South Africa which has a rich history of life imprisonment, the sentence of life imprisonment in Uganda has not been as often used as the

‘... a person sentenced to imprisonment for a period exceeding 31 days shall be eligible for discharge after having served two thirds of the period of sentence.’

⁶⁷⁶ *De Boucherville v The State of Mauritius* 2006: para 23.

⁶⁷⁷ See 4.2.3.8.5 (below).

⁶⁷⁸ Chapter VI, 6.2.

death penalty. And unlike South Africa and Mauritius that abolished the death penalty, in Uganda the death penalty is still lawful and has been imposed for a long period of time even before colonialism.⁶⁷⁹ The penal history of Uganda has witnessed not only a large number of people sentenced to death but also a high number of executions dating back to as early as 1938 when of the 67 offenders sentenced to death in that year 38 were executed.⁶⁸⁰ One has to recall that between 1966 and 1986 Uganda was characterised by political instabilities and gross human rights violations⁶⁸¹ which saw the death penalty used not only to punish serious crimes such as murder and armed robbery, but also to silence political opponents and it was in some circumstances imposed by Military Tribunals that disregarded the basic principles of the right to fair trial.⁶⁸² In Uganda the death penalty is still imposed for various crimes⁶⁸³ although the last executions took place in 1999 when 28 prisoners were executed.⁶⁸⁴

⁶⁷⁹ Chenwi 2007: 18.

⁶⁸⁰ Kamugisha 2005: 11.

⁶⁸¹ In 1994, the Commission of Inquiry into Violations of Human Rights after listen to evidence of gross human rights violations in Uganda between 1962 and 1986 noted 'with dismay the vast scale of human rights violations which evidence brought before it indicates as having been committed during the period of its inquiry. Hundreds of thousands of Ugandans were affected by what happened either directly or indirectly. Many came forward to testify before the Commission but the great number did not, due to limited time and resources at its disposal, whenever it sat to hear testimonies.' *The Report of the Commission of Inquiry into Violations of Human Rights: Findings, Conclusions and Recommendations* (1994): para 13:11(3).

⁶⁸² *The Report of the Commission of Inquiry into Violations of Human Rights: Findings, Conclusions and Recommendations* (1994): 147 – 234. For a detailed discussion of the concept of the right to a fair trial see Mujuzi 2008(c): 135 – 157.

⁶⁸³ A person convicted of any of following offences under the Penal Code Act is liable to be sentenced to death, treason (section 23), detention with sexual intent (section 134), murder (section 189), kidnapping or detaining with intent to murder (section 243), robbery (section 286), smuggling (section 319); a person convicted of terrorism related offences is liable to suffer death under the Anti-Terrorism Act, 2002 (sections 7, 8, and 9).

⁶⁸⁴ *The Report of the Commission of Inquiry into Violations of Human Rights: Findings, Conclusions and Recommendations* (1994): 172.

Since the early 1990s when Uganda embarked on the process of enacting the new Constitution which was adopted in 1995 and amended in 2005, the question of whether the death penalty should be retained for serious crimes has been widely debated. Some people have suggested that the death penalty should be replaced with life imprisonment without the possibility of parole. However, the majority of the Ugandans are not yet convinced that life imprisonment is as tough a penalty as the death penalty for heinous offences. Our attention now shifts to the Constitution-making process to illustrate how the Constituent Assembly justified the enactment of a constitutional provision that sanctions the imposition of the death penalty. However, before the discussion of the 1995 Constitution-making process, the author deals with the issue of the death penalty in the constitutions of Uganda since 1962.

4.2.3.2 The death penalty in the Constitutions of Uganda since 1962

4.2.3.2.1 The 1962 Constitution (the Independence Constitution)

Uganda got her first Constitution, the Independence Constitution, at independence on the 9 October 1962. The Independence Constitution was discussed by a few people in London, some from the Colonial Office and others from Uganda, and adopted in England.⁶⁸⁵ The Independence Constitution provided for human rights especially civil and political in nature.⁶⁸⁶ Though the Independence Constitution provided for the right to

⁶⁸⁵ Kanyeihamba 1975: 59-65. For a list of the delegates at the 1961 London Constitutional Conference see Mukholi 1995: 85-86.

⁶⁸⁶ Kanyeihamba 1975: 374-395.

life, the relevant provision was phrased in such a manner that this right was not absolute.⁶⁸⁷ The Independence Constitution had two major weaknesses: one, its drafters ostensibly wanted to create a federal as opposed to a unitary republic of Uganda but surprisingly the Independence Constitution treated the Buganda Kingdom, one of the federal states, as superior to the other federal states.⁶⁸⁸ This was a recipe for grievance among the less favoured federal states that justifiably, desired equal treatment and status as the Buganda Kingdom. The second problem with the Independence Constitution is that it vested too much Executive power in the Office of the President, the then Kabaka (King) of Buganda. The Prime Minister, who practically ran the affairs of independent Uganda, had very limited decision-making powers. There was thus always a power struggle between the President and the Prime Minister regarding which of the two was authorised to make executive decisions. This struggle led to the partial abrogation and suspension of the Independence Constitution in the 1966 Buganda Crisis and the adoption of the Revolutionary Constitution of 1966 (the 1966 Constitution).⁶⁸⁹

4.2.3.2.2 The 1966 and 1967 Constitutions and the death penalty

Kanyehamba has argued that

[L]ooking at the events that followed the suspension of the constitution [the Independence Constitution] and the provisions of the 1966 Constitution it is not true to say that the Independence Constitution was suspended or abolished. What happened was that only those parts which dealt with the

⁶⁸⁷ Article 18(1) provided that '[n]o person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under the law of Uganda of which he has been convicted.'

⁶⁸⁸ Kanyehamba 1975: 59-78.

⁶⁸⁹ Kanyehamba 1975: 78-100.

executive powers and the Head of the Government were altered in order to merge the post of the President and the Prime Minister into the executive president; and the abolition of the federal form of government.⁶⁹⁰

The partial suspension and abrogation of the Independence Constitution did not have any effect on the human rights provisions and in particular on the provision relating to the right to life.⁶⁹¹ As Kanyeihamba points out, it only affected the executive provisions of the Constitution. There could be various reasons why the 'right to life' provision was not one of the provisions that were amended, suspended or abrogated in 1966, but one reason could be advanced to explain this: In 1966, the death penalty was still widely used not only in Africa,⁶⁹² but also in other parts of the world⁶⁹³ and accordingly, Uganda had no incentive to abolish it. The 1966 Constitution was only meant to 'continue in force until such time as a new constitution would be enacted by a Constituent Assembly to be established by Parliament for that purpose.'⁶⁹⁴ On 8 September 1967, a new Constitution, the 1967 Constitution was promulgated. Mukholi argued that the 1967 Constitution was 'in real terms [an] amended version' of the 1966 Constitution for it only introduced three fundamental changes: the abolition of the kingdoms; the investment of enormous powers in the hands of the President; and the high centralisation of power.⁶⁹⁵ The provision relating to the right to life in the 1967 Constitution was transferred verbatim from the

⁶⁹⁰ Kanyeihamba 1975: 90.

⁶⁹¹ Article 8 of the 1967 Constitution provided that the right to life could be taken away in the execution of a death sentence imposed by the court under the laws of Uganda.

⁶⁹² Chenwi 2007: 15 – 56.

⁶⁹³ See generally Schabas 2002.

⁶⁹⁴ Kanyeihamba 1975: 100.

⁶⁹⁵ Mukholi 1995: 18.

1966 Constitution. The 1967 Constitution was suspended in 1971 when Idi Amin came to power in Uganda in a *coup d'etat*.⁶⁹⁶

The Amin regime and the other short-lived regimes that ruled the country (the Military Commission, the Military Council and Junta) until the National Resistance Movement (NRM) government came into power committed some of the gravest human rights violations known in Ugandan history, which included the blatant disregard of the right to life. These regimes resorted frequently to the death penalty and it would have been too optimistic for one to have expected such dictatorial and brutal regimes to amend the Constitution to provide for more protection of the right to life.⁶⁹⁷

The NRM overthrew the Military Junta on 26 January 1986. By Legal Notice 1 of 1986, some parts of the 1967 Constitution, in particular those regarding the executive and legislative powers, were suspended. The NRM government promised that their ascent to power was not a mere 'change of guard'⁶⁹⁸ but a radical change. But because the NRM government had relied on the death penalty during the war to discipline errant rebels (as will be illustrated later during the discussion of the Constituent Assembly debates) it supported the death penalty and would still execute people in 1999 several years after coming into power.

Initially the NRM government promised that it was intent to retaining power for only four years, during which period it would have enacted a new Constitution which would have been the basis on which to bring

⁶⁹⁶ Kanyeihamba 2002: 136 – 152.

⁶⁹⁷ Kanyeihamba 2002: 126 – 221.

⁶⁹⁸ See Museveni 1997: 172.

democratic rule in Uganda. In other words, it intended to ensure that by January 1990 democratic rule had been introduced in Uganda. However, by January 1990 the government had not promulgated, let alone drafted, the new Constitution. Legal Notice No.1 of 1990 was amended and the government extended its term of office to January 1994. One of the reasons it cited for extending its term of office was that there was a need for Ugandans to debate and adopt a new constitution.⁶⁹⁹ The discussion now turns to the constitution-making process and how the issues of life imprisonment and the death penalty were addressed.

4.2.3.3 The Uganda Constitutional Commission

The Uganda Constitutional Commission (the Odoki Commission) was established by the Uganda Constitution Commission Statute of 1988. The Odoki Commission consisted of 21 members, who were appointed by the President of Uganda.⁷⁰⁰ Its terms of reference were:

- A. To study and review the constitution with the view of making proposals for the enactment of a national constitution that would:
 - i. guarantee the national independence and territorial integrity and sovereignty of Uganda;
 - ii. establish a free and democratic system of government that will guarantee the fundamental rights and freedoms of the people of Uganda;
 - iii. create viable political institutions that will ensure maximum consensus and orderly succession to government;

⁶⁹⁹ Mukholi 1995: 27.

⁷⁰⁰ These members were: 1) Justice Benjamin J Odoki (Chairman); 2) Dr. Dan Mudhoola (Vice Chairman); 3) Prof. Phares Mukasa Mutibwa (Secretary); 4) Dr. Edward Kiddu Makubuya; 5) Mr. Jonathan Kateera (Member); 6) Mr. Justine A.O. Okot (Member); 7) Dr. Rev. Fr. John Mary Waliggo (Member); 8) Mrs. Immaculate Damali Angena Maitum (Member); 9) Prof. Fredrick Ssempebwa (Member); 10) Mr. Cyprian Rwaheru (Member); 11) Prof. Andrew Otim (Member); 12) Dr. Eric Adriko (Member); 13) Mr. George Ofuyuru (Member); 14) Mrs. Gertrude Byekwaso (Member); 15) Mr. Sam Kirya Gole (Member); 16) Mr. Cuthbert Obwangor (Member); 17) Hon. Miria Matembe (Mrs.)(Member); 18) Mr. Medi Kagwa (Member); 19) Lt. Col. Serwanga Lwanga (Member); 20) Hon. Jotham Tumwesigye (Member); and 21) Ms. Mary Amaitumu. Mukholi 1995: 28. For the qualifications and roles of each member during the constitutional making process see Odoki 2005: 1-18.

- iv. recognise and demarcate division of responsibility among the state organs of the Executive, the Legislature and the Judiciary and create viable checks and balances between them;
- v. endeavour to develop a system of government that ensures people's participation in governance of their country;
- vi. endeavour to develop a democratic, free and fair electoral system that will ensure people's representation in the legislature and at other levels;
- vii. establish and uphold the principle of public accountability by the holders of public offices and political posts; and
- viii. guarantee the independence of the Judiciary.

B. Formulate and produce a draft constitution that will form the basis for the country's new national constitution.⁷⁰¹

It is clear from the terms of reference that the Odoki Commission had the mandate to ensure that it came up with a constitution that established a government that would guarantee the rights and freedoms of the people of Uganda. As alluded to earlier, previous governments had committed gross human rights violations in blatant disregard of the human rights that had been enshrined in the successive constitutions. The Commission's terms of reference did not specify which human rights it should emphasise. What it was required to do was to ensure that the draft Constitution established 'a free and democratic system of government that w[ould] guarantee the fundamental rights and freedoms of the people of Uganda.' This meant that the Commission had wide mandate with regard to which human rights it would consult the public and which submissions with regard to human rights should be included in the draft Constitution and how those rights should be phrased for debate by the Constituent Assembly.

⁷⁰¹ Mukholi 1995: 29. See also Odoki 2005.

4.2.3.4 Ugandans participating in the Constitution-making process

To understand how the 1995 Constitution would allow the right to life to be taken away in some circumstances, it is useful to understand how Ugandans participated in the Constitution-making process. This would explain the role of public opinion in the Constitution-making process. The Odoki Commission introduced mechanisms to ensure that all Ugandans participated in the constitution-making process. The Commission organised district and sub-county seminars in all the districts and sub-counties countrywide to brief local, civic and opinion leaders about the Constitution-making process and the important issues to be addressed.⁷⁰² The aim of these initiatives was to ‘enable the majority of Ugandans at the grassroots to actively participate in the constitution-making process.’⁷⁰³ Seminars for institutions and special interest groups, like women, were also organised.⁷⁰⁴ Odoki was of the view that the major objective of seminars for institutions and special interest groups was ‘to stimulate discussion and debate and the secondary objective was to collect views.’⁷⁰⁵ Publicity campaigns were also launched ‘to stimulate public discussion of constitutional issues amongst individuals and groups throughout the country.’⁷⁰⁶ Thousands of memoranda on what people thought should be included in the new Constitution were collected from all parts of Uganda and from special

⁷⁰² Odoki 2005: 46-74.

⁷⁰³ Odoki 2005.

⁷⁰⁴ Odoki 2005: 75-84.

⁷⁰⁵ Odoki 2005: 75.

⁷⁰⁶ Odoki 2005: 107.

interest groups.⁷⁰⁷ Several non-governmental organisations (NGOs) also submitted their views.⁷⁰⁸ Some of the issues raised in these memoranda were that the new constitution should include a comprehensive Bill of Rights and that it should incorporate international human rights.⁷⁰⁹ According to Odoki ‘every major group - religious, political, professional, cultural, social or economic presented a memorandum.’⁷¹⁰

4.2.3.5 The inclusion of the death penalty friendly provision in the Draft Constitution and the rejection of life imprisonment

The Commission of Inquiry into Violations of Human Rights was one of the interest groups the submitted proposal to the Odoki Commission. It proposed that ‘[t]he right to life should be protected. No life should be taken or death sentence imposed in the manner prescribed [sic] by law.’⁷¹¹

It is very unlikely that the authors of proposal sought the prohibition of the death penalty under all circumstances. Arguably, what the authors meant was that no life should be taken or death sentence imposed in a manner ‘proscribed’ not ‘prescribed’ by law. In other words, the authors contemplated that the Constitution incorporate safeguards that under no circumstances should the death penalty be imposed in a manner contrary to the law. Put differently, guaranteeing that the new Constitution should

⁷⁰⁷ Odoki 2005: 135-154.

⁷⁰⁸ Odoki 2005: 145.

⁷⁰⁹ Odoki 2005: 146.

⁷¹⁰ Odoki 2005: 146.

⁷¹¹ Constitutional Proposals by the Commission of Inquiry into Violations of Human Rights to the Uganda Constitutional Commission, CHR. 105/91, 29 January 1992: para 6.1, *The Report of the Commission of Inquiry into Violations of Human Rights: Findings, Conclusions and Recommendations* (1994): Appendix 7.

provide for circumstances where the death penalty could be imposed, but in accordance with the law.

Thus, in its report to the Constituent Assembly, the Odoki Commission stated that '[t]he debate on abolition of capital punishment did not receive substantial submissions. This may be a reflection of the past history of the country.'⁷¹² The Commission added that people advanced various reasons in support of the retention of the death penalty and one of them was that '[h]istory has shown that as each new regime came to power, prisoners sentenced to life sentences for murder have used the confusion to escape and to again terrorise society and commit murders.'⁷¹³ Those who opposed the death penalty, argued, amongst other things, that the death penalty was neither advantageous to the State nor to 'the family which has lost a person, or the criminal who is condemned to death. It is therefore better to convert it to life imprisonment which may bring some some benefit both to society and to the criminal.'⁷¹⁴ The Commission thus concluded as follows:

We have considered the arguments of both sides with care, critically analysed the international attitude to capital punishment and especially the praiseworthy campaign of Amnesty International for the abolition of the death penalty and consideration of the fact that the death penalty has been abolished in several countries, including a few African countries. We fully understand the need for a change of attitude to capital punishment.

⁷¹² Report of the Uganda Constitutional Commission (1992): para 7.120.

⁷¹³ Report of the Uganda Constitutional Commission (1992): para 7.120(c). Other reasons given in the support of the death penalty were: it is a deterrent sentence; it protects society from criminals especially murderers; those who commit murders do so intentionally and they deserve to be punished for their crimes; that the death penalty indicates that life is sacred; and that countries that abolished the death penalty were considering bringing it back.

⁷¹⁴ Report of the Uganda Constitutional Commission (1992): para 7.121(d).

We have, however, not found sufficient reasons to justify going against the majority views expressed in submissions to us.⁷¹⁵

It is upon that background that the Odoki Commission recommended that:

(a) Capital punishment should be retained in the new Constitution; (b) [c]apital punishment should be the maximum sentence for extremely serious crimes, namely murder, treason, aggravated robbery, and kidnapping with intent to murder; (c) It should be in the discretion of the Courts of Law to decide whether a conviction on the above crimes should deserve the maximum penalty of death or life imprisonment; (d) the issue of maintaining the death penalty should be regularly reviewed through national and public debates to discover whether the views of the people on it have changed to abolition or not.⁷¹⁶

The above two paragraphs raise important points. The Odoki Commission weighed the views of the majority of Ugandans who supported the death penalty against those of international organisations such as Amnesty International, which wanted the death penalty abolished. The Commission ‘fully’ understood the ‘need for change of attitude to capital punishment’ but its hands were tied because the majority of Ugandans supported it and there were no sufficient justifications for its abolition. However, the Commission recommended that capital punishment should be the ‘maximum’ not ‘mandatory’ sentence for extremely serious offences and that courts should have the discretion to determine whether a person convicted of such serious offences ‘should deserve the maximum penalty of death or life imprisonment.’ It is argued that the Commission thought that whereas the court should be given the discretion to impose the death

⁷¹⁵ Report of the Uganda Constitutional Commission (1992): para 7.122. See also *Attorney – General v Susan Kigula and 416 others*, Constitutional Petition No. 03 of 2006 (Judgment of 21 January 2009, unreported, Supreme Court of Uganda) 21 (emphasis removed).

⁷¹⁶ Report of the Uganda Constitutional Commission (1992): para 7.123. See also *Attorney – General v Susan Kigula and 416 others* 2009: 22. (Emphasis removed).

penalty, in the event that it did not impose it for ‘extremely serious crimes’, it had to impose life imprisonment. Put differently, the court had two options: either the death sentence or life imprisonment. However, the Commission recommended that the question of the death penalty should be reviewed regularly to establish whether or not Ugandans still supported its retention.

During the Constituent Assembly debates, three views emerged with respect to the way the death penalty should be treated in the new Constitution: ‘[o]ne which is the most extreme – to abolish it; the other one, to retain it generally on criminal offences; and the third one which specifies the type of criminal offences.’⁷¹⁷ Because the Odoki Commission had recommended the retention of the death penalty in the new Constitution, the motion by some delegates that the death penalty be abolished prompted the Chairperson of the Constituent Assembly to state that ‘...these Amendments depart from the text. The one that departs furthest is one which seeks to totally abolish the concept of the death sentence or capital punishment...’⁷¹⁸ Some of the Constituent Assembly delegates who opposed the death penalty argued that the death penalty does not achieve one of the major objectives of punishment – reform (in the sense that a person who has been executed cannot be reformed) and that the execution of the death penalty is not punishment of the offender but ‘instead it is a punishment to the rest of the family, relatives and friends’ and that there is

⁷¹⁷ Submission by Mr. ML Ojulla, *Proceedings of the Constituent Assembly (Official Report)* 2 September 1994: 1875.

⁷¹⁸ Chairman of the Constituent Assembly, *Proceedings of the Constituent Assembly (Official Report)* 2 September 1994: 1875.

no 'sufficient information to conclude that death [the] sentence necessarily can deter [sic] people from committing ... crimes.'⁷¹⁹

Delegates supporting the abolition of the death penalty advanced a variety of reasons in support of their contention. Some of reasons were: that (a) the 'better substitute' for the death penalty was life imprisonment, on condition that 'life imprisonment not meaning 16 years that are presently prescribed in Law. But actual life imprisonment...'⁷²⁰ and that 'if life sentence means life sentence' the offender will not come out of prison and reoffend and that such an offender will be 'utilised in prison, he will be able first of all to reform and will probably render some service to this country through hard labour in prison'⁷²¹; (b) that 'capital punishment originated from primitive society', (c) the argument that the death penalty is deterrent 'is false', (d) that the 'death penalty is not only wicked and cruel as a punishment but it is responsible for making human life as cheap as fish'⁷²²; (e) the death penalty was the same as revenge yet 'revenge is better' and that it could be used to eliminate political opponents;⁷²³ and (f) the death penalty was 'barbaric' and that 'it is not a deterrent' but, controversially, that 'death penalty is

⁷¹⁹ Submission by Dr. Magezi, *Proceedings of the Constituent Assembly (Official Report)* 2 September 1994: 1875.

⁷²⁰ Submission by Dr. Magezi, *Proceedings of the Constituent Assembly (Official Report)* 2 September 1994: 1875.

⁷²¹ Submission by Dr. Magezi, *Proceedings of the Constituent Assembly (Official Report)* 2 September 1994: 1895.

⁷²² Submission by Mr. Odur, *Proceedings of the Constituent Assembly (Official Report)* 2 September 1994: 1876.

⁷²³ Submission by Mr. K Pecos, *Proceedings of the Constituent Assembly (Official Report)* 2 September 1994: 1876 – 1877.

more lenient than giving someone life in prison ... [because] if you left [the offender] in prison ... he can suffer more than just this instant death.’⁷²⁴

One delegate gave three reasons for his support for the death penalty, explaining, too, why he was opposed to life imprisonment as a substitute for the death penalty:

[T]he death sentence has been effective enough in reducing murder cases. Secondly ... we will be setting a dangerous precedent between the bereaved family and the murderer’s family in such away that the bereaved family will be forced to appease them on their own. Thus reverting to the years where it used to be the only means of settling such cases. Thirdly ... from the economic point of view, this abolition of the maximum sentence from death to life imprisonment will create unnecessary ability to the Government in maintaining these murderers. (*Applause*). Even more or less it will increase cases of corruption because given time these murderers will want to buy their way out of prison.’⁷²⁵

As mentioned earlier, Uganda’s history has been characterised by gross human rights violations especially by military regimes. It is upon that background that one of military officers in the Constituent Assembly supported the retention of the death penalty by arguing that it was a deterrent because it ‘had worked very well in the Army’ and that the abolition of the death penalty would lead to ‘lawlessness’ because ‘a soldier

⁷²⁴ Submission by SK Kiwanuka, *Proceedings of the Constituent Assembly (Official Report)* 2 September 1994: 1877.

⁷²⁵ Submission by Mr. K Robinson, *Proceedings of the Constituent Assembly (Official Report)* 2 September 1994: 1875. One delegate submitted that people from his constituency were ‘opposed to the abolition of the death sentence vigorously so. To them they think and they are sure this punishment is deterrent [sic]. It deters more people who would commit murders. The only thing is that it is not possible to measure exactly how many are deterred but it has an effect on the community. The second reason is that although the death sentence does not compensate the bereaved ones, it creates or gives some mental satisfaction with [sic] the fact that he killed our person he is also dead (*Applause*). It also discourages people – bereaved ones from taking the Law into their own hands. Thirdly it will discourage mob justice. If the community knows that the person who killed the other will eventually get away, they will not arrest whoever is suspected. They will go in for him and kill him. They will not take him to Court. They appeal to Members to uphold a death sentence as par our Law books.’ See submission by Mr. Kiwagama: 1876.

will kill somebody in the village and will keep on rotating with his gun everywhere eating some food ... in prison, we shall not even administer this Army. (*Applause*).⁷²⁶ One delegate who rejected life imprisonment as the substitute for the death penalty argued that the death penalty is a deterrent, 'it is a way of getting rid of the bad element from society. (*Applause*) Those Delegates who say that we give the man or women life imprisonment if that man or woman is a bad element in society, wherever he or she goes, he can commit murder. He can commit murder in prison.'⁷²⁷ One delegate argued that he supported the retention of the death penalty and that the majority of people in his constituency (30 of the 450 who discussed the issue) supported the retention of the death sentence on the ground that 'life sentence ... is only to encourage people to go to Luzira [Uganda's maximum security prison] and do management by remote-control for their families ... and the nation spends a lot of money on [them]...'⁷²⁸

Some delegates argued for the retention of the death penalty while others argued for its abolition. It would have taken the Constituent Assembly longer to debate this issue if each and everyone was allowed to take the floor and make submissions. The submissions for or against the death penalty also became repetitive, with delegates either agreeing with what others had already said or emphasising the points made earlier. It is against this background that one of the delegates suggested to the Chairperson of

⁷²⁶ Submission by Lt Col. Sserwanga Lwanga, *Proceedings of the Constituent Assembly (Official Report)* 2 September 1994: 1877.

⁷²⁷ Submission by Mr. S Kizito, *Proceedings of the Constituent Assembly (Official Report)* 2 September 1994: 1878.

⁷²⁸ Submission by Mr. G Kinyata, *Proceedings of the Constituent Assembly (Official Report)* 2 September 1994: 1878 – 1879.

the Constituent Assembly that since he (the Chairperson) had the names of those who were for or against the death penalty, ‘people by indication would give their views whether they support [the death penalty] or not without necessarily spending ten or twenty minutes debating the obvious principles.’⁷²⁹ When the motion was put to vote, 144 delegates supported the retention of the death penalty, 26 supported the abolition of the death penalty, and three abstained.⁷³⁰ When the Constitution was adopted and promulgated, it provided under Article 22(1) that

No person shall be deprived of life intentionally except in execution of a sentence passed in a fair trial by a court of competent jurisdiction in respect of a criminal offence under the laws of Uganda and the conviction and sentence have been confirmed by the highest appellate court.

Most of the delegates who supported the abolition of the death penalty were of the view that life imprisonment, which meant the offender would spend the rest of his life in prison would have been a better substitute. Those who supported the death penalty saw life imprisonment as not sufficiently deterring. They also argued that it would be expensive for the state to keep a person in prison for the rest of his life. Although it is not a strong point to justify the retention of the death penalty, the financial consequences for a person who has been imprisoned for the rest of his or her life cannot be underestimated. We are talking about people who would grow old in prisons, who cannot do any prison labour because of old age, and who need constant medical attention, which may not even be available in prisons. One has to recall that in many prisons in Uganda prisoners are being

⁷²⁹ Submission by Mr. R Kaijuka, *Proceedings of the Constituent Assembly (Official Report)* 2 September 1994: 1880.

⁷³⁰ *Proceedings of the Constituent Assembly (Official Report)* 2 September 1994: 1881 – 1884.

detained under conditions that are below internationally accepted standards. This exposes them to many infectious diseases and could explain why the Supreme Court recommended that '[t]he government and all those who inspect prisons must ensure that the conditions under which all prisoners are kept strictly conforms [sic] to the law and to international standards.'⁷³¹

4.2.3.6 Attempts to revise the death penalty provision: the life imprisonment issue emerges again

In 2002 the government appointed the Constitutional Review Commission whose mandate was to seek the views of Ugandans on whether or not several aspects of the Constitution needed to be amended, and if so, what the amendments should be.⁷³² The Commission was required to elicit the public's views on whether or not some provisions of the Bill of Rights needed to be amended. In its report, the Commission stated that 'the people are in agreement that the [human rights] provisions in the Constitution are adequate.'⁷³³ In respect of the Bill of Rights, the Commission was mandated also to consider particularly 'whether the death penalty should be

⁷³¹ *Attorney General v Susan Kigula and 416 others* 2009: 50.

⁷³² The mandate of the Constitutional Review Commission covered the following areas: political systems and good governance; executive authority in relation to the role of parliament and the judiciary; the role and function of parliament; the electoral process (elections and elections and succession to government); Bank of Uganda; local government and whether federalism should be introduced where required; human rights and the Uganda Human Rights Commission; citizenship; protection of children; death penalty; constitutional bodies (the Inspector General of Government, the Uganda Law Reform Commission, the Uganda Land Commission, and National Planning Authority); Service Commissions; land management, dispute resolution and compulsory acquisition of land; access to justice and efficiency of courts; cultural institutions; language (whether Uganda should adopt a national language and another official language) . See generally *The Report of the Commission of Inquiry (Constitutional Review) Findings and Recommendations*, 10 December 2003.

⁷³³ *The Report of the Commission of Inquiry (Constitutional Review)* 2003: para 10.2.

abolished...⁷³⁴ After reviewing the relevant international human rights instruments, the Commission found that '[i]t is apparent ... that the death penalty is not outlawed by international law. However, a trend towards its abolition is evident.'⁷³⁵ The Commission reported that '[t]he people responded widely on this issue. The majority who responded argued in favour of retaining the death penalty' for several reasons.⁷³⁶ The Commission also added that '[a] substantial percentage of those who support the penalty want it to be retained for only the most heinous crimes.'⁷³⁷

Some of the supporters of the death penalty also 'expressed concern about the long stay of convicts before execution, a burden to the tax payer, and recommended expeditious executions.'⁷³⁸ Those opposed to the death penalty supported their position with arguments ranging from human rights concerns to religious issues.⁷³⁹ Of interest were the recommendations made by the Uganda Prisons Service, the institution charged not only with the

⁷³⁴ *The Report of the Commission of Inquiry (Constitutional Review) 2003*: para 1(r).

⁷³⁵ *The Report of the Commission of Inquiry (Constitutional Review) 2003*: para 13.4.

⁷³⁶ *The Report of the Commission of Inquiry (Constitutional Review) 2003*: para 13.5. The reasons were: it is a just penalty for serious crimes such as murder, rape and defilement of minors; it demonstrates society's disapproval of serious crimes; without the death penalty, serious crimes will be on the increase; the people of Uganda approve of the death penalty, if it is abolished, the people will resort to mob justice; and that those who urge abolition of the death penalty are not concerned about the rights of the victims.

⁷³⁷ *The Report of the Commission of Inquiry (Constitutional Review) 2003*: para 13.5. These crimes include murder, kidnapping with intent to murder, defilement of minors, and intentionally spreading AIDS.

⁷³⁸ *The Report of the Commission of Inquiry (Constitutional Review) 2003*: 13-173.

⁷³⁹ *The Report of the Commission of Inquiry (Constitutional Review) 2003*: 13-173. The reasons were: the death penalty is a cruel and inhuman punishment; it simply terminates the life of the condemned person and therefore serves no purpose; there is no credible evidence that the existence of the death penalty deters people from committing crimes; God does not permit killing; and that civilised societies are abolishing the death penalty.

imprisonment of those sentenced to life imprisonment, but also with the execution of the death sentence. Like many other people who supported the abolition of the death penalty, it recommended that the death penalty be substituted with life imprisonment without reprieve. The submission is worth reproducing:

As an alternative to the death penalty most of the people who want it abolished have proposed life imprisonment without any reprieve. Some have proposed that the convict be engaged in productive labour; that some of the proceeds of that labour should compensate the victims of the crime. The Uganda Prisons Service made a submission ... calling for the abolition of the [death] penalty. They stated that the execution of the death sentence is very traumatising to the Prison staff. "It affects the life of the officers carrying it out because of their professional relationship to the inmates. They recommended that the death penalty should be replaced by life imprisonment; that life imprisonment should imply "imprisonment until death." "In this way, the death of the offender can be achieved without hanging him".⁷⁴⁰

This submission needs to be assessed in the light of the following two factors: One, the Uganda Prisons Service has never dealt with offenders who are to be imprisoned for the rest of their lives and therefore has never faced the challenge of dealing with prisoners who know that even if they misbehaved in prison all the sentences imposed on them will have no practical effect. Two, the only reason why the Uganda Prisons Service opposed the death penalty was because it traumatises the officers who execute it. That explains why the Prison officers recommended to the Commission that 'if executions have to continue, this gruesome exercise be privatised and performed away from prison.'⁷⁴¹

⁷⁴⁰ *The Report of the Commission of Inquiry (Constitutional Review) 2003: 13-173.*

⁷⁴¹ *The Report of the Commission of Inquiry (Constitutional Review) 2003: 13-174.*

The Commission finally recommended the retention of the death penalty because the majority of Ugandans still supported it. But recommended that the death penalty be retained and remain a mandatory sentence for the crimes of murder, aggravated robbery, kidnapping with intent to murder, and the defilement of minors below fifteen years of age.⁷⁴² The Commission also recommended that since '[e]xecuting the sentence of death by hanging with the rope until the convict dies is painful[,] [that] [t]he sentence should be implemented by a method which ensures instant death.'⁷⁴³ In its White Paper, the Government accepted the recommendations of the Commission on the death penalty and noted that 'article 22 of the Constitution that relates to protection of right to life will not require any amendment.'⁷⁴⁴ In its report on the Government White Paper, the Parliamentary Committee on Legal Affairs also agreed with the government's recommendations that the death penalty should be retained and the mode of execution revised.⁷⁴⁵ This meant that the only way that the death penalty could be challenged was through courts of law because the proposed amendments had retained Article 22 intact.

⁷⁴² *The Report of the Commission of Inquiry (Constitutional Review)* 2003: para 13.7(i).

⁷⁴³ *The Report of the Commission of Inquiry (Constitutional Review)* 2003: para 13.7(ii).

⁷⁴⁴ *Government White Paper on the Report of the Commission of Inquiry (Constitutional Review) and Government Proposals not Addressed by the Report of the Commission of Inquiry (Constitutional Review)*, September 2004: para 12.3.

⁷⁴⁵ *The Report of the Legal and Parliamentary Affairs Committee on the Government White Paper on Constitutional Review and Political Transition*, 20 December 2004: 49.

4.2.3.7 Challenging the constitutionality of the death penalty: Supreme Court and its order substituting death penalties by life imprisonment without remission

On 21 January 2009, the Supreme Court of Uganda handed down the long-awaited judgment of *Attorney-General v Susan Kigula and 416 others* (the *Kigula* case).⁷⁴⁶ It was a result of an appeal against the Constitutional Court's ruling, *inter alia*, that the death penalty was not unconstitutional, but that the mandatory death sentence in the Penal Code Act for murder was.⁷⁴⁷ Following the Constitutional Court's ruling, both the government and death row inmates appealed to the Supreme Court with the government arguing, *inter alia*, that the Constitutional Court erred in law when it found that the mandatory death penalty for murder was unconstitutional.⁷⁴⁸ On the other hand, the death row inmates appealed against the Constitutional Court's ruling that the death penalty was not unconstitutional and therefore not a cruel, inhuman and degrading form of punishment because it was provided for under the Constitution.⁷⁴⁹ They also appealed against the Constitutional Court's finding that hanging, as a form of execution, was not a cruel and inhuman punishment within the meaning of Article 24 of the Constitution, and therefore not unconstitutional.⁷⁵⁰

⁷⁴⁶ *Attorney – General v Susan Kigula and 416 others* 2009.

⁷⁴⁷ See *Susan Kigula and 417 Others v Attorney – General*, Constitutional Petition No.6 of 2003 (Judgment of 5 June 2005). The Constitutional Court held that the mandatory death sentence was unconstitutional because it violated the accused's right to a fair trial in the sense that he could not be heard in mitigation once found guilty of murder. The Court also held that hanging as a method of execution did not violate Article 24 of the Constitution which prohibits cruel, inhuman and degrading punishment.

⁷⁴⁸ *Attorney-General v Susan Kigula and 416 others* 2009: 10.

⁷⁴⁹ *Attorney-General v Susan Kigula and 416 others* 2009: 10.

⁷⁵⁰ *Attorney-General v Susan Kigula and 416 others* 2009: 2.

While the appeal against the Constitutional Court's judgment was pending before the Supreme Court,⁷⁵¹ the sentencing of offenders who had been found guilty of murder became not only a source of considerable uncertainty at the High Court level but had also almost come to a standstill in the Court of Appeal and the Supreme Court. With regard to the High Court, some judges held the view that the death penalty was still a mandatory sentence for murder and sentenced offenders accordingly.⁷⁵² Other High Court (and also Court of Appeal) judges were of the view that the death sentence was a discretionary sentence in cases of murder, and imposed lesser sentences where there were mitigating circumstances.⁷⁵³ At the Court of Appeal⁷⁵⁴ and Supreme Court levels, sentencing in several

⁷⁵¹ Under Article 132 of the Constitution the Supreme Court is the final Court of Appeal in constitutional matters.

⁷⁵² For example, in *Uganda v Wepondi Robert alias Mutto* [HCT-04-CR-SC-0003 of 2005][2005] (14 July 2005), which was decided just over a month after the Constitutional Court had declared the mandatory death sentence to be unconstitutional, the accused was convicted on three counts of murder and in sentencing him to death, the High Court observed that '[o]n counts 1, 2 and 3 there is only one sentence authorized by the law and that is that you shall suffer death in a manner authorised by the law.'

⁷⁵³ For example, in *Uganda v Bizimana* (HC-00-CR-SC-0122 of 2005)[2006]UGHC 46 (16 January 2006) the accused was convicted of nine counts of murder (he and others murdered tourists) and the Court before sentencing him to 15 years' imprisonment instead of death held that '[i]n Constitutional Section [sic] No.6 of 2003 the Constitutional Court ruled and declared that Section 189 of the Penal Code which prescribes a mandatory death sentence is inconsistent with Article 21, 22(1), 24, 28, and 44(a) and 44(b) of the Constitution. The court ordered that in capital offence the trial court must, before sentencing the convict afford him/ her a hearing on mitigation of sentence.' In *Okwang William v Uganda* (Criminal Appeal No. 69 of 2002)[2007]UGCA 59 (21 May 2007) the appellant's appeal against his conviction for murder was confirmed by the Court of Appeal which then observed that '[t]he death sentence was passed against the appellant on 8/5/2002. This was before Constitutional Court pronounced itself on the mandatory death sentence... we have taken into account all the mitigating factors. We have found no mitigating factors deserving reduction of the sentence. We are of the considered view that this was a brutal murder...The ground on mitigation of the sentence that was imposed on the appellant also fails.' Of the 47 offenders who were serving life imprisonment in Uganda in July 2008, five had been convicted of murder and sentenced to life imprisonment instead of death. Mujuzi 2008(a): 167.

⁷⁵⁴ For example, *Absolom Omolo Owiny v Uganda* (Criminal Appeal No. 321 of 2003) [2008] UGCA 2 (8 April 2008) the appellant's appeal against his conviction for murder was dismissed and on the issue of the sentence of death imposed on him, the Court of Appeal 'regarding ground 4 of the memorandum of appeal which concerns mitigation of

judgments where the appeals of offenders who had been convicted of murder and sentenced to death had been dismissed was put on hold because the judges were waiting for the Supreme Court's ruling on the constitutionality of the death penalty and the constitutionality of the mandatory death sentence for murder.⁷⁵⁵

On 21 January 2009, the Supreme Court finally handed down its judgment and held: first, that the death penalty is constitutional because it is sanctioned under the Constitution and that the framers of the Constitution took into consideration Uganda's history of grave human rights violations before including Article 22(1) in the Constitution, which provides that the right to life can be taken away as long as the manner in which it is taken away is not 'arbitrary'; second, that the mandatory death sentence is unconstitutional because it violates the offender's right to a fair trial in the sense that he or she cannot be heard in mitigation at the sentencing stage. It also infringed the doctrine of separation of powers because it eliminated the judge's discretion in determining which sentence fitted both the offence and the offender; finally, that hanging, as a form of execution, is not a

sentence, we would say that we cannot enforce our decision in ... *Susan Kigula and 416 Ors v Attorney-General* because it is pending confirmation of the Supreme Court, on appeal.'

⁷⁵⁵ For example, in *Enock v Uganda* (Criminal Appeal No. 11 of 2004) [2007] UGSC 3 (30 May 2007) the Supreme Court dismissed the appellant's conviction for murder but held that 'because of the decision of the Constitutional Court in Constitutional Court Petition No. 6 of 2006 (**Susan Kigula & 417 Others v Attorney General**) from which an appeal is pending in this Court, we exercise our discretion and postpone confirmation of sentence in this case under Article 22(1) of the Constitution, until determination of the pending Constitutional Appeal in this Court'; in *Susan Kigula Sserembe and Anor v Uganda* (Criminal Appeal No. 1 of 2004)[2008] UGSC 15 (15 October 2008) the Supreme Court dismissed the appellants' appeal against their conviction for murder but held that '[t]he sentence of death imposed upon the appellants is suspended pending the determination of Constitutional Appeal No.3 of 2006.' See also *Bagatenda Peter v Uganda* (Criminal Appeal No. 10 of 2006) [2007] UGSC 15 (16 October 2007); *Sekandi Hasan v Uganda* (Criminal Appeal No. 12 of 2005) [2007] UGSC 12 (5 July 2007).

cruel, inhuman and degrading punishment within the meaning of Article 24 of the Constitution. It was therefore not unconstitutional and that there was no evidence that other methods of execution, such as, lethal injection, were less painful than hanging; and third and most importantly for our discussion, that when a prisoner sentenced to death spends three years in detention after his appeal has been dismissed by the highest court and his application for the President to exercise his prerogative of mercy and commute his sentence has not been dealt with, to know whether he has been granted reprieve or remission or would be executed, the death row phenomenon sets in. The Court held that the death row phenomenon is a cruel, inhuman and degrading treatment and that executing a prisoner who has spent three years on death row is cruel, inhuman and degrading. The Court ordered that a prisoner who has been on death row for three years and more his sentence should automatically be commuted to 'imprisonment for life without remission.'⁷⁵⁶ The Court's ruling attracted considerable media coverage both in Uganda⁷⁵⁷ and abroad.⁷⁵⁸ However, it also had the

⁷⁵⁶ *Attorney-General v Susan Kigula and 416 others* 2009: 63.

⁷⁵⁷ Afedraru *et al* 'Uganda Supreme Court Upholds Death Sentence' *Daily Monitor*, 22 January 2009 at http://www.monitor.co.ug/artman/publish/news/Ugandan_Supreme_Court_upholds_death_sentence_78608.shtml (accessed 24 January 2009); Editorial, 'Positives from Ruling on the Death Penalty' *Daily Monitor*, 23 January 2009 at http://www.monitor.co.ug/artman/publish/opinions/Positives_from_ruling_on_the_death_penalty_78644.shtml (accessed 24 January 2009); A Mugisa *et al* 'Death Sentence Judgment Puzzles Lawyers' *The New Vision*, 22 January 2008 at <http://www.newvision.co.ug/D/8/13/668974> (accessed 24 January 2009); and Mugisa and Nsambu, 'Supreme Court Retains Death Penalty' *The New Vision*, 21 January 2009, at <http://www.newvision.co.ug/D/8/12/668812> (accessed 24 January 2009); Mujuzi, 'Implications of the Death Penalty Ruling' *The Monitor*, 28 January 2009 at http://www.monitor.co.ug/artman/publish/opinions/Implications_of_the_death_penalty_ruling_78887.shtml (accessed 19 February 2009).

⁷⁵⁸ 'Uganda Court Keeps Death Penalty' BBC News, 21 January 2009 at <http://news.bbc.co.uk/2/hi/africa/7841749.stm> (accessed 24 January 2009); and 'Uganda's Supreme Court Declares Death Penalty Right' *Guardian Newspaper*, 22 January 2009 at http://www.ngrguardiannews.com/africa/article02//indexn3_html?pdate=220109&ptitle=U

effect of confusing prison authorities on how they should deal with prisoners who had exhausted their appeals and had been on death row for more than three years.⁷⁵⁹ The Court should be applauded for declaring the mandatory death sentence unconstitutional. At least this would save many people who would have been convicted of murder, but with mitigating circumstances, from being sentenced to death. In the words of the Court:

Not all murders are committed in the same circumstances, and all murderers are not necessarily of the same character. One may be a first offender, and the murder may have been committed in circumstances that the accused person deeply regrets and is very remorseful. We see no reason why these factors should not be put before the court before it passes the ultimate sentence.⁷⁶⁰

Consequently, the Court ordered that

[f]or those respondents whose sentences arose from the mandatory sentence provisions and are still pending before an appellate Court, their cases shall be remitted to the High Court for them to be heard only on mitigation of sentence, and the High Court may pass such sentence as it deems fit under the law.⁷⁶¹

The South African experience shows that it is not unlikely that several offenders who were on death row could be re-sentenced to life

ganda's%20supreme%20cour%20declares%20death%20penalty%20right&cpdate=240109 (accessed 24 January 2009).

⁷⁵⁹ See Butagira *et al* 'Death Penalty Ruling Puzzles Prison Bosses' *Saturday Monitor*, 24 January 2009 at http://www.monitor.co.ug/artman/publish/news/Death_penalty_ruling_puzzles_prison_bos ses_78725.shtml (accessed 24 January 2009) where it is reported that 'The Supreme Court ruling that prisoners, who have stayed on death row for more than three years, after exhausting all appeals, should not be executed but imprisoned for life has confused prison officials. Saturday Monitor has learnt that the officials are puzzled about how to handle condemned persons still in formal confinement. Dr. Johnson Byabashaija, the [C]ommissioner [G]eneral of Uganda Prisons, said the government needs to clarify if the ... decision, a rising from a petition by some 417 death row inmates to have the court quash the death sentence, would apply retrospectively. "We are going to write to the Attorney General...for advice because the Supreme Court ruling has got implications on all persons who have gone through all appeals [and stayed thereafter] on death row for more than three years".'

⁷⁶⁰ *Attorney – General v Susan Kigula and 416 others* 2009: 43.

⁷⁶¹ *Attorney – General v Susan Kigula and 416 others* 2009: 64.

imprisonment or lengthy prison terms pursuant to the Court's order after being heard in mitigation.⁷⁶² However, in Uganda some offenders could still be sentenced to death when the High Court deems it fit that the aggravating circumstances outweigh the mitigating circumstances. The Court should also be applauded for holding that keeping death row inmates for longer than three years in detention after they have exhausted their appeals which allowed the death row phenomenon to set in was cruel, inhuman and degrading. The Court ordered that:

[f]or those respondents whose sentences were already confirmed by the highest Court, their petitions for mercy under article 121 of the Constitution must be processed and determined within three years from the date of confirmation of the sentence. Where after three years no decision has been made by the Executive, the death sentence shall be deemed commuted to imprisonment for life without remission.⁷⁶³

The Court held that it should not be misunderstood as calling upon the government to execute expeditiously prisoners whose appeals and application for clemency have been dismissed. However, in what appears to be a contradiction, it held that 'a delay [in] carrying out [a] sentence beyond three years from the date when the sentence of death was confirmed by the highest court constitutes unreasonable delay'⁷⁶⁴ consequently, the execution of a prisoner after the expiry of that period would be cruel and inhuman and therefore unconstitutional.

It is argued that there are three possible implications that could flow from the above ruling. One, when all prisoners who have been sentenced to death

⁷⁶² See 4.2.1.2.1 (above).

⁷⁶³ *Attorney – General v Susan Kigula and 416 others* 2009: 63.

⁷⁶⁴ *Attorney – General v Susan Kigula and 416 others* 2009: 57.

apply for clemency, there is no requirement that the President must consider those applications on a first-come-first-serve basis. Therefore, there is a perceived danger that some applications (of, for example of political prisoners, ritual murderers or people who have committed the worst forms of murder) being fast-tracked and quickly declined so that the prisoner is executed as soon as possible before the death row syndrome sets in. This is not unlikely because in his reaction to the Supreme Court ruling, the President of Uganda, Yoweri Kaguta Museveni, reportedly said that he was happy that the Court had not abolished the death penalty and that ‘those who kill innocent Ugandans deserve nothing less than death.’⁷⁶⁵

The second consequence is the most obvious one: if within three years of the application the President’s decision on the application for clemency is still pending, the death sentence is automatically commuted to life imprisonment without remission. The third consequence is that the President could commute many death sentences to either lengthy prison terms or life imprisonment.

The Court could have gone too far in ordering that those prisoners whose applications for clemency have not been attended to within three years should have their death sentence deemed to have been commuted to imprisonment for life without remission. It should not have overlooked the fact that the prison authorities have the discretion to grant remission to offenders for meritorious behaviour in prison. This discretion derives from

⁷⁶⁵ See Vision Reporter, ‘Museveni Backs Court on Death Penalty’ *The New Vision*, 26 January 2009, at <http://www.newvision.co.ug/D/8/12/669387> (accessed 27 January 2009).

sections 84 to 86 of the Prisons Act.⁷⁶⁶ Remission of a sentence is always an incentive for good conduct in prison. Evidence from other countries like Mauritius shows that prisoners who are aware that they are not entitled to remission are hard to manage and can be troublesome.⁷⁶⁷ However, unlike the Constitutional Court, which held that if the death penalty is to be abolished life imprisonment should mean that the prisoner would be imprisoned for the rest of his life, the Supreme Court held that death sentences would be commuted to life imprisonment without remission. It is argued that there is a difference between life imprisonment where the prisoner is imprisoned for the rest of his life on the one hand and life imprisonment without remission. In the latter case, a prisoner sentenced to life imprisonment would have to be imprisoned for 20 years because under the Uganda Prisons Act life imprisonment means a maximum of 20 years' imprisonment. However, in practice, prisoners sentenced to life imprisonment are released after serving 16 years, 8 months and 10 days if they behaved well while in prison and earned credits.⁷⁶⁸ However, in the former scenario, the prisoner would be imprisoned until his death.

⁷⁶⁶ Prisons Act, Act 17 of 2006.

⁷⁶⁷ The Mauritius National Commission on Human Rights reported that '[t]he Security Audit Committee commented on the fact that those convicted of drug offences are not entitled to any remission. Other prisoners are entitled as of right to one third of their sentence as remission. Misconduct on their part is sanctioned by a loss of remission. There is an incentive for them to be of good conduct. On the other hand, as drug offenders are not entitled to remission, they have no incentive to be of good behaviour. We endorse the view of the Security Audit Committee that a measure of remission would be beneficial to both offenders and the prisons administration. It is hoped that the authorities will come forward with appropriate measures.' See *The 2001 Annual Report of the National Human Rights Commission of Mauritius* (February 2002): paras 76 – 77.

⁷⁶⁸ Personal interview with 10 prisoners who are serving life imprisonment in the Luzira Maximum Security prison, Kampala, Uganda on 14 January 2008. (One of the prisoners interviewed was to be released in the following month because he had served 16 years and 7 months). The prison officers also informed the author that it is true that prisoners

The Supreme Court's ruling could also be interpreted to mean that an offender whose death sentence has been commuted to life imprisonment without remission should remain in prison for the rest of his life. This interpretation would be disputable on at least two grounds: One, if the Supreme Court wanted to hold that life imprisonment should mean life imprisonment where the prisoner would be imprisoned for the rest of his life, it should have expressly stated so. But it chose to rule that such prisoners are not entitled to remission. Second, as indicated above, after the Supreme Court's ruling, the Prison authorities said they were in the process of seeking the Attorney-General's advice on whether or not the judgment applied retrospectively.⁷⁶⁹ The Attorney-General's advice would guide them on when the relevant prisoners would be eligible for release.

Current positive Ugandan law does not permit imprisonment of a prisoner until his death. However, as mentioned earlier, the Constitutional Court held that if the death penalty is to be abolished, life imprisonment should mean that the prisoner will be imprisoned until his death. The discussion now turns to the Constitutional Court ruling and it will deal with why the law in Uganda should not be amended to allow life imprisonment without the possibility of release.

sentenced to life imprisonment could serve the maximum of 20 years and that in practice if they behaved well their sentence could be remitted to 16 years, 8 months and 10 days.

⁷⁶⁹ See Butagira *et al* 'Death Penalty Ruling Puzzles Prison Bosses' *Saturday Monitor*, 24 January 2009 at http://www.monitor.co.ug/artman/publish/news/Death_penalty_ruling_puzzles_prison_bosses_78725.shtml (accessed 24 January 2009).

4.2.3.8 Challenging ‘whole life’ imprisonment as suggested by the Constitutional Court

In Uganda section 86(3) of the Prisons Act⁷⁷⁰ provides that ‘[f]or the purpose of calculating remission of sentence, imprisonment for life shall be deemed to be twenty years’ imprisonment.’ Courts that have been imposing life sentences in Uganda have always understood life imprisonment to mean a sentence of imprisonment of not more than 20 years. In the 1975 Court of Appeal decision of *Wasaja v Uganda*,⁷⁷¹ the appellant was found guilty of the offences of robbery and threatening to use violence. The High Court sentenced him to 15 years’ imprisonment and to 24 strokes with a cane after already having spent nearly two years in custody. He appealed against the sentence. The Court of Appeal reduced the sentence to 10 years’ imprisonment and 12 strokes on the ground that it was excessive, stating that ‘[t]he maximum sentence of imprisonment [for the offences the accused had committed] is life, which we take to be equivalent to a sentence of 18-20 years.’⁷⁷²

In 1994 the Supreme Court of Uganda set aside a High Court decision in which it convicted the appellant of manslaughter and sentenced him to 18 years’ imprisonment.⁷⁷³ The High Court had sentenced the appellant after she had already spent two years in prison. The Supreme Court set aside the High Court’s decision on the ground that the appellant had been effectively sentenced to 20 years which was in effect a life sentence under the Prisons

⁷⁷⁰ Act 17 of 2006.

⁷⁷¹ *Wasaja v Uganda* [1975] E.A. 181.

⁷⁷² *Wasaja v Uganda* 1975: 184.

⁷⁷³ *Kakooza v Uganda* [1994] V KALR 54.

Act. In 2003 in *Wanaba v Uganda*,⁷⁷⁴ the Court of Appeal held that ‘a sentence of life imprisonment means 20 years imprisonment.’⁷⁷⁵ However, in its 2005 judgment of *Susan Kigula & 416 others v The Attorney General*⁷⁷⁶ the Constitutional Court was of the view that imprisonment for life should not merely mean 20 years. But, in the words of Appleton and Grøver, ‘whole-life.’⁷⁷⁷

In 2006, a few months after the Constitutional Court’s decision, a new Prisons Act was enacted which retained the provision as is in the old Prisons Act to the effect that life imprisonment means 20 years’ imprisonment. In January 2007, in *Guloba Muzamiru v Uganda*⁷⁷⁸ in which the appellant, a 22-year old man was sentenced by the High Court (in 2004) to life imprisonment for defiling a two-and-a-half-year-old baby, the Court of Appeal rejected the appellant’s argument that ‘life imprisonment was almost as bad as death.’⁷⁷⁹ This means courts still consider life imprisonment to mean 20 years’ imprisonment. As at 30 September 2007,

⁷⁷⁴ *Wanaba v Uganda* Criminal Appeal No. 156 of 2001, (decided on 22 July 2003), (unreported).

⁷⁷⁵ *Wanaba v Uganda* 2003: 8.

⁷⁷⁶ *Susan Kigula and 416 others v the Attorney-General*, Constitutional Petition No.6 of 2003(Judgment of 20 June 2005, unreported): 140-142. In this case the petitioners had been sentenced to death and they petitioned the Constitutional Court for declaration that the death penalty was unconstitutional *inter alia* that because it amounted to torture, cruel or degrading and inhuman treatment and that it violated the right to life. The Constitutional Court held that the death penalty was not unconstitutional because according to the constitution (article 22(1)) the right to life is not absolute and it can be taken away provided due process of law has been followed. However, the Court held that mandatory death penalty was unconstitutional because it eliminated the discretion of the courts in sentencing. The court held that mandatory death penalty in cases of murder meant that it was the executive and the legislature passing the sentence and not the courts.

⁷⁷⁷ Appleton and Grøver 2007: 603.

⁷⁷⁸ *Guloba Muzamiru v Uganda* Criminal Appeal No. 289/2003 (unreported).

⁷⁷⁹ *Guloba Muzamiru v Uganda* 2003: 2.

43 prisoners, only two of whom were female, were serving life sentences in Uganda for the following offences: five for robbery; five for murder (all sentenced after February 2006 when the Constitutional Court declared the mandatory death penalty for murder unconstitutional in the *Kigula* case); six for manslaughter; one for rape and manslaughter; 20 for defilement; one for failure to protect war material (sentenced by a military court); one for attempted murder; one for aggravated robbery; one for kidnap with intent to murder; one for simple robbery; and one for rape. Only three had been sentenced by military courts and the rest by the High Court.⁷⁸⁰

The aim of this section is to highlight the challenges associated with ‘whole-life’ life imprisonment and recommend that the law in Uganda should not be amended to provide that an offender sentenced to life imprisonment should be in prison for the rest of his life. However, before arguing this issue, it is important to reproduce the statement made by the Constitutional Court to justify its support for life imprisonment without the possibility of release.

In the case of *Susan Kigula & 416 others v The Attorney General*⁷⁸¹ Justice Amos Twinomujuni held as follows:

I hold the view that section 47(6) of the Prisons Act (cap 304 Laws of Uganda), should be brought into conformity with the Constitution. It states:-
“For the purpose of calculating remission of a sentence, imprisonment for life shall be deemed to be twenty years imprisonment.” To my understanding, this provision has the effect of fettering the discretion of courts to pass a sentence of imprisonment which is greater than 20 years! Suppose, during sentencing, the court does not use the term **“life**

⁷⁸⁰ Statistics obtained from Uganda Prisons Headquarters, Kampala, in January 2008 (on file with the author).

⁷⁸¹ *Susan Kigula and 416 others v Attorney-General* 2005.

imprisonment” and for example simply imposes a sentence of 50 years, does this provision confer the discretion on the Prisons authorities to deem 20 years imprisonment as the maximum sentence imposed? Is this not another attempt by the legislature to pre-determined [sic] sentences without hearing the parties in order to determine an appropriate sentence? *If a “life imprisonment” sentence is pronounced, why can’t the convict serve imprisonment for life?* I do appreciate that there will be cases where a person sentenced to serve imprisonment for life deserves remission for good behavior[sic] while in prison or indeed for any other just cause. Couldn’t such a case be taken care of under article 121(1) of the Constitution where the President has the power to grant remissions of sentences to deserving prisoners? *In my opinion, if the Supreme Court confirms a sentence of Life Imprisonment, it will only do so in conformity with article 126 of the Constitution. It will only do so to give effect to the peoples [sic] wish that the convict is an undesirable character in society and should be removed and kept away forever. It would be unconstitutional for Parliament to authorise Prisons authorities to alter the sentence in the guise of calculating remission. Such a person is not entitled to any remission at all. If, however, the Prisons Authorities think such a person is entitled to remission, they should make a representation to the President to exercise his constitutional powers under article 121 of the Constitution.* Other than the President and in accordance with the constitution, nobody should be allowed to alter the order of the Supreme Court passed in accordance with the Constitution of Uganda. *In the circumstances, where the courts must fully comply with articles 22(1), 28 and 44(c), life imprisonment is a realistic alternative to a death penalty and it can only be a viable alternative if it means imprisonment for life, and not a mere twenty years as it is currently understood to mean.*⁷⁸²

In order to discuss of the Constitutional Court’s opinions above properly, it is useful to divide them into a two broad categories, namely: (1) the constitutionality or otherwise of sentences imposed to prevent prison authorities from releasing certain offenders; and (2) the implications of ‘whole-life’ life sentences.

4.2.3.8.1 The constitutionality of sentences longer than life imprisonment

In the above quotation, the Constitutional Court poses a question to the effect that supposing the court imposed a sentence of 50 years instead of

⁷⁸² *Susan Kigula and 416 others v Attorney-General* 2005: 140-142. (Emphasis in bold in original judgment. Emphasis in italics added).

life sentence, would the prison authorities go ahead and release a prisoner after he/she has served twenty 20 years. It might be useful in addressing this question, to look to see how other African jurisdictions have approached this issue. In Botswana, for example, there are cases where courts have imposed sentences where the offenders would be required to spend more years in prison before being eligible for release on parole than they would have had spent had they been sentenced to life imprisonment. Section 85(c) of the Prisons Act of Botswana⁷⁸³ provides that ‘... a prisoner shall be eligible for release from prison on parole if he is serving – a term of imprisonment for life or is confined during the President’s pleasure and has served seven years imprisonment.’ However, there are cases where offenders have been sentenced to 35 years⁷⁸⁴ and 25 years⁷⁸⁵ imprisonment. What is vital to note about these cases is that the law empowers courts to impose them. Even though courts in Botswana are allowed to impose such lengthy sentences, such sentences must be proportional to the offence committed, otherwise they would be found to be inhuman.⁷⁸⁶

Even in cases where lengthy sentences have been imposed, the Botswana Prisons Act provides that such persons are eligible for parole after serving a

⁷⁸³ Chapter 21:03 of 1980.

⁷⁸⁴ *S v Mokhe* (CLCLB-068-07) [2008] BWCA 65 (24 July 2008), the High Court found the accused guilty of murder with extenuating circumstances and sentenced him to an effective 35 years’ imprisonment. However, on appeal, the Court of Appeal reduced the sentence to 20 years’ imprisonment.

⁷⁸⁵ *S v Monnapudi* (CLCLB-039-08) [2008] BWCA 58 (1 July 2008), the accused, an HIV – positive man, was found guilty of rape and sentenced to 30 years’ imprisonment by the High Court although the Court of Appeal reduced the sentence to 25 years.

⁷⁸⁶ *S v Seguma* (117 of 2003) [2008] BWCA 30 (24 April 2008) where the Court of Appeal held that a cumulative sentence of 24 years’ imprisonment for rape in the circumstances was inhuman.

stipulated number of years. In other words, the court is aware that the prisoner will not stay in prison for the rest of his life. On the other hand, what the Constitutional Court of Uganda is impliedly suggesting is that in some cases, where courts predict that the prison authorities would release a prisoner earlier than what such courts would prefer, a court may impose a sentence that would in effect mean that the prisoner should never be released until he/she has served a very long period of time: this would be a period longer than he/she would have served had he been sentenced to life imprisonment. Jurisprudence emanating from the Supreme Court of Appeal of South Africa will be used to analyse the human rights implications of sentences where the prisoner would in practice be required to spend the rest of his life in prison.

Following the abolition of the death penalty in South Africa, and the increase of violent crime countrywide, the courts resorted to imposing excessively lengthy sentences. The aim was to ensure that such prisoners are, to use the words of the Constitutional Court of Uganda, 'kept away forever.' This happened at a time when a sentence of life imprisonment meant 20 years. In *Mhlakaza and Others v S*⁷⁸⁷ the accused were convicted of a number of offences, including the murder of a police officer. The first accused was sentenced to an 'effective'⁷⁸⁸ sentence of 47 years' imprisonment and the second accused to 38 years' imprisonment. The

⁷⁸⁷ *Mhlakaza and Others v S* [1997] 2 All SA 185 (A)

⁷⁸⁸ According to the judgment effective sentence meant 'the difference between the cumulative and suspended sentence.' See page 185. 'Appellant No.1 was sentenced cumulatively to 62 years of which 15 years were suspended; No 2, who was similarly to 62 years, had 20 years of his sentence suspended and further two years were ordered to run concurrently. The so-called effective sentences were thus 47 and 38 years respectively.' See page 187.

Supreme Court of Appeal set aside the sentences holding that they were excessive. In *Nkosi and Others v S*⁷⁸⁹ the appellants were convicted of a number of offences, including murder. The first appellant was sentenced to an effective period of 120 years' imprisonment; the second and third appellants were sentenced to an effective period of 65 years' imprisonment; and the fourth appellant was sentenced to an effective term of 45 years' imprisonment. While allowing the appeal, the Supreme Court of Appeal held that:

the courts are discouraged from imposing excessively long sentences of imprisonment in order to avoid having a prisoner being released on parole. A prisoner serving a sentence of life imprisonment will be considered for parole after serving at least 20 years of the sentence, or at least 15 years thereof if over 65 years, according to the current policy of the Department of Correctional Services. A sentence exceeding the probable life span of a prisoner means that he [or she] will have no chance of being released on the expiry of the sentence and also no chance of being released on parole after serving one half of the sentence. Such a sentence will amount to cruel, inhuman and degrading punishment.⁷⁹⁰

The holding by the Supreme Court of Appeal above should answer the question asked by the Constitutional Court of Uganda with regard to sentences the aim of which is to prevent the release of a prisoner on parole. Such sentences would amount to cruel, inhuman and degrading treating or punishment under Article 24 of the Constitution of Uganda, Article 7 of the International Covenant on Civil and Political Rights⁷⁹¹ and Article 5 of the

⁷⁸⁹ *Nkosi and Others v S* [2002] JOL 10209(SCA).

⁷⁹⁰ See page 1 of 10209(SCA).

⁷⁹¹ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 and entered into force on 23 March 1976. Uganda ratified the ICCPR on 21 September 1995 without reservations or interpretative declarations. See <http://www.unhchr.ch/html/menu3/b/treaty5_asp.htm> (3 October 2007). For a discussion on the meaning and legal implications of reservations and interpretative declarations in international law, see Mujuzi 2008(d): 41-61. See also Brownlie 2008: 612 – 616.

African Charter on Human and Peoples' Rights which Uganda ratified on 10 May 1986. As judges Tulkens, Carbral Barreto, Fura-Sandström, Spiellmann and Jebens rightly wrote in their dissenting opinion in *Kafkaris v Cyprus*, '[u]nless one chooses to ignore reality, a sentence ... with no hope of release... constitutes inhuman and degrading treatment.'⁷⁹²

Related to the above is the issue of imposing sentences of more than 20 years with the aim of protecting society from such criminals. Over time, researchers have found that lengthy prison sentences are not effective in deterring offenders from re-offending when released, neither are they effective in reducing the crime rate.⁷⁹³ As the Constitutional Court of South Africa observed in *Makwanyane*⁷⁹⁴ the possibility of a would-be offender being arrested has a more deterring effect than the severe punishment of the unlucky few offenders who get arrested.⁷⁹⁵ Luckily, no Ugandan court has ever imposed a sentence as severe as 50 years' imprisonment as the Constitutional Court noted.

4.2.3.8.2 The implications of 'whole-life' life imprisonment

As mentioned earlier, in some countries such as Zimbabwe, Ghana, and Kenya, life imprisonment means spending the rest of the offender's life in

⁷⁹² *Kafkaris v Cyprus* 2008: para 6.

⁷⁹³ Giffard and Muntingh have stated that '...there is no evidence to suggest that longer sentences reduce crime levels, except in so far as they keep some offenders in custody, who are thus unable to commit offences in free society... long sentences place greater strain on the resources of the criminal justice system, undermine the rehabilitative ideal, and thus make it more likely that ...offenders will re-offend.' See Giffard and Muntingh 2006: 47. See also O'Donovan and Redpath 2006: 22-33.

⁷⁹⁴ *S v Makwanyane and another* 1995.

⁷⁹⁵ *S v Makwanyane and another* 1995: para 126.

prison.⁷⁹⁶ The Constitutional Court of Uganda, too, would like life imprisonment in Uganda to change from 20 years to whole-life. This will raise problems which are discussed in the next section.

4.2.3.8.3 Denial of parole to prisoners serving life sentences: Cruel, inhuman and degrading punishment

Section 89 of the Uganda Prisons Act⁷⁹⁷ provides that a prisoner who is serving a sentence of imprisonment for a period of three years or more may be released on parole within six months of the date he is due for release on conditions and for reasons approved by the Commissioner General of Prisons. The prisoner's temporary absence from prison shall not be greater than three months. Such a prisoner is supposed to obey the parole conditions imposed by the Commissioner General. Failure to do so will result in the person being called back to prison.⁷⁹⁸ Section 84 of the Act provides for the remission of a sentence of any convicted prisoner sentenced to imprisonment for a period exceeding one month. As indicated above, for purposes of remission life imprisonment means 20 years' imprisonment. Unlike the South African Correctional Services Act,⁷⁹⁹ which specifically provides that a prisoner serving a life sentence may be considered for parole after 25 years,⁸⁰⁰ and which lays down in detail the

⁷⁹⁶ See 4.1 (above).

⁷⁹⁷ Act 17 of 2006.

⁷⁹⁸ Section 89(2-4).

⁷⁹⁹ Act 111 of 1998.

⁸⁰⁰ Section 73 (6)(b)(iv).

conditions that may be imposed on such a prisoner released on parole,⁸⁰¹ the Uganda Prisons Act is not so detailed.

Section 86(3) should therefore be read together with sections 89 and 84 to mean that a prisoner serving a life sentence shall also be released on parole within six months of the date he/she is due for release on conditions that may be imposed by the Commissioner General of Prisons. This means that if prisoners serving a life sentence were to serve ‘whole-life,’ they would not only be deprived of the benefit of sections 84 and 89, but they will never have a chance of expecting to be released at all unless pardoned by the President whose decision depends on many unknown factors. As the dissenting judges in the European Court of Human Rights in *Kafkaris v Cyprus* rightly put it, for a prisoner sentenced to life imprisonment to wait for a presidential pardon for his release which is a matter dependant on unknown factors, such a prisoner would not have ‘a real and tangible prospect of release.’⁸⁰² One has to recall that parole is an administrative decision which must be exercised in line with Article 42 of the Constitution, which provides that any administrative decision must be taken justly and fairly. Parole is not a right. As the European Court of Human Rights rightly observed in the case of *Ezeh and Connors v The United Kingdom*,⁸⁰³

[T]he early release, the remission, the conditional release, the parole or whatever one chooses to call it, *cannot* be a prisoner's right. It may be a

⁸⁰¹ Chapters VI and VII.

⁸⁰² *Kafkaris v Cyprus* 2008, joint dissenting judgment of judges Tulkens, Cabral Barreto, Fura- Sandström, Spielmann and Jebens, para 6.

⁸⁰³ *Ezeh and Connors v The United Kingdom* (Applications nos. 39665/98 and 40086/98) Judgment of 9 October 2003.

factual “expectation”, even a reasonable one, but at bottom it is still a privilege. The privilege may or may not be granted.⁸⁰⁴

However, the above-cited decision of the European Court of Human Rights’ should be interpreted on a case by case basis, with the importance of preserving human dignity undergirding the considerations feeding into such a decision. If prisoners serving a 10-year sentence, for example, were to be denied parole, it could be argued that they can still serve the 10 years without their right to human dignity being infringed. The reason being that they expect to be, and will be, released after 10 years. However, in a situation where a person has been sentenced to a ‘whole-life’ sentence, such a person does not expect to be released unless by a presidential pardon. Courts have held that such a sentence would amount to cruel, inhuman and degrading punishment. The Supreme Court of Appeal of South Africa observed that ‘...it is the possibility of parole which saves a sentence of life imprisonment from being cruel, inhuman and degrading punishment.’⁸⁰⁵ The Supreme Court of Namibia held that

a sentence of life imprisonment...can therefore not be constitutionally sustainable if it effectively amounts to an order throwing the prisoner into a cell for the rest of the prisoner’s natural life as if he was a ‘thing’ instead of a person without any continuing duty to respect his dignity (which would include his right not to live in despair and helplessness and without any hope of release, regardless of the circumstances).⁸⁰⁶

The Constitutional Court of Uganda is correct to assume that a person sentenced to life imprisonment, even where life imprisonment means ‘whole-life’, can be pardoned by the President under Article 121 of the

⁸⁰⁴ *Ezeh and Connors v. The United Kingdom* 2003: para 5.

⁸⁰⁵ *Bull and another v The State* 2001: para 23.

⁸⁰⁶ *S v Tcoeb* 1996: 399.

Constitution.⁸⁰⁷ The problem with such an approach is that the prisoner will never know if and when the pardon will be granted. The Federal Constitutional Court of Germany rightly held that ‘...the principle[s] of legal certainty... [and]...natural justice require that conditions, in terms of which a prisoner serving a life sentence is released and the procedure to be followed in securing his release, should be determined by legislation.’⁸⁰⁸ Practice has also shown that in cases where the President has pardoned prisoners, no one serving a life-sentence has ever been pardoned.⁸⁰⁹ As the Constitutional Court held, this all depends on whether or not the prison authorities recommend to the President that such a person to be considered for release. Such a recommendation could be made after 10 years, 20 years or 50 years depending on the way prison authorities work.⁸¹⁰ This means that at sentencing, the prisoner will know that he/she will be in prison for

⁸⁰⁷ See *Susan Kigula and 146 others v Uganda* 2005: Issue No. 5 (iii). In early February 2003 the President pardoned 92 prisoners including a Member of Parliament who were serving prison sentences in prisons in Uganda. It was impossible to establish whether anyone of them was serving a life sentence. See <<http://www.newvision.co.ug/D/8/13/115199/Mulindwa%20Birimumaaso%20pardoned>> (accessed 4 October 2007).

⁸⁰⁸ BVerfGE, 45, 187, 246, as cited in van Zyl Smit 2006: 409.

⁸⁰⁹ In February 2007, the President pardoned over 170 prisoners but none of them was serving a life sentence. See Candia and Jaramoji ‘President Pardons over 170 inmates’ *The New Vision* 27 February 2007 at <<http://www.newvision.co.ug/D/8/13/551457/prisoners%20pardoned>> (accessed 4 October 2007). In December 2004, the President also pardoned 173 prisoners and none of them was serving a life sentence. See J Etyang & H Kiirya ‘Museveni Pardons 173 Inmates’ *The New Vision* 8 December 2004 at <<http://www.newvision.co.ug/D/8/13/404696/prisoners%20pardoned>> (accessed 4 October 2007); in January 2009 the President pardoned two death row inmates and commuted the death sentences of three death row inmates to life imprisonment. See Butagira, ‘Rwakasisi Pardoned’ *Daily Monitor*, 21 January 2009, at http://www.monitor.co.ug/artman/publish/news/Rwakasisi_pardoned_78559.shtml (accessed 19 February 2009).

⁸¹⁰ Van Zyl Smit has argued that ‘[i]t must be recognised that the many decisions taken by the prison authorities at every step in this process [of ensuring that prisoners serving life sentences are released] may have a bearing on when the prisoner is eventually released. For example, an administrative decision not to transfer a prisoner to an open facility may lead to a parole board deciding not to release the lifer conditionally.’ See van Zyl Smit 2006: 415.

the rest of his/her life, which would surely infringe the right to human dignity as the South African and Namibian courts have held. Dünkel and van Zyl Smit state that '[t]he sentences of life without any prospect of parole....should be condemned as fundamentally cruel and inhumane as the prospect of freedom is a fundamental human right.'⁸¹¹ The African Commission on Human and Peoples' Rights, although it supports life imprisonment as an alternative to the death penalty,⁸¹² also supports the view that prisoners should have a chance of being released on parole, and where possible, they should have their sentences remitted.⁸¹³ The recommendation is therefore that there is no need to amend section 86 (3) of the Prisons Act to provide that offenders sentenced to life imprisonment should be detained for the rest of their lives.

4.2.3.8.4 Life imprisonment and rehabilitation of offenders

Under section 5 (b) and (c) of the Ugandan Prisons Act, the functions of the Prisons Service include: facilitating the social rehabilitation and reformation of prisoners through specific training and education programmes; and easing the re-integration of prisoners into their respective communities. The question that should be put into consideration before

⁸¹¹ Van Zyl Smit & Dünkel 2001: 846.

⁸¹² The African Commission has called on African states to 'at least commute death sentences into life imprisonment...' See Resolution Calling on States Parties to Observe the Moratorium on the Death Penalty, ACHPR/Res.136(XXXVIII). 08 of 24 November 2008.

⁸¹³ See *Prisons in Cameroon: Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa* (Report to the Government of the Republic of Cameroon on the Visit of the Special Rapporteur on Prisons and Conditions of Detention in Africa From 2-15 September 2002) ACHPR/37/OS/11/437 where, under the section 'General recommendations' the Special Rapporteur recommends that '[m]easures such as parole, judicial control, reductions of sentences, community service, diversion, mediation and permission to go out should also be developed.'

Parliament amends the law to the effect that life imprisonment should mean ‘whole life’ is whether it is possible for the Prisons Service to exercise the above-stated functions with regard to prisoners who are aware that they will never be released. Why would prisoners participate in any rehabilitation or reintegration programme when they know that the possibility of being released is almost non-existent? In Kenya, where life imprisonment means ‘whole life’, the High Court has held that if the objective of imprisonment is to rehabilitate or reform the offender, a court that sentences an offender to life imprisonment defeats that objective because life imprisonment is not conducive to rehabilitation.⁸¹⁴

Even in South Africa, where the law provides that a prisoner serving a life sentence will be considered for parole after 25 years, the Supreme Court of Appeal held in *S v Sikhhipha*,⁸¹⁵ where the appellant, a 31-year-old man, was found guilty of raping a 13-year-old girl and sentenced to life imprisonment, that ‘[t]he sentence of life imprisonment required by the Legislature is the most serious that can be imposed. *It effectively denies the appellant the possibility of rehabilitation...*’⁸¹⁶ The Court reduced the sentence to 20 years’ imprisonment. The German Federal Constitutional Court held that ‘[t]he prison institutions also have a duty in the case of prisoners sentenced to life imprisonment, to strive towards their

⁸¹⁴ In *Paul Ngure Ngige v Republic* [2006]eKLR 1, the appellant was convicted of defiling a 4 year old girl and sentenced to life imprisonment being the maximum sentence for defilement. In allowing his appeal and substituting the sentence of life imprisonment with that of 15 years imprisonment with hard labour, the High Court held that ‘In matters of sentencing we should never lose [sic] sight of the fact that imprisonment is meant to reform and or rehabilitate the convict. I do not see how we can achieve the foregoing with a life sentence.’ At 3

⁸¹⁵ *S v Sikhhipa* 2006 (2) SACR 439.

⁸¹⁶ *S v Sikhhipa* 2006: para 19. (Emphasis added).

resocialization [read rehabilitation], to preserve their ability to cope with life and to counteract the negative effects of incarceration...’⁸¹⁷

Were the Ugandan law to be amended to provide that life imprisonment means ‘whole-life’, it would mean that prisoners sentenced under the ‘whole-life’ idea would most probably not be rehabilitated.⁸¹⁸ This would not only make sections 5(b) and (c) redundant as far as this category of prisoners is concerned, but would also fly in the face of Uganda’s international obligation under Article 10(3) of the International Covenant of Civil and Political Rights. Article 10(3) of the ICCPR states that the essential aims of the prisons system is to reform and rehabilitate prisoners.⁸¹⁹ It would also mean that our society would effectively have treated such prisoners as those sentenced to death - people that will never come back and make any contribution to the development of the society. As pointed out above ‘to lock up a prisoner and take away all hope of release is to resort to another form of death sentence.’⁸²⁰ Moreover, as Wright avers, prisoners sentenced to ‘whole-life’ “vehemently disapprove of their sentences” and would prefer to be executed rather than kept alive behind

⁸¹⁷ BVerfGE, 45, 187, 238, as cited in van Zyl Smit 2006: 408.

⁸¹⁸ In their joint partly dissenting opinion in the case of *Kafkaris v Cyprus* 2008: para 5, judges Tulkens, Cabral Barreto, Fura-Sandström, Spielmann and Jebens observed in relation to the parliamentary debates surrounding the abolition of the death penalty in the United Kingdom in 1964 that ‘as a general rule “experience shows that nine years, ten years, or thereabouts is the maximum period of confinement that normal human beings can undergo without their personality decaying, their will going, and their becoming progressively less able to re-enter society and look after themselves and become useful citizens”.’

⁸¹⁹ See van Zyl Smit 2002(a): 5.

⁸²⁰ Appleton and Grøver 2007: 606.

bars for the rest of their lives.’⁸²¹ The African Commission on Human and Peoples’ Rights has also emphasised the importance of rehabilitating prisoners, an unattainable goal if prisoners are sentenced to ‘whole-life’ life sentences.⁸²²

4.2.3.8.5 Disciplining prisoners serving ‘whole life’ sentences

Under section 68 of the Prisons Act, ‘[e]very prisoner shall be subject to prison discipline and to all laws, orders and directions relating to prisons and prisoners during the whole time of imprisonment...’ Many prison officials are of the view that one of the most difficult tasks is to keep prison order. Another challenge is how to discipline prisoners who breach prison rules and laws without subjecting them to cruel, inhuman and degrading punishments. Parole has always acted as an incentive to ensure that prisoners obey prison rules and regulations because the more a prisoner follows the rules, the higher the chances that he/she may be released on parole at the earliest available opportunity.

However, in cases of prisoners serving ‘whole-life’, ‘the “carrot” of parole cannot be used as an incentive to ensure the compliance and cooperation of those who have neither hope of release nor any thing to lose.’⁸²³ Research has suggests that ‘imposing [‘whole-life’] sentences on violent offenders

⁸²¹ Wright 1991: 346, as cited in Appleton and Grøver 2007: 607. For a discussion of some of the perceptions of prisoners sentenced to life imprisonment without the possibility of parole, see Stokes in Yorke (ed) 2008: 281 – 302.

⁸²² See *Report on the Visit to Prisons in Zimbabwe by Professor E.V.O. Dankwa, Special Rapporteur on Prisons and Conditions of Detention*, 10th Annual Activity Report of the African Commission on Human and Peoples’ Rights 1996/97, Annex VII, in which the Special Rapporteur recommended that ‘[t]he prison service should help orient public attitude to accepting that rehabilitation does occur in the prisons of Zimbabwe by employing ex-convicts whenever there is the opportunity to do so.’ Recommendation 7.

⁸²³ Appleton and Grøver 2007: 604.

could result in a new class of “superinmates”...uncontrollable in prison because they have nothing else to lose.’⁸²⁴ While commenting on the situation of prisoners not entitled to remission of their sentences, the National Human Rights Commission of Mauritius observed as follows:

The Security Audit Committee commented on the fact that those convicted of drug offences are not entitled to any remission. Other prisoners are entitled as of right to one third of their sentence as remission. Misconduct on their part is sanctioned by a loss of remission. There is an incentive for them to be of good conduct. On the other hand, as drug offenders are not entitled to remission, they have no incentive to be of good behaviour. We endorse the view of the Security Audit Committee that a measure of remission would be beneficial to both offenders and the prisons administration. It is hoped that the authorities will come forward with appropriate measures.⁸²⁵

Prisoners who are not entitled to remission or parole, especially those serving ‘whole life’ are aware that even if they broke prison rules, any sentence of imprisonment imposed will run concurrently with the sentence they are already serving and in effect they would not have been punished for disobeying prison rules.⁸²⁶ As Lord Parker observed in *R v Foy* in which a lower court imposed a sentence of imprisonment consecutive to life imprisonment:

Life imprisonment means imprisonment for life. No doubt many people come out while they are still alive, but, when they do come out, it is only on

⁸²⁴ Appleton and Grøver 2007: 604. ‘In her report...in 2004, the Ombudswoman criticised the Cypriot authorities’ interpretation of life sentence as imprisonment for the rest of the convicted person’s life...The Deputy Director of the Central Prison spoke of the difficulties in dealing with those currently serving life sentence...both in terms of the prisoners’ morale, and security issues. The usual incentives for encouraging good behaviour in prisoners were inevitably of no use in relation to those serving life sentences, and this posed security problems both for the warders and for the other prisoners.’ See *Follow-up report on Cyprus (2003-2005)* “Assessment of the progress made in implementing the recommendations of the Council of Europe Commissioner for Human Rights” Doc. Comm. DH (2006) 12 cited in *Kafkaris v Cyprus* 2008: para 73.

⁸²⁵ *The 2001 Annual Report of the National Human Rights Commission of Mauritius* (February 2002): paras 76-77.

⁸²⁶ See generally Rahman 2000: 87.

licence, and the sentence of life imprisonment remains on them until they die. According, if the court makes any period of years consecutive to life, the court is passing a sentence which is no sentence at all, in that it cannot operate until the prisoner dies.⁸²⁷

To use the language of the Botswana Court of Appeal, had the ‘scourge of corporal punishment’⁸²⁸ not been declared a cruel, inhuman and degrading punishment in *Simon Kyamanya v Uganda*⁸²⁹ and subsequently abolished by the Penal Code Act,⁸³⁰ some people could have argued that such prisoners could be subjected to corporal punishment. It appears under the Prisons Act that the only serious punishment that could be imposed on a prisoner serving a ‘whole-life’ would be punishment by close confinement under section 94. But even then, before this punishment is imposed, the medical officer must first examine such a prisoner and certify in writing that he/she is fit to under go such punishment. The medical officer is also required to advise the officer in charge to terminate such a confinement if he/she considers it necessary on the ground of physical or mental health. It is also unlikely that prisoners, in the name of punishment, can be denied their rights such as the right to food and to exercise as these are rights under sections 69 and 70 of the Prisons Act not privileges. Any punishment imposed is required also to comply with Rules 27-32 of the United Nations Standard Minimum Rules for the Treatment of Prisoners.⁸³¹ What this

⁸²⁷ *R v Foy* [1962] 2 All ER 246, 247.

⁸²⁸ *S v Ndou* (CLCLB-029-08) [2008] BWCA 60 (1 July 2008): para 50.

⁸²⁹ *Simon Kyamanya v Uganda* Constitutional Reference No. 10 of 2000.

⁸³⁰ Section 1 of the Penal Code (Amendment) Act of 2007 provides that ‘corporal punishment is abolished and accordingly, all references to corporal punishment in the Penal Code Act...are repealed.’

⁸³¹ 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

discussion has attempted to illustrate is that for proper discipline among prisoners, it is essential that they should expect to be released.

4.2.3.8.6 Does ‘whole-life’ imprisonment have support in international criminal law?

Under contemporary international criminal law, one would have to look at the law and decisions of four international bodies to ascertain whether the ‘whole-life’ approach has any support at the international level.⁸³² These

Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

⁸³² It should also be recalled that both the International Military Tribunal at Nuremberg (the Nuremberg Tribunal) and the International Military Tribunal for the Far East (the Tokyo Tribunal) sentenced some war criminals to life imprisonment. The Nuremberg Tribunal sentenced three defendants to life imprisonment (Rudolf Hess, Walter Funk and Erich Raeder). See *The Trial of German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg Germany*. Part 22 (22 – 31 August 1946 and 30 September – 1 October 1946) (1950): 529. Funk and Raeder were released in 1957 and 1955 respectively because their health had deteriorated. Even though his health had deteriorated, Hess’ release was continuously vetoed by the Russian government. He subsequently committed suicide in prison. See Kress and Sluiter in *Casese 2002*: 1762. The Spandau Prison in Berlin where the World War II German prisoners were serving their sentences, ‘was administered and guarded jointly by the four Allied Powers: the Soviet Union, France, the United Kingdom and the United States’ and therefore all the representatives of all the Allied Powers had to consent for any prisoner to be released. See Kamchibekova 2007: 124. The reason why Hess was not released could be attributed to the fact that the Soviet Judge at the Nuremberg Tribunal, Major General IT Nikitchenko, wrote a dissenting judgment holding that Hess should have been sentenced to death by hanging instead of life imprisonment. After indicating clearly the role Hess had played in the Nazi government, Major General IT Nikitchenko held that ‘[t]aking into consideration that among the political leaders of Hitlerite Germany Hess was third in significance and played a decisive role in the crimes of the Nazi regime, I consider the only justified sentence in his case can be death.’ See Dissenting Opinion of the Soviet Member of the International Military Tribunal in *The Trial of German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg Germany*. Part 22 (22 – 31 August 1946 and 30 September – 1 October 1946) (1950): 541. On the other hand, the Tokyo Tribunal sentenced the following persons to imprisonment for life: Araki Sadao, Hashimoto Kingoro, Hata Shunroku, Hiranuma Kiichiro, Hoshino Naoki, Kido Koichi, Koiso Kuniaki, Minimi Jiro, Oka Takasumi, Oshima Hiroshi, Sato Kenryo, Shimada Shigetaro, Suzuki Teiichi, Kaya, Shiratori and Umezu. See Röling and Rüter 1977: Vol. 1, 465-466. It has been observed in relation to prisoners sentenced to life imprisonment by the Tokyo Tribunal that ‘[n]ot a single Tokyo defendant...actually served his life sentence “unless he died of natural causes within a very few years. They were all paroled and pardoned by 1958”.’ See Penrose 2000: 564-565. Footnotes omitted. It should also be recalled that unlike the life sentences imposed by the Nuremberg Tribunal, where there was no law specifically stipulating the minimum number of years to be served before a prisoner could be released for parole, as regards the sentences imposed by the Tokyo Tribunal, ‘[t]he Supreme Commander General did lay down criterion for early release:... offenders sentenced to life imprisonment were to be considered for parole after they had served 15 years.’ See van Zyl Smit 2005: 359

courts are the ICTR; the ICTY; the ICC and the SCSL. Of the four courts, emphasis will be put on the ICTR because it is the only one that has sentenced and actually has prisoners serving life sentences.

4.2.3.8.7 The ICTR

The background to the establishment of the ICTR and its jurisdiction has been illustrated under Chapter III.⁸³³ Under article 23 the Tribunal has jurisdiction to impose the following sentences:

(1.)The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of Rwanda.(2) In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person. (3) In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

Another important feature to note with regard to the punishments that can be imposed by the ICTR is under article 27 which provides that:

If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the International Tribunal for Rwanda accordingly. There shall only be pardon or commutation of sentence if the President of the International Tribunal for Rwanda, in consultation with the judges, so decides on the basis of the interests of justice and the general principles of law.⁸³⁴

⁸³³ Chapter III, 3.4.

⁸³⁴ Van Zyl Smit has pointed out that '[t]he major difficulty [with a provision such as this one] is that the trigger lies in the national law of the states, which may vary greatly. This results in the same sentence being implemented for different for different periods depending on where it is served.' See van Zyl Smit 2002(a): 9. See also Rules 124-126 of the Tribunal's Rules of Procedure and Evidence.

Whereas the ICTR has sentenced some offenders to short terms of imprisonment, ranging from six to 15 years;⁸³⁵ long prison sentences ranging from 25 to 45 years;⁸³⁶ life imprisonment;⁸³⁷ and ‘imprisonment for the remainder of the offender’s life’,⁸³⁸ the statistics show that the ICTR has sentenced more people to imprisonment for the remainder of their lives than to life imprisonment.

Under Article 23, the Tribunal has powers to impose the penalty of ‘imprisonment’ among other penalties. The Statute does not stipulate the maximum or minimum numbers of years to which the Tribunal can sentence a person to imprisonment.⁸³⁹ But the Tribunals’ Rules of Procedure and Evidence provide under Rule 101(A) that ‘[a] person

⁸³⁵ See *Prosecutor v Paul Bisengimana* Case No. ICTR-00-60 (the offender was sentenced to 15 years’ imprisonment); *Prosecutor v Samuel Imanishimwe* Case No. ICTR-97-36 (the offender was sentenced to 12 years’ imprisonment); *Prosecutor v Elizapah Ntakirutimana* Case No. ICTR-96-10 and ICTR-96-17 (the offender was sentenced to 10 years’ imprisonment); *Prosecutor v Joseph Nzabirinda* Case No. ICTR-01-77 (the offender was sentenced to 7 years imprisonment); *Prosecutor v Georges Ruggiu* Case No. ICTR-97-32 (the offender was sentenced to 12 years’ imprisonment); *Prosecutor v Joseph Serugendo* ICTR-2005-84 (the offender was sentenced to six years’ imprisonment); *Prosecutor v Omar Serushago* Case No. ICTR-98-39 (the offender was sentenced to 15 years’ imprisonment); *Prosecutor v Tharcisse Muvunyi* Case No. ICTR-2000-55 (the offender was sentenced to 12 years’ imprisonment); and *Prosecutor v Athanase Seromba* Case No. ICTR-2001-66.

⁸³⁶ *Prosecutor v Juvenal Kajelijeli* Case. No. ICTR-98-44 (the offender was sentenced to 45 years’ imprisonment); *Prosecutor v Gerald Ntakirutimana* Case No. ICTR-96-10 and ICTR-96-17 (the offender was sentenced to 25 years’ imprisonment); *Prosecutor v Obed Ruzindana* ICTR-95-1 and ICTR-96-10 (the offender was sentenced to 25 years’ imprisonment); *Prosecutor v Laurent Semanza* Case No. ICTR-97-20 (offender sentenced to 35 years’ imprisonment); and *Prosecutor v Jean Bosco Barayigwiza* Case No. ICTR-97-19 (offender was sentenced to 35 years’ imprisonment).

⁸³⁷ *Prosecutor v Jean Paul Akayesu* Case No. ICTR-96-4; *Prosecutor v Jean Kambanda* 1998; *Prosecutor v Alfred Musema* Case No. ICTR-96-13; and *Prosecutor v Georges Rutaganda* 1999.

⁸³⁸ *Prosecutor v Sylvester Bacumbitsi* Case No. ICTR-2001-64; *Prosecutor v Jean de Dieu Kamuhanda* Case No. ICTR-99-54; *Prosecutor v Clement Kayishema* Case No. ICTR-95-1; *Prosecutor v Mikaeli Muhima* Case No. ICTR-95-1; *Prosecutor v Emmuel Ndimdabahizi* Case No. ICTR-2001-71; *Prosecutor v Eliezer Niyitegeka* 2003; *Prosecutor v Ferdinand Nahimana* Case No. ICTR-96-11; and *Prosecutor v Hassan Ngeze* Case No. ICTR-97-27.

⁸³⁹ Van Zyl Smit 2002: 186.

convicted by the Tribunal may be sentenced to imprisonment for a fixed term or the remainder of his life.⁸⁴⁰ Cassese rightly puts it that ‘[i]nternational courts do not have any prison available in which to detain convicted persons. Consequently they must of necessity turn to states to see whether they may hold those persons in jail.’⁸⁴¹ One could argue that even in cases where the Tribunal has condemned the offenders to imprisonment for the rest of their lives, this may not mean exactly that. Cassese has argued that:

International provisions stipulate that the state where the convicted person serves his sentence is not allowed to reduce or change the penalty, or release the person, before expiry of the sentence pronounced by the international tribunal...Only the international tribunal may decide upon any change in the sentence. However, conflicts may arise between the general legislation of the state enforcing the penalty and international prescriptions. It may happen that in the state at issue detainees are entitled to a reduction of sentence, or to early release, or to special treatment (for instance, parole) after serving the sentence for a certain number of years, or in case of good behaviour. If these conditions are not applied to persons convicted by an international tribunal, this might be deemed to constitute discrimination against international convicts.⁸⁴²

Cassese commented on the possibility of the early release of an offender sentenced by the ICTR in the following terms:

On the face of it [Article 27 of the ICTR Statute], the matter is ‘decided’ by the President of the Tribunal in consultation with judges. The power of pardon would thus seem ultimately to belong to the international body, in contrast to the regulation of most national constitutions.⁸⁴³

⁸⁴⁰ Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda (as amended on 15 June 2007).

⁸⁴¹ Cassese 2008: 431.

⁸⁴² Cassese 2008: 432.

⁸⁴³ Cassese 2008: 433.

Countries like Rwanda⁸⁴⁴ and Swaziland⁸⁴⁵ have signed agreements with the ICTR to enforce the sentences imposed by the Tribunal. In Rwanda⁸⁴⁶ and Swaziland, an offender sentenced to life imprisonment serves 20 years after which he has to be considered for early release. Therefore if some of the prisoners were transferred to Rwanda or Swaziland, Article 27 could be invoked and such people considered for release without spending their natural lives in prison. However, the President of the ICTR in consultation with judges would have to approve the early release of the prisoners. Therefore, the ‘whole-life’ approach has little support, if any, under practical implementation of the sentences imposed by the ICTR.

4.2.3.8.8 The SCSL, ICTY and ICC

The SCSL is a hybrid court that was established by the Agreement between the United Nations and the government of Sierra Leone pursuant UN Security Council Resolution 1315 (2000) of 14 August 2000.⁸⁴⁷ As at the time of writing, the SCSL had handed down three judgments. In *The Prosecutor of the Special Court v Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu*, it sentenced the three accused as follows: two to 50 years and one to 45 years of imprisonment. In *Prosecutor v Moinina Fofana and Allieu Kondewa*, the offenders were

⁸⁴⁴ Agreement between the Government of the Republic of Rwanda and the United Nations on the Enforcement of Sentences of the International Criminal Tribunal for Rwanda of 4 March 2008.

⁸⁴⁵ Agreement between the Kingdom of Swaziland and the United Nations on the Enforcement of the Sentences of the International Criminal Tribunal for Rwanda, 30 August 2000.

⁸⁴⁶ Article 3 of the Organic Law on the Abolition of the Death Penalty, Organic Law No. 31/2007 of 25 July 2007. For a detailed discussion of this organic law see, Mujuzi 2009(a).

⁸⁴⁷ *The Prosecutor of the Special Court v Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu* 2007: para 2. For a detailed discussion of this judgment see Mujuzi 2007: 105-137.

sentenced to 20 years' imprisonment each for war crimes and crimes against humanity.⁸⁴⁸ In *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* the offenders were convicted of war crimes and crimes against humanity and sentenced to 52, 47 and 25 years' imprisonment respectively.⁸⁴⁹ As Schabas rightly argues, the SCSL does not have the jurisdiction to impose life sentences because its Statute and Rules of Procedure do not authorise it to do so.⁸⁵⁰ As with the ICTR, prisoners sentenced by the SCSL may be released before completing the determinate sentences imposed by the Court,⁸⁵¹ but the President of the SCSL, in consultation with the judges, has to decide whether such prisoners should be released 'on the basis of the interests of justice and the general principles of law.'⁸⁵² This means that whereas the Court imposed excessive sentences on the offenders, there is a possibility that they may be pardoned, depending on the laws in countries they will serve their sentences should the President of the SCSL agree to such.

At the time of writing, the ICTY had one case in which the accused had been sentenced to a life sentence.⁸⁵³ In one case of *Prosecutor v Milomir Stakić*,⁸⁵⁴ the offender had been sentenced to life imprisonment by the Trial Chamber but on appeal the sentence was reduced to 'a global sentence of

⁸⁴⁸ *Prosecutor v Moinina Fofana and Allieu Kondewa* Case No. SCSL-04-14-A (judgment of 28 May 2008): para 565.

⁸⁴⁹ *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL-04-15-T (sentencing judgement of 8 April 2009).

⁸⁵⁰ See Schabas 2006: 549.

⁸⁵¹ Cassese 2008: 433.

⁸⁵² Article 23 of the Statute of the SCSL.

⁸⁵³ *Prosecutor v Stanislav Galić* 2006.

⁸⁵⁴ *Prosecutor v Milomir Stakić* 2006.

40 years' imprisonment, subject to credit being given under Rule 101(C) of the Rules for the Period the Appellant has already spent in detention.⁸⁵⁵ However, there is practice that many offenders sentenced by the ICTY have been granted early release. Drumbl illustrated that 15 percent of the ICTY offenders have been granted early release.⁸⁵⁶ At the time of writing, the ICC had not convicted any criminal but what is vital to note is that under Articles 77(1)(b), 78(3) and 101(3) of the Rome Statute, a person sentenced to life imprisonment by the ICC shall have his/her sentence reviewed by the ICC to determine whether such a sentence should be reduced when such a person has served 25 years imprisonment. Cassese⁸⁵⁷ and Strijards⁸⁵⁸ have discussed the law and procedure governing the early release of offenders sentenced by the ICC. This clearly demonstrates that the Constitutional Court of Uganda's ruling that life should mean 'whole-life' does not have support under international criminal jurisprudence.⁸⁵⁹

⁸⁵⁵ See XII. Disposition. The 'reluctance' of the ICTY to impose life sentences could be attributed to the fact that its Statute does not expressly allow it to impose life sentences. As one scholar observes '[t]he argument is not that life sentence is necessarily an inappropriate ultimate penalty for the Yugoslavia Tribunal to impose. But if the Security Council had wanted to allow the Tribunal to impose sentences of more than twenty years with life imprisonment as its ultimate penalty, it should, in the interest of legal certainty, have made this explicit in the Statute of the Tribunal rather than requiring the Tribunal to have recourse to "the general practice regarding prison sentences in the courts of the former Yugoslavia.' See van Zyl Smit 2002(a): 8. Footnotes omitted. Schabas observes that '[i]n *Jelisić*, the ICTY Appeals Chamber stated that "it falls within the Trial Chamber's discretion to impose life imprisonment." Perhaps this was a message to the Trial Chambers, as none of them had previously seen fit to pronounce such a sentence.' See Schabas 2006: 550. Footnote omitted.

⁸⁵⁶ Drumbl 2007: 57. For a brief analysis of the law and procedure governing the early release of offenders sentenced to imprisonment by the ICTY, see Kittichaisaree 2008: 323.

⁸⁵⁷ Cassese 2008: 433.

⁸⁵⁸ Strijards in Triffterer 2008: 1647, 1683.

⁸⁵⁹ As early as 1990 the International Law Commission never supported 'whole-life' sentences. During that time, 'the Commissioners...considered whether life imprisonment as an alternative ultimate penalty [to the death sentence] would satisfy human rights norms. Of particular concern was the notion that no system of punishment that recognized human dignity of offenders could impose a penalty that excluded them permanently from

4.3 Conclusion

This chapter has examined the relevant legal and historical developments relating to life imprisonment in South Africa, Mauritius and Uganda. It showed that the abolition of the death penalty directly affects the sentence of life imprisonment in the sense that the government and the judiciary pay more attention to the meaning of life imprisonment when the death penalty has been abolished. This explains why the number of offenders serving life imprisonment in South Africa and Mauritius rose when the death penalty was abolished. The ruling by the Supreme Court of Uganda that the mandatory death penalty for murder and other serious offences is unconstitutional means that the number of offenders sentenced to life imprisonment is likely to increase. This is because judges now have to weigh mitigating factors against aggravating factors in determining whether to impose the death penalty or any other sentence, which could be life imprisonment, in cases where the murder was brutal but not heinous enough to attract a death sentence. Unlike in Uganda and South Africa where the prison laws specifically regulate the release of offenders sentenced to life imprisonment, Mauritius has no such regulations. It is recommended that there is a need for Mauritius to amend its prisons laws to specifically provide for the release of offenders serving life imprisonment. It should be underscored that should Uganda abolish the death penalty, it would not be necessary to introduce life imprisonment without parole. The human rights and administrative shortcomings of life imprisonment without

society. Not only was the death penalty fundamentally unacceptable from this perspective but life sentence prisoners would also have the prospect of release.’ See van Zyl Smit 2002(a) 6. Footnotes omitted.

parole have been highlighted and have to be avoided. The next chapter examines the law and practice relating to life imprisonment in South Africa, Mauritius and Uganda.

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CHAPTER V

OFFENCES THAT ATTRACT LIFE IMPRISONMENT, DISCRETION OF COURTS, AND THEORIES OF PUNISHMENT COURTS HAVE EMPHASISED IN SENTENCING OFFENDERS TO LIFE IMPRISONMENT

5. Introduction

One important component of the study of life imprisonment is the understanding of the offences for which the sentence of life imprisonment could be imposed, and how much discretion judges have in deciding whether or not to impose this sentence. In answering these two different, but related, questions, the three countries, namely, of South Africa, Uganda and Mauritius will be studied separately. The aim is to see whether there are any similarities and differences. As illustrated in Chapter II, there are three major theories of punishment: retribution, deterrence and rehabilitation. Apologists of each of these theories of punishment invoke different moral justifications of punishment. Chapter II also discusses arguments of fervent supporters of retribution who contend that there is nothing wrong with the court invoking other theories of punishment at the penalty fixing stage.⁸⁶⁰ Chapter III shows that, in practice, some international tribunals, such as, the ICTR have invoked all the three theories of punishment when imposing sentences of life imprisonment and imprisonment for the remainder of the prisoner's life.

This chapter deals with: offences that carry life imprisonment; the courts having jurisdiction to impose life imprisonment; the manner in which the

⁸⁶⁰ Chapter II, 2.4.2.3.

courts have exercised their discretion in imposing life sentences; the right to legal representation of accused facing charges for offences that attract life imprisonment; and the theories of punishment that courts in Uganda, South Africa and Mauritius have emphasised in sentencing offenders to life imprisonment. With regard to the theories of punishment, it is important to investigate whether in Uganda, where the death penalty is still lawful and where life imprisonment is not a minimum sentence for any offence, courts emphasise the same theories of punishment in sentencing offenders to life imprisonment as courts in South Africa and Mauritius, where the death penalty was abolished and life imprisonment is the maximum sentence that could be imposed and the minimum sentence for some offences. Put differently, do judges in these two different penal regimes regard the sentence of life imprisonment as serving similar or different objectives of punishment?

5.1 Uganda

5.1.1 Offences for which an offender could be sentenced to life imprisonment

In Uganda, a person is 'liable to imprisonment for life'⁸⁶¹ if he/she: commits any acts intended to alarm, annoy or ridicule the President;⁸⁶² conceals treason;⁸⁶³ engages in or carries out acts of terrorism;⁸⁶⁴ aids,

⁸⁶¹ While interpreting the term 'liable' in relation to attempted murder, the High Court held that '[a] person convicted of attempted murder is liable to life imprisonment. The sentence is not mandatory.' See *Saymon Muganga v Uganda*, HCT-O5-CR-CN-0022-2003 (Judgment of 4 April 2005, unreported) 6.

⁸⁶² Section 24 of the Penal Code. These acts are: to wilfully throw any matter or substance at or upon the person of the President; to wilfully strike the person of the President; and to wilfully assault or wrongfully restrain the person of the President.

⁸⁶³ Section 25 of the Penal Code.

finances, harbours or in any way renders supports to a person knowing that such support will be used in the preparation or commission of acts of terrorism;⁸⁶⁵ promotes war on chiefs, body or group of persons;⁸⁶⁶ aids prisoners of war to escape;⁸⁶⁷ takes any unlawful oath or engagement, not being compelled to do so;⁸⁶⁸ riots and pulls down or begin to pull down or destroy any building, railway, machinery, structure or property;⁸⁶⁹ rescues or attempts to rescue from lawful custody any person sentenced to death or imprisonment for life or charged with an offences punishable with death or imprisonment for life;⁸⁷⁰ attempts to commit rape;⁸⁷¹ commits or allows another person to commit on him an unnatural offence (homosexuality, bestiality or anal sex);⁸⁷² commits incest with a person under the age of 18 years;⁸⁷³ commits manslaughter;⁸⁷⁴ attempted murder;⁸⁷⁵ being a convict serving a sentence of imprisonment of three or more years attempts to commit murder;⁸⁷⁶ aids suicide;⁸⁷⁷ kills an unborn child;⁸⁷⁸ disables another

⁸⁶⁴ Section 26(1) of the Penal Code.

⁸⁶⁵ Section 26(2) of the Penal Code.

⁸⁶⁶ Section 27 of the Penal Code.

⁸⁶⁷ Section 31(1) of the Penal Code.

⁸⁶⁸ Section 45(b) of the Penal Code.

⁸⁶⁹ Section 72 of the Penal Code.

⁸⁷⁰ Section 108(1)(a) of the Penal Code.

⁸⁷¹ Section 125 of the Penal Code.

⁸⁷² Section 145 of the Penal Code. For a detailed discussion of the issue of homosexuality in Uganda see, Mujuzi 2009(b).

⁸⁷³ Section 149 of the Penal Code.

⁸⁷⁴ Section 190 of the Penal Code.

⁸⁷⁵ Section 204 of the Penal Code.

⁸⁷⁶ Section 205 of the Penal Code.

⁸⁷⁷ Section 209 of the Penal Code.

⁸⁷⁸ Section 212 of the Penal Code.

person in order to commit a felony or misdemeanour;⁸⁷⁹stupefies in order to commit a felony or misdemeanour;⁸⁸⁰ commits any act intended to cause grievous harm or prevent arrest;⁸⁸¹unlawfully prevents any person from escaping from wreck;⁸⁸²intentionally endangers the safety of persons travelling by railway;⁸⁸³organises or participates in cattle rustling;⁸⁸⁴commits robbery and is convicted by the High Court;⁸⁸⁵ is convicted by the High Court of attempted robbery;⁸⁸⁶commits arson;⁸⁸⁷casts away ships;⁸⁸⁸maliciously damages a dwelling property, vessel, bank railway etc using explosives;⁸⁸⁹forgets a will and negotiable instruments being a banker or a businessman;⁸⁹⁰counterfeits coin;⁸⁹¹ and, prepares coin.⁸⁹² There are also several offences under the Uganda People Defence

⁸⁷⁹ Section 214 of the Penal Code. The section provides in detail that ‘any person who, by any means calculated to choke, suffocate or strangle, and with intent to commit or to facilitate the commission of a felony or misdemeanour, or facilitate the flight of an offender after the commission or attempted commission of a felony or misdemeanour, renders or attempts to render any person incapable of resistance commits a felony is liable to imprisonment for life.’

⁸⁸⁰ Section 215 of the Penal Code.

⁸⁸¹ Section 216 of the Penal Code.

⁸⁸² Section 217 of the Penal Code.

⁸⁸³ Section 218 of the Penal Code.

⁸⁸⁴ Section 266(1) of the Penal Code.

⁸⁸⁵ Section 286(1)(b) of the Penal Code.

⁸⁸⁶ Section 287(2)(b) of the Penal Code.

⁸⁸⁷ Section 327 of the Penal Code.

⁸⁸⁸ Section 332 of the Penal Code.

⁸⁸⁹ Section 335(2) and (3) of the Penal Code.

⁸⁹⁰ Section 348(1) of the Penal Code.

⁸⁹¹ Section 363 of the Penal Code.

⁸⁹² Section 364 of the Penal Code.

Forces Act where an offender is liable to be sentenced to imprisonment for life.⁸⁹³

5.1.2 Discussion of legal issues surrounding offences that attract life imprisonment

The question that needs to be answered with regard to Uganda is this: why is it that at the end of 2007 there were only few offenders serving life sentences despite the many offences for which a person could be sentenced to life imprisonment? The answer, it is submitted, lies in the fact that life imprisonment is not a mandatory sentence. In other words, courts have a wide discretion to determine whether or not to sentence an offender to life imprisonment. This is because in all the above provisions, the law provides that the convicted person is ‘liable to imprisonment for life.’ Unlike in South Africa and Mauritius, and in some African countries such as Rwanda where life imprisonment is the minimum sentence in some circumstances, in Uganda a judge is not obliged to sentence an offender to life imprisonment. This is because life imprisonment is not imposed for the most heinous offences such as murder, treason and armed robbery. As illustrated in Chapter IV, prior to the Supreme Court decision in January 2009 that the mandatory death sentence was unconstitutional,⁸⁹⁴ offences such as treason, murder, and armed robbery, attracted mandatory death penalty.⁸⁹⁵ Courts were not permitted to consider whether or not there were

⁸⁹³ See discussion (5.4) on courts with the jurisdiction to impose life sentences.

⁸⁹⁴ Chapter IV, 4.2.3.7.

⁸⁹⁵ Under section 23(1), (2), and (3) of the Penal Code, any person found guilty of treason and other offences against the State ‘shall suffer death’; under section 189 ‘any person convicted of murder shall be sentenced to death’; section 286(2) of the Penal Code provides that where any person convicted uses a deadly weapon during robbery or causes the death or grievous bodily harm to any person during a robbery, ‘shall, on conviction by

any mitigating or extenuating circumstances. This explains why as at the time of writing, there were over 900 prisoners on death row in Uganda,⁸⁹⁶ most of whom were convicted of murder and armed robbery.⁸⁹⁷

One could argue that if Uganda abolished the death penalty, it could take one of the two following approaches to life imprisonment: one, the sentence of life imprisonment would probably be a mandatory penalty for serious offences such as murder, treason and armed robbery. This was an approach taken by Rwanda. In Rwanda, when the death penalty was abolished, the government enacted the Organic Law on the Abolition of the Death Penalty which provides that all sentences that were punishable with the death penalty in the past are now punishable with life imprisonment or life imprisonment with special provisions as mandatory sentences.⁸⁹⁸ In

the High Court, be sentenced to death'; and under section 319(2) of the Penal Code a person found guilty of smuggling using a deadly weapon or who causes the death or grievous bodily harm to any person during smuggling, 'shall, on conviction by the High Court, be sentenced to death.' The Constitutional Court of Uganda held that the word 'shall' in the law is mandatory not directory. See *Fox Odoi Oywelowo and another v Attorney General* (Constitutional Petition No.8 of 2003)[2004]UGCC 2 (30 March 2004). The Supreme Court of Zambia held that where the word 'shall' is used in a statute, it is mandatory and not directory. See *Mutale v Attorney General and another* (18/2007) [2007]ZMSC 14 (where it was held that the provision of the law which provided that the petitioner 'shall' sign the petition was mandatory not discretionary).

⁸⁹⁶ See 'Towards the Abolition of the Death Penalty in Uganda' at http://fhri.or.ug/index.php?option=com_content&task=view&id=68&Itemid=68 (accessed 5 March 2009).

⁸⁹⁷ Telephone interview with Mr. Robert Omita, Commissioner in Charge of Rehabilitation, Uganda Prisons Service, 5 March 2009.

⁸⁹⁸ The law provides that 'in all legislative texts in force before the commencement of this Organic Law, the death penalty is substituted by life imprisonment or life imprisonment with special provisions...' see Article 3 of Organic Law No. 31/2007 of 25/7/2007 Relating to the Abolition of the Death Penalty. For a detailed discussion of the meaning and human rights implications of life imprisonment with special provision see Mujuzi 2009(a). In November 2008, Rwanda amended this law to provide that life imprisonment with special provisions was not applicable to persons accused of genocide and crimes against humanity transferred from the ICTR or other states. See Article of Organic Law No.66/2008 of 21/11/2008 Modifying and Complementing Organic Law No. 31/2007 of 25/07/2007 Relating to the Abolition of the Death Penalty. This was after the ICTR refused to order the transfer of cases to Rwanda on amongst other grounds that fear that the offenders if convicted could be sentenced to life imprisonment with special provisions.

Mauritius, after the abolition of the death penalty, penal servitude for life was introduced as a mandatory sentence for drug trafficking under the Dangerous Drugs Act.⁸⁹⁹ And the second approach would be making life imprisonment the minimum sentence in cases of serious offences. This was the approach taken by South Africa and Mauritius, at a later stage. As indicated in Chapter IV, before the death penalty was abolished in South Africa, courts had wide discretion in deciding whether or not to impose life imprisonment. However, after the abolition of the death penalty, courts are now obliged to send offenders convicted of murder or rape in certain circumstances to life imprisonment, unless there are substantial and compelling circumstances, in which case a lesser sentence is imposed.⁹⁰⁰

However, a country does not have to abolish the death penalty before making life imprisonment a mandatory sentence for some serious offences.⁹⁰¹ In Kenya, for example, prior to 2006, a person convicted of defilement was 'liable to imprisonment with hard labour for life' in terms

See *The Prosecutor v Yussuf Munyakazi* (Decision on the Prosecution's Appeal against Decision on Referral under Rule 11bis) Case No. ICTR-97-36-R11bis (Appeals Chamber judgment of 8 October 2008); *The Prosecutor v Ildephonse Hategekimana* Case No. ICTR-00-55B R11bis (Decision on Prosecutor's Request on Referral of the Case of Ildephonse Hategekimana to Rwanda) (Decision of 19 June 2008); and *The Prosecutor v Kanyarugiga, Decision on Request for Referral*, Case No. ICTR-2002-78-Rule 11bis (judgment of 6 June 2008).

⁸⁹⁹ See the discussion of Mauritian courts and theories of punishment below (7.3) for jurisprudence on mandatory life sentences for offenders convicted of drug trafficking.

⁹⁰⁰ For a detailed discussion of the concept of substantial and compelling circumstances, see Chapter IV, 4.2.1.3.

⁹⁰¹ Under the Penal Code of Sudan (2003) the death penalty is still imposed for various offences, including murder. However, section 334 provides that 'if robbery is committed with the use of [a] fire arm, [the offender] shall be sentenced to life imprisonment and may also be liable to [a] fine.' For example, section 238(2) of the Criminal Code of the Federal Democratic Republic of Ethiopia, Proclamation No.414/2004, punishes 'crimes against the Constitution or the State' and provides that '[w]here the crime has entailed serious crisis against public security or life, the punishment shall be life imprisonment or death.'

of section 145(1) of the Penal Code.⁹⁰² During this period, courts imposed different sentences for defilement⁹⁰³, including not only life imprisonment,⁹⁰⁴ but also life imprisonment with hard labour.⁹⁰⁵ As at the time of writing, the death penalty is mandatory in Kenya for offences such as treason,⁹⁰⁶ murder⁹⁰⁷ robbery,⁹⁰⁸ and attempted robbery.⁹⁰⁹ There were thousands of inmates on death row⁹¹⁰ although the last execution took place

⁹⁰² Section 145(1) of the Penal Code. See also section 145(2) of the Penal Code.

⁹⁰³ For example, in *Apui Achau Lopui v Republic* [2006]eKLR 1, the appellant was convicted of defilement on his plea of guilty and sentenced to 5 years' imprisonment. On appeal against the sentence, the High Court dismissed his appeal stating that 'the appellant was convicted for defiling a girl aged 3 ½ years...taking into account the totality of the facts of this case, the sentence that was imposed was lenient. The maximum sentence for an accused person who is convicted of the offence of defilement is life imprisonment' page 2; in *Hamisi Ngala Chupli v Republic* [2005]eKLR 1, the appellant, a 50 – year – old man, was convicted of defiling a 15 – year – old girl and sentenced to 20 years' imprisonment. In dismissing his appeal against the sentence, the High Court held that '[t]he punishment for this offence is life imprisonment with hard labour. It is clear the trial Magistrate considered all facts in coming to the sentence of 20 years with hard labour instead of imposing life imprisonment with hard labour...I find no reason to interfere with the sentence' at 1-2; *Peter Kariuki Michinga v Republic* [2007]eKLR 1, the appellant was convicted of defilement and sentenced to 25 years' imprisonment. In allowing the appeal and reducing the appellant's sentence to 8 years' imprisonment, the High Court held that '[t]he appellant was sentenced to 25 years' imprisonment. The offence carries a maximum sentence of imprisonment for life plus hard labour...I am however of the view that the sentence of 25 years' imprisonment was harsh and manifestly excessive.' At 6.

⁹⁰⁴ In *George Mwaura Njoki v Republic* [2007] eKLR 1, the appellant was convicted of defilement and sentenced to life imprisonment with hard labour. In reducing his sentence to 15 years, the High Court held that '...since the [a]ppellant pleaded guilty to the charge showing his remorse and also saving the court precious time, taking into account he is a young person, a life sentence was in the circumstances harsh and excessive.' At 2-3.

⁹⁰⁵ For example, in *James Koril v Republic* [2006] eKLR 1, the appellant was convicted by the magistrate of defiling his 12 year old niece and sentenced to life imprisonment. In dismissing the appeal, the High Court held that the magistrate had erred in sentencing the accused to life imprisonment without hard labour. The High Court 'order[ed] that the life sentence imposed will be **hard labour**.' 5. (Emphasis in original).

⁹⁰⁶ Section 40(3) of the Penal Code.

⁹⁰⁷ Section 204 of the Penal Code.

⁹⁰⁸ Section 296(2) of the Penal Code.

⁹⁰⁹ Section 297(2) of the Penal Code.

⁹¹⁰ As at end of 2008, there were 4,420 prisoners on death row in Kenya. Information acquired from Ms Rhoda Ngweta of Kenya National Human Rights Commission, 5 March 2009 (by email). R Omungo, 'Death Penalty Kenya: Call for Abolition as Thousands Await Execution' 9 July 2007, IPS at <http://ipsnews.net/news.asp?idnews=38474> (accessed 5 March 2009).

in 1987.⁹¹¹ However, section 145(1) of the Penal Code was amended by section 8(1) of the 2006 Sexual Offences Act which provides that ‘a person who commits an offence of defilement with a child aged eleven years or less shall, upon conviction, be sentenced to imprisonment for life.’ And since the coming into force of that provision some offenders have indeed been sentenced to imprisonment for life with the court observing rightly that it is a mandatory sentence.⁹¹²

In Kenya another situation where life imprisonment is mandatory relates to the conviction of a pregnant woman of an offence punishable with death. Section 211 of the Penal Code provides that ‘where a woman convicted of an offence punishable with death is found ... to be pregnant, the sentence to be passed on her shall be a sentence of imprisonment for life instead of sentence of death.’ It should be mentioned in passing that this provision is in line with Article 6(5) of the International Covenant on Civil and Political Rights which Kenya acceded to on 1 May 1972⁹¹³ which provides that the ‘sentence of death shall not be carried out on pregnant women.’ One could argue that the Penal Code of Kenya actually offers better protection to pregnant women than the ICCPR because the latter contemplates that the said woman could still be executed after giving birth without the state party

⁹¹¹ Chenwi 2007: 29.

⁹¹² In *Robert Njuguma Mungai v Republic* [2008] eKRL 1, the appellant was convicted of defiling a 7 – year – old girl in terms of section 8(1)(2) of the Sexual Offences Act and sentenced to life imprisonment. In upholding the sentence and conviction, the High Court observed that ‘the sentence of life imprisonment [under section 8] is the mandatory sentence provided by law.’

⁹¹³ See ICCPR Status of Ratification at <http://www2.ohchr.org/english/bodies/ratification/4.htm> (accessed 10 January 2009).

violating its obligations under the treaty. However, a discussion of that issue falls outside the scope of this work.

The position in the Penal Code of Kenya in relation to a pregnant woman found guilty of an offence punishable with death should be distinguished from that under the Penal Code of Botswana.⁹¹⁴ Section 26(3) of the Penal Code of Botswana provides that '[w]here a woman convicted of an offence punishable with death is found...to be pregnant, she shall be liable to imprisonment for life and not to sentence of death.' It is argued that unlike under section 211 of the Penal Code of Kenya, where the court has no alternative but to sentence such a woman to life imprisonment, section 26(3) of the Penal Code of Botswana gives the court wide discretion to determine which sentence to impose, with life imprisonment being the maximum sentence that could be imposed. If Uganda, or any other country, wanted to amend its law to ensure that a pregnant woman is not sentenced to death when convicted of an offence punishable with the sentence of death, I would recommend the approach under section 26(3) of the Penal Code of Botswana instead of that under section 211 of the Penal Code of Kenya. This is because the approach under the Penal Code of Botswana gives court wide discretion to determine which sentence to impose after taking into consideration factors such as the personal circumstances of the offender, the circumstances in which the offence was committed and the objective that the punishment to be imposed would serve. Put differently,

⁹¹⁴ Section 211 of the Penal Code of Kenya and section 26(3) of the Penal Code of Botswana should be distinguished from section 120(1) of the Criminal Code of the Federal Democratic Republic of Ethiopia, Proclamation No.414/2004, which provides that '[i]n the case of a woman with child and such child is born alive and the mother has to nurse such child, the death sentence may be commuted to rigorous imprisonment for life.'

the discretion courts have under section 26(3) of the Penal Code of Botswana allows them to impose a sentence proportionate to the offence. A provision that gives court discretion to impose a sentence that fits both the offence and the offender enables court, as was rightly observed by the High Court of Kenya, to reserve the maximum sentence of life imprisonment for the serial offenders⁹¹⁵ or the worst offences.

5.1.3 South African and Mauritian or Rwandan approach

The question that arises is which of the two approaches Uganda should be recommended to follow in the event of the abolition of the death penalty, assuming that it abolishes it. Should it follow the South African and Mauritian approach of making life imprisonment a minimum sentence unless there are substantial and compelling circumstances, or the Rwandan approach where life imprisonment is mandatory regardless of the personal circumstances of the offender and the circumstances under which the offence was committed? I would recommend the South African and Mauritian instead of the Rwandan approach because, courts would still have the discretion to determine the sentence proportionate to the offence.

⁹¹⁵ In *Paul Ngure Ngige v Republic* [2006]eKLR 1, the appellant was convicted of defiling a 4- year old girl and sentenced to life imprisonment being the maximum sentence for defilement. In allowing his appeal and substituting the sentence of life imprisonment with that of 15 years' imprisonment with hard labour, the High Court held that 'the [a]ppellant's act was and is reprehensible. However to have imposed a life sentence on the Appellant who was a first offender would appear...to be harsh and excessive...maximum sentence should be left to those who are serial criminals. For instance, in this case if it had been shown that the Appellant is a serial child molester and or defiler, life sentence would have been well deserved... [E]ven if it had been shown that the Appellant though not a serial defiler but had a record of sorts, the sentence ... [of life imprisonment] would not have looked out of place. In matters of sentencing we should never loose [sic] sight of the fact that imprisonment is meant to reform and or rehabilitate the convict. I do not see how we can achieve the foregoing with a life sentence.' 3.

Jurisprudence emanating from countries such as Botswana⁹¹⁶ and Zimbabwe⁹¹⁷ shows that courts have upheld the constitutionality of mandatory sentences on, amongst other grounds, that such sentences do not infringe the offender's right not to be subjected to inhuman and degrading treatment. However, it has to be recalled that in all those cases courts were not dealing with the question of life imprisonment as a mandatory sentence. Life imprisonment which could mean imprisonment for the whole life of the offender or more than 20 years, as would be the case today if Uganda abolished the death penalty, would be a substantial punishment which would require courts to weigh mitigating factors against aggravating factors before imposing such a sentence. Both the Constitutional Court of Uganda and the Supreme Court are not supportive of mandatory sentences. A

⁹¹⁶ In the case where two youthful offenders were sentenced to the statutory minimum sentences of 10 years' imprisonment for rape and robbery, while commenting on the rationale and constitutionality of such sentences, the Supreme Court of Botswana held '[T]he enactment by the legislature of the mandatory minimum sentences for robbery and rape was clearly in 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...They are not unconstitutional... and, 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.' See *S v Keboseke* (CLCLB-012-08 and CLCLB-016-08)[2008]BWCA 32 (24 April 2008) para 16. See also *Moatshe v The State; Motshwari and Others v The State* (Criminal Appeal No.26 of 201; Criminal Appeal No.2 of 202)[2003]B.L.R.1 (CA) where the appellant challenged the constitutionality of a 10- year minimum sentence under the Motor Theft Act and the Penal Code Act and the Court of Appeal held that '...the enactment of mandatory minimum sentences is justifiable where the public weal would require them.' Para 18.

⁹¹⁷ In upholding the sentence minimum sentence of 20 years imposed on the appellant for dealing in drugs, the Supreme Court of Zimbabwe held that '[t]he legislature, in prescribing the minimum sentence which can be imposed...has taken a strong view of the dangers caused to society by the use of certain drugs. When one has regard to the possible deleterious effect of the drugs, the mandatory sentence cannot be described as grossly disproportionate...regard must be had to the fact that Parliament is in a better position to determine the class of crimes which endanger the economic and moral fabric of the nation and the extent of the damage caused by that particular offence...Because the legislature, being representative of the people, has its ear to the ground, it is also fair to say that it is in a better position to determine both the attitude of society to specific crimes and the type of sentence which would be acceptable by society for certain types of criminal conduct. The minimum sentence prescribed in this case was then regarded by the legislature as the appropriate sentence for this kind of offence.' See *Chichera v Attorney General of Zimbabwe* (300/00) (SC 98/04) [2004] ZWSC 98, 105-106 (5 May 2004).

mandatory life sentence may not pass the constitutional test. In declaring the mandatory death penalty unconstitutional, Byamugisha J of the Constitutional Court of Uganda held that:

I am aware that Parliament has the power to pass a legislation prescribing sentences for certain crimes and in some of them setting a minimum sentence that a court can impose. This of course curtails the discretion of the court in the sentencing process. However, a mandatory death sentence makes the circumstances under which the offence was committed irrelevant and has the effect of depriving the courts their legitimate jurisdiction in determining the appropriate sentence. The provisions of the Constitution providing for equality before the law, fair trial, and those against cruel, inhuman and degrading treatment or punishment were intended to guard against situations that the petitioners are complaining about. The superimposition of the mandatory death penalty on the courts is old fashioned and backward in this age... There is of course another aspect to the mandatory death sentence. The Constitution reiterates in **article 128(1)** that courts "*in the exercise of judicial power shall be independent and shall not be subject to the control or direction of any person or authority*". It can therefore be said that strict adherence to the principle of independence of the judiciary presupposes that courts are not to be guided by legislative provisions since such provisions deprive the courts independence in the exercise of their judicial power. I therefore consider it cruel and degrading to tell an accused person that he or she has no right of being heard about the sentence to be imposed. It is not Parliament that tries criminal cases where a mandatory death penalty is imposed. In all fairness, the legislature should not determine for the court what sentence it should impose. This issue was well founded and it would be answered in the affirmative.⁹¹⁸

In declaring the mandatory death sentence unconstitutional, by upholding the above ruling of the Constitutional Court, the Supreme Court held that:

the administration of justice is a function of the Judiciary under article 126 of the Constitution. The entire process of trial from the arraignment of an accused person to his/her sentencing is, in our view, what constitutes administration of justice. By fixing a mandatory death penalty Parliament removed the power to determine sentence from the Courts and that, in our view, is inconsistent with article 126 of the Constitution...In any case, the Laws passed by Parliament must be consistent with the Constitution as provided for in article 2(2) of the Constitution. Furthermore, the

⁹¹⁸ *Susan Kigula and Others v The Attorney – General* 2005: 27 – 29, Judgment by Byamugisha J. (Emphasis in the original).

Constitution provides for the separation of powers between the Executive, the Legislature and the Judiciary. Any law passed by Parliament which has the effect of tying the hands of the judiciary in executing its function to administer justice is inconsistent with the Constitution...The Court has power to confirm both conviction and sentence. This implies a power NOT to confirm, implying that court has been given discretion in the matter. Any law that fetters that discretion is inconsistent with this clear provision of the Constitution. We therefore agree with the Constitutional Court that all those laws on the statute book in Uganda which provide for a mandatory death sentence are inconsistent with the Constitution and therefore are void to the extent of that inconsistency.⁹¹⁹

The above reasoning would be applicable to mandatory life sentences with equal force. Like a mandatory death penalty, a mandatory life imprisonment would curtail the discretion of the court in the sentencing process, make the circumstances under which the offence was committed irrelevant and therefore make a mockery of the principle of proportionality in sentencing,⁹²⁰ would amount to cruel, inhuman and degrading treatment and finally would infringe the doctrine of separation of powers.

5.1.4 Special feature of life imprisonment in Uganda

Another feature to be noted about the penalty of life imprisonment under the Penal Code of Uganda is that it is the maximum penalty that the court can impose on conviction for any of the above offences but the law does not impose a minimum sentence. In other words, courts have the discretion to determine the minimum sentence that could be imposed when they decide not to impose the life sentence. The same approach is taken in the Penal Code of Kenya where people found guilty of several offences are

⁹¹⁹ *Attorney – General v Susan Kigula and 416 others* 2009: 44 - 45.

⁹²⁰ Courts in Germany and Australia have held that a mandatory life sentence even in cases of murder ignores the principle of proportionality. See van Zyl Smit in Kahn 1995: 310 – 315.

‘liable to imprisonment for life.’⁹²¹ However, unlike the Ugandan Penal Code, the Kenyan Penal Code gives courts express discretion to impose a sentence less than life imprisonment in cases where the offender is liable to be sentenced to life imprisonment.⁹²² However, with regard to sexual offences, Kenya has taken a different approach to life sentencing than of Uganda. In Kenya, under the 2006 Sexual Offences Act⁹²³, a person convicted of the offences of rape⁹²⁴ and sexual assault⁹²⁵ shall be sentenced to a minimum of 10 years’ imprisonment with life imprisonment being the maximum sentence; and a person convicted of gang rape shall be sentenced to no less than 15 years’ imprisonment with life imprisonment being the maximum.⁹²⁶

Section 205 of the Penal Code of Uganda raises an unlikely, though not impossible, but interesting scenario. It provides that ‘any person, who, being under the sentence of imprisonment for three years or more, attempts to commit murder is liable to imprisonment for life, with or without

⁹²¹ See sections 42(b)(concealment of treason); 43 (treasonable felony); 43A (treachery); 44 (promoting war-like undertaking); 47 (inciting mutiny); 50 (aiding prisoners of war to escape); 59 (unlawful oath to commit capital offences); 60(3)(piracy); 83 (riot after proclamation); 84 (preventing or obstructing proclamation); 85(rioters demolishing buildings); 122 (1)(a) (attempting to rescue a person from lawful custody); 205 (manslaughter); 220 (attempted murder); 221 (attempted murder by convict); 222 (accessory after the fact of murder); 225 (aiding suicide); 228 (killing unborn child); 229 (disabling in order to commit a felony or misdemeanour); 290 (stupefying in order to commit a felony or misdemeanour); 232 (preventing escape from wreck); 233 (intentionally endangering safety or persons travelling by railway); 234 (grievous harm); 332 (arson); 339(2) and (3) (malicious injury to property); 343(a)(sabotage); 365 (counterfeiting coin); and 366 (preparation for coining).

⁹²² Section 26(2) of the Penal Code provides that ‘save as may be expressly provided by the law under which the offence concerned is punishable, a person liable to imprisonment for life... may be sentenced to a shorter term.’

⁹²³ Sexual Offences Act, Chapter 3 of 2006.

⁹²⁴ Section 3(3).

⁹²⁵ Section 5(2).

⁹²⁶ Section 10.

corporal punishment.’ The question that arises is: What would happen if a person serving a life sentence attempted to commit murder and he was sentenced to a life imprisonment to run consecutively to the life sentence he is already serving in terms of section 205? Would it mean that such a person would be released after serving 40 years (because life imprisonment means 20 years under the Prisons Act)? In countries like South Africa there are instances where courts have sentenced offenders to more than one life sentence.⁹²⁷ However, such sentences are practically of academic value because under section 73(6)(a) of the Correctional Services Act a prisoner who, let us say, was sentenced to four life sentences and 200 years’ imprisonment would have to be considered for parole after 25 years⁹²⁸ and under section 39(2)(a)(ii) ‘one or more life sentences...run concurrently.’ Which means that if the parole granting authority decides that such a prisoner qualifies for parole after serving 25 years he would have to be granted parole. However, the Prisons Act of Uganda does not cater for such a scenario and that could explain why the Constitutional Court asked what would happen if an offender was sentenced to 50 years’ imprisonment? Would the prison authorities release him after serving 20 years? This is an issue that would have to be resolved by Parliament.

⁹²⁷ For example, in *S v De Kock* 1997, the offender was sentenced to two life sentences and 212 years imprisonment for committing several serious political crimes including murder; in *S v Sidyno* 2001 (2) SACR 613 (T) the accused was convicted of seven counts of murder and sentenced to life imprisonment on each count; and in *S v Van Wyk* 1997 (1) SACR 345(T), the accused was convicted of several counts of murder and robbery and sentenced, inter alia, to three terms of life imprisonment.

⁹²⁸ Section 73(6)(a) provides that ‘a prisoner serving a determinate sentence may not be placed on parole until such prisoner has served either the stipulated non-parole period, or if no non-parole period was stipulated, half of the sentence, but parole must be considered whenever a prisoner has served 25 years of a sentence or cumulative sentences.’

The law needs to be amended to provide for the maximum number of years that a person serving any sentence should serve, after which he should be considered for parole. Secondly, Parliament needs to amend the Prisons Act to provide specifically that more than one life sentence imposed on one person should run concurrently, and also that any sentence of imprisonment imposed on a prisoner serving a life sentence should run concurrently with the life sentence. It is not necessary here to comment on the sentence of corporal punishment under section 205 because, as mentioned earlier, the Constitutional Court of Uganda, in the case of *Simon Kyamanywa v The Attorney General*, declared it to be unconstitutional, and it was subsequently outlawed by an amendment to the Penal Code Act.⁹²⁹ However, under section 142 of the Penal Code of Botswana, a person convicted of rape and sentenced to life imprisonment, being the maximum sentence, could also be sentenced to corporal punishment. Even if there are discussions by international and regional human rights courts to the effect that corporal punishment is inhuman and degrading⁹³⁰, Botswana still retains it notwithstanding persistent calls from the African Commission on Human and Peoples' Rights to abolish it.⁹³¹

Still on the issue of the possibility of a court sentencing an offender to two or more consecutive life sentences, in reacting to the increasing number of serious offences, including rape, in 1998 Botswana amended its Penal Code

⁹²⁹ Section 1(1) of the Penal Code Amendment Act, 2007 provides that 'corporal punishment is abolished and accordingly, all references to corporal punishment in the Penal Code Act...are repealed.'

⁹³⁰ For a general discussion of national, regional and international jurisprudence on the issue of corporal punishment see, O'Neil 2008: 60 – 78.

⁹³¹ See Mujuzi 2008(e) 73 – 77.

and created ‘a regime of more severe sentences for serious and prevalent crimes...[by] providing for minimum sentences of imprisonment for certain grave offences.’⁹³² Section 142 of the Penal Code was amended⁹³³ to provide that a person convicted of rape shall be sentenced to a minimum of 10 years, 15 years’ or 20 years’ imprisonment depending on the circumstances in which the rape was committed and to ‘a maximum term of life imprisonment.’⁹³⁴ The most controversial aspect of section 142 was clause 5 which provided that ‘[a]ny person convicted and sentenced for the offence of rape shall not have the sentence imposed run concurrently with any other sentence whether the other sentence be for the offence of rape or any other offence.’ This meant, for example, that a person sentenced to life imprisonment for murder with extenuating circumstances,⁹³⁵ could, if, for example, he raped a prison nurse, still be sentenced to life imprisonment for rape and both sentences had to run consecutively.⁹³⁶ The constitutionality of section 142(5) was challenged in *S v Matlho*⁹³⁷ in which the appellant was convicted on two counts of rape and sentenced to two consecutive

⁹³² *S v Ndou* (CLCLB-029-08)[2008]BWCA 60 (1 July 2008): para 40.

⁹³³ For details of other amendments to provide for minimum sentences see *S v Matlho* (CLCLB 019-07)[2008]BWCA 26 (1 January 2008).

⁹³⁴ See section 142 (1) – (4) of the Penal Code of Botswana.

⁹³⁵ Under section 203 of the Penal Code of Botswana, a person convicted of murder shall be sentenced to death unless there are extenuating circumstances. While upholding the appellant’s sentence of life imprisonment for murder, The Court of Appeal of Botswana held that, ‘...[previously] this court said that “A sentence of life imprisonment should be confined to the more serious convictions of murder with extenuating circumstances”. The case of this appellant is an example of such a conviction.’ See *Baeti Ntsimanyana v The State* (Criminal Appeal No.7 of 1981)[1981]BWCA 4, page 8.

⁹³⁶ In order to avoid cases where the sentences of life imprisonment could run consecutively, section 252 of the Penal Code of Sudan (2003) provides that ‘Murder by Life-Convict: Whoever being under sentence of imprisonment for life commits murder, shall on conviction be punished with death.’ See also section 259(3) (a person serving a life sentence for murder found guilty of attempted murder ‘may’ be sentenced to death).

⁹³⁷ *S v Matlho* (CLCLB 019-07)[2008]BWCA 26 (1 January 2008).

sentences of 10 years' imprisonment, which amounted to 20 years. He argued that section 142(5) violated Article 7(1) of the Constitution of Botswana, which prohibited inhuman and degrading punishment. In a unanimous judgment, the Court of Appeal found in the appellant's favour and ruled that:

[s]ection 142(5) of the Penal Code, because of the prevalence of rape offences ...will often come into operation in the future, resulting, as it must, in cumulative sentences of lengthy periods many of which will be grossly excessive. [The Court] therefore hold that the provisions of Section 142(5), that sentences are to run consecutively is in violation of Section 7(1) of the Constitution and is accordingly struck down.⁹³⁸

As mentioned earlier, the Constitutional Court of Uganda is of the opinion that if an offender has been sentenced to life imprisonment, it should mean that he should be imprisoned for the rest of his life and not merely 20 years. The Court also highlighted the fact that there could be instances where an offender has been sentenced to a term of imprisonment that is in effect longer than a life sentence if life imprisonment means 20 years. The arguments against longer prison terms have been highlighted already⁹³⁹ and will not be repeated here. However, the Constitutional Court of Uganda's concerns should not be ignored because in countries such as Botswana an offender serving a life sentence could be eligible for parole earlier than an offender serving a determinate sentence.⁹⁴⁰ This must be confusing, especially to lay people, who assume, and rightly so, that a person

⁹³⁸ *S v Matlho* 2008: 30.

⁹³⁹ Chapter IV, 4.2.3.8.1.

⁹⁴⁰ Under section 85(c) of the Prisons Act, 21:03, an offender sentenced to life imprisonment is eligible for parole after serving seven years' imprisonment. For countries where offenders could serve sentences longer than life imprisonment, see generally Stokes in Yorke 2008: 281-302.

sentenced to life imprisonment should serve a longer sentence than any other prisoner.

5.2 South Africa

Unlike in Uganda where courts in all cases have wide discretion to determine whether the offender, who has committed an offence for which life imprisonment is the maximum sentence, should be sentenced to life imprisonment or not, or in Kenya, where in some instances life imprisonment is a mandatory sentence,⁹⁴¹ in South Africa offences that attract life imprisonment can be categorised into two groups: One, where courts have wide discretion to decide whether the offender should be sentenced to life imprisonment (as in Uganda) – cases where life is not the minimum sentence; and two, where life imprisonment is the minimum sentence unless there are substantial and compelling circumstances which justify the imposition of a lesser sentence. Life imprisonment under the latter category has been dealt with already and that discussion will not be repeated here. What follows is the discussion of the offences for which courts have wide discretion in determining whether to impose the sentence of life imprisonment or not.

5.2.1 Offences where courts have wide discretion

Since 1993 South Africa passed a range of laws whose breach empowers courts to sentence the offender to life imprisonment. These laws include the

⁹⁴¹ In Sudan there are cases where life imprisonment is the lightest sentence that can be imposed. For example, section 96 of the Penal Code (2003) provides that '[w]hoever wages war against the New Sudan or attempts to wage such war or abets the waging of such war, shall be punished with death or imprisonment for life and shall forfeit all his properties.' See also sections 98(C) (espionage) and 251 (murder).

Non-Proliferation of Weapons of Mass Destruction Act (1993)⁹⁴² where a person convicted of intentionally using or threatening to use a weapon of mass destruction against a citizen of or a person ordinarily resident in the Republic of South Africa whether that person is in South Africa or outside South Africa; any person within South Africa; any property that is owned, leased or used by a South African citizen or resident or government whether the property is in or outside South Africa;⁹⁴³ or where a person is found guilty of threatening, attempting, conspiring with any other person, aiding, abetting, inducing, inciting, instigating, instructing, commanding, counselling or procuring to commit the foregoing offences under section 26(1)(j) is ‘liable on conviction to a fine or to imprisonment for a period up to imprisonment for life.’⁹⁴⁴ Under the Nuclear Energy Act⁹⁴⁵, any person who, *inter alia*, intentionally obtains nuclear material by means of theft, robbery, embezzlement or fraud or intentionally demands nuclear material by threat or use of force or by any other mode of intimidation ‘is liable, on conviction...to a fine or to imprisonment for a period up to imprisonment for life.’⁹⁴⁶

Section 4(1) of the Implementation of the Rome Statute of the International Criminal Court Act (2002)⁹⁴⁷ provides that a person found guilty of genocide, a crime or crimes against humanity, and a war crime or crimes,

⁹⁴² Non-Proliferation of Weapons of Mass Destruction Act, Act 87 of 1993.

⁹⁴³ Section 26(1)(j) (aa – cc).

⁹⁴⁴ Section 26(1)(v).

⁹⁴⁵ Nuclear Energy Act, Act 46 of 1999.

⁹⁴⁶ Section 56(2)(d).

⁹⁴⁷ Implementation of the Rome Statute of the International Criminal Court Act, Act No. 27 of 2002.

‘...is liable on conviction to a fine or imprisonment, including imprisonment for life, or such imprisonment without the option of a fine, or both a fine and such imprisonment.’ Section 3(1) of the Prevention of Organised Crimes Act (1998)⁹⁴⁸ provides that a person found guilty of racketeering ‘shall be liable to a fine not exceeding R1000 million or to imprisonment to a period up to imprisonment for life.’ The Preventing and Combating of Corrupt Activities Act (2004)⁹⁴⁹ provides that a person convicted of any of the following offences: general offences of corruption, offences in respect of corrupt activities relating to specific persons (i.e. public officers, foreign public officers, agents, members of legislative authority, judicial officers and members of prosecuting authority), offences of receiving or offering unauthorised by or to party to an employment relationship, offences in respect of corrupt activities relating to specific matters (i.e. to witnesses and evidential material during certain proceedings, contracts, procuring and withdrawal of tenders, auctions, sporting events and gambling games or games of chance), ‘in the case of a sentenced to be imposed by a High Court, to a fine or to imprisonment up to a period of imprisonment for life.’⁹⁵⁰

The Protection of Constitutional Democracy against Terrorist and Related Activities Act (2004) provides that any person guilty of participating in, financing, aiding or abetting serious terrorist activities ‘is liable in the case of the sentence to be imposed by a High Court, to a fine or to imprisonment

⁹⁴⁸ Act 121 of 1998, section 3.

⁹⁴⁹ Act 12 of 2004.

⁹⁵⁰ Section 26(1)(a).

for a period up to imprisonment for life.⁹⁵¹ Section 24(3) of the Defence Act (2002)⁹⁵² is to the effect that a person found guilty of piracy ‘is liable to a fine or to imprisonment for any period, including life imprisonment.’ However, as at the time of writing, there was no known case in which an offender had been sentenced to life imprisonment other than in cases of murder and rape. One could argue that whereas under all the aforementioned pieces of legislation a court could sentence an offender to life imprisonment, in practice it is the Criminal Law Amendment Act which has been enforced.

As mentioned earlier, it is clear that when a court finds a person guilty of any of the offences in the above pieces of legislation, it has wide discretion to determine whether to impose life imprisonment or a shorter term of imprisonment and in some cases even a fine is sufficient. At sentencing, the court would weigh the mitigating factors against the aggravating factors to decide which sentence to impose. It is argued that in determining whether to impose the sentence of life imprisonment or not under the above pieces of legislation, courts could be guided by some of the factors that were considered to impose or not to impose the sentence of life imprisonment before the death penalty was abolished. These have been mentioned earlier⁹⁵³ and will not be rehearsed here. Life imprisonment under the above mentioned pieces of legislation can only be imposed by the High Court. However, as has been illustrated earlier, since 31 December 2007

⁹⁵¹ Act 33 of 2004, section 18(1)(a).

⁹⁵² Act 42 of 2002.

⁹⁵³ Chapter IV, 4.2.1.1.

the jurisdiction of the Regional Courts was increased to empower regional magistrates to impose life imprisonment under the MSL.⁹⁵⁴

One of the striking things about life imprisonment in South Africa is that for serious and international offences like war crimes, crimes against humanity and genocide, the court, while playing its complementary role to the ICC⁹⁵⁵ under the Implementation of the Rome Statute of the International Criminal Court Act, has wide discretion to determine whether to sentence the offender to life imprisonment or not whereas, as illustrated earlier, in cases of murder or rape under certain circumstances, the court is required to sentence the offender to life imprisonment unless there are substantial and compelling circumstances. This means that a person could be convicted of acts of genocide, war crimes or crimes against humanity which could have resulted into the death of several people, for example, and not sentenced to life imprisonment (it should be recalled that the ICTY, ICTR⁹⁵⁶ and SCSL⁹⁵⁷ jurisprudence show that not all people convicted of genocide, war crimes or crimes against humanity are sentenced to lengthy prison terms like life imprisonment).

⁹⁵⁴ Chapter IV, 4.2.1.5.

⁹⁵⁵ Article 1 of the ICC Statute provides that the Court ‘...shall be complementary to national criminal jurisdictions.’ For a discussion of the complementary role of the national courts under the ICC Statute see, Burke-White 2008: 53- 108; Yang 2005: 121-132; and Kleffner and Kor (eds) 2006.

⁹⁵⁶ Schabas 2006: 545-584.

⁹⁵⁷ For example, in *Prosecutor v Moinina Fofana and Allieu Kondewa*, Case No.SCSL-04-14-A (Judgment of 28 May 2008) the Appeals Chamber sentenced both the appellants to 20 years’ imprisonment for crimes against humanity and war crimes (see para 565). In justifying the sentence of 20 years imprisonment, the Appeals Chamber held that ‘[w]hat should be one of the paramount considerations in the sentencing of an accused person convicted of crimes against humanity and war crimes is the revulsion of mankind, represented by the international community, to the crime and not the tolerance by a local community of the crime; or the lack of public revulsion in relation to the crimes of such community; or local sentiments about the persons who have been found guilty of the crimes.’ Para 564.

One the other hand, a person convicted of, for example, the murder of one person in certain circumstances has to be sentenced life imprisonment unless there are substantial and compelling circumstances. The reason the Implementation of the Rome Statute of the International Criminal Court Act gives wide discretion to courts to determine whether life imprisonment should be imposed or not could be attributed to the fact that Article 77(2) of the ICC Statute does not require that life imprisonment should be a mandatory or minimum sentence for offenders found guilty of offences that fall under the jurisdiction of the ICC or domestic courts. This is attributable to the ICC's drafting history which was characterised by, amongst other things, disagreements on the issue of penalties.⁹⁵⁸ Article 77(2) provides that '...the Court may impose ... [a] term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.' It has been argued that '[g]iven the severity of the crimes under the ICC's jurisdiction, the requirement of "extreme gravity" for a life sentence seems to be superfluous.'⁹⁵⁹

Countries that have enacted legislation implementing the ICC Statute have provided for different penalties for genocide, war crimes and crimes against humanity. In Australia, for example, life imprisonment is a mandatory

⁹⁵⁸ It has been observed that given the contentious issue of punishment, 'it should hardly be surprising that the negotiations on the penalties proved both difficult and time consuming.' See Fife in Lee (ed) 1999: 322. It has been demonstrated that '[d]uring the negotiations for the adoption of the Rome Statute of the International Criminal Court, a small but determined group of states, mainly from Arabic and Islamic countries and the Commonwealth Caribbean, argued that the new institution should impose capital punishment. Perhaps surprisingly, the United States voiced opposition to capital punishment ...and argued that if the International Court, if empowered to impose the death penalty, would fail because a large number of states would simply refuse to transfer criminals to the Court.' See Schabas 2003: 581.

⁹⁵⁹ Glickman 2004: 259.

sentence for genocide, war crimes and crimes against humanity committed in the most heinous manner;⁹⁶⁰ in Canada, life imprisonment is mandatory for genocide, war crimes and crimes against humanity if ‘an intentional killing forms the basis of the offence’⁹⁶¹; and in Germany, a person found guilty of genocide, war crimes and crimes against humanity ‘shall be imprisoned for life’ where death, amongst other things, resulted from the commission of such crimes.⁹⁶² The Criminal Code of Bosnia and Herzegovina provides that a person found guilty of genocide, war crimes or crimes against humanity ‘shall be punished by imprisonment for a term not less than ten years or longer-term imprisonment.’⁹⁶³

Pieces of legislation from the above four countries indicate that the legislatures have ensured that the court’s discretion is limited in cases where the offender has been found guilty of genocide, war crimes or crimes against humanity. In the first three countries – Australia, Canada and German – courts have no discretion but to impose the sentence of life imprisonment in the above mentioned circumstances. In Bosnia and Herzegovina on the other hand, the minimum sentence is 10 years’ imprisonment although courts have the discretion to impose a longer prison

⁹⁶⁰ See International Criminal Code (Consequential Amendments) Act, Act No. 42 of 2002, sections 268.3 – 268.9(1),268.24(1), 268.35,268.37(1),268.38,268.39, 268.41 – 268.44,268.47,268.48(1),268.49,268.50,268.66(1),268.70,268.71(1),268.76(2),268.77,268.78(1),268.79(1),268.90, 268.91, 268.92, 268.93(1), 268.97,and 268.98. Although under the Act penalties ranging from 5 to 25 years’ imprisonment could be imposed for various offences not serious enough to attract life imprisonment.

⁹⁶¹ See Crimes against Humanity and War Crimes Act (2000, c.24), sections 4(2)(a) and 6(2)(a).

⁹⁶² Code of Crimes against International Law (2002), sections 6,7.

⁹⁶³ Criminal Code of Bosnia and Herzegovina (Adopted by the Bosnia and Herzegovina Parliamentary Assembly and published in the Official Gazette of Bosnia and Herzegovina 37/03) Articles 171 – 176(1).

term. Genocide, war crimes and crimes against humanity are serious crimes that should attract serious sentences. It is recommended that the Implementation of the Rome Statute of the International Criminal Court Act should be amended so that life imprisonment is the minimum sentence for genocide, war crimes and crimes against humanity – unless there are substantial and compelling circumstances in which case the judge should impose a lesser sentence or the amendment should provide for the minimum number of years of imprisonment to which the offender found guilty of such offences should be sentenced with life imprisonment being the maximum sentence. This would ensure that the sentence to be imposed on people found guilty of genocide, war crimes or crimes against humanity is not left entirely to the discretion of the court, which could impose lighter sentences failing to reflect the grave nature of the offences.

5.3 Mauritius

Section 150A of the Criminal Code provides that:

Where under any enactment other than the Criminal Code, a Court is empowered or required to pass a sentence of penal servitude for life, the sentence may, at the discretion of the Court, be for a term of not less than 3 years and not exceeding 60 years.

The above provision indicates that there are circumstances where the court is ‘empowered’, that is, the court has the discretion to decide whether or not to impose a penal servitude for life, and where the court is ‘required’, that is, where the court *must*, impose life imprisonment. It also indicates that life imprisonment is provided for under different pieces of legislation including the Criminal Code. There are several offences for which an offender can be sentenced to penal servitude for life (life imprisonment). These offences

will be divided into two categories: first, where life imprisonment is a mandatory sentence, that is, where the court is ‘required’ to impose a life sentence; and second, where life imprisonment is a discretionary sentence, that is, where the court is ‘empowered’ to impose a life sentence.

5.3.1 Offences where life imprisonment is mandatory

Whereas section 150A of the Criminal Code contemplates that there may be other legislation apart from the Criminal Code where life imprisonment is mandatory, the author was unable to come across any. It is only under the Criminal Code where the author was able to identify provisions where life imprisonment is mandatory. A person found guilty of any of the following offences ‘the punishment shall be penal servitude for life’: killing another person by explosives;⁹⁶⁴ stirring up war against the state;⁹⁶⁵ inciting citizens or other inhabitants of Mauritius to rise up in arms against the State;⁹⁶⁶ attempting or plotting to stir a civil war by arming or by inciting the inhabitants of Mauritius to arm themselves against one another or carry devastation, massacre or plunder;⁹⁶⁷ castration or amputation or destruction of any organ necessary to generation resulting to the death of the victim;⁹⁶⁸ and arson causing death.⁹⁶⁹

⁹⁶⁴ Section 66 of the Criminal Code (Supplementary) RL 2/137 of 12 June 1982.

⁹⁶⁵ Section 51 of the Criminal Code.

⁹⁶⁶ Section 60 of the Criminal Code.

⁹⁶⁷ Section 62 of the Criminal Code.

⁹⁶⁸ Section 234(2) of the Criminal Code.

⁹⁶⁹ Section 347 of the Criminal Code.

As discussed earlier, in *Philibert and 6 others v The State*⁹⁷⁰ the Supreme Court of Mauritius held that sections 222(1) of the Criminal Code and 41(3) of the Dangerous Drugs Act which required courts to impose 45 years' imprisonment for murder and penal servitude for life dealing in dangerous drugs, respectively, was held to be unconstitutional for violating the right to a fair trial. The Supreme Court reasoned that mandatory sentences under those provisions violated the sentencing principle of proportionality in the sense that an offender was denied an opportunity to plead in mitigation for the court to impose a lesser severe sentence. However, none of the above mentioned provisions that require the court to impose a mandatory life sentence was impugned in the *Philibert* judgment. This means, it is argued, that an offender convicted of an offence under the Criminal Code where the court is 'required', in the light of section 150A of the Criminal Code, to impose a life sentence, the Court has no alternative but to impose a life sentence.

It is argued that, like sections 222(1) of the Criminal Code and 41(3) of the Dangerous Drugs Act, the Criminal Code provisions which require the court to impose a life sentence on an offender convicted of the relevant offence or offences, violate the right to a fair trial and cannot pass the constitutionality test. It could be argued that one of the reasons why the constitutionality of the above provisions in the Criminal Code, which require courts to sentence an offender to life imprisonment, have never been challenged is that no person has ever been convicted of and sentenced for an offence under any of those provisions. This means that since their

⁹⁷⁰ *Philibert and 6 others v the State* 2007.

inception, they have been ‘dormant.’ However, this does not mean that they will never be activated once a person commits an offence punishable with a mandatory life sentence.

In the author’s opinion, there are two options to ensure that mandatory life imprisonment is removed from the Criminal Code: One, any person sentenced to life imprisonment under any of those provisions should challenge their constitutionality on the ground that they violate the rights to a fair trial and not to be subjected to inhuman and degrading punishment and rely on the reasoning of the Supreme Court in the *Philibert* judgment to substantiate his argument. The offender’s right to challenge the constitutionality of a mandatory life sentence flows from Article 17(1) of the Constitution of Mauritius which provides that ‘[w]here any person alleges that any of sections 3 to 16 has been, is being or likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter that is lawfully available, that person may apply to the Supreme Court for redress.’ However, the foregoing is not readily available and could take longer unless in the near future a person is convicted and sentenced under the relevant provision. The second and readily available option is for Parliament to amend the relevant provisions and make life imprisonment a discretionary sentence.

5.3.2 Offences where life imprisonment is discretionary

A person convicted of any of the following offences: inciting an officer to mutiny;⁹⁷¹ taking command of an armed force;⁹⁷² murder or homicide;⁹⁷³ or manslaughter accompanying or preceding another crime.⁹⁷⁴

[s]hall be punished by penal servitude for life or, where the Court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence and has entered those circumstances on the record of the proceedings, for a term not exceeding 60 years.

Courts are required by sections 61, 64, 222(1) and 223(1) of the Criminal Code, as amended by the 2007 Criminal Procedure (Amendment) Act, to sentence to penal servitude for life offenders convicted of offences under those sections unless there are substantial and compelling circumstances. The challenge is that the Criminal Procedure (Amendment) Act does not define or describe ‘substantial and compelling circumstances.’ Consequently, courts have a wide discretion to determine, on a case by case basis, what constitutes substantial and compelling circumstances. Experience from South Africa, where the same phrase was introduced in 1997⁹⁷⁵, makes one anticipate that different judges are likely to come to confusing, and at times conflicting, interpretations of what constitute substantial and compelling circumstances. The Privy Council appears to reason that there is no difference between substantial and compelling

⁹⁷¹ Section 61 of the Criminal Code.

⁹⁷² Section 64 of the Criminal Code.

⁹⁷³ Section 222 of the Criminal Code.

⁹⁷⁴ Section 223(1) of the Criminal Code.

⁹⁷⁵ See Criminal Law Amendment Act, Act 105 of 1997.

circumstances, on the one hand, and mitigating factors, on the other hand.⁹⁷⁶

The Privy Council's equating of substantial and compelling circumstances with mitigating factors appears to have opened an avenue for the courts in Mauritius to also invoke mitigating factors that have always formed their basis to depart from when imposing heavy penalties, as substantial and compelling circumstances.⁹⁷⁷ Whether this would be the correct position or not will have to be resolved by the Supreme Court or the legislature in guiding lower courts on what substantial and compelling circumstances should include or by the legislature amending the law to enumerate what substantial and compelling circumstances should include or exclude, respectively. In my opinion, by equating substantial and compelling circumstances with mitigating factors, the Privy Council appears to have ignored the intention of the legislature, which expressly provided for substantial and compelling circumstances instead of mitigating factors.

⁹⁷⁶ *De Boucherville v The State of Mauritius* 2008: para 6.

⁹⁷⁷ It has to be recalled that before the Privy Council's ruling, judges appear to have held that view that substantial and compelling circumstances were slightly different from mitigating circumstances. In *The State v Takah P and another* 2007 SCJ 174, the Supreme Court found the accused guilty of murder and before sentencing the first accused to 32 years' imprisonment and the second accused to 26 years' imprisonment instead of the maximum 45 years' imprisonment, the Court held that it had 'given due consideration to a number of mitigating factors which have been highlighted in the course of the hearing: (1) the accused readily confessed the guilt and adopted a cooperative attitude with the police; (2) they had spent about 14 months in custody whilst on remand before they were released on bail; (3) they adopted a repentant attitude in Court and tendered their apologies in Court to the victim's family; (4) they expressed feelings of remorse and regret and have pledged to behave properly in future; (5) they both have a clean record; and (6) they both are young and immature and were led into the commission of the offence as a result of the temptation for money. I consider that the above-mentioned factors constitute substantial mitigating circumstances ... The cumulative effect of the mitigating factors and the timely guilty plea would in the light of the circumstances of the of the present case constitute "substantial and compelling circumstances" to justify a lesser sentence...' see 176. (Emphasis in original).

Experience from South Africa tells us that if the legislature had wanted courts to take mitigating factors into account, it would have expressly stated so, and would not have used the 'composite yardstick' of substantial and compelling circumstances. In South Africa the Criminal Law Amendment Act of 1997 requires courts to sentence offenders convicted of some serious offences, such as, murder and rape to life imprisonment unless there are substantial and compelling circumstances. Until 2001 the South African High Courts devised confusing, and at times conflicting, interpretations of what amounted to substantial and compelling circumstances. In 2001 the Supreme Court of Appeal, in the famous case of *S v Malgas*, established detailed guidance on what the legislature intended to mean by substantial and compelling circumstances. It held that:

A Section 51 has limited but not eliminated the courts' discretion in imposing sentence in respect of offences referred to in Part 1 of Schedule 2 (or imprisonment for other specified periods for offences listed in other parts of Schedule 2). **B** Courts are required to approach the imposition of sentence conscious that the legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should *ordinarily* and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances. **C** Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts. **D** The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded. **E** The legislature has however deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored. **F** All factors (other than those set out in D above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from

consideration in the sentencing process. **G** The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ("substantial and compelling") and must be such as cumulatively justify a departure from the standardised response that the legislature has ordained. **H** In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against sentence as the sole criterion. **I** If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence. **J** In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the bench mark which the legislature has provided.⁹⁷⁸

As illustrated in Chapter IV,⁹⁷⁹ since the *Malgas* judgment above, the South African courts have developed what are regarded as substantial and compelling circumstances. In *Direkteur van Openbare Vervolgings, Transvaal v Makwetsja* it was held that the 'youthfulness [of the offender] per se is a substantial and compelling circumstance.'⁹⁸⁰ In *S v Ferreira and others*⁹⁸¹ the first appellant, a woman in an abusive relationship, contracted the second and third appellants to murder her partner, believing that his death was the only way by which she could escape from the abusive relationship. The Supreme Court of Appeal held that the belief that the only way to escape an abusive relationship was to kill her partner was a substantial and compelling circumstance which necessitated the imposition of a term of imprisonment of six years instead of life imprisonment. Courts have held that it is a substantial and compelling circumstance where the

⁹⁷⁸ *S v Malgas* 2001: para 25.

⁹⁷⁹ Chapter IV, 4.2.1.3.

⁹⁸⁰ *Direkteur van Openbare Vervolgings, Transvaal v Makwetsja* 2004: 3. See also *Brandt v S* 2005: 1.

⁹⁸¹ *S v Ferreira and others* 2004: 454.

rape of the victim was ‘not one of the most serious manifestations of rape.’⁹⁸² Courts have also held that the absence of previous convictions, and the fact that the accused had ‘displayed remorse and was a good candidate for rehabilitation’ are substantial and compelling circumstances.⁹⁸³ It has also been held that the fact that the accused was of a low IQ is a substantial and compelling circumstance.⁹⁸⁴ The Supreme Court of Appeal held that the fact that the appellant had a dependant wife and children, and was gainfully employed, were substantial and compelling circumstances.⁹⁸⁵ The Supreme Court of Appeal also held in *S v Thebus and another*⁹⁸⁶ that the fact that the accused had played a minimal role in the commission of the crime was one of the substantial and compelling circumstances justifying departure from the prescribed minimum sentence.⁹⁸⁷

The above cases show that courts determine what amount to substantial and compelling circumstances, depending on the circumstances under which the offence was committed, the personal characteristics of the offender, and the effects the crime had on the victim, amongst other things. It is evident that even in South Africa, where the law requiring the imposition of life

⁹⁸² *S v G* 2004 (2) SACR 296 (W). See also *S v M* 2007 (2) SACR 60 (W); *S v Ncheche* 2005 (2) SACR 386 (W).

⁹⁸³ *S v Malan en ‘n ander* 2004 (1) SACR 264 (T) at 267. See also *S v Obisi* 2005 (2) SACR 350 (W); *S v Nkomo* 2007 (2) SACR 198 (SCA); *Rommoko v Director of Public Prosecutions* 2003 (1) SACR 200 (SCA).

⁹⁸⁴ *S v Riekert* 2002 (1) SACR 566 (T).

⁹⁸⁵ *S v Sikhapha* 2006. See also *S v Boer en andere* 2000 (2) SACR (NC).

⁹⁸⁶ *S v Thebus and another* 2002 (2) SACR 566 (SCA).

⁹⁸⁷ However, in *S v Vuma* 2003 (1) SACR 597 (W) the appellant was sentenced to life imprisonment for murder even though it was proved to the Court that the following favourable circumstances existed: he was employed, had a family to assist financially, he attended church regularly, was not a violent person, and had no previous convictions.

imprisonment on offenders found guilty of serious crimes unless there are substantial and compelling circumstances, has been on the statute book for over a decade now, an exhaustive list of scenarios of what amount to substantial and compelling circumstances has not been compiled. Using their discretion and the *Malgas* criteria as guide, the South African courts will continue developing their jurisprudence in this area until such time as an exhaustive list of scenarios, or something close to an exhaustive list, of what amount to substantial and compelling circumstances is developed. Courts in Mauritius are also likely to follow the same route as that of South Africa. Mauritian courts could refer to South African jurisprudence as a persuasive interpretation tool in their attempt to define or enumerate what are substantial and compelling circumstances. However, this does not mean that courts in Mauritius are not at liberty to construct their own understanding of substantial and compelling circumstances without being influenced by the South African jurisprudence.

5.4 Courts with jurisdiction to impose life sentences and the right to appeal against the sentence

It is important to make note of courts with jurisdiction to impose the sentence of life imprisonment in the three jurisdictions of Uganda, South Africa and Mauritius. This could help to explain, amongst other things, the weight the legislature attaches to the sentence of life imprisonment and the frequency with which the sentence of life imprisonment could be imposed. In almost all jurisdictions the imposition of heavy penalties is reserved for the superior courts of record such as the High Court, Court of Appeal and Supreme Court and light penalties are reserved for lower courts such as

magistrate courts although the superior courts have unlimited jurisdiction and can impose any sentence permissible under the law. Superior court trials are usually presided over by some of the most skilled and seasoned legal practitioners in country, and this explains why they are always empowered to impose the most serious penalty in many jurisdictions. In Uganda it is the High Court,⁹⁸⁸ the Chief Magistrates Court⁹⁸⁹, the Division Court Martial⁹⁹⁰ and General Court Martial⁹⁹¹ that have the jurisdiction to impose life sentences. The Division Court Martial and the General Court Martial have jurisdiction to sentence offenders to life imprisonment when they commit some of the offences under the Uganda Peoples' Defence Forces Act.⁹⁹² Of the 47 people who were serving life sentences in Uganda

⁹⁸⁸ Section 14(1) of the Judicature Act, Chapter 13 of the Laws of Uganda.

⁹⁸⁹ See section 161(1) of the Magistrates' Courts Act, Chapter 16 of the Laws of Uganda provides that '(a) a chief magistrate may try any offence other than an offence in respect of which the maximum penalty is death; (b) a magistrate grade I may try any offence other than an offence in respect of which the maximum penalty is death or imprisonment for life.' However, the author is aware of only one case where the Chief Magistrates Court has ever sentenced an offender to life imprisonment. Because the offender appealed against his conviction to the High Court which upheld the sentence imposed by the Chief Magistrate, the Prisons Records indicate that the prisoner was sentenced to life imprisonment by the High Court. See *Saymon Muganga v Uganda* 2005, unreported. The appellant was convicted of attempted murder and sentenced to life imprisonment by the Chief Magistrate.

⁹⁹⁰ Section 198(c) of the Uganda Peoples' Defence Forces Act, 2005.

⁹⁹¹ Section 197(2) of the Uganda Peoples' Defence Forces Act, 2005 provided that '[t]he General Court Martial shall have unlimited original jurisdiction under this Act...'

⁹⁹² The Uganda Peoples' Defence Force Act, 2005. A person subject to military law found guilty of any of the following offences is 'liable to life imprisonment': cowardice in action not resulting in failure of operation or loss of life (section 120(1)); breaching concealment not resulting in loss of life (section 121(1)); failure to brief not resulting in loss of life (123(1)); personal interests endangering operational efficiency (section 124); careless shooting in operation (section 125); several offences relating to operation e.g. breaking into any house or other place with intention to plunder, without orders from his or her superior, improperly destroys or damages any property etc (section 126); offences by persons in command when in action e.g. giving premature orders to attack resulting in failure of operation (section 128); mutiny not resulting in failure of operation, loss of life or destruction of military operational materials (section 132); disobeying lawful orders not resulting in failure of operation or loss of life (section 133(1)); failure to execute one's duty not resulting in failure of operation or loss of life (section 134); spreading harmful propaganda not resulting in failure of operation or loss of life (section 137(1)); malingering or maiming (section 138); desertion provided the desertion does not endanger

in 2008, three had been sentenced by the General Court Martial and the rest by the High Court.⁹⁹³

However, those sentenced to life imprisonment by the High Court have the right to appeal against the sentence to the Court of Appeal.⁹⁹⁴ If the Court of Appeal upholds the sentence, the offender has a right to appeal to the Supreme Court which ‘the final court of appeal.’⁹⁹⁵ Many of the offenders serving life imprisonment in Uganda appealed their sentences up to the Supreme Court which confirmed such sentences and some were in the process of lodging the appeals.⁹⁹⁶ However, unlike the death penalty that cannot be executed unless it has ‘been confirmed by the highest appellant court’,⁹⁹⁷ a life sentence does not have to be confirmed by the Supreme Court to be served.

In South Africa, as mentioned earlier, both the High Court and the Regional Courts have the jurisdiction to impose life sentences under the MSL.⁹⁹⁸

life or leads to loss of life, he has not deserted with arms and ammunition or other war materials and he does not desert and join the enemy (section 146); commits dangerous acts in relation to aircraft (section 154); disobedience of Captain’s orders (section 155); fraudulently using, concealing or receiving military marks (section 160); and causing fire (section 165). Under section 221 (4)(a) ‘every person who on conviction for a service offence is liable to life imprisonment ... may be sentenced to imprisonment for a shorter term.’

⁹⁹³ Mujuzi 2008(a): 167.

⁹⁹⁴ Article 132(2) of the Constitution.

⁹⁹⁵ Article 132(1) of the Constitution.

⁹⁹⁶ Personal interview with offenders serving life imprisonment, Luzira Maximum Security Prison, 14 January 2008.

⁹⁹⁷ Article 22(1) of the Constitution.

⁹⁹⁸ Before the December 2007 amendments which extended the jurisdiction of the regional courts to impose life imprisonment, there were some regional courts’ magistrates who argued that they did not have the jurisdiction to try offenders for offences that attracted life imprisonment. In *Director of Public Prosecutions (Kwazulu-Natal) v Regional Magistrate, Mtubatuba* 2002 (1) SACR 31 (N), the High Court held that a regional magistrate had the

However, as already indicated, it is only the High Court with the jurisdiction to impose life imprisonment under other pieces of legislation. As indicated earlier, a person sentenced by the Regional Court to life imprisonment under the MSL has an automatic right of appeal to the High Court. However, when the High Court upholds the sentence, that person can appeal to the Supreme Court of Appeal when granted leave to appeal by the High Court. An offender can only appeal to the Constitutional Court when his appeal raises a constitutional issue. Most of the offenders serving life sentences in South Africa were sentenced by the High Court under the MSL although some have been sentenced by the Regional Courts since the 2007 amendments to the MSL.⁹⁹⁹ In Mauritius, it is only the Supreme Court, which has the jurisdiction to impose life imprisonment.¹⁰⁰⁰ Offenders aggrieved by the Supreme Court's decision may appeal to the Judicial Committee of the Privy Council in terms of section 81(1) of the Constitution¹⁰⁰¹ and section 116 of the Courts Act on condition that the

jurisdiction to try offences that attracted life imprisonment under the MSL and that he was required to refer the offender to the High Court for sentencing.

⁹⁹⁹ For a full discussion of this issue, see Chapter IV, 4.2.1.5.

¹⁰⁰⁰ Section 70A of the Courts Act, Act 5 of 1945 (as amended by the Courts (Amendment Act, Act No.21 of 2008). The Supreme Court while commenting on the jurisdictions of courts under the Courts Act held that the District Court 'is not competent to try cases which are punishable by penal servitude for life...' see *Muktar Ali and Gulam Rasool v R* 1991 MR 138, 342.

¹⁰⁰¹ Under section 81(1) 'An appeal shall lie from decisions of the Court of Appeal or the Supreme Court to the Judicial Committee as of right in the following cases- (a) final decisions, in any civil or criminal proceedings, on questions as to the interpretation of this Constitution...' In *Sumodhee S.I. and ors v The State* 2006 SCJ 171, where the appellants were found guilty of manslaughter and sentenced to penal servitude for life, they sought leave from the Supreme Court to appeal to the Judicial Court on the ground that, *inter alia*, that their right to a fair trial had been violated because they had not been tried by a jury. In declining their application, the Supreme Court held that they had not 'established that there was a question as to the interpretation of any of the provisions the Constitution on which there has been a final decision...' and that it was not 'established that there [was] any ground which, by reason of its great general or public importance or otherwise, ought to be submitted to the Judicial Committee...' see 176.

appeal raises an issue of ‘great public importance or otherwise, ought to be submitted to the Judicial Committee’.¹⁰⁰²

5.5 Legal representation for people charged with offences that carry life imprisonment

Closely related to the issue of the court’s jurisdiction to impose life imprisonment is the question of legal representation of people accused of offences that attract a life sentence. In Uganda, Article 28(3)(e) of the Constitution provides that ‘in case of any offence which carries a sentence of ... imprisonment for life, [the accused shall] be entitled to legal representation at the expense of the state.’¹⁰⁰³ However, under section 2 of the Poor Persons Defence Act an indigent accused appearing before the High Court is also entitled to legal representation although not facing an offence carrying a life sentence.¹⁰⁰⁴ In its recent judgment, the Supreme Court of Uganda referred to Article 28(3)(e) and held that ‘it gives an extra safeguard to a person ...[who is faced with a life sentence], i.e., legal representation at the expense of the state’¹⁰⁰⁵ and that ‘[t]his can only be because the framers of the Constitution deemed that an offence carrying ...[a life sentence] is so heavy and so important that all help and latitude

¹⁰⁰² Section 116 of the Courts Act, Act 5 of 1945 (as amended by the Courts (Amendment Act, Act No.21 of 2008).

¹⁰⁰³ Rule 25(2) of the Judicature (Court of Appeal Rules) Directions, Statutory Instrument 13 – 10 provide that ‘[i]n accordance with 28(3)(e) of the Constitution, the applicant or appellant shall be entitled to be assigned an advocate ...in the case of an offence which carries a sentence of death or imprisonment for life.’

¹⁰⁰⁴ A prisoner who is poor and charged before the High Court with an offence that do not carry death or life sentence can also get legal representation at the expense of the state ‘[w]here it appears for any reason that it is desirable, in the interest of justice, that a prisoner should have legal aid in the preparation and conduct of his or her defence at his or her trial...’ section 2 of The Poor Persons Defence Act, Chapter 20 of the Laws of Uganda, 1998. The means test is applied in these circumstances.

¹⁰⁰⁵ *Attorney – General v Susan Kigula and 416 others* 2009: 24.

must be given to the accused person for that person to have a fair trial.’¹⁰⁰⁶

All offenders serving life imprisonment in Uganda who were interviewed by the author said that they had received legal representation paid for by the state.¹⁰⁰⁷

On the other hand, although the right to legal representation is guaranteed in the constitutions of Mauritius and South Africa, there is no express provision in those constitutions that a person accused of committing an offence that attracts a life sentence is entitled to legal representation at the expense of the state. Article 10(2)(d) of the Constitution of Mauritius provides that ‘[e]very person who is charged with a criminal offence shall be permitted to defend himself in person or, at his own expense, by a legal representative of his choice or, where so prescribed, by a legal representative provided at the public expense.’ Article 10(2)(d) with regard to who qualifies for legal aid at the ‘public expense’ is operationalised by section 4 of the Legal Aid Act¹⁰⁰⁸ which sets two conditions for a person to qualify for legal aid: one, a person who wishes to obtain legal aid in criminal proceedings ‘shall’ apply to the court before which he is being charged for legal aid and that application should state his ground of defence; and two, a person applying for legal aid must make a sworn statement that (a) excluding his wearing apparel and tools of trade and the subject matter of the proceedings, he is not worth 75,000 rupees; and (b) his

¹⁰⁰⁶ *Attorney – General v Susan Kigula and 416 others* 2009: 41.

¹⁰⁰⁷ Personal discussion with 14 offenders serving life imprisonment, 14 January 2008, Luzira Maximum Security Prison, Kampala, Uganda.

¹⁰⁰⁸ The Legal Aid Act, Act 57 of 1973 (as amended by Act No.18 of 2003).

total monthly earnings are less than 5000 rupees.¹⁰⁰⁹ Under section 7 of the Legal Aid Act an application for legal aid cannot succeed unless it satisfies the requirements under section 4 and that application must be ‘well-founded.’ Thus, the only criterion on which a person qualifies for legal aid in Mauritius is his inability to pay for his legal representation.¹⁰¹⁰

Under section 35(3)(g) of the Constitution of South Africa, ‘[e]very accused person has a right to a fair trial, which includes the right to have a legal practitioner assigned to ...[him] by the state and at the state expense, if substantial injustice¹⁰¹¹ would otherwise result, and to be informed of this right promptly.’¹⁰¹² While interpreting section 35(3)(g), the Cape High Court held that the ‘right to legal representation has three separate and distinct forms ... (a) the right to a legal practitioner of one’s choice; (b) the right to a legal practitioner assigned to one at the State’s expense; and (c) the right to a legal practitioner furnished by the Legal Aid Board.’¹⁰¹³ In South Africa, an accused qualifies for legal aid when he is an ‘indigent person’ or cannot afford the costs of his legal representation within the

¹⁰⁰⁹ Section 4 of the Legal Aid Act.

¹⁰¹⁰ However, under section 7A of the Legal Aid Act, a minor charged with any offence or misdemeanour must be granted legal aid if he applies for it irrespective of his parent’s or guardian’s income.

¹⁰¹¹ For a definition of substantial injustice, see paragraph section 1 of Legal Aid Guide (2002), drafted in line with Section 3A of the Legal Aid Act, Act No. 22 of 1969 (as amended in 1996).

¹⁰¹² For a detailed discussion of the right to legal representation in South Africa see, Du Toit *et al* 2007: Chapter 11. See also Vawda 2005: 234 – 247, who has argued that ‘...access to justice has routinely come to be interpreted as the right of the accused persons to legal representation, particularly where a sentence of imprisonment of some length might be imposed, in order to circumvent the “substantial injustice” potentially befalling an unrepresented accused.’ At 236.

¹⁰¹³ *S v Cornelius and another* 2008 (1) SACR 96 (C), 97.

meaning of section 3 of the Legal Aid Act as interpreted by section 1 of the Legal Aid Guide.¹⁰¹⁴

However, it has been held that the ‘means test’ applied by the Legal Aid Board to assess whether the accused qualifies for legal aid is ‘completely wrong’ because ‘that is not what the Constitution requires.’¹⁰¹⁵ What the Constitution requires, it has been emphasised, is that every accused person ‘is entitled to legal representation at State expense if substantial injustice would occur in the case, if the trial is conducted without him being legally represented.’¹⁰¹⁶ However in practice, before the court refers the accused’s case to the Legal Aid Board for legal aid, it has to consider factors such as the personal circumstances of the accused, the nature and gravity of the alleged offence, and ‘any other factor which in the opinion of the court should be taken into account.’¹⁰¹⁷ It has been held that in cases where the accused is charged with an offence that carry direct imprisonment, the Legal Aid Board is constitutionally ‘obliged to provide legal assistance to the accused in order that he...should realise his...right to legal representation at State expense’ and that the Court must advise the accused and the Legal Aid Board accordingly.¹⁰¹⁸

¹⁰¹⁴ Section 1 of the Legal Aid Guide defines an indigent person to mean ‘a natural person who qualifies for legal aid in terms of the means test set out in t[he] Guide or a natural person who is unable to afford the cost of his/her own legal representation (in circumstances where substantial injustice would otherwise arise...’

¹⁰¹⁵ *S v Cornelius and another* 2008: 97.

¹⁰¹⁶ *S v Cornelius and another* 2008: 97.

¹⁰¹⁷ Section 3B of the Legal Aid Act.

¹⁰¹⁸ *S v Cornelius and another* 2008: 97.

However, cases have arisen where although the accused was being charged with an offence or offences that carried life imprisonment on conviction, the court did not advise him to obtain legal representation.¹⁰¹⁹ And where the accused was charged with rape in circumstances where on, conviction, he was to be sentenced to life imprisonment unless there were substantial and compelling circumstances, the court did not warn him that failure to acquire legal representation could prejudice his defence.¹⁰²⁰ Thus, it has been held that:

Where an accused is charged before the High Court with an offence for which a penalty of life imprisonment is in prospect and he has not made arrangements for his own defence, extreme seriousness of the charge will be sufficient by itself to render it obligatory to assign defence counsel to him at State expense without any initiative from his side.¹⁰²¹

The Durban Coastal Division of the South African High Court has warned that in cases where offenders rely on legal aid lawyers for representation during their trial, 'it was not unusual to find inexperienced counsel representing accused persons' and that 'judges ...[are] frequently required

¹⁰¹⁹ *S v Mbambo* 1999 (2) SACR 421(W), the accused appeared in the regional court on the charge of raping a girl of nine years where, on conviction, he was to be sentenced to life imprisonment unless there were substantial and compelling circumstances. There were no substantial and compelling circumstances. However, the magistrate did not encourage him to obtain legal representation and the accused conducted his own defence. When the case was referred to the High Court for sentencing, the court held that failure to encourage the accused to obtain state-funded legal representation amounted to an irregularity and referred the case back to the regional court for retrial so that the accused could get legal representation. In *S v Mkhondo* 2001(1) SACR 49 (W), the regional court convicted the accused of rape, although he had no legal representation during his trial, and referred his case to the High Court to impose a life sentence should it not find substantial and compelling circumstances. The High Court set aside the conviction and referred the matter back to the regional court for retrial. In *S v Ndlovu* 2001(1) SACR 204 (W), the regional court convicted the accused of rape, although he did not have legal representation, and referred to his case to the High Court for sentencing although 'it was not clear whether he had been fully informed of his right to legal representation or encouraged to accept legal representation.' At 204.

¹⁰²⁰ *S v Dickson* 2000 (2) SACR 304(C).

¹⁰²¹ *S v Mkhondo* 2001 (1) SACR 49(W), 50.

to play an active role in assisting counsel in order to ensure a fair trial.’¹⁰²²

It has been emphasised that ‘the right to legal representation mean[s] a right to representation that ...[is] competent and of a quality and nature that ensure[s] that the trial ...[is] indeed fair.’¹⁰²³

The difference between Uganda on the one hand and Mauritius and South Africa on the other hand, with respect to the right to legal representation for people accused of offences that carry life imprisonment, is that in Uganda that right is constitutionally protected irrespective of the accused’s ability to pay for his legal representation whereas in Mauritius and South Africa it is dependant on amongst other factors, the accused’s inability to pay for his legal representation. Unlike in South Africa where both the accused’s inability to pay for his legal representation and the seriousness of the offence have to be assessed before he qualifies for legal aid in order to avoid substantial injustice, in Mauritius, as mentioned earlier, the only criterion is the accused’s inability to pay for his legal representation.

5.6 Courts and theories of punishment in imposing life imprisonment

As indicated in Chapter II, there are three major theories of punishment: retribution, deterrence and rehabilitation. In Chapter III it has been illustrated that the international criminal tribunals have emphasised one or more of the above theories in sentencing offenders to life imprisonment. It

¹⁰²² *S v Mseleku* 2006(2) SACR 574(D), 574. The accused was convicted of rape by the regional court. His case was referred to the High Court for sentencing in terms of the MSL. Court records showed that the regional court did not mention the age of the victim, *inter alia*. The prosecution argued before the High Court that that oversight did not prejudice the accused’s right to a fair trial because he had a legal representative during the trial.

¹⁰²³ *S v Tandwa and others* 2008(1) SACR 613 (SCA), 614. The accused were convicted of robbery and on appeal one of them argued that his right to a fair trial was violated because his lawyer was incompetent and misled him on the consequences of not testifying. However, the appeal was dismissed.

has to be mentioned at the outset that, as mentioned in Chapter III, unlike the *ad hoc* international criminal tribunals such the ICTR, ICTY and the SCSL which are required by the relevant UN Security Council resolutions that formed the backbone of their establishment to consider some of the above theories of punishment in sentencing offenders, in Uganda, South Africa and Mauritius the relevant penal provisions under which a person could be sentenced to life imprisonment do not require judges to put any of the above theories of punishment into consideration in sentencing offenders. Instead, what the judges do is to weigh mitigating factors against aggravating factors to determine whether to impose a life sentence or any other sentence or, in the cases of South Africa and Mauritius, to establish whether there are substantial and compelling circumstances to deviate from imposing life imprisonment. However, in practice, judges have invoked one or more of the above theories of punishment in sentencing offenders not only to life imprisonment but also to other sentences. As indicated in Chapter IV, in Uganda the death penalty is still lawful, whereas in South Africa it was abolished after the Constitutional Court's ruling. In Mauritius it was abolished by an Act of Parliament. The question that one needs to answer is whether courts in these three different jurisdictions emphasise the same or different theories of punishment in sentencing offenders to life imprisonment.

5.6.1 Uganda

As shown above, in Uganda, unlike in South Africa and Mauritius where life imprisonment is a minimum sentence in some respects, courts have a

wide discretion in deciding whether or not to impose a life sentence.¹⁰²⁴ There are no instances where life imprisonment is a mandatory or minimum sentence in Uganda. This means that courts weigh various factors before sentencing offenders to life imprisonment. These factors have included the heinous manner in which the offence was committed and the remorseless conduct of the offender;¹⁰²⁵ the effect the crime, such as defilement, had on the victim;¹⁰²⁶ the manner in which the offence was committed, the behaviour of the accused during arrest and the fact that the accused is a danger to society;¹⁰²⁷ that the offence is rampant;¹⁰²⁸ and the fact that the offender was a recidivist and appeared ‘to be taking pride in his crimes.’¹⁰²⁹ With regard to theories of punishment, courts have emphasised

¹⁰²⁴ See 5.1.1 – 5.1.2 (above).

¹⁰²⁵ For example, in *Sayson Muganga v Uganda* 2005, the appellant was convicted of attempted murder and sentenced to life imprisonment by the Chief Magistrate. While dismissing his appeal against the conviction and the sentence, the High Court held that ‘I am persuaded by neither the circumstances of this case nor the arguments of counsel to disturb the sentence. The act was ghastly and revolting and no remorse whatsoever was shown by the appellant.’ 6. In *Guloba Muzamiru v Uganda* Criminal Appeal No. 289/2003 (judgment of 22 January 2007, unreported), the Court of Appeal in dismissing the appellant’s appeal against his life imprisonment sentence for defiling a 2 ½ - year – old girl, held that ‘[t]he appellant acted savagely.’ 3.

¹⁰²⁶ *Uganda v Matumbwe William*, Criminal Session No. 24 of 2000 (High Court of Mbale, judgment of 26 September 2002, unreported) the accused, a 40-year old man was convicted of defiling a five – year – old girl, and in sentencing the accused to life imprisonment, the Court held that offender made the victim’s ‘life traumatized till she dies.’ 14; *Uganda v Guloba Muzamiru* 2003: 7, where the accused, aged 22, was convicted of defiling a 2 ½ - year – old girl, the Court held that ‘[t]here is no excuse whatever for him to do such a thing to this innocent child. The child was penetrated bleeding...’ 7.

¹⁰²⁷ *Uganda v Kasozi Lawrence*, Case No. HCT-00-CR-0001 of 2002 (judgment of the High Court of Kampala, 13 December 2003): 13 – 14.

¹⁰²⁸ *Uganda v Togolo Musa*, HCT-04-CV-SC-0207/2002 (Judgment of the High Court of Mbale of 13 August 2003) the accused, aged 25, was convicted of defiling a 7 – year – old girl.

¹⁰²⁹ *Uganda v Baguma Moses*, High Court Criminal Session Case. No.72/2001 (High Court of Fort Portal, Judgment of 10 December 2002, unreported), where the accused was sentenced to 15 years’ imprisonment for rape which was to run consecutively to the sentence of 10 years’ imprisonment he was serving for rape.

deterrence,¹⁰³⁰ protection of the society or community,¹⁰³¹ and a combination of deterrence and protection of society.¹⁰³² In *Uganda v Kikonyogo Swaibu*, the offender was sentenced to life imprisonment for defiling his one-year old baby and the High Court used a very strong language to justify the imposition of a life sentence:

The accused is a first offender. However, he is a first offender who has started his journey to crime in high gear. His act of seeking sexual gratification from a baby shows a dangerous level of sexual perversion which, unless the convict is put out of circulation for a long time, could manifest itself on yet another victim either in accused's home village or anywhere else in this country...The upcoming generation must be protected from people of the accused's insatiable sexual appetite especially for toddlers. Therefore, even if [the] convict is a first offender,

¹⁰³⁰ For example, in *Kikonyogo Swaibu v Uganda*, Criminal Appeal No.27 of 2002, (Judgment of 26 September 2005, unreported). The appellant was convicted of defiling his one – year – old daughter and sentenced to life imprisonment. The Court of Appeal in dismissing his appeal against the sentence held that ‘the sentence of life imprisonment passed on the appellant was not illegal...The offence committed by the appellant on his own baby daughter was a heinous one and warrants a deterrent sentence.’ 5 -6; in *Uganda v Guloba Muzamiru* 2003: 7, where the accused, aged 22, was convicted of defiling a 2 ½ - year – old girl, the Court in sentencing him to life imprisonment held ‘[t]he child was penetrated [and] started bleeding, so I shall pass a deterrent sentence since this offence is so rampant [and] also the circumstances in which he did it were deadly.’; in *Uganda v Togololo Musa* 2003: 7, the accused was convicted of defilement and in sentencing him to life imprisonment, the Court held that ‘[t]he ... convict is a first offender, this offence is rampant and when the circumstances are considered in which it was committed, it was so brutally done under threat that he would kill the victim if she raised an alarm...I shall therefore pass a deterring sentence and taking into account the period he has been on remand he is sentenced to life imprisonment (20) years. So that the other potential defilers can learn.’; in *Uganda v Matumbwe William* 2002: 14, the accused, a 40-year old man was convicted of defiling a 5 – year – old girl, and in sentencing the accused to life imprisonment, the judge held that ‘I shall pass a deterrent sentence since he is first offender... He is sentenced to life imprisonment.’

¹⁰³¹ In *Uganda v Wofeda Stephen*, HCT-04-CV-SC-0293/2002 (Judgment of the High Court of Mbale of 7 August 2003), the accused was convicted of defilement and in sentencing him to life imprisonment, the Court held that it had ‘a duty to protect the Society against such animalism as demonstrated by the convict.’ 7; *Uganda v Kasozi Lawrence* 2003: 14, in sentencing the convict to life imprisonment for robbery, the Court held that ‘[t]he manner in which the offence was committed and the way he behaved when he was being arrested show clearly that this is a man that is dangerous to society. Court should protect society from the likes of the accused. He is sentenced to life imprisonment.’

¹⁰³² In *Uganda v Bahingana William*, CHT-01-CR-SC-0071-2001 (Judgment High Court of Fort Portal of 22 May 2002, unreported) the accused, a 55 – year – old man, was convicted of defiling a 2 ½ - year – old baby girl. In sentencing him to life imprisonment, the Court held that the ‘court had to be merciless if society is to learnt that’ the severe penalty provided for under the law for defilement ‘is not a formality but that it is meant to be a deterrent to would be defilers.’

the ends of justice require that he gets a harsh punishment. He is a brute who deserves incarceration throughout his life. For the reasons above, I sentence him to life imprisonment.¹⁰³³

The above quotation shows that the Court was of the view that the only sentence that could keep the accused 'out of circulation' for a very long period of time was life imprisonment. The Court was clear that the reason why the accused was being sentenced to life imprisonment was the need for the society as a whole and future generations to be protected from people such as the likes of the accused. The Court did not hold that the sentence was meant to reform the offender so that by the time he gets out of prison, society would be safer as a result of his rehabilitation. It could be argued that in cases where courts have emphasised deterrence and protection of the society in sentencing offenders to life imprisonment, they are not concerned whether the offender will be rehabilitated while in prison or not. That is why the judge never mentions that the sentence would enable the appellant to be rehabilitated while in prison. In the case where court was of the view that a lengthy prison term would serve a rehabilitative role, it mentioned so expressly.¹⁰³⁴ In some situations, the court although imposes a sentence of life imprisonment with a deterrent objective in mind, it does not expressly mention deterrence.¹⁰³⁵

¹⁰³³ *Uganda v Kikonyogo Swaibu*, Criminal Session Case No. 0023 of 2002 (Judgment of the High Court of Jinja of 21 March 2002, unreported) 5.

¹⁰³⁴ In *Kalibobo Jackson v Uganda*, Criminal Appeal No. 45 of 2001 (judgment of 5 December 2001), the High Court convicted the appellant of rape and sentenced him to 17 years' imprisonment. In justifying the imposition of a lengthy sentence, the Court held that 'I shall pass a deterrent sentence taking into account the 2 years he has stayed on remand. Since the maximum sentence for this offence is death, the accused being a young man can reform. He is therefore sentenced to 17 years' imprisonment.' 4. However, on appeal the Court of Appeal reduced the sentence to seven years' imprisonment.

¹⁰³⁵ For example in *Uganda v Tigo Stephen*, HCT-04-CV-SC-0176/2002 (judgment of 12 August 2003, unreported) the accused was convicted of defiling an eight – year – old girl

Of all the cases reviewed, the author did not come across a case in which the court referred to retribution in sentencing an offender to life imprisonment.¹⁰³⁶ This could be attributed to the fact that of all the cases reviewed, there was no instance where the prosecution directly asked court to impose a retributive sentence. In most cases, the prosecution asked court to impose a deterrent sentence.¹⁰³⁷ However, there were cases where the prosecutor did not mention the objective the punishment imposed should serve and just called upon the court to, for example, impose a ‘severe sentence’¹⁰³⁸, ‘an appropriate sentence’¹⁰³⁹ ‘a maximum sentence of death’¹⁰⁴⁰, ‘stiff punishment’¹⁰⁴¹ or the ‘maximum sentence.’¹⁰⁴² One could

and in sentencing him, the High Court held that ‘I take into account the fact that he has been on remand for 2 years, so taking that in account he is sentenced to life imprisonment (20 years). So that the rest who intend to do the same can stand warned.’ 8.

¹⁰³⁶ It would be a generalisation to argue that courts in Uganda never refer to retribution in sentencing offenders to life imprisonment. It was not possible for the author to study all the cases in which offenders were sentenced to life imprisonment. This is because most of them are not reported. As regards those used in the study, the author had to visit different courts in Uganda and perused through volumes of files to identify them. Probably a study of all cases where life imprisonment was imposed could reveal that courts have in some instances emphasised retribution.

¹⁰³⁷ For example in *Uganda v Tigo Stephen* 2003: 7 – 8, the accused was convicted of defiling an 8 – year – old and the prosecution submitted that ‘[t]he small girl has to be traumatized throughout her life. I therefore pray for a still deterring sentence.’ In *Uganda v Kasozi Lawrence* 2003: 13, the prosecution submitted that ‘[r]obbery is a rampant offence which has caused severe sufferings to victims. Pray that the accused is given a deterrent sentence.’ 13; in *Uganda v Senyondo Umaru*, Criminal Session Case No. 0018/99 (Judgment of the High Court of Masaka of 5 April 2000) the offender was convicted of defiling a 7 – months – old baby, and before he was sentenced to life imprisonment, the prosecution prayed that ‘a deterrent sentence be imposed on the accused and the would be defilers to respect other people’ 16; in *Uganda v Guloba Muzamiru*, HCT-04-CV-SC-0004/2003 (High Court of Mbale, judgment of 27 July 2003, unreported) the prosecution submitted that ‘[t]he child he defiled was so young. I therefore pray that a deterrent sentence be passed’ 6; and in *Uganda v Togololo Musa* 2003: 7, the prosecution prayed that ‘the Court passes a sentence which is deterrent.’

¹⁰³⁸ In *Uganda v Walubiri George*, Criminal Session No. 37/2001 (judgment of the High Court of Jinja of 22 November 2001), the offender was convicted of defilement and before he was sentenced to life imprisonment the prosecution asked court that ‘a severe sentence be meted out.’ 18.

¹⁰³⁹ In *Uganda v Wofeda Stephen* 2003: 6.

¹⁰⁴⁰ *Uganda v Kikonyogo Swaibu* 2002: 5.

¹⁰⁴¹ *Uganda v Baguma Moses* 2002: 7.

argue that in such cases, the prosecution thought that the punishment would achieve a retributive objective because the offender was not being punished for purposes such as deterrence or retribution but for breaking the law. As discussed in Chapter II, some of those who argue that punishment should serve a retributive role are of view that punishment cannot be justified on grounds such as deterrence and rehabilitation. In one case where the offender was convicted of defilement, the prosecutor asked the court to impose a 'stiff punishment' because 'society need [sic] protection.'¹⁰⁴³ This submission, one could argue, reflects both the retributive and deterrent objectives of punishment.

It is also vital to note that in most of the cases reviewed, although the prosecution called upon the court to impose a deterrent sentence, the defence did not directly submit that the court should not impose a deterrent sentence. The defence instead argued that the court should be lenient towards the offender and impose a light sentence without explaining which objective of punishment that light punishment would serve.¹⁰⁴⁴ In *Uganda v*

¹⁰⁴² *Uganda v Bahingana William* 2002: 6.

¹⁰⁴³ *Uganda v Baguma Moses* 2002: 8.

¹⁰⁴⁴ In *Uganda v Togolo Musa* 2003: 7, the defence prayed 'for leniency'; in *Uganda v Guloba Muzamiru* 2003: 7, the defence prayed 'for leniency'; in *Uganda v Bahingana William* 2002: 7 the defence prayed to 'Court to impose a lenient sentence commensurate with the offence committed'; in *Uganda v Wofeda Stephen* 2003: 7, the defence asked the court to exercise 'mercy' in sentencing the offender. However, in *Uganda v Nuhuu Asuman Kibuka*, Criminal Session Case No.507/99 (Judgment of the High Court of Kampala of 5 May 2000) the accused was convicted of kidnapping with the intent to murder. At sentencing, the prosecution submitted that '[t]he offender [sic] attracts a maximum sentence of life imprisonment. A maximum sentence should be given.' The defence argued that the accused had health problems and that he had spent some time on remand and that the 'period on remand should be taken into account so that the accused can be reformed if released early.' At 19 and 20.

Twinomugisha Moses,¹⁰⁴⁵ the accused was convicted of manslaughter which carries a maximum sentence of life imprisonment. The Court took into consideration the fact that the convict was young at the time he committed the offence (18 years old) and although the prosecution prayed for ‘a deterrent sentence’, the Court sentenced him to 7 years imprisonment and held that it could not sentence the offender to life imprisonment because ‘[i]t is not in the interest of justice to convict such a young man to long custodial sentence. It will nor[sic] reform him. The convict should be given a chance to reform and live [as] a useful citizen.’¹⁰⁴⁶ This could be interpreted to mean that the Court was of the view that lengthy prison terms, such as life imprisonment, are not good for rehabilitation and that if courts want offenders to reform, they should sentence them to short prison terms.

Whereas courts are justified in expressing their views with regard to the objective the sentence they have imposed should achieve, courts need to be careful not to phrase their judgments in a language that casts doubt on the ability of the prison authorities to rehabilitate offenders.¹⁰⁴⁷ By holding that, if an offender is to reform he should not be sentenced to a long custodial sentence, the court is by implication suggesting that prison authorities have failed in their duty of rehabilitating offenders and that the court should try all it can to ensure that offenders capable of rehabilitation are sentenced to short prison terms. It is argued that the reasoning that

¹⁰⁴⁵ *Uganda v Twinomugisha Moses* (HCT-05-CR-SC-124 of 2003)[2005] UGHC 50 (15 September 2005).

¹⁰⁴⁶ *Uganda v Twinomugisha Moses* 2005: 57.

¹⁰⁴⁷ Mujuzi 2008(f): 331- 341.

courts should not sentence offenders to lengthy custodial terms if they want such offenders to reform could violate the doctrine of separation of powers. The judiciary should not interfere in the work of the executive (the prison authorities) unless the latter's actions or omission violates the Constitution.

There were cases where the defence counsel did not even mention the theory of punishment the court should rely on in sentencing the offender although the prosecution called upon the court to impose a deterrent sentence.¹⁰⁴⁸ However, in the cases reviewed, courts did not give reasons why they preferred deterrence over rehabilitation. Another important factor is that there are cases where offenders have been sentenced to life imprisonment without the court mentioning which objective the punishment imposed is meant to achieve. What the court does is to emphasise the seriousness of the offence and the aggravating factors and then impose a life sentence.¹⁰⁴⁹ In all cases reviewed courts did not engage in a detailed discussion of the theories of punishment. As shown in Chapter III even judges at international criminal tribunals, such as the ICTR, do not engage in a detailed discussion of the theories of punishment although they mention them at sentencing.¹⁰⁵⁰ As indicated earlier, most of the offenders serving life imprisonment in Uganda were convicted of offences that attract

¹⁰⁴⁸ For example in *Uganda v Tigo Stephen* 2003: 8, where the accused was convicted of defiling an 8 – year – old girl, the court sentenced him to life imprisonment. Although the prosecution prayed for the imposition of ‘a stiff deterring sentence’ the defence submitted that ‘[t]he convict is remorseful and sorry. He has a family. He prays for leniency. He has been on remand for 2 years. I pray that, that is taken into account.’

¹⁰⁴⁹ See, for example, *Uganda v Senyondo Umaru* 2000: 17 – 18, where the accused was convicted of defiling and the court sentenced him to life imprisonment without stipulating the objective the sentence it imposed was to achieve although it emphasised the seriousness of the offence; and *Sayson Muganga v Uganda* 2005: 6.

¹⁰⁵⁰ Chapter III, 3.4.1 – 3.4.2.

the death sentence as the maximum sentence.¹⁰⁵¹ In some of the cases, the prosecutors asked the court to impose ‘the maximum sentence’ a ‘stiff sentence’ or an ‘appropriate sentence’ without specifically asking the court to impose a life sentence. What this has meant is that courts have looked at life imprisonment as a lenient sentence resorting to statements such as the following

The convict is a first offender who has been in detention for 2 years and 10 months. This offence is a serious one which attracts a maximum sentence of death ... I shall pass a deterrent sentence since he is a first offender having taken into account the period he has been on remand. He is sentenced to life imprisonment.¹⁰⁵²

Or

I consider the convict a first offender. I also consider his age and health as pleaded to court by his counsel...Doing the best I can, the only leniency which this court can extend to him is to reduce the punishment from death to life imprisonment. I accordingly condemn and sentence the convict to life imprisonment... I have had to pass this harsh sentence in the hope that it will act as a deterrent to the accused who certainly deserves to be out of circulation for a long time and those with similar criminal inclinations.¹⁰⁵³

There are cases where offenders have been sentenced to life imprisonment without the court mentioning that the offender has been sentenced to life imprisonment. All that the courts mention in such cases is the number of years of imprisonment to which the offender has been sentenced.¹⁰⁵⁴ For

¹⁰⁵¹ Chapter IV, 4.2.3.8.

¹⁰⁵² *Uganda v Mutumbwe William* 2002: 14. The offender was convicted of defiling a 5-year old girl.

¹⁰⁵³ *Uganda v Walubiri George* 2001: 21 – 22.

¹⁰⁵⁴ In *Nuuhu Asuman Kibuuka v Uganda* (Criminal Appeal No.3 of 2004) (Judgment of 4 November 2005) the appellant was convicted of kidnapping with intent to murder and sentenced to 20 years imprisonment. In dismissing his appeal against both the sentence and the conviction, the Supreme Court held that ‘[t]he sentence of 20 years imprisonment is not unlawful. The ground [of appeal] must therefore fail.’ See also *Nuuhu Asuman Kibuuka v Uganda*, (Criminal Appeal No.54 of 2002)[2004]UGCA 17 (20 July 2004) the decision which the appellant appealed against to the Supreme Court. In *Zungu Denis v Uganda* (Criminal Appeal No. 287 of 2003)[2007]UGCA 61 (23 March 2007), the

example, in *Uganda v Muwonge John*,¹⁰⁵⁵ the accused was convicted of defiling a 5-year old girl. The Court considered the fact that he was a first offender and had a family to care for and held that it ‘will not pass the maximum sentence of death. However, considering all the circumstances of this case the Accused is sentenced to nineteen (19) years imprisonment. Sentence takes [in account] the fact that the Accused has been on remand for one years [sic] otherwise he would have been sentenced to 21 years imprisonment.’¹⁰⁵⁶ When the prison officials look at the number of years to which the offender has been sentenced, they notify him that he was in fact sentenced to a life sentence.¹⁰⁵⁷ In some cases courts have mentioned that the offender has been sentenced to life imprisonment and the judge goes to the extent of mentioning what the sentence means in practice. In *Uganda v Tigo Stephen*, for example, the offender was convicted of defiling an 8-year old girl and while sentencing him, the court held that ‘I take in account the fact that he has been remand for 2 year, so taking that in account he is sentenced to life imprisonment (20 years).’¹⁰⁵⁸

appellant had been convicted of defilement and sentenced to 20 years’ imprisonment by the High Court although the Court of Appeal allowed his appeal and finally acquitted him.

¹⁰⁵⁵ *Uganda v Muwonge John* (HCT-00-CR-SC-0116 of 2002)[2003]UGHC 10 (20 June 2003).

¹⁰⁵⁶ *Uganda v Muwonge John* 2003. It is argued that probably the Court could have intended to impose 20 years’ imprisonment instead of 21 years’ imprisonment because life imprisonment means 20 years’ imprisonment. In *Baguma Fred v Uganda* (Criminal Appeal No.7 of 2004)[2005]UGSC 24 (4 November 2005) the appellant was convicted of defilement and sentenced to 20 years’ imprisonment. In dismissing his appeal against the sentence, the Supreme Court held that ‘[t]he sentence of 20 years imprisonment is not unlawful. The ground [of appeal] must therefore fail.’

¹⁰⁵⁷ Discussion with Uganda Prisons officials (who preferred to remain anonymous), Luzira Prison, 14 January 2008.

¹⁰⁵⁸ *Uganda v Tigo Stephen* 2003: 8.

5.6.1.1 Conclusion on Uganda

The above discussion has illustrated that in sentencing offenders to life imprisonment, Ugandan courts have a wide discretion. They consider factors such as the personal circumstances of the accused, the manner in which the offence was committed and the effects the offence had on the victim. This wide discretion enables courts to ensure that the punishment imposed fits both the offender and the offence. Courts have put more emphasis on the deterrence and protection of society as the objectives that the sentence of life imprisonment should serve. This could be interpreted to mean that if the judge is of the view that the sentence he/she is to impose would serve a reformatory or rehabilitative objective, he/she would sentence the offender to a prison term shorter than life imprisonment. This could be gathered, for example, from the sentences imposed where offenders have been convicted of defilement. As the discussion above has shown, in most of the cases where offenders were sentenced to life imprisonment for defilement, the court either emphasised deterrence or protection of society or both. However, in cases where offenders have been convicted of defilement and sentenced to prison terms as of less than 10 years, courts have emphasised rehabilitation.¹⁰⁵⁹

Ugandan courts have not emphasised retribution as an objective of punishment in sentencing offenders to life imprisonment. This, as has been mentioned earlier, could be attributed to the fact that the prosecutors at

¹⁰⁵⁹ For example, in *Akampulira Samuel v Uganda* (Criminal Appeal No. 209 of 2003)[2006]UGCA 12 (3 February 2006), the appellant was convicted of defilement and sentenced to six years' imprisonment. In dismissing the appeal against the sentence, the Court of Appeal held that '[t]he appellant is supposed to learn something while in prison if he is capable of doing so.'

sentencing have often called upon courts to pass deterrent sentences. Because of the fact that in some of the cases the accused have been convicted of offences that carry the death penalty, courts have tended to regard the sentence of life imprisonment as a lenient sentence. As we have seen in Chapter III, judges at the Nuremberg and Tokyo tribunals also viewed life imprisonment as a relatively lenient sentence compared to the death penalty. However, the situation with regard to the ICTY, ICTR, SCSL and the ICC is quite different, in that life imprisonment is reserved for the most heinous offences. This is because, as we saw earlier, it is the maximum penalty that these courts can impose.¹⁰⁶⁰ The discussion now turns to how courts in South Africa have considered theories of punishment in cases where offenders have been sentenced to life imprisonment.

5.6.2 South Africa

We have seen in Chapter IV that the sentence of life imprisonment has gone through various changes in South Africa.¹⁰⁶¹ In Chapter IV we have also seen the various factors that courts have considered in sentencing offenders to life imprisonment during the period when the death penalty was lawful and also when the death penalty was abolished.¹⁰⁶² Those factors will not be repeated here. This section, however, examines the theories of punishments that courts emphasised in sentencing offenders to life imprisonment in the immediate aftermath of the abolition of the death penalty (when life imprisonment was discretionary for all serious offences)

¹⁰⁶⁰ Chapter III, 3.3 – 3.6.

¹⁰⁶¹ Chapter IV, 4.2.1.

¹⁰⁶² Chapter IV, 4.2.1.1 – 4.2.1.2.2.

and during the MSL era (when life imprisonment was introduced as a minimum sentence for murder and rape committed in certain circumstances). The question this chapter attempts to answer is whether courts have tended to emphasise different or the same theories of punishment in the above two different penal structures when sentencing offenders to life imprisonment.

It should be mentioned at the outset that the analysis of case law on life imprisonment in South Africa poses one big challenge – thousands of offenders who have been sentenced to life imprisonment. This means that thousands of cases are not reported. The analysis is therefore confined to all life imprisonment cases reported in the *South African Criminal Law Reports* and the *South African Law Reports* between 1995 (when the death penalty was abolished) and January 2009 (when this analysis was carried out). A reading of all cases, both reported and unreported, would probably lead to a different conclusion or conclusions from the one based solely on the reading of reported cases.

5.6.2.1 Courts and theories of punishment in the immediate aftermath of the abolition of the death penalty

This section discusses the theories of punishment that courts emphasised in sentencing offenders to life imprisonment during this period. Terblanche illustrates that South African courts have always emphasised the following purposes or theories of punishment in imposing sentences: deterrence, prevention, rehabilitation, retribution and restorative justice.¹⁰⁶³ The question is how did courts treat those theories of punishment when they

¹⁰⁶³ Terblanche 2007: 146 – 178.

imposed life imprisonment, which was the maximum sentence after the abolition of the death penalty, during that era?

The well-known case of *S v De Kock*¹⁰⁶⁴ shows how the court weighed the theories of punishment against one another before concluding which of them was to be relied on in sentencing the offender to life imprisonment. In this case, the accused was found guilty of various political offences, including several murders. In sentencing him to two life imprisonment terms and 212 years' imprisonment, the Court considered the four theories of punishment: deterrence; prevention; rehabilitation; and retribution. The Court held with regard to deterrence and prevention that 'it remained important that the repetition of such behaviour would not be tolerated.'¹⁰⁶⁵ With regard to rehabilitation, it held that '[r]eformation was aimed primarily at the offender and where the causative factors for the crimes had been removed... rehabilitation was not a prime consideration.'¹⁰⁶⁶ On the issue of retribution, the Court held that 'retribution still played a decisive role in sentencing in certain cases.'¹⁰⁶⁷ The Court held that 'imprisonment for life was appropriate where a court wished to protect society effectively and permanently against an accused. Imprisonment for life was also the ultimate deterrent.'¹⁰⁶⁸ The Court added that life imprisonment 'especially

¹⁰⁶⁴ *S v De Kock* 1997. In *S v Van Wyk* 1997, the appellant was convicted of politically related murders and sentenced to life imprisonment. Although the court emphasised the seriousness of the offence in imposing the sentence, it did not mention the theory of punishment it relied on to impose the sentence.

¹⁰⁶⁵ *S v De Kock* 1997: 178.

¹⁰⁶⁶ *S v De Kock* 1997: 178.

¹⁰⁶⁷ *S v De Kock* 1997: 178.

¹⁰⁶⁸ *S v De Kock* 1997: 181.

in view of the abolition of the death penalty as the ultimate sanction.’¹⁰⁶⁹

And that

imprisonment for life was competent not only where an offender was not susceptible to rehabilitation and therefore had to be prevented from committing further crimes, but also where the offence committed was so abhorrent that it justified the strongest condemnation that society was capable of expressing in a sentence. Imprisonment for life was not, however, a sentence that left an offender with no hope of release.¹⁰⁷⁰

The above judgment raises interesting points with regard to the theory of punishment that the court thought the sentence of life imprisonment would serve. It is clear that the court excluded rehabilitation. It was of the view that the serious nature of the offence did not favour the emphasis of rehabilitation. It also mentioned that retribution has a role to play when sentencing offenders to life imprisonment for serious offences. The court based its sentence on deterrence (specific deterrence) and the protection of the society rather than on retribution. The court was of the view that by sentencing the offender to life imprisonment, society would be protected from him and that he would not be able to commit further crimes against members of the society as long as he was in prison. The court also seems to reason that life imprisonment could be justified on, amongst other grounds, the fact that the offender is ‘not susceptible to rehabilitation.’ As will be discussed below, even in the MSL era, some courts have held the view that the prospect of rehabilitation is one of the substantial and compelling circumstances the existence of which has been invoked to avoid sentencing offenders to life imprisonment.

¹⁰⁶⁹ *S v De Kock* 1997: 180.

¹⁰⁷⁰ *S v De Kock* 1997: 181.

Unlike in the *De Kock* decision where the court mentioned, although it did not discuss in detail, the four theories of punishment and indicated which of them it based its sentence on, in some cases courts mentioned just one theory of punishment which they regarded to be that which a life sentence should serve. In *S v Martin*, for example, the accused was found guilty on four counts of murder and two counts of attempted murder, and although the state prayed for the imposition of a life sentence as the appropriate sentence, the court sentenced the offender to 21 years' imprisonment because, in the court's opinion, 'life imprisonment [should] only be imposed in exceptional cases, namely those cases where the established need to use detention as a means of preventing repetition of crime was a reality.'¹⁰⁷¹ In *S v Matolo en 'n ander* the accused were convicted of armed robbery and murder.¹⁰⁷² In sentencing them to life imprisonment, the court held, amongst other things, that 'the community has to be protected against the onslaughts of such an unscrupulous aggressor by his removal from society for the rest of his life.'¹⁰⁷³ In *S v Schoeman*, the court, in sentencing the offenders to life imprisonment for murder, held that 'a sentence of life imprisonment is a form of imprisonment which must be considered...where the protection of society is an imperative consideration.'¹⁰⁷⁴ In *S v Stonga*¹⁰⁷⁵ the appellant was convicted of rape and murder of an eight-year-

¹⁰⁷¹ *S v Martin* 1996 (1) SACR 172 (W): 173.

¹⁰⁷² *S v Matolo en 'n ander* 1998 (1) SACR 206 (O).

¹⁰⁷³ *S v Matolo en 'n ander* 1998: 208.

¹⁰⁷⁴ *S v Schoeman* 1995 (1) SACR 423 (T): 424.

¹⁰⁷⁵ *S v Stonga* 1997 (2) SACR 497(O).

old girl and sentenced to life imprisonment. In upholding the sentence of life imprisonment, the High Court held that the manner in which the appellant committed the offences meant that ‘he be permanently removed from society. To achieve this goal he as a person had to be subordinated to the interests of society.’¹⁰⁷⁶ And in *S v T*, where the accused was sentenced to life imprisonment for rape, the court held that the sentence of life imprisonment was appropriate ‘where the convicted person represented a danger to the physical and mental well-being of other persons sufficiently serious to warrant his detention for an indefinite period...’¹⁰⁷⁷

At this point it is important to highlight one important aspect from the above five decisions. In all cases the courts, emphasised the protection of the community or society against the individual as the justification for the imposition of a life sentence. The courts held that by imposing a lengthy sentence, the individual, at least for duration of the life term, would be removed from society, the assumption being that the society would be safe without him.

The case of *S v Ngcongco and another*¹⁰⁷⁸ is indicative of how the court was less clear on the theories of punishment that it believed should be emphasised in sentencing offenders to life imprisonment after the abolition of the death penalty. The accused were convicted of murder and in sentencing them to life imprisonment, the judge concluded thus:

¹⁰⁷⁶ *S v Stonga* 1997: 498.

¹⁰⁷⁷ *S v T* 1997 (1) SACR 496 (SCA): 496.

¹⁰⁷⁸ *S v Ngcongco and another* 1996 (1) SACR 557 (N).

I must also look at the possibilities of reforming or rehabilitating the ... accused in this matter. The prison service is equipped to enquire into the causes of criminality and provide therapy to help reform the criminal. The viciousness and depravity of the deeds of the accused viewed with the catalogue of their previous convictions does not inspire optimism that this process will be successful. Taking into account all the arguments of counsel and the circumstances of this case, I believe that the objects of punishment, ie deterrence, prevention, reformation and retribution can only be fulfilled by life imprisonment. I am of the view that the community can only properly be protected if both accused are permanently removed from society.¹⁰⁷⁹

At least three observations can be made from the above quotation. One, the court was of the view that the offenders were incapable of rehabilitation even though the Department of Correctional Services is equipped to reform criminals. Two, the court was of the opinion that the sentence of life imprisonment would serve the four objectives of punishment including rehabilitation! Three, although the court pointed out that all the objectives of punishment could be served by life imprisonment, it is clear that the sentence was based on general deterrence when it held that the ‘community can only properly be protected if both the accused are permanently removed from society.’¹⁰⁸⁰ This shows that in some cases one needs to be more critical to understand the theory of punishment that courts emphasise in sentencing offenders to life imprisonment. This is not isolated to the South Africa courts. As we observed in Chapter III, there are cases in which the ICTR sentenced offenders to life imprisonment in circumstances that makes it difficult to know which theory of punishment the tribunal emphasised.¹⁰⁸⁰

It is recommended that courts should be clearer with regard to which objective they aim to achieve by imposing a life sentence. This would be

¹⁰⁷⁹ *S v Ngcongco and another* 1996: 559.

¹⁰⁸⁰ Chapter III, 3.4.1.

especially important for the offender to know that, apart from the fact that he/she was convicted of a serious offence the lengthy detention is also meant to serve another objective, such as, general deterrence.

Clarity on the objective of punishment could also help the offender on appeal to give reasons or adduce evidence why the trial judge could have erred in emphasising a particular objective of punishment. It is also important that during sentencing both the prosecution and the defence submit to the court what objective they regard the sentence to be imposed should achieve. In *S v De Kock*, the prosecution argued that the 'effective imprisonment of so many years be imposed' whereas that defence was of the view that 'the accused was no longer a danger to society and that it was therefore not necessary that he be removed from society for the rest of his life.'¹⁰⁸¹ The fact that the defence raised the issue of the accused no longer being a danger to society could explain why the court mentioned different objectives of punishment and identified what it thought were applicable in the case before it. In all the cases mentioned above, where the court emphasised one objective of punishment, records do not show that either the defence or the prosecution asked the court to emphasise a particular objective of punishment in sentencing.

As mentioned earlier, when the death penalty was abolished and before the minimum sentences legislation was introduced, courts imposed longer sentences where people had been convicted of serious offences such as

¹⁰⁸¹ *S v De Kock* 1997: 180.

murder and rape.¹⁰⁸² It is also important to identify the objectives of punishment that courts invoked to impose such lengthy prison terms. In *S v Mhlakaza and another*, the Supreme Court of Appeal in sentencing the accused ‘to an effective 38 years’ imprisonment¹⁰⁸³ for several serious offences, including murder, warned that ‘since the scrapping of the death penalty, sentences of imprisonment in cases where the death penalty would have been imposed before the advent of the new Constitution, would inevitably be long and such sentences could become more common.’¹⁰⁸⁴ In *S v M*, for example, the appellant was found guilty of murder and rape and sentenced to 35 years’ imprisonment. In reducing his sentence to 33 years, the High Court held that ‘sentences in excess of 25 years’ imprisonment were becoming more common’¹⁰⁸⁵ although it noted that ‘sentences as long as this [35 years] were foreign in our law.’¹⁰⁸⁶ The Court held that ‘a sentence should be long enough to express society’s disapproval of an accused’s conduct but not so long as to cause him to lose his incentive to rehabilitate himself.’¹⁰⁸⁷ In *S v Maseko*, the accused was convicted of robbery and murder and sentenced to an effective 50 years’ imprisonment by the trial judge.¹⁰⁸⁸ In reducing the 50 year sentence to 35 years, the Court held that such lengthy sentences were meant ‘to try to protect the

¹⁰⁸² In *S v Qamata and another* 1997 (1) SACR 497 (E), the accused were sentenced to 30 years’ imprisonment for murder;

¹⁰⁸³ *S v Mhlakaza and another* 1997 (1) SACR 515 (SCA): 516.

¹⁰⁸⁴ *S v Mhlakaza and another* 1997: 515.

¹⁰⁸⁵ *S v M* 1998 (1) SACR 47 (O): 49.

¹⁰⁸⁶ *S v M* 1998: 49.

¹⁰⁸⁷ *S v M* 1998: 49.

¹⁰⁸⁸ *S v Maseko* 1998 (1) SACR 451 (T): 453.

public' from people like the accused because armed robberies 'were on the increase.'¹⁰⁸⁹ As in the cases of life imprisonment imposed during this period, in cases where offenders were sentenced to lengthy prison terms of 30 years or more, courts emphasised the protection of society to justify such sentences. However, some judges took note of the fact that lengthy prison terms could dissuade the offenders from participating in rehabilitation programmes as there would be no incentive to do so.

In all of the cases studied above, no court mentioned retribution as the objective that a life sentence it imposed was to serve. Also no court mentioned that the life sentence it imposed was meant to enable the prisoner to spend more time in prison for rehabilitation. On the contrary, courts were of the view that lengthy prison terms would be a disincentive for the offender to participate in rehabilitation programmes. Courts seemed to hold the view that a life sentence was justified in protecting the community against the offender. In other words, courts were of the view that a life sentence would serve both specific and general deterrence objectives. Although this was not mentioned in any of the judgments above, it could be gathered from the language the courts used when they emphasised that life sentences were meant to protect the community from the offender.

5.6.2.2 Minimum sentences legislation era

In terms of the MSL, a court convicting the offender for murder or rape in stipulated circumstances is required to impose a life sentence when there

¹⁰⁸⁹ *S v Maseko* 1998: 453.

are no substantial and compelling circumstances. We have already seen what courts have held to be substantial and compelling circumstances to avoid sentencing offenders to life imprisonment.¹⁰⁹⁰ It should also be noted that some of the factors courts considered as extenuating circumstances or mitigating circumstances not to impose the death penalty are now being reintroduced as substantial and compelling circumstances to avoid sentencing offenders to life imprisonment.¹⁰⁹¹ This is so, notwithstanding the fact that the Supreme Court of Appeal put it clearly that ‘[s]peculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.’¹⁰⁹² While commenting on sentencing under the MSL and in particular the criteria that the court has to apply in order to determine whether there are substantial and compelling circumstances to avoid imposing a life sentence, the High Court recently held that ‘[t]he concept of substantial and compelling circumstances has engaged the attention of the courts on numerous occasions’¹⁰⁹³, and that it has made sentencing ‘one of the most difficult and onerous duties imposed upon a judicial officer.’¹⁰⁹⁴

In sentencing offenders to life imprisonment, some courts have emphasised deterrence (without mentioning whether it is specific or general

¹⁰⁹⁰ Chapter IV, 4.2.1.3.

¹⁰⁹¹ For these factors see, Chapter IV, 4.2.1.1.

¹⁰⁹² *S v Malgas* 2001: para 25(d).

¹⁰⁹³ *S v Ntozini* 2009(1) SACR 42(E) 46.

¹⁰⁹⁴ *S v Ntozini* 2009: 49.

deterrence).¹⁰⁹⁵ There are cases where courts have invoked the protection of the community or society to justify the imposition of a life sentence. For example, it was held that ‘the community is entitled to expect that the offender will not escape life imprisonment’¹⁰⁹⁶ where he has convicted of an offence under the MSL unless there are substantial and compelling circumstances. In *S v Hlongwane and another* where the accused were found guilty of murdering a policeman, the court sentenced them to life imprisonment because ‘[a]lthough any murder was detestable, the deterrent element of punishment and the interest of society at large seemed to be of great importance when it concerned the killing of a member of the police force.’¹⁰⁹⁷ In *S v Mojaki*, the accused was convicted of raping a 10-year-old girl, and in sentencing him to life imprisonment, the Court held that ‘[w]hat society would we all be if ten-year olds cannot play in the street without feeling vulnerable and unsafe? Such innocence must be protected.’¹⁰⁹⁸ In *S v Ncheche*, the court, while sentencing the offender for rape, held that ‘[a] woman's body is sacrosanct and anyone who violates it does so at his peril and our Legislature, and the community at large, correctly expect our courts to punish rapists very severely.’¹⁰⁹⁹ In some instances courts have emphasised deterrence in sentencing offenders to life imprisonment. For example, in *S v Khathi* where the accused was convicted of murdering a

¹⁰⁹⁵ *Dikana v S* [2008] 2 All SA 182(E), where the accused was sentenced to life imprisonment for arson resulting into death and the trial court emphasised deterrence. On appeal, it was held that there were no substantial and compelling circumstances for the appellant to be sentenced to a lesser sentence and that the trial judge had come to the right conclusion.

¹⁰⁹⁶ *Rammoko v Director of Public Prosecutions* 2003 (1) SACR 200 (SCA): 200.

¹⁰⁹⁷ *S v Hlongwane and another* 2000 (2) SACR 681 (W): 682.

¹⁰⁹⁸ *S v Mojaki* 2006(2) SACR 590(T): 592.

¹⁰⁹⁹ *S v Ncheche* 2005 (2) SACR 386 (W): para 35.

traffic officer and robbing him of his gun, the court in sentencing him to life imprisonment held that ‘a merely lengthy sentence was unlikely to be viewed as an appropriate deterrent. The only appropriate sentence on the murder count was one of life imprisonment.’¹¹⁰⁰

The reason why courts have tended to emphasise deterrence over rehabilitation could be explained by the fact that in all the cases reviewed above, the offenders were convicted of very serious and rampant crimes such as murder and rape. One judge made it clear in the following terms: ‘[i]t is indeed true that the modern day approach to punishment should lay emphasis on rehabilitation and prevention... however, I am of the view that deterrence should play a more prominent role because of the seriousness and prevalence of the offence.’¹¹⁰¹ The Constitutional Court also appears to hold the view that life imprisonment should be reserved for those who commit either violent crimes or whose pose ‘danger to society.’¹¹⁰² In other words, the Constitutional Court is of the view that people should be sentenced to life imprisonment because society is safer when such offenders are behind bars. In a case where an offender between the ages of 16 and 18 was convicted of an offence that attracts a life sentence, it was held that ‘[t]he sentence of life imprisonment may only be considered in exceptional circumstances. Such circumstances would be present where the offender is a danger to society and there is no reasonable prospect of his or

¹¹⁰⁰ *S v Khathi* 2008 (2) SACR 589 (W): 590.

¹¹⁰¹ *S v Ncheche* 2005: para 22 (the judges on appeal quoting with approval statements by the trial judge).

¹¹⁰² *S v Niemand* 2001 (2) SACR 654 (CC): para 19. The Constitutional Court found section 286 of the Criminal Procedure Act (1977) to be unconstitutional on grounds, *inter alia*, that it could justify the indeterminate detention of a non violent habitual criminal.

her rehabilitation.¹¹⁰³ In *S v Tikini* the court in sentencing the offender to life imprisonment for sodomising and murdering a six-year-old boy, held that the accused was ‘an immense danger to society in general and to children in particular.’¹¹⁰⁴ Courts have also emphasised ‘the interests of the community’ in imposing life sentences.¹¹⁰⁵

There are cases where a judge would not expressly mention the objective of punishment that a life sentence is to achieve although the words used show that he indeed emphasised general deterrence. In *S v Olivier*, for example, in sentencing the offender to life imprisonment for indecent assault and murder, the court held that ‘[c]ourts need to send a clear message that it will act firmly against the offenders of such heinous crimes lest the members of the community take the law into their own hands.’¹¹⁰⁶ In *S v Segole*, in sentencing the offenders to life imprisonment and other prison terms for various serious offences including aggravated robbery and hijacking, the Court held that ‘a message must be sent out to criminals that society is sick and tired of living in fear...’¹¹⁰⁷

¹¹⁰³ *S v Nkosi* 2002 (1) SA 494 (W), 505.

¹¹⁰⁴ *S v Tikini* 2008(1) SACR 42(E) para 22.

¹¹⁰⁵ *S v Obisi* 2005 (2) SACR 350 (W) 354, the accused, a 21 – year – old man, was convicted of armed robbery and sentenced to life imprisonment. In *S v Olivier* 2007 (2) SACR 596 (C): para 35, the Court, in sentencing the offender to life imprisonment for indecent assault and murder held that ‘the object of sentencing is to serve the public interest and not necessarily to be swayed by public opinion.’ In *S v Roslee* 2006(1) SACR 537 (SCA): para 37, the offender was convicted of murder, with the Court emphasizing the interests of the community in sentencing him to life imprisonment.

¹¹⁰⁶ *S v Olivier* 2007: para 36.

¹¹⁰⁷ *S v Segole and another* 1999(2) SACR 115 (W): 126.

Courts have approached the issue of life imprisonment and rehabilitation as an objective of punishment in three different ways. First, some courts have justified sentencing offenders to life imprisonment on the ground that they are unlikely to be rehabilitated. In other words, an offender is sentenced to life imprisonment not that his long stay in prison would enable the prison authorities to rehabilitate him, but rather because the court thinks that the offender should be removed from society for a longer period of time because he is a danger to society. *In S v Sidyno*, for example, the offender was sentenced to life imprisonment because of, *inter alia*, 'his unlikely [prospect of] rehabilitation.'¹¹⁰⁸ As indicated earlier, there are numerous cases where courts have specifically mentioned that some offenders are incapable of rehabilitation.¹¹⁰⁹ The criteria that a judge uses to determine whether an offender is capable or incapable of rehabilitation are not clear although courts have repeatedly held that some offenders are incapable of rehabilitation. Courts have sometimes based their conclusion on the fact that the offender is a repeat offender, especially with regard to serious crimes, to conclude that he is incapable of rehabilitation. It was held in case where an offender was sentenced to 24 years' imprisonment for murder and robbery that 'the prospects of the appellant's rehabilitation must be doubtful in the light of his steadfast denial of any involvement in the crimes in question.'¹¹¹⁰

¹¹⁰⁸ *S v Sidyno* 2001(2) SACR 613(T): 614. The accused was convicted of seven counts of murder and sentenced to life imprisonment on each of the counts.

¹¹⁰⁹ See Chapter IV, 4.2.1.3.

¹¹¹⁰ *S v Bailey* 2007 (2) SACR 1 (C): para 49.

It is submitted that unless a complete list of the characteristics or features of a person capable or incapable of rehabilitation is developed to guide judges in determining which offender falls in which category, it will always be a subjective and vague conclusion whether the offender is capable of rehabilitation or not.¹¹¹¹ Different courts will always look for different reasons to conclude that an offender is either capable or incapable of rehabilitation.

The second approach has been for the courts to hold that offenders capable of rehabilitation could also be sentenced to life imprisonment. Put differently, there are cases where courts have held the view that life imprisonment should not be reserved for those offenders categorised as being incapable of rehabilitation. In *S v Beukes en 'n ander*, for example, it was held that 'life imprisonment was not only to be imposed where the accused was incapable of being rehabilitated.'¹¹¹² One could argue that in cases where offenders have been sentenced to life imprisonment and courts do not expressly mention that the sentence is based on the fact that the

¹¹¹¹ The Supreme Court of Appeal has warned judicial officers against conducting themselves as psychologists in approaching the question of sentencing. The Court held that 'prison [is] primarily an institution of punishment not cure. The approach of the sentencing officer [is] not the same as that of a psychologist. The sentencing officer [has] to take into account all the recognized aims of sentencing, including retribution; the psychologist [is] concerned with diagnosis and rehabilitation. To focus on the well-being of the accused at the expense of the other aims of sentencing, such as the interest of the community, [is] to distort the process and produce, in the likelihood, a warped sentence.' See *S v Botha* 1998(2) SACR 206 (SCA): 206 (applying the dictum in *S v Lister* 1993 (2) SACR 228(A): 232). See also *S v Salzwedel and others* 1999 (2) SACR 586 (SCA) where the court applied the same dictum in reversing a suspended sentence that had been imposed on the accused for the racially-motivated murder of black people. The psychologist had recommended to the trial court that the murderers should be given a suspended sentence because their crimes had been motivated by their hate of black people. The Supreme Court of Appeal substituted the suspended sentence with 12 years' imprisonment.

¹¹¹² *S v Beukes en 'n ander* 2000 (2) SACR 412 (T), where the accused's death sentence for murder was commuted to life imprisonment.

offender cannot be rehabilitated, some courts are of the view that an offender sentenced to life imprisonment is capable of being rehabilitated. This is because courts are aware, or are expected to be aware, that the Department of Correctional Services has different rehabilitation programmes in most of the South African prisons in which offenders serving life sentences also participate.¹¹¹³ For instance, in *S v Blaauw*,¹¹¹⁴ the accused was found guilty of raping a 5-year-old girl. The Court held that it could not impose a life sentence because, among other factors, the accused could be rehabilitated. The court went on to recommend ‘that the accused be placed as soon as possible in ... [a] rehabilitation programme in the prison.’¹¹¹⁵ However, whether prisoners sentenced to short prison terms other than life imprisonment could be rehabilitated remains debatable in the light of at least two factors: One, that the Department of Correctional Services spends only three percent of its budget on rehabilitation programmes;¹¹¹⁶ and two, the Cape High Court has warned that ‘most prison inmates belong to a gang’ and that ‘without addressing and solving the problems of prison gangs, prisons will remain the best guarantee of continued crime at the level and intensity which is currently experienced’ in South Africa.¹¹¹⁷

¹¹¹³ For a discussion of rehabilitation as an objective of punishment and for sources on rehabilitation programmes being implemented in South African prisons, see Mujuzi 2008(f): 331 – 441.

¹¹¹⁴ *S v Blaauw* 2001 (2) SACR 255(C).

¹¹¹⁵ *S v Blaauw* 2001: 257.

¹¹¹⁶ Mujuzi 2008(f): 339.

¹¹¹⁷ *S v Mark and another* 2001(1) SACR 572(C): 584. Where the accused were charged with the murder of a fellow prisoner while being transferred from one prison to another.

The third approach is for the courts to hold that life imprisonment defeats the objective of rehabilitation. In *S v Ntozini*, the Court, in sentencing the offender to 20 years' imprisonment for rape, held that '[t]he sentence of life imprisonment required by the Legislature is the most serious that can be imposed. It effectively denies the appellant the possibility of rehabilitation.'¹¹¹⁸ In *S v Tshisa en 'n ander* the court held that although the offender had been convicted of premeditated murder 'an injustice would be committed if life imprisonment was imposed' and the court sentenced them to 22 years' imprisonment because 'they could still develop into responsible adults.'¹¹¹⁹ The challenges associated with relying on the possibility of rehabilitation as a substantial and compelling circumstance to avoid the imposition of life imprisonment have already been highlighted and are discussed shortly in the context of the *S v Nkomo* decision, where the Supreme Court of Appeal was divided on the issue of whether the prospect of rehabilitation could be invoked as a substantial and compelling circumstance to avoid sentencing offenders to life imprisonment.¹¹²⁰ However, in what appears to be a reaction to the continued emphasis of the fact that the offender should be sentenced to life imprisonment where evidence shows that he is incapable of rehabilitation, it was held in *S v Solomon and another*, where the accused's life sentences for murder were reduced to 10 years imprisonment, that '[t]he potential of rehabilitation does not in itself mean that life imprisonment should not be imposed.'¹¹²¹

¹¹¹⁸ *S v Ntozini* 2009: 48.

¹¹¹⁹ *S v Tshisa en 'n ander* 2003(1) SACR 171(O): 172.

¹¹²⁰ *S v Nkomo* 2007 (2) SACR 198 (SCA).

¹¹²¹ *S v Solomon and another* 2008(2) SACR 149(E): para 24.

5.6.2.3 Departing from or watering down one of the criteria in *Malgas*?

When the death penalty was declared unconstitutional in *Makwanyane*,¹¹²² the government reacted by introducing the MSL which, amongst other measures, provided that a person found guilty of some of the scheduled offences, in particular of the offences under Part 1 of Schedule 2, was to be sentenced to imprisonment for life unless there were substantial and compelling circumstances. The CLA did not define what amounted to substantial and compelling circumstances. Various courts attached different various and confusing meanings to these words. The matter was ‘finally’ settled by the Supreme Court of Appeal in *S v Malgas*,¹¹²³ which was approved by the Constitutional Court in *S v Dodo*.¹¹²⁴ The word ‘finally’ is in quotation marks, because the decision of the Supreme Court of Appeal in *S v Nkomo*¹¹²⁵ attests to the fact that even at present, almost a decade since the Supreme Court of Appeal laid down the criteria that courts should follow to determine what amounts to substantial and compelling circumstances, the boundaries seem to be shifting. It is possible that one could argue that the criteria set in *S v Malgas*¹¹²⁶ are either being disregarded in some respects by the same court that set them or being modified to suit the realities of the situation – that is, to limit number of offenders being sentenced to life imprisonment. The *Nkomo* decision is

¹¹²² *S v Makwanyane* 1995.

¹¹²³ *S v Malgas* 2001 (2) SA 1222 (SCA): Para 25.

¹¹²⁴ *S v Dodo* 2001.

¹¹²⁵ *S v Nkomo* 2007.

¹¹²⁶ For the criteria set out in *Malgas* para 25, see, 5.3.2 (above).

discussed to illustrate how the Supreme Court of Appeal could have watered down one of the criteria laid down in the *Malgas* decision. And the contention here is that this could be a recipe for confusing lower courts when they have to decide whether substantial and compelling circumstances exist before they impose a life sentence.

5.6.2.4 S v Nkomo

A. Facts

The appellant was convicted in the regional court of rape and kidnapping. The complainant testified that she was at the bar drinking a cold drink, given to her by the appellant and which he had laced with alcohol. The appellant forced her into a hotel room that he had hired, forced her to undress and raped her. The appellant locked her in the room and went back to the bar for more drinks. She attempted to escape from the room by jumping out of a window. She fell some ten metres to the ground and injured her leg. Unfortunately, where she fell was where the appellant had been sitting and drinking. He forced her back into the hotel room and raped her four more times during the course of the night. He also forced her to perform oral sex on him, and slapped her, pushed her and kicked her. He prevented her from leaving the room again by taking her clothes away. When the complainant managed to escape the following morning, she went to the police station straight away. The appellant was arrested and charged. The regional court sentenced him to a three-year sentence on the kidnapping charge and referred him to the High Court for sentence on the charge of rape. The High Court did not find any substantial and compelling circumstances and sentenced the appellant to life imprisonment in terms of

section 51(1) of the CLA.¹¹²⁷ The appellant appealed to the Supreme Court of Appeal against the sentence.

B. Holding

The Supreme Court of Appeal (the majority) allowed the appellant's appeal and replaced the sentence of life imprisonment with that of 16 years' imprisonment. Most importantly, the Court observed that '[t]he factors that weigh in the appellant's favour are that he was relatively young at the time of the rapes [he was 29 when he raped the complainant], he was employed, and that there may have been a chance of rehabilitation.'¹¹²⁸ Theron AJA dissented and held, *inter alia*, that '[t]here is hardly any person of whom it can be said that there is no prospect of rehabilitation.'¹¹²⁹ Theron AJA held further that she could not agree that the prospect of rehabilitation, of which there was no evidence, was a substantial and compelling circumstance 'within the meaning of that expression and [is] truly [a] convincing reason for departing from the minimum sentence ordained by the Legislature.'¹¹³⁰ Whereas the majority seemed to think that the prospect of rehabilitation amounted to a substantial and compelling circumstance, the minority did not agree.

The language of the *Malgas* case is very instructive.¹¹³¹ Courts have to make sure that those who have been found guilty of committing the scheduled offences are punished severely in order to reflect the intention of

¹¹²⁷ Act No. 105 of 1997.

¹¹²⁸ *S v Nkomo* 2007: para 13.

¹¹²⁹ *S v Nkomo* 2007: para 30.

¹¹³⁰ *S v Nkomo* 2007: para 31.

¹¹³¹ See 5.3.2 (above).

the legislature in enacting the MSL, unless there are substantial and compelling circumstances. This explains why the Court says that ‘the specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy...are to be excluded’ and that ‘courts are required to approach the imposition of sentence conscious that the legislature has ordained life imprisonment... as the sentence that should *ordinarily* and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.’ One needs to answer the question whether the prospect of rehabilitation as a substantial and compelling circumstance does not fall within the ambit of what the Supreme Court of Appeal termed ‘speculative hypotheses favourable to the offender’ and ‘undue sympathy.’ To answer this question, we need to refer to the discussion of rehabilitation as an objective of punishment in Chapter II.

As shown earlier, rehabilitation as an objective of punishment has a long history dating back to the Enlightenment period in Europe.¹¹³² Rehabilitation has also been part of the South African criminal justice system for decades.¹¹³³ Whereas the Supreme Court of Appeal considers the prospect of rehabilitation to be a substantial and compelling circumstance, it does not explain or define what it means by ‘rehabilitation.’¹¹³⁴ Although the word rehabilitation is used at least on one

¹¹³² See generally Dubber 1998: 113-146. See also Chapter II, 2.4.4.

¹¹³³ In 1915, for example, Gardiner J of the Cape Provincial Division emphasized the importance of rehabilitation as the aim of punishment for juvenile offenders. See *Rex v Hlatse* [1915] CPD 1.

¹¹³⁴ It is the same with the International Criminal Court Statute. It has been suggested that ‘[a]lthough there is scope for the individual rehabilitation of offenders to be

occasion in relation to prisoners in the Correctional Services Act of 1998,¹¹³⁵ no attempt is made to define it.¹¹³⁶ Rehabilitation is probably easier to describe than to define.¹¹³⁷ And this is exactly what the 2005 *White Paper on Corrections* in South Africa does. It states that:

Rehabilitation is the result of a process that combines the correction of offending behaviour, human development and the promotion of social responsibility and values. It is a desired outcome of processes that involve both departmental responsibilities of Government and social responsibilities of the nation. Rehabilitation should be viewed not merely as a strategy to preventing crime, but rather as a holistic phenomenon incorporating and encouraging: social responsibility; social justice; active participation in domestic activities; empowering with life-skills and other skills; and a contribution to making South Africa a better place to live in. Rehabilitation is achieved through the delivery of key services to offenders, including both correction of the offending behaviour and the development of the human being involved. The correction of offending behaviour and development are two separate, but linked responsibilities. Rehabilitation is achieved through interventions to change attitudes, behaviour and social circumstances. The desired outcome is rehabilitation and the promotion of social values and responsibility.¹¹³⁸

From the above description we can extract the following as the features of rehabilitation: rehabilitation is the initiative(s) taken by the prison authorities to model the offender's life during his time in prison in such a way that when he is released from prison, either on parole or after serving

accommodated within the ambit of sentence individualisation permitted under Article 78(1) [of the Rome Statute of the International Criminal Court] by implication, there is no attempt made to define the possible meaning of rehabilitation in the wider context of international trials, or explain the nature of the values and attitudes that underpin it.' See Henham 2003: 89.

¹¹³⁵ Act 111 of 1998.

¹¹³⁶ Under s 18(1) of the Correctional Services Act, '[e]very prisoner must be allowed access to available reading material of his or her choice, unless such material constitutes a security risk or is not conducive for his or her rehabilitation.' Rehabilitation was also not defined in the 1959 Correctional Services Act (which was repealed by the 1998 Correctional Services Act). See Lidovho 2003: 417.

¹¹³⁷ In the United States it has been shown that '[w]hile most juvenile court practitioners agree the purpose of the system is rehabilitative, there is lack of consensus on the meaning of rehabilitation.' See Vieth 2001: 49.

¹¹³⁸ *White Paper on Corrections in South Africa* (February 2005), Department of Correctional Services: paras 4.2.1 - 4.2.3.

his full sentence, he has been reformed to such an extent that he is not likely to re-offend; and that the said initiatives could include various programmes that are implemented in a manner which ensures that the prisoner is reformed holistically.¹¹³⁹ Thus, the Correctional Services Act indirectly recognises this point by providing, in section 36, that ‘the implementation of a sentence of imprisonment has the objective of enabling the sentenced prisoner to lead a socially responsible and crime-free life in the future.’¹¹⁴⁰ The *White Paper on Corrections* recognises that ‘rehabilitation is best facilitated through a holistic sentence planning process that engages the offenders at all levels – social, moral, spiritual, physical, work, educational/intellectual and mental. It is premised on the approach that every human being is capable of change and transformation if offered the opportunity and resources.’¹¹⁴¹ It thus makes it compulsory for prisoners to participate in rehabilitation programmes.¹¹⁴²

¹¹³⁹ For the rehabilitation programmes being implemented in prisons and corrections see *Department of Correctional Services Annual Report for the 2006/2007 Financial Year*: 16-23. It has been suggested that ‘[t]he essence of rehabilitation is to bring about positive change in offenders and their fundamental behaviour. This means that the disposition, attitude and behaviour of the individual must be changed.’ See Cilliers and Smit 2007: 84.

¹¹⁴⁰ It has been stated that ‘[s]ection 36 of the Correctional Services Act defines the purpose of imprisonment: after having due regard that the deprivation of liberty serves the purposes of punishment, the purpose of a term of imprisonment is to enable the sentenced prisoner “to lead a socially responsible and crime free-life in the future”. It is in this formulation that the *constitutional justification for the rights limitations imposed on sentenced prisoners* is found.’ See Muntingh, *Prisons in South Africa’s Constitutional Democracy* (Centre for the Study of Violence and Reconciliation, Criminal Justice Programme) (2007) 8 available at <http://www.csvr.org.za/docs/correctional/prisonsinsa.pdf>, accessed on 15 February 2008. (Emphasis in original). Footnotes omitted.

¹¹⁴¹ *White Paper on Corrections* 2005: para 4.2.4. The White Paper lists various government departments that the Department of Correctional Services has to work with to holistically rehabilitate offenders. At paras 6.2.3 and 6.2.4.

¹¹⁴² *White Paper on Corrections* 2005: para 4.4.1. For a discussion of optional rehabilitation programmes, see Braman 2006: 1180.

The Correctional Services Act enumerates the manner in which the above objectives will be achieved by requiring a sentenced prisoner to participate in various programmes and activities.¹¹⁴³ The Act also provides for the custody of prisoners under humane conditions, and this could be interpreted to mean that such a step is meant to ensure that prisoners are detained in conditions that facilitate their rehabilitation.¹¹⁴⁴ Community corrections are also implemented to facilitate the rehabilitation and re-integration of the offenders,¹¹⁴⁵ so are the parole procedures and conditions.¹¹⁴⁶ After describing what rehabilitation is in the South African context, as provided for in the *White Paper on Corrections*, one needs to look at the problems associated with it so as to highlight the likely challenges if its prospect were

¹¹⁴³ Section 37 of the Correctional Services Act provides that

- (1) In addition to the obligations which apply to all prisoners every sentenced prisoner must – (a) participate in the assessment process and the design and implementation of any development plan or programme aimed at achieving the said objective; and (b) perform any labour which is related to any development programme or which generally is designed to foster habits of industry, unless the medical officer or psychologist certifies in writing that he or she is physically or mentally unfit to perform such labour.
- (2) In addition to providing a regime which meets the minimum requirements of this Act, the Department must seek to provide amenities which will create an environment in which sentenced prisoners will be able to live with dignity and develop the ability to lead a socially responsible and crime-free life.
- (3) ...
- (4) ...the disciplinary system for sentenced prisoners shall have the particular aim of promoting self-respect and responsibility on the part of the prisoner.

¹¹⁴⁴ Chapter III of the Correctional Services Act. Cilliers and Smit 2007: 86, agree that rehabilitation cannot take place ‘without first providing inmates with conditions that are consistent with human dignity.’

¹¹⁴⁵ Chapter VI of the Correctional Services Act. Rabie and Strauss 1985: 31, are of the view that ‘successful rehabilitation can take place only within the community and not in isolation thereof.’

¹¹⁴⁶ Chapter VII of the Correctional Services Act. It has been observed in relation to the United States that ‘[t]he relationship between rehabilitation and parole is deeply imbedded in the law...In its opinion in *Campbell County*, the Supreme Court said that rehabilitation programs are “intrinsicly beneficial and extrinsicly essential to parole considerations.’ See Lawson 2006-2007: 42. Footnotes omitted.

to be mainstreamed as one of the substantial and compelling circumstances enabling courts to depart from imposing life sentences.

C. Challenges facing rehabilitation

Rehabilitation is largely based on the assumption that the offender, after undergoing the various training, and attending the relevant courses in prison, will lead a crime-free life.¹¹⁴⁷ This emerges in the language of the *White Paper on Corrections* where it uses phrases such as ‘rehabilitation is achieved through interventions to change attitudes, behaviour and social circumstances.’ Thus, for the Supreme Court of Appeal to invoke the prospect of rehabilitation as a substantial and compelling circumstance, it is contemplating that the offender will be rehabilitated by serving a shorter prison term other than life imprisonment. The Court is also invoking ‘undue sympathy’ towards the offender in the sense that it thinks that life imprisonment may be a very severe punishment for him, and that is why it opts to impose a lesser sentence.

Related to the above are the following two issues: First is the matter of funding existing rehabilitation programmes; and second are the achievements that the Department of Correctional Services has registered over time with regard to rehabilitation.

Whereas the Department of Correctional Services has a huge budget for the years 2009 - 2010,¹¹⁴⁸ this budget has been declining in real and relative

¹¹⁴⁷ It has been rightly put that ‘the theory of rehabilitation implies that we know how to rehabilitate offenders and that facilities exist for the treatment of offenders.’ See Rabie and Strauss 1985: 30.

¹¹⁴⁸ Approximately R13.7 billion. See Vote 18, Correctional Services at <http://www.treasury.gov.za/documents/national%20budget/2009/ene/18%20correction.pdf>

values over the past few years. The result is that and that the Department has also been unable to meet its rehabilitation targets.¹¹⁴⁹ As Muntingh succinctly put it:

Indicative of the difficulties in spending on rehabilitation and reintegration is the fact that the DCS planned in 2005/6 to have 23% of all offenders assessed in respect of their risk profile, a prerequisite for the development of a sentence plan that would assist in their rehabilitation. This target was not met and risk profiling will now begin in 2007/8 after the necessary tools have been approved. Similarly the Department set itself a target of 30 000 inside work opportunities for sentenced prisoners in 2005/6, but only 3400 opportunities were realised. The challenge emerging from this is not one of lack of funds, but rather of how to effect spending on the rehabilitation and reintegration of prisoners. The Corrections Programme budget makes specific mention of the new programmes developed and planned in line with the White Paper but the amounts involved are small and comprise less than 3% of the programme budget. One is therefore left with the impression that allocations aimed at implementing rehabilitation and reintegration are not strongly articulated in the budget vote.¹¹⁵⁰

The question that arises is whether the Supreme Court of Appeal will ensure that those people it has sent to prison to be rehabilitated indeed get rehabilitated despite the declining real funds of the Department and its failure to meet its rehabilitation targets. If the Court is of the view that the Department has the capacity to rehabilitate offenders when they are in a prison serving sentences other than life imprisonment, why does it hold the view that the Department does not have the capacity to rehabilitate prisoners serving life sentences? This could be attributed partly to the fact

(accessed 19 March 2009). For the year 2000/2001, the budget for the Department of Correctional Services was just over R 5 billion. See http://www.treasury.gov.za/documents/national%20budget/1998/review/chapter_01.pdf (accessed 19 March 2009).

¹¹⁴⁹ Muntingh, 'Correctional Services Budget 2007/08 to 2009/10' *Civil Society Prison Reform Initiative Newsletter*, No. 21, March 2007, available at <http://www.communitylawcentre.org.za/Projects/Civil-Society-Prison-Reform/newsletter/cspri-newsletter/archive-of-cspri-newsletter/CSPRI%20Newsletter%2021> accessed on 22 October 2007.

¹¹⁵⁰ Muntingh 2007.

that the Department lacks rehabilitation programmes specifically designed for people serving life sentences irrespective of the fact that the number in that category of prisoners is growing rapidly.¹¹⁵¹

As pointed out earlier, Theron AJA observed in her dissenting judgment in the *Nkomo* case that there is no person of whom it can be said that he is incapable of rehabilitation. This view, as already mentioned, is also supported by the *White Paper on Corrections* which states that ‘every human being is capable of change and transformation if offered the opportunity and resources.’¹¹⁵² However, without any ideological explanation, some judges of the Supreme Court of Appeal have adopted the position that some offenders are incapable of rehabilitation.¹¹⁵³ What this means is that the Supreme Court of Appeal appears to reason that offenders who are capable of rehabilitation should not be sentenced to life imprisonment, and by implication, that life imprisonment should be reserved for those incapable of rehabilitation. By suggesting that some prisoners cannot be rehabilitated, the Supreme Court of Appeal is not only casting doubt on the ability of the Department of Correctional Services to rehabilitate all prisoners, but it is also indirectly suggesting that the prison environment in South Africa is not conducive to rehabilitating offenders.

¹¹⁵¹ Personal informal conversation with senior Department of Correctional Services officials, 4 September 2007 (National Parliament, Old Chambers Assembly, Cape Town, at public hearings on the Correctional Services Amendment Bill). In its *2006/2007 Annual Report*, the Judicial Inspectorate of Prisons indicates that most prisons in South Africa lack rehabilitation programmes, and as a result most prisoners spend 23 hours a day in their cells. At 21-22.

¹¹⁵² *White Paper on Corrections* 2005: para 4.2.4.

¹¹⁵³ In *Boy and another v S* [1999] JOL 5392 (A) in which the accused, who were prisoners serving life sentences for killing their fellow inmate by strangulation, the Supreme Court of Appeal, in sentencing them to life imprisonment held that they were ‘irretrievably beyond any possibility of rehabilitation.’ 3.

The Court is probably taking cognisance of the fact that, as illustrated earlier, the number of prisoners serving life imprisonment is skyrocketing, and that many prisons are overcrowded and not conducive for rehabilitation purposes, especially for prisoners serving life sentences.¹¹⁵⁴ The Court could also be aware that many South African prisons, as the Judicial Inspectorate of Prisons has pointed out, are characterised by a gang culture which is not conducive for rehabilitation.¹¹⁵⁵ Peacock and Theron concluded that '[g]ang activities permeate almost every sphere of prison life in South Africa.'¹¹⁵⁶ One could also argue that, by sentencing offenders to life imprisonment, the Supreme Court of Appeal believes that because of the offences they have committed, the personal characteristics of prisoners and the circumstances under which they committed the said offences, would take them time to be rehabilitated, thus justifying why they should be kept in prison for longer. If this were the view, one would have to assess it in light of what the Constitutional Court said in the *Dodo* case: that it

¹¹⁵⁴ It has been reported that '[d]espite the overall reduction in prison numbers, there are numerous prisons that are still badly overcrowded. While 74 prisons [of the 240 prisons in South Africa] had less than 100% occupation, 161 exceeded 100% with 72 having more than 150% including 38 with more than 175%.' See *Annual Report of the Judicial Inspectorate of Prisons 2005-2006* : para 7.2. In its *2006/2007 Annual Report*: 40, the Department of Correctional Services also notes that overcrowding is a serious problem in prisons. For the latest challenges resulting from overcrowding also see *Annual Report of the Office of the Judicial Inspectorate of Prisons 2006/2007*: 11.

¹¹⁵⁵ 'It is common cause that many prisoners do not accept the authority of correctional officials nor do they necessarily obey lawful instructions. The best examples of these are the involvement of many prisoners in prison gangs, gang assaults, and the smuggling of contraband. Based on our observations and the reports of Independent Prisons Visitors (IPVs), these acts of defiance are common to most prisons...The JIOP receives daily reports and complaints from prisoners and their families of assaults and intimidation by ...prison gangs.' *Annual Report of the Judicial Inspectorate of Prisons 2006/2007* supra (64) 15. See also *S v Mark and another* 2001: 584.

¹¹⁵⁶ Peacock and Theron 2007: 63. For a discussion of how some gangs formed in prison affect communities outside prison see, van Wyk and Theron 2005: 51- 60.

would be a violation of the offender's right to human dignity were he to be sentenced to a lengthy period of time in prison for reformatory purposes.¹¹⁵⁷

By ruling that offenders should not be sentenced to life imprisonment because life imprisonment will deny them the opportunity to be rehabilitated, the Supreme Court of Appeal appears to be adopting an understanding of the purpose of prison sentences that is different from that stipulated in the White Paper on Corrections. The White Paper provides that 'rehabilitation needs to be understood in the courts, by those sentenced and by the correctional officials as the key reason for sentencing.'¹¹⁵⁸ This should ordinarily include life sentences.

One important issue that merits discussion, however briefly, relates to the question of separation of powers. In addressing this issue we need to ask ourselves one question and answer it honestly and directly: should courts be reasonably expected to look at the White Paper on Corrections to inform their understanding of rehabilitation? Put differently, would not the principle of separation of powers be violated if courts were expected to refer to a document of the Executive or a government policy, in this case the White Paper on Corrections, to establish what does or does not amount to rehabilitation? This question is hard to answer. It needs an understanding of what is meant by the principle of separation of powers in the South African context.

¹¹⁵⁷ At para 38. It has been stated that '[South Africa's] traditional prisons are not...ideally suited to the task of rehabilitation, although valuable work is done there by *inter alia* social workers, clinical psychiatrists, educationists and clergymen' See Rabie and Strauss 1985: 30-31.

¹¹⁵⁸ *White Paper on Corrections* 2005: para 4.4.1.

The principle of separation of powers is expressly provided for as Constitutional Principle VI, which requires that there shall be separation of powers between the three arms of government, that is, the executive, the judiciary and the legislature, but that there have to be ‘appropriate checks and balances to ensure accountability, responsiveness and openness.’¹¹⁵⁹

The Constitutional Court held in the *Dodo* that ‘[t]here is under our Constitution no absolute separation of powers between the judicial function, on the one hand, and the legislature and the executive on the other’¹¹⁶⁰, and that ‘[w]hen the nature and process of punishment is considered in its totality, it is apparent that all three branches of the state play a functional role and must necessarily do so.’¹¹⁶¹ It thus follows that when courts impose sentences, they should do so in a manner that does not seek to eliminate the role of the Executive in the sentencing process and outcome unless it is clear that by doing so, that is, by accommodating the role of the Executive, courts will be violating the Constitution. The Constitutional Court adds that the Executive and legislature ‘have a general interest in sentencing policy, penology and the extent to which correctional institutions are used to further the various objectives of punishment’¹¹⁶², rehabilitation being one of them.

The extent to which the judiciary should allow the Executive or the legislature to influence its sentencing policy, but within the ambit of the Constitution, is ‘incapable of comprehensive abstract formulation, but must

¹¹⁵⁹ *S v Dodo* 2001: para 14.

¹¹⁶⁰ *S v Dodo* 2001: para 22.

¹¹⁶¹ *S v Dodo* 2001: para 22.

¹¹⁶² *S v Dodo* 2001: para 23. Footnotes omitted.

be decided as specific challenges arise.¹¹⁶³ The specific challenge which has arisen, and needs to be dealt with, relates to the extent to which courts can rely on the definition or description of rehabilitation in the *White Paper on Corrections* to inform their approach with respect to rehabilitation. In the light of the above discussion, it would not amount to a violation of the principle of separation of powers if courts referred to the *White Paper on Corrections* for guidance on what constitutes to rehabilitation in the South African context. This is because it is through the White Paper on Corrections that the Executive communicates to the judiciary what it thinks rehabilitation should mean, and unless by adopting that understanding of rehabilitation the courts will be violating the Constitution, there is no reason why they should not do so. Otherwise courts could develop an understanding of rehabilitation which is not in line with the Executive's, and the result would be, as happened in the *Nkomo* case, that the court will consider as the role of punishment (in this case rehabilitation) in a manner opposed to that of the Executive.

We have to recall that there are at least two occasions when the Constitutional Court referred to White Papers in its decisions, which supports our view that courts can refer to the White Paper on Corrections. In *Die Oranje Vrystaatse Vereniging vir Staatsondersteunde Skole Dimakatso Ann Nkiane v Die Premier van die Provinsie Vrystaat* the White Paper on Education was referred to in a case where the applicants challenged the Province's policy of 'terminating bursaries and transport subsidies for pupils attending what were known as "state-aided-

¹¹⁶³ *S v Dodo* 2001: para 26.

schools”.¹¹⁶⁴ Recently, and most importantly, in *M v S (Centre for Child Law Amicus Curiae)*, the Constitutional Court expressly relied on the White Paper for Social Welfare, which emphasises the importance of the family in society and in the upbringing of children, to hold that ‘the importance of maintaining the integrity of family care’ is one of the factors that must be considered by the sentencing court, especially where the convicted person is the primary caregiver.¹¹⁶⁵

Unless a comprehensive study were carried out to evaluate the effectiveness on prisoners of the rehabilitation programmes being implemented by the Department of Correctional Services,¹¹⁶⁶ the prospect of rehabilitation remains highly speculative, and there is indeed no guarantee that some of the prisoners sentenced to prison terms other than life imprisonment will be rehabilitated. The White Paper acknowledges that ‘to achieve rehabilitation, serious study is needed into the ...rehabilitative effects of various alternative sentences in order to develop, as an integrated justice system, guidelines to assist the judiciary in sentencing convicted individuals.’¹¹⁶⁷ The Supreme Court of Appeal will need to set the record straight by either explaining what it meant for the prospect of rehabilitation to be one of the substantial and compelling circumstances, or to revisit its ruling in the *Malgas* case and explain what it meant by speculative

¹¹⁶⁴ *Die Oranje Vrystaatse Vereniging vir Staatsondersteunde Skole Dimakstso Ann Nkiane v Die Premier van die Provinsie Vrystaat* 1998(3) SA 692: para 1.

¹¹⁶⁵ *M v S (Centre for Child Law Amicus Curiae)* 2007(12) BCLR 1312(CC): para 38.

¹¹⁶⁶ In the United States, it has been pointed out that ‘...a comprehensive 1998 report to Congress funded by the National Institute of Justice reviewed all of the relevant research conducted since the mid-1980s, and concluded that rehabilitation programs can indeed effectively change offenders.’ See Warren 2007: 1308.

¹¹⁶⁷ *White Paper on Corrections* 2005: para 6.1.4.

hypotheses and undue sympathy to the offender as factors that should be excluded from the composite yardstick of what amounts to substantial and compelling circumstances. The Court will also need to develop criteria that should be used to gauge whether a particular offender is capable of rehabilitation or not, so that the lower courts can be able to follow the Court's reasoning without much confusion. Otherwise, one is left with no option but to conclude that the majority ruling in the *Nkomo* case has paved the way for future confusing interpretations of what amounts to substantial and compelling circumstances, which we had hoped had been 'finally' settled in the *Malgas* case.

Still on the question of theories of punishment, there are cases in which courts have sentenced offenders to life imprisonment without mentioning the theory of punishment that has been relied to justify the sentence. What courts have done is to emphasise the seriousness of the offences and the aggravating factors and hold that there are no substantial and compelling circumstances justifying the imposition of a lesser sentence.¹¹⁶⁸ In *S v Snoti*, for example, the offender was sentenced to life imprisonment for raping a nine-year old girl when he knew that he was HIV positive. The court did not mention the objective that the punishment it imposed would serve although it mentioned that the offence placed the case 'within the worst category of rape cases.'¹¹⁶⁹In *S v Van Wyk* the offender was convicted of rape and in sentencing him to life imprisonment the court emphasised that

¹¹⁶⁸ See, for example, *S v Robiyana and others* 2009 (1) SACR 104(Ck), where the offenders were sentenced to life imprisonment for serious offences such as murder and where the court held that life imprisonment in the circumstances was not shockingly disproportionate.

¹¹⁶⁹ *S v Snoti* 2007 (1) SACR 660 (E): 663.

‘[t]his is not a case which could be considered to be a borderline rape... This was a deliberate act of savagery which all too commonly occurs in South Africa.’¹¹⁷⁰ In *S v Vermeulen* the accused were found guilty murder in that they buried the deceased alive causing her death. In upholding the sentence of life imprisonment that had been imposed by the High Court, the Supreme Court of Appeal did not mention the theory of punishment that the upheld sentence would serve. Instead it emphasised the seriousness of the offence and held that ‘[t]he killing was cruel, inhuman and degrading and no self-respecting society can tolerate deeds of this nature.’¹¹⁷¹

One could argue that in cases where offenders have been sentenced to life imprisonment without the courts mentioning the objective of punishment that the sentence should achieve, courts probably have a retributive objective in mind. This is because, as we saw in Chapter II, retribution is premised on the notion that the offender should be punished because he committed an offence and not because of any other reason such as rehabilitation or deterrence.¹¹⁷² It could be argued that by emphasising the seriousness of the offence in imposing a life sentence, courts are punishing the offender not for no reason other than he/she committed a serious offence. The MSL does not require the court to take into consideration any objective of punishment in determining whether or not to impose a life sentence. What the court is required to do is to determine whether there are

¹¹⁷⁰ *S v Van Wyk* 2000 (1) SACR 45(C): 51.

¹¹⁷¹ *S v Vermeulen* 2004(2) SACR 174(SCA): para 33.

¹¹⁷² Chapter II, 2.4.1.1.

substantial and compelling circumstances that justify the imposition of a sentence less than life imprisonment.

The case of *S v Vuma*¹¹⁷³ shows one of the consequences flowing from the inability of the courts to establish the existence of substantial and compelling circumstances. The accused was convicted of murder ‘in that he had participated in the death of the deceased while acting in common purpose with the actual killer.’ Although the court found that ‘the accused had favourable personal circumstances’ they were not strong enough to reach the threshold of substantial and compelling circumstances.¹¹⁷⁴ In sentencing him to life imprisonment, the judge was of the view that he ‘was convinced that the sentence [he] was about to impose was grossly and utterly inappropriate’ but that he was ‘compelled, most reluctantly and under protest’ to do so.¹¹⁷⁵ However, the judge ‘recommend[ed], possibly irregularly, that the accused be considered for all available reductions or remissions of sentence and for the earliest possible parole’ and ‘direct[ed] that a copy of this judgment accompany his detention warrant and be brought to the attention of the relevant authorities.’¹¹⁷⁶

5.6.2.5 Conclusion on South Africa

There are several observations that could be made from the above discussion; One, courts seem to be leaning more towards deterrence and protection of the community than towards retribution and rehabilitation in

¹¹⁷³ *S v Vuma* 2003(1) SACR 597(W).

¹¹⁷⁴ *S v Vuma* 2003: 597.

¹¹⁷⁵ *S v Vuma* 2003: 605.

¹¹⁷⁶ *S v Vuma* 2003: 605.

sentencing offenders to life imprisonment. Ugandan courts are also similarly inclined towards deterrence; Two, there are cases where courts do not mention the theory of punishment on which the sentence of life imprisonment is based. This could be attributed to the fact that the MSL does not require courts to impose sentences with certain punishment objectives in mind. This should be distinguished from the jurisprudence of the international criminal tribunals such as the ICTR, ICTY and the SCSL where the founding documents emphasise the objectives of punishment that should be imposed on those convicted of war crimes and crimes against humanity.¹¹⁷⁷

5.6.3 Mauritius

Courts in Mauritius have emphasised ‘retribution, the protection of society, the prevention of crime and the reformation of the offender [as] the aims of legal punishment.’¹¹⁷⁸ One can safely say that whether the court will emphasise or highlight the objectives that a sentence of penal servitude for life will serve has been influenced by the offence of which the offender has been convicted, and the nature of punishment provided for under the relevant legislation. In cases where courts have the discretion to determine whether to sentence an offender to penal servitude for life or to lesser sentence, courts have not only weighed the mitigating and aggravating

¹¹⁷⁷ See Chapter III generally.

¹¹⁷⁸ *Rex v Millien* 1949 MR 35: 48. The accused was convicted of sedition. In *Francis Stephen Joseph v The State* 1994 SCJ 372 where the offender was sentenced to 20 years’ imprisonment for drug trafficking, the Court emphasised deterrence but also observed that are other theories of punishment such as incapacitation, desert, and protection of society but warned that too much theory could cloud the purpose of sentencing. In *Hummjuddy v The Queen* 1961 MR 158, in sentencing the appellant for involuntary homicide, the Intermediate Court emphasised ‘just retribution’ although the Supreme Court set aside both the conviction and sentence.

circumstances, but have also mentioned the objective of punishment that the sentence of penal servitude for life should serve. In *State v Kung Tai Yan*, for example, the offender was convicted of five counts of manslaughter. In sentencing him to penal servitude for life, the Supreme Court held that

[t]he sentence that can be imposed for the offence of Manslaughter is penal servitude for life or for a term not exceeding 20 years. I take into consideration the accused's plea of guilty, his age and his clean record. However, given the circumstances of the offence, I am of the view that penal servitude for life is the appropriate sentence which the accused deserves in respect of each count, when looked at individually, although he can only have but one life span. I therefore sentence him to penal servitude for life under counts I, III, IV, VII and X, the sentences to run concurrently.¹¹⁷⁹

Although the Court does expressly mention that it based its sentence on retribution as a theory of punishment, it is submitted that by holding that penal servitude for life was the sentence that the accused 'deserved' for the offences he committed, the Court based its sentence on retribution. As we have seen in Chapter II, retribution is founded on the principle of just desert which holds that the offender is punished not for any other purpose such as his rehabilitation or deterrence but because he 'deserves' to be punished for the offences he committed.¹¹⁸⁰ In *State v Sockalingum Veeren*, the accused pleaded guilty to the murder and rape of a nine-year-old girl. In sentencing him to penal servitude for life for manslaughter and 30 years' imprisonment for rape, the court emphasised the facts that the accused had previous criminal records and that the accused had to get a severe sentence because he committed his offences 'at a time when the State and the international

¹¹⁷⁹ *State v Kung Tai Yan* 1999 SCJ 273, 275.

¹¹⁸⁰ Chapter II, 2.4.1.1.

community are pressing for better protection of children.¹¹⁸¹ It could be argued that in this judgment the Court based its sentence not only on the seriousness of the offences that the accused had committed, but also on the need to protect children from people such as the accused. The Court was of the view that by sentencing him to penal servitude for life, it would further the efforts of the international community and the State in protecting the rights of children.

There were cases where the accused were sentenced to penal servitude for life without the court mentioning the objective the punishment it imposed was to serve. These were cases where offenders were sentenced under the Dangerous Drugs Act which prescribed a mandatory penal servitude for life for drug trafficking. The judge merely mentioned the offence or offences for which the accused had been convicted, the law under which the sentence was provided for, the offence and then concluded that the accused has been sentenced to ‘penal servitude for life.’¹¹⁸² In those cases, the judge

¹¹⁸¹ *State v Sockalingum Veeren* 1995 SCJ 246: 248.

¹¹⁸² See for example, *State v Eric Solomon John* 1998 SCJ 117, the accused was sentenced to penal servitude for life for drug trafficking; *State v A.M. Shaik* 1997 SCJ 399, accused sentenced to penal servitude for life for drug trafficking; *State v Juma Ali Saidi Weta* 1998 SCJ 131, where the accused was sentenced to penal servitude for life for drug trafficking; *State v Mrs Rajwantee Wooseye and others* 1995 SCJ 421, where the first accused was sentenced to penal servitude for life for drug trafficking; *State v Satianan Urjoon and anor* 1999 SCJ 193, in which the first accused was sentenced to penal servitude for life for drug trafficking; *The State v Hamood Said Hamood AL-BUSAID* 2000 SCJ 251, the accused was sentenced to penal servitude for life for drug trafficking; *The State v A.M. Sardar* 1996 SCJ 319, the accused was sentenced to penal servitude for life for drug trafficking; *The State v G.Ariyayakrishnan* 1998 SCJ 350, here the offender was sentenced to penal servitude for life for drug trafficking; in *The State v Habib Hasham Jam* 1998 SCJ 316, the offender was sentenced to penal servitude for life for drug trafficking; *The State v Ramburrun N. and Luchun S* 2002 SCJ 95, the offender was sentenced to penal servitude for life for drug trafficking; *The State v Mamitiana Thomson Rasamoelina* 1998 SCJ 396, the offender was sentenced to penal servitude for life for drug trafficking; *The State v Mohamed Abzein Alawy* 1998 SCJ 56, the accused pleaded guilty to drug trafficking and was sentenced to penal servitude for life; *The State v Rakesh Kumar Lakar* 1998 SCJ 341, the offender was sentenced to penal servitude for life for drug trafficking; *The State v Syed Parvez Syed Abdul Kader* 1996 SCJ 368, the offender was sentenced to penal servitude for

was not required to motivate why he had sentenced or not sentence the offender to penal servitude for life. What the judge was required to do was to hold that the accused had been found guilty of an offence that attracted a sentence of penal servitude for life and to state that he had no alternative but to impose the sentence. However, even in cases where the penal servitude for life was a mandatory sentence, it was possible to gather from the language used in some of the judgments that the judge, apart from imposing the required sentence, also regarded the sentence as serving a particular objective of punishment. For example, in *The State v Fazal Hussain*, the accused was convicted of drug trafficking. In sentencing him, the Court made the following statement:

[f]rom the evidence adduced and from the account given by accused himself, it is clear that the accused has knowingly joined the band of traffickers. On account of their insatiable greed for money those sinister vultures trade and feed on the life of their victims by proliferating such a deadly substance like heroin which, they know fully well, destroys and kills. Drug traffickers are the enemies of mankind and represent a permanent threat to man and humanity. The ultimate consequence of their sordid activities is the destruction of numerous innocent and valuable lives.

The Legislator ha[s] provided a special penalty under S 38 (4) for offences committed under S 28 (1) (c) of the Dangerous Drugs Act. Those who have committed such offences as traffickers should be subjected to the full rigour of the law. By virtue of S 28 (1) (c) and S 38 of the Dangerous Drugs Act ... as amended and pursuant to S 2 (2) of the Abolition of Death Penalty Act ... I sentence the accused to undergo penal servitude for life.¹¹⁸³

Whereas the Court does not say so directly, the language used could be interpreted to mean that the Court held the view that the sentence it was

life for drug trafficking; and *The State v Winstone* 2001 SCJ 201, the offender was sentenced to penal servitude for life for drug trafficking.

¹¹⁸³ *The State v Fazal Hussain* 1996 SCJ 305A: 51.

about to impose was to serve both the retributive and deterrent objectives. It is retributive in the sense that the offender was being punished severely for the offence he committed. It is deterrent in the sense that the Court wanted to send out a clear message to potential drug traffickers that should they join that business, the Legislature provided for heavy penalties which awaits them and the courts are ready and willing to impose those penalties. One could also argue that the language of the Court could be interpreted to mean that the Court wanted society to be protected from people like the accused who deal in substances that not only destroy but also kill those who use them.

In some cases the Supreme Court dismissed the appellant's appeal against the conviction for the offence for which the penal servitude for life was imposed without highlighting the objective the sentence of penal servitude for life should serve. The Court did not even highlight the seriousness of the offence. What it mentioned was that the appellant was rightly convicted and sentenced accordingly.¹¹⁸⁴ This approach could be attributed to the fact that in most of the cases reviewed,¹¹⁸⁵ no appellant appealed against the

¹¹⁸⁴ See for example, *Mrs S.B. Chharee v The State* 2000 SCJ 328, where the appellant's appeal against the conviction in trafficking in heroin for which she was sentenced to penal servitude for life was dismissed by the Supreme Court; in *Ramburrun Navin and Luchun Sanjay v The State* 2004 SCJ 219, the Supreme Court upheld the appellants' conviction and sentence of penal servitude for drug trafficking by only highlighting the fact that the appellants were rightly convicted; *Wadud M.A.R.A v The State* 1999 SCJ 187, where the appellant's appeal against the conviction for drug trafficking for which she was sentenced to penal servitude for life was dismissed; *Ariyakrishnan G v The State* 1999 SCJ 103, where the appellant's appeal against a conviction for drug trafficking was dismissed; and *David Ibanda v The State* 1997 SCJ 106, where the appellant's death sentence for trafficking heroin was converted into penal servitude for life.

¹¹⁸⁵ In *Unmole H and v State* 2006 SCJ 138, the appellant was sentenced to penal servitude for life for drug trafficking and he appealed against the sentence, arguing that it was excessive. The court dismissed his appeal and held that the sentence of penal servitude for life was not manifestly harsh or excessive.

severity of the sentence imposed.¹¹⁸⁶ Most of them appealed against the conviction. This could be attributed to the fact that if the appellant is acquitted, the sentence of penal servitude for life automatically falls away, and, if the appeal is dismissed, the court has no alternative but to impose a sentence of penal servitude for life. As we have seen earlier, because of the fact that courts in Uganda and South Africa have the discretion to impose life sentences in all cases, some of the appellants have appealed against the severity of the sentence imposed and the appellate courts have had to justify why in the circumstances the appellant had to be sentenced to life imprisonment.

Because of the fact that life imprisonment was a mandatory sentence for drug trafficking and courts did not have to consider aggravating or mitigating circumstances,¹¹⁸⁷ even if the accused pleaded for leniency and

¹¹⁸⁶ In *Lacloche v The State* 1961 MR 91, the appellant was sentenced to three years' imprisonment for the possession of explosives. He appealed against both the conviction and the sentence and argued that the sentence was excessive. The court held that the sentence of three years' imprisonment was not excessive in the light of the fact that the appellant could have been sentenced to penal servitude for life.

¹¹⁸⁷ In *State v A.M. Shaik* 1997 SCJ 399: 314 in sentencing the offender, the Supreme Court held that '[u]nder section 38(4) of the Dangerous Drugs Act...read in conjunction with section 2(2) of the Abolition of Death Penalty Act... a mandatory sentence of penal servitude for life is provided for in the case of a person who is convicted of importation of heroin under section 28(1)(c) of the Act and is found to be a trafficker. Therefore the question of mitigating circumstances does not arise. I accordingly sentence the accused to undergo penal servitude for life.' In *State v Mukasa James Kanamwanje and anor* 1997 SCJ 411, the accused were convicted of drug trafficking and the prosecution submitted that both of them had not previous convictions. The Court held that '[b]y virtue of **S 38(4) of the Dangerous Drugs Act...** pursuant to section **2(2) of the Abolition of the Death Penalty Act...** there being a fixed penalty provided for a person convicted under **S 28(1)(c) of the Dangerous Drugs Act...**as trafficker, there is no room for mitigation. I accordingly sentence...[both the accused] to undergo penal servitude for life.' See 409, emphasis in original. In *The State v Akbar Ali and Anwar Ali Abjani* 2000 SCJ 112 both the accused were convicted of drug trafficking and sentenced to penal servitude for life. It had been argued that accused one did not have a previous record and he had cooperated with the police in arresting the second accused but the Court in sentencing him to penal servitude for life held that 'the sentence imposed by the law for such an offence is mandatory.' At 120. In *The State v Maryam Abdul Razak Abdul Wadud* 1998 SCJ 210, the offender was convicted of drug trafficking and in sentencing the offender to penal servitude for life the Court held that '[u]nder section 38(4) of the Dangerous Drugs

was remorseful,¹¹⁸⁸ or the objective the punishment to be imposed was to serve, in one instance the Supreme Court imposed a penal servitude for life on an offender not because he had been charged with and convicted of the same serious offences as his co-accused, but because it was of the opinion that because his co-accused had been sentenced to penal servitude for life he also automatically qualified for the same sentence.¹¹⁸⁹ However, the error was rectified later and the offender was sentenced to 18 years' imprisonment instead of penal servitude for life.¹¹⁹⁰

However, in cases where offenders have not been sentenced to penal servitude for life and where courts have the discretion to impose the appropriate sentence, courts have invoked different theories of punishments

Act...read in conjunction with section 2(2) of the Abolition of Death Penalty Act... a mandatory sentence of penal servitude for life is provided in the case of a person who is convicted of importation of heroin under section 28(1)(c) of the Act and is found to be a trafficker. Therefore the question of mitigating circumstances does not arise.' At 213.

¹¹⁸⁸ In *State v M Nawakwi* 1998 SCJ 93, the accused was convicted of trafficking in drugs and although she pleaded for lenience and said she was remorseful, the Court sentenced her to penal servitude for life without making a comment on her remorseful character. In *State v Prem Raaj* 1997 SCJ 426, accused was convicted of drug trafficking and at sentencing he told court that 'he had never been involved in drug dealing before and that he was ashamed of what had happened and prayed for clemency...[H]e acted out of mere childishness and foolishness. He regretted having spoilt the bright future he had ahead of him and begged for mercy.' The Court held that '[t]he accused having been found to be a trafficker, the question of mitigating circumstances does not arise. Pursuant to section 38(4) of the Dangerous Drugs Act...and section 2(2) of the Abolition of Death Penalty Act...I sentence the accused to undergo penal servitude for life.' See 428 and 429.

¹¹⁸⁹ In *R.K. Dussaruth and others v The State* 1996 MR 189, the three appellants were convicted of drug trafficking and sentenced to 18 years' imprisonment. The first appellant was charged with aiding the procuring and transportation of drugs an offence that carried a lesser sentence than drug trafficking which carried a mandatory term of penal servitude for life. The Supreme Court revised the sentencing error on the part of the judge and substituted the 18 years' sentence by penal servitude for life which was the mandatory sentence for drug trafficking.

¹¹⁹⁰ *Dussaruth R.K. v The State* 1996 SCJ 349A where the Court held that '[f]urther to our judgment, we have now ascertained that a mistake has been made in respect of the sentence passed on appellant Dussaruth. Counsel on all sides at the hearing unfortunately did not draw the attention of the Court that the sentence of penal servitude for life could not apply to appellant Dussaruth. In the circumstances, in order to comply with the provisions of section 38(3) of the Dangerous Drugs Act 1986, we amend our judgment by substituting for the sentence passed on appellant Dussaruth one of fine Rs 52,000 together with penal servitude for a term of 18 years.'

to justify the sentences imposed. These theories have included deterrence;¹¹⁹¹ the fact that the sentence would ‘meet the ends of justice’;¹¹⁹² the court must ‘send a clear signal that those who are guilty of [serious] crimes...will be dealt with severely’;¹¹⁹³ and that it is ‘essential to protect the community against such offenders for along time... [and] to demonstrate as clearly as possible to others who may be tempted to resort to such serious crimes that they would not be treated with leniency.’¹¹⁹⁴ Courts have also emphasised rehabilitation especially in cases of petty offenders,¹¹⁹⁵ but also in cases where offenders have been convicted of serious offences.¹¹⁹⁶

¹¹⁹¹ For example, in *Hurrucksing Jacques Desire Edley v The State* 1996 SCJ 284, the Supreme Court in dismissed the appellant’s appeal against conviction and 3 year’s sentence for dealing in drugs held that the sentence was justified because the appellant had not been ‘deterred’ by previous convictions and sentences for related offences; in *The State v Robertson JJ* 2008 SCJ 203, the accused was sentenced to 30 years’ imprisonment for murder and the court emphasised deterrence;

¹¹⁹² *The State v Momus Joseph Rajesh and another* 2006 SCJ 67, where offenders pleaded guilty to manslaughter and were sentenced to 18 years’ imprisonment instead of the 20 years’ maximum sentence. The court also took into consideration the fact that they had spent two years in custody awaiting trial.

¹¹⁹³ *The State v Robertson JJ* 2008: 308 (quoting the previous decisions of *State v A. Ghumaria* 2008 SCJ 184; *State v S. Vyapooree* 2008 SCJ 136; and *State v P. Taka and anor* 2007 SCJ 174, in which the court emphasised similar objectives of punishment.’

¹¹⁹⁴ *The State v Takah P and anor* 2007: 7, where the two accused were sentenced to 32 years’ and 26 years’ imprisonment for murder, respectively.

¹¹⁹⁵ In *Gokhool K S v The State* 2008 SCJ 340, the magistrate sentenced the appellant to four months’ imprisonment for possession of a small amount of cannabis. The Supreme Court set aside the sentence and remitted the case to the magistrate to impose an appropriate sentence that could facilitate the appellant’s rehabilitation. In *Sunnotah D v The State* 2008 SCJ 277, the Supreme Court held that the appellant’s sentence of two years’ imprisonment for offering cannabis for sale could not prevent him from being rehabilitated. In *Thodda v The State* 2005 SCJ 67, the appellant’s 18 months’ imprisonment for larceny was reduced to nine months to facilitate his rehabilitation.

¹¹⁹⁶ For example, in *Leboeuf LG v The State* 2009 SCJ 30, in reducing the appellant’s sentence for murder from 45 to 30 years’ imprisonment, the Court considered the fact that he had been of good conduct in prison and that also participated in the prison’s rehabilitation activities.

Following the 2007 Supreme Court ruling that the mandatory penal servitude for life for drug trafficking was unconstitutional,¹¹⁹⁷ the government amended the outlawed provisions of the Dangerous Drugs Act to provide, *inter alia*, that a person found guilty of drug dealing is liable to be sentenced to terms of imprisonment ranging from 10 – 60 years, depending on the street value of the drugs.¹¹⁹⁸ These provisions clearly give the court a wide discretion to determine which sentence to impose on an offender convicted of drug trafficking, depending on different factors, including the seriousness of the offence and the personal characteristics of the offender. This wide discretion also gives the court room to invoke theories of punishment to justify the sentence imposed on the offender. Since the 2007 amendment, courts have sentenced drug traffickers to lengthy prison terms, and deterrence and protection of society are the only theories of punishment that have been highlighted in all the cases reviewed in this study.¹¹⁹⁹ In many judgments, the Supreme Court has held that it has ‘continuously and repeatedly emphasis[ed] the catastrophic consequences on Mauritian society of the drug scourge and the imperative need for a severe penalty which can serve as an effective deterrent. The sentence...must also act as a clear and unequivocal signal to offenders of that sort, who are very much on the increase, that no leniency can be

¹¹⁹⁷ Chapter IV, 4.2.2.

¹¹⁹⁸ Sections 30 and 41 of the Dangerous Drugs Act. The higher the street value of the drugs, the severer the sentence to be imposed.

¹¹⁹⁹ The author reviewed all the sentences since the 2007 amendment when offenders were sentenced to terms of imprisonment of more than 10 years for drug trafficking. All the judgments reviewed are referred to in this section.

expected.¹²⁰⁰ In *State v Bruls BT and another*, in sentencing both the accused to 24 years' imprisonment for drug trafficking, the Supreme Court held that it 'has repeatedly stated that the sentence passed must reflect the seriousness of the offence and also to serve as a deterrent to would-be offenders' and that it is 'the duty of the Court to protect society against the drug scourge.'¹²⁰¹ In *State v Charles LJ*, in sentencing the offender to 28 years' of imprisonment for drug trafficking, the Supreme Court held that 'the sentence passed must...act as a deterrent' and that if the Court imposed

¹²⁰⁰ *State v Bajiji RSM* 2008 SCJ 234, 242. The offender was sentenced to 32 years' imprisonment for drug trafficking. In *State v Gooranah* 2008 SCJ 239, 249 in sentencing the accused to 32 years' imprisonment for drug trafficking, the Court emphasised that drugs 'cause considerable harm to Mauritian society and its youth in particular', that 'it has been repeatedly highlighted in all the judgments' that drug traffickers 'must be severely dealt with...The sentence imposed...must also act as a deterrent which may effectively deal with the drug trafficking scourge.' In *State v Du Preez GI* 2008 SCJ 56, 57, in sentencing the offender to 10 years' imprisonment for importing drugs into Mauritius, the Court held that 'the sentence should be commensurate with the gravity of the offence in order to act as a deterrent to any potential offenders of that sort.' In *State v Erasmus A.E* 2008 SCJ 87, the Court emphasised deterrence and protection of society in imposing a 10 year prison term on the offender for dealing in drugs. In *State v Fangamar LDL* 2008 SCJ 105, in sentencing the accused to 26 years' imprisonment for drug trafficking, the Court held that it 'has repeatedly and unreservedly emphasised the need to impose a sentence which is commensurate with the gravity of the offence. This is also essential in order to act as a deterrent to such offenders who are very much on the increase and who cannot be expected to be treated leniently.' See 120. In *State v Nathan A.M* 2008 SCJ 5, in sentencing the offender to 10 years' imprisonment for importing drugs in Mauritius, the Court held that it 'has repeatedly laid stress on the need to impose penalties which can effectively act as a deterrent and serve as a strong signal to any potential offenders.' See 6. In *State v Ramsun D* 2008 SCJ 50, in sentencing the offender to 11 years' imprisonment for being in possession of drugs, the Court held that '[o]nly a penalty which is commensurate with the gravity of the offence can effectively serve as a deterrent to potential offenders...' See 51. In *State v Scharrer EDG* 2008 SCJ 3, in sentencing the offender to 11 years' imprisonment for importing drugs to Mauritius, the Court held that it 'has repeatedly emphasised the need for a deterrent sentence with regard to such offences which would act as a clear and strong signal to any potential offenders.' See 4. In *State v Theodore JM and another* 2008 SCJ 27, in sentencing the accused who had been found guilty of possessing small amounts of drugs to 9 and 11 years' imprisonment, respectively, the Court held that it 'has repeatedly laid stress on the necessity of imposing penalties which can act as a deterrent and to send a strong signal to any potential offenders...' see 29. The objectives of punishment in *State v Theodore* have been reproduced verbatim in the following cases (where *State v Theodore* is also quoted): *State v Sivathree G* 2008 SCJ 166, in which the offender was sentenced to 20 years' imprisonment for drug trafficking; *State v Chambolle LCL* 2008 SCJ 158 in which the offender was sentenced to 12 years' imprisonment for importing a small amount of drugs in Mauritius.

¹²⁰¹ *State v Bruls BT and another* 2008 SCJ 78, 81 and 82. The reasoning underpinning sentencing in this case was repeated in *State v Peh Sing IP* 2008 SCJ 176, where the offender was sentenced to 30 years' imprisonment for drug trafficking.

a lenient sentence ‘it would be failing in its duty...and sending the wrong signal to the public at large.’¹²⁰² It has been held that imposing a deterrent sentence for drug trafficking ‘is of utmost necessity in order to cope with the scourge of drug proliferation...’¹²⁰³ and that ‘[t]he Court must send the right signal that, as the fight against the drug scourge is a long and relentless battle, those caught and found guilty, would face a long custodial sentence.’¹²⁰⁴ This means that retribution and rehabilitation are not considered or are overlooked by the courts in sentencing offenders to lengthy prison terms for drug trafficking. Courts are of the view that by providing for stiff penalties for drug trafficking, the Legislature wanted to deter people from engaging in such a risky activity. It was held, for example, in *State v Bajji*, where the offender was sentenced to 32 years’ imprisonment for drug trafficking, that ‘the penalty which has been prescribed conveys in no uncertain terms the clear intention of the legislator as to the severity of the sentences that should be imposed in such cases [of dealing in drugs].’¹²⁰⁵ In *State v Fangamar L*, in sentencing the offender to 26 years’ imprisonment for drug trafficking, the Court held that in order to deal with the ‘proliferation of dangerous drugs’ which have caused ‘considerable problems with catastrophic consequences’ in Mauritius, ‘the legislator ... prescribe[d]...penalties... which may effectively deal with the

¹²⁰² *State v Charles LJ* 2008 SCJ 142, 143 and 143.

¹²⁰³ *State v Makinana PV* 2008 SCJ 36, 37. In which the offender was sentenced to 11 years’ imprisonment for drug trafficking.

¹²⁰⁴ *State v Puttaroo NAR* 2008 SCJ 92, 108. Where the offender was sentenced to 35 years’ imprisonment for drug trafficking.

¹²⁰⁵ *State v Bajji RSM* 2008: 242.

scourge of drug trafficking.’¹²⁰⁶ The legislator’s emphasis of deterrence could explain why courts have also emphasised deterrence instead of other objectives of punishment in sentencing offenders to lengthy prison terms. Although the Court has been imposing severe penalties to deter potential offenders from drug trafficking, it appears to doubt whether such sentences have had any effect on crime. Lam Shang Leen J thus held as follows:

I must say that it seems that the fight against the drug scourge has not been won in view of the number of cases of possession of drugs...trafficking coming before our Courts. The Courts have shown sympathy in certain cases...Despite the fact that severe sentences ha[ve] been passed, it seems that there ha[s] been no deterrent effect. The message which must be passed is that those who are engaged in drug trafficking would be dealt with severely’¹²⁰⁷

It is also important to note that, as mentioned earlier in Chapter IV,¹²⁰⁸ when the Supreme Court declared the mandatory 45 years’ imprisonment for murder to be unconstitutional, the government amended section 222 of the Criminal Procedure Act and provided that a person found guilty of murder shall be imprisoned ‘for life or, where the Court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence and has entered those circumstances on the record of the proceedings, for a term not exceeding 60 years.’ This means that the judge is required to enter those substantial and compelling circumstances on the record should he decide not to sentence the offender to penal servitude for life. Although there is one known case where the Court emphasised substantial and compelling circumstances in order not to

¹²⁰⁶ *State v Fangamar* LDL 2008 SCJ 105, 120.

¹²⁰⁷ *State v Unmole H and others* 2005 SCJ 142, 168. Where the offenders were sentenced to terms of imprisonment ranging from 10 to 14 years for drug trafficking.

¹²⁰⁸ Chapter IV, 4.2.2.6.

sentence the offender to penal servitude for life for murder,¹²⁰⁹ there are cases where the court has emphasised deterrence or aggravating factors instead of substantial and compelling circumstances to send a murderer to a sentence other than penal servitude for life.¹²¹⁰ This could be interpreted to mean that some judges are still of the view that what they are required to do is to look at other circumstances other than substantial and compelling circumstances to decide whether or not to impose a penal servitude for life for murder.

5.7 Conclusion

This Chapter has dealt with the offences that attract life imprisonment in Uganda, South Africa and Mauritius. It discussed the discretion that courts have in deciding whether to impose a life sentence or not. This chapter has also addressed the issue of legal representation for the suspects facing charges that carry the sentence of life imprisonment. The theories of punishments that courts emphasise in sentencing offenders to life

¹²⁰⁹ *The State v Takah P and anor* 2007.

¹²¹⁰ For example, in *Philibert P v The State* 2008 SCJ 289, the Court held that it was required to put into consideration the existence or otherwise of substantial and compelling circumstances in deciding which sentence to impose on the appellant for murder after setting aside the mandatory 45 years' imprisonment that had been imposed. Although the Court reduced the appellant's sentence to 30 years, it did not mention that there were substantial or compelling circumstances. The courts considered the facts that the appellant had pleaded guilty and had stayed on remand awaiting trial for six years. In *State v Ghumaria A* 2008 SCJ 184, the Court, in sentencing the offender to 35 years' imprisonment for the murder of his wife and the child did not mention substantial and compelling circumstances. However, it mentioned that it considered as mitigating factors that the accused had pleaded guilty, had cooperated with the police, was remorseful, and had spent time on remand awaiting trial, but that 'public interest' required that it impose a heavy penalty. In *State v Nachheje S* 2008 SCJ 250, the Court, in sentencing the accused to 35 years' imprisonment for the murder of his wife considered the mitigating factors, that is, 'the plea of guilt, the remorse and apologies accused expressed...the period spent on remand pending trial...[and] the state of mind of the accused when he committed the irreparable reprehensible act', but held that the accused's offence called 'for a long custodial sentence ...which would also serve as a deterrent.' See 253 and 254. In *State v Vyapooree S* 2008 SCJ 136, in which the Court, when sentencing the offender to 35 years for the murder of his son, emphasised deterrence, the seriousness of the offence, and the public interest. The Court did not mention of substantial and compelling circumstances.

imprisonment have been discussed. In all three jurisdictions, courts have emphasised deterrence over other theories or objectives of punishment. This is so notwithstanding the fact that these are three different legal systems in which the punishment of life imprisonment is approached from different angles. However, in South Africa, courts have gone to a greater length than in Uganda and Mauritius to explain why rehabilitation as an objective of punishment is not appropriate in cases of life imprisonment. The fact that courts in all the three jurisdictions are emphasising deterrence in sentencing offenders to life imprisonment is worrying in the light of the fact that the prisons authorities in these countries consider the rehabilitation of the offender as their major objectives. Offenders leave courts knowing that their stay in prison is meant to serve a deterrent objective but when they arrive in prison they are told that their stay in prison would help them rehabilitate. Another important feature to note about life imprisonment in these three countries is that in Uganda, most of the offenders serving life imprisonment were convicted of defilement whereas in South Africa the offenders were convicted for rape and murder, and in Mauritius, drug trafficking. This shows that sentencing is not only influenced by the decision the judge makes but also by the statutory law itself.

The next chapter discusses the law governing the release of offenders serving life imprisonment South Africa, Uganda and Mauritius.

CHAPTER VI

THE RELEASE OF OFFENDERS SENTENCED TO LIFE IMPRISONMENT

6. Introduction

It has already been illustrated in Chapter IV that life imprisonment in Uganda, South Africa and Mauritius does not mean that the offender will be detained for the rest of his life. There are laws and/or mechanisms that govern the release of an offender serving life imprisonment in these countries. The law and practice relating to the release of offenders sentenced to life imprisonment by the international criminal tribunals has been discussed above.¹²¹¹ This Chapter illustrates the laws and procedures governing the release of offenders sentenced to life imprisonment in South Africa, Mauritius and Uganda. The author shows the differences in the release laws and procedures, identifies the advantages and disadvantages in each system, if any, and makes recommendations, where necessary, on how the laws governing the release of offenders could be improved the three countries.

6.1 South Africa

It has been illustrated in Chapter IV that life imprisonment in South Africa has gone through different changes.¹²¹² These changes have not only affected the jurisdiction of the courts in imposing life sentence and the offences that attract life sentences but also the length of the sentence of life

¹²¹¹ Chapter IV, 4.2.3.8.6 – 4.2.3.8.8.

¹²¹² Chapter IV, 4.2.1.

imprisonment and the release procedure of an offender serving a life sentence. What follows is a discussion of the laws that govern the release of offenders serving life imprisonment since the abolition of the death penalty. The discussion of the circumstances under which an offender serving a life sentence was released before the abolition of the death penalty has been dealt with elsewhere else and it is not necessary to repeat it here.¹²¹³

6.1.1 Prisoners sentenced before 1998

In 1996 the Department of Correctional Services published its Release Policy in the *Government Gazette* in which it stipulated that a prisoner sentenced to life imprisonment was to be considered for parole after serving at least 20 years of the sentence or, once he had reached the age of 65 years, after serving 15 years.¹²¹⁴ In the following year, the Parole and Correctional Supervision Amendment Act (PCSAA)¹²¹⁵ amended section 65(5) and (6) of the Correctional Services Act by providing under section 9 (d) (v) that a prisoner serving a life sentence shall not be released on parole before serving at least 25 years of the sentence. However, the same section included a proviso to the effect that parole could be granted to a prisoner who reached the age of 65 years while serving his sentence on condition that such a prisoner had served at least 15 years of his prison term.¹²¹⁶ The PCSAA also substituted section 63 of the Correctional Services Act to give

¹²¹³ Van Zyl Smit and Dünkel (eds) 2001: 601-602.

¹²¹⁴ See the Department of Correctional Services Release Policy published in *Government Gazette* No. 17386 of 30 August 1996 by Notice 1222 of 1996 as referred to in *S v Bull and another*; *S v Chavulla and others* 2002: para 23.

¹²¹⁵ Act 87 of 1997 (assented to by the President on 26 November 1997 and came into force on 12 December 1997, see *Government Gazette* No. 18503).

¹²¹⁶ *S v Bull and another*; *S v Chavulla and others* 2002: para 23.

the parole board the following functions in relation to prisoners serving life sentences:

Section 63(2) A parole board shall, in respect of any prisoner serving a sentence of life imprisonment, submit a report with recommendations on the possible placement of the prisoner concerned on parole or on day parole, and the conditions under which the prisoner may be so placed to the court which sentenced the prisoner.

The PCSAA also inserted section 64B(1) into the Correctional Services Act which gave the court (to which the report mentioned in section 63(2) was to be submitted) the power to ‘order that the prisoner concerned be placed on day parole and determine the conditions on which the prisoner shall be so placed.’ Section 64B(2) provided that should the court decide that a prisoner serving a life sentence ‘should not be placed on parole or day parole, it shall determine the period of imprisonment which the prisoner shall serve before the prisoner may again be considered for placement on parole or on day parole.’ Therefore, prisoners who were sentenced to life imprisonment before 12 December 1997, the date on which the PCSAA came into force, are governed by the law and policies which were operational during that time, that is, section 65 of the Correctional Services Act and the 1996 Release Policy. This fact is also acknowledged under section 24 of the PCSAA, which provides that any person serving a prison sentence immediately before the commencement of the PCSAA shall have his sentence and release governed by the law that was in place at the time he was sentenced. Consequently the PCSAA governs those offenders who were sentenced to life imprisonment on or after 12 December 1997. In practice, the first prisoner serving a life sentence whose parole is governed by the 1996 Release Policy will have to be considered for release in 2016

and the one whose parole is governed by the PCSAA will have to be considered for release in 2022.

6.1.2 Prisoners sentenced after 1998 under the minimum sentences legislation

In 1998, the new Correctional Services Act was enacted but the provision relevant to the release only came into force in October 2004. Section 73(6)(b)(iv) provides that a prisoner serving a life sentence ‘may not be placed on parole until he or she has served at least 25 years of the sentence but a prisoner on reaching the age of 65 years may be placed on parole if he or she has served at least 15 years of such a sentence.’ Under section 73(5)(a)(ii), read together with section 75(1)(c), before the court releases the prisoner on parole, such a prisoner’s release has to be recommended to the court by the Correctional Supervision and Parole Board.¹²¹⁷ The latter, before recommending to the former that a prisoner may be released on parole, has to study the Case Management Committee’s report on that prisoner.¹²¹⁸ Under section 73(5)(a)(ii) it is the court which has to determine whether the date on which a prisoner sentenced to life imprisonment on or after 1 October 2004 should be placed on day parole or parole. Terblanche submits that the above

[A]mendments should lay to rest most of the concerns judges may have that life prisoners will be released early. However, this procedure may not necessarily be popular. The judge considering the release of the prisoner will rarely be the same judge who presided over the trial, simply because

¹²¹⁷ For a brief historical discussion of this provision see A Dissel, *A Review of Civilian Oversight over Correctional Services in the Last Decade* (CSPRI Research Paper No. 4, 2003) 26- 28.

¹²¹⁸ Terblanche 2007: 234.

of the time that will have lapsed. This means that the procedure will simply add to the workload of judges.¹²¹⁹

Under section 136(3)(a) of the Correctional Services Act¹²²⁰ ‘any prisoner serving a sentence of life imprisonment immediately before [1 October 2004] is entitled to be considered for day parole and parole after he or she has served 20 years of the sentence.’¹²²¹ Such prisoners ‘may only be released on parole by the Minister of Correctional Services, after the recommendation by the National Council.’¹²²² This means that ‘specific regard [has] to be given to the interests of society and to the reports of the parole board.’¹²²³ Terblanche adds that with regard to prisoners sentenced to life imprisonment before 1 October 2004,

The discretion really rests with two bodies: the National Council and the Minister of Correctional Services. If the [National Council] does not recommend release, the Minister has no say in the matter. But if the National [Council]...does recommend release, the Minister has the final say and is authorised not to accept the recommendation. There are, therefore, at least some checks and balances in the exercise of the discretion. The final responsibility to protect society lies with the Minister.¹²²⁴

What one observes is that the parole regime governing prisoners serving life sentences went through different and at times unclear and confusing

¹²¹⁹ Terblanche 2007: 234-235.

¹²²⁰ Which deals with transitional arrangements.

¹²²¹ This provision is subject to confusing interpretation in the light of the fact that immediately before 1 October 2004, there were prisoners serving life sentences whose release was regulated by the 1997 PCSAA (see detailed discussion under 3.3 above). It is argued that this ambiguity could be escaped by invoking the ‘later-in-time’ rule which dictates that when an earlier legislative provision conflicts with the subsequent legislative provision, the latter prevails. The effect would be that even prisoners sentenced at the time when the PCSAA was in force should be released after 20 years instead of 25 years.

¹²²² Terblanche 2007: 235.

¹²²³ Terblanche 2007: 235.

¹²²⁴ Terblanche 2007: 235.

changes. There were prisoners who were serving life sentences each time a new change in the parole regime was effected. This meant that the Department of Correctional Services had prisoners serving the same sentence, life imprisonment, but with varying durations/tariffs and different release procedures and bodies. This, as one would expect, caused confusion among many prisoners who did not know which policy applied to them and which body was responsible for their release or to recommend their release and under what circumstances. This could explain why there have been various applications before courts in which prisoners have challenged their continued imprisonment, arguing that it was illegal because according to the parole regime that was applicable at the time of their imprisonment they were entitled to an earlier release than that contemplated by the relevant authorities.¹²²⁵ The 1998 Correctional Services Act also established a new Parole Board system involving civilians. One could argue that this added confusion to the existing complex set of rules and procedures.¹²²⁶

¹²²⁵ See for example in *S v Matolo en 'n ander* 1998, where it was held that the court does not have jurisdiction to order the Department of Correctional Services never to release a prisoner serving a life sentence on parole; in *Van Vuren v Minister of Justice and Constitutional Development and another* 2007 (8) BCLR 903 (CC) the applicant who had been sentenced to life imprisonment petitioned court for his release arguing that the parole policies that applied to him were those that existed at the time of his sentence in 1992 and not those that were adopted after.

¹²²⁶ See Sloth-Nielsen *Submission to the Parliamentary Portfolio Committee on Correctional Services relating to Parole and the Proposed Amendments concerning parole in the Correctional Services Amendment Bill* 31 August 2007, at <<http://www.pmg.org.za/docs/2007/070905sloth-nielsen.htm>> (accessed 21 May 2008).

6.1.3 The release of prisoners serving life sentences after the coming into force of the Correctional Services Amendment Act of 11 November 2008

On 8 November 2008, the South African President assented to the Correctional Services Amendment Act¹²²⁷ which, at the time of writing, March 2009, was yet to come into force.¹²²⁸ The Act was published in the Government Gazette on 11 November 2008.¹²²⁹ It should be noted that when this Act comes into force, it will introduce two fundamental changes with regard to prisoners serving life imprisonment. First, the prisoners would cease to be called prisoners but ‘offenders’; a prison would cease to be called a prison but a ‘correctional centre’, and the sentence of life imprisonment would become known as ‘life incarceration.’¹²³⁰ Second, and most importantly, the Amendment Act provides a different regime under which offenders incarcerated for life would be released. Importantly, it would be the Minister of Correctional Services (and not the Court anymore), on the recommendation of the Correctional Supervision and Parole Board, to release the offender incarcerated for life on parole¹²³¹; the duration to be served before an offender serving a life sentence is released will be determined by the National Council in line with the incarceration framework that it would develop¹²³²; and the Amendment Act will be applicable to all prisoners sentenced to life imprisonment since 1 October

¹²²⁷ Correctional Services Amendment Act, Act 25 of 2008.

¹²²⁸ See section 87 of the Correctional Services Amendment Act for the circumstances under which the Act will come into force.

¹²²⁹ *Government Gazette*, Volume 521, Cape Town, No. 31593, 11 November 2008.

¹²³⁰ See sections 73, 75, and 78.

¹²³¹ Section 78.

¹²³² Section 73A.

2004.¹²³³ It is appropriate to outline below section 78 which details with the manner in which offenders serving life sentences will be released on the coming into force of the Amendment Act:

78. (1) Having considered the record of proceedings of the Correctional Supervision and Parole Board and its recommendations in the case of a person sentenced to life incarceration, the National Council may... recommend to the Minister to grant parole or day parole and prescribe the conditions of community corrections in terms of section 52. (2) If the Minister refuses to grant parole or day parole in terms of subsection (1), the Minister may make recommendations in respect of treatment, care, development and support of the sentenced offender which may contribute to improving the likelihood of future placement on parole or day parole. (3) Where a Correctional Supervision and Parole Board ... recommends, in the case of a person sentenced to life incarceration, that parole or day parole be withdrawn or that the conditions of community corrections imposed on such a person be amended, the Minister, on advice of the National Council, must consider and make a decision upon the recommendation.(4) Where the Minister refuses or withdraws parole or day parole the matter must be reconsidered by the Minister, on advice of the National Council, within two years.

Two important features, amongst others, should be noted here with regard to section 78. First, the Minister, when he/she refuses to release the offender on parole, has discretion (in section 78(2) the word ‘may’ instead of ‘shall’ is used) to make recommendations to ensure that that offender attends or participates in programmes that would improve his/her chances of being placed on parole in the near future. One could argue that if the Minister’s refusal to place an offender on parole is based on the reason that the offender has to participate in a particular rehabilitation programme, for example, an anger management course, it becomes obligatory on the Minister to introduce such a programme in the correctional centre where that offender is being incarcerated so that he/she can participate in it, or the

¹²³³ Sections 85 and 136(4).

Minister must ensure that that offender is transferred to a correctional centre where such a programme is offered. Another important aspect that the Amendment Act introduces is that should the Minister decline to put the offender on parole, he/she is under a duty, on the advice of the National Council, to reconsider that offender's case for parole after two years. It is argued that even then the Minister is at liberty to refuse to release the offender on parole. The question that remains to be answered is this: If the Minister refused to place the offender on parole after the two years' period, what remedy does the inmate have? The Act is silent on that issue, but one could assume that the Minister would be in a position to advise the offender as to when he/she would be considered for placement on parole again, and would have to give reasons why parole has been denied this time again. Otherwise some prisoners would petition the courts for intervention.

6.2 Mauritius

As mentioned in Chapter IV,¹²³⁴ offenders sentenced to penal servitude for life could be pardoned by the President under section 75(1) of the Constitution. In practice, since 2006 and even after the Privy Council ruling in July 2008 to the effect that offenders sentenced to life imprisonment should have the prospect of being released,¹²³⁵ section 75 remains one of the only likely windows through which those prisoners could escape imprisonment for lengthy prison terms. For the President to pardon any prisoner, he/she must first of all be advised by the Commission on the

¹²³⁴ Chapter IV, 4.2.2.

¹²³⁵ *De Boucherville v The State of Mauritius* 2008.

Prerogative of Mercy, established under section 75(2) of the Constitution. This means that the Commission probably would have to study the relevant judgment, the recommendations made by the judge at sentencing, and the recommendations made by the prison authorities relating to that particular prisoner, in order to determine whether such prisoner should be recommended to the President for pardon or early release. The challenge with this approach is that prisoners do not know what is expected of them in order to be considered by the Commission as suitable for recommendation to the President for pardon or early release. Most importantly, the President is not obliged to release any prisoner just because the Commission has advised him/her to do so.¹²³⁶ This means that prisoners will always remain in a state of uncertainty, not knowing whether they could ever qualify to be, at least, recommended for pardon or early release. The German Constitutional Court held that for the sentence of life imprisonment to pass the human dignity test, there should be a legislative enactment detailing the circumstances under which a prisoner may be released.¹²³⁷ Some judges of the European Court of Human Rights have

¹²³⁶ The Supreme Court held, in a case where the President commuted the offender's death sentence to 20 years' imprisonment without remission, and the prisoner sued the Commission on the Prerogative of Mercy and asked court to order the Commission to recommend to the President to grant him remission on the 20 years' sentence, that under section 50(1) of the Reform Institutions Act '[a] prisoner is eligible to remission but has no right to remission as such' and that section 75 of the Constitution 'provides for a constitutional exercise of quasi-judicial function by the Executive. In the exercise of its function under section 119, this court has no power to direct the way in which the prerogative of mercy is to be exercised unless it amounts to a breach of the Constitution. Nor does the Judiciary propose to recuperate by the backdoor what has constitutionally been placed in the hand of the Executive.' See *P Poongavanam v The Commission of the Prerogative of Mercy* 1999 MR 204, 206.

¹²³⁷ BVerfGE 45 187 246 as cited in Van Zyl Smit 2006: 409.

also held that prisoners should have ‘a real and tangible prospect of release’ otherwise life imprisonment will be a cruel and inhumane punishment.¹²³⁸

The impression one gets from the Supreme Court’s jurisprudence discussed in Chapter IV,¹²³⁹ although the Privy Council appears to have ignored it,¹²⁴⁰ is that the Commission on the Prerogative of Mercy does not seem to be carrying out its work in a satisfactory manner. In cases where the Supreme Court wanted prisoners who were serving sentences of penal servitude for life to be released after 20 years, it avoided instructing the Commission to oversee their release. Instead, the Court decided that such prisoners should be released pursuant to its judgment. In the Court’s words:

We could have made a recommendation to the Commission [on the Prerogative of Mercy] to ensure that all those who have been sentenced to penal servitude for life in respect of manslaughter both before and after the coming into operation of the [Abolition of the Death Penalty] Act should serve only a maximum term of 20 years’ penal servitude. But we have declined to do so for two reasons. First, Mr Ramdin who, it is recalled, withdrew his motion in Court and intended to seek redress from the Commission, is still in prison. *Boucherville*, cited already, obviously made matters worse. Second, the Commission might very well decide not to act upon our recommendation. In such a case, Mr Ramdin and all the others who have been sentenced for manslaughter to penal servitude for life both before and after the coming into operation of the Act will be left with no redress.¹²⁴¹

The above discussion shows that the law and mechanism in place do not favour the interpretation of both the Supreme Court and the Privy Council that offenders sentenced to penal servitude for life have, to use the European Court of Human Rights words, a ‘real and tangible prospect’ of

¹²³⁸ *Kafkaris v Cyprus* 2008: para 6, joint dissenting judgment of Judges Tulkens, Cabral Barreto, Fura-Sandström, Spielmann and Jebens.

¹²³⁹ Chapter IV, 4.2.2.4.

¹²⁴⁰ *De Boucherville v The State of Mauritius* 2008: para 23.

¹²⁴¹ *State of Mauritius v Jeetun* 2006: 153-154. (Emphasis in original).

being released.¹²⁴² Their release, should it materialise, would depend on several unclear administrative decisions that can never be subjected to judicial¹²⁴³ or public scrutiny. This may result in some prisoners being pardoned because of their political affiliation, race, sex, and nationality, amongst other grounds, and others being imprisoned for lengthy periods because of the same grounds. The Supreme Court has also indicated that there was a case where an applicant applied ‘on several occasions to the Commission on the Prerogative of Mercy pursuant to section 75 of the Constitution to review his case albeit without success’¹²⁴⁴ and cites only one case in 1992 where the offender’s death sentence was commuted to 20 years’ imprisonment after several legal battles as an example to illustrate ‘the effective operation of section 75 of the Constitution.’¹²⁴⁵ Had the Court been aware of more than one case where offenders had had their sentences commuted in line with section 75, it would have relied them to justify the effective operation of section 75. The fact that in 2009 the Court relies on an incident that happened in 1992, almost two decades ago, shows how it is almost impossible for offenders to have their sentences commuted under section 75. It should also be recalled that in 1992 Mauritius was just about

¹²⁴² Although the Supreme Court, after realising that some offenders serving penal servitude for life had applied unsuccessfully to the Commission on the Prerogative of Mercy to be pardoned by the President, held that ‘[o]ur system has also the singular advantage that any convicted person may, on his own initiative, petition the Commission to exercise its prerogative of mercy. The petition may be presented at any time and there does not appear to be any limitation as to the number of times it can be presented.’ See *De Boucherville Roger FP v The State of Mauritius* 2009: 9.

¹²⁴³ The Supreme Court has itself held that ‘the Supreme Court, in exercise of its functions under section 119 of the Constitution ha[s] no power to direct the way in which the prerogative of mercy [is] to be exercised unless to amount to a breach of the Constitution.’ See *De Boucherville Roger FP v The State of Mauritius* 2009: 9.

¹²⁴⁴ *De Boucherville Roger FP v The State of Mauritius* 2009: 8.

¹²⁴⁵ *De Boucherville Roger FP v The State of Mauritius* 2009: 8.

to abolish the death penalty, which it did in 1995, and all death sentences, as we have seen earlier, were commuted to penal servitude for life, which meant 20 years at the time.

There is also evidence that some prisoners who want to petition the President for their release under Section 75 of the Constitution are sidelining the Commission on the Prerogative of Mercy and addressing their complaints/applications to the National Human Rights Commission.¹²⁴⁶ This could be attributable to two factors: one, that such prisoners do not have confidence in the Commission on the Prerogative of Mercy and believe that the National Human Rights Commission is in a position to present their cases to the President more comprehensively and convincingly than the Commission on the Prerogative of Mercy; and, secondly, they may not be aware of the existence of the Commission on the Prerogative of Mercy. Either way, the fact that prisoners are directing themselves to the National Human Rights Commission and not the

¹²⁴⁶ See File No. 07/85, Mauritius National Human Rights Commission Annual Report for the Year 2007 (Annex X, Table E, Complaints against Prisons) in which a prisoner, who was sentenced to death and his sentenced commuted to penal servitude for life, petitioned the National Human Rights Commission to petition the President to pardon him; and the National Human Rights Commission referred his case to the Director of Public Prosecutions. In File No. 07/195, the prisoner, who was serving a term of 8 years imprisonment and had been paralyzed while in prison, contacted the National Human Rights Commission to take his case for his release to the President. The National Human Rights Commission advised the prisoner to write to the Commission on the Prerogative of Mercy. See also complaints on File Nos. 07/18 (the prisoner who was sentenced to seven years imprisonment for sexual offences asked the National Human Rights Commission to intervene and have his sentence reduced; and he was referred to the Commission on the Prerogative of Mercy); File No. 07/36 (the prisoner was serving five years in prison for drug dealing and argued that his counsel misled him when he advised him to plead guilty, and that therefore, the sentence should be set aside. The National Human Rights Commission advised him to address his complaint to the Commission on the Prerogative of Mercy); and File No. 07/86 (the prisoners argued that their sentence of penal servitude for life was wrong in law because they were erroneously convicted, and, therefore, asked the National Human Rights Commission to intervene and have the sentence set aside. The National Human Rights Commission advised them to refer their complaint to the Commission on the Prerogative of Mercy). See Annex X Table H, Complaints against the Judiciary.

Commission on the Prerogative of Mercy could be indicative that the latter body has not made its role well-known among prisoners. In at least one incident, when the prisoner contacted the National Human Rights Commission for it to present his case to the President for pardon or early release under section 75 of the Constitution, the National Human Rights Commission, instead of referring the prisoner's case to the Commission on the Prerogative of Mercy, referred it to the Director of Public Prosecution.¹²⁴⁷ This could be interpreted to indicate that the National Human Rights Commission casts doubt on the ability of the Commission on the Prerogative of Mercy to give the prisoner's case the attention it deserved to secure a Presidential pardon.

The above discussion of the manner in which the Commission on the Prerogative of Mercy operates, and the lens through which it is viewed by the National Human Rights Commission and the Supreme Court, is evidence that the window through which prisoners serving a sentence of penal servitude for life could secure their pardon or early release is not wide open. It is regrettable that the Privy Council did not pay attention to that fact and also that the lawyers representing the appellant did not draw the Privy Council's attention to the above facts.

¹²⁴⁷ Mauritius National Human Rights Commission Annual Report for the Year 2007, File No. 07/85.

6.2.1 Introduction of a new release regime?

Whereas the Supreme Court believes that penal servitude for life is not an irreducible sentence and that offenders could be released pursuant to section 75 of the Constitution, there is reason to believe that the Court has introduced a new regime that is likely to regulate the manner in which offenders serving penal servitude for life are to be released in the future. In the 12 January 2009 decision of *De Boucherville Roger FP v The State of Mauritius*,¹²⁴⁸ the appellant had been sentenced to death for murder in 1986, and when the death penalty was abolished in 1995 his death sentence was commuted to penal servitude for life. As discussed earlier, the Privy Council held in July 2008 that applicant's life sentence was unconstitutional¹²⁴⁹ and that the 'applicant was invited by the Judicial Committee to apply to the Supreme Court under section 5 of the Criminal Procedure (Amendment) Act 2007 to review the sentence.'¹²⁵⁰ The following lengthy quotation from the Court's judgment shows the factors that are likely to be considered before and offender sentenced to penal servitude for life is released:

We have called on Counsel for both the applicant and for the respondent to bring before us all materials which they deem relevant for the exercise of our review. We have considered the judgment of the Court of Criminal Appeal delivered on 8 July 1986 ... which gives an insight of the facts and circumstances of the cold blooded murder committed by the applicant in January 1984. A list of previous convictions – 20 prior to the pronouncement of his death sentence in 1986 – has also been placed before us. These relate mainly to cases of larceny, some with aggravating

¹²⁴⁸ *De Boucherville Roger FP v The State of Mauritius* 2009.

¹²⁴⁹ *De Boucherville v The State of Mauritius* 2008.

¹²⁵⁰ *De Boucherville Roger FP v The State of Mauritius* 2009: 5 -6.

circumstances, 4 cases of aggravated wounds and blows, but also two drug offences. Finally, the State has produced a list of 45 prison offences against the applicant spanning from 13 July 1987 to 30 June 2007 involving the applicant during his detention. These were mainly in relation to the use of disrespectful, offensive, abusive and insolent language towards prisons officers including the Prisons Medical Officer, disobeying lawful order, making false and malicious allegations against the Commissioner of Prisons. But one of those questioned prisons [sic] offences stands out. It relates to a number of unauthorized articles found in applicant's cell on 9 January 2007...¹²⁵¹The updated profile of the applicant, including his conduct in prison, does not show someone who is contrite, remorseful and who understands the gravity of the crime he had committed. In an affidavit affirmed on 14 August 2008, which forms part of the respondent's brief, Assistant Commissioner of Prisons Rughoobeer has given his opinion that the applicant still represents a risk to society if released. That is not in our consideration, an element which would "per se" disqualify the applicant of any humane approach and consideration by the Court, considering specially his advanced age as was indeed addressed by the Judicial Committee. On the other hand, whilst being prepared to "take the risk", as it were, of granting applicant an earlier release than would normally have been granted on the basis of fixing *a posteriori* a tariff and giving adequate discounts in line with the observations of the Judicial Committee, we must also bear in mind the impact and message which undue leniency even at this late stage could convey to the Mauritian population as a whole and to potential criminals in particular. After anxious consideration we believe that, in the light of all the facts and circumstances of this case, the applicant must serve a sentence of not less than 25 years penal servitude before his release. This shall occur on 20 February 2011.¹²⁵²

The above quotation raises several factors that are likely to determine whether an offender serving a serving a penal servitude for life should be released or not. First, the court will look at the nature and circumstances

¹²⁵¹ These items were: 'a fair amount of money (some Rs 38,000; (ii) several items of offensive weapons, like one federal steamer, one barber type razor blade, one small knife, one tailor's cutter and four pairs of scissors; (iii) communication equipment including battery charger, dry cells, mobile phone with four sim cards, about 50 ft of telephone wire, a portable radio; (iv) suspected dangerous drugs viz. 6 pieces of glazed paper containing whitish powder and several seeds suspected to be cannabis, several assorted pills and certain paraphernalia used in the consumption of dangerous drugs like cigarette papers and aluminium foil... There were also some items of clothings, some perfume and five bottles of containing 500ml each of alcohol described as "blue" alcohol which is a highly inflammable substance.' *De Boucherville Roger FP v The State of Mauritius* 2009: 9 – 10. Footnotes omitted.

¹²⁵² *De Boucherville Roger FP v The State of Mauritius* 2009: 10 – 11.

under which the offence for which the offender was sentenced to penal servitude for life was committed. This means that if the offence, for example, of murder was committed in a brutal manner, the offender is likely to stay in prison longer than another offender who is serving a penal servitude for life for murder but who committed the offence in less brutal circumstances. It is argued that the court should not be influenced unduly by the circumstances under which the offence was committed in determining whether or not the offender should be released early. This is because the sentencing court would have considered or taken into account those circumstances in imposing a sentence.¹²⁵³ This could explain why, in the first place, the offender was sentenced to penal servitude for life as opposed to a lesser sentence. Therefore, the factors that influenced the court to impose a severe sentence should not be the same factors that should be relied upon to detain the prisoner for longer. Related to the above is the issue of the personal circumstances of the accused when the sentence he/she is serving was imposed. If he/she was a first offender, the court would order his early release more easily than would be the case if he was a recidivist.

Secondly, the court will ask the state to adduce evidence regarding the offender's conduct during the period of imprisonment. If the offender consistently disobeyed prison regulations and was a troublesome prisoner, for example, if he/she trafficked in contraband and was disrespectful of

¹²⁵³ The Supreme Court held that '[i]n determining the sentence which the detainee has yet to serve, various factors might be taken into consideration, including pure retribution, expiation, expressions of moral outrage of society, maintenance of public confidence in the administration of justice, deterrence, the interest of the victims, rehabilitation and, last but not least, mercy.' See *State of Mauritius v Jeetun* 2006: 154.

prison warders, the court may delay in ordering an early release. This would be the case especially where the prisoner breached prison regulations a few months or years preceding the application for early release. This could explain why the Court stated that '[t]he updated profile of the applicant, including his conduct in prison, does not show someone who is contrite, remorseful and who understands the gravity of the crime he had committed.' Although the Court does not so say expressly, it is argued that a prisoner's consistent disobedience of prison regulations could be an indicator that he/she has not been rehabilitated and that he/she has not learnt any hard lessons from his/her prison term. The release could be delayed either because a longer stay in prison would enable the prisoner to reform or to protect the society from him/her. The Court expressly recognises this fact and held that the 'Assistant Commissioner of Prisons Rughoober has given his opinion that the applicant still represents a risk to society if released' although the Court warns that the fact that the offender's early release could still pose a danger does not constitute an 'element which would "per se" disqualify the applicant of any humane approach and consideration by the Court...'

Thirdly, although closely related to the foregoing point, relates to the applicant's age and whether he suffers from ill-health. It appears that the Court would not be very reluctant to order the early release of a prisoner of advanced age coupled with ill-health. This could be explained on the ground that such a prisoner is more unlikely to re-offend or at least to commit serious offences and therefore his release does not put the society at great risk. The early release of a prisoner serving a life sentence on the

ground of ill-health would not be exclusive to Mauritius. In South Africa, for example, a prisoner serving a life sentence could be released earlier on medical parole.¹²⁵⁴

The fourth factor that the Court is likely to consider in determining whether an offender serving a penal servitude for life should be released earlier is the manner in which the Mauritian population and the potential criminals would react to the applicant's early release. The Court expressly stated that 'we must also bear in mind the impact and message which undue leniency even at this late stage could convey to the Mauritian population as a whole and to potential criminals in particular.' The Court is thus more unlikely to order the early release of a high-profile prisoner than a low-profile prisoner because of the media attention that would accompany the release of the former, which would presumably make Mauritians believe that the court is treating criminals leniently. The Court is also with the view that the early release of prisoners would not deter potential criminals from offending. They would be led to believe that even when they commit serious offences, they would be detained for only a short period. However, the Court's holding above is based on two highly questionable assumptions: one is that the Mauritian population follows criminal trials; and two, that potential

¹²⁵⁴ Under section 79 of the Correctional Services Act, '[a]ny person serving any sentence in a prison and who, based on the written evidence of the medical practitioner treating that person, is diagnosed as being in the final phase of any terminal disease or condition may be considered for placement under correctional supervision or on parole, by the Commissioner, Correctional Supervision and Parole Board or the Court as the case may be, to die a consolatory and dignified death.' For a detailed discussion of the jurisprudence and practice relating to medical parole in South Africa, see Mujuzi, 'Reflecting on Medical Parole in South Africa' Civil Society Prison Reform Initiative Newsletter No.23 September 2007 at <http://www.communitylawcentre.org.za/Civil-Society-Prison-Reform/newsletter/cspri-newsletter/archive-of-cspri-newsletter/cspri-newsletter-no-23.pdf> (accessed 7 March 2009).

criminals would be deterred by knowing that if they committed an offence such as murder they would be punished severely. It is argued that unless in high-profile cases, where the media would widely publicise the release of a prisoner, very few people in Mauritius would know that a prisoner serving a penal servitude for life has been released early. These would be the prisoner's relatives, neighbours and victims of his crime. Secondly, research has shown that what deters most potential offenders from committing crimes is not the severity of the punishment they could face, but the certainty of being detected, arrested, prosecuted and punished.¹²⁵⁵ Therefore, the Court's assumption that the late or delayed release of offenders serving penal servitude for life would deter potential criminals remains highly disputable.

One can argue that in Mauritius there are two ways through which an offender serving a penal servitude for life could be released. One, by applying to the Supreme Court for a reduction of sentence; and two, by applying to the Commission on the Prerogative of Mercy to recommend to the President that the applicant's sentence be commuted. If the prisoner does not take the initiative to utilise either of the above avenues, this could result in being in prison for the rest of his/her natural life, unless the prison authorities apply on his/her behalf or the Commission on the Prerogative of Mercy visits the prison and deem it fit to recommend his release. However, it appears that more prisoners would rather go to court to order their release or commute their sentences than approach the Commission on the

¹²⁵⁵ The South African Constitutional Court held that '[t]he greatest deterrent to crime is the likelihood that offenders will be apprehended, convicted and punished.' See *S v Makwanyane*, 1995: para 122.

Prerogative of Mercy. This is because, as we have seen above, the court has ordered the early release of many prisoners serving penal servitude for life whereas the Commission on the Prerogative of Mercy has been successful only in one known case.

6.3 Uganda

Unlike in South Africa where prisoners serving life imprisonment have to be considered for parole after 25 years, in which case they may be released or not but when released remain on parole for the rest of their lives, and also unlike in Mauritius where the Reform Institutions Act does not provide for the release of offenders serving life sentences, in Uganda an offender sentenced to life imprisonment is supposed to be released after serving a maximum of 20 years' imprisonment and could also be released on parole before serving 20 years' imprisonment. The author will outline the relevant sections relating to the release of offenders serving life imprisonment in Uganda under the Prisons Act and thereafter discuss them. However, it should be noted at the outset that the Prisons Act only came into force in 2006 and there is little practice emanating from it at the moment. Most of the discussion will endeavour to suggest practical suggestions how the Act could be interpreted to facilitate the release of prisoners serving life imprisonment. It will thus assess the relevant sections against each other for the purpose of indentifying how the Act can be implemented better with respect to the release of prisoners serving life imprisonment.

Section 84(1) of the Prisons Act provides that ‘a convicted prisoner sentenced to imprisonment whether by one sentence or consecutive sentences for a period exceeding one month, may by industry and good conduct earn a remission of one third of his or her sentence or sentences.’ Under section 84(2) ‘each prisoner on admission shall be credited with the full amount of remission to which he or she is entitled at the end of his or her sentence or sentences if he or she lost or forfeited no such remission.’ Whereas section 84(1) appears to suggest that it is within the discretion of the prison authorities to decide whether a prisoner earned a remission of one third of his sentence, section 84(2) obliges the prison authorities to credit each prisoner serving a sentence of more than one month with a remission of one third of his sentence. The combined effect of the two subsections is that the prison authorities are under a duty to credit each prisoner serving a sentence of more than a month a one third remission of his/her sentence on the day he/she arrives in prison. The applicability of section 84 to offenders serving life imprisonment will be dealt with in due course. However, under section 85, ‘a prisoner may lose remission as a result of its forfeiture as a punishment for an offence against prison discipline and shall not earn any remission in respect of any period spent in hospital through his or her own fault or while malingering, or while undergoing confinement as a punishment in a separate cell.’ Section 86(1) is to the effect that the ‘Commissioner General may recommend to the Minister responsible for justice to advise the President ... to grant a further remission on special grounds.’ Section 86(3) provides that ‘for the purpose of calculating remission of sentence, imprisonment for life shall be deemed

to be twenty years' imprisonment.' The author shifts to the discussion of the above provisions and how they relate to offenders serving life sentences.

The effect of the combined reading of sections 86(3) and 84(2) is that an offender sentenced to life imprisonment, which means 20 years, on the day he/she arrives in prison the sentence is no longer 20 years but two-thirds of the 20 years. In other words, the sentence is remitted by one-third and the prisoner could be released after serving the remainder of the sentence if he/she does not lose his/her remission in terms of section 85 of the Act. However, such an offender can also be granted remission in terms of section 86 by the President on 'special grounds' provided that the Commissioner General of Prisons makes the recommendation to the Minister responsible for justice and the minister also follows up the matter with the President. The challenge with the remission under section 86 is that three officials must all be of the opinion that the offender has to be remitted on 'special grounds.' That is, the Commissioner General, the Minister and the President. The Commissioner General is at liberty not to recommend to the minister the grant of remission to the prisoner, but even if the Commissioner General decided to make such a recommendation, the Minister is at liberty not to advise the President that the prisoner's sentence should be remitted. Also, if the Minister advises the President to grant special remission to the prisoner, the President is at liberty whether or not to accept the Minister's advice. Another difficulty with section 86 is that it does not define or enumerate the 'special grounds' upon which a prisoner may be granted further remission. It is argued that these could include

remission on health grounds, for example, where a prisoner is in the final stage of an incurable ailment. In countries such as Zimbabwe and Botswana, a prisoner could also be released on special grounds, and these include ‘the mental or physical condition of such a prisoner.’¹²⁵⁶ Section 86 should also be read with section 88 which provides as follows

- (1) The Commissioner General shall submit to the Minister responsible for justice a report on the general condition and conduct of every prisoner undergoing imprisonment for life... at the end of every four years of such imprisonment or of such lesser period as the Minister or the Commissioner General considers desirable.
- (2) A review referred to in subsection (1) shall include-
 - (a) A statement by the officer in charge of the prison, where the prisoner concerned is detained on work and conduct of the prisoner;
 - (b) A report from the medical officer on the mental and physical health of such a prisoner with particular reference to the effect of imprisonment on the health of the prisoner;
 - (c) From the social worker about the community attitude and possible reintegration of the prisoner back into the community.

It is argued that a combined reading of sections 86 and 88 could assist the prison authorities in identifying some of the ‘special grounds’ upon which a prisoner serving a life sentence could be granted further remission. For instance, if the medical officer is of the view that the continued imprisonment of the offender will have a negative impact on his health and could even result in his death or permanent disability, this could be communicated to the officer in charge of the prison who would then

¹²⁵⁶ Under section 110 of the Zimbabwe Prisons Act which governs remission on special grounds as section 86 of the Prisons Act of Uganda, ‘[t]he Commissioner may recommend to the Minister, who, if he thinks fit, may recommend to the President that remission should be granted to a prisoner by reason of meritorious conduct or the mental or physical condition of such prisoner.’ Section 91(4)(a) of the Prisons Act of Botswana provides that ‘any prisoner serving a determinate term of imprisonment of not less four years be granted special remission on the ground of – (i) of his meritorious conduct, (ii) that his mental or physical condition warrants such remission; (iii) that special circumstances exist which, in the opinion of the parole board, warrant such remission.’ Section 91(4)(b) provides that ‘any prisoner serving a term of imprisonment for life ... be released on any grounds specified in paragraph (a).’

communicate it to the Commissioner General to ask the Minister of Justice to advise the President to grant such a prisoner further remission. If the social worker is of the view that the community would not be outraged by the offender's early release and that he/she will easily be reintegrated into the community, the Commissioner General could initiate the process to ensure that the prisoner gets further remission on the basis that his ability to integrate easily into society easily is a special ground. This would mean that the social worker should have visited the community to which the prisoner is expected to be released after the completion of his sentence and would have assessed that community's attitude towards the possible release of the prisoner and also analysed the possible reintegration of the prisoner into the community. This ground raises two practical problems: one, offenders serving life imprisonment in Uganda are imprisoned in two prisons – Jinja Central Prison (about 50 kilometres from the capital city, Kampala) and Luzira Prison (in the capital city) – because they are the only maximum security prisons with the facilities to host prisoners for lengthy periods of imprisonment.¹²⁵⁷ However, most of the offenders serving life imprisonment are from places hundreds of kilometres away from these prisons.¹²⁵⁸ This would require a social worker attached to these two prisons to travel hundreds of kilometres to the prisoners' communities to

¹²⁵⁷ When the author visited Luzira Maximum Security Prison in January 2008, Mr. Kivumbi Jacob, Assistant Superintendent of Prisons, told him that many prisoners serving life imprisonment had been transferred to Jinja prison. Mr. Kivumbi also said that many more prisoners were to be transferred from Luzira prison to Jinja.

¹²⁵⁸ Information which the author obtained from Uganda Prisons Services shows that many offenders serving life imprisonment are from the rural districts of Masindi, Kabarole, Mbarara, Mbale, Masaka, Kabale, Fort Portal, Kumi, and Lira. Although some come from within Kampala and others from the neighbouring districts of Jinja and Mukono. Information on file with author.

assess whether integration is possible in an event of early release. This is a very difficult task for the Uganda Prisons to execute.

The second problem is that Uganda Prisons Service does not have enough social workers to effectively assess prisoners and make the necessary recommendations after every four years. In March 2009 there were 86 social workers for the prison population of approximately 25, 000 prisoners in the whole country.¹²⁵⁹ With the abolition of the mandatory death penalty, many offenders could be sentenced to life imprisonment and the workload of the social workers could increase which would make it even more difficult for them to effectively assess prisoners serving life sentences and make the appropriate recommendations.

Section 89(1) relates to the release of prisoners on parole. It provides that ‘a prisoner serving a sentence of imprisonment for a period of three years or more may be allowed by the Commissioner General within six months of the date he or she is due for release on conditions and for reasons approved by the Commissioner General to be temporarily absent from prison on parole for a stated length of time which shall not be greater than three months.’ The practical effect of section 89(1) in relation to the offender serving life imprisonment is that when such an offender has served two-thirds of the sentence, assuming that he/she did not forfeit the one-third remission in terms of section 85, he could be released on parole six months before he completes his sentence. This means, the two thirds of the life

¹²⁵⁹ Telephonic interview with Mr. Robert Omita Okoth, Commissioner Welfare/Rehabilitation, Uganda Prisons, 10 March 2009.

sentence could actually be reduced further by three months or more in terms of section 89. It is important to underscore here the fact that, unlike in South Africa where a prisoner serving a life sentence is supposed to be on parole for the rest of his life, in Uganda when an offender serving a life sentence has completed a prison term (depending on whether or not there was a remission of sentence) the prisoner has to be released because life imprisonment means a maximum of 20 years imprisonment.

It is argued that there are cases in Uganda where offenders have been sentenced to serve prison terms and are likely to serve more time in prison than an offender sentenced to life imprisonment before they can be released. This is so when an offender has been sentenced by different courts for different offences. In *Uganda v Baguma Moses*, for example, the offender was sentenced to 10 years for rape and while still serving his rape sentence, he was sentenced to 15 years for defilement.¹²⁶⁰ In sentencing him, the High Court observed that:

I cannot lose sight of the fact that this is [a] serious offence and society, especially the girl children need protection from habitual rapists like the convict. Having considered all the above and the time spent on remand the convict is sentenced to a term of 15 years imprisonment. For the avoidance of doubt this sentence of imprisonment shall be executed after the expiration of the former sentence...¹²⁶¹

This means that he was sentenced to a total of 25 years imprisonment. This was in effect a sentence longer than life imprisonment. If he served two thirds of the first sentence and two thirds of the second sentence, assuming that he did not forfeit his remission in terms of section 85 of the Prisons

¹²⁶⁰ *Uganda v Baguma Moses* 2002.

¹²⁶¹ *Uganda v Baguma Moses* 2002: 8.

Act, he would serve more time, although a few more months, than a person serving a life sentence. To avoid situations where offenders could be sentenced to sentences longer than life imprisonment, it is important that the Prisons Act be amended to provide that any sentence longer than a life sentence is presumed to be a life sentence.

6.4 Conclusion

The above discussion has illustrated the laws and mechanisms that govern the release of offenders serving life imprisonment in South Africa, Mauritius and Uganda. As shown, in South Africa, an offender sentenced to life imprisonment and released on parole spends the rest of his life on parole. It is recommended that there is a need for the law to be amended to provide that when an offender released on parole does not re-offend in five years on the outside, he/she should be presumed to have served his sentence in full. This would serve at least two objectives: one, it would relieve the Department of Correctional Services of the task to monitor the offender's compliance or otherwise of his parole conditions for the rest of his life hence allowing the Department to put both the human and financial resources where they are needed most; and two, will enable the offender to fully reintegrate into society and be able to seek employment in any part of the country because he/she will not be required to be confined in one area for parole purposes or to report to a parole officer often. In Mauritius, there is no law governing the release of offenders serving the sentence of penal servitude for life.

It is recommended that the Mauritian legislature need to enact a law which not only stipulates the maximum number of years an offender sentenced to penal servitude for life should serve before he/she could be considered for parole or early release, but also the procedure and mechanisms that should be followed by the offender serving a life sentence when the time for his release comes. The law should, for example, provide that an offender serving a life sentence will be eligible for parole after serving 15 years and that on completing the 15 years the parole board should consider release him on parole. If upon refusal to grant release on parole, the prisoner should have the right to request to review the decision of the parole board. As shown above, the Uganda Prisons Act does not define ‘special grounds’ upon which an offender could be granted additional remission. It is recommended that the Minister of Justice should use his/her powers under section 124(1) of the Prisons Act¹²⁶² to promulgate a regulation, setting what constitutes special grounds, in order that prisoners and prison authorities know them and are able to invoke them where prisoners would qualify for early release. We have seen that the frequent amendments to the laws relating to life imprisonment in South Africa have resulted in uncertainty on both the side of the prisoners and prison officials where some prisoners serving life sentence are due for release on parole. It is recommended that the Department of Correctional Services take the initiative to educate all prison warders about the relevant provisions of the Correctional Services Act, including all the subsequent amendments, so

¹²⁶² Section 124(1) provides that ‘[t]he Minister may in consultation with the Prisoner General, by statutory instrument, make regulations for the effective management and government of prisons and prisoners whether in or, about or beyond the limits of the prison, and generally for the better carrying out of the provisions and purposes of this Act.’

that they know exactly when a prisoner who was sentenced under a different regime is eligible for parole. The Department of Correctional Services needs to simplify the provisions of the Correctional Services Act and to translate them into all nine official languages of the country. These would be published in pamphlet form and be distributed to all prisons so that prisoners may know when they are eligible for parole.

Unlike in countries such as Germany where the prison officials are required ‘to prepare the prisoner for early release’¹²⁶³ South African, Mauritian and Ugandan prisoners have to prepare themselves for early release by participating in the rehabilitation programmes available in prisons. In these countries early release from prisonment is dependant on prisoners participating in rehabilitation programmes to the satisfaction of prison authorities. The problem here is that in some prisons in South Africa, for example, there are no rehabilitation programmes available for prisoners and some of the prisoners complete their sentences without having been given an opportunity at all to participate in rehabilitation programmes.¹²⁶⁴ There have also been cases in South Africa where prisoners have not been released even where they have been fully rehabilitated, thus prompting them to go to court to order their release.¹²⁶⁵ In Uganda, the government

¹²⁶³ Dünkel and Rössner in van Zyl Smit and Dünkel (eds) 2001: 333.

¹²⁶⁴ The Judicial Inspectorate of Prisons established that ‘[i]n a survey conducted by the [Independent Prison Visitors], 60% of sentenced prisoners indicated that they are involved in rehabilitation programmes. However, these statistics were influenced by variables such as the sample selection and categories of prisoners interviewed. The actual number of sentenced prisoners involved in rehabilitation is probably lower. Without accurate information about the number of prisoners involved in formal rehabilitation programmes ... the rate of rehabilitation cannot be calculated.’ Judicial Inspectorate of Prisons, *Annual Report for the Period 1 April 2007 to 31 March 2008*, (April 2008): 40.

¹²⁶⁵ See generally, Sloth-Nielsen, ‘Parole Pandemonium’ Civil Society Prison Reform Initiative, Issue No.14 (2005) at <http://www.communitylawcentre.org.za/Civil-Society->

does not allocate enough money to Uganda Prisons Services. This has resulted not only in prisoners almost starving and being naked,¹²⁶⁶ but it has also led to rehabilitation programmes being provided by non-governmental organisations such as faith-based organisations.¹²⁶⁷

In Mauritius, the prison authorities provide different rehabilitation programmes in prisons. These include education, moral instruction, health service, vocational training and sports.¹²⁶⁸ The Prison authorities ‘in close collaboration with the Trust Fund for the Treatment and Rehabilitation of Drug Addicts, the Probation Service, the Social Security Department and also the Employment Service have elaborated a part time Pre-Release Program for the benefit of the detainees’ which aims ‘to encourage detainees to retain links with their families and the community at large and preparing them for their gradual return to society in a variety of ways and this is, in a very significant manner, strengthening the role of this service in the community.’¹²⁶⁹ Prisoners who participate in the scheme attend lectures which address different aspects of prison life.¹²⁷⁰ As pointed out above,

Prison-Reform/newsletter/cspri-newsletter/archive-of-cspri-newsletter/newsletter-14.pdf (accessed 7 March 2009).

¹²⁶⁶ See Karugaba, ‘Police, Prisons Run Out of Food’ 4 December 2008, *The New Vision*, at <http://www.newvision.co.ug/D/8/13/662855> (accessed 10 March 2009).

¹²⁶⁷ Interview with Mr. Robert Omite, Commissioner Welfare and Rehabilitation 10 March 2009 (who said that there are several faith-based organisations that provide rehabilitation programmes in prisons).

¹²⁶⁸ See ‘Activities’ at

http://www.gov.mu/portal/site/prisons/menuitem.123d5e7025df95eef4a9e75b0bb521ca/?content_id=3f410e3e8ef68010VgnVCM100000ca6a12acRCRD (accessed 7 March 2009).

¹²⁶⁹ See ‘Projects: Pre-Release Scheme’ at

<http://www.gov.mu/portal/site/prisons/menuitem.c9a355ecf9be5d2ff4a9e75b0bb521ca/#5.Pre-Release%20Scheme> (accessed 7 March 2009).

¹²⁷⁰ These lectures are on: the rehabilitation of drug addicts; drug abuse; Aids; communicable and non-communicable diseases; human values; family life education; man and his environment; and employment and nutrition. See ‘Lectures’ at

rehabilitation is one of the conditions that the Supreme Court has highlighted as essential before the prisoner serving a penal servitude for life is released.¹²⁷¹

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<http://www.gov.mu/portal/site/prisons/menuitem.c9a355ecf9be5d2ff4a9e75b0bb521ca/#5.Pre-Release%20Scheme> (accessed 7 March 2009).

¹²⁷¹ See generally 6.2.1 above.

CHAPTER VII

GENERAL CONCLUSION

As mentioned earlier, each chapter has its own conclusion and recommendations and most of the recommendations made earlier will not be repeated here. However, the following general conclusions and observations merit attention.

Chapter two of the study has dealt with the three major theories of punishment – retribution, deterrence and rehabilitation. The author's objective was not to point out which of the three objectives of punishment is more or should be more applicable to the sentence of life imprisonment. The author's objective was rather to discuss in detail the strength(s) and weakness(es) of each of these theories of punishment and to demonstrate which of them has been emphasised by the international criminal tribunals and courts in the selected jurisdictions of Mauritius, Uganda and South Africa in sentencing offenders to life imprisonment. It has been illustrated that both the international criminal tribunals (the ICTY and the ICTR) and courts in Mauritius, Uganda and South Africa have emphasised deterrence and retribution in sentencing offenders to life imprisonment. The difficult question that arises is how should a judicial balance be struck between the three main aims of punishment when considering the imposition of a life sentence? Sentencing is inherently difficult as different factors come into play to influence the imposition of a lenient or heavy penalty. These factors could include the seriousness of the offence, the personal characteristics of the offender, and the manner in which the offence was committed. Naturally, the first point of reference should be the piece of legislation that

the judicial officer is interpreting or applying in imposing a life sentence. If the law requires the judicial officer to emphasise any of the above aims of punishment in imposing a life sentence, he has to option but to emphasise that objective of punishment. However, if the judicial officer has a wide discretion, whether deriving it from a piece of legislation or court practice, to determine which aim of punishment should be emphasised in imposing a life sentence, he should look at factors such as the seriousness of the offence or the manner in which it was committed in order to determine whether to impose a life sentence or not. However, caution should be exercised so that factors that were considered in convicting the offender of a particular crime are not the same factors that are relied on in imposing a severe sentence. This is a difficult balance to strike but an effort must be made to ensure that the offender is not prejudiced at sentencing.

Chapter three has dealt with the sentence of life imprisonment before international criminal tribunals and has particularly illustrated the theories of punishment that these tribunals have emphasised in sentencing offenders to life imprisonment. The following conclusions have been drawn from the discussion of the jurisprudence or the relevant documents of the international tribunals with regard to life imprisonment: retribution and deterrence are emphasised more than any purpose of punishment; the Nuremberg and Tokyo Tribunals did not state the purpose the punishments they imposed were to serve; the Tribunals generally pay scant attention to the discussion of the objectives of punishment; the ICTR in some cases erroneously equates life imprisonment with imprisonment for the remainder of the offender's life; and the ICC Statute approaches punishment in a

manner that is more human rights friendly than the statutes of the ICTY, the ICTR and the SCSL. It is recommended that international tribunals should always engage in a robust discussion of the objectives/purposes of punishment at the sentencing stage so that the offenders and their counsel know whether the sentence imposed reflects the objectives that the Tribunal intends to achieve.

The author has illustrated, *inter alia*, that the ICTR has drawn a distinction between the sentence of life imprisonment on the one hand and imprisonment for the remainder of the offenders' life on the other. It has been argued that in the light of the human rights jurisprudence emanating from some African countries such as South Africa and Namibia, and from regional and international human rights bodies, such as, the African Commission on Human and Peoples' Rights, the European Court of Human Rights, and the Committee against Torture and the Human Rights Committee, emphasising the rights to human dignity and to freedom from cruel, inhuman and degrading treatment or punishment, the ICTR's argument that an offender sentenced to imprisonment for the remainder of his life will be imprisoned until his death is not persuasive. Offenders sentenced to imprisonment for the remainder of their lives should have a real and tangible prospect of being released otherwise they are likely to petition human rights bodies or courts in countries in which they are serving their sentences arguing that life imprisonment without the possibility of release amounts to cruel, inhuman and degrading treatment or punishment.

In Chapter four the author has demonstrated that the sentence of life imprisonment has different meanings in different countries and that it has different meanings in Mauritius and South Africa. The author has also discussed the history and legal developments relating to life imprisonment in South Africa, Mauritius and Uganda. In South Africa, life imprisonment has been used since 1906 and has gone through different changes. Before the abolition of the death penalty in 1995, life imprisonment was a discretionary sentence in all circumstances and very few people were sentenced to life imprisonment. However, after the abolition of the death penalty, life imprisonment was made a minimum sentence for the most serious offences unless there are substantial and compelling circumstances for the court to justify the imposition of a lesser sentence. The number of offenders sentenced to life imprisonment since it was introduced as minimum sentence has increased drastically. The author has illustrated, *inter alia*, that in Mauritius, as in South Africa, the number of offenders sentenced to life imprisonment (penal servitude for life) increased after the abolition of the death penalty.

It has been illustrated that the Constitutional Court of Uganda held that if the death penalty is to be abolished and replaced with life imprisonment, an offender sentenced to life imprisonment should be detained until death unless pardoned by the President. It is argued that abolishing the death penalty does not mean that life imprisonment as the ultimate sentence should mean imprisonment for the remainder of the offender's life. In some African countries such as Rwanda, Namibia and South Africa where the death penalty was abolished, there are laws providing for the release of

offenders sentenced to life imprisonment. The following reasons have been given in support of the view that life imprisonment where the offender should be detained until his death as suggested by the Constitutional Court of Uganda is untenable. One, courts in South Africa, Namibia and German have held that life imprisonment where the offender does not have the possibility of being released is inhuman and degrading (with some judges of the European Court of Human Rights holding that an offender sentenced to life imprisonment should have a real and tangible prospect of being released and this prospect must be contained in legislation). Two, were the Ugandan law to be amended to provide that life imprisonment means ‘whole-life’, it would mean that prisoners sentenced under the ‘whole-life’ idea would most probably not be rehabilitated because such prisoners would have no incentive in participating in rehabilitation programmes. Three, disciplining offenders serving ‘whole life’ would be a challenge to prison officials because any sentence of imprisonment imposed on such prisoners will run concurrently with the sentence they are already serving and in effect they would not have been punished for disobeying prison rules. Therefore, they would not be deterred from breaking prison rules because even other punishments like solitary confinement must be administered in accordance with the strict provisions of the Prisons Act. Four, ‘whole life’ life imprisonment has no support in international criminal law because, *inter alia*, the statutes of the ICTY, ICTR and ICC provide for mechanism for the release of offenders sentenced to imprisonment for war crimes and crimes against humanity.

It should be emphasised here that the Constitutional Court of Uganda's recommendation that an offender sentenced to life imprisonment should be detained until his death unless pardoned by the state president is a violation of Article 24 of Uganda's Constitution which prohibits cruel, inhuman and degrading treatment or punishment. It is also a violation of Uganda's regional and international obligations in the various human rights treaties it has ratified such as the African Charter on Human and Peoples' Rights, the International Covenant on Civil and Political Rights and the UN Convention against Torture all of which specifically prohibit cruel, inhuman and degrading treatment or punishment. The same argument applies to other African countries such as Kenya, Zimbabwe and Ghana where life imprisonment means that the offender will be imprisoned for the rest of his life unless pardoned by the state president. A sentence, for example, of 50 years' imprisonment which would in practice also result into the detention of the offender until death, like life imprisonment with only a possibility of executive pardon, also amounts to cruel, inhuman and degrading treatment or punishment and should not be imposed and if imposed should be challenged either before national courts or before regional and international human rights bodies.

Chapter five has discussed the offences that attract life imprisonment in Mauritius, South Africa and Uganda; the discretion of courts in imposing life sentences, and the theories of punishment which courts have emphasised in sentencing offenders to life imprisonment. It has been illustrated that unlike in South Africa and Mauritius where life imprisonment is the minimum sentence in some circumstances, in Uganda a

judge is not obliged to sentence an offender to life imprisonment. It is recommended that in the event of the abolition of the death penalty, Uganda should not introduce life imprisonment as a mandatory sentence as this would be challenged in the Constitutional Court for violating the offenders' right to a fair trial as they would not be able to plead in mitigation. A mandatory life imprisonment will also be challenged in the Constitutional Court for violating the constitutional doctrine of separation of powers.

The Ugandan Prisons Act, unlike the South African Correctional Services Act, does not provide for the maximum number of years that an offender sentenced to a specified number of years of imprisonment should serve before being released on parole. It is recommended that the Prisons Act needs to be amended to provide for the maximum number of years that a person serving any sentence, be it for 50 years, should serve, after which he should be considered for parole. Unlike the South Africa Correctional Services Act which specifically provides that two or more life sentences must run concurrently, the Ugandan Prisons Act is silent on the issue of whether two or more life sentences should run concurrently. It is recommended that, Parliament needs to amend the Prisons Act to provide specifically that more than one life sentence imposed on one person should run concurrently, and also that any sentence of imprisonment imposed on a prisoner serving a life sentence should run concurrently with the life sentence.

In South Africa offences that attract life imprisonment can be categorised into two groups: One, where courts have wide discretion to decide whether

the offender should be sentenced to life imprisonment – cases where life is not the minimum sentence; and two, where life imprisonment is the minimum sentence unless there are substantial and compelling circumstances which justify the imposition of a lesser sentence. Most of the offenders serving life imprisonment in South Africa were sentenced in terms of the minimum sentences legislation and many more are likely to be sentenced to life imprisonment since Regional Courts are now empowered to impose this sentence since December 2007. There is thus a need to investigate the likely effect of the extended jurisdiction of the Regional Courts to impose life sentences on the size of the South Africa prison population. It is more likely that the number of prisoners sentenced to life imprisonment will increase further when Regional Courts also impose life sentences. In this scenario the quality of legal representation of persons facing life imprisonment becomes critical.

In Mauritius, there are cases under the Criminal Code, for example, killing others by explosives, where life imprisonment is mandatory and also cases where it is a minimum sentence. It is argued that the relevant provisions of the Criminal Code which oblige court to impose a life sentence on an offender convicted of the relevant offence or offences, violate the right to a fair trial and cannot pass the constitutionality test. It is recommended that there are two options to ensure that mandatory life imprisonment is removed from the Criminal Code: One, any person sentenced to life imprisonment under any of those provisions should challenge their constitutionality on the ground that they violate the rights to a fair trial and not to be subjected to inhuman and degrading punishment. The second and

readily available option is for Parliament to amend the relevant provisions and make life imprisonment a discretionary sentence. In terms of the 2007 amendments to the Criminal Code, an offender convicted of offences such as murder or homicide, has to be sentenced to penal servitude for life unless there are substantial and compelling circumstances. Mauritian courts are encouraged to refer to South African jurisprudence as a persuasive interpretation tool in their attempt to define or enumerate what are substantial and compelling circumstances.

The study has dealt with courts that have jurisdiction to impose life imprisonment in Uganda, Mauritius and South Africa. It has been demonstrated that life imprisonment in Uganda can only be imposed by the High Court, the Chief Magistrates' Court, the Division Court Martial and the General Court Martial. In South Africa life imprisonment can be imposed by the High Court and the Regional Court. Although in both jurisdictions appellate courts can also increase any sentence to life imprisonment (the Court of Appeal and the Supreme Court in Uganda and the Supreme Court of Appeal in South Africa). In Mauritius it is only the Supreme Court that is empowered to impose a life sentence.

The study has also dealt with the question of legal representation in Uganda, Mauritius and South Africa for accused faced with a life sentence on conviction. It has been illustrated that the difference between Uganda on the one hand and Mauritius and South Africa on the other hand, with respect to the right to legal representation for people accused of offences that carry life imprisonment, is that in Uganda that right is constitutionally protected irrespective of the accused's ability to pay for his legal

representation whereas in Mauritius and South Africa it is dependant on amongst other factors, the accused's inability to pay for his legal representation.

Chapter five also examines the theories of punishment that courts in Mauritius, South Africa and Uganda have emphasised in sentencing offenders to life imprisonment. In all three jurisdictions, courts have emphasised deterrence over other theories or objectives of punishment. This is so notwithstanding the fact that these are three different legal systems in which the punishment of life imprisonment is approached from different angles. However, in South Africa, courts have gone to great length than in Uganda and Mauritius to explain why rehabilitation as an objective of punishment is not appropriate in cases of life imprisonment. The fact that courts in all the three jurisdictions are emphasising deterrence in sentencing offenders to life imprisonment is worrying in the light of the fact that the prisons authorities in these countries consider the rehabilitation of the offender as their major objectives. Another important feature to note about life imprisonment in these three countries is that in Uganda, most of the offenders serving life imprisonment were convicted of defilement whereas in South Africa the offenders were convicted for rape and murder, and in Mauritius, drug trafficking. This shows that sentencing is not only influenced by the decision the judge makes but also by the statutory law itself.

Chapter six discusses the law relating to the release of offenders sentenced to life imprisonment in Mauritius, Uganda and South Africa. In South Africa, the release of offenders serving life sentences is governed by three

different release procedures each depending on when the sentence was imposed. Those sentenced before and shortly after 1996 their release is governed by the Department of Correctional Services 1996 Release Policy which provides that a prisoner sentenced to life imprisonment was to be considered for parole after serving at least 20 years of the sentence or, once he had reached the age of 65 years, after serving 15 years. Prisoners sentenced in 1997 and thereafter their release is governed by the 1997 Parole and Correctional Supervision Amendment Act (PCSAA) which provides that a prisoner serving a life sentence shall not be released on parole before serving at least 25 years of the sentence. However, parole could be granted to a prisoner who reached the age of 65 years while serving his sentence on condition that such a prisoner had served at least 15 years of his prison term. In practice, the first prisoner serving a life sentence whose parole is governed by the 1996 Release Policy will have to be considered for release in 2016 and the one whose parole is governed by the PCSAA will have to be considered for release in 2022. In 1998, the new Correctional Services Act was enacted but the provision relevant to the release only came into force in October 2004. Section 73(6)(b)(iv) provides that a prisoner serving a life sentence ‘may not be placed on parole until he or she has served at least 25 years of the sentence but a prisoner on reaching the age of 65 years may be placed on parole if he or she has served at least 15 years of such a sentence.’

In Uganda, in terms of the Prisons Act, an offender sentenced to life imprisonment is supposed to be released after serving a maximum of 20

years' imprisonment and could also be released on parole without completing 20 years' imprisonment. Unlike in Uganda and South Africa where the prison laws specifically provide for the release of offenders sentenced to life imprisonment, in Mauritius there is no such law. Offenders sentenced to penal servitude for life in Mauritius could be pardoned by the President using his prerogative of mercy under section 75(1) of the Constitution on the recommendation of Commission on the Prerogative of Mercy, established under section 75(2) of the Constitution. The challenge with this approach is that prisoners do not know what is expected of them in order to be considered by the Commission as suitable for recommendation to the President for pardon or early release.

The Supreme Court of Mauritius appears to have created a new window through which offenders sentenced to penal servitude for life will be released in the future. In the 12 January 2009 decision of *De Boucherville Roger FP v The State of Mauritius* the Supreme Court held that the following factors should be considered by the Court in determining whether or not an offender sentenced to penal servitude for life should be released: One, the Court will look at the nature and circumstances under which the offence for which the offender was sentenced to penal servitude for life was committed; two, the Court will ask the state to adduce evidence regarding the offender's conduct during the period of imprisonment; three, the Court will evaluate evidence relating to the applicant's age and whether he suffers from ill-health. Finally, before ordering the release of a prisoner, the Court will consider the manner in which the Mauritian population and the

potential criminals would react to the applicant's early release. Therefore, in Mauritius, there are two ways through which an offender serving a penal servitude for life could be released. One, by applying to the Supreme Court for a reduction of sentence; and two, by applying to the Commission on the Prerogative of Mercy to recommend to the President that the applicant's sentence be commuted. In Mauritius, although according to the Privy Council and the Supreme Court's jurisprudence offenders sentenced to life imprisonment have the possibility of being released, there is no piece of legislation expressly providing for the mechanism that has to be followed. It is recommended that there is a need for Mauritius to amend its prisons laws to specifically provide for the release of offenders serving life imprisonment.

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Appendix 1 – Full list of reference to Chart 1

In 1949, 60 offenders were sentenced to death and 3 to life imprisonment; in 1950, 77 offenders were sentenced to death and 4 to life imprisonment; in 1951, 73 offenders were sentenced to death and 3 to life imprisonment; in 1952, 77 offenders were sentenced to death and 1 to life imprisonment; in 1953, 75 offenders were sentenced to death and 1 to life imprisonment; in 1954, 115 offenders were sentenced to death and 1 to life imprisonment; 1955-56, 94 offenders were sentenced to death and 19 to life imprisonment; 1956-57, 123 offenders were sentenced to death and 34 to life imprisonment; in 1957-58, 128 offenders were sentenced to death and 3 to life imprisonment; 1958-59, 105 offenders were sentenced to death and 16 to life imprisonment; in 1959 -60, 134 offenders were sentenced to death and 23 to life imprisonment; 1960 -61, 108 offenders were sentenced to death and 23 to life imprisonment; 1961-62, 177 offenders were sentenced to death and 20 to life imprisonment; in 1962-63, 149 offenders were sentenced to death and 21 to life imprisonment. See *Special Report No. 272, Statistics of Offences and Penal Institutions, 1949-1962* (Bureau of Statistics, 1964) Table 10 – Convicted Prisoners Admitted According to Nature of Sentence, 1949-1963. In 1963-64, 157 offenders were sentenced to death and 48 to life imprisonment; in 1964-65, 124 offenders were sentenced to death and 21 to life imprisonment; 1965 -66, 138 offenders were sentenced to death and 5 to life imprisonment; 1966-67, 143 offenders were sentenced to death and 5 to life imprisonment; 1967-68, 115 offenders were sentenced to death and 34 to life imprisonment; in 1968 -69, 107 offenders were sentenced to death 13; in 1969-70, 95 offenders were sentenced to death and 19 to life imprisonment. For the respective years, see *Statistics of Offences and Penal Institutions, 1963-64, Report No. 08-01-01* (Table 10); *1965-66, Report No. 08-01-02* (Table 15); *1965-66, Report No. 08-01-02* (Table 15); *1966-67, Report No. 08-01-03* (Table 16); *1967-68, Report No. 08-01-04* (Table 14); *1968-69, Report No. 08-01-05* (Table 16); and *1969-70, Report No. 08-01-06* (Table 16). All the Reports were printed by the Government Printer, Pretoria. In the year 1977-78, 151 offenders were sentenced to death and 17 to life imprisonment; in 1978-79, 158 offenders were sentenced to death and 12 to life imprisonment; 1979-80, 151 offenders were sentenced to death and 2 to life imprisonment; 1980-81, 148 offenders were sentenced to death and 8 to life imprisonment; 1981-82, 124 offenders were sentenced to death and 7 to life imprisonment; 1982-83, 171 offenders were sentenced to death and 4 to life imprisonment; 1985-85, 203 offenders were sentenced to death and 4 to life imprisonment; 1985-86, 126 offenders were sentenced to death and 4 to life imprisonment; 1986-87, 226 offenders were sentenced to death and 6 to life imprisonment. See *Statistics of Offences 1968-1969 to 1978-1979, Report No. 08-01-10* (Table 5.1); *1968-1969 to 1978-1979, Report No. 08-01-10* (Table 5.5); *1979-1980, Report No. 08-01-11* (Table 5); *1980-81, Report No. 08-01-12* (Table 5); *1981-1982, Report No. 08-01-13* (Table 5); *1982-1983, Report No. 08-01-14*

(Table 5); 1984-1985, Report No. 08-01-16 (Table 5); 1985-1986, Report No. 08-01-17 (Table 5); Report No. 00-11-01 (1986/87) (Table 5) respectively. All the reports from 1977- 1986, were printed by the Government Printer, Pretoria. However, that of 1986/87 was printed by the Central Statistics Services. In 1987-88, 204 offenders were sentenced to death and 12 to life imprisonment; 1988-89, 154 offenders were sentenced to death and 6 to life imprisonment; 1989-90, 123 offenders were sentenced to death and 9 to life imprisonment; 1990-91, 64 offenders were sentenced to death and 28 to life imprisonment; 1991-92, 65 offenders were sentenced to death and 28 to life imprisonment; 1992-93, 80 offenders were sentenced to death and 18 to life imprisonment; 1993-94, 149 offenders were sentenced to death and 15 to life imprisonment; 1994-95, 35 offenders were sentenced to death and 49 to life imprisonment; and 1995-96 no offender was sentenced to death but 122 were sentenced to life imprisonment. See *Crimes: Prosecutions and Convictions with Regard to Certain Offences*, Report No. 00-11-01 (1987/88) (Table 5); Report No. 00-11-01 (1988/89) (Table 5); Report No. 00-11-01 (1989/90) (Table 5); Report No. 00-11-01 (1990/91) (Table No.5); Report No. 00-11-01 (1991/92) (Table 5); Report No. 00-11-01 (1992/93) (Table 5); Report No. 00-11-01 (1993/94) (Table 5); Report No. 00-11-01 (1994/95) (Table 5); and Report No. 00-11-01 (1995/96) (Table 5) respectively). All the reports from 1987-1995 were printed by the Central Statistical Services.

Appendix 2: Offences under Part 1 of Schedule 2 of the MSL

Murder When

- (a) it was planned or premeditated;
 - (b) the victim was— (i) a law enforcement officer performing his or her functions as such whether on duty or not; or (ii) a person who has given or was likely to give material evidence with reference to any offence referred to in Schedule 1 to the Criminal Procedure Act, 1977 (Act No. 51 of 1977)¹²⁷² at criminal proceedings in any court;
 - (c) the death of the victim was caused by the accused in committing or attempting to commit or after having committed or attempted to commit one of the following offences:
 - (i) Rape: or
 - (ii) Robbery with aggravating circumstances: or
 - (d) The offence was committed by a person or group of persons or syndicate acting in the execution or furtherance of a common purpose or conspiracy.
-

Rape

- (a) when committed—
 - (i) in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice;
 - (ii) by more than one person where such persons acted in the execution or furtherance of a common purpose or conspiracy;
 - (iii) by a person who has been convicted of two or more offences of rape, but has not yet been sentenced in respect of such convictions: or
 - (iv) by a person, knowing that he has the acquired immune deficiency syndrome or the human immune deficiency virus:
 - (b) where the victim—
 - (i) is a girl under the age of 16 years;
 - (ii) is a physically disabled woman who, due to her physical disability, is rendered particularly vulnerable: or
 - (iii) is a mentally ill woman as contemplated in section 1 of the Mental Health Act 1973 (Act No. 18 of 1973): or
 - (c) Involving the infliction of grievous bodily harm.
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¹²⁷² There offences are: treason, sedition, murder, culpable homicide, rape, indecent assault, sodomy, bestiality, robbery, kidnapping, child stealing, assault when dangerous wounds inflicted, arson, malicious injury to property, breaking or entering any property with intent to commit an offence, theft, receiving stolen property, fraud, forgery or uttering a forged document knowing it to have been forged, any offence punishable with the period of imprisonment exceeding six months without the option of fine, offences relating to the coinage, escaping from lawful custody, any conspiracy, incitement or attempt to commit any of the offences mentioned above.

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