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INHUMAN SENTENCING OF CHILDREN: A FOCUS ON ZIMBABWE AND BOTSWANA

A thesis submitted in fulfilment of the requirements for the degree Doctor of Laws (LLD) in the Department of Public Law and Jurisprudence, Faculty of Law at the University of the Western Cape

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Abstract

The prevalence of corporal punishment and life imprisonment sentences for children in Africa is tied to their legal history. Colonialism had an extensive impact on the criminal law of most African States, including the handling of children in conflict with the law. African States adopted models of juvenile justice which were a result of social, economic and political circumstances occurring in Europe at that time. However, these circumstances were not necessarily similar to the circumstances prevalent in African States at the same time, neither was the image of the colonial country's child similar to that of the African child. The coming into force of the Convention on the Rights of the Child, which has been ratified by all nations, except the United States, created a uniform platform for all State Parties to create separate justice systems for dealing with children in conflict with the law and abolish inhuman sentences such as life imprisonment and corporal punishment.

In light of the obligation to abolish inhuman sentences and create separate systems for dealing with children in conflict with the law, this thesis discusses Zimbabwe and Botswana's compliance with these obligations. The thesis proposes a sentencing guideline for children in conflict with the law in Zimbabwe and Botswana. The study also proposes an alignment of the national laws of these two countries on sentencing children to reflect their international obligations.

Keywords

Children's Rights

CRC General Comment 24

Convention on the Rights of the Child

Corporal Punishment

Detention during the President's Pleasure

Diversion

Global Study on Children Deprived of Liberty

Inhuman Sentencing

Juvenile Justice

Life Imprisonment

Minimum age of Criminal Responsibility

Acronyms/Abbreviations

African Charter	African Charter on Human and People‘s Rights
ACRWC	African Charter on the Rights and Welfare of the Child
African Committee	African Committee of Experts on the Rights and Welfare of the Child
CRC	Convention on the Rights of the Child
CRC Committee	Committee on the Rights of the Child
ICCPR	International Covenant on Civil and Political Rights
MACR	Minimum Age of Criminal Responsibility
LOWP	Life Imprisonment Without Parole
LWP	Life Imprisonment with Parole
GC	General Comment

Declaration

I, Sheena Mutsvara, do hereby declare that, *Inhuman Sentencing of Children: A focus on Zimbabwe and Botswana* is my own work, that it has not been submitted for other degree or to any other institution of higher learning, and that I have properly acknowledged all the sources which I have used by means of complete references.

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Dedication

To ABBA FATHER, My Daddy,

LORD JESUS, My Life,

HOLY GHOST, My Helper,

YOU ARE MY EVERYTHING

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CHAPTER 1: INTRODUCTION

1.1 Background of the Study

Internationally, the development of juvenile justice[1] can be traced to the child savers movement and the development of separate institutions for the reformation of children in distress - 'delinquent' children, orphaned children, runaways, children on the street, and children who commit offences, amongst others.[2] Before this development, young persons in conflict with the law were dealt with in terms of the general criminal justice system wherein they were treated with little or no distinction from adults in terms of the applicable criminal justice rules, procedures and sentencing options.[3]

Special trials and institutions for confining and controlling young people were established in the mid-19th century in Great Britain, where courts acquired the authority to intervene as *parens patriae* (Latin term for parent of the land) to protect the property rights of children.[4] In criminal justice, juveniles were tried in the same courts as adults until the Juvenile Court of Law was founded in Chicago, USA, in 1899.[5] The success of the first court dedicated to cases involving 'delinquent' children, led to the creation of other juvenile courts known colloquially

[1] The United Nations Office on Drug and Crime defines juvenile justice as a system of laws, policies, and procedures intended to regulate the processing and treatment of non-adult offenders for violations of law and to provide legal remedies that protect their interests in situations of conflict or neglect. See The United Nations Office on Drug and Crime, 2006 available at *http://www.unodc.org* (accessed 10 November 2019). Save the Children defines juvenile justice as the legislation, norms, standards, procedures, mechanisms and institutions specifically designed for monitoring young persons who are alleged as or accused of infringing the criminal law. It can be a legislation for protection rather than of punishment, affecting children in conflict with the law as well as children at risk requiring a form of protection, or educational assistance for children below the age of criminal responsibility. See Save the Children Italy *Children Rights and Juvenile Justice: Best practices and lesson learned from Save the Children Italy National and International programs* (2016) 9.

[2] Sloth- Nielsen J 'Child Justice' in Boezaart T *Child Law in South Africa* 2ed (2018) 677.

[3] Zimring F E 'The common thread: Diversion in the jurisprudence of juvenile courts' in Rosenheim MK *et al* (eds) A *Century of Juvenile Justice* (2002) 142.

[4] Hoover H C 'Separate justice: Philosophical and historical roots of the juvenile justice system' available at: *https://www.cengage.com/custom/static_content/troy_university/data/CJ3325.pdf* (accessed 19 May 2018).

[5] Zimring (2002) 150.

as Children's Courts or family courts, in other states in America.[6] In recent times the old and derogatory expression of 'juvenile delinquent' has been replaced with a generic term 'children in conflict with the law' to denote persons below the age of 18 years who come into contact with the justice system as a result of committing a crime or being suspected of committing a crime.[7] In Africa however, the development of juvenile justice systems was shaped by a colonial legacy under which the legal framework in most of the countries mirrored laws received from the colonising country[8] - Britain in the case of Zimbabwe, Botswana and most of sub-Saharan Africa. .[9] This meant that law received from the Children and Young Persons Act of 1969 of Britain, was the legal framework for dealing with issues affecting children in these countries, including juvenile crime.[10] As such, the sentencing of children which is the focal aspect of this thesis flowed from the British laws for both Zimbabwe and Botswana.[11]

Apart from the creation of special courts, the philosophy behind the treatment of children in conflict with the law was very significant and is still influential for theories of juvenile justice in international law. The most prominent theories are the welfare theory and justice/just deserts theory.[12] These theories are argued to be products of western philosophical, social and criminological research.[13] The starting point of the welfare theory is a presumption that children in general and those in conflict with the law in particular, are vulnerable and as such,

[6] Vengesai S *Juvenile Justice in Zimbabwe: A Contradiction between Theory and Practice: An analysis of Zimbabwe's compliance with Article 37 and 40 CRC and Article 17 ACRWC* (unpublished LLM thesis, Tilburg University, 2014) 2.
[7] Assim M U 'Fulfilling Article 40 of the CRC under the Tanzanian Law of the Child Act 2009' (2013) 15 *Article 40 the Dynamics of Youth Justice & the Convention on the Rights of the Child in South Africa* 11.
[8] Odongo OG 'Kenya' in Decker SH & Marteache N (eds) *International Handbook of Juvenile Justice* 2 ed (2017) 29.
[9] Sloth – Nielsen J 'Sloth – Nielsen J 'Children and Informal Justice Systems in Africa' in Brinig M (ed) *International Survey of Family Law* (2018) 1.
[10] Muncie J & Goldson B 'States of transition: Convergence and diversity in international youth justice' in Muncie J & Goldson B (eds) *Comparative Youth Justice: Critical Issues* (2006) 9. See also Odongo (2017).
[11] A discussion of the sentencing laws of these two countries will be done later in this thesis.
[12] Odongo G O *The Domestication of International Law Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context* (unpublished PhD thesis, University of the Western Cape, 2005) 19.
[13] Odongo (2005) 19.

they deserve special protection.[14] Such special protection can only be granted by the State by way of establishing a separate criminal justice system for them which will offer them a different treatment from the one accorded to adults.[15] The welfare theorists borrowed from the doctrine of *parens patriae* – where children were not perceived as holders of rights, thus advocating the treatment of delinquent children as objects of intervention.[16] The problem with welfarism was that it granted wide discretion to juvenile court judges and thus led to a departure by these judges from the established principles of due process, leading to arbitrariness.[17]

In stark contrast to the welfare theory, children are perceived under the justice theory as mature, rational, self-determining, fully responsible for their actions and thus accountable before the law.[18] The justice or just deserts theory advocates for informed and transparent decisions through due process of the law in courts, whose powers are adapted to accommodate and recognise children's status and where criminal justice safeguards applied to adults are extended to children.[19] Punishment is portrayed as rational, consistent and determinate: 'fitting' the crime, while protecting the child against disproportionate or arbitrary punitive measures.[20] The justice theory is a significant departure from the notion of the 'immature' and 'innocent' child under the welfare theory, and an erosion of the distinction between an adult and innocent offender.[21] As a result, a juvenile justice system modelled solely on a justice philosophy will not primarily focus on the issue of protecting the best interests of the child.[22]

[14] Vengesai (2014) 4. See also Raymond L *Transformation of the juvenile justice system: a paradigm shift from a punitive justice system of the old order to a restorative justice system of the new dispensation* (unpublished MPA thesis, University of the Western Cape, 2002) 24.
[15] Vengesai (2014) 5. See also Young S, Greer B & Church R 'Juvenile delinquency, welfare, justice and therapeutic interventions: a global perspective' (2017) 41(1) *British Journal of Psychiatry Bulletin* 23.
[16] Vengesai (2014) 4. See Hollingsworth K 'Theorising children's rights in youth justice: The significance of autonomy and foundational Rights' (2013) 76 (6) *The Modern Law Review* 1050.
[17] Vengesai (2014) 5.
[18] Odongo (2005) 32.
[19] Scraton P & Haydon D 'Challenging the criminalisation of children and young people: securing a rights based agenda' in Muncie J, Hughes G & Mc Laughlin E (eds) *Youth Justice: Critical Readings* (2002) 311.
[20] Scraton P & Haydon D (2002) 311.
[21] Odongo (2005) 29.
[22] Odongo (2005) 30.

A more 'recent' theory of restorative justice has become the central theme in the theoretical and policy debates in juvenile justice and criminal justice reform worldwide.[23] Restorative justice has gained prominence in juvenile justice as an alternative discourse which seeks to address the perceived deficiencies inherent in the earlier philosophies.[24] It has been characterised as a form of justice that relies on reconciliation rather than punishment.[25] Restorative justice is defined as a problem-solving approach to crime, which involves the parties themselves and the community generally, in an active relationship with statutory agencies.[26] The purpose of this meeting is for the offender to acknowledge the harm done and consider redressing the damage in the best possible way and putting strategies in place to avoid the same mistake happening again.[27] The restorative justice movement raises the possibility of less formal crime control and more informal offender/victim participation and harm minimisation.[28]

According to Odongo, the welfare-justice continuum cannot, even in the extreme, exist in pure forms.[29] This is because, these theories were developed in the absence of a child rights' orientation that was at the time, nominally developing, if not absent altogether.[30] A binding children's rights centred approach to juvenile justice was introduced in 1990, by the coming

[23] Imiera P 'Therapeutic jurisprudence and restorative justice: healing crime victims, restoring the offenders' (2018) 51 *De Jure* 91. See also United Nations Office on Drugs and Crime Handbook on Restorative Justice Programmes (2006) 26-27, available at *https://www.unodc.org/pdf/criminal_justice/Handbook_on_Restorative_Justice_Programmes.pdf* (accessed 10 October 2019).

[24] Odongo (2005) 29. According to Muncie (2013) the restorative justice movement is meant to further rather than diminish children's rights.

[25] Bazemore G & Schiff M *Juvenile Justice Reform Restorative Justice: Building theory and practice from practice* (2011) 27. See also Odongo (2005) 29.

[26] Gavrielides T *Restorative Justice Theory and Practice: Addressing the Discrepancy* (2007) 27. Restorative justice is also defined as a process to involve, to the extent possible, those who have a stake in a specific offence to collectively identify and address harms, needs and obligations in order to heal and put things as right as possible – See Zehr H *The Little Book of Restorative Justice* (2015) 40.

[27] Skelton A 'Restorative justice as a framework for juvenile justice reform: A South African perspective' (2002) *British Journal of Criminology* 500.

[28] Muncie J 'International juvenile (in) justice: Penal severity and rights compliance' (2013) 2 (2) *International Journal for Crime, Justice and Social Democracy* 44.

[29] Odongo (2005) 16.

[30] Odongo (2005) 16.

into force of the Convention on the Rights of the Child (CRC), which provisions will be the central focus of this thesis.[31] Against the backdrop of the CRC, international rules and guidelines, this thesis discusses the concept of sentencing in the juvenile justice systems of two counties – Botswana and Zimbabwe. Apart from sentencing, this thesis will also discuss the general aspects of juvenile justice which are related to the sentencing phase such as the determination of a child's age, legal representation, and the minimum age of criminal responsibility, among others. This thesis will focus on two forms of sentences which are life imprisonment in all its forms, such as Detention during the President's Pleasure and judicial corporal punishment, which sentences are presented in this thesis as inhuman sentences when passed upon children. Thus, throughout the thesis, the discussion will be centred on these two forms of inhuman sentences. What follows is a clarification of the various concepts and terms that will be used continually throughout the thesis.

1.2 Conceptual clarification

In order to present a sound academic research study, it is important to define some key concepts as a basis for the theoretical framework.

1.2.1 Inhuman Punishment/ Sentencing

The concept of inhuman sentencing used in this research has been derived from Article 37 (a) of the CRC which prohibits inhuman punishment of children. The term punishment is

[31] UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577. See discussion of the CRC and other soft laws in Chapter 2 at 2.2 and 2.3.

interpreted to mean sentencing in this thesis and is used interchangeably. The provision states that:

> *(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;*

What constitutes inhuman punishment has not been defined in international law. However, a literal reading of part (b) of Article 37 indicates that two forms of punishments which amount to inhuman punishment/sentencing are explicitly prohibited – capital punishment and life imprisonment without parole. This thesis, therefore, submits that inhuman punishment refers to capital punishment and life imprisonment of children without parole. The basis of the description of these punishments as 'inhuman' is their direct negative effect on the humanity of children. The Oxford English Dictionary defines inhuman - applied to persons, as: 'not having the qualities proper or natural to a human being; especially destitute of natural kindness or pity; brutal, unfeeling and cruel.'[32] The CRC Committee has found the sanction of corporal punishment to violate article 37 (a) of the Convention, which prohibits all forms of cruel, inhuman and degrading treatment or punishment.[33] In light of the CRC Committee's finding, this thesis will additionally discuss the sentence of corporal punishment as an inhuman form of punishment. The sentence of corporal punishment is discussed at length in Chapter 4 of this thesis. A discussion of capital punishment is beyond the scope of this thesis because both Botswana and Zimbabwe have abolished the sentencing of children to capital punishment. As

[32] The Oxford Dictionary available at *https://en.oxforddictionaries.com/definition/inhuman* (accessed 23 May 2018).
[33] See UN Committee on the Rights of the Child (CRC), *General comment No. 24 (2019): Children's Rights in Juvenile Justice*, CRC/C/GC/24, para 75.

a result, two forms of punishments/sentences will be discussed which are judicial corporal punishment and life imprisonment.

1.2.2 Sentencing/ Punishment

The central characteristic of criminal law is that a violation of the rule results in punishment before the courts.[34] The main issue raised by the concept of punishment is the basis upon which the evils administered by the State on offenders can be justified.[35] Punishment is often justified as one of the aspects of a modern sovereign State.[36] In this aspect, the State has the responsibility of ensuring peaceable cooperation of individuals in society and one aspect of that is to establish a category of wrongs that amount to crimes.[37]

According to Canton, punishment has five components. Firstly, it involves imposing, pain, hardship, and deprivation or at least something unwanted.[38] It could be said that, unless a response to wrongdoing has that character, it would not be a punishment but something else, like ignoring, forgiving or rewarding.[39] Secondly, punishment must be for an offence.[40] The offence, however, must be not only, the occasion, but also the reason for punishment.[41] Thirdly, it must be imposed on the offender.[42] Fourthly, it must be imposed by an authority.[43] Unless the punishment is imposed by the relevant authority, it may be thought to be more of getting your own back or retaliation.[44] Lastly, it is always an act of censure or blame. It expresses

[34] Lippman M (ed) *Contemporary Criminal Law: Concepts, Cases, Controversies* 4 ed (2015) 54.
[35] Bagaric M *Punishment And Sentencing: A Rational Approach* (2001) 3.
[36] Ashworth A *Sentencing and Criminal Justice* 5 ed (2010) 75.
[37] Ashworth (2010) 75.
[38] Canton R *Why Punish? An Introduction to the Philosophy of Punishment* (2017) 3.
[39] Canton (2017) 3.
[40] Canton (2017) 4.
[41] Canton (2017) 4.
[42] Canton (2017) 4.
[43] Canton (2017) 5.
[44] Canton (2017) 5.

disapproval and declares the individual responsible for an offence.[45] The idea of punishment, therefore, is not only meant to serve as prevention of violence, but also to make the offender realise that what they have done is wrong.

The notion of sentencing, thus, reveals to us that it is that aspect of a justice system where a child who is found in conflict with the law is punished by a judicial or non – judicial authority for wrongdoing.[46] This thesis will argue that a punishment which affects the enjoyment of a child's life (in life imprisonment sentences) and physical punishment or other acts (in corporal punishment) should be abolished. As mentioned earlier above, a children's rights approach to the treatment of children in conflict with the law should be employed.

1.2.3 Detention During the President's Pleasure

Detention during the President's Pleasure is a form of a sentence used in Botswana for young offenders below the age of 18 who would otherwise be sentenced to death.[47] This sentence could be in 'such place and under such conditions as the President may direct.'[48] It is submitted that due to the uncertainty of the length of this sentence, it can be described as a form of life imprisonment sentence for children as will be argued in chapter 4 of this thesis.

[45] Canton (2017) 5.
[46] According to Terbalanche, sentencing is 'an action by an official criminal court imposing a sentence on a convicted offender - See Terblanche S S *A Guide to Sentencing in South Africa* 3 ed (2016) 7. Champion defines sentencing as the imposition of punishment on an offender after he or she has been convicted of a criminal offence. See Champion in Champion D *Sentencing: A Reference Book* (2008) 20.
[47] See discussion of the sentence in Chapter 4 at 4.6.3.
[48] Padfield N 'Fixing the tariff and the length of Her Majesty's Pleasure' (1997) 56 (3) *The Cambridge Law Journal* 478.

1.3 Choice of Jurisdictions

As highlighted earlier, the prevalence of corporal punishment and life imprisonment[49] sentences is closely tied to the legal history and legal cultures across African countries, beyond their geographic patterns. In this respect, it is difficult to ignore the extensive impact colonialism has had on the criminal law of most African States. The philosophy of how to deal with young people in conflict with the law in Africa, thus, mirrors the social construction of childhood as conceptualised by the colonising countries.[50] African States adopted models of juvenile justice systems which were a result of social, economic and political circumstances occurring in Europe at that time.[51] However, these circumstances were not necessarily similar to the circumstances prevalent in African States at the same time, neither was the image of the colonial country's child similar to that of the African child. [52] Therefore, one basis on which the countries under this study were chosen is their colonial background and history of the development of their legal systems.

Two Southern African countries have been chosen for this study. These are; Botswana and Zimbabwe (hereafter referred to as 'countries under study'). Both Zimbabwe and Botswana have ratified the CRC and the African Charter on the Rights and Welfare of the Child (ACRWC), which are the major international instruments governing the treatment of children on the African continent. Botswana ratified the ACRWC in 2001 and Zimbabwe in 1995. Based on their ratification status these two countries have obligations flowing from these instruments to protect and promote the rights and welfare of children.[53]

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[49] The conversation also extends to life imprisonment without parole.
[50] Alemika EEO & Chukwuma IC 'Juvenile justice administration in Nigeria: Philosophy and practice' (2001) *Centre for Law Enforcement Education* 10.
[51] Vengesai (2014) 21.
[52] Vengesai (2014) 21.
[53] Obligations towards inhuman sentencing also flow from other instruments such as the United Nations Convention against Torture and the African Charter on Human and People's Rights, ratified by the selected countries.

1.4 Problem Statement

For States to adhere to international law, there should be limitations placed on certain forms of sentencing, such as the ban on life imprisonment without the possibility of parole[54] and corporal punishment. There is a growing global concern for the prohibition of all forms corporal punishment[55] for children and life imprisonment sentences without parole.[56] These sentences have been categorised as a violation of children's rights and have been denounced by the United Nations and regional human rights bodies.[57] The prohibition of corporal punishment and life imprisonment sentences in juvenile justice systems draws from the right of the child to be protected from torture or other cruel, inhuman or degrading treatment or punishment.[58] In a study to end violence against children, the United Nations Secretary-General reiterated States' obligations to end these violent and extreme forms of sentencing.[59]

Despite a clear international condemnation, some States still legalise these sentences for children. In Africa at least 22 out of the 54 States on the continent retain laws that permit offenders to be sentenced to at least one form of life imprisonment for offences committed

[54] Sloth – Nielsen J 'The role of international human rights law in the development of South Africa's legislation on juvenile justice' (2001) 5 (1) *Law, Democracy & Development*: University *of the Western Cape* 60.

[55] See Global Initiative to end All Corporal punishment of children available at *https://endcorporalpunishment.org/* (accessed 18 November 2019). According to the Initiative: any corporal punishment violates children's right to respect for their human dignity and physical integrity, and their rights to health, development, education and freedom from torture and other cruel, inhuman or degrading treatment or punishment. Its legality in the majority of states – unlike other forms of interpersonal violence – violates their right to equal protection under the law. See further discussion of corporal punishment in Chapter 5.

[56] See Global study on children deprivation of liberty available at *https://www.ohchr.org/EN/HRBodies/CRC/StudyChildrenDeprivedLiberty/Pages/Index.aspx* (accessed 15 August 2019). A detailed discussion of the study is provided in Chapter 2 at 2.13.

[57] Prohibited by the CRC, the International Covenant on Civil and Political Rights and African Charter on Human and People's Rights.

[58] Odongo G O 'Impact of international law on Children's rights on juvenile justice law reform in the African context' in Sloth – Nielsen J *Children's Rights in Africa, A Legal Perspective* (2008) 160.

[59] UN Study on Violence against Children of 2006 available at *http://www.ohchr.org/EN/HRBodies/CRC/Study/Pages/StudyViolenceChildren.aspx* (accessed 22 March 2018).

while under the age of 18.[60] Both Zimbabwe and Botswana are on the list of these countries.[61] Corporal punishment is not fully prohibited as a sentence for a crime in 32 States worldwide, including in Botswana.[62] Zimbabwe recently outlawed corporal punishment as a sentence for crime, in a 2019 Constitutional Court judgement,[63] however, various laws legalising judicial corporal punishment have not yet been updated to reflect the outcome of this judgement.

1.5 Significance of the Study

This thesis provides a timely opportunity for Zimbabwe and Botswana to join the international debate on the elimination of corporal punishment and life imprisonment of children in all its forms. In examining these forms of inhuman sentences, from a children's rights perspective, the thesis contributes to a broader body of research that has critiqued the imposition of these sentences on children. Key case examples are provided throughout the thesis to illustrate the operation of current international and regional laws and standards governing the sentencing of children.

Generally, juvenile justice is a little-studied and researched area in both Zimbabwe and Botswana. There are no doctoral studies on the sentencing of children in Zimbabwe. A recent study by Macharia is the only doctoral study focusing on sentencing in Botswana, howbeit not only focusing on children.[64] Given the small volume of writing on sentencing in these two

[60] These counties are Botswana, Burkina Faso, Eritrea, Ethiopia, Gabon, Gambia, Kenya, Liberia, Madagascar, Mauritius, Malawi, Namibia, Nigeria, Seychelles, Sierra Leone, Somalia (South Central and Puntland), Swaziland, Tanzania, Zambia and Zimbabwe.
[61] As highlighted earlier, Botswana uses a form of life imprisonment for children called Detention during the President's Pleasure.
[62] Global Progress towards prohibiting all corporal punishment available at *www.endcorporalpunishment.org* (accessed 20 December 2019). Botswana's corporal punishment is legalised by Section 85(d) and Section 90 (1) of the Children's Act and Section 28(1) Penal Code. These provisions will be discussed in detail in Chapter 5 at 5.4.1.
[63] The case will be fully discussed in Chapter 5 at 5.3.5.2.
[64] Macharia E W *Sentencing in Botswana: A Comparative Analysis of Law and Practise* (unpublished LLD thesis, University of Pretoria, 2016).

countries, the researcher believes that exploring the chosen topic will not replicate any similar study. It is also necessary to explore this area to bring to light State obligations when sentencing children. Bearing in mind that both Zimbabwe and Botswana do not have a juvenile justice law (at the time of writing this thesis) which is focused on children in conflict with the law, this contribution will provide recommendations to these two countries, on the sentencing and related aspects of the juvenile justice system drawn from various international laws and case law.

The value addition of the study will be its proposed sentencing guideline for children in conflict with the law for both Zimbabwe and Botswana. The writer is aware of a Child Justice Bill still under discussion in Zimbabwe, however, it has not yet been published at the time of the writing of this thesis. The thesis will also give an account of the recent judicial and legislative developments in the area of judicial corporal punishment of children in Zimbabwe. The study also proposes an alignment of the national laws of these two countries on sentencing children, to reflect their international obligations. The writer believes that the study is not only of academic interest but covers practical everyday realities that children are facing in today's world.

1.6 Research Question

The main question this study attempts to ask is:

- How can Zimbabwe and Botswana ensure the promotion of the rights and welfare of children in their sentencing practices in order to eliminate inhuman sentencing?

Within this main question, several sub-issues will be addressed such as:

- The general administration of juvenile justice in Zimbabwe and Botswana which impacts sentencing
- The legality of sentencing children to life imprisonment and corporal punishment in international and regional African law
- The legality of life imprisonment and Detention during the President's Pleasure in Zimbabwe and Botswana
- The recent judicial and legislative developments on the outlawing of judicial corporal in Zimbabwe and the administration and legality of judicial corporal punishment in Botswana

1.7 Research Objectives

In attempting to answer the above research questions, the study aims to contribute towards the movement to abolish sentencing practices that dehumanise children. The study also aims to propose theoretical and practical (policy and legislative) recommendations in paving the way for upholding children's rights in juvenile justice in the countries under study.

This study is also an attempt to centre the sentencing practices of the countries under study in the human rights arena, eliminating archaic sentencing laws in favour of sentences that respect the human dignity of children and seek to restore the offender's relationship with the community. Arguments will be made, in attempting to answer the above research questions, to motivate for a child justice system in the counties under study.

The study also seeks to emphasise the important aspect of State's obligations in the field of juvenile justice. The study notes that States' obligations in the field of juvenile justice go far beyond ending the availability of inhuman sentences for child offenders but extends to the developing of separate, rights-compliant juvenile justice systems, with a single focus on

rehabilitation and reintegration and to ensure that within these systems detention of children is only used as a measure of last resort and for the shortest period of time.

1.8 Literature Review

While the broad areas of juvenile justice have been given considerable attention in books and articles, these books and articles are seldom situated within the context of sentencing of children and more so in the African context. This thesis fills a gap in scholarly research in this area of sentencing of children.

According to Sloth – Nielsen, if States are to adhere to international law, there should be limitations placed on certain forms of sentencing, such as the ban on life imprisonment without the possibility of parole.[65] Moyo casts the need to balance the best interests of the child, the offence committed and the interests of society as a reflection of the tension between the need to dispense justice and the need to treat the 'innocent' child.[66] According to Moyo, the triadic[67] method, which is determined by the nature and gravity of the offence; the circumstances of the offender and the interests of society, needs to be codified as the criteria for determining sentences that balance the interests of the child and those of society.[68] This triadic method, therefore, takes into account all the key elements when determining the sentencing of child offenders.

[65] Sloth – Nielsen (2001) 60.
[66] Moyo A 'Balancing the Best Interests of the Child and the Interests of Society when sentencing Youth Offenders and Primary Caregivers in South Africa' (2013) 29 *SAJHR* 325.
[67] The triadic method was explained in S v Zinn 1969 2 SA 537 (A) where it was noted that the sentencing court must consider the 'triad consisting of the crime, the offender, and the interests of society' in determining the appropriate response to adult and youth crime.
[68] Moyo A (2013) 330.

Van Zyl Smit is of the view that the prospect of rehabilitation in the case of children convicted of serious crimes, must always be contemplated more readily than in the case of adults, whose personalities are more completely formed.[69] Van Zyl Smit found the suggestion of the Full Bench in the *Nkosi*[70] case, that there might be children for whom there is no reasonable prospect of rehabilitation, to have no foundation.[71] This writer agrees with Van Zyl Smit that there is a reasonable prospect of rehabilitation for children who commit crimes before the age of 18 because their minds might not have been completely formed to comprehend their actions.

Mujuzi has called for the abolition of the imposition of the sentence of life imprisonment and/or imprisonment at the President's pleasure on people convicted of offences they committed while below the age of 18 years in Eastern and Southern Africa, on the basis that such a sentence violates the CRC and the ACRWC.[72] Mujuzi's research provides a platform for further research into other African countries whose laws provide for detaining children at His Majesty's Pleasure. This research will, therefore, extend the conversation to examine the sentence of detention at the President's pleasure in Botswana.

Recent research by Sloth – Nielsen highlights the respective role of legislatures, executives and the judiciary in moving towards abolition of corporal punishment in all settings.[73] In reviewing recent judicial and legislative developments in Zimbabwe, Namibia, South Africa and Botswana, she identifies pitfalls in the court's failure to approach an abolitionist agenda with the necessary sensitivity it deserves.[74] As highlighted by Sloth-Nielsen, this research will also emphasise the need for legislatures and executives to take an active role in ensuring that not

[69] Van Zyl Smit D 'Sentencing children convicted of serious crimes' (2001) 3 (4) *Dullah Omar Institute* 4 – 5.
[70] Van Zyl Smit (2001) 4. See also *S v Nkosi* (Case A727/00 Unreported WLD).
[71] Van Zyl Smit (2001) 4.
[72] Mujuzi J D 'Sentencing Children to Life Imprisonment and/or to be detained at the President's Pleasure in Eastern and Southern Africa' (2010) *International Journal of Punishment and Sentencing* 50.
[73] Sloth – Nielsen J 'Southern African Perspectives on Banning Corporal Punishment – A Comparison of Namibia, Botswana, South Africa and Zimbabwe' in Saunders B J, Leviner P & Naylor B (eds) *Corporal Punishment of Children: Comparative Legal and Social Developments towards prohibition and beyond* (2018) 255.
[74] Sloth – Nielsen (2018) 256.

only corporal punishment is abolished as a sentence, but that life imprisonment and other indeterminate sentences are abolished.

The need to translate law into practice has been highlighted by Macharia in her review of the unwritten sentencing policy in Botswana.[75] According to Macharia, Section 82(2) of Botswana's Children's Act,[76] which provides that the relevant date for determining the age of a child who is alleged to have committed an offence is the date of the alleged offence, has not made much difference as shown in the *Letsididi*[77] case. In the *Letsididi* case, the court treated an offender who was aged 16 at the time he committed the offence of manslaughter, as an adult for purposes of sentencing, despite the provision in Section 82 (2) of the Children's Act which had come into force a year earlier.[78] The Letsididi case reveals that courts in Botswana need to be cognisant of the provisions of the Children's Act and international law when sentencing juveniles.

In addition to the above-mentioned laws and cases, this contribution discusses other recent cases dealing with judicial corporal punishment, such as the Zimbabwean case of *S v. C (a Juvenile)*[79] which held that judicial sentences of corporal punishment against juvenile offenders violate the constitutional right to be free from torture or cruel, inhuman or degrading treatment or punishment.

[75] See Macharia 'Sentencing of Children in Conflict with the law in Botswana' in The United Nations Children's Fund *Thari Ya Bana Reflections on Children in Botswana* (2013) 10.
[76] Botswana's Children's Act of 2009.
[77] *Letsididi v the State 2010 1 BLR 18 CA.*
[78] Macharia (2013)11.
[79] *S v C (a minor) HH 718-2014.*

1.9 Methodology

This research is purely a desktop study and it analyses judicial and legislative developments by looking at and interpreting national legislation and case law. The researcher believes that the method employed in this study will do justice to this research. To substantiate arguments in this thesis, reference will be made to primary sources such as national legislation and regulations, gazetted government documents and position papers, reports of relevant law reform commissions and national case law from case reports. Relevant international instruments such as the CRC, the ACRWC, the Torture Convention and case law from treaty bodies, among others will also be analysed. Secondary sources such as textbooks, academic or journal articles, conference papers, internet sites and websites will also be relied on in this research.

1.10 Chapter Outline

The research is divided into six chapters. The chapters are thematically centred on the various forms of sentences under discussion. Chapter 1 introduces the study, the aims of the study, the selected methodology and a general overview and structure of the thesis. The first chapter also conceptualises the notion of 'inhuman sentencing' that will be used throughout the thesis.

Chapter 2 discusses the international and regional framework that regulates the inhuman sentencing of children in all the forms discussed in this contribution. This chapter outlines the general principles and standards under international and regional law to be applied when sentencing children. This chapter also offers an analysis and discussion of the provisions of juvenile justice in Articles 37 and 40 of the CRC and the recommendations of the CRC Committee on how those provisions should be implemented at a national level. Chapter 2 also

extensively discusses the recent general comment, General Comment 24 on juvenile justice published by the CRC Committee in September 2019. In this General Comment, the CRC Committee described the components of a comprehensive juvenile justice to be employed by State parties. The chapter will also discuss the recent global study on children deprived of liberty. The global study's core objectives are to assess the magnitude of the phenomenon of children being deprived of liberty, in several areas including in the administration of justice.

Chapter 3 discusses aspects of juvenile justice in Zimbabwe and Botswana which have an impact on sentencing. The Chapter looks at; age determination in sentencing, alternatives to the imprisonment of children, diversion and legal assistance for children in conflict with the law, among other issues. Chapter 4 discusses life imprisonment in all its forms in the selected countries and highlights the need for law reform in this area. This examination is designed to identify possible gaps in the implementation of the CRC and general principles of international law and standards in sentencing children. The chapter also discusses the sentence of Detention during the President's Pleasure as a form of life imprisonment of children in Botswana.

Chapter 5 discusses judicial corporal punishment in Zimbabwe and Botswana. The chapter traces the recent judicial and legislative reforms for the legal prohibition of judicial corporal punishment on male juvenile offenders in Zimbabwe. It also reviews Botswana's standpoint on judicial corporal punishment. The final chapter, Chapter 6 is a conclusion of the research and recommendations drawn from the discussions in the previous chapters. A proposed guideline for sentencing of children is recommended in this final chapter.

CHAPTER 2: INTERNATIONAL LEGAL FRAMEWORK FOR JUVENILE JUSTICE

2.1 Introduction

Whilst most governments are keen to see themselves aligned against child abuse and exploitation, this logic disappears when those same children are deemed 'offenders.'[1] Ironically, the rolling out of the Convention on the Rights of the Child (CRC) has been alongside a growing politicisation of the 'youth problem' and of 'problem youth' in particular.[2] A punitive mentality evident in many societies, albeit differentially expressed, has shifted juvenile justice agendas away from protecting 'best interests' towards criminalisation and retribution.[3] Over the years, the rationale/ theories for punishment of children have been established as deterrence, rehabilitation, incapacitation and retribution among others.[4] These have been termed the traditional theories of juvenile justice.[5]

From 1989, the year in which the CRC came into force, these traditional theories have had a new framework within which to situate juvenile justice – a children's rights theory or approach.[6] A children's rights theory has been described by the United Nations Children's Emergency Fund (UNICEF) as:

> 'an approach which furthers the realisation of the rights of all children as set out in the CRC through programming, which develops the capacity of duty-bearers to meet their

[1] Muncie J 'The United Nations children's rights and juvenile justice' in Taylor W, Earle R & Hester R (eds) *Youth Justice Handbook: Theory, Policy and Practice* (2009) 20.
[2] Muncie J 'The punitive turn in juvenile justice: Cultures of control and rights compliance in Western Europe and the USA' (2008) 8 (2) *Youth Justice: An International Journal* 108.
[3] Muncie (2008) 109.
[4] Warner K et al 'Why sentence? Comparing the views of jurors, judges and the legislature on the purposes of sentencing in Victoria, Australia' (2019) 19 (1) *Criminology & Criminal Justice* 27. See also Warner K, Davis J & Cockburn H 'The purposes of punishment: How do judges apply a legislative statement of sentencing purposes?' (2017) 41 (2) *Criminal Law Journal* 70. See also Marson J 'The History of punishment: What works for state crime?' (2015) 7 (2) *The Hilltop Review* 20.
[5] The concept of 'juvenile justice' was discussed in Chapter 1.
[6] Sloth – Nielsen J 'The role of international human rights law in the development of South Africa's legislation on juvenile justice' (2001) 5 (1) *Law, Democracy & Development* 59.

obligations to respect, protect and fulfil rights and the capacity of rights-holders to claim their rights and which is guided at all times by the principles of the right to life, survival and development, non-discrimination, the best interests of the child and respect for the views of the child.'[7]

This theory is developed from the children's rights laws and principles established in international and regional instruments and soft laws. In international children's rights law, the major instrument is the UN Convention on the Rights of the Child (CRC)[8] and in the African region - the African Charter on the Rights and Welfare of the Child (ACRWC).[9] These, together with the interpretations of the treaty provisions by the treaty monitoring bodies and other non – binding laws on children establish the theory of children's rights within which this thesis is situated and the sentencing of children interpreted. These binding and non – binding laws will form the discussion in this chapter, as the framework for a children's rights theory for sentencing of children. Although all provisions in the CRC and the ACRWC can be used for the children's rights theory, this chapter will focus only on provisions that pertain to children in juvenile justice, which are mainly Articles 37 and 40 of the CRC and Article 17 of the ACRWC. The chapter thus seeks to place the sentencing of children in juvenile justice within this model/theory, which should then influence sentencing policies in Zimbabwe and Botswana.

An overview of the legal development of a juvenile justice framework in international law will be the starting point for discussion in this chapter. This development describes how the concept of juvenile justice started, the instruments that instigated it and where it is today. Thereafter,

[7] UNICEF Toolkit on Diversion and Alternatives to Detention, 2009, available at www.unicef.org/tdad/glossary(4).doc (accessed 10 March 2018).
[8] UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577.
[9] Organization of African Unity (OAU), *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49 (1990).

the focus will be on the main Convention, the CRC, and the four cardinal principles used in interpretation of the Convention and the Charter. Other principles drawn from the CRC and ACRWC, which are significant in sentencing, such as the imprisonment of a child as a last resort, the dignity principle, the proportionality principle among others, will thereafter be discussed. Subsequently, the chapter will then discuss General Comment 8 and 24 of the CRC. General Comment 8 offers an in-depth focus on the issue of corporal punishment in all its aspects, as a form of violence against children. General Comment 24, adopted by the CRC Committee in 2019, covers all aspects of the juvenile justice system and will thus be imperative for this discussion as the most recent soft law on juvenile justice. Finally, the chapter will discuss provisions in the ACRWC, particularly Article 16 and 17 which provide for the right of the child to be protected from violence in all areas. All discussions in this chapter will also be in light of the inhuman sentences of life imprisonment and corporal punishment as established in Chapter 1.

2.2 The legal development of a juvenile justice framework in international law

A framework for juvenile justice has constantly been updated according to the needs and the gaps in addressing juvenile justice issues over the years. The first step for establishing a juvenile justice framework in international law started in Beijing in 1985.[10] A group of specialised people in juvenile justice worked on what was then termed the UN Standard Minimum Rules for the Administration of Justice (Beijing Rules), whose purpose was to give guidance to State parties on juvenile justice when drafting or reviewing legislation.[11] The

[10] United Nations Standard Minimum Rules for the Administration of Juvenile Justice (‘The Beijing Rules’) Adopted by General Assembly resolution 40/33 of 29 November 1985.
[11] UN General Assembly, United Nations Standard Minimum Rules for the Administration of Juvenile Justice (‘The Beijing Rules’): resolution / adopted by the General Assembly, 29 November 1985, A/RES/40/33. See also

Beijing Rules provide a framework for operations of national juvenile justice systems and offer guidelines to States for investigation and prosecution of juveniles, the adjudications and dispositions of juveniles, and the treatment of juveniles in both institutional and non – institutional settings.[12] The main principles established by these rules have been integrated into the CRC, giving them a binding effect through this integration.[13]

Following the Beijing rules, the CRC was adopted in 1989, providing a comprehensive rights system for children in all aspects.[14] On the African continent, the ACRWC was adopted just a year after the CRC. The Charter brings the rights of the child to an African context.[15] In Riyadh, in 1990, the international community worked on UN Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines), tackling the problem of juvenile delinquency comprehensively.[16] The Riyadh Guidelines are underpinned by diversionary and non-punitive imperatives.[17] They emphasise that children should not be criminalised for minor offences and they provide a detailed strategy for preventing juvenile delinquency.[18] In that same year in Havana, the UN Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules) were developed.[19] These rules were intended to counteract the detrimental effect of deprivation

Jacobs-du Preez N 'The United Nations standard minimum rules for the administration of juvenile justice applied in an African context' (2002) 15 (2) *Acta Criminologica: Southern African Journal of Criminology* 37.

[12] Kethineni S 'India' in Decker S H & Marteache N (eds) *International Handbook of Juvenile Justice* 2 ed (2017) 175. See also Goldson B & Muncie J 'Towards a global 'child friendly' juvenile justice' (2012) 40 *International Journal of Law, Crime and Justice* 48. See also Muncie (2013) 46.

[13] Manco E 'Detention of the child in the light of international law: A commentary on Article 37 of the United Nation Convention on the Rights of the Child (2015) 7 *Amsterdam Law Forum* 57.

[14] CRC will be discussed at 2.4 below.

[15] The ACRWC will be discussed at 2.5 below.

[16] UN General Assembly, United Nations Guidelines for the Prevention of Juvenile Delinquency ('The Riyadh Guidelines'): resolution / adopted by the General Assembly, 14 December 1990, A/RES/45/112.

[17] Muncie J 'International juvenile (in) justice: Penal severity and rights compliance' (2013) 2 (2) *International Journal for Crime, Justice and Social Democracy* 46.

[18] Paragraph 2 of the Rules states: 'the successful prevention of juvenile delinquency requires efforts on the part of the entire society to ensure the harmonious development of adolescents'. Paragraph 5 states: 'formal agencies of social control should only be utilised as a means of last resort.' Paragraph 54 states: 'no child or young person should be subjected to harsh or degrading correction or punishment measures at home, in schools or in any other institutions.' See also Banks C & Baker J *Comparative, International and Global Justice: Perspectives from Criminology and Criminal Justice* (2015) 205.

[19] UN General Assembly, United Nations Rules for the Protection of Juveniles Deprived of Their Liberty ('The Havana Rules'): resolution / adopted by the General Assembly, 2 April 1991, A/RES/45/113.

of liberty and to ensure respect for children's rights.[20] Emphasis was placed on the pre-trial detention phase of arrest and the situation in police stations.[21] The rules also establish measures for the social integration of young people deprived of their liberty in prisons and other institutions.[22] The main message the Havana Rules proclaim is that deprivation of liberty should be a disposition of last resort and for the minimum period of time.[23]

The Guidelines on Justice for Child Victims and Witnesses of Crimes were thereafter published in Vienna in 2005, with some basic principles such as the right to effective assistance, the right to be protected from justice process hardship, the right to safety, the right to reparation and re-integration and compensation.[24] In 2010, at Strasbourg, the Council of Europe adopted the Guidelines on Child-Friendly Justice.[25] These guidelines are intended to favour children's access to justice and are intended also to be used by professionals working in the criminal, civil and administrative justice system and adopt a multidisciplinary approach.[26] These guidelines focus on the need for training for all professionals working with children. In 2013, a Model Law on Juvenile Justice was established as legal guidance to States parties on the development of a juvenile justice system. In 2019, the CRC Committee published a General Comment on juvenile justice, thus becoming the most recent soft law on juvenile justice.

These rules and guidelines, together with the CRC, serve as an internationally accepted comprehensive framework for States parties to create a sound juvenile justice system in their countries.[27] The rules usefully flesh out the provisions of the CRC and other instruments

[20] The Havana Rules.
[21] Goldson B & Kilkelly U 'International human rights standards and child imprisonment: Potentialities and limitations' (2013) 21 (2) *IJCR* 346.
[22] Kethineni (2017) 175.
[23] Goldson B & Kilkelly U (2013) 350.
[24] The Economic and Social Council, Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime: Resolution 2005/20.
[25] Council of Europe, Guidelines on Child Friendly Justice, adopted 17 November 2010.
[26] Council of Europe, Guidelines on Child Friendly Justice.
[27] Manco (2015) 59.

because they recognise the social context in which the youth justice process is located, and they also take into account the complex and challenging nature of translating human rights compliant youth justice principles in practice.[28] While these juvenile justice instruments are not without ambiguity, vagueness or omission, it is remarkable nonetheless that they are consistent concerning their commitment to age-appropriate treatment, the importance of diversion and the imperative of rehabilitation of children.[29]

2.3 International and regional children's rights and African human rights framework

The first recognition of children's rights in an internationally recognised instrument was in the 1924 Geneva Declaration[30] which referred explicitly to the rights of the child. Although it was a non – binding instrument, it was the first international document to speak of the rights of a child.[31] Legally recognised and enforceable rights of children were introduced in 1989 by the CRC. The following is a discussion of the CRC.

2.3.1 The UN Convention on the Rights of the Child (CRC)

The CRC remains the most ratified treaty in the history of treaties and it provides an extraordinary catalogue of rights for children.[32] The almost universal ratification of the treaty affirms a shared recognition of the universality of children's rights and indicates increasing support and acceptance by the world community of the need to promote and protect children's

[28] Kilkelly U 'Youth justice and children's rights: Measuring compliance with international standards' 2018 (8) 3 *Youth Justice* 188.
[29] Kilkelly (2008) 188.
[30] Geneva Declaration of the Rights of the Child, Adopted 26 September 1924, available at *http://www.un-documents.net/gdrc1924.htm* (accessed 20 August 2018).
[31] Van Bueren G *The International Law on the Rights of the Child* (1995) 7.
[32] Tobin J *The UN Convention on the Rights of the Chid: A Commentary* (2019) 1.

rights.[33] The influence of the CRC can be seen in the content of national constitutions, judicial decision-making, law reform, policy development, the work of international and national institutions, advocacy efforts, service delivery and research concerning children across a multitude of disciplines.[34] This is not to say that the CRC does not have its flaws, but it has already contributed to a 'qualitative transformation' in the status of children as holders of rights.[35]

The goal of the CRC in juvenile justice is for a justice system for children which emphasises the rehabilitation and reintegration of child offenders while balancing their interests and those of society, having due regard to the rights of the victims of crime.[36] The CRC also calls for a specialised child-sensitive juvenile justice system that places the respect for the dignity and the best interest of the child at the centre of legislation, policy and practice, while promoting children's sense of worth and long-lasting reintegration in society.[37] The formulation of the CRC also stresses the importance of incorporating a rights consciousness into all juvenile justice systems, through, for example, the establishment of an age of criminal responsibility relative to developmental capacity; encouraging participation in decision making; providing access to legal representation; protecting children from capital or degrading punishment and ensuring that arrest, detention and imprisonment are measures of last resort.[38]

Articles in the Convention that relate to juvenile justice include, Article 19 concerning the protection of children against any form of violence, injury, abuse and maltreatment,[39] Article

[33] Kaime T 'The Convention on the Rights of the Child and the cultural legitimacy of children's rights in Africa: Some reflections' (2005) 5 *AHRLJ* 221.
[34] Tobin (2019) 1.
[35] Tobin (2019) 1.
[36] Assim M U 'Fulfilling Article 40 of the CRC under the Tanzanian Law of the Child Act 2009' (2013) 15 *Article 40 the Dynamics of Youth Justice & the Convention on the Rights of the Child in South Africa* 11.
[37] The International NGO Council on Violence Against Children *Creating A Non-Violent Juvenile Justice System Report* (2013) 7.
[38] Muncie (2013) 44.
[39] Article 19 provides that:

37 which prohibits inhuman sentencing, principles and procedural safeguards for deprivation of liberty and Article 40 promoting the child's sense of dignity and self - worth. Articles 37 and 40, which are sometimes, called the juvenile justice articles, will subsequently be discussed in detail below.

2.3.1.1 Analysis of Article 37 and 40 of the CRC

Article 37 of the CRC broadly establishes principles regarding detention and imprisonment of children.[40] As already conceptualised in Chapter 1, Article 37 (a) prohibits inhuman sentencing of children to punishments such as capital punishment and life imprisonment without parole.[41] Although the prohibition is only limited to life imprisonment without parole, this thesis extends it to prohibit all forms of life imprisonment as recommended by the CRC Committee.[42] The drafting history of Article 37 reveals that the caveat regarding the possibility of release was

1. States parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

[40] Article 37 provides that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;
(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner, which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;
(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

[41] See Chapter 1 at 1.2.1. The text of the first sentence of Article 37(a) prohibiting torture or other cruel, inhuman or degrading treatment or punishment was derived from Article 5 of the UDHR. The same phrase is also echoed through most of the subsequent human rights instruments, including Article 7 of the International Covenant on Civil and Political Rights (CCPR).

[42] See UN Committee on the Rights of the Child *General Comment No. 24 (2019) on children's rights in the child justice system*, CRC/C/GC/24, para 81. See also Concluding Observations of Netherlands CRC/C/NLD/CO/3, para 78. See also concluding observation of Antigua & Barbuda, CRC/C/15/Add.247, para 68.

likely included to temper an otherwise absolute prohibition of life imprisonment.[43] The initial proposal for a prohibition of life imprisonment for children was opposed by the Japanese delegation due to its absolute nature.[44] The Canadian representative suggested inclusion of the words 'without the possibility of release.'[45] Delegates remained divided as to the merit of this amendment, some calling for its deletion, but a compromise was achieved, with the provision being retained.[46]

Articles 37(b), (c) and (d) establish a broad range of standards regarding deprivation of liberty of children expressed as legal requirements related to the use of deprivation of liberty, provisions regarding the treatment of children deprived of their liberty, and procedural and substantive rights for every child deprived of liberty.[47] Article 37 standards on deprivation of liberty constitute a unique blend of general human rights norms, child rights concepts and criminal justice developments, a significant feature to be kept in mind for interpretation and implementation.[48] Article 37(b) requires that any restriction of liberty of children, whether part of the juvenile justice system or otherwise, must not be arbitrary and must be authorised in legislation.[49] The 'lawful' requirement addresses compliance with the grounds and procedures set primarily under domestic law for deprivation of liberty, whereas 'non-arbitrary' adds elements beyond the principle of legality, including reasonableness of the law itself and proportionality of measures.[50] The requirement of lawfulness and non-arbitrariness also means that 'cases of deprivation of liberty provided for by the law must not be manifestly

[43] Tobin (2019) 1463.
[44] United Nations Economic and Social Council *Report of the working group on a draft Convention on the Rights of the Child*, E/CN. 4/19/86/39, 13 March 1986, para 104.
[45] E/CN. 4/19/86/39, para 104.
[46] E/CN.4/19/86/39, para 541.
[47] Manco (2015) 58.
[48] Schabas A & Sax H 'Article 37: Prohibition of Torture, Death Penalty, Life Imprisonment and Deprivation of Liberty' in Alen A et al (eds) *A Commentary on the United Nations Convention on the Rights of the Child* (2006) 35.
[49] United Nations Children's Emergency Fund (UNICEF) *Implementation Handbook of the Convention on the Rights of the Child* (2007) 555.
[50] Schabas & Sax (2006) 77.

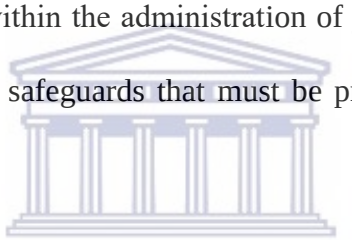
disproportionate, unjust or unpredictable, and the specific manner in which an arrest is made must not be discriminatory and must be able to be deemed appropriate and proportional given the circumstances of the case.'[51] The second part of paragraph (b) is a restriction on deprivation of liberty to be only in exceptional cases - as a last resort and always 'for the shortest appropriate time.'[52]

Article 37 (c) stresses that children deprived of their liberty, should not lose their fundamental rights and that their treatment must take account of their age and development.[53] The provision calls for the respect of all human rights of persons deprived of liberty because of mostly the power imbalances, dependencies, abuse and exploitation that occur with the restriction of persons in closed locations.[54] The qualification added by Article 37(c) in respect to the needs of children, highlights a specific child development-orientation within this general principle.[55] The reference to the child's age conveys the message that children should not be regarded as one homogenous group, but instead that the conditions and the treatment of the young persons have to be constantly monitored and flexibly adapted due to their personal development.[56] Article 37 (c) also includes the right for children to be kept separate from adults during their period of deprivation of liberty. The CRC Committee has reiterated that a child deprived of liberty should not be placed in a centre or prison for adults, as there is abundant evidence that this compromises their health and basic safety, their future ability to remain free of crime and to reintegrate.[57] The second sentence of Article 37(c) contains the child's right to maintain

[51] Nowak M *UN Covenant on Civil and Political Rights - CCPR Commentary* 2 ed (2005) 10.
[52] UNICEF *Implementation Handbook of the Convention on the Rights of the Child* (2007) 555. See discussion on the principle of imprisonment as a last resort and for the shortest period of time in relation to sentencing on 2.7.2 below.
[53] UNICEF *Implementation Handbook of the Convention on the Rights of the Child* (2007) 565.
[54] Schabas & Sax (2006) 89.
[55] Schabas & Sax (2006) 89.
[56] Van Bueren G (1995) 219.
[57] General Comment 24, para 92. In a Concluding Observation for Tunisia the CRC Committee voiced concern over 'detention of juveniles with adults which has resulted in sexual abuse or other ill-treatment' and recommended treatment of children in conflict with the law 'in a different and distinct manner so that they are not placed in the same institutions with the same regime or restrictions.' – See *Concluding Observations*: *Tunisia* (UN

contacts with the family during deprivation of liberty, through visits or correspondence. According to the CRC Committee, for facilitation of visits, a child should be placed in a facility that is as close as possible to the place of residence of his/her family. Exceptional circumstances that may limit this contact should be clearly described in the law and not be left to the discretion of the competent authorities.[58]

Article 37(d) of the CRC contains important procedural guarantees for children deprived of their liberty. These guarantees are; the right to prompt access to legal and other assistance, the right to challenge the legality of the decision leading to deprivation of liberty, and the right to a prompt decision on this matter. This provision requires effective complaint procedures in general and calls for the establishment of an 'independent, child-sensitive and accessible complaint system for children' within the administration of juvenile justice context.[59]Article 40 provides further detail of the safeguards that must be provided in the administration of juvenile justice.



In line with Article 37 (d), the CRC Committee proposes that a child arrested and deprived of his/her liberty should be brought before a competent authority to examine the legality of the deprivation of liberty or its continuation within 24 hours.[60] The Committee also recommends that States parties ensure that pre-trial detention is reviewed regularly with a view of ending it.[61] In cases where conditional release of the child at or before the first appearance (within 24 hours) is not possible, the CRC Committee recommends that the child should be formally charged with the alleged offences and be brought before a court or other competent, independent and impartial authority or judicial body, for the case to be dealt with as soon as

Doc. CRC/C/15/Add.181, 2002), paras. 45, 46(c). See also Rule 13(4) of the Beijing Rules which provides for children to be 'detained in a separate institution or in a separate part of an institution also holding adults.'

[58] General Comment 24, para 94.

[59] UNICEF *Implementation Handbook of the Convention on the Rights of the Child* (2007) 567.

[60] General Comment 24, para 90.

[61] General Comment 24, para 90.

possible but not later than 30 days after pre-trial detention takes effect.[62] Additionally, Article 37 (d) provides that a child has a right to challenge the legality of the deprivation of his liberty before the court or other competent, independent and impartial authority and to a prompt decision on any action. The right to challenge the legality of the deprivation of liberty includes not only the right to appeal court decisions but also the right of access to court for review of an administrative decision e.g. the police, the prosecutor and other competent authority.[63]

Article 40 provides for the procedural safeguards to States that detain children. All provisions in Article 40 have been fully discussed and elaborated in General Comment 24 of the CRC, which will be discussed later in this chapter.[64]

2.3.2 The African Charter on the Rights and Welfare of the Child (ACRWC)

On the African continent, the major children's rights protection instrument is the ACRWC. The ACRWC was created in 1990, just soon after the CRC.[65] The African Charter was created to specifically cater for the needs of the African child, which the drafters thought had been skipped and are of particular relevance to the African child's situation.[66] The limited presence of African countries during the drafting process of the CRC also caused the creation of a separate African Children's Charter.[67] The African Children's Charter was also necessary as each region has its own unique human rights problems or priorities that it wishes to address, often difficult to tackle in international agreements due to the background disparities of each State.[68]

[62] General Comment 24, para 90.
[63] General Comment 24, para 91.
[64] See discussion at 2.9 below.
[65] Adopted on 11 July 1990.
[66] Kaime (2005) 6.
[67] Lloyd A 'A theoretical Analysis of the realities of children's rights in Africa: An Introduction to the African Charter on the Rights and Welfare of the Child (2002) 2 *African Human Rights Law Journal* 14.
[68] Lloyd (2002) 14.

The ACRWC recognises children in Africa as direct bearers of rights and also as bearers of responsibilities to others.[69] Although the provisions in the ACRWC are almost similar to those in the CRC, it has been argued that the ACRWC offers a higher level of protection for children, compared to the CRC, which is often criticised as having a Western bias.[70] The ACRWC has thus been hailed for putting children's rights legally and culturally into perspective.[71] The Charter reinforces the protection given to children by the CRC regarding, for example, the child's best interest's principle, the participation of children in armed conflicts, marriage and children promised in marriage, refugee and internally displaced children, protection against apartheid and discrimination, as well as socio-economic and cultural rights. The adoption of the ACRWC means that African States have an obligation to implement two international children's rights instruments concurrently.[72]

Bhabha & Candea[73] however, believe that children engaged in the criminal justice systems of several African States cannot, at present, expect the promises of international human rights to be fully and manifestly evident in their lives, despite the apparent embrace of fundamental children's rights by their States. By contrasting the CRC both with practices on the ground and with a regional human rights instrument, they demonstrated the inconsistent messaging concerning the content of children's rights in Africa.[74] They believe that the concern about over-promising and under-delivering is evident in this confusion over the status and rights of

[69] Lloyd A 'The African Regional System for the Protection of Children's Rights' in Sloth-Nielsen J (ed) *Children's Rights in Africa: A Legal Perspective* 54.
[70] Kaime T *The African Charter on the Rights and Welfare of the Child - A Socio-Legal Perspective* (2009) 36. See Lloyd (2002) 14. See also Viljoen F 'Supra-national human rights instruments for the protection of children in Africa: The Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child' (1998) 31 *Comparative and International Law Journal of Southern Africa* 200.
[71] Kaime (2009) 37.
[72] Mashamba C J 'Domestication of international children's norms in Tanzania' (2009) 8 (2) *The Justice Review* 9.
[73] Bhabha F & Candea C 'Who will remember the Children? The international human rights movement and juvenile justice in Africa' (2016) *The Transnational Human Rights Review* 3.
[74] Bhabha & Candea (2016) 3.

children in the African political and social context.[75] Be that as it may, the ACRWC remains a great beacon of hope for the improvement of children's rights protection on the African continent.

Provisions in the ACRWC, which relate to juvenile justice are Article 16, 17 and 19. Article 16 implores State parties to take specific legislative, administrative, social and educational measures to protect children from all forms of torture, inhuman or degrading treatment and physical or mental injury or abuse, neglect or maltreatment.[76] The ACRWC provision on the general prohibition of violence against children is similar to that of Article 19 of the CRC referred to earlier. Both Articles 16 and 19 place an obligation on State parties to take a variety of steps, namely legislative, administrative, social and educational, to ensure that no level of violence is condoned and that children are protected from all forms of violence. These provisions also require State parties to undertake protective measures which include the establishment of social programmes or special monitoring units to provide the necessary support for the child as well as for those who have the care of the child.[77] These special monitoring units are also necessary to provide other forms of prevention, as well as to engage in identification, referral, reporting, investigation, treatment and follow up of instances of child maltreatment, abuse and neglect.[78]

Article 17 provides for a child in detention not to be subjected to torture, inhuman or degrading treatment or punishment[79] and it also requires the separation of child offenders from adult offenders.[80] This provision is similar (although not as detailed), to Article 37 of the CRC which has been extensively discussed above. The ACRWC is silent on whether States parties can

[75] Bhabha & Candea (2016) 3.
[76] In Article 16 (1) of the ACRWC.
[77] Kassan D 'The Protection of children from all forms of violence – African experiences' in Sloth - Nielsen J *Children's Rights in Africa – A legal perspective* (ed) (2010) 168.
[78] Kassan (2010) 168.
[79] Article 17(2) (a) of the ACRWC.
[80] Article 17(2) (b) of the ACRWC.

impose the sentence of life imprisonment on child offenders, with or without parole.[81] A literal interpretation of the ACRWC could lead to the unfortunate conclusion that State parties are not barred from not only sentencing children to life imprisonment but also to life imprisonment without the possibility of parole.[82] The ACRWC is also silent on the imprisonment of children as a last resort and for the minimum period of time.[83] However, in terms of Article 17, a child accused or found guilty of having infringed the penal law has the right to special treatment in a manner consistent with the child's dignity and worth which reinforces the child's respect for human rights and fundamental freedoms of others.[84] Thus, interpreted in line with Article 17, the ACRWC, does ensure that any form of treatment that diminishes a child's worth and dignity is barred. In that regard, life imprisonment sentences and judicial corporal punishment which invade the dignity and self - worth of a child are not allowed in terms of the Charter. Moreover, the ACRWC as regional law is subject to the CRC, thus, the (higher) standard for the prohibition of life imprisonment and imprisonment of children only as a measure of last resort and for the shortest period of time set by the CRC, supersedes any contrary interpretation of the ACRWC. More so, Article 17(3) of the ACRWC demands that the essential aim of treatment of every child during the trial and also if found guilty of infringing the penal law should be his or her reformation, re-integration into his or her family and social rehabilitation.[85] It is thus, difficult to argue that the sentence of life imprisonment achieves any of these aims.

[81] Mujuzi J D 'Sentencing Children to Life Imprisonment and/or to be detained at the President's Pleasure in Eastern and Southern Africa' (2010) 6 (2) *International Journal of Punishment and Sentencing* 50.
[82] Mujuzi (2010) 50.
[83] Gose M *The African Charter on the Rights and Welfare of the child: An assessment of the legal value of its substantive provisions by means of a direct comparison to the Convention on the Rights of the Child* (2002) 67.
[84] Article 17(1) of the ACRWC.
[85] UNICEF 'Key international treaties in the promotion, protection and fulfilment of children's rights: A Compendium for child rights advocates, scholars and policy makers' 2014 available at *https://www.unicef.org/southafrica* (accessed 15 July 2019).

2.4 African Charter on Human and People's Rights (ACHPR)

The prohibition of inhuman punishment is also found in the African Charter on Human and People's Rights (ACHPR).[86] The African Charter is not specifically for children but its provisions have been interpreted to promote the rights of children and protect them from inhuman punishment.

The ACHPR's monitoring body - the African Commission, has stated that the prohibition of torture, cruel, inhuman, or degrading treatment or punishment is to be interpreted as widely as possible to encompass the widest possible array of physical and mental abuses, which includes corporal punishment.[87] In the communication heard by the African Commission in the case of *Curtis Francis Doebbler vs Sudan* [88] eight female students of Ahlia University in Sudan were sentenced to 25 - 40 lashes, to be inflicted on their bare backs for infraction of public order, contrary to Article 152 of the Criminal Law of 1991. These students were sentenced to corporal punishment because they were not properly dressed and were acting in a way considered immoral, for example, girls danced and talked with boys. The lashes were administered with a wire and plastic whips that left permanent scars on the girls. The instrument used was not clean and there was no doctor present to supervise the execution of the punishment. A complaint was brought to the African Commission stating that this punishment was carried out in violation of Article 5 of the ACHPR which prohibits inhuman or degrading treatment. The Commission held that: 'there is no right for individuals and particularly the government of a country to apply physical violence for minor offences. Such a right will be tantamount to sanctioning State-

[86] Article 5 of the Charter provides that: 'Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

[87] Communication 236/2000 *Curtis Francis Doebbler v. Sudan*, Sixteenth Activity Report (2003), AHRLR 153 (ACHRP 2009), paras 42 – 44.

[88] *Curtis Francis Doebbler v. Sudan.*

sponsored torture under the Charter and contrary to the very nature of the human rights treaty.'[89]

2.5 The definition of a child and age determination and the minimum age of criminal responsibility in juvenile sentencing

2.5.1 The definition of a child

The CRC defines a child as 'every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.'[90] Unlike other Human Rights treaties, the Convention adopts a presumption in favour of an age-based conception of childhood.[91] According to Hodgkin & Newell, the reference to domestic law in Article 1 of the CRC must not be 'interpreted as a general escape clause, nor should it allow ages to be established which might be contrary to the principles and provisions of the Convention.'[92] In Article 2 of the ACRWC, a child is defined as 'every human being below the age of 18 years.'[93] The ACRWC does not provide any exceptions, thereby extending the standard of protection for the African child and ensuring favourable provisions in States were majority is attained earlier.[94] Save the Children defines a child as, 'a human being under 18 years of age, whose dignity is the same as that of other human beings, but who has, at that stage of their life, a

[89] *Curtis Francis Doebbler v. Sudan.*
[90] Article 1 of the CRC.
[91] Tobin (2019) 22.
[92] Hodgkin R & Newell P *Implementation Handbook for the Convention on the Rights of the Child* 2 ed (2002) 6.
[93] Article 2 of the ACRWC.
[94] Ekundayo E 'Does the African Charter on the Rights and Welfare of the Child (ACRWC) only underline and repeat the Convention on the Rights of the Child (CRC)'s provisions? Examining the similarities and the differences between the ACRWC and the CRC (2015) 5 (7) *International Journal of Humanities and Social Science* 148. See also Chirwa D 'Merits and Demerits of the ACRWC' (2002) 10 *International Journal of Children's Rights* 158.

relative capacity for judgement, expression and defence.'[95] This definition is the basis for the existence of an autonomous system of justice for children, distinct from that for adults.[96]

From these definitions, it is evident that the age of 18 years is the standard for defining a child in both international and regional African law. For purposes of sentencing, the CRC prohibits severe sentences such as capital punishment and life imprisonment without the possibility of parole for persons below the age of 18.[97] The decisive age in this regard is the age at the time of the commission of the offence not at the time of sentencing.[98] The exception provided in the CRC can thus not be used to sentence children who would otherwise in their laws not been defined as children. To do so would defeat the purposes of the Convention.

2.5.2 Age determination

Age determination is very crucial in juvenile justice, particularly in the area of sentencing. The CRC Committee requires a definite ascertaining of a child's age before sentencing to prove the age of the child. Age can be proven by the child's birth certificate, however, if the child does not have a birth certificate, the CRC requires the State to promptly provide one for the child free of charge.[99] Where there is no proof of age by birth certificate, the State authorities are required to accept all documentation that can prove age, such as notification of birth, extracts from birth registries, baptismal or equivalent documents or school reports.[100] Authorities are also urged to permit interviews with or testimony by parents regarding age, or permit affirmations to be filed by teachers or religious or community leaders who know the age of the

[95] Save the Children *Child rights and Juvenile Justice* (2016) 13.
[96] Save the Children *Child rights and Juvenile Justice* (2016) 13.
[97] See Article 37 (b) of the CRC.
[98] UN Committee on the Rights of the Child (CRC*), General comment No. 10 (2007): Children's Rights in Juvenile Justice*, 25 April 2007, CRC/C/GC/10, para 75.
[99] General Comment 24, para 33.
[100] General Comment 24, para 33.

child.[101] In the case of inconclusive evidence, the Committee encourages the State to give the child or young person the benefit of the doubt.[102]

2.5.3 The minimum age of criminal responsibility (MACR)

In juvenile justice the age at which a child can be held criminally liable is essential. The CRC requires States parties to set a minimum age below which children are considered by law not to have the capacity to infringe the criminal law.[103] Children who commit an offence at an age below that minimum, cannot be held responsible in a criminal law process.[104] Children at or above the minimum age at the time of the commission of an offence but younger than 18 years, can be formally charged and subject to juvenile justice procedures in full compliance with the CRC.[105]

The CRC Committee has reiterated that the juvenile justice system should apply to children who are above the minimum age of criminal responsibility but below the age of 18 years at the time of the commission of the offence.[106] According to the Committee, the juvenile justice systems should also extend protection to child offenders who were below the age of 18 at the time of the commission of the offence but who turn 18 during trial or the period of sentencing.[107]

In the first General Comment on juvenile justice, General Comment No. 10 (2007), the CRC Committee had considered 12 years as the absolute minimum age of criminal responsibility,

[101] General Comment 24, para 33.
[102] General Comment 24, para 34.
[103] Article 40 (3) of the CRC. See General Comment 24, para 8. See also Cipriani D *Children's Rights and the Minimum Age of Criminal Responsibility: A Global Perspective* (2009) 54.
[104] General Comment 24, para 20.
[105] General Comment 24, para 20.
[106] General Comment, para 29.
[107] General Comment 24, para 31.

however, the Committee found that this age was too low and encouraged State parties in General Comment 24 (2019) to increase their minimum age to at least 14 years of age.[108] Thus, children below the age of 14 should be deemed not to have the capacity to infringe the penal law. According to the Committee, evidence in the fields of child development and neuroscience indicates that maturity and the capacity for abstract reasoning is still evolving in children aged 12 to 13 years because their frontal cortex is still developing.[109] Therefore, they are unlikely to understand the impact of their actions or to comprehend criminal proceedings and are also affected by their entry into adolescence.[110] The Committee referred to its General Comment 20 (2016) on the implementation of the rights of the child during adolescence, to which it reiterated that adolescence is a unique defining stage of human development characterised by rapid brain development, and this affects risk-taking, certain kinds of decision-making and the ability to control impulses.[111] The Committee in a Concluding Observation for the UK in 2016, recommended that the MACR be raised 'in accordance with acceptable international standards' and not merely to 12 years.[112] Similarly for Kenya in 2016, the Committee was alarmed that the minimum age of criminal responsibility is still set at 8 years of age, which is well below acceptable international standards.[113] The Committee recommended that the State should raise the minimum age of criminal responsibility to an internationally acceptable level, and ensure that all children, by definition persons under 18 years of age, are protected by the juvenile justice system.[114]

[108] General Comment 24, para 22.
[109] General Comment 24, para 22.
[110] General Comment 24, para 22.
[111] General Comment 24, para 22.
[112] Concluding Observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland 2016, CRC/C/GBR/CO/5.
[113] Concluding observations on the combined third to fifth periodic reports of Kenya, CRC/C/KEN/CO/3-5, para 75.
[114] CRC/C/KEN/CO/3-5, para 76 (a).

2.6 The general principles of the CRC and ACRWC in the context of juvenile sentencing

The CRC and the ACRWC establish four general principles which guide consideration of all issues relating to children, including issues in the administration of juvenile justice. These principles are; the best interests' principle, the principle of non – discrimination, the principle of life, survival and development of the child and the principle of child participation.[115] The four general principles, however, do not stand alone, they are underpinned by a broad array of substantive rights, together comprising a bewildering hotchpotch of provisions.[116] These principles will subsequently be discussed individually in the context of juvenile justice and sentencing.

2.6.1 The principle of non – discrimination

The principle of non – discrimination bears a specific role for children's rights. Both the CRC and the ACRWC entrench it as a right for every child.[117] The struggle against child discrimination has been a central driving force in the development of the rights of the child through three kinds of discrimination. The first form being discrimination between children

[115] See Lundy L & Byrne B 'The four general principles of the United Nations Convention on the Rights of the Child: The potential value of the approach in other areas of human rights law' in Brems E, Desmet E & Wouter Vandenhole W *Children's Rights Law* in *the Global Human Rights Landscape Isolation, inspiration, integration?* (2017) 87. See alsoVerhellen E 'The Convention on the Rights of the Child reflections from a historical, social policy and educational perspective' in Vandenhole W et al (eds) *Routledge International Handbook of Children's Rights Studies* (2015) 49. See also Lundy L & McEvoy E L 'Childhood, The United Nations Convention on the Rights of the Child and research: what constitutes a rights-based approach' in Freeman M (ed) *Law and Childhood* (2012) 78.

[116] Marshall K & Parvis P *Honouring Children – The Human Rights of the Child in Christian Perspective* (2004) 20. Which are all the rights of a child provided in the CRC and the ACRWC.

[117] Article 2 of the CRC and Article 3 of the ACRWC. Article 2 of the CRC provides that: 'States parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.' Article 3 of the ACRWC provides that: 'Every child shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in this Charter irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, relation, political or other opinion, national and social origin, fortune, birth or other status.'

and adults.[118] For a long time, children were not deemed as capable of holding human rights and hence were discriminated against in comparison to adults.[119] Gradually, children's rights are being recognised and children's interests are now deemed fundamentally equal to those of adults, notwithstanding that they are vulnerable and in need of special protection. Secondly, discrimination was between children and young adults.[120] This has been 'resolved' by the definition of the child and the delineation of childhood from adulthood.[121] Finally, the discrimination that occurs between children and children.[122] Little girls are not treated in the same way as little boys, migrant children are not treated as local children; rural children do not get the same opportunities as those living in the cities, and children with disabilities are not treated the same with children without disabilities.[123] Moreover, children are often discriminated against on account of the status of their parents or guardians. However, the provision in Article 2 of the CRC protects a child in his or her specific circumstances and not only as any other human being; and it also protects children not only against discrimination targeted at them but also against discrimination based on attributes of their parents, legal guardians or family members.[124]

The Committee warns against discrimination for children in conflict with the law when they contact the criminal justice system and throughout their trials.[125] The Committee has emphasised that safeguards should be made against discrimination against certain groups of children. It has urged gender-sensitive attention to be paid to girls and to children who are

[118] Tobin (2019) 43. See also Besson S 'The Principle of Non-Discrimination in the Convention on the Rights of the Child (2005) 13 *The International Journal of Children s Rights* 445.
[119] Tobin (2019) 43. See also Abramson B 'Article 2. The right of non-discrimination' in Alen A et al. (eds), A Commentary on the United Nations Convention on the Rights of the Child (2008) 2.
[120] Tobin (2019) 43. See also Besson (2005) 445.
[121] Tobin (2019) 43.
[122] Tobin (2019) 43. See also Besson (2005) 446. See also Crover S 'On recognising children's universal Rights: What needs to change in the Convention on the rights of the child (2004) 12 *International Journal of Children's Rights* 259.
[123] Tobin (2019) 43. See also Besson (2005) 446.
[124] Tobin (2019) 43.
[125] General Comment 24, para 40.

discriminated against based on sexual orientation or gender identity.[126] The Committee also encourages the accommodation of children with disabilities, which may include physical access to court and other buildings, support for children with psychosocial disabilities, assistance with communication and the reading of documents, and procedural adjustments for testimony.[127]

2.6.2 The best interests of the child principle

Countless people are deeply concerned with promoting the best interests of children but are sceptical about the value of using rights language to achieve this.[128] The best interests' principle is an established principle of the CRC which provides for the right to have a child's best interests assessed and taken into account as a primary consideration in all actions or decisions that concern the child, both in the public and private sphere.[129] The best interest principle is also provided as 'the primary consideration' under the ACRWC.[130] There is a slight difference in the formulation of the principle in the ACRWC and the CRC. The CRC refers to the principle as 'a primary consideration,' while the ACRWC refers to it as 'the primary consideration.' The formulation of this principle under the CRC provides room for other principles and considerations to be taken into account, and, in a given case, to override the best interest's principle.[131] The ACRWC, however, seems to maximise the influence of the best interests

[126] General Comment 24, para 40.
[127] General Comment 24, para 40.
[128] Campbell T *Rights A Critical Introduction* (2016) 8.
[129] Article 3 (1) of the CRC provides that: 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.' See general discussion of the principle in Freeman M 'Article 3: The Best Interests of the Child' in Alen A et al (eds) *A Commentary on the United Nations Convention on the Rights of the Child* (2007).
[130] Article 4 (1) of the ACRWC provides that: 'In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.'
[131] Ekundayo (2015) 149. See also Gose (2002) 26.

principle in proclaiming its supremacy over other considerations.[132] The expression 'primary consideration' according to the CRC Committee means 'that the child's best interests may not be considered on the same level as all other considerations', that is they have high priority due to the special situation of children, such as dependency, maturity, legal status, and often voicelessness.[133]

The CRC Committee has described the best interests of the child as a dynamic concept that encompasses various issues which are continuously evolving.[134] This dynamism and evolving concept of the best interest principle is often neglected,[135] hence, the difficulty in fully describing the content of the best interests principle. However, despite all the difficulties in defining the content of the best interest of the child, the CRC Committee adopted General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration, whose aim is to provide a better understanding of the new position of children as the holders of the rights proclaimed and guaranteed by the Convention and to provide a framework for assessing and determining the child's best interests.[136]

In General Comment 14, the CRC Committee underlines the 'best interests of the child' as a right, a principle and a rule of procedure based on an assessment of all elements of a child's or children's interests in a specific situation.[137] As a substantive right, it means the right of the child to have his or her best interests assessed and taken as a primary consideration when

[132] Sloth – Nielsen J 'Children's Rights in Africa' in Ssenyonjo M '*The African Regional Human Rights System: 30 Years after the African Charter on Human and People's Rights* (2012**)** 165. Mezmur also believes that the definite articulation of 'the primary consideration' in the ACRWC as opposed to 'a primary consideration in the CRC 'elevates its role in the advancement of children's rights' – See Mezmur B 'The African Children's Charter versus the UN Convention on the Rights of the Child: A zero-sum game?' (2008) 23 *SA Public Law* 18. See also Gose M (2002) 26.

[133] See UN Committee on the Rights of the Child (CRC), *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration* (art. 3, para. 1), 29 May 2013, CRC /C/GC/14, paras 37 & 39.

[134] General Comment 14, para 11.

[135] Cvejić Jančić O *The Rights of the Child in a Changing World 25 Years after the UN Convention on the Rights of the Child* (2016) 8.

[136] General Comment 14, para 11. See also Cvejić Jančić (2016) 8.

[137] General Comment 14, para 46.

different interests are being considered to decide on the issue at stake, and the guarantee that this right will be implemented whenever a decision is to be made concerning a child, a group of identified or unidentified children or children in general.[138] This right is self-executing and can be invoked before a court.[139] As a fundamental, interpretative legal principle, it denotes that, if a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen.[140] As a rule of procedure, it means that whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned.[141] Thus, in sentencing courts have to use the best interests principle as a rule of procedure and the decision to sentence a child should be made upon an evaluation of the possible impact on the child concerned. It is submitted that, if used as a rule of procedure, dispositions of corporal punishment and life imprisonment sentences which have a great negative impact on children will not be made.

A child's best interests play a vital role in the interpretation of any statutory provision affecting the child in criminal justice.[142] The Committee underlines that protecting a child's best interests means that the traditional objectives of criminal justice, such as repression or retribution, must give way to rehabilitation and restorative justice objectives when dealing with child offenders.[143] The best interests of a child offender during the sentencing process can be established only through careful analysis of all of the facts relevant to the matter at hand.[144] A

[138] General Comment 14, para 46.
[139] General Comment 14, para 46.
[140] General Comment 14, para 28.
[141] General Comment 14, para 28.
[142] Terbalanche S S 'The Child Justice Act: a detailed consideration of Section 68 as a point of departure with respect to the sentencing of young offenders' (2012) 15 (5) *Potchefstroom Electronic Law Journal* 445.
[143] General Comment 14, para 10.
[144] Terbalanche (2012) 445.

decision taken to sentence a child to life imprisonment, which is retributive and not restorative, cannot be in the best interests of the child.

2.6.3 The principle of child participation

Historically, children have often been considered unable to express or even to have a view, but this changed by the introduction of participatory rights by the CRC.[145] The CRC does not define or mention the 'right to participation' as such, but Article 12 and other related articles of the Convention are together interpreted as the 'participatory rights of children' as they mutually inform an understanding of children's agency as active members of society.[146] Van Bueren has called the participatory rights of children the most significant feature of the CRC because they acknowledge the growing autonomy of children and grant children the opportunity to participate in the decisions that affect their immediate lives.[147] The CRC Committee described the concept of participation as 'ongoing processes, which include information-sharing and dialogue between children and adults based on mutual respect, and in which children can learn how their views and those of adults are taken into account and shape the outcome of such processes.'[148]

Effective and meaningful participation, as a core element of a child rights-based approach, holds an important potential to stress and reinforce the rehabilitative aim that has to inform all

[145] Fokala E M *Implementing Children's Right to Participation in Family Decision-Making Processes in Africa* (2017) 30.
[146] Article 12 of the CRC provides for the right of the child to be heard and to have his or her views taken into account, in accordance with the age and maturity of the child. Other related articles are Articles 13 – 17 of the CRC. See Ruiz-Casares M et al 'Children's rights to participation and protection in international development and humanitarian interventions: nurturing a dialogue' (2017) 21 *The International Journal of Human Rights* 1-13. See also Manco E 'Protecting the child's right to participate in criminal justice proceedings' (2016) 8 *Amsterdam Law Forum* 58.
[147] Van Bueren G *The International Law on the Rights of the Child* (1995) 183.
[148] UN Committee on the Rights of the Child (CRC), *General comment No. 12 (2009): The right of the child to be heard*, 20 July 2009, CRC/C/GC/12. See also Ruiz-Casares et al (2017) 22.

dimensions of the juvenile justice system.[149] This is because the penal measure can only make sense when the child, through participation, actively acquires awareness about her/his behaviour and its legal and social implications.[150] Thus, participation within the juvenile justice system can be seen as a process, involving the child, institutions, professionals, and officials as well as the community.[151] The process evolves with the child at the centre and encourages their rehabilitation and social inclusion.[152] The importance of rehabilitation and social inclusion is to enable and encourage children and young persons to become active members of the community, to contribute with their own resources and skills, and to assume a constructive role in society.[153] This can be achieved through the reciprocal nature of the rehabilitation process that creates a feeling of belonging and enables children to feel accepted by the community, which they are 'part of.'[154]

In sentencing, involving children can help them to understand their actions, to take responsibility and to be recognised and respected by others as community members. In particular, it can help give meaning to the sentence, the custodial or non-custodial measures ordered and the opportunities they present for the child's longer-term development.[155]

2.6.4 The principle of life, survival and development

[149] Defence for Children International *12 Children's right to participation and the juvenile justice system: Theory and Practices for Implementation* (2016) 34.
[150] Manco (2016) 9.
[151] Manco (2016) 9.
[152] Defence for Children International (2016) 34.
[153] Defence for Children International (2016) 34.
[154] Defence for Children International (2016) 34.
[155] Terbalanche (2012) 446.

The principle of life, survival and development is contained in Article 6 of the CRC and Article 5 of the ACRWC.[156] A wide variety of rights and obligations in the CRC and ACRWC are related to the survival and development of the child. The CRC Committee implores States to interpret 'development' in its broadest sense as a holistic concept, embracing the child's physical, mental, spiritual, moral, psychological and social development.[157] The verb 'develop' has been defined as 'to unfold more completely; to evolve the possibilities or power of; to make active; to perfect; advance; further; to increase and to promote the growth of.'[158] Thus, the development of a child should target advancing, furthering, increasing and promoting the growth of the child. The CRC Committee has reiterated that 'States must create an environment that respects human dignity and ensure the holistic development of every child.'[159] Child survival is inextricably linked to child development. The right to maximum survival and development speaks to a continuum that begins at maximum survival and progresses to an endpoint represented by the optimum development of the child.[160] Children, therefore, have the right to survive under conditions that enable them to develop to their full potential.[161]

The CRC Committee has noted that incarceration has very negative consequences for the children's harmonious development and seriously hampers their successful reintegration in society.[162] The impact of institutionalisation goes beyond the experience of violence by children and the long term effects can include severe developmental delays, disability,

[156] Article 6 of the CRC calls for States parties to 'recognise that every child has the inherent right to life and to 'ensure to the maximum extent possible the survival and development of the child.' Article 5 of the ACRWC provides that: 'Every child has an inherent right to life and the right shall be protected by law.'
[157] UN Committee on the Rights of the Child (CRC), *General comment No. 13 (2011): The right of the child to freedom from all forms of violence*, 18 April 2011, CRC/C/GC/13, para 62.
[158]Article I of the Geneva Declaration of 1924 provides that the child must be given the means requisite for its normal development both materially and spiritually.
[159] General Comment 14.
[160] Freeman M, Hawkes S & Bennet B *Law and Global Health: Current Legal Issues* (2014) 283. See also Vandenhole W et al *Routledge International Handbook of Children's Rights Studies* (2015) 70.
[161] Dutscheke M & Abrahams K Rights in Brief: *Children's Rights to Maximum Survival and Development* (2006) 1.
[162] General Comment 10, para 11.

irreversible psychological damage and increased rates of suicide and recidivism.[163] In this regard, Article 37 (b) explicitly provides that: 'arrest, detention and imprisonment should be used only as a measure of last resort and for the shortest appropriate period of time so that the child's right to development is fully respected and ensured.'[164] Sentencing children to life imprisonment goes to the heart of this principle. It severely and directly impacts the child's life, survival and development. It is submitted that a child who is incarcerated for long periods of time is robbed of his/her life and cannot develop fully and be a functional member of society. Corporal punishment also has the effect of hampering a child's survival and development and in some instances can take the child's life, hence the call for these punishments to be abolished in national laws.

2.7 General principles for the treatment of children in conflict with the law

Apart from the four cardinal principles, this thesis draws other principles from the CRC and the ACRWC which directly relate to the treatment of children in conflict with the law and sentencing. These include; the proportionality principle; the principle of imprisonment as a last resort and for the shortest period of time and the treatment of children with dignity and self-worth. The following is an extensive discussion of these principles.

2.7.1 The proportionality principle

[163] UN Study on Violence against Children, 2006 p16 available at http://www.ohchr.org/EN/HRBodies/CRC/Study/Pages/StudyViolenceChildren.aspx. See also Liefaard T *Deprivation of Liberty of Children in Light of International Human Rights Law and standards* (2008) 164.
[164] General Comment 10, para 11.

The concept of proportionality goes to the heart of the inquiry as to whether punishment is cruel, inhuman or degrading, particularly where it is almost exclusively the length of time for which an offender is sentenced that is in issue.[165] This principle is nowadays considered one of the core principles in juvenile justice and is of particular importance when it comes to the imprisonment of children.

This principle provides that the reaction taken in the adjudication and disposition of a case involving a child should be in proportion to the gravity of the offence, the circumstances and needs of the child and society.[166] The proportionality principle also implies that the circumstances of an individual child should influence the manner and the form of the reaction in the juvenile justice system.[167] The CRC Committee has stated that the reaction to an offence should always be in proportion not only to the circumstances and the gravity of the offence but also to the age, lesser culpability, circumstances and needs of the child, as well as to the various and particularly long-term needs of the society.[168] A strictly punitive approach is not in accordance with the leading principles for juvenile justice spelled out in the CRC.[169] In cases of severe offences by children, measures proportionate to the circumstances of the offender and the gravity of the offence may be considered, including considerations of the need for public safety and sanctions.[170] In the case of children, such considerations must always be outweighed by the need to safeguard the well-being and the best interests of the child and to promote his/her reintegration.[171]

[165] Van Zyl Smith D & Ashworth A 'Disproportionate Sentences as Human Rights Violations' (2004) 67 (4) *Modern Law Review* 541 quoting Ackermann J in *S v Dodo* 2001 (3) SA 382 (CC) 303.
[166] Beijing Rule 17(1) (a), CRC Article 40(4) & ACRWC Article 17.
[167] Van Bueren (1995) 183.
[168] General Comment 24, para 76.
[169] General Comment 24, para 76.
[170] General Comment 24, para 76. See also Angel W D, Cardana J & Porcaro G *The International Law of Youth Rights 2* (ed) (2015) 1338.
[171] General Comment 24, para 76. See also Angel et al (2015) 1338.

Van Zyl Smit advocates for the fundamental principle that no person should be subjected to a disproportionate sentence, on the ground that punishment, particularly imprisonment, constitutes a prima facie violation of an individual's right to liberty; secondly, that in principle such a measure can be justified only where a person has been convicted of a serious offence.[172] To allow States to impose substantial restrictions or deprivations of liberty where the offence was not serious would be to condone the use of individuals merely as a means to an end, which is inconsistent with the fundamental respect of the dignity of each human being.[173]

The Beijing Rules stress that the principle of proportionality and the wellbeing of the juvenile should be the guiding factors during sentencing and the use of alternative sanctions or granting less time of imprisonment than provided by law, are sufficient to attain a balance between the legitimate aim of punishment of the juvenile for the wrongdoing and the needs of public safety.[174] Recognising the harm caused by deprivation of liberty to children and adolescents and its negative effects on their prospects for successful reintegration, the CRC Committee recommends that States parties should set a maximum penalty for children accused of crimes that reflect the principle of 'the shortest appropriate period of time.'[175] Moreover, mandatory pre-trial detention and sentencing of children is not compatible with Article 37(b) because it ignores the principle of proportionality and the discretion necessary for the decision in the individual case.[176] It is therefore submitted that life imprisonment sentences are disproportionate to the needs of the child, the culpability of the child and the long-term needs of the society.

[172] Van Zyl Smit & Ashworth A (2004) 4. See also Goh J 'Proportionality - An unattainable ideal in the criminal justice system' (2013) 2 *Manchester Student Law Review* 44.
[173] Van Zyl Smith & Ashworth (2004) 4.
[174] Rule 5 of the Beijing Rules.
[175] General Comment 24, para 77.
[176] Abramson (2008) 2.

2.7.2 The principle of imprisonment as a last resort and for the shortest period of time

The CRC Committee has highlighted the need for a range of alternatives – diversions – to avoid restriction of liberty of children.[177] As a result, domestic legislation that does not reflect the principles of 'last resort' and 'shortest appropriate period of time' would not comply with the requirement of lawfulness under Article 37(b) of the CRC.[178] The Beijing Rules stress that imprisonment should only be imposed when there is 'no other appropriate response' and 'shall be limited to the possible minimum'[179] This State obligation calls for a comprehensive understanding of the child's personal development, its interaction with his or her environment and others, before considering social reaction to a certain behaviour of the child.[180]

Introduced as an exclusive child-specific requirement, the principle is based on scientific research exposing the negative impact of imprisonment not only to juveniles but also to their families, their victims, and society at large.[181] The principle simply imposes a duty on State parties to continuously explore the variety of dispositions operating as alternatives to institutionalisation and to establish facilities offering a less restrictive environment.[182] In addition, the principle implies that the whole juvenile justice system should provide, by law, an indication of the competencies of authorities and time limits for the use of arrest, detention,

[177] See discussion of the diversion options elaborated in General Comment 24 by the CRC Committee at 2.9.2 below.
[178] Schabas & Sax (2006) 77. This principle is derived from Article 37(b) of the CRC, which states that 'the arrest, detention or imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of time.'
[179] Rule 17 (1) (b).
[180] Schabas & Sax (2006) 81.
[181] Manco (2015) 62.
[182] Manco (2015) 62. In line with this principle the CRC Committee also highlights the need for a range of alternatives diversions to avoid restriction of liberty. See Concluding Observations for Canada, Benin, Latvia and Oman in UNICEF *Implementation Handbook of the Convention on the Rights of the Child* (2007) 556. For Canada the Committee recommended that the State should 'To take the necessary measures (e.g. noncustodial alternatives and conditional release) to reduce considerably the number of children in detention and ensure that detention is only used as a measure of last resort and for the shortest possible period of time, and that children are always separated from adults in detention.' (Canada CRC/C/15/Add.215, para. 57(d)). The Committee encouraged Benin to implement alternative measures to deprivation of liberty, such as probation, community service or suspended sentences, in order to ensure that persons below 18 are deprived of liberty only as a last resort and for the shortest appropriate period of time;…' (Benin CRC/C/BEN/CO/2, para. 76(d)).

and imprisonment.[183] When arrest, detention, and imprisonment are imposed, authorities involved in the administration of juvenile justice must have regard to the whole picture of the case in consideration.[184] Consequently, the authorities dealing with a case involving a juvenile must prove that the use of arrest, detention, and imprisonment, including the duration of deprivation of liberty, is necessary.[185] This principle limits institutionalisation in quantity and time. It also implies an emphasis on the use of alternatives to institutional care to the maximum extent possible. Detrick writes that this standard aims to avoid incarceration in the case of children unless there is no other appropriate response that would protect public safety.[186]

Striking a balance toward the juveniles and their best interests, the principle of 'last resort and shortest appropriate period of time' might come into conflict with public interest and principle of proportionality.[187] However, the principle should only be used to justify interventions that are in proportion to the offence, implying an individualised decision.[188] More precisely, the principle requires not only that alternative options should be considered or excluded, rather than imposing deprivation of liberty, but, if imprisonment is the only appropriate option, that an 'appropriate' time frame is considered.[189] The principle, therefore, reinforces the principle of proportionality concerning juveniles in conflict with the law and replaces more retributive principles.[190] More precisely, the use of imprisonment as last resort might be read as a way of 'having a more humane penal policy and keeping a better balance between the requirements of crime control and human rights.'[191]

[183] Manco (2015) 62. See also Schabas & Sax (2006) 81.
[184] Manco (2015) 62.
[185] Van Eeden C *An Analysis of the legal responses to children who commit serious crimes in South Africa* (unpublished LLM thesis, University of Pretoria, 2013) 17.
[186] Detrick S *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 20.
[187] Van Eeden (2013) 16.
[188] Manco (2015) 63.
[189] Manco (2015) 63.
[190] Odala V 'The spectrum for child justice in the international human rights framework: From 'reclaiming the delinquent child' to 'restorative justice' (2012) 27 (3) *American University International Law Review* 576.
[191] Manco (2015) 63.

The ACRWC does not expressly state that children can only be imprisoned as a measure of last resort and for the shortest period of time. However, various Articles of the Charter could be broadly interpreted as encouraging or requiring State parties not to imprison children unless it is unavoidable. These include; Article 4 (1), which is the best interests' provision, the dignity provision in Article 17 (1) and the provision for rehabilitation and reintegration in Article 17.

2.7.3 The principle of dignity and self-worth

The principle of dignity and self - worth is derived from Article 40 (1) of the CRC which reinforces the treatment of children in conflict with the law with dignity and worth.[192] This principle reflects the fundamental human right enshrined in Article 1 of the UDHR, which stipulates that all human beings are born free and equal in dignity and rights.[193] This inherent right to dignity and worth, to which the preamble of the CRC makes explicit reference, has to be respected and protected throughout the entire process of dealing with the child, from the first contact with law enforcement agencies to the implementation of all measures for dealing with the child.[194] Respect for the dignity of the child also requires that all forms of violence in the treatment of children in conflict with the law must be prohibited and prevented. The CRC Committee has urged States parties to take effective measures to prevent such violence and to make sure that the perpetrators are brought to justice and to give effective follow-up to the recommendations made in the report on the United Nations Study on Violence against Children presented to the General Assembly in October 2006.[195] Interpreted in the context of sentencing,

[192] Article 40 provides that: 'States parties recognise the right of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.'
[193] General Comment 10, para 13.
[194] General Comment 10, para 13.
[195] A/61/299. General Comment 10, para 13.

this principle implies that all sentences that take away the dignity and self-worth of a child cannot be imposed. Such sentences will be hugely inhuman as they get to the core of humanity, which is dignity. It is submitted that a corporal punishment sentence which involves the whipping of a child, strips that child of his dignity. Moreover, life imprisonment sentences with or without parole, erode a child of all self-worth. It sends a message to the child, that he is not worthy to be part of society and to grow up among his peers.

2.8 The guarantees for a fair trial

Article 40 (2) of CRC contains an important list of rights and guarantees to ensure that every child in conflict with the law receives fair treatment and trial. Most of these guarantees can also be found in Article 14 of the ICCPR. These guarantees are directly linked to the sentencing aspect in the trial phase. These fair trial guarantees precede sentencing and if followed correctly will ensure that no child will be sentenced inhumanely.

These rights and guarantees are; the non – retroactive action of juvenile justice,[196] presumption of innocence,[197] the right to be heard,[198] effective participation in proceedings,[199] prompt and

[196] Article 40 (2) (a).
[197]Article 40 (2) (b) (i). The presumption of innocence requires that the burden of proof of the charge is on the prosecution, regardless of the nature of the offence. The child has the benefit of the doubt and is guilty only if the charges have been proved beyond reasonable doubt. See General Comment 24, para 43.
[198] Article 12 (2). See discussion on child participation at 2.6.3 above.
[199] Article 40 (2) (b) (iv). See also discussion on participation at 2.6.3 above. The CRC Committee additionally provides that: to effectively participate, a child needs to be supported by all practitioners to comprehend the charges and possible consequences and options in order to direct the legal representative, challenge witnesses, provide an account of events and to make appropriate decisions about evidence, testimony and the measure(s) to be imposed. The CRC Committee also underscore that proceedings should be conducted in a language the child fully understands or an interpreter is to be provided free of charge, in an atmosphere of understanding to allow children to fully participate. See General Comment 24, para 46.

direct information of the charge(s),[200] legal and other appropriate assistance,[201] decisions without delay and with the involvement of parents,[202] freedom from compulsory self-incrimination,[203] presence and examination of witnesses,[204] the right of review and appeal,[205] free assistance of an interpreter,[206] and full respect of privacy.[207]

The CRC Committee emphasised that the continuous and systematic training of professionals in the criminal justice system is crucial for the implementation of the guarantees to a fair trial in Article 40.[208] These professionals should be able to work in interdisciplinary teams, be well informed about the child, and particularly about the adolescent's physical, psychological,

[200] Article 40 (2) (b) (ii). Promptly means as soon as possible after the first contact of the child with the justice system. Children who are diverted at the charge stage need to understand their legal options, and legal safeguards should be fully respected. See General Comment 24, para 47.
[201] The Committee recommends that there be a legal guarantee or other appropriate assistance by the State from the outset of the proceedings for the child, in the preparation and presentation of the defence, and until all appeals and/or reviews are exhausted. The Committee also recommends that States provide effective legal representation, free of charge, for all children who are facing criminal charges before judicial, administrative or other public authorities. See General Comment 24, paras 49, 51.
[202] Article 40 (2) (b) (iii). The CRC Committee reiterates that the time between the commission of the offence and the conclusion of proceedings should be as short as possible. The longer this period, the more likely it is that the response loses its desired outcome. The Committee also recommends that States parties set and implement time limits for the period between the commission of the offence and the completion of the police investigation, the decision of the prosecutor to institute charges, and the final decision by the court or other judicial body. The Committee also recommends that States parties explicitly legislate for the maximum possible involvement of parents or legal guardians in the proceedings because they can provide general psychological and emotional assistance to the child and contribute to effective outcomes. See General Comment 24, paras 54, 55, 57.
[203] Article 40 (2) (b) (iv). The Committee prohibits coercion leading a child to a confession or self-incriminatory testimony. The Committee implores States to interpret 'compelled' broadly and not to limit it to physical force. See General Comment 24, para 59.
[204] Article 40 (2) (b) (iv). According to the CRC Committee children have the right to examine witnesses who testify against them and to involve witnesses to support their defence. See General Comment 24, para 61.
[205] Article 40 (2) (b) (v). The CRC Committee reiterates that the child has the right to have any finding of guilt or the measures imposed on him/her reviewed by a higher competent, independent and impartial authority or judicial body. The Committee implores States parties not to limit the review to only serious offences and to also consider introducing automatic measures of review, particularly in cases that result in criminal records or deprivation of liberty. See General Comment 24, para 62.
[206] Article 40 (2) (b) (vi). According to the Committee a child who cannot understand or speak the language used in the child justice system has the right to the free assistance of an interpreter, who is trained to work with children, at all stages of the process. See General Comment 24, para 64.
[207] Article 40 (2) (b) (vii). According to the CRC Committee child justice hearings are to be conducted behind closed doors and exceptions should be very limited and clearly stated in the law. If the verdict and/or sentence is pronounced in public at a court session, the identity of the child should not be revealed. According to the Committee, the right to privacy also means that the court files and records of children should be kept strictly confidential and closed to third parties except for those directly involved in the investigation and adjudication of, and the ruling on the case. See General Comment 24, para 67.
[208] General Comment 24, para 39.

mental and social development, as well as about the special needs of the most vulnerable children.[209]

2.9 General Comment 24 on Juvenile Justice

The CRC General Comment 24 is the most recent non – binding instrument in juvenile justice, adopted by the CRC Committee in September 2019. The General Comment replaces General Comment No. 10 (2007) on children's rights in juvenile justice. It reflects the developments that have occurred since 2007 as a result of the promulgation of international and regional standards, the Committee's jurisprudence, new knowledge about child and adolescent development, and evidence of effective practices, including those relating to restorative justice.[210] The General Comment also reflects concerns such as the trends relating to the minimum age of criminal responsibility and the persistent use of deprivation of liberty.[211]

The objectives of the General Comment are to provide a contemporary consideration of the relevant articles and principles in the CRC and to guide States towards a holistic implementation of child justice systems that promote and protect children's rights.[212] The General Comment also aims to reiterate the importance of prevention and early intervention, and protecting children's rights at all stages of the system.[213] Other objectives of the General Comment are; to promote key strategies for reducing the especially harmful effects of children's contact with the criminal justice system in line with increased knowledge about children's development, in particular; setting an appropriate minimum age of criminal

[209] General Comment 24, para 39.
[210] General Comment 24, para 1.
[211] General Comment 24, para 1.
[212] General Comment 24, para 1.
[213] General Comment 24, para 1.

responsibility and ensuring the appropriate treatment of children on either side of that age; scaling up of the diversion of children away from formal justice processes to effective programmes; expanding the use of non-custodial measures to ensure that detention of children is a measure of last resort; ending the use of corporal punishment, capital punishment, and life sentences and for the few situations where deprivation of liberty is justified as a last resort, ensuring that its application is for older children only, is strictly time-limited and subject to regular review.[214] The General Comment also aims to promote the strengthening of systems through improved organisation, capacity-building, data collection, evaluation, and research and to provide guidance on new developments in the field, in particular, the recruitment and use of children by non-State armed groups, including those designated as terrorist groups, and children coming into contact with customary, indigenous and non-State justice systems.[215]

According to the Committee, a comprehensive policy for juvenile justice must deal with the following core elements: the prevention of child offending; interventions without resorting to judicial proceedings and interventions in the context of judicial proceedings; age in child justice systems; the guarantees for a fair trial; measures of intervention, the deprivation of liberty including pre-trial detention and post-trial incarceration and other specific issues such as customary, indigenous and non – State forms of justice.[216] Some of these elements such as age determination and the guarantees of a fair trial have already been discussed above.[217] The rest of these elements will be discussed below.

[214] General Comment 24, para 5.
[215] General Comment 24, para 5.
[216] General Comment 24, para 17.
[217] See discussion at 2.5.2 and 2.8 above.

2.9.1 Prevention of child offending, including early intervention directed at children below the minimum age of criminal responsibility

The CRC Committee recommends the strong involvement of parents, families and peer groups in the creation of programs to prevent child offending.[218] According to the Committee, intensive family and community-based treatment programmes, designed to make positive changes in aspects of the various social systems that contribute to the serious behavioural difficulties of children, reduce the risk of children coming into child justice systems.[219] The Committee encourages States to provide support for children at risk of criminal offending, particularly children who stop attending school, are excluded or otherwise do not complete their education.[220] States parties are also encouraged to develop community-based services and programmes that respond to the specific needs, problems, concerns and interests of children, and that provide appropriate counselling and guidance to their families.[221]

The Committee also stresses the importance of early intervention for children below the minimum age of criminal responsibility as a measure to prevent child offending. This early intervention requires child-friendly and multidisciplinary responses to the first signs of behaviour that would be considered an offence if the child were above the minimum age of criminal responsibility.[222] Evidence-based intervention programmes that reflect not only the multiple psychosocial causes of such behaviour, but also the protective factors that may strengthen resilience are strongly recommended by the Committee.[223] These evidence-based interventions must be preceded by a comprehensive and interdisciplinary assessment of the

[218] Articles 18 and 27 of the Convention confirm the importance of the responsibility of parents for the upbringing of their children, but at the same time it requires States parties to provide the assistance to parents (or other caregivers) necessary to carry out their child-rearing responsibilities. See General Comment 24, para 10.
[219] General Comment 24, para 9. These include the home, school, community and peer relations.
[220] General Comment 24, para 9.
[221] General Comment 24, para 9.
[222] General Comment 24, para 11.
[223] General Comment 24, para 11.

child's needs.[224] The Committee also strongly recommends the support of children within their families as an absolute priority and in the exceptional cases that require an out-of-home placement, such alternative care to preferably be in a family setting, although placement in residential care may be appropriate in some instances, to provide the necessary array of professional services.[225]

2.9.2 Interventions without resorting to judicial proceedings (diversion)

Article 40 (3) (b) of the Convention requires States parties to establish measures for dealing with children without resorting to judicial proceedings, whenever appropriate. In practice, the measures generally fall into two categories which are: measures referring children away from the judicial system any time before or during the relevant proceedings (diversion) and measures in the context of judicial proceedings. These measures are for children above the minimum age of criminal responsibility and in applying these measures, a child's human rights and legal safeguards are to be fully respected and protected.[226]

Diversion involves the referral of matters away from the formal criminal justice system usually to programmes or activities.[227] According to the Committee, diversion yields good results for children, is congruent with public safety and has proved to be cost-effective.[228] It is also recommended because it avoids stigmatisation and criminal records.[229] In a majority of cases, the Committee recommends diversion as the preferred manner of dealing with children from as early as possible after their contact with the system, and at various stages throughout the

[224] General Comment 24, para 11.
[225] General Comment 24, para 11.
[226] General Comment 24, para 14.
[227] General Comment 24, para 15.
[228] General Comment 24, para 15.
[229] General Comment 24, para 15.

process. [230] The Committee encourages States parties to continually extend the range of offences for which diversion is possible, including serious offences where appropriate.[231] States parties have discretion on deciding on the exact nature and content of measures of diversion, and to take the necessary legislative and other measures for their implementation.[232] The Committee encourages States to develop community-based programmes, such as; community service, supervision and guidance by designated officials, family conferencing and other restorative justice options, including reparation to victims.[233] Van der Merwe argues that the issue of compensation in the child justice system by child offenders seems to be an empty promise as children are seldom in a position to pay any compensation or often come from very poor families.[234] However, the child offender can always do household chores to 'pay back' to their parents who took responsibility for paying compensation.[235] Van der Merwe further suggests that, if the child is old enough to work, some effort should be made to earn part-time money in order to pay at least a portion of the damage or loss.[236]

The Committee emphasises, first, that diversion should be used only when there is compelling evidence that the child committed the alleged offence, that he or she freely and voluntarily admit responsibility, without intimidation or pressure, and that the admission will not be used against the child in any subsequent legal proceedings.[237] Secondly, the child's free and voluntary consent to diversion should be based on adequate and specific information on the nature, content, and duration of the measure and on an understanding of the consequences of a failure to cooperate or complete the measure.[238] Thirdly, the law should indicate the cases in

[230] General Comment 24, para 16.
[231] General Comment 24, para 16.
[232] General Comment 24, para 17.
[233] General Comment 24, para 17.
[234] See Van der Merwe A 'A new role for crime victims? An evaluation of restorative justice procedures in the Child Justice Act 75 of 2008' (2013) 3 *De Jure* 1037 – 1038.
[235] Van der Merwe (2013) 1037.
[236] Van der Merwe (2013) 1037.
[237] General Comment 24, para 18.
[238] General Comment 24, para 18.

which diversion is possible, and the relevant decisions of the police, prosecutors and/or other agencies should be regulated and reviewable.[239] Fourthly, the child is to be given the opportunity to seek legal or other appropriate assistance relating to the diversion offered by the competent authorities, and the possibility of a review of the measure.[240] Fifthly, diversion measures should not include the deprivation of liberty and finally, the completion of the diversion should result in a definite and final closure of the case.[241] Although confidential records of diversion can be kept for administrative, review, investigative and research purposes, they should not be viewed as criminal convictions or result in criminal records.[242]

Diversion is thus a preferred alternative to the imprisonment and corporal punishment of children. Diversionary options in no way intend to make offenders less accountable or responsible for their actions but rather provide offenders with the opportunity to rethink their lives without getting a criminal record.[243] Diversion programs provide offenders with essential services that can address the underlying causes of criminal behaviours such as alcohol and drug abuse.[244] Diversion programs are also designed to be less costly than formal court proceedings because they reduce the burden on the court system, reduce the caseload of juvenile probation officers, and free up limited resources and services for high-risk juvenile offenders.[245]

2.9.3 Interventions in the context of judicial proceedings (disposition)

Interventions in the context of judicial proceedings mean that when judicial proceedings are initiated by a competent authority against a child in conflict with the law, the principles of a

[239] General Comment 24, para 18.
[240] General Comment 24, para 18.
[241] General Comment 24, para 18.
[242] General Comment 24, para 18.
[243] Muntingh L 'The effectiveness of diversion programmes - a longitudinal evaluation of cases' (2001) 11.
[244] Muntingh (2001) 12.
[245] Muntingh (2001) 12.

fair and just trial must be applied.[246] These principles can be found in Article 40 (2) discussed above.[247] At the same time, the child justice system should provide ample opportunities to apply social and educational measures and to strictly limit the use of deprivation of liberty, from the moment of arrest, throughout the proceedings and in sentencing. [248]

After proceedings in full compliance with the principles of a just and fair trial are completed, the Committee implores States to have a wide variety of non-custodial measures and to expressly prioritise the use of such measures to ensure that deprivation of liberty is used only as a measure of last resort and for the shortest appropriate period of time in sentencing.[249] The Committee requests States to use the experience of others to develop and implement restorative justice measures, adjusting them to their own cultures and traditions.[250] The Committee also encourages States parties to have in place a probation service or similar agency with well-trained staff to ensure the maximum and effective use of measures such as guidance and supervision orders, probation, community monitoring or day reporting centres, and the possibility of early release from detention.[251] The Committee prohibits sentencing by the juvenile court to death,[252] life imprisonment without parole[253] and corporal punishment.[254]

2.9.4 Customary, indigenous and non-State forms of justice

[246] General Comment 24, para 19.
[247] Discussed at 2.7 above.
[248] General Comment 24, para 19.
[249] General Comment 24, para 73.
[250] General Comment 24, para 74.
[251] General Comment 24, para 19.
[252] General Comment 24, para 79.
[253] General Comment 24, para 81.
[254] General Comment 24, para 75. The Committee reiterates that corporal punishment as a sanction is a violation of Article 37 (a) of the CRC.

The CRC Committee has noted the existence of plural justice systems that operate parallel to or on the margins of the formal justice systems that many children come into contact with.[255] These may include customary, tribal, indigenous or other justice systems. According to the Committee, these systems may be more accessible than the formal mechanisms and have the advantage of quickly and relatively inexpensively proposing responses tailored to cultural specificities.[256] They also serve as an alternative to official proceedings against children and are likely to contribute favourably to the change of cultural attitudes concerning children and justice.[257]

The Committee has recognised the need for reforms in the justice sector to be more attentive to these systems.[258] However, considering the potential tension between State and non-State justice, in addition to concerns about procedural rights and risks of discrimination or marginalisation, the Committee implores that these reforms should proceed in stages, with a methodology that involves a full understanding of the comparative systems concerned and that is acceptable to all stakeholders.[259] The CRC Committee also points out that customary justice processes and outcomes should be aligned with constitutional law and with legal and procedural guarantees.[260]

According to the Committee, the principles of the Convention should be infused into all justice mechanisms dealing with children including customary, indigenous or other non-State justice systems.[261] The Committee also noted that customary, indigenous or other non-State justice systems are more likely to achieve the objectives of restorative justice and may provide

[255] General Comment 24, para 102.
[256] General Comment 24, para 102.
[257] General Comment 24, para 102.
[258] General Comment 24, para 103.
[259] General Comment 24, para 103.
[260] General Comment 24, para 103.
[261] General Comment 24, para 104.

opportunities for learning for the formal child justice system.[262] Furthermore, recognition of such justice systems can contribute to increased respect for the traditions of indigenous societies, which could have benefits for indigenous children.[263] The Committee encourages State parties to drive the process of designing interventions, strategies, and reforms for their specific contexts.[264]

2.10 General Comment 8 on Corporal Punishment

General Comment 8 is aimed at guiding State parties in understanding the provisions of the CRC concerning the protection of children against all forms of violence, but it mainly focuses on corporal punishment and other cruel or degrading forms of punishment. The CRC Committee issued the General Comment to highlight the obligations of all States parties to move quickly to prohibit and eliminate all corporal punishment and all other cruel or degrading forms of punishment of children and to outline the legislative and other awareness-raising and educational measures that States must take.[265]

2.10.1 Human rights standards and corporal punishment of children

Corporal punishment is a violation of the right to human dignity, physical integrity and equal protection under the law.[266] The dignity of every individual is the fundamental guiding

[262] General Comment 24, para 104.
[263] General Comment 24, para 104.
[264] General Comment 24, para 104.
[265] UN Committee on the Rights of the Child (CRC), *General comment No. 8 (2006): The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment (Arts. 19; 28, Para. 2; and 37, inter alia)*, 2 March 2007, CRC/C/GC/8, para 1.
[266] The principle of dignity and protection under the law has also been elaborated in other human rights instruments such as the ICCPR, UDHR and ICESCR.

principle of international human rights law. The preamble to the CRC affirms, in accordance with the principles in the Charter, repeated in the preamble to the Universal Declaration, that 'recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world.'[267]

Corporal punishment is not one of the listed forms of violence against children in the CRC and the *travaux préparatoires* for the Convention does not record any discussion of corporal punishment during the drafting sessions, but the Convention, like all human rights instruments, must be regarded as a living instrument, whose interpretation develops over time.[268] Interpreting the Convention in this light reveals that the practice directly conflicts with the equal and inalienable rights of children to respect for their human dignity and physical integrity.[269] The distinct nature of children, their initial dependent and developmental state, their unique human potential as well as their vulnerability, all demand the need for more, rather than less, legal and other protection from all forms of violence.[270]

2.10.2 Measures and mechanisms required to eliminate corporal punishment and other cruel or degrading forms of punishment

2.10.2.1 Legislative measures

The wording of Article 19[271] of the Convention builds upon Article 4[272] and makes clear that legislative as well as other measures are required to fulfil States' obligations to protect children

[267] General Comment 8, para 17.
[268] General Comment 8, para 20.
[269] General Comment 8, para 21.
[270] General Comment 8, para 21.
[271] See note 39 above.
[272] Article 4 provides that: 'States parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the present Convention. With regard to economic,

from all forms of violence.[273] The CRC Committee reiterates that States need to explicitly prohibit corporal punishment in their civil or criminal legislation in order to make it absolutely clear that it is as unlawful to hit or 'smack' or 'spank' a child as to do so to an adult, and that the criminal law on assault does apply equally to such violence, regardless of whether it is termed 'discipline' or 'reasonable correction'.[274] The Committee has also stated that simply repealing authorisation of corporal punishment and any existing defence is not enough.[275]

Given the traditional acceptance of corporal punishment, the Committee has pointed out that it is essential that the applicable sectoral legislation e.g. family law, education law, the law relating to all forms of alternative care and justice systems, employment law - should clearly prohibit corporal punishment in all the relevant settings.[276] In addition, it is valuable if professional codes of ethics and guidance for teachers, carers, and others, and also the rules or charters of institutions, emphasise the illegality of corporal punishment and other cruel or degrading forms of punishment.[277]

2.10.2.2 Educational and other measures

Article 12 of the CRC underlines the importance of giving due consideration to children's views on the development and implementation of educational and other measures to eradicate corporal punishment and other cruel or degrading forms of punishment.[278] Article 42 of the CRC also implores States to make the principles and provisions of the Convention widely

social and cultural rights, States parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.'

[273] General Comment 8, para 30.
[274] General Comment 8, para 34.
[275] General Comment 8, para 34.
[276] General Comment 8, para 35.
[277] General Comment 8, para 35.
[278] General Comment 8, para 44.

known by appropriate and active means, to adults and children alike.[279] Attitudes and practice of corporal punishment do not necessarily change with only prohibition, comprehensive awareness-raising of children's rights to protection and the laws that reflect this right is required.[280]

According to the CRC Committee, children learn from what adults do, not only from what adults say and when the adults to whom a child most closely relates uses violence and humiliation in their relationship with the child, they are demonstrating disrespect for human rights and teaching a potent and dangerous lesson that these are legitimate ways to seek to resolve conflict or change behaviour.[281]

2.10.2.3 Monitoring and evaluation

The Committee, in its general comment No. 5 on General measures of implementation for the CRC, emphasises the need for systematic monitoring by States parties of the realisation of children's rights, through the development of appropriate indicators and the collection of sufficient and reliable data.[282] States parties are thus required to monitor their progress towards eliminating corporal punishment and other cruel or degrading forms of punishment and thus realising children's right to protection.[283]

The monitoring and evaluation involve research using interviews with children, their parents and other carers, in conditions of confidentiality and with appropriate ethical safeguards, to accurately assess the prevalence of these forms of violence within the family and attitudes to

[279] General Comment 8, para 45.
[280] General Comment 8, para 45.
[281] General Comment 8, para 46.
[282] Articles 4, 42 and 44. General Comment 8, para 6.
[283] General Comment 8, para 51.

them.[284] The Committee encourages every State to carry out or commission such research, as far as possible with groups' representatives of the whole population, to provide baseline information and then at regular intervals to measure progress.[285] According to the Committee, the results of this research can provide valuable guidance for the development of universal and targeted awareness-raising campaigns and training for professionals working with or for children.[286]

The Committee also underlines the importance of independent monitoring of implementation by, for example, parliamentary committees, NGOs, academic institutions, professional associations, youth groups, and independent human rights institutions.[287] These could all play an important role in monitoring the realisation of children's rights to protection from all corporal punishment and other cruel or degrading forms of punishment.[288]

2.11 The Model Law on Juvenile Justice and Related Commentary

The Model Law on Juvenile Justice was created by the United Nations Office on Drugs and Crime in 2013, to provide legal guidance to States in the process of juvenile justice reform and assist them in drafting juvenile justice legislation.[289] The Model Law is one of the non – binding 'soft laws' on juvenile justice and as such it only provides guidance to States. The Model Law is however significant in that, it translates compelling international juvenile justice standards

[284] General Comment 8, para 51.
[285] General Comment 8, para 51.
[286] General Comment 8, para 51.
[287] General Comment 8, para 52. See also the CRC General comment No. 2 (2002): *The Role of Independent National Human Rights Institutions in the Promotion and Protection of the Rights of the Child*, 15 November 2002, CRC/GC/2002/2.
[288] General Comment 8, para 52.
[289] United Nations Office on Drugs and Crime (UNODC) *Justice in Matters Involving Children in Conflict with the Law: Model Law on Juvenile Justice and Related Commentary 2013,* available at www.unodc.org (accessed 10 July 2018).

and norms into a national context and aims to harmonise national legislation with international requirements.[290]

The Model Law further covers all phases of the juvenile justice process, starting with the pre-trial phase, including the crucial moment of the apprehension and arrest of the child, as well as his or her treatment in police custody and pre-trial detention. In line with sentencing principles, the law recognises alternatives to judicial proceedings (diversion) and, in particular, restorative justice as key requirements to keep children away from the formal justice system.[291] The principle that deprivation of liberty should be a last resort and only for the shortest appropriate period of time is frequently stressed in the text of the Model Law.[292] A key element of this Model Law is its extensive elaboration of the various alternatives to judicial proceedings and the imprisonment of children. These alternatives are mostly important in the creation of juvenile justice laws and will be fully discussed in Chapter 6 of this thesis.

2.12 Guidelines on Action for Children in Justice Systems in Africa (2011)

The Guidelines on Action for Children in Justice Systems in Africa were adopted in Kampala in 2011 and were created as a framework to achieve full implementation of the African Union and related international instruments, among other aims and objectives.[293] The Guidelines recognise that all decisions and actions pertaining to children should be taken in a 'child-friendly' manner, noting that the justice system must be cognisant of the child's family life as well as his or her increasing capacity and developing maturity.[294] According to the Guidelines,

[290] Model Law on Juvenile Justice.
[291] Model Law on Juvenile Justice.
[292] See Article 13 of the Model Law.
[293] Guidelines on Action for Children in Justice Systems in Africa available at *https://www.childjusticeinafrica.info/index.php/resources/item/25-guidelines-on-action-for-children-in-the-justice-system* (accessed 10 August 2019).
[294] Guideline 8.

the child in conflict with the law is to be treated with care, sensitivity, and respect at all stages of proceedings in the child justice system, 'regardless of his/her legal status or of the manner in which they have come into contact with the justice system.'[295] The Guidelines make provision for every accused child to have legal assistance, and, if appropriate and in the best interests of the child, his or her parents, a family relative or legal guardian, should be present during the proceedings.[296]

The Guidelines encourage States to raise progressively the minimum age of criminal responsibility to 15 years.[297] As a regional 'soft law', the Guidelines surpass the proposed minimum age of criminal responsibility of 14 years by the CRC Committee. The Guidelines also prohibit the sentence of life imprisonment for offences committed by children whilst below the age of 18 years.[298] The Guidelines also prohibit sentencing of children to imprisonment unless the child is judged of having committed a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response that can result in rehabilitation of the child and reintegration into society.[299] Capital and corporal punishment sentences are prohibited for any crime committed by children.[300]

The Guidelines also emphasise the use of alternatives to contact with the formal justice system where children are alleged to be in conflict with the law ('diversion') wherever this is consistent with the best interests of the child and other human rights standards. These alternative measures should be educative, vocational and reintegrative in nature.[301] The Guidelines promote alternatives to formal adjudication of cases involving children - such as mediation, conciliation,

[295] Guideline 19.
[296] Guideline 38.
[297] Guideline 46.
[298] Guideline 59.
[299] Guideline 57.
[300] Guideline 59.
[301] Guideline 27.

restorative justice practices, and traditional dispute resolution mechanisms, which are aimed at the child's reformation, re-integration into family and social rehabilitation.[302] Other alternatives to criminal prosecution offered by the Guidelines, with proper safeguards include; community, customary or traditional mediation; warnings, cautions and admonitions accompanied by measures to rehabilitate the child; implementation of programmes of restorative justice such as conferences between the child, the victim and members of the community; and community programmes such as temporary supervision and guidance, or programmes involving restitution and compensation to victims.[303]

In disposing of a case involving a child in conflict with the law, the Guidelines provide principles to be followed by the competent authority which are; that the action taken against the child should always be in proportion to the circumstances and gravity of the offence and in the best interest of the child; that non-custodial options which emphasise the value of restorative justice should be given primary consideration and restrictions on the personal liberty of a child shall only be imposed after careful consideration and shall be imposed as a last resort and for the shortest appropriate period of time.[304] Non-custodial measures proposed by the Guidelines include; care, guidance and supervision orders; probation; financial penalties, compensation and restitution; intermediate treatment and other treatment orders; orders to participate in group counselling and similar activities; orders concerning foster care, living communities or other educational settings and referral to restorative justice processes for the furtherance of restorative outcomes.[305]

Like General Comment 24, the Guidelines recognise the role of traditional or customary justice relating to child justice proceedings and provide a list of minimum factors to be implemented

[302] Guideline 28.
[303] Guideline 50.
[304] Guideline 56.
[305] Guideline 56.

in traditional justice systems in Africa. These minimum factors include; equality for all, respect for the inherent dignity of the child, gender equality – recognising the special vulnerability of the girl child, respect for liberty and security of the child, assistance of an interpreter and impartiality of the courts.[306] Having been specially crafted for the African context, these Guidelines are a powerful tool in the hands of African States in the implementation of their child justice systems. The array of alternatives offered by the Guidelines is a clear indication of the need to eradicate inhuman sentences such as corporal punishment and life imprisonment sentences.

2.13 The UN Global Study on Children Deprived of Liberty

An in-depth study on the deprivation of liberty of children was commissioned by the General Assembly in 2014 and was completed in 2019.[307] The study was the first scientific attempt, based on global data, to comprehend the magnitude of the situation of children deprived of liberty, its possible justifications and root causes, as well as conditions of detention and their harmful impact on the health and development of children.[308] The study identified best practices in non-custodial solutions applied by States concerning the detention of children in the administration of justice; children living in prisons with their primary caregivers; migration-related detention; deprivation of liberty in institutions and detention in the context of armed conflict and on national security grounds.[309] This thesis will, however, focus on the findings of the study in the context of detention of children in the administration of justice.

[306] Guideline 43 (a) – (o).
[307] United Nations *Report of the Independent Expert leading the United Nations global study on children deprived of liberty* 11 July 2019 A/74/136.
[308] United Nations *Report of the Independent Expert leading the United Nations global study on children deprived of liberty* 11 July 2019 A/74/136.
[309] United Nations *Report of the Independent Expert leading the United Nations global study on children deprived of liberty* 11 July 2019 A/74/136.

This global study will thus reveal the extent of imprisonment of children and the various consequences thereof. Lessons drawn from this study will be used to recommend changes in the administration of juvenile justice for the countries under study.

2.13.1 Findings from the study

According to the Independent Expert, one of the reasons for deprivation of liberty of children is the existence of practices allowing life imprisonment without the possibility of release, capital punishment and longer terms of imprisonment, despite their absolute prohibition under Article 37 (a) of the CRC.[310] The study established that life sentences remain legal in 68 States, specifically in Africa, Asia, the Caribbean, and Oceania regions.[311] In the 110 States and territories that have no life sentences for children, long terms of imprisonment exist, the maximum sentences ranging from 3 to 50 years and in some cases, children have been sentenced to imprisonment for up to 25 years.[312] The Independent Expert considers such lengthy prison sentences to violate the legal requirement of the 'shortest appropriate period of time' under Article 37 (b) of the CRC.

Research for the study proves that detention remains the sad reality of an estimated 160,000–250,000 children in remand centres and prisons worldwide on any given day, indicating the overuse of detention in the context of the administration of justice.[313] The study revealed several reasons for this phenomenon, starting before and going beyond the criminal justice system – such as; lack of effective child welfare systems; lack of support for family environments; excessive criminalisation; low minimum age of criminal responsibility; harsh

[310] Para 44.
[311] Para 44.
[312] Para 44.
[313] Para 40.

sentencing; discrimination; socioeconomic reasons and lack of resources in the administration of justice.[314] In many States, police officers, judges, prosecutors, and prison guards lack specialised child-sensitive training, are underpaid and may be susceptible to corruption.[315] Although children are guaranteed legal or appropriate assistance in the preparation and presentation of their defences, functioning State-funded legal aid systems are completely absent in 42 States.[316] Children consulted for the study specifically expressed concerns about the lack of child-sensitive procedures, lack of access to information, poor detention conditions and insufficient contact with family and the outside world.[317]

The study also revealed that States are often relying on repressive and punitive policies that lead to excessive criminalisation of children.[318] Behaviours that are typical for children are criminalised as so-called 'status offences', these include; truancy, running away from home, disobedience, underage drinking, 'disruptive' behaviours and practices against traditions and morality.[319] The study also revealed that over 120 States maintain the minimum age at below 14, despite encouragement by the Committee on the Rights of the Child to increase the minimum age of criminal responsibility to at least 14 years.[320]

2.13.2 Recommendations from the Independent Expert

Generally, the Independent Expert strongly recommended that States make all efforts to significantly reduce the number of children held in places of detention and prevent deprivation of liberty before it occurs, including addressing the root causes and pathways leading to

[314] Para 41.
[315] Para 46.
[316] Para 46.
[317] Para 48.
[318] Para 43.
[319] Para 43.
[320] Para 43.

deprivation of liberty systemically and holistically.[321] The Independent Expert also called upon States to repeal all laws and policies that permit the deprivation of liberty of children based on an actual or perceived impairment.[322] The Study also encouraged States to ratify the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and to establish independent and effective national preventive mechanisms with particular expertise, to conduct visits to places where children are or may be, deprived of liberty.[323]

The Independent Expert encouraged States to prioritise restorative justice, diversion from judicial proceedings and non-custodial solutions.[324] According to the Independent Expert, capital and corporal punishment and life sentences should never be imposed on a child and States should set a maximum penalty for children accused of crimes, which reflects the principle of 'shortest appropriate period of time.'[325] The Independent Expert reiterated that pre-trial detention should be avoided as far as possible and should in no case last longer than 30 days until the child is formally charged or 6 months until a judgment is rendered.[326] In all decisions that may lead to the detention of children, the Independent Expert called upon States to most rigorously apply the requirement of Article 37 (b) of the CRC, that deprivation of liberty shall be applied only as a measure of last resort in exceptional cases, and that the views of children shall be heard and taken duly into account.[327]

The Study also recommended that there be increased support to families, communities, schools and child welfare systems.[328] The Study encouraged the development of structured inter-

[321] Para 98.
[322] Para 101.
[323] Para 104.
[324] Para 113.
[325] Para 113.
[326] Para 111.
[327] Para 101.
[328] Para 42.

agency cooperation between the child welfare, social protection, education, and health systems, law enforcement and the justice system, to build comprehensive child protection systems and implement prevention and early intervention policies.[329]

2.14 Conclusion

This chapter laid a theoretical foundation of the international and regional law on juvenile justice. Provisions relating to juvenile justice in the CRC, the ACRWC and General Comment 24 on juvenile justice and other soft laws were extensively discussed. These were also discussed in light of sentencing and the inhuman sentences of corporal punishment and life imprisonment.

Aspects of a comprehensive juvenile justice system discussed include age determination, deprivation of liberty, diversion and guarantees of a fair trial. Principles of sentencing such as the imprisonment of children as a last resort, the principle of proportionality and the principle of dignity and self-worth were discussed. This chapter established that for purposes of sentencing a child is a person under the age of 18 years and the minimum age at which a child can be criminally liable should at least be 14 years. It was also established that the age to be considered during the sentencing of a child is the age at the time of the commission of the offence, not the age at the time of sentencing. The chapter also established that the best interests of the child in sentencing, mean that the traditional objectives of criminal justice such as repression or retribution, must give way to rehabilitation and restorative justice objectives.

A discussion of Article 37 of the CRC revealed a clear prohibition of inhuman sentences of life imprisonment without parole and corporal punishment. The prohibition was also extended to

[329] Para 42.

all forms of life imprisonment. General Comment 24 laid out the elements to be included in an effective juvenile justice policy, which will be proposed at the conclusion of this thesis. In General Comment 24, States are implored to use alternatives to the imprisonment and deprivation of liberty of children such as probation, counselling, mediation, warnings, community service among others. The chapter also discussed the Model Law on juvenile justice which complements the elements of a comprehensive juvenile justice policy in General Comment 24. The Model Law's added value is its commentary which elaborates and expands on the various alternatives to the imprisonment of children, which will be highlighted in the concluding chapter of this thesis.

Lastly, the chapter discussed the recent global study on children deprived of liberty published in July 2019. The study revealed that in many States there is a tendency towards criminalising the behaviour of children instead of upholding the principle to deprive children of liberty only as a last resort. The study also showed a common trend for putting children who are vulnerable through rigid criminal justice systems that tend to resort to deprivation of liberty as an automatic response over other more effective and evidence-based alternatives. The Independent Expert strongly recommended that States should make all efforts to significantly reduce the number of children held in places of detention and prevent deprivation of liberty before it occurs, including addressing the root causes and pathways leading to deprivation of liberty in a systemic and holistic manner. The Independent Expert called upon States to most rigorously apply the requirement of Article 37 (b) of the CRC that deprivation of liberty shall be applied only as a measure of last resort in exceptional cases, and that the views of children shall be heard and taken duly into account.

As a background to the sentencing of children in Zimbabwe and Botswana, the upcoming chapter discusses the general administration of juvenile justice in these two countries.

CHAPTER 3: ADMINISTRATION OF JUVENILE JUSTICE IN ZIMBABWE AND BOTSWANA

3.1 Introduction

As discussed in Chapter 2, children in conflict with the law face various challenges due to their vulnerability as 'children' and mostly as 'breakers of the law.' Children, because they differ from adults in their physical and psychological development, require a separate system with a differentiated and individualised approach, especially in criminal justice.[1] Since the adoption of the Convention on the Rights of the Child (CRC), emphasis has been placed on the establishment of a separate juvenile justice system dealing with children in conflict with the law. As State parties to the CRC, Zimbabwe and Botswana have an obligation to create this separate system founded on children's rights laws and principles.[2] In Chapter 2, it was established that a comprehensive policy for juvenile justice must deal with the following core elements: the prevention of child offending; interventions without resorting to judicial proceedings and interventions in the context of judicial proceedings; provisions elaborating the role of age in child justice systems; the guarantees for a fair trial; measures of intervention before and during criminal proceedings; rules concerning the deprivation of liberty including pre-trial detention and post-trial incarceration; and other specific issues such as customary, indigenous and non – State forms of justice.[3] This chapter will therefore discuss these aspects in the context of Botswana and Zimbabwe.

Currently, Botswana does not have a separate policy on juvenile justice for dealing with children in conflict with the law. As such, provisions for dealing with children in conflict with

[1] UN Committee on the Rights of the Child *General Comment No. 24 (2019) on children's rights in the child justice system*, CRC/C/GC/2, para 1.
[2] See discussion in Chapter 2 from 2.3 – 2.9.
[3] See a discussion on what these core elements should entail in Chapter 2 at 2.9.

the law are found in various legislations.[4] In Zimbabwe, a draft policy on juvenile justice is being debated by parliament and various stakeholders and there is no indication as to when it will be published. Thus, children in conflict with the law are still being dealt with under various laws as well. Under the CRC both Zimbabwe and Botswana are under an obligation to undertake appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the Convention,[5] and under the African Charter on the Rights and Welfare of the Child (ACRWC), they are obliged to take constitutional, legislative and such other measures as may be necessary, to give effect to the provisions of the Charter.[6]

Bearing in mind that there is no separate justice system for children in Botswana and Zimbabwe, this chapter therefore discusses the various constitutional, legislative and other measures employed in these two countries for the protection of children in conflict with the law. These measures will be discussed in light of the core elements for a comprehensive juvenile justice system laid out in Chapter 2. Specific attention will be given to the sentencing aspect of the juvenile justice system. The chapter will also discuss the sentencing component of the draft juvenile justice policy still underway in Zimbabwe.

The chapter will begin by discussing Zimbabwe's provisions for the protection of children's rights in general, children's rights in juvenile justice, the sentencing of juveniles and the various aspects of juvenile justice provided in various laws. Thereafter, a discussion of Botswana's laws for the protection of children's rights in juvenile justice will ensue. The various components of juvenile justice found in various laws of Botswana will thereafter be discussed.

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[4] See discussion at 3.3 below.

[5] Article 4 of the CRC. See also UN Committee on the Rights of the Child (CRC), *General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003, CRC/GC/2003/5, available at *https://www.refworld.org/docid/4538834f11.html* (accessed 26 January 2020), which gives effect to Article 4 of the CRC.

[6] Article 1 of the ACRWC. See also African Committee of Experts (ACERWC), *General Comment no. 5 (2018) 'State Party Obligations under the African Charter on the Rights and Welfare of the Child (Article 1) and systems strengthening for child protection*, 2018, available at *https://www.acerwc.africa/general-comments/* (accessed 8 January 2020), which gives effect to Article 1 of the CRC.

The discussion is to ascertain whether these aspects are in line with established international law principles.

3.2 Zimbabwe

The adoption of the Constitution of Zimbabwe in 2013, ushered a new era of hope for children as it brought about provisions for children's rights which were non - existent in the previous Constitution.[7] Anchoring children's rights in this supreme law significantly increased the visibility of children, particularly in the justice system. It sends a strong message to the nation that children are recognised as part of our society and are deserving of essential protection. The Constitution, apart from the general protection of children's rights, has extensive provisions particularly for children in conflict with the law which will be discussed below.[8] The various laws dealing with children in conflict with the law in Zimbabwe include; the Criminal Procedure and Evidence Act (CPEA) (Chapter 9:07) as amended to 2016, the Criminal Law (Codification and Reform) Act (CLCRA) (Chapter 9:23) of 2005 and the Children's Act of 2001.[9]

3.2.1 Applicability of International Law in Zimbabwe

The impact of the CRC and the ACRWC, like any other international Convention, depends on the system applicable for the domestication of international treaties in each and every country. There are two systems applicable. Under the monist system, international conventions are

[7] Constitution of Zimbabwe, 1980 available at *https://www.refworld.org/docid/3ae6b5720.html* (accessed 30 January 2019).
[8] At 3.2.2.2.
[9] The Children's Act is currently under amendment to align it with the Constitution.

directly applicable in the domestic courts, that is to say, there is no need for the domestication of international conventions by way of, for instance, an Act of Parliament. The dualist system, on the other hand, is whereby treaties can only be incorporated into national law by domestic statutes. Zimbabwe belongs to the second category hence Section 34 of the Constitution which states that the state must ensure that all international conventions, treaties and agreements to which Zimbabwe is a party to, are incorporated into domestic law. Furthermore, Section 327(2) of Zimbabwe's new Constitution provides that 'an internationa1 treaty which has been concluded or executed by the President or under the President's authority does not bind Zimbabwe until it has been approved by Parliament and does not form any part of the law of Zimbabwe unless it has been incorporated into the law through an Act of Parliament.'[10] Although Zimbabwe signed and ratified the CRC in 1990, no further action has been taken by Parliament to give the Convention the force of national law.

However, upon ratification of the CRC and the ACRWC, Zimbabwe came under an obligation to align all its laws on juvenile justice to the dictates of these two treaties. Sufficient inclusion of Article 37 and 40 of the CRC and Article 17 of the ACRWC into domestic law in Zimbabwe entails that the constitutional and legislative provisions that relate to children in conflict with the law - the Constitution, the Children's Act, the Criminal Law Codification (and Reform) Act, the Prisons Act and the Criminal Procedure (and Evidence) Act, must be in line with the provisions of the ACRWC and the CRC.

3.2.2 Protection of Children's Rights under Zimbabwe's Constitution

[10] Section 327(2) of the Constitution on Zimbabwe, 2013.

The Constitution in Section 19 states the nation's objectives as they relate to children and in Section 81, provides for children's rights. These objectives guide the interpretation of the State's obligations under the Constitution and the formulation of laws and policies in Zimbabwe. The State is obliged to adopt policies and measures to ensure that in matters relating to children, the best interests of a child are paramount.[11] The State is also obliged to adopt reasonable policies and measures, within the limits of the resources available to it; to ensure that children enjoy family or parental care, or appropriate care when removed from the family environment;[12] to have shelter and basic nutrition, health care, and social services;[13] to be protected from maltreatment, neglect or any form of abuse;[14] and to have access to appropriate education and training.[15] In terms of the objectives, the State must take appropriate legislative and other measures to protect children from exploitative labour practices;[16] and to ensure that children are not required or permitted to perform work or provide services that are inappropriate for the children's age;[17] or place at risk the children's well-being, education, physical or mental health or spiritual, moral or social development.[18] The objective of ensuring that the best interests of the child are protected and for ensuring that children are protected from all forms of abuse can be used to guide sentencing practices and policies affecting children. In light of these objectives, Zimbabwe is in the right direction of ensuring that State policies concerning children are properly regulated.

[11] Section 19 (1) of the Constitution.
[12] Section 19 (2) (a).
[13] Section 19 (2) (b).
[14] Section 19 (2) (c).
[15] Section 19 (2) (d).
[16] Section 19 (3) (a).
[17] Section 19 (3) (b) (ii).
[18] Section 19 (3) (b) (ii).

3.2.2.1 Children's rights under the Constitution

Children's rights are found in Section 81 of the Constitution of Zimbabwe. The provision of children's rights is the first of its kind in the history of the country and a cause for credit to the government of Zimbabwe. The CRC Committee in its second periodic report welcomed the new Constitution of Zimbabwe and its inclusion of provisions promoting and protecting the rights of children in line with the Convention.[19] The rights provided for children in Section 81 are; the right to be given a name and family name,[20] to citizenship based on birth,[21] to family or parental care, or to appropriate care when removed from the family environment, [22] to be protected from economic and sexual exploitation, from child labour, and maltreatment, neglect or any form of abuse,[23] to education, health care services, nutrition, and shelter,[24] not to be recruited into a militia force or take part in armed conflict or hostilities,[25] and not to be compelled to take part in any political activity.[26]

The best interests of the child are considered paramount in all matters concerning a child in Zimbabwe.[27] The formulation of this principle in Zimbabwe as 'the primary consideration' is similar to that of the ACRWC, thus ensuring the supremacy of the principle above other considerations in matters concerning children. This section also places the courts as upper guardians of children and as such, they play a significant role in the protection of children's rights. As an upper guardian, the courts are placed on a higher pedestal to ensure that no inhuman sentences are passed on children.

[19] CRC Concluding observations on the second periodic report of Zimbabwe, 7 March 2016, CRC/C/ZWE/CO/2, para 76.
[20] Section 81 (1) (b).
[21] Section 81(1) (c).
[22] Section 81 (1) (d).
[23] Section 81 (1) (e).
[24] Section 81 (1) (f).
[25] Section 81 (1) (g).
[26] Section 81 (1) (h).
[27] Section 81(2).

3.2.2.2 Rights pertaining to juvenile justice

In line with the CRC and the ACRWC, the Constitution provides for every child's right not to be detained except as a measure of last resort and, if detained, to be detained for the shortest appropriate period.[28] In applying this provision, in the *S v FM* (A Juvenile), the court denounced a 9-year sentence for a 17-year-old child, considering it to be violating the principle of 'shortest period of time.' The court remarked:

> 'Our Constitution, in s 81(h)(i), adopts the principle that juveniles should be detained for the shortest possible time and only as a last resort – an obligation that is found in international law, as exemplified by Article 37 (b) of the CRC to which Zimbabwe is a party… A 9-year sentence for a 17-year-old runs contrary to the letter and spirit of this constitutional imperative. From a children's rights viewpoint, custodial punishment is regarded as criminally damaging for children due to the criminogenic influences of prison.[29]

The Constitution also provides for every child's right to be kept separately from detained persons over the age of eighteen years;[30] and to be treated in a manner, and kept in conditions that take account of the child's age.[31] Additional protection for children in conflict with the law regarding fair trial guarantees is found in Sections 69 and 70 of the Constitution.[32] In terms of Section 53 of the Constitution, children, like all persons in Zimbabwe, have the right not to be subjected to physical or psychological torture or to cruel, inhuman or degrading treatment or punishment.[33] The provision prohibiting inhuman treatment and punishment is similarly

[28] S 81(h) (i).
[29] (CRB 415/14) [2015] ZWHHC 112 (15 January 2015).
[30] S 81(h) (ii).
[31] S 81(h) (iii).
[32] Section 69 provides for the right to a fair hearing, while Section 70 gives detailed protection of all rights of accused persons.
[33] Section 53 of the Constitution.

phrased as that of the CRC, thus, as established in Chapter 2, inhuman sentencing of children to life imprisonment and corporal punishment should not be permitted in Zimbabwe.

3.2.3 Defining a child for purposes of sentencing in Zimbabwe

The Constitution of Zimbabwe defines a child as any boy and girl under the age of 18 years.[34] This definition is in line with the CRC and the ACRWC's definition of a child. The CRC Committee in its recent concluding observation on Zimbabwe welcomed the Constitutional provision establishing the age of a child as 18 years.[35]

The Children's Act, on the other hand, has various definitions relating to children. The Act defines a child as 'a person under the age of 16 years including an infant.'[36] An infant is defined as 'a person under the age of 7 years.'[37] A minor is defined as 'a person below the age of 18.'[38] For juvenile justice purposes, the Act defines a young person as 'a person who has attained the age of 16 but has not attained the age of 18 years.'[39] All these are categories for defining persons below the age of 18. This categorisation may however pose some challenges in the implementation of child welfare issues,[40] hence the submission that one definition of a child as a person below the age of 18years should be adopted by the Children's Act. Since the Constitution is the supreme law of the land and any law, practice, custom or conduct inconsistent with it is invalid,[41] the definition of a child in the Children's Act is overridden by the definition in the Constitution.

[34] Section 81 (1) of the Constitution.
[35] CRC/C/ZWE/CO/2, para 79.
[36] Section 2 of Zimbabwe's Children's Act, Chapter 5:06 of 1972.
[37] Section 2 of the Children's Act.
[38] Section 2 of the Children's Act.
[39] Section 2 of the Children's Act.
[40] Bhaiseni B 'Zimbabwe Children's Act alignment with international and domestic legal instruments: unravelling the gaps' 2016 (6) *African Journal of Social Work* 2.
[41] Section 2 (1) of the Constitution.

3.2.4 Age Determination

As discussed in the previous chapter, the child's age at the time of the commission of the offence is the age to be considered for purposes of sentencing.[42] Courts in Zimbabwe are cognisant of the need to ascertain a child's age before sentencing. In terms of the Criminal Procedure and Evidence Act (CPEA), where there is insufficient evidence of an offender's age, the magistrate may estimate the child's age based on his appearance and on any information, including hearsay evidence, which may be available.[43] In *S v TM*. (A Juvenile), the High Court acknowledged that a sentence of 12 months imprisonment with labour imposed on two accused aged between 16 and 17 was harsh especially where there was no proof of the accused's age in the record of the proceedings and therefore no basis for the trial magistrate to make an informed estimation of the accused's age.[44] The court noted that the trial magistrate had failed to fully appreciate the accused's age and to properly assess how that may affect the overall sentence.[45] The court also stated that age is an important factor when it comes to sentencing and where there are doubts as to age, attempts must be made to ascertain the accused's age as accurately as possible.[46]

3.2.5 Minimum age of criminal responsibility (MACR)

The CRC requires States parties to the Convention to establish a minimum age below which children are presumed not to have the capacity to infringe the penal law.[47] In its recent General

[42] See Chapter 2 at 2.5.2.
[43] Section of the 387 CPEA.
[44] *S v T.M*. (A Juvenile) (CRB ZVI 313/02) [2003] ZWBHC 65 (11 June 2003).
[45] *S v T.M*.
[46] *S v T.M*.
[47] Article 40 (3) of the CRC.

Comment No. 24 on juvenile justice, the CRC Committee set the MACR internationally at 14 years.

In Zimbabwe, the Criminal Law Codification and Reform Act (CLCRA) deems a child under the age of 7 as lacking criminal capacity.[48] Children who are or over the age of 7 but below the age of 14 are presumed, unless the contrary is proved beyond a reasonable doubt, to lack the capacity to form the deliberate intention or have the capacity for negligence to commit a crime.[49] There is no presumption of criminal incapacity for persons over the age of 14 years.[50] An interpretation of these provisions indicates that a child at or above the minimum age of 7 years at the time of the commission of an offence but younger than 18 years can be formally charged and subject to juvenile justice procedures. The CRC Committee expressed concern about the very low age of criminal responsibility in Zimbabwe, which is currently at 7 years.[51] In light of the then General Comment 10 on juvenile justice, the Committee urged the State party to bring its juvenile justice system fully into line with the Convention and other relevant standards and to raise the minimum age of criminal responsibility in conformity with international standards.[52] This thesis also proposes that the minimum age of criminal responsibility be raised to 14years.

3.2.5 Sentencing under the Constitution

The highest sentence that can be passed in Zimbabwe is the death sentence. Section 48 of the Constitution permits the death sentence to be imposed on a person convicted of murder

[48] Section 6 of Zimbabwe's Criminal Law Codification and Reform Act (CLCRA), Chapter 9:23, 2005.
[49] Section 7 of the CLCRA.
[50] Section 7 of the CLCRA.
[51] CRC/C/ZWE/2, para 77.
[52]CRC/C/ZWE/2, para 77.

committed with aggravating circumstances.[53] The passing of the sentence is however discretionary, [54] and can only be in accordance with a final judgment of a competent court.[55] The death sentence may also not be imposed on a person who was less than 21 years old when the offence was committed, a person who is more than 70 years old, and a woman.[56] As such, there is an express prohibition of the death penalty for children in Zimbabwe; however, there is no express prohibition for long or life imprisonment sentences for them. Provisions for life imprisonment in Zimbabwe will be discussed in the next chapter.

Paradoxically, the Constitution prohibits cruel and inhuman treatment or punishment.[57] Section 86 also prohibits any limitation on the right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment.[58] These provisions are similar to those provided in Article 7 (a) of the International Covenant on Civil and Political Rights (ICCPR) and Article 37 (a) of the CRC prohibiting inhuman treatment or punishment. Section 52 also provides for the right of every person to bodily and psychological integrity, which includes the right to freedom from all forms of violence from public or private sources. Additionally, Section 51 enshrines the right to human dignity.[59] These provisions are a limitation on the various punishments that may be imposed on anyone including children. The Constitution, therefore, seems to be conflicting itself by permitting the imposition of the death penalty and at the same time prohibiting cruel and inhuman treatment or punishment.

[53] Section 48 (2) of the Constitution. The death penalty is also allowed for aggravated circumstances in terms of s336 and 337 of the Criminal Procedure and Evidence Act.
[54] Section 48 (2) (a) of the Constitution.
[55] Section 48 (2) (b) of the Constitution.
[56] Section 48 (2) (c) & (d) of the Constitution. See also Section 338 of the CPEA.
[57] Section 53 of the Constitution provides that 'no person may be subjected to physical or psychological torture or to cruel, inhuman or degrading treatment or punishment.'
[58] Section 86 (1) (c) of the Constitution.
[59] Section 52 (a) of the Constitution.

3.2.6 Sentencing of juveniles

In terms of Section 351 of the CPEA, a person under the age of 18 who is convicted of an offence can either be sentenced to a fine, imprisonment or be dealt with in terms of the Children's Court.[60] Alternatively, such a child can be placed in a training institute in Zimbabwe or a reform school in South Africa,[61] for three years or until released by a licence in terms of the Children's Act.[62] The CPEA also empowers the courts to postpone the passing of sentence and to suspend the operation of the sentence passed.[63] The courts can also discharge the offender with caution or reprimand.[64] All these options can give a child the chance to reform. Male juveniles can in addition to other punishments be sentenced to corporal punishment. The sentence of corporal punishment will be discussed in Chapter 5 of this thesis. Courts also have discretion on the punishments that can be imposed on juveniles. Non-custodial sentences in terms of the CPEA, therefore, include; fines, suspended sentences, and discharge with caution or reprimand. The writer believes that these sentences are likely to be passed for non – serious offences and are not sufficient alternatives to the imprisonment of children.

3.2.6.1 Sentence of imprisonment

The CPEA provides for cumulative or concurrent imprisonment sentences to be imposed on offenders.[65] There are no limits placed by the Act for the imprisonment of juvenile offenders to these cumulative sentences for children.

[60] Section 351 (2).
[61] Section 351 (2) (b). The Department of Social Development plays an important role in this regard and is responsible for ensuring the placement of these juveniles.
[62] Section 352.
[63] Section 358.
[64] Section 358.
[65] Section 343.

In *S v FM* (A Juvenile),[66] the accused, a 17-year-old male, was convicted on 8 counts of unlawful entry into premises and 8 counts of theft from those premises. He was sentenced to a total of 9 years' imprisonment for the 16 counts he was accused of. The court, in this case, noted that it was indeed faced with an unrelenting offender whom the probation officer had recommended to appear in criminal court due to his propensity to commit crimes. Although acknowledging his youth in sentencing him, blameworthiness and protection of the community were among the factors considered in sentencing the accused.[67]

On review, the High court stated that: 'the sentence appears to be clearly dictated by the need to protect the public from a perceived delinquent and incorrigible young criminal offender. Yet, the risks of incarcerating such a young offender over a lengthy period of time should not be so easily sacrificed at the altar of expediency.' The court held that sentencing the accused as an adult offender lacked justification when the factors surrounding his home environment are considered. The court further held that there was no evidence that the accused had ever been referred to a juvenile institution or of a history of prior intervention appropriate to juveniles. According to the court, instead of rushing to impose adult punishment in the form of a lengthy prison sentence that may merely accentuate to the juvenile's path to becoming a hardened criminal, it seems a 17-year-old could have been given a chance by being referred to an appropriate juvenile institution for rehabilitation. The court also held that it is the responsibility of the State and its officials who come into contact with cases of need, to reduce chances of recidivism by thoroughly examining the range of possible interventions. Eventually, the sentence was reduced to 3 years imprisonment for all counts, of which 1 year was suspended for five years on condition the accused does not, during that time, commit any offence

[66] *S v FM* (A Juvenile) (CRB 415/14) [2015] ZWHHC 112 (15 January 2015).
[67] *S v FM* (A Juvenile) (CRB 415/14) [2015].

involving unlawful entry for which he is sentenced to a term of imprisonment without the option of a fine.[68]

Thus, although imprisonment is a viable option for the sentencing of children, courts are aware that they should not impose lengthy sentences on children and that imprisonment should be imposed only as a measure of last resort. However, as long as imprisonment remains an option for sentencing it is not a guarantee that courts will always see the need not to imprison children for longer periods. It is submitted that since the CRC does not outrightly prohibit imprisonment in itself, the provision for imprisonment can be amended to read: 'imprisonment only as a measure of last resort and for the shortest period of time.' It is also submitted that the State should set a maximum period of imprisonment that can be imposed on a convicted child in line with the requirement of a 'shortest period of time.' Clear probation should also be made for cumulative sentences against juvenile offenders as they may amount to life imprisonment sentences.

3.2.6.2 Sentencing options in terms of the Children's Act

The Children's Act mainly offers custodial sentences to children found in conflict with the law. In terms of the Children's Act, the Children's Court can sentence a child to be placed in a certified institution,[69] to be placed in foster care or to remain in the custody of any suitable person,[70] to be placed in the custody of his parent or guardian,[71] to reside in such place as the court may determine,[72] and to be placed in a training institute.[73] Where a child is placed in the

[68] *S v FM* (A Juvenile) (CRB 415/14) [2015].
[69] Section 20 (1) (b) (i).
[70] Section 20 (1) (b) (ii).
[71] Section 20 (1) (b) (iii).
[72] Section 20 (1) (b) (iv).
[73] Section 20 (1) (b) (vi).

custody of a parent or guardian, foster care of any named suitable person or where the child resides in a named place, the court may also order the child to be under the supervision of a probation officer for a period not exceeding 3 years.[74] These sentences can be used as alternatives to imprisonment or corporal punishment of children; however, emphasis should be placed on non – custodial sentences.

The Act only offers community service [75] and attendance at an attendance centre for three hours per week[76] as non – custodial sentences. These non – custodial sentences are not sufficient. It is thus submitted that the State should provide more non – custodial sentences which are community-based, such as group counselling, education orders, restorative justice orders, supervision orders, and suspended sentences, among others.[77]

3.2.7 Diversion

In line with the CRC, Zimbabwe initiated a pre-trial diversion programme (PTD) under the CPEA, where, with the support of a probation officer, offenders charged with petty crimes are diverted from the formal criminal justice system, their cases are heard in a closed court, and sentences are imposed along rehabilitative lines.[78] The PTD programme came into existence in

[74] Section 20 (3).
[75] Section 20 (1) (b) (v).
[76] Section 20 (3). This option is available for children above the age of 12.
[77] See a range of non – custodial orders discussed in Chapter 2 at 2.11.3.
[78] In terms of Section 9 of the CPEA, the Prosecutor General can refuse to prosecute any matter if the accused is below the age of 18 years, where he/she is admitting to the crime committed and where the crime committed would not ordinarily attract a custodial sentence of more than one year. See also UNICEF 'Zimbabwe launches the Pre – Diversion Programme' available at *https://www.unicef.org/zimbabwe/press-releases/zimbabwe-launches-pre-trial-diversion-programme* (accessed 18 December 2018).

2009 when UNICEF and Save the Children instituted a pilot of the project which was then formally adopted by the government in 2016.[79]

The programme is guided by the principles of the best interests of the child, detention as a last resort and for the shortest period of time, minimised contact of juveniles with the formal justice system, respect of children's rights to protection from abuse, exploitation and violence and separation of all children from alleged and convicted adult offenders, respect of children's rights to due process and separation of boys and girls to ensure their maximum participation in the programme.[80] The programme applies to children who have committed offences that would not attract a sentence of over 12months imprisonment.[81] Children who commit serious offences such as murder, rape and robbery are not eligible for diversion,[82] neither are repeat and serious offenders who, without coercion, accept and take responsibility for their actions.[83] Children who also deny their guilt are not eligible for diversion.[84]

The goals of the programme are: to make young people responsible and accountable for their actions, to provide an opportunity for reparation, to prevent young offenders from receiving a criminal record early in their lives and being labelled as criminals, to open the judicial process for education and rehabilitative procedures and to some extent, lessen the caseload on the

[79] UNICEF 'Zimbabwe launches a pre – trial diversion programme' available at *https://www.unicef.org/zimbabwe/press-releases/zimbabwe-launches-pre-trial-diversion-programme* (accessed 18 December 2019).

[80] Ministry of Justice, Legal and Parliamentary Affairs: Pre – Trial Diversion available at *http://www.justice.gov.zw/index.php/departments/policy-legal-research?showall=&start=4* (accessed 16 November 2018). See also 'Hear them Cry Report 2019, pg. 15.

[81] Ministry of Justice, Legal and Parliamentary Affairs: Pre – Trial Diversion available at *http://www.justice.gov.zw/index.php/departments/policy-legal-research?showall=&start=4* (accessed 16 November 2018). See also 'Hear them Cry Report 2019, pg. 15.

[82] Ministry of Justice, Legal and Parliamentary Affairs: Pre – Trial Diversion available at *http://www.justice.gov.zw/index.php/departments/policy-legal-research?showall=&start=4* (accessed 16 November 2018).

[83] Ministry of Justice, Legal and Parliamentary Affairs: Pre – Trial Diversion available at *http://www.justice.gov.zw/index.php/departments/policy-legal-research?showall=&start=4* (accessed 16 November 2018).

[84] Ministry of Justice, Legal and Parliamentary Affairs: Pre – Trial Diversion available at *http://www.justice.gov.zw/index.php/departments/policy-legal-research?showall=&start=4* (accessed 16 November 2018).

formal justice system.[85] The programme has measures put in place to assist its beneficiaries in reforming. These include; reparation,[86] counselling,[87] attendance at a particular institution for educational and vocational purposes, victim-offender mediation,[88] constructive use of leisure time,[89] police cautions,[90] and family group conferencing.[91]

As of July 2019, over 3,000 children in conflict with the law had been diverted from the formal criminal justice system and supported in their rehabilitation through the PTD programme.[92] In February 2018, a total of 629 juvenile offenders had been assisted through the PTD programme pilot project in Harare, Bulawayo, Gweru, Murehwa and Chitungwiza.[93] Of the 629, 39.9 per cent were charged with theft which indicates that theft is the most committed offence, assault and bullying being the second most prevalent offence constituting 30.7 per cent of the cases.[94] Harare province received 279 juvenile offences and diverted 198, Bulawayo received 105 cases

[85] Ministry of Justice, Legal and Parliamentary Affairs: Pre – Trial Diversion available at *http://www.justice.gov.zw/index.php/departments/policy-legal-research?showall=&start=4* (accessed 16 November 2018).

[86] This refers to community service or work or for the benefit of the victim. It may also include reasonable compensation in cash or kind.

[87] This may be necessary depending on the nature of the offence and will be facilitated by persons trained in this field.

[88] This involves meeting the young person and the victim, with their close relatives. The intention is to facilitate the healing of wounds to encourage societal healing. Issues such as feelings, compensation, apology, performance of community service etc., are discussed.

[89] This is intended to occupy the leisure time of the juvenile in order to prevent him from engaging in crime through boredom. This may include activities such as sport, church or youth groups and training in areas such as horticulture.

[90] In practice the police issue cautions in deserving cases. However, this practice is not legislated nor are there guidelines to assist the police.

[91] This is similar to victim offender mediation but is more comprehensive and will include all persons such as local leaders, church leaders and others who have a stake in the matter.

[92] UNICEF 'Zimbabwe launches a pre – trial diversion programme' available at *https://www.unicef.org/zimbabwe/press-releases/zimbabwe-launches-pre-trial-diversion-programme* (accessed 18 December 2019).

[93] Auxilia Katongomara 'Bulawayo tops in pre-trial diversion 629 juveniles saved from appearing in court' *The Chronicle* 24 February 2018, available at *https://www.pressreader.com/zimbabwe/chroniclezimbabwe/20180224/281694025265504* (accessed 20 November 2019).

[94] Auxilia Katongomara 'Bulawayo tops in pre-trial diversion 629 juveniles saved from appearing in court' *The Chronicle* 24 February 2018, available at *https://www.pressreader.com/zimbabwe/chroniclezimbabwe/20180224/281694025265504* (accessed 20 November 2019).

and diverted 99 cases, while Chitungwiza recorded 120 cases and diverted 92 cases.[95] Murehwa recorded 68 cases and 58 diverted, while Gweru diverted 43 cases from the 57 that were recorded.[96] Bulawayo province had the highest diversion rate of 94.3 per cent, followed by Murehwa with 85.3 per cent and Chitungwiza with 77.5 per cent. None of the 629 offenders defaulted and none withdrew, which shows a positive aspect of the program.[97]

The CRC Committee hailed the pre-trial diversion programme launched in Zimbabwe and also urged the State party to continue with it and ensure that children have access to alternative disciplinary measures to deprivation of liberty, such as probation, mediation, counselling or community service, and to ensure that detention is used as a last resort.[98] Zimbabwe can thus be applauded for initiating a process which ensures that children will not have to face the justice system where they are prone to be sentenced to corporal punishment and life imprisonment. The PTD programme is however not yet implemented in all 10 provinces of the country. Considering the success of the programme in the areas in which it was implemented and the growing number of children being diverted each year, it is recommended that the programme be extended to the rest of the country. As it stands, the PTD programme is being run with no legal regulation, thus, this thesis recommends that there be a legal regulation of the programme.

[95] Auxilia Katongomara 'Bulawayo tops in pre-trial diversion 629 juveniles saved from appearing in court' *The Chronicle* 24 February 2018, available at *https://www.pressreader.com/zimbabwe/chroniclezimbabwe/20180224/281694025265504* (accessed 20 November 2019).
[96] Auxilia Katongomara 'Bulawayo tops in pre-trial diversion 629 juveniles saved from appearing in court' *The Chronicle* 24 February 2018, available at *https://www.pressreader.com/zimbabwe/chroniclezimbabwe/20180224/281694025265504* (accessed 20 November 2019).
[97] Auxilia Katongomara 'Bulawayo tops in pre-trial diversion 629 juveniles saved from appearing in court' *The Chronicle* 24 February 2018, available at *https://www.pressreader.com/zimbabwe/chroniclezimbabwe/20180224/281694025265504* (accessed 20 November 2019).
[98] CRC/C/ZWE/CO/2, para 77 (f).

3.2.8 Pre – Trial Detention

The CRC Committee has noted with concern that, in many countries, children languish in pre-trial detention for months or even years, which constitutes a grave violation of Article 37 (b) of CRC.[99] According to the Committee, pre-trial detention should not be used except in the most serious cases, and even then only after community placement has been carefully considered.[100] The Committee advised States to use diversion and non – custodial measures at the pre-trial stage as a means of reducing the use of detention.[101]

Section 28 of the Children's Act, empowers the Minister to establish places of safety and remand homes for the reception and detention of children awaiting trial and to be brought before the Children's Court within seven days.[102] The provision for remand homes and places of safety goes against the CRC, as children should not be kept in detention while awaiting trial. The Children's Act, however, prohibits the imprisonment of a child before conviction, subject to the nature of the offence, age, sex, race and character.[103] In essence, pre-trial detention is allowed in some instances. The Act thus falls short of the CRC standard for the detention of children only as a measure of last resort and for the shortest period of time.

3.2.9 Legal assistance for juvenile offenders

Article 40 of the CRC and Article 17 of the ACRWC oblige Zimbabwe to provide mandatory legal aid to children in conflict with the law.[104] The availability of legal assistance for children in conflict with the law will ensure that those juvenile offenders from poor families are not

[99] General Comment 24, para 86.
[100] General Comment 24, para 86.
[101] General Comment 24, para 86.
[102] Section 28 of the Children's Act.
[103] Section 84 of the Children's Act.
[104] Article 40 (2) (b) (ii) & 17 (2) (c) of the ACRWC.

unduly disadvantaged. Juvenile justice cannot be fully realised unless children in conflict the law have an inalienable right to legal representation in court. It is submitted that the availability of legal assistance for children who commit serious offences has a direct bearing on the outcomes they receive as their punishment. Experienced and knowledgeable legal aid directed at children in conflict with the law will ensure they are not sentenced to inhuman punishments. Legal experts will encourage non – custodial measures to be passed and ensure that children are diverted from the criminal justice system.

Section 31 of the Constitution provides within the limits of available resources for legal representation in civil and criminal cases for people who need it and are unable to afford legal practitioners of their choice.[105] Children in conflict with the law can thus apply for legal assistance as everyone else under the provisions of Section 31 of the Constitution. In line with Section 31, the government set up the Legal Aid Directorate, which is aimed at providing legal assistance free of charge to deserving and underprivileged people.[106] The success of any application for legal aid in terms of the Act is subject to the availability of resources at the Legal Aid Directorate and the Legal Aid Fund.[107] Several organisations such as the Zimbabwe Lawyers for Human Rights (ZLHR), the Legal Resources Foundation (LRF) and the Justice for Children Trust also provide legal services free of charge to cases involving human rights abuses and children's rights in civil and criminal cases.[108] As part of the LRF's access to justice for children project, a total of 8,749 children were reached within the first year. 180 cases

[105] Section 31 of the Constitution.
[106] Ministry of Justice, Legal and Parliamentary Affairs: The Legal Aid Directorate available at *http://www.justice.gov.zw/index.php/departments/legal-aid-directorate* (accessed 21 November 2018).
[107] Section 7 & 8 of the Legal Aid Act.
[108] See *http://www.nyulawglobal.org/globalex/zimbabwe.htm#_Legal_Aid_by_Private%20Institutions* (accessed 19 November 2018).

involving children were taken to court by LRF lawyers and 122 of these were successfully closed, of these 47, were criminal juvenile cases.[109]

The CRC Committee in its recent concluding observations noted the inadequacy of budgetary allocations to ensure the implementation of programmes to support juvenile justice and access to legal aid services by children in conflict with the law in Zimbabwe.[110] The Committee recommended the government to ensure the provision of qualified and independent legal aid to children in conflict with the law at an early stage of the justice procedure and throughout the legal proceedings, by increasing the allocation of human and financial resources to the Legal Aid Directorate.[111]

3.2.10 The Draft Child Justice Bill

In June 2019, a 'layman's draft' of the proposed Child Justice Bill was released by the Ministry of Justice, Legal and Parliamentary Affairs. The Bill seeks to establish a distinct criminal justice system for children in conflict with the law so that due protections accorded to children by the Constitution are observed.[112] These include all procedural and substantive issues attendant to a child alleged to have committed a criminal offence. In January 2020, a Write shop was held – which is a process where relevant stakeholders convene and give input on the drafted Bill. Once the drafting process has been completed, the Bill is to be presented for consideration by the Cabinet Committee on Legislation (CCL).[113] After approval by the

[109] CRIN 'Access to Justice for Children: Zimbabwe' available at *https://www.crin.org/sites/default/files/zimbabwe_access_to_justice.pdf* (accessed 20 November 2019). See also *http://www.lrfzim.com/legal-services/* (accessed 21 November 2018).
[110] CRC/C/ZWE/CO/2, para 76 (b).
[111] CRC/C/ZWE/CO/2, para 77 (c).
[112] The Bill referred to in this thesis is as at December 2019.
[113] Parliament of Zimbabwe 'Bill origination' available at *https://www.parlzim.gov.zw/bill-origination* (accessed 20 January 2020).

Cabinet, the Bill is then published in the Government Gazette about 14 days before its introduction in Parliament.[114] Once in Parliament, the Bill stands to be referred to the Portfolio Committee that shadows the Ministry responsible for administering the Bill. The Portfolio Committee can then consult the public through public hearings or oral evidence or via interviews to get their input on the Bill and prepares a report that is presented at the second reading stage.[115] After three readings in parliament, the Bill is then sent for Presidential assent and then enrolled on the record of the registrar by the clerk of Parliament.[116] The Child Justice Bill is therefore still in progression and subject to these processes before it becomes law. However, some aspects of what the Bill proposes will be looked at below.

The Bill covers aspects such as; age, police powers and duties, detention and release of children, assessment of child offenders, diversion, legal representation and sentencing. This thesis will mainly focus on the sentencing aspect of the Bill, although touching on some related aspects such as age determination and legal representation.

3.2.10.1 Age and minimum age of criminal responsibility

This proposed Bill applies to a child in Zimbabwe irrespective of nationality, country of origin or immigration status, who is alleged to have committed an offence and was under the age of 18 years at the time of the alleged commission of the offence.[117] In line with the recommendations made by the CRC Committee in General Comment 24, the Act makes provision for children below the minimum age to be dealt with in terms of Section 13 of the

[114] Parliament of Zimbabwe 'Bill origination' available at *https://www.parlzim.gov.zw/bill-origination* (accessed 20 January 2020).
[115] Parliament of Zimbabwe 'Bill origination' available at *https://www.parlzim.gov.zw/bill-origination* (accessed 20 January 2020).
[116] Parliament of Zimbabwe 'Bill origination' available at *https://www.parlzim.gov.zw/bill-origination* (accessed 20 January 2020).
[117] Section 3 (1).

Act.[118] The Act focuses on the involvement of a parent or guardian in cases where a child below the minimum age is alleged to have committed an offence. In the best interests of the child, the Act makes further provision for counselling, therapy and family meetings in an effort to ascertain the child's offending behaviour and come up with appropriate action for dealing with the child.[119]

The proposed Child Justice Act sets the minimum age of criminal responsibility (MACR) at 12 years. Slightly below the recommended age of 14 years recommended internationally by the CRC Committee,[120] the Act makes a progressive step from the previous minimum age set at 7 years old. In the previous General Comment 10 on juvenile justice, the CRC Committee had set the MACR at 12 years but in General Comment 24, the Committee raises the MACR to 14 years. The Committee argues that from the evidence in child development and neuroscience, children aged between 12 to 13 years are still developing in their frontal cortex and their maturity and capacity for abstract reasoning is still evolving.[121] Since the Bill is still under discussion, this thesis proposes that the minimum age of criminal responsibility be raised to 14 years in line with international standards and arguments raised by the CRC Committee.

3.2.10.2 Legal representation

The Act makes provision for access to legal representation by a child by providing a right for a child to give instructions to a legal practitioner in the language of his or her choice, with the assistance of an interpreter when necessary.[122] The Act also makes provision for legal

[118] See General Comment 24, paras 9 - 12.
[119] See Section 13 of the Act.
[120] See discussion on minimum age of criminal responsibility in Chapter 2 at 2.5.3.
[121] See discussion on minimum age of criminal responsibility in Chapter 2 at 2.5.3.
[122] Section 57.

representation at State expense, where a child is not represented by a legal practitioner and if the matter is not diverted before the first or second appearance in court, but is set down pending trial in a Child Justice Court.[123] Additional legal representation may also be offered free of charge by a legal practitioner working for a child rights or human rights organisation, with the consent of the court and of the child, parent custodian, guardian or appropriate adult to a parent, custodian or guardian of a child who cannot afford a legal practitioner.[124] Furthermore, where legal representation at State expense is not available for court proceedings in terms of the Act, a probation officer fulfils the role of an adviser to the child in lieu of legal representation.[125] The Bill, thus, recognises the need to give a child a voice through legal representation and as such it fulfils one of the goals of the CRC, which is to ensure that a child's right to be heard is respected and protected in national laws.

3.2.10.3 Sentencing

The sentencing of children in conflict with the law is regulated by Part 11 of the proposed Act. The Act provides that **t**he purposes of sentencing are to:

(a) encourage the child to understand the implications of and be accountable for the harm caused;

(b) promote an individualised response which is appropriate to the child's circumstances and proportionate to the circumstances surrounding the harm caused by the offence;

[123] Section 59 (1).
[124] Section 57 (3).
[125] Section 59 (2).

(c) promote restorative justice responses and the reintegration of the child into the family and community;

(d) ensure that any necessary supervision, guidance, treatment or services which form part of the sentence can assist the child in the process of reintegration; and

(e) use deprivation of liberty only as a last resort and for the shortest appropriate period of time.[126]

The Act provides that when imposing a sentence involving deprivation of liberty, the court must take into account: whether the harm caused by the offence is of such a serious nature that it warrants the imposition of such sentence; the culpability of the child in causing the harm; the protection of the community; the impact of the offence upon the victim; the failure of the child to respond to previous orders which did not involve deprivation of liberty, if applicable; and the desirability of keeping a child out of prison.[127] These listed factors can ensure that children are not deprived of their liberty unlawfully and arbitrarily as required by Article 37 of the CRC. The Act also requires the court to request a pre-sentence report from a probation officer or social worker before imposing a sentence.[128] The court, therefore, must ensure that a pre-sentence report is obtained before passing a sentence on a convicted child.

Sentences which can be passed in terms of the Act include; community-based sentences – provided as diversion options in Section 53,[129] restorative justice sentences such as; family group conferences and victim-offender mediation or other restorative justice process

[126] Section 73.
[127] Section 83 (2).
[128] Section 84 (1).
[129] See Section 75.

extensively detailed in Sections 55 and 56 of the Act,[130] and sentences involving deprivation of liberty – which are referral to a place of safety or remand home and imprisonment.

3.2.10.3.1 Diversion

The Act extensively regulates the diversion of children from the criminal trial and offers a wide range of diversion options for children aged 12 years and above. Diversion is defined as the referral of cases of children alleged to have committed offences away from formal court procedures with conditions.[131] The Act, thus, formalises the diversion of cases from court procedures and most significantly provides restorative justice sentences that were left to the non-formal court systems in most cases. This regulation ensures that children's rights are protected throughout the diversion process. The Act also offers a wide range of alternatives that ensures that children are channelled into the most suitable diversion options available. Diversion options offered are:

(a) an oral or written apology to a specified person or persons or institution;

(b) referral to the police for a formal caution in the prescribed manner with or without conditions; provided that the offence for which the referral is made does not attract a penalty of more than six months imprisonment;

(c) referral to a specified person for counselling or therapy for a period not exceeding six or twelve months;

[130] Section 76.
[131] Section 2 of the Act.

(d) placement under the supervision of a probation officer, diversion officer or a specified person or organisation in the prescribed manner for a period not exceeding six or twelve months;

(e) requiring the child to report periodically to a probation officer, diversion officer or police station for a period not exceeding six or twelve months;

(f) the issue of an order in the prescribed manner for a period not exceeding six months or twelve months prohibiting the child from visiting, frequenting or appearing at a specified place;

(g) referral to a specified person or organisation who will ensure that the child engages in activities intended to be undertaken as constructive use of his or her leisure time;

(h) compulsory attendance at a specified place for a specified vocational or educational purpose either on a full-time basis or part-time, for a maximum period of six or twelve months;

(i) symbolic restitution to a specified person, persons, group or institution;

(j) provision of some service or benefit to a specified victim or victims in an amount which the child or the family can afford;

(k) compensation, where the child or his or her family are in a position to effect this;

(l) restitution of a specified object to a specified victim or victims for the alleged offence if the object concerned can be returned or restored;

(m) if there is no identifiable person or persons to whom restitution or compensation could be made, provision of some service or benefit or payment of a contribution to a community organisation, charity or welfare organisation.

(n) performance without remuneration of some service for the benefit of the community under the supervision or control of an organisation or institution, or a specified person or group identified by the probation officer or diversion officer for a maximum period of one hundred hours to be completed within six months or two hundred and fifty hours within a maximum period of twelve months.

(o) referral to appear at a family group conference, a victim-offender mediation or other restorative justice process approved by the National Child Justice Committee or the National Coordinator for Child Justice at a specified place and time;

(p) referral to counselling or therapeutic intervention in conjunction with any of the options listed in this subsection.

The Act in Sections 55 and 56 offers restorative justice sentences such as victim-offender mediation and family group conferencing. Victim-offender mediation provides an opportunity for the victim of an offence to tell the person accused of committing the offence about its impact upon him or her or his or her family, premises, or business.[132] A family group conference process applies to a child who admits having committed an offence or after conviction by a court.[133] It brings together the child, a victim of the offence, the child's family and community, and persons to provide support to the victim to consider or deal with the offence in a way benefiting all who are concerned.[134] The family group conferencing provisions are detailed -

[132] Section 55 (3).
[133] Section 56 (1).
[134] Section 56 (1).

covering aspects such as: who may benefit from the conference, who can refer an offence for conferencing, notice of the family group conference, who may attend a family group conference, conduct of family group conference, the form of family group conference plan, the report of outcome of family group conference and the failure of child to comply with family group conference plan.

3.2.10.3.2 Imprisonment

The sentence of imprisonment is only to be used only as a last resort and for the shortest appropriate period of time.[135] It may not be imposed for a child who was less than 16 at the time of commission of the offence and unless substantial and compelling reasons exist for imposing the sentence.[136] An imprisonment sentence can also only be imposed where the child has been convicted of a serious or violent offence or where the child has previously failed to respond to alternative sentences, including available sentences involving deprivation of liberty other than imprisonment.[137] Profoundly the Act sets a maximum period for which a child may be sentenced to imprisonment in terms of the Act, which is 12 years.[138] This is an unprecedented provision which ensures that a child will not be detained for an indefinite period. The provision is balanced in that it ensures that imprisonment is only used after other alternatives have failed and that children are not imprisoned for minor offences. The writer believes that a period of 12 years for serious or violent crimes is not an unjustified time for imprisonment and can be justified to be 'the shortest period of time' when considering the needs of society as well.

[135] Section 79 (1).
[136] Section 79(2) (a).
[137] Section 79 (2) (b).
[138] Section 79 (5).

A sentence of imprisonment could, however, be a cause for concern in Zimbabwe in that there is only one juvenile detention centre for the whole country, the Whawha Young Offenders Prison. The prison offers relief to young people where they are taught good behaviour as well as being allowed to attend school.[139] A 2018 report from the NGO Forum revealed that notwithstanding the unique nature of Whawha Young Offenders Prison, the institution operated like any other prison, with no special safeguards for the young inmates.[140] The report showed that there was no difference between Whawha Young Offenders Prison and other custodial institutions except that it housed young offenders.[141] The report recommended that the institution should employ staff that are trained in juvenile justice, social work and other relevant disciplines and respect every young offender's right to be treated in a manner that takes cognisance of their age.[142]

The Act also makes provision for postponement and suspension of sentences in terms of Section 90. The court can also impose a fine for an offence for which a fine is appropriate in terms of Section 91. In line with Article 37(b), the Act prohibits corporal punishment and life imprisonment sentences for a child or person who has committed an offence whilst aged below 18 years.[143] The Act also prohibits detention in a prison or in police custody pending designation of the place where the sentence of detention must be served.[144] The regulation of sentencing in the Bill is quite extensive and comprehensive, allowing more non – custodial

[139] The Zimbabwe Human Rights NGO Forum *Rights behind bars: A study of prison conditions in Zimbabwe* 2018, p34.
[140] The Zimbabwe Human Rights NGO Forum *Rights behind bars: A study of prison conditions in Zimbabwe* 2018, p35.
[141] The Zimbabwe Human Rights NGO Forum *Rights behind bars: A study of prison conditions in Zimbabwe* 2018, p35.
[142] The Zimbabwe Human Rights NGO Forum *Rights behind bars: A study of prison conditions in Zimbabwe* 2018, p 40.
[143] Section 92 (2).
[144] Section 90 (1).

measures to be passed on children in conflict with the law. In that regard, the Bill as it stands, to a greater extent, complies with the CRC's regulations of sentencing in juvenile justice.

3.2 Botswana

Botswana has ratified and acceded to various international instruments which all prohibit torture and or cruel and inhuman, treatment and punishment for everyone including children. These include; the ICCPR ratified in 2000,[145] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment also ratified in 2000,[146] the CRC ratified in 1995,[147] the African Charter on Human and Peoples' Rights ratified in 1986 and the ACRWC acceded to in 2001. Like Zimbabwe, Botswana does not have a juvenile justice system targeted specifically at the protection of children in conflict with the law. Thus, children in conflict with the law are dealt with in terms of the Children's Act,[148] the Penal Code,[149] the Criminal Procedure and Evidence Act, [150] and the Prisons Act.[151]

[145] Botswana entered a reservation which reads: 'The Government of the Republic of Botswana considers itself bound by Article 7 of the Covenant to the extent that 'torture, cruel, inhuman or degrading treatment' means torture inhuman or degrading punishment or other treatment prohibited by Section 7 of the Constitution of the Republic of Botswana.'

[146] Botswana entered a reservation which reads: 'The Government of the Republic of Botswana considers itself bound by Article 1 of the Convention definition of torture] to the extent that 'torture' means the torture and inhuman or degrading punishment or other treatment prohibited by Section 7 of the Constitution of the Republic of Botswana.'

[147]Botswana entered a reservation which reads: 'The Government of the Republic of Botswana enters a reservation with regard to the provisions of Article 1 of the Convention [definition of the child] and does not consider itself bound by the same in so far as such may conflict with the Laws and Statutes of Botswana.'

[148] Of 2009.

[149] Botswana Penal Code, 1964 (Law No. 2 of 1964) (as amended up to Act No. 14 of 2005).

[150] Criminal Procedure and Evidence Act of 1939 as amended to 2005.

[151] Act 28 of 1979.

3.3.1 Legal Status of the CRC in Botswana

Botswana has a dualist legal tradition, which regards domestic and international laws as separate systems.[152] Thus, ratified international treaties, including the CRC, do not form part of the national law of the country unless they have been incorporated through domestic legislation.[153] Though neither the CRC nor the ACRWC has been incorporated into domestic legislation, the 2009 Children's Act of Botswana attempts to incorporate provisions under the CRC and other international treaties by extensively incorporating a 'bill of child rights' which integrates children's rights in the CRC.[154]

Courts in Botswana have also acknowledged the persuasive value of the CRC. In *Ndlovu v. Macheme*, the court acknowledged the persuasive value of the CRC as follows: 'the fact that a Convention has not been incorporated into national law, as is the case with the UN Convention on the Rights of the Child, does not mean that its ratification holds no significance for Botswana law, for its provisions have strong persuasive value on the decisions of this Court.'[155]

3.3.2 Protection of Children's Rights under the Constitution of Botswana

The Constitution of Botswana does not specifically provide for children's rights in their own category. Children are generally not perceived to be recipients of rights in their own right.[156]

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[152] The African Child Policy Forum, Harmonisation of Children's Laws in Botswana, page 2, available at *http://www.acerwc.org/wpcontent/uploads/2012/05/EnglishACERWCBotswanaHarmonisationofLawsonChildren.pdf* (accessed 12 December 2019).
[153] The African Child Policy Forum, Harmonisation of Children's Laws in Botswana, page 2, available at *http://www.acerwc.org/wpcontent/uploads/2012/05/EnglishACERWCBotswanaHarmonisationofLawsonChildren.pdf* (accessed 12 December 2019).
[154] See Section 12 – 25 of the CRC.
[155] *Ndlovu v. Macheme*, (MAHLB00052207) [2008] BWHC 293.
[156] The African Child Policy Forum, Harmonisation of Children's Laws in Botswana, page 2, available at *http://www.acerwc.org/wpcontent/uploads/2012/05/EnglishACERWCBotswanaHarmonisationofLawson-Children.pdf* 5. (Accessed 12 December 2019).

Their protection is thus included in the broad spectrum of protection of the rights of all persons in Botswana in terms of Section 3 of the Constitution.

3.3.3 Defining a child for purposes of sentencing in Botswana

In line with the CRC and the ACRWC, Botswana's Children's Act defines a child as any person who is below the age of 18 years.[157] The Criminal Procedure and Evidence Act also defines a juvenile as a person under the age of 18 years, which is in line with the Children's Act.[158] The Constitution of Botswana, adopted in 1966, prior to the CRC and the ACRWC, does not have a definition of a child and is lagging in compliance with the CRC and the ACRWC.

3.3.4 Age determination

The CPEA provides for the estimation of a person's age where insufficient evidence is available in any criminal proceedings.[159] In terms of the Children's Act, the relevant date for determining the age of a child who is alleged to have committed an offence shall be the date of the alleged offence.[160] This is in line with the provisions in General Comment 24 of the CRC.

Botswana's laws are in line with international obligations when it comes to the determining of the age of a child for purposes of sentencing; however, there seems to be an inconsistency in practice. After a year of the coming into force of the Children's Act, the court in *Letsididi v the State*[161] treated an offender who was 16 at the time he committed an offence of manslaughter, as an adult for purposes of sentencing. It seems the judiciary was unaware of, or reluctant to

[157] Section 2.
[158] Section 3.
[159] CRC/C/15/Add.242.
[160] Section 82(2) Children's Act.
[161] *Letsididi v the State* 2010 1 BLR 18 CA.

apply, the provisions of the Act. Therefore, there is need for further emphasis to be placed on the role of the judiciary in Botswana to comply with the CRC and internationally set principles when sentencing offenders who have committed crimes before they turned 18.

3.3.5 Minimum age of criminal responsibility (MACR)

Under the Penal Code, a person under the age of eight years is not criminally responsible for any act or omission.[162] There is a rebuttable presumption that a person under the age of 14 is not criminally liable unless proven that he/she had the capacity to act.[163] The Children's Court is also empowered to hear cases of children between the ages of 14 to 18 years of age.[164] However, Section 83(1) provides that the Children's Court can hear charges against any person aged between 4 and 18 years old. This is subject to proof of criminal responsibility for persons under the age of 14.[165] There is an apparent confusion as to whether Section 83(1) lowers the age of criminal capacity from 8 years in terms of Section 13(1) of the Penal Code to 4 years.[166] This is probably a typing error; however, there is a need for it to be clarified, as there is now a contradiction.[167] The Children's Act, however, provides that the provision of the Act take precedence in the event of any conflict or consistency with any other laws.[168] Botswana's MACR whether at 4 or 8 years is still way below the proposed MACR of 14 years by the CRC Committee. The CRC Committee expressed concern over the low age of criminal

[162] Section 13 (1).
[163] Section 13 (2).
[164] Section 36 (2) (e).
[165] Section 83 (1).
[166] Macharia E W *Sentencing in Botswana: A Comparative Analysis of Law and Practise* (unpublished LLD thesis, University of Pretoria, 2016) 162.
[167] Macharia (2016) 162.
[168] Section 3 of the Act provides that: In the event of any conflict or inconsistency between the provisions of this Act and any other legislation, the provisions of this Act shall take precedence, except where the exercise of the rights set out in this Act has or would have the effect of harming the child's emotional, physical, psychological or moral well-being, or of prejudicing the exercise of the rights and freedoms of others, national security, the public interest, public safety, public order, public morality or public health.

responsibility, fixed at 8 years in Botswana.[169] The Committee recommended that the State should raise the age of criminal responsibility to an internationally acceptable standard, which is now set at 14 years.[170]

3.3.5 Punishment under the Constitution

Section 7 of Botswana's Constitution prohibits torture and inhuman or degrading treatment or punishment.[171] This provision, like the ICCPR and the CRC, protects children from being punished inhumanely. However, the same section makes an exception to punishments that were lawful in the country prior to the promulgation of the Constitution, which includes the death penalty and corporal punishment.[172] The Constitution, thus, legalises the death penalty and corporal punishment. The Penal Code which was promulgated in 1964, before the Constitution, retained the death penalty which therefore remains as the highest punishment in Botswana.[173] Women and persons who commit offences while under the age of 18 cannot be sentenced to death.[174] In lieu of the death penalty, however, young offenders below the age 18 can be detained during the President's pleasure, which is a form of a life imprisonment sentence as will be submitted in Chapter 4 of this thesis. A comprehensive discussion of corporal

[169] See Convention on the Rights of the Child, Concluding observations on the combined second and third reports of Botswana, 31 May 2019, CRC/C/BWA/CO/2-3, para 66. The Committee considered the combined second to third periodic reports of Botswana (CRC/C/BWA/2-3) at its 2388th and 2389th meetings (see CRC/C/SR.2388 and 2389), held on 23 and 24 May 2019, and adopted the present concluding observations at its 2400th meeting, held on 31 May 2019.

[170] See Convention on the Rights of the Child, Concluding observations on the combined second and third reports of Botswana, 31 May 2019, CRC/C/BWA/CO/2-3, para 67.

[171] Section 7 provides that: 'No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.'

[172] Section 7(2) provides that: 'Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorizes the infliction of any description of punishment that was lawful in the country immediately before the coming into operation of this Constitution.'

[173] The death penalty in Botswana is the punishment prescribed for murder without extenuating circumstances in Section 203, treason (Section 34) and piracy (Section 63) and certain military offences (Sections 28, 29 of the Defence Force Act).

[174] Section 26 of the Penal Code. See also Section 89 (2) of the Children's Act.

punishment will be undertaken in Chapter 5 of this thesis. Thus, although there is a prohibition of inhuman punishments, Botswana allows children to be sentenced inhumanely to life imprisonment and corporal punishment. The State is thus not acting in line with its obligations under the CRC and the ACRWC. This constitutional 'conflict' should thus be addressed.

3.3.6 Protection of children's rights under the Children's Act

Botswana adopted a new Children's Act in 2009 which replaced the old Act of 1981. The Act contains principles and institutional arrangements that form the framework upon which children in conflict with the law are dealt with. These include the best interests of the child principle and the institution of the Children's Courts, among others. These principles and institutions warrant examination, as they are the basis upon which sentencing of child offenders occur. The promulgation of the Children's Act reflects an evolving conception of children rights in Botswana and an acknowledgement of children as right holders.[175]

Botswana has an extensive Bill of Rights in its Children's Act. The rights included in the Bill of Rights include; the inherent right to life,[176] the right to a name, from birth, which neither stigmatises nor demeans the dignity of that child,[177] the right to a nationality from birth,[178] the right to know and be cared for by both biological parents of a child and the right to appropriate alternative care where the child is removed from the family environment.[179] The Bill of Rights also include the right to parental guidance appropriate to that child's age, maturity and level of

[175] Leite R 'Child and Family Focused Policy in Botswana' in Robila M (ed) *Handbook of Family Policies Across the globe* (2014) 28.
[176] Section 10 further provides that: 'In order to ensure the enjoyment of this right, no person shall take any action or make any decision the effect of which will be to deprive a child of survival and development to the child's full potential.'
[177] Section 11.
[178] Section 12.
[179] Section 13.

understanding,[180] the right the highest attainable standard of health and medical care,[181] the right to adequate and safe housing,[182] the right to adequate clothing,[183] the right to free basic education[184] and the right to leisure, play and recreation which are appropriate to the age, maturity and level of development of the child.[185] Additionally, a child has the right to freely express his or her views and opinions and to freely receive and communicate ideas and information,[186] the right to freedom of religion,[187] the right to freedom of association,[188] the right to privacy,[189] the right to protection from harmful labour practices,[190] the right to protection from sexual abuse and exploitation,[191] and the right to protection from involvement in armed conflict.[192]

The best interests of the child are paramount in the exercise of powers under the Act.[193] Section 6 extensively provides several facts that need to be considered in determining the best interest of the child. These include; the need to protect the child from harm; the capacity of the child's parents, other relative, guardian or other person to care for and protect the child; the child's spiritual, physical, emotional and educational needs; the child's age, maturity, sex, background and language and the child's cultural, ethnic or religious identity.[194] Other factors to be considered include; the likely effect on the child of any change in the child's circumstances; the importance of stability and continuity in the child's living arrangements and the likely effect

[180] Section 14.
[181] Section 15.
[182] Section 16.
[183] Section 17.
[184] Section 18.
[185] Section 19.
[186] Section 20.
[187] Section 21.
[188] Section 22.
[189] Section 23.
[190] Section 24.
[191] Section 25.
[192] Section 26.
[193] Section 5 provides that: 'a person or the court performing a function or exercising a power under this Act shall regard the best interests of the child as the paramount consideration.'
[194] Section 6 (2) of the Children's Act.

on the child of any change in, or disruption of those arrangements; any wishes or views expressed by the child, having regard to the child's age, maturity and level of understanding in determining the weight to be given to those wishes or views; and any other factor which will ensure the general well-being of the child.[195] The Act does not limit the factors considered for the best interest of the child to only those listed in the Act. These extensive factors to be considered for the best interests of the child are a reflection on Botswana's commitment to ensure that there is maximum protection of children's best interests. If applied consistently, these principles will ensure that children are not sentenced inhumanely.

The Act provides for the creation of village committees,[196] children's consultative forums[197] and the national children's council.[198] The functions of village child committees are; to educate their respective communities about the neglect, ill-treatment, exploitation or other abuse of children, to promote, amongst members of those communities such education,[199] and to monitor the welfare of children in their respective communities.[200] The forum is responsible for discussing issues affecting the education, health, safety or general well-being of children, and to make recommendations as it considers appropriate, to the National Children's Council.[201] The functions of the Council are; to coordinate, support, monitor and ensure the implementation of sectoral ministries' activities relating to children; guide sectoral ministries' interventions as they relate to or impact on children; advocate for a child-centred approach to

[195] Section 6 (2) of the Children's Act.
[196] Section 33 (1) of the Children's Act. See Sloth – Nielsen J (2018) 6. A Village Child Committee comprises of the following members —
(a) the *kgosi* or *kgosana* of the community concerned;
(b) a social worker;
(c) a man and a woman representing parents in that community;
(d) a female child representing the female children in that community, and
(e) a male child representing the male children in that community.
[197] Section 34 (1) of the Children's Act. The Forum comprises of ten child representatives from each district whose selection is facilitated by the local district council.
[198] Section 35 (1).
[199] Section 33 (1) (a).
[200] Section 33 (1) (b).
[201] Schedule 2 of the Children's Act.

legislation, policies, strategies and programmes; and advocate for a substantive share of national resources to be allocated to children related initiatives and activities.[202] These institutional arrangements reflect a commitment in law to empower children to have active voices in policy discussions and issues of their wellbeing.[203] However, despite the establishment of forums in Botswana, children remain largely voiceless.[204]

The CRC Committee while welcoming the establishment of the children's consultative forums and village child protection committees to facilitate child participation at national and village levels, as well as school councils in secondary schools, expressed concern that such mechanisms do not facilitate meaningful and empowered participation of children in matters that concern them.[205] The Committee also expressed concern about the lack of procedures or protocols to ensure respect for the views of the child in administrative and judicial proceedings.[206] The Committee recommended that the State party should ensure that children's views are given due consideration in courts, schools, relevant administrative and other processes concerning children and in the family through, inter alia, the training of professionals working with and for children and the development of operational procedures or protocols to ensure respect for the views of children in administrative and judicial proceedings.[207] The Committee also recommended that the State allocate sufficient technical, human and financial resources to the effective functioning of the children's consultative forum and village child protection committees and ensure that their outcomes are systematically fed into public decision-making.[208] The State was also encouraged to conduct awareness-raising activities to promote the meaningful and empowered participation of all children in the family, the

[202] Schedule 3 of the Children's Act.
[203] Robila (2014) 53.
[204] Robila (2014) 53
[205] CRC/C/BWA/CO/2-3, para 27.
[206] CRC/C/BWA/CO/2-3, para 27.
[207] CRC/C/BWA/CO/2-3, para 28 (a).
[208] CRC/C/BWA/CO/2-3, para 28 (b).

community and schools, including within school councils, with particular attention to girls, children with disabilities and children affected by HIV/AIDS.[209]

The Act establishes all Magistrates' Courts as Children's Courts for purposes of hearing charges against persons aged between 14 and 18.[210] The Act also establishes the High Court as the upper guardian of all children.[211] In listing courts that may sit as Children's Courts, the Children's Act does not include Customary Courts.[212] In practice, however, customary courts continue to hear cases involving children, which is completely outside the framework of the law.[213] This situation, though suffering from a lack of legal recognition, is not unusual. The practice is exacerbated by the fact that Magistrate's Courts are not present in every locality in Botswana, whereas in contrast, a *Kgosi* (chief) or *Kgosana* would be present in every village in the country.[214] Moreover, customary courts have the confidence of the general population who believe in the adjudication process including cases involving children.[215] The government therefore needs to clarify the institutional capacity of customary courts to try child offenders.

3.3.7 Sentencing of juveniles

Due to lack of an exclusive juvenile justice system which informs the sentencing of children in conflict with the law, various laws have provisions for juvenile sentencing in Botswana. These include the Penal Code, the Children's Act and the Criminal Procedure and Evidence Act. The Penal Code lists various punishments to be imposed by courts in Botswana which are: the death

[209] CRC/C/BWA/CO/2-3, para 28 (c).
[210] Section 36 (1).
[211] Section 36 (3).
[212] Section 36 (1).
[213] Macharia E 'Sentencing of Children in conflict with the law in Botswana' in UNICEF *Thari ya bana: Reflections of Children in Botswana* (2013) 13.
[214] Macharia (2013) 13.
[215] Macharia (2013) 13.

penalty, imprisonment, corporal punishment, fines[216], forfeiture[217], finding security to keep the peace and be of good behaviour or to come up for judgement[218] and any other punishment provided in any other law.[219] In place of the death penalty for persons who commit offences before they turn 18, the Code provides for detention during the President's Pleasure,[220] which is a form of a life imprisonment sentence, as will be argued in Chapter 4 of this thesis. In terms of Section 304 (1) of the Criminal Procedure and Evidence Act, any court can also order a child to be placed in the custody of any suitable person designated in the order for a specific period. The sentence of corporal punishment will be discussed extensively in Chapter 5 of this thesis.[221]

Section 61 of the Children's Act prohibits torture or other cruel or inhuman degrading treatment or punishment for children.[222] Section 81 provides the manner which proceedings against a child should be instituted.[223] In terms of Section 85,[224] a child who has been charged and found guilty of an offence can be placed on probation for not less than six months or more than three years;[225] sent to a school of industries for a period not exceeding three years or until he or she attains the age of 21 years;[226] sentenced to community service for such period as the court

[216] Fines are regulated by S29 of the Code.
[217] Section 30.
[218] Regulated by Section 31 of the Code.
[219] Section 25 (a – h).
[220] Section 26 (2).
[221] The manner of execution of the sentence is outlined in s305 of the CPEA.
[222] Section 61 (1) of the Children's Act.
[223] In terms Section 81:
(1) Any person having reasonable cause to believe that an offence has been committed by a child shall make a report thereof to a police officer in the district in which the offence was alleged to have been committed.
(2) If, on receipt of a complaint, the police officer is satisfied that *prima facie* an offence has been committed, the police officer shall —
(a) investigate the alleged crime; and
(b) cause a social worker to enquire into, and file a report to, the Children's Court, on the general conduct, home environment, school records and medical history (if any) of the child.
(3) The social worker shall, in the report, recommend the best way of dealing with the child.
(4) After concluding his or her investigations into the alleged crime, the police officer shall refer the docket relating to the child's matter to the Director of Public Prosecution who shall take such steps as are appropriate in respect of the matter.
[224] This can be done after taking into consideration the general conduct, home environment, school records and medical history (if any).
[225] Section 85 (a).
[226] Section 85 (b).

considers appropriate;[227] sentenced to corporal punishment;[228] or sentenced to imprisonment.[229] In terms of Section 89 (3) a child charged with a capital offence other than murder shall, subject to the provisions of the Penal Code, be sentenced to imprisonment for such term as the court considers appropriate[230]- this could amount to life imprisonment. Thus, although Botswana does not have a separate law on juvenile justice, it does offer alternatives such as diversion and community service to children in conflict with the law. The provisions are however limited and mixed with other inhuman sentences such as corporal punishment, hence the need for a separate system which covers all aspects of juvenile justice.

3.3.7.1 Imprisonment

The Penal Code provides for imprisonment for persons between the ages of 14 and 18.[231] The Children's Act also allows for the imprisonment of children in terms of Section 85 and 88. Imprisonment is a mandatory punishment for repeat juvenile offenders in terms of Section 88.[232] This is a radical departure from the Children's Act of 1981, which did not provide for custodial sentences for children.[233] It is debatable whether this new development of mandatory imprisonment of repeat juvenile offenders is an improvement to be applauded or a step backwards in child protection in Botswana.[234] Imprisonment is justifiable as a tool of last resort

[227] Section 85 (c).
[228] The sentence of corporal punishment will be discussed at length in Chapter 5 of the thesis.
[229] See discussion on imprisonment below.
[230] See discussion above of the death penalty under the Penal Code.
[231] Section 27.
[232] Section 88 provides that: 'A Children's Court shall, in the case of a child who is a repeat offender, sentence that child to imprisonment for such term as the Children's Court considers appropriate, subject to the provisions of the Penal Code.'
[233] Macharia (2013) 19.
[234] Macharia (2013) 19.

in the effort to rehabilitate a juvenile in conflict with the law, however, it is not to be preferred to alternative sentencing methods that keep juveniles out of jail.[235]

Having provided for the imprisonment of juveniles, the challenge facing the administration of juvenile justice concerning the imprisonment of juveniles is one of institutional capacity in Botswana.[236] These children cannot be detained at the school of industries because the school is not used as a facility for incarceration.[237] International law requires that children deprived of their liberty be separated from adults deprived of their liberty, therefore the question remains whether the justice system has the capacity to detain these juveniles in conditions that meet international standards.[238]

3.3.7.2 School of industries

Botswana has one school of industries, Ikago, in Molepolole.[239] This institution is a rehabilitation centre for male juvenile offenders aged between 14 and 18 years who can stay until they turn 21 years old.[240] The Ikago centre admits juveniles who have committed offences that would otherwise warrant prison sentences, but because they are still young and growing, they need to be protected from hard-core criminals that are committed to the prisons.[241] Some of these juveniles commit offences due to low economic status in their families or lack of parental guidance, hence the need to provide rehabilitation to mould their characters to become

[235] Macharia (2013) 19.
[236] Macharia (2013) 20.
[237] Macharia (2013) 20.
[238] Macharia (2013) 20.
[239] Macharia (2013) 19.
[240] Government of Botswana available at *http://www.gov.bw/en/Citizens/Sub-Audiences/Children--Youth1/Student-Placement-and-Welfare/* (accessed August 2019).
[241] Government of Botswana at *http://www.gov.bw/en/Citizens/Sub-Audiences/Children--Youth1/Student-Placement-and-Welfare/* (accessed August 2019).

responsible citizens.[242] The school offers trades such as carpentry, building, welding and fabrication, and motor mechanics. The trainees are also provided with psychosocial support for emotional enrichment.[243]

The school of industries has however been criticised as being under-utilised. Some of the concerns raised were that: there is a poor relationship between the boys admitted at the school and villagers - making it difficult to gain community acceptance of the boys; poor literacy skills of the boys admitted means they cannot take full advantage of the vocational courses offered at the school; the school runs without any regulations and has never been reviewed; the school has no specialist staff in the areas of child psychology, criminology or child justice; there is no structure of discipline at the school and no structured rehabilitation program; the school's mandate as a place of safety is not utilised but is solely focused on detention of children in conflict with the law and lastly the school is under Ministry of Local Government and not under the Ministry of Justice, Defence and Security where the latter's facilities may be tapped to better assist in the rehabilitation of juveniles.[244] Sending a child to the school of industries removes the child from parental control and the home environment and it separates the child from his/her family; thus, it should be used sparingly.[245] It is submitted that such school should be used for children who have committed serious offences, recidivists, unruly children who pose a serious danger to themselves and the community and those who are considered to need more supervision than is available at home.[246]

[242] Government of Botswana available at *http://www.gov.bw/en/Citizens/Sub-Audiences/Children--Youth1/Student-Placement-and-Welfare/* (accessed August 2019).
[243] Government of Botswana available at *http://www.gov.bw/en/Citizens/Sub-Audiences/Children--Youth1/Student-Placement-and-Welfare/* (accessed August 2019).
[244] Macharia (2013) 18.
[245] Somolekae K C 'Child justice in Botswana: the compatibility of the children's act with international and regional standards' (LLM Humans Rights, University of Cape Town, 2009) 66.
[246] Somolekae (2009) 66.

In its 2018 report to the CRC, Botswana presented that the school of industries is fully operational even though it has never operated to full capacity.[247] This has mainly been so because institutionalisation of children in conflict with the law is done only as a measure of last resort.[248] The State reported that in many cases, children are placed under the care of social welfare officers, instead of being placed in residential facilities.[249] In its discussion of the State party's report in 2019, the CRC Committee did not address the issue of the school of industries presented by the State.[250]

3.3.7.3 Community Service

Community service is one of the sentencing options available to Children's Courts in terms of the Children's Act. This sentencing option is in actual fact not available because structures and regulations for its implementation have not been created.[251] In contrast, community service is operational in the customary courts where offenders are often sentenced to extramural labour in terms of Section 91 of the Prisons Act.[252] The presiding officer at a customary court will, at the sentencing hearing, inform the offender what tasks he will have to fulfil in the community as his sentence, which could be, for instance, working at the Kgotla or the local clinic.[253] The lack of institutional capacity is hampering the effective utilisation of community service as a sentencing option for juvenile offenders.[254]

[247] Convention on the Rights of the Child/ Combined second and third reports submitted by Botswana under Article 44 of the Convention, due in 2017/27 November 2018/CRC/C/BWA/2-3.
[248] Convention on the Rights of the Child/ Combined second and third reports submitted by Botswana under Article 44 of the Convention, due in 2017/27 November 2018/CRC/C/BWA/2-3.
[249] Convention on the Rights of the Child/ Combined second and third reports submitted by Botswana under Article 44 of the Convention, due in 2017/27 November 2018/CRC/C/BWA/2-3.
[250] See Convention on the Rights of the Child, Concluding observations on the combined second and third reports of Botswana, 31 May 2019, CRC/C/BWA/CO/2-3.
[251] Macharia (2013) 18.
[252] Macharia (2013) 18.
[253] Macharia (2013) 18.
[254] Macharia (2013) 18.

3.3.7.4 Probation

A probation order can be made in terms of Section 86 of the Children's Act. The court is required to inform the juvenile offender clearly in a language that the juvenile understands, the terms of their probation and conditions attached thereto before making a probation order.[255] The functions of probation officers include; risk assessment of the offender, preparing a pre-sentence report for the court, devising and implementing measures to reduce delinquency in children, supervising probation and resettling children released from prison back into the community.[256]

Challenges facing this sentencing option are that there is currently no probation service in Botswana and the Minister has not appointed any probation officers.[257] Social welfare officers, who have yet to be trained in this role, carry out the tasks envisaged for probation officers.[258] This institutional and training gap hampers the administration of the system dealing with children in conflict with the law.[259]

3.3.7.5 Legal Assistance

The Children's Act of Botswana makes provision for legal representation by the State to any person before the Children's Court who cannot afford the costs.[260] Legal advice, legal representation and public education on legal matters to indigent persons is also provided by Legal Aid Botswana to citizens of Botswana.[261] The provision for legal representation by the

[255] Section 86.
[256] Section 96 (3).
[257] Macharia (2013) 17.
[258] Macharia (2013) 17.
[259] Macharia (2013) 17.
[260] Section 95(2).
[261] Legal Aid Botswana available at *http://www.labbw.net/* (accessed 10 October 2019).

Children's Act is commendable as it will ensure that children from poor backgrounds and who would otherwise be disadvantaged due to the high costs of representation can find a voice and receive fair treatment.

3.4 Conclusion

A justice system specially focused on children is essential in today's society. It ensures that all due process rights, procedures and any related matters concerning children are found in one piece of legislation. The Constitution of Zimbabwe is applauded for its extensive provision of children's rights in its Bill of Rights, the first of its kind, which shows a positive attitude by the government towards protecting children in the country. Although having a section on juvenile justice, the Constitution does not exhaustively provide for all rights for children in conflict with the law. The Children's Act has also been found to be falling short of the CRC standard for protection of children in conflict with the law. The Act's definition of the child is inconsistent with the Constitution and the CRC, it lacks significant provisions of non – custodial sentences as alternatives to the imprisonment of children and does not provide legal assistance for children who commit serious offences. It has been submitted that the sentencing option for imprisonment in the Children's Act should be qualified as 'imprisonment as a measure of last resort and only for the shortest period of time.' The diversion programme in Zimbabwe is a major step in ensuring that children are not faced with the wrath of the criminal justice system. The Child Justice Bill still under discussion, is a major development for children in conflict with the law in Zimbabwe. The Bill extensively covers the sentencing of children and provides for non – custodial sentences which can be used as alternatives to imprisonment. Since the Bill has not yet been finalised, additional non - custodial sentences proposed in the final chapter of this thesis can be added.

Botswana's extensive Bill of Rights in the Children's Act is applaudable. Although the Bill of Rights makes provision for rights of children in conflict with the law, a separate law on juvenile justice needs to be enacted to exhaust all aspects of protection of children in conflict with the law. The Children's Act also has limited options for non – custodial sentencing.

CHAPTER 4: LIFE IMPRISONMENT

4.1 Introduction

A global trend towards the universal abolition and restriction of the death penalty has resulted in many States adopting life imprisonment as their ultimate sanction.[1] Whether or not life imprisonment is a lesser punishment than the death penalty is a 'legal-philosophical question.'[2] Some have argued that life imprisonment is a death sentence as it amounts to 'putting an individual in a waiting room until his death'.[3]

The use of life imprisonment varies significantly across different countries. Formal life imprisonment exists in 183 out of 216 countries and territories around the world and in 149 of these, it is the most severe penalty available.[4] It is also the most severe penalty in current international criminal courts and tribunals. In 144 of the 183 countries with formal life imprisonment, there is some provision for release, while 65 countries impose life imprisonment without parole sentences.[5] In 2014, at least 304,814 prisoners were serving formal life sentences worldwide.[6] The numbers could have increased since then.

The Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (ACRWC) prohibit the imprisonment for life for offences committed

[1] Penal Reform International *Report on the abolition of the death penalty and its alternative sanction in East Africa: Kenya and Uganda* (2012) 7. See also Stokes R 'A fate worse than death? The problems with life imprisonment as an alternative to the death penalty' in Yorke J (ed) *Against the death penalty: International initiatives and implications* (2008) 282.
[2] Knoops G A *Theory and practice of international and internationalised criminal proceedings* (2005) 275.
[3] De Beco G 'Life sentences and human dignity' (2005) 9 (3) *The International Journal of Human Rights* 412. See also Van Zyl Smit D 'Life imprisonment: Recent issues in national and international law' (2006) 29 *International Journal of Law and Psychiatry* 405. See also Abellan Almenara M & Van Zyl Smit D 'Human Dignity and Life Imprisonment: The Pope Enters the Debate' (2015) 15 (2) *Human Rights Law Review* 371. See also Appleton C & Grover B 'The Pros and Cons of Life without parole' (2007) 47 (4) *British Journal of Criminology* 611.
[4] Appleton C & Van Zyl Smit D *Life Imprisonment: A Global Human Rights Analysis* (2019) 1. See also Penal Reform International and University of Nottingham *A policy briefing on life imprisonment* (2018) 2.
[5] Appleton C & Van Zyl Smit D *Life Imprisonment* (2019) 1. Penal Reform International and University of Nottingham A *policy briefing on life imprisonment* (2018) 2.
[6] Appleton C & Van Zyl Smit D *Life Imprisonment* (2019) 1.

while under the age of 18, without the possibility of release or parole. The CRC Committee further recommends strongly that States parties abolish all forms of life imprisonment, including indeterminate sentences, for all offences committed by persons who were below the age of 18 at the time of commission of the offence.[7] The Committee notes the 2015 report in which the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment finds that life imprisonment and lengthy sentences, such as consecutive sentencing, are grossly disproportionate and therefore cruel, inhuman or degrading when imposed on a child.[8] The CRC Committee's submission, therefore, is that life imprisonment with or without parole should be abolished. Additionally, this thesis argues that all forms of life imprisonment sentences are contrary to Article 37 (b) of the CRC, in that they violate State party obligations to ensure that children are imprisoned for the shortest appropriate period of time.[9] The same cannot be said of the ACRWC because it does not have a provision similar to or modelled along the lines of Article 37 (b) of the CRC.[10] However, the African Committee of Experts on the ACRWC has noted the absence of these provisions in the ACRWC and has reiterated that the higher standards on child justice contained in the CRC instrument apply to ACRWC State's parties, as they are already State parties to the CRC.[11]

Although there is a prohibition on life imprisonment sentences for children in the CRC, 73 countries around the world retain some kind of formal life imprisonment for children, with the United States alone having 8 300 prisoners serving either life imprisonment or sentences longer

[7] See UN Committee on the Rights of the Child *General Comment No. 24 (2019) on children's rights in the child justice system*, CRC/C/GC/24, para 81.
[8] See Human Rights Council *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment* (2015) para74. See also CRC/C/GC/24, para 81.
[9] Mujuzi J D 'Sentencing Children to Life Imprisonment and/or to Be Detained at the President's Pleasure in Eastern and Southern Africa' (2010) 16 (2) *International Journal of Punishment and Sentencing* 52.
[10] Mujuzi (2010) 52.
[11] African Committee of Experts (ACERWC), *General Comment no. 5 (2018) 'State Party Obligations under the African Charter on the Rights and Welfare of the Child (Article 1) and systems strengthening for child protection*, 2018, available at *https://www.acerwc.africa/general-comments/* (accessed 8 January 2020), p24.

than 40 years for crimes committed when they were under 18 years of age.[12] The UN Special Rapporteur on Torture, in agreement with the CRC, has also submitted that any kind of life sentence is incompatible with the human rights of a child, as it causes 'physical and psychological harm that amounts to cruel, inhuman or degrading punishment.'[13]

This chapter will thus argue, in line with the CRC Committee's submission and the Special Rapporteur's statement that all forms of life imprisonment sentences passed on children, amount to inhuman sentencing and should be abolished. The chapter will define life imprisonment in international law and discuss the justifications and limitations in imposing life imprisonment sentence. Further discussion will also be made on the prohibition of life imprisonment sentences on children as a *jus cogens* norm. The chapter will thereafter examine the legality of life imprisonment sentences for children under the age of 18 in Botswana and Zimbabwe. As State parties to both the CRC and the ACRWC, both Zimbabwe and Botswana are bound by obligations not to impose life imprisonment sentences on children. This examination is designed to identify possible gaps in the implementation of the CRC, the ACRWC and general principles of international law and standards, in the sentencing of children.

4.2.Defining life imprisonment in international and national laws

The term 'life imprisonment' has different meanings in different jurisdictions. In some countries, it means that life-sentenced prisoners have no right to be considered for release.[14] In others, life-sentenced prisoners are routinely considered for release after a certain period. There

[12] Penal Reform International and University of Nottingham *A policy briefing on life imprisonment* (2018) 5.
[13] Mendez J E *Human Rights Council Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, A/HRC/28/68 (2015) para. 74.
[14] Penal Reform International and University of Nottingham *A policy briefing on life imprisonment* (2018) 1.

are also other sentences that are not formally identified as life imprisonment, but which have the power to detain a person in prison until death.[15] Life imprisonment in which a minimum term of detention must be served before some form of parole is possible is by far the most common form of life imprisonment for child offenders across Africa. 14 of the 23 States that permit life sentences for children retain this form of sentence.[16]

Van Zyl Smith defines life imprisonment as the solemn public pronouncement that henceforth the State will have the legal authority to curtail drastically some of the most basic rights and liberties of sentenced offenders for the rest of their natural lives.[17] Van Zyl Smith and Appleton also define life imprisonment as a sentence, following a criminal conviction, which gives the State the power to detain a person in prison for life, that is, until they die there.[18] Within this definition, two basic types of life sentences can be identified. The first is *formal life imprisonment*, in which the sentencing authority imposes a sentence of 'imprisonment for life,' or uses other words indicating explicitly that it intends convicted persons to be held in prison for as long as they live.[19] The second is *informal life imprisonment* where the sentencing authority imposes a sentence that it does not call life imprisonment, but which could actually result in offenders being held in prison until they die there.[20]

In the case of formal life imprisonment, there is a distinction between life imprisonment without parole (LWOP) and life imprisonment with parole (LWP). At the heart of this distinction is the fact that prisoners serving LWOP sentences are not routinely considered for

[15] Penal Reform International and University of Nottingham *A policy briefing on life imprisonment* (2018) 1.
[16] These are Botswana, Burkina Faso, Eritrea, Ethiopia, Gabon, Liberia, Madagascar, Namibia, Nigeria, Seychelles, Somalia (South Central and Puntland), South Africa, Zambia, and Zimbabwe.
[17] Van Zyl Smith (2006) 406.
[18] Appleton C & Van Zyl Smit D *Life Imprisonment* (2019) 15.
[19] Appleton C & Van Zyl Smit D *Life Imprisonment* (2019) 15. See also Penal Reform International and University of Nottingham *A policy briefing on life imprisonment* (2018) 2.
[20] Appleton C & Van Zyl Smit D *Life Imprisonment* (2019) 15. See also Penal Reform International and University of Nottingham A policy briefing on life imprisonment (2018) 5.

release, although they may still be granted clemency.[21] LWOP sentences have been described as worse than a death sentence, as death sentences at least mark an anticipated end to suffering.[22] In contrast, prisoners serving LWP sentences are entitled to have their release considered after a fixed period of their sentence has been served and regularly thereafter.[23] In the case of informal life imprisonment, there is a distinction between *de facto life* and *post-conviction indefinite detention.* De facto life refers to fixed-term sentences that are so long that they are likely to result in the persons subject to them dying in prison.[24] The focus is on the length of the sentence itself, not the person's ability to survive the term due to age or state of health.[25] Post-conviction indefinite detention refers to sentences and post-sentencing measures that follow from a conviction and provide for the indefinite detention of convicted persons without specifying that they are life sentences.[26] Serving indeterminate sentences has been described by different individuals as 'a tunnel without light at the end', 'a black hole of pain and anxiety', 'a bad dream, a nightmare', and even 'a slow, torturous death.'[27] Lack of control, futility of existence and fear of institutionalisation are recurring themes among prisoners serving indeterminate prison terms.[28]

In identifying life sentences of different types, language may be problematic, even where the translation seems clear. In English speaking countries and British colonies, there are particular sentences phrased as 'detention during Her Majesty's or 'at the President's pleasure,' used to denote indeterminate detention. When, as in the United Kingdom, it is applied to children under the age of eighteen years who have been convicted of a criminal offence such as murder, the

[21] Appleton C & Van Zyl Smit D *Life Imprisonment* (2019) 15.
[22] Berry III W 'Life With Hope Sentencing: The Argument for Replacing Life Without Parole Sentences with Presumptive Life Sentences' (2015) 76 (5) *Ohio State Law Journal* 1054.
[23] Penal Reform International and University of Nottingham *A policy briefing on life imprisonment* (2018) 1.
[24] Appleton C & Van Zyl Smit D Life Imprisonment (2019) 15.
[25] Appleton C & Van Zyl Smit D Life Imprisonment (2019) 15.
[26] Appleton C & Van Zyl Smit D *Life Imprisonment* (2019) 15.
[27] Zehr H Doing Life *Reflections of Men and Women Serving Life Sentences* (1996) 58. See also Berry III (2015) 1054.
[28] Appleton C & Van Zyl Smit D *Life Imprisonment* (2019) 15.

courts have stated bluntly that detention during Her Majesty's pleasure is effectively life imprisonment.[29] In 2014, a judge told a sixteen- year old boy convicted of murdering his high school teacher that 'the sentence for murder is automatic: given your age, it is detention during Her Majesty's pleasure. That is an indeterminate sentence; it is, to all intents and purposes, a life sentence.'[30] In countries such as Tanzania, Kenya, Malawi and Zambia the Penal Laws, although not expressly using the phrase life imprisonment, empower courts to sentence child offenders convicted of murder to imprisonment at the 'President's pleasure' which in practice could amount to life sentences.[31]

4.3. Justifications and Limitations on Life Imprisonment Sentences

Punishment that removes offenders from society is sometimes justified simply on the basis that it incapacitates them, thus, protecting society from the crimes that these offenders could otherwise commit as they are permanently excluded from normal society.[32] Life imprisonment is seen not only as a deterrent sentence but also as a retributive punishment that particularly if implemented harshly and fully, has sufficient penal bite to make it proportionate to the most serious crimes.[33] The use of life imprisonment has however been limited by the principle of proportionality. As is the case with every other sentence, life imprisonment may only be imposed where it is proportional to the offence and the offender. Since life imprisonment is a

[29] Appleton C & Van Zyl Smit D *Life Imprisonment* (2019) 15.
[30] See Mujuzi (2010) 53. Section 25 (2) of Kenya's Penal Code states that: 'Sentence of death shall not be pronounced on or recorded against any person convicted of an offence if it appears to the court that at the time when the offence was committed he was under the age of eighteen years, but in lieu thereof the court shall sentence such person to be detained during the President's pleasure, and if so sentenced he shall be liable to be detained in such place and under such conditions as the President may direct, and whilst so detained shall be deemed to be in legal custody.' A similar provision is found in Section 26 (2) of Tanzania's Penal Code, Section 25 (2) of the Penal Code of Malawi, Section 25 (2) of Zambia's Penal Code and Section 16 of the Mauritian Juvenile Act of 1935.
[31] Mujuzi (2010) 53.
[32] Appleton C & Van Zyl Smit D Life Imprisonment (2019) 6.
[33] Appleton C & Van Zyl Smit D Life Imprisonment (2019) 4.

severe sentence, it must only be imposed for serious offences committed in aggravated circumstances and where it is warranted to protect the community.[34] Further restrictions on the use of life imprisonment have been derived from various rights under international human rights, which include the rights to human dignity and liberty, and the prohibition of cruel, inhuman and degrading punishment.[35]

Life imprisonment should also only be imposed where there is a realistic prospect of release for offenders.[36] The International Covenant on Civil and Political Rights (ICCPR) requires that the prison system must have as its essential aim the reintegration and social rehabilitation of an offender.[37] This is in line with Article 10 (1) which requires that persons deprived of their liberty must be treated with 'humanity and respect for the inherent dignity of the human person.'[38] The human dignity of prisoners is intricately related to their having the prospect of being reintegrated into society. Rule 107 of the Standard Minimum Rules for Treatment of Prisoners (the Nelson Mandela Rules) states that, from the beginning of a prisoner's sentence, consideration must be given to his future after release.[39] Further, rule 88 states that imprisonment should not emphasise the exclusion of prisoners from society but their continuing part in it.[40] The African Commission on Human and Peoples' Rights has recommended the use of conditional or early release, parole and remission of sentences to improve the rehabilitation of offenders.[41] Another restriction regarding life imprisonment in

[34] Gumboh E 'A Critical Analysis of Life Imprisonment in Malawi' (2017) 61 (3) *Journal of African Law* 447.
[35]Article 5 of the UDHR provides that 'No one shall be subjected to cruel, inhuman, degrading treatment or punishment. See also Article 7 of the ICCPR and the African Charter on Human and People's Rights.
[36] Gumboh E 'A Critical Analysis of Life Imprisonment in Malawi' (2017) 61 (3) *Journal of African Law* 447.
[37] Article 10 (3).
[38] Gumboh (2017) 447.
[39] UN General Assembly, *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules): resolution / adopted by the General Assembly*, 8 January 2016, A/RES/70/175.
[40] UN General Assembly, *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules): resolution / adopted by the General Assembly*, 8 January 2016, A/RES/70/175.
[41] African Commission on Human and Peoples' Rights *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.

international law is that the prospect of release must be accompanied by procedural safeguards. This requires that an adequate release mechanism must be in place. A decision on continued detention affects the liberty of an offender and thus requires the review mechanism to comply with international safeguards.[42]

Life imprisonment has been criticised as a violation of the right to human dignity, in that it is imposed as a deterrent to potential offenders, hence it results in the instrumentalisation of offenders.[43] Moreover, it is doubtful whether deterrence can be achieved by life imprisonment or indeed long terms of imprisonment. The underlying causes of gross human rights violations, some of which lie within the political system, cannot be curbed by the threat of imprisonment.[44] Indeed, not even the prospect of death can deter the commission of such crimes.[45] It has been argued that life imprisonment presents 'an intolerable threat to the human dignity' of the offender because it is a cruel, inhuman and degrading punishment.[46] Life imprisonment denies the prisoner any hope of rehabilitation and reintegration into society.[47]

4.4. Prohibition of life imprisonment as *Jus Cogens*

Customary international law has recognised that the special characteristics of children preclude them from being treated the same as adults in the criminal justice system.[48] To sentence a child in such a severe manner contravenes society's notion of fairness and the shared legal

[42] Gumboh 2017 (444).
[43] De Beco 'Life sentences and human dignity' (2005) 414.
[44] Gumboh 'The penalty of life imprisonment under international criminal law' (2011) 11 *African Human Rights Law Journal* 76.
[45] Gumbo (2011) 76.
[46] Van Zyl Smit D 'Life imprisonment as the ultimate penalty in international law: A Human rights perspective' (1999) 9 *Criminal Law Forum* 5 26-45.
[47] De Beco (2005) 414.
[48] UN Committee on the Rights of the Child (CRC) *General Comment No. 24 (2019): Children's Rights in Juvenile Justice*, CRC/C/GC/24, para 92.

responsibility to protect and promote child development.[49] The United Nations has begun to look at life imprisonment of children more generally and in November 2012, the General Assembly urged States to consider repealing all forms of life imprisonment for children.[50]

The prohibition against sentencing child offenders to life imprisonment without parole is part of customary international law and the virtually universal condemnation of this practice can now be said to have reached the level of a *jus cogens* norm.[51] For a norm to be considered customary international law, it must be a widespread, constant, and uniform State practice compelled by a legal obligation that is sufficiently long to establish the norm, notwithstanding that there may be a few uncertainties or contradictions in practice during this time.[52] The International Court of Justice (ICJ) has said that 'a very widespread and representative participation in [a] Convention might suffice of itself to evidence the attainment of customary international law, provided it included participation from 'States whose interests were specially affected.'[53]

When customary law is said to be *a jus cogens* norm, no persistent objection by a particular country will suffice to prevent the norm's applicability to all nations.[54] According to Article 53 of the Vienna Convention on the Law of Treaties, it is 'a norm accepted and recognised by the general international law having the same character.' The former President of the ICJ, the Honourable Rosalyn Higgins, stated that 'what is critical in determining the nature of the norm as a *jus cogens* norm is both the practice and *opinio juris* of the vast majority of nations.'[55] It is important to look at the legal expectations of the international community of nations and

[49] De La Vega C & Leighton M 'Sentencing Our Children to Die in Prison Global Law and Practice' (2008) 42 *University of San Francisco Law Review* 1008.
[50] Resolution adopted by the General Assembly on 19 December 2016, A/RES/71/188.
[51] De La Vega & Leighton (2008) 1014.
[52] De La Vega & Leighton (2008) 1014.
[53] De La Vega & Leighton (2008) 1014.
[54] De La Vega & Leighton (2008) 1014.
[55] Higgins R *Problems and Process: International Law and how we use it* (1994) 200.

their practice in conformity with those expectations.[56] As such, General Assembly resolutions can provide evidence of such expectations.

The prohibition of LWOP fulfils these requisites for three reasons: there is a widespread and consistent practice by countries to not impose a sentence of LWOP for child offenders as a measure that is fundamental to the basic human value of protecting the life of a child; the imposition of such sentences is relatively new and now practised by only one nation, the United States-all of the other States which had taken up the practice have joined the global community in abolishing the sentence; and there is virtually universal acceptance that the norm is legally binding, as codified by the CRC and elsewhere and requires countries to abolish this practice, as evidenced by the community of States as a whole, as a norm from which no derogation is permitted.[57]

Indeed, because only one country, the United States, now applies this sentence and holds 100% of the cases, the prohibition against the sentence can now be said to have reached the level of a *jus cogens* norm, a practice no longer tolerated by the international community of nations as a legal penalty for children.[58] In sum, the United States alone is violating international law by allowing its courts to impose this penalty on children.[59] In addition to the legal prohibition recognised in the context of treaty law, countries have reinforced their obligation to uphold this norm in a myriad of international resolutions and declarations.[60]

[56] Higgins (1994) 200.
[57] De La Vega & Leighton (2008) 1016.
[58] De La Vega & Leighton (2008) 1019.
[59] De La Vega & Leighton (2008) 1019.
[60] De La Vega & Leighton (2008) 1019.

4.5. Life Imprisonment in Zimbabwe

The Criminal Procedure and Evidence Act (CPEA) empowers the High Court to impose a sentence of imprisonment if the court considers such a sentence appropriate in all the circumstances of the case.[61] This sentence is made without distinction between adults and persons under the age of 18. Thus, the High Court may impose a sentence of life imprisonment in serious cases which cannot be diverted for persons above the age of 14 years. The Criminal Law Codification and Reform Act (CLCRA) legalises the sentence of imprisonment for life to persons who commit murder while under the age of 18 years or where there are extenuating circumstances.[62] The Act further makes no distinction for adults and those who commit offences while under the age of 18 for crimes of attempted murder, incitement or conspiracy to commit murder.[63] Thus, the law in Zimbabwe under the CPEA and the CLCRA allows for the sentencing of children to life imprisonment. Before the *Makoni* case, which was decided in 2017, such life imprisonment could mean life for life without the option of parole. After the *Makoni* case, such life imprisoned persons can be considered for parole. By legalising such sentences, the law violates the CRC and the constitutionally guaranteed rights of children not to be treated inhumanely.

Although the law permits life sentences to children under the age of 18, the practice in Zimbabwe shows that the courts are reluctant to pass such sentences even when serious offences such as murder are committed. This is reflected in decisions such as *S v FM, S v Khumalo* and *S v Mutinhima*. In *S v Khumalo*,[64] the accused had fatally stabbed the deceased

[61] Section 336 (1) (a) of the CPEA.
[62] Section 47 provides that : 'Subject to Section 337 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], a person convicted of murder shall be sentenced to death unless:
(*a*) the convicted person is under the age of eighteen years at the time of the commission of the crime; or
(*b*) the court is of the opinion that there are extenuating circumstances; in which event the convicted person shall be liable to imprisonment for life or any shorter period.'
[63] Section 47 (3) provides that: 'A person convicted of attempted murder or of incitement or conspiracy to commit murder shall be liable to be sentenced to death or to imprisonment for life or any shorter period.'
[64] *S v Khumalo* HB-143-1.

over a squabble for a girl, when he was 17 years of age. Instead of getting a life imprisonment sentence, the accused was sentenced to 10 years imprisonment because of his youthfulness.[65] In *S v Mutinhima,* the accused was 17 years when he fatally stabbed the deceased.[66] The court held that immaturity had played a role in the commission of the crime and thus accused was sentenced to 9 years imprisonment instead of life imprisonment.[67] It is commendable that the courts are not sentencing children to life imprisonment, however, the law needs to be amended to truly reflect the practice in the country. The CPEA and the CLCRA should be amended to specifically exclude children and those who would have committed offences while under the age of 18. Clarity of law is important for understanding and predictability.

4.5.1. The Meaning of Life imprisonment in Zimbabwe

In terms of the CPEA, a sentence of life imprisonment means imprisonment for the rest of one's life.[68] The Act does not make provision for parole for life-imprisoned prisoners. In the *Makoni*[69] case, the court stated obiter that the provisions in Section 344A of the CPEA, which when interpreted, means life for life without parole, would not escape a conclusion that it constitutes a violation of human dignity and amounts to cruel, inhuman or degrading treatment or punishment in breach of Sections 51 and 53 of the Constitution, as the same with the Prisons Act provisions.[70]

[65] *S v Khumalo* HB-143-1.
[66] *S v Mutinhima* HH-16-18.
[67] *S v Mutinhima* HH-16-18.
[68] Section 344A of the CPEA.
[69] *Makoni v Commissioner of Prisons* constitutional appeal no CCZ 48/15, judgment no CCZ 8/16 (13 July 2016) (Zimbabwe Constitutional Court) (Makoni).
[70] *Makoni v Commissioner of Prisons*.

4.5.2. Offences carrying the penalty of life imprisonment

Life imprisonment sentences can be imposed for offences such as; treason,[71] insurgency, banditry, sabotage or terrorism,[72] recruitment[73], training[74] or supplying weapons[75] or possessing weapons[76] for bandits, saboteurs or insurgents and terrorists, murder with extenuating circumstances,[77] attempted, incitement of or conspiracy to commit murder,[78] culpable homicide,[79] inciting or assisting suicide,[80] rape,[81] kidnapping or unlawful detention,[82] robbery committed in aggravating circumstances[83] and hijacking.[84] It is however not mandatory for the court to impose the sentence of life imprisonment where these offences are committed. The CPEA allows the court to exercise discretion when imposing these sentences and in some instances allowing for a lower sentence to be imposed.[85] Courts are thus encouraged to apply this discretion when faced with a child offender who would have committed any of these crimes.

In *S v Ndlovu*, Judge Kamocha held that in cases of murder with actual intent, where the court is of the opinion that there are extenuating circumstances, the convicted person is usually sentenced to imprisonment for a period ranging from 21 years imprisonment upwards.[86] For

[71] Section 20 of the CLCRA.
[72] Section 23A of the CLCRA.
[73] Section 24 of the CLCRA.
[74] Section 25 of the CLCRA.
[75] Section 26 of the CLCRA.
[76] Section 27 (1) of the CLCRA.
[77] Section 47 (2) (b) of the CLCRA. See for example *S v Basera* HH-316-14 where a husband fatally attacked his wife with a dibble (small implement for digging holes) on her head and knee several times, and was sentenced to 25 years imprisonment. The court found extenuating circumstances that the accused was a first offender and that there are certain customary consequences associated with the murder of a person. Thus although his crime attracted a life imprisonment sentence, he did not receive that sentence.
[78] Section 47 (3) of the CLCRA.
[79] Section 49 of the CLCRA.
[80] Section 50 of the CLCRA.
[81] Section 65 of the CLCRA.
[82] Section 93A of the CLCRA.
[83] Section 126 of the CLCRA.
[84] Section 147 of the CLCRA.
[85] Section 344 (1) of the CPEA provides that: 'Where any person is liable by law to a sentence of imprisonment for life or for any period, he may be imprisoned for any shorter period.'
[86] *S v Ndlovu* 2012 (1) ZLR 393 (H).

murder with constructive intention, where there are extenuating circumstances, the sentence is usually between 14 and 20 years.[87] Thus where age as a mitigating sentence exists, a convicted child offender can be sentenced to a maximum of 20years for attempted murder.[88]

4.5.3. Release of offenders on life imprisonment sentences

Prior to the *Makoni* case, prisoners serving life imprisonment sentences were not eligible for release on parole. The Prisons Act specifically excluded person sentenced to death and life imprisonment.[89] Prisoners sentenced to life imprisonment may however benefit from the President's prerogative of mercy in terms of Section 378 of the CPEA, in which the President may suspend whole or part of any sentence of imprisonment.[90] The Prisons Act also does not allow the remission of a sentence for persons serving a sentence of imprisonment for life.[91] The *Makoni* case challenged the provisions of the Prison's Act which did not allow the release on parole of prisoners sentenced to life imprisonment. The following is an extensive discussion of the *Makoni* case challenging the Prisons Act.

[87] *S v Ndlovu* 2012 (1) ZLR 393 (H). See also Feltoe G, Reid-Rowland J & Crozier B *Sentencing Murderers* (2018) 2.
[88] Feltoe et al (2012) 2.
[89] Section 115 of the Prisons Act provides that: 'the Minister may at any time release on licence, for such period and subject to such conditions as may be specified in the licence, any convicted prisoner, including a prisoner who has been sentenced to periodical or extended imprisonment, other than a prisoner who has been sentenced to death or to imprisonment for life.
[90] Section 378 of the CPEA.
[91] Section 109 of the Prisons Act provides that: 'A convicted prisoner under sentence of imprisonment for a period of more than one month, other than a prisoner sentenced to imprisonment for life or to periodical or extended imprisonment, may, subject to such conditions as may be prescribed, earn by satisfactory industry and good conduct remission of one-third of his sentence: Provided that in no case shall a sentence be reduced by reason of remission to less than one month.'

4.5.4. *Makoni Case*

The constitutionality of life imprisonment sentences without parole came under scrutiny in the *Makoni v Commissioner of Prisons* case.[92] The applicant in this matter was convicted of the murder of his girlfriend and because of extenuating circumstances, he was sentenced to life imprisonment. He was aged 19 at the time of his conviction and had served almost 21 years in prison when he challenged the provisions of the Prisons Act. The crux of his application was that a life imprisonment sentence without the possibility of judicial review or parole is unconstitutional as it amounts to inhuman and degrading treatment and constitutes a violation of human dignity in breach of Sections 51 and 53 of the Constitution. The applicant also challenged provisions of the Prisons Act which allow the release of prisoners on extended imprisonment sentences except for those serving life sentences, which amounts to a violation of his rights to equality and non – discrimination in Section 56 of the Constitution. The applicant claimed that his dignity and expectations have been crushed. Despite his excellent behaviour whilst in prison, which behaviour was acknowledged and conceded by the respondents, he had absolutely no hope of amnesty or release from prison. He further averred that the conditions in Zimbabwean prisons are horrendous due to prevailing economic constraints which compounds the psychological stress of knowing that he will never be released.

The court noted the evolution of the penological theory in international law from sentencing as a tool of retribution to one of rehabilitation and the re-socialisation of prisoners. In that regard the court noted the provisions in the ICCPR, which provides that; 'All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person' and that 'the penitentiary system shall comprise treatment of prisoners the essential

[92] *Makoni v Commissioner of Prisons.*

aim of which shall be their reformation and social rehabilitation'[93] The same sentiments, the court noted, were echoed by the Human Rights Committee in General comment 21.[94]

The court also paid particular attention to Rules 56 to 64 of the Standard Minimum Rules for the Treatment of Prisoners which emphasise the following principles; that the prison system should not aggravate the suffering inherent in the deprivation of liberty; that the prisoner should be able to lead a law-abiding and self-supporting life upon his return to society; that the institution should seek to address the individual treatment needs of the prisoners; that the institution should respect the dignity of prisoners as human beings; that steps should be taken to ensure for the prisoner a gradual return to life in society; that the treatment of prisoners should emphasise not their exclusion from the community, but their continuing part in it; that the institution should detect and treat any mental or physical illnesses or defects that hamper a prisoner's rehabilitation and that institutions should endeavour to achieve the individualisation of prisoner treatment.[95] The court also referenced principles set in the 2015 United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules), particularly on their emphasis on human dignity and the need to safeguard that dignity through appropriate corrective measures.[96]

[93] Article 10 (1) & (3).
[94] UN Human Rights Committee (HRC), CCPR General Comment No. 21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty), 10 April 1992, available at: *https://www.refworld.org/docid/453883fb11.html* (accessed 10 December 2019).
[95] United Nations, Standard Minimum Rules for the Treatment of Prisoners, 30 August 1955, available at: *https://www.refworld.org/docid/3ae6b36e8.html* (accessed 10 December 2019).
[96] On 17 December 2015, the General Assembly adopted Resolution 70/175. The resolution provides that: 1. 'All prisoners shall be treated with the respect due to their inherent dignity and value as human beings. No prisoner shall be subjected to, and all prisoners shall be protected from, torture and other cruel, inhuman or degrading treatment or punishment, for which no circumstances may be invoked as a justification. The safety and security of prisoners, staff, service providers and visitors shall be ensured at all times.' 4. 'The purposes of a sentence of imprisonment or similar measures deprivative of a person's liberty are primarily to protect society against crime and to reduce recidivism. These purposes can be achieved only if the period of imprisonment is used to ensure, so far as possible, the reintegration of such persons into society upon release so that they can lead a law-abiding and self-supporting life.'

The court acknowledged the hopelessness of life imprisonment sentences without parole by stating that:

> 'In the instant case, the applicant's assertions as to the acute angst that he continues to endure are uncontroverted and the sheer hopelessness of his mindset cannot be denied. It must be accepted as being truly reflective of the highly deleterious impact of indeterminate imprisonment on his emotional and psychological well-being.'

In denouncing life imprisonment sentences without parole, the court referred to the precedent set by the Namibian Supreme Court in *State* v *Tcoeib*[97] where the court held that:

> "…….. there is no escape from the conclusion that an order deliberately incarcerating a citizen for the rest of his or her natural life severely impacts upon much of what is central to the enjoyment of life itself in any civilised community and can therefore only be upheld if it is demonstrably justified. In my view, it cannot be justified if it effectively amounts to a sentence which locks the gates of the prison irreversibly for the offender without any prospect whatever of any lawful escape from that condition for the rest of his or her natural life and regardless of any circumstances which might subsequently arise. To insist, therefore, that regardless of the circumstances, an offender should always spend the rest of his natural life in incarceration is to express despair about his future and to legitimately induce within the mind and the soul of the offender also a feeling of such despair and helplessness.[98]

[97] 1996 7 BCLR 996 (NmS).
[98] At 1004-1005.

The court also referred to the South African case of *State* v *Bull & Another*[99] where the court adopted a similar approach as in the Namibian case and noted that the possibility of parole saves a whole life sentence from being cruel, inhuman and degrading punishment.

The court, therefore, held that the exclusion of life prisoners from the statutory process of possible release on parole availed to other prisoners is a violation of life prisoners' constitutionally guaranteed right to equal protection and benefit of the law. The court also noted that apart from the argument that persons sentenced to life imprisonment would have been so sentenced for having committed some heinous or atrocious crime, the government did not provide any reasonable or justifiable basis for the limitation of their rights within the contemplation of Section 86 of the Constitution. Additionally, no clear legitimate public interest was served by depriving life prisoners of the possibility of release following an appropriate period of reformative and rehabilitative incarceration. As such, the provisions of the impugned Prisons Act were held to be unconstitutional to the extent that they exclude whole life prisoners from the parole process and thereby contravene the right to equal protection and benefit of the law under Section 56(1) of the Constitution.

Notably, the Court rejected the respondent's argument that a life-term prisoner's situation was not completely hopeless because of the existence of a mechanism for the executive prerogative of mercy. The respondent had argued that the hope of release was inherent in a life sentence because the President can exercise the prerogative of mercy at any time, even without an application by a prisoner and simply because the President had not granted mercy did not imply that the applicant would never be pardoned. The State also referenced the mandatory report that the commissioner of prisons makes to the President on behalf of every life-term prisoner every five years after the first ten years of imprisonment. Judge Patel explained that the

[99] 2002 (1) SA 535 (SCA) at para, 23.

existence of a clemency or pardon mechanism was constitutionally insufficient to provide a life-term prisoner with a prospect of release. According to the Court, the Presidential clemency power was derived from the common law royal prerogative of mercy and therefore was 'not ordinarily justiciable.'[100] By contrast, decisions of the Advisory Board, Parole Board, Commissioner of Prisons and Minister of Justice were 'ordinarily reviewable on the established grounds of irrationality, illegality or procedural irregularity', either under English common law principles or Zimbabwe's Administrative Justice Act.[101]

According to Novak, the decision in Makoni was remarkable because of the Court's reliance on foreign and international legal authorities to discern an emerging global consensus that life imprisonment without the possibility of parole constitutes cruel and degrading punishment.[102] Novak also remarks that the Makoni decision may be indicative of an emerging global 'common law' on life without parole, similar to the body of transnational jurisprudence that developed on the application of the death penalty. [103] Novak submits that the Court's decision will probably be significant at the international level because of the relatively undeveloped nature of international law concerning life without parole compared to that regarding the death penalty.[104] As such, the decision will probably be cited by foreign courts and thereby become part of the human rights *ius commune*.[105]

4.5.5. The meaning of life imprisonment after the *Makoni* case

[100] Novak A J 'Toward a Global Consensus on Life Imprisonment without Parole: Transnational Legal Advocates and the Zimbabwe Constitutional Court's Decision in Makoni v Commissioner of Prisons' (2018) 62 (2) *Journal of African Law* 316.
[101] Novak (2018) 316.
[102] Novak (2018) 316.
[103] Novak (2018) 316.
[104] Novak (2018) 320.
[105] Novak (2018) 327.

The sentence of life imprisonment in Zimbabwe has now been redefined in the *Makoni* case as prisoners serving life imprisonment can now be considered for parole. The parole procedure begins with a consideration and a report by the Parole Board, on the case of each prisoner serving a sentence of life imprisonment within one month after the expiry of the minimum period of such imprisonment determined in accordance with the Criminal Procedure and Evidence Act; and thereafter at intervals of not more than twelve months.[106] The board after making the report will inform the prisoner within one month if it has recommended the release of the prisoner and if not will give reasons why no such recommendation was made.[107]

When making a report to the Minister as to the release of any prisoner, the Parole Board considers all the relevant circumstances of the case and the prisoner, and in particular to the number and nature of the offences committed by the prisoner; the period during which the prisoner has been detained; the behaviour of the prisoner while in prison; the likelihood of the prisoner leading a useful and law-abiding life outside prison; and the need to protect the public.[108] The prisoner will then be released by the Minister in terms of Section 115 of the Act.

4.6. Life Imprisonment in Botswana

Life imprisonment is one of the listed punishments in Botswana's Penal Code.[109] The Code makes provision for the sentencing of children between 14 and 18 years to imprisonment,[110] which may include life imprisonment as there is no exclusion of this age group. However the

[106] See procedure for release of prisoners serving extended prison sentences in Section 114 of the Prisons Act. In addition, the Parole Board may consider and report on the case of any such prisoner at any other times that it thinks appropriate.
[107] Section 114 (3) of the Prisons Act.
[108] Section 114 (2) of the Prisons Act.
[109] See Section 27 of the Penal Code.
[110] Section 27 (1) of the Penal Code.

passing of a life imprisonment sentence is not mandatory - courts are allowed to exercise discretion, thus not making it arbitrary.[111]

In lieu of the death penalty for serious offences committed by persons while under the age of 18, the Penal Code permits such offenders to be 'detained during the President's pleasure' for an unspecified period of time.[112] This form of sentence as will be discussed in detail later in this chapter is a form of life imprisonment sentence as one can be detained at such President's pleasure for the rest of his/her life.

The Children's Act also allows the imprisonment of children convicted of offences.[113] Subject to the Penal Code, the Act allows a child to be sentenced for an unspecified time of imprisonment at the court's discretion for capital offences other than murder. Thus, there is no provision prohibiting life sentences for children in the Children's Act. In terms of Section 89, murder charges for children are tried in the High Court and the sentence for murder is the death penalty.[114] However since a child cannot be sentenced to death, Section 27 will come into play and such a child will be sentenced to be detained during the President's pleasure, as such, to life imprisonment. It is thus, submitted that both the Penal Code and the Children's Act of Botswana legalise the sentencing of children to life imprisonment which is a form of an inhuman sentence as discussed in Chapter 2 of this thesis.

4.6.1. The Meaning of Life Imprisonment in Botswana

[111] Section 27 (2) of the Penal Code.
[112] Section 27 (2) of the Penal Code.
[113] Section 85 (e) of the Children's Act.
[114] Section 203 (1) of the Penal Code.

The sentence of life imprisonment is not absolute in Botswana. A person sentenced to life imprisonment is eligible for release on parole after serving a minimum of seven years.[115] Shortly before a prisoner becomes eligible for release, the parole board may consider his case at least once every year taking into account reports on the prisoner from a medical officer and the officer in charge of the prison in which the prisoner is detained, with a view of recommending or denying his/her release on parole.[116] The recommendation is made in writing to the relevant Minister, who, after considering the recommendation may order the conditional release of such prisoner subject to the President's written confirmation.[117] There is, therefore, a likelihood that children sentenced to life imprisonment under Section 27 of the Penal Code might only serve 7 years of imprisonment for serious offences.

4.6.2. Offences carrying a maximum sentence of life imprisonment

The Penal Code lists several offences that carry the sentence of life imprisonment. These include rape,[118] attempted rape,[119] defilement of a person under 16 years,[120] procuration,[121] attempted murder,[122] disabling in order to commit offence,[123] intentionally endangering safety of persons travelling by railway,[124] inciting to mutiny,[125] piracy,[126] hijacking,[127] rioting after proclamation,[128] preventing or obstructing the making of proclamation,[129] rioters demolishing

[115] Section 85 (c) of the Prisons Act.
[116] Section 86 of the Prisons Act.
[117] Section 87 of the Prisons Act.
[118] Section 142(1) (ii) of the Penal Code.
[119] Section 143 (1) of the Penal Code.
[120] Section 147 (1) of the Penal Code.
[121] Section 149 of the Penal Code.
[122] Section 217 of the Penal Code.
[123] Section 225 of the Penal Code.
[124] Section 229 of the Penal Code.
[125] Section 42 of the Penal Code.
[126] Section 63 (1) of the Penal Code.
[127] Section 65 of the Penal Code.
[128] Section 79 of the Penal Code.
[129] Section 80 of the Penal Code.

buildings,[130] incest with a person under 16 years[131] and aiding suicide.[132] Since life imprisonment is not a mandatory sentence, these offences may receive a shorter sentence.

4.6.3. Detention during the President Pleasure

Like many countries, Botswana prohibits the verdict of the death penalty on persons below the age of 18 at the time of the commission of an offence, in line with international law.[133] However, as a substitute for the death sentence, Botswana sentences persons who commit serious offences before the age of 18 to be detained during the President's pleasure.[134] Thus, if a child commits an offence that is punishable by death, instead of receiving the death penalty, he/she will be sentenced to be detained during the President's pleasure. What the phrase 'during the President's pleasure' mean is not defined in any statute law in Botswana. An attempt to describe it is made in the Penal Code, which will be discussed later in this chapter. The argument made in this chapter is that the sentence of detention at the President's pleasure is a form of an indeterminate sentence. This form of sentence violates the principles of detention only as a last resort and for the shortest period established in international law intended to keep young offenders out of prison, with their families and integrated into their societies.

4.6.3.1. Legality of Detention during the President's Pleasure in Botswana

[130] Section 81 of the Penal Code.
[131] Section 168 (1) of the Penal Code.
[132] Section 222 of the Penal Code.
[133] With the exception of China, DRC, Iran, Pakistan, Nigeria, Yemen, Saudi Arabia and the United States. See Amnesty International 'Executions of Juveniles Since 1990 as of March 2018' available at *https://www.amnesty.org/download/Documents/ACT5038322016ENGLISH.pdf* (accessed 22 May 2019).
[134] See Section 26 (2) of the Penal Code of Botswana.

Detention during the President's pleasure is legalised by Section 26 (2) of Botswana's Penal Code. The section provides that:

> '[The] Sentence of death shall not be pronounced on or recorded against any person convicted of an offence if it appears to the court that at the time when the offence was committed he was under the age of 18 years, but in lieu thereof the court shall sentence such person to be detained during the President's pleasure, and if so sentenced he shall be liable to be detained in such place and under such conditions as the President may direct, and whilst so detained shall be deemed to be in legal custody.'

A close examination of this section reveals that detention during the President's pleasure is a mandatory sentence on all crimes carrying the death penalty, committed by an offender while under the age of 18. The section further reveals that this sentence is directed by the President, hence the term 'detained during the President's pleasure', in a place and under conditions that the President so directs. The place and conditions to which the President directs are not known. However, since the section provides that such detention is deemed to be 'legal custody,' such detention will, therefore, be in the confines of a detention centre or prison, the conditions of which will be defined by the President.

The problem with this form of sentence is that it is indefinite. Thus, a child detained under this provision may be detained without any certainty as to when he/she will be released until the 'President's pleasure' is known. The pleasure of the President is a subjective notion which no one can know at any given time. In the *Mojaki* case, the court held that the sentence of detention at the President's pleasure is not determinate and it could be years before an accused is released on this sentence.[135] The probable rationale for this sentence is to ensure that a child who has

[135] *Modisaotsile Mojaki v The State* 2005(2) [BLR] 106, p 5.

committed a serious crime like murder, is closely monitored to avoid re-offending and to ensure a complete change of behaviour, which objective can be met in other ways.

4.6.3.2. Offences punishable by Detention during the President's Pleasure

In place of the death penalty, a child can be sentenced to be detained during the President's pleasure for offences such as treason,[136] murder without extenuating circumstances,[137] instigating invasion,[138] and piracy with the intent to murder or injure.[139] These are very serious crimes in Botswana, to which the State extends the full might of the law on children.

4.6.3.3.Release of children detained during the President's Pleasure

A child offender ordered to be detained during the pleasure of the President is eligible for release on parole after serving at least seven years of imprisonment.[140] The recommendation of the parole board is submitted to the Minister, who may order the release of the prisoner concerned subject to the President's written confirmation.[141] The President, however, has the power to release or decline to release a person detained during the President's pleasure.[142]

[136] Section 34 of the Penal Code.
[137] Section 203 of the Penal Code.
[138] In terms of Section 35 of the Penal Code, any person who instigates any foreigner to invade Botswana with an armed force is guilty of treason and shall, subject to Section 40, be sentenced to death.
[139] Section 63 (2) provides that: A person who, with intent to commit or at the time of or immediately before or immediately after committing an act of piracy in respect of any ship, assaults, with intent to murder, any person being on board, or belonging to, the ship or injures any such person or unlawfully does any act by which the life of any such person may be endangered shall be guilty of an offence and shall be liable to suffer death.
[140] Section 85(c) Prisons Act [Cap 21:03] of 1979.
[141] Section 87 of the Prisons Act.
[142] Section 87 of the Prisons Act.

The combined reading of Sections 85(c) and 87 of the Prisons Act means that there are at least five steps that must be followed before an offender confined at the President's pleasure can be released on parole.[143] Firstly, such an offender has to serve a minimum of seven years to be eligible for release on parole.[144] Secondly, for that release to take effect, the parole board must recommend to the Minister that such a prisoner should be released on parole.[145] Thirdly, the Minister must agree with the parole board's recommendations. Should the Minister agree with the parole board's recommendation that such a prisoner should be released on parole; the Minister may impose such parole conditions as he deems fit.[146] The fourth step is for the Minister to forward the order for an offender to be released on parole to the President for confirmation. The President can either confirm that order or not.[147] The last step is for the President to confirm the said order in writing in terms of Section 91 of the Botswana Prisons Act, which relates to the remission of sentences of offenders serving prison terms.[148]

In terms of the Prisons Act, prisoners under the sentence of imprisonment for more than one month on admission to prison, are eligible for remission of one-third of their sentence; however, such remission is not granted to prisoners confined during the President's pleasure among other prisoners.[149] This section implies that a child confined during the President's pleasure cannot have his sentence reduced because the sentence to be detained at the President's pleasure is an indeterminate sentence. Under Section 91(4) (b) the parole board is empowered to recommend to the Minister that a prisoner confined during the President's pleasure be released on one or more of the following grounds: because of his meritorious conduct; that his mental or physical condition warrants such release; and that special circumstances exist which,

[143] Mujuzi (2010) 49.
[144] Mujuzi (2010) 59.
[145] Mujuzi (2010) 59.
[146] Mujuzi (2010) 59.
[147] Mujuzi (2010) 59.
[148] Mujuzi (2010) 59.
[149] Section 91 (1) & (2). Among other prisoners not eligible for remission are prisoners sentenced to life imprisonment.

in the opinion of the parole board, warrant such release.[150] After the recommendation is made to the Minister, he will then consider the recommendation and then submit it to the President together with his own recommendation.[151]

Section 91(4) (b) sets three grounds upon which the parole board can recommend to the Minister that an offender confined during the President's pleasure should be released. On the first ground, the prison authorities and the parole board will, *inter alia,* not only look at the fact that the offender has consistently observed prison rules, but also that he has conducted himself in a manner that clearly merits recognition by releasing him from prison.[152] It is not possible to give an exhaustive list of cases in which an offender could be considered to have behaved meritoriously.[153] The prison authorities and the parole board will look at each and every prisoner's case and assess whether there is reason to conclude that such an offender has behaved in a manner that any reasonable decision-maker who is fully aware of the prison environment would consider as meritorious.[154] Reaching such a conclusion requires an objective examination of all the relevant factors and a strong motivation to the Minister why such a prisoner is clearly different from others and why his excellent behaviour should be rewarded by release.[155]

Releasing a prisoner based on the second ground (which is a person's mental or physical condition) may require the parole board to enlist the services of experts such as psychologists or psychiatrists and physicians to advise it that the continued detention of a prisoner poses a serious danger to his mental or physical health or to the mental or physical health of other prisoners.[156] The third ground of release requires the parole board to show that there are

[150] Section 91(4) (b) of the Prisons Act.
[151] Section 91(5) of the Prisons Act.
[152] Mujuzi (2010) 60.
[153] Mujuzi (2010) 60.
[154] Mujuzi (2010) 60.
[155] Mujuzi (2010) 60.
[156] Mujuzi (2010) 60.

'special circumstances' that warrant the release of such a prisoner. The Act does not define or describe what the special circumstances entail. The parole board has a wide discretion to determine what amounts to special circumstances on a case-by-case basis. There is nothing that bars the parole board from recommending that the fact that the offender committed the offence, for which he was incarcerated at the pleasure of the President when he was below the age of 18 years, is in itself a special circumstance that warrants his early release.[157] Mujuzi argues that age could be a special circumstance, because when a child commits an offence while under the age of 18, he would be immature and therefore, unlike an adult convicted of an offence falling in the same category, did not have a fully developed mental state that would have enabled him to clearly comprehend the legal consequences that would flow from breaking the law.[158]

4.6.3.4. Training and Rehabilitation of Prisoners detained during the President's Pleasure

In line with Article 40 of the CRC, the Prisons Act of Botswana provides for the training and rehabilitation of prisoners. In terms of Section 90, the aim of the training and rehabilitation is directed towards encouraging and assisting prisoners to lead good and useful lives.[159] The Act further encourages any prisoner who can benefit from any educational and vocational facilities provided at any prison to take advantage of the facilities.[160] The Act, however, does not make it compulsory for persons detained during the President's pleasure to receive education during their time in prison. Special attention is provided for illiterate prisoners who can be given extra time for lessons.[161] It is submitted that such special attention also ought to be given to children detained during the President's pleasure, especially in terms of education and regular review

[157] Mujuzi (2010) 60.
[158] Mujuzi (2010) 60.
[159] Section 90 (1) of the Prisons Act.
[160] Section 90 (2) of the Prisons Act.
[161] Section 90 (3) of the Prisons Act.

of their development and progress. To enhance this education the Act further provides for the provision of a library for every prison where it is reasonably practicable to do so.[162]

4.6.3.5. Modisaotsile Mojaki v The State

The *Mojaki*[163] case involved an appeal to the sentence of detention during the President's pleasure. The appellant in this case had been convicted by the High Court on two counts of murder, one count of housebreaking and one count of robbery all of which he committed when he was 17 years old. In the High Court, Kirby J found that the appellant's youth, his probable intoxication and the influence of his older companion (his co-accused) were extenuating circumstances but 'by the barest of margins.' This meant that although extenuating circumstances were present, the crime was committed out of pure viciousness and would have warranted the imposition of the death sentence. If not for the fact that the accused was below 18, the court would have imposed the ultimate penalty.

The High Court held that the sentence under Section 26(2), (which is detention during the President's pleasure) is a mandatory sentence, for if the appellant had been an adult, he would have sentenced him to death despite the extenuating circumstances. The Court thus sentenced the appellant to be confined during the President's pleasure on the first count of murder and to 16 years imprisonment on the second count of murder as he found extenuating circumstances in respect of the latter. The accused was also sentenced to a prison term of six months for the offence of housebreaking and six months for robbery. Both sentences were to run concurrently with the sentence of 16 years on the second count of murder.

[162] Section 90 (4) of the Prisons Act.
[163] *Modisaotsile Mojaki v The State 2005(2) [BLR]* 106, pg. 6.

On appeal, the accused sought to have the 16 years imprisonment to which he was sentenced on the second count of murder to run concurrently with the sentence of detention during the President's pleasure on the first murder sentence. However, the Appeal Court set aside the order that the accused be detained during the President's pleasure and substituted it with a sentence of 16 years imprisonment to run concurrently with the murder crime on count two. The court held:

> 'It is it would seem, clear that an order that an accused person be detained during the President's pleasure is not a determinate sentence and cannot therefore be ordered to run concurrently with a determinate sentence of imprisonment; nor can a period of imprisonment be made to run concurrently with an order for the detention at the President's pleasure.'

The appeal court was also of the view that the age of the accused although being an extenuating circumstance 'in the barest of margins,' should have been taken into account by the High Court and thus not warrant the death penalty. In this regard, the court held:

> 'Despite the horrific nature of the crimes, the appellant was only 17 years of age at the time and was probably intoxicated. It would, I feel, be excessive punishment for him to have to serve a sentence of I8 and half years and maybe much more. Having found extenuating circumstances, even if by the barest of margins, the learned judge did not have to impose the death sentence for the murder of the old lady, although, of course, he could have done so despite that finding. In my view, gruesome though the killing was, a lesser sentence than the ultimate penalty would in all the circumstances not have been inappropriate'

This court's ruling shows that where extenuating circumstances exist, no matter how slim, a child under the age of 18 should not be sentenced to be confined during the President's pleasure.

Mujuzi argues that nothing bars courts from invoking Section 27(4) of the Penal Code to sentence child offenders convicted of murder to short prison sentences or non-custodial sentences, as evidenced by the outcome of this case.[164] This is because Article 37 of the CRC obliges States parties to use imprisonment only as a measure of last resort and for the shortest appropriate period.[165]

4.7. Conclusion

In conclusion, this chapter has established that although the Penal Law of both Zimbabwe does not have an express prohibition of life imprisonment sentences to persons below the age of 18, the practise shows that courts are not imposing life sentences for children. However, a clear legal prohibition in the Penal Law should be made to exclude persons below the age of 18years. This chapter has also noted that the meaning of life imprisonment in Zimbabwe, as life for life, will not stand constitutional scrutiny as indicated in the *Makoni* case. The constitutional court established that life imprisonment without parole constitutes a violation of human dignity and amounts to cruel, inhuman or degrading treatment or punishment and such a sentence will be in breach of Sections 51 and 53 of the Constitution.

In Botswana, a person under the age of 18 can be detained during the President's pleasure for serious offences. Such a sentence has been interpreted to mean a life imprisonment sentence. The chapter also established that this form of a sentence is an indeterminate sentence in that there are no time frames for possible release; hence it could be classified as a form of life imprisonment for children. The Prison Act, however, offers parole for such children detained at the President's pleasure after serving a minimum of seven years. The granting of the parole

[164] Mujuzi (2010) 59.
[165] Mujuzi (2010) 59.

is however highly dependent on the President after receiving recommendations from a parole board. An argument was made that this form of a sentence is not in line with the principles of child protection in the CRC or the ACRWC and thus should be abolished. The State is recommended to use other forms of custodial or non – custodial sentences for children who commit serious offences. These include; committing the child to vocational training schools, short terms of imprisonment and rehabilitation centres, among others. The detention of child offenders at the President's pleasure goes against, not only the principle of imprisonment of children as a measure of last resort and only for the shortest appropriate period of time, but it also violates the principles of proportionality and rehabilitation. For a child offender not to know exactly when he would be released from prison is punishment in itself that offers no hope and does not in any way assist in the rehabilitation of the child. The indeterminate nature of the sentence is also not consistent with the objective of release and reintegration of the child into the community, which is one of the aims of juvenile justice.

CHAPTER FIVE: JUDICIAL CORPORAL PUNISHMENT OF CHILDREN IN ZIMBABWE AND BOTSWANA

5.1 Introduction

Although corporal punishment of women, employees, and convicted criminals has fallen into disrepute, and despite 'a gradual softening of sentiments towards children' and 'increasing attention to children as moral subjects' in many liberal democracies, physical punishment of children is still resorted to and considered a morally permissible component of child discipline.[1] This perceived acceptability extends to the legal toleration of this practice on the physically smallest and most dependant human beings.[2]

Corporal punishment is a global issue, which has attracted a lot of attention and is currently being debated worldwide in many forums and in a variety of disciplines. Over the world, 54 States have legally banned all corporal punishment, while an additional 56 States have committed to banning all corporal punishment.[3] In 19 States, corporal punishment is legal in any setting.[4] 33 States worldwide still sentence children to corporal punishment and 58 States still use corporal punishment as a disciplinary measure in penal institutions.[5] In Eastern and Southern Africa, as at January 2018, corporal punishment is lawful in the home for 13 States,[6]

[1] Lenta P 'Corporal punishment of Children' (2012) 38 (4) *Social Theory and Practice* 689.
[2] Lenta (2012) 689. See also Skelton A 'S v Williams: A springboard for further debate about corporal punishment' (2015) *Acta Juridica* 337 and Saunders B J, Leviner P & Naylor B 'To prohibition of corporal punishment – and beyond! Issues and insights from an inaugural workshop in Stockholm on the corporal punishment of children' in Saunders B J, Leviner P & Naylor B (eds) *Corporal Punishment of Children: Comparative Legal and Social Developments towards prohibition and beyond* (2019) 1.
[3] Global Initiative to End All Corporal Punishment of Children *Global report 2018 Progress towards ending corporal punishment of children* (2019).
[4] Global Initiative to End All Corporal Punishment of Children *Global report 2018 Progress towards ending corporal punishment of children* (2019).
[5] Global Initiative to End All Corporal Punishment of Children *Global report 2018 Progress towards ending corporal punishment of children* (2019). See also Saunders BJ, Leviner P & Naylor B (eds) *Corporal Punishment of Children: Comparative Legal and Social Developments towards prohibition and beyond* (2019) 2.
[6] These include Angola, Comoros, Mauritius, Mozambique, Namibia, Rwanda, Seychelles, South Africa, Uganda, Zambia, Zimbabwe, Burundi and Botswana. Of the 13, 11 are committed to law reform with Botswana and Burundi not clearly committed to law reform. See information on Global Initiative to End All Corporal Punishment of Children available at *https://endcorporalpunishment.org/* (accessed 06 March 2019).

in schools; it is lawful in 5 States[7], in alternative and day care in 12 States[8] and in penal institutions, 7 States.[9]

A Global Initiative to End All Corporal punishment of children, aimed at ending legalised violence against children through universal prohibition and elimination of all corporal punishment, was started in 2001.[10] According to the Initiative, any corporal punishment violates children's right to respect for their human dignity and physical integrity, and their rights to health, development, education and freedom from torture and other cruel, inhuman or degrading treatment or punishment.[11] Its legality in the majority of States, unlike other forms of interpersonal violence, violates their right to equal protection under the law.[12] Aside from securing children's immediate compliance with commands, however, there is consensus or near-consensus among social scientists about there being little evidence to suggest that corporal punishment is a more effective means of controlling and improving behaviour than the alternative available punishments.[13] In rejecting any justification of violence and humiliation as forms of punishment for children, the CRC Committee has noted that it is not in any sense rejecting the positive concept of discipline but that the healthy development of children

[77] Angola, Cosmos, Mauritius, Botswana and Zimbabwe. See information on Global Initiative to End All Corporal Punishment of Children available at *https://endcorporalpunishment.org/* (accessed 06 March 2019).
[8] These include Angola, Comoros, Mauritius, Mozambique, Namibia, Rwanda, Seychelles, South Africa, Uganda, Zambia, Zimbabwe, Burundi and Botswana. See information on Global Initiative to End All Corporal Punishment of Children available at *https://endcorporalpunishment.org/* (accessed 06 March 2019).
[9] Angola, Cosmos, Mauritius, Seychelles, Zimbabwe, Botswana, Burundi. See information on Global Initiative to End All Corporal Punishment of Children available at *https://endcorporalpunishment.org/* (accessed 06 March 2019).
[10] Global Initiative to End All Corporal Punishment of Children available at *https://endcorporalpunishment.org/* (accessed 06 March 2019).
[11] Global Initiative to End All Corporal Punishment of Children available at *https://endcorporalpunishment.org/* (accessed 06 March 2019). The CRC is clear and unambiguous that any form of violence against children is unacceptable and children must be protected from any practice that threatens their well-being and human dignity.
[12] Global Initiative to End All Corporal Punishment. See also The African Child Policy Forum *The African Report on Violence against Children* (2014)16.
[13] Larzelere R & Kuhn B 'Comparing Child Outcomes of Physical Punishment and Alterative Disciplinary Tactics: A Meta-Analysis' (2005) 8 *Clinical Child and Family Psychological Review* 25.

depends on parents and other adults for necessary guidance and direction, in line with children's evolving capacities to assist their growth towards responsible life in society.[14]

Although corporal punishment in all its forms is still rampant in many societies of the world, the focus for this thesis will be on judicial corporal punishment of male offenders under the age of 18. Judicial corporal punishment is mainly instigated by the State as a form of punishment for juveniles in conflict with the law. This chapter, therefore, seeks to promote the enforcement of a legal ban on judicial corporal punishment for States in Africa and around the world that still have legalised judicial corporal punishment for children. A legal prohibition apart from regulating conduct is aimed at changing attitudes and to make people over time to believe that they have no moral right to resort to corporal punishment.[15] Banning physical punishment may result in such a change of attitude because of the effect of legal regulation on moral beliefs. Just as 'we may appeal to morality to tell us what the law ought to be, so we may appeal to the law as providing a pointer to sound thinking in the moral sphere.'[16] The chapter thereafter traces the judicial and legislative reforms for the legal prohibition of judicial corporal punishment on male juvenile offenders in Zimbabwe. A discussion of the recent Constitutional Court's decision banning judicial corporal punishment of male juveniles will be discussed extensively in this chapter. As the whole world is moving towards ending all corporal punishment for children, this judgement is timely and in line with international law goals to end all forms of violence against children. The prohibition, however, is still to be achieved in the home, alternative care settings, day care, schools and in penal institutions. The chapter will

[14] UN Committee on the Rights of the Child (CRC), *General comment No. 8 (2006): The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment (Arts. 19; 28, Para. 2; and 37, inter alia)*, 2 March 2007, CRC/C/GC/8, para 13.
[15] Lenta (2012) 670.
[16] Cane *Responsibility in Law and Morality* (2002) 14.

then examine Botswana's standpoint on judicial corporal punishment and suggest that Botswana follows the precedent set by Zimbabwe in outlawing judicial corporal punishment.

5.2 Defining corporal punishment in international law

The CRC Committee defines 'corporal' or 'physical' punishment as any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light.[17] The physical punishment mostly involves hitting, which includes, 'smacking', 'slapping', 'spanking' children, with the hand or with an implement - a whip, stick, belt, shoe, wooden spoon, etc.[18] Corporal punishment can also involve, kicking, shaking or throwing children, scratching, pinching, biting, pulling hair or boxing ears, forcing children to stay in uncomfortable positions, burning, scalding or forced ingestion (for example, washing children's mouths out with soap or forcing them to swallow hot spices).[19] General Comment 8 of the CRC covers not only physical punishment but also other cruel and degrading forms of punishments, which may cause psychological or emotional pain. These include for example punishment, which belittles, humiliates, denigrates scapegoats, threatens, scares, or ridicules the child.[20] The CRC definition covers every form of physical force used as punishment without excluding any other possibilities.

5.3 Corporal Punishment in Zimbabwe

In Zimbabwe, corporal punishment is legal in the home, in penal institutions, in alternative care and in schools. The Criminal Law Codification and Reform Act 2004 (CLCRA) legalises

[17] CRC/C/GC/8, para 11.
[18] CRC/C/GC/8, para 11.
[19] CRC/C/GC/8, para 11.
[20] CRC/C/GC/8, para 11.

corporal punishment by authorising a parent or guardian to administer moderate corporal punishment on his/ her minor child or ward for disciplinary purposes.[21] The Act also allows corporal punishment to be inflicted on boys in schools[22] and specifically prohibits it for girls.[23] Administration of corporal punishment in schools is a complete defence under the CLCRA.[24] Interestingly, while allowing corporal punishment for children, the Act prohibits spousal corporal punishment.[25]

Judicial corporal punishment for males has been a subject of much litigation in Zimbabwe even since the old constitutional dispensation. Judicial corporal punishment was being administered in terms of Sections 336 and 353 of the Criminal Procedure and Evidence Act. Although it has recently been abolished, an analysis of the developments leading towards this abolishment is vital as it will give useful insights and the arguments raised can be used to advocate for the abolishment of corporal punishment in other settings such as alternative care, schools and in the home.

5.3.1 The meaning of corporal punishment in Zimbabwe

[21] Section 241(2) of the CLCRA.
[22] Section 241 (2) (b) of the CLCA provides that: a schoolteacher shall have authority to administer moderate corporal punishment for disciplinary purposes upon any minor male pupil or student. See also Section 66 of the Education Act of Zimbabwe 2004.
[23] Section 241 (4) provides that: no schoolteacher or person acting under authority delegated to him or her by a school-teacher shall administer corporal punishment upon a female pupil or student. There is therefore a clear distinction between male and female students.
[24] Section 241 (2) (b) provides that: where moderate corporal punishment is administered upon a minor person by a parent, guardian or schoolteacher within the scope of that authority, the authority shall be a complete defence to a criminal charge alleging the commission of a crime of which the administration of the punishment is an essential element. Section 241 (3) further states that: any person who administers moderate corporal punishment upon a minor person under authority delegated to him or her by a parent, guardian or school-teacher shall have a complete defence to a criminal charge alleging the commission of a crime of which the administration of such punishment is an essential element, if it would have been lawful for the parent, guardian or school-teacher to have administered such punishment himself or herself.
[25] Section 242 states that: It shall not be lawful for a person to purport to administer corporal punishment upon his or her spouse, whatever the nature of their marriage and wherever their marriage may have been contracted.

The Prisons Act of Zimbabwe defines corporal punishment as 'a moderate correction of whipping.'[26] The Oxford Dictionary defines whipping as 'a thrashing or beating with a whip or similar implement.'[27] A 2016 Amendment Bill to the Prisons Act, defines corporal punishment as 'a moderate correction of whipping imposed upon a male person under the age of eighteen.'[28] This bill has not been brought into law yet but has the following note: 'The Constitutional Court is still to decide whether this form of punishment is constitutional.'[29] With the recent judgement passed outlawing judicial corporal punishment, the proviso in this bill will probably be removed.

5.3.2 Place, manner and instrument for infliction of corporal punishment

The CPEA provides that corporal punishment shall be inflicted in private.[30] When corporal punishment is inflicted, the parent or guardian of the person sentenced to corporal punishment has to be present.[31] A person subject to corporal punishment has to be examined by a medical practitioner who has to certify that such person is in a fit state to undergo punishment.[32] If a person subject to corporal punishment is found to be unfit, the court may amend the sentence as it thinks appropriate.[33]

The Prisons Act further provides that a sentence of moderate correction of whipping referred to in the CPEA should be carried out in the presence of the officer in charge and of the medical

[26] Section 101 of the Prisons Act of Zimbabwe Chapter 7:11 of 1956.
[27] English Oxford Dictionary, available at *https://en.oxforddictionaries.com/definition/whipping* (accessed 07 March 2019).
[28] Draft Prisons and Correctional Service Act, 2016 available at *https://www.policinglaw.info/assets/downloads/Draft_Prisons_Bill.pdf* (accessed 08 May 2019).
[29] Draft Prisons and Correctional Service Act, 2016 available at *https://www.policinglaw.info/assets/downloads/Draft_Prisons_Bill.pdf* (accessed 08 May 2019).
[30] Section 353 (2) of the CPEA.
[31] Section 353 (3) of the CPEA.
[32] Section 353 (4) of the CPEA.
[33] Section 353 (5) of the CPEA.

officer who certified the person as fit to undergo the punishment.[34] The medical or prison officer may halt the punishment 'if, in his opinion, the punishment is likely to cause more serious injury than is contemplated in the sentence.[35] The punishment also has to be inflicted once and not in instalments.[36] Similar provisions are to be found in the Draft Prisons and Correctional Services Act, 2016.[37]

The Prison Regulations prescribe that corporal punishment should be administered by a rattan cane. The Regulations also refer to the measurements of the cane in feet and inches. For prisoners under the age of eighteen years, the rattan cane should be three feet long and not more than three-eighths (3/8) of an inch in diameter, or prisoners eighteen years old and above, the measurements are four feet and not more than half (½) an inch respectively.[38]

In terms of Section 109 (2) of the Prison Regulations, the manner in which corporal punishment shall be inflicted is as follows:

(a) A blanket or similar form of protection is placed across the small intestines of the prisoner's back above the buttocks;

(b) A small square of thin calico is dipped in water, wrung out and tied over the prisoner's buttocks;

(c) Strokes are administered from one side upon the buttocks of the prisoner and on no account on the back.

[34] Section 103 of the Prisons Act.
[35] Section 104 of the Prisons Act.
[36] Section 105 of the Prisons Act.
[37] Section 135 of the Act.
[38] The Prisons Regulations 1956 (RGN 42 of 1956).

Elaborating on the manner of execution of corporal punishment, the Supreme Court painted the following graphic description in *S* v *Ncube*[39]:

> 'Once the prisoner is certified fit to receive the whipping, he is stripped naked. He is blindfolded with a hood and placed face down upon a bench in a prone position. His hands and legs are strapped to the bench, which is then raised to an angle of 45 degrees. A calico square is tied over his buttocks and the kidney protector secured above his buttocks at waist level. The prisoner's body is then strapped to the bench. The cane is immersed in water to prevent splitting. The strokes are administered to one side across the whole of the buttocks.'

The picture painted in this case shows how degrading and inhuman judicial corporal punishment is. It strips a person of all dignity, as a person is laid naked and blindfolded, while strapped to a bench. The rights of all children to dignity, security of the person and not to be subjected to degrading punishment, sets limits on how children should be punished. These provisions in the Prisons Act and the CPEA have not yet been repealed to reflect the recent constitutional court judgement.

5.3.3 The Children's Act and corporal punishment

The Children's Act does not include corporal punishment as one of the orders that may be given by the Children's Court for child offenders.[40] However, the Act sentences a child who

[39] *S v Ncube; S v Tshuma; S v Ndhlovu* 1988 2 SA 702 (ZSC).
[40] See orders in Section 20 of the Act.

fails to comply with an order of the court to moderate corporal punishment.[41] The child can be sentenced to moderate corporal punishment not exceeding six strokes.[42]

The Act, although punishing ill-treatment and neglect of children and young persons, it also preserves reasonable punishment by parents or guardians on their children. Such preservation is made by the wording 'Nothing in this section shall be construed as derogating from the right of any parent or guardian of any child or young person to administer reasonable punishment to such child or young person.'[43] Such provision is not in line with the constitutional guarantee of every child's right to be free from all forms of violence from public and private sources protected in the Constitution and should thus be repealed.[44]

5.3.4 Corporal punishment under the old Constitution

Until 1988, corporal punishment was one of the prescribed methods for punishing both adult and juvenile males convicted of criminal offences in Zimbabwe.[45] In 1988, an adult male challenged the constitutionality of corporal punishment of male adults based on Section 15 of the Constitution, which prohibited torture, inhuman or degrading punishment or other such treatment.[46] This case is very significant because it was the first challenge against judicial corporal punishment. The court laid the foundation on which similar cases being heard, even after the new constitution, can build on. A male juvenile brought a similar challenge in 1989

[41] Section 20 (3a) provides that: 'A child or young person who fails to comply with an order to attend an attendance centre shall be guilty of an offence and liable to a sentence of moderate corporal punishment, not exceeding six strokes, in accordance with Section 353 of the Criminal Procedure and Evidence Act.
[42] Section 20 of the Children's Act of 2001.
[43] Section 7 (6) of the Children's Act.
[44] Section 52 of the Constitution.
[45] Naldi G J 'Judicial corporal punishment declared unconstitutional by the Supreme Court of Zimbabwe' (1990) 2 *African Journal of International & Comparative Law* 131.
[46] *S v Ncube*; *S v Tshuma*; *S v Ndhlovu* 1988 2 SA 702 (ZSC).

and the same finding was made.[47] The government was not pleased with the outlawing of corporal punishment for male juveniles and amended the Constitution in 1990 to specifically legalise corporal punishment of male juveniles in the highest law.

The 1979 Constitution was amended in 1990 to allow 'moderate' corporal punishment 'in appropriate circumstances upon a person under the age of eighteen years by his parent or guardian or by someone *in loco parentis* or in whom are vested any of the powers of his parent or guardian.'[48] The Constitution thus provided that juvenile male corporal punishment cannot be regarded as inhuman or degrading. It is sad that after such a progressive step by the judiciary to hold corporal punishment of male juveniles unconstitutional, the government would react in such a manner and reason regressively. As the upper guardian of children, the courts certainly have an important role to play in protecting children and that role ought to be respected.

5.3.4.1 *State v Ncube*

In *S v Ncube*[49] three adult males who had been convicted of rape and sentenced to various periods of imprisonment and a whipping of six strokes in addition, challenged the constitutionality of this form of punishment.[50] The accused argued that it infringed their right

[47] *S v A Juvenile* 1990 4 SA 151 (ZS).
[48] Section 15(1) provided that: No person shall be subjected to torture or to inhuman or degrading punishment or other such treatment.' Section 15(3) thereof provided that: 'No moderate corporal punishment inflicted (a) in appropriate circumstances upon a person under the age of eighteen years by his parent or guardian or by someone in loco parentis or in whom are vested any of the powers of his parent or guardian; or (b) in execution of the judgment or order of a court, upon a male person under the age of eighteen years as a penalty for breach of any law; shall be held to be in contravention of subsection (1) on the ground that it is inhuman or degrading.
[49] *S v Ncube*; *S v Tshuma*; *S v Ndhlovu* 1988 2 SA 702 (ZSC). See discussion of this case in Crocker A D & Pete S A 'Letting go of the lash: the extraordinary tenacity and prolonged decline of judicial corporal punishment in Britain and its former colonies in Africa: Part 2' (2007) 28 (3) *Obiter* 476 – 477.
[50] The whipping was imposed under the authority of Section 54(5) (c) and (s) of the Magistrates Court Act Chap 18(z).

to protection from inhuman or degrading punishment in contravention of Section 15(1) of the Constitution of Zimbabwe.[51]

Justice Gubbay, in seeking to establish whether there exists a universal standard on such corporal punishment, surveyed both local and international law. He began with six Zimbabwean statutes that authorised the sentence of whipping as a punishment for various crimes and then proceeded to establish the legal status of corporal punishment in various countries, canvassing South Africa, the United Kingdom, Canada, Australia and the United States of America.[52]

In South Africa, Gubbay referred to a caution made by Leon J in *S v Masondo and Another,*[53] that a whipping is not only an assault upon the person of a human being but also upon his dignity as such.[54] In the United Kingdom, Gubbay referred to the Report of the Departmental Committee on Corporal Punishment (1938) (the Cadogan Committee) which led to the abolition of corporal punishment in the United Kingdom by the introduction of the Criminal Justice Act 1948. Page 59 of the report contained the following statement: 'In its own interests, society should, in our view, be slow to authorise a form of punishment which may degrade the brutal man still further and may deprive the less hardened man of the last remaining traces of self-respect…Corporal punishment is certainly more degrading than any of the other punishments recognised by our criminal law.'[55]

[51] Section 15 (1) of the Declaration of Rights, contained in the Constitution of Zimbabwe 1979, provided that 'no person shall be subjected to torture or to inhuman or degrading punishment or other such treatment.'
[52] Adjami M E 'African courts, international law, and comparative case law: Chimera or emerging human rights jurisprudence? (2002) 24 *Michigan. Journal of International Law* 140.
[53] *S v Masondo and Another* 1969 (1) PH H58 (N).
[54] Gubbay referred to similar sentiments made in cases such *as S v Ximba and Others* 1972 (1) PH H66 (N), *S v Maisa* 1968 (1) SA 271 (T), *S v E Kantor* 1972 (4) SA 683 (O) at 684B, *S v Ruiters en 'n Ander; S v Beyers en Andere; S v Louw en 'n Ander* 1975 (3) SA 526 (C) at 530B, and in *S v See land 1982* (4) SA 472 (NC) at 477A.
[55] *S v Ncube*; *S v Tshuma*; *S v Ndhlovu* 1988 2 SA 702 (ZSC).

In respect of Australia, Justice Gubbay quoted from a dissenting judgment of Smith J in *R v Taylor and O'Meally* in which Smith said:

> 'Whether whipping is to be regarded as a severe punishment or not must, of course, depend on the standards of the time. A few centuries ago, when suspects were interrogated on the rack, and burning at the stake was common, and the ordinary penalty for serious crime was death, whipping was naturally regarded as a minor punishment. But with the growth of feeling against cruelty and the development of modern police systems and the consequent drastic reduction in the severity of the sanctions of criminal law, whipping has come to be regarded, and properly so, as an extremely severe punishment … In addition, over the last hundred years or thereabouts, the view has steadily gained ground, and it appears now to be generally accepted by experts in such matters, that the whipping of adults is a form of punishment the use of which is ordinarily unwise ...'[56]

In reaching his decision, Justice Gubbay relied heavily upon the views of the European Court of Human Rights in *Tyrer v United Kingdom*.[57] The judgement focused on Article 3 of the European Convention of Human Rights, a provision worded virtually identical to Section 15(1) of the Constitution of Zimbabwe. Justice Gubbay considered this decision to be perhaps the most important decision of the European Court of Human Rights relating to judicial corporal punishment.[58] The European Court held the punishment to be degrading and reiterated:

> 'The very nature of judicial corporal punishment is that it involves one human being inflicting physical violence on another human being. Furthermore, it is institutionalised violence that is in the present case violence permitted by the law, ordered by the judicial

[56] 1958 VR 285.
[57] 1978 2 EHHR 1.
[58] Adjami (2002)141.

> authorities of the State and carried out by the police authorities of the State... Thus, although the applicant did not suffer any severe or long-lasting physical effects, his punishment whereby he was treated as an object in the power of the authorities constituted an assault on precisely that which it is one of the main purposes of Article 3 to protect, namely a person's dignity and physical integrity. Neither can it be excluded that the punishment may have had adverse psychological effects. The institutionalised character of this violence is further compounded by the whole aura of official procedure attending the punishment and by the fact that those inflicting it were total strangers to the offender.'[59]

Justice Gubbay stated that his decision to declare corporal punishment of adult offenders unconstitutional was influenced by the following factors: the current opinions of many distinguished jurists and leading academics opposed to judicial corporal punishment; the fact that whipping had been abolished in very many countries of the world as being repugnant to the consciences of civilised men; the progressive move of the courts in countries in which whipping was not susceptible to constitutional attack; the fact that its imposition had been restricted to instances in which a serious, cruel, brutal and humiliating crime had been perpetrated; and the decreasing recourse to the penalty of whipping in Zimbabwe itself.[60]

In concluding judge, Gubbay made note of the following adverse features, which are inherent in the infliction of a whipping. These are:

> 1. The manner in which it is administered - 'It is somewhat reminiscent of flogging at the whipping post, a barbaric occurrence particularly prevalent a century or so past. It is a punishment, not only inherently brutal and cruel, for its infliction is attended by

[59] 1979-80 2 EHRR 1, paras 30-5.
[60] *S v Ncube; S v Tshuma; S v Ndhlovu* 1988 2 SA 702 (ZSC). See Adjami (2002) 142. See also Naldi (1990) 134.

acute pain and much physical suffering, but one which strips the recipient of all dignity and self-respect. It is relentless in its severity and is contrary to the traditional humanity practised by almost the whole of the civilised world, being incompatible with the evolving standards of decency.

2. By its very nature, it treats members of the human race as nonhumans. Irrespective of the offence he has committed, the vilest criminal remains a human being possessed of common human dignity. Whipping does not accord him human status.

3. No matter the extent of regulatory safeguards, it is a procedure easily subject to abuse in the hands of a sadistic and unscrupulous prison officer who is called upon to administer it.

4. It is degrading to both the punished and the punisher alike. It causes the executioner, and through him, society, to stoop to the level of the criminal. It is likely to generate hatred against the prison regime in particular and the system of justice in general.'

Judicial corporal punishment as stated by the judge is highly problematic in that it is institutionalised violence at the instigation of the State. A clear message was sent by the court, of the extent of the inhumanity of corporal punishment. This decision as far back as 1989, is an indication that the courts in Zimbabwe respond positively to the protection and promotion of human rights. A precedent was not only set for Zimbabwe by this case, but for other courts in African countries who were later asked to decide on the humanity of corporal punishment.[61]

[61] See the South African case of *S v Williams and Others* 1995 (3) SA 632 (CC) which held that judicial corporal punishment of juvenile males was cruel, inhuman and degrading punishment. In this case the court found that there is a definite and growing consensus in the international community that judicial whipping, involving as it does the deliberate infliction of physical pain on the person of the accused, offends society's notions of decency and is a direct invasion of the right which every person has to human dignity. This consensus has found expression through the courts and legislatures of various countries and through international instruments and has established a clear trend. See a discussion of the case by Skelton A in her article 'S v Williams: A springboard for further debate about corporal punishment' (2015) *Acta Juridica.* See also the Namibian case of *Ex parte: Attorney-General In Re: Corporal Punishment by Organs of State* (SA 14/90) [1991] NASC 2 (05 April 1991). In this case

5.3.4.2 *State v A Juvenile*[62]

The Juvenile case concerned the constitutionality of a sentence of a moderate correction of four cuts to be administered in private on a male juvenile by a prison officer at the Bulawayo Prison in Zimbabwe. The issue before the court was whether the imposition of a sentence of whipping or corporal punishment upon juveniles was an inhuman or degrading punishment or treatment in conflict with Section 15(1) of the Constitution of Zimbabwe.[63]

This case came two years after the *Ncube*[64] case in which the court decided that the punishment of whipping upon an adult offender contravened Section 15(1) of the same Constitution. The Chief Justice in this case relied heavily on the precedent of the *Ncube* case which canvassed a lot of international laws and various judgements which pointed to the fact that corporal punishment was both degrading and inhuman. In noting that the only significant difference between the whipping of an adult and that of a juvenile in the execution of the sentence of corporal punishment was in the size of the rattan cane to be used, the Constitutional Court held, 'that the strictures applied to corporal punishment of adults would apply *a fortiori* to such punishment when meted out on juveniles.'[65]

following the precedent of the Ncube case, the court held that: 'Juveniles also have an inherent dignity by virtue of their status as human beings and that dignity is also violated by corporal punishment inflicted in consequence of judicial or quasi-judicial authority. The manner in which corporal punishment is administered upon juveniles is also intended to result in acute pain and suffering which invades his dignity and self-respect of the recipient. The court held that any sentence by any judicial or quasi-judicial authority, authorising or directing any corporal punishment upon any person is unlawful and in conflict with Article 8 of the Namibian Constitution. See also *S v A Juvenile* 1990 4 SA 151 (ZS) and *S v Walter Mufema*, 2015 HH 409-15, discussed later in this chapter.

[62] *S v A Juvenile* 1990 4 SA 151 (ZS). The administration of cuts was regulated by S 330 of the CPEA the Prisons Act, Chapter 21 & 59. See discussion of this case in Crocker A D & Pete SA (2007) 478 – 479.

[63] Section 15 (1) at that time provided that: 'No person shall be subjected to torture or to inhuman or degrading punishment or other such treatment.

[64] *S v Ncube; S v Tshuma; S v Ndhlovu* 1988 2 SA 702 (ZSC).

[65] At p159 A.

The Court declared Section 330 of the Criminal Procedure and Evidence Act repugnant to Section 15(1) of the Constitution of Zimbabwe as being an inhuman and degrading form of State redress for a criminal act. In a concurring judgment, Justice Gubbay stated that:

> '…. Judicial whipping in any form must inevitably tend to brutalise and debase both the punished and the punisher alike. It causes the latter, and through him, society, to stoop to the level of the offender. It marks a total lack of respect for a fellow human, be he adult or juvenile. It treats members of the human race as non-humans. By its very nature, it is extremely humiliating to the recipient.'[66]

Judge Gubbay held that judicial whipping, no matter the nature of the instrument used and the manner of execution, is a punishment inherently brutal and cruel; for its infliction is attended by acute physical pain. Irrespective of any precautionary conditions which may be imposed, the judge reiterated that it is a procedure subject to ready abuse in the hands of a sadistic or overzealous official.

He further noted that whipping, which invades the integrity of the human body, is an antiquated and inhuman punishment which blocks the way to understanding the pathology of crime. It has been abolished in very many countries of the world as being incompatible with contemporary concepts of humanity, decency and fundamental fairness.'

In the same judgment, Khosa JA, on the side of the majority, held that even if corporal punishment was to be administered without the victim taking his clothes off, 'the mere idea of inflicting physical pain as a form of punishment corresponds with torture and the *lex talionis* –

[66] At pp 90G – 91C.

an eye for an eye, a tooth for a tooth, a life for a life – all of which have been condemned because they represent an inhuman approach to punishment ….'[67]

Khosa particularly noted the very important role that the judiciary plays as the third arm of government in directing the change in policies and practices that are inhuman. The judge in his words said:

> 'It seems to me that the supreme law of the land has bestowed on the Supreme Court the sacred trust of protecting human rights of people in Zimbabwe by declaring whether or not any punishment imposed by the laws of this country is inhuman or degrading. In bestowing upon us this sacred trust, I believe the legislature calls upon us as experts in our field to assist them in passing laws that are just and humane.'
>
> 'After all, the Judiciary is the third arm of Government. In the exercise of this duty, the paramount consideration, as I perceive it, is to determine whether or not, in the light of existing social norms, such punishment unnecessarily humiliates, debases or lowers the image of the individual in his own esteem. We cannot shirk this duty merely because there is no alternative suitable punishment on the statute books for errant juveniles. If there is the need for such alternative punishment, the task of promulgating the requisite legislation lies with Parliament.'[68]

McNally JA and Manyara JA disagreed with Chief Justice Dumbutshena and Justice Gubbay's generalised statement that any corporal punishment inflicted in terms of a court order is necessarily a contravention of Section 15(1) of the Constitution. They also disagreed with the argument that, because adult strokes have been ruled unconstitutional, it must follow that juvenile cuts are unconstitutional. McNally JA noted that since the term 'inhuman or

[67] At p 101E – G.
[68] At p176 B – D.

degrading' involves a value judgment, a judge when deciding on the appropriateness of a sentence of cuts would normally have regard to the physical and psychological robustness of the young delinquent before them.[69]

Manyara JA did not agree with a complete ban on judicial corporal punishment; however, he did disapprove of the way in which a whipping was administered in terms of the Prison Regulations at the time. These regulations did not differentiate between the method by which adults and juveniles should be flogged and was reminiscent of a 'flogging at the whipping post.' He stated that this method should not be used in the case of a juvenile whipping which, in terms of the Criminal Code, was to be carried out by means of a 'moderate correction of cuts.' He noted that a juvenile who is dealt with in terms of Section 330 is but a child who is brought before a court as his upper guardian for punishment by the State. Therefore, Section 330 properly construed, merely presents the court with the same problem as an average parent will face when he has to punish his child for a misdeed. Since no reasonable parent could ever administer corporal punishment on his child in the manner provided by the Prison Regulations, and the court is a reasonable institution, the same considerations should guide it in its application of the provisions of Section 330.[70]

5.3.5 The 2013 Constitution-making process and corporal punishment

As a reaction to the Juvenile case, the government pushed for the amendment of the Constitution to specifically include a section that legalised corporal punishment for male juveniles. The amendment came in 1990 by the insertion of Section 5 of Act 30 of 1990.[71] After

[69] At p175.
[70] At p175D.
[71] Amendment No. 11.

this amendment, there was no challenge to this constitutional provision until the new Constitution (2013) was being discussed.

The issue of corporal punishment was one of the issues carrying heavy moral tones which were debated and negotiated during the 2013 constitution-making process.[72] During this process, there were the traditionalists or conservatives, who believed corporal punishment was a socially-acceptable and legitimate tool to maintain discipline in society and the liberals who believed corporal punishment exposed children to physical violence.[73] During the consultations, the data from the field had demonstrated clear evidence of demands for enhanced protection of children's rights.[74] The result was the resounding declaration of children's rights in the Constitution in Section 19.[75]

The argument for the liberals was that in light of abuses inflicted upon children under the guise of applying corporal punishment, it was necessary to ensure that the Constitution did not specifically sanction forms of conduct that could increase the risk of abuse. The warnings of the Supreme Court in the *Ncube*[76] and *Juvenile*[77] cases were invoked, demonstrating that there was no way of controlling the use of such punishment and that it was, therefore, open to abuse, much to the detriment of children. There was also the new right to personal security provided for in Section 56 of the Constitution which goes against corporal punishment.[78] Further, the liberals argued that corporal punishment offends against the dignity of children, contrary to

[72] Among the morally heavy debated issues were the issues of abortion, death penalty and sexual orientation and gay rights.
[73] Magaisa AT 'Outlawing of corporal punishment on male juveniles in Zimbabwe' 29 January 2015 available at: *https://www.zimbabwesituation.com/news/zimsit_w_outlawing-of-corporal-punishment-on-male-juveniles-in-zimbabwe-newzimbabweconstitution/* (accessed 2 March 2019).
[74] Magaisa (2015) 2.
[75] An extensive discussion of children's rights in the new constitution was done in Chapter 3 of this thesis at 3.2.1.
[76] *S v Ncube, S v Tshuma, S v Ndhlovu* 1988 2 SA 702 (ZSC).
[77] *S v A* (Juvenile) 1990 4 SA 151 (ZS).
[78] Section 56 (1)(a) provides that:' Every person has the right to bodily and psychological integrity, which includes the right to freedom from all forms of violence from public or private sources …'

Section 51 of the Constitution which guarantees every person's inherent dignity and to have that dignity respected and protected.[79]

The major argument advanced in favour of corporal punishment was that it was a necessary and socially-accepted form of discipline which helped in enforcing good morals and proper behaviour among children.[80] The existence of corporal punishment and the possibility that it could be used was believed to give children an incentive to behave well and to maintain discipline.[81] The belief among most proponents of this notion was that administering 'moderate chastisement' was part of traditional culture and that it helped in the building of a decent and well-behaved society.[82] The counter-argument was that there were other ways of disciplining children rather than exposing them to the risk of excessive, harsh and cruel treatment under the guise of 'moderate corporal punishment' which was undefined.[83] A further counter-argument was that the provisions for corporal punishment under the old Constitution were patently discriminatory since it could be imposed on male juveniles only and not on their female counterparts. The view that corporal punishment was good for discipline in society did not explain why the argument applied only to male juveniles but not to female juveniles.[84]

This was also one of the instances where the government invoked international human rights law particularly noting Zimbabwe's obligations as a State party to the CRC and the ICCPR. Reference was also made to the Global Initiative to End All Corporal Punishment of Children, proving Zimbabwe's commitment to outlawing corporal punishment of children.

[79] S51 provides that: 'Every person has inherent dignity in their private and public life, and the right to have that dignity respected and protected.'
[80] Magaisa (2015) 4.
[81] Magaisa (2015) 4.
[82] Magaisa (2015) 5.
[83] Magaisa (2015) 5.
[84] Magaisa (2015) 5. It was argued that permitting corporal punishment on boys but not on girls was a violation of Section 81(1) of the Constitution, which states that, 'Every child, that is to say every boy and girl under the age of eighteen years, has the right to equal treatment before the law.'

The pro corporal punishment wing had argued for the limitation of the right in Section 53 as far as male juveniles are concerned, thus allowing moderate corporal punishment for male juveniles. This was heavily resisted on the grounds stated above but what proved to be the most persuasive view was that the protection against torture, cruel, inhuman or degrading treatment or punishment had already been entrenched as one of the non-derogable rights (rights that could never be taken away or reduced, even in emergencies) and that it would be unreasonable to make exceptions derogating from it. It was argued that any exceptions, such as the one that was being proposed, would be a claw-back on this fundamental and non-derogable right and that this was unacceptable. It was important to avoid anything that might dilute the absolute protection against this protection.[85]

The result of the discussions was the removal of judicial corporal punishment of male juveniles in the new Constitution. This move showed the State's commitment to protecting children from institutionalised violence. However, provisions of the CPEA and the Prisons Act legalising corporal punishment were not discussed and reflected on, which is a great cause for concern. Thus, although the new Constitution does not have a corporal punishment clause for male juveniles like the previous Constitution, other statutes still permit corporal punishment of male juveniles.

5.3.6 Judicial Corporal Punishment after the 2013 Constitution

5.3.6.1 *S v Mufema*

[85] Magaisa (2015) 6. In the end, the matter was settled very simply by Section 86(3) of the Constitution which states that, 'No law may limit the following rights enshrined in this Chapter, and no person may violate them (c.) the right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment'. Therefore, no law, policy or code may claw back on the rights provided for in s. 53, i.e. the right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment.

In 2015, the issue of corporal punishment on male juvenile offenders was addressed by the High Court.[86] The case was an automatic criminal review of four cases, which dealt with the unconstitutionality of corporal punishment in terms of Section 57 of the Magistrates Court Act.[87] The court in this case referred extensively to the case of *S v C*[88], decided a year earlier, which declared Section 353 of the Criminal Procedure and Evidence Act *ultra vires* based on Sections 52, 53 and 56 of the Constitution. In the words of Judge Mafusire, the manner those courts have expressed themselves on the subject is, 'the mark of leadership in the development of jurisprudence.'[89]

Mafusire J, emphasising on the abolition of corporal punishment, made the following remarks:

> 'There can be no question that corporal punishment of juveniles has become unlawful in this country. The old Constitution made this country an outpost of tyranny and cruelty against children. Our stance on corporal punishment stuck up like a sore thumb. All around us, and in virtually all over the progressive world, corporal punishment, whether of adults or juveniles, had been abolished. That the Prisons Act defines corporal punishment as '… ***moderate correction of whipping*** …', or that the Regulations seem to go to some length to mollify or mitigate the manner of its execution cannot, in my view, make it any less brutal. It is like applying lipstick on a bullfrog, or blowing incense on a skunk.'

Judge Mafusire also added:

[86] *S v Mafema* HH 409-15.
[87] These are *S v Walter Mufema* CRB No. R1063/14, *S v Callington Chavhunduka* CRB No. R771/14, *S v Tafadzwa Ruzvidzo* CRB No. BNR 449/14 and *S v Claudios Baundi* CRB No. BNR 457/14.
[88] *S v Chokuramba* HH 718-14.
[89] *S v Mafema* HH 409-15.

> 'if the new Constitution has dropped the amendment to the old Constitution that permitted the meting out of corporal punishment upon male juveniles, and if the Constitution has gone on to strengthen certain provisions of the Bill of Rights…, there can be no doubt that Section 353 of the CPEA, has become anachronistic.'

The court referred the matter to the Constitutional court for confirmation of invalidity in terms of Section 175 of the Constitution. According to Sloth – Nielsen, the Zimbabwean cases challenging corporal punishment indicate an auspicious start to strategic litigation to vindicate children's constitutional rights, bolstered by international treaty law, by the intervention of children's rights NGOs as co-applicants, and by the evident willingness of the judiciary to take bold steps to advance children's rights.[90]

5.3.5.2 S *v Chokuramba*[91]

On 3 April 2019, the Constitutional court for the first time after the new constitutional dispensation decided on the issue of judicial corporal punishment of male juveniles.[92] The court had to confirm the order of invalidity of Section 353 of the CPEA (which authorised corporal punishment for male juveniles) made by the High Court in 2014, on the grounds that it violates Section 53[93] of the Constitution. The main issue was whether Section 353 of the CPEA contravenes Section 53 of the Constitution. To answer this question, the court had to first determine the meaning of the phrases 'inhuman punishment' and 'degrading punishment' and

[90] Sloth – Nielsen J 'Southern African Perspectives on Banning Corporal Punishment – A Comparison of Namibia, Botswana, South Africa and Zimbabwe' in Saunders BJ, Leviner P & Naylor B (eds) *Corporal Punishment of Children: Comparative Legal and Social Developments towards prohibition and beyond* (2018) 255.
[91] *The State v Willard Chokuramba* Judgment No CCZ 10/19.
[92] *The State v Willard Chokuramba* Judgment No CCZ 10/19.
[93] Section 53 is the right not to be tortured or treated in an inhuman or degrading treatment or punishment.

then determine whether judicial corporal punishment amounts to 'inhuman' or 'degrading' punishment or both.

In finding judicial corporal punishment to be inhuman and degrading , the court referred to the precedent set by the *Juvenile* case[94] decided under the old Constitution in which the Supreme Court sitting as the Constitutional Court, held by a majority decision that moderate corporal punishment inflicted on a male juvenile in execution of a sentence for any offence of which he had been convicted, was an inhuman and degrading punishment within the meaning of Section 15(1) of the former Constitution of Zimbabwe. The court also relied on the *Ncube* case[95] in which the Supreme Court held by a unanimous decision that corporal punishment inflicted in the execution of a sentence imposed by a court on an adult male person convicted of any offence was an inhuman and degrading punishment within the meaning of Section 15(1) of the former Constitution. In the present case, the court had to make a decision in light of the new constitutional provisions.

The Interpretation of Section 53 of the Constitution and Human Dignity

Deputy Chief Justice Malaba provided a detailed analysis and interpretation of Section 53 of the Constitution which was relied on by the applicants. Section 53 provides that: 'No person may be subjected to physical or psychological torture or to cruel, inhuman or degrading treatment or punishment.'

He pointed out that, Section 53 occupies a central place in the scheme of constitutional protection of fundamental human rights and freedoms enshrined in Chapter 4 of the Constitution. According to the judge, the assessment of the purpose of the protection of a fundamental human right or freedom takes into account the values and principles on which a

[94] *S* v *A Juvenile* 1989 (2) ZLR 61 (S).
[95] *S* v *Ncube and Ors* 1987 (2) ZLR 246 (S).

democratic society is based. In this regard, the court noted that it is clear from a consideration of the value system underpinning the Constitution that the object and purpose of Section 53 of the Constitution is to afford protection to human dignity, and physical and mental integrity, which are some of the most fundamental values. This entails adopting an interpretation of Section53 that promotes respect for the inherent dignity of the male juvenile when subjected to punishment for an offence.

DCJ Malaba pointed out that the right not to be subjected to inhuman or degrading punishment is also closely related to the respect for human dignity enshrined in Section 51 of the Constitution and the right to bodily and psychological integrity, which includes the right to freedom from all forms of violence from public or private sources.[96] The court further emphasised that the right not to be subjected to inhuman or degrading punishment and the right to the inherent dignity are non-derogable in terms of Section 86 (3) of the Constitution. Thus, no law may limit these rights and no person may violate them.

The court also emphasised the importance of international human rights in the interpretation of Section 53. In this regard, the court referred to Article 1 of Universal Declaration of Human Rights,[97] Article 7 of the International Covenant on Civil and Political Rights,[98] Article 4 of the African Charter on Human and People's Rights,[99] Article 37 of the CRC and General Comment 8 of the CRC.[100] The court pointed out that Article 37(c) requires State parties to treat children convicted of offences with humanity and respect for the inherent dignity of the human person.

[96] Protected by Section 52 (a) of the Constitution.
[97] Article 1 provides that: All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.
[98] Article 7 provides that: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
[99] Article 4 provides that: Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.
[100] General Comment 8, para 16.

The court articulated the importance of human dignity as follows:

> 'Human dignity asserts the worth of the person who is imbued with it. We cannot define what a human being is without recourse to an essential characteristic such as inherent dignity. Human dignity is a special status, which attaches to a person for the reason that he or she is a human being. It is the fact of being human that founds human dignity. Human dignity is therefore inherent in every person all the time and regardless of circumstances or status of the person. All human beings are equal, in the sense that each has inherent dignity in equal measure. What this means is that human dignity is innate in a human being. It remains a constant factor and does not change as a person goes through the stages of development in life. Human dignity is not created by the State by law. The law can only recognise the inherence of human dignity in a person and provide for equal respect and protection of it. In fact, human dignity demands respect. In other words, every human being merits equal respect for his or her inherent dignity regardless of social, economic and political status.'[101]

According to the court, equal respect for the inherent dignity of the other person means refraining from doing anything under the guise of the exercise of one's rights which would injure his or her rights.[102]

Emphasising on the right to human dignity, the court referred to the *Makwanyane* case in which O'Reagan J held that:

> 'Recognizing a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This

[101] At p19.
[102] At p20.

right, therefore, is the foundation of many of the other rights that are specifically entrenched in Chapter 3.'[103]

The right to have the inherent dignity respected and protected translated to sentencing means that a person must be punished as a person. He or she cannot be punished as if he or she is a non-human. It means that the State should not prescribe or impose a punishment, which by its nature and effect constitutes a humiliating assault on the inherent dignity of the person being punished. The obligation to respect and protect the inherent dignity of every person means that the inherent dignity of a person being punished for a crime must remain intact or unimpaired notwithstanding the infliction of the punishment. Punishment must be provided in a way that is consistent with and respects the inherent dignity of the offender.[104]

Section 53 and Punishment

DCJ Malaba pointed out that Section 53 of the Constitution is aimed primarily at the nature or effect of punishment. Its immediate purpose is to protect every person from inhuman or degrading punishment, however, it also extends to punishments which are 'grossly disproportionate', those, which are inhuman or degrading in their disproportionality to the seriousness of the offence. The test is that the punishment should be such that no one could possibly have thought that the particular offence would have attracted such a penalty – the punishment being so excessive as to shock or outrage contemporary standards of decency.

[103] *S v Makwanyane* 1995 (3) SA 391 (CC) at para 328.
[104] At p20.

It follows thus; from the purposive interpretation of Section 53 of the Constitution, that inhuman or degrading punishment for any offence is punishment, which, by its nature or effect invades human dignity. According to the judge, to be inhuman is:

> 'To act towards another person without feelings of pity or sympathy as a fellow human being when circumstances demand such humane conduct. It is to treat the other person as if he or she is a mere object. A punishment, the method of the infliction of which involves the use of violence to cause severe physical and mental pain and suffering, would, by contemporary standards of decency and prevailing ideas on the meaning of human dignity, constitute inhuman punishment. It is a punishment that brutalises the person being punished and the one punishing alike. It violates the physical and mental integrity of the person being punished. A punishment, the infliction of which involves debasement or humiliation of the person in his or her own esteem or self-respect, does not comport with human dignity.'[105]

Degrading punishment 'exposes the person to disrespect and contempt from fellow human beings superintending the administration of the punishment.'[106] According to the judge, punishment is degrading when it has the effect of arousing in the person being punished feelings of fear, anguish or inferiority. It is, 'a punishment which inflicts an ignominious disgrace on the offender.'[107]

DCJ Malaba pointed out that the fundamental principle is that a person does not lose his or her human dignity on account of the gravity of an offence he or she commits. The fact that he or she has committed a crime of a serious nature does not mean that he or she has lost the capacity to act with self-respect and respect for others in the future. Commission of an offence is a result

[105] At p22.
[106] At p22.
[107] At p23.

of an exercise of freedom of choice to act in a manner proscribed by a societal norm. That in itself means that the person has the rational capacity to choose to act in a manner approved by the societal norm which is consistent with self-respect and respect for the inherent dignity of others. He or she remains entitled to the equal respect of his or her dignity as a human being, regardless of the gravity of the crime he or she committed. A humane penal system is one that is based on the principle that a human being must not be treated only as a means but always as an end for punishment.

Does judicial corporal punishment amount to inhuman or degrading punishment?

In answering this question, the court stated that the constitutionality of the punishment must be assessed in the light of the values which underlie the Constitution to decide whether it amounts to inhuman or degrading punishment. The punishment must be assessed in the light of the effect it has or is likely to have on the values of human dignity and physical integrity of the persons being punished, which should take into account the method of infliction or amount of force applied.

DCJ Malaba pointed out that:

> 'Judicial corporal punishment by nature involves the use of physical and mental violence against the person being punished. There is no doubt that blindfolding the male juvenile offender and strapping his body to a bench to ensure that he remains motionless and helpless when he is caned on the buttocks by the officer administering the strokes ordered by the court would inevitably arouse in him the feelings of fear, anguish and inferiority which humiliate and debase his self-respect. The mere anticipation of a

stroke is within the parameters of the inhuman and degrading elements of judicial corporal punishment.'[108]

The judge further stated that corporal punishment causes mental suffering that is generated by anticipating each stroke, apart from the actual pain and humiliation of canning. According to the judge, treating the male juvenile offender in the manner prescribed under Section 353 of the CPEA as punishment for any crime is to treat him as if he is a non-human and it makes him a mere object of state action.

The court stated that the aim of Article 37(a) of the CRC is to highlight the obligations of all States parties to move quickly to prohibit and eliminate all corporal punishment and all other cruel or degrading forms of punishment of children. It emphasises eliminating corporal punishment of children as 'a key strategy for reducing and preventing all forms of violence in societies.'

The court looked at corporal punishment from the perspective of the effect of the punishment on the human dignity and physical integrity of the person being punished. In this regard, the court held that: 'any punishment which involves the infliction of physical and mental violence on the person being punished to cause him or her pain and suffering in execution of a sentence for an offence is an inhuman and degrading punishment'[109] And thus, judicial corporal punishment because it does not respect the inherent dignity of the person being punished and by its nature, intent and effect, amounts to an inhuman and degrading punishment. He further noted that 'the precautionary measures prescribed to accompany its administration do not detract from its nature and effect which are evidence of its invasion of human dignity and *ipso facto* violation of the non-derogable right protected by Section 53 of the Constitution.'

[108] At p26.
[109] At p46.

The court, like the *Ncube* case, relied on the precedent of the European Court of Human Rights in *Tyrer* v *United Kingdom*[110], which held that 'a system of judicial corporal punishment for male juvenile offenders in use in the United Kingdom violated Article 3 of the European Convention on Human Rights ('the ECHR'). The court also relied on the precedent of the *Juvenile*[111] case which found judicial corporal punishment of male juveniles to be both inhuman and degrading.

DCJ Malaba also relied on the precedent in the Namibian case of *Ex parte Attorney-General, Namibia*[112] in which the Supreme Court of Namibia by a unanimous decision, held that judicial corporal punishment as practised in that country constituted inhuman and degrading punishment. The Namibian court questioned:

> 'If corporal punishment upon adults authorised by judicial or quasi-judicial authorities constitutes inhuman or degrading punishment in conflict with Article 8(2)(b) of the Constitution, can it successfully be contended that such a punishment is nevertheless lawful where it is sought to be inflicted upon juvenile offenders in consequence of a direction from such a similar judicial or quasi-judicial authority?' [113]

The court also referred to the South African case of *S v Williams and Ors*[114] where Judge Langa said:

> 'In determining whether punishment is cruel, inhuman or degrading within the meaning of our Constitution, the punishment in question must be assessed in the light of the values which underlie the Constitution. The simple message is that the State in

[110] [1978] EHRR 1 at 11, para 33.
[111] *S* v *A Juvenile* at 73F-G.
[112] 1991 (3) SA76 (NmSc).
[113] 1991 (3) SA76 (NmSc) at 90C-91A.
[114] 1995 (3) SA 632 (CC) at 644C-645C.

imposing punishment, must do so in accordance with certain standards; these will reflect the values which underpin the Constitution; in the present context, it means that punishment must respect human dignity and be consistent with the provisions of the Constitution. There is unmistakably a growing *consensus* in the international community that judicial whipping, involving as it does the deliberate infliction of physical pain on the person of the accused, offends society's notions of decency and is a direct invasion of the right which every person has to human dignity. This *consensus* has found expression through the Courts and Legislatures of various countries and international instruments. It is a clear trend which has been established.'

The court also referred to the judgement by the Inter – American Court of Human Rights in *Winston Caesar* v *Trinidad and Tobago.*[115] In this case, the court emphasised that the prohibition of inhuman and degrading punishment or treatment had reached the status of a peremptory norm of international law based on a reading of international human rights instruments as well as regional case law. The court held that corporal punishment imposed on Caesar for the offence of attempted rape amounted to inhuman and degrading punishment in contravention of Article 5 of the American Convention on Human Rights ACHR.[116]

The court further emphasised that the use of unauthorised means cannot be justified based on the legitimate objective sought to be achieved. According to the court, the contention that judicial corporal punishment saves a male juvenile offender from imprisonment is fallacious and does not show that the punishment does not amount to inhuman or degrading punishment. In this regard, the court held that:

[115] Inter-Am. Ct. H.R. (Ser. C) No. 123 (Mar. 11, 2005).
[116] Article 5 of the ACHR prohibits any torture, or cruel, inhuman, or degrading punishment or treatment.

> ‘Keeping male juvenile offenders out of jail cannot justify the imposition of inhuman or degrading punishment as the means of securing the legitimate objectives of punishment. The fact that judicial corporal punishment is a type of punishment that amounts to a total lack of respect for the human being does not change on account of the legitimacy of the objective pursued by its infliction on the male juvenile offender. No interest, such as saving the male juvenile offender from imprisonment, can justify the infringement of human dignity.’[117]

According to the judge, the principle of constitutional morality implores courts to approach constitutional issues from the point of view that accepts that the content of the rights protected by the Constitution, changes with the change in social norms. The Constitution is a dynamic document which must by its very nature be interpreted and applied to absorb the changes in society’s attitudes towards what is right and wrong at any given period in its development. Like every human rights instrument, the Constitution is a living instrument. The judge pointed out that the former Constitution did not have an express provision on the right to inherent dignity and the right to have that dignity respected and protected as provided for in Section 51 of the Constitution. There was no provision for the protection of the right to bodily and psychological integrity, which includes the right to freedom from all forms of violence from public and private sources. Finally, the court held that: ‘It is absolutely inconceivable under the applicability of Section 53 as read with Section 51 of the Constitution, to have corporal punishment as a punishment to be imposed on a male juvenile offender on the basis of statutory authorisation.’[118]

In conclusion, the court held that courts have to play a fundamental role in the promotion and development of a new culture in juvenile sentencing, founded on the recognition of human

[117] At p40.
[118] At p 46.

rights enshrined in the Constitution. This means that sentencing policies have to be influenced by both the Constitution and international law. The court emphasised the need to use alternative sentencing options to judicial corporal punishment such as formal rehabilitation programmes and vocational training. Unanimously, the court held that the elimination of judicial corporal punishment from the penal system is an immediate and unqualified obligation on the State.

5.4 Judicial corporal punishment in Botswana

Although the Constitution of Botswana enshrines the rights of all people in Botswana not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment, judicial corporal punishment has not yet been abolished.[119] Corporal punishment occupies a central place in the punishment of male offenders in Botswana and the country 'still clings to its pre-independence position where flogging was seen as an appropriate punishment.'[120] Although the courts and various sectors of civil society have voiced their dissatisfaction with this form of punishment as being unconstitutional, practical considerations such as prison overcrowding have motivated legislators to accept judicial corporal punishment as an appropriate sentence.[121]

5.4.1 The legality of corporal punishment in Botswana

Botswana's Constitution does not have a provision which legalises corporal punishment, but corporal punishment is one of the 'preserved' punishments that existed before Botswana had a

[119] Article 7 of the Constitution of Botswana (1961, amended 1999).
[120] Thebe S 'Juvenile justice in Botswana' (1998) 11(1) *Lesotho Law Journal* 117.
[121] Thebe (1998) 118.

Constitution. Article 7 protects every person from inhuman or degrading punishment or treatment. In addition, it provides that:

> 'Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the infliction of any description of punishment that was lawful in the country immediately before the coming into operation of this Constitution'[122]

In general terms, Section 7(2) provides that no law authorising the infliction of punishment shall be held to be inconsistent with Section 7(1) of the Constitution if it was lawful in the former Protectorate of Bechuanaland immediately before the coming into operation of the Constitution.[123] The court in the Petrus case remarked that:

> 'Section 7(2) of the constitution 'may be regarded as a 'derogation clause' since it derogates from the freedom so clearly enshrined under subsection (1). Subsection (1) was designed very clearly to prohibit absolutely torture, inhuman, degrading and other treatment. Subsection (2) was only added to prevent a complete break from the position of punishment as it existed by 29 September 1966, based upon the common knowledge of the people at the time. It was not meant, for example, to resuscitate torture even if it had existed somewhere or the other within the areas of the land which at the present constitute the State of Botswana.'[124]

Corporal punishment is legal in all settings in Botswana. It is lawful as a disciplinary measure in penal institutions under the Prisons Act,[125] the Prisons Regulations[126] and the Children's

[122] Article 7 of the Constitution of Botswana of 1965.
[123] *Petrus and another v the State* 1984 BLR 14 (CA).
[124] *Petrus and another v the State* 1984 BLR 14 (CA).
[125] Sections 109, 114 and 115 of the Prisons Act of 1980.
[126] Section 18 of the Prisons Regulations of 1965.

Act.[127] It is also lawful in alternative care and day care settings under Sections 27 and 61 of the Children's Act. In the home, corporal punishment is lawful under Section 27 (3) of the Children's Act[128] and in schools, it is lawful under the Education Act.[129]

Judicial corporal punishment is one of the punishments that can be inflicted by a court in Botswana.[130] However, corporal punishment cannot be inflicted on females, males sentenced to death and males considered by the court to be over 40 years of age.[131] Corporal punishment is also used as an additional punishment or alternative punishment to imprisonment for males under the age of 40 at the discretion of the court.[132] Thus, male persons between the ages of 14 and 40 are subject to the sentence of corporal punishment and the court authorises it as an alternative to imprisonment for all crimes which are punishable by imprisonment, except the crimes of murder, rape and robbery. Additionally, the Magistrates' Courts Act of 1974 authorises all magistrates to impose a sentence of whipping.[133] The Customary Courts Act of

[127] Section 61 of the Children's Act 2009.
[128] Section 27(3)(h) States that every parent has a duty to 'respect the child's dignity and refrain from administering discipline which violates such dignity or adversely affects the physical, emotional or psychological well-being of the child or any other child living in the household.' But Section 27(5) states that this 'shall not be construed as prohibiting the corporal punishment of a child in such circumstances or manner as may be set out in this Act, the Penal Code or any other law.' There is a similar provision in article 61 of the Act, which prohibits 'unreasonable' correction of a child – thereby allowing 'reasonable' correction – and explicitly states that the article does not prohibit corporal punishment that is carried out lawfully. It puts a duty on the Minister to ensure parent education for 'appropriate' discipline, but does not state that this should be non-violent.
[129] Section 29 of the Education Act 1967 provides for the Minister to make regulations to prescribe 'the conditions for the administration of corporal punishment'. Section 2 of the Education (Corporal Punishment) Regulations 1968 states: 'No corporal punishment shall be administered to any pupil (a) at any school; or (b) by any school teacher for anything done by the pupil at school or in respect of his schooling, unless the following conditions are complied with: (i) the punishment shall be administered either by the headmaster or by some other teacher in the presence of the headmaster; (ii) no instrument of punishment other than a light cane shall be used and no punishment shall exceed 10 strokes with the cane; (iii) no male teacher may inflict corporal punishment upon any girl whom he has grounds for believing is over the age of 10 years; (iv) no punishment shall be administered except for offences of a serious or repeated nature. Article 3 states that records must be kept of 'the nature of the offence committed by the pupil, the number of strokes administered, the date of the punishment and the name of the person administering the punishment' Article 4 provides for a fine or imprisonment for contravention of the Regulations. Similar provisions can be found in the Education (Government and Aided Secondary Schools) Regulations 1978 and the Education (Primary Schools) Regulations 1980. Article 61 of the Children's Act also applies in schools.
[130] See Section 25 of the Penal Code of 1964.
[131] Section 28 (3) of the Penal Code. The Customary Courts Act also prohibits corporal punishment for females and persons over the age of 40.
[132] Section 28 (3) of the Penal Code. For offences such as murder, rape, robbery and any incitement, conspiracy or attempt to commit such crimes as listed in Schedule 2 to the Criminal Procedure and Evidence Act.
[133] Section 60.

1961 also authorises customary courts to order corporal punishment, and they may, at their discretion, order this in addition to or in lieu of any other punishment.[134]

5.4.2 The Children's Act and corporal punishment

The Children's Act prohibits torture or other cruel, inhuman or degrading treatment or punishment, but also states that this 'shall not be construed as prohibiting the corporal punishment of children in such circumstances or manner as may be set out in this Act or any other law.'[135] Thus removing corporal punishment from the bracket of torture or cruel, inhuman or degrading treatment or punishment and not prohibiting it in any other law including the Constitution or the Criminal Procedure and Evidence Act (CPEA). The Act provides for a child convicted of an offence by a Children's Court to be sentenced to corporal punishment.[136] The punishment must be a maximum of six strokes and must be inflicted as specified in the CPEA and the Penal Code.[137]

5.4.3 Place, manner and instrument for infliction of corporal punishment

[134] Section 18.
[135] Section 61 & Section 27. Section 61 provides that:
'(1) No person shall subject a child to torture or other cruel, inhuman and degrading treatment or punishment.
(2) No person shall subject a child to correction which is unreasonable in kind or in degree relative to the age, physical and mental condition of the child, and which, if the child by reason of tender age or otherwise is incapable of understanding the purpose and fairness thereof.
(3) The provisions of this Act shall not be construed as prohibiting the corporal punishment of children in such circumstances or manner as may be set out in this Act or any other law.
(4) The Minister shall cause to be put in place parental guidance programmes aimed at developing the capacity of parents to discipline and guide their children appropriately.'
[136] Section 85 (d) provides that a Children's Court may sentence a child to corporal punishment.
[137] Section 90 of the Children's Act 2009.

A sentence of corporal punishment in terms of the CPEA is a sentence of caning and is subject to several provisions.[138] First, the caning has to be carried out in a manner and with a cane of a type approved by the Minister, who may approve different types of canes for different classes of persons.[139] A convicted person subject to caning has to undergo medical check-up and be certified by a medical officer to be fit for caning. The caning also has to be inflicted in the presence of the medical officer or a magistrate.[140] If a convicted person has been certified as unfit to undergo caning, such person may be kept in custody pending the decision of the court to substitute another punishment in lieu of the sentence of caning.[141] For a child serving an imprisonment sentence, the Act does not specify if such 'detention' waiting canning is included on their sentence. If the child is not serving an imprisonment sentence, such 'detention' could amount to pre-trial detention which is prohibited for persons under the age of 18. The sentence of caning also has to be carried out once and not in instalments.[142] The punishment should be administered on the bare buttocks.[143] Administration of corporal punishment on bare buttocks has been held to be humiliating and degrading and thereby inhuman.[144]

The sentence of corporal punishment is carried out privately in a prison. For persons under 18, the parent or guardian should be present and the sentence can be administered in a place and by a person specified by the court.[145] The Minister has powers to make an order specifying places for administering corporal punishment in a 'traditional manner' with 'traditional instruments.'[146] What 'traditional manner' and 'traditional instruments' mean is not defined in the Act or elsewhere. Judge Baron in the *Petrus* case (which did not address the issue),

[138] Section 305 (1) of the Criminal Procedure Act of [Chapter 8:02] of 1939.
[139] Section 305 (1) (a) of the CPEA.
[140] Section 305 (1) (b) of the CPEA.
[141] Section 305 (1) (c) of the CPEA.
[142] Section 305 (1) (c) of the CPEA.
[143] Section 305 (3) of the CPEA.
[144] See Zimbabwean High court case of *S v Chokuramba* HH 718-14.
[145] Section 305 (2) of the CPEA.
[146] Section 305 (3) of the CPEA.

highlighted the importance of the court to decide whether the infliction of corporal punishment in a traditional manner and with a traditional instrument was constitutional.[147] In a dissenting judgement, Judge Baron was of the view that caning in a 'traditional manner' with a 'traditional instrument' provision in Section 301 (3) of the CPEA contravenes Section 7 of the Constitution.[148]

According to the Penal Code, the sentence of corporal punishment has to specify the number of strokes which should not exceed 12.[149] For persons under the age of 18, the sentence should not exceed six strokes.[150] In a customary court, the law states that corporal punishment should be inflicted with a cane or a thupa and on the buttocks only, with protection placed over the kidneys.[151]

5.4.4 Crimes punishable by corporal punishment

Crimes punishable by corporal punishment in Botswana, include rape,[152] attempted rape,[153] indecent assault,[154] defilement of persons under 16,[155] defilement of idiots or imbeciles,[156] procuration,[157] persons living on earnings of prostitution or permanently soliciting,[158] attempt

[147] *Petrus and another v the State* 1984 BLR 14 (CA).
[148] *Petrus and another v the State* 1984 BLR 14 (CA). The court noted that there was no clear evidence of what constitutes the infliction of strokes 'in traditional manner with traditional instrument'; and there was indeed a degree of conflict between counsel as to precisely what this entailed. Counsel referred to a passage from a Handbook of Tswana Law and Custom by Schapera (2nd ed.) (1955), at p. 49 which stated that the instrument most commonly employed for the purpose is a switch of the moretlwa bush (Grewia cana), something like a cane of pliant wood tapering to a very fine end. In recent years the sjambok has been introduced, and is often used instead. The other counsel also argued that the decision as to what constitutes 'in traditional manner with traditional instrument' lies entirely with the authority charged with the duty to administer the stroke.'
[149] Section 28 (2) of the Penal Code.
[150] Section 28 (2) of the Penal Code.
[151] Section 2 & 3 Customary Courts (Corporal Punishment) Rules 1972.
[152] Section 142 of the Penal Code.
[153] Section 143 of the Penal Code.
[154] Section 146 of the Penal Code.
[155] Section 147 of the Penal Code.
[156] Section 148 of the Penal Code.
[157] Section 149 of the Penal Code.
[158] Section 155 of the Penal Code.

to murder by convicted person,[159] choking, suffocating or strangling someone in order to commit an offence,[160] intentionally endangering safety of persons travelling by railway,[161] assault resulting in bodily harm,[162] robbery,[163] attempted robbery,[164] housebreaking and burglary,[165] entering a dwelling-house with intent to commit certain serious offences,[166] breaking into a building and committing certain serious offences,[167] breaking into building with intent to commit certain serious offences[168] and travelling on train without free pass or a ticket.[169] Corporal punishment is an additional mandatory punishment for these crimes. These crimes already carry the sentence of imprisonment to varying degrees. Adding corporal punishment on persons already serving imprisonment sentence is not justifiable. It is submitted that corporal punishment should not be made a mandatory punishment. A challenge to the mandatory sentence of corporal punishment was made in the case of *Petrus*[170] which is the subject of the following discussion.

5.4.5 Petrus v S[171]

In the case of *Petrus v the State*, the Botswana Court of Appeal was faced with the issue of the constitutionality of mandatory sentences of corporal punishment. The two accused in this case were convicted of housebreaking and theft and were each sentenced to three years imprisonment and to receive corporal punishment in terms of Section 301(3) of the CPEA. On

[159] Section 218 of the Penal Code.
[160] Section 225 of the Penal Code.
[161] Section 229 of the Penal Code.
[162] Section 247 of the Penal Code.
[163] Section 292 of the Penal Code.
[164] Section 293 of the Penal Code.
[165] Section 300 of the Penal Code.
[166] Section 301 of the Penal Code.
[167] Section 302 of the Penal Code.
[168] Section 303 of the Penal Code.
[169] Section 316 of the Penal Code.
[170] *Petrus and another v the State* 1984 BLR 14 (CA).
[171] *Petrus and another v the State* 1984 BLR 14 (CA).

review, the High Court suspended two years of imprisonment but reserved for the Supreme Court to answer the question of the mandatory sentence of corporal punishment.

The court in the majority found Section 301 (3) of the CPEA to be inconsistent with the Section 7 of the Constitution (the provision prohibiting torture and other cruel, inhuman or degrading treatment or punishment) only to the extent that it provided for repeated and delayed infliction of strokes. Section 301(3) provided for the punishment of certain offenders to include 'four strokes each quarter in the first and last years of his imprisonment and such strokes to be administered in a traditional manner with a traditional instrument…'[172] In this regard, Judge Maisels found it 'noteworthy that postponed whipping or whipping by instalments was deemed cruel as long ago as 1880 and 1881.' The court further found that corporal punishment that is inflicted in instalments may be deemed to be unconstitutional since, prior to the coming into operation of the Constitution, the law provided that offenders should be canned immediately and not in instalments and that 'if the like description of punishment had been inflicted in the like circumstances before independence, this would not have been authorised by law.'

Significantly, the court did not find 'the infliction of strokes in a traditional manner with a traditional instrument' (judicial corporal punishment itself) to be unconstitutional. The court pointed out that judicial corporal punishment was permitted in Botswana before independence. According to Judge Aguda, the onus then shifted to the State to show that, that piece of legislation was saved by Section 7(2) of the Constitution, and in this regard, he stated that:

> 'Suffice it to say that whatever views one may have of corporal punishment of an adult as a form of punishment for an offence, it is, in so far as Botswana is concerned, saved by subsection (2) of Section 7 of the Constitution.'[173]

[172] Section 301 of the CPEA.
[173] At p9.

In a minority judgement, the court was of the view that the prohibition against torture, cruel, inhuman and degrading treatment or punishment in Section 7 (1) of the Constitution was absolute, however subject to the limitation clause in Section 7(2). Agreeing with the majority judge Aguda remarked:

> 'I do not doubt in my mind that judicial flogging of an adult is a degrading form of punishment, but so long as the world community has not reached that stage when it can be abolished throughout the world, just as slavery has been abolished, it must continue to exist in some countries.'[174]

This thesis submits that courts in Botswana missed an opportunity to uphold the protection of human rights and move away from its pre-independence state of thinking. Perhaps if a challenge is to be brought in today's day, the court might make a different finding since corporal punishment is now abolished in many countries in the world.[175] In light of Botswana's international obligations under the CRC and the ACRWC, the State is obliged to outlaw all corporal punishment. Since the Petrus case was heard in 1984 before the adoption of the CRC, the courts might come to a different outcome if a case against judicial corporal punishment of male juveniles is to be currently heard. It is thus an opportunity for advocates of children's rights and human rights lawyers in Botswana to raise this issue once again in the courts. A review of Botswana's recent State party report shows that the State is not likely to abolish corporal punishment without a persistent push by the courts and human rights organisations.[176] A discussion of the treaty bodies' reports for Botswana is following.

[174] At p12.
[175] Macharia E W *Sentencing In Botswana: A Comparative Analysis of Law and Practice* (unpublished LLD thesis, University of Pretoria, 2016) 168.
[176] See review of Botswana's State Party report by the CRC Committee in May 2019 at CRC/C/BWA/2-3.

5.4.6 Recommendations for the abolishment of corporal punishment by human rights treaty monitoring bodies

5.4.6.1 Committee on the Rights of the Child

Botswana's initial report to the Committee on the Rights of the Child was examined in 2004. In this report, the Committee expressed serious concern about the legality of corporal punishment and recommended that the State takes legislative measures to expressly prohibit punishment in the family, schools and other institutions.[177] The Committee strongly recommended that the State Party:

> 'should take legislative measures to expressly prohibit corporal punishment in the family, schools and other institutions and to conduct awareness-raising campaigns to ensure that positive, participatory, non-violent forms of discipline are administered in a manner consistent with the child's human dignity and in conformity with the Convention, especially Article 28, paragraph 2, as an alternative to corporal punishment at all levels of society.'[178]

5.4.6.1.1 2018 State Party Report

Botswana's 2018 State Party report under the CRC was reviewed in May 2019.[179] The report by the State shows no indication of the willingness by the State to prohibit corporal punishment. The State submitted that corporal punishment is one of the alternatives to capital punishment

[177] CRC/C/15/Add.242, 3 November 2004, concluding observations on initial report: Botswana, paras. 36, 37, 60 and 61.
[178] CRC/C/15/Add.242, para 37.
[179] Convention on the Rights of the Child, *Concluding observations on the combined second and third reports of Botswana*, 31 May 2019, CRC/C/BWA/CO/2-3.

along with probation; community service; committal to a school of industries; and imprisonment. The State also indicated that it is faced with challenges with corporal punishment within the education system[180] and in the home setting.[181] Corporal punishment within the criminal justice system is listed as one of the challenges by the State in implementing civil rights and freedoms. The State stated that it is well aware that it must ultimately adopt measures that reform and rehabilitate children who have offended against society. However, it is currently faced with a situation where the majority of its population, including children, have not been persuaded that detention of children in places of safety is necessarily humane and non-degrading. The State party submitted that it is faced with following general arguments for the retention of corporal punishment:

(a) 'The pain inflicted [a maximum of six strokes with a cane whose size is regulated by law] does not meet the torture standard. The resultant injury is less than the type that could result from a rough game of football, body piercing, tattoos, boxing match etc. It is argued that it cannot be the injury to the child that is found objectionable;

[180] Botswana submitted that it is exploring reformative measures which incorporate such cultural values as parental participation in discipline and punishment, while abandoning acts that degrade and dehumanize the child. The State acknowledged that the challenge lies in changing mind sets and supervising the actions of teachers who fail to follow the guidelines on using corporal punishment. The State is however prepared to ensure that: the Corporal Punishment Regulations are adhered to, the Ministry of Education has introduced a *Punishment Book* at every school. All acts of punishment should be recorded in this book, and it should reflect the type of offence committed by the pupil, type of punishment, date when administered, the teacher who administered it, the name of the child, the number of strokes, and the way they were administered. The State is in essence stating that 'corporal punishment can only be administered by the headmaster or someone authorised by the headmaster. Although the Ministry has received few complaints relating to corporal punishment, the reality is that a lot of the conditions stipulated above are flouted, and that teachers do administer corporal punishment outside of these rules. This has led to numerous complaints by children, but it is not on record how often these are taken seriously. See paras 96, 201 and 202 of the CRC State Party Report, 2018.

[181] The State submitted that: 'It is appreciated that allowing corporal punishment of children within homes can allow serious abuse to occur. Child Line, an NGO offering counselling for abused children, has indeed reported that corporal punishment of the nature that qualifies as physical abuse is a common complaint by children. In that regard, public debates on the issue of corporal punishment and alternative punishment continue.' See para 97.

(b) The humiliation that results, which appears to be the main objection to corporal punishment, is less than the humiliation a Motswana child would feel if he were sent to a juvenile centre or prison;

(c) Juveniles sent to detention centres are removed from the positive influence of their parents and family members and afterwards consider themselves 'government children' and reject guidance from family members;

(d) Life in Botswana revolves around family and if it is lived in incarceration, of whatever nature and duration it is harsh and humiliating treatment;

(e) Children who have been to detention centres can expect to be stigmatised as 'criminals' whilst children who have been lashed for exactly the same crimes are generally not considered as criminals;

(f) For punishment to be potentially reformative, the person receiving the punishment must see it as such. Juveniles accept corporal punishment as intended to reform them and incarceration as punishment intended to take them away from their families; and

(g) Juvenile offenders would choose corporal punishment over any other form of punishment. In imposing corporal punishment, children's views on it are often taken into consideration, in line with the principles contained under the UNCRC.'

On the implementation of General Comment 8 on corporal punishment the State submitted that it has undertaken wide consultations with citizens to ensure that the implementation measures to be undertaken are effective and take into account all fundamental issues.[182] The State also

[182] CRC/C/BWA/2-3, para 93.

submitted that public debates on the issue of corporal punishment were ongoing with the support of UNICEF to engage influential persons to discuss with the traditional leaders and communities on the importance of other alternative disciplines for children with antisocial behaviours.[183]

The Committee expressed serious concern that corporal punishment remains lawful in all settings, including as a sentence for a crime, and urged the State party to explicitly and unconditionally prohibit, through legislative and administrative measures, the use of corporal punishment in all settings, including in the home, schools, childcare institutions, alternative care settings and in the administration of justice.[184] The Committee also urged the State Party to repeal clauses related to 'unreasonable correction' and 'the conditions for the administration of corporal punishment' in, respectively, the Children's Act and Education Act.[185] Additionally, the Committee urged the State to raise awareness to parents, teachers, professionals working with children and the public in general of the harm caused by corporal punishment and promote positive, non-violent and participatory forms of child-rearing and discipline.[186]

Arguments raised by the State in support of judicial corporal punishment, I believe were not fully addressed by the CRC Committee. The Committee should have expounded on the notion of corporal punishment as a from form violence against children.

5.4.6.2 Human Rights Committee

[183] CRC/C/BWA/2-3, para 93.
[184] CRC/C/BWA/CO/2-3, para 35 (a).
[185] CRC/C/BWA/CO/2-3, para 35 (b)
[186] CRC/C/BWA/CO/2-3, para 35 (c).

The Human Rights Committee recommended the abolition of all forms of penal corporal punishment in Botswana in 2008.[187] In 2010, the Committee on the Elimination of Discrimination against Women also recommended the prohibition of corporal punishment in all settings.[188]

5.4.6.3 Universal Periodic Review

Botswana was examined under the Universal Periodic Review (UPR) process in December 2008. Under this UPR process, a recommendation was made to prohibit corporal punishment.[189] The Government rejected this recommendation and asserted that it had no plans to eliminate the practice.[190]

Botswana was reviewed in the second cycle of the UPR in 2013. The issue of corporal punishment of children was raised in the compilation of UN information[191] and the summary of stakeholders' information.[192] The Government rejected several recommendations to prohibit

[187] UN Human Rights Committee (HRC), *Consideration of reports submitted by States parties under Article 40 of the Covenant: International Covenant on Civil and Political Rights: concluding observations of the Human Rights Committee: Botswana*, 24 April 2008, CCPR/C/BWA/CO/1, para. 19.
[188] Convention on the Elimination of All Forms of Discrimination against Women, *Concluding observations of the Committee on the Elimination of Discrimination against Women* 26 March 2010, CEDAW/C/BOT/CO/3, paras. 31 and 32.
[189] UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review - Botswana*, 13 January 2009, A/HRC/10/69; A/HRC/WG.6/3/L.1, para. 92(20).
[190] UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Botswana, Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review*, 17 January 2009, A/HRC/10/69/Add.1, page 7.
[191] UN Human Rights Council, *Compilation : [Universal Periodic Review] : Botswana / prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21*, 9 November 2012, A/HRC/WG.6/15/BWA/2, para. 20.
[192] UN Human Rights Council, *Summary : [Universal Periodic Review] : Botswana / prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21*, 29 October 2012, A/HRC/WG.6/15/BWA/3, paras. 15, 16 and 22.

it in all settings in contradiction with its international obligations.[193] In declining the recommendation to abolish corporal punishment, the government stated:

> 'The recommendation is not accepted. The Government, however, has no plans to eliminate corporal punishment, contending that it is a legitimate and acceptable form of punishment, as informed by the norms of the society. It is administered within the strict parameters of legislation in the frame of the Customary Courts Act, the Penal Code and the Education Act.'[194]

Despite the five recommendations on corporal punishment received by Botswana at its second cycle review in 2013, there was no change in its legality. The 2016 mid-term report refers to corporal punishment only to confirm its legality as a sentence for a crime.[195] It seems that the government does not intend to start a reform process having previously defended the use of corporal punishment and there are currently no opportunities for law reform.[196]

5.5 Conclusion

There is a global call to end all legalised violence against children being driven by the Global Initiative to End all Corporal Punishment of children. Although corporal punishment is still rampant in other settings, it is almost a non – existent phenomenon in the judicial system – as a sentence for a crime in many States around the world. Zimbabwe has recently joined this global progress by finding judicial corporal punishment of male juveniles unconstitutional. The

[193] UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Botswana*, 22 March 2013, A/HRC/23/7, paras. 116 and 117.
[194] UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review*, 17 March 2009, A/HRC/10/69/Add.1 20.
[195] UN Human Rights Council *Mid-Term Progress Report on the Implementation of agreed recommendations from Botswana's 2nd Cycle Review* (2016) 12.7.
[196] UN Human Rights Council *Mid-Term Progress Report on the Implementation of agreed recommendations from Botswana's 2nd Cycle Review* (2016) 12.7.

extensive Constitutional court judgement, canvassing various international laws and cases revealed the extent of the court's knowledge of the global views on the elimination of corporal punishment. The court's extensive discussion of the provisions of the new Constitution which uphold human rights and dignity gives hope to the protection of children's rights in Zimbabwe. Although the court did not decide on the constitutionality of corporal punishment in other settings such as the home setting and alternative care, the precedent set by the court can be used to call for the abolishment of corporal punishment in these other settings.

With the recent outlawing of judicial corporal punishment in Zimbabwe, Botswana is now the only country which legalises judicial corporal punishment of children in Southern Africa. Botswana should now come to terms with its international obligations under the CRC and the ACRWC. Although Botswana passed a seemingly progressive Children's Act in 2009, it still falls short of the CRC standard by legalising corporal punishment of children. The Children's Act, therefore, needs to be amended to reflect Botswana's true commitment to the CRC. The manner in which corporal punishment is inflicted is a clear indication of the inhumane nature of corporal punishment. Botswana should take heed of the various calls made by the international community and align with the new world order of abolishing corporal punishment as a sentence. Botswana should also take its obligations under international treaties, especially the CRC, seriously and ensure that corporal punishment is abolished in all settings as it is a violation of the right not to be treated inhumanely under Article 37 (c) of the CRC.

A constitutional challenge to the legality of corporal punishment failed in the *Petrus* case in 1984. It appears that the courts have their finger on the pulse of the nation and would be reluctant to adopt a position grossly disparate from the more commonly held views on judicial corporal punishment.[197] It is yet to be seen whether the courts in Botswana if faced again with

[197] Macharia (2016) 185.

the constitutionality of corporal punishment, will have a different view now that most countries in the world have abolished corporal punishment. A submission to the human rights and children's rights organisations is made to push for the outlawing of corporal punishment in all settings in Botswana.

CHAPTER 6: CONCLUSION AND RECOMMENDATIONS AND A PROPOSED SENTENCING GUIDELINE

6.1.General Conclusion and recommendations

This thesis set out explore ways in which Zimbabwe and Botswana can ensure the promotion of the rights and welfare of children in their sentencing practices in order to eliminate inhuman sentences. The thesis defined an inhuman sentence as a sentence that can be regarded as unkind to children, brutal, unfeeling, cruel, that takes away the humanity of a child and that robs a child of his/her childhood.[1] The thesis derived two sentences from Article 37 (b) of the CRC, which it considered to be inhuman. These are corporal punishment and life imprisonment in all its forms. The thesis addressed several sub-issues in connection to the main aim of the thesis which include: the general administration of juvenile justice in Zimbabwe and Botswana which impacts sentencing, the legality of sentencing children to life imprisonment and corporal punishment in international and regional African law, the legality of life imprisonment and Detention at the President's Pleasure in Botswana, the recent judicial and legislative developments on the outlawing of judicial corporal in Zimbabwe and the administration and legality of judicial corporal punishment in Botswana. A thematic analysis was made to address these issues.

The thesis established that a children's rights-oriented juvenile justice system (anchored on the principles set in international law, particularly the CRC) requires the limitation of life imprisonment sentences and judicial corporal punishment and should essentially provide alternative sentences for child offenders. The core issue related to children in conflict with the law is the fact that due to their age, immaturity and vulnerability, they warrant separate and

[1] See Chapter 1 at 1.2.

different treatment from their adult counterparts in criminal processes as they are still in their formative stage of development. The child-centred system, when sentencing a child, should be responsive to the child's care and developmental needs in order to ensure that the child is reintegrated back into the community as a law-abiding citizen and give priority to any action respecting the child's best interests. This thesis thus recommends a separate child-centred system of justice for Botswana. In Zimbabwe, a Child Justice Bill is currently being drafted and this thesis proposes that the Bill be adopted as soon as possible. Sentencing provisions of the Draft Bill were analysed in Chapter 3 and recommendations were made. At the time of writing of this thesis, however, Zimbabwe has no separate juvenile justice law.

What follows in this chapter is a summary of the main conclusions and recommendations that were distilled from the study. It is hoped that the findings and recommendations from this study will help inform law reform in order to eliminate uncertainty and inconsistency in sentencing law and practice in Zimbabwe and Botswana. The study also proposes a sentencing guideline at the end of this chapter, adapted from the various international and regional laws and principles discussed in Chapter 2.

6.2 Age, Age Determination and MACR in sentencing

In Chapter 2, aspects of the administration of juvenile justice which have a direct impact on sentencing such as age determination, the minimum age of criminal responsibility and legal representation, among others, were comprehensively explored. A child as defined by the CRC and the ACRWC is a person below the age of 18. Assessing Botswana and Zimbabwe's compliance with the established age under international law, it was found that the Children's Act of Zimbabwe is not in full compliance with the CRC and the ACRWC as it defines a child as a person under the age of 16 years. The Constitution, however, defines a child as a person

under the age of 18. It was therefore recommended that the Children's Act should be aligned with the Constitution. It was also recommended that in criminal matters involving the child, the age of 18 years set by the Constitution as the supreme law should be used. In line with the Children's Act and the CRC, Botswana defines a child as a person below the age of 18years.

Age determination in sentencing denotes the limits within which a person can either be punished as a child or as an adult. The study recommended that, appropriate age determination be done before the sentencing of children who are likely to face the sentence of life imprisonment for serious crimes. For purposes of sentencing, it was established that the relevant age to be used during sentencing, is the age at the time of the commission of the crime not the age at the time of sentencing.[2]

Connected to the issue of age determination is the age of criminal responsibility. The CRC Committee has recommended the age of 14 as the age of criminal responsibility in line with international practices.[3] In Zimbabwe, the minimum age of criminal responsibility is currently 7years.[4] This means that children at or above the minimum age of 7years at the time of the commission of an offence but younger than 18 years can be formally charged and subject to criminal justice procedures. Zimbabwe's Draft Child Justice Bill proposes a minimum age of criminal responsibility of 12 years. Although there is an improvement in the proposed Bill, there is still room for the minimum age to be raised to 14 years. In Botswana, the Penal Code sets the age of criminal responsibility at 8years, while the Children's Act empowers the Children's Court to hear matters against persons between the ages of 4 and 18.[5] There has been uncertainty whether the Children's Act lowers the age of criminal responsibility from 8 to 4 years. Perhaps it was a typing error, but it may cause serious consequences. Assuming that the

[2] See discussion in Chapter 2 at 2.5.1.
[3] See discussion in Chapter 2 at 2.5.3.
[4] See discussion in Chapter 3 at 3.2.4.
[5] See discussion in Chapter 3 at 3.3.5.

minimum age is at 8 years, it is still way below the recommended international standard of 14 years. It is therefore recommended that Botswana should raise its minimum age of criminal responsibility to 14 years.

6.3 General Principles of sentencing derived from the CRC and the ACRWC

Chapter 2 discussed essential principles that should be considered when sentencing children in conflict with the law. These include; the principle of proportionality; imprisonment as a last resort and for the shortest period of time and the principle of dignity and self-worth. The proportionality principle, in essence, provides that the reaction taken in the adjudication and disposition of a case involving a child should be in proportion to the gravity of the offence and the circumstances and needs of the child and society.[6] The principle of imprisonment as a last resort and for the shortest period of time imposes a duty on State parties to the CRC to continuously explore the variety of dispositions operating as alternatives to institutionalisation of children and to establish facilities offering a less restrictive environment.[7] The principle of dignity and self-worth implies that children in conflict with the law should not be treated differently from any other child.

In discussion of the three principles, it was submitted that the two inhuman sentences (corporal punishment and life imprisonment) identified in this thesis, erode a child of all self-worth and dignity. In turn, it was submitted that life imprisonment sentences are disproportionate to the needs of the child and the long term needs of society. It was also submitted that life imprisonment sentences go against the principle of imprisonment as a last resort and for the

[6] Beijing Rule 17(1) (a) CRC, Article 40(4). ACRWC Article 17. See also Chapter 2 at 2.7.1.
[7] See Chapter 2 at 2.7.2 for a detailed discussion.

shortest period of time. In that regard, it was recommended that these sentences should be abolished in national laws.

6.4 Diversion

The CRC Committee has over the years encouraged member States to use diversion as a way of channelling matters involving children from the formal criminal justice system.[8] As discussed in Chapter 2, diverting matters involving children from the criminal justice system ensures that children will have a chance to rethink their lives without having a criminal record.[9] In General Comment 24, the CRC Committee encouraged State Parties to use diversion programs such as community service, supervision and guidance by social workers or probation officers, family conferencing and other forms of restorative justice, including restitution to and compensation of victims.[10] In line with its international obligations, Zimbabwe implemented a pre-trial diversion (PTD) program aimed at promoting the provision of rehabilitative and restorative justice to children in conflict with the law. The program was however established on a trial basis in a few Provinces of the country and is running without any legislative framework in place. The Draft Child Justice Bill being drafted in Zimbabwe incorporates diversion extensively. The Bill thus reinforces and legalises the diversion of children from criminal trials and offers a wide variety of diversionary options for courts to use.[11] The coming into law of this Bill will ensure that most children who commit less serious offences will not find themselves trapped in the formal criminal justice system.

[8] See discussion in Chapter 2 at 2.9.2.
[9] See discussion in Chapter 2 at 2.9.2.
[10] See discussion in Chapter 2 at 2.9.2. As highlighted earlier, compensation should not solely be the responsibility of the parents of the child offender, if the child offender is old enough to work, he/she must do so to contribute to part or all of the damages paid to the victim.
[11] See discussion in Chapter 3 at 3.2.10.3.1

The study also concluded that although Botswana has provisions for the diversion of children legislatively, it does not have programs to ensure the effective implementation of the provisions. It is thus recommended that Botswana should create programs such as the PTD program in Zimbabwe. Such a program will enable effective enforcement of the provisions in the Children's Act.

6.5 Legal Assistance

In Chapter 3, it was established that neither the Constitution nor the Children's Act of both Zimbabwe and Botswana guarantees legal assistance for children in conflict with the law who commit serious offences. Children who commit serious offences cannot access justice most times due to the high costs of legal representation. Thus, a guarantee of legal assistance especially for children who commit serious offences will ensure that children's rights to access justice are protected and their best interests respected. The Draft Child Justice Bill of Zimbabwe makes provision for the legal representation at State expenses for parents, custodians or guardians who cannot afford legal representation. The Bill additionally provides for representation of children by legal practitioners working for human rights or children's rights organisations free of charge. The Bill also takes a step further by making provision for legal advice to be granted by a probation officer in the absence of legal representation, thus ensuring that the child is legally informed of all proceedings concerning him or her. The extensive provisions on legal representation for children in conflict with the law in the Draft Bill are commendable and show a commitment by the government to ensure that the participatory rights of children are respected.

For Botswana, this thesis recommends that a Constitutional provision guaranteeing legal representation by the State at the State's expense to children who commit serious offences

should be enacted. Such provision can also be made part of the Juvenile Justice legislation like the one currently being drafted in Zimbabwe.

6.6 Life Imprisonment

Chapter 4 discussed the sentence of life imprisonment for children in Botswana and Zimbabwe. The chapter established that there is a prohibition of all forms of life imprisonment sentences for children in conflict with the law as submitted by the CRC Committee in its recent General Comment 24 on juvenile justice.[12] It was also established that there is a limitation in Article 37 (b) of the CRC to the imprisonment of children only as a measure of last resort and for the shortest period of time. The chapter established that the Penal Law of both Zimbabwe and Botswana do not have an express prohibition of life imprisonment sentences to persons below the age of 18, although the practice is different in Zimbabwe. Children who commit serious offences could, however, find themselves sentenced to this harsh sentence, thus a clear prohibition in the Penal Law should be enacted to exclude persons below the age of 18 years. The chapter also discussed the sentence of Detention at the President's Pleasure in Botswana which was established to be a life imprisonment sentence.[13] This thesis argued that this form of a sentence is not in line with the principles for child protection in the CRC and the ACRWC and thus should be abolished. It is therefore recommended that both Zimbabwe and Botswana should use other forms of custodial or non – custodial sentences for children who commit serious offences.

The study recommends that Zimbabwe and Botswana should prohibit life imprisonment in all its forms for any offence committed while under the age of 18. In that regard the State should

[12] See General Comment 21, para 81.
[13] See discussion in Chapter 4 at 4.6.3.

repeal relevant articles in the Penal Code, the Criminal Procedure and Evidence Act and the Children's Act legalising such sentences. It is also recommended that the States should review the sentence of any person currently serving any form of life imprisonment for an offence committed while under the age of 18 and commute it to a lesser sentence or other measures. The Draft Child Justice Bill of Zimbabwe proposes a maximum period of 12 years for imprisonment for juvenile offenders. This period can meet the requirement of 'shortest period of time' when considering the seriousness of the offence committed and the needs of the community. The Bill also expressly prohibits life imprisonment sentences for offences committed while a person was under the age of 18. [14]

6.7 Judicial Corporal punishment

Chapter 5 traced the judicial and legislative reforms for the legal prohibition of judicial corporal punishment of male juvenile offenders in Zimbabwe. The chapter also reviewed Botswana's standpoint on judicial corporal punishment. The practice in Zimbabwe through a review of court cases indicated an end to judicial corporal punishment. In the *Chokuramba* case, the court canvassed regional and international law revealing that judicial corporal punishment is now archaic. In an in-depth constitutional analysis, the case revealed that the sentence of judicial corporal punishment is in direct violation of the Constitution as it violates the right to dignity and the right not be treated in an inhuman or degrading treatment or punishment.

Having been declared unconstitutional, this thesis proposes that all legal provisions in Zimbabwe's CPEA, the Prisons Act and the CLCRA authorising judicial corporal punishment for offences committed while under the age of 18, should be repealed and an explicit

[14] See discussion in Chapter 3 at 3.2.10.3.3.

prohibition on such punishment be enacted. The Draft Justice Bill has an express provision prohibiting corporal punishment, which shows a clear commitment on the government to completely eradicate corporal punishment of children.[15]

A constitutional challenge to the legality of corporal punishment in Botswana did not succeed in the *Petrus* case. This was despite a constitutional provision prohibiting torture, degrading or inhuman treatment or punishment. The chapter established that Botswana is reluctant to start a law reform process to abolish corporal punishment as revealed by its submissions in the 2018 State party report to the CRC.[16] The State argued among other things that the punishment is still well accepted by the majority of the people in Botswana. It is therefore recommended that given the high levels of public support for judicial corporal punishment, the government of Botswana should embark on a public education campaign to sensitise the public to the possibility of changes in law, to give them information and provide cogent reasons for the amendment of the law to prohibit judicial corporal punishment.[17] Public education campaigns will begin the process of transforming attitudes and practice so that judicial corporal punishment is no longer seen as a necessary sentencing option in Botswana.[18] Law reform to prohibit corporal punishment is achieved when legislation sends a clear message that corporal punishment, whatever level of severity and regardless of perceived impact in terms of 'injury' or 'harm', is prohibited.[19]

The author also recommends that Botswana should employ strategic litigation based on the direct application of the CRC and the States' obligations to challenge judicial corporal punishment, such as the one used in Zimbabwe with a successful outcome. Since the last

[15] See discussion in Chapter 3 at 3.2.10.3.3.
[16] See discussion in Chapter 5 at 5.4.6.1.1.
[17] Macharia (2016) 75.
[18] Macharia (2016) 75.
[19] Progress towards prohibiting all corporal punishment of children in East and Southern Africa, available at *http://endcorporalpunishment.org/wp-content/uploads/legality-tables/East-and-Southern-Africa-progress-table-commitment.pdf* (accessed 10 October 2019).

constitutional challenge was made in 1984 before the CRC came into force, it is believed that a challenge based on the CRC and recent practices in other countries such as Zimbabwe, will bring awareness to the courts, to the international and national abhorrence of judicial corporal punishment. It is also recommended that the government of Botswana should enact a constitutional amendment, repealing the constitutional savings clause preserving corporal punishment in Section 7(2) of the Constitution.

6.8 Developing a Sentencing Guideline

Currently, both Botswana and Zimbabwe have no sentencing policy for children or offenders in general. It is recommended that a Child Justice Act should be established in Botswana with clear sentencing principles and provisions. For Zimbabwe, it is recommended that the Child Justice Act underway should be adopted at the soonest possible time. Below, the author proposes sentencing provisions which could be incorporated in Botswana's Child Justice Act. For Zimbabwe, the provisions will serve as a mirror for its drafted Bill still under discussion. Provisions for the following proposal have been adapted from the above recommendations and the various international laws and principles discussed in Chapter 2.

6.8.1 Sentencing Guideline

PART 1 - 1. Principles of Sentencing

Every Children's Court that imposes a sentence on a child found guilty of a criminal offence shall take into account the following principles;

a. that the child is to be dealt with in a manner appropriate to his or her well-being;

b. that any sentence given to the child must be proportionate not only to the circumstances and the gravity of the offence but also to his or her age, individual circumstances and needs;

c. that any sentence must promote the reintegration of the child and his or her assumption of a constructive role in society;

d. that the sentence imposed must be the one most likely to enable the child to address his or her offending behaviour;

e. that the sentence must be the least restrictive one possible;

f. that detention is a measure of last resort and must not be imposed unless all available sentences other than a custodial sentence have been considered and adjudged inappropriate to meet the needs of the child and provide for the protection of society;

g. that following every conviction, an individual sentencing plan must be elaborated.[20]

2. Pre – Sentence Reports

(1) In all cases, the Children's Court shall obtain a pre-sentence report before passing a sentence on a child.

(2) The pre-sentence report shall be undertaken by a social welfare agency.

(3) The pre-sentence report shall provide possible alternatives to sentencing the child and include details of the family background of the child, the child's current circumstances, including where he or she is living and with whom, the child's educational background and

[20] Adapted from Article 51 (a) to (g) of the Model Law on Juvenile Justice, discussed in Chapter 2 at 2.11.

health status, previous offences, the circumstances surrounding the commission of the offence and the likely impact on the child of any sentence.[21]

4. Non-custodial sentences/ Diversion options[22]

(1) Where a child is convicted of a criminal offence, the Children's Court shall consider, having regard to the circumstances of the case, alternatives to detention including but not limited to:

(a) Mediation and Conciliation;[23]

(b) Attendance at a community-based programme to help the child address his or her offending behaviour;[24]

(c) probation,[25]

(d) a restorative justice order;[26]

(e) attendance at counselling;[27]

[21] Adapted from Article 52 of the Model Law on Juvenile Justice.
[22] See General Comment 24 on diversion discussed in Chapter 2 at 2.9.2.
[23] See Guideline 28 of Guidelines on Action for Children in Justice Systems discussed in Chapter 2 at 2.12.
[24] Community-based programmes and orders to participate in group counselling and similar activities provide a good opportunity for children in conflict with the law to learn positive patterns of behaviour. Group counselling allows the children to be reintegrated into the community and contribute towards helping their peers. See Model Law on Juvenile Justice Commentary.
[25] See General Comment 24, para 19. Probation orders generally contain conditions such as an obligation to report to a particular person, often a probation officer, at a particular time or to attend a particular place such as school. If the child breaks the condition then he or she will be referred back to the court. See Model Law on Juvenile Justice Commentary.
[26] In General Comment 24, para 74 the CRC Committee encourages States to States parties to develop and implement restorative justice measures by adjusting them to their own culture and tradition. Restorative justice measures can include conferences between the child, the victim and members of the community. See Guideline 50 Guidelines on Action for Children in Justice Systems discussed in Chapter 2 at 2.12.
[27] In most cases children's offending behaviour can be as a result of alcohol, drug related issues or anger issues amongst others. These can be addressed during counselling sessions. Counselling orders should be made only where the pre – sentence reports has identified problems such as those just mentioned as contributing factors in the offending behaviour and this requirement is necessary to address these issues. See Model Law on Juvenile Justice Commentary.

(f) a community service order;[28]

(g) an education order[29];

(h) a prohibited activity order;[30]

(i) a supervision order;[31]

(j) a residence order;[32]

(k) a care order;[33]

(l) traditional dispute resolution;[34]

[28] Community service orders require a child to undertake unpaid work for a certain number of hours, generally for the benefit of the community. Community service orders should require children to carry out constructive and interesting activities and not hard labour. Community service orders have proved to be more effective when children are able to learn new skills and feel that they have made a positive and useful contribution to their community. The community service orders can be linked with restorative justice processes, as the order can be discussed with the victim of the crime or with the community and relate specifically to the nature of the offence, or it can simply be a form of non-custodial sentence which has a reintegrative purpose. See Model Law on Juvenile Justice Commentary.

[29] As children who are in conflict with the law have frequently missed periods of schooling or have learning difficulties, educational measures are useful and can require a child to attend classes as part of his or her reintegration process. These measures are most helpful when they are tailored to the individual needs of the child and help the child to attain the same level of education as his or her peers so that he or she can re-enter school. See Model Law on Juvenile Justice Commentary.

[30] Prohibited activity orders can include a prohibition on contacting certain people with whom the child has committed offences or who are generally regarded as contributing to the child's offending behaviour. See Model Law on Juvenile Justice Commentary.

[31] Supervision orders or guidance orders allow children to stay with their family, to remain part of their community and to continue with their education and work. Supervision orders generally contain conditions that the child must comply with, often involving meeting with a supervisor at a specified time or participating in a specified activity, including attendance at drug rehabilitation programmes. A condition may be made that requires the child to attend school regularly, or to refrain from meeting certain people or going to certain places. It is usually helpful for a child to be allocated to a specific social worker or probation officer in order to help the child to comply with an order. See Model Law on Juvenile Justice Commentary.

[32] A residence order can be used to ensure that the child stays in a particular place for a period of time. Such an order will be appropriate where the child's living arrangements are thought to have contributed to his or her offending. The order should be short-term and should not exceed a period of about six months, as anything longer than this may hinder the child's reintegration into the family or community. Such an order may be particularly effective where the child is estranged from the parents and is living without parental care. See Model Law on Juvenile Justice Commentary.

[33] Care orders allow a court to order a child who has committed an offence to be removed from his or her parents into the care of another individual. Usually this will be another family member or a foster parent, or an institution such as a residential children's home. See Model Law on Juvenile Justice Commentary.

[34] See Guideline 28 Guidelines on Action for Children in Justice Systems discussed in Chapter 2 at 2.12.

(m) warnings, cautions and admonitions accompanied by measures to rehabilitate the child;[35]

(n) financial penalties;[36]

(o) compensation and restitution;[37]

(p) a suspended sentence.[38]

5. Implementation of non-custodial sentences

(1) Within the framework of a given non-custodial measure, the most suitable type of supervision and treatment shall be determined for each individual case, considering the needs of the child. Any supervision and treatment shall be periodically reviewed and adjusted as necessary.

(2) When considering the conditions to be attached to a non-custodial measure, the Children's Court shall take into account the needs and rights of the sentenced child, the needs of the victim and the needs of society.

(3) At the beginning of the application of a non-custodial measure, the child shall receive an explanation appropriate to his or her age and level of understanding, both orally and in

[35] See Guideline 50 Guidelines on Action for Children in Justice Systems discussed in Chapter 2 at 2.12.
[36] See Guideline 56 Guidelines on Action for Children in Justice Systems discussed in Chapter 2 at 2.12.
[37] See Guideline 56 Guidelines on Action for Children in Justice Systems discussed in Chapter 2 at 2.12.
[38] A suspended sentence is a custodial sentence the implementation of which is suspended for a period of time. Provided that the child does not commit a further offence and complies with any conditions attached to the suspended sentence, the custodial part of the sentence will not take effect. However, if there is a breach of the conditions or the child commits a further offence, the custodial part of the sentence will then be activated. Conditions attached to a suspended sentence may include a requirement that the child comply with curfew provisions or take part in specified activities. Any conditions imposed must be proportionate. As failure by the child to meet the conditions of the suspended sentence could result in a custodial penalty, which should however be made as a measure of last resort. See Model Law on Juvenile Justice Commentary.

writing, of the conditions governing the application of the measure, including the child's rights and obligations.

(4) The Children's Court may involve the community and social support systems in the application of non-custodial measures.

(5) The child shall be provided, as needed, with psychological, social and material assistance and with opportunities to strengthen links with the community and facilitate his or her reintegration into his or her family and/or society.

(6) The duration of a non-custodial measure shall be proportionate and shall not exceed the period established by the Children's Court in accordance with the law.

(7) Provision may be made for early termination of the measure if the child has responded favourably to it.

(8) If a non-custodial measure entails supervision, this measure shall be carried out by a social worker or any competent authority under the specific conditions prescribed by this law.

(9) When it is decided that treatment is necessary, efforts should be made to understand the child's background, personality, aptitudes, intelligence and values and, especially, the circumstances leading to the commission of the offence.

(10) Treatment should be conducted by professionals who have suitable training and practical experience and in accordance with standards and regulations.

(11) Where a breach of the conditions attached to a non-custodial measure results in the modification or revocation of the non-custodial measure, this shall be done only after a careful examination of the facts adduced by both the probation officer and the child.

(12) The possibility of arresting and detaining a child where there is a breach of the conditions of a non-custodial order shall be prescribed by law.

(13) A breach of the conditions attached to a non-custodial measure shall not automatically lead to the imposition of a custodial measure.

(14) In the event of a modification or revocation of a non-custodial measure, the Children's Court shall attempt to establish a suitable alternative non-custodial measure.

(15) Upon modification or revocation of a non-custodial measure, the child shall have the right to appeal to the appeals court at the Children's Court.[39]

6. Custodial sentences

(1) Deprivation of liberty as a sentence shall be imposed only after careful consideration, only as a measure of last resort and only for the shortest appropriate period of time.

(2) The Children's Court shall not impose a custodial sentence on a child unless he or she is convicted of a serious offence or is a persistent offender and there is no other appropriate response.

(3) The child shall serve the custodial sentence in a detention facility, as close as possible to the area in which his or her parents or legal guardian reside.[40]

7. Prohibited sentences

[39] Adapted from Article 54 of the Model Law on Juvenile Justice.
[40] Adapted from Article 55 of the Model Law on Juvenile Justice.

(1) No child shall be subjected to either capital punishment or life imprisonment for a crime committed when he or she was under the age of 18.[41]

(2) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.[42]

(3) No child shall be subjected to corporal punishment as a sentence.[43]

8. Maximum Penalty

(1) The maximum penalty for a child charged with a serious offence shall be 15years.[44]

9. Criminal record

(1) In case of conviction, the criminal record of a child's offence(s) shall be kept strictly confidential and closed to third parties.

(2) The record shall not be used in adult proceedings involving the same child.[45]

PART 11 - Children under Custodial Sentences/ Deprived of Liberty

10. The purpose of deprivation of liberty

[41] See General Comment 24, para 79 – 81. If there is no reliable and conclusive proof that the person was below the age of 18 at the time the crime was committed, he or she should have the benefit of the doubt and the death penalty cannot be imposed. See Model Law on Juvenile Justice Commentary. See also recommendation from the UN Global Study on Children Deprived of Liberty discussed in Chapter 2 at 2.13.
[42] See General Comment 24, para 75.
[43] See General Comment 24, para 75.
[44] See General Comment 24, para 77. Recognizing the harm caused by deprivation of liberty to children and adolescents, and its negative effects on their prospects for successful reintegration, the Committee recommends that States parties should set a maximum penalty for children accused of crimes, which reflects the principle of shortest appropriate period of time in line with Article 37 (b).
[45] Article 57 of the Model Law on Juvenile Justice.

The purpose of detention shall be to contribute to the rehabilitation and reintegration of the child into society by:

(a) ensuring that the child serves his or her custodial sentence in a fair and humane environment that promotes the welfare of the child and upholds his or her rights and dignity, and

(b) providing effective programmes aimed at the rehabilitation and reintegration of the child.[46]

11. Principles of deprivation of liberty

In addition to the sentencing principles, the following principles shall apply, in order to promote the protection, rehabilitation and reintegration of a child deprived of liberty:

(a) every child deprived of liberty must be treated with humanity and respect for the inherent dignity of the human person;

(b) every child deprived of liberty must be protected from all forms of abuse and ill-treatment including neglect, exploitation and physical, sexual and emotional abuse;

(c) no child deprived of liberty may be denied his or her rights, except to the extent that these are necessarily removed or restricted in order to implement a custodial sentence; and

(d) early release schemes must be used to the greatest extent possible and linked with the child's rehabilitation.[47]

[46] Adapted from Article 58 of Model Law on Juvenile Justice.
[47] Adapted from Article 59 of Model Law on Juvenile Justice.

12. Separation from adults, between age groups and by type of offence

(1) A child deprived of liberty shall be held in separate facilities from adult detainees.

(2) A detainee who reaches the age of 18 years while serving a sentence shall serve the remainder of his or her sentence in a child detention facility, provided that his or her sentence will be completed before his or her 21st birthday unless this is deemed not to be in his or her best interests or the best interests of other child detainees.

(3) The decision to retain or transfer the detainee to an adult institution shall be made by the court / competent authority based on a full assessment of the case.

(4) A detainee who has attained 18 years and remains in a child custody facility shall not be regarded as an adult and shall enjoy the rights and entitlements of children deprived of liberty set out in this law.

(5) A detainee shall not remain in a child custody facility once he or she reaches the age of 21 years unless leaving such a facility is deemed not to be in his or her best interests.

(6) A child deprived of liberty shall be held only with other children who are of the same age group and whose offences are commensurate to the offence(s) committed by the child in question.[48]

13. Girls and children with special needs

(1) A girl deprived of liberty shall be held in separate facilities from male children.

[48] Adapted from Article 61 of Model Law on Juvenile Justice.

(2) Detention facilities shall put in place measures to meet the specific needs of female children and children with special needs to protect them from all forms of abuse.[49]

14. Physical environment, accommodation and nutrition

(1) A child deprived of liberty shall have the right to facilities and services that meet all requirements of health and human dignity. Facilities and services shall be properly maintained and include:

(a) sleeping accommodation;

(b) sufficient and clean bedding which is appropriate for the climate;

(c) storage facilities for personal items; and

(d) adequate sanitary facilities that are hygienic and respect the child's privacy and particular gender needs.

(2) A child deprived of liberty shall have the right to sufficient food of adequate nutritional value and access to clean drinking water.[50]

15. Education and vocational training

(1) A child deprived of liberty of compulsory school age shall receive education and vocational training while detained in accordance with national curriculum requirements.

(2) A child above compulsory school age who wishes to continue his or her education shall be permitted to do so and shall have access to appropriate educational and vocational training opportunities.

[49] Adapted from Article 62 of Model Law on Juvenile Justice.
[50] Adapted from Article 64 of Model Law on Juvenile Justice.

(3) Educational and vocational training programmes shall be relevant and shall promote skills that will support the reintegration of the child into society and prepare him or her for future employment. Where possible, the child should be able to select programmes in which he or she has an interest.

(4) Special education programmes shall be provided for a child with cognitive or learning difficulties and a child who has missed schooling.

(5) Diplomas or educational certificates shall not indicate that the child was detained when they were awarded.

(6) The detention facility shall promote and provide opportunities for the child to undertake education and/or vocational training outside the institution in which he or she is deprived of liberty.[51]

16. Contact with family and the outside world

(1) A child deprived of liberty shall have the right to maintain contact with his or her parents, the legal guardian and other significant persons.

(2) The child shall be permitted to inform his or her parents, the legal guardian or other significant persons within 24 hours of his or her admission or transfer to or placement in any place where he or she is detained. The institution in which the child is detained shall provide the child with a telephone or other means of communication to enable such information to be given.

[51] Adapted from Article 65 of Model Law on Juvenile Justice.

(3) The management of the detention facility shall promote measures aimed to facilitate contact between children and their relatives, the legal guardian and other significant persons, including through correspondence and visits.

(4) Communication with and visits by relatives, the legal guardian and other significant persons shall be permitted unless:

(a) an order of the Children's Court exists restricting communication or visits by specific individuals, or (b) the management of the detention facility determines that communication or visits by specific individuals will have a serious detrimental impact on the child.

(5) Any decision to restrict communications or visits must be reviewed periodically and must be subject to challenge by the child.

(6) The management of the detention facility shall promote measures aimed at facilitating the child's contact with the community, which shall include granting leave of absence.[52]

17. Disciplinary measures

(1) Disciplinary measures must be consistent with upholding the inherent dignity of the child and must be used only as a measure of last resort. A child deprived of his or her liberty shall not be subjected to disciplinary measures that amount to cruel, inhuman or degrading punishment, including but not limited to:

(a) corporal punishment; and

(b) placement in an isolation unit or solitary confinement.

[52] Adapted from Article 69 of Model Law on Juvenile Justice.

(2) The child shall not be subjected to disciplinary measures that may compromise his or her physical or mental health, including:

(a) denial or reduction of food;

(b) denial of necessary health care; and

(c) denial of family visits or family contact.

(3) Work shall not be imposed as a disciplinary measure.

(4) Any disciplinary measure imposed on a child shall be recorded in writing in an official record book and shall be made available for inspection by an authorised body.

(5) The rules on discipline and the procedures for applying permitted measures shall be made available and made known to all children serving a custodial sentence, in a language that they can understand.[53]

6.9 Conclusion

In conclusion, this thesis recommends the elimination of sentences that amount to the inhuman punishment of children, such as life imprisonment and corporal punishment. Following the declaration of unconstitutionality of judicial corporal punishment in Zimbabwe, the thesis recommends the quick alignment of laws in Zimbabwe to reflect the constitutional judgement. The thesis also recommends that Botswana takes the recommendations made by the various human rights bodies to eliminate corporal punishment in all settings seriously. Further emphasis has to be placed by children's rights and human rights organisations in Botswana of

[53] Adapted from Article 71 of Model Law on Juvenile Justice.

the State's obligations under the CRC. A sentencing guideline is proposed for the sentencing of children in conflict with the law at the end of the thesis. Lastly, the thesis recommends a separate juvenile justice law, which incorporates the proposed sentencing guideline in this thesis, to be enacted for the countries under study.

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