TITLE: THE CHALLENGES OF SENTENCING OFFENDERS UNDER A DUAL LEGAL SYSTEM: DOES THE VALUE OF HUMAN DIGNITY INFORM JUDICIAL PUNISHMENT IN BOTSWANA

BY

LOT MOROKA - MRKLOT001

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THE CHALLENGES OF SENTENCING OFFENDERS UNDER A DUAL LEGAL SYSTEM: DOES THE VALUE OF HUMAN DIGNITY INFORM JUDICIAL PUNISHMENT IN BOTSWANA

ABSTRACT

The recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.[1]

Decisions about sentencing and punishment of criminal offenders and issues of substantive criminal law have traditionally been within the sovereignty of each nation state. That is not true anymore. Human rights
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international standards aimed at the protection of human rights and consequently human dignity?

The sanctity of human life is encapsulated in the concept of human dignity.[4] A collective reaffirmation of faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women[5] pronounced on the floors of the General Assembly of the United Nations Organization (UNO) marked a tuning point in humanity's appreciation of the value of human dignity. [6] The pronouncements of the Universal Declaration of Human Rights, while essentially exhortatory in nature were so weighty in character that they reverberated across the globe and in the process lending posture to many subsequent international human rights instruments and national constitutions of many states. A plethora of international human rights instruments and conventions find inspiration from the Universal Declaration of Human Rights.[7] The following instruments and conventions are central to the protection of human rights: International Covenant on Civil and Political Rights (ICCPR), The Convention Against Torture and other Cruel and Degrading Treatment or Punishments, European Convention for the Protection of Human Rights and Fundamental Freedoms, The American Convention on Human Rights, the African Charter on Human and Peoples Rights and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. The development of the concept of human rights centres on the concept of human dignity. In succeeding chapters a detailed discussion of the centrality of the concept of human dignity in punishment will be developed and it will be argued that human dignity is

[4] The concept of human dignity has been central to the evolution of human rights jurisprudence following the Second World War.
[5] See fifth paragraph 5 of the Universal Declaration of Human Rights
[6] On the 10th of December 1948
[7] Hereinafter referred to as UDHR

universal and transcends cultural and national idiosyncrasies. Thus inhuman and degrading punishment cannot find shelter under cultural relativist argument.

In this paper, the concept of human dignity shall be used as an overarching value upon which the examination of Botswana's penal system will be based. In the process three punishment areas will be isolated and analysed. These are capital punishment, corporal punishment and mandatory minimum sentences. Ultimately the objective of this work is to motivate for a paradigm shift in Botswana's penal policies to bring it in line with modern human rights thought. In this regard it will be argued that the appropriateness of capital punishment, corporal punishments and mandatory minimum sentences should be questioned.

The paper will also discuss the dichotomy presented by the dual legal system currently in use in Botswana in the area of sentencing of offenders. The question of compatibility of African customary law to human rights will be addressed.

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CHAPTER I

INTRODUCTION

While the sages may debate until eternity on the definition of crime, there will be little quarrel with the contention that the characteristic of criminal law is the imposition of official sanctions calculated to interfere with the life, liberty or property of the offender for certain objectionable conduct classified as criminal by statute or common law.[8] Criminal law has its origin in the human instinct for vengeance. In primitive societies individuals who suffered hurt or loss at the hands of another exacted vengeance personally by in turn inflicting wrong or injury to the wrongdoer. [9] The need to settle a score, to even up old wrongs is deeply embedded into the meaning of justice of in almost all cultures of the world.[10] To this date the primitive objective of expiation or atonement still plays a minor role even in the most advanced countries around the world.[11] This is the psychological reality of punishment as Sigmund Freud called it. Modern penologists call it just desert or retribution. Many years ago Mr. Justice Schreiner had this to say on the subject of punishment:

> ***"It is common to reject the idea of allowing retribution to enter into the infliction of punishment. I believe that this disapproval is, in general sound. But cases occur in which it is certainly natural and, I think to some extent justifiable to allow a measure of social indignation to enter into sentences. The cases I have particularly in mind are those in which the prisoner has behaved with great brutality towards his helpless victim. I cannot think that in such cases it is unjust or gratuitously cruel to impose a penalty which, without***

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[8] Ellison Khan 'Crime and Punishment 1910-1960' *Acta Juridica* (1960) 191
[9] Jonathan Burchell *Principles of Criminal Law* 3rd Ed (2005) Juta p19
[10] Graeme Newman *Just and Painful* Macmillan: London 1983 p21
[11] Ellison Khan op cit (n8) p191.

reproducing the savagery of which the accused was guilty, will yet represent in some degree the anger that the ordinary citizen must feel against the criminal[12]

Modern penal philosophy has since made huge strides. While punishment of the wrong doer remains central and undisputed, there are raging debates on appropriate forms of punishment. As a result, a plethora of theories of punishment have over the past centuries evolved. The debates swing from retribution to deterrence and from deterrence to restoration. Ultimately what is done to the criminal is a very index to the quality of any civilization. [13] Therefore the choice and philosophy of punishment adopted by a particular society is most of the time a reflection of its value system.

Punishment is an institution in almost every society. Only very small and very isolated communities are at a loss about what to do with transgressors. [14] Linked to the institution of punishment is the definition of crime. Crime becomes crime by reason of proscription of certain human conduct as such and visiting it with punishment. The categorization of conduct deserving of prohibition and visiting its commission with punishment is the seat of society's mores and values. The content of a criminal code is therefore a mirror reflection of the moral and aesthetic values of a particular society. Punishing crime is therefore an exercise in preservation of these very values which are held dear by the society. Ultimately, the definition of crime is a reflection of what values society seeks to preserve. What then happens when one community is colonised by another and foreign values are imposed on the community? Which values should be protected? What values should

[12] 'The Prisoner in Court' *(1945) 12 Race Relations 51 at 58* as cited by Allison Khan in 'Crime and Punishment' 1910-1960 *Acta Juridica 1960* 191

[13] Winston Churchill as quoted by Nigel Walker in *Why Punish?* Oxford: New York (1991) at p6

[14] Nigel Walker Why *Punish?* Oxford: New York (1991) at 1

the criminal code embody? And most importantly the choice of punishment methods, whose values should the punishment methods reflect?

The institution of punishment in Botswana is as a result of the country's history a confluence of seemingly irreconcilable indigenous and Western values. Botswana is a country of deep penal contradictions and dichotomy. The country is peopled by Africans of Bantu descent interspersed between people of Khoisan origins. By dint of a colonial past the country is grappling with the task of locating a criminal justice system reflective of the values of its people and their traditions and at the same time be in conformity with the evolving international human rights norms and standards. Will this search have an end and if it does what type of end will it be? To be able to understand and appreciate Botswana's penal system and its sensitivity to human rights protection, it is very critical that one understands and appreciates the country's political history and its place in the comity of nations. Human rights are universal and central to the respect for human rights by any jurisdiction is the recognition of the value of human dignity. It is my argument that the concept of human dignity cannot be divorced from the concept of human rights. Human dignity is therefore the seed that gives birth to the garden of human rights flowers. Without this seed it is impossible for the flower garden of human rights to blossom in any jurisdiction. Therefore to competently respect and protect human rights, human dignity must provide the foundation of laws for all nations. Recognition for the worth and value of human dignity is in my view inseparable from recognition and protection of human rights.

To develop this line of thinking, I will first examine the international human rights terrain and demonstrate the centrality of human dignity in the evolving battle to protect human rights. This

examination will largely focus on the protection of civil and political rights in the context of a criminal trial. Having examined the international terrain, I will then turn to Botswana. Here my primary task will be to measure judicial punishment in Botswana against the international standards that the country subscribes to. Particular focus will be placed on the extent to which human dignity finds expression in the punishment process in Botswana. In doing so I will focus on three critical methods of punish being; capital punishment, corporal punishment and mandatory minimum sentences.

But what is human dignity? Where is it derived from? And when can it be lost or gained. Answers to these questions constitute the nub of this paper. In Chapter II we shall deal with the concept of human dignity, its definition and significance and how it relates to the concept of human rights. In doing so we shall lay the foundation and context within which the rest of the chapters will be discussed. Human dignity shall particularly be discussed in both the international and municipal contexts.

In chapter three, we shall look at Botswana's legal system from past to present. The purpose of this chapter is to provide the basis for the understanding of the nature and context of the country's legal system. This is indispensable if one is to appreciate the ethos that informs the country's jurisprudence. The duality of the legal system and its attendant problems will be discussed in this chapter.

Chapter four deals with theories of punishment from a Botswana perspective. The dichotomy in the normative choices of the two justice systems in place in the country will be discussed. Difficulties in observing norms of human rights as a result of the duality of the system will be highlighted. It will also be demonstrated that duality creates inconsistency. Human dignity is therefore a casualty of this inconsistency.

Chapter five, deals with capital punishment. The discussion will be hemmed by the concept of human dignity. It will in this chapter be demonstrated that the concept of human dignity is inseparable from that of human rights. Thus respect for the right to life is impossible without respect for the inviolable dignity and worth of the human person.

Chapter six will deal with corporal punishment. The human dignity theme will again provide the normative context. The inseparability of human rights and dignity will once again be emphasized.

In chapter seven, mandatory minimum sentences are discussed. The purpose for this chapter is to bring to the fore the futility of linking harsh punishment to the fight against crime. Human dignity is in the process of pursuing crime prevention sacrificed.

The conclusion will then knit together the entire discussion and finally convey the message that the state must in imposing punishment do so in accordance with certain standards and that these standards must be reflective of the state's commitment to respect for fundamental human rights even in the face of mounting crime.

CHAPTER II

VALUE OF HUMAN DIGNITY IN SENTENCING

1. Defining human dignity

Dignity has deep roots in Kantian moral philosophy that affirms the inherent worth of human beings.[15] A human being should be treated never simply as a means, but always as an end in himself/herself.[16] The intrinsic worth of human beings qua human beings is termed human dignity.[17] Human dignity cannot be acquired by outside grant; it is resident in the nature of the human person. Therefore man treatment of man must be predicated on the assumption that man is an end in himself and not a means towards an end. Human dignity is objectively universal and cannot be a status conditional to the occurrence of other external factors. By their innate qualification of their nature human beings are endowed with freedom of will and hence are capable of virtue.[18]

The concept of human dignity however transcends moral, ethical and religious boundaries. All major religions of the world are founded on the recognition of the concept of human dignity. To this end the triad of Jewish, Christian and Islamic religions has as their basis the recognition of the inestimable worth of the human person.[19] The concepts of human dignity and the sanctity of human life are historically bound up with the

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[15] Sandra Liebenberg 'The Value of Human Dignity in Interpreting Socio Economic Rights' ***SAJHR*** Vol. 21 Part 1 2005.
[16] I Kant *The Moral Law: Kant's Ground work of the metaphysics of Morals* (1963) p96
[17] Robert Paul Wolff Kant: *Foundations of The Metaphysics of the Foundations of Morals* (1969) p296.
[18] Kant: ***Foundations of the Metaphysics of Morals: Text and Critical Essays*** The Bobb-Merril Co. Inc: New York 1969 at p297 Edited by Paul Wolff
[19] Yair Lorberbaum 'Blood and the Image of God: On the Sanctity of Life in Biblical and Early Rabbinic Law, Myth and Ritual' ***The Concept of Human Dignity*** Edited by David Kretzmer and Eckart Klein. Kluwer Law International: New York 1999 at p55.

biblical idea of humankind created in the image of God.[20] This divine nature of mankind has inevitably lent posture to national and international instruments on human rights.

1.1Human dignity and protection of human rights in international law

The evolution of contemporary thought in international protection of human rights is founded on the recognition of the inviolability of the dignity of man.[21] Respect for human dignity is implicit in the rights of personality, and in the social and economic rights instruments. It is inherent in any order based on freedom and human rights.[22] All critical human rights instruments and covenants refer to human dignity as a value to be protected. The Charter of the United Nations Organisation calls upon member states to reaffirm faith in human rights, in the dignity and worth of the human person, in the equal rights of all men and women and of all nations big or small.[23] The Universal Declaration on Human Rights[24] makes reference to human dignity in its preamble in the following words; "

> ***"All human beings are free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one anther in the spirit of brotherhood."***[25]

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[20] Yair Lorberbaum op cit (n19) p55 See also Genesis 1: 26-27 of the Christian Bible.
[21] Klaus Dickie 'The Foundation of Human Dignity in The Universal Declaration on Human Rights' ***The Concept of Human Dignity in Human Rights Discourse*** edited by David Kretzmer and Eckart Klein, Kluwer Law International 1998 p111
[22] Arthur Chaskalson 'Human Dignity as a Constitutional Value' published in ***The Concept of Human Dignity in Human Rights Discourse*** op cit (n21) at p134
[23] First paragraph of the Preamble of the UN
[24] Adopted by the General Assembly of the United Nations Organisation on 10th December 1948
[25] See paragraph 1 of the preamble of the UDHR

The Universal declaration further makes mention of human dignity on article 1. The International Covenant on Civil and Political Rights[26] refers to human dignity on article 7, the International Covenant on Economic, Social and Cultural Rights[27] makes reference to human dignity on article 13, the Convention Against Torture and other Cruel, Inhuman, Degrading Treatment or Punishment[28] makes reference to human dignity on article16, The Convention on the Elimination of All Forms of Discrimination against Women[29] refers to human dignity in the second preamble paragraph and lastly the Convention on the Rights of the Child[30] refers to human dignity in the second paragraph of the preamble.

Most remarkably, the usage of the concept of human dignity as the bases for human rights protections percolates all regional human rights instruments, which also make reference to human dignity as the basis for the protection of human rights. The African Charter on Human and Peoples Rights says;

> ***"Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of this legal status. All forms of exploitation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."***[31]

The European Convention on Human Rights makes reference to protection of human dignity on article 3.The second preambular paragraph of the American Convention on Human Rights eloquently

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[26] Adopted by the General Assembly of the UN on 16th December 1966
[27] Adopted by the General Assembly of the UN on 16th December 1966
[28] Adopted by the General Assembly of the UN on 19th December 1948
[29] Adopted by the General Assembly of the UN on 18th December 1979
[30] Adopted by the general Assembly of the UN on 20th November 1989
[31] article 2

states that; "...*the essential rights of man are not derived from one being a national of a certain state, but are based upon attributes of the human personality...*"

It is therefore unquestionably evident that human dignity forms the basis of not only international law; it is also the basis upon which many national laws are founded.

1.2 *Locating human dignity in municipal law*

The UN Charter went beyond just affirming faith in human rights and dignity, it required from all member states that are signatory to the Charter, a pledge to promote respect for and observance of, human rights and fundamental freedoms.[32] Member states pledged to take joint and separate action in cooperation with the UN for the achievement of this purpose.[33] Individual human beings carry nationalities and citizenships of individual countries. For the pledge that nations of the world made on the floors of the UN to be of any significance to individual persons, respect for human dignity must find expression in municipal laws. The national laws of the individual countries constituting the comity of nations must reflect this respect for human dignity. In this regard, the Constitution of Botswana prohibits the treatment or punishment of persons in a cruel and inhuman manner.[34] The German Constitution provides interesting reading on this point. It stares that:

1. "The dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority.
2. The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and justice in the world.

[32] Article 55 of the Charter
[33] Article 56 of the Charter.
[34] Section 7(1) of the Constitution of Botswana.

3. The following basic rights shall bind the legislature, the executive and judiciary as directly enforceable law."[35]

Consequently, the German state has a duty to respect and protect human dignity, which is regarded as the central value of Basic Law. All basic rights enshrined in the German constitution are interpreted and applied by the German Federal Constitutional Court in the context of this central value.[36]

Nearer to home, the South African Constitution recognises and gives protection to the right to dignity.[37] As a result of the constitutional entrenchment of this right, the South African Constitutional Court has developed rich human rights jurisprudence.[38] There is consequently no doubt that human dignity constitutes a foundational value of the South African quest to protect fundamental human rights. This founding value informs courts decisions in cases involving all generations of rights.[39]

Can the same be said of Botswana? What is the place of human dignity in Botswana's jurisprudence?

On the question of the sanctity of human dignity, Botswana's Constitution says:

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[35] Article 1 of the German Constitution.
[36] Chaskalson op cit (n22) at p135-136.
[37] Section 10 of the South African Constitution
[38] ***Soobramoney v Minister of Health KZN*** 1998(1) SA (CC), ***Grootboom v Oostenberg Municipality and Others*** 2000(3) BCLR (C), ***AZAPO and Others v President of RSA and Others*** 1996(4) SA 671 (CC), ***S v Makwanyane and Another*** 1995 (3) SA 391 (CC) etc.
[39] The case of ***Makwanyane*** concerns the first generation of rights such as the right to life while on the other hand the ***Soobramoney*** case concerned the second generation of right such as the right to health.

"No person shall be subjected to torture or to inhuman and degrading or other treatment."[40]

It is without any doubt that the Bill of Rights embodied in the Constitution of Botswana derived significant normative influence from the Universal Declaration on Human Rights.[41] We have alredy observed that human dignity constitutes the guiding value in the Universal declaration on Human Rights. Is human dignity the 'guiding value'[42] of Botswana's penal system? If it is, how then is the continued usage of capital punishment and corporal punishment comport with the respect for the sanctity of human dignity?

In this paper, Botswana's pledge to respect and promote the sanctity of human dignity as its signature on international human rights instruments suggests, is evaluated in the area of sentencing. Focus shall basically be placed on three forms of punishments; the death penalty, corporal punishment and mandatory minimum sentences. The next chapter looks at the legal history of Botswana, the judicial system and punishment philosophies employed by the courts.

[40] Section 7 of the Constitution.
[41] Chapter 1 of the Constitution of Botswana bears striking resemblance to articles 1-20 of the UDHR. Botswana is a signatory of the UDHR.
[42] Sandra Liebenberg 'The Value of Human Dignity in Interpreting Socio-Economic Rights' *SAJHR Vol.21 Part I 200 5* at p1.

CHAPTER III

1. A BRIEF HISTORY OF BOTSWANA'S LEGAL SYSTEM

Botswana was a British Protectorate from 1885 to 1966. The Protectorate was established by the Queen of England by an Order in Council.[43] In the same Order in Council the Queen bestowed the governance of Bechuanaland to The High Commissioner of South Africa. Pursuant to the powers delegated to him, he had all the powers and jurisdiction, which her Majesty had or may have subject to such instructions as he may from time to time receive from her Majesty or through a Secretary of State. These powers included the power to appoint officers such as a Resident Commissioner, Deputy Commissioners, judges, magistrates and other officers to administer the territory.[44] Most significantly, the High Commissioner was clothed with powers to legislate for the Protectorate by proclamation and provide generally for the administration of justice.[45] By virtue of these powers the High Commissioner issued proclamation No. 10 of 10 June 1891 which said:

> *"Subject to the foregoing provisions of this proclamation, in all suits, actions or proceedings civil, or criminal, the law to be administered shall as nearly as the circumstances of the country will permit, be the same as the law for the time being in force in the Cape of Good Hope: Provided that no Act passed after this date by the Parliament of the Colony of the Cape of Good Hope shall be deemed to apply to the said territory.*[46]

The law in force in the Cape of Good Hope at the time was Roman Dutch law.[47] The High Commissioner was by this Order in Council empowered to legislate for the protectorate by Proclamation. If there was any doubt and or ambiguity about the reception of Roman Dutch law to

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[43] 18 May 1891.
[44] Order in Council of 18 May 1891
[45] Athalia Molokomme 'The Reception and Development of Roman Dutch Law in Botswana' *Lesotho Journal of Law Vol. 5 1985*
[46] DD Ntanda Nsereko ***Constitutional Law in Botswana*** (2001) p56
[47] Ibid (n46) p53

Bechuanaland, the General Law Proclamation of 1909 put those to eternal rest. It read:

> *Subject to the provision of the Order in Council in force in the Bechuanaland Protectorate at the date of the taking into effect of this proclamation, and the provisions of any proclamation or regulation in force in the said Protectorate at such a date... the laws in force in the Colony of the Cape of Good Hope, promulgated after the 10th day of June 1891 shall mutatis mutandis and so far as not inapplicable be the laws in force and to be observed in the said Protectorate. But no statute of the Colony of the Cape of Good Hope, promulgated after the 10th of June 1891, shall be deemed to apply, or to have applied to the said Protectorate unless especially applied thereto by the Proclamation.*[48]

In the face of the importation of Roman Dutch law to Botswana the inevitable question is; what law existed before its imposition and what became of that law after the imposition of Roman Dutch Law? The answer to this question connects to the geo-political history of the territory that today constitutes Botswana. Until the onset of British colonisation Botswana did not exist as a single nation. It was created by the British towards the end of the 19h century during the scramble for Africa. Up until then the peoples who make up Botswana today lived alongside each other as independent entities. Most of them had chiefs ruling over them while others where achephalous. There was no one paramount chief exercising authority over the entire territory.[49]

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[48] AJGM Sanders 'Legal Dualism in Lesotho Botswana and Swaziland' *Lesotho Law Journal* Vol.1 1985 at p47

[49] op cit (n46) p17

1.1Pre-Colonial legal system

Before the introduction of Roman Dutch Law, customary law governed the indigenous people. As part of colonial administration of Bechuanaland, as we have already seen above, the High Commissioner was empowered to legislate for the Protectorate by proclamation. This he did incrementally and in accordance with the growing demands and complexity of the administrative arrangements in place in the Colony. The High Commissioner, himself resident in the Cape, was assisted to administer the Protectorate by a Resident Commissioner based in Vryburg. The Resident Commissioner was himself assisted by Assistant Commissioners who were resident in the Colony. Laws for the governance of the territory were promulgated by Proclamation, as there was no legislature for the territory.[50] Initially, the introduction of foreign law into Bechuanaland was done in such a way as to respect indigenous law but only to the extent that it was not repugnant to English civilisation.[51] However, to the extent that it was not inconsistent with the received law customary law was left intact. [52] This led to the evolution of a dual legal system by which the whites were governed by one set of law and the blacks by another. The indigenous people continued to be governed in accordance with customary law only to the extent to which it was not repugnant[53] to the "civilised" standards.

As mandated by the 1891 Order in Council, the High Commissioner established courts of law across the colony. These tried all capital offences and all other offences to which non-Africans were involved. These courts functioned side by side with the indigenous

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[50] DD Ntanda Nsereko (n46) p19

[51] Bojosi Otlhogile 'Criminal Justice and the Problems of a Dual Legal System in Botswana' ***Criminal law Forum*** Vol4 No.3 (1993) 67

[52] AJGM Sanders 'Legal Dualism in Lesotho, Botswana and Swaziland: A general Survey' ***Lesotho Law Journal Vol. 1*** (1985) 47 at p56

[53]Section 14(2) of The African Courts Proclamation 19 of 1961.

kgotla[54] system in which Africans were involved. The traditional courts handled both civil and criminal cases.[55] The lower courts were presided over by assistant commissioners who combined judicial and administrative functions. [56] Initially the newly introduced general law was meant to be essentially personal in that it applied primarily to Europeans.[57] However the dictates of social, economic, political and administrative developments in the colony led to the gradual loss of the personal character of the law as it gained more of a territorial character. In gaining a territorial character, the received law became more and more dictatorial as it encroached on the jurisdiction of the chiefs and their courts. Soon legal dualism was translated into a system of indirect rule in which the indigenous legal system was made subservient to received law.[58] The Colonial government did not want to incur the expenses of running the government in the protectorate. As a result chiefs became convenient tools to further Colonial governance with minimum expense. The system of indirect rule evolved. Chiefs were thus made conveyor belts of Colonial law and policy into the Colony.

1.2 Early evidence of differences between the two systems

From both an ideological and from purely a legal perspective, the two systems of law are different. Ideologically, the indigenous system is of communal and socialist type. In contrast, the received law has an individualist and capitalistic orientation.[59] The ethos of traditional African life is social solidarity. This forms the theme of indigenous law. The maintenance or restoration of social solidarity expresses itself in the

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[54] A traditional Tswana court, where all adults met to discuss all significant tribal matters. It is also referred to as the chief's kraal.
[55] Constitutional Law Supplement 46(January 2002)
[56] DD Ntanda Nsereko op cit (n46) p19
[57] AJGM Sanders op cit (n48) p56
[58] AJGM Sanders op cit (n48) p56
[59] AJGM Sanders op cit (n48) p56

form of kinship communalism. It is the kinship group which is at the core of the social structure. However recognition is given to the individual and his personality.

Traditional legal proceedings mirror the communal social structure. Crime is regarded as an affront not only on the integrity of the individual victim, but also on the very foundation on which society rests which unending harmony. Traditional criminal proceedings therefore are aimed at restoration and reconciliation. The entire group participates in the proceedings. On the other hand, criminal proceedings under received law are adversarial and often damning on the offender and the victim. At worst the offender faces an execution and or a life sentence. The gaping wound left by the incidence of crime is left eternally bleeding. Modern penological thought has substituted the traditional punishment philosophy based on the concept of ***Botho/ubuntu*** with foreign philosophies. Now punishment must reflect Euro-centric values sugarcoated as deterrence, rehabilitation, reformation, retribution etc. Chiefs who preside over criminal matters are expected to be mindful of these theories. This has created a dichotomy of values that continues to bedevil punishment methods in Botswana to this day.

The Order in Council clothed the High Commissioner with Powers to legislate by Proclamation. This the High Commissioner did dutifully. From a legal perspective, the High Commissioner set up courts across the colony. These were courts of the Assistant Commissioners, which were the precursor to the current magistrate courts.[60] All presiding officers in the magistrate courts were British. The introduction of magistrate courts saw chiefs lose jurisdiction over many areas of the law. The bulk of criminal and civil matters were transferred to the magistrate

[60] DD Ntanda Nsereko op cit (n46) p19

courts. All matters beyond the jurisdiction of the lower courts were referred to the High Court. Be that as it may, the dual legal system persisted. Both traditional and modern courts enjoy concurrent jurisdiction over many criminal cases in Botswana to this day. A two high ways criminal justice system has evolved and this presents serious human rights concerns for Botswana as will be seen in succeeding chapters of this paper.

1. **The dichotomy of values**

Indigenous law was and still is wholly unwritten. It is found in the values and ethos of the people and is constantly and dynamically been shaped by the environment in which it operates. Law is in this context a reflection of the values of the people. The people know what the law is and understood the consequence of breaking it. The elderly constitute its repository and dutifully pass it on to succeeding generations. In this context law serves the interests of society rather than the other way round, as it often seems the case in rigid western legal thought. Criminal law was thus unwritten and uncodified. The introduction of European legal system marked the beginning of a long winter of despair for Botswana. Firstly the colonial government codified all criminal law. Thus no person could be charged with any offence unless it was written in a statute. As observed earlier customary law was wholly unwritten. Persons could be charged, tried and punished of unwritten offences such as adultery; contempt of court etc.[61] On the other hand, the European law introduced a new regime of offences often criminalising indigenous cultural practices. Hunting of wild animals was for Batswana, a central part of their existence as a people. Hunting often marked certain significant cultural practices such as the enthronement of the chief, birth of a new baby and initiation of boys and girls into boyhood and

[61] Bojosi Otlhogile op cit (n51) p67

womanhood respectively. Over and above that hunting was part of the subsistent existence of the people. The colonial government criminalized it by promulgating the Fauna Conservation Act[62], which made it a crime to hunt wild animal without a license. Ironically the concept of ignorance of the law not constituting a defence accompanied the entry into force of alien laws in Botswana. If law did not evolve out of the specific needs of society and was an exotic import how could people not be ignorant of it? Frustratingly, now people get to know about the existence of a particular law when they break it. The dichotomy deepened further in matters of punishment as will be demonstrated later.

2. Post colonial legal system

Botswana attained independence from Britain in 1966.[63]The Constitution[64] of the Republic is the supreme law of the land. The independent government retained the dual legal system.[65] This incidence finds expression in the Constitution. The result is the presence of two systems of justice in the country, the mainstream/conventional system and the customary/traditional legal system. The two steams have jurisdiction to try both criminal and civil cases. The existence of the dual criminal courts presents problems in the country's quest to observe and protect human rights. From a criminal law perspective, the dual legal system presents a number of critical problems. Firstly the traditional legal system is wholly uncodified. It creates offences, which are punishable by law though unwritten. Secondly the traditional leaders are largely unschooled in legal matters but are adept in traditional matters. Be that as it may the dual legal system persists with growing contradictions. Traditional courts are now creatures of statute. As a

[62] Act 11 of 1964
[63] Tlou and Campbell A History of Botswana Macmillan: London 1988 p112
[64](Cap 01:01) of the Laws of Botswana
[65] Bojosi Otlhogile 'Criminal Justice and the Problems of a Dual Legal System in Botswana' *Criminal Law Forum Vol 4 No. 3* (1993)

result, they derive their powers from the statutes that create them. To be able to appreciates and understand the dynamics of Botswana's criminal justice system it is imperative that one understands and appreciates the structures of the two streams of courts and their jurisdictions.

2.1 *The power to prosecute offenders in Botswana*

To understand and appreciate the involvement of the courts in trying offences it is critical that one understands and appreciates how the prosecution chooses which forum to take which cases to and why. The power to prosecute offenders in Botswana lies in the hands of the Attorney General.[66] As a result of the shortage of manpower in the Prosecution Division of the Attorney General's Chambers, the AG has delegated[67] his powers to prosecute to the Botswana Police Services. As a result, prosecution in the magistrate courts is predominantly conducted by police officers (nine out of ten cases are handled by police officers). Where the matter is complex or controversial a state counsel is assigned the case. Prosecution in the Customary Courts is wholly conducted by police officers. Lawyers have no audience in the customary courts, so all persons appearing before customary courts must conduct their own defences.[68] This has resulted in abuse of the process by the police with devastating consequences on human rights. Firstly, police officers are not trained to make technical legal choices on whether any particular case is ripe for prosecution or whether the evidence gathered is too scant to warrant prosecution. Secondly there is interference by the commanders on which cases should be sent to court and when. Thirdly police officers would always want to secure conviction at all costs. In pursuit of conviction police always avoid sending to the magistrate courts any cases whose evidence is not sufficient to attain a conviction. Such

[66] Section 51(3)(a) of the Constitution
[67] Section 51(4) of the Constitution
[68] Bojosi Otlhogile (n51) p230

cases find their way to the customary courts where convictions are easily attainable.

2.2 Anatomy of the legal system

The conventional system

This system defines Botswana's legal system. It is comprised of the Court of Appeal[69] at the apex, followed by The High Court[70] and the Magistrate Courts[71] at the lowest level.

2.2Jurisdiction

The Court of Appeal

The Court of Appeal is the apex court and therefore has limitless jurisdiction both territorially and in terms of its judicial powers.[72] This means therefore that no matter will ever be beyond the jurisdiction of the court. However it remains a court of appeal. Matters can only come before it on appeal from the High Court and by leave of the High Court

2.3The High Court

The High Court enjoys original unlimited jurisdiction to hear and determine any civil and criminal proceedings under any law and also such powers as may be conferred by the Constitution or any other law.[73] The High Court is a superior court of record[74] and has supervisory powers over all subordinate and magistrate courts.[75] Therefore all matters from the magistrate courts are appellable to the High Court.

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[69] Created by section 99 (1) of the Constitution
[70] Created by section 95 (1) of the Constitution
[71] Created by a statute The magistrates Courts Act (Cap 04:04)
[72] Section 99(4) of the Constitution, see also section 7 of The Court of Appeal Act (Cap 04:01) of the Laws of Botswana
[73] Section 95(1) Constitution of Botswana

[74] Section 95(3) of the Constitution
[75] Section 95(5) of the Constitution

2.4The Magistrate Court

Jurisdiction in criminal matters

The magistrate courts are a creature of the Magistrates Court Act.[76] The country is divided into 21 magisterial districts. Each magisterial districts being headed either by a Senior Magistrate, Chief Magistrate or Principal Magistrate. The magistrate courts have jurisdiction to try all offences except murder and treason. The Chief Magistrate, Principal Magistrate and Senior Magistrate shall have jurisdiction to try any offence, except an offence which is punishable with death or imprisonment in excess of 21 years and any conspiracy or attempt to commit or the counseling or the procuring the commission of any such offence.[77]

A Magistrate Grade I and a Magistrate Grade II shall have jurisdiction to try only those offences for which the maximum penalty prescribed does not exceed 10 years imprisonment with or without options of a fine and any conspiracy or attempt to commit such offences.[78]

3. Jurisdiction in punishment matters

The limits to the punishments that may be imposed by magistrates shall be as follows:[79]

Chief Magistrates:

15 years imprisonment or P4 000 fine or both;

Principal Magistrates;

12 years imprisonment or P30 000 fine or both

Senior Magistrate;

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[76] (Cap 04:04) of the Laws of Botswana

[77] Section 60 of the Magistrate Court Act

[78] Section 60(2) of the Magistrate Court Act

[79] Section 61(1) of the Magistrate Court Act

10 years imprisonment or P20 000 fine or both
Magistrate Grade I
7 years imprisonment or P15 000 fine or both
Magistrate Grade II;
5 years imprisonment or P10 000 fine or both

3.1Jurisdiction in respect of corporal punishment

In respect of offences for which such punishment has been specifically authorised by written law, all magistrates shall be competent to impose a sentence of whipping subject to the following maximum strokes;[80]
Chief Magistrate:
12 strokes
Principal Magistrate
10 strokes
Senior Magistrate:
9 strokes
Magistrate Grade I
7 strokes
Magistrate Grade II
5 Strokes

4. The traditional legal system

Alongside the mainstream legal system runs the traditional legal system. This is the system of the chiefs. The Customary Act[81] governs the establishment, constitution, jurisdiction and powers of customary courts in Botswana.[82] Customary courts exist in the following hierarchical order;

- lower customary court
- upper customary court

[80] Section 61(2) of the Magistrate Court Act
[81] { Cap 04:05} of the Laws of Botswana
[82] DD Ntanda Nsereko (n38) p199

- customary court of appeal

Contrary to conventional wisdom customary courts in Botswana are not creatures of custom but they are creatures of statute. The Minister of Local Government is responsible for their establishment and supervision. The minister confers powers/jurisdiction on the courts through a system of warrants published in the government gazette. The establishment of a customary court is preceded by a request from a chief in a particular area whose demographics justify the establishment of a court.[83] The request is submitted to the Minister who considers it and responds accordingly. The establishment of the court would then be published in the government gazette. The warrant would then prescribe the extent of the courts jurisdiction.

As pointed out above, customary courts are of different levels. All levels however handle both civil and criminal matters.[84] Our concern is with the criminal side of their jurisdiction. The decisions of the lower customary courts are appellable to the upper customary court. The decisions of the upper customary courts are appellable to the Customary Court of Appeal. There is a right of appeal against the decisions of the Customary Court to the High Court. [85]

4.1 Criminal Jurisdiction

Customary courts can only try those offences that are created in terms of written law.[86] The Constitution of the Republic of Botswana provides as follows:

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[83] Section 6 of the Customary Court Act.
[84] Bojosi Otlhogile op cit (n36) p231
[85] Section 40 of The High Court Act
[86] *State v Bimbo H. Ct. Crim App. No. 36 of 1980* (un reported)

> ***"No person shall be convicted of an offence unless it is defined and the penalty thereof is prescribed in a written law."***[87]

This presents a dichotomy for the duality of the legal system. In terms of custom, a person may be convicted of unwritten offences only recognised by the custom. The case of ***Bimbo v State***[88] presented such a dichotomy. In this case the appellant was tried by customary court of the unwritten offence of adultery and was duly convicted and sentenced. Upon appeal to the High Court, it was held that it was unconstitutional and indeed unlawful for the customary court to try anyone of an unwritten offence. Customary criminal law was thus made non existent. Customary courts now have to preside over cases based on written and duly enacted law.

The Customary Courts Act[89] empowers the customary courts to try offences under the Penal Code.[90] The customary courts also have powers to try any offences created by any other statute provided that the particular statute does not expressly exclude the jurisdiction of the customary courts.[91]

5. Punishment under customary law

As pointed out above, customary courts are no longer creatures of tradition but of statute. This therefore means that they derive their powers and legitimacy to try and punish offenders not from tradition but from the statute creating them. They do not administer law in terms of tradition but in terms of written law. The sentencing powers of the customary courts are entombed in a warrant issued by the minister of

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[87] Section 10(8) of the Constitution
[88] Criminal case #CS109/87
[89] Section 12 of the Customary Courts Act (Cap 04:05)
[90] (Cap 04:04) of the Laws of Botswana
[91] *State v Molomo* 1984 BLR 108 (HC)

local Government by which he clothes a particular court with powers to try and punish offenders for particular offences and mete out sentences to a particular level. The powers are distributed as follows:

5.1.1 Criminal Jurisdiction under the Stock Theft Act

Court Rank	***Maximum Fine***	***Maximum Term of imprisonment***
Tribal Authority	P5000	10 years
Senior Sub Tribal Authority		P4000 9years
Subordinate Tribal Authority		P3000 8years
Headman		P2000 7years

There are over 1000 customary courts of different levels across the country. In contrast the country has only 21 magistrate courts presided over by a total of 49 magistrates in the whole country. The overwhelming numbers of criminal cases are by choice of prosecutors handled by customary courts.

5.1.2 Criminal Jurisdiction under the Drugs and Related Substances Act[92] is as follows*:*

Customary Court	***Maximum Fine***	***Maximum Term of Imprisonment***
Tribal Authority		P8500 8years

[92] (Cap 63:04) of the Laws of Botswana. The Act was as a result of the Court of appeal decision in the case of ***Desai v S*** 1987 BLR 55 (CA) repealed and replaced by the Drugs and Related Substances Act (Cap63:04) of 1992

Senior Sub Tribal Authority 7years			P8000
Subordinate Tribal Authority 6years			P7500
Headman 5years			P7000

5.1.3 General Criminal Jurisdiction:

Subject to the contents of its warrant and designation, a customary court may sentence a convicted person to a fine, imprisonment, corporal punishment or any combination of such punishments.[93]

No customary court may sentence any person over the age of 40 years or a female to corporal punishment.[94]

Where any person under the age of 18years is convicted of any offence, a customary court may, in its discretion order him to undergo corporal punishment in addition to or in substitution for any other punishment.[95]

No customary court shall subject any person to any punishment which is not in proportion to the nature and circumstances of the offence and the circumstances of the offender.[96]

[93] Section 18 of the Customary court Act
[94] Section 18(2) of the customary court Act
[95] Section 18(3) of the customary Court Act
[96] Section 18(4) of the Customary Court Act

5.1.4 Suspended sentences under the customary court

Whenever a person is convicted before a Customary Court of Appeal, or any Customary Court, of any offence, the court may in its discretion postpone the sentence for a period not exceeding three years. In that case the court will then release the offender on any condition it would have set. If at the end of the set period the conditions have been fulfilled to the satisfaction of the court, the prisoner may be released without passing any sentence.[97]

Similarly, a customary court may in its discretion following a conviction of any person pass a sentence and order that the operation of the whole or any part of the sentence be suspended for a period not exceeding three years. In so doing the court may attach conditions to be met by the offender during the period of suspension.[98]

A customary court may in its discretion direct that a fine, damages or any other payment, which it imposes, or awards, shall be paid within such time as it thinks just.[99] The payment of a fine or damages may be ordered to be in instalments.[100]
In the event a person fails to pay the fine, he may be imprisoned or have his property attached and sold in fulfillment of the fine.[101]

[97] Section 24(1) of the Customary Court Act
[98] Section 24(2) of the Customary Court Act
[99] Section 25(1) of the Customary Court Act
[100] Section 25(2) of the Customary Courts Act
[101] Section 25 (3) of the Customary Court Act

CHAPTER IV

1. UNDERSTANDING THEORIES OF PUNISHMENT: A BOTSWANA PERSPECTIVE

The rise in crime has been a postcolonial reality for Botswana.[102] The rise in crime is unabating. Crime levels have been rising by 12% annually.[103] The police commissioner's annual report reveals a rise in the following categories of crime; Murder, assault related offences, rape, robbery, defilement of girls under 16years of age, malicious damage to property, stock theft and house breaking. The crime rate has not escaped the concern of the country's government. The Minister of Presidential Affairs and Public Administration Mr. Phandu Skelemani under whose portfolio the criminal justice system falls recently made this observation; "Botswana is experiencing rising levels of crimes that are obtrusive in nature. Crimes such as murder, robbery, rape, house breaking and theft are a major concern to the country."[104]

1.2 Country's response to rising crime

The rise in crime has caused a national paranoia. The man in the street calls for stiffer penalties and the politicians have yielded to the pressure. In the search for a solution to the crime problem in the country, the responses of the legislature and the courts have been mutually exclusive. The legislature has responded by enacting draconian mandatory minimum penalties, which have progressively narrowed down the discretion of the courts in sentencing.

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[102] Barrington –Jones Ag CJ speech made at the opening of the Legal Year on 1st February 1988 published in ***Ways of the Bench*** edited by Bojosi Otlhogile Government Printer (1999) , p3.

[103] Botswana Police Commissioner Annual Report (2004) at p2.

[104] Botswana Police Newsletter Vol.2 No. 21 (2005) p3.

2. Sentencing guidelines and court discretion

Over the years the defining characteristic of Botswana's criminal justice system has been the freedom and discretion of judicial officers in sentencing. Aside from legislative prescription of maximum and minimum sentences, sentencing in Botswana has always been the exclusive domain of the judiciary.[105] Provided they stay within the boundaries set by the legislature judicial officers are free to pass any sentence they deem appropriate based on what their perception of justice require in a particular case. Armed with these discretionary powers, judicial officers have had the freedom to pass individualised sentence. The law does however provide a few legislative sign posts to be taken into cognisance by courts in sentencing. These signposts constitute of the following:

1. Sentence of imprisonment shall not be passed on any person under the age of 14 years;[106]
2. When a woman convicted of an offence punishable with death is found to be pregnant, she shall be liable to life imprisonment and not death sentence[107]
3. Sentence of death shall not be passed on a person who was below the age of 18 years at the time he committed offence punishable with death;[108]
4. A person convicted of an offence punishable with life imprisonment may be sentenced for any shorter term;[109]
5. a person convicted of an offence punishable with imprisonment may be sentenced to pay a fine in addition, or instead of imprisonment;[110]

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[105] John I.P. 'Sentencing Guidelines- Post Sentencing Act' *New Zealand Law Journal* November 2005 p397

[106] Section 27(1) Penal Code

[107] Section 26(1) of the Penal Code

[108] Section 26(2) of the Penal Code

[109] Section 27(2) of the Penal Code

6. No person convicted of an offence shall be sentenced to undergo corporal punishment unless such punishment is specifically authorised by the penalty creating section of the offence of which he has been convicted of;[111]
7. Where a fine is imposed under any law, and no sum is specified the courts discretion is unlimited but shall not impose an excessive fine;[112]
8. In the case of an offence punishable with a fine and imprisonment, the imposition of a fine or imprisonment shall be a matter for the discretion of the court;[113]
9. Where an offender is sentence to a fine, and in default of payment thereof to a term of imprisonment, the term of imprisonment in default of payment of the fine shall always be in addition to any other imprisonment impose on him. In short it shall not be made to run concurrently to any other imprisonment sentence;[114]
10. A court imposing a sentence of fine may upon default of payment of the fine issue a warrant for the levy of the amount by attachment and sale of the property of the convict.[115]

These are useful signposts and they save the courts many agonising moments as what to do in certain grey areas. These signposts enhance the courts' discretion in sentencing in the exercise of its discretion. Before sentencing, the court may receive such evidence as it thinks fit in order to inform itself as to the sentence proper to be passed.[116] It is lawful for a court other than the court that sentenced the

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[110] Section 27(3) of the Penal Code
[111] Section 28 of the Penal Code
[112] Section 29(a) of the Penal Code
[113] section 29(b) of the Penal Code
[114] Section 29(c)(1) of the Penal Code
[115] section29(ii) of the Penal Code
[116] Section 297(1) of the Criminal Procedure and Evidence

convict to issue a warrant authorizing the commencement of such sentence by the convict.[117] Further if in a magistrate court a sentence is not passed immediately after conviction; any judicial officer may in the absence of the judicial officer who made the conviction, pass the sentence.[118]

These are indeed use friendly and very useful guidelines. Their presence does not in any way harm the courts treasured ability to individualise sentencing according to the dictates of each case. The wide discretion enjoyed by the courts is however not without controversy. It often engenders inconsistencies in sentences coming out of the courts.[119] These inconsistencies often invite criticisms from the man in the street. A further discussion on this point will be made in chapter VII when we discuss mandatory minimum sentences.

3. Theories of punishment: from modern to traditional courts

Criminal justice systems the world over have for decades been grappling with the question of finding appropriate punishments for the ever evolving crimes and criminal conduct. The world is rapidly changing and distances between countries and peoples of the world are diminishing. The world is indeed becoming a global village. Sadly crime and criminal conduct is also being globalised. Conduct that a few years ago did not warrant legislative intervention is attracting the attention of the legislatures in many countries. Money laundering and cyber crimes are threatening economies of many countries. Botswana's growing economy attracts fortune seekers from all over the world. The country's judicial system is facing increasing challenges. More that at any other

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[117] Section 297(2) of the Criminal Procedure and Evidence Act
[118] section 297(3) of the Criminal Procedure and evidence Act
[119] John I. P. 'Sentencing Guide Lines –Post Sentencing Act' *New Zealand Law Journal* Nov. 2005 p397

point in the history of the country, the country's criminal justice system is constantly in the radars of many commentators in criminal and penal laws. What then is the preferred punishment philosophy for Botswana courts? Two cases embody the attributes of Botswana's punitive system that of ***Bosch v State***[120] ***and Ofetotse v State.***[121] Almost every penal enthusiast knows about the case of ***Bosch v State.***[122] Among many cases of a similar nature these cases summarise Botswana's penal policies. The facts of the case are that Marietta Sonjaleen Bosch a white South African woman was charged with murder of her friend Maria Wolmarans and wife to the man known as Tinny Wolmarans whom she subsequently married. She was tried and duly convicted and sentenced to death. In electing to impose the supreme penalty, the court was clearly motivated by retributive impulse more that anything else. The court ominously said having taken the life of her trusting friend; the accused person did not deserve to live. Nothing but cold retribution moved the court to impose the supreme penalty. In contrast, in ***Ofetotse*** where another woman who was charged with murder of her husband, the court found extenuating circumstances and sentenced the accused to ten years imprisonment. In passing sentence, the court said;

> "***Deterrence has been described as the essential, all important, paramount and universally admitted object of punishment. The other objects are accessory. The aspect of retribution is considered in modern times to be of lesser importance. While the deterrent aspect of punishment has remained as important as ever, it is I think correct to say that the retributive aspect has tended to yield ground to the aspect of prevention and correction. That is no doubt a good thing. But the element of retribution historically important***

[120] Criminal Appeal 34/2001 (unreported)
[121] 1989 BLR 582
[122] Criminal Appeal 31 of 2001 (unreported)

is by no means absent from the modern approach. It is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences that courts impose, and it is no irrelevant to bear in mind that if sentences for serious offences are too lenient the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands..."[123]

The above pronouncement was indeed made by the highest court of the land and without doubt qualifies as a guide for all courts of inferior status. It is therefore very clear that in finding appropriate penalty for offenders, courts should accord the deterrence philosophy greater emphasis. As observed earlier Botswana has a dual legal system. Is this message also intended for the traditional courts, which also try criminal cases? What philosophy do these courts subscribe to?

3.1 Philosophy of punishment in the traditional courts

Whatever obtains in the modern judicial system does not necessarily obtain in the customary courts. While the magistrate courts, the High Court and the Court of Appeal are presided over by trained legal professionals, the traditional courts are presided over by untrained laymen in modern penal thinking. While the country has a dual legal system, it does not have two systems of criminal justice. The criminal justice system is only one. Therefore the two legal systems do the same job but using different tools. Criminal law in the modern courts is conducted in accordance with universally known principles of law. The first principle is the presumption of innocence.[124] The second principle is the need for a fair trial.[125] Fairness entails the independence and

[123] Bizos JA *Ofetotse v State* 1989 BLR 315 (HC) at 322
[124] Section 10(1) of the Constitution
[125] Section 10(2) of the Constitution

impartiality of the court, trial within a reasonable time, the opportunity to instruct a lawyer of one's choice, adequate time and facilities to prepare for one's trial,[126] opportunity to cross examine witnesses, right to refuse to answer questions etc.[127] In contrast, criminal matters in the customary courts are conducted in accordance with the Customary Courts Procedure rules.[128]

Though customary courts are supposed to be courts of tradition, they in no way function in accordance with traditional law. The law they administer was supposed to be traditional law. Unfortunately the traditional courts in Botswana cannot administer traditional criminal justice as it does not exist. Theses courts can therefore not invoke pure Tswana traditional method of conflict resolution. They are no longer creatures of tradition but are creatures of statute and must act within its parameters. The constraints of statutory rigidity thus deprive these courts from invoking the ***Botho/ubuntu*** philosophy, which forms the bases of Tswana society.

The traditional courts are in effect a pale version of the magistrate courts but without the necessary legal skills and tools to make head and tail of the law they administer. The results are catastrophic. A close examination of cases coming out of the customary courts reveals an orientation towards retribution and restoration. There is an unshakable faith corporal punishment, which is a punishment of first choice. An examination of the court register of the Kanye Customary Court[129]

[126] Section 10(2)(c) of the Constitution
[127] Section 10(7) of the Constitution
[128] (Cap 04:05) Laws of Botswana
[129] The Kanye customary Court is among the biggest courts in the country handling thousands of cases annually. It is the seat of the capital of the Bangwaketse tribe who occupy the South Eastern part of Botswana. The writer paid the court a visit, observed

presided over by Chief Seepapitso IV reveals that the court presides over an assortment of cases including use of insulting language, assault, theft, house breaking etc. In all cases where a conviction was entered an order for the compensation of the victim by the perpetrator was made. Chillingly, corporal punishment is a common denominator for all sentences be they fine, imprisonment or compensation. The preference of corporal punishment reveals the retributive face of this system. Punishment philosophy in the customary legal system is encapsulated in the Tswana maxim- ***ya mosimane ke ennkgwe***[130] (meaning the back of an offending person is a striped one. The administration of corporal punishment leaves with linear marks similar to a zebra hence the expression) Unlike in the magistrate courts where corporal punishment can only be administered in offences where the law prescribes it as a competent penalty,[131] In contrast the law exempts the traditional courts from this vital constraint.[132] This licenses widespread retributive practices in the customary courts. A recent amendment of the Customary Courts Act[133] has widened the scope of the application of the corporal punishment to foreigners. Before this amendment, traditional courts had no jurisdiction to try cases involving foreigners. This impediment is no more. As a result illegal immigrants mostly of Zimbabwean origin are subjected to this sort of punishment before deportation.[134] Zimbabwean illegal immigrants are blamed for the rising

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court proceedings and studied the courts records which include courts register and individual case files on finished matters.

[130] Isaac Schapera Tswana ***Law and Custom*** 2nd. Ed.1955 p49

[131] Section 28(1) of the Penal Code

[132] In terms of Section 18(2) of the Customary Court, where a person of the age below 18 is convicted of any offence, the court is at liberty to impose a penalty of corporal punishment even though not provided as a punishment option by the offence creating section.

[133] Botswana Government Gazette 10th October 2004.

[134] Mmegi-The Reporter 5th December 2004 p3.

levels of crime in Botswana.[135] The flogging of Zimbabwean illegal immigrants has created tension between the two countries.[136]

In the final analyses there is a dichotomy between the two legal systems existing in Botswana. While the modern system pursues respect for fundamental rights,[137] the traditional legal system breaks every sentencing rule in the book. This does not auger well for respect for the country's aspiration of being a liberal democracy characterized by rule of law and respect for human rights. Botswana cannot continue to ride two horses one of a liberal democracy with respect for human rights and the other of blatant disregard of basic human dignity.

4. The significance of a record of previous convictions in sentencing offenders

The record of the offender's past criminal record is an integral part of the court's determination of an appropriate sentence for the offender. Is reliance on past convictions unjust? Is the offender punished for offences he has already paid his dues for? How far back should the court dig? When should the record of previous convictions come into play?

The position of the law in Botswana is that it shall no be lawful in any indictment or summons against any person for any offence to allege that such person has been previously convicted of any offence whether in Botswana or elsewhere.[138] Similarly it is not legally permissible in Botswana to adduce evidence of previous convictions during trial before

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[135] Mmegi-The Reporter 5th December 2004 p3.
[136] In protest to the flogging of its citizens the Zimbabwean government officially communicated its displeasure to the Botswana government through the Zimbabwean High Commissioner to Botswana,- Mmegi- The Reporter 3 August 2004
[137] Aguda JP ***Dow v Attorney General*** 1992 BLR 119
[138] Section 283(1) of the Criminal Procedure and Evidence Act

conviction.[139] Evidence of previous convictions is admissible upon production of a police office having custody of the same.[140]

[139] Section 284 of the Criminal Procedure and Evidence Act
[140] Section 288 of the Criminal Procedure and Evidence Act

CHAPTER V

1. THE DEATH PENALTY

Of all punishments, the death penalty is perhaps the most controversial form of punishment currently on Botswana's statute books. No other punishment has attracted the same amount of comment and out pouring of emotion as the death penalty. There are no fence sitters in the debate on this subject. People are either strongly in favour of the death penalty or strongly against it.[141] As we discuss this issue in succeeding paragraphs, the golden thread that stitches our discussion together will continue to be that foundational touch stone- human dignity. Is capital punishment reflective of respect for this sacred value?

1.1 The position of international law on the death penalty

There is no principle of customary international law that prohibits the imposition of the death penalty. The collective standpoint of international law on this point can be extrapolated from a plethora of international instruments that are in existence. The position of international law is two fold; there is the universal position as reflected by the United Nations Organisation[142] and regional positions as reflected by the various regional instruments that are functional in the various regions of the world.

1.2 Universal position

The universal position is embodied in the UN human rights instruments. In this regard the natural starting point is the UN Charter, The Universal Declaration on Human Rights[143] and the International Covenant on Civil

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[141] SS Terblanche ***The guide to Sentencing in South Africa*** (1999) at 509

[142] Formed in San Francisco USA in 1945

[143] Adopted by the UN General Assembly Resolution 217A (III) of 10 December 1948

and Political Rights.[144] The Convention on the Rights of the Child[145] The Convention against Torture and other Cruel and Degrading Treatment and Punishment,[146] The Standard Minimum Rules on the Treatment of Prisoners, The Second Protocol of the ICCPR.

There is no doubt that the United Nations Organisation exists to establish conditions under which justice and respect of human rights, the dignity and worth of the human person could be possible. Hence The Universal Declaration on Human Rights declares; "*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 the spirit of brotherhood.*"[147] It declares further that everyone has a right to life, liberty and security of the person.[148] The ICCPR took the issue beyond exhortation.[149] It provides that every human being has an inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.[150] From its promulgation, the ICCPR implored states to make no delays in the quest to abolish the death penalty.[151] Therefore abolition of the death penalty has always been the aspiration of the ICCPR. This aspiration became concrete reality with the coming into being of The Second Optional Protocol of the ICCPR, which finally puts the position of the universal human rights on the question of the death

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[144] Adopted by UN General Assembly resolution 22000A(XXI) of 10 December 1966 and came into effect on 23rd March 1976

[145] Adopted by UN General Assembly Resolution 44/25 of 20th November 1989 and came into force on 2nd November 1990

[146] Adopted by the UN General Assembly in 1948

[147] Article 1

[148] Article 3

[149] Unlike the Universal declaration on Human Rights, the ICCPR is a Treaty with enforceable mechanism. State Parties to it are bound by the principle of ***pacta sunt servada*** to respect its provisions.

[150] Article 6(1)

[151] Article 6(6)

penalty beyond doubt. For purposes of clarity of this position it is best to quote the protocol as is;

> ***States parties to the present protocol,***
>
> ***Believing that abolishing of the death penalty contributes to the enhancement of human dignity and progressive development of human rights,***
>
> ***Recalling article 3 of the Universal Declaration of Human Rights, adopted on 10 December 1948 and article 6 of the International Covenant on Civil and Political Rights, adopted on 16 December 1966,***
>
> ***Noting that article 6 of the International Covenant on Civil and political Rights refers to the abolition of the death penalty in terms that suggest that abolition is desirable,***
>
> ***Convinced that all measures of abolition of the death penalty should be considered as progressive in the enjoyment of the right to life,***
>
> ***Desirous to undertake hereby an international commitment to abolish the death penalty, have agreed as follows;***
>
> 1. ***No one within the jurisdiction of the State Party to the present Protocol shall be executed.***
> 2. ***Each state party shall take all necessary steps to abolish the death penalty within its jurisdiction...”***

Beyond that the ICCPR says; “no one shall be subject to torture, or cruel, inhuman or degrading punishment.”[152] The death penalty is an extreme form of torture, a form of punishment that violates human

[152] Article 7 of the ICCPR

rights.[153] The UN sponsored Commission on Human Rights has unequivocally called on states that still practice the death penalty to establish a moratorium on executions, with a view to completely abolishing it.[154]

Botswana has since 1966 been a member of the United Nations Organisation and signatory to the ICCPR. It is regrettably not a signatory to the Second Optional Protocol of the ICCPR. Beyond its membership of the UN, Botswana is also a member of The African Union formerly The Organisation of African Union.

1.3The African position

The African position paper on human rights is the African Charter on Human and Peoples Rights.[155] The African human rights position on the question of the death penalty is couched in these words;

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

Both article 6(2) of the ICCPR and this provision of the African Charter have been used as justification for the continued usage of the death penalty in Botswana. Further discussion on this issue is deferred to succeeding paragraphs. For now let us examine the usage of the death penalty in Botswana. In our attempt, we shall look at the constitutionality of its usage and of course the juxtaposition of the country's laws with norms of international law on this question.

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[153] Roger Hood 'The Importance of Abolishing the Death Penalty' ***Death Penalty Beyond Abolition*** Council of Europe P 2004

[154] Resolution 2003/67 of April 2003, co-sponsored by seventy five countries and adopted by a vote of 24 for and 18 against with 10 abstentions.

[155] Adopted by the General Assembly of the Heads of States and Government of the OAU at Banjul on 27 June 1981, entered into force on 21 October 1986

1.4Scope of application of the death penalty

In Botswana, the death penalty is both a statutory reality[156] and an active ingredient of the country's penal system.[157] The continued usage of the death penalty in Botswana is a source of fierce debates across the country. The death penalty may be imposed in respect of three offences; treason, murder and piracy with intent to murder.[158] The law that legitimises this supreme penalty will be briefly examined in these three scenarios:

1.4.1Treason

Section 34 of The Penal Code provides:

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

(a) prepares or endeavours to overthrow by unlawful means the government as established by law;

(b) prepares or endeavours to procure by force any alteration of the law or polices of government;

(c) prepares or endeavors to carry out by force any enterprise which usurps the executive power of the state in any matter of both of both a public and a general nature;

(d) in time of war and with intent to give assistance to the enemy, does any act which is likely to give assistance;

(e) gives assistance to any person who threatens the security or sovereignty of Botswana.

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[156] section 25 of The Penal Code {Cap 04:04} laws of Botswana

[157] There are currently three convicts awaiting execution in the Gaborone Maximum Security Prison

[158] Daniel D Ntanda Nsereko 'Extenuating Circumstances in Capital Offences in Botswana' *Criminal Law Forum Vol. 2 No. 2 1991 p241*

Interestingly, while the criminal jurisdiction of Botswana courts in criminal matters is generally territorial[159], an exception is drawn in regard to treason. Section 34(3) states:

> *A person who is not a citizen of Botswana shall not be punished under this for anything done outside Botswana, but a citizen of Botswana may be tried and punished for an offence under this section as if it had been committed within the jurisdiction of the court.*

This latter provision raises interesting questions of international human rights nature. A Botswana citizen suspected of treason is liable to a charge even if the conduct that constitutes treason is done while outside the jurisdiction of the court. For the person to be put to trial he must be extradited from the foreign country. The request by Botswana to have the suspect handed to Botswana for trial will then raise various questions. I will defer discussions on the implication of the extradition request for later discussion.

1.4.2Murder

The offence of murder in Botswana is created by section 202 of the Penal Code which provides as follows:

"Any person who of malice afore-thought causes the death of another person by an unlawful act or omission is guilty of murder."

Section 203 further provides that; "subject to the provision of subsection 2 any person convicted of murder shall be subject to the death penalty." (own emphasis)

1.4.3Piracy with intent to murder

This offence is created by section 63 of the Penal Code which provides that:

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[159] Section 4 of The Penal Code of Botswana

> *"A person who with intent to commit or at the time of or immediately after committing an act of piracy in respect of a ship, assaults, with intent to murder, any person being on board a ship or injures any such person being on board, or belonging to, the ship or injures any such person or unlawfully does an act by which life of any such a person may be endangered shall be guilty of an offence and shall be liable to suffer death."*

Questions have been asked as to the appropriateness of the offence of piracy to a land locked country. Piracy can only be committed on ship on high seas. The high seas are ***res communes***. All nations of the world including the landlocked ones enjoy the freedom of the high seas. This freedom includes the rights of navigation and of the exploitation of marine resources. For that reason all nations of the world have a right and indeed a duty to proscribe and punish acts of piracy committed on the high seas not only for the protection of their ships but also because piracy is ***hostis humanis***. Botswana therefore has both a right to have ships flying her flags on the high seas and a duty under international law to protect its ships and shipping interests by enacting and enforcing laws that proscribe acts of piracy committed aboard such ships.[160]

Of the three afore mentioned offences, the courts of Botswana have only dealt with capital punishment in murder cases. Since independence the courts have not dealt with both treason and piracy. The discussion of the death penalty in Botswana will thus be based on murder offences. I will deal with the following issues around capital punishment as practiced in Botswana:

1. Whether it is a justifiable form of penalty

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[160] Daniel D Ntanda Nsereko op cit (n148) p242

2. Whether it provides effective deterrence in the fight against crime.

2. Constitutionality of the death penalty

The evaluation of the constitutionality of the death penalty in Botswana should begin with a look at this provision:

"*Whereas every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex but subject to respect for the rights and freedoms of others and for the rights and freedoms of others and for public interests to each and all of the following, namely-*

(emphasis mine)

(a) life, liberty, security of the person and the protection of the law;

(b) freedom of conscience, of expression and of assembly and association

While the constitution guarantees the right to life it does so subject to limitations. The right to life is therefore not absolute in Botswana. The limitations to the right to life are further illuminated by the following provisions:

> *"No person shall be deprived of his life intentionally save in the execution of the sentence of a court in respect of an offence under the law in force in Botswana of which he has been convicted."*[161]

This provision therefore provides a constitutional basis for the existence of the death penalty in Botswana. A person may lawfully be deprived of his life in the execution of a court sentence in respect of an offence he has committed. As we have already seen above the death

[161] Section 4(1) of the Constitution of Botswana

penalty can competently be imposed following convictions of treason, piracy and murder. The constitutionality of the death penalty in Botswana however remains debatable and indeed open to fundamental questions of morality and law. In this regard, the Constitution states;

> *"No person shall be subjected to torture or to inhuman or degrading punishment or treatment."* [162]

> *"Nothing contained in or done under the authority of the 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 form of punishment that was lawful in the country immediately before the coming into operation of this Constitution."*[163]

The Penal Code which introduced the death penalty in Botswana was enacted on the 10th of June 1964.[164] The Constitution was itself enacted on 30th September 1966. By subsection 2 of section 7, the Constitution made the death penalty, which predated it, consistent with its provisions and therefore lawful.

Is the death penalty not an inhuman punishment? Is it not a degrading punishment? If the answer to either or both of the questions is in the affirmative can we justifiably say that the death penalty is still a constitutionally sanctioned penalty in Botswana?

2.1Judicial attitude to the death penalty

[162] Section 7(1) of the Constitution
[163] Section 7(2) of the Constitution
[164] See Penal Code of Botswana p 1. See also Aguda JA *Ntesang v S* 1995 BLR at 160

Judicial response to the death penalty in Botswana can be described in two words mechanical and deferential. The judicial position is encapsulated in the decision of the highest court of the land, which is that; while the death penalty is regarded as cruel and inhuman, and degrading, parliament and not courts is responsible for promulgating laws. Courts must therefore apply the law as it is and hope that before long the matter will engage the attention of the law makers who would wake up to the unpalatable reality that the death penalty is inconsistent with the country's aspiration of being one of the great liberal democracies of the world.[165] The courts have on numerous occasions been called upon to deal with the question of the constitutionality of the death penalty with regrettable consequences. The case of ***Ntesang v State***[166] provides an eloquent testimony of the courts' attitude to this issue. The brief background to this case is that the appellant a 29-year-old man was convicted by the High Court of murder without extenuating circumstances and sentenced to death. He appealed against both the sentence and conviction. Our focus shall only be on the sentence. The appeal against the sentence was based on the ground that it was an inhuman and degrading punishment and therefore contrary to section 7(1) of the Constitution which makes any punishment or treatment which is inhuman and degrading unlawful.

The question was whether the Penal Code provision (section 25) which creates the death penalty is contrary to section 7(1) of the constitution. The second question was whether the form of execution (hanging by the neck) itself was inhuman and degrading and thus the Penal Code provision (section 26) creating it unconstitutional. In its terse judgment, the court said "despite that the death penalty may be considered elsewhere to be torture, inhuman or degrading punishment or

[165] Aguda JA *Ntesang v State* 1995 BLR 151 at 161
[166] Ibid

treatment, that form of punishment is preserved by subsection 2 of section 7 of the Constitution. Concluding its judgment, the court said; "I have no doubt in my mind that the court has no power to rewrite the Constitution in order to give effect to what the appellant has described as progressive movement taking place all over the world and give effect to the resolutions of the United Nations as to the abolition of the death penalty, while section 7 of the constitution prohibits any punishment which is inhuman and degrading subsection 2 thereof legalizes it as it says that all laws that were in place before the coming into effect of the constitution shall be regarded as consistent the provision of the constitution."[167] In essence what the court said was that it needed not examine the content and form of the particular punishment and determine if it was inhuman or degrading so long as such punishment preceded the constitution. This is a regrettable act of judicial deference. In a show of deference the court further says that it had no power to rewrite the Constitution. It is submitted here that the court has a duty to examine the method of execution and determine if it is inhuman and degrading. This attitude is a set back for the human rights movement in Botswana.

3. The impact of the extenuating circumstances clause

It has to be acknowledged that while the conviction rate for murder is high in Botswana, the rate of death sentences is correspondingly very low. For instance, in the year 2004 a total of 70 people were convicted of murder. Out of this only 3 were sentenced to death. This result is a consequence of the application of the extenuating circumstances clause in constraining the courts in imposing the death penalty. The legal position is that a court convicting a person of murder shall sentence him

[167] Aguda JA op cit (n155) at p166

to death.[168] However where the court in convicting a person of murder has found that there are extenuating circumstances, the court may impose any other sentence except the death penalty.[169]

3.1What are extenuating circumstances?

Extenuating circumstances are factors which have a bearing on the accused state of mind at the time he committed the offence which are sufficient to have a bearing on his\her state of mind sufficiently to abate his moral blameworthiness.[170] On this question, Holmes JA once said:

> *"... an extenuating circumstance is a fact associated with the crime which serves in the minds of reasonable persons to diminish, morally, albeit not legally, the degree of a prisoner's guilt."*[171]

Over the years courts have considered matters such as provocation, immaturity, intoxication, belief in witchcraft etc. as constituting extenuating circumstances.

3.1.2Procedure for establishing extenuating circumstances

The procedure is that upon conviction of the accused person for murder, the court calls upon him/her or the defence counsel to address it on the question of extenuating circumstances. The accused may lead evidence to establish this fact.[172] The court will then make a determination whether indeed extenuating circumstances are present in the case before it. If they are present, the court would then take its inquiry to a different level and establish whether such established facts, in their cumulative effect, probably had a bearing on the accused

[168] Section 203 of the Penal Code
[169] Section 203(2) of The Penal Code see also Ntanda D Nsereko op cit note 148 at p244
[170] Ammisah JP *Ndlovu` v State* 1995 BLR at 432
[171] *R v Biyana* 1938 EDL 310 at 311
[172] Ammisah JP *in Kelaletswe v S* 1995 BLR at 120

person's state of mind in doing what he did, and whether such a bearing was sufficiently appreciable to abate the moral blameworthiness of the accused in doing what he did.[173]

Having established the presence of extenuating circumstances, the court would then be free to impose any penalty other than death. This provision in the law is responsible for the reduction in the number of death penalties in Botswana. It is however interesting to observe that the section 203(2) says where a court in convicting a person of murder is of the opinion that there are extenuating circumstances; the court may impose any sentence other than death. This therefore saddles the court with discretion to impose the death penalty even when extenuating circumstances exist. The provision is merely permissive or enabling and not mandatory.[174] To their credit, courts in Botswana have as a matter of practice substituted the permissive with the peremptory and have evolved a practice which has assumed the status of law that where extenuating circumstances are established the death penalty automatically falls off the picture and sentence other than the death penalty is inevitably imposed. To date not once have the courts departed from this practice. In doing so the courts do invaluable service to the cause of restricting the usage of the noose in many cases where the facts of the case would permit its usage. However courts not being law makers can only do so much.

4. Justification for retaining the death penalty

Rape, robbery and murder are the fastest growing crimes in Botswana. In the year 2003 259 murders were reported, in the year 2004 268 were reported while in the year 2005, 375 murders were reported.[175]

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[173] Holmes *JA State v Letsolo 1970 (3) SA 476 (A)*
[174] op cit (n46) p246
[175] Botswana Police Commissioner Annual Report 2004 p7

In the country's 40 years of independence 38 people have been executed by hanging. There are currently three people on death row waiting to be executed.[176] Those in favour of the death penalty argue that the penalty serves a deterrent against violent crime; that it meets society's need for adequate retribution for heinous offences; and that the majority of the people regard it as an acceptable form of punishment.[177]

4.1Argument against the retention of the death penalty

The main arguments against the death penalty are that; it is an affront to human dignity; it cannot be corrected in case of error or enforced in a manner that is not arbitrary and that it negates the essential content of the right to life and other rights that flow from it.[178] Criminal trials like all human processes are fallible. Even the most careful of criminal courts may afterwards discover that it took a decision without knowledge of all the relevant facts.[179] The tragic case of ***Letlhogonolo Kobedi v S***[180]eloquently illustrates this point. The tragedy of the case compels that its facts be told in full; the prisoner a South Africa male was arrested and charged with murder and armed robbery in the Southern Division of the High Court of Botswana in 1995. His trial only commenced three years later in 1998. The prisoner spoke Sotho a language not spoken in Botswana. Upon commencement of the trial no Sotho interpreter was used. Proceedings were conducted in English. A *pro deo* lawyer was employed for him by the registrar of the High Court. The facts of the case are that the accused person and others not before the court robbed a wholesalers business. Shortly thereafter police cornered them and a shootout ensued. During the shoot out a police

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[176] *Ditshwanelo*- Botswana centre for Human Rights Annual Report 2005
[177] **S v Makwanyane** 1994 (2) SACR 158 (A)
[178] Ibid
[179] Kenneth Younger 'Historical Perspective' ***The Hanging Question*** edited by Blom Cooper (1969) p8
[180] Criminal Appeal No. 15 of 2003

officer was fatally wounded. The accused was then charged with his murder. He was duly convicted and sentenced to death. His appeal to the Court of Appeal failed and the State President refused to grant him clemency. The execution was delayed by an application of a stay of execution and a request for a retrial based on the failure of the accused to follow the English language proceedings. Meanwhile, his health quickly deteriorated. The long wait in the gallows made him suffer a mental break down. He also suffered from some medical condition which could only be treated by medical specialists in South Africa. In spite of all these the stay of execution was refused and on the 16th of November 2005 he was finally executed. Soon after his execution a police officer confessed to have accidentally shot his colleague during the shoot out. It further emerged that critical forensic evidence proved that at the time of the shootout, the accused was armed with a pistol and the police armed with AK 47 rifles. Forensic examinations revealed that the wounds that caused the death of the deceased were caused by a high calibre weapon such as AK 47. This evidence was always in the custody of the state and it withheld it from the court.[181] The forensic experts were never called to give this valuable piece of evidence to the court. Once again even the most seemingly careful of criminal trials is not devoid of fatal mistakes. We shall return to this question in succeeding paragraphs.

One of the main arguments made in favour of the death penalty in Botswana is that it follows a fair trial carried out in accordance with due process. Is this due process infallible and so safe that it warrants the continued usage of the death penalty? Let us closely examine the trial process involving murder cases in Botswana.

5. Murder trials in Botswana due process or façade

[181] See Press release of Ditshwanelo-Botswana Centre For Human Rights of 7th February 2003

As we have already seen above international law instruments which Botswana is privy to at the very minimum require that no person be deprived of his life arbitrarily. An arbitrary process has been described as one taken without due process. The person at the receiving end of the process is not afforded adequate opportunity to fairly defend himself. Those in favour of retaining the death penalty in Botswana's statute books argue that its imposition in Botswana is not arbitrary. Is this true? Let us look beyond the surface.

5.1Murder trial: Fairness or arbitrariness

The Constitution of Botswana does not impose any obligation on the state to provide indigent defendants with free legal representation.[182] The Constitution merely obligates the state to permit free choice of legal representation. Section 10(1) provides as follows:

1. If any person is charged with a criminal offence, then unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established or recognized by law.
2. Every person who is charged with a criminal offence-

(a) shall be presumed innocent until he is proved or has pleaded guilty;

(b) shall be informed as soon as practicable in a language that he understands and in detail, of the nature of the offence charged

(c) shall be given adequate time and facilities for the preparation of his defence

(d) shall be permitted to defend himself before court in person or at his own expense by a legal representative of his own choice

[182] Daniel D Ntanda Nsereko note 148 p265

(e) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court, and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before court on the same conditions as those witnesses called by the prosecution; and

(f) shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge..." (own emphasis)

6. The murder docket trail and sins of the pro deo counsel

In capital offences such as murder is in Botswana, these Constitutional guarantees are rendered nugatory by a multiplicity of factors. These include the fairness of the trial and the quality of legal representation. Let us take the right to legal representation. The value of legal representation in all criminal matters cannot be overemphasised. The stakes are even higher in capital offences. The first problem is that in the majority of cases, persons charged with murder in the Botswana courts are as a matter of the country's economic realities unable to afford the services of a lawyer. They inevitably fall into the category of persons represented by *pro deo* attorneys. Numerous problems are attendant to the instruction of *pro deo* attorney to represent defendants in Botswana courts.

6.1 The timing of the arrival of pro deo *counsel: too little too late*

The practice is that upon arrest of a murder suspect, police would detain him for questioning for the customary 48 hours at the end of

which they have to charge or release him.[183] In the event that they charge him the police on behalf of the Attorney General[184] then take him before the local magistrate court where a holding charge is read to him. The police prosecutor would then ask the court to remand the accused person in custody pending investigation. Inevitably the unrepresented accused is then remanded in custody for a renewable period not exceeding 15 days. At the expiry of the 14 days the accused is then brought before court for the extension of his detention warrant. This process normally goes on average at least for three years before a decision is made whether to finally charge the accused with any offence or release him.

The following process obtains between arrest and arraignment three years down the line. Firstly the local criminal investigation office allocates the case to an investigator who investigates and compiles a docket. Upon finishing investigations the docket is then handed to the local CID Chief who would read it and make recommendations either for further investigations or if he is satisfied with the investigations he then passes it on to the Regional CID Chief for his consideration. The Regional Chief would also peruse the docket and make recommendations whether any further investigations should be conducted or not. In the event that he is satisfied, the regional Chief would then pass the docket on to the Divisional CID Chief for final perusal. Like his subordinates, the Divisional Chief peruses the docket and determines if the evidence is sufficient or not. If it is not he would send it back to the original office for further investigation.

[183] Section 36(1) of the Criminal Procedure and Evidence Act (Cap 04:05) Laws of Botswana

[184] Section 13(1) of The Criminal Procedure and Evidence Act (Cap 04:05) Laws of Botswana

It is only when the divisional CID chief is satisfied that the docket would be dispatched to the Attorney Generals office for consideration. It is at this stage that the case for the first time receives professional evaluation by trained lawyers. As non of the police chiefs who did the initial evaluations is legally trained, chances that the lawyer to whom the case is allocated for decision whether to prosecute or not will find irregularities which will force him to send the docket back to the sender for further investigation and or for clarification are very high. When the state counsel is satisfied with the evidence gathered, he then prepares a summary of evidences and makes a recommendation to the Attorney General that the accused be indicted of murder or manslaughter as evidence would dictate. The Attorney General then signs the indictment. The docket is then sent back to the local police station where a local police prosecutor then takes the accused before court for committal to the High Court. The local magistrate would then read the indictment to the accused and inquire from him if he is ready to trial. The accused would then be committed to the High Court for trial. ***It is at this stage three to four years down the line that the* accused would be asked if he can afford a lawyer.** If he cannot, a *pro deo* lawyer is found for him. In practice *pro deo* lawyers are instructed upon preparation of the roll when the case is already allocated to a trial judged and often after a trial date is fixed. The lawyer would in most cases meet the accused for the first time on the floor of the court and hold a brief meeting with him/her before court starts. Nine out of ten times a conviction would be inevitable. What difference can a lawyer who is instructed so late do? The accused person would by now have been pressured into confessing the murder and his confession statement firmly in the docket.

This process renders the constitutional guarantees a nugatory and conviction and hanging inevitable. When the criminal trial starts, the dice is already loaded against the accused person. His indigent status

means that he is represented by a pro deo counsel. Because of the unprofitability of the pro deo fees, law firms usually send green horned upstarts to represent the accused. The second casualty of this convoluted process is the constitutional guarantee of trial within a reasonable time.[185] Ironically, while the accused person would have been languishing in custody for three years or more he is only informed of the charge a few weeks before the trial. He is thus denied adequate time and facilities for the preparation of his defence and yet another constitutional guarantee becomes a casualty.[186] Because of inadequate consultation with the barely interested pro deo counsel, the accused would rarely call witnesses. Murder trials under these circumstances bear all the hallmarks of an unfair trial. The fairness of the trial does not begin in the court room but rather it begins upon arrest of the suspect. The constitutional guarantees for a fair trial as entombed in Botswana's Constitution offer no shelter to persons charged with murder in Botswana as they are deprived of the facilities, time and opportunity to access a lawyer at the most critical stage of the proceedings when they are subjected to all sorts of pressures during investigation. As a result while the legal position in Botswana is that the right to legal representation accrues upon arrest,[187] for murder suspects it accrues when the case is placed on the roll. Underscoring the significance of the right to legal representation an American judge, Justice Sutherland said:

> ***"Even the intelligent educated layman has a small and sometimes no skill in the science of law. If charged with crime, he is incapable generally of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence, left without aid he may be put on trial without a proper and convicted upon***

[185] Section 10(1) of the Constitution of Botswana
[186] Section 10(2)(b) of the Constitution of Botswana
[187] Marumo J *in Makopong v S Crim App 66/2001* (unreported)

> ***incompetent evidence, or evidence irrelevant to the issue, or evidence which is otherwise inadmissible. He lacks both the skill and the knowledge adequately to prepare his defence even though he had a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he is not guilty, he faces the danger of conviction because he does not know how to establish his innocence...***"[188]

The right to legal representation remains a hollow salutation without its practical manifestation where it matters most. The right remains dangerously a court room right.[189] It is without doubt that the continued presence in Botswana's statute books of the death penalty imposed against the backdrop of such a skewed criminal justice process is unjustifiable. An evaluation of 100 hundred murder cases that were completed by the Botswana High Court in the past 18 months reveals an ominous trend. Out of the 100, 95 suspects had tendered confessions to the police in the first week of their arrest. All were detained for the entire period between arrest and trial ranging from 24 months to 48 months. All had no access to legal representation up until the matter was committed to the High Court for trial. During trial 90 of the suspects alleged to have been tortured before confessing. Of the 90, 85 confession statements were thrown out by the courts on account of

[188] *Powell v Alabama* 287 US 45 (1932)
[189] Baatlhodi Molatlhegi 'The Right to Legal Representation in Criminal Proceedings in Botswana: More than a Court Room Right for the Knowledgeable Suspect' *SAJHR* Vol 13 1997 p458

inadmissibility[190] owing to evidence of torture by the police during detention.[191]

The case of ***Lesego v S***[192] Thebe is perhaps an eloquent testimony of the dangers in the investigation and prosecution of capital offences in Botswana. In this case three murder and robbery suspects were arrested by the Botswana police in Gaborone. During detention they were subjected to brutal torture which left one of the suspects dead and the other two seriously injured. The interrogating officers were then charged with murder and grievous harm. Three of the officers were convicted of the murder. This case brought to the fore what most if not all suspects go through while in police hands during the pretrial stages. The Judges Rules are blatantly disregarded by police during interrogation and the suspects' right to silence nullified by coercion. The trial judge citing the words of Chief Justice Warren of the US Supreme Court said; "*Prior to questioning, the person must be warned that any statement he makes may be used as evidence against him.. If however he indicates in any manner that he wishes to consult an attorney before speaking there can be no questioning. Likewise if the individual is alone and indicates in any manner that he does not wish to be interrogated the police may not interrogate him*"[193] These words went unheeded and to this date illegally obtained confession statements continue to blight proceedings in capital offences cases in Botswana. Convictions secured under such circumstances will continue to be unsafe and the death penalty meted out as a result of the convictions unsafe. The gulf between the constitutional safeguards and the practical realities faced by murder

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[190] Section 228 of the Criminal Procedure and Evidence Act of the Laws of Botswana makes any confession statement which has not been freely and voluntarily made inadmissible.

[191] Source- Archives of the Botswana High Court.

[192] Criminal Appeal 4 of 1991 (unreported)

[193] Op cit (n182) at p25

suspects in Botswana renders the continued usage of the death penalty a lottery. A death penalty imposed in the absence of fair trial is arbitrary and unfair. It therefore follows that the constitutional safeguards on paper merely musk what is in essence an arbitrary process.

The arbitrariness of the process is also revealed by the casual manner in which some murder convicts are sent to the gallows while some escape with a short prison sentence. The extenuating circumstances clause while it is welcome in so far as it limits the scope of the application of the death penalty, it also lends itself to arbitrary usage. It is purely up to the whim of a particular judge to accept or reject a fact as constituting extenuating circumstances. This whimsical judgment then makes the difference between life and death.

7. The haves and the have nots

The absence of legal aid across the board in Botswana's criminal justice system has created one justice for the haves and another for the have not. Two cases serve to illustrate this unsavory state of affairs. ***State v Bissau Gaobakwe***[194] Criminal trial 300/04 on one hand and that of ***State v Mothibi***.[195] Both accused person faced murder charges. ***Bissau Gaobakwe*** is a son of a prominent businessman and political kingmaker of profound influence in Botswana. He, in 1998 shot and mortally wounded one man known as ***Itseng Kwelagobe*** at a party in Gaborone. He immediately went on the run and was arrested after five years while on the run. He was then charged with attempted murder and arraigned before the Lobatse High Court. He used his considerable wealth to get arguably the best lawyer in town who promptly applied for his bail. Despite his being a flight risk he was granted bail. His trial was then conducted admist fanfare and ended in an anti climax. He was

[194] Criminal Trial 300 of 2004 (unreported
[195] Criminal Trial 201/2004 (unreported)

convicted of attempted murder and contrary to precedent sentenced to 12 months imprisonment for which he only served six in custody and the rest in n the comfort of his him was doing community service at a local police station. In contrast Mothibi a poor peasant with no formal education was charged with murder which he allegedly committed in 1998. He never went into hiding but was arrested and detain from 1998. He had neither financial resources nor the ability to argue for bail. As a result he remained in custody for four years when the matter came up for trial. Meanwhile he incriminated himself during interrogation and purportedly confessed to the murder. A lawyer was found for him during trial. But the damage had already been done he was predictably convicted and sentenced to death. He is currently on death row.

8. Summary

Our discussions of the inherent weaknesses in the trial processes that lead to the imposition of the death penalty are adequate to compel its immediate removal from the statute books. Fair trial is just not possible under these circumstances. The public outcry on the ever rising murder rate puts pressure on the police and prosecutors to attain conviction at any rate often leads to shortcuts and breaches of procedural protections. The case of ***Letlhogonolo Kobedi*** amply illustrates this point. The interrogation of capital offences suspects without the presence of counsel are nothing short of scandalous.[196]
Secondly, the continued usage of the death penalty has not had any deterrent effect on would be murderers. In fact there is evidence to the contrary. The murder rate is on an unprecedented upward spiral in spite of the hangings.[197] The Midweek Sun Newspaper[198] paints the murder rate in the following words:

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[196] Roger Hood note 135 p18
[197] Speech by P. Skelemani Botswana's Minister of Presidential Affairs and Public Administration, Botswana Police News letter Vol.2 No. 22 p3

> *"As the year 2005 closes many people will be making long journeys to their home villages to celebrate the festive season. However, this will be a time for a good number of families to regroup and count their losses having lost their loved ones in the murder suicide killings. Not only did the killings increase this year they became more gruesome. In his state of the nation address the President expressed concern at the escalating rate of killings."*

The escalating murder rate surely defeats the deterrent argument as the bases for retaining the death penalty. Replicating the cruelty of the criminal is no solution to the murder problem.

Thirdly, the concept of cruelty of the death penalty transcends physical torment. It is implicit in the power relations between the mighty state with infinite resources on one the hand and the powerless defendant with no resources to wiggle out of his plight. Thus it is the interaction between the condemned helpless defendant and the annihilating state that reveals the very essence of the cruelty of the death sentence. [199]

Once again the death penalty is inhuman and without doubt degrading. The cruelty of torture is evident. Like torture, an execution constitutes an extreme physical and mental assault on the person already rendered helpless by government authorities. The cruelty of the death penalty is manifest not only in the execution but also in the time

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[198] 21 December 2005 at p3

[199] Hugo A. Bedau *Death is Different: Studies in Morality, Law and Politics of capital Punishment* (1987), 307

spent under sentence of death, during which the prisoner is constantly contemplating his/her own death at the hands of the state. The cruelty cannot be justified no matter how cruel the crime of which the prisoner has been convicted. It is impermissible to cause grievous physical and mental harm to a prisoner by subjecting him/her to electric shocks and mock executions. How can it be permissible for public officials to attack not only the body or the mind but the prisoner's very life?[200] Its imposition is incompatible with a political culture based on human rights.[201] It is to be hoped that political and judicial leaders will emerge in Botswana just as they have in Namibia and South Africa with courage, whatever the opinion polls may show, to declare the death penalty to be incompatible with a political culture which values human rights.

[200] Eric Prokosh 'The Death Penalty v Human Rights' ***The death penalty beyond Abolition*** (2004), p24
[201] Roger Hood note 135 p19

CHAPTER VI

1. COPORAL PUNISHMENT

T Scholars and practitioners in the criminal justice system agree on one thing that crime must have a reciprocal cost to the perpetrator.[202] The confluence of opinions ends here. Beyond this point is a polemical terrain littered with a litany of theories and arguments on what an appropriate penalty for offending behavior is. The essential element of any civilization is its ability to cast of violence.[203] The decisive factor that sets a civilized society apart from a barbarous one is that of capacity to symbolize, to solve the problems abstractly.[204] The miles that human civilization has travelled have led to an evolution in the appreciation of human innate bodily integrity. This realization has meant that bodily punishments are thought of as repugnant. Imprisonment was civilization's response to punishment that focused on bodily mutilation. There is in all civilisation recognition that a person's physical being is sovereign.[205]

1.1 The law on corporal punishment in Botswana

This recognition has unfortunately not arrived at the same time for all nations of the world. Botswana is unfortunately one country where this realisation is rather late in arriving. Corporal punishment is still a lawful punishment in Botswana.[206] There are various types of corporal punishment and not all have the same physical and mental effects. There is the lash-***thupa*** usually applied on the bare buttocks, the paddle, electric shock, denial of sleep, making the offender stand in a certain position for long periods, inadequate diet, imposition of hard labour

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[202] Graeme Newman Just and Painful Macmillan Publishers: London 1983, 140
[203] Ibid p34
[204] S. Garn *Culture and the Direction of Evolution* Wayne State University Press: Detroit 1964, as quoted by Graeme Newman op cit (n202) at 80
[205] Graeme Newman op cit (n202) p28
[206] Section 25(c) of the Penal Code

etc.[207] However, in Botswana the lawful method is administration of a cane to the bare buttocks. On this point the law prescribes as follows:

"When a person is sentenced to undergo corporal punishment such sentence of caning shall be in accordance with the following provisions-

(a) the caning shall be carried out in a manner and with a cane prescribed by the minister who may approve different types of pain for different types of people;

(b) no caning shall be inflicted on any convicted person until he has been certified by a medical doctor to be a person fit for such punishment; caning shall only be inflicted in the presence of the medical officer or in his absence in the presence of a magistrate; the medical officer shall immediately stop the infliction of further punishment if he considers that the convicted person is not in a fit state of health to undergo the remainder thereof and shall verify the fact in writing;

(c) whenever the medical officer or magistrate has certified that any prisoner sentenced to undergo caning is not in a fit state of health to undergo the whole or remainder thereof he shall immediately transmit his certificate to the court having jurisdiction which may substitute another punishment in lieu of the sentence of caning; such prisoner may lawfully be kept in custody pending the decision of the court to which the medical officer or magistrate has transmitted his certificate as hereinbefore provided;

(d) no sentence of caning shall be carried out by installments;

[207] Graeme Newman op cit (n 192) p16

(e) where in any one sitting of the court more than one sentence of caning is imposed on any person, the sentences shall be deemed to be one sentence for purpose of subsection 2 of section 28 of the Penal Code

3. Every sentence of corporal punishment must be carried out in private in a prison.

On the type and size of the cane appropriate the law states as follows;
2"Corporal punishment shall be administered as follows-

(f) In the case of males of the age of 18 years or over, with a rattan cane which shall be 1,218 metres and 12,7 millimetres in diameter;

(g) In the case of males under the age of 18 years with a rattan cane which shall be 0,914 metres long and 9,525 millimetres in diameter

3. Corporal punishment shall be administered on the buttocks only and on no other parts of the body."[208]

The above provisions of the law were clearly intended to add some palliative to an otherwise acutely painful and inherently undignifying form of punishment. Do the palliative measures put in place make corporal punishment more tolerable? Does the presence of a medical doctor or magistrate who may stop any further infliction of the punishment if the offender's body can't take it make it more human? These are some of the questions, which we shall in the course of this paper answer.

[208] Criminal Procedure Corporal Punishment Regulations (Cap 08:02) Laws of Botswana

1.2 Scope of application of corporal punishment

While the few jurisdictions that still retain corporal punishment reserve it for violent crimes, this is not the case is Botswana. The penalty is applied in a variety of offences in Botswana. An important principle in the application of corporal punishment in Botswana is that the penalty is embodied in section 28 of the Penal code which says;

"Subject to the provisions of subsection (4), no person shall be sentenced to undergo corporal punishment for any offence unless such an offence is specifically authorized by this code or any other law. " (own emphasis)

Courts do not therefore have a free hand in choosing which offences attract the penalty. In meting out the penalty, the court shall order that it be carried out once.[209] This prevents the possibility of staggering the penalty and administering it over an extended period. The constitutional significance of this provision will be discussed shortly in succeeding paragraphs. The sentence shall also specify the number of strokes to be administered and these shall not exceed 12 for persons above the age of 18 and shall for persons below the age of 18 not exceed 6 .[210]

1.2Categories of persons on whom it is applicable and not applicable

The following persons are exempted from corporal punishment;

- Females
- Males sentenced to death
- Males whom the court considers to be more than 40 years of age[211]

A penalty of corporal punishment may be imposed on all males from the age of 14 years to 40 years.

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[209] Section 28(2) of the Penal Code
[210] Section 28(2) of the Penal Code
[211] section 28(3)(a)(b)(c)

1.3Categories of offences for which corporal penalty is applicable

The following classes of offences attract corporal punishment;

- ***Property related offences***- The offences include house breaking,[212] entering a dwelling house with intent to commit an offence,[213] shop breaking[214] and all offences relating to breaking and theft across the board
- ***Offences against the person***. These include rape,[215] attempted rape,[216] indecent assault on females,[217] defilement of girls under the age of 16 years,[218] defilement of imbeciles,[219] male persons living off the proceeds of prostitution,[220] disabling in order to commit an offence,[221] intentionally endangering the lives of persons traveling by railway,[222] grievous harm,[223] robbery,[224]
- ***Drugs related offences***; unlawful possession of drugs and dealing in drugs attract corporal punishment[225]

Interestingly, there is inconsistency in the application of the penalty. The punishment is mandatory for some offences and discretionary for others. Ordinarily, mandatory sentences convey the legislature's serious view of the offences on which the mandatory penalty is attached.[226] Defilement of boys under the age of 14 years does not attract corporal

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[212] section 300 of the Penal Code
[213] section301 of the Penal Code
[214] section 302 of the Penal Code
[215] section 142 of the Penal Code
[216] section 143 of the Penal Code
[217] section 146 of the penal Code
[218] section 147 of the penal code
[219] section 148 of the penal code
[220] Section 155 of the Penal Code
[221] Section 225 of the Penal Code
[222] Section 220 of the Penal Code
[223] section 230 of the penal Code
[224] section 292 of the penal Code
[225] section 3(1) of the Drugs and Related Substances Act
[226] Aguda JA *Petrus v State*

punishment. Is the legislature saying that this is less serious than defilement of girls for which corporal punishment is attached to a term of imprisonment?

1.5 Discretionary vs. mandatory application of corporal punishment

Similarly the promulgation of a mandatory minimum penalty is communication by the legislature that he/she attaches greater seriousness to the offences on which mandatory minimum penalty is attached. If this principle is true then the Botswana's legislature has a humorous sense of appreciation of what is serious and what is not serious. Two patterns emerge from an analysis of all offences attracting corporal punishment in Botswana; firstly there are those offences for which the application of the penalty is discretionary. The penalty is couched in these terms; with or without corporal punishment; in the second category the law says a term of imprisonment with corporal punishment.

1.6 Offences for which imposition of corporal punishment is mandatory

The penalty provision of this category of offences is couched in the following terms: ...is liable to imprisonment for a term not exceeding 14 year with corporal punishment. The following offences fall into this category:

- Drugs and related Substances
- All breaking related offences
- Rape
- Grievous harm
- Robbery
- Attempted robbery

- Male living off the proceeds of prostitution
- Procuration

1.7 Offences for which imposition of corporal punishment is optional

The penalty provision of this category of offences is couched as follows; is liable to a term of imprisonment with or without corporal punishment. The following offences fall into this category;

- Attempted rape
- Intentional harm of the lives of persons traveling on railway
- Assault occasioning actual bodily harm
- Disabling in order to commit an offence
- Defilement of imbeciles
- Defilement of girls under 16 years of age
- Indecent assault on females

1.8 What message does the categories convey?

Why corporal punishment is made mandatory for house breaking and optional for attempted rape boggles the mind. The only explanation one can muster is that the choice was arbitrary and nothing else.

8. CUSTOMARY COURTS AND CORPORAL PUNISHMENT

The entry into the picture of the customary courts adds another interesting and painful dimension to the picture. As pointed out earlier in chapter II, customary courts in Botswana have jurisdiction to try criminal cases. Statistically, the customary courts try most of the criminal cases in Botswana. Similarly these courts mete out most sentences of corporal punishment. This has serious implications for human rights. The following areas create human rights problems;

1. the scope of the application of the penalty
2. the fairness of the trial in the customary courts
3. the absence of legal safe-guards that are present in the application of the punishment in the magistrate courts
4. method of administration off the penalty

8.1 Corporal punishment in the customary court

As we noted earlier customary courts in Botswana have jurisdiction to try criminal cases[227] an upon conviction sentence the offender to either a fine, imprisonment and to corporal punishment or to a combination of such punishments.[228] By far, the customary courts try the majority of criminal cases tried by the courts in Botswana. As a result the majority of prison inmates in Botswana are from the customary courts. Ominously thousands of convicts are sentenced to corporal punishment by these courts. Unlike the magistrate courts, the imposition of a sentence of corporal punishment in the customary courts is without any legal constraints. Carte blanche, customary courts may impose a sentence of corporal punishment on all offences they try. Whereas in the magistrate courts corporal punishment may only be imposed in offences where the law creating the offence specifies it as a competent penalty the customary courts suffer from no such a constraint.[229] Further in the name of tradition the instrument used to effect corporal punishment is not limited by any measurement as is the case in the magistrate court. Here a ***thupa-*** lash is to be used. [230] Its length and size are not restricted. Unlike in the magistrate courts, the law does not enjoin a chief imposing a corporal punishment to order that the convict be subjected to medical examination before the

[227] Section 12 of the Customary Courts Act,
[228] Section 18 of the Customary Court Act
[229] section 18 of the customary courts Act
[230] Section 2 Customary Courts(Corporal Punishment Rules)

administration of the punishment, neither is the customary court enjoined to order that a medical doctor be present when the penalty is administered. The modicum of palliation that is put in place by the law in respect of magistrate courts to put a human face on the palpably inhuman and degrading punishment is tragically absent. Thus a degrading punishment is administered with no lawful constraints. Invariably, the punishment is meted out immediately after the conviction whose safety is always in question and on the spot in public. Because of the sheer volumes of cases that come before the customary courts, lots of people face this humiliating experience on a daily basis.

8.2 Impact on human dignity

The continued usage of corporal punishment in Botswana is clearly inhuman and degrading and contrary to human decency. Respect for human dignity is implies respect for the autonomy of each person and the right of everyone not to be devalued as a human being or treated in an inhuman and degrading or humiliating manner.[231] Botswana has no system of traditional criminal law. The source of criminal law is one- written law *viz* the Penal Code and all other offence creating statutes such as the Stock Theft Act, Drugs and Related Substances Act etc. There is therefore no system of customary criminal law reserved for administration by the customary courts. The so called customary courts do not therefore apply custom but preside over criminal cases in terms of modern written law just like magistrate courts. Add the fact that the choice of the forum is reserved to the police with the accused or the complainant having no say then you have a human right violation in your hands. The basic criteria used by the police for

[231] Arthur Chaskalson op cit (n22) p134

preferring the customary courts over the magistrate courts are the strength of the evidence gathered by the police. The weaker the evidence, the more the likelihood that the case will be taken to the customary court for trial because rules of evidence and procedures in these courts are lax if not existent. Conviction is easier to achieve unlike in the magistrate courts where rules of evidence may exclude the admission of certain pieces of evidence. In this courts conviction with scantiest evidence such as a statement made by one accused to another or a confession to the police officer and hearsay find their way onto the pressing officer's record. These factors make the continued usage of corporal punishment a human right violation.

Historically, the alternative to imprisonment was corporal punishment was imprisonment. Imprisonment can at least be divided into weeks, months and years and its duration prescribed by standards. Given the numerous possibilities that modern technology affords the infliction of pain and the difficulty of measuring the subjective degree of distress, effectively controlling the use of corporal punishment is virtually an impossible task. Beyond the problem of effective control, corporal punishment poses disturbing ethical problems. Besides any physical pain involved, intentional corporal punishment evokes in its victim intense feelings of humiliation and terror. Ought a civilized nation to visit such mortifications? Doesn't there not exist a right to the integrity of one's own body that not even the state's interests in punishing may override?[232]

9. Justification for corporal punishment

Imprisonment places a burden on the state and ultimately on the tax payer including the victim of the crime that landed the convict in jail.

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[232] A. Petri *Individuality in Pain and Suffering* (1961) p5

Imprisonment has wider socio-economic consequences than corporal punishment as the taking away of the offender from his family robs it of a bread winner and thus economically punish even the non offending members of his family. In contrast the effects of corporal punishment are localized to the offending individual and in no way impact on members of his family. On this question, author Graeme Newman had this to say;

> ***"a comparative analyses of the pains caused by the various types of punishment is , however, the most useful. It is clear that prison has the very severe economic effects on the offenders' family, as do heavy fines. In contrast, physical punishment which are confined to administering pain to the body over a brief period of time, such as a particular number of strokes of the lash, do not have the carry over effects upon others who depend upon the offender for their livelihood."***[233] ***There are a variety of corporal punishments available that are much less mutilating, or not mutilating at all. These include electric shock. If properly administered electric shock leaves no bodily scars or mutilation and therefore does not leave behind any mental anguish or stigma that goes with bodily mutilation.***[234]

9.1 WHY CORPOAL PUNISHMENT IS REPUGNANT

Three factors render corporal punishment repugnant:

1. Mutilation
2. Excess
3. violence

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[233] *Just and Painful* Macmillan Publishing: London
[234] Graeme Newman op cit (n192) p28

The past of human civilization is littered of anecdotes of horror and savagery. This savagery cannot be denied for all human cultures and there is always a danger of sinking back.[235] However humanity has man strides in discovering the sovereignty of the human body. The person is now no longer viewed as a thing but a psychological entity worthy of respect. Mutilating punishments are barbaric because they violate the body's integrity which is a value we have come to respect as a civilisation.[236] The use of the cane is no doubt a violent process.

10. THE CONSTITUTIONALITY OF CORPORAL PUNISHMENT IN BOTSWANA

Botswana regards itself as a liberal democratic state with a constitution which is the supreme law of the land. There is a separation of powers between the three arms of the state namely; parliament, the executive and the judiciary. The role of parliament is to legislate and in so far as legislative work is concerned, parliament is supreme. However Botswana being a constitutional democracy, parliament is supreme only in the exercise of legislative powers It is not supreme in the sense that it can pass any legislation which is ***ultra vires*** the provisions of the Constitution.[237] Therefore the judiciary in its supervisory role over the arms of government may declare all laws that are inconsistent with the constitution unlawful.[238] Any piece of legislation is subject to the scrutiny of the courts at the instance of any citizen and in appropriate cases at the instance of a non citizen.[239]

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[235] Graeme Newman note 80 p28
[236] Graeme Newman note 80 p28
[237] Aguda *JA Petrus v State* 1984 BLR 14
[238] *Dow v Attorney General* 1992 BLR119
[239] Aguda JA Petrus v State supra at p33

How then do the laws creating corporal punishment reflect against the country's Constitution? As noted above the following provisions of the law creates corporal punishment; section 25(c) of the Penal Code and indeed section 305(1) of the Criminal Procedure and Evidence Act and the regulations thereof. Section 7 of the Constitution says; no person shall be subjected to torture or to inhuman or degrading punishment or other treatment. Is corporal punishment not an inhuman and degrading punishment and therefore contrary to this constitutional principle? This matter came before the Botswana Court of Appeal- the highest court of the land in significant cases. These are ***Petrus v State***[240] and ***Desai and others v State.***[241] Let us briefly look at these two cases; ***Petrus v State***, here the accused person was charged with House Breaking contrary to section 305 of the Penal Code. The section provided as follows;

> ***"Any person who breaks and enters any building with intent to commit therein any offence punishable under this code is guilty of an offence and liable to imprisonment for ten years with corporal punishment."***

The accused was convicted by a magistrate court and sentenced to three years imprisonment and to 6 strokes of the cane. The strokes were to be administered on intervals in accordance with section 301(3) of the criminal Procedure and Evidence Act. This latter provision was problematic as it provided that;

> ***"Notwithstanding anything to the contrary contained in section 61(2) of the Magistrates Courts***

[240] 1984 BLR 14
[241] 1987 BLR 55

Act and section 30 of the Penal Code and the preceding provisions of this section, where a person is sentenced to undergo corporal punishment, such person shall be given four strokes each quarter of it in the first and last years of his term of imprisonment and such strokes shall be administered in traditional manner with traditional instrument at such places as such be designated by the minister."

Three questions came before the court for determination;

(a) whether the combination of the imprisonment with corporal punishment was unconstitutional

(b) whether corporal punishment was unconstitutional

(c) whether the administration of corporal punishment in instalments was unconstitutional

The court then decided as follows; On the question whether corporal punishment is inhuman and degrading punishment and therefore in violation of section 7(1) of the constitution which prohibit inhuman and degrading punishment, the court said that while corporal punishment may be inhuman its lawfulness was saved by the derogation clause found in subsection 2 of section 7 which makes all manner of punishments which were in place before the coming into being of the constitution lawful. For this reason the administration of corporal punishment in Botswana is constitutional.

On the second issue the court said the combination of imprisonment and corporal punishment was lawful and on the third issue the court held that corporal punishment administered in instalments is inhuman and degrading and therefore unconstitutional.

Three years later the court was once again called upon to determine on the constitutionality of corporal punishment in Botswana in the Desai case. In ***Desai and Others v The State***[242], three accused persons were in this case charged with unlawful possession of Drugs in contravention of section 3(1) of The habit Forming Drugs Act. The penalty provision of the section provided that upon conviction the court shall sentence the accused person to the following punishments;

(a) imprisonment for a term not less than 10 years or more than 15 years;
(b) a fine of not less than P15 000 or in default of payment, additional imprisonment of not less than three years or more than 5 years;
(c) corporal punishment
(d) not withstanding any law to the contrary, the court shall not order that the operation of part or any whole of the sentence be suspended

The accused persons were sentenced to the mandatory minimum sentences as prescribed by the statute. Each got 10 years imprisonment, a fine of P15 000 and 6 strokes of the cane. All three appealed against sentence on the grounds that;

- the combination of the penalties rendered the sentence inhuman and degrading
- corporal punishment is an inhuman and degrading punishment.

The high court saw nothing wrong with the sentences and dismissed the appeals. The matter was then taken before the court of appeal. At issue was the constitutionality of corporal punishment. The

[242] 1987 BLR 55 (CA)

court held that the combination of the three penalties rendered the sentences excessive and consequently inhuman. On the issue of corporal punishment the court said that " much as we personally dislike corporal punishment, and despite the fact that judicial flogging has been abolished in many countries of the civilized world, the stage has not yet been reached where it can be said that it has been abolished, like slavery throughout the world."[243] Regrettably the court spurned an opportunity to advance the course of human rights and declare the punishment unconstitutional. The court reasoning was perturbing to say the least. Need an act be banned the world over for it to constitute an unconstitutional act in Botswana. The court was called upon to determine if corporal punishment is inhuman and degrading on the basis of Botswana's constitutional provisions. This it failed to do. The dissenting judgment of Aguda J however provides hope for the future. The following words fell from the eminent lips of His Lordship Aguda:

> ***"...I must express my dissent with regard to certain observations of the learned President... In his judgment he expressed his personal opinion that corporal punishment of an adult is not per se inhuman or degrading in all circumstances. After very sober consideration and having given due respect to his opinion, I find that I am convinced beyond any shadow of doubt that the mere imposition of corporal punishment is under any circumstances at this day and age certainly degrading if not inhuman. Serious offences may demand aggravated punishment-and even then within the limits of human decency. But the imposition of corporal punishment is not meant to serve any of the ends of punishment as are now regarded the***

[243] Judgment of Maisels JP at p63

world over as justified. The main purpose of criminal justice is to reduce if not to eliminate totally the incidents of crime, and that end is not served by the imposition of a corporal punishment. Incarceration in prison or such other place of custody assures society that the person is unable to do more harm during the period of incarceration..."[244]

The crime statistics cited earlier in this paper indicate in very clear terms that despite the harsh penalties imposed on offenders by the courts, crime levels continue to rise. This reality brings home one lesson which the history of penology has taught us, that the mere severity of punishment is not effective in the suppression of crime. Apart from this, while it is certain that the consequence of corporal punishment is to degrade men and make them callous, the effect of it as a deterrent is both uncertain and open to question.[245]

Summary

Dignity is no doubt a foundational value on which all other rights are based. The right to life, the right to housing, the right to health and indeed the right to personal liberty cannot be protected and competently guaranteed without according proper respect and protection to human dignity. Human dignity is therefore the pivot around which all these other rights revolve. As the German constitution says; the dignity of man is inviolable.[246] The subjection of individuals to corporal punishment no matter what their crimes violates this sacred value. It is therefore time that Botswana's constitution particularly section 7(2) which makes

[244] Op cit at p66
[245] Commission into Assault on Women U.G. No. 39 of 1913 as cited by Ellison Khan note 8 p192
[246] Article 1 of the German Constitution

corporal punishment lawful, be removed from the statute books. The same Constitution cannot seek and purport to provide protection to basic human rights and yet provides leeway for the violation of the founding norm that breathes life into all these other rights. If a treatment or punishment is in violation to human dignity it must not be allowed to stand. The basic concept of human dignity is at the core of the prohibition of cruel punishments.[247]

[247] *Trop v Dulles* (1958) 356 US 86 p100

CHAPTER VII

1. RISE IN CRIME AND MANDATORY SENTENCES

Sentencing in Botswana is a reflection of a confluence of quadruple factors. These are crime control, community pressure, service delivery and the demands for protection of human rights. Since independence, Botswana has witnessed a sharp increase in crime.[248] Perhaps second to HIV/AIDS, crime is the major concern of the majority of Botswana. Very often public opprobrium against crime is directed at the courts who are accused of passing too lenient sentences. And quiet strangely the presence of lawyers to defend crime suspects is viewed in a dim light by the public. From a public's perspective the rise in crime is attributable to lenient sentences and lawyers who assist criminals get of the hook. The opprobrium has not escaped the legislatures who have also jumped on the band wagon and often indulge in court bashing. The legislatures have gone further and responded by promulgating draconian mandatory and minimum sentences. The following statutes carry mandatory minimum sentences:

The Drugs and Related Substances Act[249]

The Wild Life Conservation and national Parks Act[250]

The Stock Theft Act[251]

Road Traffic Act[252]

The Penal Code[253]

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[248] P Sekelemani Minister of Presidential Affairs and public administration *Botswana Police Magazine* Vol. XI No. 12 2005

[249] (Cap 63:01) of the Laws of Botswana

[250] (Cap 38;01) of the laws of Botswana

[251] (Cap 09:01) of the Laws of Botswana

[252] (Cap 69:01) of the Laws of Botswana

[253] (Cap 08:01) of the Laws of Botswana

1.1 Definition

A mandatory sentence is one that is prescribed by the legislature which leaves the court with no discretion at all in respect of the kind of sentence to be imposed or, in the case of imprisonment, the period thereof. It reduces the court's normal sentencing function to the level of a rubber stamp.[254] This therefore means that as soon as the preconditions for its imposition exist, the prescribed penalty must be imposed.[255] Botswana's statute books are replete with examples of these kinds of sentences. For example section 202 of the Penal Code provides as follows; "subject to the provisions of subsection 2, any person convicted of murder shall be sentenced to death." The provisions of subsection 2 are; "where a court on convicting a person of murder is of the opinion that there are extenuating circumstances, the court may impose any sentence other than death."

Therefore following a conviction of murder, the court must make a determination whether extenuating circumstances exist or not. If they do not exist, the court has no choice but to impose the death penalty. Death penalty is therefore mandatory where no extenuating circumstances are found.[256] However mandatory sentences are different from minimum sentences.

1.2 Minimum sentences

Minimum sentences are sentences in which the legislature has prescribed the lowest rung of the sentence below which the court is not competent to go. The court is thus deprived of discretion on the lowest sentence it can impose but retains its discretion on the upper limits. In this regards section 142 of the Penal Code Provides thus;

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[254] Smalberger JA ***State v Toms: State v Bruce*** 1990 2 SA 802 (A) at 806-807
[255] SS Terblanche *The Guide to Sentencing in South Africa (*1999) p63
[256] SS Terblanche op cit (note 242) p63

"Any person charged with the offence of rape shall upon conviction be sentenced to a minimum term of 10 years imprisonment."

On the same vein, The Habit-forming Drugs Act s.3 (1), (2) and (3) provide as follows:

"3. (1) except as provided by this Act, no person shall -

(a) deal in any habit-forming drug or any plant from which an habit-forming drug can be manufactured; or

(b) possess or use any such drug or plant.

(2) Any person who contravenes subsection (1) (a), otherwise than in relation to dagga, shall be guilty of an offence and on conviction thereof shall be sentenced to all the following punishments -

(a) imprisonment for a term of not less than 10 or more ;than 15 years imprisonment

(b) a fine of not less than P15 000 or in default of payment imprisonment for an additional term of not less than 3 or more than 5 years;

(c) corporal punishment;

and, notwithstanding any law to the contrary, the court shall not order that the operation of the whole or any part of the sentence be suspended.

(3) Any person who contravenes subsection (1) (b), otherwise than in relation to dagga, shall be guilty of an offence and on conviction thereof shall be sentenced to either or both of the following punishments -

(a) imprisonment for a term of not less than one or more

more than 5 years imprisonment;

(b) a fine of not less than P1 500 or more than P5 000 or in default of payment to imprisonment for a term of not less than one or more than 5 years or, where a term of imprisonment has been imposed under paragraph (a), an additional term of not less than one or more than 3 years,

and may, in addition thereto, be sentenced to corporal punishment:

Provided that any person who, in contravening subsection (1) (b), otherwise than in relation to dagga, possesses at any one time more than 100 tablets, capsules or pills each consisting of or containing an habit-forming drug shall be guilty of an aggravated offence and on conviction thereof shall be sentenced to all the punishments specified in subsection (2) and, notwithstanding any law to the contrary, the court shall not order that the operation of the whole or any part of the sentence be suspended."

This above legislation prescribes a three fold minimum sentences; (a) a minimum of ten years imprisonment; (b) a minimum of P15 000 fine or in default a minimum of three years imprisonment and corporal punishment. The court is upon conviction faced with no alternative but to impose the minimum penalty provided.[257]

1.3Judicial response to mandatory minimum sentences

The Botswana Court of Appeal has had an opportunity to pronounce on the constitutionality of mandatory minimum sentences in Botswana. Two cases best illustrate the Court's attitude towards such penalties; these are ***Desai and Others v State***[258] and that of ***Petrus v***

[257] SS Terblanche op cit(n242) p65
[258] 1987 BLR 55 (CA)

State.[259] The court's position is that parliament enjoys legislative supremacy and may enact any laws it deems fit. However the supremacy is only in its legislative powers. If parliament enacts any law that is inconsistent with constitutional values the court may upon invitation of any person upon whom such law impact declare it unlawful.[260] Further, those minimum sentences are not per se unconstitutional.[261] That standing on its own each minimum sentence is not inhuman or degrading.[262] The combination of the three minimum penalties however leads to unproportionate sentences. This is contrary to section 7(1) of the constitution of Botswana and therefore unconstitutional. The Act has since been amended to make it consistent with the Constitution.

The consequences of the promulgation of mandatory minimum sentences have been profoundly adverse to the development and sustenance of a human rights culture in sentencing.

As a result courts have been deprived of any form of discretion. The presence of statutory minimum sentences has led to a rapid rise in prison population but no corresponding drop in crime levels. This therefore calls into question the linkage between stiff penalties and crime. Research has in fact repeatedly shown that there is very little linkage between stiff punishment and crime.[263]

2. Minimum sentences and the customary courts

The promulgation of mandatory minimum sentences has had ghastly consequences for human rights protection in the traditional

[259] 1984 BLR 14 (CA)
[260] Aguda JA Desai v State
[261] ***State v Vries*** (1962) 2 SACR 638 (N)
[262] Aguda JA paragraph 61
[263] A Ashworth 1992:23

courts. Of all statutes containing mandatory minimum sentences, the Stock Theft Act,[264] has had devastating impact.

The Act defines stock as any horse, mare, gelding, ass, mule, bull, cow, ox, ram, ewe, whether, goat, pig or ostrich ***or the young thereof***.[265] Perhaps of all minimum sentences creating statutes the Stock Theft Act has caused the greatest injustice. The following provision continues to cause mourning and gnashing of teeth for all human rights activist in Botswana;

> ***Any person who steals any stock or produce, or receives any stock or produce knowing or having reason to believe it to be stolen stock or produce, shall be guilty of an offence and notwithstanding the provisions of any other written law, shall be sentenced for a first offence to a term of imprisonment for not less than five years or more than ten years without the option of a fine and for a second or subsequent offence to a term of imprisonment for not less than seven years of more than 14 years without the option of a fine.***

This provision is identical to the Namibian Stock Theft Act which received the attention of the High Court of Namibia in the case of ***State v Vries.***

The following cases best illustrate what minimum sentences have done to the sentencing in the traditional courts:

- ***State v Motlogelwa Moraka*** **CRB 2/062.** The accused person appeared before the Phitshane Molopo customary court on a charge of unlawful wounding contrary to section 233 of the Penal

[264] 21 of 1996 { Cap 25:09} Laws of Botswana
[265] Section 2 of the Stock Theft Act

Code. The particulars of the offence alleged that he on the date specified in the charge unlawfully wounded the complainant in the Republic of South Africa. He appeared without legal representation. Witnesses were shipped from South Africa where the offence was committed. At the end of the case the accused was found guilty and convicted as charged. He was then sentenced to five years imprisonment. He served his sentence at the Kanye state Prison. This case raises a critical question of legal education of traditional leaders charged with presiding in customary courts. Firstly every presiding officer should know and understand that criminal law is territorial. Therefore an offence committed in South Africa can only be prosecuted by South African courts. The Botswana courts had no jurisdiction to try the particular offence. Secondly the tools employed in determining the appropriate sentence are very suspect.

- ***State v Rabonyokwane Mokgwatleng* case #KH40/2001**

The accused person was tried and convicted by the Kanye customary court of an offence of Stealing Stock in contravention of section 3(1) of The Stock Theft Act. The particulars of offence thereof allege that accused on the date mentioned in the charge stole six herds of cattle belonging to the mentioned complainant. He was convicted and sentenced to the minimum 5years imprisonment. He is currently serving the sentence at the Kanye state prison. His is a classic case of a mistrial. Upon reading the case file and interviewing the prisoner the following picture unfolds; the prisoner was employed as a herd man by a prominent farmer. The employer and the prisoner drove the cattle at the centre of the trial to butchery for sale. As the sale transaction was unfolding police arrived and arrested both. Investigations revealed that the employer had before the arrival in his employ of the prisoner stolen the cattle from another farmer and

imprinted his identifying marks on it. The case was registered at the Kanye customary court. Upon first appearance the employer broke ranks with the employee and instructed an attorney for himself leaving the employee alone. A separation of trials was made and his case was referred to the magistrate court.[266] The employee was summarily tried without legal representation and was convicted and sentenced to five years imprisonment. After stops and starts the employer's case was discharged and acquitted by the magistrate court as evidence proved that he infact had legitimately bought the cow.

- ***State v Ramooki*** case MH 41/2002. The accused was tried and convicted by the Moshupa customary court of the offence of Stealing Stock contrary to section 3(1) of the stock Theft Act. The particulars of offence thereof allege that the accused on the date specified the charge stole a goat belonging to the mentioned complainant. He was tried, convicted and sentenced to five years imprisonment by the customary court. The evidence contained in the case file reveals that the accused person accompanied the complainant's son to sell the goat to the local teacher. Strangely the son was never tried though the teacher unequivocally testified that he bought the goat from him. The accused was sentenced to five years imprisonment which he served at the Kanye state prison till the prison visiting magistrate reviewed his case and released him.
- ***State v Boiki Mpolokang case*** *#Mm 14/ 2003.* The accused was tried and convicted by the Mmathete customary court of Stealing stock contrary to section 3(1) of the stock Theft act. The particulars of offence thereof allege that the accused and

[266] Lawyers have no audience before the traditional courts. If any accused person indicates a desire to instruct a lawyer, his case must in terms of section 29 of the Customary Court Act be transferred to the magistrate court where legal representation is possible.

> others not before the court stole ten herd of cattle. His record of previous convictions revealed five other previous stock related convictions dating back to 1985. This prompted a quick invocation of section 3(1) which says for a second or any subsequent offence the minimum sentence of 7years imprisonment shall be applied. He was sentence to 7 years imprisonment on each of the five counts. All the sentences were made to run concurrently. He is currently serving the sentence at the Kanye state prison.

Because of the ease with which they obtain convictions, police prosecutors prefer taking stock case to the customary courts. The preference has been devastating on defendants. The 2004 Botswana Prison Services annual Report reveals that 65% of all prisoners in Botswana overflowing prisons are from the traditional courts. The bulk of these are stock theft convicts. Mandatory minimum sentences have no doubt created more problems than solutions for the country.

3. Impact of mandatory minimum sentences

The assumption of the legislature in passing the mandatory minimum sentences was that they would act as useful deterrent against future crimes as potential offenders who know in advance what sentence will be visited upon them would think twice before offending. That the stiff penalties would restore public confidence in the criminal justice system; and that the wide discretion given to judicial officers in sentencing leads to inconstancies and these in turn undermine public confidence in the judiciary.[267]

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[267] Moatlhodi Marumo Judge of the Botswana High Court '***Sentencing in Botswana: Some Practical Aspects***' unpublished paper presented at the Botswana judicial officers' conference held at the Grand Palm Hotel 20th July 2005

The opposite has been true. Public confidence has been undermined by senseless penalties. A person stealing a goat is sentenced to five years minimum sentence under the stock theft Act[268] while another gets 12months for attempted murder.

Judicial infliction of punishment is pre-eminently a matter for the discretion of the trial court.[269] Courts must as far as possible have an unfettered discretion in relation to sentence. Such discretion permits of balanced and fair sentencing which is a hallmark of an enlightened criminal justice system.[270] Sentence requires individalisation of punishment. This requires proper consideration of individual circumstances of each accused person.[271] A mandatory sentence runs counter to these principles. It reduces the court to a rubber stamp. It negates the ideal of individualisation. The morally just and the morally reprehensible are treated alike. Extenuating or aggravating factors count for nothing. No consideration no matter how valid can affect the question of sentence.[272] Mandatory minimum sentence unduly puts all the emphasis on the punitive and deterrent factors of sentence, and precludes the traditional consideration of subjective factors relating to the convicted person.[273] Harsh and inequitable results flow from such a situation.[274] Courts now have to impose sentences by legislative compulsion. This has removed a very vital tool from the sentencing process; that of discretion and individualization of the penalty. The one size fits all type of penal system is creating judicial resentment.

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[268] ***State v Ramooki*** Crim trial MH 45/2001 (unreported)
[269] ***R v Mapumulo and Others*** 1920 AD 56 at 57
[270] ***S v Tom: S v Bruce***
[271] ***S v Rabie*** 1975 SA (CA) 154 at 158
[272] Smalberger JA in ***S v Tom*** op cit at p807
[273] Holmes JA in ***S v Gibson*** 1974 (4) SA 478 at 482
[274] Smalberger JA note p807

The inherent inconsistencies between the sentencing of similar cases attract inevitable criticism from the ordinary members of the public, the media and resented by offenders. This is detrimental not only to the persons at the receiving end of such penalties but also to the image and standing of the courts.[275] Appellate courts often use inconsistencies as grounds for interference with the sentence.[276] Minimum sentences are on their own lead to injustice, add the traditional court to the already existing injustice and you have a serious human rights problem in your hands. The duality of Botswana's legal system is undesirable as it creates two mutually contradictory criminal justice systems. The major weakness of maintaining a dual legal system is the inconsistencies between the sentences meted out by the two systems. Inconsistency is unjust.[277] Punishment is a social institution which must serve a specific desired function. If it does not it is not worth it.

CONCLUSION

The value of human dignity must be a constant feature of any modern penal system. With crime rates souring there is always a temptation to go tough on crime. Unfortunately going tough on crime is synonymous with promulgation of penalties which negatively impact on basic human rights. The sanctity of human dignity impels us not to replicate the savagery of the criminal in our punishment.

Up to now Botswana's approach to fighting crime has been the promulgation of very draconian and often inhuman and degrading penalties. The continued usage of both corporal punishment and the death penalty is clearly inconsistent with Botswana's quest for a liberal democracy respectful of fundamental human rights one hope that a day

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[275] ***S v Mpetha*** 1985 (3) SA 702 at 710
[276] Nigel Walker note1 p6
[277] Nigel Walker note1 p6

shall not in the distant future dawn when these penalties shall be removed from the statute books. It is self evident that the genesis of all rights and freedoms entombed in international instruments and domestic constitutions of most countries around the world is respect for the inherent dignity of the human person.[278]

[278] Dickson CJC *in R v Oakes* (1986) 19 CRR 308

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Lot Moroka
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Student No. mrklot