

LETTING GO OF THE LASH: THE EXTRAORDINARY TENACITY AND PROLONGED DECLINE OF JUDICIAL CORPORAL PUNISHMENT IN BRITAIN AND ITS FORMER COLONIES IN AFRICA: PART 2

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SUMMARY

This article continues from Part 1 in attempting to explain the extraordinary tenacity and prolonged decline of judicial corporal punishment in Britain and its former colonies in Africa. The focus in Part 2 is on the status of judicial corporal punishment within a number of these former colonies. The majority of former British colonies in Africa appear to be moving towards eradicating the use of judicial corporal punishment in all courts, be they criminal or tribal. Some countries, such as Botswana, have made no move to abolish the practice of judicial corporal punishment, whilst others, such as Namibia and South Africa, have outlawed the practice completely. In other countries such as Tanzania, the position is unclear, with legislation still authorising the practice, although the courts have pronounced on its unconstitutional nature. What is clear is that in most of these countries, whether the practice has been abolished or not, public opinion on the matter is deeply divided. Continuous calls are made for the return of corporal punishment in those countries which have abolished it, while equally insistent calls are made for its removal in those countries which retain the practice.

1 INTRODUCTION

In general terms, the post-colonial period in Africa was characterized by intense political turmoil, with more than seventy military coups being staged during the first thirty years of this period. John Reader submits that, by the 1990s, most African states did not even preserve the vestiges of democracy, and he characterizes the post-colonial period as a time during which: "One-party states, presidents-for-life, and military rule became the norm; resources were squandered as the elite accumulated wealth and the majority of Africans suffered."¹ Economic decline resulted in the breakdown of effective government in many African states, which led to the rapid deterioration of the penal systems in those states. Dictatorial regimes made use of supposedly "lawful" punishments to harass their political opponents and generally failed to separate law from political administration. Further, according to Coldham, post-colonial African governments failed to develop their criminal justice systems in ways which were appropriate to the needs of developing African countries, but instead continued to rely on outdated and foreign penal policies based on retribution and general deterrence. As crime levels rose, these governments introduced ever harsher punishments and reduced procedural safeguards in order to secure a greater number of convictions.²

Much physical violence was directed at prisoners in Africa during the post-colonial period. Moreover, much of this violence did not even pretend to be lawful. It is not possible in a brief article such as this to provide a detailed overview of the appalling human rights abuses suffered by prisoners in various parts of Africa during the post-colonial period at the hands of brutal political dictators. No discussion on this point would be complete, however, without at least a passing reference to certain of the most notorious centres of detention and torture constructed by different dictators. According to Florence Bernault, centres such as Sékou Touré's Camp Boiro in Conakry (Guinea), Bokassa's prison at Ngaragba (Central African Republic), and Idi Amin Dada's jails in Kampala (Uganda), "speak to no other logic than that of megalomaniacal and murderous power".³ In relation to Camp Boiro, Theirno Bah points out that hundreds of prisoners died of hunger at this notorious camp during Sékou Touré's regime.⁴ Referring to Didier Bigo's study of Ngaragba prison, Bernault states that:

"Ngaragba functioned like an open-air theatre, where torturers and prisoners enacted tragic scenes of power and submission that celebrated Bokassa's personal will and grandeur. A monstrous excrescence of arbitrary power, Ngaragba and its involuntary actors dramatized the cruel confrontation

¹ Reader *Africa – A Biography of the Continent* (1997) 657.

² Coldham "Criminal Justice Policies in Commonwealth Africa: Trends and Prospects 2000" 44 *Journal of African Law* 218.

³ Bernault "The Politics of Enclosure in Colonial and Post-Colonial Africa" in Bernault (ed) *A History of Prison and Confinement in Africa* (2003) 1 32.

⁴ Bah "Captivity and Incarceration in Nineteenth-Century West Africa" in Bernault (ed) *A History of Prison and Confinement in Africa* (2003) 69 73.

between the weak and the strong, in an institution where inconsistency, contingency, and unpredictability – not bureaucratic routine – provided the organizing principle.”⁵

Mention must also be made of the Rwandese genocide, one of the greatest human rights tragedies to befall the African continent in recent times. Events leading up to and following this tragedy resulted inevitably in great suffering for prisoners. For example, Michele Wagner notes as follows in relation to the treatment meted out to those confined in detention centres in Rwanda during the 1990s:

“In *cachots* throughout the country, suspected RPF sympathizers were subject to a variety of abuses. In some *cachots*, groups of Tutsi were picked up and held without charge, beaten, and then released. Suspects held by the national intelligence service were reportedly beaten with electric wire and hoe handles, given electric shocks, tied at the elbows with their arms behind their backs, and made to drink urine and eat vomit. Thousands of others never made it to detention; they were simply executed.”⁶

Apart from the extreme cases referred to above, unlawful physical violence directed at prisoners was not uncommon in prisons throughout the African continent during the post-colonial period. For example, Amanda Dissel refers to the following disturbing findings of the Uganda Human Rights Commission just after the turn of the century:

“[T]he Uganda Human Rights Commission ... found that the levels of torture in prisons was alarming. A visit to Nakifuma prison in Mukono District in August 2001 by the African Centre for the Treatment and Rehabilitation of Torture Victims at work (ACTV) revealed that prisoners were often beaten with sticks, iron bars, metallic wires and motor vehicle fan belts. One of the prisoners had scars on his back from a recent beating with an iron bar.”⁷

During this same period Dissel reported on conditions in the prisons of Kenya and pointed out that torture and ill-treatment of prisoners was said to be widespread, including beatings with hippo-hide whips.⁸ Bearing in mind the extent to which prisoners in Africa have suffered unlawful physical violence during the post-colonial period, the official position in relation to the use of judicial corporal punishment during this period will now be examined.

Turning to the official position adopted by former British colonies in Africa during the post-colonial period, it is interesting to note that the legal provisions allowing for corporal punishment were not set aside in any of these former colonies immediately after they became independent. It is only very recently that most of the former British colonies have begun to take legal steps to abolish this form of punishment. The codes of criminal law and procedure of the former British colonies in Africa were inherited from the

⁵ Bernault 33.

⁶ Wagner “The War of the Cachots – A History of Conflict and Containment in Rwanda” in Bernault (ed) *A History of Prison and Confinement in Africa* (2003) 239 259-260.

⁷ Dissel “Prison Conditions in Africa” Research Report written for the Centre for the Study of Violence and Reconciliation, September 2001. See website: <http://www.csvr.org.za/papers/papdis10.htm>.

⁸ *Ibid.*

colonial period and made use of existing models of penal law.⁹ These models were based closely on nineteenth-century English criminal law, and post-colonial African governments were slow to introduce reforms in this area.¹⁰ According to Coldham, the definition of offences and the type and scale of penalties contained in these codes “made no concession to the African context, nor was any attempt made to amend the codes in line with changes in the substantive law and in criminological thinking that occurred in England and elsewhere during the first half of the twentieth century”.¹¹ Thus post-colonial governments made little or no effort to incorporate African values or traditions into their penal systems. Penal policies continued to emphasise retribution at the expense of rehabilitation.¹²

During recent years, however, various African countries have begun to question the validity of their penal codes in the context of the emergence of human rights-based legal systems in various parts of the continent.¹³ In a number of groundbreaking cases dealing with judicial corporal punishment decided during the last decade, in the absence of domestic precedent, the courts in various parts of Africa have looked to international courts as well as neighbouring African courts in order to define the scope of fundamental rights provisions.¹⁴ Mirna Adjami comments that these cases show evidence of a budding African human rights jurisprudence, in which African judiciaries debate the scope of international human rights norms in the historical and cultural context of Africa. Adjami claims that these judgments identify African courts as participants in the current era of judicial dialogue and global constitutionalism and serve to temper the simplistic but dominant image of the African State as a violator of human rights.¹⁵

⁹ The following are examples of these models: the Penal Codes from the 1899 Queensland Code and the Procedure Codes from the 1877 Gold Coast Criminal Procedure Ordinance. Coldham states that in 1964 Botswana introduced a Penal Code based on the Queensland model, replacing the Roman-Dutch common law. The Penal Code, introduced into Northern Nigeria in 1959 derives from the Sudan Penal Code and ultimately from the Indian Penal Code.

¹⁰ *Eg*, Coldham states as follows: “Governments which have undertaken far-reaching reforms of land law and family law, of customary law and constitutional law, seem never to have asked whether the criminal justice system inherited at independence was appropriate for the needs of a modernizing African state. This lack of official interest is reflected in the paucity of research in the field; Read’s 1966 lament about the ‘appalling lack of serious and informative research on crime and the administration of criminal justice in common law African states’ remains valid today. Penal legislation is seldom the fruit of research and deliberation; more often ... it is enacted in instant response to some threat (real or imagined) to the status quo.” See Coldham 2000 44 *Journal of African Law* 223.

¹¹ Coldham 2000 44 *Journal of African Law* 218-219.

¹² Coldham 2000 44 *Journal of African Law* 223.

¹³ See, *eg*, Bukurura “Emerging Trends in the Protection of Prisoners’ Rights in Southern Africa” 2002 2 *African Human Rights Law Journal* 92.

¹⁴ Examples of such cases are *S v Petrus* (1985) LRC (Const) 699; and *Ex parte Attorney-General, Namibia: In re corporal punishment by organs of the State* 1991 3 SA 76 NmSC. See also Adjami “African Courts, International Law, and Comparative Case Law: Chimera or Emerging Human Rights Jurisprudence?” 2002 24 *Michigan Journal of International Law* 103 138.

¹⁵ Adjami 2002 24 *Michigan Journal of International Law* 165-167.

The majority of former British colonies in Africa appear to be moving towards eradicating the use of judicial corporal punishment in all courts, be they criminal or tribal.¹⁶ Some countries, such as Botswana, have made no move to abolish the practice of judicial corporal punishment, whilst others, such as Namibia and South Africa, have outlawed the practice completely. In other countries such as Tanzania, the position is unclear, with legislation still authorising the practice, although the courts have pronounced on its unconstitutional nature. What is clear is that in most of these countries, whether the practice has been abolished or not, public opinion on the matter is deeply divided. Continuous calls are made for the return of corporal punishment in those countries which have abolished it, while equally insistent calls are made for its removal in those countries which retain the practice.

Before proceeding to examine the position of judicial corporal punishment in individual African countries, it is worth noting that this form of punishment was not entirely foreign to Africa before the arrival of the colonists. The use of corporal punishment within traditional African societies may, to a certain extent, account for its continued popularity in some areas. It is beyond the scope of this article to engage in an extensive discussion on the use of corporal punishment within traditional African customary law systems. However, it is interesting to note that, according to James Read, in his discussion of the traditional societies of East Africa, judicial corporal punishment was rarely used:

“Death, mutilation, beating and torture were employed as penalties but usually with a very limited application. Death was commonly imposed as a last resort in cases of offenders who had, by the persistence or gravity of their crimes, made themselves dangerous beyond the limits of endurance of their fellows. In Kikuyu law homicide was normally a matter for compensation, but causing death by poison or witchcraft ‘was looked upon as a crime against the whole community, and the penalty was death by burning’. Similarly, theft generally resulted in compensation being paid but an habitual thief was a public danger and was executed.”¹⁷

In relation to the practices of the Tswana people of Southern Africa, Schapera states as follows:

“Thrashing is not restricted to any specific class of offence. Fining is generally preferred; but where the wrongdoer cannot pay the fine imposed, thrashing is commonly resorted to as the only alternative form of punishment. Ya modiidi ke e nkgwde, says the proverb: ‘(The punishment) of the poor man is a white-backed ox’ (referring to the discoloration produced by the bruises). Any offender may be so punished, regardless of sex, age, or position. But it is unusual to thrash the very old or the very young ... The number of lashes is determined according to the gravity of the offence and the demeanour of the offender while under trial. They generally amount to no more than two to four,

¹⁶ This article has researched newspaper and amnesty international reports, US country reports and academic articles in order to ascertain the current position on judicial corporal punishment in the African countries discussed.

¹⁷ Read “Kenya, Tanzania and Uganda” in Milner (ed) *African Penal Systems* (1969) 91 104.

and seldom exceed ten; but cases are known where a much larger number was administered."¹⁸

In South Africa, corporal punishment carried out within traditional societies was, to a certain extent, incorporated into the formal judicial system.¹⁹ Some evidence in support of the popularity of this form of punishment within South African society as a whole, is provided by the views of African witnesses who gave evidence to the Viljoen Commission, which was appointed in 1974 to review the criminal justice and penal policy in South Africa. These witnesses pleaded, almost unanimously, for the retention of corporal punishment on the basis that this form of punishment was "respected by Africans and was believed to be an effective deterrent".²⁰ A further example of support for corporal punishment within South African society is provided by the activities, over many decades, of both left-wing and right-wing vigilante groups within South Africa's volatile African townships, which made extensive use of this form of punishment. According to one source, referring to various informal courts operating in South Africa's townships between the 1970s and 1990s:

"The *makgotla* in the urban areas were essentially driven by socially conservative values, and were mostly tolerated (or possibly at times even quietly encouraged) by the then white-supremacist government. The 'people's courts', on the other hand, were broadly an outgrowth of the black liberation movement, often with links to such anti-apartheid groups as the ANC, and run by mostly young people whose overarching purpose was fundamental regime change (which was achieved in 1994, when the ANC came to power after the first democratic elections) ... But as we have seen, the 'right-wing black vigilantes' and the 'left-wing black vigilantes' used remarkably similar methods. In so far as these included floggings, this state of affairs rather undermines claims that corporal punishment can be seen as an alien or 'un-African' procedure imposed from outside black culture by, and peculiar to, either the Afrikaner regime or its British colonial predecessors."²¹

As stated earlier, however, it is beyond the scope of this article to examine in detail the nature and extent of corporal punishment within traditional African societies.

¹⁸ Schapera *A Handbook of Tswana Law and Custom* 2ed (1955), quoted in *Petrus v The State* 1984 BLR 14 (CA) 26-27.

¹⁹ According to www.corpun.com, s 20(1)(a) of the Black Administration Act 38 of 1927 "[P]rovided that the Minister might confer in writing on a Chief or Headman or his deputy the jurisdiction to try and punish any black person for offences at common law or under black law and custom, including stock theft. The sentence could include corporal punishment in the case of unmarried males below the apparent age of 30 ... These provisions were re-enacted in 1967 (Proc R348)." See <http://www.corpun.com/jcpza1.htm> 3: Historical Background and Legislative Timeline.

²⁰ See <http://www.corpun.com/jcpza11.htm> 12: The Deterrent Effect of Corporal Punishment, citing the Report of the Commission of Enquiry into the Penal System of the Republic of South Africa ("Viljoen Report"), Government Printer, Pretoria, 1976. Despite these pleas the Viljoen Commission recommended that corporal punishment in South Africa be curtailed.

²¹ See <http://www.corpun.com/jcpza10.htm> 11: Illegal Punishments, Kangaroo Courts, Native/Customary Courts. For a more detailed discussion on the activities of informal courts in South Africa between the 1970s and 1990s see fn 142.

In the sections which follow, we turn to an examination of the present position in relation to judicial corporal punishment in each of the following countries: Botswana, Zimbabwe, Namibia, Ghana, Uganda, Kenya, Tanzania, Nigeria, Zambia and South Africa.

2 BOTSWANA

Although the Constitution of Botswana enshrines the right of the inhabitants of that country not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment, judicial corporal punishment has not been abolished.²² In fact, Botswana continues to support corporal punishment, which occupies a central place in the punishment of male and female offenders in that country. Thebe comments that Botswana “still clings to its pre-independence position where flogging was seen as an appropriate punishment”.²³ Although the courts and various sectors of civil society have voiced their dissatisfaction with this form of punishment as being unconstitutional, practical considerations such as prison overcrowding have motivated legislators to extend the circumstances in which judicial corporal punishment is considered an appropriate sentence.

In 1984, in the case of *Petrus v State*, the Botswana Court of Appeal questioned the constitutionality of mandatory sentences of corporal punishment.²⁴ The statute under scrutiny provided for the punishment of certain offenders to include “four strokes each quarter in the first and last years of his imprisonment and such strokes shall be administered in traditional manner with traditional instrument ...”²⁵ The court determined that “the provision for the repeated and delayed infliction of strokes [under the Criminal Procedure Evidence Act] offends against section 7(1) of the Constitution ... because of the factors of repetition and delay it is inhuman and degrading”.²⁶ In this regard Judge Maisels found it “noteworthy that postponed whipping or whipping by instalments was deemed cruel as long ago as 1880 and 1881, and this in the absence of any provision such as to be found in section 7(1) of the Constitution”.²⁷

Significantly, the court in *Petrus* did not find “the infliction of strokes in traditional manner with traditional instrument” [judicial corporal punishment itself] to be unconstitutional, nor did they make a finding on the issue “whether the provision for mandatory corporal punishment in terms of section 305(1) of the Penal Code is in conflict with section 7 of the

²² See Article 7 of the Constitution of Botswana (1961, amended 1999).

²³ Thebe “Juvenile Justice in Botswana” 1998 11(1) *Lesotho Law Journal* 117 129-130; and Nsereko “The Police, Human Rights and the Constitution: An African Perspective” 1993 15 *Human Rights Quarterly* 465 480-481.

²⁴ Under s 305(1) of the Penal Code as prescribed in s 301(3) of the Criminal Procedure and Evidence Act; and [1984] BLR 14 (Bots. Ct. App.) 18.

²⁵ *Petrus v The State supra* 19.

²⁶ *Petrus v The State supra* 19 and 30.

²⁷ *Petrus v The State supra* 29.

Constitution".²⁸ The reason for this was technical. Although section 7(1) of the Botswana Constitution prohibits punishment or other treatment that is inhuman or degrading, section 7(2) prohibits an attack on any form of punishment which was lawful immediately before the Constitution came into operation. In general terms, section 7(2) provides that no law authorizing the infliction of punishment shall be held to be inconsistent with section 7(1) of the Constitution, if it was lawful in the former Protectorate of Bechuanaland immediately before the coming into operation of the Constitution.²⁹ One of the five judges in the *Petrus* case, Judge Aguda, remarked that section 7(2) "may be regarded as a 'derogation clause' since it derogates from the freedom so clearly enshrined under subsection (1)".

He stated further that:

"[S]ubsection (1) was designed very clearly to prohibit absolutely torture, inhuman, degrading and other treatment. Subsection (2) was only added to prevent a complete break from the position of punishment as it existed by 29 September 1966, based upon the common knowledge of the people at the time. It was not meant, for example to resuscitate torture even if it had existed somewhere or the other within the areas of the land which at the present constitute the State of Botswana."³⁰

The court in the *Petrus* case pointed out that judicial corporal punishment was permitted in Botswana before independence. According to Aguda then, the onus shifted on to the State to show that that piece of legislation was saved by section 7(2) of the Constitution, and in this regard he stated that: "Suffice it to say that whatever views one may have of corporal punishment of an adult as a form of punishment for an offence, it is, in so far as Botswana is concerned, saved by subsection (2) of section 7 of the Constitution."³¹ The court found, however, that corporal punishment that is inflicted in instalments may be deemed to be unconstitutional since, prior to the coming into operation of the Constitution, the law provided that offenders should be caned immediately and not in instalments and that "if the like description of punishment had been inflicted in the like circumstances before independence, this would not have been authorized by law".³² Moreover, the court in *Petrus* expressed its general disapproval of judicial corporal punishment. For example, Judge Baron, although agreeing with Judge Maisels, stated:

²⁸ *Petrus v The State supra* 19.

²⁹ S 7 falls under chapter II of the Botswana Constitution that is entitled "Protection of Fundamental Rights and Freedoms of the Individual." The text of s 7 reads:

(1) No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorizes the infliction of any description of punishment that was lawful in the former Protectorate of Bechuanaland immediately before the coming into operation of this Constitution."

³⁰ *Petrus v The State supra* 37-38.

³¹ *Petrus v The State supra* 38-40.

³² *Petrus v The State supra* 29. Thebe 1998 11(1) *Lesotho Law Journal* 129-130; Nsereko 1993 15 *Human Rights Quarterly* 480-481.

"It is, however, with considerable hesitation, and only because of the importance of conveying our decision without delay, that I concurred in making no finding on the question of corporal punishment 'in traditional manner with traditional instrument'. This is an issue of great moment in the field of human rights and a question on which I think the legislature would have appreciated comment by this court ... I should perhaps add that in coming to this conclusion on the basis of the possible use of the sjambok I am not to be taken to approve of corporal punishment with a thupa – or indeed with anything else."³³

In a similar vein Aguda JA remarked:

"I have no doubt in my mind that judicial flogging of an adult is a degrading form of punishment, but so long as the world community has not reached that stage when it can be abolished throughout the world, just as slavery has been abolished, it must continue to exist in some countries."³⁴

In a later case concerning corporal punishment which was heard in Namibia, the Namibian Chief Justice Mahomed noted the judges' disapproval of corporal punishment in the *Petrus* case, commenting as follows: "In the course of the judgments given in that case the disapproval of corporal punishment by the members of the Court was ... repeatedly manifest."³⁵

The *Petrus* case had the effect of encouraging courts in Botswana to reduce the potentially degrading nature of sentences prescribed in terms of provisions contained in various criminal Statutes, by deleting those sections relating to the imposition of corporal punishment.³⁶

Despite the disapproval expressed in *Petrus* and other cases towards judicial corporal punishment, it remains firmly entrenched in the Botswana Penal Code.³⁷ The code allows corporal punishment to be meted out to all male persons between the ages of 14 and 40 years and authorizes it as an alternative to imprisonment for all crimes which are punishable by imprisonment, except the crimes of murder, rape and robbery.³⁸

In relation to the crime of rape, a minimum sentence of 10 years will be imposed, increasing to 15 years with corporal punishment if the offender is HIV-positive, and to 20 years with corporal punishment if the offender knew his HIV-positive status at the time the crime was committed.³⁹ Knowledge of HIV status is determined on a balance of probabilities and the 20-year

³³ *Petrus v The State supra* 31-32.

³⁴ *Petrus v The State supra* 39-40.

³⁵ Nsereko 1993 15 *Human Rights Quarterly* 481.

³⁶ *Eg*, in *Desai v State*, Court of Appeal Crim. App. No. 9 of 1986 (unreported) the Court deleted caning from the Habit Forming Drugs Act, on the ground that caning, in combination with two other mandatory sentences (a minimum ten-year jail term and a minimum P15,000 fine or in default an additional three-year jail term) made the totality of the sentences inhuman and degrading; and Nsereko 1993 15 *Human Rights Quarterly* 481.

³⁷ (Amendment) Bill 39 of 2004.

³⁸ Nsereko 1993 15 *Human Rights Quarterly* 481.

³⁹ Country report on human rights practices, Botswana, released by the Bureau of Democracy, Human Rights and Labor, March 31, 2003, submitted by the US Department of State to the US Congress.

sentence with corporal punishment may be substituted with a sentence of life imprisonment.⁴⁰

In relation to the use of corporal punishment on child offenders, Thebe remarks that the law of Botswana⁴¹ falls short of the standards that have been laid down by international human rights instruments, which do not allow this form of punishment to be inflicted on juvenile offenders.⁴² In Botswana, corporal punishment is one of the punishments provided for in the Penal Code, which is awarded readily to child offenders, pursuant to the provisions of section 29 of the Children's Act.⁴³

With respect to traditional courts it appears as if corporal punishment is not only sanctioned by the Botswana government, but its parameters are in the process of being extended. In February 2005 MMEGI, the daily independent newspaper in Botswana, reported that the Attorney General, Ian Kirby, had justified the extensive use of corporal punishment in Botswana by citing the need to reduce overcrowding in the country's prisons. Botswana's prisons had reportedly exceeded their holding capacity by 160 percent.⁴⁴ This explains in part the enactment of the Customary Courts Amendment Bill in April 2005, which authorized traditional courts in Botswana to mete out corporal punishment to an even wider range of persons than had previously been the case. It is also interesting to note, however, that there was such a degree of support for corporal punishment in the country, that opposition to the Bill was virtually non-existent.⁴⁵ Following the enactment of the Bill, chiefs in traditional courts in Botswana were, and at time of writing still are, permitted to sentence men and women up to the age of 50 years who have committed minor infractions to a flogging, ranging from 4 to 6 strokes.⁴⁶

The US Country report on human rights practices stated in 2006 that, in practice, corporal punishment in the customary courts is imposed "in the

⁴⁰ December 16, 2005 – Justice Thomas Masuku sentenced an HIV-positive man who raped his victim three times after assaulting her and threatening to stab her with a knife to 20 years 2005-12-19 *The Reporter*.

⁴¹ See the Botswana Penal Code and the Education Regulations.

⁴² Children between the ages of 14 and 18 years are liable for their criminal acts, although corporal punishment cannot be inflicted on females below the age of 18 (s 28(3)(a) Penal Code). S 28(4) of the Penal Code provides that where any male person below the age of 18 is convicted of any offence punishable with imprisonment (that is, where an order for probation has been made and the juvenile fails to comply with the provisions of his probation order), a court may order him to undergo corporal punishment as an alternative to a term of imprisonment. Thebe 1998 11(1) *Lesotho Law Journal* 130-133; Nsereko "Criminal Procedure in Botswana" cited in Thebe 1998 11(1) *Lesotho Law Journal* 123-124.

⁴³ Thebe 1998 11(1) *Lesotho Law Journal* 129-130; Nsereko 1993 15 *Human Rights Quarterly* 480-481.

⁴⁴ *MMEGI*, Wednesday 2 February, 2005.

⁴⁵ Karnam "Legalising Corporal Punishment in Botswana?" Summer 2005 12(2) *Commonwealth Human Rights Initiative Newsletter*.

⁴⁶ *Daily News Online*, 30 March 2005; and Karnam, Consultant, CHRI, "Legalising Corporal Punishment in Botswana?" Summer 2005 12(2) *Commonwealth Human Rights Initiative Newsletter*.

form of lashings on the buttocks” and is used “generally against young male offenders in villages for crimes such as vandalism, theft, and delinquency”.⁴⁷

It is interesting to note that Zimbabwe, Botswana’s neighbour, has expressed concern over the continued use of corporal punishment in Botswana. In 2004 it was reported that Zimbabwe’s chief immigration officer, Elasto Mugwadi, had condemned Botswana’s use of corporal punishment against Zimbabweans who broke the law by illegally entering Botswana.⁴⁸ Botswana’s Assistant Minister for Presidential Affairs, Oliphant Mfa, defended the actions of his government by saying that Zimbabweans would not be given any preferential treatment. If they broke the law by crossing the border illegally, they would be punished accordingly.⁴⁹ The issue arose again in 2006 when the following report appeared in the media:

“Botswana has clarified that it does not single out Zimbabweans, as corporal punishment is legal and applied to anyone breaking the rules. However, in 2004 it pointed out that 26,214 Zimbabweans were involved in criminal activities in Botswana. ‘There is a clear correlation between the increases in the rise of crime in Botswana with the presence of illegal immigrants, most of whom are from Zimbabwe’, the government said in a statement.”⁵⁰

Human rights organizations within Botswana continue to oppose the practice of judicial corporal punishment, as well as the imposition of the death penalty, within the country. For example, on 23 June 2004 the Botswana Centre for Human Rights – Ditshwanelo – voiced its opposition to both judicial corporal punishment and the death penalty, on the grounds that such punishment violated the constitutional right of prisoners not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment.

Further, Dr Murali Karnam, a consultant with the Commonwealth Human Rights Initiative, commented on the legalising of corporal punishment in Botswana as follows:

“Many Commonwealth countries unfortunately continue to use the excuse of tradition and culture to lend legitimacy to authoritarian regimes and practices. Flogging and such corporal punishments receiving public sanction and state approval is dangerous. The remedy has become more lethal than the disease.”⁵¹

3 ZIMBABWE

Shortly after the *Petrus* case was heard in Botswana, the Zimbabwean courts for the first time confronted the issue of whether or not judicial

⁴⁷ Country report on human rights practices, Botswana, released by the Bureau of Democracy, Human Rights and Labor March 8, 2006, submitted by the US Department of State to the US Congress.

⁴⁸ South African Press Association (SAPA), April 22, 2004: Source: Financial Times Information Limited; SAPA, 11 May 2004.

⁴⁹ *Star*, 11 August 2004.

⁵⁰ All Africa Global Media, June 5, 2006.

⁵¹ Karnam Summer 2005 12(2) *Commonwealth Human Rights Initiative Newsletter*.

corporal punishment was constitutional. Until 1988, corporal punishment was one of the prescribed methods for punishing both adult and juvenile male persons convicted of criminal offences in Zimbabwe.⁵² Then, in *State v Ncube*,⁵³ an adult male offender who had been convicted of rape and sentenced to a whipping of six strokes, challenged the constitutionality of this form of punishment.⁵⁴ He argued that it infringed his right to protection from inhuman or degrading punishment in contravention of section 15(1) of the Constitution of Zimbabwe.⁵⁵ The Supreme Court upheld his contention.

Justice Gubbay,⁵⁶ in seeking to establish whether there exists a universal standard on such corporal punishment, undertook a survey of both local and international law. He began with six Zimbabwean statutes that authorized the sentence of whipping as a punishment for various crimes,⁵⁷ and then proceeded to establish the legal status of corporal punishment in various countries, canvassing South Africa (which, although at the time legal in South Africa had been described by a number of South African judges as brutal and degrading),⁵⁸ the United Kingdom, Canada, Australia and the United States of America.⁵⁹

In respect of Australia, Justice Gubbay quoted from a dissenting judgment in the case, *R v Taylor*⁶⁰ and O'Meally:

"Whether whipping is to be regarded as a severe punishment or not must, of course, depend on the standards of the time. A few centuries ago, when suspects were interrogated on the rack, and burning at the stake was common, and the ordinary penalty for serious crime was death, whipping was naturally regarded as a minor punishment. But with the growth of feeling against cruelty and the development of modern police systems, and the consequent drastic reduction in the severity of the sanctions of criminal law, whipping has come to be regarded, and properly so, as an extremely severe punishment ... In addition, over the last hundred years or thereabouts, the view has steadily gained ground, and it appears now to be generally accepted by those expert in such matters, that the whipping of adults is a form of punishment the use of which is ordinarily unwise ..."⁶¹

⁵² S 314(2)(e) of the Criminal Procedure and Evidence Act Chap 59 (Z).

⁵³ *S v Ncube; S v Tshuma; S v Ndhlovu* 1988 2 SA 702 (ZSC).

⁵⁴ The whipping was imposed under the authority of s 54(5)(c) and (s) of the Magistrates Court Act Chap 18(z).

⁵⁵ S 15(1) of the Declaration of Rights, contained in the Constitution of Zimbabwe, provides that "(n)o person shall be subjected to torture or to inhuman or degrading punishment or other such treatment".

⁵⁶ The other judges in the case concurred with Justice Gubbay's judgment.

⁵⁷ *S v Ncube; S v Tshuma; S v Ndhlovu supra* 705.

⁵⁸ *S v Ncube; S v Tshuma; S v Ndhlovu supra* 707-709. Justice Gubbay mentioned no less than 12 South African cases, heard between 1965 and 1987, 5 works by eminent South African academics, and a report of the Commission of Inquiry into the Penal System (the Viljoen Commission), all of which criticised the use of judicial corporal punishment.

⁵⁹ *S v Ncube; S v Tshuma; S v Ndhlovu* 710-713. Adjami 2002 24 *Michigan Journal of International Law* 140-141.

⁶⁰ 1958 VR 285.

⁶¹ *S v Ncube; S v Tshuma; S v Ndhlovu supra* 712.

In relation to the position regarding judicial corporal punishment in America, Justice Gubbay acknowledged the “many and obvious differences between the American constitutional system and our own” but nevertheless felt it important to take into account the “attitudes and expressions” of the “distinguished Justices of the Supreme Court of the United States”. He quoted from the American case, *Hutto v Finney*,⁶² where it was stated:

“[The Constitution of the United States of America] guarantees that the power of the State to punish is exercised within the limits of civilized standards. Punishments which are incompatible with the evolving standards of decency that mark the progress of a maturing society or which involve the unnecessary and wanton infliction of pain are repugnant ...”⁶³

In respect of Europe and Scandinavia, Justice Gubbay concluded that most of these countries hold a modern view of justice and humanity, which has led them to reject the utility of corporal punishment.⁶⁴

In reaching his decision, Justice Gubbay relied heavily upon the European Court of Human Rights in *Tyrer v United Kingdom*,⁶⁵ which focused on article 3 of the European Convention of Human Rights – a provision worded virtually identically to section 15(1) of the Constitution of Zimbabwe. Justice Gubbay considered this decision to be perhaps the most important decision of the European Court of Human Rights relating to judicial corporal punishment.⁶⁶

Finally, in concluding his judgment, Justice Gubbay stated that his decision to declare corporal punishment of adult offenders unconstitutional was influenced by the following factors: the current opinions of many distinguished jurists and leading academics opposed to judicial corporal punishment; the fact that whipping had been abolished in very many countries of the world as being repugnant to the consciences of civilized men; the progressive move of the courts in countries in which whipping was not susceptible to constitutional attack; the fact that its imposition had been restricted to instances in which a serious, cruel, brutal and humiliating crime had been perpetrated; and the decreasing recourse to the penalty of whipping in Zimbabwe itself.⁶⁷

Two years after the *Ncube* decision, in the case of *State v A Juvenile*, the Zimbabwean Supreme Court considered the constitutionality of criminal statutes that imposed corporal punishment on boys under the age of eighteen years.⁶⁸ In his judgment, Dumbutshena CJ commented that, in

⁶² 437 US 678.

⁶³ *S v Ncube*; *S v Tshuma*; *S v Ndhlovu supra* 716-717.

⁶⁴ *S v Ncube*; *S v Tshuma*; *S v Ndhlovu supra* 713.

⁶⁵ (1978) 2 EHHR 1.

⁶⁶ Adjami 2002 24 *Michigan Journal of International Law* 140-141; and *S v Ncube*; *S v Tshuma*; *S v Ndhlovu supra* 717-719.

⁶⁷ *S v Ncube*; *S v Tshuma*; *S v Ndhlovu supra* 721; and Adjami 2002 24 *Michigan Journal of International Law* 141-142.

⁶⁸ *State v A Juvenile* 1990 4 SA 151 (ZS). S 330 of the Criminal Procedure and Evidence Act, Chapter 59, the Prisons Act, Chapter 21.

interpreting section 15(1) of the Constitution, the Zimbabwean courts were free to import interpretations of similar provisions in international and regional human rights instruments into the domestic human rights law, and that by doing so Zimbabwe's domestic human rights jurisdiction would be enriched.⁶⁹

The Court declared the relevant statutes to be unconstitutional, with Chief Justice Dumbutshena saying:

"The only difference between [juvenile whipping] and street violence is that the inflicter assaults another human being under the protection of the law. He might during the execution of the punishment vent his anger in a similar manner on his victims as the street fighter does ... Because this institutionalized violence is meted out to him, the victim's personal dignity and physical integrity are assailed. In the result the victim is degraded and dehumanized. In a street fight he can run away from his assailant or he can defend himself. The juvenile offender cannot because he is tied down to the bench."⁷⁰

In a concurring judgment Justice Gubbay stated:

"S 330 of the Criminal Procedure and Evidence Act is repugnant to s 15(1) of the Constitution of Zimbabwe as being an unhuman and degrading form of State redress for criminal act. This conclusion, I am confident, will prove acceptable to all who care for the reputation of the legal system in this country and are anxious for it to be thought humane and civilized. For we must never be content to keep upon our Criminal code provisions for punishment having their origins in the Dark Ages."⁷¹

The Court held that the reasoning in the *Ncube* decision applied equally to the case before it, since the corporal punishment of minors was no less inhuman or degrading than that of adults. In a paper produced some years later, Justice Gubbay commented on the decision in *State v A Juvenile*, pointing out the significance of the fact that the judgment in *Tyrer v United Kingdom*, as in the *Ncube* case, formed the main basis for the majority opinion, and that the judgment of the Court was "fortified by the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)."⁷²

It is interesting to note, however, that McNally JA and Manyarara JA disagreed with Chief Justice Dumbutshena and Justice Gubbay's generalized statement that any corporal punishment inflicted in terms of a court order is necessarily a contravention of section 15(1) of the Constitution. They also disagreed with the argument that, because adult strokes have been ruled unconstitutional, it must follow that juvenile cuts are

⁶⁹ Such as, the International Bill of Human Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the Inter-American Convention on Human Rights; and *State v A Juvenile supra* 155.

⁷⁰ *State v A Juvenile supra* 156.

⁷¹ *State v A Juvenile supra* 169.

⁷² The role of courts in promoting human rights: The case of Zimbabwe. Paper submitted by the honourable Mr Justice Anthony R Gubbay, Chief Justice of Zimbabwe, for the Bergen Seminar on Development 2001, held on June 19 and 20, 2001.

unconstitutional. McNally JA noted that since the term “inhuman or degrading” involves a value judgment, a judge, when deciding on the appropriateness of a sentence of cuts, would normally have regard to the physical and psychological robustness of the young delinquent before them. Thus brutalization and brutality in the imposition of juvenile cuts would not be inevitable.⁷³

Manyarara JA did not agree with a complete ban on judicial corporal punishment; however, he did disapprove of the way in which a whipping was administered in terms of the Prison Regulations at the time.⁷⁴ These regulations did not differentiate between the method by which adults and juveniles should be flogged and was reminiscent of a “flogging at the whipping post”. He stated that this method should not be used in the case of a juvenile whipping which, in terms of the Criminal Code, was to be carried out by means of a “moderate correction of cuts”. The Criminal Code did not state that juvenile cuts be administered in terms of the Prison Regulations.⁷⁵ He noted that:

“A juvenile who is dealt with in terms of s 330 is but a child who is brought before a court as his upper guardian for punishment by the State. Therefore I believe that s 330, properly construed, merely presents the court with the same problem as an average parent will face when he has to punish his child for a misdeed ... Since no reasonable parent could ever administer corporal punishment on his child in the manner provided by the Prison Regulations, and the court is a reasonable institution, the same considerations should guide it in its application of the provisions of s 330.”⁷⁶

Immediately after the judgment in *State v A Juvenile* was handed down, the decision of the court was nullified when the Zimbabwean parliament amended section 15 of the Constitution of Zimbabwe, so as to legitimize corporal punishment for juveniles.⁷⁷ Hatchard comments that the main issue at stake following the Court’s decision in *State v A Juvenile* concerned the power of the Supreme Court to enforce the provisions set out in the Declaration of Rights contained in Chapter III of the Constitution of Zimbabwe. Hatchard states that:

“Crucially, the government did not challenge the ruling of the court that corporal punishment of this nature contravened section 15, but relied instead on the extremely dubious ground that otherwise many juveniles would have to

⁷³ *State v A Juvenile supra* 175.

⁷⁴ Under s 333 of the Criminal Code.

⁷⁵ In terms of s 330(2) of the Criminal Code read with s 109 of the Prison Regulations.

⁷⁶ *State v A Juvenile supra* 175.

⁷⁷ Constitution of Zimbabwe Amendment Act 11 of 1990. Coldham 2000 44 *Journal of African Law* 231. S 15(3) was added to the Act, which provides that ‘No moderate corporal punishment inflicted:

(a) in appropriate circumstances upon a person under the age of eighteen years by his parent or guardian or by someone *in loco parentis* or in whom are vested any of the powers of his parent or guardian; or
 (b) in execution of the judgment or order of court, upon a male person under the age of eighteen years as a penalty for breach of any law; shall be held to be in contravention of Subsection (1) on the ground that it is inhuman or degrading. The Act does not affect the ruling of the Supreme Court in *S v Ncube* (188 (2) SA 702; [1988] LRC (Const) 442).”

be sent to prison. The Minister of Justice made it clear that any holding to the contrary 'would be untenable to government which holds the correct and firm view ... that Parliament makes the laws and the courts interpret them'.⁷⁸

During the Second Reading of the Bill, the Minister of Justice adopted the approach taken in the dissenting judgment of McNally JA in *A Juvenile*. The Minister explained his actions as being necessary to prevent undesirable consequences to the administration of justice in the country. He argued that, in the absence of corporal punishment, the courts had no option but to send juvenile offenders to prison and that this had "shaken the conscience of Government". According to the Minister, although the government was searching for other alternatives, the "immediate amelioration of the problem requires the reintroduction of corporal punishment".⁷⁹

A number of international human rights-based institutions have expressed their concern at the state of affairs as regards juvenile judicial corporal punishment in Zimbabwe. In 1996 a report by the United Nations Committee on the Rights of the Child stated as follows:

"The Committee is concerned at the present system of juvenile justice, including the lack of a clear legal prohibition of capital punishment, life imprisonment without possibility of release and indeterminate sentencing, as well as at the recourse to whipping as a disciplinary measure for boys."⁸⁰

Furthermore, in 1999 the United States Country Report on Human Rights Practices in Zimbabwe noted that "the Zimbabwe government repeatedly has amended the Constitution in response to judicial rulings protective of human rights and that these amendments to the Constitution are not ratified by the public but are subject only to the ZANU-PF-dominated Parliament's approval".⁸¹

At the time of writing judicial corporal punishment of juveniles remains an option in Zimbabwe.⁸²

4 NAMIBIA

The constitutional guarantee to "Respect for human dignity" is set out in Article 8 of the Namibian Constitution and article 8(2) provides as follows:⁸³

⁷⁸ Parliamentary Debates 6 December, 1990. Hatchard "The Constitution of Zimbabwe: towards a model for Africa?" 1991 *Journal of African Law* 79 95-96.

⁷⁹ Parliamentary Debates, 6 December, 1990. Hatchard, "The Fall and Rise of the Cane in Zimbabwe" 1991 35(1/2) *Journal of African Law* 198 202.

⁸⁰ Concluding observations on Zimbabwe, CRC/C/15/Add.55 (Twelfth session, 1996).

⁸¹ Country report on human rights practices, Zimbabwe, released by the Bureau of Democracy, Human Rights and Labor February 23, 2000, submitted by the US Department of State to the US Congress.

⁸² See, eg, the Zimbabwe Chronicle, Harare, of 23 January 2006 concerning the corporal punishment of a juvenile transsexual which dealt with the dilemma of whether or not a transsexual juvenile offender could be sentenced to corporal punishment since corporal punishment was allowed for boys but not girls under 18.

- “(a) In any judicial proceedings or in other proceedings before any organ of the state and during the enforcement of a penalty, respect for human dignity shall be guaranteed.
 (b) No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

In 1991 this Constitutional prohibition against torture and inhuman treatment was reinforced by the Namibian Supreme Court, in a landmark case, *Ex parte Attorney-General, Namibia: In re corporal punishment by organs of the State*,⁸⁴ which declared that, “the infliction of all corporal punishment (in consequence of an order from a judicial or quasi-judicial authority) both in respect of adults as well as juveniles constitutes degrading and inhuman punishment within the meaning of article 8(2)(b) of the Namibian Constitution”.⁸⁵

In this case the Supreme Court was requested to determine whether the infliction of corporal punishment, in respect of certain categories of persons, certain offences, or in respect of the procedure employed during the infliction thereof, was in conflict with chapter 3, article 8, of the Constitution of the Republic of Namibia.⁸⁶ The scope of the case covered corporal punishment sanctioned by the judiciary, administrative, and quasi-administrative organs, and by government schools through a series of statutes.⁸⁷ In his judgment, Justice Mahomed referred frequently to the views of the Supreme Court of Zimbabwe in *S v Ncube*, the Botswana Court of Appeal decision in *S v Petrus*⁸⁸ and commented on the demise of corporal punishment in many parts of the world, saying:

“there is beginning to emerge an accelerating consensus against corporal punishment for adults throughout the civilized world”.⁸⁹

Justice Mahomed then turned to the issue of juvenile corporal punishment and, after scrutinizing the Zimbabwean case of *State v A Juvenile*⁹⁰ and highlighting the international sources discussed therein, declared that

⁸³ Manyuha *The Future of Corporal Punishment in South Africa in the Light of the Recent Namibian and Zimbabwean Experience* (1993) University of South Africa (submitted in part fulfilment of the requirements for the degree of Master of Laws).

⁸⁴ 1991 3 SA 76 (NmS).

⁸⁵ *Ex parte Attorney-General, Namibia: In re corporal punishment by organs of the State supra* 93.

⁸⁶ *Ex parte Attorney-General, Namibia: In re corporal punishment by organs of the State supra* 77. Mahomed AJA makes the point that the provisions of art 8(2) of the Constitution are not peculiar to Namibia but “articulate a temper throughout the civilised world which has manifest itself consciously since the Second World War.” *Eg*, Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; Article 1(1) of the German Constitution; Article 7 of the Constitution of Botswana; Article 15(1) of the Zimbabwean Constitution. See *Ex parte Attorney-General, Namibia: In re corporal punishment by organs of the State supra* 87.

⁸⁷ *Ex parte Attorney-General, Namibia: In re corporal punishment by organs of the State supra* 78-85.

⁸⁸ [1985] LRC (Const.) 699.

⁸⁹ *Ex parte Attorney-General, Namibia: In re corporal punishment by organs of the State supra* 88.

⁹⁰ 1989 2 ZLR 61.

corporal punishment for juveniles violated article 8 of the Namibian Constitution.⁹¹ Mahomed AJA commented that there existed an “impressive judicial consensus” opposed to judicial corporal punishment in general, and cited a number of cases in support of his contention.⁹² The objections to judicial corporal punishment referred to by Mahomed AJA included: the violation of the inviolable dignity of human beings; the acute pain and physical suffering that accompanies whipping which strips the recipient of dignity and self-respect and which is incompatible with evolving standards of decency; the fact that a society that plans and prescribes assaults on a human being is reduced to the level of the offender; the fact that the inherently arbitrary nature of the punishment makes it capable of abuse by each executioner of the punishment; and the fact that receiving this type of punishment from a stranger is an alien and humiliating experience.

In the opinion of at least one academic, John Hatchard, the consensus among judges against judicial corporal punishment warranted its removal from those African countries which retained it.⁹³

Berker CJ concurred with Mahomed AJA’s judgment but added that the decision which the Court had to make would have to be based on a value judgment which should take full cognisance of the social conditions, experiences, perceptions and the historical background of the Namibian people. He stated:

“These experiences generally, but in particular with regard to infliction of corporal punishment by judicial and quasi-judicial organs in accordance with South African legislation introduced into the country during the colonial rule, and even more so by the arbitrary extra-judicial infliction of corporal injuries as a result of physical treatment meted out by the officials of the ruling administrative power and which were in many cases of an extreme nature ... left an indelible impression on the people of Namibia. It is not surprising that a deep revulsion in respect of such treatment, including corporal punishment, has developed, which ultimately became articulated in the Bill of Fundamental Human Rights enshrined in the Constitution ...”⁹⁴

Almost from the time that judicial corporal punishment was abolished, however, Namibians began calling for its return. For example, during 1996 a report in the *Mail and Guardian* stated that there was “support for the return of corporal punishment” because “a new war was sweeping the country and criminals had to be punished”.⁹⁵

Also, during 2002, after holding consultations with various communities throughout Namibia, the Namibian Parliamentary Standing Committee on

⁹¹ *Ex parte Attorney-General, Namibia: In re corporal punishment by organs of the State supra* 93. Adjami 2002 24 *Michigan Journal of International Law* 143-144.

⁹² *Ex parte Attorney-General, Namibia: In re corporal punishment by organs of the State supra* 87.

⁹³ Hatchard “The Fall of the Cane Again: Corporal Punishment in Namibia” 1992 36(1) *Journal of African Law* 81 82.

⁹⁴ *Ex parte Attorney-General, Namibia: In re corporal punishment by organs of the State supra* 96.

⁹⁵ Hopwood “Namibians Call for Death Penalty” 1996-09-13 *Mail and Guardian Online*.

Governmental Affairs reported that members of the community were calling for the introduction of corporal punishment in community courts as they said it was the only form of punishment that deterred criminals and potential criminals.⁹⁶ It is clear, therefore, that although judicial corporal punishment has long been outlawed in Namibia, it retains a strong hold on the public imagination.

5 SOUTH AFRICA

As pointed out in Part 1 of this article, judicial corporal punishment was extensively employed in South Africa as a method of social control.⁹⁷ This form of punishment was imposed in South Africa for centuries and was important in bolstering both colonial and Apartheid rule, which perhaps explains its prolonged existence in the country.⁹⁸ In this section we intend to focus on the imposition of judicial corporal punishment in South Africa during the twentieth century.

Before 1917 judicial corporal punishment was imposed in different degrees in the four colonies which made up the Union of South Africa.⁹⁹ In that year the Criminal Procedure and Evidence Act was passed, which prohibited all courts within the Union of South Africa from imposing more than fifteen strokes.¹⁰⁰

⁹⁶ Menges "Witchdoctors Wanted Above Lawyers in Traditional Courts" 2003-04-04 *The Namibian*.

⁹⁷ *Eg.*, in an Internet site containing an extensive research archive dealing with corporal punishment around the world, the following is stated in relation to judicial corporal punishment in South Africa: "Apart from present-day Singapore, there can hardly be another country where judicial corporal punishment (JCP) was used as widely as in twentieth-century South Africa. JCP evolved over a long period from traditional use under British colonial administration for serious crimes only, to a mandatory requirement in the 1950s and 1960s for many crimes in the case of adult men. In a milder form it was also over many decades a routinely inflicted penalty for males under 21 for any offence." See <http://www.corpun.com/jcpza1.htm> (1: Introduction).

⁹⁸ *Eg.*, according to www.corpun.com, citing Venter "Die Geskiedenis Van Die Suid Afrikaanse Gevangenisstelsel: 1652-1958 (History of the South African Prison System) (1959) 3": "In the early days of the 17th-century Cape Colony, under the rule of the Dutch East India Company, corporal punishment was usually reserved for those convicted of petty misdemeanours. Even so, it was not uncommon for whippings of more than one hundred lashes to be administered, sometimes resulting in serious injury or even death. See <http://www.corpun.com/jcpza1.htm> (3: Historical Background and Legislative Timeline).

⁹⁹ The pre-1917 position in three of the colonies is summarized in www.corpun.com as follows: "The general magistrates' court jurisdiction had remained unchanged in the Cape since 1856 (Act 20/1856 (C) s 42) – up to 36 strokes in the event of a second or subsequent conviction within two years, which could be combined with imprisonment. In Transvaal, both in his ordinary jurisdiction and on remittal, a magistrate could impose up to 25 strokes for a first conviction for certain common law crimes and statutory offences. Natal allowed up to 20 strokes with a cane or rod for a first offence, which could be accompanied by imprisonment, while the Chief Magistrates of Durban and Pietermaritzburg had the extended power to impose 25 strokes (Act 22/1896 (N) s 21, Act 32/1905 (N))." See <http://www.corpun.com/jcpza1.htm> (3: Historical Background and Legislative Timeline).

¹⁰⁰ See <http://www.corpun.com/jcpza1.htm> (3: Historical Background and Legislative Timeline).

In 1944 the Magistrates Court Act 32 of 1944 was passed, which reduced the number of strokes that could be imposed by Magistrates from fifteen to ten. Any sentence of adult (but not juvenile) whipping imposed either by a Magistrates Court or within a prison was to be subject to automatic review. In addition Magistrates' Courts were prohibited from ordering convicted persons to be lashed with the cat-o'-nine tails and were only permitted to order strokes with the cane. Sentences involving lashes with the cat-o'-nine tails could only be imposed by the Supreme Court.¹⁰¹

In 1945 a review of penal policy was conducted by the Lansdown Commission. Despite the fact that judicial corporal punishment had been abolished in most Western countries, the commission decided to retain this form of punishment in South Africa. According to Midgley, the Commission's "main reason for recommending that corporal punishment be retained was the belief that such punishment was a deterrent of 'special efficacy' for Africans, who the Commission noted, had not yet emerged from an 'uncivilized state'".¹⁰²

In 1952, a few years after coming to power, the National Party government passed the Criminal Sentences Amendment Act 33 of 1952, which made whipping a compulsory sentence for males under the age of 50 years, who had been convicted of rape (where the death penalty was not imposed), robbery, housebreaking, and culpable homicide involving assault with intent to rape or rob. In 1955 further offences were made punishable in this way. Julia Sloth-Nielsen notes that the courts were "forced to sanction an orgy of whipping" and "it was only in 1965 when black political organization had been crushed and the rule of apartheid imposed upon the population that these compulsory sentencing provisions were relaxed".¹⁰³

¹⁰¹ *Ibid.*

¹⁰² Midgley "Corporal Punishment and Penal Policy – Notes on the Continued Use of Corporal Punishment with Reference to South Africa" 1982 73(1) *The Journal of Criminal Law and Criminology* 388 395.

¹⁰³ Sloth-Nielsen "Corporal Punishment – Acceptable State Violence?" in Hanssen and Van Zyl Smit (eds) *Towards Justice? Crime and State Control in South Africa* (1990) 195 201-202. According to *www.corpun.com*: "In the twenty years between 1942 and 1962, about 1,000,000 strokes were administered to 180,000 offenders; and 850,000 of these strokes were administered after the 1952 Act was passed." The said website, citing Prisons Department annual reports and replies given in Parliament, with supplementary information from the Howard League for Penal Reform (Sir Benson 1937) and analysis in Albie Sachs, *Justice in South Africa*, Chatto and Heinemann 1973; and Kahn "Crime and Punishment 1910-1960" 1961 *Acta Juridica*, reflects the number of judicial corporal punishments carried out on offenders in prison, whether for prison discipline reasons or as a court sentence each year between 1911 and 1976 as: **1911**: 3,399; **1916**: 4,489; **1917**: 2,729; **1921**: 2,733; **1927**: 2,458; **1928**: 2,497; **1931**: 2,981; **1932**: 3,683; **1935**: 3,014; **1937**: 2,918; **1940**: 1,864; **1941**: 1,617; **1942**: 2,056; **1943**: 1,927; **1944**: 2,126; **1945**: 2,649; **1947**: 2,696; **1951**: 4,783; **1952**: 8,724; **1953**: 12,927; **1954**: 13,879; **1956-57**: 17,498; **1957-58**: 18,542; **1960-61**: 17,389; **1963-64**: 16,889; **1964-5**: 15,756; **1965-66**: 8,888; **1968-69**: 5,273; **1971-72**: 4,536; **1974-75**: 2,910; and **1975-76**: 2,251. Note that these statistics do not include juvenile canings not administered in prison. In relation to juvenile canings *www.corpun.com* states that in 1970 alone, "some 34 000 young offenders received judicial corporal punishment" and further that: "According to Department of Justice figures, the whipping of juvenile males in 1982 accounted for around 39,000 cases -- well over 100 canings for every day of the year. Even

With the rise to power of the National Party judicial corporal punishment came to be used as one of the instruments to enforce the system of Apartheid. For example, in terms of section 1 of the Criminal Law Amendment Act 8 of 1953, a person convicted of even a minor offence, which was committed by way of protest or in support of a campaign against any law, could be sentenced to a whipping not exceeding ten strokes.¹⁰⁴ Furthermore, the Riotous Assemblies and Criminal Laws Amendment Act 15 of 1954 provided for lashes to be imposed for political crimes. This “marked a significant intensification of direct state repression against the democratic opposition”.¹⁰⁵

A decade later, in 1965, a clause was inserted in the Criminal Procedure Amendment Act 1965 by the Minister of Justice in terms of which compulsory whipping was repealed, and discretion over the imposition of corporal punishment was restored to the courts.¹⁰⁶ However, although this resulted in the frequency of judicial corporal punishment decreasing somewhat, political offenders continued to receive corporal punishment for politically-motivated crimes.¹⁰⁷

Furthermore, in 1986, the Criminal Procedure Act was amended to extend the number and types of offences for which an offender might be sentenced to corporal punishment. Adults could henceforth be subjected to this form of punishment for the offences of sedition, arson, public violence and malicious damage to property, although corporal punishment was no longer permitted for the offences of bestiality and homosexual acts.¹⁰⁸

Between July 1989 and June 1990, a total of 36,706 offenders were sentenced to corporal punishment in South Africa.¹⁰⁹ In 1993 the South African Minister of Justice stated that, during 1992, more than 30,000 people were sentenced to corporal punishment without the option of a fine or imprisonment in South Africa.¹¹⁰ It is clear, therefore, that judicial corporal punishment held a central position within the South African penal system

ten years later, on the eve of the transition to democracy, the figure was still 36,000.” See <http://www.corpun.com/jcpza9.htm> (10: Statistics); and <http://www.corpun.com/jcpza1.htm> (3: Historical Background and Legislative Timeline).

¹⁰⁴ See <http://www.corpun.com/jcpza1.htm> (3: Historical Background and Legislative Timeline).

¹⁰⁵ See <http://www.corpun.com/jcpza1.htm> (3: Historical Background and Legislative Timeline), citing Rich *State Power and Black Politics in South Africa 1912-1951* (1996).

¹⁰⁶ See <http://www.corpun.com/jcpza1.htm> (3: Historical Background and Legislative Timeline).

¹⁰⁷ Eg, www.corpun.com, detailing events between 1976 and 1977, states as follows: “After widespread unrest in the urban African townships of several large cities, many schoolchildren were brought before the courts and caned for participating in politically motivated activities”. See <http://www.corpun.com/jcpza1.htm> (3: Historical Background and Legislative Timeline), citing Midgley 1982 73(1) *The Journal of Criminal Law and Criminology*.

¹⁰⁸ According to www.corpun.com: “The stage was thus set for an increase in court-imposed whippings in retaliation for political activity. The new list of corporally punishable offences was intended to deal with offences against public order in the ongoing climate of political unrest.” See <http://www.corpun.com/jcpza1.htm> (3: Historical Background and Legislative Timeline).

¹⁰⁹ Hansard “Questions and Replies” 27 March 1991 *House of Assembly – South Africa* 784.

¹¹⁰ *The Natal Mercury*, 19 March 1993.

during this time. However, there were certain judicial officers who were not convinced of the effectiveness of this punishment. In April 1986 the *Daily News* reported on a call, by Judge-President Mr Justice Milne and Mr Justice Page, for an investigation into whether the whipping of adults should be abolished. The newspaper quoted the justices as describing whipping as “torture sanctioned by law”. Mr Justice Milne was also quoted as saying that 15 years of jail inspections, criminal trials, appeals and reviews had not persuaded him of the deterrent effectiveness of whipping and that, “[i]ndeed the recurrence of so many cases where offenders who have been whipped, commit offences subsequently, suggests the contrary”.¹¹¹ It is interesting to note, however, that Mr Justice Thirion disagreed:

“[T]hose criminals who qualify for a whipping have already by their crimes shown their coarseness of character and lack of refinement ... It is the indulgence in crime which degrades and coarsens; not its expiation.”¹¹²

Seven years later corporal punishment for prison disciplinary offences was prohibited in terms of the 23 June 1993 amendment to the Correctional Services Act.¹¹³

Shortly thereafter the Constitutional Court, in the case of *S v Williams*,¹¹⁴ on deciding an issue of whether a sentence of juvenile whipping,¹¹⁵ was inconsistent with the provisions of the Interim Constitution of the Republic of South Africa, 1993¹¹⁶ found that:

“Courts do have a role to play in the promotion and development of a new culture ‘founded on the recognition of human rights’, in particular with regard to those rights which are enshrined in the Constitution ... One of the implications of the new order is that old rules and practices can no longer be taken for granted; they must be subjected to constant reassessment to bring them into line with the provisions of the Constitution.”¹¹⁷

And that:

“at this time, so close to the dawn of the 21st century, juvenile whipping is cruel, it is inhuman and it is degrading”.¹¹⁸

The court also argued “that in addition to constituting cruel, inhuman or degrading punishment, corporal punishment also violated the right to

¹¹¹ *The Daily News*, 4 April 1986.

¹¹² *S v Motsesoana* 1986 3 SA 350 (N) 372.

¹¹³ See <http://www.corpun.com/jcpza1.htm> (3: Historical Background and Legislative Timeline).

¹¹⁴ 1995 3 SA 632.

¹¹⁵ In accordance with the provisions of s 294 of the Criminal Procedure Act 51 of 1977.

¹¹⁶ S 33(1) of Act 200 of 1993.

¹¹⁷ *S v Williams supra* 635-636.

¹¹⁸ *S v Williams supra* par 91. De Kock “Constitutionality of the Sentence of Corporal Punishment” June 1996 *Nexus* 18.

equality (s 8); the right to respect for and protection of dignity (s 10); and the rights of children (s 30).¹¹⁹

In making his decision, Justice Langa referred to a number of southern African cases,¹²⁰ as well as additional international sources.¹²¹ However, he focused on the decisions of the Supreme Courts of Namibia and Zimbabwe as having “special significance” primarily because they are geographic neighbours of South Africa, which have a shared colonial experience as well as a common Roman-Dutch legal tradition.¹²²

Langa J also scrutinized Article 5 of the African Charter of Human and Peoples’ Rights and used this to substantiate the assertion that section 11(2) of the interim Constitution corresponds with most international human rights instruments.¹²³

Thus the Court, in the final instance, found that:

“The Constitution now offers an opportunity for South Africans to join the mainstream of a world community that is progressively moving away from punishments that place undue emphasis on retribution and vengeance, rather than on correction, prevention and the recognition of human rights.”¹²⁴

It is interesting to note that in his reasoning the judge not only had regard to the position in other jurisdictions, but also to the context in which these human rights were being sought in South Africa. He noted that since the mid-1980’s South African society had been “subjected to an unprecedented wave of violence” and that, as such, “a culture of authority which legitimates the use of violence would be inconsistent with the values for which the Constitution stands”.¹²⁵

Thus the whipping of juveniles was declared unconstitutional.

¹¹⁹ Keightley “Torture and Cruel, Inhuman and Degrading Treatment or Punishment in the UN Convention Against Torture and Other Instruments of International Law: Recent Developments in South Africa” 1995 11(3) *South African Journal on Human Rights* 379 395.

¹²⁰ *S v Petrus* (1985) LRC (Const) 699, 1987 (2) ZLR 246 (SC); *S v Ncube*; *S v Tshuma*; *S v Ndhlovu supra*; and *Ex parte Attorney-General, Namibia: In re corporal punishment by organs of the State* 1991 (3) SA 76 NmSC.

¹²¹ See *S v Williams supra* 640-641 where international sources discussed included the United Nations Human Rights Committee, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Commission of Human Rights, the European Court of Human Rights, the Constitution of the United States of America, the Canadian Charter of Rights and Freedoms and *Tyrer v United Kingdom* (1978) 2 EHRR 1. In this case “Tyrer was sentenced by a juvenile court in the Isle of Mann, a self-governing territory of the UK, to three strokes with a cane. He petitioned the European Commission of Human Rights arguing that his punishment was in violation of article 3 of the European Convention on Human Rights (which prohibits torture or inhuman or degrading treatment or punishment). Both the commission and the court concluded that the issue at stake was whether corporal punishment amounted to degrading punishment within the meaning of article 3. Both held that indeed it did.” Mubangizi “International Human Rights Protection for Prisoners: Which Way South Africa?” 2001 26 *SAYIL* 103.

¹²² *S v Williams supra* 642.

¹²³ Par 21 fn 24. Viljoen “Application of the African Charter on Human and Peoples’ Rights by Domestic Courts in Africa” 1999 43 *Journal of African Law* 1 12.

¹²⁴ *S v Williams supra* 648.

¹²⁵ *Ibid.*

In this regard it has been pointed out that, as the State endeavours to move away from a violent past, it must be foremost in upholding those values which are the guiding light of civilized societies. According to De Kock "punishment that is excessive serves neither the interests of justice nor those of society ... punishment is excessive if it is unnecessary", and he points out that it is unnecessary "if there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted ..."¹²⁶

It is interesting to note that not all members of South African society agreed with the esteemed judges. Around the same time, a 1995 issue of the Farmer's Weekly reported on a security summit organized by the Natal Agricultural Union, held at Pietermaritzburg. The summit comprised four workshops, one of which addressed the issue of criminal procedure and justice. At this workshop, attended by police, security personnel, politicians, senior military officials and farmers, it was agreed that "capital and corporal punishments are necessary if law and order are to be restored, particularly in KwaZulu-Natal". Crime statistics given at the summit by John Fair,¹²⁷ quoting the World Health Organisation, highlighted that South Africa had the "highest murder rate in the world", and that "the country with the second highest murder rate per head of population had half that of South Africa". Fair also pointed out that "the ratio of wanted criminals at large to policemen was 2 to 1".¹²⁸

The next year the South African Constitution of 1996 came into being, in terms of which everyone has the right to freedom and security of person, which includes the right to be free from all forms of violence from either public or private sources; not to be tortured in any way; and not to be treated or punished in a cruel, inhuman or degrading way.¹²⁹

Immediately thereafter in 1997 the Abolition of Corporal Punishment Act¹³⁰ was promulgated, which repealed any law authorising the imposition of corporal punishment by a court of law, including a court of traditional leaders.¹³¹ The new legislation sparked vigorous debate and a number of political parties voiced their opposition to the abolition of judicial corporal punishment of adults. The Inkatha Freedom Party (IFP) commented that:

"Corporal punishment is a particularly suitable form of punishment for petty offenders whose criminal ways could well be strengthened by having to do time in prison."¹³²

¹²⁶ De Kock June 1996 *Nexus* 19.

¹²⁷ Senior production adviser to the South African Wool Board on stock theft information centres.

¹²⁸ Farmer's Weekly, December 15, 1995 "Get tough with criminals urges security summit" Issue 85050, 16-17.

¹²⁹ S 12(1).

¹³⁰ 33 of 1997.

¹³¹ S 1.

¹³² The *Eastern Province Herald*, 14 May 1997.

They refuted the argument put forward by supporters of judicial corporal punishment that there was a growing consensus overseas that this form of punishment should be outlawed. The party stated that only a few developed, western countries had done so and that most African countries had kept whipping on the statute book.¹³³ In fact, at the time of writing in 2007 the following was stated in the justice policy section of the IFP website: "Tougher sentencing is needed and, where appropriate, corporal punishment for juveniles should replace stifling incarceration."¹³⁴

The leader of the New National Party, Marthinus van Schalkwyk, also came out strongly against the new legislation. The Independent Online reported that, whilst visiting the allegedly drug and gangster-ridden suburb of Westbury in Johannesburg, Van Schalkwyk spoke to the media, saying that he would ask the government to review legislation that outlawed corporal punishment.¹³⁵

Also, more recently, African National Congress (ANC) councillor, Likhaya Matebese, apparently spoke out of turn when, reacting to a robbery at a clinic in his ward, he appealed to the public sentiment by saying: "Let's bring back the culture of lashing culprits. This is the only language they understand ... Communities who apprehend criminals should be allowed to lash them in public."¹³⁶ The following day the ANC made it clear that the councillor's statement did not reflect the views of the ANC.¹³⁷

Both the traditional courts and the public showed a lack of positive response to the abolition of corporal punishment. Traditional leaders were apparently not adhering to the recently enacted law, and in May 1999 the South African Law Commission published a discussion paper wherein one of the recommendations stated as follows: "Traditional courts need to be alerted that corporal punishment is unconstitutional and therefore illegal!"¹³⁸

Such was the public negativity that certain members of the public took it upon themselves to punish offenders in a show of vigilantism. Commenting on vigilante violence in South Africa, Bronwyn Harris describes vigilantism as:

"a blanket term for activities that occur beyond the parameters of the legal system, purportedly to achieve justice ... Violence, especially in an extreme form of corporal punishment, is an integral feature of vigilante methodology.

¹³³ The *Eastern Province Herald*, 14 May 1997.

¹³⁴ Inkatha Freedom Party justice policy (available at <http://www.ifp.org.za>). Citing Ben Harding, "Zulus Gather for Final South African Election Push" 2004-04-12 *Reuters*; and *www.corpun.com* notes that: "In fact one IFP spokesman has accused the ruling ANC of 'running roughshod over Zulu tradition' with the law banning corporal punishment." See <http://www.corpun.com/jcpza10.htm> (11: Illegal Punishments, Kangaroo Courts, Native/Customary Courts).

¹³⁵ The *Independent Online*, 25 April 2000.

¹³⁶ *The Herald (EP Herald)*, 25 March 2004.

¹³⁷ *The Herald (EP Herald)*, 26 March 2004.

¹³⁸ South African Law Commission Discussion Paper 82: *Traditional Courts and the Judicial Function of Traditional Leaders*, 6 May 1999.

The efficacy of vigilante violence pivots on fear and operates through the very public, visible nature of vigilantism".¹³⁹

She explains further that, because the public have lost faith in the country's criminal justice system, they do not necessarily perceive the acts of vigilantism as criminal. Instead, when analysed in the context of South Africa's political transition, the acts are seen as "a privatisation of the old-style policing function".¹⁴⁰

An interesting example of a group of citizens banding together to combat increasing crime in South Africa, is the organization known as Mapogo-A-Mathamaga, which was formed in the Northern Province of South Africa in September 1996. The group, which was set up after six local businessmen had been shot in armed robberies in one month, proclaims that they are leopards and Mathamaga is their colour.¹⁴¹ They are reported as stating:

"A criminal here is likened to a tiger because he makes life miserable for his victims. What we are saying is that if these tigers continue with their attitude,

¹³⁹ Harris "As for Violent Crime that's our Daily Bread': Vigilante Violence during South Africa's Period of Transition" May 2001 1 *Violence and Transition Series*.

¹⁴⁰ *Ibid*. It should be noted, however, that vigilante activity has a long history in South Africa, particularly in the context of the political turmoil which characterised this country's volatile African townships. Eg, according to www.corpun.com, citing Dutfield "A Revolution in the Townships" 1986-05-22 *The Listener*. "In the 1970s unofficial 'crime-busting' groups called *makgotla* came to prominence, notably in the huge black township of Soweto. These were illegal groups of vigilantes or 'home guards' who held their own 'trials' on patches of waste land. On-the-spot floggings sometimes ensued." In the 1980s and early 1990s, with increasing political violence towards the end of Apartheid rule, there was a rise in left-wing vigilante activity. Eg, www.corpun.com, citing Beresford "A Gentler Type of People's justice" 1991-05-05 *Guardian Weekly*, a report on the state of affairs in Mamelodi township outside Pretoria, states as follows: "In the continued absence of effective policing in South Africa's townships there is a growing tendency for residents to take the law into their own hands and a proliferation of kangaroo courts ... flogging is the favourite 'sentence'. The beatings, often referred to by the Zulu term *siwasho*, which means 'cleansing medicine', are sometimes dealt out in terms of duration rather than the numbers of lashes." Further, www.corpun.com gives the following example of vigilante activity, alleged to be taking place in 1994 in the Ivory Park informal settlement in the Mid-rand area: "In December 1994, residents of the Ivory Park squatter settlement in the mid-Rand area likewise drew up their own rough penal code. The guidelines were later adopted by other squatter settlements in the Gauteng region ... Punishments tended to be of the severe physical kind, possibly because there was not the option of putting those found guilty in prison." See <http://www.corpun.com> notes that the punishments stipulated in terms of the "rough penal code" ranged from 500 lashes for a man 'convicted' of rape (after being paraded naked), to 90 lashes for assault and 50 lashes for theft. Citing Khupiso "People's Court Dishes out Tough Justice to 'Romeo'" 1998-07-05 *Sunday Times*, www.corpun.com notes that this "court" was still operating in 1998, despite South Africa's transition to democracy. See <http://www.corpun.com/jcpza10.htm> (11: Illegal Punishments, Kangaroo Courts, Native/Customary Courts).

¹⁴¹ The *Independent Online*, 21 June 1999; the official website of the Mapogo-A-Mathamaga, states that the group was established by a group of people who were not satisfied with the service they had received from the SAPS. [Http://www.mapogoafrica.co.za](http://www.mapogoafrica.co.za). According to www.corpun.com, citing Ngobeni "Vigilante Group Sweeps the Suburbs" 2000-01-25 *Daily Mail & Guardian*, by the year 2000 "... the organisation was claiming 50,000 members and had spread to other parts of the country". See <http://www.corpun.com/jcpza10.htm> (11: Illegal Punishments, Kangaroo Courts, Native/Customary Courts).

we will be left with no option but to be leopards who can match the savagery of the tiger. If they hit us, we hit back, and with more strength."¹⁴²

The group maintains a strong presence on the Internet, which explains the ethos of the group's activities. The following is stated:

"We are invisible, but our warnings are not ... Criminal cases are investigated and dealt with by our agents the real African way. People who are found in possession of our customer's goods do not have the luxury of long-lasting court cases and being found innocent on a technical point. They will immediately be dealt with on a traditional way to an extent that they will become exemplary citizens serving an integral part in our community."¹⁴³

John Monhle Magolego, the president of Mapogo,¹⁴⁴ is a firm believer in corporal punishment¹⁴⁵ and stated in an interview with the *Mail and Guardian* that criminals are being "pampered" by the government and that he does not want to make their life any easier. "The government gives these criminals jelly and custard. We don't do that, we believe in the African way of stopping crime."¹⁴⁶

Alternative forms of policing have also been noted in countries other than South Africa and, in a similar vein, Coldham talks of "instant justice", which he says:

"[O]perates outside the law and, though it may claim an antecedent in the practices of customary law, it is essentially a post-independence phenomenon reflecting dissatisfaction with the criminal justice system on the part of the urban poor."¹⁴⁷

6 GHANA

It appears that judicial corporal punishment was abolished in Ghana in 1960.¹⁴⁸ Also the Constitution states¹⁴⁹ that: "A child shall not be subjected to torture or other cruel, inhumane or degrading treatment."¹⁵⁰ However, it is interesting to note that in July 2006 Amnesty International-Ghana called upon the Ghanaian government to implement a 12-point plan setting out measures to "prevent the torture and ill-treatment of people who are in government custody or otherwise in the hands of agents of the State". Point

¹⁴² Makatile "Return of the Sjambok" 1997-06-12.

¹⁴³ See <http://www.mapogoafrica.co.za> and <http://www.mapogo.co.za>.

¹⁴⁴ In the sePedi language the name of the group means: "If you (the criminal) conduct yourself like a leopard, remember the victim can change into a tiger." "Unlikely Allies Fight Crime" 1998-12-05 *Mail and Guardian Online*.

¹⁴⁵ "Without corporal punishment, our government will never stop crime in South Africa." Magolego (President of Mapogo) "The Development of Vigilantism in South Africa" March 2002 72 *Monograph ISS Seminar* 8 June 2001. Violent Justice, Vigilantism and the State's Response.

¹⁴⁶ "What's Cooking ... with Mapogo" 2000-12-22 *Mail and Guardian*.

¹⁴⁷ See [1991] Tanzania Law Reports 1 and [1992] Tanzania Law Reports 134 in Hatchard "Crime and Penal Policy in Zambia" 1985 *Journal of Modern African Studies* 493 500.

¹⁴⁸ Coldham 2000 44 *Journal of African Law* 231.

¹⁴⁹ Article 28.3.

¹⁵⁰ <http://www.endcorporalpunishment.org/pages/progress/reports/ghana.html>.

5 calls on the government to: "Prohibit torture and other ill-treatment in law. Governments should adopt laws for the prohibition and prevention of torture and other ill-treatment incorporating the main elements of the UN Convention against torture and other cruel, inhuman or degrading treatment or punishment (Convention against Torture) and other relevant international standards. All judicial and administrative corporal punishments should be abolished."¹⁵¹

7 UGANDA

It is only relatively recently that the courts have acknowledged that judicial corporal punishment is unconstitutional. In August 1997, the Children Statute, 1996 came into force, which expressly prohibits the corporal punishment of persons below the age of 18 years.¹⁵² Shortly thereafter, in 1999 a Supreme Court ruling stated that corporal punishment is prohibited under article 24 of the Constitution.¹⁵³

The matter was subsequently taken to the Ugandan Constitutional Court, where it was ruled in 2000, with a three to two majority verdict, that corporal punishment was inconsistent with the provisions of the Ugandan Constitution.¹⁵⁴ The court stated that section 274 of the Penal Code Act, which imposed a sentence of corporal punishment on convicted persons was inconsistent with the provisions of Article 24 of the Constitution which states that: "No person shall be subjected to any form of torture, cruel, inhuman or degrading treatment or punishment."¹⁵⁵

However, corporal punishment continued to be used in various sectors while legislation was in the process of being amended.¹⁵⁶

For example, in 2003 it appeared as if clan leaders were still caning clan members for mistakes or failure to fulfil traditional rites. These leaders were warned by the Executive Director of the Foundation for Human Rights Initiative, Livingstone Ssewanyana, that they were breaking the law.¹⁵⁷

Also, in early 2006 it was clear that corporal punishment was still being meted out. The Monitor reported that:

"The government is investigating the caning of immigrant pastoralists in Teso on the orders of MP elect Musa Ecweru ... [Internal Affairs Minister] Rugunda said, 'caning is not permissible unless the courts have directed so. The matter

¹⁵¹ *Ghanaian Chronicle*, July 26 2006.

¹⁵² S 95. Recent developments "Reforming the Law Relating to Children in Uganda" 1998 42(1) *Journal of African Law* 136-137.

¹⁵³ *Kyamanywa v Uganda*, Criminal appeal No. 16 of 1999 www.endcorporalpunishment.org/pages/progress/reports/uganda.html.

¹⁵⁴ *Kyamanywa Simon v Uganda*, Constitutional Reference No. 10 of 2000.

¹⁵⁵ *New Vision*, Kampala, 23 January 2002.

¹⁵⁶ As at 2005, legislation was still in the process of being amended and corporal punishment continued to be imposed under the Penal Code – <http://www.endcorporalpunishment.org/pages/progress/reports/uganda.html>.

¹⁵⁷ *Legalbrief Africa*, 9 June 2003.

is under investigation and we shall come back and report where necessary’.¹⁵⁸

It was only in May 2006 that the Ugandan Parliament passed the Prisons Bill, which abolished corporal punishment as a valid administrative tool and created a nationwide Uganda Prisons Service, which will oversee all prisons in Uganda and be responsible for conducting regular reviews of the prisons to ensure they are complying with all penal-system guidelines. The proposed legislation was presented to Parliament three years previously by the Internal Affairs Minister, Dr Ruhakana Rugunda.¹⁵⁹

8 KENYA

In 1981 Kercher described the status of corporal punishment in Kenya as having gained considerable official favour since independence. He stated further that, in fact, a series of amendments to the Penal Code made in the late 1960s and early 1970s had made it mandatory for many offences (primarily property offences) and discretionary for even more (primarily sexual offences). Although these policies were adopted in response to public concern about growing crime rates there was no evidence to suggest that they were, in fact, an effective deterrent.¹⁶⁰

In 2003, Mwai Kibaki replaced Daniel Arap Moi as president of Kenya. President Kibaki promised to deliver responsive, transparent and innovative leadership and, in 2003, the Criminal Law (Amendment) Act was promulgated,¹⁶¹ which abolished corporal punishment and caning as a court sentence.¹⁶²

Pravin Bowry, a Nairobi-based lawyer, noted the passing of corporal punishment without regret:

“Since the advent of the colonial era, and through the post-independence period, Kenyans have been humiliated by the law stipulating whipping for convicts, legally known as corporal punishment. This was a colonial means of control, a means of demeaning humanity. That it continued into independent Kenya is something Kenyans will have to reflect on ...”¹⁶³

In addition, in 2005 the Nation reported on the new Kenyan Constitution, saying that, if it was passed, every sentence of corporal punishment passed before the effective date would be remitted (pardoned) and shall not be

¹⁵⁸ Mulondo and Mutumba “Government Probes Teso Immigrants Assault” 2006-04-14 *Monitor (Uganda)*.

¹⁵⁹ The Monitor, May 4, 2006.

¹⁶⁰ Coldham 2000 44 *Journal of African Law* 231. Coldham quotes Kercher *The Kenya Penal System* (1981) 73ff as saying that the use of corporal punishment for adults rose from an annual figure of 181 in 1962 to around 5000 cases in the late 1970s.

¹⁶¹ 5 of 2003.

¹⁶² De Sousa and Bryce “International Legal Development in Review: 2003” 2004 38 *International Lawyer* 539.

¹⁶³ *Daily Nation*, Nairobi, 16 September 2003.

carried out.¹⁶⁴ The new Constitution shall be deemed to have been retrospective and takes effect from the 2002 General Election.”¹⁶⁵

However, despite this legislation, it appears as if references to corporal punishment had not been removed from all penal legislation. In June 2006 a Kenyan Newspaper, *The Nation*, reported on the deportation of two Armenians, who would have had to face criminal charges “had they been arraigned in court over a gun incident at Jomo Kenyatta International Airport”. The article went on to state that section 234 of the Code stipulates:

“Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life, with or without corporal punishment.”¹⁶⁶

9 TANZANIA

Not only did the newly independent state of Tanzania not take steps to abolish judicial corporal punishment, but it introduced legislation making corporal punishment mandatory for certain offences. The Minimum Sentences Act 1963 of Tanzania was enacted two years after independence. This Act restricted discretion previously available to judges and magistrates when sentencing convicted persons by imposing two-year minimum sentences for certain itemized crimes against property together with mandatory corporal punishment of at least 24 strokes.¹⁶⁷ Males over the age of 16 and under the age of 45 could be punished in this way.¹⁶⁸ The number of strokes mandated by the legislation indicates the extent to which severe corporal punishment played an important role within the penal system of post-colonial Tanzania. Far from withering away during this period, it is clear that judicial corporal punishment became even more widely used than previously.

Williams contends that although the Government leaders sympathised with the prison officers who had to administer corporal punishment, they supported the Act inasmuch as the mandatory punishment served to teach criminals that to commit an offence against the nation or its citizens was evil. In fact, many members of the National Assembly enthusiastically supported the corporal punishment provisions.¹⁶⁹

However, it did not appear as if the harsh measures introduced in the Act were achieving the desired outcome. According to criminal statistics for some scheduled offences in Tanzania, immediately after the introduction of

¹⁶⁴ *The Nation*, Nairobi, August 24, 2005.

¹⁶⁵ *East African Standard*, Nairobi, February 13 2004.

¹⁶⁶ *The Nation*, June 14 2006.

¹⁶⁷ Cap. 526, s 5 and 11. Coldham 2000 44 *Journal of African Law* 233.

¹⁶⁸ Shaidi, 1989; Kato, 1972

¹⁶⁹ Williams “The Minimum Sentences Act, 1972, of Tanzania” 1974 18(1) *Journal of African Law* 79, quoting from statements in Read “Minimum Sentences in Tanzania” 1965 *JAL* 20.

the Minimum Sentences Act there was, in fact, a rise in the actual crime rates.¹⁷⁰

On the strength of these reports, in 1969, the Second Vice-President, Mr Kawawa, and the Attorney-General, Mr Bomani, argued in the National Assembly¹⁷¹ that, since flogging had failed as a deterrent, the mandatory requirement to impose corporal punishment should be repealed, and introduced a Bill to this effect.¹⁷² However, although the majority of the members agreed that the mandatory requirement should be repealed, they were adamant that corporal punishment should remain in the Act, and even be applied to juveniles and older persons who were at present exempted. The Bill was thus “withdrawn completely and the 1963 Act remained unamended.”¹⁷³

Two years later the Minister for Home Affairs, Mr S Maswanya, held a press conference at which he expressed the opinion that corporal punishment was unsocialistic.¹⁷⁴ Then, after a series of seminars organised by various people’s organisations and members of the press,¹⁷⁵ in which the public were invited to comment on the abolition of compulsory caning under the Minimum Sentences Act, two Bills were published, which in effect mirrored the 1969 Bill.¹⁷⁶ The Minimum Sentences Act of 1963 was then replaced by the Minimum Sentences Act of 1972, which abolished mandatory corporal punishment but retained it as a sentencing option.¹⁷⁷

Seventeen years later in 1989 mandatory corporal punishment was reintroduced, as Coldham writes, “by an enthusiastic and near unanimous Parliament”.¹⁷⁸ This move by Parliament elicited a negative response from the respected Tanzanian academic Issa Shivji:

“The attitude of the executive and the legislature has not been particularly accommodating to human rights. The Attorney General in various speeches has been particularly keen to remind the judiciary of the general interests of society which in practice means the interests of the state. He justified the recent re-introduction of corporal punishment on those grounds.”¹⁷⁹

¹⁷⁰ Williams 1974 18(1) *Journal of African Law* 80.

¹⁷¹ “The Standard” 22 and 23 October 1969 quoted in Williams 1974 18(1) *Journal of African Law* 79-91.

¹⁷² In October 1969, the Criminal Law (Miscellaneous Amendments) Bill, 1969 Bill Supplement No. 9 to the Gazette, No. 42, Vol. 1, was introduced, which repealed the requirement of mandatory corporal punishment. Williams 1974 18(1) *Journal of African Law* 81.

¹⁷³ Williams 1974 18(1) *Journal of African Law* 80.

¹⁷⁴ “The Nationalist” 21 August 1971 quoted in Williams 1974 18(1) *Journal of African Law* 79-91.

¹⁷⁵ See, eg, letters to “The Standard’s” People’s Forum, 11 and 28 September 1971 quoted in Williams 1974 18(1) *Journal of African Law* 79-91.

¹⁷⁶ 1972 Bill Supplement No. 1 to the Gazette, No. 54, Vol. LII. Williams 1974 18(1) *Journal of African Law* 81.

¹⁷⁷ See s 5 of Minimum Sentences (Consequential and Incidental Provisions) Act 2 of 1972, which amended s 7 of the Criminal Procedure Code. See also Coldham 2000 44 *Journal of African Law* 233.

¹⁷⁸ Coldham 2000 44 *Journal of African Law* 231.

¹⁷⁹ Shivji “Contradictory Developments in the Teaching and Practice of Human Rights Law in Tanzania” 1991 *Journal of African Law* 116 126.

In 1992 the High Court of Tanzania, deriving support from the judgment of the Supreme Court of Zimbabwe in *Ncube v S*,¹⁸⁰ and from other jurisdictions, held that corporal punishment was unconstitutional.¹⁸¹ However, despite this decision, judicial corporal punishment continued to be applied. More than ten years later, the U.S. Country Report on Human Rights Practices in Tanzania reported that:

“The police and the judicial system continued to use corporal punishment. On June 4, a High Court in Dodoma ordered six cane strokes for a juvenile convicted of manslaughter. In July Justice Minister Mwapachu said that the issue of whether to continue the practice of caning offenders would be suspended until the Government carried out thorough investigations.”¹⁸²

Currently, according to a 2005 United Nations Refugee Agency report, the Prisons Act, 1967 states that where corporal punishment is prescribed for any offence the number of strokes shall not exceed ten in the case of persons of or under the apparent age of sixteen years, and eighteen in all other cases, and shall be inflicted with such type of cane and in such manner as may be prescribed. Also, corporal punishment shall not be inflicted upon any female prisoner, nor upon male prisoners under sentence of death or over the age of forty-five years, nor upon any civil prisoner nor upon any prisoner imprisoned as a vagrant.¹⁸³

Members of the Tanzanian parliament also seem very much in favour of judicial corporal punishment. During a parliamentary debate on a bill to strengthen laws that regulate banks and other financial institutions, one parliamentarian went as far as stating that “spanking should be added in the list of punishments to deal with investors who are not abiding by the laid-down laws”.¹⁸⁴ He added that “a stroke or two on offenders would humiliate them and whip them back in line”.¹⁸⁵

10 NIGERIA

In 1955 the corporal punishment of adults was totally abolished in the Eastern Region of Nigeria. However, Coldham writes that it remained “an extremely popular punishment for juveniles”, and that between 1958 and 1963, “79 percent of juvenile offenders in the region were sentenced to corporal punishment”.¹⁸⁶

¹⁸⁰ 1987 2 ZLR 246.

¹⁸¹ Mwalusanya J in *Thomas Mjengi v Republic* [1992] Tanzania Law Reports 157. Coldham 2000 44 *Journal of African Law* 231.

¹⁸² Country report on human rights practices, Tanzania, released by the Bureau of Democracy, Human Rights and Labor March 31, 2003, submitted by the US Department of State to the US Congress.

¹⁸³ The UN Refugee Agency, Thursday, 27 October 2005.

¹⁸⁴ *Independent Online*, South Africa, 6 April 2006, quoting legislator Masolwa Cosmas Masolwa from the *Citizen*, Tanzania.

¹⁸⁵ *Independent Online*, South Africa, 6 April 2006, quoting from the *Daily News*, Tanzania.

¹⁸⁶ Coldham 2000 44 *Journal of African Law* 221 from Milner *The Nigerian Penal System* (1972) 263-264.

The current position under Nigerian Criminal Law¹⁸⁷ is that caning is a punishment (together with death, imprisonment, fine and forfeiture) that can be ordered by court after conviction. Section 77 of the Penal Code prescribes caning and/or flogging as a punishment for any male offender in lieu of or in addition to any other punishment to which he might be sentenced for an offence not punishable with death.¹⁸⁸ The Criminal Code Act¹⁸⁹ also provides for the caning of male persons under 17 years and states that:

“whenever a male person who, in the opinion of the Court, has not attained 17 years of age, has been found guilty of any offence, the court may, in its discretion, order him to be caned in addition to or in substitution for any other punishments to which he is liable”.¹⁹⁰

An example of the manner in which corporal punishment still forms a part of everyday life in Nigeria, is provided by a 2004 report in the local newspaper concerning efforts to force citizens to use footbridges when crossing public roads:

“[A]s if bent on losing their lives, majority of Lagosians (until now), never felt a need to use those bridges which cost government a lot of money to erect. They prefer to cross the expressway at the risk of being knocked down by fast-moving automobiles. This continued for many years until recently when the Lagos State Government felt enough was enough. Using men of the Kick Against Indiscipline (KAI) Brigade as well as council officials, the state government is beginning to change the attitude of people to these bridges. Lagosians now know that they stand to be punished, through fines and imprisonment if they fail to use the footbridges. KAI officials have been accused in the past of high-handedness towards those who refuse to use the footbridges by forcing them to pack refuse, undergo corporal punishment and in some cases pay hefty fines. We think this is in order ...”¹⁹¹

In 2005, as part of the Open Society Justice Initiative, the Director of Africa Programme¹⁹² reviewed the recommendations of the Committee on Judicial and Legal Reforms (Ajibola Committee), which is one of the 18 committees of the National Political Reforms Conference (NPRC). Its membership comprised 24 delegates to the conference, nearly all of them lawyers. The committee, reporting on the state of the existing legal rules, judicial institutions, processes and the personnel entrusted with dispensation of justice, found that “on the whole there is not much wrong”. It also recommended the retention of “capital and severe corporal punishment” for “only those young persons found to have been engaged in heinous offences such as armed robbery and cultism”. However, the Director noted that the

¹⁸⁷ S 17 of the Criminal Code Act.

¹⁸⁸ S 384-388 of the Criminal Procedure Act also provide for caning and s 386(1) specifically provides that caning shall be with light rod or cane or birch, and the number of strokes shall be specified in the sentence and shall not exceed twelve. Ogunye “The Police, Horsewhip and the Law” 2004-12-24 *Accra Mail*.

¹⁸⁹ S 18.

¹⁹⁰ Ogunye 2004-12-24 *Accra Mail*.

¹⁹¹ PM News, Nigeria, April 28, 2004.

¹⁹² Chidi Anselm Odinkalu.

Committee, in choosing the issues to focus on, was narrow and mechanistic in its understanding of legal and judicial reform and, as a result, their point of departure was aimed at preserving the status quo.¹⁹³

11 ZAMBIA

In 1984 the Zambian Supreme Court in the case of *Berejena v The People* stated as follows:

“Corporal punishment ... should be imposed very sparingly ... only in the most serious circumstances, such as grave brutality or a most serious outbreak of crime; mere prevalence of crime is not enough. We think that in this modern day and age, this form of punishment should be discouraged in Zambia. Indeed, the legislature itself has moved towards this direction by its recent repeal of mandatory caning in stock theft cases.”¹⁹⁴

Despite this ruling it appears as if corporal punishment continued to be imposed on offenders in spite of the Zambian Chief Justice’s description of it as inhuman and degrading and his plea for it to be used sparingly.¹⁹⁵

In 1999, in the Zambian High Court case of *Banda v The People*,¹⁹⁶ Judge Chulu pointed out that “it cannot be doubted that the provisions of sections 24(c) and 27 of the Penal Code, which permit the infliction or imposition of corporal punishment on offenders, are in total contravention, and conflict with the above provisions of article 15 of the Constitution”. He concluded by declaring that sections 24(c) and 27 of the Penal Code, chapter 87 were unconstitutional and therefore null and void, and were to be severed from the Penal Code.

On 10 May 2000 this ruling was commented on in an article in the *Sowetan*, which reported that corporal punishment was a “legacy of the colonial era” and “a brutal relic of British rule, which had only been used against black people and contravened a constitutional ban on inhuman and degrading punishment”.¹⁹⁷

The 2001, 2002 and 2003 US Country Reports all reported negatively on human rights practices in Zambia, with the 2001 report stating that the Chief Administrator of the High Court had to publicly remind magistrates of their obligation to uphold the ban on corporal punishment. In addition, the report stated that the Chief Administrator had held a meeting with prison officials to reinforce the ban and had prevented the implementation of a sentence of

¹⁹³ *Accra Mail*, May 23, 2005.

¹⁹⁴ Silungwe CJ in *Berejena v The People*, [1984] ZR19 21.

¹⁹⁵ See Coldham 2000 44 *Journal of African Law* 231.

¹⁹⁶ (2002) AHRLR 260 (ZaHC 1999).

¹⁹⁷ The *Sowetan*, May 10, 2000, Colonial Era Punishment Scrapped In Zambia, Newton Sibanda in Lusaka and Hobbs Gama in Blantyre; *Africa News Online*, Kenya, 16 February 2000, Human rights Judge quashes oppressive law, Newton Sibanda; *PanosLondon Online*, Spare The Rod ... And Save Zambian Schoolchildren, Mildred Mpundu.

corporal punishment by one magistrate.¹⁹⁸ The 2002 country report stated that some chiefs in Zambia's Northern Province continued to use corporal punishment as a disciplinary measure in local court cases, and that during the year the Government had made efforts to enforce the ban on corporal punishment by publicizing the fact that corporal punishment was illegal.¹⁹⁹

In 2003 the United States Country Report reiterated the fact that some chiefs in Zambia's Northern Province continued to use corporal punishment as a disciplinary measure in local court cases, despite the High Court ban on corporal punishment in the country. The police made it clear to one chief²⁰⁰ in the Northern Province, that they could not enforce the decree he had issued on February 1 in terms of which anyone who killed or assaulted another person, would be killed or assaulted with the same weapon.²⁰¹

On 17 January 2004 the *Independent Online* reported on judicial corporal punishment in Zambia under the headline: "Zambia smacks corporal punishment for good." The article stated that one of the reasons Legal Affairs Minister, George Kunda, was no longer prepared to tolerate corporal punishment, was that it went against constitutional provisions that forbade torture and all forms of punishment that were inhuman or degrading.²⁰² Shortly thereafter the *Times of Zambia* reported on the performance of the New Deal Government, listing a number of Acts, all of which had been amended to prohibit corporal punishment.²⁰³ Despite this, Chirwa remarked in 2004 that:

"In Zambia and Zimbabwe, [corporal punishment] continues to be used despite the courts having held that it was inhuman and degrading."²⁰⁴

It was evident, however, that the courts were beginning to pursue a hard line against chiefs who continued to impose corporal punishment on offending citizens. The 2004 US Country Report noted as follows:

"In July, Choma-area village Headman, Victor Muzimo, and his two messengers were sentenced to 1-year imprisonment with hard labour for

¹⁹⁸ Country report on human rights practices, Zambia, released by the Bureau of Democracy, Human Rights and Labor February 23, 2001, submitted by the U.S. Department of State to the US Congress.

¹⁹⁹ Country report on human rights practices, Zambia, released by the Bureau of Democracy, Human Rights and Labor March 4, 2002, submitted by the U.S. Department of State to the US Congress.

²⁰⁰ Chief Chiundaponde in Mpika.

²⁰¹ Country report on human rights practices, Zambia, released by the Bureau of Democracy, Human Rights and Labor March 31, 2003, submitted by the US Department of State to the US Congress.

²⁰² "Zambia smacks corporal punishment for good" 2004-01-17 *Independent Online*; South African Press Association (SAPA), January 17, 2004: Source: Financial Times Information Limited.

²⁰³ Penal Code (Amendment) Act, Criminal Procedure Code (Amendment) Act, Supreme Court (Amendment) Act, Local Court (Amendment) Act and the Education (Amendment) Act. George Kunda "Successes of the Zambian Governance Programme" *Times of Zambia*, April 23, 2004.

²⁰⁴ Chirwa "The Implications of the Emerging Jurisprudence in International Criminal Law for Penal Regimes in Post-independent Africa" 2004 17 *SACJ* 193 209.

whipping a village resident accused of theft. In handing down the sentence, the presiding judge noted that the law did not permit chiefs or village headmen to inflict corporal punishment on their subjects."²⁰⁵

Finally, in 2006 it was reported that: "Unlike in previous years, there were no reports that traditional rulers used corporal punishment."²⁰⁶

12 CONCLUSION

It is clear from the analysis conducted above that judicial corporal punishment still plays a significant role within the penal systems of many ex-British colonies in Africa. Even though this form of punishment has been abolished in certain African countries, this has only occurred in recent years. Furthermore, judicial corporal punishment continues to be used informally in certain of these countries, despite the fact that it is unlawful. When faced with high crime rates caused by deteriorating social and economic conditions, strong calls are often made for a return to judicial corporal punishment in Africa. In Britain, even though judicial corporal punishment was abolished over half a century ago, occasional calls for a return to this form of punishment continue to be made. The question of whether or not judicial corporal punishment is able to deter crime is still the subject of public debate. For example, in 2004, BBC News conducted an online debate in which members of the public worldwide were asked to comment on the issue of judicial corporal punishment.²⁰⁷ The following extracts indicate the wide range of public opinion on the issue:

"Flogging managed to turn Singapore from a Colombia-style society to one of the safest places on earth. It is the most effective method of discipline especially when it involves criminals ..."²⁰⁸

"Flogging is an accepted form of punishment for males under our customary law in Botswana. It is a VERY effective punishment against petty criminals and others involved in practices such as stock theft and inappropriate behaviour, e.g. using insulting language ..."²⁰⁹

"Flogging is not only 'primitive', but it is also the after taste of colonialism ..."²¹⁰

"Flogging adults is just too barbaric and archaic. It is also in contravention of the human rights declaration ..."²¹¹

There is even some debate within academic circles on the issue, with at least one academic calling for the reintroduction of judicial corporal

²⁰⁵ Country report on human rights practices, Zambia, released by the Bureau of Democracy, Human Rights and Labor February 25, 2004, submitted by the US Department of State to the US Congress.

²⁰⁶ Country report on human rights practices, Zambia, released by the Bureau of Democracy, Human Rights and Labor March 8, 2006, submitted by the US Department of State to the US Congress.

²⁰⁷ *BBC News* 13 August 2004.

²⁰⁸ Goh Tong, USA.

²⁰⁹ Bonnie, Gaborone, Botswana.

²¹⁰ Kuria Burugu, Kenyan in USA.

²¹¹ John Chiwawa, Harare, Zimbabwe.

punishment. In a relatively recent work, Graeme Newman²¹² argues that the majority of offenders should be punished by means of painful electric shocks, and that imprisonment should be reserved for those guilty of very serious crimes. What is interesting about Newman's argument is the form which he suggests that corporal punishment should take in modern times:

"We now see the distinct advantage of electric shock as a punishment. The actions of the punisher, rather than being 'heated', are cool and methodical, requiring little overt physical effort. There is less observable aggressive behavior for others to copy in the use of electric shock, and less violence is learned. In addition, the State comes across as what it really is: a cold, inhuman and calculating machine."²¹³

At one point Newman expressly refers to Bentham's "whipping machine", and it is clear that he is simply proposing a modern version of what Bentham had in mind.²¹⁴ The reason that Bentham's idea was never put into practice, is that he failed to appreciate the true nature of corporal punishment. Whether it is inflicted by a person or a machine, its essential "form" as an overt expression of absolute power based on violence, remains the same. As might have been predicted, academic reaction to Newman's proposal was extremely negative.²¹⁵ Steven Spitzer perhaps best sums up the reason for this negative reaction as follows: "By returning the body and physical suffering to the centre of the drama of crime and punishment, Newman threatens to release the demons that were, for so many years, tucked away in the criminological closet."²¹⁶

Although it is unlikely that Newman's suggestion will be adopted in any of the countries discussed in this article, or that judicial corporal punishment will be reinstated in those countries in which it has been abolished, it is clear that debate on the issue will continue, even if it is only at a political level. It seems that calls for the reintroduction of this form of punishment will continue to be made by members of the public, and politicians eager to secure their votes, from time to time, particularly when society is in the grip of a "moral panic" and is confronted by some or other "folk devil". Finally, it seems clear that judicial corporal punishment seems set to retain its popularity in certain African countries, such as Botswana and Tanzania.

²¹² *Just and Painful – A Case for the Corporal Punishment of Criminals* (1983).

²¹³ Newman 116.

²¹⁴ Newman 36-37.

²¹⁵ Glaser "Shocking to Satisfy the Public" 1984 13(5) *Contemporary Sociology* 573-575; Conrad "News of the Future – Research and Development in Corrections" 1985 49(3) *Federal Probation* 76-78; Simon "Back to the Future – Newman on Corporal Punishment" 1985 *American Bar Foundation Research Journal* 927-941; Spitzer "Book Review – Just and Painful: A Case for the Corporal Punishment of Criminals" 1985 9(2) *Contemporary Crises* 195-196; Walker "Book Review – Just and Painful: A Case for the Corporal Punishment of Criminals" 1985 12(3) *Criminal Justice and Behavior* 387-388.

²¹⁶ Spitzer 1985 9(2) *Contemporary Crises* 195.