**IN THE CONSTITUTIONAL COURT OF ZIMBABWE CASE NO CCZ48/2015**

**HELD AT HARARE**

In the matter between:-

**OBADIAH MAKONI APPLICANT**

AND

**THE COMMISSIONER OF PRISONS 1ST RESPONDENT**

**THE MINISTER OF JUSTICE, LEGAL &**

**PARLIAMENTARY AFFAIRS 2ND RESPONDENT**

**APPLICANT’S CONSOLIDATED HEADS OF ARGUMENT**

1. **GENERAL**
2. This matter raises the important issue of whether a sentence of life imprisonment imposed in Zimbabwe is constitutional or whether it breaches the protections under Sections 51 and 53 of the Constitution of Zimbabwe.
3. A secondary issue is the constitutionality of Section 112 of the Prisons Act [Chapter 7:11] when read in conjunction with Section 56 of the Constitution, which gives rights to parole to all prisoners except those sentenced to a life term.
4. Lastly, whether to subject the Applicant, who has been incarcerated for more than 20 years, to further imprisonment is a breach of Sections 49, 51, 53 and 56 of the Constitution of Zimbabwe.
5. **THE APPLICANT’S POSITION IN OUTLINE**
6. The Applicant is not advancing that a term of life imprisonment that is served in full, without release on parole, constitutes inhuman and degrading punishment. The Applicant recognises that serving a natural life sentence until the offender dies in prison may be appropriate in some cases. Some prisoners’ offences may be so serious, and their lack of rehabilitation so significant, that the requirements of just punishment and public protection require imprisonment for the offender’s whole life. So the Applicant does not suggest that requiring a prisoner to spend his whole life in prison can never be appropriate or compatible with the Constitution.
7. What the Applicant does submit in this case is that:
	1. The decision whether to release a life prisoner should be taken by the parole board (or even by a court), independently from the Executive, so as to protect the separation of powers that inheres to the Constitution.
	2. The decision should be taken according to established and available criteria (with a clear emphasis on rehabilitation), in an open process, where the reasons for permitting or refusing release must be given and, crucially, the decision must be subject to review by the courts.
8. He submits that, broadly speaking, this was the principled approach taken by the Namibian Supreme Court in *State v Tcoeib* (2001) AHRLR 158 (NaSC 1996) (see **Part E** below) and that this is the appropriate approach to be taken in Zimbabwe, as has been followed in many other common law jurisdictions. The absence of such a process in Zimbabwe renders imprisonment for the whole of an offender’s natural life, with no realistic hope of release on parole, arbitrary, inhuman and incompatible with the Constitution. The theoretical availability of executive clemency, which is central to the Respondents’ position, but is in practice arbitrary, opaque, rarely exercised and outwith effective judicial supervision, does not save the constitutionality of the current arrangements in Zimbabwe.
9. **PRINCIPLES OF CONSTITUTIONAL INTERPRETATION**
10. At the outset it should be noted that this case coincides with the period of infancy of the new Constitution, this Constitutional Court and the interpretation of the Constitution thereof, and affords this Honourable Court the opportunity of defining its own constitutional footprint that would be important in shaping the future jurisprudence of the country. In this respect, the Applicant sets out the following recognised principles of constitutional interpretation:
11. Transformative interpretation
12. Generous interpretation
13. Purposive Interpretation
14. Value based interpretation

**I. Transformative Interpretation - A Break With The Past**

1. Firstly, it is respectfully submitted that the present Constitution creates a fundamental break with the past. For that reason, when interpreting it, the court must entrench the values and principles that underlie a democratic society based on openness, justice, human dignity, equality and freedom under Section 46 (1) (b) of the Constitution.
2. It is common cause that the Constitution that was adopted in May of 2013 followed an elaborate and exhaustive process, with almost every provision heavily contested. The negotiations were typical of a society overcoming a past characterised by violence, disunity, intolerance and disrespect, with a quest to establish an even equal free and democratic society. The Constitution, thus, seeks to create a new beginning, as exemplified by the Preamble[[1]](#footnote-1), which underlines a commitment to democracy and the rule of law:

*“… upholding and defending fundamental human rights and freedoms …*

*Cherishing freedom, equality, peace, justice, tolerance, prosperity and patriotism in search of new frontiers under a common destiny …*

*Resolve by the tenets of this Constitution to commit ourselves to build a united, just and prosperous nation, founded on values of transparency, equality, freedom, fairness, honesty and the dignity of hard work …”*

1. Chapter 1 has what it describes as founding provisions of the Constitution. These Founding Provisions include:-

*“(a) Supremacy of the Constitution,*

*(b) The rule of law,*

*(c) Fundamental human rights and freedoms,*

*…*

*(e) Recognition of the inherent dignity and worth of each human being.*

*…”*

1. In these regards, the Constitution is no different from the South African interim or final Constitution. In*State v Makwanyane & Another*1995 (3) SA 391 (CC), Mahomed J stated at p.953, para 262: -

*“All Constitutions seeks to articulate, with differing degrees of intensity and details, the shared aspirations of a nation; the values which bind its people, and which discipline its government and its national institutions; the basic premises upon which judicial, legislative and executive power is to be wielded; the Constitutional limits and the conditions upon which that power is to be exercised; and the moral and ethical direction which that nation has identified for its future. In some countries the Constitution only formalises, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: It retains from the past only what is defensible and represents decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular and repressive and vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos expressly articulated in the Constitution.”* (emphasis added)

1. Second, there is no question that the current Constitution is more than a legal document. It has progressive, developmental, redistributive and transformative concepts at its heart. Karl Klare in the decisive article *Legal Culture Transformative Constitutionalism* 1998 (14) SA 146 Journal on Human Rightswrites as follows:

*“The Constitution invites a new imagination and self-reflection about legal method, analysis and reasoning consistent with its transformative goals. By implication, new conceptions of judicial role and responsibility are contemplated. Judicial mindset and methodology are part of the law, and therefore they must be examined and revised so as to promote equality, a culture of democracy and transparent governance.”*

**II. Generous Interpretation**

1. A generous interpretation is one that is robustly and aggressively in favour of rights. It is an interpretation that seeks to promote the essence and substance of the freedoms and rights set out in Chapter 4. In *State v Zuma* 1995 (2) SA 642 (CC), the Court said as follows:-

*“A Supreme Constitution requires a generous interpretation ... suitable to give to individuals the full measure of the fundamental rights and freedoms referred to ...”[[2]](#footnote-2)*

1. In Lord Wilberforce’s famous judgment on constitutional interpretation in *Minister of Home Affairs (Bermuda) v Fisher* 1979 (3) ALL ER 121he said that constitutional provisions should be given

*“a generous interpretation... suitable to give to individuals, the full measures of the fundamental rights and freedoms referred to ...” and that the Constitution called for ‘principles of interpretation of its own.’*

1. See also *R v Big M Drug Mart Ltd* 1984 18 DLR (4th) below.

**III. Purposive Interpretation**

1. Purposive interpretation is aimed at interrogating and teasing out the core values that underpin the listed fundamental rights in an open and democratic society based on human dignity equality and freedom. Using this approach, we have to identify the purpose of a right, in spirit and in substance. This purposive approach is one that has found home in a number of decisions *including State v Mhlungu & Others 1995* (3) SA 391 (CC); *State v Twala* 2000 (1) SA 879 (CC); *Ex Parte Attorney General, Namibia: In re Corporal Punishment by Organs of State 1991* (3) SA 76 (NmSC).
2. The seminal case on the purposive approach to constitutional interpretation is from the Canadian Supreme Court in *R v Big M Drug Mart Ltd* 1984 18 DLR (4th) wherein it was stated as follows:-

*“The meaning of a right of freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interest it was meant to protect. In my view, this analysis is to be undertaken, and the purposes of the right or freedom in question is to be sought, by references to the character and larger objects of the Charter [of Rights and Freedom] itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedom with which it is associated within the text of the Charter. The interpretation should be ... a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter’s protection.”*

1. The purposive interpretation also finds authority in *Minister of Home Affairs (Bermuda) v Fisher.* After calling for a generous interpretation of constitutional provisions, Lord Wilberforce continued as follows:

*“This is no way to say that there are no rules of law which should apply to the interpretation of a Constitution. A Constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used to the traditions and the usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principles of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences.”*

**IV. Value Based Interpretation**

1. Earlier on, in *State v Acheson* 1991 (2) SA 805, the former Chief Justice, Mahomed J, had referred to the Constitution as a mirror reflecting the values of the nation. He stated as follows:-

*“The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a “mirror reflecting the national soul”, the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and tenor of the Constitution must therefore preside and permeate the process of judicial interpretation and judicial discretion.”*

1. This fourth cannon of interpretation, thus, urged upon this Honourable Court is that any interpretation of the Constitution is founded on values. Section 46 (1) (b) of the Constitution itself reads as follows:-

*“(1) When interpreting this Chapter, a court, tribunal, forum or body –*

*(a) must give full effect to the rights and freedoms enshrined in this Chapter;*

*(b) must promote the values and principles that underlie a democratic society based on openness, justice, human dignity, equality and freedom, and in particular, the values and principles set out in Section 3;”* (emphasis added)

1. The above phrase entails that the Constitution and indeed the provisions relating to fundamental rights do not only safeguard those rights as individual, subjective rights, but also embody an objective value system applicable to all areas of the law and serving as a guiding principle for the legislature, executive and judiciary.
2. **CONSITUTIONAL INTERPRETATION AND INTERNATIONAL OBLIGATIONS UNDER THE ICCPR**
3. In addition, creating that break with the past requires fulfilment of international law and the treaties and conventions to which Zimbabwe is a party. This Court is specifically obliged, under Section 46(1)(c) of the Constitution, to “*take into account international law and all treaties and conventions*” when interpreting fundamental rights under Chapter 4. Under Section 327(6) the Court must adopt any reasonable interpretation of legislation that is consistent with those international treaties or conventions over an interpretation that is inconsistent.
4. Article 10 of the International Covenant on Civil and Political Rights (ICCPR) provides, in relevant part:

*“(1) All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”*

1. In its General Comment 21 on Article 10, the Human Rights Committee[[3]](#footnote-3) stated:

*“No penitentiary system should be only retributory; it should essentially seek the reformation and social rehabilitation of the prisoner.”[[4]](#footnote-4)* (emphasis added)

1. The United Nations Standard Minimum Rules for the Treatment of Prisoners of 1957 emphasise a reformative approach to imprisonment and acknowledge the best practice of ensuring the dignity and normalcy of the prisoner’s existence in order to ensure appropriate behavioural adjustment. For example, the Rules state:

*“60 (1) The regime of the institution should seek to minimize any differences between prison life and life at liberty which tend to lessen the responsibility of the prisoners or the respect due to their dignity as human beings. …*

*61 The treatment of prisoners should emphasize not their exclusion from the community, but their continuing part in it. Community agencies should, therefore, be enlisted wherever possible to assist the staff of the institution in the task of social rehabilitation of the prisoners.”* (emphasis added)

1. In stating the purpose of imprisonment, the Rules provide:

*“65 The treatment of persons sentenced to imprisonment or a similar measure shall have as its purpose, so far as the length of the sentence permits, to establish in them the will to lead law-abiding and self-supporting lives after their release and to fit them to do so. The treatment shall be such as will encourage their self-respect and develop their sense of responsibility.”* (emphasis added)

1. Furthermore, Section 327(2) of the Constitution appears to establish Zimbabwe firmly as a “dualist system” in terms of which international treaties have to be “domesticated” (approved by Parliament) in order to be binding and to form part of Zimbabwe’s law. The Constitution is, however, silent on treaties concluded prior to enacting the new Constitution. It is therefore argued that treaties ratified prior to 2013 remain binding to the extent that they were binding at the time of ratification under Zimbabwe’s law. In the 2004 decision of *Kachingwe supra* the Court considered the contention that the ICCPR was part of Zimbabwe’s domestic law to be correct in all probability but held that the question needn’t be determined. This possibly strengthens the view that treaties ratified before 1993 are part of Zimbabwean domestic law.
2. **THE LIFE SENTENCE IMPOSED ON THE APPLICANT INFRINGES SECTION 53 OF THE CONSTITUTION**
3. The Constitution is clear that no person may be subjected to physical or psychological torture or cruel, inhuman or degrading treatment or punishment. This right is absolute, and is not subject to any exceptions: Section 86 of the Constitution prohibits any limitation or violation.
4. Whilst the Constitution permits imprisonment, it must not be arbitrary or, in other words, disproportionate. Although arbitrary punishment is implicit in the concept of cruel, inhuman and degrading treatment or punishment (see *Vinter* below) the right not to be subject to arbitrary detention is additionally recognised as a stand-alone right in the Zimbabwe Constitution under Section 49(1)(b). Consequently, the Applicant’s submissions that his continued detention is arbitrary and disproportionate is dealt with more fully in **Part H** in relation to Section 49.
5. The submissions under Section 53, therefore, made by the Applicant apply to life sentences generally as they currently operate in Zimbabwe in that (i) a life term imposed without a realistic prospect of release mounts to inhuman and degrading treatment in contravention of Section 53 and (ii) the conditions of prison detention in Zimbabwe are a further reason why a life sentence amounts to cruel or inhuman and degrading treatment or punishment in contravention of this section.

**I. Irreducible Life Sentences Amount To Inhuman And Degrading Treatment Or Punishment**

1. That a life sentence, without a realistic prospect of release, amounts to inhuman or degrading is recognised in a number of international jurisdictions and it is submitted that the Zimbabwe Constitution, which upholds the same core values and protection for fundamental human rights, should be interpreted in a similarly progressive manner.
2. **Namibia**
	1. That an irreducible life imprisonment amounts to cruel and degrading treatment, was accepted by the Namibian Supreme Court in the case of *State v Tcoieb* (2001) AHRLR 158 (NaSC 1996). The judgment of the Court was given by Mahomed CJ and the learned Chief Justice engaged in a wide-ranging review of foreign and international caselaw, while recognising that, ultimately, the answer to the constitutional challenge lay in the municipal laws and Constitution of Namibia. On the question of whether life imprisonment constituted inhuman or degrading punishment, he acknowledged that it might:

*“To insist… that regardless of the circumstances, an offender should always spend the rest of his natural life in incarceration is to express despair about his future and to legitimately induce within the mind and the soul of the offender also a feeling of such despair and helplessness. Such a culture of mutually sustaining despair appears to me to be inconsistent with the deeply humane values articulated in the preamble and the text of the Namibian Constitution which so eloquently portrays the vision of a caring and compassionate democracy determined to liberate itself from the cruelty, the repression, the pain and the shame of its racist and colonial past”* (p. 12).

The Applicant submits that such concerns are no less applicable in Zimbabwe.

* 1. Mahomed CJ went on to question whether the arrangements in Namibia were consistent with these principles. He recognised that there was a release/parole board mechanism which did allow for the early release of prisoners serving life sentences. He formulated the test to be applied to that mechanism as follows:

*“The nagging question which still remains is whether the statutory mechanisms to which I have referred, constitute a sufficiently ‘concrete and fundamentally realisable expectation’ of release adequate to protect the prisoner's right to dignity, which must include belief in, and hope for, in an acceptable future for himself”* (p. 14).

* 1. In short, the learned Chief Justice concluded that this test was met in Namibia. His reasons are important. The statutory arrangements were not arbitrary or unpredictable because the authorities (including the parole/release board) were required to act impartially, in accordance with the law and Constitution, and, crucially, subject to the supervision of the courts (see p. 15 of the judgment). Those qualities saved the constitutionality of the life sentence provisions. As the Chief Justice concluded on this point,

*“For the reasons which I have articulated I am unable to hold that life imprisonment as a sentence is per se unconstitutional in Namibia, regard being had to the fact that the relevant legislation permits release on parole in appropriate circumstances”* (p. 19).

* 1. Mahomed CJ acknowledged that a prisoner might have a separate constitutional challenge based on the specific facts of his own case. In particular, he might argue that having served a period of imprisonment reflecting the punitive part of his sentence, and that his further incarceration was no longer necessary for the protection of society, his continued imprisonment was unconstitutional (p. 18). This argument is made in respect of the Applicant’s detention in **Part H**, wherein it is contended that, besides amounting to inhuman or degrading treatment or punishment, his lifelong detention would be disproportionate and therefore contrary to Section 49 of the Constitution.
1. **European Court of Human Rights (“ECtHR”)**
	1. A series of decisions from the ECtHR has set out an approach under the European human rights system that-
		1. Enforces a rehabilitative approach to criminal punishment.
		2. Determines that life sentences without the prospect of review to determine the ongoing service of the particular person’s imprisonment of the goals of incarceration, violates Article 3 of the Convention, the prohibition against torture, inhuman and degrading treatment.

*Rehabilitative approach to punishment*

* 1. In a case relating to artificial insemination in prison, the Grand Chamber of the ECtHR, in *Dickson v UK* No. 44362/04, §§ 28‑36, ECHR 2007‑V, considered the objectives of imprisonment in the course of its reasoning. The Court cited the established penological goals of:
1. Retribution
2. Prevention or deterrence
3. Protection of the public
4. Rehabilitation.
	1. The Grand Chamber implied, however, that rehabilitation should lie at the core of punishment and stipulated a useful understanding of “rehabilitation”:

*“[I]n recent years there has been a trend towards placing more emphasis on rehabilitation, as demonstrated notably by the Council of Europe’s legal instruments. While rehabilitation was recognised as a means of preventing recidivism, more recently and more positively it constitutes rather the idea of re-socialisation through the fostering of personal responsibility. This objective is reinforced by the development of the “progression principle”: in the course of serving a sentence, a prisoner should move progressively through the prison system thereby moving from the early days of a sentence, when the emphasis may be on punishment and retribution, to the latter stages, when the emphasis should be on preparation for release.”* (emphasis added)

*Karkaris v Cyprus*[[5]](#footnote-5)

* 1. The ECtHR confirmed that that a life sentence will not amount to inhuman and degrading treatment or punishment providing it is *de jure* and *de facto* reducible. However, a life sentence does not become “irreducible” by the mere fact that in practice it may be served in full.
	2. Clemency mechanisms for life sentence prisoners may be sufficient to avoid being inhuman and degrading but only where prisoners sentenced to life terms have their sentences regularly commuted: *Kafkaris v Cyprus* [2008] ECHR 21906/04 (12 February 2008)**[[6]](#footnote-6)**. This is not the case in Zimbabwe, where the President’s prerogative is rarely exercised in favour of life sentence prisoners (paragraphs 9.6 and 11.1 - 11.5 of the Applicant’s Answering Affidavit).

*Vinter v UK*[[7]](#footnote-7)

* 1. Under the UK Criminal Justice Act of 2003, the sentence for murder is a mandatory sentence of life imprisonment. Upon imposing the sentence, the trial judge must set a minimum term of imprisonment to be served, taking into account the seriousness of the offence and the penological aims of retribution and deterrence. After serving the minimum term, the prisoner may apply for parole. In exceptional cases, the Act provides for the imposition of “whole life” sentences if the judge considers the seriousness of the offence to be exceptionally high. Such prisoners may only be released at the ‘pardon’ of the Secretary of State for ‘compassionate grounds’.
	2. The applicants in the case of *Vinter* argued that the ‘whole life’ sentences imposed on them amounted to inhuman treatment contrary to Article 3 of the European Convention on Human Rights.
	3. On appeal in the Grand Chamber, the Court held that a grossly disproportionate sentence would violate Article 3 of the Convention. Considering States’ ‘margin of appreciation’ under the European system, the Court held that States must remain free to impose life sentences on adult offenders for especially serious crimes. The imposition of such a sentence is not in itself incompatible with Article 3.
	4. But the sentence must be *de jure and de facto* reducible. Thus, in order to be compatible with Article 3, a life sentence must include the prospect of release and sentence review by an independent body because the balance between the various penological aims (punishment, deterrence, public protection and rehabilitation), which may have existed at the time of the commission of sentencing, may not remain static and might need reconsideration during the pendency of the sentence to be proportionate (at para 119).
	5. The Grand Chamber held at paragraphs 11 - 112:

*“It is axiomatic that a prisoner cannot be detained unless there are legitimate penological grounds for that detention. As was recognised by the Court of Appeal in Bieber and the Chamber in its judgment in the present case, these grounds will include punishment, deterrence, public protection and rehabilitation. Many of these grounds will be present at the time when a life sentence is imposed. However, the balance between these justifications for detention is not necessarily static and may shift in the course of the sentence.**What may be the primary justification for detention at the start of the sentence may not be so after a lengthy period into the service of the sentence. It is only by carrying out a review of the justification for continued detention at an appropriate point in the sentence that these factors or shifts can be properly evaluated.*

*Moreover, if such a prisoner is incarcerated without any prospect of release and without the possibility of having his life sentence reviewed, there is the risk that he can never atone for his offence: whatever the prisoner does in prison, however exceptional his progress towards rehabilitation, his punishment remains fixed and unreviewable. If anything, the punishment becomes greater with time: the longer the prisoner lives, the longer his sentence. Thus, even when a whole life sentence is condign punishment at the time of its imposition, with the passage of time it becomes – to paraphrase Lord Justice Laws in Wellington – a poor guarantee of just and proportionate punishment (see paragraph 54 above).*

*…*

*Indeed, there is also now clear support in European and international law for the principle that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved.”[[8]](#footnote-8)* (emphasis added)

*Trabelsi v Belgium[[9]](#footnote-9)*

* 1. Building upon *Vinter*, the ECtHR in *Trabelsi v Belgium* held that for a sentence to be realistically reducible, there must be properly defined criteria which provide sufficient clarity to enable prisoners to know under what circumstances the power to release could or would be exercised, and *a fortiori*, when such circumstances might apply to their case (at para 129). This information (and the realisation of a possibility of release) must be available to prisoners from the outset of their sentence, otherwise it:

“*would be capricious to expect the prisoner to work towards his own rehabilitation without knowing whether, at an unspecified, future date, a mechanism might be introduced which would allow him, on the basis of that rehabilitation, to be considered for release.”*

*Hutchinson v UK[[10]](#footnote-10)*

* 1. Subsequently, the Chamber (the lower court in the ECtHR) had the opportunity to consider whether the pardon system in the UK (as had been interpreted by the domestic courts) met the standards as set out in *Vinter*. Under UK law, ‘whole lifers’ can be released if the Justice Secretary is satisfied that *exceptional circumstances* exist which justify release on compassionate grounds. The Secretary of State determines the criteria for the exercise of this discretion in terms of the “Lifer Manual” in terms of which release is justified only under conditions of terminal illness where death is imminent or the prisoner is bedridden or similarly incapacitated. In February 2014, UK Court of Appeal released a judgment clarifying that the Justice Secretary is not limited to the restrictive policy of the Life Manual but can take into account all exceptional circumstances relevant to the prisoner’s release on compassionate grounds. The discretion is wide and the meaning of “compassionate grounds” determined on a case-by-case basis.
	2. The (lower) Chamber of the ECtHR held that this as a system was sufficient to make the UK’s life sentences compliant with Article 3 of the Convention. The Chamber considered that the Secretary of State was required to consider all relevant circumstances (regardless of the Lifer Manual) in the individual’s case, and any decision reached by the Secretary of State was subject to judicial review**.** To this extent, the Chamber was satisfied that the system as interpreted by the domestic courts provided life prisoners with hope and the possibility of release in the event that “*exceptional circumstances meant that punishment was no longer justified*.”[[11]](#footnote-11)
1. **Germany**
	1. The South African constitutional system was largely modelled in similar lines to the German constitutional model of adjudication and for that reason, the jurisprudence of the South African Constitutional Court often makes reference to German decisions. Considering the Zimbabwe Constitution’s similarity to that in South Africa, it can therefore be argued that the consideration of German jurisprudence is of high persuasive value.
	2. In 1977, the Federal Constitutional Court of Germany decided on the “Life Imprisonment” case.[[12]](#footnote-12) The Court considered whether a mandatory sentence of life imprisonment for a murder of “wanton cruelty” was compatible with the German Constitution.
	3. The Court held that the State could not turn an offender into an object of crime prevention to the detriment of his constitutionally protected right to social worth or human dignity. The Court held that respect for human dignity and the rule of law meant the humane enforcement of life imprisonment was possible only when the prisoner was given “*a concrete and realistically attainable chance*” to regain his freedom at some later point in time. A life sentence struck at the very heart of human dignity if it stripped the prisoner of all hope of ever earning his freedom.
	4. The Court linked the right to human dignity to the requirement that punishment be aimed at rehabilitation. An offender had to be given the chance, after atoning for his crime, to re-enter society. The State was obligated to take all measures necessary for the achievement of that goal. The Court emphasised the individual nature of the assessment of rehabilitation. For a criminal who remained a threat to society, the goal of rehabilitation might never be fulfilled; in that case, it was the particular personal circumstances of the criminal which might rule out successful rehabilitation rather than the sentence of life imprisonment itself. The Court held that, subject to these conclusions, life imprisonment for murder was not a senseless or disproportionate punishment. The fact that, under the German Criminal Code, life prisoners generally had a chance to be released after serving a certain length of time meant that the relevant provisions of the German Criminal Code could be interpreted and applied in a manner which was compatible with the German constitutional law (Basic Law).[[13]](#footnote-13)
2. **Italy**
	1. Decisions in relation to human rights guarantees under the Italian Constitution are of interpretive assistance to the extent that it illustrates international understandings of certain human rights guarantees. The Italian jurisprudence highlights the following principles:
3. The prohibition against inhuman and degrading treatment requires a reformative approach to imprisonment.
4. The possibility of parole is essential to rehabilitation.
5. The importance of judicial oversight in parole matters in order to assess the question of rehabilitation.
	1. Article 27(3) of the Italian Constitution provides that punishments may not be inhuman and shall aim at rehabilitating the convicted. Four Italian judgments have interpreted this provision in relation to life sentences. The translation and description of these have been adapted as quoted in the ECtHR *Vinter* decision cited above.
	2. In the first judgment, of 27 June 1974[[14]](#footnote-14), a prisoner had applied for parole to the Minister of Justice. The Minister of Justice had consulted the judge responsible for the execution of the sentence, who, in turn, referred the case to the Constitutional Court for its opinion on the constitutionality of the law on parole. The Constitutional Court held that, on the basis of Article 27(3) of the Constitution, rehabilitation was the aim of every sentence and the right of every prisoner. As such, there should be review of the sentence, carried out by a judge rather than a member of the executive, to determine whether, given the time served, rehabilitation had been achieved. The Court also emphasised that, subject to appropriate conditions, parole was essential to achieving the aim of rehabilitation.[[15]](#footnote-15)
	3. The reasoning of that judgment was confirmed in a second judgment, of 7 November 1974.[[16]](#footnote-16)
	4. The third judgment of 21 September 1983,[[17]](#footnote-17) concerned a provision in Italian law which, at the time, allowed for the reduction of sentences by twenty days for every six months served but did not apply to those serving life sentences. In declaring the provision unconstitutional, the Constitutional Court recalled that Article 27(3) applied to all sentences without distinction and that the provision allowing for reduction of sentences (which had the stated aim of encouraging rehabilitation) could not in principle be precluded from applying to life sentences. The effect of the judgment was that, in respect of life sentences, the provisions on reduction of sentences applied to the period to be served before a life prisoner became eligible for parole. (This case also supports the Applicant’s assertions in relation to the discrimination claims in **Part G.**)
	5. The fourth judgment of 2-4 June 1997,[[18]](#footnote-18) concerned Article 177 of the Italian Criminal Code, which provided that if a life prisoner breached any of the terms of his parole he forfeited the right to apply for parole in the future. The Constitutional Court held that the effect of Article 177 was to exclude entirely the possibility of the prisoner’s rehabilitation. The Court held further that the possibility of parole was the only means by which a sentence of life imprisonment could remain compatible with Article 27(3). Article 177 was therefore unconstitutional. However, it remained for the legislature to determine the conditions under which parole could be obtained, provided that those conditions complied with the Constitution.
6. **Caribbean**
	1. Like the Namibian and European jurisdictions, Caribbean jurisprudence has confirmed that determination or supervision of early release periods is a matter reserved to the courts. The Bahamas Court of Appeal in *Poitier v R* SC Cr App No. 95 of 2011 refused to uphold a life sentence imposed on the appellant because it *“raised the sceptre of unconstitutionality*” by being irreducible only by the executive and without any judicial consultation.
	2. Similarly, in *R v Robinson* (2009) 74 WIR 243, the Court of Appeal of Bermuda held unconstitutional and void the statutory minimum periods of 15 years for all cases of murder where a life sentence had been imposed, regardless of the circumstances of the individual case and offender. When passing a sentence of life imprisonment, a trial judge was required as part of the sentencing process to determine what minimum period of the sentence should be served as the so-called tariff period, namely for the purposes of retribution and deterrence in the circumstances of the particular case. While this case was considered by the Privy Council, the State of Bermuda did not appeal this point, therefore conceding the correctness of this approach.

**II. Detention Under Zimbabwe Prison Conditions Further Amounts To Inhuman Or Degrading Treatment Or Punishment**

1. It is submitted that the conditions of Zimbabwe prisons and the psychological effects of prisons on prisoners amounts to cruel, inhuman or degrading treatment or punishment in contravention of Section 53 of the Constitution.
2. In *Kachingwe & Others v Minister of Home Affairs &* Another 2005 (2) ZLR 12 (S), the Chief Justice had occasion to inspect and discuss prison conditions. The conditions that Applicant has described in his founding affidavit are not dissimilar to the conditions in described by the Chief Justice. The Applicant refers to the following conditions:-
3. Inadequate food and this led to various prisons riots;
4. Inadequate clothing, particularly in the crisis years 2006 to 2009; and
5. Inadequate water and ablution facilities.
6. In *Kachingwe* the Constitutional Court had no hesitation in finding that prison conditions in holding cells, that is conditions which the Applicant has been subjected to, were cruel and degrading punishment in conflict with the then Section 51 of the Constitution of Zimbabwe. When coming to this conclusion, the Court accepted as correct a number of international judgments which included *Kalashnikov v Russia* (2003) 36 EHRR 34, *Hilaire, Constantine and Benjamin et al v Trinidad Tobago* Inter American Court of Human Rights Series C No. 92 (21 June 2002).
7. **THE BREACH OF THE RIGHT TO HUMAN DIGNITY UNDER SECTION 51 OF THE CONSTITUTION**
8. The Zimbabwean Constitution protects the right of every person to the entitlement of inherent dignity in their private and public life, and right to have that dignity respected and protected. The right to human dignity is foundational and has been equated with the right to life.[[19]](#footnote-19)
9. Human dignity is a central value of the *“objective, normative value system”* established by the Constitution perhaps the pre-eminent value. See *Carmichele v Minister of Security 2001 (4) SA 938 (CC).*  Chief Justice Chaskalson,[[20]](#footnote-20) has written as follows:

*“The affirmation of (inherent) human dignity as a foundational value of the constitutional order places our legal order firmly in line with development of constitutionalism in the aftermath of the second world war.”*

1. Further, in *State v Makwanyane 1995 (3) SA 391 CC* at 144, Justice O’Regan stated as follows:-

*“Recognizing a right to dignity is an acknowledgement of the intrinsic worth of human beings: Human beings are entitled to be treated as worth of respect and conserve. The right therefore is the foundation of many of other rights that are specifically entrenched in the Bill of Rights.”*

1. In the same case, Chief Justice Chaskalson, at 144 stated as follows:-

*“The right to life and dignity are the most important of all human rights, and source of all other personal rights in the Bill of Rights. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others.”*

Thus, the right to human dignity is at the cornerstone of the constitutional order introduced by the new Constitution.

1. The protection of human dignity in the new Zimbabwe Constitution becomes a justiciable and enforceable right. Thus, it is both a procedural and substantive right. It is procedural in the sense that in interpreting the Constitution, the courts must lean towards an approach that recognizes and protect the right to human dignity. It is substantive in the sense that it is content and a value based matrix which is at the centre of protecting the citizen in the Constitution.
2. There is no question that being treated like an object without any hope that he will ever be freed from incarceration, as described by Applicant, assaults and infringes on his human rights. A human being does not deserve to be treated as an object and rehabilitation of prisoners and their reintegration into society should be encouraged.
3. See also Comments from the UN Human Rights Committee under the ICCPR, which link the rehabilitation of prisoners to protection for human dignity (**Part D**) and, similarly, the jurisprudence of the German Federal Constitutional Court. (**Part E**)
4. **SECTION 112 OF THE PRISONS ACT BREACHES SECTION 51 OF THE CONSTITUTION**
5. It is respectfully submitted that, it is wrong and discriminatory to deny the right of parole to prisoners serving a term of life imprisonment, which is available to prisoners serving determinate terms.
6. Section 56 (1) of the Zimbabwean Constitution states that every person is entitles to equal protection of the law. The meaning of the phrase *‘equal protection and benefit of the law’* is important. The phrase *‘equal protection of the law’* is found in amendment 14 to the American Constitution. That 1868 amendment read as follows:-

*“Amendment XIV*

*Section 1: All persons born or naturalised in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any laws which shall abridge the privileges or immunities or citizens of the United States; nor shall any State deprive any person of life liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”*

1. The Federal Supreme Court, has developed the term ‘equal protection of the law’ to mean that the government must not import differences in treatment, except upon some “*reasonable differentiation fairly related to the subject of the regulation*” see *Railway Express Agency v New York 336* US 106 (1949) cf *Murray’ Lessee v Haboken Land Development Co.* 59 US 232 (1850). The standard that denotes fairness, conformity in the absence of arbitrariness. It postulates that constitutionally established rights be given effect to at all times, and by all.
2. Applying the above, to matter *in casu*, it is quite clear that Section 112 of the Prisons Act, discriminates between so called lifers and non-lifers. It is unacceptable discrimination, which could only justified on the basis of Section 86 of the Constitution of Zimbabwe.
3. That Section 86 is clear that fundamental rights and freedom set out in this Chapter may be limited only in terms of a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity and equality. First then, the Court must determine whether there is discrimination, which is outlawed by Section 56(1) of the Constitution. *In* *casu* there is no question that there is discrimination. Secondly, the Court should determine whether that discrimination and difference is reasonable, necessary and justifiable in a democratic society based on justice, human dignity, equality and freedom.
4. The formulation in Section 86(2), which adds the words ‘necessary, and fair’, demands that, those seeking to justify the limitation bear a greater onus than in the past. It is submitted that there is no justification for distinguishing between lifers and non-lifers. Once, a prisoner has served many years and is on good behaviour, the aims of punishment addressed above require that an opportunity for rehabilitation and reintegration into society be considered. The penological aims of retribution, deterrence, protection of the public and rehabilitation apply to all prisoners.
5. This was recognised in by the Italian Constitutional Court[[21]](#footnote-21) which declared that Article 27(3)[[22]](#footnote-22) applied to all sentences without distinction and that the provision allowing for reduction of sentences (which had the stated aim of encouraging rehabilitation) could not in principle be precluded from applying to life sentences. The effect of the judgment was that, in respect of life sentences, the provisions on reduction of sentences applied to the period to be served before a life prisoner became eligible for parole (see **Part E**).
6. Under Section 227 (1) (a) of the Zimbabwe Constitution, which provides that Prisons and Correctional Services are responsible for:-

*“(a) The protection of society from criminals through the incarceration and rehabilitation of convicted persons and others who are lawfully required to be detained, and their reintegration into society.”*

Therefore, interpreting the protection against inhuman or degrading treatment under Section 53 in light of Zimbabwe’s obligations under international law (see **Part D**), and taking into account the duties of the Prison Services under Section 227, it is clear that life sentence prisoners should not be precluded from the possibility of rehabilitation and reintegration into society. Such a restriction of their rights as a group[[23]](#footnote-23) is not fair, nor reasonable and is certainly not necessary.

1. For these reasons, it is contended that the discrimination contained in the Prison Act is unjustifiable and it is, therefore, respectively submitted that the Sections concerned must be declared unconstitutional or alternatively must be modified so as to include prisoners sentences to life imprisonment.
2. **BREACH OF SECTION 49 OF THE CONSITUTION AND THE CASE FOR THE APPLICANT’S IMMEDIATE RELEASE**
3. It has already been submitted that life sentences generally, as they currently operate in Zimbabwe, are a violation of Sections 53 (**Part E**), 51 (**Part F**) and 56 (**Part G**) of the Constitution. The Applicant further submits that in his case, the life sentence which he is serving is a breach of Section 49(1)(a) of the Constitution.
4. There is a further body of international law which recognises that life sentences can be arbitrary and disproportionate. They may be arbitrary when indiscriminately imposed and where release is only possible through petition to the Executive. In *de Boucherville v the State of* *Mauritius* [2008] UKPC 70, the legislative provisions on parole and remission did not apply to mandatory life sentences. Like Zimbabwe, circumstances in which clemency might be granted were opaque and rarely exercised. In determining the lawfulness of a life sentence, the Judicial Committee of Privy Council noted that the lack of individuation of sentence is arbitrary because it risks being disproportionate. Whilst, the Mauritian Supreme Court had interpreted such a sentence as condemning the prisoner to penal servitude for the rest of his life, the Privy Council held that this meant the sentence was manifestly disproportionate and arbitrary and therefore contrary to section 10 of the Mauritian Constitution which provides for fair trial and procedural rights for prisoners.[[24]](#footnote-24)
5. However, sentences may be arbitrary even when not mandatorily imposed. As stated in *Vinter* above, even where a judge has decided that a whole life order is appropriate to reflect the seriousness of the circumstances of the offence, the balance between penological aims (punishment, deterrence, public protection and rehabilitation), which may have existed at the time of sentencing, may not remain static and might need revision during the pendency of the sentence to be proportionate (see **Part E**).
6. Although implicitly part of the protection against in human and degrading treatment, the protection against arbitrary sentencing forms a standalone right undersection 49(1)(a) of the Zimbabwe Constitution.
7. In this regard, it is important to state that the Applicant was a young man of nineteen years at the time that he committed the crime. The Applicant, who on the submission of the Respondents themselves has been an excellent prisoner who has achieved the rank of Red Chevron, has served over 20 years imprisonment. Thus he has been punished and rehabilitated and offers no danger to the public. Further detention will be serve no legitimate penological aim and therefore be arbitrary and disproportionate.
8. **THE RESPONDENTS HEADS OF ARGUMENT**
9. The Respondents present the following arguments to the Court:
	* + 1. The Court has already determined that a life sentence is constitutional in the case of *Woods v Commissioner of Prisons* (at paras 20-22).
			2. A life sentence in Zimbabwe is reducible through executive clemency (23-26).
			3. The Applicant must be punished severely and giving powers to the Parole Board to consider early release of life prisoners would ‘trivialise’ the offence of murder (at para 36).

**I. Woods v Commissioner Of Prisons**

1. The Respondents place significant reliance in their Heads of Argument (para 21) on Supreme Court of Zimbabwe’s ruling in *Woods v Commissioner of Prisons & Anr* 2003 (2) ZLR 421 (S). In that case the Court cited with approval an earlier ruling of the Namibian Supreme Court, *S v Tcoeib*, which has been discussed in detail in **Part E**.
2. The *Woods* case raised a number of issues. As to life imprisonment, the crux of Mr Woods’ complaint was that his petitions for mercy to the President had been rejected, this destroyed his hope of restitution of his freedom in his lifetime and this in turn rendered inhuman and degrading his continued incarceration under sentence of life imprisonment. The Court referred to the important statements of principle by Mahomed CJ in *Tcoeib* but rejected Mr Woods’ argument, solely by reference to the availability of the prerogative of mercy. Malaba JA held:

*“It appears to me that the hope of release from prison is inherent in the statutory mechanisms which incorporate the President’s prerogative of mercy. The prerogative of mercy is exercisable at any time depending upon the circumstances which may include the prisoner’s age and state of his health”.*

1. In the light of the above observations, the Applicant respectfully makes the following submissions in respect of *Woods*.
2. First, the ruling of the Supreme Court obviously does not bind the Constitutional Court in this case.
3. Second, *Woods* is distinguishable on a number of important grounds. It answered a different question arising from failed petitions for clemency, which does not arise in the present case. And it posed its questions in relation to a different Constitution. For instance, the previous Constitution expressly excluded (in section 15(6)) the alteration or remission of sentence by reference to inhuman punishment since the sentence was imposed. Such restriction does not appear in the current Constitution. It is also right to say that the issues and arguments raised in the present application were not raised in *Woods* and were not addressed in the judgment.
4. Third, the caselaw in this area across the common law has developed considerably since *Woods* was decided(see **PART E**).The Court’s brief conclusions on this issue included a reference to the Privy Council case of *Reckley v Minister of Public Safety & Immigration and Ors (No. 2*) [1996] 1 LRC 401 for the proposition that the exercise of the Executive’s prerogative powers is not reviewable by the courts. But as the Respondents point out, that is no longer good law (see paragraph 36 of the Respondents’ Heads’ of Argument, citing *President of South Africa v Hugo*; the Privy Council has reversed its reasoning in *Reckley* in *Lewis v Attorney General of Jamaica* [2001] 2 AC 50). As will be seen, the Applicant’s complaint in the present case is that the notional reviewability of the prerogative power is ineffective when the process of early release is entirely opaque and no reasons are given.
5. Fourth, in so far as the *Woods* judgment provides authority for the proposition that the availability of executive clemency saves the constitutionality of the current arrangements for life prisoners in Zimbabwe, it is respectfully submitted that the Supreme Court’s decision on that issue was wrong. This is for the reasons amplified above, but also for reasons to be found in Mahomed CJ’s observations in *Tcoeib.* Most obviously, in Zimbabwe, and in contrast to the position as examined in *Tcoeib*, there is no possibility of release of life prisoners following an assessment by a parole board, in a process which is independent from the Executive, which is subject to identifiable decision making criteria, and which is subject to effective judicial supervision. The current arrangements for life prisoners cannot possibly meet those criteria, because they are opaque and unpredictable. No reasons are given for decisions on clemency and there is no possibility of effective judicial supervision. In short, the arrangements are inherently arbitrary.

**II. The Importance Of A Separation Of Powers Between Executive And Judiciary**

1. The Respondents’ position is that the Applicant must wait for the executive prerogative, as defined in Section 122 of the Prisons Act read together with Section 112 of the Constitution of Zimbabwe, to provide any prospect of early release. The basis of the Respondents’ defence is that, a right to mercy exists defined in Section 112 of the Constitution of Zimbabwe.
2. However, as a matter of jurisdiction, the Applicant approaches this Court to provide redress for contravention of a right guaranteed and set out in the Constitution, using the medium of Section 85 of the Constitution. This Court has a duty to exercise jurisdiction in the present application. It cannot leave the issue of the Applicant’s rights to the mercy of the Executive in terms of Section 112 of the Constitution. A number of constitutional provisions oblige the court to determine the dispute irrespective of the executive’s mercy powers:
3. the courts are, in terms of Section 164, independent and subject only to the Constitution. Section 164(1) further obliges the courts to apply the law impartially and expeditiously and its orders are binding on the State and all persons in terms of Section 164(3). In terms of Section 165 (1) (c) “*the role of the courts is paramount in safeguarding human rights and freedoms and the rule of law.*” The mere existence of a discretionary, political executive power cannot therefore oust the courts’ jurisdiction nor its obligation to ensure human rights are realised both within and without the realm of the executive’s powers.
4. The court in *Biti and Another v the Minister of Justice, Legal and Parliamentary Affairs and Another* 2002 (1) ZLR 268 (S) made this point clear:

*‘... there is no doubt that the Constitution has entrusted to the judicature in this country the task of construing the provisions of the Constitution and of safeguarding the fundamental rights of the citizen. When a statute is challenged on the ground that it has been passed by legislature without authority, or has otherwise unconstitutionally trespassed on fundamental rights, it is for the courts to determine the dispute and decide whether the law passed by the Legislature is valid or not. Just as the legislatures are conferred legislative authority and their functions are normally confined to legislative functions, and the functions and authority of the executive lie within the domain of executive authority, so the jurisdiction and authority of the judicature in this country lie within the domain of adjudication. If the validity of any law is challenged before the courts, it is never suggested that the material question as to whether legislative authority has been exceeded or fundamental rights have been contravened can be decided by the legislatures themselves. Adjudication of such a dispute is entrusted solely and exclusively to the judicature of this country...’*

1. Second, Section 47 provides that the rights set forth in Chapter 4 (the Bill of Rights, including the prohibition against inhuman and degrading treatment) “*do not preclude the existence of other rights and freedoms*.” The mere existence of the right to seek the application of the executive’s mercy powers or the prospect of its application does not preclude or define the limits of the Applicant’s rights, nor the importance of the courts fulfilling their mandate in this regard.
2. Third, while executive power is subject to the Constitution, nothing in section 112 limits the discretionary power to grant mercy or pardon. The section does not, in addition, oust the courts’ criminal, sentencing, or human rights adjudicatory functions.
3. Fourth, Section 69 guarantees the right to a fair hearing in relation to both civil and criminal disputes before a competent court. The Applicant is entitled to approach the courts to resolve his dispute, the realisation of which right carries the corollary duty of the courts to entertain those disputes insofar as the interests of justice permit. This is reinforced by Section 85 which entitles the Applicant to “*approach a court, alleging that a fundamental right … has been, is being, or is likely to be infring*ed”. The Court is empowered in that same provision with broad remedial powers.
4. In terms of the substantive application, the Applicant’s submissions, however, are in large part grounded in the separation of powers, a fundamental principle that is firmly entrenched in Zimbabwe’s constitutional order. Sentencing is an intrinsically judicial function, and the courts should zealously protect the primacy of their role in the sentencing process. See, for example:
5. *Attorney General v Kigula & Ors* [2009] UGSC 6, where one of the grounds of the Ugandan Supreme Court for striking down the mandatory death penalty was its encroachment on the separation of powers;
6. *Hinds v R* [1997] AC 195 at p.226A - the judiciary must not be deprived of the essential judicial function of determining the appropriate level of punishment in an individual case; and
7. *Reyes v R* [2002] 2 AC 235, per Lord Bingham:

“While the Board would be the first to acknowledge the importance of the role which the Constitution has conferred on the Advisory Council, it is clear that such a non-judicial body cannot decide what is the appropriate measure of punishment to be visited on a defendant for the crime he has committed” (at paragraph 47).

1. The need to protect the separation of powers and prevent the usurpation of the role of the judiciary has been repeatedly recognised by the African Commission on People's and Human Rights: see *Civil Liberties Organisation v Nigeria* 129/94, *Constitutional Rights Project v Nigeria* 60/91 and *Constitutional Rights Project v Nigeria* 87/93.
2. In contrast to the judiciary, the Executive’s function is inherently political, and rightly so. That is its primary and legitimate constitutional function: to devise and implement policy. Its contribution to the sentencing process should only ever be marginal. In any event, the courts must never relinquish their function of supervising the protection of constitutional rights, including the rights of prisoners not to be subject to inhuman punishment. The courts cannot perform that function when, as now happens in Zimbabwe, the entire decision making process governing the release of life prisoners is opaque, unpredictable and outwith the constraints of effective judicial supervision.

**III. Irreducible Life Sentences As Ultimate Retribution**

1. The argument by the state through the Attorney General is a contention that the Applicant has committed a serious offence, murder, and ought to be punished and punished heavily and that the offence of murder should not be ‘trivialised’. That the Applicant committed a serious offence is not in dispute. However, prisoners still remain human beings entitled to human rights. In *State v Moyo & Others* 2006 (2) ZLR 315 (H) at 318G, Cheda J stated as follows:-

*“It should not be forgotten that, irrespective of how bad the offender is in the eyes of society, he is still entitled to human treatment, for it is his human right to be so treated. It is for this reason that the sentence imposed should not amount to total condemnation by society”*

1. The approach of the Attorney General finds jurisprudential basis on the justice theory where the aim is to express the public revulsion to the offence by inflicting punishment to the offender. The mindset and thinking is thus steeped in what Korsah JA in *State v Ncube* 1987 (2) ZLR 246 (SC)at 101 E-G defined as the *lex talionis* that is to say an eye for an eye, a tooth for a tooth, a life for a life. It is respectfully submitted that there has been a departure from the *lex talionis* to one promotes rehabilitation and correction, as illustrated by Section 227 (1) (a) of the Constitution, which provides that Prisons and Correctional Services are responsible for *“The protection of society from criminals through the incarceration and rehabilitation of convicted persons and others who are lawfully required to be detained, and their reintegration into society.”*
2. In *State v William and Others* 1995 (7) BCLR 861 (CC), the South African Constitutional Court spoke of a new era of enlightenment in respect of which rehabilitation plays a significant role. In paragraph 65 to 66 the court stated as follows:-

*“65. There has been a shift of emphasis with regard to the overall aims of punishment. There is a general acceptance, as observed by Schreiner JA in R v Karg, 1961 (1) SA 231 (A) at 236A, that the retributive aspect has tended to give way to the aspects of prevention and correction. .… the justice and penal systems have been evolving towards a more enlightened and humane implementation of those shift of emphasis away from the idea of sentencing being predominantly the arena where society wreaks its vengeance on wrongdoers. Sentences have been passed with rehabilitation in mind.”*

1. In *State v Hwemba* 1999 (1) ZLR 234 (H), Bartlett J emphasised the principle of keeping sentences of imprisonment as short as possible. Lengthy sentences, do not achieve the desired consequences:

*“Overlong imprisonment is counter-productive. It brutalizes and contaminates the offender and may cause him to redefine himself as a criminal and behave accordingly..”[[25]](#footnote-25)*

1. The shift, to reformation as opposed to retribution also found favour, in *State v Chera & Another* 2008 (2) 58 (H). At page 62E, Justice Ndou stated as follows:-

*“The sentence here is well in excess of general accepted outer limit. …. The magistrate seems to have adopted the old form of lex talionis, an eye for an eye or tooth for a tooth. The most popular theory today is that the proper aim of criminal procedure is to reform the criminal so that he may become adjusted to the social order.”*

1. **CONCLUSION**
2. It is respectfully submitted that this matter raises important issues and questions. For all the reasons above, it is respectfully submitted that:-
3. An life sentence without a real prospect of release, is a breach of Section 51 and Section 53 of the Constitution.
4. The existence of the potential of a pardon, under Section 112 of the Constitution of Zimbabwe, does not alter or affect or gives sufficient hope or safeguard so as to render an irreducible life sentence constitutional.
5. The discrimination contained in the Prisons Act between prisoners on life and those not on life with regards to their right to parole, is unconstitutional and a breach of Section 56 (1) of the Constitution of Zimbabwe.
6. In the circumstances of this case, the Applicant poses no harm to society, has sufficiently saved his sentence, and therefore to subject him to further imprisonment would be disproportionate and amount to clear breaches of Sections 49 and 53 of the Constitution. He must therefore be released.

**DATED AT HARARE ON THIS \_\_\_ DAY OF DECEMBER 2015.**

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TO: **THE REGISTRAR**

 Constitutional Court of Zimbabwe

 **HARARE**

And

To: **CIVIL DIVISION OF THE**

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1. The importance of the preamble as a cornerstone of the constitution has been accepted in other jurisdictions, such as South Africa: *State v Makwanyane & Another* 1995 (3) SA 391 (CC), *Executive Council of Western Cape Legislator & Others v President of the Republic of South Africa & Others* 1995 (4) SA 877 (CC); *Verela v Levin* 1996 (1) SA 984 (CC); *Gemston v Baxter* NO 1996 (2) SA 752; *Fose v Minister of Security* 1997 (3) SA 786 (CC); *Prinsloo v Van De Linde* 1997 (3) SA 1012. [↑](#footnote-ref-1)
2. See Paragraph 14 [↑](#footnote-ref-2)
3. UN Human Rights Committee (HRC), CCPR General Comment No. 21: Article 10 (*Humane Treatment of Persons Deprived of Their Liberty*), 10 April 1992, available at: <http://www.refworld.org/docid/453883fb11.html>. [↑](#footnote-ref-3)
4. At para 10 [↑](#footnote-ref-4)
5. ECtHR [2008] 21906/04; Available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-85019#{"itemid":["001-85019>"]

See also *Trabelsi v Belgium* (2015); Available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-146372#{"itemid":["001-146372>”] which considered the lawfulness of extraditing a person to a jurisdiction where he would face an irreducible life sentence. [↑](#footnote-ref-5)
6. Early release was so frequent that, at the time of the decision, there had been no life prisoners who had served more than 20 years [65]. [↑](#footnote-ref-6)
7. (ECtHR) 9 July 2013, Grand Chamber judgment. [↑](#footnote-ref-7)
8. Paras 111-112 [↑](#footnote-ref-8)
9. [2014] ECHR 893 [↑](#footnote-ref-9)
10. Application 57592/08 ECtHR, Chamber 3 February 2015, which can be accessed at <http://hudoc.echr.coe.int/eng?i=001-150778#{"itemid":["001-150778"]}> [↑](#footnote-ref-10)
11. At para 23 [↑](#footnote-ref-11)
12. *Lebenslange Freiheitsstrafe*, 21 June 1977, 45 BVerfGE 187. An English translation of extracts of the judgment, with commentary, can be found in D.P. Kommers, The Constitutional Jurisprudence of the Federal Republic of Germany (2nd ed.), Duke University Press, Durham and London, 1997 at pp. 306-313. [↑](#footnote-ref-12)
13. See also a decision of 16 January 2010, BVerfG, 2 BvR 2299/09 in which the Federal Constitutional Court considered an extradition case where the offender faced “aggravated life imprisonment until death” (*erschwerte lebenslängliche Freiheitsstrafe bis zum Tod*) in Turkey. The German government had sought assurances that the prisoner would be considered for release and had received the reply that the President of Turkey had the power to remit sentences on grounds of chronic illness, disability, or old age. The Court refused to allow extradition, holding that this power of release offered only a vague hope of release and was thus insufficient. Notwithstanding the need to respect foreign legal orders, if someone had no practical prospect of release such a sentence would be cruel and degrading (*grausam und erniedrigend*) and would infringe the requirements of human dignity provided for in the German Basic Law. [↑](#footnote-ref-13)
14. 204/1974 [↑](#footnote-ref-14)
15. The same conclusion was reached in respect of those serving life sentences in military prisons by the court in judgment 192/1976, 14 July 1976, concerning two German military officers serving such sentences for crimes committed during World War II. [↑](#footnote-ref-15)
16. 264/1974 [↑](#footnote-ref-16)
17. 274/1983 [↑](#footnote-ref-17)
18. 161/1997 [↑](#footnote-ref-18)
19. In *State v Makwanyane* 1995 (3) SA 391 (CC) at Paragraph 144, the Constitutional Court, described the right to dignity and the right to life as the most important human rights [↑](#footnote-ref-19)
20. A Chaskalson “*Human Diginity as foundation of value of our Constitutional order*” (2000) 16 SAJHR 193.

 [↑](#footnote-ref-20)
21. 274/1983 [↑](#footnote-ref-21)
22. “Punishment cannot consist in inhuman treatment and must aim at the rehabilitation of the convicted person.” [↑](#footnote-ref-22)
23. It is accepted that for some prisoners sentenced to a life term, whole life detention *will* be appropriate – see **Part B**. [↑](#footnote-ref-23)
24. The Privy Council did not fully consider the prisoner’s argument relating to torture, inhuman and degrading punishment or treatment, having already declared the sentence unconstitutional under section 10 of the Mauritian Constitution. [↑](#footnote-ref-24)
25. See also, *S v Ngombe* HH-504-87 at p 2. [↑](#footnote-ref-25)