



UNIVERSITY *of* LUSAKA

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SCHOOL OF LAW

**MANDATORY SENTENCING VIS A VIS JUDICIAL DISCRETION: A CRITIQUE ON
ZAMBIA'S APPROACH TO CRIMINAL JUSTICE**

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DECLARATION

I, **RICHARD CHIPEPO**, do declare that this dissertation titled " **MANDATORY SENTENCING VIS A VIS JUDICIAL DISCRETION: A CRITIQUE ON ZAMBIA'S APPROACH TO CRIMINAL JUSTICE**" which is hereby submitted to the School of Law at The University of Lusaka as part of the requirements for the award of the Bachelor of Laws (LLB) degree, is my original work and has not previously been submitted for the award of a degree at this or any other tertiary institution.

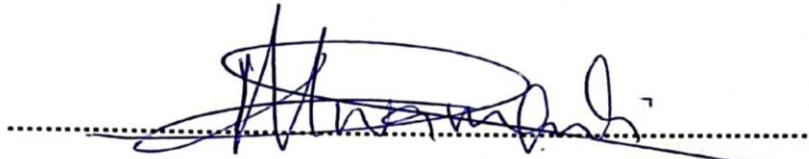
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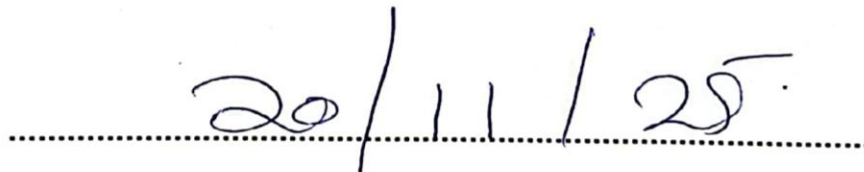
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I, **KAWAMA MWAMFULI**, do recommend that this dissertation titled " **MANDATORY SENTENCING VIS A VIS JUDICIAL DISCRETION: A CRITIQUE ON ZAMBIA'S APPROACH TO CRIMINAL JUSTICE** " authored by **RICHARD CHIPEPO**, done under my supervision, be admitted by the university, I have checked it carefully and I am satisfied that it meets necessary requirements pertaining to the format laid down by the university regulations.

A handwritten signature in blue ink, appearing to read 'Kawama Mwamfuli', is written over a horizontal dotted line.

Hon. KAWAMA MWAMFULI

(Supervisor)

A handwritten date '20/11/25' is written in blue ink over a horizontal dotted line.

(Date)

DEDICATION

I would like to dedicate this dissertation to my lovely wife Racheal Namulunga Chipepo, my beautiful daughter Busuma Chipepo and my mother Jane Kashimoto. I would further like to dedicate this dissertation to my elder brother Bwalya Chipepo, his wife Georgina. M. Chipepo, my young sister Miracle B. Chipepo, my elder sister Jane Chipepo and my young brother Philemon Mulenga Mutale. I thank you all for the support you have showered me with during my academic journey.

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I would like to acknowledge my lovely wife Racheal Namulunga Chipepo who encouraged me to soldier on even when conditions did not allow. I think of her and realize that I married right. To my beautiful daughter Busuma Chipepo who may not understand this now, but I know she will one day read this and make sense of it. Each time I look at her, she drives my passion to fight harder so that she may have a life better than this that I have lived, and so that she may never lack the needs that I could not afford. I extend the dedication to my mother Jane Kashimoto who never gave up on me when life was tough and she had to be both a mother and father after dad died when I was only ten (10) years of age. Her love is a fuel that has pushed me this far.

To my elder brother Bwalya Chipepo, I say thank you for jump starting me into my first fields of study before law, when my financial battery was low. A round of applause to your wife Georgina. M. Chipepo who when I was low financially at some point in life, she supported me financially on a monthly basis until I got back on my feet despite her just getting her first job that was limited in pay. To my elder sister Jane Chipepo, you are a great support in this journey of life. To my young sister Miracle Chipepo, you are a special backup and you have been reliable in all times of need. Lastly, but not the least, to my young brother Philemon Mulenga Mutale our last born, you are kind, a kid with the mind of an adult and I am fighting this battle to see you win in life.

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Table of Contents

DECLARATION.....	ii
SUPERVISORS RECOMMENDATION.....	iii
DEDICATION	iv
ACKNOWLEDGMENTS	v
ABSTRACT.....	ix
CHAPTER ONE	1
1.0 INTRODUCTION.....	1
BACKGROUND OF THE PROBLEM.....	1
STATEMENT OF THE PROBLEM.....	3
1.3 OBJECTIVES OF THE STUDY	4
1.4 RESEARCH QUESTIONS.....	4
1.5 SIGNIFICANCE OF THE STUDY	4
1.6 SCOPE OF THE STUDY.....	5
1.7 DEFINITION OF KEY TERMS	5
1.8 LITERATURE REVIEW	5
1.9 RESEARCH METHODOLOGY.....	9
1.9.1 RESEARCH APPROACH.....	9
1.9.2 RESEARCH DESIGN	9
1.9.3 RESEARCH TYPE.....	9
1.9.4 STUDY POPULATION.....	10
1.9.5 SAMPLE SIZE.....	10
1.9.6 SAMPLING TECHNIQUES	10
1.9.7 DATA COLLECTION TECHNIQUES	10
1.9.8 ETHICAL CONSIDERATIONS	11
CHAPTER 2.....	12
APPRAISING ZAMBIA’S CURRENT CRIMINAL SENTENCING FRAMEWORK.....	12
2.0 Introduction	12
2.1 The Narcotic Drugs and Psychotropic Substances Act	12
2.1 The Penal Code	15
2.1.1 Aggravated Robbery.....	15
2.1.2 Murder	17
2.1.3 Indecent Assault.....	18

2.2 The Penal Code (Amendment) Act No. 23 of 2022	19
2.2 The Penal Code (Amendment) Act No. 20 of 2023	20
2.2.1 Offences Relating to Stock	20
2.4 Conclusion	23
CHAPTER 3.....	24
THE EFFECTS OF MANDATORY SENTENCING ON JUDICIAL DISCRETION AND FAIR TRIAL RIGHTS	24
3.1 Introduction	24
3.2 Advantageous Effects of Mandatory Sentencing	24
3.3 Disadvantageous Effects of Mandatory Sentencing.....	25
3.4 Prison Overcrowding.....	26
3.5 Disproportionate and Unjust Outcomes	27
3.6 Mixed Public Satisfaction with Sentencing	31
3.7 Conclusion.....	32
CHAPTER 4.....	34
EXTRACTING LESSONS FOR IMPROVEMENT FROM KENYA AND SOUTH AFRICA	34
4.1 INTRODUCTION.....	34
4.2 Lessons from South Africa.....	34
4.3 Criminal Law - Mandatory Minimum Sentencing in relation to Judicial Discretion in South Africa .	34
4.3.1 - The Offence of Stock Theft.....	36
4.3.2 The Drugs and Drug Trafficking Act 140 of 1992.....	38
4.4 Lessons from Kenya.....	40
4.5 The Offence of Stock Theft.....	40
4.5.1 Narcotic Drugs and Psychotropic Substances (Control) Act.....	41
4.6 Conclusion.....	43
CHAPTER 5.....	44
AN OVERVIEW OF FINDINGS RECOMMENDATIONS AND CONCLUSIONS	44
5.0 General Findings and Conclusions	44
5.1 Specific Findings and Conclusions.....	44
5.1.1 Chapter One	44
5.1.2 Chapter Two	45
5.1.3 Chapter Three	47
5.1.4 Chapter Four	47
5.2 Recommendations	48

BIBLIOGRAPHY	50
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ABSTRACT

This study is on the effects that mandatory sentencing has on judicial discretion in Zambia. This study primarily delved into the aspect of mandatory minimum sentences, vis-a-vis the amount of exercisable judicial discretion left to the Courts as a result of the mandatory minimum sentence. The purpose of this study was to shed light on challenges and consequences that have been present as well as new and potentially new challenges and consequences. Ultimately investigating the legal framework, the advantages and disadvantages, the effects that are present in Zambia, as well as drawing the pathway to resolving the issue from other countries.

This study's chosen methodology was as follows; the study takes a qualitative approach, making use of both primary and secondary data such as reports, statutes and books. The study drew substantially from case law and compared Zambia's legal system to that of other countries.

Ultimately, the findings of the study were that in comparison to other jurisdictions the Zambian legal framework does not have adequate leeway that enhances and promotes the exercise of judicial discretion by the Courts.

CHAPTER ONE

1.0 INTRODUCTION

In criminal justice, a sentence is the punishment handed down to an individual or individuals after being found guilty of committing an offence by a court of law. The type of sentence imposed on a guilty party varies and largely depends on the severity of the offence committed. Sentences imposed include imprisonment, fines, community service, probation and sanctions such as restrictions on activities such as travel. The purpose of sentencing cannot be limited to one particular thing, but includes, ensuring the punishment fits the crime, ensuring the general public is kept safe, to place a deterrent for other would-be offenders, and to potentially rehabilitate the offender.

Criminal law has for some of its offences, mandatory sentences. These 'one-size-fits all' punishments are a predefined punishment for certain offences. In the space of criminal justice, proportionality and fairness act as an essential cornerstone of fair sentencing and in the broader context, a fair trial. The punishment must correspond with the severity of the offence committed as well as the circumstances under which the offence was committed. This study seeks to explore the impact of mandatory sentencing on judicial discretion in Zambia. Black's law dictionary defines discretion as, a liberty or privilege allowed to a judge, within the confines of right and justice, but independent of narrow and unbending rules, to decide and act in accordance with what is fair, equitable and wholesome, as determined upon the peculiar circumstances of the case and as discerned by his own personal wisdom and experience, guided by the spirit, principles and analogies of the law¹

BACKGROUND OF THE PROBLEM

The Constitution of the Republic of Zambia is the Grund Norm of Zambian law. It is the embodiment of the principles that the citizens of Zambia wish to uphold and to be governed by. **Article 18 of the Constitution of Zambia (Amendment) Act²**, stipulates that if a person is charged with a criminal offence, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by a fair and impartial Court.

¹ <https://thelawdictionary.org/discretion/> > accessed 5th April, 2025.

² No. 18 of 1996

A fair hearing is not limited to the trial, its pleadings and submissions made, but also includes the sentencing that occurs after an individual is found guilty. One of the tenets of fairness as per the Constitution is judicial discretion. In order for the Court system to uphold the principle of fairness as per the Constitution, Judges and Magistrates must have the freedom to exercise their own discretion. All laws that are made within the Republic of Zambia, irrespective of the date on which that Act of Parliament was enacted must be in line with the provisions set out by the Constitution. In this instance, all provisions with regards to punishments for criminal offences must fall in line with **Article 18 of the Constitution of Zambia (Amendment) Act³**.

The Penal Code Act⁴ serves as one of Zambia's principal pieces of legislation concerning offences of a criminal nature, as well as the penalties that are to be imposed upon individuals that are found guilty of committing those offences. **The Penal Code** is an old piece of legislation, having being enacted in 1931, has been amended a handful times since its inception. These handful of amendments being made to keep up with changing perspectives on punishment and justice.

For instance, the 1990 amendment, **Penal Code (Amendment) Act⁵** which allowed the Court to consider extenuating circumstances when considering a convicted persons moral guilt with regards to crimes of murder. This entails that the court is only to take into account the factors associated with the offence. This is arguably too restrictive in that other factors unrelated to the crime, such as the youth of the accused, his or her behaviour after the commission of the crime or the fact that he/she has no criminal record, might be equally important in determining the sentence⁶. Another instance is the 2022 amendment, **Penal Code (Amendment) Act⁷**, which abolishes the mandatory death penalty for the offence of murder and substitutes it with life imprisonment. This amendment is timely and

³ No. 18 of 1996

⁴ Chapter 87 of the Laws of Zambia

⁵ No. 3 of 1990

⁶ <https://www.cambridge.org/core/journals/journal-of-african-law/article/abs/developing-the-criminal-law-in-zambia-the-penal-code-amendment-act-1990/A163DCDB318B73F694AC7856C75A58B7> > Accessed 6th April 2025

⁷ No. 23 of 2022

beneficial with respect to the basic right to life that we all possess. However, it does very little in increasing the amount of exercisable judicial discretion by the Courts.

STATEMENT OF THE PROBLEM

Mandatory sentencing is an instance in which the law stipulates a fixed punishment that must be handed out to a person after being found guilty of an offence. Mandatory sentencing in Zambian statutes takes away judicial discretion in sentencing from Judges, particularly for the more serious felony offences, such as those contained in the **Narcotic Drugs and Psychotropic Substances Act⁸**, **The Penal Code Act⁹**, for instance **Section 294(2) of the Penal Code Act¹⁰** as well as the **Penal Code (Amendment) Act¹¹**.

Despite the essence behind mandatory sentencing being to ensure consistency, deterrence and to foster public confidence in the justice system, mandatory sentencing causes rigidity in the Zambian legal framework. This rigidity created by the Zambian legal framework often leads to disproportionate punishment and injustice, particularly instances where the circumstances under which the said offence was committed warrant special consideration during sentencing. With mandatory sentencing and its effect on judicial discretion, judges and magistrates are unable to take into consideration factors such as the offenders background and likelihood of reoffending. The resultant harsh penalties may not serve the interests of justice, as well as fulfill principles such as the principle of proportionality as well as the principle of individualized justice. Furthermore, it also undermines an individual's right to a fair trial which is enshrined in **Article 18 of The Constitution of the Republic of Zambia (Amendment) Act¹²**.

This study aims to highlight, analyze and provide an appraisal of the effects that mandatory sentencing has on judicial discretion in Zambia. This reality of the criminal justice system will also be looked at within the context of a "fair trial", as enshrined by **Article 18 of The Constitution of the Republic of Zambia (Amendment) Act¹³**. Furthermore, this study will highlight other jurisdictions that have adopted a more

⁸ No. 35 of 2021

⁹ Chapter 87 of the Laws of Zambia

¹⁰ *ibid*

¹¹ No. 20 of 2023

¹² No. 18 of 1996

¹³ *ibid*

discretionary approach as well as draw possible recommendations for improvement from those jurisdictions.

1.3 OBJECTIVES OF THE STUDY

1. To appraise the current criminal sentencing framework in Zambia.
2. To examine the effects of these provisions on judicial discretion and fair trial rights.
3. To analyze and draw possible lessons for improvement from Kenya and South Africa.

1.4 RESEARCH QUESTIONS

The following questions will be addressed within this study

1. What is the current criminal sentencing framework in Zambia?
2. How does mandatory sentencing affect judicial discretion and fair trial rights?
3. What lessons can be drawn from Kenya and South Africa regarding the position of mandatory sentencing within a country's legal framework?

1.5 SIGNIFICANCE OF THE STUDY

This study is timely and significant because it aims to highlight the shortcomings of the Zambian criminal justice system with regards to the effect of mandatory sentencing on judicial discretion in light of **Article 18 of the Constitution of Zambia (Amendment) Act¹⁴**. The study aims to address and add to the scholarly debate on whether or not a fair trial in the complete sense is being afforded to all individuals. The study shall provide an in-depth analysis of the concept of “fair sentencing”, within the broader context of a fair trial. The study shall assist policy makers in ensuring that they develop or amend existing legislation in a way that creates more room for Judges and Magistrates to exercise much their much-needed judicial discretion when it comes to handing down sentences. It will point out and highlight possible strategies for improvement that can be drawn from other jurisdictions’, similar to that of our own, that have made further and more significant steps in affording unfettered judicial discretion to Judges and Magistrates. Jurisdictions such as Kenya and South Africa. Furthermore, the study aims to act as a point of reference and offer a different perspective for civil society organisations, servants and officers of the

¹⁴ No. 18 of 1996

court, the general public as well as the government of the Republic of Zambia on the topic of the effects of mandatory sentencing on judicial discretion.

1.6 SCOPE OF THE STUDY

The physical location for this study is the Republic of Zambia. The study location shall include a focus on the Constitutional framework in relation to judicial discretion, scholarly works relevant to the subject matter as well as looking at the criminal sentencing framework as outlined by various pieces of Zambian legislation. Legislation such as **The Constitution of the Republic of Zambia (Amendment) Act¹⁵**, **The Penal Code Act¹⁶**, and the **Narcotic Drugs and Psychotropic Substances Act¹⁷**. The focus shall be on the sentencing provisions in the Acts of Parliament and how they affect the judicial discretion afforded to Judges and Magistrates. The study shall also look at the legal framework of Kenya and South Africa as well as scholarly works, relevant to the subject matter from the two jurisdictions.

1.7 DEFINITION OF KEY TERMS

Mandatory: Something that is mandatory must be done or is demanded by law¹⁸

Sentence: To decide and say officially what a punishment will be¹⁹

Discretion: A liberty or privilege allowed to a Judge, within the confines of right and justice, but independent of narrow and unbending rules, to decide and act in accordance with what is fair, equitable and wholesome, as determined upon the peculiar circumstances of the case and as discerned by his own personal wisdom and experience, guided by the spirit, principles and analogies of the law²⁰

1.8 LITERATURE REVIEW

Andrew Ashworth and Julian V. Roberts²¹ in their book place emphasis on the value of discretion in sentencing as a proponent for fair and individualized justice. Their work

¹⁵ No. 18 of 1996

¹⁶ Chapter 87 of the Laws of Zambia

¹⁷ No. 35 of 2021

¹⁸ <https://dictionary.cambridge.org/dictionary/english/mandatory> > accessed 8th April, 2025

¹⁹ <https://dictionary.cambridge.org/dictionary/english/sentencing> > accessed 8th April, 2025

²⁰ <https://thelawdictionary.org/discretion/> > accessed 5th April, 2025.

²¹ Andrew Ashworth and Julian V Roberts, *Sentencing Guidelines: Exploring the English Model* (Oxford University Press, 1, 2013).

explores how a balance is struck between consistency and judicial discretion in light of sentencing guidelines. Despite their support and acknowledgment of sentencing frameworks, they are alert to the dangers of rigid systems such as mandatory sentencing. They are alert to the fact that mandatory sentencing may lead to unfair outcomes in certain cases. The researcher in this study aims to positively contribute to the scholarly debate on the effects of mandatory sentence on judicial discretion and individualized justice.

Mwila Sabi²² in his body of work delves into the rationale behind sentencing. He highlights the failure of the Court to consider all appropriate facts and pieces of evidence that will allow an appropriate sentence to be handed down. Mwila Sabi's work has its core at studying the ideal of prisoner rehabilitation and the effectiveness of the Zambia Correctional Service (formerly called the Zambia Prison Service), regardless of whether the sentence handed down was fair or just. In this study, the researcher shall focus his research on the events that happen before rehabilitation. The researcher shall look into sentencing, the judicial discretion that is applied during sentencing and the effects that rigid mandatory sentencing laws has on judicial discretion. The researcher shall analyze the relevant legal framework in order to contribute to the broader scholarly discussion.

Andrew von Hirsch²³ in his book analyzes penal censure and looks into the moral principles that underly sentencing. Andrew von Hirsch is of the view that for punishment to be deemed just, it must be proportionate and given in light of the very specific circumstances under which the offence was committed. He is of the view that the realization of this standard is hard to achieve under rigid sentencing laws. The researcher in this study affirms the views and findings of Andrew von Hirsch. However, the researcher shall aim to go a step further by heavily scrutinizing other jurisdictions that have gone a step further in realizing this ideal and shall draw lessons for improvement that can be adjusted to the Zambian context.

²² Mwila Sabi, 'A Critical Analysis of the Effectiveness of the Rationale Behind Principles of Sentencing' (2013) The University of Zambia

²³ Andrew von Hirsch, *Censure and Sanctions* (Clarendon Press; Oxford University Press, 1, 1994).

Kate Warner²⁴ underscores the importance of the role that legal professionals and scholars play in fighting against the expansion of rigid mandatory sentence laws. Her work focusses on the Australian perspective of the negative effects of mandatory punishment on judicial discretion. In this body of work, the researcher aims add onto the scholarly body of works by applying some of the methods used by Warner in an appraisal of the Zambian Legal framework and system.

Arie Freiberg²⁵ like the researcher in this study scrutinizes mandatory sentencing from a criminal law point of view. Freiberg is of the view that mandatory sentencing steers against individualized justice and the ideals of a fair trial as a whole. Freiberg speaks from a standpoint that shows an awareness of the complex realities of criminal behavior, and highlights the fact that despite mandatory sentencing aiming to increase certainty, it also introduces unnecessary severity in certain instances. The researcher in this study aims to go a step further than Freiburg by also highlighting the effects that mandatory sentencing has on the judicial process.

Delane Janse van Rensburg²⁶ in his master of laws thesis discusses the importance of judicial discretion in the pursuit for equitable and individualized punishment. He argues that factors such as whether the accused continues to be a danger to society, the individual needs and circumstances of the person, and the availability of more appropriate options for punishment are all crucial pieces of evidence that must be taken into consideration during sentencing. In this study, the researcher shall look into the factors that should be taken into consideration when Zambian judicial officers are passing down sentences. The researcher shall in this study scrutinize the relevant pieces of legislation in the Zambian legal framework.

Micheal Tonry²⁷ in *Sentencing Matters* comprehensively scrutinizes mandatory sentencing. In his work he highlights how it sidelines judicial discretion in certain instances and how that disparity with regards to sentencing leads to unjust outcomes for individuals

²⁴ Kate Warner 'Mandatory Sentencing and the Role of the Academic' (2007) 18(3-4) Criminal Law Forum 344.

²⁵ Arie Freiberg 'Mandatory Sentencing: A Criminology Perspective' (2001) 13 Current Issues Crim Just 110

²⁶ Delane Janse van Rensburg, 'A Constitutional Analysis of the Courts (lack of) discretion in terms of Section 77(6) of the Criminal Procedure Act 51 of 1977' (2015) University of Pretoria

²⁷ Micheal Tonry, *Sentencing Matters* (Oxford University Press 1996)

with respect to the need for individualized justice. In this study, the researcher aims to further investigate how judicial discretion plays a role in ensuring adequate individualized justice.

Julia Sloth-Nielsen and Louise Ehlers²⁸ in their study, focus on the effects of mandatory sentencing in South Africa. They place emphasis on its effects on children's rights. They discuss how mandatory sentencing puts the court in a situation where it fails to take into consideration developmental differences of youths and juvenile offenders. Their argument is premised on mandatory sentencing and rigid penalties limits much needed judicial discretion as well as contradicting principles of proportionality and fairness. In this study, the researcher aims to scrutinize mandatory sentencing and its effect on judicial discretion in the Zambian context, and will use aspects of their analysis as a comparative foundation.

Nicola Padfield²⁹ takes a broader approach in the analysis of the effects of rigid sentencing laws. Despite her focus being on parole, her analysis and criticisms resonate with those of mandatory sentencing. Arguing that justice and indeed fairness in the criminal justice process must be present at all levels. The ideal of achieving equitable outcomes cannot be met if judicial discretion is impaired at the sentencing stage. For the purpose of this study, the researcher shall limit the scope of analysis and research to the sentencing stage of the justice process. The researcher aims to contribute to this broader scope of scholarly debate.

Ngcobo J³⁰ stated "The importance of judicial discretion cannot be gainsaid. Discretion permits judicial officers to take into account the need for tailoring their decisions to the unique facts and circumstances of a particular case. There are many circumstances where the mechanical application of a rule may result in an injustice. What is required is individualized justice, that is, justice which is appropriate tailored to the needs of the individual case. It is only through discretion that the goal of individualized justice can be

²⁸ Julia Sloth-Nielsen and Louise Ehlers 'A Pyrrhic Victory? Mandatory Sentences and the Rights of Children' (2005) 21 (1) South African Journal on Human Rights 113

²⁹ Nicola Padfield, Who to Release? Parole, Fairness and Criminal Justice (Willan 2007)

³⁰ Director of Public Prosecution, Transvaal v Minister of Justice and Constitutional Development 2009 4 SA 222 (CC) 267G – 268A

achieved. Individual justice is essential to the proper administration of justice.” The afore statement was made in the judgement of a case held in South Africa. For the purpose of this study the researcher shall analyze the South African legal system in order to highlight the positive strides their jurisdiction has made with regards to judicial discretion. The author shall further draw recommendations for improvement that can be applied to the Zambian justice system and contribute positively to the scholarly debate on mandatory sentencing in lieu of judicial discretion.

1.9 RESEARCH METHODOLOGY

1.9.1 RESEARCH APPROACH

This study shall adopt and utilize a Qualitative Method approach. The reason for this is because the study is of a legal nature and thus shall not include any numerical research. As per Creswell³¹ studies of this nature are excellent due to the leeway they give researchers to focus on writings as well as draw and collect data which is beneficial to the study. The researcher is allowed to obtain and make use of data retrieved through interviews, case and historical studies, as well as primary and secondary data.

1.9.2 RESEARCH DESIGN

A mixture of comparative and narrative research design is the chosen research design method. In the context of this study, a comparative research design method shall involve comparing the sentencing frameworks and their subsequent effect on judicial discretion across the aforementioned jurisdictions as they are similar to the Republic of Zambia. This approach shall afford a more in depth and broader understanding of the challenges and ideas for improvement associated with criminal sentencing and judicial discretion in different contexts. The narrative approach shall accord the researcher the ability to have insight into the challenges and affects concerning mandatory sentencing and judicial discretion.

1.9.3 RESEARCH TYPE

This research shall employ as its chosen research type, the comparative study method. The purpose of this being to analyze, provide an appraisal, and contrast criminal sentencing frameworks and their effects on judicial discretion in Zambia, Kenya, and

³¹ JW. Creswell; Research Design Qualitative, Quantitative, and Mixed Methods Approaches. (SAGE Publishers 2009)

South Africa. The approach will accord the researcher the ability to have a comprehensive examination of Zambia's criminal sentencing framework, whilst drawing lessons from South Africa and Kenya

1.9.4 STUDY POPULATION

This study will encompass within its study population the Judiciary, Correctional Service, Legal Practitioners, Civil Society Organizations, members of the general public, former prison inmates as well as case studies in Zambia. The aforementioned will serve as the core of this study's comprehensive appraisal of mandatory sentencing and its effect on judicial discretion in Zambia. The researcher will, with the help of the aforementioned, obtain more insightful data.

1.9.5 SAMPLE SIZE

The sample size for this study shall be ten. Those ten individuals shall be selected from amongst former inmates, Correctional Service officers, Officers of the Judiciary, members of the general public, as well as Legal Practitioners.

1.9.6 SAMPLING TECHNIQUES

For the purpose of this study, the researcher shall utilize the purposive sampling technique. This is the chosen technique because I will accord the researcher the opportunity to identify and select participants who have specific knowledge and experience relevant to the aforementioned research questions. The researcher will be accorded the opportunity to obtain more in-depth data with respect to insights and perspectives from individuals who have been directly impacted or have first-hand knowledge of the effects of mandatory sentencing on judicial discretion in our Zambian criminal justice system.

1.9.7 DATA COLLECTION TECHNIQUES

Methods for collecting primary data

Primary data will mainly be collected through one-on-one interviews as well as through direct and participant observations. Gaining multiple perspectives from the different participants is the aim behind this combination of data collection methods. The interviews will be conducted one-on-one in order to obtain first-hand information.

Methods for collecting secondary data

For the purpose of collecting secondary data the researcher shall utilize statutes, journals, books, internet sources as well as academic writings by prominent scholars that relate to this study.

1.9.8 ETHICAL CONSIDERATIONS

In order to ensure the achievement and upholding of the highest level of integrity during the course of this research, an introductory letter shall be obtained from the University of Lusaka by the researcher. The essence behind this is to allow the researcher to properly introduce himself to the interviewee and to assure the interviewee that the information that is being as for is only for academic purposes. All information that is sensitive or has the potential to damage the reputation, either socially or professionally, of the interviewee shall be excluded from the research in order to keep it confidential or shall be subjected to anonymization techniques such as pseudonymization. Further, the researcher shall utilize the OSCOLA referencing style to make certain that all works of other scholars and of authors are duly given credit.

CHAPTER 2

APPRAISING ZAMBIA'S CURRENT CRIMINAL SENTENCING FRAMEWORK

2.0 Introduction

In this chapter, the researcher shall aim to give an in-depth outline, analysis, and appraisal of specific acts within the scope of Zambia's broad criminal law sentencing framework. Acts of Parliament such as the **Penal Code Act**³², **The Penal Code (Amendment) Act**³³ and **The Narcotic Drugs and Psychotropic Substances Act**³⁴ will be looked at in this chapter. The purpose being to adeptly criticize the effectiveness of our laws in allowing for the adequate practice of judicial discretion by courts of law during the entire trial process. Criminal sentencing framework refers to the methodological approach taken by the courts in the process of determining an appropriate punishment for an accused person. Zambia's criminal sentencing system encompasses aspects of statutorily prescribed penalties, judicial discretion and mandatory sentencing provisions.

2.1 The Narcotic Drugs and Psychotropic Substances Act

The Narcotic Drugs and Psychotropic Substances Act³⁵ serves the purpose of controlling and regulating the import, export, possession, distribution and sale of narcotic drugs, as well as, serving as a tool in the fighting of illicit drug trafficking. **Section 2 of The Narcotic Drugs and Psychotropic Substances Act**³⁶ defines trafficking as (a) being involved directly or indirectly in the unlawful buying or selling of narcotic drugs or psychotropic substances and includes the commission of an offence under this Act in circumstances suggesting that the offence was being committed in connection with buying or selling; or (b) being found in possession of narcotic drugs or psychotropic substances in amounts or quantities that the Minister may, by statutory instrument, declare to be trafficking. Due to the core purpose of the act, and the nature of the offences and harm it aims at preventing, the aforementioned definition is a crucial addition added by the drafters in order to allow for the act to be construed in a manner that allows for the fulfilment of the core purpose of the act.

³² Chapter 87 of the Laws of Zambia

³³ No. 23 of 2022

³⁴ No. 35 of 2021

³⁵ No. 35 of 2021

³⁶ No. 35 of 2021

Part III of the Act covers offences and penalties. **Section 15(1) of the Narcotic Drugs and Psychotropic Substances Act**³⁷ states that a person shall not engage in the trafficking of a drug or a precursor chemical. While **Section 15(2) of the Narcotic Drugs and Psychotropic Substances Act**³⁸ goes further to state that a person who contravenes subsection (1) commits an offence and is liable, on conviction, to imprisonment for a term not less than one year, but not exceeding 25 years. The law prescribes a mandatory minimum sentence of one year imprisonment, as well as a mandatory maximum sentence of twenty-five years imprisonment. The mandatory maximum sentencing threshold acts as a deterrent, signaling would be repeat offenders, kingpins, drug lords, and whoever may want to traffic a large quantity of drugs, or to attempt to run a drug trafficking ring of the dire consequences of doing so. However, the imposition of the mandatory minimum sentence is not just. The mandatory minimum placed by the law ties the hands of Judges and Magistrates in the exercise of the much-needed judicial discretion needed when sentencing convicted persons. **Section 81 of the Narcotic Drugs and Psychotropic Substances Act**³⁹ further provides, A court shall not grant bail in respect of an offence under section 15, 16 or 17. This is a further restriction on judicial discretion that is made by the Act.

However, **Section 38 (1) of the Narcotic Drugs and Psychotropic Substances Act**⁴⁰, which provides for alternative sentences states, a court may, where a person is convicted of an offence under Part III, order the restriction of the movement of that person within the Republic for a prescribed term. Further, under **Section 38 (2) of the Narcotic Drugs and Psychotropic Substances Act**⁴¹, the Court is given the ability to order the surrender and suspension of the convict's passport, and in the case of a non-citizen, withdraw the convict's visa, deport or prohibit the convict's re-entry into the Republic. Suspension and Revocation of a suspended sentence is also provided for under the Act. **Section 39 (1) of the Narcotic Drugs and Psychotropic Substances Act**⁴² states, A court may order

³⁷ ibid

³⁸ ibid

³⁹ ibid

⁴⁰ ibid

⁴¹ ibid

⁴² ibid

suspension of the whole or any part of the penalties imposed on a person, on such terms and conditions considered necessary to ensure that the person does not commit a similar offence, except that it is in the interest of justice and not contrary to the broader public interest to make an order, where a person convicted of an offence under this Part is—(a) below the age of eighteen years; (b) a first offender; (c) a drug abuser; or (d) a drug dependent person.

The aforementioned sections accord a degree of judicial discretion to the Courts. They permit the Courts to provide alternative sentences to guilty persons. A guilty persons travel and freedom of movement may be temporarily restricted within the Republic of Zambia for a specified period of time. Further, as stated by **Section 39 of the Narcotic Drugs and Psychotropic Substances Act**⁴³ the Court has the option of suspending either the entire sentence, or only a part of it. In addition, the Court may impose on a guilty person any terms and conditions that it deems necessary in order to ensure that the guilty person does not become a repeat offender.

The Narcotic Drugs and Psychotropic Substances Act seem to acknowledge the importance and need for judicial discretion but almost at the same time undercuts it with the mandatory minimums and bail restrictions. There are sections of the Act that take away discretion in the sense that the Court cannot go below mandatory set minimums, a section that denies bail for certain offences committed, all of which anchors the law in rigidity as both bail status and sentencing boundaries are predetermined. Though the Act does allow for the imposition of alternative sentences, this freedom is limited by policy limitations such as the 'public interest'. That essentially creates theoretical discretion. Discretion that is limited to a minor number of cases. Further, the despite the act providing for the suspension of sentences either entirely or in part, this latitude is limited. Limited in the sense that discretion may only be applied to limited classes of offenders such as first-time offenders, drug dependent individuals and those under the age of 18 years old. Additionally, this discretion is conditional and may be revoked. In essence, the Narcotic Drugs and Psychotropic Substances Act create illusory judicial discretion. There are a lot prefixed and predetermined outcomes.

⁴³ ibid

2.1 The Penal Code

2.1.1 Aggravated Robbery

The Penal Code Act⁴⁴ is the principal piece of legislation in Zambia concerning criminal law. First commenced on the 1ST of November 1931, it has been amended at least 9 times since the date of its inception. **Section 294(1) of the Penal Code Act**⁴⁵ provides for the offence of aggravated robbery, and it states, Any person who, being armed with any offensive weapon or instrument, or being together with one person or more, steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony of aggravated robbery and is liable on conviction to imprisonment for life, and, notwithstanding subsection (2) of section twenty-six, shall be sentenced to imprisonment for a period of not less than fifteen years. **Section 294 (2) of The Penal Code Act**⁴⁶ goes further to state that the penalty shall be death where the offensive weapon is a firearm and the court is not convinced that the accused was not armed with a firearm, or was not aware that another person involved in the commission of the offence was armed with a firearm or that he disassociated himself from the offence as soon as he become aware of the involvement of a firearm in the commission of the offence. **Section 15 of the Penal Code (Amendment) Act**⁴⁷ currently amends **section 294 of the principle Penal Code Act**⁴⁸ by deleting the word death and substituting it with life imprisonment.

Section 294 of the Penal Code Act⁴⁹ read in line with **section 26(2) of the Penal Code Act**⁵⁰ which states a person liable to imprisonment for life or any other period may be sentenced for any shorter term, does introduce and increase a certain sense of exercisable judicial discretion for the courts to utilize.

⁴⁴ Chapter 87 of the Laws of Zambia

⁴⁵ Chapter 87 of the Laws of Zambia

⁴⁶ Chapter 87 of the Laws of Zambia

⁴⁷ No. 23 of 2022

⁴⁸ Chapter 87 of the Laws of Zambia

⁴⁹ *ibid*

⁵⁰ *ibid*

However, the application of **section 26(2) of the Penal Code Act**⁵¹ only comes into play in situations where an individual is still only liable for the commission of the said offence, or in situations where extenuating circumstances come into play. Section **201(2)(a) of the Penal Code Act**⁵² defines an extenuating circumstance as any fact associated with the offence which would diminish morally the degree of the convicted person's guilt. **Blacks Law Dictionary**⁵³ defines an extenuation as a mitigating circumstance, a fact or situation that does not justify or excuse a wrongful act or offence, but that reduces the culpability and this may reduce punishment. A fact or situation that does not bear on the question of a defendant's guilt, but that is considered by the court in imposing punishment and especially in lessening severity of a sentence.

In essence, the status quo regarding the amount of judicial discretion exercisable by the courts is still gravely limited. The current position of the law is that if an individual is found guilty of an offence such as aggravated robbery with a firearm, as alluded to earlier, or murder as per **section 200 of the Penal Code Act**⁵⁴, in the absence of extenuating circumstances they will only be convicted to the mandatory punishment imposed on them by the law. This isn't progressive in the sense that every individual, every accused person has differing circumstances that were present during the time of the commission of the offence. Circumstances such as the individual being a first offender. By first offender, reference is made to those who already have a police record that indicates the commission of prior misdemeanors and/or felonies. A first offender should not have to face the same consequences as a repeat offender. Another circumstance includes, having an impaired sense of reasoning. Impaired in the sense of not being able to reason well due to background exposure to bad influences or even a lack of education. A wide majority of offenders are individuals who come from backgrounds where they had little to no role models to look up to. Further, a wide majority of offenders lack an educational background, or did not go as far as they should have with their education.

⁵¹ *ibid*

⁵² *ibid*

⁵³ Black's Law Dictionary (Bryan A Garner ed, 8th edn, Thomas Reuters 2019) at p. 260

⁵⁴ *ibid*

Of course, the law through more recent acts of parliament such as the **Childrens Code Act**⁵⁵ as well as various judicial precedents do help remedy the issues that are caused by limited discretion. For instance, in the case of **The People v Mulenga**⁵⁶, in mitigation for the convict who was found guilty of the offence of aggravated robbery, his Counsel requested that the court consider his age, he being young at the time the offence was committed, the fact that he was still youthful and the fact that he was remorseful. The court determined that the convicted was indeed a child as per **section 2 of the Childrens Code Act**⁵⁷. The court in the aforementioned case also took into consideration **section 79 of the Childrens Code Act**⁵⁸ which provides for the different considerations that the court is able to take into consideration whilst sentencing children. The court ultimately settled upon a sentence of 36 months imprisonment for the convicted individual. The court deviated from the mandatory sentence that is to be imposed for the committed offence. The court only had this discretion due to the priority placed on ensuring proportionate justice for children, ensuring their best interests, as well as the legislation enacted to support the aforementioned interests. However, for adults, the reality is not the same. Regardless of other mitigating circumstances might be in place.

2.1.2 Murder

Section 200 of the Penal Code Act⁵⁹ provides for the offence of murder, stating, any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder. **Section 201 of the Penal Code Act**⁶⁰ provides for the punishment to be administered by a person for committing the offence of murder, stating, any person convicted of murder shall be sentenced to (a) to death; or (b) where there are extenuating circumstances, to any sentence other than death: Provided that paragraph (b) of this subsection shall not apply to murder committed in the course of aggravated robbery with a firearm under section two hundred and ninety-four.

⁵⁵ No. 12 of 2022

⁵⁶ (HP/29/2024) [2024] ZMHC 29 (15 April 2024)

⁵⁷ No. 12 of 2022

⁵⁸ *ibid*

⁵⁹ No. 23 of 2022

⁶⁰ *ibid*

As is the case with the offence of aggravated robbery, the circumstances of each accused person are different, thus, wider leeway to apply different levels of discretion to suit the offence should be present. Yes, the law does provide for the application of extenuating circumstances where applicable, however, there are instances where perhaps there may not be the presence of extenuating circumstances but culpability of an accused needs to be reduced due to other factors such as the factors earlier alluded to. In as much as the stiff penalty is in place to act as a deterrent, a balance must be struck between placing a deterrent, and providing justice in a way that is considerate of the circumstances and befitting. The background of the convicted equally need to be taken into consideration. Individuals who do not fit within the brackets introduced by the law, brackets such as those who are children as prescribed by statute, or individuals whose case has some extenuating circumstances, also have to be given equal consideration of their unique facts.

2.1.3 Indecent Assault

The offence of indecent assault is an offence provided by **Section 137(1) of the Penal Code Act**⁶¹, which states, any person who unlawfully and indecently assaults any woman or girl is guilty of a felony and is liable to imprisonment for fourteen years. Indecent assault is unlawful and indecent contact that is of a sexual nature, that is made without the other party's consent. **Section 137 (1) of the Penal Code (Amendment) Act**⁶² clearly outlines the sentence to be passed on a person found guilty of indecent assault as imprisonment for a term not less than fifteen years and not exceeding twenty years. For an act or series of actions to be considered indecent assault the act must have occurred without consent, without lawful justification, physical, and must have been sexual in nature, such as touching without private parts or kissing without consent. The case of **Miloslav v The People**⁶³ is an indecent assault case where the offender had made a woman massage his private parts. The challenge concerning the law regarding indecent assault is the law is structured in a way that makes it very difficult for the Court to exercise judicial discretion when sentencing. Regardless of whether it is an individuals first offence or whether he it

⁶¹ Chapter 87 of the Laws of Zambia

⁶² No. 15 of 2005

⁶³ (Appeal 49 of 2013) [2014] ZMSC 142 (9 March 2014)

was an action such as massaging another's private parts or touching certain areas such as breasts or buttocks without consent, the minimum sentence remains the same.

2.2 The Penal Code (Amendment) Act No. 23 of 2022

The 2022 amendment of the Penal Code Act⁶⁴ is a significant amendment to legislation in the sense that it abolishes the death penalty in Zambia. **Section 3(a) of the Penal Code (Amendment) Act⁶⁵** amends the principal piece of legislation by deleting the word “death” from **section 24(a) of the Penal Code⁶⁶**. **Sections 14 and 15 Penal Code (Amendment) Act⁶⁷** go further and change the sentence for the offences of aggravated robbery with the use of a firearm and murder to life imprisonment from the previous mandatory sentence of death.

The 2022 amendment of the Penal Code Act⁶⁸ significantly changes Zambia's criminal sentencing framework in the sense that it lowers the limit for the standard of punishment that can be set. The amendment is a positive step in sentencing reforms within our legal framework. It comes in light with a global trend regarding the appreciation for the right to life, regardless of the individual or what the individual has done. Essentially, the notion of ‘a life for a life’, is being done away with. However, in as much as capital punishment has been abolished, discretion is still limited in the sense that the statutory range has been reduced, but Judges cannot impose shorter sentence. Judges are still confined within the statutory limits that have been set. The sort of flexibility that is exercised by court due to legislation such as **The Childrens Code Act⁶⁹** as was earlier alluded to in the case of **The People v Mulenga⁷⁰**, is a significant step in increasing judicial discretion for Judges. However, it is not sufficient as many other individuals are not covered by the change in position of the law. In order to allow for wider leeway with regards to sentencing convicts,

⁶⁴ Chapter 87 of the Laws of Zambia

⁶⁵ No. 23 of 2022

⁶⁶ Chapter 87 of the Laws of Zambia

⁶⁷ No. 23 of 2022

⁶⁸ Chapter 88 of the Laws of Zambia

⁶⁹ No. 12 of 2022

⁷⁰ (HP/29/2024) [2024] ZMHC 29 (15 April 2024)

statutory minimums have to be changed, allowing judges to consider all unique facts before passing down a sentence that is deemed appropriate to the situation.

2.2 The Penal Code (Amendment) Act No. 20 of 2023

2.2.1 Offences Relating to Stock

This Act of Parliament was enacted in December of 2023 to amend the **Penal Code Act**⁷¹. The 2023 amendment repeals **Section 275 of the Penal Code Act**⁷² and amends it by the introduction of a new chapter immediately following after Chapter XXVI. Chapter XXVIA deals with offences relating to stock. **Section 282A of the Penal Code (Amendment) Act**⁷³ defines “stock” as including a horse, mare, gelding, ass, mule, camel, ostrich, ram, ewe, wether, goat, pig, bull, cow, ox or the young of such animal.

Section 282B (1) of the Penal Code (Amendment) Act⁷⁴ states, a person who steals any of the following commits an offence: (a) a horse, mare, gelding, ass, mule, camel, ostrich, ram, ewe, wether, goat or pig, or the young of such animal; (b) and a bull, cow or ox, or the young of such animal. Further, **Section 282B (2) of the Penal Code (Amendment) Act**⁷⁵ states, a person who is convicted of an offence under subsection (1)(a) is liable — (a) in the case of a first offence, to imprisonment for a term not exceeding fifteen years; and (b) in the case of a second and subsequent offence, to imprisonment for a term of not less than seven years and not exceeding fifteen years. Lastly, **Section 282B (3) of the Penal Code Amendment Act**⁷⁶ states, a person who is convicted of an offence under subsection (1)(b) is liable— (a) in the case of a first offence, to imprisonment for a term of not less than five years and not exceeding fifteen years; and (b) in the case of a second or subsequent offence, to imprisonment for a term of not less than seven years and not exceeding fifteen years.

The aforementioned section is very restrictive. It imposes a mandatory minimum sentence on persons who have been found guilty of the offence of stock theft. The law creating the offence of stock theft was and is intended to prevent persons from stealing mainly, but of

⁷¹ Chapter 87 of the Laws of Zambia

⁷² Chapter 87 of the Laws of

⁷³ No. 20 of 2023

⁷⁴ No. 20 of 2023

⁷⁵ *ibid*

⁷⁶ *ibid*

course not limited to, farm livestock. The intention of the legislators and drafters was to protect the many farmers in the country that struggle to contain and protect their livestock from persons who want to steal from them. However, in the pursuit of creating an intimidating deterrent for would be offenders, an unjust law has been created in the sense that Judges and Magistrates are left very little room to exercise judicial discretion in sentencing.

Section 282B (2) of the Penal Code (Amendment) Act⁷⁷ indicates that in the instance of the guilty person being convicted of a first offence, the punishment shall be imprisonment for a term not exceeding fifteen years imprisonment. This is fair and not restrictive in the sense that the Court will be given a lot of judicial discretion. The Court will of course primarily consider the fact that the guilty person is committing that offence for the first time. Thus, deserves leniency in order to teach him a lesson, while also rehabilitating him without drastically altering his/her future with a lengthy sentence. The Court will also have the capacity to take into consideration other factors involved during the commission of the offence. This will ultimately lead the Court to hand down the most appropriate sentence. Despite this initial leniency, the section goes further to state that in the case of a second offence, the guilty person may be sentenced to imprisonment for a term in between seven and fifteen years. The law leaves the same maximum sentence that may be imposed; however, it increases a mandatory minimum sentence to be imposed. Placing a mandatory minimum sentence of seven years imprisonment for a person who has been found guilty is very restrictive and is a step back regarding giving the Courts more judicial discretion with regards to discretion in sentencing.

Section 282B (3) of the Penal Code (Amendment) Act⁷⁸ provides that a person who commits an offence under the aforementioned subsection (1)(b) of the Amendment Act⁷⁹ is liable in the case of a first offence to a term of imprisonment not less than five years and not exceeding fifteen years; and in the case of a second offence to imprisonment for a term not less than seven years and not less than fifteen years. This subsection is a step

⁷⁷ ibid

⁷⁸ ibid

⁷⁹ ibid

further away from **Article 18 of the Constitution (Amendment) Act**⁸⁰ which sets the ideal to be pursued with regards to the notion of a fair trial. As was elaborated in Chapter One's Background of the Problem, a fair trial includes the sentencing being handed down. The entire process must be fair for both parties, the aggrieved party, as well as the offender. The offender must also be treated fairly because there may be factors in that case that reduce the offender's level of culpability, and thus he/she must be sentenced accordingly. According to the culpability that may be placed on them after all factors and facts are considered. This fairness, after one has already been found guilty of committing the offence and is awaiting sentencing, can only be accorded by granting the Court with judicial discretion to the Court in sentencing. **Section 282B (3) of the Penal Code (Amendment) Act**⁸¹ is very restrictive and grants very little discretion to Judges and Magistrates in sentencing because it imposes mandatory minimum sentences for both the first offence and the second offence committed. The implication of this is, even if the circumstances under which the first offence is committed warrant a certain degree of leniency with regards to sentencing, the Courts hands are tied to the minimum mandatory sentence and above.

Section 282B (4) of the Penal Code (Amendment) Act⁸² is worth noting as it states, a person who steals produce commits an offence and is liable, on conviction, to imprisonment for a term not exceeding fifteen years. **Section 282A of the Penal Code (Amendment) Act**⁸³ defines "produce" as the whole or any part of any skins, hides, horns or carcass of stock, any wool, mohair, ostrich egg or ostrich feathers. This provision unlike the last two aforementioned provisions, leaves room for Judges and Magistrates to have and exercise much needed judicial discretion when sentencing an offender. It only sets a mandatory maximum sentence for the offence. This is irrespective of whether the individual in question has committed his first or second offence.

⁸⁰ No. 18 of 1996

⁸¹ No. 20 of 2023

⁸² *ibid*

⁸³ *ibid*

2.4 Conclusion

The purpose of this chapter was to look into different pieces of legislation and their impact on judicial discretion. The researcher aimed to provide insight into both sides of the coin in order to highlight frailties and appreciate them. Judicial discretion is not absent as earlier alluded to. It is present, and its presence is brought out in situations where there are mitigating circumstances present, or where the age of the accused is such that other pieces of legislation and/or principles of law come into play. As is seen in the case of children and the **Childrens Code Act**⁸⁴. However, as the researcher has shown, the amount of judicial discretion accorded to judges in sentencing individuals that have been found guilty of committing certain offences, is not as wide spread as it should be. The criteria within which the current levels of discretion apply is either limited to 'lowered' statutory limits, as is the case regarding the **Penal Code (Amendment) Act**⁸⁵, only applicable to individuals below a certain age, as is the case regarding the Childrens Code Act, or only applies in the presence of mitigating circumstances. A multitude of other factors that should be taken into consideration are not.

⁸⁴ No. 12 of 2022

⁸⁵ No. 23 of 2022

CHAPTER 3

THE EFFECTS OF MANDATORY SENTENCING ON JUDICIAL DISCRETION AND FAIR TRIAL RIGHTS

3.1 Introduction

The researcher in this chapter shall attempt to delve into the effects of mandatory sentencing on judicial discretion and fair trial rights on the Zambian legal system. The researcher shall delve into aspects such as the advantageous as well as disadvantageous effects, disproportionate and unjust outcomes, prison overcrowding, and mixed public satisfaction with sentencing. The researcher will settle on findings and contributions rooted in case law, statutory provisions and scholarly works as well as contributions by reputable individuals and organizations.

3.2 Advantageous Effects of Mandatory Sentencing

The most notable outcome of mandatory sentencing is its effect of acting as a deterrent for would be offenders. The strict and lengthy sentences applicable to the aforementioned offences scare, and thus prevent breakers of the law. In the case of ***Zulu v The People***⁸⁶ an appeal was dismissed, with the Court stating that:

Whilst it is accepted that an accused person should not be allowed to leave Court with a sense of grievance that he was given a severe sentence, a sentence of three years imprisonment does not come to me with a sense of sense of shock. The sentence was proportionate to the seriousness, and gravity of offence. (See *The People v Simolu*⁸⁷. Third, in any case, the trial magistrate was entitled to take into account the prevalence of the offence, and to use that prevalence as a basis for imposing a deterrent sentence.

The Court stressed that sentences are imposed, in part to deter would be offenders from committing prevalent offences.

⁸⁶ (HPA 50 of 2010) [2011] ZMHC 50 (28 December 2011)

⁸⁷ (HNR 332 of 1981) [1981] ZMHC 3 (20 July 1981)

Another advantage of mandatory sentencing that is worth noting is with regards to retribution, which is sometimes referred to as legalized vengeance. Retribution is defined as punishment for something seriously wrong that somebody has done⁸⁸. Retribution is one of the principles/concepts of criminal law that sentencing seeks to uphold. The other principles being; to act as a deterrent, incapacitation and to foster rehabilitation. In the matter of ***R v Bail***⁸⁹, Mr. Justice Hilbery stated as follows:

“The criminal law is publicly enforced, not only with the object of punishing crime, but also the hope of preventing it”

Though not directly speaking to it, Mr. Justice Hilbery alludes to the importance of criminal law and criminal sentencing in ensuring that the tenet of retribution in criminal justice is upheld.

3.3 Disadvantageous Effects of Mandatory Sentencing

Mandatory minimum sentencing has the negative effect of undermining the essence of rehabilitation of offenders. Recidivism is defined as a relapse into criminal behavior, often after the person undergoes intervention or receives sanctions for a previous crime⁹⁰. Recidivism is an important concept in criminal justice that is linked to other code criminal justice concepts such as deterrence, incapacitation, rehabilitation, and desistance⁹¹.

Section 3 of the Zambia Correctional Service Act⁹² outlines the purposes of sentences of imprisonment. **Section 3 of the Zambia Correctional Service Act**⁹³ provides, the purposes of a sentence of imprisonment or similar measures deprivative of a person's liberty are primarily to - (a) protect against crime and to reduce recidivism; and (b) ensure, as far as possible, the reintegration of an inmate into society on discharge through provision of programmes in a prison correctional center.

⁸⁸ <https://www.oxfordlearnersdictionaries.com/definition/English/retribution> > accessed 27th August, 2025

⁸⁹ [1951] 35 Cr. App. R. 164.

⁹⁰ <https://not.ojp.gov/topics/corrections/recidivism> > accessed 29th August, 2025

⁹¹ <https://not.ojp.gov/topics/corrections/recidivism> > accessed 29th August, 2025

⁹² No. 37 of 2021

⁹³ No. 37 of 2021

The aforementioned excerpt from the **Zambia Correctional Service Act**⁹⁴ gives a perspective of the purpose of punishment from the point of view of the Service Commission tasked with ensuring that punishment is imposed on the offender for the required time. The Zambia Correctional Service does not have a role to play in sentencing and is only present in the last part of the criminal justice chain. Despite that, the Service Commission highlights the importance of the concept of recidivism in the criminal justice system as a whole.

Ultimately, the Courts due to their mandate to pass down sentence play a crucial part in the criminal justice systems mandate to reduce recidivism. Mandatory minimum sentencing due to its stringent nature, hinders the fulfilment of the ultimate goal of punishment, which is to ensure that the offence is not committed again, and if it does occur again, the perpetrator should not be the same individual who's already been taken through one of the forms of punishment.

Despite the current framework and criminal justice system indeed satisfying the other aspects such as incapacitation, retribution and deterrence, it could do more to reduce recidivism. Mandatory minimum sentencing restricts the Courts ability to use the authority vested in it to try and remedy the issues aforementioned, as well as the ones that will be introduced later on in the study.

3.4 Prison Overcrowding

Prison overcrowding is one of the biggest effects of mandatory sentencing. As of 16th September, 2023, the Zambia Correctional Service had a total of 27,947 inmates against a holding capacity of 10,500⁹⁵. This represents a strain on capacity and resources by almost 3 times the safe and practical amount. In the report, the Zambia Correctional Service lists a number of key stakeholders in relation to the aforementioned problem. The Zambia Police Service, National Legal Aid Board, National Prosecutions Authority, Drug Enforcement Commission, National Parole Board, the Zambia Correctional Service itself and the Judiciary of Zambia⁹⁶. As per the report, the

⁹⁴ *ibid*

⁹⁵ PRESENTATION OF THE FINDINGS OF THE PRISONS AND CORRECTIONAL CENTERS AUDIT REPORT 2023

⁹⁶ PRESENTATION OF THE FINDINGS OF THE PRISONS AND CORRECTIONAL CENTERS AUDIT REPORT 2023

Judiciary plays a vital role in the fate of the accused⁹⁷. The report advises that the Court should consider options such as non-custodial sentences or probation for minor offences rather than automatically opting for incarceration, and priority should be placed on the use of probation for first time and non-violent offenders to reduce the prison population crisis. The report raises a valuable suggestion for policy change. By failing to reduce or impose shorter sentences, even when the particular circumstances of the offence entitle the guilty person to leniency, the prisons clog as offenders are kept in custody for longer than necessary.

Mandatory minimums tend to focus on vengeance, on punishment rather than on rehabilitation and its various types thereof. The exclusion of these alternatives reduces the rate at which the correctional facilities decongest.

Non-custodial sentence means a sentence that does not involve the person who has been found guilty of an offence or crime being sent to prison as punishment⁹⁸. The Court should have the leeway to impose a non-custodial sentence upon guilty persons. However, due to the structure and phrasing of certain laws within the Zambian legal framework, this freedom is non-existent. As a result, a lot of individuals are sent to prison for offences and under circumstances that do not warrant their committal to prison, or, warrant a degree leniency. The influx of the multitude of individuals who are being incarcerated is leading to the population crisis within Zambia's prisons.

3.5 Disproportionate and Unjust Outcomes

Disproportionate outcome with regards to trial and sentencing refers to a result that is too large or too small in comparison with the facts and circumstances of the matter. In essence, an outcome that is not proportional to the offence or to the other factors surrounding or concerning the commission of the offence. Essentially, in as much as a person or group of persons may commit an offence and ultimately be found guilty by a Court of law, they must not be given a punishment of which they are not deserving. Not deserving in the sense that they should not be given a punishment which is inconsiderate of the present circumstances. An outcome can be unjust in the sense that it not grounded

⁹⁷ ibid

⁹⁸ <https://www.collinsdictionary.com/dictionary/english/non-custodial> > accessed 31st August, 2025

on what is morally correct and fair. In the matter of *R v Ball*⁹⁹, Mr. Justice Hilbery stated as follows:

“In deciding the appropriate sentence, a Court should always be guided by certain considerations. The first, and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also the hope of preventing it”

The aforementioned case is made reference to again, because in this context, the researcher is aiming to highlight how the failure to ensure the equal or adequate adherence to all the tenets of criminal justice such as retribution, leads to disproportionate and unjust outcomes.

Criminal law and criminal sentencing serve to provide for the law that stipulates what acts are condemned as crimes, what the punishment for those crimes is, and ultimately serves to prevent the furtherance of those actions that have been deemed crimes. Ultimately serving it's a retributive function, rehabilitative function and a deterrent function. Those functions must be balanced. The imposition of a one-size-fits-all type of punishment system created by mandatory sentencing, despite the individual and specific circumstances of offences, removes the necessary needed judicial discretion for the implementation of the aforementioned functions of criminal law. Mandatory sentencing tends to shift the balance too far towards retribution.

When a punishment that is fixed and harsh is imposed on a convict who is a first time or petty offender, public confidence is affected. Public confidence is affected in the sense that sentences stop reflecting fairness and proportionality. A petty offender is generally defined as someone who commits a crime that is either minor, not very serious, or has very little harm on society as a whole. Petty offenders are worth noting in the study because due to the stringent nature of mandatory minimum sentences, petty offenders are more often than not punished the same way as hardened criminals. The punishment imposed on them is excessive, thus, leading to the disproportionate and unjust outcomes.

⁹⁹ [1951] 35 Cr. App. R. 164.

Disproportionate or unjust outcomes also arise in situations where a guilty party who could be adequately punished by being given a determinate sentence is given the harsh statutory sentence by which the Court is bound. Determinate sentences are the most common type of prison sentence¹⁰⁰. Determinate sentences could be defined as follows¹⁰¹:

A determinate prison sentence is where the court sets a fixed length for the prison sentence. If an offender is sentenced to four years in prison, for example, that is the maximum time the offender could spend in custody, but they will not necessarily spend the whole time in prison.

A determinate sentence is basically a fixed term of imprisonment, whose end or release date can be calculated during the period of time set for sentencing, or due to other factors like parole. The opposite is what is termed as an indeterminate sentence. An indeterminate sentence is basically a sentence where its length is not fixed during sentencing time. The guilty person may remain in prison indefinitely, depending on interventions such as pardons. For example, life imprisonment. More light is shed on this in the case of ***R v Lichniak and Pyrah***¹⁰², where it was stated as follows:

I do not regard this argument as either trivial or misconceived. The sentence of life imprisonment is now the most severe penalty for which the law provides. There is ground for concern if the sentences imposed on those who, despite the seriousness of their crimes, could adequately be punished by a determinate sentence. Indeed, any mandatory or minimum mandatory sentence arouses concern that it may operate in a disproportionate matter in some cases. It was considerations of this kind which led the Supreme Court of Canada to conclude that a mandatory 7 years minimum sentence for importing drugs was incompatible with Section 12 of the Canadian Charter of Rights and Freedoms, which

¹⁰⁰ <https://sentencingcouncil.org.uk/about-sentencing/types/of/sentence/determinate-prison-sentences/> > accessed 3rd September, 2025

¹⁰¹ <https://sentencingcouncil.org.uk/about-sentencing/types/of/sentence/determinate-prison-sentences/> > accessed 3rd September, 2025

¹⁰² [2002] UKHL 47

guaranteed that no one should be subjected to cruel and and unusual treatment or punishment. The Court also acknowledges that despite the serious nature of certain offences, provided that the circumstances present are right, a determinate sentence is a suitable punishment for the offender. In most cases, the particular and specific circumstances that are present are what the court may fail to take into consideration due to the stringent nature of the law, and ultimately what contributes to making the sentence that has been passed down seem disproportionate.

As per the aforementioned case, the House of Lords acknowledged the negative effect that mandatory minimum sentencing has on the criminal justice system. Mandatory minimum sentences sometimes create a situation where the Court hands down a disproportionate sentence onto an offender. A sentence that could be considered cruel and unusual, as was the case in the aforementioned holding of the Canadian Supreme Court.

As per the holding in the case of ***Zulu v The People***¹⁰³:

In deciding the appropriate sentence, a Court should always be guided by two primary considerations. The first and foremost is the public interest. The second, is that criminal law is publicly enforced, not only, with the object of punishing crime, but also with preventing it.

It was further held in ***Zulu v The People***¹⁰⁴:

With the exception of prescribed or mandatory sentences, a trial court has discretion to select a sentence that seems appropriate in the circumstances of each individual case. An appellate Court does not normally have such discretion. An appellate Court will not interfere with a sentence as being too high, unless that sentence comes to the Court with a sense of shock. Equally, an appellate Court will not interfere with a sentence as being too low, unless it is of the opinion that it is totally inadequate to meet the circumstances of the particular offence.

¹⁰³ (HPA 50 of 2010) [2011] ZMHC 50 (28 December 2011)

¹⁰⁴ *ibid*

The Court in the case of ***Zulu v The People***¹⁰⁵ is a legal precedent that shows how difficult it is for the Courts to exercise the necessary needed Judicial discretion, even upon appeal by the convict. If the law prescribes a mandatory sentence, then the court is forced to abide by it, regardless of the particular circumstances that warrant consideration.

3.6 Mixed Public Satisfaction with Sentencing

Mixed public satisfaction with regards to sentencing refers to situations under which the public does not have a single or prevailing stance with regards to the outcome of a Court process. Due to the nature of the court process and the objectives it abides by, there is hardly ever complete satisfaction concerning a judicial decision.

Victims and their families in most cases tend to feel that a sentence that has been handed down on their aggriever may be too lenient. For instance, the family of a murdered individual may feel like a life sentence is too lenient, may feel like it's unfair to have their loved one's killer still have a chance to live. On the other hand, offenders and their supporters such as their friends and their families may feel like the sentence imposed on the individual is too harsh. For instance, in the event that the guilty person is a first-time offender, the offence committed is petty, or there are some other factors that should have been taken into consideration. The general public and the wider citizenry are in some instances divided. Some feel a stiff or stiffer punishment is what is deserved or needed, while others feel a stiff or the stiff punishment imposed does little in terms of rehabilitation and thus is not fair. Lastly, the Court itself, Judges and Magistrates may feel the constraints of mandatory minimums that force them to deliver sentences that are not the best with all things considered.

Retributionists are defined as individuals who believe that there must be vengeance or punishment for transgressions¹⁰⁶. Retributionists are supporters of mandatory minimum sentences because they provide assurance that severe punishment will be handed down and that vengeance will be achieved on behalf of the aggrieved parties. The rationale behind the reasoning of retributionists is that the consistent harsh nature of mandatory

¹⁰⁵ *ibid*

¹⁰⁶ <https://www.yourdictionary.com/retributionist> > accessed 13 September, 2025

minimum sentences provides an adequate level of consistency and predictability. Essentially, whoever commits a certain crime, should expect a certain punishment.

However, there are members of the public who view mandatory sentences as creating unjust and disproportionate results. Particularly with regards to first time offenders, and/or petty offences. Constantly seeing the Judicial system to appear to be unfair or unjust over time erodes public trust and confidence in the system.

As per the case of ***Access Bank (Zambia) Limited v Group Five/ZCON Business Park Joint Venture***¹⁰⁷, it was stated as follows:

“We, of course, realize that Court decisions, by their very nature hardly ever give universal satisfaction to both parties to litigation”

However, despite the Court acknowledging that it more often than not it is highly unlikely that every concerned party will be happy with the outcome of a trial, there is a difference between structural injustice and ordinary satisfaction. Taking a practical approach towards satisfaction in relation to sentencing brings to the fore system flaws that damage justice as a whole. For instance, as aforementioned, the overcrowding in Zambian prisons is partially to do with the effects of mandatory sentences and the flooding in of convicts.

The public dissatisfaction being referred to is not limited the victim or offender, but extends to society at large. It extends to society at large in the sense that it is the public that will bear the cost of overcrowding in prison. Ultimately, there is not just the failure to deliver “universal satisfaction”, there is also systemic dissatisfaction that is caused by breaking correctional capacity.

3.7 Conclusion

In the just concluded chapter, the researcher highlighted and provided an in-depth appraisal of the effects of mandatory minimum sentencing on judicial discretion and fair trial rights. The researcher began by looking at both sides on the coin, delving into the advantageous effects of mandatory sentencing. The purpose of this was to have better understanding of the negative effects of mandatory sentencing. First looking at the

¹⁰⁷ (SCZ 8 52 of 2014) [2016] ZMSC 24 (26 February 2016)

positive aspects and then looking at the negative, at the concepts that are not being implemented due to the effects of mandatory minimum sentencing. The researcher, with the aid of statutory and case law, found that mandatory minimum sentencing has very damaging effects not only on judicial discretion, trial rights, public perception, and the correctional service, but on the entire criminal justice system as a whole.

CHAPTER 4

EXTRACTING LESSONS FOR IMPROVEMENT FROM KENYA AND SOUTH AFRICA

4.1 INTRODUCTION

The researcher shall in this chapter extract lessons and possible strategies for improvement from Kenya and South Africa. The researcher has settled upon both Kenya and South Africa as his chosen jurisdictions because their legal systems are similar to that of Zambia. Further, they have in different ways addressed the frailties within their own jurisdiction with regards to mandatory minimum sentencing. The researcher shall extract the lessons and strategies for improvement from amongst the judicial decisions, works by prominent and reputable scholars, statutory provisions and reports originating from the two aforementioned countries

4.2 Lessons from South Africa

South Africa's legal system is a hybrid legal system. It comprises a combination of Roman-Dutch law, English Common law and Customary law. Its Court system comprises Magistrates Courts, High Courts, a Supreme Court of Appeal, and similarly to Zambia, a Constitutional Court that has jurisdiction over all Constitutional matters. It similarly also utilizes specialized Courts for land and tax matters among other legal issues.

4.3 Criminal Law - Mandatory Minimum Sentencing in relation to Judicial Discretion in South Africa

South Africa's Criminal Law legal framework comprises of various pieces of legislation, with the primary source being the **Criminal Procedure Code Act**. South Africa's **Criminal Procedure Code Act**¹⁰⁸ was in 1997 amended by **The Criminal Procedure Code Act**¹⁰⁹, and like Zambia's **Penal Code Act**¹¹⁰ introduced amendments to set aside all death sentences and repeal provisions that provide for capital punishment.

Section 51(2)(a) of The Criminal Procedure Code Act provides;

¹⁰⁸ 51 of 1977

¹⁰⁹ 105 of 1997

¹¹⁰ Chapter 87 of the Laws of Zambia

(2) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in-depth

(a) Part II of Schedule 2, in the case of-

(i) a first offender, to imprisonment for a period not less than 15 years;

(ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and

(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years

In the case of **S v Gumbo and Others (Sentence)**¹¹¹ the High Courts of South Africa KwaZulu-Natal Division, North Eastern Circuit stated as follows: -

"The offence of Robbery with aggravating circumstances farmed in counts, 1,2,3 and 5 of the indictment, which for first offenders attracts a minimum sentence of 15 years imprisonment in terms of the provisions of section 51(2)(a) of Act 105 of 1997 (the Act), read with part 2 of Schedule 2 to that Act. For a second offender, the! minimum sentence is 20 years imprisonment"

The Court in the same matter goes further to state: -

"I am not compelled to impose the minimum sentence on the counts of robbery with aggravating circumstances, namely counts 1,2,3 and 5 of the indictment, upon which I have convicted all four of you. I can impose a lesser sentence if I am satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence. The act does not define what 'substantial and compelling' circumstances are. This is left to the Courts to determine"

The South African legal system similarly places emphasis on the severity of robbery, and the added harm that arises from aggravated robbery, which is robbery that involves the use of a firearm or an offensive weapon. The law, just like Zambia's places a statutory

¹¹¹ (CC24/2023) [2023] ZAKZPHC 65 (15 June 2023)

minimum sentence to be handed down by the Court to persons found guilty. Though, their legal system already has sufficiently addressed the frailties that Zambia's legal system possesses by prescribing different and more lenient sentences for first time and second time offenders, Zambia's law grants no discretion to Judges and Magistrates because they are bound to abide strictly to the prescribed penalty.

Aggravated Robbery is a particularly serious and violent offence that is traumatizing to the victim, which is why there is likely to always be a mandatory minimum sentence for it. However, in South Africa, the Courts have a lot of leeway in their sentencing despite the presence of a mandatory minimum sentence. For instance, in the instance that the individual is a first offender, the Court may use its discretion to sentence him to imprisonment for any period of time, for as long as it is not below 15 years imprisonment. This sentence still acts a deterrent, but does not destroy the life of the convict. He still has room for reform, reintegration into society and redemption.

Further, the Court highlight's that despite the mandatory minimum sentencing created by statutory law, they still maintain high levels of judicial discretion. They are bound to only apply their discretion in the presence of compelling circumstances that justify the imposition of a lesser sentence. However, this binding effect is not limiting in the sense that they are given the leeway to determine what circumstances are justified as compelling enough for them to impose a lesser sentence. The lack of a strict definition of compelling circumstances in the statutory framework gives the Court it's much needed judicial discretion and flexibility.

4.3.1 - The Offence of Stock Theft

The Stock Theft Act¹¹² is South Africa's primary piece of legislation with regards to the offences relating to stock. **Section 1 of The Stock Theft Act**¹¹³ defines "stock" as: -

"Any horse, mule, ass, bull, cow, ox, heifer, calf, sheep, goat, pig, poultry, domesticated ostrich, domesticated game, or the carcass or portion of the carcass of any stock;(v)"

¹¹² No. 57 of 1959

¹¹³ ibid

The definition being very similar to that found within the **Penal Code Act**¹¹⁴. The Act goes further to outline the circumstances in which a person charged with stock theft may be found guilty. The circumstances are similar to those contained in Zambia's **Penal Code Act**¹¹⁵, and as per **Section 11(1) of The Stock Theft Act**¹¹⁶ which states: -

"Any person who is charged with the theft of stock or produce may be found guilty of-

- (a) the stock of or an attempt to commit the theft of such stock or produce; or
- (b) receiving such stock or produce knowing the same to have been stolen; or
- (c) inciting, instigating, commanding or procuring another person-
 - (i) to steal such stock or produce; or
 - (ii) to receive such stock or produce; or
- (d) knowingly disposing of, or knowingly assisting in the disposal of, stock or produce which has been stolen or which has been received with knowledge of it having been stolen; or
- (e) contravening section two or three

Section 13 of The Theft of Stock Act¹¹⁷ provides for the sentences to be imposed on a person found guilty of an offence as per section 11, and it states: -

- (a) In the case of a first conviction for any offence mentioned in paragraph (a), (b), (c) or (d) of subsection (1) of section eleven-
- (i) imprisonment for any period not exceeding two years; or
- (ii) imprisonment with spare diet or solitary confinement or both for any period not exceeding six months; or
- (iii) whipping not exceeding ten strokes; or

¹¹⁴ Chapter 87 of the Laws of Zambia

¹¹⁵ *ibid*

¹¹⁶ No. 57 of 1959

¹¹⁷ *ibid*

- (iv) both such whipping and imprisonment for any period not exceeding two years; or
- (v) a fine not exceeding five hundred pounds; or
- (vi) both such fine and imprisonment for any period not exceeding two years;
- (b) in the case of a second or subsequent conviction for any such offence-
 - (i) imprisonment for any period exceeding three years; or
 - (ii) whipping not exceeding ten strokes; or
 - (iii) both such whipping and imprisonment for any period not exceeding three years;
- (c) any penalty prescribed by section fourteen

The aforementioned South African legislation has been amended by **The Abolition of Corporal Punishment Act**¹¹⁸ which abolished corporal punishment in various pieces of South African legislation, **The Stock Theft Act**¹¹⁹ included. Further, capital punishment was abolished in South Africa many years ago with the help of landmark cases such as **S v Makwanyane and Another**¹²⁰, in which capital punishment was declared by the Court as unconstitutional and a crime against humanity.

Regardless of the aforementioned amendments, it is clearly seen that South African law makers have not bound the Courts hands by drafting sections of the act that take away the Courts discretion with regards to sentencing. As aforementioned, the law goes a great deal to leave wide judicial discretion by placing statutory maximums instead of minimums. Further, the law pays particular attention to consider circumstances such as an individual being a first offender.

4.3.2 The Drugs and Drug Trafficking Act 140 of 1992

The Drugs and Drug Trafficking Act¹²¹ is the South African piece of legislation that provides for the prohibition of the use or possession of, or dealing in, drugs and of certain acts relating to the manufacture or supply of certain substances or the acquisition or

¹¹⁸ No. 33 of 1997

¹¹⁹ No. 57 of 1959

¹²⁰ (CCT3/94) [1995] ZACC3

¹²¹ 140 of 1992

conversion of the proceeds of certain crimes; for the obligation to report certain information to the police; for the exercise of the powers of entry, search, seizure and detention in specified circumstances; for the recovery of the proceeds of drugs trafficking; and for matters connected therewith.

Section 4 (a) and (b) of The Drugs and Drug Trafficking Act¹²² states;

No person shall use or have in his possession

(a) any dependence-producing substance; or

(b) any dangerous dependence-producing substance or any undesirable

The rest of section 4 outlines the circumstances under which a person found in possession would not be liable. Circumstances such as being in possession for medical purposes

Section 5 (a) and (b) of The Drugs and Drug Trafficking Act¹²³ states;

No person shall deal in

(a) any dependence-producing substance; or

(b) any dangerous dependence-producing substance or any undesirable dependence-producing substance.

Similarly, the rest of section 5 outlines the circumstances under which a person found in possession would not be liable. Circumstances such as administering to a patient for medical reasons.

Sections 13(c), (d), (e), (f) of The Drugs and Drug Trafficking Act¹²⁴ states that persons who contravene **sections 4(a) and (b) as well as 5(a) and (b) of The Drugs and Drug Trafficking Act¹²⁵** respectively shall be guilty of an offence.

¹²² ibid

¹²³ ibid

¹²⁴ ibid

¹²⁵ ibid

Further, **Sections 17 of The Drugs and Drug Trafficking Act**¹²⁶ states that commission of an offence referred to in Section 13(c) will attract a punishment of not more than 5 years imprisonment, or a fine, or both. It further states that the commission of an offence referred to in Section 13(d) will attract a punishment of not more than 15 years imprisonment, or a fine, or both. Additionally, commission of an offence under Section 13(e) attracts a punishment of not more than 10 years imprisonment, or a fine, or both. Lastly, Section 13(f) attracts a punishment of not more than 25 years imprisonment, or a fine, or both.

Contrasting these laws with what the Zambian legal framework provides for clearly indicates the key difference with regards to judicial discretion between the two jurisdictions. Evidently, South Africa has very steep and very harsh maximum penalties. However, the key aspect is those penalties are the maximum that can be imposed under the specified offence. The law does not provide for a minimum sentence that may be imposed. The consequence of this is that Judges and Magistrates may impose any sentence they deem fit, for as long as it does not exceed the maximum penalty stipulated by law.

4.4 Lessons from Kenya

Kenya's legal system is a common law system based heavily on the British tradition. Unlike Zambia, Kenya does not have a Constitutional Court. It has a Supreme Court which acts as the final Court of Appeal and the Court with jurisdiction to interpret the Constitution. Similar to Zambia, it has specialized Courts and Tribunals that deal with Land, Employment and Environmental issues.

4.5 The Offence of Stock Theft

The Penal Code Act¹²⁷ is the principal piece of Kenyan legislation with regard to offences relating to stock. **Section 278 of the Penal Code**¹²⁸ provides for the offence of Stealing Stock, and it states;

¹²⁶ *ibid*

¹²⁷ Chapter 63 of the Laws of Kenya

¹²⁸ *ibid*

"If the thing stolen is any of the following things, that is to say, a horse, mare, gelding, ass, mule, camel, ostrich, bull, cow, ox, ram, ewe, whether, goat or pig, or the young thereof the offender is liable to imprisonment for a period not exceeding fourteen years"

The Stock and Produce Theft Act¹²⁹ is one of the pieces of legislation that deal with the offence of stock theft in Kenya. **Section 2 of The Stock and Theft of Produce Act**¹³⁰ defines 'Stock' as;

"The male, female or young of any animal, mentioned in **section 278 of the Penal Code**¹³¹ , and includes poultry; and further includes the meat, hide or skin or any part of any such animal or bird

The distinction between Zambian law and Kenyan law in the context of this particular offence is clear to see. The Kenyan legislators did not impose a mandatory statutory minimum that would end up binding the Courts hands. Rather, they impose a statutory maximum. This statutory maximum allows the Court to adopt and consider more of the guilty party's circumstances and facts concerning the commission of the crime. This consideration allows the Court to exercise its wider given discretion with regard to sentencing.

4.5.1 Narcotic Drugs and Psychotropic Substances (Control) Act

This piece of legislation is the Kenyan equivalent of the **Narcotic Drugs and Psychotropic Substances Act**¹³² of Zambia and serves as Kenya's key piece of legislation with regards to drug possession and drug trafficking. **Section 3 of The Narcotic Drugs and Psychotropic Substances (Control) Act**¹³³ states;

(1) Subject to subsection (3), any person who has in his possession any narcotic drug or psychotropic substance shall be guilty of an offence.

(2) A person guilty of an offence under subsection (1) shall be liable-

¹²⁹ Chapter 335 of the Laws of Kenya

¹³⁰ *ibid*

¹³¹ Chapter 63 of the Laws of Kenya

¹³² No. 35 of 2021

¹³³ Cap 245

(a) in respect of cannabis, where the person satisfies the Court that the cannabis was intended solely for his own consumption, to imprisonment for ten years and in every other case to imprisonment for twenty years; and

(b) In respect of a narcotic drug or psychotropic substance, other than cannabis, where the person satisfies the Court that the narcotic drug or psychotropic substance was intended solely for his own consumption, to imprisonment for twenty years and in every other case to a fine of not less than one million shillings or three times the market value of the narcotic drug or psychotropic substance, whichever is the greater, or to imprisonment for life or to both such fine and imprisonment.

(3) Subsection (1) shall not apply to-

(a) a person who has possession of the narcotic drug or psychotropic substance under a license issued pursuant to section 16 permitting him to have possession of the narcotic drug or psychotropic substance; or

(b) a medical practitioner, dentist, veterinary surgeon or registered pharmacist who is in possession of a narcotic drug or psychotropic substance for any medical purposes; or

(c) a person who possesses the narcotic drug or psychotropic substance for medical purposes from, or pursuant to a prescription of, a medical practitioner, dentist or veterinary surgeon; or

(d) a person authorized under the regulations to be in possession of the narcotic drug or psychotropic substance.

Further, **Section 4 of The Narcotic Drugs and Psychotropic Substances (Control) Act¹³⁴** provides for the penalty for trafficking in narcotic drugs and it states;

Any person who traffic's many narcotic drugs or psychotropic substance or any substance represented or held out by him to be a narcotic drug or psychotropic substance shall be guilty of an offence and liable-

¹³⁴ ibid

(a) in respect of any narcotic drug or psychotropic substance to a fine of one million shillings or three times the market value of the narcotic drug or psychotropic substance, whichever is the greater, and, in addition to imprisonment for life; or

(b) in respect of any substance other than a narcotic drug or psychotropic substance, which he represents or holds out to be a narcotic drug or psychotropic substance to a fine of five hundred thousand shillings and, in addition, to imprisonment for a term not exceeding twenty-five years.

The afore cited Act has a mixture of provisions that leave the Court with the leeway to apply their own discretion when sentencing and provisions that are stringent so that the act serves more of a deterrent purpose. Some provisions of the act have mandatory maximum sentences without a mandatory minimum, and others are strict with only a fixed penalty of imprisonment imposed. The act shows an adequate balance between the two objectives of the law. A good balance between the law serving its deterrent purpose whilst also according the Court much needed discretion, of which Zambia can replicate.

4.6 Conclusion

In the just concluded chapter, the researcher identified and highlighted laws from Kenya and South Africa with regards to the subject of mandatory minimum sentences. The researcher identified the different ways in which law makers from South Africa and Kenya drafted laws in a way that serves its deterrent purpose whilst also leaving judicial discretion in the hands of the Court and its Judges. The researcher also used the findings obtained to contrast the differences in structuring of the law in Kenya and South Africa comparison to Zambia. The just concluded chapter shows that Zambia could pick valuable lessons that can be obtained from the studied jurisdictions in order to ensure that the law serves its deterrent purpose whilst also according Judges and Magistrates with enough leeway to apply their own discretion. The researcher highlighted the differences in the law of the 3 countries to pin point how Zambian legislation can rightly strike a good balance between two of the objectives of the law, serving its deterrent purpose, and according the Court with sufficient judicial discretion in order to ensure Justice is rightly met.

CHAPTER 5

AN OVERVIEW OF FINDINGS RECOMMENDATIONS AND CONCLUSIONS

5.0 General Findings and Conclusions

Mandatory sentencing is aimed at providing consistency, acting as a deterrent, and ultimately fostering public confidence in the judicial system. Ensuring that fairness and justice is present and seen to be present across the board. Therefore, the effect that mandatory sentencing has on judicial discretion is an aspect of justice that is indispensable in scholarly and research studies that are conducted in order to ascertain the overall effectiveness of the judiciary. The researcher has during the course of this study shown through analysis of Zambia's legislative framework and in comparison, to the legislative frameworks of similar jurisdictions, not done enough to ensure that Judges and Magistrates have enough exercisable judicial discretion. This study has highlighted the need for the Zambian legislative framework concerning offences within the criminal jurisdiction to strike a balance between being a stringent deterrent, and a fair penalty for all both the guilty and the accused. The researcher appreciated the serious nature of various offences, the history of the law and the changes that have been made and implemented.

The importance of ensuring that Judges and Magistrates have as much exercisable judicial discretion as possible is seen in the appraisal of Zambia's legal framework. Evidence of this importance and how to implement the ideal within a country's legislation is seen in the analysis of the legislative framework of Kenya and South Africa. Ultimately showing that it is possible to effectively strike an adequate and effective balance between the two.

5.1 Specific Findings and Conclusions

The specific findings and conclusions concerning each chapter of this dissertation shall be highlighted.

5.1.1 Chapter One

Chapter one of the researcher's study serves the purpose of acting as an introduction to this study, serving as a foundation. Aside from giving a background into the history of the study, chapter one through the statement of the problem clearly outlines what the frailty of Zambia's legal framework is. Chapter one gives merit to the study by

highlighting other scholars that have addressed the importance of solving the problem that the researcher aims to address through this study. The literature review validates the researchers work as being important to the overall scholarly discussion. The importance of justice, fairness, and proportionality with regards to Constitutionally enshrined principles are discussed briefly. Further, the study through this chapter briefly highlight's how all three concepts are intertwined, and despite serving different purposes, are all necessary for national progress.

The significance of the study is also addressed, with the scope of the study being outlined as well in order to guide the reader further on the significance of the as well as the individuals, government bodies, and commissions involved in ensuring the adequate fulfilment of the need to grant Judges and Magistrates with as much judicial discretion as possible.

5.1.2 Chapter Two

The researcher in chapter two conducts a thorough appraisal of Zambia's criminal legal framework. The researcher narrows down Zambia's wide legislative framework to concentrate on a select few offences. This is in order to build on the foundation laid in chapter one, and to lead up to the comparative aspect of the study in a later stage of the study.

The researcher begins by looking into the **Narcotic Drugs and Psychotropic Substances Act**¹³⁵. The researcher discovers that the Act which serves as the principal piece of legislation for prosecuting drug related offences such as possess and trafficking, has a lot of discrepancies. The Act does provide the Court with discretionary power through the ability to impose alternative sentences. However, as the researcher posited in the afore chapters, the discretion given to Judges and Magistrates by the Act is in some cases illusory.

The researcher then analyses the **Penal Code Act**¹³⁶, looking into three (3) offences in particular. Aggravated robbery, murder and indecent assault. Beginning with aggravated robbery, the researcher discovers and posits that despite a recent amendment to

¹³⁵ No. 35 of 2021

¹³⁶ Chapter 87 of the Laws of Zambia

Zambian criminal law that reduces the mandatory sentence for the offence from death to life imprisonment, the law still does not grant the Court with the much-needed judicial discretion. The researcher posits that the current structure of the law does not accord the Court with enough room to consider all the different circumstances that do have a bearing on the level of guilt of the offender.

The study then focuses on the offence of murder. Similarly to the offence of aggravated robbery, amendments to the law have reduced the mandatory sentence for the offence from death to life imprisonment. The Courts do have the discretion to reduce the offence from death to the lesser offence of manslaughter. The exercise of this discretion is dependent on the presence of extenuating circumstances. However, as was earlier posited by the researcher in this study, in the event of situations that warrant the exercise of this discretion, so long as they are not within the current list of extenuating circumstances, the Courts hands are tied. Additionally, even if extenuating circumstances are present, and the Court exercises its authority to lower the offence, the Court still lacks sufficient judicial discretion to impose a sentence that is fit when all circumstances are considered.

Further, the researcher delves into the offence of indecent assault. The offence of indecent assault has a mandatory minimum sentence placed beside it. However, the severity of the assault is something that Zambian law has not adequately addressed within the Zambian legal framework. The vagueness regarding the levels of severity of the offence leave the Court with hands that are tied when it comes to sentencing individuals. For instance, if one person massages someone's private part, and another person hits someone's buttocks, upon conviction they are both liable to the same minimum sentence of imprisonment.

Lastly, the researcher delves into the **Penal Code Amendment Act**¹³⁷, particularly the offence of stock theft. The Penal Code Amendment significantly changed the law with regards to stock theft. This offence served as a significant part of this study because, as the comparative aspect shows, Zambian legislation regarding the offence is significantly

¹³⁷ No. 20 of 2023

harsher than that of similar jurisdictions. Stock Theft in Zambia largely has mandatory minimum sentences that are harsh and limit the judicial discretion that the Court may exercise, even in the event that circumstances that reduce the blameworthiness of the individual exist.

Ultimately, the researcher discovered that Zambia's criminal law framework is marred with provisions that focus largely serving as a deterrent, thus taking away much judicial discretion from the Courts.

5.1.3 Chapter Three

In this chapter the researcher focused on the effects that mandatory sentencing has on judicial discretion and fair trial rights. The researcher delves into the advantageous effects of mandatory sentencing, effects such as its purposes as an adequate deterrent to would be offenders. The researcher then looks at the disadvantageous effects, such as recidivism. Further, prison overcrowding was looked at as well. Serving as a particularly large consequence of mandatory sentencing, the incarceration of individuals who should be warranted lighter sentences has largely contributed the overcrowding of prisons. The researcher also looks at disproportionate and unjust outcomes as an effect. The researcher delves into case law concerning the aforementioned aspects before concluding with the aspect of mixed public satisfaction with regards to mandatory sentencing.

Ultimately, the researcher discovered that the effects of mandatory sentencing on not only Zambia's judiciary, but the entire country as a whole are far reaching and create a domino of effects.

5.1.4 Chapter Four

The researcher at this stage of the study focusses on the lessons for improvement that could be drawn from Kenya and South Africa. The researcher begins by looking at the South African legal framework. Beginning with **The Stock Theft Act**¹³⁸, which is an old piece of legislation, the researcher observes that the law does set a deterrent through its mandatory maximum sentences. However, despite having a mandatory maximum sentence, that aforementioned law does not have a mandatory minimum sentence. A

¹³⁸ No. 57 of 1959

significant difference when compared to Zambian legislation concerning the same offence.

The researcher then proceeds to analyze the **Drugs and Drug Trafficking Act**¹³⁹ which serves as South Africa's principal legislation concerning drug and drug related offences. Similarly to the Stock Theft Act, the legislation provides for mandatory maximum sentences that are not illusory at all. They provide the South African Courts with full discretion to sentence individuals to any length of imprisonment, provided it is within the! mandatory! maximum.

The researcher then proceeded to draw lessons from Kenya. Beginning by looking at the offence of Stock Theft, the researcher looked at the **Penal Code Act**¹⁴⁰ and the **Stock Theft Act**¹⁴¹ similarly to the offence of Stock Theft in South Africa is significantly categorized by mandatory maximum sentences that accord the Court with maximum exercisable judicial discretion with regards to sentencing. Lastly, the researcher dove into the **Narcotic Drugs and Psychotropic (Control) Act**¹⁴². This piece of legislation is the principal piece of legislation concerning drugs and drug related offences in Kenya. The level of discretion within the Act is not absolute. However, the drafters, struck a good balance between strict sentencing provisions in order to serve as a deterrent, and provisions that accord the Court with large amounts of exercisable judicial discretion.

Ultimately Zambian legislators can draw lessons from both countries on how to strike a balance between setting a strict deterrent for all offences, but in particular for the prevalent and serious offences, and according the Courts with the! much needed leeway with regards to sentencing for all offences.

5.2 Recommendations

This study has revealed that Zambia's criminal legislative framework, particularly for certain felonies, does very little to accord the Court with adequate levels of judicial discretion in order to ensure a just outcome for both parties. The law focuses largely on

¹³⁹ 140 of 1992

¹⁴⁰ Chapter 63 of the Laws of Kenya

¹⁴¹ Chapter 335 of the Laws of Kenya

¹⁴² Cap 245

creating a stiff deterrent on would be offenders, failing to strike an adequate balance. The contrary is seen in the criminal law legal frameworks of Kenya and South Africa. The law grants the Court wider judicial discretion with regards to sentencing, this is before the Courts reach the extent of having to highlight and consider extenuating circumstances. The following are therefore recommended by the author;

- i. Provisions of the **Narcotic Drugs and Psychotropic Substances Act**¹⁴³, **Penal Code Act**¹⁴⁴, and the **Penal Code (Amendment) Act**¹⁴⁵ should be amended to remove mandatory minimum sentences.
- ii. Sentencing provisions of the aforementioned Acts should be amended to explicitly accord the Court with wider leeway to apply judicial discretion.
- iii. Judges, Magistrates and other key stakeholders such as officers of the Zambia Correctional Service and members of the general public should be included more in the drafting and amendment of laws.
- iv. Legislators should adopt more theories and best practices from other jurisdictions in order to keep in touch with ever changing world views on how to effect punishment.
- v. More Court hearings must be made available live digitally in order for all relevant stakeholders to make informed input when consulted during the amendment and creation of laws.
- vi. Judicial discretion exercisable by the Court should not remain largely applicable for procedural application of the law but should be allowed to expand to include application of the substantive aspect of the law.

¹⁴³ No. 35 of 2021

¹⁴⁴ Chapter 87 of the Laws of Zambia

¹⁴⁵ No. 20 of 2023

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UNIVERSITY
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L400 – DIRECTED RESEARCH (OBLIGATORY ESSAY)

RESEARCH CLEARANCE FORM

NAME: Richard Chiwepe STUDENT NUMBER: LB22112733

SUPERVISOR: K. Mwanfuli TOPIC: Mandatory Sentencing

Vis a Vis Judicial Discretion: A Critique on Zambia's Approach to Criminal Justice

Stage	Comments	Supervisor's Signature & Date	Student's Signature & Date
Research Proposal	Expand rationale behind minimum mandatory sentence	<i>K. Mwanfuli</i> 17/08/25	<i>R. Chiwepe</i> 17/08/25
Chapter 1 – Introduction	Read Section 38 & 39 of Narcotic & Psychotropic	<i>K. Mwanfuli</i> 26/08/25	<i>R. Chiwepe</i> 26/08/25
Chapter 2 –	Read section 130 of Zambia Wildlife Act.	<i>K. Mwanfuli</i> 10/09/25	<i>R. Chiwepe</i> 10/09/25
Chapter 3 –	All definitions to be cited	<i>K. Mwanfuli</i> 18/10/25	<i>R. Chiwepe</i> 18/10/25
Chapter 4 –	Each chapter to be ten pages long	<i>K. Mwanfuli</i> 28/10/25	<i>R. Chiwepe</i> 28/10/25
Chapter 5 – Conclusions & Recommendations	Expand on the recommendations	<i>K. Mwanfuli</i> 01/11/25	<i>R. Chiwepe</i> 01/11/25
Table of Contents, Bibliography and Appendices	All work referred to, to be reflected in Bibliography	<i>K. Mwanfuli</i> 11/11/25	<i>R. Chiwepe</i> 11/11/25
First Draft	Brainstorm on possible titles.	<i>K. Mwanfuli</i> 12/11/25	<i>R. Chiwepe</i> 12/11/25

Second Draft	Amend grammar to spelling errors	Atkinson 13/11/25	R. Yepo 13/11/25
Final Draft	Good	Atkinson 13/11/25	R. Yepo 13/11/25

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2025 i DECLARATION ii SUPERVISORS RECOMMENDATION iii DEDICATION

I would like to dedicate this dissertation to my lovely wife Racheal Namulunga Chipepo, my beautiful daughter Busuma Chipepo and my mother Jane Kashimoto. I would further like to dedicate this dissertation to my elder brother Bwalya Chipepo, his wife Georgina. M. Chipepo, my young sister Miracle B. Chipepo, my elder sister Jane Chipepo and my young brother Philemon Mulenga Mutale. I thank you all for the support you have showered me with during my academic journey. iv
ACKNOWLEDGMENTS I would like to acknowledge my lovely wife Racheal Namulunga Chipepo who encouraged me to soldier on even when conditions did not allow. I think of her and realize that I married right. To my beautiful daughter Busuma Chipepo who may not understand this now, but I know she will one day read this and make sense of it. Each time I look at her, she drives my passion to fight harder so that she may have a life better than this that I have lived, and so