SAL 1991(3) 76 (NmS) SA 14/90

IN THE SUPREME COURT OF NAMIBIA

In the application of:

EX PARTE:

ATTORNEY-GENERAL

In Re:

CORPORAL PUNISHMENT BY ORGANS OF STATE

Coram: Berker, C.J.;

Mahomed, A.J.A.; Trengove, A.J.A.

Delivered on: 5 April 1991

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APPEAL JUDGMENT

BERKER, C.J.: I have read the judgment prepared by my brother Mahomed, A.J.A, in this matter, and fully agree with the conclusions arrived at by him.

There are only a few general comments I should like to make in addition thereto. Whilst it is extremely instructive and useful to refer to, and analyze, decisions by other Courts such as the International Court of Human Rights, or the Supreme Court of Zimbabwe or the United States of America on the question whether corporal punishment is impairing the dignity of a person subjected to such punishment, or whether such punishment amounts to cruel, inhuman or degrading treatment, the one major and basic consideration in arriving at a decision involves an enquiry into the generally held norms, approaches, moral standards,

aspirations and a host of other established beliefs, of the people of Namibia.

In other words, the decision which this Court will have to make in the present case is based on a value judgment, which cannot be primarily be determined by legal rules and precedents, as helpful as they may be, but must take full cognisance of the social conditions, experiences and perceptions of the people of this country. This is all the more so as with the advent and emergence of an independent sovereign Namibia, freed from the social values, ideologies, perceptions and political and general beliefs held by the former colonial power, which imposed them on the Namibian people, the Namibian people are now in the position to determine their own values free from such imposed foreign values by its former colonial rulers.

Added to this is the fact that in the case of Namibia the former colonial rulers, namely the Government of the Republic of South Africa, during their administration of our country embraced certain ideologies, values, and social conventions which were totally unacceptable to the Namibian people, and indeed to the rest of the world. It is therefore inevitable that on independence these ideologies, values and conventions would be discarded by the people and the Government of a free and independent Namibia, in the light of their experiences under the colonial rule.

These experiences generally, but in particular with regard to

infliction of corporal punishment by judicial and quasi-judicial organs in accordance with South African legislation introduced into the country during the colonial rule, and even more so by the arbitrary extra-judicial infliction of corporal injuries as a result of physical treatment meted out by the officials of the ruling administrative power and which were in many cases of an extreme nature, such as torture, inhuman and excessive beatings, left an indelible impression on the people of Namibia. It is not surprising that a deep revulsion in respect of such treatment, including corporal punishment, has developed, which ultimately became articulated in the Bill of Fundamental Human Rights enshrined in the Constitution, and in particular in Article 8 thereof, which protects absolutely the dignity of every person, even in the enforcement of a penalty legally imposed, and further absolutely prohibits torture or cruel, inhuman or degrading treatment or punishment.

Furthermore the factors determining the basic social values and are never static. Apart from changing perceptions within our own community, and in particular in respect of corporal punishment, as well as the changing perceptions of other countries, particularly on the African Continent, but also in the rest of the world, as evidenced in changing laws and global or regional instruments dealing inter alia with such specific problems, are also influencing the thinking and result in changing perceptions and norms of our own community.

I have made the above comments to make it clear that this Court

will have to arrive at a value judgment in the sense set out above in order to arrive at a decision, and that the making of a value judgment is only possible by taking into consideration the historical background with regard to social conditions and evolutions, of the political impact on the perceptions of the people and a host of other factors, as well as the ultimate crystallisation of the basic beliefs and aspirations of the people of Namibia in the provisions in the Bill of Fundamental Human Rights and Freedoms.

There is one further comment I wish to make. Whilst very often there is little or no disagreement as regards the abolishment or corporal punishment by judicial or quasi-judicial bodies, there is less agreement with regard to the desirability or otherwise of the imposition of corporal punishment, judicially or quasi-judicially ordered to be meted out to juveniles, that is on young persons under the age of 21 years. Even less agreement exists in respect of the desirability or otherwise of corporal punishment in schools. It seems to me that once one has arrived at the conclusion that corporal punishment <u>per se</u> is impairing the dignity of the recipient or subjects him to degrading treatment or even to cruel or inhuman treatment or punishment, it does not on principle matter to what extent such corporal punishment is made subject to restrictions and limiting parameters, even of a substantial kind - even if very moderately applied and subject to very strict controls, the fact remains that <u>any</u> type of corporal punishment results in some impairment of dignity and degrading treatment. The remarks made by Warren,

D.J. in Trop v Dulles, 356 U.S. 86, quoted by my brother, make this point very clear. Added to this is of course is the fact that whatever substantial restrictions and controls are placed on the method of the imposition of corporal punishment or chastisement by law, the actual execution thereof can never be fully controlled so that in practice despite such controlling provisions the application of such punishment may nevertheless result in a brutal and excessive manner.

My brother Mahomed, A.J.A., has of course also dealt with these comments in his erudite judgment, but I believe that the above observation may be helpful in understanding the conclusions all the members of this Court have arrived at.

H.J. BERKER, C.J.

/mv

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**IN THE SUPREME COURT OF NAMIBIA**

**In the application of:**

**EX PARTE:**

**ATTORNEY-GENERAL**

**IN RE:**

**CORPORAL PUNISHMENT BY ORGANS OF STATE**

**CORAM: BERKER, C.J.; MAHOMED, A.J.A.; TRENGOVE, A.J.A.**

Delivered on: 1991/04/05

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APPEAL JUDGMENT:

MAHOMED, A.J.A.: During November 1990, the Attorney-General submitted a petition to the Chief Justice in terms of Section 15(2) of the Supreme Court Act No. 15 of 1990, in which he sought the consent of the Chief Justice (or such other judge designated for that purpose by the Chief Justice) for the Supreme Court to exercise its jurisdiction to act as a Court of first instance, in hearing and determining a constitutional question which the Attorney-General sought to refer to the Supreme Court under the powers vested in him by Article 87(c) read with Article 79(2) of the Namibian Constitution.

The Chief Justice was of the opinion that the application was of a nature which justified the exercise of the Court's jurisdiction to act as a Court of first instance in hearing and determining the relevant constitutional question, which

was set out by the Attorney-General in the following terms:

> "The Supreme Court is requested to determine whether the imposition and infliction of corporal punishment by or on the authority of any organ of state contemplated in legislation is -
>
> 1. per se: or
>
> 2. in respect of certain categories of persons; or
>
> 3. in respect of certain crimes or offences or misbehaviours; or
>
> 4. in respect of the procedure employed during the infliction thereof;
>
> in conflict with any of the provisions of Chapter 3 of the Constitution of the Republic of Namibia and more in particular Article 8 thereof, and if so, deal with such laws as contemplated in Article 25(1) of the Namibian Constitution".

The Attorney-General engaged Counsel to assist the Court with argument both for and against the proposition that the infliction of corporal punishment by or on the authority of any organ of the state contemplated in the relevant legislation and rules was unconstitutional.

The Court is indebted to Advocate Maritz and Adv. Desai who appeared before us, for their research and assistance.

The relevant provisions of the Constitution.

The Namibian Constitution seeks to articulate the aspirations and values of the new Namibian nation following upon independence. It expresses the commitment of the

Namibian people to the creation of a democratic society based on respect for human dignity, protection of liberty and the rule of law. Practices and values which are inconsistent with or which might subvert this commitment are vigorously rejected.

For this reason colonialism as well as "the practice and ideology of apartheid from which the majority of the people of Namibia have suffered for so long" are firmly repudiated.

Article 8 of the Constitution must therefore be read not in isolation but within the context of a fundamental humanistic constitutional philosophy introduced in the preamble to and woven into the manifold structures of the Constitution.

Article 8 reads as follows:

"Respect for Human Dignity.

'(1) The dignity of all persons shall be inviolable.

(2)(a) in any judicial proceedings or in other proceedings before any organ of the State, and during the enforcement of a penalty, respect for human dignity shall be guaranteed.

(b) No persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment' .

The statutory and other provisions sought to be impugned.

"The imposition and infliction of corporal punishment by or on the authority of any organ of state" in Namibia falls

into two classes. The first class consists of legislation permitting and regulating the imposition of corporal punishment by judicial, quasi-judicial and administrative organs of the State. The second class deals with corporal punishment in schools.

(a) Corporal punishment by judicial, quasi-judical and administrative organs of the State:

There is a vast network of legislation falling within this category. The most important laws include the following: (My underlining)

Section 112 of the Criminal Procedure Act, 1977 (Act, 1977 (Act No.51 of 1977)) which provide as follows:

> 'Where an accused at a summary trial in any court pleads guilty to the offence charged, or to an offence of which he may be convicted on the charge and the Prosecutor accepts that plea -
>
> (a) the presiding Judge may, if he is of the opinion that the offence does not merit the sentence of death, or the presiding Judge, regional Magistrate or Magistrate may, if he is of the opinion that the offence does not merit punishment of imprisonment or any other form of detention without the option of a fine or of a whipping or of a fine exceeding R300,00, convict the accused in respect of the offence to which he has pleaded guilty on his plea of guilty only and -
>
> (i) impose any competent sentence, other than the sentence of death or imprisonment or any other form of detention without the option of a fine or a whipping or a fine exceeding R300,00; or
>
> (ii) deal with the accused otherwise in accordance with law;
>
> (b) the presiding Judge shall, if he is of the opinion that the offence merits

> the sentence of death, or the presiding Judge, regional Magistrate or Magistrate shall, if he is of the opinion that the offence merits punishment of imprisonment or any other form of detention without the option of a fine or a whipping or a fine exceeding R300,0 or if requested thereto by the Prosecutor, question the accused with reference to the alleged facts of the case in order to ascertain whether he admits the allegations in the charge to which he has pleaded guilty, and may, if satisfied that the accused is guilty of the offence to which he had pleaded guilty, convict the accused on his plea of guilty of that offence and impose any competent sentence: Provided that the sentence of death shall not be imposed unless the guilt of the accused has been proved as if he had pleaded not guilty' .

Section 276 of Act No.51 of 1977 which provides as follows:

> '(1) Subject to the provisions of this Act and any other law and of the common law, the following sentences may be passed upon a person convicted of an offence, namely -
> (a) ...
> (b) ...
> (c) ...
> (d) ...
> (e) ...
> (f) ...
> (g) a whipping.'

Section 290(2) of Act No.51 of 1977 which provides as follows:

> 'Any court which sentences a person under the age of 18 years to a fine or a whipping may, in addition to imposing such punishment, deal with him in terms of paragraph (a) (b), (c) or (d) of Subsection (1)'

Section 292 of Act No.51 of 1977 which provides as follows:

> '(1) When a court may sentence a person to a whipping, the whipping, may be imposed in addition to or in substitution of any other punishment to which such person may otherwise be sentenced.....

(2) Except as provided in Section 294, a whipping by means of a cane only may be imposed and the number of strokes, which may not exceed seven, shall, subject to the provisions of any other law, be in the discretion of the court which shall specify in the sentence the number of strokes imposed.

(3) Except where a whipping is imposed under Section 294, no person shall be sentenced to a whipping more than two times or within a period of 3 years of the last occasion on which he was sentenced to a whipping.

(4) Subject to the provisions of Section 294, the punishment of a whipping shall be inflicted in private in a prison and in accordance with the laws governing prisons.'

Section 293 of Act No.51 of 1977 which provides as follows:

'A whipping may be imposed only in the case of a conviction for -

(a)(i) robbery or rape or assault of an aggravated or indecent nature or with intent to do grievous bodily harm;

(ii) breaking or entering any premises with intent to commit an offence, whether under the common law or under any statutory provision, theft of a motor vehicle (except where the accused obtained possession of the motor vehicle with the consent of the owner thereof) or theft of goods from a motor vehicle or part thereof, where the said motor vehicle or the said part was properly locked;

(iii) receiving stolen property knowing it to be stolen property;

(iv) bestiality or an act of gross indecency committed by one male person with another;

(b) an attempt to commit any offence referred to in paragraph (a);

(c) culpable homicide; or

(d) any statutory offence for which a whipping may be imposed as a punishment.'

Section 294 of Act No. 51 of 1977:

'(1) If a male person under the age of 21 years is convicted of any offence, whether such conviction is a first or a subsequent conviction, the court convicting him may, in lieu of any other punishment, sentence him to receive in private a moderate correction of a whipping not exceeding seven strokes, which shall be administered by such person and in such place and with such instrument as the court may determine.

(2) The whipping shall be inflicted over the buttocks, which shall not be exposed during the infliction but shall be covered with normal attire.

(3) A parent or, as the case may be, a guardian of the person concerned may be present when the whipping is inflicted, and the court shall advise such parent or guardian, if present at the court proceedings when the whipping is imposed, of his right to be present at the infliction.

(4) A whipping under this section shall not be inflicted unless a District Surgeon or an assistant District Surgeon has examined the person concerned and has certified that he is in a fit state of health to undergo the whipping.

(5) If a District Surgeon or assistant District Surgeon certifies that the person concerned is not in a fit state to receive the whipping or any part thereof, the person appointed by the court to execute the sentence shall forthwith submit a certificate to the court which passed the sentence or to a court having like jurisdiction, and such court may thereupon, if satisfied that the person concerned is not in a fit state to receive the whipping or any part thereof, amend the sentence as it deems fit' .

Section 295 of Act No.51 of 1977 which provides as follows:

'(1) No female and no person of or over the age of 30 years shall be sentenced by any court to the punishment of a whipping.

(2) A whipping shall not be imposed by any court if it is proved that the existence of some psychoneurotic or psychopathic condition contributed towards the commission of the offence.'

Section 302(1)(a)(iii) which provides as follows:

> '(1)(a) any sentence imposed by a Magistrate's Court -
>
> (i) ...
> (ii) ...
> (iii) which consists of a whipping, other than a whipping imposed under section 294,
>
> shall be subject in the ordinary course to review by judge of the Provincial Division having jurisdiction.'

Section 308 of Act No.51 of 1977 which provides as follows:

> '(1) A whipping, other than a whipping imposed under Section 294, shall in no case be inflicted until the relevant proceedings have been returned with the certificate referred to in Section 304(1) or the Provincial Division in question has confirmed the sentence.
>
> (2) If a person sentenced to receive a whipping is not also sentenced to imprisonment for such a period as shall allow time for the judge's certificate to be received before the whipping is inflicted, such person, if he has not been released on bail, shall be detained in custody until either the record of the proceedings in the case has been returned as aforesaid or the sentence has been confirmed as aforesaid.'

Section 309(4) which provides as follows:

> '(1) When an appeal under this section is noted, the provisions of -
> (a) ...
> (b) Sections 307 and 308 shall mutatis mutandis apply with reference to the sentence appealed against, including a sentence of a whipping imposed under Section 294.'

Section 321 of Act No.51 of 1977 which provides as follows:

> '(1) The execution of the sentence of a superior court shall not be suspended by reason of any appeal against a conviction or by reason of any question of law having been reserved for consideration by the court of appeal unless -

(a) the accused is sentenced to death or to whipping in which case the sentence shall not be executed until the appeal or question reserved has been heard and decided; or

(b) ...'

Section 92 of the Magistrates' Courts Act, 1944 (Act No.32 of 1944) which provides as follows:

'(1) Save as otherwise in this Act or in any other law specially provided, the court, whenever it may punish a person for an offence -

(a) ...

(b) ...

(c) by whipping, may impose a sentence of whipping with a cane only.'

Section 36 of the Prison's Act, 1959 (Act No. 8 of 1959) which provides as follows:

'(1) Corporal punishment shall not be inflicted before the medical officer has examined the prisoner and has certified that he is in a fit state of health to undergo such punishment.'

(2) If it appears to the medical officer that the prisoner is not in a fit state of health to undergo corporal punishment, he shall certify that fact in writing.

(3) After the prisoner has been certified by the medical officer to be fit for corporal punishment, the punishment shall be inflicted in private in a prison in the presence of the medical officer.

(4) The medical officer shall immediately stop the infliction of any further punishment if it appears to him during the infliction of the corporal punishment that the prisoner is not in a fit state of health to undergo the remainder thereof, and shall certify that fact in writing.

(5) Whenever under the provisions of Subsection (2) or (4) any medical officer has certified that any person sentenced to undergo corporal punishment is not in a fit state of health to undergo the whole or the remainder thereof, the certificate shall immediately be transmitted to the Commissioner and, if urgently necessary,

the fact shall be reported to him by telegraph.

(6)(a) Upon the receipt of any such certificate by telegraphic advice, the Commissioner shall report the matter to the court which passed the sentence or, in the case of a superior court, if that court is not sitting, to the Provincial Division of the Supreme Court concerned, and such court or Provincial Division may, subject to the provisions of any relevant law, either remit the sentence of corporal punishment or substitute another penalty in lieu of the sentence of corporal punishment.

(b) If no remission or substitution as aforesaid is made by the court or Provincial Division, the President may remit the whole or the remainder of the corporal punishment, as the case may be.

(7) Where corporal punishment has been ordered in more than one sentence passed at or at approximately the same time on the same person, that punishment shall not be inflicted at intervals, but shall be inflicted at one and the same time as early as possisble after the sentences were passed, subject to the provisions of this section and of any law relating to the review of such sentences by a judge.

(8) The number of strokes inflicted at one and the same time in terms of Subsection (7) shall in no instance exceed ten and the remainder of the strokes, if any, ordered in the said sentences shall lapse."

Section 37 of Act No.8 of 1959 which provides as follows:

"No women prisoner shall under any circumstances be subjected to corporal punishment."

Section 48(1) of Act No. 8 of 1959 which provides as follows:

"Any prisoner who -

(a) escapes or conspires with any person to procure the escape of any prisoner, or who assists or incites any other prisoner to escape from the prison in which he is placed, or from any post or place where of wherein he may be for the purpose of labour or

detention, or from hospital or while in the course of removal in custody from one place to another; or

(b) makes any attempt to escape from custody; or

(c) is in possession of any instrument or other thing with intent to procure his own escape or that of another prisoner,

shall be guilty of an offence and liable on conviction to imprisonment for a period not exceeding 5 years, and, in addition, where the escape or attempt to escape was accompanied by an act of violence, such prisoner may be sentenced to undergo corporal punishment not exceeding 7 strokes."

Section 54(2) of Act No.8 of 1959 which provides as follows:

"Upon conviction of any prisoner in respect of any such contravention or non-compliance, such commissioned officer shall have jurisdiction to impose any one or more of the following punishments:

(a) ...

(b) ...

(c) ...

(d) corporal punishment, not exceeding six strokes, if the prisoner is a convicted male prisoner apparently under the age of 40 years and no other punishment is imposed upon him in respect of the same contravention or non-compliance."

Section 56(3) of Act No.8 of 1959 which provides as follows:

"No sentence, other than a sentence imposing corporal punishment, shall be suspended pending the decision of the said Judge."

Regulation 100 of the Prison's Regulations which provides as follows:

"(1) Subject to the provisions of Sections 36, 37 and 56 of the Act, Sections 302, 308, 309, 316 and

321(1)(a) of the Criminal Procedure Act, 1977 (Act No.51 of 1977), and the directions which may be prescribed, corporal punishment shall not be inflicted -

(a) before the period within which an appeal in terms of the relative provisions of the Criminal Procedure Act, 1977, may be noted, has expired and written notification has been received that an appeal has not been noted, unless the convicted person has indicated in writing that he has no intention of noting an appeal, and he agrees that corporal punishment may be inflicted before the expiry of the said period;

(b) where an appeal has been noted against the sentence whereby such corporal punishment was imposed, before written notification had been received that the sentence has been confirmed;

(c) where the sentence whereby such corporal punishment was imposed is subject to review, before written notification had been received that this sentence has been confirmed;

(d) where a request, as contemplated in Section 316 of the Criminal Procedure Act, 1977, has been made, before written notification had been received either that such a request has been refused or that the sentence whereby such corporal punishment was imposed has been confirmed.

(2) A member of the Prison Service shall be present at the infliction of corporal punishment and shall endorse the date thereof on the relevant warrant, carry out such instructions as the medical officer may issue in order to prevent injury to health, and comply with further directions as may be specially or generally prescribed in regard to the infliction of corporal punishment.

(3) Corporal punishment shall be inflicted across the buttocks with a cane in the manner prescribed.

(4) A cane used to inflict corporal punishment -.

(a) on an adult prisoner shall be approximate 125 centimetres in length and 12

millimetres in diameter;

(b) on a juvenile prisoner shall be approximate 1 meter in length and 9 millimetres in diameter."

Section 32 of the Children's Act, 1960 (Act No.33 of 1960) which provides as follows:

"Any person who fails to comply with a requirement referred to in subsection (4) of Section 31, with which it is his duty to comply, shall be guilty of an offence and liable on conviction -

(a) if the person convicted is the child concerned, to -

(i) ...

(ii) ...

(iii) a moderate whipping as provided in Section 345 of the Criminal Act, 1955 (Act No.56 of 1955);

(b) ... "

Section 92(1) of the Children's Act, 1960 (Act No.33 of 1960) which provides as follows:

"The Minister may make regulations -

(a) ...

(b) as to the organisation and maintenance of places of safety, places of detention and observation centres established or approved in terms of Section 38, the care, control and bringing-up of children in those places and centres, and the maintenance there of discipline, inter alia also by the infliction of corporal punishment;

(c) as to the organisation and maintenance of schools of industries and reform schools and of children's homes established under subsection (3) of Section 39, the constitution of their Boards of Management, the appointment, resignation and discharge of members of such Boards, the powers and duties of such Boards, and the manner in which they shall function and the care, control, bringing-up and training of pupils in institutions, the maintenance there of discipline, inter alia also by the infliction of corporal punishment and the manner in which persons who have

absconded or are deemed to have absconded from any institution are to be dealt with;

(d) - (o) ... "

Section 1 of the Criminal Law Amendment Act, 1953 (Act No. 8 of 1953) which provides as follows:

"Whenever any person is convicted of an offence which is proved to have been committed by way of protest or in support of any campaign against any law or in support of any campaign for the repeal or modification of any law or the variation or limitation of the application or administration of any law, the court convicting him may, nothwithstanding anything to the contrary in any other law contained, sentence him to -

(a) ...

(b) ...

(c) a whipping not exceeding ten strokes; or

(d) ...

(e) both such fine and such a whipping; or

(f) both such imprisonment and such a whipping."

Section 2 of Act No.8 of 1952 which provides as follows:

"Any person who -

(a) in any manner whatsoever advises, encourages, incites, commands, aids or procures any other person or persons in general; or

(b) uses any language or does any act or thing calculated to cause any person or persons in general,

to commit an offence by way of protest against a law or in support of any campaign against any law, or in support of any campaign for the repeal of modification of any law or the variation or limitation of the application or administration of any law, shall be guilty of an offence and liable upon conviction to -

(i) ...

(ii) ...

(iii) a whipping not exceeding ten strokes; or

(iv) ...

(v) both such fine and such a whipping; or

(vi) both such imprisonment and a whipping:

Provided that in the case of a second conviction, it shall not be competent to impose a fine except in conjunction with a whipping or imprisonment."

Section 2(1) of the Animals Protection Act, 1962 (Act No.71 of 1962) which provides as follows:

"Any person who -

(a) -

(b)(Description of acts relating to cruelty to animals)

shall, subject to the provisions of this Act and any other law, be guilty of an offence and liable on conviction to a fine not exceeding R200,00 or in default of payment to imprisonment for a period not exceeding six months or to such imprisonment without the option of a fine, or, where any such act or omission is of a wilful and aggravated nature, to a whipping not exceeding six strokes or to both such a fine and such a whipping or to both such imprisonment without the option of a fine and such a whipping."

Section 3(2) of Proclamation R348 of 1967 which provides as follows:

"The procedure at any trial under this section, the punishment, the manner of execution of any sentence imposed and the appropriation of fines shall be in accordance with native law and custom observed by the tribe or in the location or native reserve concerned: Provided that a Chief, Headman, Chief's deputy or Headman's deputy man not inflict any punishment involving death, mutilation,. grievous bodily harm or imprisonment or impose a fine in excess of R40,00 or two head of large stock or ten head of small stock: Provided

> further that nothing in this subsection contained shall be construed as prohibiting corporal punishment being imposed in the case of unmarried males below the apparent age of 30 years".

Section 4(2) of Proclamation R348 of 1967 which provides as follows:

> "The jurisdiction of any person or body referred to in Subsection (1) as to persons, causes of action or offences, the procedure at any trial by such person or body, the punishment, the manner of execution of any judgment or sentence and the appropriation of fines shall be in accordance with the native law and custom observed in the area in question: Provided that no punishment involving death, mutilation or grievous bodily harm may be imposed: Provided further that nothing in this subsection contained shall be construed as prohibiting corporal punishment being imposed in accordance with the said native law and custom."

(b) The authority for imposing corporal punishment in schools.

It was common cause before us that corporal punishment is permitted in schools administered by the Ministry of Education, Culture and Sport in Namibia. There is indeed a Code which regulates such punishment, which has been issued by this Ministry.

The material provisions of this Code provide that -

(i) The head of the school has the exclusive responsibility for the administration of corporal punishment;

(ii) If circumstances so demand the head of the school may extend this responsibility to the deputy and departmental heads.

(iii) The administration of corporal punishment by a teacher may only take place in the presence of and with the approval of the head of the school;

(iv) No corporal punishment may be administered upon females.

(v) Corporal punishment may only be imposed in respect of serious contraventions of which the following are examples:

Bullying; continuous and serious failure to perform duties; swearing; indecency; abusive language; unbecoming conduct; truancy; insubordination; deliberate damage to property; assault.

(vi) Corporal punishment must be administered moderately so that it does not cause permanent bodily injury or give rise thereto.

(vii) The age and bodily condition of the student must be taken into account.

(viii) Before any corporal punishment or any other punishment is administered there must be a proper investigation of the contravention which the student is alleged to be guilty of.

(ix) No corporal punishment may be imposed in the presence of other students.

(x) Only an ordinary cane may be used in the administration of corporal punishment.

This cane may not be longer than 75 centimetres and thicker than 13 millimetres.

(xi) The cane used for the administration of corporal punishment may not be in the possession of a teacher in the classroom.

(xii) Corporal punishment may not be imposed on the hands or the legs or any other part of the anatomy except for the buttocks.

(xiii) Pulling the hair or ears of the student or smacking or pinching or knocking him or assaulting him in any other way is strictly prohibited.

(xiv) A full written record of the imposition of the corporal punishment in all cases must be maintained in a punishment register which must show the name of the student, his age, the number of strokes imposed, the name of the person who administered the punishment, the date on which the punishment was administered and a full description of the contravention.

Clearly the Code sought to temper the administration of corporal punishment but there is nothing in the Code which limits the number of strokes which may be imposed for particular contraventions; many of the substantive contraventions themselves are defined very widely and are inherently vague and protean; and the intensity of the punishment would vary with the personality and strength of the punisher, as well as the resilience or vulnerability of the person sought to be punished.

The application of Article 8 of the Constitution:

In terms of Article 8(2)(b) of the Constitution:

> "No persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment". (My underlining)

It seems clear that the words underlined have to be read disjunctively. Thus read, the section seeks to protect citizens from seven different conditions:

(a) torture;
(b) cruel treatment;
(c) cruel punishment;
(d) inhuman treatment;
(e) inhuman punishment;

(f) degrading treatment;

(g) degrading punishment.

Although the Namibian Constitution expressly directs itself to permissible derogations from the Fundamental Rights and Freedoms entrenched in Chapter 3 of the Constitution, no derogation from the rights entrenched by Article 8 is permitted. This is clear from Article 24(3) of the Constitution. The State's obligation is absolute and unqualified. All that is therefore required to establish a violation of Article 8 is a finding that the particular statute or practice authorised or regulated by a state organ falls within one or other of the seven permutations of Article 8(2)(b) set out above; "no questions of justification can ever arise" (Sieghart: "The International Law of Human Rights", page 161 paragraph 14.3.3.)

It accordingly follows that even if the moderation counselled or comtemplated in some of the impugned legislation or practice succeeds in avoiding "torture" or "cruel" treatment or punishment, it would still be unlawful if what it authorises is "inhuman" treatment or punishment or "degrading" treatment or punishment.

What is the meaning of the words "inhuman" and "degrading"?. According to the Oxford English Dictionary "inhuman" means "destitute of natural kindness or pity; brutal, unfeeling, cruel; savage, barbarous". "To degrade" means "to lower in estimation, to bring into dishonour or contempt; to lower in character or quality; to debase". (S

v Ncube; S v Tshuma; S v Ndhlovu, 1988(2) SA 702 (ZSC) at 717(D - E) See also S v Chabalala, 1986(3) SA 623 (B AD) at 626 (I) to 627 (B); Sieghart (supra) pages 162 tot 172; S v Petrus and Another, (1985) LRC (Const.) 699 at 714 g.

The question as to whether a particular form of punishment authorised by the law can properly be said to be inhuman or degrading involves the exercise of a value judgment by the Court. (S v Ncube and Others, (supra) at 717 (I).

It is however a value judgment which requires objectively to be articulated and identified, regard being had to the contemporary norms, aspirations, expectations and sensitivities of the Namibian people as expressed in its national institutions and its Constitution and further having regard to the emerging consensus of values in the civilised international community (of which Namibia is a part) which Namibians share. This is not a static exercise. It is a continually evolving dynamic. What may have been acceptable as a just form of punishment some decades ago, may appear to be manifestly inhuman or degrading today. Yesterday's orthodoxy might appear to be today's heresy.

The provisions of Article 8(2) of the Constitution are not peculiar to Namibia; they articulate a temper throughout the civilised world which has manifested itself consciously since the Second World War. Exactly the same or similar articles are to be found in other instruments (See for example Article 3 of the European Convention for the

Protection of Human Rights and Fundamental Freedoms; Article 1(1) of the German Constitution; Article 7 of the Constitution of Botswana; Article 15(1) of the Zimbabwean Constitution.)

In the interpretation of such articles there is strong support for the view that the imposition of corporal punishment on adults by organs of the State is indeed degrading or inhuman and inconsistent with civilised values pertaining to the administration or justice and the punishment of offenders. This view is based substantially on the following considerations:

1. Every human being has an inviolable dignity. A physical assault on him sanctified by the power and the authority of the State violates that dignity. His status as a human being is invaded.

2. The manner in which the corporal punishment is administered is attended by, and intended to be attended by, acute pain and physical suffering "which strips the recipient of all dignity and self-respect". It "is contrary to the traditional humanity practised by almost the whole of the civilised world, being incompatible with the evolving standards of decency". (S v Ncube and Others, (supra) at page 722 (B to C)).

3. The fact that these assaults on a human being, are systematically planned, prescribed and executed by an organised society makes it inherently objectionable. It reduces organised society to the level of the offender. It demeans the society which permits it as much as the citizen who receives it.

4. It is in part at least premised on irrationality, retribution and insensitivity. It makes no appeal to the emotional sensitivity and the rational capacity of the person sought to be punished.

5. It is inherently arbitrary and capable of abuse leaving as it does the intensity and the quality of the punishment, substantially subject to the temperament, the personality and the idiosyncrasies of the particular executioner of that punishment.

6. It is alien and humiliating when it is inflicted as it usually is by a person who is a relative stranger to the person punished and who has no emotional bonds with him.

There is an impressive judicial consensus concerning most of these general objections. (S v Ncube & Others, (supra) at page 722 A to E; Tyrer v United Kingdom (1978) 2 EHRR, 1 (paragraph 32 and 33 of the judgment;) S v Petrus and

Another,(supra); S v A Juvenile, 1990(4) SA 151 (ZSC); S v Kumalo and Other, 1965(4) SA 565 (N) at 574; S v Masondo and Another, 1969(1) PH, H58 (N); S v Motsoesoana, 1986(3) SA 350 (N) at 352D to 354E and 358D to F; S v Ruiters and Others, 1975(3) SA 526 (C) at 530 531.

In the result there is beginning to emerge an accelerating consensus against corporal punishment for adults throughout the civilized world. Thus -

(i) In Europe, Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms which is in the same terms as Article 8(2)(b) of the Namibian Constitution was interpreted in the case of Tyrer, (supra) to render unconstitutional an order by a Juvenile Court in the Isle of Man, sentencing the applicant "to three strokes of the birch". (See paragraph 35 of the judgment.)

(ii) In the United Kingdom, Section 36 of the Criminal Justice Administration Act of 1914 abolished whipping for all common law offences and Section 1 of the Criminal Justice Act of 1948 abolished whipping as a sentence by a court of law altogether pursuant to the Report of the Departmental Committee on Corporal Punishment. ("The Cadogan Committee").

The United Kingdom does not have a domestic statute incorporating a provision equivalent to Article 8(2) of the Namibian Constitution but it respects the findings of the European Court on Human Rights.

(iii) In Germany, Article 1(1) of the German Constitution provides as follows:

> "Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt."

Section 2(2) of the German Constitution further provides that -

> "Jeder hat das Recht auf Leben und körperliche Unversehrtheit. Die Freiheit der Person is unverletzlich. In diese Rechte darf nur auf Grund eines Gesetzes eingegriffen werden".

Corporal punishment imposed by judicial authorities is regarded as unconstitutional in the light of these provisions of the German Constitution. (Ingo von Münch "Grundgesetz-Kommentar" (3rd edition), vol.p.90.)

(iv) In the United States the relevant constitutional provision is the 8th Amendment which provides that -

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted".

The question is to whether or not a particular statute prescribing penalties violates the 8th Amendment is essentially dependent on an analysis of the relevant statute. (Corpus Juris Secundum, volume 16 C, par.1082.) Apparently only the state of Delaware still retains the whipping post for crimes or offences committed.

(v) Section 7(1) of the Botswana Constitution is substantially in the same terms as Article 8 (2) of the Namibian Constitution, but Section 7(2) of the Constitution of Botswana saves from attack under Section 7(1) of the Constitution any punishment authorised by a law which preceded the independence of Botswana.

For this reason the Botswana Court of Appeal, in the case of the S v Petrus and Another, was not invited to set aside the provisions of the previous legislation preceding the independence of Botswana permitting corporal punishment, but it was invited to hold and did hold that an amendment subsequent to the commencement of the Constitution which provided for strokes in instalments was ultra vires Section 7(1) of the Botswana Constitution.

In the course of the judgments given in that case the disapproval of corporal punishment by the members of the Court was however repeatedly manifest.

(vi) Section 15(1) of the Constitution of Zimbabwe is exactly in the same terms as Article 8(2)(b) of the Namibian Constitution.

The Supreme Court of Zimbabwe has unanimously held that corporate punishment for adults "which in its very nature is both inhuman and degrading" violates the constitutional guarantee against inhuman or degrading punishment or treatment. (S v Ncube, (supra).

(vii) In Canada corporal punishment was abolished with the enactment of the Criminal Law Amendment Act of 1972 and in Australia corporal punishment is no longer resorted to. (See Ncube's case (supra) at pages 710 to 713 and especially 713A containing a trenchant criticism of corporal punishment which is said to brutalise "the prisoner and executioner alike. It breeds hatred and bitterness, uproots personal dignity, and frustrates any attempt at social re-adjustment. At the same time it arouses among fellow prisoners a community of interests against the prison régime and a sympathy with its victims."

(viii) South Africa has never had a Constitutional provision which entitles the Court to strike down legislation of the Central Parliament. Some of the strongest and most eloquent criticisms of corporal punishment have however come from the judiciary in that country in the course of interpreting and applying the manifold statutes which authorise and regulate corporal punishment in the Republic of South Africa.

In S v Basson and Another, (supra) Leon, J. stated that -

> "Whipping is not only an assault upon the person of a human being but also upon his dignity as such".

In S v Myute & Others; S v Baby, 1985 (2) SA 61 (Ck) at 68H-I, De Wet, C.J. stated:

> "That the imposition of strokes is a very severe and humiliating form of punishment".

In S v Machwili, 1986(1) SA 156 (N), Didcott, J. expressed the view that -

> "When an adult is flogged on the other hand, especially when he is flogged not in lieu of but in addition to being sent to gaol, nothing is achieved but revenge. Such is gained at a cost, what is more. Society's standards suffer. It stoops to the level of the criminal whom it punishes. It behaves with the same sort of barbarism as that which it condemned in him."

In S v Motsoesoana, (supra), Milne, J.P.(as he then was) described corporal punishment as "a brutal and degrading form of punishment" (at 357 I).

I am in strong agreement with these views.

I have no difficulty whatever in coming to the conclusion that corporal punishment upon adults, inflicted by an organ of the state in consequence of a sentence directed by a judicial or quasi-judical authority in Namibia is indeed a form of "inhuman or degrading" punishment which is in conflict with Article 8(2)(b) of the Namibian Constitution.

Corporal punishment in respect of Juveniles.

If corporal punishment upon adults authorised by judicial or quasi-judicial authorities, constitutes inhuman or degrading punishment in conflict with Article 8(2)(b) of the Constitution, can it be succesfully contended that such punishment is nevertheless lawful where it is sought to be inflicted upon juvenile offenders in consequence of a direction from such a similar judicial or quasi-judicial authority? There is some dispute on this issue on the authorities. In the case of the S v A. Juvenile, (supra) the majority of the Court held that the imposition of a sentence of whipping or corporal punishment upon juveniles did indeed constitute inhuman or degrading punishment or treatment which violated the relevant provisions of the Zimbabwean Constitution which, as I have previously stated are substantially in the same terms as the Namibian Constitution. The minority distinguished the position of adults from that of juveniles and came to the conclusion that the imposition of corporal punishment on juveniles was not unconstitutional.

In the case of Tyrer, (supra) the European Court of Human Rights also held that Article 3 of the European Convention on Human Rights which correspond with Article 8(2)(b) of the Namibian Constitution rendered unlawful an order sentencing a juvenile to "three strokes of the birch". The reason for that conclusion was that the judicial corporal punishment which was ordered on the juvenile applicant amounted to degrading punishment within the meaning of Article 3 of the Convention. (Paragraph 35 of the judgment).

On the other hand in the case of Campbell and Cosans v United Kingdom, (1980) 3 EHRR 531 and (1982) 4 EHRR 293, the majority of the Court held that teachers who inflicted corporal punishment upon schoolchildren did not offend Article 3 of the European Convention. This case however did not deal with corporal punishment inflicted in consequence of a sentence from a judicial or quasi-judicial authority.

It would seem to me that most of the six objections against corporal punishment in general to which I previously referred, would be of equal application to both adults and juveniles. Juveniles also have an inherent dignity by virtue of their status as human beings and that dignity is also violated by corporal punishment inflicted in consequence of judicial or quasi-judical authority.

The manner in which corporal punishment is administered upon juveniles is also intended to result in acute pain and

suffering which invades his dignity and self-respect of the recipient. Such punishment is also potentially arbitrary and open to abuse in the hands of the person administering the punishment. Both the punisher and the juvenile sought to be punished are also equally degraded. The juvenile is also alienated by such punishment. Corporal punishment upon juveniles in consequence of judicial or quasi-judicial direction also has a retributive element with scant appeal to the rational and emotional sensitivities of the juvenile.

What then are the material differences which could sufficiently distinguish the position of juveniles from adults for the purposes of Article 8(2) of the Constitution?

There appear to be three arguments advanced in support of such a distinction. The first contention is that the right to impose corporal punishment gives to the sentencing officer the opportunity of avoiding more unsuitable alternatives. Since most juveniles would not be in the position to pay a fine, it is contended that judicial officers might be compelled to resort to unsuitable custodial sentences, if the alternative of corporal punishment was made constitutionally unavailable. (See the judgment of McNally, J.A. in the case of S v A Juvenile, (supra) at page 173 H.) In support of this argument we were also reminded that there are no suitable reformatories or correctional institutions apparently available for young juveniles in Namibia at present.

I am not persuaded by this argument. The first issue which requires to be determined is whether the infliction of corporal punishment upon juveniles, in consequence of a punishment, directed by a judicial or quasi-judicial authority, in fact constitutes degrading or inhuman treatment within the meaning of Article 8(2)(b) of the Constitution. If it does it is unlawful even if the motive behind such a practice is to keep young offenders, who need to be punished, out of prison. Means otherwise unauthorised by the law do not become authorised simply because they seek to achieve a permissible and perhaps even a laudable objective. (Van Eck N.O. and Van Rensburg N.O. v Etna Stores, 1947(2) SA 984 (A) at 996 998.) The provisions of Article 8(2) of the Constitution do not permit of a derogation on such grounds. The duty of the Court is to apply the clear provisions of the Constitution. As Warren, C.J. said in Trop v Dulles, 356 US 86:

> "We are oath-bound to defend the Constitution. This obligation requires that congressional enactments be judged by the standards of the Constitution. The Judiciary has the duty of implementing the constitutional safeguards that protect individual rights. When the Government acts to take away the fundamental right of citizenship, the safeguards of the Constitution should be examined with special diligence.
>
> The provisions of the Constitution are not time-worn adages or hollow shibboleths. They are vital, living principles that authorise and limit governmental powers in our Nation. They are the rules of government. When the constitutionality of an Act of Congress is challenged in this Court, we must apply those rules. If we do not, the words of the Constitution become little more than good advice.

> When it appears that an Act of Congress conflicts with one of these provisions, we have no choice but to enforce the paramount commands of the Constitution. We are sworn to do no less. We cannot push back the limits of the Constitution merely to accommodate challenged legislation. We must apply those limits as the Constitution prescribes them, bearing in mind both the broad scope of legislative discretion and the ultimate responsibility of constitutional adjudication."

The second argument in support of a constitutional distinction between the position of adults and that of juveniles subject to corporal punishment, is said to lie in the difference between the way in which the punishment is executed. Our attention was drawn firstly to Section 294 of Act 51 of 1977 which provides that where the offender is a male person under the age of 21 years the corporal punishment authorised can only be inflicted in private and must consist only of "a moderate correction of a whipping not exceeding seven strokes", which "shall be inflicted across the buttocks which shall not be exposed during the infliction but shall be covered with normal attire". This section also provides that a parent or, as the case may be, a guardian of the person concerned may be present when the whipping is inflicted (Section 294 (3)) and a district surgeon or assistent district surgeon must certify that the person concerned is in a fit state of health to undergo the whipping".

We were further referred in this regard to regulation 100 of the Prison Regulations which provides for a different type of cane which is authorised for the infliction of corporal punishment on juveniles. Regulation 100(4)

provides that the cane to be used in order to inflict corporal punishment on an adult prisoner shall be approximately 125 centimetres in length and 12 millimetres in diameter, whereas the cane which is to be used to inflict such corporal punishment on a juvenile prisoner must be approximately 1 meter in length and 9 millimetres in diameter.

I have little doubt that these and other similar provisions appearing in the relevant statutes and regulations which I have referred to in the earlier part of this judgment are intended to ameliorate the harshness and the severity of corporal punishment upon juveniles. They do not however in my view meet the basic objection to all corporal punishment inflicted upon citizens in consequence of a sentence imposed by a judicial or quasi-judicial authority. Such punishment remains an invasion on human dignity; an unacceptable practice of inflicting deliberate pain and suffering "degrading to both the punished and the punisher alike". Even in the case of juveniles it remains wide open to abuse and arbitrariness; it is heavily loaded with retribution with scant appeal to the sensitivity and rational responses of the juvenile. It is inconsistent with the basic temper and the letter of the Namibian Constitution.

The differences between adults and juveniles which appear from the relevant statutes and regulations, with respect to the manner in which corporal punishment is administered, are in my view insufficient to convert punishment which is

degrading or inhuman for adults into punishment which is not so degrading and inhuman in the case of juveniles.

The third argument which has been advanced in support of the proposition that corporal punishment inflicted upon juveniles in consequence of a sentence imposed by a judicial or quasi-judical tribunal does not offend Article 8(2) of the Constitution is that -

> " ... an adult whose character has already been formed and hardened may be adversely affected by punishment which humiliates him (i.e. forcibly makes him humble). Yet a young person will not be adversely affected by similar punishment because he is accustomed to subordination and open to correction. This "humility" is part of the very nature of youth, however rebellious". (Per McNally, J. in S v Juvenile, (supra) at page 171 H.)

I am not persuaded by this argument. A deliberate and systematic assault with a cane on the buttocks of an individual inflicted by a stranger as a form of punishment authorised by a judicial or quasi-judicial tribunal, is inherently a demeaning invasion on the dignity of the person punished. It must, in these circumstances be degrading or inhuman. It does not become less so because a juvenile might conceivably recover from such a basic infliction on his dignity sooner than an adult might in comparable circumstances. In any event McNally, J. who articulates this distinction in Juvenile's case does not suggest that this consideration by itself rescues such corporal punishment from being inhuman or degrading. What he suggests is that combined with the other two

considerations to which I have referred, it is sufficient to justify the conclusion that juveniles who receive corporal punishment in consequence of a sentence imposed upon them by a judicial or quasi-judicial tribunal are in a constitionally different position from adults who receive corporal punishment in such circumstances. Since I am not persuaded that these other two considerations are relevant and persuasive considerations which could justify a constitutional discrimination between corporal punishment for adults and corporal punishment for juveniles, it follows that even the ancillary influence of the third consideration cannot make a difference to my primary conclusion which is that the infliction of all corporal punishment (in consequence of an order from a judicial or quasi-judical authority) both in respect of adults as well as juveniles, constitutes degrading and inhuman punishment within the meaning of Article 8(2)(b) of the Namibian Constitution.

Corporal punishment in schools.

Corporal punishment of male students at government schools in Namibia is clearly permitted by the educational authorities. The relevant code issued by the Ministry of Education Culture and Sport, to which I have referred earlier, seeks merely to regulate the procedures which must be followed and to ensure that only "moderate" corporal punishment is imposed on the buttocks of male students, with an ordinary cane which is not longer than 75 centimetres and not thicker than 30 millimetres.

This Code does not limit the maximum number of strokes which may be imposed on a student on a particular occasion or the maximum that may be imposed in any defined period. Most of the objections against corporal punishment inflicted in consequence of a sentence by a judicial or quasi-judicial tribunal would seem to me to continue to be of application where such corporal punishment is sought to be inflicted as some kind of sentence for acts of indiscipline (which are very widely defined in the Code). It remains an invasion on the dignity of the students sought to be punished. It is equally clearly open to abuse. It is often retributive. It is equally alienating. It is also equally degrading to the student sought to be punished, notwithstanding the fact that the head of the school who would ordinarily impose the punishment might be less of a stranger to the student concerned than a prison official who administers strokes upon a juvenile offender pursuant to a sentence imposed by a Court.

I do not therefore believe that on the facts there is any substantial difference between the objections which have been proffered against corporal punishment on juveniles pursuant to a sentence by a judicial or quasi-judicial Court and corporal punishment on students in government schools pursuant to a disciplinary Code formulated and administered by the Ministry of Education, Culture and Sport.

The real distinction between corporal punishment imposed in

government schools and corporal punishment inflicted on offenders in consequence of a sentence imposed by a judicial or quasi-judicial tribunal is said however to be based on legal grounds. The judicial tribunal which imposes a sentence of corporal punishment, it is argued, obtains its authority to do so from govermental legislation or regulations whereas the school authorities who do so obtain their authority from the common law just as parents do. It is accordingly argued that the rights of the school authorities to impose corporal punishment are no more subject to review in terms of Article 8(2)(b) of the Constitution than the rights of parents to do so. If the punishment is so excessive as to be unlawful at common law it could be assailed in terms of Article 8(2)(b) as being inhuman or degrading, but corporal punishment per se at schools, it is argued, cannot be unconstitutional.

The courts outside Namibia which have addressed themselves to the issue of corporal punishment in government schools have expressed divergent views. In the case of S v A Juvenile (supra) Dumbutshena, C.J. expressed himself strongly against corporal punishment inflicted on schoolchildren but the court in that case was not called upon to decide that issue and his remarks were therefore obiter. The remarks of Dumbutshena, C.J. however are supported by German Constitutional law which holds that the imposition of corporal punishment on children at schools violates the German Constitution. (Ingo von Münch "Grundgesetz-Kommentar" (3rd edition), vol 1 p. 154). The approach of Dumbutshena, C.J. also finds support in the

dissenting opinion of Mr Klecker in the case of Campbell and Cosans v United Kingdom, (1980)(3) EHRR 531 at 556 and in the dissenting opinion of Mr Justice White in the case of Ingraham v Wright, 430 U.S. 651 and in the opinion of the European Commission of Human Rights in the case of Warwick v United Kingdom (report dated 18th July 1986) referred to in the case of S v A Juvenile at page 161 G - H.) Support for the contrary view appears from the remarks of McNally in the case of S v A Juvenile at page 169 (J) and in various observations of the majority in the case of Campbell and Cosans v United Kingdom, (1980) 3 EHRR 531 and (1982) 4 EHRR to 93.

The system of corporal punishment at schools sought to be protected in the present matter is regulated by a formal Code formulated and administered by a Government Ministry. This was also substantially the position in Zimbabwe and it was this distinction which influenced Dumbutshena C.J. in Juvenile's case to state that -

> " ... in a system of education which has formal rules on corporal punishment drawn by a competent authority, the same considerations governing judicial corporal punishment must apply".

I am in respectful agreement with this approach.

Whatever the position might be in cases where a parent has actually delegated his powers of chastisement to a schoolmaster it is wholly distinguishable from the situation which prevails when a schoolmaster administers and executes a formal system of corporal punishment which

originates from and is formulated by a governmental authority. Such a schoolmaster does not purport to derive his authority from the parent concerned who is in no position to revoke any presumed "delegation".

I am accordingly of the view that any corporal punishment inflicted upon students at government schools pursuant to the provisions of the relevant Code issued by the Ministry of Education, Culture and Sport would be in conflict with Article 8(2)(b) of the Namibian Constitution.

The alternative arguments based on Article 10 of the Namibian Constitution.

The conclusions which I have come to are based on the provisions of Article 8 of the Namibian Constitution. It is therefore unnecessary for me to consider the very interesting alternative submissions made by Mr Maritz based on Article 10 of the Constitution which provides for equality and freedom from discrimination. His submission was that the system of corporal punishment in Namibia which discriminates between males and females constitutes a contravention of Article 10, because the purported discrimination is not rationally related to the objects sought to be achieved by the relevant statutory provisions and regulations. I make no comment on the merits of that submission because of the conclusions to which I have come on the main submission based on Article 8. The same applies to a number of other alternative arguments which Mr Maritz advanced.

The appropriate order in terms of Article 25(1)(b) of the Constitition.

Article 25(1)(b) of the Constitution provides that if a court is of the opinion that any law in force immediately before the date of independence is unconstitutional, it may either set aside the law or allow Parliament to correct any defect in such law, in which event the provisions of Article 25(1)(a) shall apply.

I do not think that it would be appropriate to allow corporal punishment which is unconstitutional to continue to be inflicted until Parliament makes the necessary amendments.

In the result I would make the following orders:

1. It is declared that the imposition of any sentence by any judicial or quasi-judicial authority, authorising or directing any corporal punishment upon any person is unlawful and in conflict with Article 8 of the Namibian Constitution.

2. It is further declared that the infliction of corporal punishment in goverment schools pursuant to the existing code formulated by the Ministry of Education, Culture and Sport or any other direction by the said Ministry

or any other organ of the Government, is unconstitutional and unlawful and in conflict with Article 8 of the Namibian Constitution.

I. Mahomed

I.MAHOMED, A.J.A.

I concur

H.J.BERKER, C.J.

I concur

J.J.TRENGOVE, A.J.A.