

**Contextualising the Right to Life and the Phenomenon
of
Mob Justice in South Africa**

By

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Contextualising the Right to Life and the Phenomenon of Mob Justice in South Africa



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A Mini-Dissertation Submitted to the Faculty of Law in Partial Fulfilment of the Requirements for the Degree Magister Legum at the North-West University (Mafikeng Campus)

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March 2014

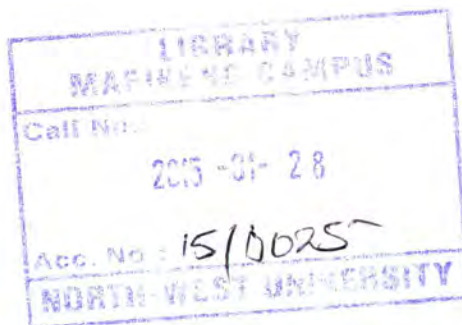


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Declaration by Candidate

I, Marrien Sibanda, duly declare that this mini-dissertation for the degree of Master of Laws at the North-West University (Mafikeng Campus) hereby submitted has not been previously tendered by me for a degree at this institution or any other university. I further declare that this mini-dissertation is my work in design, structure and execution and that all the materials contained herein have been acknowledged.

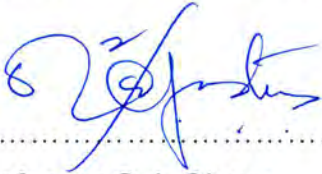
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Declaration by Supervisor

I, Professor O.J. Olowu, hereby declare that this mini-dissertation by Marrien Sibanda for the Degree of Master of Laws (LLM) was carried out under my supervision and that it be accepted for examination.



.....
Professor O.J. Olowu

March 2014

Abstract

This mini-dissertation seeks to investigate the harm caused by mob justice to people who are endowed with the right to life that is entrenched in the Bill of Rights. The investigation is done against the backdrop of an elaborate Bill of Rights that makes the right to life inviolable in democratic South Africa. It exposes the factors that underlie the growing incidence of mob justice in the country and the implications of this phenomenon for legal and policy options. The mini-dissertation proceeds from the understanding that the state has a duty to protect the right to life and that mob justice is unconstitutional and violates the right to life and its associated rights like the section 35 rights, right to dignity and so on. It is necessary that the state acts upon this phenomenon so as to fulfil its constitutional duty to protect the right to life. Beyond the analysis of the incidence of mob justice in South Africa, an effort was made to proffer viable strategic responses to curb the phenomenon in the short and long terms.

List of abbreviations

ACHPR	African Charter on Human and Peoples Rights
ANC	African National Congress
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
SAHRC	South African Human Rights Commission
SAPS	South African Police Service
UDHR	Universal Declaration of Human Rights
UN Charter	Charter of the United Nations
UN	United Nations

Acknowledgements

I wish to express my deep gratitude and appreciation to the following people without whom this mini-dissertation would not have been possible:

My Supervisor, Professor O.J. Olowu, for his constant and superb guidance, advice, patience and constructive criticism. Without him, this study would not be successful.

E se gan an!

To Dr L. P Siziba, (Department of English, NWU- Mafikeng Campus) thank you for being there when I needed you the most, you are truly a friend indeed. ESiziba mnawami. Ungakhathali ngami. Ngizokukhumbula kuyo yonke imihla yokuphila kwami.

Last but not least, my Mom and Dad, who not only taught me how to persevere in life but also gave me character in life. Anginto ngaphandle kwenu!

Dedication

To my husband: Bhekimpilo Sibanda; my love and my best friend.

“Without you, I’m nothing, with you I’m something. Together we are everything.”

Chapter 1: Introduction

1. Background to the Study

Mob justice, also known as instant justice or lynching, is a common practice in South Africa. The spate of these violent incidents nation-wide is a dire warning of South Africa's imminent slide into lawlessness. A commentator once asserted that "a culture of instant justice has serious implications for a community at large, through the decay of the moral fibre of society and undermining of its values."¹ South Africa is a country where the fabric of society is already fragile and mob justice is a trend that threatens further erosion of this fabric. Mob justice violates a number of human rights in the Bill of Rights. By condemning and killing others the mob undermines the very essence of human rights. The insistence coupled with consistent spread of mob justice means that the right to life is severely undermined in South Africa. It is against this background that the study is carried out to examine how the problem of mob justice can be curtailed in South Africa.

2. Statement of the Problem

Section 11 of the 1996 Constitution provides that everyone has the right to life. In *S v Makwanyane* the Constitutional Court interpreted the right to life as "...an antecedent to all other rights in the Constitution. It is not life as mere organic matter that the constitution cherishes but the right to human life: the right to live as a human being, to be part of a broader community, to share in the experience of humanity. This concept of human life is at the centre of our constitutional values."² This resonates well with the assertion that "the primacy of the right to life is based on recognition that without this right, other human rights are meaningless."³ The right to life is, therefore, an important right that gives rise to other rights. Without it all other rights have no basis. In *Makwanyane* the Court adopted a value-based approach and thus invalidated Section 277 of the Criminal Procedure Act 51 of 1977 not because it conflicted with the right to life but the thrust of the argument was that it is a cruel,

¹ Asiamah F September 2006

http://www.humanrightsinitiative.org/chri/news/2006/instant_justice_is_no_justice_chri_cries_out.pdf.

² *S v Makwanyane and Another* 1995 6 BCLR (CC) par 326.

³ Holt 1989-1990 30 *Va. J.Int'l L.* 273 283.

inhuman and degrading punishment.⁴ This makes it even more compelling to get rid of mob justice. Section 35(3)(a)-(o) of the Constitution provides for the trial rights that are applicable in relation to an accused person. In short this section means that an individual must have the right to a fair trial, due process and a chance to explain their actions or defend themselves. Mob justice is a total denial of this right because the victim is killed before any trial can be held so as to give the suspect a chance to defend him or herself.

The right to life has different facets. It entails the right to quality of life, safety and security among others. This study specifically deals with the right not to be killed. The state has a duty to respect, protect, promote and fulfil the rights in the Bill of Rights. The duty is both negative and positive. The negative duty is to refrain from taking someone's life which was identified as death penalty in the *Makwanyane* case. The positive constitutional duty is to protect everyone from life-threatening attacks. In this respect the state's primary duty is to secure the right to life by enacting effective criminal provisions that deter the commission of offences against persons and can be supported by law enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions.⁵ Failure of the state to fulfil these duties results in anarchy with people taking law in their own hands. This is a constitutional duty and as the Constitution is the supreme law of the Republic of South Africa the duties it imposes must be fulfilled accordingly. The rule of law refers to the supremacy of law meaning that society is governed by law and this law applies equally to all persons including the government and the state officials. The notion of equality before the law means that people are treated equally before the law. They must have the same protection of the law regardless of whether they are criminals, state officials or ordinary individuals.⁶ Against this backdrop, the recurrence of mob justice makes it necessary to ask whether the state has become complacent with mob justice or the laws are merely espousing correct doctrines that are not serving any purpose.

⁴ Currie and De Waal *The Bill of Rights Handbook* 282.

⁵ Currie and De Waal *The Bill of Rights Handbook* 285-286.

⁶ Rautenbach *Rautenbach-Malherbe Constitutional Law* 341-342.

Mob justice (also known as instant justice or lynching) undermines the right to life and it seems its recurrence has led people to believe that it is a legitimate form of justice. Recent events suggest an increasing number of this practice in South Africa. A mob can be defined as a loose aggregate of individuals pursuing an informal justice. Mob justice is ultimately mob injustice. It indicates sheer disregard for the Constitution, the rule of law and the criminal justice system.⁷ Mob justice is an affront to human rights. Therefore, it is necessary to investigate this matter and to elaborate the legal position in South Africa concerning mob justice and the right to life as the two concepts do not synchronise with each other.

3. Aims and Objectives of the Study

- To analyse the scope and content of the legal protection afforded to the right to life in South Africa;
- To assess the harm and the violation of the Bill of Rights that mob justice causes relative to the right to life;
- To examine the inherent challenges in enforcing the right to life in South Africa *vis-à-vis* the incidence of mob justice; and
- To find out how the phenomenon of mob justice can be tackled in order to effectively protect the right to life in South Africa.

4. Significance of the Study

This research is of significance to scholarship as it extends the knowledge base that currently exists in the legal field. By undertaking an empirical study to see if the law is achieving its objectives, identification of new problems with existing legislation in the criminal law justice system may be achieved. The study of the problem of mob justice relative to the right to life may bring new insights to an existing area of legal thought. This can be achieved through the application of interdisciplinary analysis to legal issues. The results of this study may influence public policy implementation and may give policy makers hard data on which they can base their decisions. It may

⁷ Asiamah F September 2006

http://www.humanrightsinitiative.org/chrinews/2006/instant_justice_is_no_justice_chri_cries_out.pdf.

also give policy makers a unique opportunity to harness their special skills to the analysis of criminal activities and security issues in communities and develop actual policy recommendations for law enforcement institutions. It may help to raise awareness among those (the public in general) who are unacquainted with the import and intent of the Bill of Rights and its binding force. The results of the study should assist public service providers to both plan for and respond to the changing risk profile of mob justice in South Africa, particularly with regards to the apartheid history which took lives arbitrarily and unnecessarily. The study may help future researchers advance the purpose of the Bill of Rights, particularly with regard to the right to life.

5. Theoretical Framework/Literature Review

The study seeks to explore the concept that everyone has the right to life within a South African situation where mob justice is the order of the day. The right to life is one of the fundamental rights in the Bill of Rights. It is a universally recognised right and, thus, Article 3 of the Universal Declaration of Human Rights (UDHR), 1948, provides that everyone has the right to life, liberty and security of person. Everyone cuts across the racial boundaries. As long as you are a human being you are entitled to this right. Section 11 of the *Constitution* provides that everyone has the right to life. In this context life is not mere existence but it also means a life in which an individual is protected from arbitrary power and threat by the state. A perfect example is the apartheid that used capital punishment to implement the policies of that regime instead of using it to achieve ordinary aims of criminal law. This practice violated international law.⁸ The new constitutional era brought new policies that are meant to remedy those wrongs of the past. They are designed to achieve certain objectives, among them, to guarantee the right to life.

The Constitutional Court in *Makwanyane* found that death penalty did not only violate section 11 but also offended against the fundamental value of human dignity (sections 1(a), 7(1) and (10) and the prohibition against cruel, inhuman and degrading punishment (section 12(e)).⁹ Mob justice subjects its victims to the very

⁸ Holt 30 Va. J.Int'l L. 273.

⁹ Turrel "Murder and Capital Punishment after Apartheid" 84-113.

cruel, inhuman and degrading punishment that the *Makwanyane* case abolished. The Court had to pass this judgment in order to avoid repetition of and to redress past injustices that the majority black people suffered during the apartheid era.

The central principle of apartheid constitution was the doctrine of the parliamentary supremacy which meant that the parliament was the supreme authority of the country. The parliamentary supremacy was an excuse for white constitutional domination of the disenfranchised black population. It is documented that discrimination and political repression was practised long before the word "apartheid" was coined. Racial segregation state policy was officialised in 1948 when the National Party took political control of South Africa. The division of people along racial lines was believed to be a better way to control conflict.¹⁰ Apartheid was a system that divided the population along racial lines, a system that used capital punishment and directed it towards a particular racial group, used capital punishment to terminate or silence the opponents of apartheid and a system that prevented full participation by racial groups in political, social, economic and cultural life of the country.¹¹ The constitutional dispensation is the direct opposite of apartheid. The Constitution is the supreme law of the country. It documents entrenched rights that are justiciable in the Bill of Rights.

The 1996 Constitution of the Republic of South Africa is the supreme law of the country and any law or conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled. A Bill of Rights is entrenched in the Constitution and is applicable to all law. It binds the executive, the judiciary and all organs of State as well as natural or juristic persons provided certain conditions have been met.¹² The State has a duty to give effect to these rights¹³ while an obligation has been imposed upon courts, tribunals and forums entrusted with interpreting any legislation to promote the spirit, purport and objects of the Bill of Rights.¹⁴ It is through the constitutional authority that the Constitutional Court interpreted the right to life with the aim of promoting the spirit and purport and objects of the Bill of Rights and

¹⁰ *Özgür Apartheid the United Nations and Peaceful change in South Africa.*

¹¹ Holt 1989-1990 30 Va. J.Int'l L. 273 299-300.

¹² Section 8 (1) of the 1996 Constitution of the Republic of South Africa.

¹³ Section 7 (2) of the 1996 Constitution of the Republic of South Africa.

¹⁴ Section 39 (2) of the 1996 Constitution of the Republic of South Africa.

abolished death penalty. Having attached so much value to life and having stripped the state of the authority to execute accused persons who would have gone through criminal procedural measures to prove their guilt beyond reasonable doubt, how then does the mob take law into their own hands and violate such a sacred right by killing the accused instantly without fair trial?

A mob is defined as “a large crowd of people especially that may become violent or cause trouble”.¹⁵ This definition does not give a complete picture of a mob. Although there is no comprehensive definition of mob justice the phenomena can be described as a situation in which a group of people “take law into their own hands, act as accusers, jury, and judge and punish an alleged wrongdoer on the spot.”¹⁶ The description rather describes what transpires in mob justice. It is further argued that;

the person accused of a crime has no chance to defend him or herself or claim her innocence. This procedure often ends with the victim being beaten to death or seriously injured. The victim of mob is denied a fair trial and the right to life which violates the UN standards of human rights.¹⁷

The above quotation is descriptive of what mob justice does. The victim's right to life is not only compromised but denied. The victim is completely barred from accessing justice. This violent collective behaviour normally involves civilians rather than state agents but conversely, in South Africa the state agents are also involved in mob justice. In carrying out these brutal acts the mob resorts to violence. The excessive force used is unnecessary, hurtful and unlawful.

Mob justice is normally meted out by vigilante groups, uniformed mob (the police), the gangs and more often than not by community members. In practice these acts are categorised under different titles or names suggesting their origin or motive behind violence but they all are hostile practices of violence by a group of people who take law into their own hands and in this case, a mob. The attacks are called xenophobic attacks where foreign African nationals are attacked, hate crime attacks where the lesbians and gays or people with deviant behaviour are victims (for instance, suspected witches and wizards and prostitutes), instant justice where an

¹⁵ *Oxford Advanced Learner's Dictionary of Current English.*

¹⁶ Glad, Strongberg and Westerlund *Mob Justice* April 2010 3.

¹⁷ Glad, Strongberg and Westerlund *Mob Justice* April 2010 3.

alleged criminal is caught on the act and punished right away. On many occasions suspected criminals are the ones frequently lynched but suspected witches, gays and lesbians and people suspected of having HIV/AIDS are also lynched.¹⁸ The execution is done in all manner of ways. Some victims are stoned to death, some whipped to death, some necklaced (burnt with a car tyre doused with petrol) to death, some are hacked and stabbed to death.

Mob justice is an enduring problem in South Africa. Although these tendencies and motives associated with these attacks vary slightly among the groups the main components are fundamentally consistent. A brief outline of what transpires when a mob become violent will be provided. For the purpose of this study, these practices will be subsumed under one broad category, namely, mob justice as the work does not seek to understand these phenomena but to analyse or examine how they violate the right to life within the South African context.

Ideally vigilantism is "a self-appointed committee for the maintenance of justice and order in an imperfectly organised community".¹⁹ Vigilantism is now associated with the disturbance of peace and order in South Africa. This diversion from the objective of vigilantism is started in the mid-1980s when the liberation struggle was at its peak. The law was often taken into "own hands" in a bid to get rid of agents and structure of the apartheid state. In some instances these attacks were vengeance, retaliation or a counter attack to those attacks by other elements and groupings politically opposed to the struggle politics in the townships. The vigilante activities were largely explained in terms of political motivations like liberation and struggle ideology. In the early 1990s leading up to 1994 the term changed its meaning to include a wider variety of violence "such as a struggle by so-called 'warlords' or 'strongmen' to control resources in the informal settlements, the political contestation between nascent political parties such as ANC and IFP."²⁰ This activity was later on extended to deal with criminal activities then occurring in South Africa. The conflicts in mini-bus taxi industry, violence on urban commuter trains, the witch purging activities in some

¹⁸ Smith "Rights in transition: Lynch violence and the rule of law" 8.

¹⁹ Minnaar "The New Vigilantism in Post-April 1994 South Africa: Crime Prevention or an Expression of Lawlessness?" 1-2.

²⁰ Minnaar "The New Vigilantism in Post-April 1994 South Africa: Crime Prevention or an Expression of Lawlessness?" 3-4.

rural areas are some of the activities that were now included under vigilantism.²¹ Up to this day vigilantism is still practiced and it still violates the rights of the people in spite of them being protected in the inviolable Bill of Rights.

Although South Africa is now a democratic state, polarisation and hatred within the communities is still going on. High levels of violence continue to mark the society; and mistrust, suspicion and fear define inter-personal relationship. The perpetual presence of inequality, poverty and inaccessibility of the courts remains a stumbling block to the attainment of human culture in South Africa. Instead of establishing a human rights culture as envisaged by the Constitution, the culture of violence has taken precedence over it.²² Thus Bronwyn asserts that when a culture of violence is upheld as a primary solution to daily problems and challenges, it “necessitates an introduction of individual identity and group norms, as well as structural material factors, into an understanding of the violence during political transition.”²³ It is through the historical background that we have landed on this era with the understanding of how political transition influenced the current position. Now that the political upheavals are over vigilantism has come in different forms.

The self-appointed committees are now a threat to the maintenance of law and order. Thus, currently, vigilantism in its crudest sense can be simply described as;

... individuals in a community taking law into their own hands and dispensing their own punishment on alleged criminals, who they see not being caught, convicted and sentenced. In essence the current vigilantism in South Africa is brutal indictment of the whole criminal justice system and an expression of its failure and the inadequacies of the policing that is or not occurring.²⁴

What this means is that these communities find the purpose of the criminal justice system questionable. They initiate these groups with the objective of filling up the gaps in the criminal justice system but their activities are detrimental to human rights, particularly the right to life. It is upon this backdrop that the study is carried out to find

²¹ Minnaar “The New Vigilantism in Post-April 1994 South Africa: Crime Prevention or an Expression of Lawlessness?” 1-4.

²² Bronwyn “Spaces of Violence, places of Fear: Urban Conflict in Post-apartheid South Africa” 16.

²³ Bronwyn “Spaces of Violence, places of Fear: Urban Conflict in Post-apartheid South Africa” 20.

²⁴ Minnaar “The New Vigilantism in Post-April 1994 South Africa: Crime Prevention or an Expression of Lawlessness?” 4.

out how mob justice is a threat to the right to life and the constitutional fundamental values of the South African Constitution.

Although in criminal matters the courts do not look at the motive but intention, the social scientists derive their findings from motives. So for the purposes of the study it is imperative for the researcher to fully comprehend what drives these mobs mentality since one cannot effectively counter what he or she does not understand. The interdisciplinary approach is adopted to try and make a contextual analysis which can serve as a method of combining different concepts into a coherent whole. This approach will be used as a tool to get an in-depth understanding of the mob justice phenomena.

Of necessity, the discussion of marginalised community public safety raises a whole host of culturally tied assumptions, feelings and even misunderstandings and resentments. Social scientists argue that there are forms of conflict situations in and conditions under which violence may occur. They assert that violence occurs where there are high levels of frustrations and discontent on the part of subordinate groups, mistrust in agents and systems of social control, individuals who do not take up responsibility within their group to stop the violence and where there is a conflict as such situations tend to create a feeling of anonymity and decreased responsibility.²⁵ They further identify five forms of violence, namely, ideological, structural, institutional, criminal and pathological.²⁶

Structural violent outbursts causes, because of their external structural nature, are prominent and easy to identify. They include failure of government policies such as service delivery, failure to address crime, collapse of border controls, the high unemployment rate particularly for young urban black men and the failings of the police (whether from lack of resources or poor training). It is important to note that these structural explanations do not address the causes of the violent outbursts themselves but rather contextual issues.²⁷

Criminal violent outbursts occur where there is relative poverty of the perpetrator

²⁵ Onderwys Venster op mag en Geweld: Reflections on Power and Violence 55.

²⁶ Anstey *Managing Change Negotiating Conflict* 282-283.

²⁷ Bekker *et al* "Xenophobia and Violence in South Africa" 22.

group in a climate of rising prices and falling employment, male competition over employment, housing and women, family weaknesses (fatherless youths, broken homes, etc) and inadequate or failed state actions (coupled with corrupt practices) regarding service delivery, immigration policy, and policing. Pathological violent outbursts occur where there is widespread shared antipathy, anger against outsiders and selection of targets in a context of risk aversion. It is generally accepted that ideological violent outbursts occur where there is justification of mobilisation in terms of local history, local identities and local issues, that is, in terms of the meaning local residents give to local issues and the reversal of humiliation through collective action.²⁸ While this is the position it does not make it right for people to kill others as everyone has the right to life.

The overall perception among commentators is that these violent acts emanate from long-standing injustices and adversities such as inequality, poverty, repression, poor service delivery, corruption, human rights abuses and interpersonal conflicts. Consequently, there is a resurgence and proliferation of mob justice incidents in South African communities. These incidents are associated with the marginalised communities that bear the brunt of apartheid. The threat posed by law enforcement agents' complacency in light of these threats is also a reality and must be countered. When law enforcers become complacent as a law enforcement community, by extension, the country becomes vulnerable. Due to that complacency a mob that carries out these violent acts will believe that they are delivering justice. Yes, apartheid did a lot of damages but there is no justification in resorting to self-help as that is a violation of other people's rights.

6. Research Hypothesis

The Constitution is the supreme law of the Republic of South Africa and section 11 of the Constitution protects the physical-biological existence of human beings. Section 8 of the Constitution provides that the Bill of Rights applies to all, and binds the legislature, the executive, the judiciary and all organs of state. Subsection 8(2) extends the binding force of the Bill of Rights to natural persons. Section 9 of the

²⁸ Bekker *et al* "Xenophobia and Violence in South Africa" 22-23.

Constitution provides that everyone is equal before the law and has the right to equal protection and benefit of the law meaning that everyone has equal worth because each person has the attributes of a human being. This equality right and protection extends even to criminals. The underlying hypothesis here is, therefore, if mob justice infringes on the right to life and undermines the values underlying the South African Constitution, it is an unjustified infringement of the right to life.

It is against this backdrop that this study is aimed at examining the factors that underlie the growing incidence of mob justice in the country and the possible implications for legal and policy options. The core questions for this study, therefore, are: what informs and gives rise to mob justice as a practice and what are the legal and policy development implications? How can the government curb the injustice provided by mob justice trends in South Africa? If the constitution is designed to protect the right to life in South Africa then how does it allow for the violation of the Bill of Rights? The problem arises when the constitution allows for ramifications within the law that in itself lead to paradoxical interpretations of the law that allow for ambiguity in the Constitution.

7. Research Methodology

The study relies on documentary sources information that already exists in some form like the Constitution, textbooks, relevant law journal articles, legislation, case law, internet sources and peer researches that will be accessible in legal databases of North-West University and relevant to the topic. References are made to Sociology and Psychology textbooks which are resources from other disciplines to explain the psychological and sociological backgrounds of mob justice.

8. Scope and Outline of the Study

This dissertation is delivered under the following proposed chapters;

1. Introduction.
2. Constitutional order and the incidence of mob justice.
3. Factors promoting mob justice South Africa.

4. Strategic responses to mob justice.
5. Conclusions and recommendations.

9. Limitations of the Study

The challenges that the study is faced with is the non-availability of legal literature that deals with mob justice. The available literature is abundant in other disciplines that hardly touch on legal issues. The judicial decisions on prosecutions arising out of mob justice are scarce as well although the available few were decided before 1994. There were time-constraints on the part of the student researcher in the course of the academic year as there were set deadlines to be met. The study is emotive by nature and conducting first-hand interviews in the implicated communities may prove too risky and expensive for the student.

10. Suggestions for Further Study

Although other crimes have received considerable attention there is comparatively little in-depth research available with regard to mob justice relative to human rights in South Africa. As this study particularly examines how mob justice violates the right to life, a link between this and other rights is not given in-depth attention. It is, therefore, suggested that further research be carried out on how these other rights are compromised by mob justice. An example would be the right to equality (section 9), right to dignity (section 10) rights of the arrested, detained and accused persons (section 35). This may resolve lingering questions or gaps in knowledge in the field of criminal and constitutional law.

Chapter 2: Constitutional Order and the Incidence of Mob Justice

2.1 Introduction

The abuse of the liberties of others is widespread as people tend to take law into their own hands in summarily killing others perceived to be thugs, robbers or rapists. The phenomenon infringes on the right to life yet the right to life is the bedrock of all the other rights in the Bill of Rights of the South African Constitution. Mob justice interferes substantially with the right to life. This chapter is therefore a modest assessment of the harm that mob justice does to the Bill of Rights in general and the right to life in particular. The chapter also explores the occurrence of mob justice tracing it from the apartheid regime to the present constitutional regime.

Mob justice is one of the growing threats in the South African society that have placed the constitutional order in real jeopardy. Its recurrence is a sign of high levels of social discord in the South African communities exhibiting itself through people who do not want to abide by the rule of law as well as the lack of political will to promote the enforcement of the Bill of Rights at the grassroots. Violations of rights by mob justice killings are aptly summed up by the following statement; "In many, if not most cases, such killings constitute human rights violations and engage the international legal responsibility of the State."²⁹ Human rights violations are taking place in the presence of the inviolable Bill of Rights which is meant to safeguard against abuse of individual liberties. This leaves a lot to be desired. It is the duty of all three arms of state, namely the legislature, the executive and the judiciary to respect, protect promote and fulfil the Bill of Rights. The recurrence of mob justice points to the blatant ineffectiveness of local and regional authorities.

In a constitutional state like South Africa the rule of law is supposed to reign supreme. After all, "the essence of the rule of law is that everyone in society is subject to law. No one, no matter how important or powerful, is above the law."³⁰ In essence the purpose of the legal system is to protect the natural rights of individuals against both other individuals and the state itself. Accordingly, law is defined as

²⁹ UN Secretary-General 2009 www.refworld.org/docid/4a9e2c1e0html.

³⁰ Binchy 2009 *Trinity College 2*.

"rules and regulations that govern human conduct or other societal relations and are enforceable by the state."³¹ In other words law is a formal mechanism of social control. These rules are found in constitutions, statutes passed by legislative bodies, rules of administrative bodies, common law, judicial opinions and so on. These are meant to uphold justice and prevent harm to individuals and property. These rules can be enforced true civil lawsuits or criminal prosecutions. The distinct feature of law from other rules as moral rules, religious directives and organizational rules is the quality of enforceability by the state.³² Underpinning this notion of law is the principle that "the law ought to be just and reasonable both in regard to the subject matter, directing what is honourable, forbidding what is base and as to its form, preserving equality and binding the citizens equally."³³ Just laws are fair and morally right. Equally just law will ensure that no one suffers punishment unless there has been a distinct violation of the law.³⁴ The question is not one of deciding between right and wrong but of coordinating what is just and reasonable. The aspect of justice in law is an external measure against which law may be measured and an unjust law is as much law as a just law and it is submitted that justice is fairness³⁵ and fairness lies at the heart of justice.³⁶ Neither is truly feasible without the other and a mature law will keep them in balance. If justice is to be achieved in South Africa something needs to be done since;

The word justice in the interpretation of many has always borne a connotation with punishment in its severest form imaginable. Many in undisciplined and acculturating societies can only approve of a visitation of punishment of a person as 'justice delivered' only when it is funereal, usually by inflicting pain of violent death on a suspect and nothing short of that.³⁷

One is gripped with fear when the columnist's articulate words are proved to be true with regard to mob justice in South Africa. The threat of mob justice is rapidly spreading in South Africa and it seems it is not tractable. Insightful work needs to be done before anyone can attempt to curb this injustice.

³¹ Madhuku *An Introduction to Zimbabwean Law* 1.

³² Madhuku *An Introduction to Zimbabwean Law* 1.

³³ Madhuku *An Introduction to Zimbabwean Law* 5.

³⁴ Binchy 2009 *Trinity College* 2.

³⁵ Madhuku *An Introduction to Zimbabwean Law* 6.

³⁶ Madhuku *An Introduction to Zimbabwean Law* 6.

³⁷ Abrefa 2010 [www.ghanaweb.com>Home>News/2010-12-20](http://www.ghanaweb.com/Home/News/2010-12-20).

Formal laws are supported by moral rules, religious directives and organisational rules and these rules may even be more effective in ensuring compliance with a particular type of conduct and readily acceptable³⁸ to the community. This is demonstrated by the assertion that “rules of law and a legal system are never neutral or value-free”³⁹ as they are the creation of people. Since legal rules are a reflection of convictions of its people who made them it is not surprising that in South Africa, the moral rules are expressed in the philosophy of *ubuntu*, a term so bountiful in South African jurisprudence. The creation of the value laden rules of law, the means of interpretation of the existing rules of law and the application of those rules are means of upholding the convictions of a society. *Ubuntu* is one value that South Africans uphold and the landmark case that ejected death penalty from the South African legal system is so rich in *ubuntu*.

2.2 Ubuntu

A closer look will reveal that *ubuntu* is a concept that is intrinsic in the South African traditional way of life and its values. *Ubuntu* defies definition and is regarded as a world view of the African societies.⁴⁰ It concerns itself with duties an individual owes to the society.⁴¹ The concept of *ubuntu* represents “the principle of caring for each other’s wellbeing and the spirit of mutual support.”⁴² A man is a moral being whose actions cannot be separate from morality. Generally, moral conduct is behaviour which is good, ethical, right, honest, decent, proper, honourable, just, and principled, you name it, in the eyes or within the context of a particular society. *Ubuntu* is an epitome of all these qualities in the South African context. *Ubuntu* is not unique to the South African society as it is typical of most African societies but what makes South Africa stand out is that in its Interim Constitution⁴³ and its landmark case *S v Makwanyane* that abolished death sentence, the court discussed it at length and used it as a basis of its findings and as the hub of all human rights. The purpose hereto is not to deal with the topic of *ubuntu* in the broader sense or from a

³⁸ Madhuku *An Introduction to Zimbabwean Law* 6.

³⁹ Rautenbach *Rautenbach-Malherbe Constitutional Law* 5.

⁴⁰ Mokgoro “Ubuntu and the Law in South Africa” 2.

⁴¹ Mokgoro “Ubuntu and the Law in South Africa” 2.

⁴² Ahiauzu 2006 *Cambrian L. Rev* 32.

⁴³ The Constitution of the Republic of South Africa Act 200 of 1993.

sociological angle but to examine how it relates to the law more particularly in the context of mob justice.

Ubuntu is in consonance with the Bill of Rights. Taken together they incorporate, appreciate, and embrace deviants.⁴⁴ *Ubuntu* and the Bill of Rights as contained in the Constitution are mutually inclusive, the marked difference being that in the state's political law there is an element of coercion or force whereas *ubuntu* largely encompasses a lot of positive qualities and these are largely based on care and benefit of common or communal good. The state law calls all to obey the institutional laws set by the state and the spirit of *ubuntu* also calls for the good of others,⁴⁵ a universally accepted belief that every human being is "endowed with reason and conscience and should act towards one another in a spirit of brotherhood."⁴⁶ In terms of *ubuntu*, obedience to law is an act done as part of caring for others, an expression of concern for others. The way you conduct yourself determines how others regard you. In terms of existence of the black South African people, *ubuntu* has been an integral part of governance or policy.

These two concepts work parallel to each other to achieve the same goals, that is, the good for all mankind but they are not without contradictions. *Ubuntu* is permissive of things that exist for the common good. If one cannot fit into the society, he or she becomes an outcast. What is paramount is what one is doing as a member of the community and society at large. It is rigid and the position is such that if your conduct is unacceptable to the community you invariably become an outcast. In contradistinction to the present constitutional order it does not matter what people think as long as one has a right in terms of the Bill of Rights they are entitled to exercise it and the rest have a duty to observe and not violate those rights. This leads to a situation where the community at large has no say unlike in the traditional situation where the community had means of dealing with a certain situation. The result is that one's conduct determines their place in the community. *Ubuntu* forbids a dogmatic attitude which assumes that people are already in possession of absolute knowledge of what is right. In terms of *ubuntu* an individual who has done something

⁴⁴ Mokgoro "Ubuntu and the Law in South Africa" 5.

⁴⁵ Mokgoro "Ubuntu and the Law in South Africa" 4.

⁴⁶ *Universal Declaration of Human Rights United Nations Department of Public Information 1948.*

wrong is given a chance to right the wrong and is provided with an amicable way of resolving a dispute. This implies that mob justice is frowned upon and is never encouraged. In the final analysis Mokgoro would point out that *ubuntu* and the Bill of Rights actually strive to achieve the same goal.⁴⁷ By implication *ubuntu* is part of the legal system and if the law allows courts to apply its principles in deciding certain matters then it has merit. Therefore, it is apparent that there are close parallels and shared experiences in the history of *ubuntu* and the Bill of Rights. Despite their distinct qualities these mechanisms work towards the similar goal of regulating human conduct or other societal relations. *Ubuntu* and the Bill of Rights are intimately related. Values are determined by culture and therefore one should never allow culture to be determined by violence and absolute disobedience of law.

2.3 Human Rights

Human rights are the foundation of democracy. The South African Constitution and all laws are based on human rights.⁴⁸ South Africa as a member of the United Nations (UN) adhered to its requirements by entrenching a bill of rights in its Constitution. The UN has three core instruments that protect human rights namely; the Universal Declaration of Human Rights (UDHR), 1948, the International Covenant on Civil and Political Rights (ICCPR), 1966, the International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966. These instruments constitute the International Bill of Rights.⁴⁹ An in-depth and inclusive definition of human rights is found in the following words;

Human rights are characteristically understood, following the apparent, literal sense of the term, as the rights that one has simply because one is human. That they are universal rights in that every human being has them; that they are equal rights in that one either is a human being, and therefore has these rights equally, or is not a human being, in which case one does not have them; and that they are inalienable rights: one cannot stop being a human being, and thus cannot stop having these rights.⁵⁰

This definition is based on the provisions of the UDHR which declares a series of political, civil, economic, social and cultural rights although it is a resolution and not

⁴⁷ Mokgoro "Ubuntu and the Law in South Africa" 5.

⁴⁸ Ngoepe *Justice Today* 14.

⁴⁹ Wallace and Martin-Ortega *International Law* 243.

⁵⁰ Olowu "Liberty, Dignity and Security: Sifting the Matrix of Humanity" 11-12.

legally binding.⁵¹ For the purpose of this work, among those rights, are notably article 1 that provides that all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.⁵² The notion of brotherhood can be explained by the argument that; "human beings have a relational and social dimension: human flourishing is not possible without regard to this interpersonal perspective which generates a large tapestry of rights and obligations as between individuals, groups and society."⁵³ Our needs of each other will compel us to treat each other with dignity and equality.

Among the protected rights is the right to life. Article 3 provides that everyone has the right to life, liberty and security of person.⁵⁴ Furthermore, article 5 grants the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment.⁵⁵ At the regional level human rights are declared in the African Charter on Human and Peoples Rights (ACHPR), 1981. Article 5 states that every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status.⁵⁶ The dignity and worth of the human person is underscored in the preamble to the Charter of the United Nations, (UN Charter) 1945, and the Preamble to the UDHR. The ICCPR and the ICESCR regard it as "the inherent...and inalienable right of all members of the human family the foundation of freedom, justice and peace in the world."⁵⁷ Article 4 confers the right to life and declares that human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.⁵⁸ These rights need to be exercised with limitation the criterion being that "these limitations must be provided by law and must be necessary to protect national security, public order, public health, or morals or the rights and freedoms of others."⁵⁹ The above provisions demonstrate the importance of the right to life. Given this position it is reasonable to conclude that every human being has the inherent

⁵¹ Wallace and Martin-Ortega *International Law* 2431.

⁵² *Universal Declaration of Human Rights United Nations Department of Public Information* 1948.

⁵³ Binchy 2009 *Trinity College* 24.

⁵⁴ *Universal Declaration of Human Rights United Nations Department of Public Information* 1948

⁵⁵ *Universal Declaration of Human Rights United Nations Department of Public Information* 1948

⁵⁶ *African Charter on Human and People's Rights* 1981.

⁵⁷ Binchy 2009 *Trinity College* 19.

⁵⁸ *African Charter on Human and People's Rights* 1981.

⁵⁹ Wallace and Martin-Ortega *International Law* 245.

right to life and this right must be protected by law. However, this right is not as sacrosanct and inviolable as it should. Within this context, this is based on the premise there are rapid recurrence of mob justice, a practice that constitutes the extra-judicial execution of suspects who under normal circumstances, must be arrested and brought to trial rather than summarily executed.

2.4 The South African Constitution and the Right of Life

What constitutes a bill of rights are "provisions in a constitution that define rights and set limits to the limitation of rights."⁶⁰ The South African Bill of Rights resonates with the international human rights instruments but it is distinct in that it has a binding force as it applies to all law and binds the legislature, the executive, the judiciary and the organs of state. Its provision binds a natural or a juristic person to the extent that is applicable taking into account the nature of the right and the nature of any duty imposed by the right.⁶¹ In other words it is justiciable. Therefore, "the South African Constitution does not only incorporate most international rights norms into the country's legal system but also provides adequately for measures to enforce them."⁶² While this is the case the government is tasked with the implementation and the development of the new democratic order, an order that does not accommodate mob justice. This can be achieved if the government adopts effective planning and sustainable success in reducing mob justice.

South Africa boasts of the South African Human Rights Commission (SAHRC), a brain-child of the Human Rights Commission Act, 1994. The SAHRC is a human rights watch-dog or supervisory body that ensures that organs of state fulfil their duties by taking steps towards the crystallisation of the rights in the Bill of Rights into definite and achievable goals among others "housing, healthcare, food, water, social security, education and the environment."⁶³ Civil rights need to be given equal attention as much as socio-economic rights since;

⁶⁰ Rautenbach *Rautenbach-Malherbe Constitutional Law* 11.

⁶¹ Section 8(2) of the 1996 *Constitution of the Republic of South Africa*.

⁶² Mubangizi *The Protection of Human Rights in South Africa* 145.

⁶³ Olowu *An Integrative Rights-Based Approach to Human Development in Africa* 108.

Apart from its clear integrative human rights mandate, the SAHRC is empowered by the Constitution (a) to investigate and to report on the observance of human rights; (b) to take steps to secure appropriate redress where human rights have been violated; (c) to carry out research; and (d) to educate.⁶⁴

The SAHRC is also empowered "to confront acts and omissions of the government itself, state officials, corporate bodies and even private individuals that threaten or trample upon the dignity of human beings in South Africa."⁶⁵ The SAHRC is neglecting its duty by not confronting mob justice. Mob justice tramples upon the very essence of human rights, that is, the right to life. This failure taints the acclaimed work of the SAHRC.

The supremacy of the South African Constitution is one of the founding provisions. A constitution consists of overarching arrangements that establish the political, legal and social structures to govern society and this makes Constitutional provisions supreme or fundamental law. Thus, section 2 of the Constitution provides that the Constitution is the supreme law of the Republic, law or conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled. Section 11 provides that everyone has the right to life. This provision makes it mandatory for the government to protect the right to life. The government has an obligation to identify, bring to justice and punish perpetrators who compromise or terminate the lives of other members of the society. The right to life is the mainstay of all rights. It protects the physical-biological existence of human beings.⁶⁶ The basis of the protection of life is that the right to life is morally fundamental.⁶⁷ This right is "an individual right which protects only the particular individual whose physical existence is at stake."⁶⁸ The limitation clause, section 36(1) of the Constitution, requires that limitations on rights be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Mob justice is a conduct that infringes on the right to life of a victim. The infringement is an unjustifiable limitation of the right and is in conflict with the criteria set out in section 36. Section 39(1) (a) requires the courts, when interpreting the Bill of Rights, to promote the values that underlie a democratic

⁶⁴ Olowu *An Integrative Rights-Based Approach to Human Development in Africa* 108

⁶⁵ Olowu *An Integrative Rights-Based Approach to Human Development in Africa* 108-109.

⁶⁶ Rautenbach *Rautenbach-Malherbe Constitutional Law* 341.

⁶⁷ Davis *Human Rights Law Directions* 140.

⁶⁸ Rautenbach *Rautenbach-Malherbe Constitutional Law* 341.

society. The conduct of those involved in meting out punishment on others in cases of mob justice is, therefore, invalid as it is inconsistent with the constitution. When the Constitutional Court interpreted section 34 it gave a value based interpretation and concluded that "one purpose of section 34, stemming as it does from the higher level value of the rule of law is to prohibit self-help."⁶⁹ Of this view the Constitutional Court is quoted in *S v Makwanyane* at paragraph 168 arguing that;

In a constitutional state individuals agree (in principle at least) to abandon their right to self-helping in the protection of their rights only because the State, in the constitutional state compact, assumes the obligation to protect these rights. If the state fails to discharge duty adequately, there is danger that individuals might feel justified in using self-help to protect their rights.⁷⁰

Section 34 of the Constitution grants everyone a right to access courts although it is doubtful that it could be interpreted to impose a positive obligation to afford an individual the means to gain access to a court. It requires the government to promote the resolution of disputes through legal means.⁷¹ This requirement is not met by mob justice as justice is never served. South African law is based on principles and one of the most important legal principles;

is expressed by the maxim *ubi ius ubi remedium*-where there is a right there is a remedy. This means that the existence of a legal rule implies the existence of an authority with the power to grant a remedy if that rule is infringed.⁷²

Taping from the above assertion it is apparent that the state has a mandate to provide remedies to the victims of mob justice. The duties of a state on the right to life are to respect, protect, promote and fulfil the right and the implication is that the state may, in principle, not use killing as a form of punishment.⁷³ Respecting, protecting, promoting and fulfilling the right to life means ensuring that the state takes "preventative measures to protect human life against the actions of its own officials and any other individual."⁷⁴ The state can meet this requirement⁷⁴ by providing

⁶⁹ Rautenbach *Rautenbach-Malherbe Constitutional Law* 341.

⁷⁰ Currie and De Waal *The Bill of Rights Handbook* 709.

⁷¹ Currie and De Waal *The Bill of Rights Handbook* 710.

⁷² Currie and De Waal *The Bill of Rights Handbook* 23.

⁷³ Rautenbach *Rautenbach-Malherbe Constitutional Law* 342.

⁷⁴ Rautenbach *Rautenbach-Malherbe Constitutional Law* 342.

a legal framework that criminalises mob justice and when it ensures that all perpetrators of mob justice are prosecuted.

There are concerns that the Bill of Rights is westernised and unsuitable for the third world countries like South Africa. These are the lamentations of “sceptics” as expressed by Judge Mokgoro, who against the backdrop of crime and criminal activity are quick to attribute it to the “absence of *ubuntu* in society and attribute this absence to what they view as the permissiveness which is said to have been brought about by the Constitution with its entrenched Bill of Rights.”⁷⁵ A fundamental feature of the provisions of the South African Bill of Rights is objectivity, the realisation that law and reality exist outside of the human mind and are not affected in any way by what we may happen to think about it. What we may happen to think about the Bill of Rights is irrelevant. We all have presupposition about the law but the law must always control our presuppositions but our presuppositions must never attempt to control the law.

The victims of mob justice are not confined to citizens as foreigners are victimised too. The right to life benefits everyone and it covers every human being within South Africa. In other words, it gives the right universally.⁷⁶ The legal order by a constitutional dispensation is now heading towards the close of its second decade but there is still a crisis over the protection of certain rights particularly the right to life. The state owes its citizens a duty to protect them from being arbitrarily killed by mob justice perpetrators.

2.5 Mob Justice in South Africa

The primary concern of this study is to examine how mob justice violates the right to life not a historical survey but the study provides a brief history of mob justice back in the apartheid era. The historical background helps bring about an understanding of these contemporary practices as they are allegedly remnants of the past practices. On 16 August 1986, a comment in the *Sowetan* stated that “the stoning and burning of people is becoming almost fashionable among blacks...this is the beginning of a

⁷⁵ Mokgoro “Ubuntu and the Law in South Africa” 1.

⁷⁶ Currie and De Waal *The Bill of Rights Handbook* 35.

terrible phase that spells doom to the black nation".⁷⁷ Was this a true prophecy of doom for South Africa as this menace has been going on for nearly three decades after this declaration?

2.5.1 Mob Justice during the Apartheid Era

Informal justice mechanisms in South Africa owe their existence to "indigenous African laws, customs, and institutions, as a response to a policing vacuum and rising crime in the townships and as opposition to apartheid."⁷⁸ Besides the courts, neighbourhood patrols and street committees also mushroomed in an attempt to deal with common crime such as robbery, theft, and rape.⁷⁹ The concept of vigilantism was generally used in the same vein as categories like popular justice, extra-legal justice or informal policing which referred to ordering activities, often with a violent flavour, that were undertaken outside the ambit of the state.⁸⁰ The formal policing system of the time did not meet the needs of the black South Africans in the townships. Crime was rife and the vacuum compelled the township dwellers to form informal criminal justice mechanisms modelled on traditional rural practices such as the *lekgotla* in a bid to deal with crime in their communities.⁸¹ Paradoxically "these courts were seen as part of the political struggle against apartheid because they represented an alternative to the state structure and dealt with both normal and political crime."⁸² The tragedy of these courts was that they were characterised by their predetermined assumption of guilt of the accused, instant redress, and engagement in human rights abuses.⁸³ As time progressed there was an "emergence of the politicised youths or comrades within the townships and residents were encouraged to take their problems to the "comrades."⁸⁴

The people grew more conscious of the oppressive policies of the apartheid regime. In a bid to oppose apartheid two slogans were adopted by the African National Congress, (ANC), (an ideologically leftist political party that earned much of its

⁷⁷ Ball 1994 *Centre for the Study of Violence and Reconciliation* 2.

⁷⁸ Monaghan 2008 *International Criminal Justice Review* 89.

⁷⁹ Monaghan 2008 *International Criminal Justice Review* 88.

⁸⁰ Buur and Jensen 2004 *African Studies* 142.

⁸¹ Monaghan 2008 *International Criminal Justice Review* 88.

⁸² Monaghan 2008 *International Criminal Justice Review* 88.

⁸³ Monaghan 2008 *International Criminal Justice Review* 88.

⁸⁴ Monaghan 2008 *International Criminal Justice Review* 88.

political support by leading the struggle against the apartheid system⁸⁵ and the ANC-aligned with the UDF. Buur and Jensen argue that;

These conservative vigilantes emerged in several places in South Africa: *Inkatha* on the Witwatersrand (now Gauteng) and KwaZulu-Natal, *AmaAfrika* in Port Elizabeth and *Witdoekers* in Cape Town. Indeed, the TRC produced ample evidence of a range of levels of endorsement, support and management of vigilante groupings by different security arms of the state, without however blaming only the regime for the emergence of vigilante activity.⁸⁶

This was the beginning of lawlessness with everyone taking law in their own hands but matters of crime were secondary at the time. The two slogans adopted at that time, "people's power" and "making the country ungovernable" was meant "to dismantle the apartheid government and its security forces and to displace the authority and reach of the apartheid state by seizing control of administrative, welfare, policing, judicial and other functions in the townships, thus creating alternative sites of sovereignty."⁸⁷ At the time citizens took the law into their own hands and this was tolerated as it was a political strategy deployed to make the townships ungovernable. This South African culture tolerant of citizens taking the law into their own hands is the legacy of violent political resistance during apartheid.⁸⁸ This problem still persists to this day with people disregarding law and treating suspects as they deem fit. At that time the targets of necklacing were allegedly spies or functionaries of the apartheid state.⁸⁹ By the mid-1980s individuals accused of political crimes such as collaborating, spying, or being a sell-out (working as a councillor or a police officer) for the apartheid regime were necklaced for their alleged crimes.⁹⁰ This kind of violence spread wide and far in South Africa and on 13 April 1986, Winnie Mandela was quoted as saying that they will liberate their country with their boxes of matches and their necklaces.⁹¹ Apparently this has helped to build an illegal order that is opposed to supporting human rights, in this case, mob justice. Among the early cases of mob justice, the most cited is that of Mr Tamsanqa Kinikini who was necklaced in the township of KwaNobuhle for allegedly involvement in

⁸⁵ Minaar "The New Vigilantism in Post-April 1994 South Africa: Crime Prevention or an Expression of Lawlessness?" 1.

⁸⁶ Buur and Jensen 2004 *African Studies* 142.

⁸⁷ Buur and Jensen 2004 *African Studies* 143.

⁸⁸ Monaghan 2008 *International Criminal Justice Review* 88.

⁸⁹ Ball 1994 *Centre for the Study of Violence and Reconciliation*.

⁹⁰ Monaghan 2008 *International Criminal Justice Review* 88.

⁹¹ Ball 1994 *Centre for the Study of Violence and Reconciliation*.

corruption and violence. This incident was widely reported in the Eastern Cape.⁹² Similarly, on 20 July 1985 in Duduza a 25-year-old woman was accused of being an informer for the apartheid regime. She was beaten and stoned, stripped naked, soaked in petrol and burnt to death.⁹³ With the passage of time the distinction became blurred between those suspected of collaboration and the use of the practice in murders not politically motivated.⁹⁴ There were numerous mob justice incidents but statistical evidence will not be presented in this study because the sole purpose of this historical outline is to trace the emergence of this problem in South Africa. The summative analysis is that people did not only need liberation from the apartheid regime of the past but from the legal system that had no respect for human life.

2.5.2 Mob Justice in Contemporary South Africa

South Africa today is faced with a lot of problems which were precipitated by the practices of the erstwhile regime. Thus, it is argued that "the hallmark of the apartheid regime was the violation of human rights".⁹⁵ It has been observed that notwithstanding the ending of apartheid, the negotiation of a political settlement and the introduction of the new South Africa, retributive informal justice has not disappeared. The disappearance of the comrades opened way for the new groups,⁹⁶ the very groups that claim to be up-in-arms against crime yet they do not uphold law. Impliedly, mob justice is the remnant of the liberation struggle.

South Africa is now a constitutional state and this entails that it is governed by the rule of law but it is strange that most people still disregard law. The rule of law refers to the supremacy of law, that society is governed by law and this law applies equally to all persons, the government and state officials. The recurrence of mob justice is a demonstration of a legal gap in the criminal justice system. Mob justice killings are "carried out in violation of the law by private individuals with the purported aim of

⁹² Ball 1994 *Centre for the Study of Violence and Reconciliation*.

⁹³ Ball 1994 *Centre for the Study of Violence and Reconciliation*.

⁹⁴ Ball 1994 *Centre for the Study of Violence and Reconciliation*.

⁹⁵ Dickson 1997 *Fordham L. Rev.* 537.

⁹⁶ Monaghan 2008 *International Criminal Justice Review* 88.

crime control or the control of perceived deviant or immoral behaviour”.⁹⁷ Instead of controlling crime, mob justice tends to “function in opposition to the formal criminal justice system and threaten the rule of law, the foundation of any democracy.”⁹⁸ The prohibition of self-help in section 34 of the Constitution requires that;

no one should be permitted to take law into their own hands. Not only the right to access to court a bulwark against vigilantism, but the rule against self-help is also necessary for the protection of the individual against arbitrary and subjective decisions and conduct of an adversary. It is a guarantee against partiality and the consequent injustice that may arise.⁹⁹

This guarantee against partiality is not certain because of mob justice. Since everyone is guaranteed the right to life and protection thereof, mob justice must be eradicated. Mob justice does not only deprive its victims of their lives but also denies them access to court meaning that not only their right to life is breached but also that of access to justice. Instead of reducing crime vigilante activities add to the workload of the police and courts, that is, if the perpetrators are brought to book at all. Mob justice is cruel, inhuman and degrading punishment and also offends the right to human dignity in the process of execution of the sentence.

Chapter 2 of the Constitution of the Republic of South Africa 1996, titled the “Bill of Rights” is dedicated to the promotion and advancement of the human rights and freedoms of the citizens. Human dignity, among others, section 1(a) is identified as one of the values on which the Republic of South Africa is founded. This right is affirmed in section 7. Section 10 confers on everyone an inherent dignity that must be respected and protected.¹⁰⁰ Everyone means every person. Accordingly “the term “person” includes both citizens of South Africa as well as aliens.”¹⁰¹ Human dignity is recognised as “the core value of international human rights instruments.”¹⁰² This means that criminals, suspects, legal or illegal immigrants, and minorities are entitled to it. The Bill of Rights confers rights on every person but there are exclusive rights reserved for citizens or a specific class of people. It is one thing to bestow a right but

⁹⁷ UN Secretary-General 2009 www.refworld.org/docid/4a9e2c1e0.html 15.

⁹⁸ Makubetse, Sikhonyane and Louw 2002 *Institute of Security Studies*.

⁹⁹ Currie and De Waal *The Bill of Rights Handbook* 710.

¹⁰⁰ Binchy 2009 *Trinity College* 19.

¹⁰¹ Devenish *A Commentary on the South African Bill of Rights* 21.

¹⁰² Binchy 2009 *Trinity College* 18.

it is another to enforce it. Failure to enforce it renders it insignificant and trying to exercise the said right becomes futile. The ultimate tragedy would not only be the evil deeds of the bad people but the silence over that of the good people.

Mob justice victims are extremely dehumanised simply because of what they are alleged to have done or what or who they are and are subjected to the whims of unscrupulous vigilantes. "In present-day South Africa, the criminal has become the embodiment of evil, who must be exorcised to produce the moral community."¹⁰³ The basis for such treatment is that law transgressors deserve the ugliest treatment and they cannot complain about the depressing experience they go through even if it looks utterly cruel. The Constitution guarantees the right to life but mob justice shows disrespect for the right to life. This ultimately says a lot about the society itself.

2.6 Means of Executing Mob Justice

Mob justice is often carried out in public and tend to be executed in a particularly gruesome manner with the victim often being severely beaten, murdered in a slow and painful fashion and the corpse is often further disfigured after death.¹⁰⁴ Mob justice can occur as "an isolated, spontaneous incident or as an organised, planned action."¹⁰⁵ Under spontaneous instances a suspected criminal is identified in the street, calls are made to catch him and passers-by join in the chase, beating and killing the suspect. In some instances a group of perpetrators who know each other (often neighbours, or residents of a small community) join together to hunt down a suspect.¹⁰⁶ Mob violence exhibits itself in the beating, necklacing, stoning, banishing, lynching, destroying properties of suspected criminals and even attacking family members of suspected criminals. This violence usually leads to the loss of many lives. "The justice meted out is often of an extremely brutal nature and deaths are common."¹⁰⁷ According to the Truth and Reconciliation Commission of South Africa Report, some victims of mob justice are beaten to death by being hit, kicked, punched on the face, head, genitals, and breasts to and objects used include

¹⁰³ Buur and Jensen 2004 *African Studies* 147.

¹⁰⁴ UN Secretary-General 2009 www.refworld.org/docid/4a9e2c1e0.html 17.

¹⁰⁵ Harris 2001 *Centre for the Study of Violence and Reconciliation*.

¹⁰⁶ UN Secretary-General 2009 www.refworld.org/docid/4a9e2c1e0.html 17.

¹⁰⁷ Monaghan 2008 *International Criminal Justice Review* 89.

sjambok, baton stick, ropes, whips, planks, and sometimes the victim is beaten against wall. Other victims meet their death by being burnt after being doused by petrol or other flammable chemicals or are being scalded with boiling water or other flesh burning chemicals. Sometimes the victims are locked up in a house, hut or shack and the house, hut or shack is set alight with the victim inside. Some victims are drowned in rivers, swimming pools, or even in buckets of water. Some victims die after being subjected to extreme exposure to hot or cold weather, forced and extensive exercise or forced labour.¹⁰⁸

The most common and preferred way of mob killings in South Africa is necklacing. In necklacing, the victim is harnessed with an old tyre, doused with petrol and set alight. Stoning to death, that is, being killed with bricks, stones or other thrown missiles, is another common method used to kill mob justice victims. Some victims are tortured to death. "Torture happens in captivity or in custody of any kind, formal or informal, for instance, prisons, police cells, detention camps, private houses, containers, or anywhere while the individual is tied up or bound to something."¹⁰⁹ Some killings involve being dragged behind a vehicle, thrown out of a moving vehicle, driven over, or even being put in a vehicle boot of car.¹¹⁰ A potent understanding of mob justice can be achieved through identification of the victims, the perpetrators, their behavioural trends and driving forces behind this violent culture.

2.7 Victims of Mob Killings

It is common cause that the primary victims of vigilante violence are suspected criminals who are generally young males who are usually suspected of committing theft.¹¹¹ Suspected murderers, perpetrators of assault, gang or cartel members and suspected or convicted sex offenders, including rapists and child sex offenders, as well as suspected witches are often victimised in South Africa.¹¹² Street children have not been spared. Some victims are those "considered to have violated an

¹⁰⁸ Truth and Reconciliation Commission of South Africa Report 1998 www.justice.gov.za/trc/report/.

¹⁰⁹ Truth and Reconciliation Commission of South Africa Report 1998 www.justice.gov.za/trc/report/.

¹¹⁰ Truth and Reconciliation Commission of South Africa Report 1998 www.justice.gov.za/trc/report/.

¹¹¹ UN Secretary-General 2009 www.refworld.org/docid/4a9e2c1e0html 18.

¹¹² UN Secretary-General 2009 www.refworld.org/docid/4a9e2c1e0html 19.

individual's or group's moral or religious codes, such as abortion doctors, sex workers or those judged inappropriately dressed."¹¹³ It has been observed that "the wrong individuals are identified, or persons are deliberately accused of crimes of which they are not guilty in order to punish them for some other reason, or to eliminate an enemy or rival."¹¹⁴ In this case it means that no-one is safe as one's life is under threat of wrong identification and false accusations. This infringes on freedoms of others and it is possible that those who believe that their beliefs or religious practices are superior to those of others take it upon themselves to summarily execute those who are opposed to them. This causes a lot of insecurity and uncertainty as to how far one's life is safe from such threats. Freedoms guaranteed in the Constitution are not exercised fully as the beneficiaries are always engulfed by the shadow of death.

2.8 Perpetrators of Mob Justice

Having a constitutionally guaranteed right one would expect that people to have respect for law and life. On the contrary people treat each other cheaply. In South Africa the culture of violence seems to be a normal trend and this culture "most likely plays a role in the production and reproduction of violence."¹¹⁵ Perpetrators of mob justice may be a small group that directly attacks the victim. It is not only those who physically participate in mob justice that perpetrate violence but also those who, through their attitudes, give approval of or encourage violence. Most, if not the rest, of the community members give tacit approval by not interfering with the practice or even hide under the guise of fear of victimisation.

Mob justice is collective violence. "In the formal nomenclature of criminology, the attackers are vigilantes in one form or another because they take the law into their own hands in a violent manner"¹¹⁶. Young people living in high-violence neighbourhoods are inclined to commit aggression and violence toward other people as they are socialised into such at a tender age. "That poor black township residents are prone to spontaneous violent action seems to be a common idea today among

¹¹³ UN Secretary-General 2009 www.refworld.org/docid/4a9e2c1e0.html 19.

¹¹⁴ UN Secretary-General 2009 www.refworld.org/docid/4a9e2c1e0.html 19.

¹¹⁵ Thaler K M *Violence and Society in Post-Apartheid* 4.

¹¹⁶ Buur and Jensen 2004 *African Studies* 142.

police, politicians and the media.”¹¹⁷ This is deductive reasoning as most of mob justice incidents happen in those areas, perpetuated by the poor, or the young and black residence dwellers. It cannot be conclusively said that only these groups are responsible for mob justice in South Africa. “Perpetrators can also include individuals who hire or request others to carryout vigilante killings on their behalf,”¹¹⁸ hiring of which can be done by people with money. There are also “formal and less spontaneously formed groups of vigilantes found throughout the world.”¹¹⁹ The list is not exhaustive as mob justice comes in various forms and different fashions.

2.9 Illustrations of Mob Justice in South Africa

A few reports on mob justice are randomly examined from 2011 to 2013. The intention is not to provide statistics *per se* but to illustrate the point that mob justice is a recurring menace in South Africa. On 23 April 2012 four men and four women were arrested were to appear in the Mankwane Magistrate’s Court for a murder of a teenager.¹²⁰ On 27 July 2011, it was reported that, over a period of less than two weeks, there were about six incidents of mob killings.¹²¹ On 1 December 2011, community members were arrested for killing a murder suspect.¹²² On 26 March 2012, a man was necklaced to death in Khayelitsha, in Western Cape and another one was found dead with a tyre and concrete drain cover on his chest. Both men's feet were bound with ropes.¹²³ On 13 April, a 79-year-old man was burnt to death and his sister-in-law was seriously injured.¹²⁴

On 11 March 2013, two men were burnt to death in Freedom Park in a mob justice incident.¹²⁵ In Rustenburg two men were killed in an apparent mob justice attack at

¹¹⁷ Buur and Jensen 2004 *African Studies* 142.

¹¹⁸ UN Secretary-General 2009 www.refworld.org/docid/4a9e2c1e0html 18.

¹¹⁹ UN Secretary-General 2009 www.refworld.org/docid/4a9e2c1e0html 18.

¹²⁰ *Eight arrested for mob justice murder of teen* <http://www.sowetanlive.co.za/news/2012/04/23/eight-arrested-for-mob-justice-murder-of-teen>.

¹²¹ *Horror of necklacing returns to SA* <http://www.sowetanlive.co.za/news/2011/07/27/horror-of-necklacings-return-to-sa>.

¹²² *Community arrests after child killer is murdered*

<http://www.sowetanlive.co.za/news/2011/12/01/community-arrests-after-child-killer-is-murdered>.

¹²³ <http://www.sowetanlive.co.za/news/2012/03/26/cape-town-man-necklaced>.

¹²⁴ *Man accused of witchcraft, burnt to death* <http://www.sowetanlive.co.za/news/2012/04/13/man-accused-of-witchcraft-burnt-to-death>.

¹²⁵ *No arrests after Freedom Park mob justice incident* news@ofm.co.za.

the Selokong informal settlement in Wonderkop, Marikana.¹²⁶ In Qwa Qwa Eastern-Free State, police arrested two men and four women who murdered an 18 year-old man in a mob justice attack.¹²⁷ On the 10 September 2013, a man was set alight in Mpumalanga.¹²⁸ This could be but a tip of an ice-berg. More and more people are killed on daily basis and this calls for the government's attention as a lot of people's right to life is at stake in South Africa.

2.10 Conclusion

The South Africa Constitution guarantees the right to life to everyone within its borders because life is sacred and must be respected. The state has a constitutional duty to protect its citizens from life threatening attacks. In this respect the state's primary duty is to secure the right to life by enacting effective criminal provisions that deter the commission of offences against everyone's life and this measure needs to be supported by law enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. Mob justice can be executed by a small group or other organised or formal groups like vigilante groups. Victims are commonly those suspected of criminal activities, social deviants like gays, lesbians and witches, HIV positive people and foreigners. Mob justice is, therefore, an extra-judicial execution of persons outside the legal perimeters whereby people take law into their own hands and do what they think is just. It infringes on the right to life. *Ubuntu*, a unique African value that underpins the notion of living together in harmony is also disturbed by heinous and wanton killings of people by mobs.

¹²⁶ *Two killed in apparent mob justice in Marikana* news@ofm.co.za.

¹²⁷ *Six arrested in FS for mob justice* news@ofm.co.za Sun.

¹²⁸ *Man set alight in Mpumalanga mob justice* <http://www.news24.com/SouthAfrica/News/Man-set-alight-in-Mpumalanga-mob-justice>.

Chapter 3: Factors Promoting Mob Justice in South Africa

3.1 Introduction

It is believed that mob justice stems from social conflicts. Its presence creates conflicting interests between the law and the needs of the people. The magnitude of problems allegedly faced by the people who resort to mob justice cannot be the justification for killing other people. Different disciplines have done research on the causes of mob justice and have come up with a number of factors. It is generally agreed that;

The most commonly stated or theorised reasons, whether presented in news reports, academic writing, human rights reporting or by the perpetrators themselves for the occurrence of vigilante killings are actual or perceived high crime rates and general insecurity, ineffective policing, widespread corruption and a lack of faith that the criminal justice system will in fact provide justice because it is too slow, too lenient, too corrupt, too expensive or too inaccessible.¹²⁹

It cannot be disputed that the majority of South Africans live in abject poverty, crime is rife, corruption is high, the criminal justice system is inefficient to a certain extent and there are less job opportunities. This results in discontentment and the “disheartened choose to go against systems, at least those made up of judges and courts, laws and rights”¹³⁰ by resorting to mob justice, an illegal judicial system that requires “no paperwork, no trial, and most times no sufficient evidence. It eliminates the procedure of most legal systems and it is its own law.”¹³¹ While some problems are real there are high chances that some problems are perceived and negative reaction to them disturbs law and order. For instance in South Africa, “mob justice is a socially recognised form of action, a response to state incapacity to provide law and order.”¹³² The mob captures a context where citizens routinely but spontaneously form groups under a claim of justice and take lethal punishment into their own hands. In other words mob justice happens within a context where

¹²⁹ UN Secretary-General 2009 <http://www.refworld.org/docid/4a9e2c1e0html> 20.

¹³⁰ Ozongwu 2012 <http://www.thisisafrica.me/opinion/detail/19479/african-mob-justice-inhumane-citizens-or-failed-law-enforcement>.

¹³¹ Ozongwu 2012 <http://www.thisisafrica.me/opinion/detail/19479/african-mob-justice-inhumane-citizens-or-failed-law-enforcement>.

¹³² Taussig-Rubbo Pirate Trials, the ICC and Mob Justice: Postcolonial Forms of Sovereignty in Kenya 27.

everyone believes they have the right to avenge a violation. By punishing the said criminal the mob's victim's rights are threatened and he or she is denied his or her right to life.

The right to life is one of the most sacrosanct rights in the South African Bill of Rights. Everyone has the inherent right to life and this right must be protected by law. However, this right sacrosanct and inviolable as it is, is not respected as it deserves to be by people who arbitrarily deprive others of their lives outside allowed situations where one may deprive a person of their life without necessarily offending the law. A situation under which a person may be extra-judicially killed is where there are grounds of justification such as private defence, necessity, official capacity or obedience to orders.¹³³ Where any of these grounds in a person is lacking, it is unlawful for any private person or officers of any of the state organs, in their official capacity, to punish a person to the point of death.¹³⁴ Another situation is police brutality where there is intentional use of excessive force, usually physical, which results in death of a suspect.¹³⁵ Then there is mob justice, an "arbitrary action by a group of people punishing a person because of his or her alleged mischief."¹³⁶ This practice is possible in a culture where violence is an acceptable form of punishment.¹³⁷ The culture of violence may be one of the root causes of mob justice in South Africa. As earlier indicated, for the purposes of this study these situations will all be dealt with under mob justice.

3.2 Causes of Mob Justice in South Africa

Mob justice has become a national epidemic in South Africa. It appears as an alternative mechanism of enforcing law and order but definitely not a necessary answer to the problem of crime as it infringes on the constitutional rights of the victims. Commonly known causes of mob justice comprise high crime rates and general insecurity, ineffective policing, widespread corruption and lack of faith in the criminal justice system. These can be summed up as lack of civil reliability in the civil

¹³³ Snyman *Criminal Law* 449.

¹³⁴ Kipobota 2010 *Tanzania Human Rights Reports* 14.

¹³⁵ Kipobota 2010 *Tanzania Human Rights Reports* 16.

¹³⁶ Kipobota 2010 *Tanzania Human Rights Reports* 17.

¹³⁷ Global Conscience Initiative 2011 www.gci-cameroon.org 6.

service. There are also economic factors such as poverty and unemployment as well as social problems like moral collapse in the private institutions. It is submitted that “factors contributing to the rising occurrence of mob justice include a growing number of un-employed youths, social inequality, corruption, poverty and inadequate law enforcement.”¹³⁸ Monaghan believes that the existence of informal justice mechanisms find their roots “in historic antecedents, based on indigenous African laws, customs, and institutions, as a response to a policing vacuum and rising crime in the townships and as opposition to apartheid.”¹³⁹ The indigenous African laws were a complex justice system rooted in culture, customs and taboos but are not synonymous with mob justice in that “the African traditional courts mediate and prosecute within particular jurisdictions.”¹⁴⁰ Under the mob justice realm “the mob assumes the role of prosecutor, judge, jury, and executioner.”¹⁴¹ Moreover, mob-justice has developed into a symbol of the mind-set that revenge is just in a society where there is an ineffective or non-existent impartial judiciary.

3.2.1 Lack of Faith in the Criminal Justice System

The justice system is said to be the pinnacle of the reflection of the values of a society, a platform from which a society defines morality, revenge, punishment and forgiveness.¹⁴² The understanding of justice is said to differ in each culture as cultures are generally dependent upon a group’s shared history, mythology and or religion.¹⁴³ It is submitted that although “many legal systems are a combination of a country’s history, traditions and cultures, most African countries operate under a justice system based on colonial influence.”¹⁴⁴ South Africa’s criminal justice system has gone through several changes since the emergence of an impartial centralised justice system meant to protect the rights of the perpetrators as well as restrain the

¹³⁸ Emerson 2011 <http://minneafrika.wordpress.com/2011/12/29/why-mob-justice-is-on-a-rise-in-africa/>

¹³⁹ Monaghan 2008 *International Criminal Justice Review* 89.

¹⁴⁰ Ozongwu 2012 <http://www.thisisafrica.me/opinion/detail/19479/african-mob-justice-inhumane-citizens-or-failed-law-enforcement>.

¹⁴¹ Emerson 2011 <http://minneafrika.wordpress.com/2011/12/29/why-mob-justice-is-on-a-rise-in-africa/>.

¹⁴² Emerson 2011 <http://minneafrika.wordpress.com/2011/12/29/why-mob-justice-is-on-a-rise-in-africa/>.

¹⁴³ Onwubiko 2013 <http://www.modernghana.com/news/485138/1/is-mobvigilante-justice-good-for-democracy.html>.

¹⁴⁴ Ozongwu 2012 <http://www.thisisafrica.me/opinion/detail/19479/african-mob-justice-inhumane-citizens-or-failed-law-enforcement>.

victims from seeking vengeance beyond proportional justice.¹⁴⁵ South Africa is *par excellence* one of the mixed legal systems of the world where a substantial fusion of civil and common law has taken place and this can be largely described as a history of borrowings of legal materials from other legal systems.¹⁴⁶ Like all other societies South Africa has guidelines in place to deal with perpetrators and these guidelines develop with time.¹⁴⁷ Nevertheless, incidents of mob justice remain a challenge to the administration of justice in this country.

It is very common for people to blame the criminal justice system in a country where crime rate is high because the justice system is the vanguard of a constitutional democracy. The criminal justice system functions under the auspices of two distinct and separate institutions, the police and the prosecution services that have to rely on each other in order to succeed in their fight against crime. "In essence, one weak link in the criminal justice process is all that is required for it to fail." Schönteich has identified what he terms "weak links" in the South African criminal justice system as the crucial weaknesses that have ruined its reputation. He points out the following;

- Too many cases are withdrawn before they go to trial because of crime victims' lack of understanding of and faith in the criminal justice process, and inordinate delays in the country's criminal courts.
- Too many cases go undetected because of the public's general unwillingness to assist the police in its investigations, and to testify for the prosecution in criminal trials. Moreover, many cases go undetected because of the police's weak criminal investigation capabilities, especially in respect of forensic investigations.
- Too few cases are being taken on by the prosecution service because of a lack of experienced and adequately trained prosecutors.¹⁴⁸

If the public meant to be served and protected cannot rely on service providers for protection, the alternative measures normally are resorted to. This results in the birth of mob justice. People are literally usurping authority from these two institutions and doing what they deem necessary to protect themselves and their property from criminals. Both the perpetrator and victim of the crime are denied their constitutionally guaranteed right to access justice. The criminal is also denied his

¹⁴⁵ Emerson 2011 <http://minneafrika.wordpress.com/2011/12/29/why-mob-justice-is-on-a-rise-in-africa/>.

¹⁴⁶ Gauntlett "The Legal system of South Africa and its approach to arbitration" 28.

¹⁴⁷ Emerson 2011 <http://minneafrika.wordpress.com/2011/12/29/why-mob-justice-is-on-a-rise-in-africa/>.

¹⁴⁸ Schönteich 1999 *Institute for Security Studies*.

section 35 rights to a fair trial. Moreover "a paramount principle of the criminal justice system is that an accused is punished only after his guilt is proved beyond reasonable doubt." ¹⁴⁹ This principle resonates with the Constitution. Mob justice does now allow this to happen. Everything is done summarily to the detriment of the victim.

Section 34 of the Constitution grants everyone a right to access courts, that is, access to justice. As justice does not take place in a social or political vacuum it is deeply affected by the difficulties faced by the citizens who do not find it easy to access their constitutionally guaranteed right. Access to justice does not only mean access to institutions but entails access to fair laws, affordable and appropriate remedies in terms that conform to the constitutional values. In South Africa access to justice for the majority of the poor and marginalised population remains a challenge. The cost of litigation is high and that has rendered justice in this country inaccessible to the poor. To them the cost of accessing justice remains extremely high and even getting the services of a legal representative is out of reach for them as they cannot afford the costs.

This has led to lack of confidence in the judicial machinery, with people often giving up their rights after weighing the time and money costs of the whole process. It has also led to the development of some alternative undesirable extra-legal phenomena that is antithetical to the rule of law such as 'mob-justice', where communities seek justice for themselves by communally executing suspects on the spot. ¹⁵⁰

Not only has the public been affected by inaccessibility due to high costs of litigation but court users also travel long distances to access justice services because of lack of courts in the townships and rural areas. ¹⁵¹ Furthermore, the South African courts are clogged with backlog as criminal cases are piling up every day yet the staff members or work force remains stable. The delays usually incense the citizens who eventually resort to self-help. Due to inefficiency of the judicial system there are successive postponements of court pending cases and this presents itself as denial of justice to both the victims and perpetrators of crime. It is submitted that delays in the

¹⁴⁹ Iqbal *Supreme Court of Pakistan Press Registrar 2.*

¹⁵⁰ Taussig-Rubbo *Pirate Trials, the ICC and Mob Justice: Postcolonial Forms of Sovereignty in Kenya 27.*

¹⁵¹ Ngoepe *Justice Today 16.*

dispensation of justice result in a parallel system of justice.¹⁵² The parallel justice system in this case is obviously mob justice. The legal maxim that states that “justice delayed is justice denied” holds true under such circumstances.

The public does not seem to understand the notion of granting of bail. The granting of bail is considered to be the court’s leniency. No or little is explained by authorities why bail is granted. This normally creates problems as it fuels the anger of the communities that believe that the criminal justice system has no effect on crime. Furthermore, inefficiency of the courts is also magnified by poor investigations that cause delays as a docket shuttles between the police and the prosecutor. This results in delays and backlog which invariably affects the outcomes of cases. This is a by-product of repeated failure of the system to work efficiently resulting in criminals finding their way back to the streets and communities shortly after arrest.¹⁵³ It is asserted that the state’s failure to discharge duty adequately is dangerous in that individuals might feel justified in using self-help to protect their rights.¹⁵⁴ In other words it places judicial power in the hands of private individuals and that encourages misguided people to take the law in their own hands. In a Tanzanian court, Justice Mwalusanya, in the case of *Republic v. Mbushu alias Dominic Mnyaroje and Kalai Sangula*, pointed out the gravity of this weakness. He held that “for any system of justice to work, it must be credible in the eyes of the people of the country concerned.”¹⁵⁵ With some people believing that they have been failed by the official justice system in deterring or punishing offenders, they take the law into their own hands.¹⁵⁶ Under such situations, extra-state mechanisms of law and order increase in conjunction with a declining confidence among citizens in the abilities of the state and the police to fulfil their traditional responsibilities to secure a safe environment.¹⁵⁷ The inefficiency of the courts is accompanied by the ineffective policing system and compounds the problem of mob justice. The courts are a cardinal mechanism critical to the implementation of the right to life but they cannot

¹⁵² Iqbal *Supreme Court of Pakistan Press Registrar 4*.

¹⁵³ Taussig-Rubbo *Pirate Trials, the ICC and Mob Justice: Postcolonial Forms of Sovereignty in Kenya 27*.

¹⁵⁴ Currie and De Waal *The Bill of Rights Handbook 709*.

¹⁵⁵ *Republic v. Mbushu alias Dominic Mnyaroje and Kalai Sangula*, Criminal Sessions case No. 44 of 1991, [1994] Tanzania Law Reports 146-173 160.

¹⁵⁶ Bae *The International Journal of Human Rights 57*.

¹⁵⁷ Bae *The International Journal of Human Rights 57*.

do so without the cooperation of the other arms of state, namely, the legislature and the executive.

3.2.2 Ineffective Policing

The officers are required to be trained and holders of basic level certificates. The ideal situation is that the judicial and the law enforcement officers must be knowledgeable in the performance of their daily duties. They must act professionally and ethically in their capacity as members of the public service. However, the ineptitude or inefficiency of the police force and the judiciary in dealing with crimes and criminals is one of the causes of mob justice.¹⁵⁸

This is because criminals who are apprehended or taken to courts "buy" their freedom, and thus the societies are left with no option but to take law into their own hands. Such feud proves the fact that people have lost confidence in the security apparatus of the state.¹⁵⁹

In the South African context, it is a common assumption that police officers across the spectrum are generally corrupt. This is evidenced by an audit published in 2013 that revealed that "1 448 Police employees have criminal record."¹⁶⁰ The report reveals that the department has serious challenges in the management of discipline.¹⁶¹ In the same vein the Democratic Alliance submitted that the conducting of audit indicates that "standard procedures and criminality were ignored over years."¹⁶² This corruption is a cancerous habit that has disabled the efficiency in the public service institutions. The police as their name suggests should be guarding over the interests of the citizens but many a times when called to monitor the situation they also take the law into their own hands and kill the suspect as would the mob. Thus, the court in *S v Williams and Others* held that;

If the State, as role model *par excellence*, treats the weakest and the most vulnerable among us in a manner which diminishes rather than enhances their self-esteem and human dignity, the danger increases that their regard for a culture of decency and respect for the rights of others will be diminished.¹⁶³

¹⁵⁸ Shadrack Mistery *Behind Mob Justice: The Attention of Penal and Constitutional Principle of Proportionality in Punishment* 14.

¹⁵⁹ Shadrack Mistery *Behind Mob Justice: The Attention of Penal and Constitutional Principle of Proportionality in Punishment* 14.

¹⁶⁰ SAPA <http://www.polity.org.za/print-version/1-448-police-employees-have-criminal-records>.

¹⁶¹ SAPA <http://www.polity.org.za/print-version/1-448-police-employees-have-criminal-records>.

¹⁶² SAPA <http://www.polity.org.za/print-version/1-448-police-employees-have-criminal-records>.

¹⁶³ *S v Williams and Others* 1995 3 SA 632 (CC) para 47.

The Judge's words stresses the point that the state agents have to uphold law and by so doing they promote the culture of respecting others' rights. Buur and Jensen state that "the incapacity of South African law enforcement, even at times its complicity prompts citizens to take the law into their own hands, often in violent ways".¹⁶⁴ This would be the only option since those who are supposed to serve them are also involved in furthering the interests of the criminals. There are many reported incidents of law enforcement agents who collude with criminals in commission of crimes. This is a factor that has been noted as encouraging the community members to perpetuate mob justice and fuels complacency of law enforcers with the existence of community policing or vigilantism.

There are many periodically reported incidents where the police gang up against suspects and kill them. This would be where a notorious criminal is often released by the court on bail or through other corrupt means. This is bolstered by the argument that "the failures of the justice system leave the police with no alternative but to administer justice directly by executing those who they 'know' to be guilty and who, if arrested, would either never be prosecuted or, if charged, would be acquitted."¹⁶⁵ Mistrust of the justice system by the police is coupled with frustrating working conditions. There is obvious under-deployment in the police department. There are many policing demands yet lack of manpower. This being one excuse, it has been noted though that "police reportedly often use heavy-handed tactics to respond to crime and public unrest, occasionally resulting in serious human rights violations."¹⁶⁶ An example would be "a tragic, rights-based, protest for access to water on 13 April 2011 protest in Ficksburg, Free State, in which community activist, Andries Tatane, was brutally beaten, and allegedly killed, by the police."¹⁶⁷ The police should be curbing or controlling mob violence but, in fact, carry-out mob justice. This is a nod to the civilians to punish those who break the law.

¹⁶⁴ Buur and Jensen 2004 *African Studies* 144.

¹⁶⁵ Taussig-Rubbo *Pirate Trials, the ICC and Mob Justice: Postcolonial Forms of Sovereignty in Kenya* page 28

¹⁶⁶ Cook 2013 *Congressional Research Service* 3.

¹⁶⁷ Dugard *Urban Basic Services in South Africa: Rights, Reality and Resistance* 19.

3.2.3 Vigilante Groups

The indifference of the police to criminal activities in marginalised communities results in the formation of vigilante groups. Usually the emergence of vigilante formations is premised on a deep-seated distrust of the police and or perceived police lack of initiative in providing basic human and economic security.¹⁶⁸ Mostly these groups are known for summarily punishing the suspects of any crime. Their presence is explained by the ineffective policing and need for security in the communities. Thus, most analysts argue that vigilantism in its benevolent form is fuelled by the state's incapacity to police and secure the citizens and their rights.¹⁶⁹ Perhaps the complacency of the police or state agents to abolish vigilantism and kangaroo courts is due to the fact that a "hapless, outnumbered and outgunned, and demoralised police force finds itself unable to cope with the country's spiralling crime wave."¹⁷⁰ Vigilante groups are widely known for the harsh punishment including whipping, clubbing, and at times the killing of alleged criminals, thereby causing another controversial source of security. The complexity of vigilantism is such that it has gone to an extent of subordinating law enforcement authorities. Then it becomes impossible for police officers who are under-sourced law enforcers to handle vigilante groups fearing for their own lives.

3.2.4 Poverty and Unemployment

Mob justice is associated with illiteracy, drug and alcohol abuse, unemployment and poverty.¹⁷¹ If the problem of mob justice is to be kicked out of South Africa, poverty, economic and social inequalities, the real threats to the freedoms enshrined in the Constitution of South Africa, need to be eradicated. Thaler postulates that poverty and unemployment have indirect effects on violence perpetration through their influence on neighbourhood context or behavioural aspects.¹⁷² Poverty and unemployment can lead to violence in that poverty gives young men an incentive to commit crime,

¹⁶⁸ Buur and Jensen 2004 *African Studies* 144.

¹⁶⁹ Buur and Jensen 2004 *African Studies* 144.

¹⁷⁰ UN Secretary-General 2009 <http://www.refworld.org/docid/4a9e2c1e0html> 10.

¹⁷¹ Shadrack Mistery *Behind Mob Justice: The Attention of Penal and Constitutional Principle of Proportionality in Punishment* 13.

¹⁷² Thaler *Violence and Society in Post-Apartheid* 41.

especially when poverty co-exists with inequality. Unemployment entails that young men are idle, which “undermines traditional basis of masculinity, resulting in (these) young men resorting to violence to assert their masculinity.”¹⁷³ The unemployed youth resort to illicit activities and recreational substances. The two are intricately intertwined. Mob justice and mood altering substances are linked in that “substance abuse and heavy alcohol use alters judgement and produce violent interactions by increasing the likelihood of perpetrating assault.”¹⁷⁴ Furthermore, “high level of illiteracy, a backward and feudal mind-set and the prevalence of misogynistic views among a large section of the people further compound the problem.”¹⁷⁵ Misogynistic views are exhibited when women who wear mini-skirts are gang-raped and the lesbians are raped under the pretext that they are being corrected from their depraved minds.

Another factor is that the crime wave is mainly due to the failure of the South African democratic state to impose moral and institutional authority. This failure advances the politics of exclusion and estrangement that characterised apartheid.¹⁷⁶ This assertion is bolstered by the observation made by Shadrack that the residents of the informal settlements still have limited access to social institutions. He states that;

The marginalised residents in informal settlements are rarely served by social institutions such as the Police and Justice System. The perceived indifference of such institutions in slum communities has led to the growth of community informal justice measures, which usually take the form of “mob justice,” meted out on people suspected of committing crimes, even petty ones.¹⁷⁷

Although Shadrack wrote his work within the Tanzanian context, the same is true within the South African context. That means, therefore, that the alleged criminals bear the brunt of mob violence. It is submitted that in South Africa “crime is a legacy of apartheid and therefore a development challenge that can be countered by

¹⁷³ Thaler *Violence and Society in Post-Apartheid* 41.

¹⁷⁴ Thaler *Violence and Society in Post-Apartheid* 41.

¹⁷⁵ Iqbal *Supreme Court of Pakistan Press Registrar* 5.

¹⁷⁶ Anon Date unknown

<http://search.mywebsearch.com/mywebsearch/GGmain.jhtml?searchfor=informal+justice+in+Context+&ts=1384505868727&p2=%5EJS%5Exdm007%5EYY%5Ebw&n=77fc1dcc&ss=sub&st=hp&ptb=F27CC3B2-FCE2-43F5-95D8-6860D1F85AB5&si=COf3jPTA57QCFSTLtAod9X8AVQ&tpr=sbb> 8.

¹⁷⁷ Shadrack *Mystery Behind Mob Justice: The Attention of Penal and Constitutional Principle of Proportionality in Punishment* 12-13.

alleviating poverty and disadvantage.”¹⁷⁸ Although this is true to a certain extent it has to be acknowledged that it has been long since apartheid was abolished. Most criminals were born or at least grew up during the constitutional era. If people want change it would be best if they stopped blaming every failure on apartheid. It will take extra effort to uproot certain problems and to address some challenges found in South Africa today.

3.3 Challenges to the Constitutional Order

In a country faced with criminal justice system that is challenged by parallel informal justice system, the state still has a mandate to enforce and implement laws and respect, protect and fulfil the constitutional rights of all the people in South Africa. Thus, “it is also accepted that providing for rights is one thing and protecting or implementing them is, in fact, something else.”¹⁷⁹ Implementing the constitutional rights comes with its own challenges as that creates conflicts of interests. Ideally citizens are supposed to respect each other's rights and honour the country's Constitution but this is not always the case¹⁸⁰ as there are cases where spontaneous mobs form to mete out justice on alleged criminals.¹⁸¹ In dealing with such conflicts, justice demands that there has to be an act of balancing of the rights of the offender against the rights of the victim. This demand poses challenges to state law enforcement agents and criminal justice system as some issues are deep-rooted in the system.

The existence of the criminal justice system impliedly admits to the fact that there are behaviours that are so dangerous that they must be strictly controlled or outlawed entirely.¹⁸² There are, as well, kinds of people who are destructive that they need to be controlled or removed from society.¹⁸³ It is the duty of justice agencies to “prevent or deter prohibited behaviour by apprehending, adjudicating, and punishing

¹⁷⁸ Anon Date unknown

<http://search.mywebsearch.com/mywebsearch/GGmain.jhtml?searchfor=informal+justice+in+Context+%26ts=1384505868727&p2=%5EJS%5Exdm007%5EYY%5Ebw&n=77fc1dcc&ss=sub&st=hp&ptb=F27CC3B2-FCE2-43F5-95D8-6860D1F85AB5&si=COf3jPTA57QCFSTLtAod9X8AVQ&tpr=sbb>

¹⁷⁹ Mubangizi *The Protection of Human Rights in South Africa* 145.

¹⁸⁰ Ngoepe *Justice Today* 14.

¹⁸¹ Monaghan 2008 *International Criminal Justice Review* 89.

¹⁸² Siegel and Senna *Introduction to Criminal Justice* 8.

¹⁸³ Siegel and Senna *Introduction to Criminal Justice* 8.

lawbreakers.¹⁸⁴ In the same vein, it should be mentioned that society maintains other forms of social informal controls intended to address moral not legal behaviour.¹⁸⁵ Emphasis must be made on the fact that “only the criminal system maintains the power to control crime and punish outlawed behaviour through the arm of the criminal law.”¹⁸⁶ The criminal justice bodies or institutions are established to administer justice by enacting laws, enforcing laws, prosecuting offenders and adjudicating between parties. Criminal law is a mechanism that prohibits conduct which is harmful to the interests or the autonomy of others,¹⁸⁷ with basic framework of the South African criminal justice system found in the legislative, judicial, and executive branches of the government.¹⁸⁸ It is necessary that these institutions work hand in hand since it is apparent that criminal justice is about controlling or managing social conflict. This will build confidence and faith of the citizens in the criminal justice system since it is instrumental in social control.

South Africa is faced with a lot of challenges brought about by violent crime, mob justice included. The culture of disregarding laws of the state is deeply rooted in the apartheid experiences of political resistance which was often violent, deployed to make the townships ungovernable and it created a culture tolerant of citizens taking the law into their own hands.¹⁸⁹ It is believed that communities which are brutalised over a long period during conflicts become desensitised to violent crime.¹⁹⁰ This desensitisation results in communities developing their own responses to crime, informal justice mechanisms which are heavily influenced by the violent environment which they live in.¹⁹¹ Of this deplorable state of affairs, the court held that it is regrettable but undeniable that since the middle 1980s the society has been subjected to an unprecedented wave of violence. All kinds of disputes, whether political, industrial or personal, often result in violent assaults.¹⁹² Mob justice is often resorted to and this violates the right to life and contravenes laws of the country and the provisions of the Constitution. The benefits of the law are that it provides security

¹⁸⁴ Siegel and Senna *Introduction to Criminal Justice* 9.

¹⁸⁵ Siegel and Senna *Introduction to Criminal Justice* 9.

¹⁸⁶ Siegel and Senna *Introduction to Criminal Justice* 9.

¹⁸⁷ Duff *Trials and Punishments* 206.

¹⁸⁸ Bohm and Haley *Introduction to Criminal Justice* 113.

¹⁸⁹ Monaghan 2008 *International Criminal Justice Review* 84.

¹⁹⁰ Monaghan 2008 *International Criminal Justice Review* 86.

¹⁹¹ Monaghan 2008 *International Criminal Justice Review* 86.

¹⁹² *S v Williams and Others* 1995 3 SA 632 (CC) 51.

to citizens and help them “restrain themselves from various kinds of interference and violence which they may be tempted to commit against others in obedience to the law’s prohibitions on such conduct.”¹⁹³ In spite of the obvious benefits there are those who are discontent and take law into their own hands, defying the criminal justice system.

3.3.1 Pessimism about the Constitution

The South African Constitution of 1996 explicitly guarantees and protects human rights in general and the right to life in particular. The second chapter of the Constitution focuses on the Bill of Rights and states in unequivocal terms the need to protect such rights. Section 12(1) provides that everyone has the right to freedom and security of the person which includes the right not to be tortured in any way and not to be treated or punished in a cruel, inhuman or degrading way. A right is defined as “a duty that is owed to you by another person, either to perform or to refrain from performing a certain act.”¹⁹⁴ Some rights are primary in that one acquires them against all other persons simply by virtue of being a human being.¹⁹⁵ The enjoyment and benefits of these constitutional rights “largely depend on the level of public awareness of such rights and of the mechanisms and institutions for their enforcement.”¹⁹⁶ The biggest challenge is unawareness of the existence of these human rights or at least what they stand for.

Another problem is that there are still some unsettling issues that need attention before anyone can do anything about mob justice. “People are of the view that lenient sentences have played a major role in the increase in crime.”¹⁹⁷ They believe that the courts are too lenient with criminals. Appeals for an introduction of harsher sentences are made by those alleging leniency in the criminal justice system. Today, there are still those who advocate for the re-introduction of death penalty. Thus, “the debate still goes on with calls to reintroduce capital punishment in an effort to

¹⁹³ Duff *Trials and Punishments* 206.

¹⁹⁴ Cohn and Udolf *The Criminal Justice System and its Psychology* 2.

¹⁹⁵ Cohn and Udolf *The Criminal Justice System and its Psychology* 2.

¹⁹⁶ Mubangizi *The Protection of Human Rights in South Africa* 145.

¹⁹⁷ International Council on Human Rights Policy *Crime, Public Order and Human Rights* 17.

address the escalating crime level in the country.”¹⁹⁸ Fortunately this cannot be considered in this country as the death penalty at some point was used as a machinery to silence political opponents during the apartheid era. In the *Makwanyane* case, Chaskalson P, held that the death sentence was a form of cruel, inhuman or degrading punishment outlawed by section 11(2) of the interim Constitution and also violated the right to dignity.¹⁹⁹ This issue has been laid to rest and is unlikely to be revisited either politically, legislatively, constitutionally or judicially and remains outlawed in South Africa for the predictable future.²⁰⁰ It is simply unconstitutional. About the right to life, Mubangizi rightly argues that;

In South Africa, as in many other countries, the right to life is perceived as most fundamental of all human rights. It is seen as the most important and the source of all other rights. The right to life raises several contentious issues including death penalty, which is a source of an emotive and furious debate in South Africa.²⁰¹

It is unfortunate that those who believe in death penalty are haste to do what they think should be done with the criminals opposing the Court’s decision of outlawing death penalty as a cruel and inhumane punishment drawing that authority from the Constitution. It is regrettable that such “repressive and barbaric systems of adjudication”²⁰² are still found in South Africa a state that has made history by outlawing death penalty in a novel manner.

3.3.2 Challenges in the Criminal Justice System

The South African criminal justice system is confronted with problems when it comes to issues of access to justice. This spans “from a financial, physical and technical viewpoint... In the rural areas, police posts and higher courts are often far from many of the population.”²⁰³ The problem of staff shortages and insufficient resources cannot be emphasised as that is evidenced by backlogs and the incapacity of the system to respond to the needs of the people.

¹⁹⁸ Mubangizi *The Protection of Human Rights in South Africa* 83.

¹⁹⁹ Mubangizi *The Protection of Human Rights in South Africa* 83.

²⁰⁰ Mubangizi *The Protection of Human Rights in South Africa* 84.

²⁰¹ Mubangizi *The Protection of Human Rights in South Africa* 152-153.

²⁰² Iqbal *Supreme Court of Pakistan Press Registrar* 5.

²⁰³ Robins *Institute for Security Studies* 60.

The eroded trust and confidence in the administration of criminal justice is exhibited in violent reaction to crime. The legacy and continuing practice of mob justice is a challenge to the constitutional order in South Africa. By and large, what is obvious is the adverse impact mob justice practices have on the constitutional guaranteed rights. It is acknowledged that "frustrations with the police and courts are real and ever present danger to the survival of democracy and therefore must be tackled professionally with zeal, speed and accuracy."²⁰⁴ Impliedly democracy does not amount to the will of social deviants who act at their whims in disregard of broader societal interests. The continued existence of retributive informal justice, meaning acts committed outside the limits of the formal criminal justice system,²⁰⁵ blurs the lines between state and non-state action. It is for this reason that mob justice creates challenges to the constitutional order. Nevertheless, theoretically South Africa has a dependable and flexible judicial system capable of maintaining order in its realm but lacks in its obligation of addressing the injustice inherent in mob justice.

3.3.3 Misinterpretation of the Law

One of the challenges with mob justice is that there is no differentiation between criminal acts that are in contravention of the formal law or the Constitution²⁰⁶ and other non-criminal activities. For instance, particular sexual practices and witchcraft are considered to be criminal in many communities regardless of laws that penalise attempts to identify witches.²⁰⁷ The problem of non-recognition of the distinction between criminalised and non-criminalised acts defy the legal maxim *nullum crimen sine lege*,²⁰⁸ which loosely translated means, there can be no crime committed without a criminal law. A criminal offence is an act or conduct which the law condemns as a wrong.²⁰⁹ To respond effectively and decisively the offender must be punished. Punishment must therefore, be justified by reference to a moral wrong

²⁰⁴ Onwubiko Is Mob or Vigilante Justice Good For Democracy? 27 August 2013

<http://www.modernghana.com/news/485138/1/is-mobvigilante-justice-good-for-democracy.html>.

²⁰⁵ Anon Date unknown

<http://search.mywebsearch.com/mywebsearch/GGmain.jhtml?searchfor=informal+justice+in+Context+%&ts=1384505868727&p2=%5EJS%5Exdm007%5EYY%5Ebw&n=77fc1dcc&ss=sub&st=hp&ptb=F27CC3B2-FCE2-43F5-95D8-6860D1F85AB5&si=COF3jPTA57QCFSTLtAod9X8AVQ&tpr=sbb> 11.

²⁰⁶ Buur and Jensen 2004 *African Studies* 147.

²⁰⁷ Buur and Jensen 2004 *African Studies* 147.

²⁰⁸ Dana 2009 *Journal of Criminal Law and Criminology* 858.

²⁰⁹ Duff *Trials and Punishments* 153.

which the person punished has allegedly done.²¹⁰ This will result in the demise and disappearance of self-help groups and decline of vigilantism.

Vigilantism is an informal justice and this entails involvement of collective violence constituting acts committed outside the borders of the formal criminal justice system.²¹¹ Vigilantism is two-faced as it can be viewed as both social control and self-help. To the lay persons “social control refers to any process by which individuals or groups define or respond to the deviant behaviour of others.”²¹² It can involve a variety of phenomenon ranging from a frown or grimace to a verbal reprimand, to physical expulsion from a group, to violence. Self-help is “the handling of a grievance or dispute by unilateral aggression.”²¹³ In most South African communities vigilantism is the primary means of social control and comprises assassination, feuding, fighting, maiming and beating.²¹⁴ It is, therefore, difficult to try and outlaw vigilantism without alternative means of controlling crime. This attempt will be met with vehement opposition as community members regard it as a valuable and the most effective mechanism of crime control.

3.3.4 Police Brutality and Ineptitude

The police are the integral part of the criminal justice system. They are

basically concerned with maintaining order and enforcing the criminal law. The system and process of criminal justice depends on effective and efficient police

²¹⁰ Duff *Trials and Punishments* 153.

²¹¹ Anon Date unknown

<http://search.mywebsearch.com/mywebsearch/GGmain.jhtml?searchfor=informal+justice+in+Context+&ts=1384505868727&p2=%5EJS%5Exdm007%5EYY%5Ebw&n=77fc1dcc&ss=sub&st=hp&ptb=F27CC3B2-FCE2-43F5-95D8-6860D1F85AB5&si=COf3jPTA57QCFSTLtAod9X8AVQ&tpr=sbb> 11.

²¹² Anon Date unknown

<http://search.mywebsearch.com/mywebsearch/GGmain.jhtml?searchfor=informal+justice+in+Context+&ts=1384505868727&p2=%5EJS%5Exdm007%5EYY%5Ebw&n=77fc1dcc&ss=sub&st=hp&ptb=F27CC3B2-FCE2-43F5-95D8-6860D1F85AB5&si=COf3jPTA57QCFSTLtAod9X8AVQ&tpr=sbb> 11.

²¹³ Anon Date unknown

<http://search.mywebsearch.com/mywebsearch/GGmain.jhtml?searchfor=informal+justice+in+Context+&ts=1384505868727&p2=%5EJS%5Exdm007%5EYY%5Ebw&n=77fc1dcc&ss=sub&st=hp&ptb=F27CC3B2-FCE2-43F5-95D8-6860D1F85AB5&si=COf3jPTA57QCFSTLtAod9X8AVQ&tpr=sbb> 11.

²¹⁴ Anon Date unknown

<http://search.mywebsearch.com/mywebsearch/GGmain.jhtml?searchfor=informal+justice+in+Context+&ts=1384505868727&p2=%5EJS%5Exdm007%5EYY%5Ebw&n=77fc1dcc&ss=sub&st=hp&ptb=F27CC3B2-FCE2-43F5-95D8-6860D1F85AB5&si=COf3jPTA57QCFSTLtAod9X8AVQ&tpr=sbb> 11-12.

work, particularly when it comes to preventing and detecting crime, and apprehending and arresting probable criminal offenders.²¹⁵

Law enforcement agencies are supposed to make concerted effort and consistently enforce laws to bring about compliance and a reduction of crime. The founding provision, section 199 of the 1996 Constitution establishes the security services of the Republic. This provision mandates that a parliament statute that regulates South African Police Service (SAPS) be established.²¹⁶ Section 205(3) of the Constitution further articulates the objects of the SAPS. Among other duties the police are to uphold and enforce law, protect and secure the citizens, maintain public order, prevent, combat and investigate crime.²¹⁷ These duties are aimed at creating "social justice and the establishment of a democratic constitutional order in which, at last, all citizens will be able to respect the laws of the country and those who enforce the law."²¹⁸ Brutality is beyond the purview of those duties. This brutality has served to widen the gulf and mistrust between the police and the citizens. Human rights violations in the SAPS point to issues of accountability deficits in policing. Lack of accountability compounds the problems as the police in South Africa are hardly held accountable and easily get away with impunity. In the SAPS there is a problem of poor terms and conditions of service.

Human resource capacity deficits aggravate the problem as the members of society are not given the service and attention expected of the police in handling certain emotive matters. Police do not routinely patrol the neighbourhoods looking for law violators. This is due to transport deficiencies and if not poor geographical terrains that do not have proper infrastructure as slums are not properly planned. This hampers access to crime infested areas and creates good haven for criminals. The problem is compounded by the state's lack of mindset on addressing the problem, for instance, by channelling economic and human resources towards curbing the problem. These challenges are too much and cause lack of confidence in the police's competence to handle crime.

²¹⁵ Bohm and Haley *Introduction to Criminal Justice* 120.

²¹⁶ Joubert *Applied Law for Police Official* 13.

²¹⁷ Joubert *Applied Law for Police Official* 13.

²¹⁸ Haysom *Policing the Transition: Transforming the Police* <http://www.anc.org.za/show.php?id=252>.

3.3.5 The Breakdown of Traditional Justice System

Perpetrators are willing participants which invariably makes it hard to get people to attest to the commission of the crime. Most people do not have faith in formal institutions and are resorting to mob justice as a way of protecting themselves and their property as people are generally ignorant of how the criminal justice system works. This is accompanied by the breakdown of traditional justice system which has been an important aspect in the development of alternative methods of justice.²¹⁹ These methods would help people resolve their disputes amicably. It is also submitted that "times of transition, especially from military or authoritarian governments to democracy, or from armed conflict to peace, can often be accompanied by vigilantism."²²⁰ It's a challenge to uproot this informal structure because most people depend on it although it obviously promotes mob justice. Frustrations among the citizens who find themselves affected by, for instance, poor service delivery pose a challenge to the state as this tends to cause people to erupt and vent their anger on alleged criminals and foreigners. There is moral collapse in the private institutions like homes and schools. People abuse drugs and alcohol and then commit heinous acts against others. Traditional beliefs and other diverse incentives are deeply rooted in and are carried on from generation to generation. This also is a challenge to the South African constitutional order. There is lack of tolerance of each other that is spreading rapidly as the world becomes one big community in response to urbanisation and globalisation. It is high time that some people accept that their belief does not acquire sanctity or infallibility simply because of its association with an inspired doctrine. If each person accepts this, tolerance of personality differences will improve and cases of mob justice will decrease.

3.3.6 Urbanisation and Globalisation

Urbanisation is defined as the "concentration of human populations into discrete areas, leading to transformation of land for residential, commercial [and] industrial and transportation purposes."²²¹ Although urbanisation is good and necessary it

²¹⁹ UN Secretary-General 2009 <http://www.refworld.org/docid/4a9e2c1e0html> 20.

²²⁰ UN Secretary-General 2009 <http://www.refworld.org/docid/4a9e2c1e0html> 20.

²²¹ EPA What is urbanization http://www.epa.gov/caddis/ssr_urb_urb1.html.

brings along with it a lot of challenges especially in crime control. It is submitted that the city life attracts all sorts of people and lets all sorts of activities to flourish. Criminals also find their share of opportunities here. Street crimes become common as the authorities find it hard to patrol cities.²²² This is compounded by globalisation. Globalisation is "the connection of different parts of the world. Globalisation results in the expansion of international cultural, economic, and political activities."²²³ As people, ideas, knowledge, and goods move more easily around the globe, the experiences of people around the world become more similar. Modern communication is said to have played a larger role in cultural globalisation. Due to development of technology, communication has become much easier and faster resulting in fast spread of different kinds of influence, good and bad. It is likely that easy access to information about foreign countries is as easily accessible as it is with local news. Through globalisation people may become aware of incidents very quickly through the internet and successful global news networks. As globalisation spreads bad things spread too. It poses a challenge to states, South Africa included, to curb or curtail mob justice as this practice has proved to be a global problem.

4. Conclusion

Mob justice is rife in South Africa where an inefficient judicial system, widespread lack of trust in the police, and the legacy of vigilante groups that was operating during the apartheid, are causing civilians to take justice into their own hands. The public responds to the weaknesses in the justice system and the police's lack of capacity to provide justice within a reasonable period of time by beating and killing the alleged criminals. The crippling delays and low witness participation in court cases, witnesses who are normally worried about their security as they are also risk retribution by providing evidence, compel the courts to discharge the accused persons in most cases. Lack of witness participation increases the low conviction rate. This infuriates the community members who resort to mob justice. Most people do not appreciate the rights of criminals.

²²² <http://www.buzzle.com/articles/challenges-of-urbanization.html>.

²²³ National Geographic *Globalisation*

http://education.nationalgeographic.com/education/encyclopedia/globalization/?ar_a=1.

While the weak criminal justice system is largely to blame for the presence of mob justice, sight should not be lost of the fact that when the society takes law into its own hands it promotes anarchy. "Society, not simply the criminal justice system, is ineffective in policing itself: family members, neighbours, and communities do not act or formulate norms that constrain violence."²²⁴ The fact that there are still people who have lost faith in the system but still adhere to laws, notwithstanding that they are dissatisfied²²⁵ highlights the perpetrators of mob justice's depraved minds.

Maybe it is not all as bad as it looks or sound as there is bound to be diligent law enforcers and there is likelihood that more often than not the incompetence of the police is perceived opinions. In other words the presence of vigilante groups is not a bad idea but a notion "of a state desperately trying to assert itself but always challenged from below by ineffective and corrupt police officers, as well as by the needs and aspirations of those the state must serve and/or police".²²⁶ Maybe the high crime rate and general insecurity has caused the vigilante groups' presence but that gave birth to mob justice as power-hungry people seized the opportunity to assert themselves. Whatever excuse there is for the presence of vigilantism does not take away the fact that it is one of the causes of mob justice. With corruption so rife in the police force, it is doubtful that it would be possible for police officers to uphold their oath of office if the system is not reformed. Factors such as poverty and unemployment cannot be reversed overnight and it will take concerted effort of both the state and its organs and the citizens to realise that goal. Factors like urbanisation and globalisation are fuelling the problem of mob justice as they tend to make it possible for people to share their cultures and practices that are good and bad. This causes further predicament for the states to control crime. There is still a glimpse of hope as the state can formulate policies and other strategic means to counter the problem of mob justice and protest the right to life.

²²⁴ Thaler *Violence and Society in Post-Apartheid* 4.

²²⁵ Ozongwu 2012 <http://www.thisisafrica.me/opinion/detail/19479/african-mob-justice-inhumane-citizens-or-failed-law-enforcement>.

²²⁶ Buur and Jensen 2004 *African Studies* 144.

Chapter 4: Towards Strategic Responses to Mob Justice in South Africa

4.1 Introduction

Mob justice causes fear, insecurity and terror among the South African citizens as it disregards law and constitutional rights. The unfortunate thing is that mob justice does not differentiate between criminal acts and moral wrongs. The principle of proportionality, a principle that dictates that punishment is not supposed to be grossly or excessively severe in relation to the gravity of the crime charged²²⁷ is disregarded when punishing victims. All victims are treated at equal footing from a petty thief to a murderer. Mob justice is a criminal act that affects public order. It engages public interest that extends beyond any individual interest as people experience insecurity, fear and the erosion of trust²²⁸ in the justice system.

There exists a variety of social factors that contribute to causes of mob justice as well as pervasive mentality that it is the only way to bring people to justice. The government of South Africa, it seems, has failed and continues to fail in its international, regional and national legal obligation to protect victims of mob justice. A myriad of challenges are apparent in the criminal justice system as far as implementation of the constitutional rights and crime control measures are concerned. It is imperative that the state acts upon the crisis caused by mob justice because "from a human rights perspective, a state may be held responsible for such deaths if it can be shown that it failed to protect the right to life."²²⁹ If the state was genuine in its concerns about the protection of human life, it would not be a question of many lives lost at once but loss of one life under mob would compel the state to act upon it.

There is need for a more coordinated and comprehensive approach to and a coherent vision of peace-building. It is needless to emphasise that the South African government already has at its disposal the necessary tools and powers to exercise its responsibility to protect its people. The government bears the primary

²²⁷ Linntam 2002 *Juridica International* 50.

²²⁸ Young *Victims of Crime Research Series* 7.

²²⁹ Thompson and Giffard *Reporting Killings as Human Rights Violations Handbook*.

responsibility for personal peace and security and should play a leading role in curbing crime to prevent, manage and provide effective strategies in response to the problem of mob justice. Strategic and effective responses should be developed on the basis of a sound understanding of the nature and extent of mob justice across the country.

4.2 Understanding the Proximate Causes of Mob Justice

Research has shown that a lot of study has been done on the causes of mob justice. The findings can be used as the springboard for tackling mob justice. Combating mob justice entails dealing with the causes of the problem. It entails fighting poverty and correcting the socio-economic imbalances. Poverty, unemployment, inequality, use of apartheid era protest action and history of violence in the community, corruption and ignorance of law are often cited as the proximate causes of mob justice. The competition for access to resources, indifference to address the needs of the community by the stock holders and lack of accountability are fuelling the situation. In order to truly combat mob justice it is necessary to combat the blatant ineffectiveness of local and regional authorities.²³⁰ Thus, it is argued that;

Until these underlying problems which characterise so much of South African society are visibly and effectively addressed, the government should expect increasing frustration and more frequent, better organised, determined and long-lasting protest action.²³¹

Without government effort to fight mob justice the problem will continue unabated. The initial stage would be to try and have a deeper understanding of the factors that cause mob justice. This necessitates development of policy and effective responses on the basis of a sound understanding of the nature and extent of mob justice across the country.²³² An understanding of these factors is likely to invoke appropriate national policies and procedures by which further attacks might be avoided in the future. It is imperative to seek an understanding and reduction of this violence by undertaking a careful and detailed context-specific analysis.

²³⁰ Global Conscience Initiative 2011 www.gci-cameroon.org 4.

²³¹ Bandeira and Higson-Smith 2011 *CSV* and *SWOP* 5.

²³² UN Secretary-General 2009 www.refworld.org/docid/4a9e2c1e0.html 20.

4.3 Evolution of the Duty to Protect from Mob Justice

Generally, it is the obligation of the state to create an environment in which the right to life is protected from abuses by officials and killings by private persons.²³³ As mob justice has spread and engulfed the whole global family, in 2009, the UN Secretary-General remarked that states have a duty to both respect and ensure the right to life by refraining from violating it and adopting necessary legislative, judicial, administrative, educative and other measures to guarantee it within their area of jurisdiction.²³⁴ Section 7(2) requires the state to respect, protect, promote and fulfil the rights in the bill of rights. Section 8(2) gives these rights a binding force against natural and juristic persons relative to the nature of the right and the duty the right imposes. Therefore, the South African Constitution aspires for a society in which everyone respects human life. The laws, strategies and plans have to be formulated in response to the incidents of mob justice based on values. Mere existence of prohibitive instruments as a formality is insufficient. It is necessary to take steps to ensure that where the prohibition is not respected, there is no impunity.²³⁵ In other words, the prohibition must be effectively enforced.

South Africa is a democratic state and democracy entails the enactment of common values into law. The South African Constitution's founding provisions proclaim South Africa as a democratic state founded on values. Written norms form an important part of any legal order²³⁶ but they are not self-sufficient as there are gaps, ambiguities and controversies that cannot be overcome only within the context of written norms. The values and principles provide for the coherence of the legal system. Accountability, responsiveness and openness and the rule of law arguably coincide with the key values of *ubuntu*.²³⁷ *Ubuntu* controls how people relate to one another and encapsulates many rules of conduct such as concepts of ethics. It fully supports written norms. It is the governing nature of man, the power of decision or choice. People with *ubuntu* in its truest sense find it easy to adhere to state laws.

²³³ Thompson and Giffard *Reporting Killings as Human Rights Violations Handbook*.

²³⁴ UN Secretary-General 2009 www.refworld.org/docid/4a9e2c1e0.html 16.

²³⁵ Thompson and Giffard *Reporting Killings as Human Rights Violations Handbook*.

²³⁶ Linntam 2002 *Juridica International* VII 55.

²³⁷ Mokgoro "Ubuntu and the Law in South Africa" 7.

4.4 Accountability

Mob justice perpetuates a cycle of violence, creates a culture of fear, and rejects personal accountability for violent acts that are committed in the name of justice.²³⁸ If mob justice is to be combated the perpetrators must be held accountable for the murder of their victims. The object of policies is to hold individuals accountable for acts that threaten the safety of others by requiring them to provide redress to victims and families for their harmful acts. In line with this the society would reflect more clearly on the real costs of violence to the society. The society will be able to identify effective alternatives to mob justice. Accountability must also be demanded from the police as to eradicate corruption and enhance responsibility. The principle of accountability forms part of the basic values and public administration in South Africa with the multi-party parliamentary committees required to have an oversight of all security services as to give effect to the principle of accountability.²³⁹ The parliament needs to implement effective human resource management in the police force and to ensure that each section has adequate and sufficiently skilled people, ensure that they are doing their work and that their performance is monitored constantly. Working diligently and being accountable to the people will help boost the community confidence in the justice system and in the law enforcement agents.

4.5 Reviving Community Confidence in the Justice System and the Police

A decline in confidence in the state's law enforcement agents and judicial system compels individuals and groups to take law into their own hands. Most of the causes point to the failure of the South African government to manage the society. An aim to improve on the justice system must be adopted as part of the government strategy to combat mob justice. It is imperative for the government to endeavour to restore faith in the justice system's ability to hold criminals accountable in an attempt to dissuade the public from taking matters into their own hands. This will also confirm that "the essence of the rule of law is that everyone in society is subject to law. No one, no matter how important or powerful is above the law. Conversely, no one should suffer

²³⁸ Global Conscience Initiative 2011 www.gci-cameroon.org 3.

²³⁹ Currie and De Waal *The Bill of Rights Handbook* 17-18. See also Currie and De Waal *The Bill of Rights Handbook* (2013).

punishment except for a distinct breach of the law”.²⁴⁰ Expedient police investigations and criminal prosecutions must be engaged. It is not the public’s duty to punish the criminals but the state’s duty through its authorised institutions. Until faith in state institutions is restored criminals will continue to face the ruthless justice of the street. However, efforts to reduce vigilante killings must involve more than general calls for improved police and court systems. The government must look into ways to restore public confidence in the justice system by combating police and judicial corruption in an active and transparent manner and enhance the capacity of the justice system to deliver justice in an efficient and fair manner.²⁴¹ A more important step is for law enforcers from police to prosecutors and courts to ensure that justice and the letter of the law are upheld in all cases and for all citizens.

If the state’s law enforcement system’s failure to uphold the law continues, it opens the door even wider for mob justice. The public’s lack of faith in the police can be overcome by an adoption of a community-based approach. The police need to boost their presence in the communities so as to instil the community’s faith and trust in them. The community-based approach will help forge a bond between communities and the police force. The police need to engage more with the community if they are to instil greater public confidence in the law enforcement system. If communities interact more with police officers they would become more accustomed to their presence and not feel the need to take the law into their own hands whenever a dispute arises. Above all, the government must ensure that fair and effective administrative and judicial systems exist to provide access to criminal and civil sanctions and disciplinary measures in response to unlawful killings.

4.6 Human Rights Awareness Campaigns

The inclusion of human rights in the South African Constitution was necessary. Their mere existence is a giant step towards their protection. According to Olowu, “there is no denying the fact that the mere existence of such explicit provisions are potent in building, institutionalising and sustaining the processes that would ensure their

²⁴⁰ Binchy 2009 *Trinity College 2*.

²⁴¹ The Rapporteur “Understanding and Regulating Private Security in Ghana” 19.

promotion and protection as they gain more popular and informed cognition.²⁴² Despite all this the fact remains that in promoting human rights, controversy and dispute cannot be wholly avoided. Tackling root causes of mob justice would contribute in the creation of a society where human life and dignity are respected irrespective of individual's status. The holders of the rights must be informed of them in order to give them effect.

The starting point is for the SAHRC to revisit its obligatory duties and revise its policies in order to be more effective and responsive to human rights violations. Education can be a vehicle to eliminate or diminish mob justice. Teaching people of their rights will also ensure that state officials and the general population are aware of the prohibition of arbitrary killing.²⁴³ People need to be taught of the undesired elements of mob justice. They may have general idea of what they are but a better understanding of how exactly they function may be lacking. An understanding is bound to encourage public respect for and commitment to human rights and the rule of law.²⁴⁴ Teaching can start from primary schools to tertiary institutions. If people are taught about human rights they become aware of the rights they are endowed with and the benefits of promoting and protecting these rights.²⁴⁵ Teaching non-violence at grass roots level helps create a climate that leads to a community that does not believe in violent retribution for an un-convicted person. The state has to implement well considered and sustainable public education programmes to foster broad public knowledge of the rule of law and what is being done by the justice system to control corruption and combat crime. This entails that the teaching should not be a re-active move to the incidents of mob justice but rather a strategic tool used against mob justice. This also means incorporating such awareness-raising into training programmes, in particular, for law enforcement officials and all those carrying out such functions.

²⁴² Olowu *An Integrative Rights-Based Approach to Human Development in Africa* 80.

²⁴³ Thompson and Giffard *Reporting Killings as Human Rights Violations Handbook*.

²⁴⁴ The Rapporteur "Understanding and Regulating Private Security in Ghana" 20.

²⁴⁵ Global Conscience Initiative 2011 www.gci-cameroon.org 5.

4.7 Poverty Eradication Strategies

Purposeful government strategies are necessary for diminishing mob justice. However, this requires involvement at different levels and by different role-players although the government has a central role to play. Poverty, inequality and marginalisation underlie much of the mob justice manifest in South Africa and provide the basis for conflicts and anger directed at the authorities on one hand, and at other people who happen to be conducting themselves in a way that is undesirable to the communities on the other. The national government needs to make policies that will address issues of poverty, unemployment, inequality, and poor service delivery.²⁴⁶ There has to be long-term and short-term plans that will be used as guides to implement the plans. There is need to develop and monitor the implementation of action plans to address internal control deficiencies so that the plan succeeds. This means that there is need to establish and communicate policies and procedures to enable and support the understanding and execution of internal control objectives, processes and responsibilities.

Since the majority of the slums dwellers slums are landless, there is need to consider them first in the land reform programme. Land reform needs to be done systematically and informed by the needs of the poor.²⁴⁷ The poor people need to be fully involved in dialogues that aim at reducing poverty. The state needs to create employment suitable for the needy people. Creation of employment will generate stable incomes for households as well as social participation and restoration of dignity and this may be the necessary conditions to substantially reduce mob justice.

4.8 Control of Community Policing and Vigilante Groups

Poverty stricken communities still depend on community policing and vigilante groups. Their presence cannot be wished away as they are necessary for crime control in the eyes of the poor communities. It is necessary that means of controlling these groups are put in place. As South Africa is fraught with community policing, neighbourhood watch groups and vigilante groups, it is unnecessary to completely

²⁴⁶ Bandeira and Higson-Smith 2011 *CSV*R and *SWOP* 19.

²⁴⁷ Matunhu 2011 *AJCJS* 102.

eradicate them. It is admitted that community policing initiatives are a necessary tool as it fills in gaps in law enforcement by the police.²⁴⁸ In fact, it is reported that a research carried out in the country suggests that “appropriately designed, community policing programmes can help reduce vigilantism”.²⁴⁹ This can be one of the strategies of incapacitating or at least controlling the vigilante groups as mob justice perpetrators. One condition is that if the vigilante groups cannot be banned completely the state needs to put stern measures to ensure that such groups operate within the boundaries of the law and that they do not turn into criminal organisations that carry out unlawful killings in the name of justice.²⁵⁰ This can be realised by educating community group members about the relevant laws, and giving instructions on what actions they are permitted and not permitted to ensure that their self-policing stays within lawful bounds.²⁵¹ This will also enhance accountability. There is also need for explicit mechanisms for dealing with mob justice incidents. It will also challenge the (largely erroneous) public opinion that the criminal justice system works in favour of criminals.²⁵² It is clear that just as the state is prohibited from using private actors to carry out vigilante killings it is also required to protect people from violent vigilantism carried out by privately formed groups.

4.9 Conclusion

Mob justice makes it necessary to confront some difficult but significant questions about the nature of the South African society and the efficacy of the state’s responses to the phenomenon of murder committed by mob justice perpetrators. The state’s failure to adopt effective measures to prevent unnecessary deaths takes the form of tolerating certain traditionally accepted practices as well as the promotion of impunity by failing to prosecute perpetrators.²⁵³ It is for this reason that concerted effort must be made to curb or reduce mob justice and that must involve more than general calls for improved police and court systems.²⁵⁴ All the stakeholders and every citizen must be involved in the fight against mob justice. Senior government

²⁴⁸ UN Secretary-General 2009 www.refworld.org/docid/4a9e2c1e0html 22.

²⁴⁹ UN Secretary-General 2009 www.refworld.org/docid/4a9e2c1e0html 22.

²⁵⁰ UN Secretary-General 2009 www.refworld.org/docid/4a9e2c1e0html 22.

²⁵¹ UN Secretary-General 2009 www.refworld.org/docid/4a9e2c1e0html 22.

²⁵² The Rapporteur “Understanding and Regulating Private Security in Ghana” 20.

²⁵³ Thompson and Giffard *Reporting Killings as Human Rights Violations Handbook*.

²⁵⁴ UN Secretary-General 2009 www.refworld.org/docid/4a9e2c1e0html 20.

officials should speak out against mob justice whenever such acts occur and ensure that every effort is made to thoroughly investigate the crime and hold the perpetrators accountable. The parliament should strengthen measures to address mob violence by introducing legislation that expressly criminalises it. Law enforcement agents need to take steps to increase the confidence of crime victims to report crimes to the police.

Citizens of South Africa seem to be unaware of the fact that they, as citizens of a democratic state, have a constitutional duty to respect the rights of other people. It is necessary to carry out human rights campaigns and reach out to all people in the country. Emphasis on non-participation is also important as it was noted that non-participation means not taking part in the actual activity or being a spectator. By walking away one would be "refusing to tacitly support the torture of an un-convicted person and encouraging other people to uphold human rights."²⁵⁵ Many people mistakenly think that criminals do not have rights. In reality all natural persons have rights by virtue of being human and every individual has a duty to respect the rights of others. Mob justice is unlawful, inhuman and a violation of constitutional and fundamental rights of countless victims. The victory can be won by a joint effort as it is apparent that the solution to end or reduce mob justice is left to both the government and society at large to increase policemen and form community policing networks to curb insecurity. An effective legal system should be put in place to revive people's faith in the justice system.

²⁵⁵ Global Conscience Initiative 2011 www.gci-cameroon.org 6.

Chapter 5: Conclusions and Recommendations

5.1 Introduction

The present study was designed as an attempt to determine the effect of mob justice on the right to life. The term “mob justice” in the present study encapsulates different illegal killings of people for various reasons, for instance, xenophobia, witchcraft, police brutality and so on. Thus, this chapter sets to summarise the findings of the research. The chapter will also ascertain whether the aims and objectives of the research were achieved and then finally give recommendations.

5.2 Summary of the Study

Having abolished the death penalty, the South African state has a continuing constitutional duty to create general conditions and systems protecting the right to life and specifically fulfil those conditions and use the systems in each individual case. South Africa prides herself in an elaborate Bill of Rights that makes the right to life inviolable. This study, thus, found out that the main basis of this phenomenon is the lack of public confidence in the legal and security authorities to properly handle suspected criminals. The situation is worsened by the public’s ignorance of the human rights that every South African citizen is bestowed with. This results in people taking law into their own hands. This quick fix creates further problems for the law as the victims of mob justice, like victims of crime, feel unprotected by the law. It is crucial that in order to eradicate mob justice there need to be a high level of understanding of the proximate causes of mob justice. Those in positions of authority must be held accountable for their misdeeds because failure to do so results in diminished responsibility, thus, even those who should be the advocates of law and human rights hide behind the veil of non-enforceability of human rights. Revival of community confidence in the justice system and in the police needs to be considered if there is progress to be made. Those in positions of trust must lead by example in upholding human rights. This will encourage the public in general to respect them as well.

5.3 Major Findings of the Study

The objective of this research was to investigate the factors underlying the growing incidence of mob justice in democratic South Africa against the backdrop of an elaborate Bill of Rights that makes the right to life inviolable and the possible implications of this phenomenon for legal and policy options. The violation of the right to life has continued to take place in increased magnitude in South Africa. The question that begs for an answer is whether or not reluctance on the part of the South African government could mean that it is indirectly complicit in the incidence of mob justice as sometimes it lacks a firm voice in denouncing the occurrences. Failure to denounce mob killings by relevant senior officials has been internationally confirmed as "a reasonable presumption that they have failed to take the measures required of them under international human rights law."²⁵⁶ It is a wonder if the same does not hold true in the South African situation.

This work has shown that the notion of mob justice emerged from a long history of violent apartheid resistance which was used to make the townships ungovernable and has bred a culture tolerant of citizens taking the law into their own hands. This culture has led to new threats compounding existing political and security challenges in South Africa. The study notes that those who perceive themselves to be victims of crime and feel let down by the law collectively, feel that they have or share a common feeling. This leads to their apathy and unwillingness to report their comrades involved in mob justice. There is need to realise that things are never going back to how they were and need for a cultural change. It is shameful to note that the majority of South Africans still believe in self-help. Much as the world respects the diverse cultural norms of the diverse people, it hereby stressed that exercising those norms should not infringe the rights of other members of the society. It is necessary to face up to and understand the ugly, painful and unbearable memories of the past demonstrated by mob justice and if left unresolved, will continue to haunt the South African society even in the future.

²⁵⁶ UN Secretary-General 2009 www.refworld.org/docid/4a9e2c1e0.html 22.

What the findings seem to suggest for the overall picture, is that the occurrence of mob justice is necessarily based on the coming together of a number of factors and that it is not *per se* entirely a product of violent apartheid resistance. Apparently the problem is a fractured society where the rule of law remains fragile with erosion of trust in the administration of criminal justice, high crime rate, the ineffectiveness or corruption of the police, and vigilantism all undermining the authority of the law. There is a crisis of unemployment and poverty. Other factors such as ever changing environment and increasing complexity and diversity have provided fertile soils for mob justice. With all this along with technological advances and societal upheavals, the parliament as the legislator, the courts as custodians of law and the police as enforcers of law have a lot to grapple with. The South African government must take affirmative measures to address these challenges in a wider perspective. Likewise other stakeholders should take charge of mitigating ways and try to curb the killings caused by ignorance and illusions.

South Africa, as a developing country, is beset with a plethora of problems such as unemployment and poverty. To deal with the problem of mob justice there should be prevention of crimes but one must pay heed to the fact that prevention of crimes needs multidisciplinary approaches including economic empowerment of the people, especially the poor. Poverty and unemployment facilitate practices that lead to the undermining of law as these two elements weaken the dignity of a person. The state, therefore, ought to make poverty and unemployment its key priorities. Where people's material needs are not met the likelihood is that they will construct their own order which may be in contradiction with that which the state seeks to uphold.

It is important to bear in mind that the arbiters and executors of law bearing the responsibility to enforce the law such as courts and police force are being criticised for failure to act in the best interest of the law. This has resulted in lack of faith in the criminal justice system and policing. The delivery of justice is wholly and exclusively vested in the judiciary. Therefore, rights can be secured or lost respectively depending on the strength or weakness of the judicial system. Members of the judiciary have the duty to promote and protect the rule of law and human rights. Another problem is that people are ignorant of the due legal process and thus, they kill suspects on bail. While this does not emanate from the courts, it is up to the

courts to take action against it and ensure the safety of the suspects. At the heart of this is the need to revive and maintain trust and public confidence in the reliability and integrity of the courts in South Africa.

It also emerged from this study that ineffective policing is emphasised by the presence of vigilante groups in the whole country. The presence of vigilante groups is hinged on the fact that there is high crime rate and general insecurity yet the law enforcement system is weakened by corruption and inefficiency. What worsens the situation is that this massive corruption is not hidden from the public eye which already has prejudicial but justified foregone conclusions on the nature and characteristic conduct of the state and its organs. Apparently there are high levels of impunity and thus, this heinous act continues unabated. In some communities the problem is fuelled by little or no policing at all. Lack of resources and funding, the remoteness of some of the towns and villages, the complicity of some police officers in gang related or crime syndicates and even fear of a specific part of a society by the police exacerbate the situation. In such a situation if there is a mob that gathers up and decides to be the police, prosecutor, court and judge, there is no one to disperse the crowd or prevent the incidence of mob justice.

The study notes that the presence of mob justice is a deplorable testament of the lawlessness and wickedness which is going on in South Africa. Mob justice undermines the rationality of the state which seeks the protection of all who reside within its borders. The rule of law is under threat by those who take the law into their own hands and disregard the structures that are in place to deal with the regulation of law and order²⁵⁷ in the society. It impinges on both personal and national security in that it endangers the lives of the citizens. It perpetuates a systematic model of lawlessness that, if not controlled, can lead to uncharacteristic societal behaviour like revolutions.

One of the more significant findings to emerge from this study is that mob justice is not only illegal but also morally reprehensible. It violates the right to life and its associated rights. It can either end life itself or it can grossly destroy and

²⁵⁷ Asiamah 2006

http://www.humanrightsinitiative.org/chrinews/2006/instant_justice_is_no_justice_chri_cries.

compromise the very essence of survival such that even if one is alive the quality of their survival is so dire that it can rightly be argued that their right to life has been compromised. This violation of the most basic of rights is a shame to the state and its citizens and impacts many more than the individual victims of mob justice. Family members and friends are forced to live with and bear this torture and the country at large is irrevocably impacted by this practice that is carried out in the name of common good.

This study has found that mob justice undermines human rights. Human rights are the foundation of democracy. South Africa is a democratic state with all its laws based on human rights. An implication of this is that human rights law is the law in its own right. Its purpose is not simply to set the standards and establish the appropriate institutions and procedures for the enforcement. What counts in the end is whether human rights are realised in practice and whether the set standards and institutions serve their purpose to bring about the changes required in order to make it possible for all to enjoy all human rights.

Human beings are endowed with rights and duties as between individuals, groups and society. The results of this research support the idea that the right to life is the most fundamental right of all human rights because there would be no point in having any other human rights if the right to life did not exist. It is inherent in every human being, thus, it is one of the rights protected in the international human rights legal instruments. The South African Constitution shelters it under section 11, in the elaborate Bill of Rights that makes it inviolable. It is the duty of the state to make comprehensive efforts as to ensure that it is, by no means, not supporting or encouraging mob killings directly or indirectly.²⁵⁸

The South African Interim Constitution expressly included *ubuntu* as one of its founding values. Even if the 1996 Constitution does not expressly include it, it is obviously one of the founding values that guide the courts in their decision making especially in cases of enforcing human rights. Taken together, these results suggest that it is a principle in its own right. Mob justice undermines the principle of *ubuntu*, a

²⁵⁸ UN Secretary-General 2009 www.refworld.org/docid/4a9e2c1e0.html 22.

principle recognised in South Africa as the core of all human rights. This principle stresses that man as a moral being has to live in a manner that is morally upright. He has a duty to care for others' wellbeing with the spirit of mutual support. Mob justice disregards the spirit of *ubuntu*, a value so intrinsic in the South African traditional way of life.

The escalation of mob justice incidents implies that legal sanctions to end it have failed and the law does not adequately address all parameters and the philosophy behind this social problem. Its presence is symptomatic of lawlessness within a society and a manifest reluctance on the part of the government to denounce it or enact specific laws that address the problem. It is a revelation of a weak criminal justice system where people always resort to acts of violence whenever they are faced with challenges or an unpopular public decision has been made or whenever someone commits a crime or when someone has diverse preferences to social norms. It is a grave signal of human rights violations where even non-criminal acts are considered as such.

Mob justice must come to an end and this is the answer to the devastating effect it has on the right to life. Ultimately it becomes clear that the South African society cannot progress and uphold human rights values when it is beset by the scourge of mob justice. It is the leading factor of denial of the right to life. The challenge is left with the government to widen its scope in addressing the problem of mob justice. It has to take a number of initiatives to ensure that human rights are well administered and improved to ensure that human rights are properly realised by every South African and all those who live in South Africa.

5.4 Recommendations

Initiatives to protect the rule of law and assert the authority of the state are important steps in the struggle to stabilise democracy in post-apartheid South Africa. The study has highlighted the need for a longer-term vision for the development of standards and regulations. There need to be a mechanism for constant improvement not just when mob justice crisis is a current or prevailing matter. This will give the state the

ability to handle change, risk and uncertainty and to create visions for courts and the police force.

It is possible to have a society wherein the people have complete faith that those tasked with the protection of the society fulfil their mandates with due diligence and with due regard to the rights of those concerned. It is possible to leave in a society wherein there is no fear that one's life might be taken because of who they are, what they stand for, their sexual preference or their nationality. Mob justice threatens the very thin and volatile fabric of society.²⁵⁹ Once a society knows that they can get away with mob justice there will no longer be scattered incidents of the phenomena but regular incidents that threaten the all-important right to life. This would, unfortunately grossly undermine and threaten the rule of law without which there is no stability.

If the right to life is to be preserved and if the rule of law is to prevail there must be action rather than passivity and lethargy. There is a positive duty on the state to ensure the preservation and protection of the right to life. Furthermore, the state is tasked with the responsibility to govern those within its territory. This leads to the unassailable conclusion that the state must act to ensure that mob justice is reduced and ultimately eradicated. The following recommendations could be used to ensure that our streets and societies become safer. They are presented in point form.

- a) There is an urgent need to pump in funds in the ministry of police so that there is a bigger and regular police presence in our communities, more so, in those communities that are remote and where there is a prevalence of mob violence. It cannot be argued that only through financial muscle can this be achieved. This ultimately revolves around the state policy as well. Therefore, the reinforcement of the police in remote areas and the provision of fund to support such deployments can go a long way in ensuring that every part of the country is policed adequately.

²⁵⁹ Asiamah 2006

http://www.humanrightsinitiative.org/chri/news/2006/instant_justice_is_no_justice_chri_cries.

- b) The possible creation of a legislation that specifically tackles the incidence of mob violence might be a route the parliament must take. Alternatively the doctrine of common purpose must be used to its full effect. This doctrine regulates crimes that are committed by groups of people. Furthermore, there is the possibility of an individual being charged as accessories both before and after the fact. Therefore, these common law doctrines can either be used to their full purpose or they can be legislated on and form part of legislation. It is imperative that when the state embarks on law and order reform programmes to reduce crime and promote accountability it should directly address this phenomenon.²⁶⁰ Besides it is the state's primary duty to secure the rights to life by enacting effective criminal provisions that deter the commission of offences against persons and this can be realised by setting up law enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions.
- c) As indicted earlier, in most cases police officers themselves are caught up in crimes.²⁶¹ This almost always happens in the sight of the society itself. It is recommended that "instead of acting as an accomplice in such misdeeds, it would be better if official authorities discourage all form of arbitrary and summary justice anywhere in the country."²⁶² The constant arrest and appearance in court of those entrusted with promoting the law is a massive negative factor in the fight against mob violence and it ultimately undermines the effort and dedication of those committed to the cause. Therefore, a better training for the police is necessary so that there is efficiency in the manner in which they carry out their duties. One of the causes of mob justice, as explained earlier, is lack of faith in the policing system itself. Training updates are crucial as methods of operations and tactics continue to evolve both internationally and domestically. There is an expression that people are not what they think but what they do. If a person entertains a bad thought and feelings it is not an offence but if he acts upon that thought and those feelings, his or her conduct becomes evil. The evil conduct is a bad behaviour that

²⁶⁰ UN Secretary-General 2009 www.refworld.org/docid/4a9e2c1e0.html 22.

²⁶¹ SAPA 2013 <http://www.polity.org.za/print-version/1-448-police-employees-have-criminal-records>.

²⁶² Iqbal *Supreme Court of Pakistan Press Registrar* 5.

needs to be fought. Therefore, if policing is effective then society will have more faith in them and will not take matters into their own hands.

- d) Awareness of the programmes that are in place to protect whistle-blowers and witnesses to any incidents of mob justice is needed. No one will come out if they know that the group will retaliate or hunt for them because of the information they might have provided. However, this ties in with the need for effective policing. For instance, if the public lacks faith that the police will protect it from criminals it will be difficult for an individual to trust the police to protect him or her when he or she gives information regarding a mob incident. It only goes to show that the problem is systematic.
- e) There is need for better cooperation between the prosecution authority and police services. Police officers need to strengthen their investigative skills if they are to work efficiently and this will certainly help the effectiveness of the prosecution and sentencing of mob justice incidents. Furthermore, the knowledge that there is a possibility of severe punishment might also be a preventative and a deterrent measure. Therefore, there must be a reform in the police, national prosecution authority and the courts as well. The three are interlinked and any successful and effective conviction is dependent on a proper prosecution that relies on an appropriate and accurate investigation
- f) The government must focus more on solving the root problems, that is, service delivery. This means that policy considerations should include ways to limit the incidence of mob justice. It is suggested that it should be a governmental agenda to address the problems of mob justice. The government needs to undertake or fund systematic studies of the phenomenon which will help in making well informed decision in trying to oust this life threatening menace.²⁶³

²⁶³ UN Secretary-General 2009 www.refworld.org/docid/4a9e2c1e0.html 23.

- g) The obvious reasons for occurrence of mob justice could be unemployment and lack of economic opportunities. It is acknowledged that the government also faces financial and logistical challenges but if the people are occupied they are less likely to be involved or standby and watch mob justice. Community empowerment and job creation would ensure that people are off the streets and that society is constantly engaged.
- h) Mob justice thrives in a society where violence is prevalent. As a result it is a worthwhile exercise for the government to embark on nationwide campaigns for the purposes of raising awareness with regards to human rights and also with regards to violence. This would strike at the heart and core of mob justice, that is, violence and flagrant disregard for human rights and the rule of law. The campaigns would also help in spreading the idea and principle that participation and standing by whilst watching is equal to committing the offence. Above all, the campaigns may give people a fuller comprehension of the value of human rights especially the right to life.
- i) The government and human rights groups must make efforts to educate people on the functions, processes and proclivities of the justice system. With the way South Africa is polarised along rural and urban life and also rich and poor there are chances that most people have no idea what bail is and why it is there. Therefore, it is very possible that a section of a society might fail to understand why someone they have seen with illicit drugs or has seen actually stealing might be back in society and live with them whilst the matter has not yet been resolved. This only indicates that some do not understand what it means to be innocent until proven guilty and that bail can be given when one applies. Education and awareness must therefore be taken seriously by the government and non-governmental organisations.
- j) The traditional justice system must also be quickly resurged so that it plays a complementary role to the formal justice system. Currently the Traditional Courts Bill tabled in 2008 has not been enacted and is still lying around in parliament. There is need to have it promulgated so that there is also a formal regulation of the traditional justice system. The impact of this is that society

can see justice and dispute resolution being dispensed off in an amicable way and in ways they all understand. That way, a sense of ownership of the process and responsibility can help in desisting from engaging in self-help.

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