

Chapter 49

Sentencing and Punishment

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49.1 Introduction

The Constitution¹ assumes that the State may punish criminal offenders. Section 12(1)(e), for example, sets a relatively high threshold. It allows all punishment, save that which results in individuals being 'treated or punished in a cruel, inhuman and degrading way'.² While s 12(1)(e) creates a relatively permissive framework for punishment, a wide array of other constitutional constraints exist. So even where

¹ The Constitution of the Republic of South Africa Act 108 of 1996 ('Final Constitution' or 'FC').

s 12(1)(e) is not engaged, the State may punish individuals only by means of sentences imposed by the courts following criminal trials that are subject to rigorous constitutional requirements.³ This chapter will explore how sentencing and punishment are shaped by the fundamental rights recognised by Chapter 2 of the Constitution.

Often, lost among the welter of inquiries into the limits of the State's penal powers is whether the State has a positive constitutional duty to criminalise certain forms of conduct and to ensure that they are punished by appropriately severe penalties. The traditional view is that the State has a wide discretion to decide how to defend the constitutional rights of its citizens. Punishing offenders through the criminal justice system is but one of the options available to it.⁴ However, this flexible view of criminal sanctions is increasingly being challenged by the victims' movement. The movement goes to great lengths to point out that the protection of a range of individual rights is normally achieved through the criminal justice system and that, for this modality to be effective, it must be backed by adequate criminal sanctions.⁵ South African courts have signalled their acceptance of, though perhaps not fully embraced, the proposition that positive, constitutionally derived duties with respect to criminal sanctions may be placed on the State.⁶

The courts have also indicated that such duties may extend to sentencing and punishment. *Azanian People's Organisation (AZAPO) & others v President of the Republic of South Africa & others*⁷ can be read as authority for the proposition that, other than in the exceptional circumstances of the South African transition to democracy, the family of a deceased person would have a right to seek to

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ensure that the wrongdoers are properly prosecuted and punished. In other jurisdictions such a right has been recognised. In *Osman v United Kingdom* the European Court of Human Rights commented that the State is enjoined by Article 2(1) of the European Convention on Human Rights 'not only to refrain from the

- 2 See also the reference to sentenced prisoners in FC s 35(2). The provisions of the Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution' or 'IC') corresponding to FC ss 12(1)(e) and 35(1) were IC ss 11(2) and 25(1) respectively.
- 3 See F Snyckers and T Le Roux 'Criminal Procedure: Rights of Detained, Arrested and Accused Persons' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 51.
- 4 For a useful general discussion of the question, 'Kann der Gesetzgeber verpflichtet sein rechtsgüterverletzungen zu bestrafen?' see C Roxin *Strafrecht Allgemeiner Teil* (Vol I 1994) 22-23.
- 5 For a discussion of the human rights of victims of crime in the context of sentencing generally, see B Emmerson & A Ashworth *Human Rights and Criminal Justice* (2001) Chapter 18.
- 6 *Carmichele v Minister of Safety and Security & another* 2001(4) SA 938 (CC), 2001 (10) BCLR 995 (CC).
- 7 1996 (4) SA 671 (CC), 1996 (8) BCLR 1015 (CC). See also *S v Makwanyane & another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) ('*Makwanyane*'). Chaskalson P recognised that the State is obliged to take action to protect human life and held that 'those who commit violent crime should be met with the full rigor of the law'. *Ibid* at para 117. This passage provides support for the proposition that failure to sanction such action by adequate punishment would be a dereliction of duty on the part of the State.

intentional and unlawful taking of life, but also to take appropriate action to safeguard the lives of those within its jurisdiction'.⁸ The Court noted the '*primary duty* [of the State] to secure the right to life by putting in place *effective criminal law provisions* to deter the commission of offences against the persons backed up by law enforcement machinery for the prevention, suppression and *sanctioning of breaches* of such provisions'.⁹

It is not only the right to life that the State has a duty to protect through the use of criminal sanctions. The Constitutional Court has recognised that the rights of the child should be protected by forceful application of maintenance laws. Such laws may be enforced by contempt of court provisions resulting in the imprisonment of defaulters on maintenance payments.¹⁰ Similarly, the European Court of Human Rights has ruled that children need to be protected by a reformulation of the criminal law to outlaw more effectively assaults in the guise of parental chastisement.¹¹ Most of these developments deal with an obligation to criminalise behaviour rather than with appropriate sanctions. As a result, the impact such changes will have on constitutional requirements for sentencing law is not yet clear.

A more common question is the extent to which the imposition and the implementation of punishment is restricted by the individual rights entrenched in the Bill of Rights.¹² The analysis of this question forms the bulk of this chapter.

49.2 The imposition of punishment

In order to engage questions about the constitutional constraints on the power of the State to punish, one must consider briefly the existing legal framework for sentencing decisions. Historically, exceptionally wide discretion has been granted to courts imposing sentence. Even today no general legislation prescribes the approach to sentencing that courts must adopt.

The restrictions on the exercise of judicial sentencing discretion that do exist are imposed by different means. For many crimes there are statutorily prescribed maximum sentences. More controversially, there are also prescribed minima. For many common-law offences, however, there are no direct statutory limits. The overall range of discretion for such offences is substantial.

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Indirect statutory restriction is achieved by limitations on the punishment jurisdiction of specific courts. The High Court, which has no general restrictions on its punishment jurisdiction, can impose any sentence that it regards as appropriate. Lower courts have sentencing jurisdictions prescribed and limited by statute. While

8 See *Osman v United Kingdom* (2000) 29 EHRR 245 at para 115.

9 Ibid (emphasis added).

10 See *Bannatyne v Bannatyne & another* 2003 (2) SA 363 (CC), 2003 (2) BCLR 777 (CC).

11 See *A v United Kingdom* (1999) 27 EHRR 611.

12 The protection of these rights is constrained by s 36, the limitation clause. For further discussion, see S Woolman and H Botha 'Limitations' in Woolman et al *Constitutional Law of South Africa* supra (2nd Edition, OS, July 2006) Chapter 34.

our jurisprudence has attempted to develop sentencing principles within this broad discretionary framework, it is relatively unformed and has only a limited impact on the actual exercise of sentencing discretion.¹³ Nevertheless, sentencing decisions are subject to appeal. Appellate courts not only pronounce on the principles of sentencing and whether they have been observed but also consider and sometimes overturn individual sentences. In the process appellate courts have developed some admittedly vague rules that allow them to intervene when sentencing courts are found to have misdirected themselves or imposed sentences that the appellate courts regard as unreasonable.¹⁴

Constitutional norms add a new dimension to debates about punishment.¹⁵ They address themselves in the first instance to the question of whether the legislative framework of the sentencing system is constitutionally valid. They can also be applied directly to sentencing decisions in individual cases. While constitutional norms apply both to the sentencing process and to substantive sentencing law, most attention has been focussed on the latter. However, in *S v Dzukuda & others; S v Tshilo*,¹⁶ the Constitutional Court stressed the constitutional importance of fair trial rights. It held that, in relation to sentencing, the right to a fair trial requires, amongst other things, 'a procedure which does not prevent any factor which is relevant to the sentencing process and which could have a mitigating effect on the punishment to be imposed from being considered by the sentencing court'.¹⁷ Both procedural and substantive sentencing practices need to be measured against such general constitutional standards such as legality, equality, proportionality and the protection of human dignity.

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(a) Legality

In order for there to be even the possibility of the equal protection of the law guaranteed by s 9 of the Constitution, the law has to be reasonably clear. In criminal law this requirement is captured by the trite common-law proposition, *nulla poena sine lege*.¹⁸ The Constitution itself now entrenches a general principle of legality.¹⁹ This principle demands that legal powers only be exercised under the law and

13 See E du Toit *Straf in Suid-Afrika* (1981) 446-8. See also M A Rabie, S A Strauss & M C Mare *Punishment: An Introduction to Principles* (5th Edition, 1994) 285-300; D P van der Merwe *Sentencing* (1991); S S Terblanche *The Guide to Sentencing in South Africa* (1999) 153-202.

14 Formulations of the latter grounds of intervention are often couched in particularly vague terms, such as 'inducing a sense of shock' or 'being startlingly inappropriate': See Terblanche (supra) at 495 (and the case and sources cited there.)

15 See N Steytler *Constitutional Criminal Procedure* (1998) 403-438.

16 See *S v Dzukuda* 2000 (4) SA 1078 (CC), 2000 (11) BCLR 1252 (CC) ('*Dzukuda*').

17 *Dzukuda* (supra) at para 12. *In casu* the Court held that the procedure created by s 52 of the Criminal Law Amendment Act 105 of 1997, in terms of which an offender who had been tried and convicted by a regional court was referred for sentence in the High Court, was not unconstitutional. The procedure did not create conditions in which the offender's right to a fair trial in the imposition of sentence could not be met. The constitutional right to a fair trial also plays a role in deciding whether an accused person should be informed in the charge sheet of any enhancement of sentencing jurisdiction that the court may use in the event of a conviction. See *S v Legoa* 2003 (1) SACR 13 (SCA) at para 20; *S v Ndlovu* 2003 (1) SACR 331 (SCA) at para 11.

according to constitutionally appropriate procedures. The Constitution also recognises explicitly the right of accused persons not be convicted, or by extension punished, for acts or omissions that were not offences at the time of their commission.²⁰ Furthermore, it guarantees specifically the right of accused persons 'to the benefit of the least severe of the prescribed punishments if the prescribed punishment of the offence has been changed since the time that the offence was committed and the time of sentencing'.²¹

In respect of punishment, the legality principle has at least two implications. First, penalties themselves should be reasonably precisely defined. Secondly, the imposition of such penalties should be governed by clear legal rules, which themselves should meet the requirements of the principle of legality.

(i) Defining penalties

The definition of specific forms of punishment may at first glance appear not to be a problem in South Africa. Whatever the constitutional shortcomings of the sentence of death or of corporal punishment, their ambit was clear. Fines, too, are unambiguous in their penal content. At a conceptual level the same applies to sentences of imprisonment. Since the abolition of imprisonment with hard labour,²² the length of time to be served has been the only factor that distinguishes one sentence of imprisonment from another.

Correctional supervision is far more problematic in this regard.²³ Although correctional supervision is formally defined by s 1 of the Criminal Procedure Act, that section refers only to a community-based punishment in accordance with the 1959 Correctional Services Act.²⁴ More importantly, s 84 of the Correctional Services Act, provides that:

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every probationer shall be subject to such monitoring, community service, house arrest, placement in employment, performance of service, payment of compensation to the victim and rehabilitation or other programmes as may be determined by the court or

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- 18 See E M Burchell, P M A Hunt & J M Burchell *South African Criminal Law and Procedure* Vol I (3rd Edition, 1997) 28ff.
- 19 See *Pharmaceutical Manufacturers Association of SA & another: In re Ex parte President of the Republic of South Africa & others ('Pharmaceutical Manufacturers')* 2000 (2) SA 674 (CC), 698D-E, 2000 (3) BCLR 241 (CC) at para 50. See also FC s 1(c).
- 20 FC s 35(3)(l).
- 21 FC s 35(3)(n). See Steytler (*supra*) at 376-9.
- 22 A punishment of hard labour, under the Criminal Law Amendment Act 16 of 1959, would be subject to direct constitutional challenge in terms of FC s 13, which prohibits forced labour.
- 23 For a discussion of this issue in an international context, see D van Zyl Smit 'Legal Standards and the Limits of Community Sanctions' (1993) 1 *European Journal of Crime, Criminal Law and Criminal Justice* 309, 321.
- 24 Act 8 of 1959. This Act was still in force in October 2003, as the corresponding provisions of the new Correctional Services Act 111 of 1998 had not yet been brought into force.

the Commissioner [of Correctional Services] or prescribed by or under this Act, and to any such other form of treatment, control or supervision, including supervision by a probation officer, as the Commissioner may determine after consultation with the social welfare authority concerned in order to realize the objects of correctional supervision.

The implication is that when someone is sentenced to correctional supervision any of the varying forms of community-based punishment mentioned may be imposed by a court. A court may also impose 'other programmes'. Moreover, the Commissioner of Correctional Services may add 'any other form of treatment, control or supervision' that will realise the objects of correctional supervision. Because the content of some of these forms of correctional supervision is so unclear, a large number of punishments will not be defined precisely enough to meet the standards of legality.

There are various ways to ensure that standards of legality are met. One solution was suggested by Kriegler AJA in *S v R*.²⁵ In that case the judge recognised the perilous position of the person subject to correctional supervision:

Tydens die *uitdiening* van sy straf is die toesiggeval in groot mate uitgelewer aan die amptenare van die Departement van Korrektiewe Dienste; om die *bepaling* daarvan ook aan hulle oor te laat, sou pligsversaking wees.²⁶

The solution was for the sentencing court to determine the content of the sentence of correctional supervision and for the correctional authorities to adhere to the sentence.²⁷ This solution meets the objections to leaving an unstructured and overboard discretion to the correctional authorities. However, it does not constrain the courts themselves. The question of whether the requirements of legality are met where courts have so very wide a sentencing discretion is usually posed in respect of the length of sentence, for example, a term of imprisonment. However, it has equal force in instances where the sentencing court is asked to determine the content of the sentence itself: what, for example, correctional supervision should entail in a particular case.²⁸

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One way in which this latter difficulty can be overcome is for the legislature to provide for a limited number of community-based sentences and to define their content relatively closely. In practice this may be done by a combination of primary and secondary legislation.²⁹ For example, an Act of Parliament may specify

25 See *S v R* 1993 (1) SA 476 (A), 1993 (1) SACR 209 (A).

26 Ibid at 492G: 'While *servng* his punishment the person under supervision is to a large extent subject to the Department of Correctional Services; also to leave the *determination* of it to them would be dereliction of duty' (my translation).

27 Ibid at 492A. See also *S v Tsanshana* 1996 (2) SACR 157 (E), 160g-h. In *S v Sekoboane* 1997 (2) SACR 32 (T), the court stressed the necessity of precisely formulated conditions, but at the same time it was noted that, by analogy with parole, there could be no objection to allowing the Commissioner to mitigate the conditions of sentence, as this could only be to the advantage of the offender and better serve his or her rehabilitation.

28 It is an established rule of South African law that courts cannot directly create new forms of punishment. See Du Toit *Straf in Suid-Afrika* (supra) at Chapter 15.

29 It is noteworthy that s 36(1) of the Final Constitution allows rights to be limited by 'law of general application' rather than and not only by 'a law of general application', ie an Act of Parliament, as is the case in article 19 of German Basic Law.

community service as a sentence that may be imposed and regulations may lay down what form it should take in order to ensure that it is not unduly punitive or unduly lenient.³⁰ Alternatively, the primary legislation could stipulate a closed list of community sentences and describe their content.³¹ It therefore does not follow automatically that all community sentences are open to constitutional challenge.

There may be serious doubts, however, whether current legislation defines community sentences precisely enough to meet the constitutional requirement of legality. This concern applies particularly to 'programmes determined by the court'. However, it may also apply to other forms of community sentence mentioned in s 84 of the Correctional Services Act.

Courts also have a very wide discretion to suspend sentences on condition that certain requirements are met. The question that the courts face is: what may be regarded as an 'acceptable penal content' for such sentences or conditions of suspension? The answer is again related to human dignity and the prohibition of degrading punishment. The sanction should be 'of the kind which can be endured with self-possession by a person of reasonable fortitude'.³² Offenders should not be publicly humiliated³³ or compelled to do or not do things that undermine their dignity as human beings.³⁴

(ii) Sentencing guidelines

In most legal systems the sentence to be imposed for a specific offence is determined by a court within a range set by the legislature. The wider the range, the greater scope there is for the sentencing court to exercise discretion and the less certainty the individual offender has about the sentence to expect for a particular offence. Very wide ranges may be justified by the argument that the narrower the

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range, the greater the risk that a sentence which is disproportionate to the gravity of the offence and the guilt of the individual offender may have to be imposed. The question arises, however, whether the absence of explicit sentencing standards meets the requirements of the principle of legality.

As we have seen, South African sentencing law has traditionally allowed courts a wide discretion in selecting appropriate sentences. A direct challenge to a sentence on the basis that the punishment was not specified in advance is unlikely to succeed

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- 30 See A Ashworth *Sentencing and Criminal Justice* (3rd Edition, 2000) 262-99 for a discussion of developments in England in this regard.
- 31 Chapter VI of the Correctional Services Act 111 of 1998 provides much more detail, although it also needs to be complemented by regulations. This chapter of the Act was not in force by October 2003.
- 32 A von Hirsch 'The Ethics of Community-Based Sanctions' (1990) 36 *Crime and Delinquency* 162, 167.
- 33 For example, be compelled to drive a car with a notice declaring that the driver was convicted of drunken driving or to confess publicly to having remorse for a crime.
- 34 For example, some suspensive conditions would require that women not fall pregnant as a condition of probation; see S L Arthur 'The Norplant Prescription; Birth Control, Woman Control or Crime Control?' (1992) 40 *UCLA LR* 1, 101.

on the grounds of lack of legality alone. In the future, however, when consideration is given to the need for sentencing guidelines, or for another sentencing framework that reduces discretion and therefore the risk of arbitrariness, the requirements of legality may well influence legislation.³⁵

(b) Equality

Legislative guidelines for sentencing are subject not only to the requirement of legality but also to the related requirements of equality before the law and equal protection of the law.³⁶ One of the primary motivations in the campaign for legislation to reduce or even eliminate the discretion of sentencing courts in the United States of America was a desire to ensure that factors irrelevant to the sentence were not taken into account and thus to ensure equality in the imposition of sentence.³⁷

In the context of the death penalty, the US Supreme Court has wrestled with the question of what legislative framework the Constitution requires in order to ensure equal protection of the law. As the US Supreme Court has never found the sentence of death to be inherently unconstitutional, particular attention has been paid to the question of equal protection. The jurisprudence that has emerged in this context is of wider significance, as it can be applied to sentences other than the death penalty. It is particularly salient in South Africa because of the similarity of the constitutional provisions ensuring equal protection of the law.³⁸

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In *Furman v Georgia*,³⁹ the US Supreme Court set aside a death sentence on the basis that it was cruel and unusual only in the narrow sense in that it had been imposed according to a procedure that allowed too much discretion to the sentencers. In short, the procedure seemed subject to an element of arbitrariness. Equal protection of the law could not be ensured without clear standards for imposition of the death penalty.⁴⁰

35 For such a proposal, see South African Law Commission Report (Project 82) Sentencing (A New Sentencing Framework) (2000); S S Terblanche 'Sentencing guidelines for South Africa: Lessons from elsewhere' (2003) *SALJ*. It is a moot point whether the legislature must necessarily grant wide sentencing discretion, or indeed any sentencing discretion at all, to the courts. See *Mistretta v US* 488 US 361, 109 S Ct 647 (1989) (US Supreme Court held that the branches of government have an overlapping responsibility for sentencing and that therefore the determination of sentencing guidelines by a commission which included judges, rather than by the courts directly, was not an unconstitutional division of powers.)

36 Among other things, the right to equal protection of the law requires that 'in the administration of criminal justice no different or higher punishment should be imposed upon one than such is prescribed to all for like offences'. See *Barbier v Connolly* 113 US 27, 31, 5 S Ct 357 (1884); *Truax v Corrigan* 257 US 312, 334-5, 42 S Ct 124 (1921).

37 A von Hirsch, K A Knapp & M H Tonry *The Sentencing Commission and its Guidelines* (1987).

38 The phrase 'equal protection and benefit of the law' is used in s 9(1) of the South African Constitution and 'equal protection of the laws' in the Fourteenth Amendment to the Constitution of the United States of America.

39 See *Furman v Georgia* 408 US 238, 92 S Ct 2726 (1972).

Equal protection of the law could not be ensured by the opposite extreme either: by legislation providing for mandatory death sentences when certain specified 'objective' criteria were present. In 1978, therefore, the same Supreme Court ruled in *Lockett v Ohio* that a procedure that prevented a sentencer from considering every possible mitigating factor would be unconstitutional.⁴¹ Since then the hunt has been on for a legislative framework for the imposition of capital punishment that would ensure equality by avoiding the arbitrariness of a totally unstructured discretion, whilst at the same time allowing sufficient flexibility to ensure that all the appropriate information is placed before the court.⁴²

More difficult questions are raised by the claim that inequalities in sentencing are a function of systemic or structural bias. Such structural biases complicate legislative interventions. Prominent examples are American cases in which it has been suggested that the criminal justice system in a particular state is racially biased as a whole, and therefore statistically more likely to produce the death penalty for blacks than for whites, or more subtly, for the killers of whites than the killers of blacks. In *McCleskey v Kemp*,⁴³ this argument was rejected by the US Supreme Court on the basis that bias would have to be shown in a particular case and that evidence of systematic bias was insufficient. The view adopted by the minority, that systematic bias meant that a particular trial could not be fair, could well be resurrected in South Africa, where the limited evidence available suggests a similar bias, at least where the race of victims is concerned.⁴⁴

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(c) Proportionality

It is often said that the power of the State to create punishments is limited by the constitutional principle of proportionality. The principle that 'the punishment must fit the crime' is well established in South African sentencing law. However, the Constitution itself does not refer to this principle explicitly. Nevertheless, proportionality in sentencing is clearly required by the Constitution. In *S v*

40 See *Makwanyane* (supra) endorsing the reasoning of *Furman* (supra) at paras 41–56 (Chaskalson P), at paras 153–66 (Ackermann J) and at paras 273–4 (Mahomed J). See also *S v Williams & others* 1995 (3) SA 632 (CC), 1995 (7) BCLR 861 (CC) at paras 45 and 89 (Langa J stressed the arbitrary element in the severity of the pain inflicted by the execution of a sentence of whipping); *R v Offen*; *R v McGilliard*; *R v McKeowen*; *R v Okwuegbunam*; *R v S* [2001] 1 WLR 253 (the Criminal Division of the Court of Appeal for England and Wales recognised the prohibition on arbitrariness, in addition to the requirement of proportionality. Both had constitutional status, as they were derived from the European Convention on Human Rights as incorporated into English law by the Human Rights Act of 1998.)

41 See *Lockett v Ohio* 438 US 586, 98 S Ct 2954 (1978).

42 See L S Sheleff 'The Arbitrary "Arbitrary" Rule' in *Ultimate Penalties* (1987) 83–116.

43 See *McCleskey v Kemp* 481 US 279, 107 S Ct 1756 (1987).

44 See *Makwanyane* (supra) at para 48, n 78 (Chaskalson P commented on the way in which race and class affect the operation of the criminal justice system.) See also M C J Olmesdahl in Olmesdahl & N C Steytler (eds) *Criminal Justice in South Africa: Selected Aspects of Discretion* (1983) 142–8, 201–4.

Makwanyane Chaskalson P identified proportionality as a factor to be considered when deciding whether a particular punishment was cruel, inhuman or degrading.⁴⁵

In his analysis of proportionality or sentencing in the German Constitution, Stree has explained:

The legislator has to determine penalties which stand in a just relationship to the gravity of the offence and to the blameworthiness of the offender. This principle is derived from the general principles of the Constitution, particularly the *Rechtsstaatsprinzip*. It is, however, quite justifiably also deduced from art 1. I of the Basic Law (inviolability of human dignity). For an excessively heavy or gruesome punishment or minimum punishment amounts to a disregard of the human personality and therefore infringes against art 1. I of the Basic Law. To some extent further support for the proposition that punishment must be oriented to the degree of blameworthiness can be derived from the equality principle contained in art 3. I of the Basic Law and the related requirement of material justice. However, it is questionable whether such a far-reaching general proposition which binds the legislator can be derived from art 3. I of the Basic Law.⁴⁶

There is also international support for the principle of proportionality in sentencing.⁴⁷ The Recommendation by the Council of Europe on Consistency in Sentencing has stipulated:

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Whatever rationales for sentencing are declared, disproportionality between the seriousness of the offence and the sentence should be avoided.⁴⁸

A constitutional principle of proportionality in sentencing can be deduced from the South African Constitution by a similar process of analysis to that adopted in German law. The principle of the *Rechtsstaat* is also part of South African constitutional law,

45 See *Makwanyane* (supra) at para 94. The provision in the Canadian Constitution outlawing cruel and unusual punishment or treatment has been interpreted as outlawing both punishments that are inherently contrary to human dignity and punishments that are grossly disproportionate to the gravity of the offence. There is of course a link between the two, as a disproportionately heavy punishment may be seen as denying the human dignity of an offender. P W Hogg states that 'it is clear that the phrase [cruel and unusual] includes two classes of punishment: (1) those that are barbaric in themselves, and (2) those that are grossly disproportionate to the offence'. *Constitutional Law of Canada* (3rd Edition, 1992) 1130. See also *Weems v United States* 217 US 349, 371 30 Sct 544 (1910) (the court referred to *O'Neil v Vermont* 144 US 323, 12 Sct 693 (1892) and held that the prohibition against cruel and unusual punishments operated also 'against all punishments which, by their excessive length or severity, are greatly disproportionate to the offences charged). The prohibition against legislative disproportionality is undisputed in death penalty cases in the United States of America. It is also recognised by the US Supreme Court in cases involving imprisonment, although it has been interpreted very narrowly in recent Supreme Court decisions. See *Ewing v California* 123 Sct 1179 (2003), *Lockyer v Andrade* 123 Sct 1166 (2003), *Harmelin v Michigan* 111 Sct 2680 (1991). For a more generous formulation of the test, see *Solem v Helm* (1983) 463 US 277.

46 W Stree *Deliktsfolgen und Grundgesetz* (1960) 8 (my translation). See also the decision of the German Federal Constitutional Court of 9 March 1994 in (1994) 24 *Neue Juristische Wochenschrift* 1577.

47 See in general D van Zyl Smit 'Constitutional Jurisprudence and Proportionality in Sentencing' (1995) 3 *European Journal of Crime, Criminal Law and Criminal Justice* 369-80.

48 Recommendation No R (92) 17 of the Committee of Ministers of the Council of Europe, which was adopted on 19 October 1992. The recommendation explicitly takes into account arts 3, 5 and 6 of the European Convention on Human Rights and Fundamental Freedoms.

while human dignity is explicitly protected by s 10 of the South African Constitution. However, the South African Constitutional Court has used the prohibition on cruel, inhuman and degrading punishment and treatment in s 12(1)(e) of the Constitution as the key to a classic statement of the rationale for recognising the principle of constitutional proportionality in sentencing. In *S v Dodo* Ackermann J wrote:

The concept of proportionality goes to the heart of the inquiry as to whether punishment is cruel, inhuman or degrading, particularly where, as here, it is almost exclusively the length of time for which an offender is sentenced that is in issue . . . Section 12(1)(a) [of the Constitution of the Republic of South Africa] guarantees, amongst others, the right 'not to be deprived of freedom . . . without just cause'. The 'cause' justifying penal incarceration and thus the deprivation of the offender's freedom is the offence committed. 'Offence', as used throughout in the present context, consists of all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender. In order to justify the deprivation of an offender's freedom it must be shown that it is reasonably necessary to curb the offence and punish the offender. Thus the length of punishment must be proportionate to the offence.

To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity. Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end. Where the length of a sentence, which has been imposed because of its general deterrent effect on others, bears no relation to the gravity of the offence (in the sense defined in para [37] above), the offender is being used essentially as a means to another end and the offender's dignity assailed. So too where the reformatory effect of the punishment is predominant and the offender sentenced to lengthy imprisonment, principally because he cannot be reformed in a shorter period, but the length of imprisonment bears no relationship to what the committed offence merits. Even in the absence of such features, mere disproportionality between the offence and the period of imprisonment would also tend to treat the offender as a means to an end, thereby denying the offender's humanity.⁴⁹

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Ackermann J goes on to qualify these general propositions by emphasising that 'it would not be *mere* disproportionality between the sentence legislated and the sentence merited by the offence which would lead to a limitation of the s 12(1)(e) right, but only *gross* disproportionality'.⁵⁰

(i) Mandatory minimum sentences

The recognition of a doctrine of proportionality derived from the Constitution raises several practical questions regarding South African sentencing legislation. One of these is whether legislation may prescribe mandatory minimum sentences for certain offences. A wide-ranging survey of judicial decisions on this question in the Commonwealth and the United States suggests that courts in these jurisdictions are

49 See *S v Dodo* 2001 (3) SA 382 (CC), 403-4, 2001 (5) BCLR 423 (CC), 2001 (1) SACR 594 (CC) ('*Dodo*') at paras 37, 38.

50 *Dodo* (supra) at para 39. The meaning of the distinction between 'mere' and 'gross' disproportionality is difficult to discern and Ackermann J does not give any clear indication of how it should be understood.

reluctant to declare that all mandatory minimum sentences are inherently unconstitutional.⁵¹

Of particular relevance to South Africa in this regard are the decisions of the Supreme Court of Canada.⁵² In Canada, as in South Africa, courts have been allowed an exceptionally wide discretion in deciding on sentence. In *Smith v The Queen*,⁵³ the Court was asked to consider the constitutionality of a mandatory minimum seven-year sentence for importing narcotics into Canada. The majority held that if a hypothetical case could be imagined for which the minimum sentence would be grossly disproportionate, the legislation that created the minimum would be unconstitutional. In this instance such a hypothetical case was easily imaginable. The mandatory minimum seven-year sentence was therefore unconstitutional. The Court came to this conclusion even though on the facts before it a sentence of seven years or more might not have been inappropriate.

On the basis of *Smith*, it seemed as if all minimum sentences might be open to challenge, as it would always be possible to imagine some hypothetical set of facts on which the mandatory minimum sentence would inhibit the discretion of the judge to impose an appropriate sentence. However, in 1991, in *R v Goltz*,⁵⁴ the Supreme Court of Canada adopted a more nuanced stance. Before it was the question of the constitutionality of a mandatory sentence of seven days' imprisonment for driving a motor vehicle when prohibited from doing so. The prohibition, which could give rise to the mandatory sentence, could be imposed only on an offender who had committed several traffic offences. In *Goltz*, the Canadian Supreme Court upheld the mandatory sentence. *Smith* was qualified by holding that the hypothetical facts on which the legislation could lead to an unjust

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result had to be 'reasonable' and not 'far-fetched'.⁵⁵ The result in Canada is that while not all mandatory minimum sentences are unconstitutional, legislative minima that might result in gross disproportionality will not pass constitutional muster.

The Namibian High Court drew on Canadian case law in *S v Vries*.⁵⁶ Section 14(1)(b) of the Stock Theft Act⁵⁷ provided for a mandatory three-year sentence of imprisonment for a second or subsequent conviction of stock theft. The accused, Vries, was convicted of stock theft in May 1995. His case was covered by s 14(1)(b) because he had been convicted of stock theft more than 25 years previously in

51 D Hubbard 'Should a Minimum Sentence for Rape be Imposed in Namibia?' 1994 *Acta Juridica* 228.

52 See *Dodo* (supra) at para 39 (Ackermann J discusses the importance of Canadian and US jurisprudence in this regard.)

53 See *Smith v The Queen* 34 CCC (3d) 97 (1987).

54 See *R v Goltz* 67 CCC (3d) 481 (1992).

55 *R v Goltz* (supra) at 503. See also *R v Morrissey* [2000] 191 DLR (4th) 87.

56 See *S v Vries* 1996 (12) BCLR 1666 (Nm), 1996 (2) SACR 638 (Nm) ('Vries').

57 Act 12 of 1990 (Nm).

1969. The High Court found that the effect of s 14(1)(b) in the circumstances of the existing case was shocking in that it was grossly disproportionate to the offence committed by the accused. It accordingly struck down s 14(1)(b) as unconstitutional. In his opinion, Frank J sets out a general approach to the constitutionality of minimum sentences that mirrors that of the Canadian courts:⁵⁸

1. A statutory minimum sentence is not *per se* unconstitutional.
2. It will be unconstitutional if it provides for a punishment which will be shocking in the circumstances of the specific case before court.
3. Where a statutory minimum sentence results in a shocking sentence there are four options available to the court, namely:
 - (a) to declare the provision of no force or effect for all purposes,
 - (b) to declare the provision to be of no force and effect only in a particular class of cases i.e. to down-read it,⁵⁹
 - (c) to declare the provision to be of no force or effect in respect to the particular case before court i.e. apply a constitutional exemption,
 - (d) to allow the legislature to cure the defects in the impugned legislation pursuant to the provisions of Article 25(1)(a) of the Constitution.⁶⁰
4. Where the statutory minimum sentence is found to be shocking in the case before the Court the Court must then enquire whether it will be shocking 'with respect to hypothetical cases which . . . can be foreseen as likely to arise commonly'. If the answer to the second enquiry is in the affirmative then the Court must act in one of the respects set out in 3(a), (b) or (d) above. If the answer to the second enquiry is in the negative the court must act as set out in 3(c) above.

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Another Namibian case, *S v Likuwa*,⁶¹ tracks closely the approach adopted by Frank J in *S v Vries*. In *Likuwa*, the Court found that a minimum sentence of ten years' imprisonment for contravention of s 29(1)(a) of the 1996 Arms and Ammunitions Act was unconstitutional 'because it was grossly disproportionate when seen in the light of the very wide net cast by s 29(1)(a) of the Act'.⁶² This section prohibited, amongst other things, the possession of 'machine rifles'. The court found that many rural

58 See *Vries* (supra) at 1676G-1677A.

59 Note that this option would not fall within 'reading down' as it is understood in South African law. The Constitutional Court has emphasized that a statute can be read down only so far as the reading down is consistent with a reasonable interpretation of the language of the statute. See for example *S v Bhulwana* 1995 (2) SACR 748 (CC), 1995 (12) BCLR 1579 (CC) at para 28. However, the option contemplated by Frank J would be one within the power of the Constitutional Court to define a class of situations to which a law cannot be applied consistently with the Constitution. See for example the order made in *Ferreira v Levin NO & others* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC). The Constitutional Court describes this remedial power as notional severance.

60 The corresponding provision of the South African Constitution is FC s 172(1)(b)(ii).

61 See *S v Likuwa* 1999 (5) BCLR 599 (Nm), 1999 (2) SACR 44 (Nm) ('*Likuwa*').

62 *Ibid* at 604H.

people possessed such rifles merely in order to protect themselves and their livestock. Infringement of the section in such circumstances was 'likely to be quite common'⁶³ and ten years' imprisonment an unacceptably harsh sentence for it. The court accordingly applied the general approach suggested by Frank J and struck out the words 'of not less than ten years' that qualified the sentence of imprisonment prescribed by the section. This solution meant that not only the accused before the court but also all future offenders of this section would not be subject to a minimum sentence of imprisonment.

The South African Constitutional Court has declared itself opposed to the notion of a constitutional exemption in individual cases. In *S v Bhulwana*,⁶⁴ O'Regan J emphasised that 'the litigants before the court should not be singled out for the grant of relief, but relief should be afforded to all people who are in the same situation as the litigants'. Paragraph 3(c) of the *Vries* formulation is therefore unlikely to be adopted in South Africa. However, subject to that proviso, South African law is likely to follow an approach to minimum sentences broadly similar to that of Namibian and Canadian law. Legislative minima were used in the past, in terrorism⁶⁵ and drug legislation⁶⁶ for example, deliberately to limit the discretion of the courts. Given the opposition of South African courts to restrictions on their sentencing discretion,⁶⁷ they may be expected to examine the constitutionality

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of legislation that might result in disproportionate sentences even more critically than their Canadian counterparts. Relatively few truly mandatory minimum sentences remain on the statute book in South Africa.⁶⁸ However, compulsory

63 Ibid at 604D-I.

64 See *S v Bhulwana* 1996 (1) SA 388 (CC), 1995 (12) BCLR 1579 (CC), 1995 (2) SACR 748 (CC) at para 32.

65 Section 2(1) and s 3 of the Terrorism Act 83 of 1967 provided for a compulsory sentence of five years, but was repealed by s 73 of the Internal Security Act 74 of 1982, which made no provision for compulsory minimum sentences.

66 Section 2(1) of the Abuse of Dependence-producing Substances Act 41 of 1971 laid down a compulsory five-year sentence for the offence of dealing in drugs, and a similar provision existed in s 2(iii) and (iv) for the offence of possession of drugs. In addition to these measures, s 8 of the Act provided for compulsory forfeiture. However, this Act was repealed by s 52 of the Prevention and Treatment of Drug Dependency Act 20 of 1992, which did not re-enact the compulsory minimum sentence provisions or the provision relating to compulsory forfeiture.

67 See *S v Gibson* 1974 (4) SA 478 (A), 482 (Homes JA) (the imposition of a mandatory sentence 'cuts across traditional considerations of mitigating and reformatory factors in a particular case . . . [and] unduly puts all the emphasis on the punitive and deterrent factors of sentence, and precludes the traditional consideration of subjective factors relating to the convicted person'.) See also *S v Khumbisa & others* 1984 (2) SA 670 (N), 684. Because of their belief that minimum sentence requirements are fundamentally unsound, South African courts have shown considerable ingenuity in interpreting them narrowly. See, for example, *S v Nel* 1987 (4) SA 950 (W); *S v Toms*; *S v Bruce* 1990 (2) SA 802 (A).

68 Section 283(2) of the Criminal Procedure Act 51 of 1977 explicitly excludes the discretion of the sentencing court where legislation prescribes a minimum penalty of a term of imprisonment or a fine. Examples of legislation providing minimum sentences are s 27 of the Explosives Act 26 of 1956 and s 39 (2)(aA)(i)(aa) of the Arms and Ammunition Act 75 of 1969, substituted by s 1 of the Arms and Ammunition Amendment Act 65 of 1993.

confiscation orders or compulsory suspension of driving licences, which are not formally regarded as punishments,⁶⁹ may have the same disproportionate effect on the offender. Their constitutionality will also have to be examined critically.

In late 1997 the Criminal Law Amendment Act⁷⁰ created a range of minimum sentences for a long list of 'serious offences'.⁷¹ The minimum sentences range from life imprisonment for specified aggravated forms of murder and rape⁷² to set numbers of years for first offenders and recidivists for offences listed in the schedules to the Act.⁷³ The sentences have to be imposed on adult offenders unless 'substantial and compelling circumstances exist which justify the imposition of lesser sentences',⁷⁴ and are therefore not fully mandatory.

There can be no constitutional objection to the legislature indicating to the courts that it requires severe punishments for serious offences. However, in this instance, the legislature went further and restricted severely the ability of sentencing courts to deviate from specified minimum sentences. Much therefore depended on how the courts interpreted the words, 'substantial and compelling circumstances'. The Supreme Court of Appeal, in *S v Malgas*,⁷⁵ removed any doubts about whether the provision was compatible with the principle of constitutional proportionality.⁷⁶ This result was achieved by ruling that when a court is convinced that an 'injustice' would be done by imposing the mandatory sentence, that injustice constituted 'substantial and compelling' circumstances that would allow the court to depart from the prescribed minimum. The tautology of holding

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69 See Du Toit (*supra*) at 345.

70 Act 105 of 1997. Section 54 provides that the Act is to come into operation on a date fixed by the President by proclamation in the *Gazette*.

71 The heading to s 51 refers to 'Minimum sentences for certain serious offences'. The provision is not designed to be a permanent feature of South African law. Section 53 provides that ss 51 and 52 shall cease to have effect two years after the commencement of the Act. However, the President may extend this period with the concurrence of Parliament, by proclamation in the *Gazette*, for two years at a time.

72 Section 51(1) read with Part I of Schedule 2.

73 Section 51(2) read with Parts II, III and IV of Schedule 2.

74 Section 51(3)(a).

75 *S v Malgas* 2001 (2) SA 1222 (SCA), 2001 (1) SACR 469 (SCA) ('*Malgas*').

76 One question remains open. In its interpretation the Court gave 'due weight to the fact that these provisions were not intended to be permanent features of the legislative scene and were to lapse after two years unless extended annually'. *Malgas* at para 7. However, the legislation was amended by s 36 of Act 62 of 2000 to allow extensions of two years at a time. On 1 May 2003 the legislation was extended until 30 April 2005: *Government Gazette* 24804 Government Notice R 40, 30 April 2003. This means that by the time it is next considered the legislation would have been in force for seven years. One may doubt whether it can still be justified as a 'relatively short-term response' to 'an alarming burgeoning in the commission of crimes'.

that 'injustice' means 'substantial and compelling' is compounded by further equating 'injustice' with 'disproportionality'.⁷⁷

This reference to proportionality allowed the Supreme Court of Appeal to meet the desideratum stated earlier in the judgment. That is, that the provisions must be 'read in the light of the values enshrined in the Constitution and, unless it does not prove possible to do so, interpreted in a manner which respects those values'.⁷⁸ In formulating its conclusions, the Supreme Court of Appeal did not build directly on the many previous decisions of the High Court on the possible interpretation of these provisions.⁷⁹ Instead, it summarised its findings on the appropriate approach in a passage that defies further précis:

- A. Section 51 [of the Criminal Law Amendment Act 105 of 1997] has limited but not eliminated the courts' discretion in imposing sentence in respect of offences referred to in Part 1 of Schedule 2 (or imprisonment for other specified periods for offences listed in other parts of Schedule 2).
- B. Courts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should *ordinarily* and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.
- C. Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.
- D. The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying legislation and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.
- E. The Legislature has, however, deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored.
- F. All factors (other than those set out in D above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.

77 See *Malgas* (supra) at para 22. Marais JA seeks to explain that 'something more' than a mere discrepancy between what the sentence that law prescribes and the sentence that the sentencer would otherwise be minded to impose is required to justify a departure from the minima:

'What that something more must be it is not possible to express in precise, accurate and all-embracing language. The greater the sense of unease a court feels about the imposition of a prescribed sentence, the greater its anxiety will be that it may be perpetrating an injustice. Once a court reaches the point where unease has hardened into a conviction that an injustice will be done, that can only be because it is satisfied that the circumstances of the particular case render the prescribed sentence unjust or, as some might prefer to put it, disproportionate to the crime, the criminal and the legitimate needs of society. If that is the result of a consideration of the circumstances the court is entitled to characterise them as substantial and compelling and as such to justify the imposition of a lesser sentence.'

78 Ibid at para 7.

79 The SCA relegates the High Court decisions to a footnote. See *Malgas* (supra) at para 6, fn 3.

- G. The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ('substantive and compelling') and must be such as cumulatively justify a departure from the standardised response that the Legislature has ordained.
- H. In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against sentence as the sole criterion.
- I. If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.
- J. In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the bench mark which the Legislature has provided.⁸⁰

The constitutionality of this approach was confirmed in *S v Dodo*. The Constitutional Court noted that the judgment in *Malgas* was 'undoubtedly correct'.⁸¹ The Constitutional Court commented that the interpretation that Supreme Court of Appeal had given to s 51(1) of the Criminal Law Amendment Act made it plain that 'the power of the court to impose a lesser sentence than that prescribed can be exercised well before the disproportionality between the mandated sentence and the nature of the offence becomes so great that it can be typified as gross'.⁸² It followed, the Constitutional Court explained, that the offender's rights in terms of s 12(1)(e) of Constitution were not infringed, as all that that section, with its prohibition on cruel, inhuman and degrading punishments, required was that there should not be a gross disproportionality between the punishment and the crime.

The formulation adopted in *Malgas* and confirmed in *Dodo* has been followed in other cases, but these have added little of constitutional significance. They have emphasised, however, that life imprisonment, the ultimate penalty in South Africa, which proportionality requires, may be imposed only for the worst category of crimes. Therefore, the ultimate penalty will not be imposed merely because the rape falls into a category where the prescribed minimum sentence is life imprisonment.⁸³ As Terblanche points out this means that since only a small proportion of rapes are in or near the 'worst category', 'the prescribed sentence will ordinarily be departed

80 *Malgas* (supra) at para 25.

81 *Dodo* (supra) at para 40.

82 *Ibid.*

83 See *S v Abrahams* 2002 (1) SACR 116 (SCA); *S v Mahomotsa* 2002 (2) SACR 435 (SCA), [2002] 3 All SA 534 (A); *Rammoko v Director of Public Prosecutions* 2003 (1) SACR 200 (SCA), [2001] 4 All SA 731 (SCA).

from'.⁸⁴ Expressed differently, traditional proportionality requirements will succeed routinely in justifying departures from the minima

where the minimum sentences are substantially higher for a particular form of crime than what would be imposed without the presence of significant aggravating circumstances.

In a similar vein, s 51 of the Criminal Law Amendment Act provides that where a court decides to impose a prescribed sentence on a young offender between the age of 16 and 18 years it must record its reasons for the decision.⁸⁵ Section 51 further stipulates that the prescribed minimum sentences do not apply to children under 16 years of age.⁸⁶ Thus, the loosening of sentencing requirements in relation to children between 16 and 18 could have been interpreted as only a procedural requirement demanding that special attention be paid to the cases involving older children. However, the provincial and local divisions of the High Court that have interpreted this provision have read it as a licence to depart freely from the minima⁸⁷ and effectively treated this category in the same way that they treat children under the age of 16.⁸⁸ The basis for this interpretation has been the extensive recognition granted to the rights of children under 18 in s 28 of the Constitution. Section 28 provides that a child should only be detained as a measure of last resort: one consistent with the best interests of the child.⁸⁹ These provisions have allowed courts to develop constitutional limits on the sentencing of children that go beyond those contained in the requirement that sentences should not be grossly disproportionate to the offence committed.⁹⁰

(ii) Preventive sentences

Legislative provision for preventive sentences may provide a framework that encourages the courts to impose sentences that are disproportionate to the offence committed and to the blameworthiness of the offender. A 1993 amendment to the

84 S S Terblanche 'Mandatory and minimum sentences: Considering s 51 of the Criminal Law Amendment Act 1997' 2003 *Acta Juridica* 194, 215.

85 Section 51(3)(a).

86 Section 51(3)(b).

87 See *S v Blaauw* 2001 (2) SACR 255 (C), [2001] 3 All SA 588 (C); *S v Nkosi* 2002 (1) SA 494 (W), 2002 (1) SACR 135 (W) ('*Nkosi I*').

88 Terblanche (*supra*) at 216.

89 These rights have been bolstered by the United Nations Convention on the Rights of the Child to which South Africa is signatory, a fact that must be recognised by sentencing courts: see *S v Kwalase* 2000 (2) SACR 135 (C). Reference has also been made to the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the 'Beijing Rules') as containing further standards that must be considered in conjunction with the Convention on the Rights of the Child. See also *Nkosi I* (*supra*) at 503E-F.

90 General sentencing law has long emphasised the importance of concerns for the rehabilitation of children when imposing sentence. What is new is the constitutional emphasis that is now given to this aspect of sentencing them. See *Nkosi I* (*supra*) at 502C-505J.

Criminal Procedure Act provides that where a court exercises its discretion to declare a convicted offender a 'dangerous criminal' it must 'sentence such person to undergo imprisonment for an indefinite period'.⁹¹ The danger of disproportionality here is particularly great. On the face of the section an offender may be declared 'dangerous' after being convicted of any offence.

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How to strike the right balance between punishment necessary for the protection of society and detention that does not offend a person's dignity cannot be answered simply. Protecting society by preventing crime is the primary purpose of punishment. Detaining dangerous individuals and thus removing them from society might achieve such protection. However, it is clear from a constitutional perspective that the individual may not simply be sacrificed for the greater good. Indefinite detention of someone who has not been convicted of an offence, merely because there was evidence that he was 'dangerous', would be unconstitutional. Similarly, if someone were to be convicted of a minor offence and were then to be sentenced to indefinite detention because there was evidence of his dangerousness, the constitutionality of the sentence would be suspect because of the gross disproportionality of the sentence.

Sentences may still be legitimately influenced by considerations of prevention. A violent offender with previous convictions for violence will invariably be given a longer sentence than a first offender. The reasoning may be that because of his previous convictions his personal blameworthiness is increased and that he is therefore liable for a heavier punishment. However, a court may use the scope that this finding gives it to impose a sentence that prevents, for a time at least, the individual from committing further crimes of violence. The preventive sentence would still bear some relationship to present and previous offences of the offender.⁹²

A provision allowing for the potentially indefinite detention of dangerous offenders has been upheld in Canada. The Canadian legislation provides that when someone is convicted of a 'serious personal injury offence' and the offender is a threat to the life, safety, physical or mental well being of other persons then, subject to procedural protections, the culprit may be declared a dangerous offender and detained indefinitely.⁹³ In *Lyons v The Queen*, the Supreme Court of Canada held that a sentence that was based 'in part' upon preventive considerations was not unconstitutional.⁹⁴ However, the Court did not reject the test of proportionality to the crime entirely. It emphasised that the offender had to be convicted of a serious violent offence for him to be considered for an indefinite sentence and that there were other safeguards to protect offenders from being falsely declared to be dangerous or from being detained when they had ceased to be dangerous. Moreover, the Court found that there was a degree of flexibility in the constitutional

91 Section 286B of the Criminal Procedure Act 51 of 1977 introduced by s 22 of the Criminal Matters Amendment Act 116 of 1993.

92 See the argument developed from first principles in this regard by Stree (supra) at 57. See also *Makwanyane* (supra) at para 128 (Constitutional Court recognised prevention as a legitimate object of punishment, but found that it was an object which could be achieved without capital punishment).

93 Section 688(a) of Part XXI of the Canadian Criminal Code.

94 *Lyons v The Queen* (1988) 37 CCC (3d) 1.

notion itself. A sentence would be unconstitutional only if it were grossly disproportionate. 'The word "grossly"', La Forest J explained, 'reflects this court's concern not to hold Parliament to a standard so exacting . . . as to require punishments to be perfectly suited to accommodate to moral nuances of every crime and every offender.'⁹⁵

In spite of this rather weak formulation, the court in *Lyons* should not be seen as having effectively abandoned all protection against gross disproportionality of sentence in cases where public protection is required. *Lyons* was followed by the Supreme Court of Appeal in South Africa in *S v Bull & another; S v Chavulla & others*,⁹⁶ where the constitutionality of the South African provision authorising the indefinite detention of dangerous offenders was challenged. The South African provisions, ss 286A and 286B of the Criminal Procedure Act,⁹⁷ are similar to the Canadian provisions. However, they do not limit the inquiry into whether the offender is dangerous to cases where the offender has been convicted of a 'serious personal injury' offence. As mentioned above a South African court could conduct an inquiry into dangerousness and, if it found that an offender were a danger to society, impose an indefinite sentence following a conviction of a minor offence. However, the Supreme Court of Appeal ruled that the constitutional principle against gross disproportionality of sentence had to be respected and the offence for which the offender was convicted 'must clearly be of such a nature as to justify a present determination of continued dangerousness in the future which requires a pattern of persistent or repetitively aggressive and violent behaviour'.⁹⁸ In this way the South African Court retained an element of offence proportionality in its decision about dangerousness. These detailed procedures for determining dangerousness, plus the requirement of psychiatric evidence on dangerousness, go some way towards meeting the too-wide-a-net critique. They are designed to ensure that the status of 'dangerous criminal' is not lightly attributed.

Furthermore, the South African legislation provides that the trial court must specify the initial period that the accused must serve before being brought back to court to be considered for release if he has ceased to be dangerous.⁹⁹ The Supreme Court of Appeal, in *Bull*, introduced a further element of proportionality into the interpretation of these provisions by holding that this period should be fixed with regard to the nominal determinate sentence that the court would have imposed had it not found the accused to be a dangerous criminal.¹⁰⁰ The actual period should be

95 Ibid at 33.

96 *S v Bull & another; S v Chavulla & others* 2002 (1) SA 535 (SCA), 2002 (6) BCLR 551 (SCA), 2001 (2) SACR 681 (SCA) ('*Bull*').

97 Act 51 of 1977.

98 See *Bull* (supra) at para 19.

99 Section 286B of the Criminal Procedure Act.

100 See *Bull* (supra) at para 28.

the time that the offender would have had to serve before being considered for parole.¹⁰¹

The same question of proportionality arises in a less drastic form when a court exercises its discretionary power to declare someone an habitual criminal,¹⁰² which has the effect of imposing a sentence of between seven and 15 years' imprisonment.¹⁰³ The maximum period is essential, for, as the Constitutional Court noted in *S v Niemand*,¹⁰⁴ otherwise the declaration would be akin to a life sentence. That would be grossly disproportionate for an offender who is neither violent nor a danger to society in terms of s 286A of the Criminal Procedure Act.¹⁰⁵

A declaration that an offender is an habitual criminal may be made if the court 'is satisfied that the said person habitually commits offences and that the community should be protected against him'.¹⁰⁶ From this formulation it is clear that the offender is not being punished primarily for his current offence. However, the necessity of finding that the offender 'habitually' commits offences means that close attention is paid to his previous record. In this way the general blameworthiness of the offender is taken into consideration, making this special provision to protect the community less open to constitutional objection.

(iii) Exemplary sentences

The imposition of exemplary sentences by the courts raises problems similar to those discussed above in relation to the principle of proportionality. Hitherto the courts have cautioned that exemplary sentences are to be imposed with circumspection. It is acknowledged that inherent in the notion of an exemplary

101 That is, in practice, half the nominal determinate sentence. There is strong parallel between this approach and that adopted by English courts in setting a minimum period or 'tariff' that an offender sentenced to life imprisonment has to serve before being considered for release. See D van Zyl Smit *Taking Life Imprisonment Seriously* (2002) Chapter 3.

102 In terms of s 286 of the Criminal Procedure Act 51 of 1977.

103 The minimum is specified by s 38 of the Correctional Services Act 8 of 1959. Historically, the maximum was deduced from s 286(2) of the Criminal Procedure Act, which specifies that a court should not declare someone an habitual criminal if it would otherwise have imposed a sentence of more than fifteen years. The Constitutional Court found that the inference that the maximum period was 15 years could not be drawn in this way and held that the maximum period of 15 years should be read into section 65(4)(b)(iv) of the Correctional Services Act 8 of 1959. The maximum period will be regulated directly when the Correctional Services Act 111 of 1998 comes into force as s 73(6)(c) of that Act specifies a maximum period of 15 years.

104 See *S v Niemand* 2002 (1) SA 21 (CC), 2001 (11) BCCR 1181 (CC), 2001 (2) SACR 654 (CC) at para 25.

105 An interesting parallel is to be found in para 62 of the German Penal Code, which provides that preventive detention (*eine Massregel der Besserung und Sicherung*) may not be imposed when it is disproportionate to the offences which he has committed, and is likely to commit, as well as to the degree of danger which he poses. Commentators have suggested that this provision incorporates the principle of proportionality to a satisfactory degree, as long as it is interpreted with the further principle of minimum intervention in mind. See, for example, K Lackner *Strafgesetzbuch mit Erläuterungen* (23rd Edition, 1993) 466-7.

106 Section 286(1).

sentence is an element of injustice to the individual accused.¹⁰⁷ The imposition of an exemplary sentence by definition privileges the interests of society in deterrence over the principle of proportionality in relation to the individual offender. The courts have countenanced exemplary sentences in the past. But they have also said that such

sentences are justified only in a limited range of circumstances and only to the extent that the injustice to the individual does not outweigh the broad interest of society.¹⁰⁸ In the light of the constitutional principles of equality and proportionality, the test for whether and when an exemplary sentence is justified could well become stricter.

(iv) Punishment for specific crimes

Legislation that permits the imposition of a specific punishment for a crime for which such punishment is inappropriate under all circumstances is another form of disproportionality between crime and punishment that is unacceptable under the Constitution. In South Africa the use of capital and corporal punishment historically was restricted to specific offences. If these punishments had not been declared to be unconstitutional, the question might have arisen whether their imposition was not grossly disproportionate to the gravity of some of the specific offences for which they might have been imposed. Such an argument has been accepted by the United States Supreme Court in respect of the death sentence for rape, which, in the view of that court, would always be disproportionate to the gravity of the offence.¹⁰⁹ Similarly, South African courts (which of course did not have the power to declare legislation unconstitutional) held that corporal punishment, because of its drastic nature, was inappropriate for crimes not involving elements of violence.¹¹⁰

(d) Dignity: human dignity and cruel, inhuman or degrading punishment

The most direct challenges to legislation on punishment are likely to be directed against specific forms of punishment that may be fundamentally incompatible with a Constitution that guarantees human dignity. As many, if not all, forms of punishment undermine human dignity to some degree, it may be difficult to argue that all such punishments are so fundamentally repugnant that they cannot be considered even for the most heinous crimes.

The South African Constitution contains a number of fundamental rights that are of significance in this regard: s 10's right to human dignity, s 12(1)(d)'s prohibition of

107 See *S v Khulu* 1975 (2) SA 518 (N), 521B-H.

108 See *Khulu* (supra) at 521B-H; *S v Matoma* 1981 (3) SA 838 (A), 842H-843A; *S v Collett* 1990 (1) SACR 465 (A), 470A-H; *S v Maseko* 1982 (1) SA 99 (A), 102F; *S v Reay* 1987 (1) SA 873 (A), 877C; *S v Sobandla* 1992 (2) SACR 613 (A), 617F-H; *S v Potgieter* 1994 (1) SACR 61 (A).

109 *Coker v Georgia* 433 US 584, 97 Sct 2861 (1977). It is noteworthy that even the dissenting judges, who regarded rape as an offence which was so serious that the court could not intervene if the legislature chose to make it punishable by the sentence of death, accepted in principle that the 'concept of disproportionality bars the death penalty for minor crimes' (Burger CJ, with whom Rehnquist J concurred, dissenting at 604).

110 See *S v P* 1985 (4) SA 105 (N).

torture, and s 12(1)(e)'s prohibition of cruel, inhuman or degrading treatment or punishment. The wording of s 12(1)(e) is especially important: in

particular, the use of 'or' in linking the adjectives describing the types of punishment that are prohibited. Thus, a form of punishment (or a form of treatment) is unconstitutional when it is 'cruel', or when it is 'inhuman', or when it is 'degrading'.¹¹¹ The wording of s 12(1)(e) is similar to that in other Constitutions¹¹² and international instruments.¹¹³

Value judgments are unavoidable in deciding whether particular forms of punishment are fundamentally repugnant to the rights guaranteed in the Constitution. In a number of jurisdictions judges have agreed that these value judgments cannot merely reflect the predilections of the judges concerned, but that the reasoning and the information on which they are based should be clearly articulated. The issue has been complicated further by the recognition that such decisions cannot be made once and for all, but that they are based on evolving standards of decency.¹¹⁴ One source of evolving standards of decency is international practice. The specific provision in the South African Constitution¹¹⁵ that requires the courts to have regard to public international law, where applicable, and which permits them to look to comparable foreign case law means that South African courts, like those in Namibia and Zimbabwe, will pay considerable attention to comparative jurisprudence.¹¹⁶

The Namibian courts have suggested that when deciding whether a form of punishment is fundamentally unconstitutional, primary attention must be paid not only to the text of the Constitution and to comparative material in interpreting it but

111 See *Makwanyane* (supra) at paras 93 and 276 and *S v Williams & Others* 1995 (3) SA 632 (CC), 1995 (7) BCLR 861(CC) at para 20 ('*Williams*'). See also the interpretation given by Mahomed AJA to the similar provision in the Namibian Constitution in *Ex parte Attorney General, Namibia: In re Corporal Punishment by Organs of State* 1991 (3) SA 76 (NmS), 86, and by Gubbay JA to the similar provision in the Zimbabwean Constitution in *S v Ncube; S v Tshuma; S v Ndhlovu* 1988 (2) SA 702 (ZS), 715. In South African law, therefore, the debate which has dogged American and Canadian jurisprudence, about whether punishment has to be both 'cruel' and 'unusual' in order to be unconstitutional, will not arise: see W Hogg *Constitutional Law of Canada* (3rd Edition, 1992) at 1130.

112 See, in particular, art 8 of the Constitution of Namibia and s 15 of the Constitution of Zimbabwe.

113 Article 7 of the International Covenant of Civil and Political Rights; art 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The latter refers only to 'inhuman or degrading treatment or punishment', but the absence of the word 'cruel' does not mean that its scope is significantly different.

114 *Makwanyane* (supra) at para 199 (Kentridge J). In *Williams* (supra) at paras 36-37, Langa J suggested that the relationship between public opinion and 'contemporary standards of decency' was not clear and questioned whether it was necessary to adopt the American concept of 'contemporary standards of decency'. However, he also stated in the judgment that 'the Constitution ensures that the sentencing of offenders must conform to the standards of decency recognised throughout the civilised world'. *Ibid* at para 77.

115 Section 39(1).

116 See, eg, *Makwanyane* (supra) and *Williams* (supra).

also to the 'social conditions, experiences and perceptions of the people' of the country concerned. In *S v Tcoelib* O'Linn J analysed earlier *dicta* and pointed out that these latter factors required the presentation of wide-ranging evidence.¹¹⁷ There is still some uncertainty as to what evidence, if any, would be presented

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about objective factors of this kind and how they would be related to the fundamental value judgment.¹¹⁸

(i) The sentence of death

Much has been written about the constitutionality of various aspects of the sentence of death in many jurisdictions. As has been seen above, the death penalty has inspired close analysis of the importance of equality and proportionality in sentencing.¹¹⁹ On the direct question of whether the death penalty is inherently unconstitutional, international law is equivocal. There is, however, a strong bias towards abolition.¹²⁰

When the constitutionality of the death penalty was raised in *S v Makwanyane*¹²¹ Chaskalson P surveyed much of the international law and the comparative jurisprudence, but observed that there was little of it which could be applied directly to the question of whether death is an acceptable form of punishment in South African constitutional law.¹²² He emphasised that the court had to pay due regard to the South African legal system, to South African history and circumstances, and to the language of the South African Constitution.¹²³ The latter point was particularly important because of differences in the wording of Constitutions.¹²⁴ Many

117 See *S v Tcoelib* 1993 (1) SACR 274 (Nm) ('*Tcoelib*').

118 In *S v Williams and Five Similar Cases* 1994 (4) SA 126 (C) the court gave counsel for the state time to consider whether he wished to lead evidence, in terms of s 102(1) of the Constitution. This may be evidence of the kind referred to in *Tcoelib* (supra). On the difficulties of providing relevant evidence on these questions, see *S v A Juvenile* 1990 (4) SA 151 (ZS), 171B. On the limited relevance of 'public opinion', see *Makwanyane* (supra) at paras 87-9.

119 See § 49.2(b) supra on equality and § 49.2(c) supra on proportionality.

120 For an overview, see W A Schabas *The Abolition of the Death Penalty in International Law* (3rd Edition, 2002). An example of the balance which is being struck is art 6 of the International Covenant on Civil and Political Rights, which lays down detailed requirements which the death penalty has to meet, but adds, in art 6(6), that nothing in art 6 'shall be invoked to delay or prevent the abolition of capital punishment'. There is also an optional protocol to the International Covenant, which aims at the abolition of capital punishment.

121 *Makwanyane* (supra).

122 Ibid at paras 37-9 (Chaskalson P).

123 Ibid at para 39 (Chaskalson P).

124 In particular, the substantive protection given to the right to life by s 9 was stressed by Chaskalson P in *Makwanyane* (supra) at paras 38, 78, 80 and 85. See also *Makwanyane* (supra) at para 154 (Ackermann J) and at para 324 (O'Regan).

Constitutions either outlaw capital punishment¹²⁵ or, conversely, guarantee its existence,¹²⁶ thus removing the issue from direct constitutional debate.

In *Makwanyane*, the Constitutional Court held that capital punishment infringed the rights to life and dignity and constituted cruel, inhuman or degrading

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punishment.¹²⁷ The crucial question was whether s 277(1)(a) of the Criminal Procedure Act,¹²⁸ which made it a competent sentence for murder, created a legitimate limitation of these rights. The state's principal argument in this regard was that capital punishment was justified by its deterrent effect. The court rejected this argument on the grounds that there was no clear proof that capital punishment served effectively to deter murder.¹²⁹ It was pointed out that the deterrence argument tends to ignore the existence of alternative sentences to capital punishment¹³⁰ and that it ignored the State's duty to act as a role model in the development of a culture of rights.¹³¹ The court also rejected arguments of the Attorney-General, who sought to justify capital punishment for its retributive function or as a measure necessary to prevent criminals from killing again.¹³² In particular, the court emphasised that the retributive element of punishment had to be given less weight under a human rights regime that placed a particular emphasis on the value of *ubuntu*.¹³³ Taken cumulatively, retribution, prevention, and a marginal deterrent effect on potential murderers were held to be insufficient to justify the factors 'which taken together make capital punishment cruel, inhuman and degrading: the destruction of life, the annihilation of dignity, the elements of

125 For example, art 102 of the German Basic Law or art 6 of the Constitution of Namibia.

126 Article 5(1) of the Constitution of Malaysia or art 9(1) of the Constitution of Singapore.

127 See *Makwanyane* (supra) at para 95 (Chaskalson P). See also *Mohamed & another v President of the Republic of South Africa & others (Society for the Abolition of the Death Penalty in South Africa intervening)* 2001(3) SA 893 (CC), 2001 (7) BCLR 685 (CC) at para 39 (Constitutional Court in an *en banc* decision confirmed that death penalty was also inconsistent with the values and provisions of the Final Constitution).

128 Act 51 of 1977.

129 *Makwanyane* (supra): Chaskalson P at paras 116–25, Didcott J at paras 181–3, Kentridge J at para 202, Kriegler J at paras 212–13, Mahomed J at paras 286–94, Mokgoro J at para 317, and O'Regan J at para 340.

130 *Ibid* at para 123 (Chaskalson P), at para 181 (Didcott J), and at para 287 (Mahomed J).

131 *Ibid* at para 124 (Chaskalson P), at 222 (Langa J), and at para 316 (Mokgoro J).

132 *Ibid* at para 128 (Chaskalson P).

133 *Ibid* at paras 129–31 (Chaskalson P), at para 203 (Kentridge J), at paras 222–7 (Langa J), at paras 237–43 (Madala J), at para 296 (Mahomed J), at paras 307–13 (Mokgoro J), and at para 341 (O'Regan J).

arbitrariness, inequality and the possibility of error in the enforcement of the penalty'.¹³⁴

(ii) Corporal punishment

In *S v Williams & others*, the provisions of s 294 of the Criminal Procedure Act,¹³⁵ were challenged on the grounds that whippings were contrary to human dignity and were cruel, inhuman or degrading. The South African courts had long expressed reservations about corporal punishment and its compatibility with

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human dignity,¹³⁶ but had not previously been able to strike down the primary legislation that allowed it to be imposed. In *Williams* the Constitutional Court noted the rejection of corporal punishment at international law¹³⁷ and in the jurisprudence of many national states¹³⁸ and declared juvenile whippings to be unconstitutional. The court emphasised the dehumanising nature of whippings:

The severity of the pain inflicted is arbitrary, depending as it does almost entirely on the person administering the whipping. Although the juvenile is not trussed, he is as helpless. He has to submit to the beating, his terror and sensitivity to pain notwithstanding . . . The fact that the adult is stripped naked merely accentuates the degradation and humiliation. The whipping of both is, in itself, a severe affront to their dignity as human beings.¹³⁹

Langa J proceeded to reject 'any culture of authority which legitimates the use of violence . . . [as] inconsistent with the values of the Constitution'.¹⁴⁰ In so doing he rejected the argument of the State that the dignity of juveniles is not necessarily

134 Ibid at para 135 (Chaskalson P).

135 Act 51 of 1977. Section 294 was subsequently repealed by s 2 of Act 33 of 1997.

136 See, for example, *S v Kumalo & others* 1965 (4) SA 565 (N), 574F-H; *S v Motsoetsoana* 1986 (3) SA 350 (N); *S v Ndaba & others* 1987 (1) SA 237 (T), 245A-C.

137 See *Williams* (supra) at para 39. International law usually contains only a general prohibition of cruel, inhuman or degrading punishment. This prohibition is subject to interpretation and development: see N Rodley *The Treatment of Prisoners under International Law* (2nd Edition, 1999) 309-324. Secondary instruments do outlaw corporal punishment explicitly. Examples are the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), which outlaw corporal punishment of juveniles (Rule 17.3), and the United Nations Standard Minimum Rules for the Treatment of Prisoners, which outlaw corporal punishment of prisoners (Rule 31). In 1993 South African practice was brought into the line with the latter rule, when corporal punishment ceased to be a punishment that could be imposed on prisoners. (See s 17 of the Correctional Services Amendment Act 68 of 1993, which amended s 54 of the Correctional Services Act 8 of 1959.)

138 See *Williams* (supra) at para 40. For pronouncements of the constitutionality of corporal punishment for adults in Southern African countries, see *S v Petrus & another* [1985] LRC (Const) 699 (Botswana CA); *S v Ncube*; *S v Tshuma*; *S v Ndhlovu* (supra); *Ex parte Attorney-General, Namibia: In re Corporal Punishment* 1991 (3) SA 76 (NmS).

139 *Williams* (supra) at para 45.

140 Ibid at para 52.

infringed by the infliction of corporal punishment.¹⁴¹ The State argued that juvenile whippings were a justifiable limitation of the rights protected by ss 10 and 11 of the 1993 Constitution¹⁴² because of their deterrent value and because they provided a convenient and beneficial alternative to other socially more undesirable forms of punishment.¹⁴³ Langa J rejected these arguments and pointed to the need to utilise

new sentencing options which did not require the sacrifice of decency and human dignity.¹⁴⁴

S v Williams addressed only juvenile whippings in the context of s 294 of the Criminal Procedure Act. The judgment has had obvious implications for all forms of corporal punishment. Following *Williams* it is clear that the corporal punishment of adults in execution of criminal sentences will be unconstitutional.¹⁴⁵ It seems likely that corporal punishment at schools will be similarly struck down. Although the Constitutional Court was at pains to stress that the issue of corporal punishment of scholars was not before it,¹⁴⁶ *dicta* in *Williams* suggest that the Constitution will not countenance the caning of school children.¹⁴⁷ In any event, legislation subsequent to the decision in *Williams* outlawed corporal punishment in all schools, including private schools run by non-government bodies.¹⁴⁸ The constitutionality of this provision was challenged by parents of children in religious schools. In *Christian Education South Africa v Minister of Education*¹⁴⁹, the Constitutional Court held that, even if it were assumed that the prohibition infringed the religious rights of parents, it was saved by the limitations clause, as religious freedom could be limited in this

141 Ibid at paras 41-7. See McNally JA (dissenting) in *S v A Juvenile* 1990 (4) SA 151 (ZS), 171E-H.

142 That is, the rights to human dignity and freedom from cruel, inhuman, or degrading punishment (cf ss 10 and 12(1)(e) of the 1996 Constitution). The court found it unnecessary to consider the appellants' argument that these rights were incapable of limitation. See *Williams* (supra) at paras 55-6. In *Smith v The Queen* (1987) 34 CCC (3d) 97 Lamer J notes that there are some punishments which will always 'outrage our standards of decency'. *Smith* (supra) at 140. He includes in this *obiter* pronouncement 'corporal punishment, such as the lash, irrespective of the number of strokes'. An even wider version of this proposition is developed by Stuart, who argues that no punishment which in the Canadian context is cruel and unusual, either because of its nature or because it is grossly disproportionate in a particular case, should ever be regarded as being justifiable in terms of the Canadian limitations clause; D Stuart *Charter Justice in Canadian Law* (1991) 308-9.

143 See *S v Vakalisa* 1990 (2) SACR 88 (Tk), 94G-J; in *S v A Juvenile* (supra) at 171I-172A (McNally JA, (dissenting)).

144 See *Williams* (supra) at paras 64-75.

145 This proposition was common cause between the parties. Ibid at para 10.

146 Ibid at para 49.

147 Ibid at paras 47 and 52. Corporal punishment in Namibian schools was prohibited in *Ex parte Attorney-General, Namibia: In re Corporal Punishment* (supra).

148 Section 10(1) of the South African Schools Act 84 of 1996 provides simply: 'No person may administer corporal punishment at a school to a learner.'

way in order to protect the rights of the child and reduce violence in society generally.

(iii) Imprisonment

Imprisonment, even for a short period, is a harsh form of punishment. The circumstances of imprisonment may mean not only that the offender loses his liberty but also that his human dignity is infringed. However, this is a criticism of the manner in which imprisonment is often implemented rather than of legislation allowing its imposition. In theory at least, imprisonment, properly organised,¹⁵⁰ offers the offender the possibility of retaining his dignity, of reflecting on his conduct, and of returning to society as a full participant. A 'Methuselah sentence' – a term that is so long that a prisoner would have absolutely no chance of being released at the expiry of the sentence or on parole after serving half the sentence – will amount to cruel, inhuman and degrading punishment.¹⁵¹ The absence of a possibility of parole makes it unconstitutional.¹⁵²

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(iv) Life imprisonment

Life imprisonment, if given its literal meaning, denies the offender the possibility of returning to society. As Levy J explained in the Namibian case of *S v Nehemia Tjjo*,¹⁵³ the effects may be disastrous:

Life imprisonment robs the prisoner of . . . hope. Take away his hope and you take away his dignity and all desire he may have to continue living . . . The concept of life imprisonment destroys human dignity by reducing a prisoner to a number behind the walls of a gaol waiting only for death to set him free.

For Levy J the logic of these propositions was inescapable. Life imprisonment was unconstitutional because it infringed the human dignity of the offender. Nor was he impressed by the fact that offenders might be released on parole or unconditionally before completing their sentences. It was not sufficient to rely on the wide discretion of the executive to ensure that the human dignity of the offender was safeguarded.¹⁵⁴

149 See *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC), 2000 (10) BCLR 1051 (CC). For criticism of the Court's inconsistent protection of children's rights in Christian education, see S Woolman 'Freedom of Association' in Woolman et al *Constitutional Law of South Africa* supra (2nd Edition, OS, December 2003) Chapter 44, at § 44.3(c)(viii).

150 However, the imprisonment of a person who is not able to cope physically without being humiliated may well be contrary to human dignity. See *Price v United Kingdom* (2002) 34 EHRR 53 in which the imprisonment of a quadriplegic with out inquiring whether adequate resources were available to deal with her needs, was held to violate the prohibition on degrading punishment in art 3 of the European Convention on Human Rights.

151 Such punishment is prescribed by s 12(1)(e) of the Constitution.

152 See *S v Nkosi & another* 2003 (1) SACR 91 (SCA) ('*Nkosi II*') at para 9.

153 Unreported decision of 4 September 1991 as quoted in *Tcoeib* (supra) at 275i.

154 *Ibid* at 275j-276d.

The argument that life imprisonment is a cruel, inhuman or degrading punishment is often rejected outright. It is argued that it does not infringe human dignity significantly more than other long prison sentences and that it is justifiable as a maximum penalty, particularly where the death sentence has been abolished.¹⁵⁵ A much more subtle approach to the question of life imprisonment was developed by the German Federal Constitutional Court in 1977.¹⁵⁶ The Court recognised that the State was entitled to legislate for harsh punishments for serious offences. It said, however, that a punishment that placed the individual permanently in prison and made his release subject to the exercise of executive power was an unconstitutional violation of the human dignity of the offender.¹⁵⁷ What was required, said the court, was a mechanism that gave the offender the assurance that his release would be considered by a judicial body after a set period. This procedure would allow the person serving the sentence to retain some prospect of release and thus to preserve his dignity. Judicial review of all life sentences after the prisoner had served a maximum of 15 years was subsequently introduced by legislation.¹⁵⁸ The constitutionality of that legislation has been upheld in principle

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by a later decision of the German Federal Constitutional Court.¹⁵⁹

In *S v Tcoelib*¹⁶⁰ the Supreme Court of Namibia held that life imprisonment could not be equated with the sentence of death.¹⁶¹ Chief Justice Mahomed, who gave the judgment of the Court, adopted the same approach to life imprisonment as had the German Federal Constitutional Court in 1977.¹⁶² Life imprisonment could be justified only if the prisoner retained some hope of eventually being released from prison. Mahomed CJ explained that life imprisonment

155 See the judgment of Ackermann J in *Makwanyane* (supra) at paras 170–2. See also *Tcoelib* (supra) and the review of international practice conducted there. It should be noted, however, that life imprisonment is outlawed in a number of countries and that there is a small but active movement that is pressing for its total abolition. For an overview of the international position, see United Nations Crime Prevention and Criminal Justice Branch *Life Imprisonment* (1994).

156 45 *BVerfGE* 187.

157 It would also fail to meet the requirements of legality.

158 A new section, art 57a, was added to the German Penal Code in 1982. In its decision of 3 June 1992 the Federal Constitutional Court held that it was acceptable to take into account whether the offender had been particularly blameworthy in respect of the offence for which he had been sentenced when subsequently considering his release in terms of art 57a. 86 *BVerfGE* 288. However, the trial court should make a finding in this regard in order to guide the tribunal that would eventually decide on his release.

159 86 *BVerfGE* 288.

160 See *Tcoelib* (supra).

161 *Ibid* at 397b. The Court found that Levy J in *S v Nehemia Tjijo* (Unreported decision of 4 September 1991) had been wrong to equate the two.

162 The 1977 decision of the German Federal Constitutional Court (45 *BVerfGE* 187) is referred to with approval by Mahomed CJ in *Tcoelib* (supra) at 398g–399a and 400a.

'cannot be justified if it effectively amounts to a sentence which locks the gates of the prison irreversibly on the offender without any prospect whatever of lawful escape from that condition for the rest of his or her natural life and regardless of circumstances which might subsequently arise'.¹⁶³

Like the German Federal Constitutional Court, the Supreme Court of Namibia emphasised that the constitutionality of life imprisonment depended on the recognition of the human dignity of the prisoner. Such dignity would be undermined unless the prisoner had a 'concrete and fundamentally realizable expectation'¹⁶⁴ of release. The difficult question was whether the existing release mechanisms were sufficient to meet that requirement. Mahomed CJ conceded that

if the release of the prisoner depends entirely on the capricious exercise of the discretion of the prison or executive authorities, leaving them free to consider such a possibility at a time which they please or not at all and to decide what they please when they do, the hope which might yet flicker in the mind and heart of the prisoner is much too faint and much too unpredictable to retain for the prisoner a sufficient residue of dignity which is left uninvaded.¹⁶⁵

Mahomed CJ ruled that the procedures for the consideration of the release of life prisoners created by the Namibian Prisons Act were sufficient, notwithstanding the fact that (a) they gave wide discretionary powers to officials of the Namibian prison administration and (b) empowered the President to make the final decision to release a prisoner serving a life sentence when a Release Board had made a positive recommendation. In this respect the Namibian court did not

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follow the strict standards as set out by the German court. Decisions regarding the release of prisoners serving life sentences could be made by a judicial body. Mahomed CJ did emphasise, however, that:

The relevant authorities entrusted with these functions have not only to act in good faith but they must properly apply their minds to each individual case, the relevant circumstances impacting on the exercise of a proper discretion, the objects of the relevant legislation creating such mechanisms and the values and protections of the Constitution.¹⁶⁶

The decision of the Supreme Court of Namibia in *Tcoeib* may be regarded as strong persuasive authority in South Africa. The relevant provisions of the Namibian Constitution are mirrored by similar provisions in the South African Constitution.¹⁶⁷ One may predict with some confidence that a life sentence without the prospect of

163 Ibid at 398b.

164 Ibid at 399h, quoting D van Zyl Smit 'Is Life Imprisonment Constitutional? The German Experience' 1992 *Public Law* 263, 271.

165 See *Tcoeib* (supra) at 399h-400a.

166 *Tcoeib* (supra) at 400c.

167 Article 8 (human dignity) of the Constitution of Namibia may be compared to s 10 in the Constitution of South Africa. Also relevant are the similar provisions relating to personal liberty (art 7 and s 12 in Namibia and South Africa respectively) and to administrative justice (art 18 and s 33 in Namibia and South Africa respectively).

parole or other form of release will be found unconstitutional in South Africa.¹⁶⁸ The repeated statements of the South African Appellate Division that, as far as the courts are concerned, life means life,¹⁶⁹ do not therefore reflect the full, constitutionally required reality.

Life imprisonment has not yet been considered fully by the South African Constitutional Court.¹⁷⁰ However, in *S v De Kock*,¹⁷¹ Van der Merwe J subjected the Southern African jurisprudence on life imprisonment to a comprehensive review.¹⁷² He cited the decision of Mahomed CJ in *S v Tcoeib*¹⁷³ with approval and concluded that a decision on whether to impose life imprisonment should be taken on the basis that it was not a sentence that left the offender without a prospect of release. Van der Merwe J found that an expectation of release was inherent in the provisions of the Correctional Services Act.¹⁷⁴ He explained that the responsible authorities had to act fairly, justly and responsibly in the light of all the factors that existed at the time of sentence and that might come to the fore in the future.¹⁷⁵ If this did not happen, the courts could be asked to intervene.¹⁷⁶

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One could not proceed from the position that the responsible authorities would act irresponsibly and in a manner contrary to the Constitution and the Correctional Services Act.¹⁷⁷

The Supreme Court of Appeal has made clear on a number of occasions that life imprisonment is the ultimate penalty. It should only be imposed on offenders who commit the most serious crimes. Courts should not attempt to ensure that such

168 See *Bull* (supra) at para 23; *Nkosi II* (supra) at 95d. South African prison law does create a mechanism for the consideration of the release on parole of prisoners serving sentences of life imprisonment. Section 65(5) of the Correctional Services Act 8 of 1959.

169 See *S v Mdau* 1991 (1) SA 169 (A), 177B; *S v Oosthuizen* 1991 (2) SACR 298 (A), 302A; *S v W* 1993 (2) SACR 74 (A); *S v Mehlape en andere* 1993 (2) SACR 180 (T), 183H.

170 See *Makwanyane* (supra) at paras 170-2.

171 *S v De Kock* 1997 (2) SACR 171 (T) ('*De Kock*').

172 See *De Kock* (supra) at 204d-211i.

173 See *Tcoeib* (supra).

174 See *De Kock* (supra) at 211h. See also *S v Smith* 1996 (1) SACR 250 (E), 225b-256a.

175 See *De Kock* (supra) at 211h.

176 Ibid.

177 *De Kock* (supra) at 211h. See also the argument for legality in the implementation of sentences infra, § 49.3(b), and D van Zyl Smit 'Taking Life Imprisonment Seriously' in E Kahn (Ed) *The Quest for Justice: Essays in Honour of Michael MacGregor Corbett, Chief Justice of the Supreme Court of South Africa* (1995) 309-27.

offenders are detained for longer than the minimum period before prisoners serving life sentences are considered for release, either by declaring offenders dangerous criminals¹⁷⁸ or by imposing exorbitantly long fixed-term sentences.¹⁷⁹

49.3 The implementation of punishment

A sentence that is otherwise constitutionally acceptable may be implemented in a manner that is unconstitutional. In the case of death sentences, the Supreme Court of Zimbabwe¹⁸⁰ and the European Court of Human Rights¹⁸¹ both declared that the manner in which the death penalty was implemented could amount to inhuman or degrading treatment. Where this has been the case the courts intervened to ensure that the sentence of death was not carried out, even if the Constitution or international instrument that they were interpreting allowed the death sentence to be imposed.¹⁸² If the constitutionality of the sentence of death were ever to be upheld in South Africa, the constitutionality of the way in which it is implemented might be challenged along the same lines.

Constitutional challenges relating to the implementation of sentences are more likely to be directed against those forms of punishment in which the State plays an active part in the supervision and control of the offender over a long period of time, and which require decisions to be made about the termination of the sentence. Imprisonment and, to a lesser extent, correctional supervision, are such forms of punishment. This relationship between the State and the offender lends itself to a wide range of specific constitutional challenges. Most challenges are likely grounded in commitments to human dignity and the principle of legality.

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(a) Dignity

Most rights-based legal systems of prison law recognise that, as a general rule, imprisonment ought not to deny prisoners any other rights, except those of which the negation is the necessary consequence of incarceration. Historically, the recognition granted to prisoners' rights in South Africa has been patchy. Initially their rights were widely recognised. In 1912 in *Whittaker v Roos and Bateman; Morant v Roos and Bateman*¹⁸³ the newly constituted Appellate Division of the Union of South Africa held that prisoners of all kinds were entitled to 'all the personal rights and personal dignity not temporarily taken away by law, or necessarily inconsistent with

178 See *Bull* (supra).

179 See *Nkosi II* (supra); *S v Silvale* 1999 (2) SACR 102 (SCA).

180 *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General, Zimbabwe & others* 1993 (4) SA 239 (ZS), 1993 (2) SACR 432 (ZS).

181 *Soering v United Kingdom* (1989) 11 EHRR 439.

182 In *Soering* (supra) the intervention took the indirect form of preventing extradition to the United States, where the European Court feared that the accused would be subject to treatment that would infringe the European Convention.

183 See *Whittaker v Roos and Bateman; Morant v Roos and Bateman* 1912 AD 92 ('*Whittaker*').

the circumstances in which they had been placed.¹⁸⁴ This dictum was restricted in a series of cases dealing with the rights of political detainees and eventually sentenced political prisoners.¹⁸⁵ In *Goldberg & others v Minister of Prisons & others*¹⁸⁶, the Court held that sentenced prisoners were limited to a few basic rights. However, in *Minister of Justice v Hofmeyr*,¹⁸⁷ the Appellate Division finally recognised that all the fundamental rights of prisoners survived incarceration and effectively reinstated the 1911 decision in *Whittaker*.

The decision in *Hofmeyr* continues to form the basis of South African jurisprudence on prisoners' rights and 'has been given fresh impetus by a number of our constitutional values such as dignity, equality and humanity'.¹⁸⁸ Moreover, the same principles underlie the prisoners' rights articulated in s 35(2) of the Constitution. Amongst these rights is detention in conditions of human dignity. These conditions include 'at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment'.¹⁸⁹ The danger

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184 *Whittaker* (supra) at 123.

185 See D van Zyl Smit "'Normal" prisons in an "abnormal" society? A comparative perspective on South African prison law and practice' (1987) 6 *Criminal Justice Ethics* 37-51.

186 See *Goldberg & others v Minister of Prisons* 1979 (1) SA 14 (A). The judgment is notable also for the dissent of Corbett JA, who adopted a much more liberal approach to the rights of sentenced prisoners in conformity with the general principles articulated in *Whittaker* (supra).

187 See *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A). See also *Van Biljon & others v Minister of Correctional Services & others* 1997 (4) SA 441 (C), 1997 (6) BCLR 789 (C) at para 42 ('*Van Biljon*').

188 See *Minister of Correctional Services & others v Kwakwa & another* 2002 (4) SA 455 (SCA) at 469f, [2002] 3 All SA 242 (A), 2002 (1) SACR 705 (SCA).

189 For a thoughtful discussion of a prisoner's right to adequate medical treatment, see *Van Biljon* (supra), where Brand J ordered the prison authorities to provide HIV-positive applicant prisoners with the anti-retroviral medication that had been prescribed for them.

is that this list, together with the other rights mentioned in s 35(2),¹⁹⁰ may be considered to be the sum of prisoners' rights.

Some guidance on how prisoners' rights generally may be protected by focusing on the essential human dignity of prisoners may be gleaned from the extensive jurisprudence on prisoners' rights in other jurisdictions.¹⁹¹ In *Conjwayo v Minister of Justice, Legal and Parliamentary Affairs & others*¹⁹² the Zimbabwean Supreme Court held that the lawfulness of the actions of the authorities in drastically limiting the exercise period allowed to a condemned prisoner should be judged against '[the] broad and idealistic notion of dignity, humanity and decency'. It derived this principle directly from the provision in the Zimbabwean Constitution that outlaws torture and inhuman or degrading treatment or punishment.¹⁹³ As a general matter, the Court emphasised that it was ill equipped to make decisions regarding the administration of prisons. However, Gubbay CJ, stated that::

190 Section 35(2) provides:

Everyone who is detained, including every sentenced prisoner, has the right—

- (a) to be informed promptly of the reason for being detained;
- (b) to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;
- (c) to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
- (d) to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released;
- (e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment; and
- (f) to communicate with, and be visited by, that person's—
 - (i) spouse or partner;
 - (ii) next of kin;
 - (iii) chosen religious counsellor; and
 - (iv) chosen medical practitioner.

191 See, generally, D van Zyl Smit *South African Prison Law and Practice* (1992) 59ff; S Krantz *Cases and Materials on the Law of Corrections and Prisoners' Rights* (3rd Edition, 1986); D van Zyl Smit & F Dünkel (eds) *Imprisonment Today and Tomorrow—International Perspectives on Prisoners' Rights and Prison Conditions* (2nd Edition, 2001); A J Fowles *Prisoners' Rights in England and the United States* (1989). For examples of judicial pronouncements on the retention of civil rights by prisoners, see *Raymond v Honey* [1983] 1 AC 1 [1981] 2 AllER 1084 at 10, 14; *R v Board of Visitors of Hull Prisoners, Ex parte St Germain* [1979] QB 425, 455; *Solosky v The Queen* (1979) 105 DLR (3d) 745, 760; *Meachum v Fano* 427 US 215, 225, 96 SCt 2532 (1976); *Connecticut Board of Pardons v Dumschat* 452 US 458, 468, 101 SCt 2460 (1981); *Namunjepo & others v Commanding Officer Windhoek Prison & another* 2000 (6) BCLR 671 (NmS).

192 See *Conjwayo v Minister of Justice, Legal and Parliamentary Affairs & others* 1992 (2) SA 56 (ZS) ('*Conjwayo*').

193 *Ibid* at 63D-E.

But a policy of judicial restraint cannot encompass any failure to take cognisance of a valid claim that a prison regulation or practice offends a fundamental constitutional protection.¹⁹⁴

As is the case with imposition of punishment, the question of whether implementation of a sentence of imprisonment, or any other sentence, is contrary to human dignity can be answered by analysing closely whether the sentence

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amounts to torture or a form of cruel inhuman or degrading treatment or punishment.¹⁹⁵ The prohibition of certain forms of punishment and treatment has also been used as the basis for the protection of prisoners' rights in international human rights law.¹⁹⁶ In this regard the European Court of Human Rights has been particularly active and has emphasised that torture or degrading treatment of punishment are prohibited in absolute terms in democratic societies, irrespective of the circumstances and the victims' behaviour.¹⁹⁷ The Court held that conditions of imprisonment may amount to degrading treatment, and thus infringe art 3 of the European Convention on Human Rights,¹⁹⁸ even where the authorities do not intend to degrade the prisoner.¹⁹⁹ Prison overcrowding may be degrading to prisoners in this sense.²⁰⁰

It is clear that for any limitations of prisoners' rights to be accepted in South Africa, they have to be imposed by legislation and meet the requirements of the limitations section of the Constitution.²⁰¹ This necessary condition does not address the questions of what the full range of prisoners' rights is or of what limitations may legitimately be imposed on prisoners' rights. The answers are difficult to determine

194 Ibid at 601.

195 See s 12(1)(e) of the Constitution as discussed by M Bishop and S Woolman 'Freedom and Security of the Person' in Woolman et al *Constitutional Law of South Africa* supra (2nd Edition, OS, July 2006) Chapter 40.

196 See N S Rodley *The Treatment of Prisoners Under International Law* (2nd Edition, 1999); S Livingstone, T Owen and A MacDonald *Prison Law*, (3rd Edition, 2003) 109-140. For an overview of international and regional instruments applicable to prisoners' rights in Africa, see S H Bukurura *Protecting Prisoners' Rights in Southern Africa: An Emerging Pattern* (2002).

197 See *Kalashnikov v Russia* (2003) 36 EHRR 34 at para 95.

198 Article 3 of the European Convention on Human Rights provides: 'No one shall be subjected to torture or to inhuman treatment or punishment.'

199 See *Peers v Greece* (2001) 33 EHRR 51; *Kalashnikov v Russia* (supra); *Poltoratskiy v Ukraine* (application no 38812/97; unreported judgment of 29 April 2003).

200 See *Kalashnikov v Russia* (supra).

201 'Imprisonment is a severe punishment; but prisoners retain all the rights to which every person is entitled under Ch 3, subject only to limitations imposed by the prison regime that are justifiable under s 33.' *Makwanyane* (supra) at para 143 (Chaskalson P) (The reference to s 33 in the passage quoted is to the Interim Constitution. In the Final Constitution the same function is performed by s 36.)

in the abstract and will often depend on the circumstances of the case²⁰² or on whether more specific rights of individual prisoners are involved as well.²⁰³

One particularly controversial question is the right of prisoners to vote.²⁰⁴ In *August & another v Electoral Commission & others*²⁰⁵ the Constitutional Court recognised the fundamental constitutional importance of the right to vote²⁰⁶ and declared unconstitutional administrative action that would have deprived prisoners of the right to exercise it. However, the Court carefully left open the question

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of whether legislation disqualifying prisoners or categories of prisoners from voting could be justified in terms of the limitations clause.²⁰⁷ Given the emphasis on the importance of the right to vote, it is unlikely that a future court will uphold a total denial of the vote to all prisoners. A more limited, prospective restriction, for example, on the voting rights of offenders who are convicted of crimes against the democratic order may pass constitutional muster.²⁰⁸ However, the logic of recognising the fundamental nature of the right to vote in a democracy makes it more likely that a South African Court will follow the majority of the Supreme Court of Canada in finding that the denial of right to vote of any category of prisoners runs counter to the constitutional commitment to the inherent worth and dignity of every individual and therefore cannot be saved by the limitations clause.²⁰⁹

It is important to note that the recognition of the right of prisoners to constitutionally acceptable treatment means that prisoners may claim positive performance from the authorities. Prisoners are dependent on the authorities in ways that ordinary citizens are not. The prison authorities have to provide directly for them. For example, the courts in upholding prisoners' explicit constitutional right

202 See, for example, *Strydom v Minister of Correctional Services and others* 1999 (3) BCLR 342 (W) (long-term maximum security prisoners had a right of access to electricity where the Department of Correctional Services had allowed the privilege of having electrical appliances in their cells).

203 See *C v Minister of Correctional Services* 1996 (4) SA 292 (T) (prisoner's rights to privacy and dignity infringed when tested to determine whether he was HIV-positive without his fully informed consent.)

204 See ss 1(d) and 19 of the Constitution.

205 See *August & another v Electoral Commission & others* 1999 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC) ('August').

206 Ibid at para 17.

207 *August* (supra) at para 31.

208 See N V Demleitner 'Continuing Payment of One's Debt to Society: The German Model of Felon Disenfranchisement as an Alternative' (2000) 84 *Minnesota LR* 753. There is considerable evidence of partial restrictions being recognised in various jurisdictions. See *August* (supra) at para 31 n 30. Detailed examples are collected in the minority judgment of Gonthier J in *Sauvé v Canada (Chief Electoral Officer)* 2002 SCC 68 at paras 122-134. Gonthier J also points out that the international and regional human rights tribunals have recognised such exceptions to the right to vote.

209 *Sauvé v Canada (Chief Electoral Officer)*(supra).

to be given adequate medical treatment have explained that 'unlike persons who are free, prisoners have no access to other resources to assist them in gaining access to medical treatment' and must therefore be provided with medical treatment even if such treatment would not be available to indigent persons outside prison.²¹⁰

Prisoners' positive rights may be applied even more broadly. The German Federal Constitutional Court has held that the constitutionally protected human dignity of sentenced prisoners gives them an interest in ensuring that prisons are administered in a way that provides them with an opportunity to be resocialized and to lead a crime-free life.²¹¹ Such an approach will have far-reaching implications for the way in which sentences of imprisonment are implemented in South Africa.

With the recognition in South African prison law that the implementation of a prison sentence has as its objective the enabling of prisoners to lead a socially responsible and crime free life, comes also the possibility that certain duties may

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be placed on sentenced prisoners. As such duties restrict rights of sentenced prisoners, it must meet the requirements of the limitation section of the Constitution.²¹² An example of legislative provision for such duties is s 37 of the 1998 Correctional Services Act. Section 37 provides that sentenced prisoners must participate in an assessment process and 'perform any labour which is related to any development programme or which generally is designed to foster habits of industry'.²¹³ However, the Act strictly limits these duties by providing, for example, that prisoners who are ill cannot be compelled to work²¹⁴ and that the work may not be a form of punishment or disciplinary measure.²¹⁵ Moreover, if prison authorities compel prisoners to work in terms of these provisions, they are obliged, in order to recognise their human dignity, to reward them adequately for their labour.²¹⁶

(b) Legality

210 See *Van Biljon* (supra) at para 53.

211 35 *BVerfGE* 203 at 235-6. For further comparative material, see E Rotman 'Do Criminal Offenders have a Constitutional Right to Rehabilitation?' (1986) 77 *Journal of Criminal Law and Criminology* 1023. Note also that art 10(3) of the International Covenant on Civil and Political Rights provides: 'The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.'

212 See Woolman and H Botha 'Limitations' in Woolman et al *Constitutional Law of South Africa* supra (2nd Edition, OS, July 2006) Chapter 34.

213 This provision limits s 13 of the Constitution, which protects human dignity by stipulating that '[n]o one may be subjected to slavery, servitude or forced labour'. Note that by October 2003 the provisions relating to labour in the 1998 Correctional Services Act had not been brought into effect. Their compatibility with the Constitution (and that of the equivalent, less carefully drafted, provisions of the 1959 Correctional Services Act) has not been tested.

214 Section 37(1)(b).

215 Section 40(5).

216 D van Zyl Smit 'Anchoring the Treatment of Sentenced Prisoners in a Rights Discourse: the Example of Prison Labour in German Prison Law' (1999) 116 *SALJ* 613.

(i) During imprisonment

An important component of the principle of legality²¹⁷ is that even those rights of prisoners that are restricted as a necessary consequence of incarceration may only be limited if this is done by law, either expressly or by necessary implication. Both the Constitution and the legislation regulating prisons in South Africa must therefore be scrutinized to see whether they provide the necessary authority for the restriction of prisoners' rights.²¹⁸ In addition, the restrictions must be formulated sufficiently narrowly to ensure that prisoners are not subject to overbroad discretionary powers.²¹⁹

A further requirement is that in all dealings with prisoners the requirements of administrative justice must be met.²²⁰ The courts have held that these requirements encompass the legitimate expectations that prisoners may form as a result of

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the manner in which the prison authorities manage the privileges that they grant.²²¹ Legitimate expectations should also embrace the requirement of procedurally fair hearings before prisoners are transferred to institutions such as 'C-Max' high security prisons that may affect their privileges and concessions.²²²

(ii) On release

The requirements of legality in respect of the implementation of sentences relate also to the rules determining the release of offenders from the restrictions of their sentence. Difficulties in this regard rarely arise with respect to the final unconditional release of prisoners or those offenders subject to correctional supervision. Much more problematic are the decisions relating to conditional release on parole or correctional supervision. These decisions clearly affect the liberty of offenders. Even though it may be argued that no one has a right to parole, prisoners have a very strong interest in liberty and may often have legitimate expectations with respect to parole.²²³

217 See *Pharmaceutical Manufacturers* (supra).

218 See *Minister of Correctional Services & others v Kwakwa & another* (supra) at 473 (court emphasised that the Commissioner had to meet the requirements of legality in determining a system of privileges).

219 See the seminal decision of the German Federal Constitutional Court of 14 March 1972 (33 BVerfGE 1), which declared the necessity of a statutory framework of sufficient precision to be a constitutional requirement for all restrictions of prisoners' rights. This decision led directly to the enactment of the German Prison Act of 1976.

220 FC s 33.

221 See *Strydom v Minister of Correctional Services & others* (supra) at 354C-F.

222 See *Nortje en 'n ander v Minister van Korrektiewe Dienste* 2001 (1) SACR 514 (HHA), 2001 (3) SA 472 (SCA), [2001] 2 All SA 623 (A).

223 D van Zyl Smit *South African Prison Law and Practice* (supra) at 359-69. Whether prisoners have legitimate expectations to be granted parole is disputed. See *Greenholtz v Inmates of Nebraska Penal and Correctional Complex* 442 US 1, 11, 99 Sct 2100 (1979) (the majority of the US Supreme

The problem of expectations is particularly acute where a court has determined, formally or informally, that a person should be considered for release after a set period. In *Thynne, Wilson and Gunnell v United Kingdom*,²²⁴ the ECHR held that detaining prisoners serving discretionary life sentences²²⁵ beyond the minimum period indicated by the trial judge as necessary to meet the punitive aims of the sentence, without having their release considered by a 'court', would be a contravention of art 5(4) of the European Convention on Human Rights. An administrative inquiry by a parole board, which left the final decision to a government minister, was held to be inadequate to meet this requirement. Article 5(4) of the European Convention is analogous to s 12(1)(b) of the South African Constitution. Section 12(1)(b) outlaws detention without trial. If this section is interpreted in a similar way to art 5(4), the constitutionality of current South African procedure in terms of s 65(5) of the 1959 Correctional Services Act for the release of prisoners serving life sentences is open to serious question.²²⁶ The issue will arise

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with particular force where the sentencing court has given an indication of what may properly be regarded as the punitive part of a life sentence and the prisoner subsequently completes that part of the sentence.²²⁷

Procedures for release on parole have to comply with the standards of administrative justice.²²⁸ South African courts are divided on the question of whether the Commissioner of Correctional Services is allowed to issue a general directive that parole boards should only consider offenders who have committed certain offences after they have served two-thirds, three-quarters or even four-fifths of their sentences.²²⁹ The Act, however, allows all prisoners to be considered for release on parole after they have served half their sentences, minus any 'credits' they might be

Court ruled that a parole system 'provides no more than a mere hope that the benefit will be obtained'.) The liberty interest of parolees was recognised by Marshal J in his dissent in *Greenholtz*. Ibid at 23. This latter approach may prove persuasive in terms of the new South African Constitution.

224 See *Thynne, Wilson and Gunnell v United Kingdom* (1991) 13 EHRR 666.

225 The same analysis has now also been extended to mandatory life sentences for murder: See *Stafford v United Kingdom* (2002) 35 EHRR 32 and *Regina (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46, [2003]1 AC 837, and *Regina v Lichniak, Regina v Pyrah* [2002] UKHL 47, [2003]1 AC 903.

226 This question will not arise when Chapter VII of the Correctional Services Act 111 of 1998 comes into force as the release on parole of all prisoners serving life sentences will be considered by the court that imposed them after the prisoners have served 25 years of their sentences.

227 The question was raised but not decided in Namibia, where the release procedures are similar to those currently in force in South Africa. See *S v Tcoelib* (supra) at 402e-h.

228 See *Steele v Warden Mountain Institution* (1991) 60 CCC (3d) 1.

229 Compare *Winckler & others v Minister of Correctional Services & others* 2001 (2) SA 747 (C), [2001] 2 All SA 12 (C) (which finds that the Commissioner has this power) with *Combrink & another v Minister of Correctional Services & One Other* 2001 (3) SA 338 (D), 2000 JDR 0607 (D), [2000] JOL 7349 (D).

awarded for their behaviour in prison.²³⁰ No authority exists in the 1959 Correctional Services Act for the Commissioner to issue such a directive to parole boards. Moreover, systematic offence-based intervention by the Commissioner is not related to any of the purposes of parole. It amounts to a *de facto* resentencing by the Commissioner and thus disturbs the relative, ordinal proportionality of the sentences imposed by the courts.²³¹ Although prisoners do not have a right to be paroled, such additional penalisation infringes the right to procedurally fair and reasonable administrative action. It undermines the prisoners' legitimate expectations, created by the Act, that they will be considered for release after they have served half their sentences, reduced further by the number of the credits they receive.²³²

Where a prisoner who has already been released on parole is alleged to have infringed his parole conditions the liberty interest is even stronger. It may even be argued that he cannot be returned to prison without a full trial-like procedure being followed to determine whether he has in fact infringed his conditions of parole.²³³

The same applies to prisoners serving sentences of correctional supervision. The current position is that prisoners who were sentenced initially to correctional supervision cannot have their sentences converted to imprisonment without the matter being heard by a court.²³⁴ Such are the requirements of due process.

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However, prisoners who are initially sentenced to imprisonment, and then have part of their sentences converted to correctional supervision, may subsequently be sent back to prison without the safeguard of a determination of the facts by a court.²³⁵ The constitutionality of this latter procedure is dubious.²³⁶ While the increased flexibility of sentences allows offenders to be subject to different forms of control, it

230 Section 65(4)(a) of the Correctional Services Act 8 of 1959.

231 The courts will be able to play a much more active role in determining parole outcomes once s 276B of the Criminal Procedure Act 51 of 1977 and Chapter VII of the Correctional Services Act 111 of 1998 have come into force, *inter alia*, because they will be able to specify a non-parole period as part of the sentence. See *S v Lehloane* 2001 (2) SACR 297 (T).

232 See *Combrink & another v Minister of Correctional Services & another* (supra); *contra Winckler & others v Minister of Correctional Services & others* (supra).

233 The constitutional requirement for such a procedure has been widely recognised. See *Morrissey v Brewer* 408 US 471, 92 Sct 2593 (1972).

234 Sections 276(1)(h), 286B(4)(b)(ii) or 297(1)(a)(i)(ccA), (1)(b) or (4) of the Criminal Procedure Act 51 of 1977 read with s 84B(2) of the Correctional Services Act 8 of 1959.

235 Sections 276(1)(i) or 287(4)(a) of the Criminal Procedure Act 51 of 1977, and s 84B(1) of the Correctional Services Act 8 of 1959.

236 See D van Zyl Smit 'Degrees of Freedom' (Summer 1994) 13 *Criminal Justice Ethics* 31-7; P C Vegter 'Stellen de Grondrechten Eisen Aan De Vrijheidsbeperkende Straf' in T H van Veen & G van Essen (eds) *Sanktietoepassing Een Nieuwe Ordening* (1991) 35. In *De Lange v Commissioner of Correctional Services, Eastern Cape* 2002 (3) SA 683 (SE), 2002 (2) SACR 185 (SE) it was emphasised that a prisoner has no right enforceable against the prison authorities to compel them to approach the court to ask for a variation of the sanction.

will require the development of new procedural mechanisms to afford prisoners protection against constitutionally proscribed arbitrary exercises of power.²³⁷

The constitutional powers of the President to pardon or reprieve offenders exists outside of, and in addition to, the parole system.²³⁸ Although this power is traditionally used sparingly, its constitutional status is such that its application will not easily be subject to judicial supervision.²³⁹ However, in *Hugo v President of the Republic of South Africa & another*²⁴⁰ the Court held that the President was bound to act in accordance with the Constitution when granting special remission of sentence. He could not discriminate unfairly. Such discrimination would contravene s 8(2) of the Interim Constitution.²⁴¹ Accordingly, it was held that the President could not grant remission only to mothers of children under the age of 12 years and thus discriminate against fathers. On appeal the Constitutional Court confirmed that the President could not exercise his power of pardon in violation of the Bill of Rights, but held, on the facts, that there had been no unfair discrimination against fathers.²⁴²

237 At the very least the decision to send a person back to prison must be subject to some form of substantive review under s 33(d) of the Constitution, the right to administrative justice, to ensure that it satisfies the requirements of proportionality. See in this regard *Roman v Williams NO* 1997 (9) BCLR 1267 (C), 1998 (1) SA 270 (C), [1997] 4 All SA 210 (C). Van Deventer J confirmed the decision of the Commissioner under s 84B(1) of the Correctional Services Act 8 of 1959 to re-imprison the applicant, but only because the decision was substantively justifiable in relation to the reasons given for it. The Correctional Services Act 111 of 1998 contains much more elaborate procedures in this regard, but by October 2003 they had not been brought into effect.

238 See s 84(1)(j) of the Constitution, read with s 327 of the Criminal Procedure Act and ss 66 and 70 of the Correctional Services Act 8 of 1959.

239 *Gerhardt v State President* 1989 (2) SA 499 (T); *Kruger v The Minister of Correctional Services & others* 1995 (2) SA 803 (T), 1995 (1) SACR 375 (T); *Kommissaris van Korrektiewe Dienste v Malaza* 1996 (1) SA 1143 (W).

240 *Hugo v President of the Republic of South Africa & another* 1996 (4) SA 1012 (D), [1996] 1 All SA 454 (D), 1996 BCLR 876 (D).

241 Act 200 of 1993. Section 9(3) of the Final Constitution contains the comparable provision.

242 *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC).