

# 49 Sentencing and Punishment

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## 49.1 INTRODUCTION

What standards does the South African constitutional order require sentencing and punishment to meet? The Constitution<sup>1</sup> assumes that the State may punish criminal offenders. FC s 12(1)(e), for example, confers an expansive power on the State to punish, setting a relatively high threshold for restrictions on the State's power to punish. It allows all punishment, save that which results in individuals being tortured or 'treated or punished in a cruel, inhuman or degrading way'.<sup>2</sup> While FC s 12(1)(e) creates a relatively permissive framework for punishment, other constraints exist. Even where FC s 12(1)(e) is not engaged, common law has always required that the State punish individuals only by means of sentences imposed by the courts following criminal trials that are subject to rigorous due process. Since the advent of the FC, additional constitutional requirements have been added to the sentencing framework.<sup>3</sup> This chapter will explore how sentencing and punishment are shaped by such constitutional requirements.

Often lost among the welter of inquiries into the limits of the State's penal powers is the question of 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.<sup>4</sup> 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. In order for potential offenders to be deterred successfully from committing crimes, however, the system must be backed by adequate criminal sanctions.<sup>5</sup> 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

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\* In the light of the fact that FC s 35(2) Constitution uses the term 'sentenced prisoner' we have continued to use the terms 'prisoner' and 'prison' where appropriate. Unless otherwise indicated they refer respectively to 'inmate' and 'Correctional Centre' as used in the Correctional Services Act 111 of 1998 ('CSA' or '1998 CSA'). Where the focus is directly on the interpretation of the 1998 Correctional Services Act as amended, we have to follow in its nomenclature.

<sup>1</sup> The Constitution of the Republic of South Africa Act 108 of 1996 ('FC' or 'Final Constitution'). All references to the Constitution below are to the 1996 Constitution as amended unless otherwise indicated. In the following text the provisions of the earlier Constitution of the Republic of South Africa Act 200 of 1993 ('IC') are referred to as provisions of the Interim Constitution.

<sup>2</sup> See also the reference to sentenced prisoners in FC ss 35(2)(e) and 35(3). Ss 12(1)(e) and 35(1) correspond to ss 11(2) and 25(1),(3) respectively of the IC.

<sup>3</sup> See F Snyckers & J Le Roux 'Criminal Procedure: Rights of Arrested, Detained, and Accused Persons' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 51.

<sup>4</sup> For a useful general discussion of the question of whether the legislator can be compelled to punish certain forms of conduct, see C Roxin 'The Legislation Critical Concept of Goods-in-law under Scrutiny' (2013) 3 *European Criminal Law Review* 3-25.

<sup>5</sup> For a discussion of the human rights of victims of crime in the context of sentencing generally, see B Emmerson, A Ashworth & A MacDonald *Human Rights and Criminal Justice* (2012) 828-831.

the State.<sup>1</sup> The courts have also indicated that such duties may extend to sentencing and punishment. *Azanian People's Organisation (AZAPO) and Others v President of the Republic of South Africa and Others*<sup>2</sup> 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, having suffered the unlawful invasion of the rights to life, dignity and freedom from torture, would have a right to 'obtain redress in the ordinary courts of law and those guilty of perpetrating such violations [would be] answerable before such courts, both civilly and criminally.'<sup>3</sup>

In other jurisdictions the right to have one's 'life protected by law' includes a duty on the state to deter crime. 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 intentional and unlawful taking of life, but also to take appropriate action to safeguard the lives of those within its jurisdiction'.<sup>4</sup> 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.'<sup>5</sup>

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.<sup>6</sup> 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.<sup>7</sup> Most of these developments deal with an obligation to criminalise behaviour rather than with appropriate sanctions. As a result, it is not yet clear what impact such changes will have on constitutional requirements for sentencing law. Also unclear is whether the general requirement that imprisonment and other forms of punishment should be used only as a last resort creates a constitutional

<sup>1</sup> *Carmichele v Minister of Safety and Security and Another* 2001(4) SA 938 (CC), 2001 (10) BCLR 995 (CC), [2001] ZACC 22.

<sup>2</sup> 1996 (4) SA 671 (CC), 1996 (8) BCLR 1015 (CC), [1996] ZACC 16 (*AZAPO*). 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.)

<sup>3</sup> *AZAPO* (supra) at para 9.

<sup>4</sup> *Osman v United Kingdom* (2000) 29 EHRR 245 at para 115. See also *Giuliani v Italy* (2012) 54 EHRR 16.

<sup>5</sup> Ibid.

<sup>6</sup> See *Bannatyne v Bannatyne & Another* 2003 (2) SA 363 (CC), 2003 (2) BCLR 111 (CC), [2002] ZACC 31.

<sup>7</sup> See *A v United Kingdom* (1999) 27 EHRR 611.

duty on a state not to criminalise certain forms of conduct, or not to create too draconian a penal regime.<sup>1</sup>

A more common question is the extent to which the imposition and the implementation of punishment are restricted by the rights entrenched in the Bill of Rights.<sup>2</sup> Responses to this question form the bulk of this chapter. Attention is also paid, as required by the FC,<sup>3</sup> to comparative law and to international law relevant to sentencing and punishment.

## 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 that courts should adopt towards sentencing.

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

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. This has gradually become less significant, however, as the punishment jurisdiction of the magistrates' courts has increased over the years. Regional magistrates' courts are statutorily authorised to impose sentences of imprisonment of up to 15 years, and, in limited circumstances, to sentences of life-imprisonment.<sup>4</sup>

<sup>1</sup> An interesting example of the dilemma created by the contrary pressures both to criminalise and to resist excessive criminalisation on is to be found in *MC v Bulgaria* (2005) 40 EHRR 20 (The ECtHR held that States have a positive obligation inherent in Articles 3 and 8 of the Convention to enact criminal-law provisions effectively punishing rape. *Ibid* at para 153. Tulkens J concurred, noting that 'recourse to the criminal law may be understandable where offences of this kind are concerned.' She emphasised, however, that generally 'recourse to the criminal law is not necessarily the only answer,' that "criminal proceedings should remain, both in theory and in practice, a last resort or subsidiary remedy and that their use, even in the context of positive obligations, calls for a certain degree of 'restraint.'")

<sup>2</sup> The protection of these rights is constrained by s 36, the limitation clause. For further discussion, see S Woolman & H Botha 'Limitations' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34.

<sup>3</sup> FC ss 39(1)(b) and (c).

<sup>4</sup> Regional magistrates are also empowered to impose monetary fines of no more than R 600 000. The sentencing jurisdiction of district courts is no more than three years and fines of no more than R 120 000. See Magistrates' Courts Act 32 of 1944 s 92 and GG 19435 (30 October 1998) as amended by GN R63 in GG 36111 (30 January 2013). See also *Ndlovu v S* 2017 (2) SACR 305 (CC), 2017 (10) BCLR 1286 (CC), [2017] ZACC 19 (the Constitutional Court made it clear the fact that where the accused was convicted of a charge of rape read with the provisions of s 51(2) of the Criminal Law Amendment Act 105 of 1997 (requiring a mandatory minimum sentence of 15 years imprisonment), a sentence greater than the one set out in the charge sheet could not be imposed by a regional magistrates' court.)

While, prior to the advent of the FC, our jurisprudence developed sentencing principles within this broad discretionary framework, it was, and remains, relatively unformed and has only a limited impact on the actual exercise of sentencing discretion.<sup>1</sup> 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.<sup>2</sup>

Constitutional norms add a new dimension to debates about punishment.<sup>3</sup> 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 and Others*, *S v Tshilo*,<sup>4</sup> the Constitutional Court explored the constitutional importance of fair trial rights in relation to sentencing procedure. The right to a fair trial, it held, required, ‘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’.<sup>5</sup> More recently, the constitutional court, in *S v Bogaards*,<sup>6</sup> ruled that the right to a fair trial requires that an accused receive prior notice of a court’s intention to increase his or her sentence on appeal. Khampepe J stated:

<sup>1</sup> See E du Toit *Straf in Suid-Afrika* (1981) 446–448. See also MA Rabie, SA Strauss & MC Mare *Punishment: An Introduction to Principles* (1994) 285–300, DP van der Merwe *Sentencing* (1991), SS Terblanche *Guide to Sentencing in South Africa* (2007) 117–128.

<sup>2</sup> 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 410–411, and the case and sources cited there.

<sup>3</sup> See N Steytler *Constitutional Criminal Procedure* (1998) 403–438.

<sup>4</sup> See *S v Dzukuda* 2000 (4) SA 1078 (CC), 2000 (11) BCLR 1252 (CC), [2000] ZACC 16 (‘*Dzukuda*’).

<sup>5</sup> *Ibid* at para 12 (The Court considered the complaint that a split trial procedure, created by the Criminal Law Amendment Act s 52, in terms of which an offender who had been tried and convicted by a regional court was referred for sentence in the High Court, effectively diminished the discretion with which the sentencing function would be exercised. By removing the sentencing function from the trial court - the court considered best suited to ‘appreciate the atmosphere of the case’ — the argument went, important information would be ‘lost’ before the High Court, thus rendering the trial unfair. Ackerman J for a unanimous Constitutional Court described the complaint as having ‘overstated the position’, for ‘[n]ot all information concerning the trial, the offence or the parties is relevant to the question of sentencing and a fair trial does not require the sentencing court to be in a position identical to that of the trial court, provided it is in all material respects in the same position and the procedure adopted affords the accused a fair trial.’ Thus, 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 also *S v Legoa* 2003 (1) SACR 13 (SCA) at para 20; *S v Ndlovu* 2003 (1) SACR 331 (SCA) at para 11; *S v Makatu* 2006 (2) SACR 582 (SCA).

<sup>6</sup> 2013 (1) SACR 1 (CC) 2012 (12) BCLR 1261 (CC), [2012] ZACC 23.

‘The requirement of fairness that underpins the right to a fair trial under s 35(3) demands that an accused person must be informed if an appellate court contemplates imposing a higher sentence than the one appealed against.’<sup>1</sup>

The failure to give such notice would amount to an irregularity that may, in turn, render the appeal unfair.<sup>2</sup>

### (a) Legality

In order for there to be even the possibility of the equal protection of the law guaranteed by s 9 of the FC, the law has to be clear. The principle of legality, captured by the trite common-law proposition, *nulla poena sine lege*, requires that the law be reasonably clear.<sup>3</sup> This principle is also expressed in the FC.<sup>4</sup> Legality demands that legal powers only be exercised under the law and according to constitutionally appropriate procedures. The FC also recognises explicitly the right of accused persons not be convicted, or by extension punished retrospectively, for acts or omissions that were not offences at the time of their commission.<sup>5</sup> 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’.<sup>6</sup>

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.<sup>7</sup>

<sup>1</sup> Ibid at para 52.

<sup>2</sup> Ibid at para 45 (The Court, acknowledging that a practice had indeed developed over the years whereby parties would be notified if a court was considering an increase in sentence, noted that the lack of any formal notice requirement fell short of what is required in the constitutional era. The Court stated, accordingly, that ‘given the importance of the notice practice in giving effect to the right to a fair trial, and in particular the right of appeal in s 35(3)(f), this Court is obliged to develop the common law and elevate the notice practice to a requirement’. The Court also saw fit to lay down guidelines on how courts should dispense with the notice requirement. Ibid at para 79.) See also *S v Joubert* 2017 (1) SACR 497 (SCA).

<sup>3</sup> See JM Burchell & J Milton *Principles of Criminal Law* (2005) 103.

<sup>4</sup> FC s 1(c). See *Pharmaceutical Manufacturers’ Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC), [2000] ZACC 1 (‘Pharmaceutical Manufacturers’) at para 50; *Fedsure Life Assurance Ltd v Greater Johannesburg Metropolitan Council* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC), [1998] ZACC 17 at paras 56-59.

<sup>5</sup> FC s 35(3)(f).

<sup>6</sup> FC s 35(3)(f). See Steytler (supra) at 376-9.

<sup>7</sup> See *S v Dodo* 2001 (3) SA 382 (CC), 2001 (5) BCLR 423 (CC), [2001] ZACC 16 at para 13. See also *Director of Public Prosecutions, Western Cape v Prins and Others* 2012 (2) SACR 183 (SCA), 2012 (10) BCLR 1049 (SCA), [2012] 3 All SA 245 (SCA), [2012] ZASCA 106 at para 8 (SCA described the relationship between legality and punishment as follows: ‘the imposition of a sentence by a court must have its justification in either the common law or statute. In the absence of a provision that empowers the court to impose a sentence it is powerless to do so.’)

(i) *Defining penalties*

The definition of specific forms of punishment may at first glance appear not to be a problem in South Africa.<sup>1</sup> Whatever the constitutional shortcomings of the sentence of death or of corporal punishment, their ambit was clear. However, most other forms of punishment raise difficult questions of definition, both as to their scope and, in some instances, about whether they constitute a criminal penalty at all.<sup>2</sup> This latter question in particular may be of considerable constitutional importance, for the imposition of criminal penalties by the state is subject to safeguards that do not apply equally to all forms of state action — including the imposition of non-criminal sanctions — that affect members of the public.

(aa) Imprisonment

At a conceptual level the sentence of imprisonment, with the loss of liberty at its core, may seem unambiguous. Since the abolition of imprisonment with hard labour, the length of time to be served has been the only factor that formally distinguishes one sentence of imprisonment from another in South Africa.<sup>3</sup> Life imprisonment and imprisonment of dangerous or habitual offenders are examples of sentences where there may be particular difficulties in calculating the time to be served in detention, and which therefore require close constitutional scrutiny. In principle, however, there is no doubt that these are sentences of imprisonment.

Problems are raised by sentences that are not formally designated as imprisonment but in which restrictions imposed on the offender are so severe that they may be regarded as akin to the loss of liberty inherent in imprisonment. Thus, for example, a curfew order that compelled a person to remain in the home for

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<sup>1</sup> Criminal Procedure Act 51 of 1977 ('CPA') s 276 contains a list of 'punishments' that may be imposed. It is, however, a procedural provision, which makes exception for punishments under the common law. The power to create new offences, and by extension, punishment, that courts once enjoyed, no longer exists and would no doubt be considered a violation of the principle of legality. See J Burchell & J Milton *Principles of Criminal Law* (2005) 78.

<sup>2</sup> See *Director Public Prosecutions, Western Cape v Prins* 2012 (2) SACR 67 (WCC) (The High Court upheld a regional magistrate's quashing of a charge in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 on the grounds that the legislation did not contain a penalty clause. The Supreme Court of Appeal swiftly overturned the High Court's judgment, finding that the legislation clearly anticipated that the imposition of a sentence would necessarily follow a conviction. And, in the absence of a penalty in the statute, the sentencing process would be left to the general discretion of the courts in terms of s 276(1) of the CPA.) *Director of Public Prosecutions, Western Cape v Prins and Others* [2012] ZASCA 106; 2012 (10) BCLR 1049 (SCA); [2012] 3 All SA 245 (SCA).

<sup>3</sup> A punishment of hard labour, which used to be possible under the now repealed Criminal Law Amendment Act 16 of 1959, would be subject to direct constitutional challenge in terms of s 13 of the FC, which prohibits forced labour. This makes it slightly different from the provisions found in several international human rights documents, such as art 8 of the International Covenant on Civil and Political Rights which, although it prohibits forced labour, makes the prohibition subject to a number of exceptions, one of which is work performed during lawful detention. By contrast, the African Charter on Human and Peoples' Rights is a little more ambiguous. Although all forms of slavery are forbidden, it is silent on forced labour. No doubt, the South African FC's unequivocal prohibition of forced labour is at least partly based on the fact that 'criminalization and imprisonment were inextricably linked to apartheid's labour policies and needs'. See G Super 'Like some Rough Beast Slouching towards Bethlehem to be Born: A Historical Perspective on the Institution of the Prison in South Africa, 1976-2004' (2011) 51(1) *British Journal of Criminology* 201. [2<sup>nd</sup> Edition, RS 7: 01–18]

18 hours out of 24 might be regarded as a form of ‘imprisonment in the home’.<sup>1</sup> Similarly, close electronic monitoring, which has not yet been considered by South African courts, could be regarded as so restrictive that is akin to imprisonment.

(bb) Community Corrections

‘Community corrections’ is the umbrella term for all non-custodial measures and forms of supervision of which ‘correctional supervision’ is one.<sup>2</sup> Correctional supervision and other forms of community corrections raise more complex definitional issues.<sup>3</sup> Correctional supervision is formally defined in s 1 of the Criminal Procedure Act as a ‘community based sentence to which a person is subject in accordance with [the relevant provisions] of the Correctional Services Act...’. If a sentencing court determines that correctional supervision is the most appropriate sentence, a sentence of imprisonment may be converted into one of correctional supervision or it may be imposed as condition of a suspended sentence.<sup>4</sup>

Section 52(1) of the 1998 Correctional Services Act lists a number of specific conditions that may be attached to a sentence of community corrections, a term that includes correctional supervision.<sup>5</sup> Subsequent provisions set out what

<sup>1</sup> See *Secretary of State for the Home Department v JJ & Others* [2007] UKHL45, [2008] 1 AC 385.

<sup>2</sup> CSA s 1.

<sup>3</sup> 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.

<sup>4</sup> See CPA ss 276(1)(b) and (i); 276A(3)(e)(ii); 286B(4)(b)(ii); 287(4)(b); 286B(5)(iii); 287(4)(a); 297(1)(a)(i)(ccA) and 297(1)(b).

<sup>5</sup> ‘Community corrections’ is the umbrella term for all non-custodial measures and forms of supervision of which ‘correctional supervision’ is one. CSA s 1. CSA s 52(1) states:

‘When community corrections are ordered, a court, the Correctional Supervisions and Parole Board, the National Commissioner or other body which has the statutory to do so, may, subject to the limitations contemplated in subsection (2) and the qualifications of this Chapter, stipulate that the person concerned-

- a) is placed under house detention;
- b) does community service in order to facilitate restoration of the relationship between the sentenced offenders and the community;
- c) seeks employment;
- d) where possible takes up and remains in employment;
- e) pays compensation or damages to victims;
- f) takes part in treatment, development and support programmes;
- g) participates in mediation between victim and offender or in family group conferencing;
- h) contributes financially towards the cost of the community corrections to which he or she has been subjected;
- i) is restricted to one or more magisterial districts;
- j) lives at a fixed address;
- k) refrains from using alcohol or illegal drugs;
- l) refrains from committing a criminal offence;
- m) refrains from visiting a particular place;
- n) refrains from making contact with a particular person or persons;
- o) refrains from threatening a particular person or persons by word or action;
- p) is subject to monitoring;
- q) is the case of a child, is subject to the additional conditions as contained in section 69; or
- r) is subject to such other conditions as may be appropriate in the circumstances.’

each condition entails and how it should be applied.<sup>1</sup> The 1998 Correctional Services Act thus goes a long way towards remedying the ambiguity of the earlier 1959 legislation.<sup>2</sup> Initially s 52(1) was a closed list of provisions.<sup>3</sup> A subsequent amendment,<sup>4</sup> however, introduced an additional provision that allows community corrections ‘subject to such other conditions as may be appropriate in the circumstances’.<sup>5</sup> In our opinion, this has compromised the clarity and specificity of the section somewhat.

The 1959 Correctional Services Act was even more open-ended in its description of the contents of community corrections. Any of the varying forms of community-based punishment could be imposed by a sentencing court to which the Commissioner of Correctional Services could add ‘any form of treatment control or supervision’ intended to ‘realize the objects of correctional supervision’.<sup>6</sup> This left the offender subject to the unstructured discretion of correctional authorities, the dangers of which were acknowledged by Kriegler AJA in *S v R*: ‘While *servi*ng 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.’<sup>7</sup>

The courts ultimately resolved this problem by finding that it was for the sentencing court to determine the content of the sentence of correctional supervision, including its nature and extent, and for the correctional authorities to adhere to the sentence.<sup>8</sup> Of course, this did not solve the problem of sentencing courts themselves having the power to determine the content of sentences with very little legislative guidance.

<sup>1</sup> CSA ss 59–69.

<sup>2</sup> Correctional Services Act 8 of 1959 (‘1959 CSA’).

<sup>3</sup> Subsections (a)–(g).

<sup>4</sup> The Correctional Services Amendment Act 25 of 2008 came into force on 1 October 2009.

<sup>5</sup> CSA s 52(1)(f).

<sup>6</sup> 1959 CSA s 84 read:

‘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 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.’

<sup>7</sup> 1993 (1) SA 476 (A), 492G, 1993 (1) SACR 209 (A) (Our translation, the original read: ‘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.’)

<sup>8</sup> Ibid at 492A. See also *S v Tsanshana* 1996 (2) SACR 157 (E), 160g–h; *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.) See also *S v Ngobeni* (not reported, 20 July 2002, Transvaal Provincial Division) at 3.

*(cc)* Suspended Sentences

Courts also have a very wide discretion to suspend sentences subject to ‘one or more conditions’.<sup>1</sup> Although these conditions are broadly termed, over the years certain requirements have been laid down by the courts.<sup>2</sup> The conditions imposed must bear a relation to the crime,<sup>3</sup> be reasonable<sup>4</sup> and, importantly, be precise.<sup>5</sup> The question that all courts must face, however, is what may be regarded as an ‘acceptable penal content’ for such sentences or conditions of suspension. The answer is 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’.<sup>6</sup> Offenders should not be publicly humiliated<sup>7</sup> or compelled to do or not do things that undermine their dignity as human beings.<sup>8</sup>

*(dd)* Monetary penalties

The Criminal Procedure Act makes provision for the payment of a fine as a form of sentence.<sup>9</sup> It also makes provision for admission of guilt fines<sup>10</sup> in certain circumstances, namely, where the accused has been issued a summons or received a written notice to appear in a magistrate’s court and the ‘public prosecutor or the clerk of the court concerned believes on reasonable grounds that a magistrate’s court...will not impose a fine exceeding the amount determined by the Minister from time to time by notice in the Gazette’.<sup>11</sup> Admission of guilt fines, allowing for the circumvention of court processes where an accused has been charged

<sup>1</sup> CPA s 297(1)(a) and (b).

<sup>2</sup> Terblanche (supra) at 358-361.

<sup>3</sup> *R v Cloete* 1950 (4) SA 191 (O) (The condition need not, however, be directly related to the crime. Whether a condition is sufficiently related is a question of ‘logic and equity.’) See also *S v Stanley* 1996 (2) SACR 570 (A) at 574, *S v Nkosi* 2008 (1) SACR 87 (N). See also Terblanche (supra) at 358.

<sup>4</sup> ‘Reasonableness’ precludes the imposition of a condition beyond the control of the person concerned, the non-compliance with which would bring the sentence into effect (*S v Gaika* 1971 (1) SA 231 (C)), and that it be ‘reasonably possible’ for the offender to abide by the conditions without extreme difficulty (*S v Grobler* 1992 (1) SACR 184 (C), *S v Titus* 1996 (1) SACR 540 (C)).

<sup>5</sup> See *S v Mnguni & Others* 1985 (2) SA 448 (N) (The court said ‘for the proper exercise of this discretion, conditions of suspension should bear some relationship to the offence for which the suspended sentence is being imposed, and should be stated with reasonable precision and clarity.’)

<sup>6</sup> A von Hirsch ‘The Ethics of Community-Based Sanctions’ (1990) 36 *Crime and Delinquency* 162, 167.

<sup>7</sup> For example, by being 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.

<sup>8</sup> For example, a suspensive condition that would require that women not fall pregnant on the pain of facing imprisonment if she does would be unacceptable. See SL Arthur ‘The Norplant Prescription; Birth Control, Woman Control or Crime Control?’ (1992) 40 *UCLA LR* 1, 101. Various judgments have found that certain conditions are violations of the Bill of Rights, implying that conditions of suspension also be constitutionally compliant. See *S v Benn* 2004 (2) SACR 156 (C) (The court considered whether the offender’s banishment from a particular district was a permissible condition of suspension. The court held (at 161) that such a condition was a potential violation of the offender’s rights to dignity, freedom of movement, trade and occupation and accordingly could not be imposed.) See also *S v Koko* 2006 (1) SACR 6 (C).

<sup>9</sup> CPA s 276(1)(f).

<sup>10</sup> CPA ss 57-57A.

<sup>11</sup> The Minister has determined the amount of R10 000. See Government Notice R62 in Government Gazette 36111 (30 January 2013).

with a trivial or minor offence, once signed, are deemed to be a conviction and sentence by the court.<sup>1</sup> Accordingly, the consequences of signing an admission of guilt fine must be conveyed to the accused.<sup>2</sup> The fact that the monetary amounts are fixed (subject to the prosecutor's discretion to lower the fine),<sup>3</sup> may render the provision open to abuse: wealthier accused persons will be able to avoid the time and trouble associated with being put on trial, as well as the possibility of being sentenced to a term of imprisonment. Nevertheless, it would no doubt be more equitable were the monetary amounts to be defined according to a certain percentage of an offender's monthly or annual income, thereby reducing the risk of poorer persons being targeted indirectly for potential prison sentences.

(ee) Secondary penalties

Particular problems arise in the case of secondary measures that may be taken as a consequence of the imposition of a primary sentence. The authorities may seek to define these measures as merely administrative or preventative and therefore argue that they are not bound by the legality requirements of the criminal law in respect of precision and due process, including the prohibition on retrospective penalties.<sup>4</sup> Courts should be alive to authorities' attempts to sidestep constitutional standards by defining measures as administrative or preventative rather than criminal. In this respect the ECtHR has taken the lead and developed the so-called *Engel* test<sup>5</sup> for identifying a criminal penalty and ensuring that measures which the State may not regard as criminal punishments are subject to the safeguards of criminal and constitutional law. The factors to be taken into account in determining whether a particular measure amounts to a criminal penalty include 'the nature and purpose of the measure in question; its characterisation under national law; the procedures involved in the making and implementation of the measure; and its severity.'<sup>6</sup>

In South Africa a wide range of secondary penalties may be imposed. The authority for many such penalties lies in the provisions of the Prevention of Organised Crime Act 121 of 1998 (POCA). It is important to know what constitutional standards their imposition and implementation are required to meet.<sup>7</sup>

i) Confiscation and forfeiture orders

The Preamble to the Prevention of Organised Crime Act 121 of 1998 (POCA) indicates that the statute was enacted for the purpose of combating 'organised

<sup>1</sup> CPA s 57(6).

<sup>2</sup> *S v Parsons* 2013 (1) SACR 38 (WCC) at para 4.

<sup>3</sup> CPA s 57(4).

<sup>4</sup> FC s 35(3)(n) states that 'every accused has the right...to the benefit of the least severe of the prescribed punishment if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing'. See *Veldman v Director of Public Prosecutions, Witwatersrand Local Division* 2007 (3) SA 210 (CC), 2007 (9) BCLR 929 (CC), [2005] ZACC 22 and *Masiya v Director of Public Prosecutions & Another* 2007 (5) SA 30 (CC), 2007 (8) BCLR 827 (CC), [2007] ZACC 9.

<sup>5</sup> *Engel & Others v the Netherlands* [1976] ECHR 3.

<sup>6</sup> *Welch v United Kingdom* (1995) 20 EHRR 2478 at para 28.

<sup>7</sup> D van Zyl Smit 'Civil Disabilities of Former Prisoners in a Constitutional Democracy: Building on the South African Experience' (2003) *Acta Juridica* 221–237.

crime, money laundering and criminal gang activities’, and to allow for ‘the recovery of the proceeds of unlawful activity; for the civil forfeiture of criminal property that has been used to commit an offence, property that is the proceeds of unlawful activity or property that is owned or controlled by, or on behalf of, an entity involved in terrorist and related activities’.<sup>1</sup> In its operative provisions, POCA provides for two methods of asset seizure: the confiscation of the proceeds of unlawful activities following a criminal conviction;<sup>2</sup> and the civil recovery of property, which does not depend on the criminal conviction of a property owner.<sup>3</sup>

South African courts have not yet considered specifically whether confiscation or forfeiture amount to criminal penalties. There have, however, been several cases in which the purposes of POCA and confiscation or forfeiture orders have been discussed. In *S v Shaik and Others*,<sup>4</sup> O’Regan ADCJ, relying on the Preamble to POCA, emphasised that the primary objective of a confiscation order in terms of chapter 5 of POCA is to ‘ensure that no person can benefit from his or her wrongdoing.’<sup>5</sup> From this, O’Regan ADCJ noted, two secondary purposes flow:

‘The first is general deterrence: to ensure that people are deterred in general from joining the ranks of criminals by the realisation that they will be prevented from enjoying the proceeds of the crimes they may commit. And the second is prevention: the scheme seeks

<sup>1</sup> POCA preamble.

<sup>2</sup> POCA Chapter 5. Importantly, the South African government ratified the United Nations Convention against Corruption on 22 November 2004. Article 31 requires state parties to take measures ‘to enable the confiscation of proceeds of crime derived from offences’. The government has also ratified the African Union Convention on Preventing and Combating Corruption, which conveys the same requirement in similar terms in art 16. POCA s 18 provides:

(1) Whenever a defendant is convicted of an offence the court convicting the defendant may, on the application of the public prosecutor, enquire into any benefit which the defendant may have derived from-

(a) that offence;  
(b) any other offence of which the defendant has been convicted at the same trial; and  
(c) any criminal activity which the court finds to be sufficiently related to those offences,

and, if the court finds that the defendant has so benefited, the court may, in addition to any punishment which it may impose in respect of the offence, make an order against the defendant for the payment to the State of any amount it considers appropriate and the court may make any further orders as it may deem fit to ensure the effectiveness and fairness of that order

<sup>3</sup> POCA ss 48-50 provide for the forfeiture of property in respect of which a ‘preservation order’ is in force. POCA s 38 provides for preservation orders in the following terms:

(1) The National Director may by way of an *ex parte* application apply to a High Court for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property.

(2) The High Court shall make an order referred to in subsection (1) if there are reasonable grounds to believe that the property concerned-

(a) is an instrumentality of an offence referred to in Schedule 1;  
(b) is the proceeds of unlawful activities; or  
(c) is property associated with terrorist and related activities.

<sup>4</sup> 2008 (5) SA 354 (CC), 2008 (2) SACR 165 (CC), 2008 (8) BCLR 834 (CC), [2008] ZACC 7.

<sup>5</sup> *Ibid* at para 51. She also referred to *S v Rabuzzi* 2002 (2) SA 1 (SCA) (The SCA stated that ‘the primary object of a confiscation order is not to enrich the State, but rather to deprive the convicted person of ill-gotten gains.’) See also *S v Phillips* 2002 (4) SA 60 (W).

to remove from the hands of criminals the financial wherewithal to commit further crimes. These purposes are entirely legitimate in our constitutional order.<sup>1</sup>

The nature and implications of the two types of asset seizure are discussed below.

*a. Confiscation orders resulting from criminal convictions*

Section 12(3) of POCA states that ‘a person has benefited from unlawful activities if he or she has at any time, whether before or after the commencement of this Act, received or retained any proceeds of unlawful activities.’ The reason for the ‘wide ambit’ of this provision, as well as the broadly cast definitions of ‘proceeds of unlawful activities’ and ‘property’<sup>2</sup> is, O’Regan ADCJ stated, to combat the complex ‘system of camouflage’ that sophisticated and organised criminals are able to use to hide illegal funds and transactions.<sup>3</sup> However, one cannot escape the fact that the broadly-formulated text describing the goods to be confiscated could have far-reaching and severe consequences for an offender.<sup>4</sup> In addition, there is nothing to say that the objectives of deterrence and prevention are not inconsistent with punitive purposes.<sup>5</sup> These factors, combined with the fact that confiscation orders are made as a result a criminal conviction, indicate that confiscation orders form part of the POCA’s punitive regime.<sup>6</sup>

The ECtHR considered confiscation orders in *Welch v United Kingdom*,<sup>7</sup> a matter involving the imposition of a confiscation order on a convicted drug dealer after conviction in addition to a sentence of imprisonment. Importantly, the statute providing for confiscation of property (the Drug Trafficking Offences Act 1986) came into effect only after the offences were committed. Applying the *Engel* test, the ECtHR held that a confiscation order amounts to a criminal penalty, and that since Article 7(1) of the European Convention on Human Rights prohibits the imposition of a penalty that was not applicable at the time the offence was committed, a violation of Article 7(1) had occurred.<sup>8</sup> Accordingly, confiscation provisions, when applied prospectively, form part of the penalty for the crime.<sup>9</sup>

<sup>1</sup> *Shaik* (supra) at para 52.

<sup>2</sup> See footnote 62 above.

<sup>3</sup> *Shaik* (supra) at para 25.

<sup>4</sup> POCA s 1 describes ‘proceeds of unlawful activities’ as:

‘property or any service advantage, benefit or reward which was derived, received or retained, directly or indirectly, in the Republic or elsewhere, at any time before or after the commencement of this Act, in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived.’

POCA s 1 defines ‘instrumentality of an offences’ as ‘any property which is concerned in the commission or suspected commission of an offence at any time before or after the commencement of this Act, whether committed within the Republic or elsewhere.’

<sup>5</sup> See *Welch v United Kingdom* (supra) at para 30.

<sup>6</sup> See *Shaik* (supra) at para 57 (‘The Court acknowledged that the effect of criminal forfeiture ‘might at times have a punitive effect’. It insisted, however, that this is not its ‘primary purpose.’)

<sup>7</sup> *Welch* (supra).

<sup>8</sup> *Ibid* at para 30-35.

<sup>9</sup> Since its inception, the CPA s 35 has made provision for the prospective confiscation of weapons, instruments and articles, and, when it comes to certain offences, vehicles and containers.

POCA was amended soon after its commencement so as to ensure, specifically, that confiscation and forfeiture could operate with retrospective effect.<sup>1</sup> Whether retrospectivity of this kind renders the relevant sections of POCA unconstitutional is open to debate. Certainly, it would not be acceptable in terms of the *Welch* decision. The prohibition on retrospective penalties in the Convention, however, is not situated within the fair trial provisions of Articles 6.2 and 6.3. Its application is thus not constrained by the latter's reference to those 'charged with a criminal offence.' The opposite is true in relation to the South African Bill of Rights. The prohibition against retrospective penalties is applicable, like all the fair trial rights enumerated in s 35(3), to accused persons only. Confiscation is a civil process that occurs in the wake of the conviction of an offender.<sup>2</sup> Thus, the person facing confiscation is no longer an accused before the court. To date, courts have not extended fair trial rights to non-accused persons,<sup>3</sup> perhaps due to the general 'access to courts' provision in s 34 the FC.<sup>4</sup> But this does not necessarily prohibit an argument in favour of the extension of the protection against the imposition of retrospective penalties in s 35(3)(l) to those facing retrospective confiscation.

Several factors are relevant to the discussion on the appropriateness of retrospective confiscation. The first of these is the ambit of the confiscation provisions. Despite there being certain limitations on the monetary amounts that may be confiscated,<sup>5</sup> POCA provides for a broad array of instances where confiscation may occur. Such instances include, in addition to an offence for which an accused has been convicted, any other offence for which a defendant has been convicted at the same trial and 'any criminal activity which the court finds to be sufficiently related to those offences.'<sup>6</sup> Thus, there is no real limit on the nature of the offence from which confiscation may proceed. There is also a measure of ambiguity regarding how a court would determine whether 'any criminal activity' is 'sufficiently related' to the primary offence, be it 'organised' in nature or not. The second factor is whether and, if so, how the purposes of confiscation are

<sup>1</sup> Prior to the Prevention of Organised Crime Amendment Act 38 of 1999, the definition of 'proceeds of unlawful activities' read as follows: 'any property or any service, advantage, benefit or reward which was derived, received or retained, directly or indirectly, in connection with or as a result of any unlawful activity carried on by any person, whether in the Republic or elsewhere'. The amendment added the phrase 'at any time before or after the commencement of this Act' to the definition. The amendment came into effect soon after the case of *National Director of Public Prosecutions v Carolus and Others* 1999 (2) SACR 27 (C)(Blignaut J held that the forfeiture provisions did not have retrospective effect.)

<sup>2</sup> POCA s 13(1) provides: 'For the purposes of this Chapter [Chapter 5] proceedings on application for a confiscation order or a restraint order are civil proceedings, and are not criminal proceedings.' POCA s 37 provides that proceedings for civil recovery of property are similarly civil, not criminal.

<sup>3</sup> See *Thebus and Another v S* 2003 (6) SA 505 (CC), 2003 (10) BCLR 1100 (CC), [2003] ZACC 12; *Nel v Le Roux NO and Others* 1996 (3) SA 562 (CC), 1996 (4) BCLR 592 (CC), [1996] ZACC 6; *Ferreira v Levin NO and Others; Vryenboek and Others v Powell NO and Others* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC), [1995] ZACC 13.

<sup>4</sup> Importantly, the European Convention on Human and People's Rights does not contain an article on the right to access courts. FC s 34 states: 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or where appropriate, another independent and impartial forum.' See *Shaik* (supra) at para 56.

<sup>5</sup> POCA s 18(2).

<sup>6</sup> POCA s 18(1).

related, and therefore justify, retrospective confiscation. For instance, it is difficult to see how the attachment of the proceeds of crime collected in the past could function as a deterrent to future acts of organised crime, other than, of course, removing the resources to commit further crimes. Moreover, where proceeds collected as a result of a crime that was not ‘organised’ in nature are involved, the notion of overcoming the complex ‘system of camouflage’ simply does not apply. It seems, therefore, that the idea that one should not benefit from one’s wrongdoing is the only relevant justification for retrospective confiscation. If this is the case, however, then there is no reason to distinguish at all between retrospective confiscation regarding crimes that are organised and those that are not, unless society feels particularly strongly about punishing organised crime retrospectively.<sup>1</sup>

We think that in the absence of some or other limiting factor<sup>2</sup> to POCA (and we would suggest, given the text of its Preamble, that it be the retrospective confiscation of proceeds linked to organised crime only) the retrospective application of confiscation should then be subject to the application of s35(3)(l) of the FC.

*b. Civil recovery of property*

The POCA provisions relating to the civil recovery of property have garnered much controversy since the Act’s commencement. Such forfeitures do not depend on the criminal conviction of an accused. Rather, where a court finds, on a balance of probabilities, that property has been instrumental to an offence, is the proceeds of an unlawful activity or is associated with terrorist and related activities, such property may be forfeited to the state.<sup>3</sup> There is little doubt that the forfeiture provisions in Chapter 6 of POCA amount to penalties, for, like the Chapter 5 criminal forfeiture provisions, forfeiture in terms of Chapter 6 is broad in its application, and its definitions wide-ranging and aimed at combating unlawful activities.<sup>4</sup> In *Prophet v National Director of Public Prosecutions*,<sup>5</sup> Nkabinde J wrote:

‘Asset forfeiture orders as envisaged under Chapter 6 of the POCA are inherently intrusive in that they may carry dire consequences for the owners or possessors of properties

<sup>1</sup> It is interesting to note that similar legislation in other jurisdictions provide for the confiscation of the proceeds of unlawful actions following the conviction of a crime (which may or may not be related to organised criminal activity. Such legislation operates prospectively only. See Proceeds of Crime Act 2000, Part 5 (United Kingdom); Criminal Code of Canada, XII, 462.31; Criminal Assets Bureau Act, 1996 (Ireland).

<sup>2</sup> See *Du Toit v Minister of Safety & Security and Another* 2010 (1) SACR 1 (CC), 2009 (12) BCLR 1171 (CC), (2009) 30 ILJ 2601 (CC), [2009] ZACC 22 at para 35 (The Constitutional Court considered, amongst other things, the retrospectivity of certain provisions of the Promotion of National Unity and Reconciliation Act (Reconciliation Act). Accepting that a certain provision of the Reconciliation Act was indeed retrospective, Langa CJ, for a unanimous court, stated: ‘A provision that has retrospective operation must, in terms of the general approach to retrospectivity, be interpreted restrictively, so that the extent of retrospective operation is limited. Retrospectivity is a concept that includes a range of time-related effects, the result being that there are degrees of retrospectivity.’)

<sup>3</sup> POCA s 50(1), read with ss 38 and 48.

<sup>4</sup> See POCA s 1, definitions of ‘property’, ‘proceeds of unlawful activities’ and ‘unlawful activity.’

<sup>5</sup> 2007 (6) SA 169 (CC), 2007 (2) BCLR 140 (CC), 2006 (2) SACR 525 (CC), [2006] ZACC 17.

particularly residential properties. Courts are therefore enjoined by s 39(2) of the FC to interpret legislation such as the POCA in a manner that ‘promotes the spirit, purport and objects of the Bill of Rights’, to ensure that its provisions are constitutionally justifiable, particularly in the light of the property clause enshrined in terms of s 25 of the Constitution.<sup>1</sup>

The forfeiture provisions in Chapter 6 thus fall neatly into the *Engel* test requirements. Unlike Chapter 5 confiscation, however, prospective Chapter 6 forfeiture cannot simply form part of the penalty of the crime, as there has been no conviction. The person facing forfeiture may thus be punished without having enjoyed the protection of due process rights during the criminal process, particularly the right to be presumed innocent.<sup>2</sup>

The absence of clear and convincing reasons justifying the very obvious limits of fair trial rights makes the Chapter 6 provisions all the more alarming. Certainly, were forfeiture of this kind limited to instances of organised crime that, it could be shown, would be almost impossible to prosecute through the criminal justice system, then perhaps a form of justification would exist for these draconian provisions. This does not appear to be the case, however. First, the property to be seized must be instrumental to a ‘Schedule 1’ offence, as listed in POCA.<sup>3</sup> Very few of the offences listed in Schedule 1 are offences that would necessarily be associated with organised crime. Secondly, ‘unlawful activity’ is defined as conduct that constitutes a crime or contravenes any law, ‘whether such conduct occurred before or after the commencement of this Act...’<sup>4</sup> Again, there is nothing in the text of this definition that requires the unlawful activity be organised in nature, or even related to organised crime. To complicate matters, the courts have been rather vague about POCA’s interpretation in this regard. In *NDPP v RO Cook Properties (Pty) Ltd*<sup>5</sup> the SCA made it clear that confining the application of POCA to organised crime would ‘radically truncate the scope of the Act.’<sup>6</sup> The court pointed out that portions of the long title and the Preamble indicated that POCA was ‘designed to reach far beyond organised crime...’ and that POCA thus clearly applied to cases of individual wrong-doing too.<sup>7</sup> Importantly, however, the long title and the Preamble to POCA had been amended in 2004 to specifically include the following text extending the ambit of the Act:

‘to provide for the recovery of the proceeds of unlawful activity; for the civil forfeiture of criminal property that has been used to commit an offence, property that is the proceeds of unlawful activity or property that is owned or controlled by, or on behalf of, an entity involved in terrorist and related activities;

... And whereas no person should benefit from the fruits of unlawful activities, nor is any person entitled to use property for the commission of an offence, whether such activities or

<sup>1</sup> Ibid at para 46.

<sup>2</sup> FC s 35(3)(h). The only limiting factor in the Chapter 6 forfeiture process is the proportionality enquiry in order to determine whether the granting of a forfeiture order would amount to an arbitrary deprivation of property, a contravention of s 25(1). See *Mohunram v National Director Public Prosecutions* 2007 (4) SA 222 (CC), 2007 (6) BCLR 575 (CC), [2007] ZACC 4 at para 56.

<sup>3</sup> POCA s 50(1).

<sup>4</sup> POCA s 1.

<sup>5</sup> 2004 (2) SACR 208 (SCA).

<sup>6</sup> Ibid at para 65.

<sup>7</sup> Ibid. See also *NDPP v Van Staden* 2007 (1) SACR 338 (SCA).

offence took place before or after the commencement of this Act, legislation is necessary to provide for a civil remedy for the preservation and seizure, and forfeiture of property which is derived from unlawful activities or is concerned in the commission or suspected commission of an offence.<sup>7</sup>

In *Mobunram v National Director of Public Prosecutions*, the Constitutional Court declined to pronounce on whether the SCA's interpretation consistent with the FC or whether the legislative amendments extending the ambit of POCA were constitutional.<sup>1</sup> The majority did, however, proceed with the matter on the basis that the extension of POCA forfeiture provisions was constitutionally permissible. It thus left open the question of whether the extension of the provisions to individual wrong-doing would be constitutionally compliant.

(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.<sup>2</sup> 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 a wider range of permissible sentences increases a sentencing court's ability to impose a sentence that is proportionate to the gravity of the specific offence and the guilt of the individual offender. The question arises, however, whether the absence of explicit sentencing standards is acceptable in the light of the principle of legality that requires sentences to be reasonably foreseeable. The trade-off is between certainty on one hand and proportionality on the other hand.

South African sentencing law has traditionally allowed courts a wide discretion in selecting appropriate sentences.<sup>3</sup> The Supreme Court of Appeal has indicated however, that broad sentencing guidelines are indeed 'desirable.' These, Conradie JA stated, could be adjusted gradually so that offenders who commit a particular offence, would know what to expect.<sup>4</sup> At the same time, this discretion has been tempered in relation to certain 'serious' offences by the enactment of mandatory minimum sentencing legislation.

<sup>1</sup> *Mobunram* (supra) at paras 114-117.

<sup>2</sup> In England, for example, the Criminal Justice Act 2003 specifies various 'starting points' to which a sentencing judge 'must have regard' when setting the minimum term that offenders sentenced to life imprisonment must serve. See Ashworth *Sentencing and Criminal Justice* (5th Edition, 2010) 32. In the United States, federal sentences are regulated by a set of guidelines created by the United States Sentencing Commission, established by the Sentencing Reform Act 1985. Many states in the United States have established similar commissions which have drafted and promulgated sentencing guidelines for state courts. See, generally, S Terblanche 'Sentencing Guidelines for South Africa: Lessons from Elsewhere' (2002) *SALJ* 858.

<sup>3</sup> See *R v Mapumulo* 1920 AD 56, 57 (court stated that sentencing was 'pre-eminently a matter for the discretion of the trial Court.') See also *S v Kibido* 1998 (2) SACR 213 (SCA), 216g; *S v Mhlakaza* 1997 (1) SACR 515 (SCA), 523d-f; *S v Makwanyane* 1994 (2) SACR 158 (A), 170.

<sup>4</sup> *S v Gerber* 2006 (1) SACR 618 (SCA) at para 11.

Despite there being a wealth of commentary in favour of the structured exercise of sentencing discretion,<sup>1</sup> a direct challenge to a sentence on the basis that the punishment was not specified in advance is unlikely to succeed 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.<sup>2</sup> (Cross reference to minimum sentencing section.)

### **(b) Equality**

The right to be treated equally before the law demands that like cases be treated alike. It also requires that factors irrelevant to the determination of a sentence be excluded from consideration. Feld describes the principle as follows:

‘No person should be sentenced more severely on account of their race, national or ethnic origin, colour, gender, sexual orientation, religion, age, mental or physical disability, or similar factor.’<sup>3</sup>

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.<sup>4</sup>

In the context of the death penalty, the US Supreme Court has wrestled with the question of what legislative framework the FC 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.<sup>5</sup>

<sup>1</sup> For a recent summary, see J Roberts ‘Structured Sentencing: Lessons from England and Wales for Common Law Jurisdictions’ (2012) 14 (3) *Punishment and Society* 267-288.

<sup>2</sup> For such a proposal, see South African Law Commission Report (Project 82) *Sentencing (A New Sentencing Framework)* (2000). It is interesting to note the various forms that guidance on sentencing has taken elsewhere in the world: Judicial self-regulation, common in most common law countries; narrative sentencing guidelines, an approach adopted by the English courts; statutory sentencing principles, found in the Finnish and Swedish penal codes; and the numerical guideline system, made famous by several states in the USA, most notably in Minnesota. See A Ashworth ‘Techniques for Reducing Sentence Disparity’ in A Von Hirsch, A Ashworth & J Roberts (eds) *Principled Sentencing: Readings on Theory and Policy* (2009) 243-257. 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 SCt 647 (1989) (The 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. However, the binding power of indirectly enacted guidelines may well be subject to constitutional limitations: See *United States v Booker* 543 US 220 (2005)).

<sup>3</sup> B Feld ‘The Transformation of the American Juvenile Court’ in Von Hirsch, Ashworth & Roberts (eds) (supra) at 344.

<sup>4</sup> A von Hirsch, KA Knapp & MH Tonry *The Sentencing Commission and its Guidelines* (1987).

<sup>5</sup> The phrase ‘equal protection and benefit of the law’ is used in FC s 9(1) and ‘equal protection of the laws’ in the Fourteenth Amendment to the Constitution of the United States of America.

In *Furman v Georgia*,<sup>1</sup> 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 sentencer. 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.<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup>

Although the debate about equality in sentencing has been less robust in South Africa it is nevertheless well established that the right to equality applies to sentencing. In *S v Makwanyane* for example, several of the separate judgments found that the potential for arbitrariness in the imposition of the death penalty was one of the primary factors resulting in its unconstitutionality. Kriegler J went as far to say that ‘arbitrariness in the imposition of any sentence is fatally inconsistent with the demand for equality so emphatically mandated in [the Interim Constitution].’<sup>5</sup>

More recently, there has been a clear increase in the number of dicta from the SCA regarding the value that can be derived from sentences imposed previously. These are tacit examples of a court grappling with how best to ensure that similar sentences are imposed on similarly situated offenders. As Conradie JA stated in *S v Xaba*:

‘It is ... necessary and instructive to make a rough comparison between these sentences and those that other Courts have found appropriate. It has often been pointed out that no two cases are alike ... but the fact remains that courts must strive for some consistency in punishment.’<sup>6</sup>

<sup>1</sup> *Furman v Georgia* 408 US 238, 92 SCt 2726 (1972).

<sup>2</sup> See *Makwanyane* 1995 (3) SA 391 (CC), 1995 (2) SACR 1 (CC), 1995 (6) BCLR 665 (CC), [1995] ZACC 3 endorsing the reasoning of *Furman* (supra) at paras 41–56 (Chaskalson P), paras 153–66 (Ackermann J) and paras 273–4 (Mahomed J). See also *S v Williams & Others* 1995 (3) SA 632 (CC), 1995 (7) BCLR 861 (CC), [1995] ZACC 6 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 McKeown*, *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).

<sup>3</sup> See *Lockett v Ohio* 438 US 586, 98 SCt 2954 (1978).

<sup>4</sup> See the discussion of ‘The Arbitrary “Arbitrary” Rule in LS Sheleff *Ultimate Penalties* (1987) 83–116.

<sup>5</sup> *Makwanyane* (supra) at para 214.

<sup>6</sup> 2005 (1) SACR 435 (SCA) at para 15.

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*,<sup>1</sup> 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 a law's racially discriminatory effect is insufficient to hold a law unconstitutional in the absence of a racially discriminatory purpose underlying the law.

Compared to the United States, far less research has been conducted in South Africa regarding any racial or gender disparities in sentencing practices.<sup>2</sup> It has been acknowledged, however, that racial biases may well have an effect on criminal trials and sentencing.<sup>3</sup> This view, consistent with a dissenting minority's opinion in *McCleskey* that systematic bias does undermine the fairness of particular sentences, could well be resurrected in South Africa.

### (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,<sup>4</sup> even though the Constitution itself does not refer to this principle explicitly. In *S v*

<sup>1</sup> See *McCleskey v Kemp* 481 US 279, 107 SCt 1756 (1987).

<sup>2</sup> A notable exception is Murray et al's research into the imposition of the death penalty Cape Provincial Division in the mid 1980s. It was shown, amongst other things, that the race of the accused was indeed a factor in capital cases. See C Murray, J Sloth Nielsen & C Tredoux 'The Death Penalty in the Cape Provincial Division' (1989) 5 *SAJHR* 154-182. See also NC Steytler & MCJ Olmesdahl *Criminal Justice in South Africa: Selected Aspects of Discretion* (1983).

Prof. Barend van Niekerk noted, in a 1980 speech, that since 1910 only three executions had taken place of whites for the rape of children, whereas the figure for blacks was nearing 200. Additionally, during the same time period, not one death penalty sentence had been imposed on a white person for the rape of a black person, whereas 'the almost 200 executions of black seem to have been for the rape of whites.' B van Niekerk 'Sentencing in a Multi-Racial and Multi-Ethnic Society' Address to the Law Reform Conference at Sun City, Bophuthatswana (August 2013, 1980) 7.

<sup>3</sup> 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 MCJ Olmesdahl in Olmesdahl & NC Steytler (eds) *Criminal Justice in South Africa: Selected Aspects of Discretion* (1983) 142-148, 201-204.

<sup>4</sup> *S v Rabie* 1975 (4) SA 855 (A), 862 (Kotze JA stated: 'Punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances.')

*Makwanyane* Chaskalson P identified proportionality as a factor to be considered when deciding whether a particular punishment was cruel, inhuman or degrading.<sup>1</sup>

There is also international support for the principle of proportionality in sentencing.<sup>2</sup> The Recommendation by the Council of Europe on Consistency in Sentencing has stipulated:

‘Whatever rationales for sentencing are declared, disproportionality between the seriousness of the offence and the sentence should be avoided.’<sup>3</sup>

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 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

<sup>1</sup> 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. PW 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* (5th Edition, 2007) 1546.) 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 Supreme Court decisions relating to adults. 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. See also recent decisions involving life sentences without parole for children, which the constitutional proportionality principle has restricted severely: *Graham v Florida* 560 US 48 (2010), *Miller v Alabama*, 567 US 460 (2012).

<sup>2</sup> 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.

<sup>3</sup> Committee of Ministers of the Council of Europe Recommendation No R (92) 17 (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.) See also *Vinter & Others v United Kingdom* ECtHR (GC) (Application Nos 66069/09, 3896/10 and 130/10) (9 July 2013).

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 ..., 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.<sup>1</sup>

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'.<sup>2</sup> This standard has been applied in a number of cases since then.<sup>3</sup>

(i) *Mandatory minimum sentences*

The recognition of a doctrine of proportionality derived from the South African Constitution raises several practical questions regarding mandatory minimum sentences for certain offences. A wide-ranging survey conducted in the early 1990s suggested that courts in the Commonwealth and the United States were reluctant to declare that all mandatory minimum sentences are inherently unconstitutional.<sup>4</sup> Since then however, the US Supreme Court has changed its approach, a result, perhaps, of the Federal Sentencing Guidelines having dramatically reduced the instances in which judges could depart from them.<sup>5</sup> The Federal Sentencing Guidelines, couched in mandatory language, were considered in *United States v Booker*.<sup>6</sup> The court found the guidelines unconstitutional to the extent that they removed factors outside of the guidelines from the process of determination of sentence. Booker thus gave judges 'some room to adjust sentences based on relevant individual differences ...'<sup>7</sup>

<sup>1</sup> See *S v Dodo* 2001 (3) SA 382 (CC), 2001 (5) BCLR 423 (CC), 2001 (1) SACR 594 (CC), [2001] ZACC 16 ('*Dodo*') at paras 37-38.

<sup>2</sup> *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.)

<sup>3</sup> *S v Bull and Another, S v Chavulla* 2002 (1) SA 535 (SCA); *S v Nkosi and Another* 2003 (1) SACR 91 (SCA); *S v Niemand* 2002 (1) SA 21 (CC). See in general D Van Zyl Smit & A Ashworth 'Disproportionate Sentences as Human Rights Violations' (2004) 67 *Mod L Rev* 541.

<sup>4</sup> D Hubbard 'Should a Minimum Sentence for Rape be Imposed in Namibia?' 1994 *Acta Juridica* 228.

<sup>5</sup> R Barkow 'Sentencing Guidelines at the Crossroads of Politics and Expertise' (2011) 160 *University of Pennsylvania Law Review* 1599-1630, 1621.

<sup>6</sup> 543 US 220 (2005). See also *Blakely v Washington* 542 US 296 (2004) (Six months before *Booker*, the United States Supreme Court had handed down *Blakely* where it considered state mandatory guidelines and found that the Sixth Amendment right to a jury trial prohibited courts from enhancing sentences for reasons other than those admitted by the defendant or jury.)

<sup>7</sup> Barkow (supra) at 1621. See also C Albonetti 'Judicial Discretion in Federal Sentencing' (2011) 10 *Criminology & Public Policy* 1151-1155.

Of particular relevance to South Africa in this regard are the decisions of the Supreme Court of Canada.<sup>1</sup> In Canada, as in South Africa, courts historically have been allowed an exceptionally wide discretion in deciding on sentence. In *Smith v The Queen*,<sup>2</sup> 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*,<sup>3</sup> the Supreme Court of Canada adopted a more nuanced stance. Before the court was the question of the constitutionality of a mandatory sentence of seven days' imprisonment for driving a motor vehicle when prohibited from doing so. A prohibition on driving a motor vehicle could be imposed only on an offender who had committed several traffic offences. 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 result had to be 'reasonable' and not 'far-fetched'.<sup>4</sup> The result in Canada is that, while not all mandatory minimum sentences are unconstitutional, legislative minima that might reasonably result in gross disproportionality will not pass constitutional muster.

The Namibian High Court drew on Canadian case law in *S v Vries*.<sup>5</sup> Section 14(1)(b) of the Stock Theft Act<sup>6</sup> provided for a mandatory three-year sentence of imprisonment for a second or subsequent conviction for 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 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 set out a general approach to the constitutionality of minimum sentences that mirrors that of the Canadian courts:<sup>7</sup>

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.

<sup>1</sup> See *Dodo* (supra) at para 39 (Ackermann J discusses the importance of Canadian and US jurisprudence in this regard.)

<sup>2</sup> See *Smith v The Queen* 34 CCC (3d) 97 (1987).

<sup>3</sup> See *R v Goltz* 67 CCC (3d) 481 (1992).

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

<sup>5</sup> *S v Vries* 1996 (2) SACR 638 (Nm), 1996 (12) BCLR 1666 (Nm).

<sup>6</sup> Act 12 of 1990 (Nm).

<sup>7</sup> See *S v Vries* (supra) at 1676G–1677A.

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,<sup>1</sup>
  - (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.<sup>2</sup>
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.

Another Namibian case, *S v Likuwa*,<sup>3</sup> 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’.<sup>4</sup> This section prohibited, amongst other things, the possession of ‘machine rifles’. The court found that many rural 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’<sup>5</sup> 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*,<sup>6</sup> 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

<sup>1</sup> 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), [1995] ZACC 11 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 FC. See for example the order made in *Ferreira v Levin NO and Others* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC), [1995] ZACC 13 (The Constitutional Court describes this remedial power as notional severance.)

<sup>2</sup> The corresponding South African provision is FC s 172(1)(b)(ii).

<sup>3</sup> *S v Likuwa* 1999 (2) SACR 44 (Nm), 1999 (5) BCLR 599 (Nm).

<sup>4</sup> *Ibid* at 604H.

<sup>5</sup> *Ibid* at 604D–I.

<sup>6</sup> See *Bhulwana* (supra) at para 32.

same situation as the litigants'. Paragraph 3(c) of the *Vries* formulation is therefore unlikely to be adopted in South Africa, unless, of course, it was declared to apply to successful litigants where a declaration of invalidity had been suspended. 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.<sup>1</sup>

Prior to the late 1970s, there were a variety of legislative minima in South Africa.<sup>2</sup> Most of these were done away with following the finding of the Viljoen Commission of Inquiry<sup>3</sup> that those provisions resulted in unfair sentences. As a result, relatively few truly mandatory minimum sentences remain on the statute book in South Africa.<sup>4</sup> Historically, because of their belief that minimum sentence requirements are fundamentally at odds with judicial discretion, South African courts showed considerable ingenuity in interpreting them narrowly.<sup>5</sup> Given this opposition of South African courts to restrictions on their sentencing discretion,<sup>6</sup> they may now be expected to examine as critically, if not more so than their Canadian counterparts the constitutionality of legislation that might result in disproportionate sentences. Moreover, courts will have to consider whether civil penalties such as compulsory confiscation orders or compulsory suspension of driving licences, constitute penalties and must therefore meet the same requirements of proportionality.<sup>7</sup>

<sup>1</sup> More recent Canadian law has also rejected the idea of a constitutional exception to a mandatory minimum sentence that would assist only an individual appellant while leaving the underlying statute intact. *R v Ferguson* 2008 SCC 6, [2008] 1 SCR 96.

<sup>2</sup> Abuse of Dependence-producing Substances Act 41 of 1971 s 2(1) 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. 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.

<sup>3</sup> See Report of the Commission of Enquiry into the Penal System of the Republic of South Africa (1976).

<sup>4</sup> CPA s 283(2) 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 Explosives Act 26 of 1956 s 27, and Arms and Ammunition Act 75 of 1969 s 39(2)(aA)(i) (aa), substituted by s 1 of the Arms and Ammunition Amendment Act 65 of 1993.

<sup>5</sup> See, for example, *S v Nel* 1987 (4) SA 950 (W) and *S v Toms, S v Bruce* 1990 (2) SA 802 (A).

<sup>6</sup> See *S v Gibson* 1974 (4) SA 478, 482 (A) (Holmes JA commented that 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 and Others* 1984 (2) SA 670, 684 (N).

<sup>7</sup> See, in general, D van Zyl Smit 'Civil Disabilities of Former Prisoners in a Constitutional Democracy: Building on the South African Experience' 2003 *Acta Juridica* 221-237.

In late 1997 the Criminal Law Amendment Act<sup>1</sup> created a range of minimum sentences for a long list of ‘serious offences’,<sup>2</sup> despite the South African Law Reform Commission having recommended that there be a thorough debate before a new sentencing regime be introduced.<sup>3</sup> The swiftness with which this legislation was passed can be attributed largely to the government’s aspiration to be seen as ‘tough on crime,’ at a time when crime was reportedly on the increase and public tensions high.<sup>4</sup> Similar legislative developments occurred in other jurisdictions during that decade.<sup>5</sup> The minimum sentences range from life imprisonment for specified aggravated forms of murder and rape<sup>6</sup> to set numbers of years for first offenders and recidivists for offences listed in the schedules to the Act.<sup>7</sup> The sentences have to be imposed on adult offenders unless ‘substantial and compelling circumstances exist which justify the imposition of lesser sentences’,<sup>8</sup> and are therefore not fully mandatory.

Although courts have always been considered the primary role players when it comes to sentencing, particularly in the exercising of discretion, 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*<sup>9</sup> made it clear that the provision was compatible with the principle of constitutional proportionality by allowing that when a court is convinced that an ‘injustice’ would be done by imposing the mandatory sentence, ‘substantial and compelling’ circumstances exist that would justify the court’s departure from the prescribed minimum. The tautology of holding that

<sup>1</sup> Act 105 of 1997.

<sup>2</sup> The heading to s 51 refers to ‘Minimum sentences for certain serious offences’. The provision was not designed to be a permanent feature of South African law. Prior to amendment, s 53(1) provided that ss 51 and 52 would cease to have effect two years after the commencement of the Act. The President was authorised to extend this period, however, by two years at a time, which he did on three occasions. Section 53(1) was eventually repealed by Act 38 of 2007.

<sup>3</sup> South African Law Reform Commission Issue Paper No. 11 (Project 82) ‘Sentencing: Mandatory Minimum Sentences in 1997.’

<sup>4</sup> J Redpath & MO’Donovan ‘The Impact of Minimum Sentencing in South Africa’ (Report 2) *Open Society Foundation for South Africa* (2006), 10-11.

<sup>5</sup> S Terblanche & J Roberts ‘Sentencing in South Africa: Lacking in Principle but Delivering Justice?’ (2005) 18 *SACJ* 187, 191.

<sup>6</sup> Criminal Law Amendment Act s 51(1) read with Part I of Schedule 2.

<sup>7</sup> Criminal Law Amendment Act s 51(2) read with Parts II, III and IV of Schedule 2.

<sup>8</sup> Criminal Law Amendment Act s 51(3)(a).

<sup>9</sup> *S v Malgas* 2001 (2) SA 1222 (SCA), 2001 (1) SACR 469 (SCA) (‘*Malgas*’).

‘injustice’ means ‘substantial and compelling’ is compounded by further equating ‘injustice’ with ‘disproportionality’.<sup>1</sup>

This reference to proportionality allowed the Supreme Court of Appeal to meet the desideratum stated earlier in the judgment. 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’.<sup>2</sup> 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.<sup>3</sup> 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.

<sup>1</sup> 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.)

<sup>2</sup> Ibid at para 7.

<sup>3</sup> The SCA relegates the High Court decisions to a footnote. *Malgas* (supra) at para 6, fn 3.

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- 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.
  - 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.<sup>1</sup>

The constitutionality of this approach was confirmed by the Constitutional Court in *S v Dodo*, which found the Malgas judgment's 'substantial and compelling' test to be 'undoubtedly correct.'<sup>2</sup> Ackerman J, for a unanimous court, stated, however, that the SCA's interpretation had made it clear that 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'.<sup>3</sup> The test for 'gross disproportionality, on the other hand, Ackerman J said, 'must be applied in order to determine whether a sentence mandated by law is inconsistent with the offender's s 12(1)(e) right'.<sup>4</sup> Because the sentencing court was not obliged, therefore, to impose a sentence limiting an offender's s 12(1)(e) right, the 'court was not compelled to act inconsistently with the constitution',<sup>5</sup> thus rendering the 1997 Act constitutionally compliant, even if, from a point of view of penal policy, the mandatory sentencing regime resulted in sentences that were somewhat disproportionate to what the court would have imposed had it had the freedom to exercise its discretion.

The formulation adopted in *Malgas* has been refined, somewhat, by two SCA decisions dealing with the crime of rape, *S v Mabomotsa*<sup>6</sup> and *S v Abrahams*.<sup>7</sup> The former matter involved aggravated and repeated rape for which the Act would require the imposition of life imprisonment on the basis of the victim having been

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<sup>1</sup> *Malgas* (supra) at para 25.

<sup>2</sup> *Dodo* (supra) at para 40.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

<sup>6</sup> *S v Mabomotsa* 2002 (2) SACR 435 (SCA).

<sup>7</sup> *S v Abrahams* 2002 (1) SACR 116 (SCA).

raped more than once, nothing more. The SCA considered whether the offences concerned could be categorised as ‘falling within the worst category of rape’ and thus ‘justifying a departure from the prescribed sentence’.<sup>1</sup> The SCA found that, although the offences were indeed serious, the sentence of life imprisonment would nevertheless be disproportionate to the crimes involved and ‘the legitimate interests of society’.<sup>2</sup> In the *Abrahams* matter the SCA chose to deviate from the prescribed sentence of life imprisonment in circumstances involving less aggravating factors than those in *Mabomotsa*.<sup>3</sup> Both matters indicate that the ultimate penalty of life imprisonment will not be imposed simply because the rape falls into a category where the prescribed minimum sentence is life imprisonment.<sup>4</sup> 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 from’.<sup>5</sup> Put 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.

There have been some notable research findings since the *Malgas* decision on the practical implementation of these mandatory minima. The first is that judges seem to depart from the mandatory minima ‘in the majority of cases’.<sup>6</sup> The practical effect, according to Terblanche, is that minimum sentence legislation exacerbates disparities and inconsistencies in sentencing.<sup>7</sup> Second, there is no reliable evidence with which to conclude that minimum sentence legislation has reduced crime in any way.<sup>8</sup> Tonry states the following in respect of international sentencing trends:

‘The evidence is clear and weighty, that enactment of mandatory penalty laws has either no deterrent effect or modest deterrent effect that soon wastes away. Equally clear and consistent are findings that mandatory minimum laws provoke judicial and prosecutorial stratagems, usually by accepting guilty pleas to other non-mandatory penalty offences or by diverting offenders from prosecution altogether that avoid their application.’<sup>9</sup>

Were the constitutionality of the minimum sentence legislation to be revisited, these findings might well be useful as evidence that there is no rational connection between the government’s goals of reducing crime or increasing sentencing uniformity. Given the Constitutional Court’s findings in *Dodo* supporting *Malgas*, however, constitutional review is unlikely, leaving the possibility of revision solely

<sup>1</sup> *Mabomotsa* (supra) at para 17.

<sup>2</sup> *Mabomotsa* (supra) at para 20.

<sup>3</sup> *Abrahams* (supra) at para 29.

<sup>4</sup> See also *Rammoko v Director of Public Prosecutions* 2003 (1) SACR 200 (SCA); *S v Nkomo* 2007 (2) SACR 198 (SCA); *S v Blignaut* 2008 (1) SACR 78 (SCA).

<sup>5</sup> S Terblanche ‘Mandatory and Minimum Sentences: Considering s 51 of the Criminal Law Amendment Act 1997’ (2003) *Acta Juridica* 194, 215.

<sup>6</sup> MO’Donovan & J Redpath ‘Reaching a Verdict: The Impact of Minimum Sentencing’ (2007) 19 *South African Crime Quarterly* 7, 12.

<sup>7</sup> Terblanche ‘Mandatory’ (supra) at 218.

<sup>8</sup> J Sloth-Nielsen & L Ehlers ‘Assessing the Impact: Mandatory and Minimum Sentences in South Africa’ 2005 (14) *SACQ* 15, 16.

<sup>9</sup> M Tonry *Sentencing, Judicial Discretion and Training* (1992), quoted in S Terblanche (supra) at 218.

in the hands of the legislature. Only in respect of children has there been some progress in this regard.<sup>1</sup>

(ii) *Preventive sentences*

A sentence that is considered proportionate is most easily determined in relation to a current single offence. There is an obvious tension between the proportionality principle and the notion that a multiple offender should be sentenced for all his or her offences and the terms served consecutively. Ashworth suggests that a kind of overall proportionality should be preserved. This means that, no matter how many offences of a particular kind an offender is found to have committed, the sentence should remain in the range appropriate to that type of offence, for simply imposing and then adding together the appropriate sentences for each individual charge can lead to a combined sentence that is disproportionate overall.<sup>2</sup>

It is not easy to strike the right balance between punishment necessary for the protection of society, one of the primary purposes of punishment,<sup>3</sup> and detention that does not offend a person's dignity because it is not justified by the offence of which he or she has been convicted. Much depends on the legislative framework within which preventive concerns are taken into account. The indefinite detention of someone who has not been convicted of an offence, merely because there was evidence that he was 'dangerous', would be unconstitutional on the grounds that it is (grossly) disproportionate. 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. However, 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.

A 1993 amendment to the Criminal Procedure Act provides that where a court exercises its discretion to declare a convicted offender a 'dangerous criminal' it must 'sentence him or her to undergo imprisonment for an indefinite period'.<sup>4</sup> There is no legislative cap on the period of imprisonment that a 'dangerous criminal' must serve, with the exception of the sentencing jurisdiction of the court.<sup>5</sup> In addition, on the face of the section, an offender may be declared 'dangerous' after being

<sup>1</sup> See §49.2(e) below.

<sup>2</sup> *Ashworth* (supra) 275-277.

<sup>3</sup> See *Makwanyane* (supra) at para 128 (the Constitutional Court recognised prevention as a legitimate object of punishment, but found that it was an object which could be achieved without capital punishment.)

<sup>4</sup> CPA s 286B introduced by s 22 of the Criminal Matters Amendment Act 116 of 1993.

<sup>5</sup> CPA s 287B(1)(b).

convicted of any offence, rendering the legislative terrain dangerously permissive of grossly disproportionate sentences.

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.<sup>1</sup> In *Lyons v The Queen*, the Supreme Court held that a sentence that was based ‘in part’ upon preventive considerations was not unconstitutional.<sup>2</sup> However, the court did not reject entirely the test of proportionality between sentence and crime. 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 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.’<sup>3</sup>

*Lyons* was followed by the Supreme Court of Appeal in South Africa in *S v Bull and Another, S v Chavulla and Others*,<sup>4</sup> 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, 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’.<sup>5</sup> In this way the South African court retained an element of proportionality between offence and sentence 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

<sup>1</sup> Section 688(a) of Part XXI of the Canadian Criminal Code.

<sup>2</sup> *Lyons v The Queen* (1988) 37 CCC (3d) 1.

<sup>3</sup> *Ibid* at para 33.

<sup>4</sup> 2002 (1) SA 535 (SCA).

<sup>5</sup> *Bull* (supra) at para 19.

court to be considered for release if he has ceased to be dangerous.<sup>1</sup> 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.<sup>2</sup> The actual period should be the time that the offender would have had to serve before being considered for parole.<sup>3</sup>

The same question of proportionality arises in a less drastic form when a court exercises its discretionary power to declare someone an habitual criminal,<sup>4</sup> which, since the coming into force of the 1998 Act, requires that a court sentence him or her to a period of 15 years imprisonment, with a non-parole period of seven years. Prior to the 1998 Act, the 1959 Act required only that a 'habitual criminal' be detained for a minimum period of seven years before he or she be considered for parole.<sup>5</sup> In *S v Niemand*, the constitutionality of this legislative scheme was challenged.<sup>6</sup> The Constitutional Court found that a maximum period is essential, for, 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.<sup>7</sup>

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'.<sup>8</sup> 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, his or her blameworthiness is determined cumulatively, so to speak.

In *S v Diyani*,<sup>9</sup> the appellant appealed the declaration of 'habitual criminal' by a regional court following a conviction of the theft of R190 worth of clothes. The appeal court, due to procedural irregularities in the trial court, overturned the declaration, replacing it with a sentence of 18 months imprisonment, and thus did not explore whether such a trivial offence could justify a declaration as

<sup>1</sup> CPA s 286B.

<sup>2</sup> *Bull* (supra) at para 28.

<sup>3</sup> 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

<sup>4</sup> In terms of CPA s 286.

<sup>5</sup> 1959 CSA s 65(4)(b)(iv).

<sup>6</sup> 2002 (1) SA 21 (CC), 2002 (3) BCLR 219 (CC), [2001] ZACC 11 (Historically, the maximum was deduced from CPA s 286(2), 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 the CSA s 65(4)(b)(iv).)

<sup>7</sup> *Ibid* at para 25. An interesting parallel is to be found at para 62 of the German Penal Code, which provides that preventive detention (*eine Massregel der Besserung und Sicherung*) may not be imposed on an offender 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.

<sup>8</sup> CPA s 286(1).

<sup>9</sup> 2004 (2) SACR 365 (E).

habitual criminal. Pickering J noted, however, that were the appellant to persist in ‘committing even relatively trivial offences this may justify his declaration as an habitual criminal’.<sup>1</sup> Terblanche argues that imprisonment for seven years ‘could never be proportionate to anything other than a serious offence...’ and thus in the event that courts begin to routinely declare offenders habitual criminal following relatively trivial offences, the constitutionality of this practice would need to be examined.<sup>2</sup>

Although, in principle, we agree with this critique, more recent cases indicate that appeal courts are indeed aware of the requirements of proportionality in relation to declaration of habitual criminal sentences. In *S v Stenge*<sup>3</sup> the appellant had been declared a habitual criminal following a conviction of theft to the value of R34. On appeal, Allie J overturned the declaration, holding that the trial court had not taken into consideration the fact that a declaration as an habitual criminal is a ‘drastic and exceptional punishment, which would run into proportionality problems if imposed for a trivial offence’.<sup>4</sup> In *Makbetha v S*,<sup>5</sup> Mavundla J echoed this principle, stating that ‘an indeterminate sentence is intrinsically by its nature cruel and severe’.<sup>6</sup>

(iii) *Exemplary sentences*

The imposition of exemplary sentences by the courts raises problems similar to those discussed above. South African courts have acknowledged that inherent in the notion of an exemplary sentence is an element of injustice to the individual accused,<sup>7</sup> for it privileges the interests of society in deterrence over the principle of proportionality in relation to the individual offender. Courts have thus cautioned that exemplary sentences are to be imposed with circumspection and are justified only to the extent that the injustice to the individual does not outweigh the broad interest of society.<sup>8</sup>

This relatively loose standard was refined more recently in *Furlong v S*,<sup>9</sup> where the SCA found that an exemplary sentence that had the effect of dramatically altering existing sentencing patterns would be a disproportionate sentence. A sentencing court is less likely to impose a disproportionate exemplary sentence when using existing sentencing patterns as a frame of reference. This stricter version of testing whether an exemplary sentence is therefore justified, as it is more compatible with the constitutional principles of equality and proportionality.

<sup>1</sup> Ibid at 369f-g.

<sup>2</sup> Terblanche ‘Mandatory’ (supra) at 241.

<sup>3</sup> 2008 (2) SACR 27 (C).

<sup>4</sup> Ibid at para 19. Allie J cites the case of *S v Van Eck* 2003 (2) SACR 563 (SCA) at para 10; cf. also *S v Masisi* 1996 (1) SACR 147, 152 (O).

<sup>5</sup> [2011] ZAGPPHC 114.

<sup>6</sup> Ibid at para 15

<sup>7</sup> See *S v Khulu* 1975 (2) SA 518 (N), 521B–H.

<sup>8</sup> Ibid. See also *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).

<sup>9</sup> 2012 (2) SACR 620 (SCA).

(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.<sup>1</sup> Similarly, prior to 1994, 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.<sup>2</sup>

**(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: the right to human dignity in s 10; the prohibition of torture in s 12(1)(d); and the prohibition of cruel, inhuman or degrading treatment or punishment in s 12(1)(e). 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’,

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<sup>1</sup> *Coker v Georgia* 433 US 584, 97 SCt 2861 (1977); *Kennedy v. Louisiana* 554 US 407 (2008).

<sup>2</sup> See *S v P* 1985 (4) SA 105 (N).

or when it is ‘degrading’.<sup>1</sup> The wording of § 12(1)(e) is similar to that in other Constitutions<sup>2</sup> and international instruments.<sup>3</sup>

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.<sup>4</sup> One source of evolving standards of decency is international practice. The specific provision in the Final Constitution<sup>5</sup> 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.<sup>6</sup>

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 also to the ‘social conditions, experiences and perceptions of the people’ of the country concerned. In *S v Tcoeb* O’Linn J analysed earlier *dicta* and pointed out that these latter factors required the presentation of wide-ranging evidence.<sup>7</sup> There is still some uncertainty as to what evidence, if any, should be presented

<sup>1</sup> See *Makwanyane* (supra) at paras 93 and 276 and *S v Williams and Others* 1995 (3) SA 632 (CC), 1995 (7) BCLR 861 (CC), [1995] ZACC 6 at para 20 (*Williams*). See also *Ex parte Attorney General, Namibia: In re Corporal Punishment by Organs of State* 1991 (3) SA 76 (NmS), 86 (Mahomed AJA’s interpretation to the similar provision in the Namibian Constitution); and *S v Ncube, S v Tshuma, S v Ndhlovu* 1988 (2) SA 702 (ZS), 715 (Gubbay JA’s interpretation of the similar provision in the Zimbabwean Constitution) 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* (1992) 1130.

<sup>2</sup> See, in particular, art 8 of the Constitution of Namibia and s 15 of the Constitution of Zimbabwe.

<sup>3</sup> International Covenant on Civil and Political Rights art 7; European Convention for the Protection of Human Rights and Fundamental Freedoms art 3. 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.

<sup>4</sup> *Makwanyane* (supra) at para 199 (Kentridge J). See also *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.)

<sup>5</sup> FC s 39(1).

<sup>6</sup> See, for example, *Makwanyane* (supra) and *Williams* (supra).

<sup>7</sup> See *S v Tcoeb* 1993 (1) SACR 274 (Nm).

about objective factors of this kind and how it should best be related to the fundamental value judgment.<sup>1</sup>

(i) *The sentence of death*

Much has been written about the constitutionality of various aspects of the sentence of death in many jurisdictions.<sup>2</sup> As has been seen above, the death penalty has inspired close analysis of the importance of equality and proportionality in sentencing.<sup>3</sup> On the direct question of whether the death penalty is inherently unconstitutional, international law is equivocal. There is, however, a strong bias towards abolition.<sup>4</sup>

When the constitutionality of the death penalty was raised in *S v Makwanyane*<sup>5</sup> 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.<sup>6</sup> Many constitutions either outlaw capital punishment<sup>7</sup> or, conversely, guarantee its existence,<sup>8</sup> thus removing the issue from direct constitutional debate. 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.<sup>9</sup> The latter point was particularly important because of differences in the wording of Constitutions.<sup>10</sup>

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

<sup>1</sup> See *S v Williams & 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 IC.) This may be evidence of the kind referred to in *Tcoeb* (supra). On the difficulties of providing relevant evidence on these questions, see *S v A Juvenile* 1990 (4) SA 151, 171B (ZS). On the limited relevance of 'public opinion', see *Makwanyane* (supra) at paras 87–9.

<sup>2</sup> On the death penalty in the Africa region, see D Van Zyl Smit 'The Death Penalty in Africa' (2004) *AHRLJ* 1; L Chenwi 'Breaking New Ground: The Need for a Protocol to the African Charter on the Abolition of the Death Penalty in Africa' (2005) *AHRLJ* 89; L Chenwi 'Fair Trial Rights and their Relation to the Death Penalty in Africa' (2006) 55 *ICLQ* 609; L Chenwi *Towards the Abolition of the Death Penalty in Africa: A Human Rights Perspective* (2007) 97-147.

<sup>3</sup> See § 49.2(b) (supra) on equality and § 49.2(c) (supra) on proportionality.

<sup>4</sup> For an overview, see WA Schabas *The Abolition of the Death Penalty in International Law* (2002) and D Garland *Peculiar Institution: America's Death Penalty in an Age of Abolition* (2010). 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.

<sup>5</sup> *Makwanyane* (supra).

<sup>6</sup> *Ibid* at paras 37–9 (Chaskalson P).

<sup>7</sup> For example, German Basic Law art 102, or Constitution of Namibia art 6.

<sup>8</sup> Constitution of Malaysia art 5(1), or Constitution of Singapore art 9(1).

<sup>9</sup> *Makwanyane* (supra) at para 39 (Chaskalson P).

<sup>10</sup> In particular, the substantive protection given to the right to life by IC s 9 was stressed by Chaskalson P in *Makwanyane* (supra) at para 38, 78, 80 and 85. See also *Makwanyane* (supra) at para 154 (Ackermann J) and at para 324 (O'Regan).

punishment.<sup>1</sup> The crucial question before the court was whether s 277(1)(a) of the Criminal Procedure Act,<sup>2</sup> which rendered the death penalty a competent sentence for murder, was a justified limitation of these rights.

The Attorney-General, the only institution that elected to defend capital punishment, did so on the grounds that it was a necessary retributive measure and means of deterrence.<sup>3</sup>

The Court rejected these arguments on the grounds that there was no clear proof that capital punishment served effectively to deter murder.<sup>4</sup> It was pointed out that the deterrence argument tends to ignore the existence of alternative sentences to capital punishment<sup>5</sup> and that it ignored the State's duty to act as a role model in the development of a culture of rights.<sup>6</sup> 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*.<sup>7</sup> 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 arbitrariness, inequality and the possibility of error in the enforcement of the penalty'.<sup>8</sup>

The *Makwanyane* judgment later influenced a series of court decisions dealing with the state's decision to deport or extradite offenders where there was a possibility that the death penalty would be imposed by the requesting country. The first of these cases was *Mohamed and Another v President of the RSA and Others*.<sup>9</sup> Mohamed was arrested, detained and handed over to agents of the United States Federal Bureau of Investigation for interrogation and his eventual removal to New York to stand trial. In an appeal before the Constitutional Court, he argued that his removal to the United States without an assurance from the United States government that it would not impose the death penalty on him if convicted, infringed his constitutional rights to life, dignity and not to be subjected to cruel, inhuman or degrading punishment. The Court recalled Chaskalson P's finding in *Makwanyane* that in a society founded on the recognition of human rights 'we are required to give particular value to the rights to life and dignity, and that this must be demonstrated by the State in everything that it does'.<sup>10</sup> Moreover, given

<sup>1</sup> See *Makwanyane* (supra) at para 95 (Chaskalson P). See also *Mohamed and Another v President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa intervening)* 2001 (3) SA 893 (CC), 2001 (7) BCLR 685 (CC), [2001] ZACC 18 at para 39 (Constitutional Court confirmed that death penalty was also inconsistent with the values and provisions of the Final Constitution).

<sup>2</sup> Act 51 of 1977.

<sup>3</sup> See *Makwanyane* (supra) at para 128 (Chaskalson P).

<sup>4</sup> *Makwanyane* (supra) at paras 116–25 (Chaskalson P) paras 181–3 (Didcott J), para 202 (Kentridge J), paras 212–13 (Krieger J), para 286–94 (Mahomed J), para 317 (Mokgoro J), and para 340 (O'Regan J).

<sup>5</sup> *Ibid* at para 123 (Chaskalson P), para 181 (Didcott J), and para 287 (Mahomed J).

<sup>6</sup> *Ibid* at para 124 (Chaskalson P), para 222 (Langa J), and para 316 (Mokgoro J).

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

<sup>8</sup> *Ibid* at para 135 (Chaskalson P).

<sup>9</sup> *Mohamed* (supra).

<sup>10</sup> *Ibid* at para 49.

the Constitution's requirement that the government promote and protect these rights, the government's failure to seek an assurance against the use of the death penalty, was indeed a violation of the rights to life and not to be subjected to cruel, inhuman or degrading punishment.

The *Makwanyane* and *Mohamed* decisions have been described as instrumental 'forces' in the development of a 'norm in international law outlawing the death penalty as a competent sentence.'<sup>1</sup> The decision in *Kaunda v President of the Republic of South Africa*,<sup>2</sup> however, which was handed down several years after *Mohamed*, was less principled in its approach to balancing the requirements of the Bill of Rights against the pressures of foreign relations. In this case South African nationals detained in Zimbabwe, and at risk of being extradited to Equatorial Guinea where they would potentially be sentenced to death, appealed to the Constitutional Court to direct the South African government to intervene to protect their rights. The Court declined to intervene, the majority finding that the Constitution did not have extraterritorial effect, and that, although states have the right to protect their nationals beyond their borders, 'they were under no obligation to do so.'<sup>3</sup> This was subject, the Court said, to the qualification that the laws of the foreign state were consistent with international human rights norms. The applicants therefore had no *right* to demand that the South African government take action to prevent the laws of the foreign state in which they were being held being enforced against them.<sup>4</sup> The Court based much on the fact that the applicants had not been put on trial or sentenced yet, and their application was thus 'premature.' This is an unfortunate restriction of the application of the *Mohamed* case. As Pete and Du Plessis state:

'Chaskalson CJ did not seem prepared to concede that, in view of the fact that capital punishment is contrary to the South African Bill of Rights, there may be a duty on the government to do what it legitimately can in terms of international law, to ensure that the death penalty is not imposed on its citizens by a foreign government.'<sup>5</sup>

In the more recent decision of *Minister of Home Affairs and Others v Tsebe and Others*,<sup>6</sup> the Court declared that the removal of two fugitives to Botswana, without the assurance of the Botswana government that they would not be sentenced to death, was a violation of their right to life.<sup>7</sup>

<sup>1</sup> M du Plessis 'The *Thatcher* Case and the Supposed Delicacies of Foreign Affairs: A Plea for a Principled (and realistic) Approach to the Duty of Government to Ensure that South Africans Abroad are Not Exposed to the Death Penalty' (2007) *SACJ* 143, 153-4.

<sup>2</sup> 2005 (4) SA 235 (CC), 2004 (10) BCLR 1009 (CC), [2004] ZACC 5.

<sup>3</sup> *Ibid* at para 23.

<sup>4</sup> S Pete & M du Plessis 'South African Nationals Abroad and their Right to Diplomatic Protection — Lessons From the Mercenaries Case' (2006) 22 *SAJHR* 439, 447.

<sup>5</sup> *Ibid* at 450. See also *Thatcher v Minister of Justice and Constitutional Development* 2005 (4) SA 543 (C).

<sup>6</sup> 2012 (5) SA 467 (CC), 2012 (10) BCLR 1017 (CC), [2012] ZACC 16.

<sup>7</sup> It is worth mentioning here that art 5(c) of the SADC Extradition Protocol provides that a State which is being requested to extradite a person may refuse to do so 'if the offence for which extradition is requested carries a death penalty under the law of the Requesting State, unless that State gives such assurance, as the Requested State considers sufficient that the death penalty will not be imposed or, if imposed, will not be carried out.'

(ii) *Corporal punishment*

In *S v Williams and Others*, the provisions of s 294 of the Criminal Procedure Act,<sup>1</sup> 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 human dignity,<sup>2</sup> 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 law<sup>3</sup> and in the jurisprudence of many national states<sup>4</sup> 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.’<sup>5</sup>

Langa J proceeded to reject ‘any culture of authority which legitimates the use of violence . . . [as] inconsistent with the values of the Constitution’.<sup>6</sup> In so doing he rejected the argument of the State that the dignity of juveniles is not necessarily infringed by the infliction of corporal punishment.<sup>7</sup> The State had argued that juvenile whippings were a justifiable limitation of the rights protected by ss 10 and 11 of the 1993 Constitution<sup>8</sup> because of their deterrent value and because they provided a convenient and beneficial alternative to other less socially desirable

<sup>1</sup> CPA s 294 was subsequently repealed by s 2 of Act 33 of 1997.

<sup>2</sup> See, for example, *S v Kumalo and 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.

<sup>3</sup> 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* (2009) 427–446. 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 Correctional Services Amendment Act 68 of 1993 s 17, which amended the 1959 CSA s 54.

<sup>4</sup> See *Williams* (supra) at para 40. For pronouncements on 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* (supra); *Ex parte Attorney-General, Namibia: In re Corporal Punishment* 1991 (3) SA 76 (NmS).

<sup>5</sup> *Williams* (supra) at para 45.

<sup>6</sup> *Ibid* at para 52.

<sup>7</sup> *Ibid* at paras 41–7. See *S v A Juvenile* 1990 (4) SA 151 (ZS), 171E–H (McNally JA, dissenting).

<sup>8</sup> That is, the rights to human dignity and freedom from cruel, inhuman, or degrading punishment. FC ss 10 and 12(1)(e).

forms of punishment.<sup>1</sup> Langa J rejected these arguments and pointed to the need to utilise new sentencing options that did not require the sacrifice of decency and human dignity.<sup>2</sup>

*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.<sup>3</sup> Moreover, legislation subsequent to the decision in *Williams* outlawed corporal punishment in all schools, including private schools run by non-government bodies,<sup>4</sup>

The constitutionality of the latter provision was challenged by parents of children in religious schools. In *Christian Education South Africa v Minister of Education*,<sup>5</sup> 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 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,<sup>6</sup> 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

<sup>1</sup> See *S v Vakalisa* 1990 (2) SACR 88 (Tk), 94G–J; *S v A Juvenile* (supra) at 171I–172A (McNally JA, dissenting). The court found it unnecessary to consider the appellants’ argument that these rights were incapable of limitation. See *Williams* (supra) at paras 55–6. See also *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.

<sup>2</sup> See *Williams* (supra) at para 64–75.

<sup>3</sup> This proposition was common cause between the parties. *Ibid* at para 10.

<sup>4</sup> 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.’

<sup>5</sup> See *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC), 2000 (10) BCLR 1051 (CC), [2000] ZACC 11. For criticism of the Court’s inconsistent protection of children’s rights in Christian education, see S Woolman ‘Freedom of Association’ in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) at § 44.3(e)(viii).

<sup>6</sup> 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 (The imprisonment of a quadriplegic without 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.)

— would amount to cruel, inhuman and degrading punishment. The absence of a possibility of parole makes it unconstitutional.<sup>1</sup>

(iv) *Life imprisonment*

Life imprisonment, if given its literal meaning, means that the offender will remain in prison for the remainder of his or her natural life. In South Africa the term life imprisonment has never actually been interpreted in this fashion, although its meaning has evolved over the years.<sup>2</sup> Although life imprisonment has not yet been considered fully by the South African Constitutional Court,<sup>3</sup> it has rejected the argument that life imprisonment is a cruel, inhuman or degrading punishment, finding 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.<sup>4</sup> In *S v Bull*, however, the Supreme Court of Appeal stated that it was ‘the possibility of parole which [saved] a sentence of life imprisonment from being cruel inhuman and degrading punishment.’<sup>5</sup>

A much more subtle approach to the question of life imprisonment was developed by the German Federal Constitutional Court in 1977.<sup>6</sup> 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.<sup>7</sup> 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. Legislation subsequently introduced judicial review of all life sentences at a point no later than 15 years into

<sup>1</sup> See *S v Nkosi and Another* 2003 (1) SACR 91 (SCA) at para 9.

<sup>2</sup> See JD Majuzi ‘Life Imprisonment in South Africa: Yesterday, Today, and Tomorrow’ (2009) *SACJ* 12. The 1959 CSA had different parole procedures for persons sentenced to life imprisonment and offenders sentenced to determinate periods of imprisonment. For those serving life sentences minimum periods of imprisonment were governed by ministerial policy, and these periods varied. Between 1987 and 1994, an offender who had served ten years of imprisonment could be considered for parole, but absent ‘exceptional circumstances,’ could only be released after having served 15 years imprisonment. In March 1994, the minimum period was increased to 20 years.

<sup>3</sup> See *Makwanyane* (supra) at paras 170–2.

<sup>4</sup> See *Makwanyane* (supra) at paras 170–2 (Ackermann J). See also *Tcoeb* 1996 (1) SACR 390 (NmS) 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).

<sup>5</sup> 2001 (2) SACR 681 (SCA) at para 23.

<sup>6</sup> 45 *BVerfGE* 187.

<sup>7</sup> It would also fail to meet the requirements of legality.

the sentence.<sup>1</sup> The constitutionality of that legislation has been upheld in principle by a later decision of the German Federal Constitutional Court.<sup>2</sup>

In *S v De Kock*, Van der Merwe J subjected the Southern African jurisprudence on life imprisonment to a comprehensive review.<sup>3</sup> He cited the decision of Mohamed CJ in *S v Tcoeb*<sup>4</sup> with approval and concluded that a decision on whether to impose life imprisonment should be taken on the basis that it is a sentence that leaves the offender with a prospect of release. In *Tcoeb*, the Supreme Court of Namibia adopted the same approach to life imprisonment as the German Federal Constitutional Court and held that life imprisonment cannot be equated with the sentence of death.<sup>5</sup> Life imprisonment could be justified only if the prisoner retained some hope of eventually being released from prison. Mohamed CJ explained that life imprisonment

‘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.’<sup>6</sup>

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’<sup>7</sup> of release. The difficult question was whether the existing release mechanisms were sufficient to meet that requirement. Mohamed 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.’<sup>8</sup>

Mohamed 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

<sup>1</sup> A new section, art 57a, was added to the German Penal Code in 1982.

<sup>2</sup> 86 *BVerfGE* 288 (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. However, the trial court should make a finding in this regard in order to guide the tribunal that would eventually decide on his release.)

<sup>3</sup> *S v De Kock* 1997 (2) SACR 171, 204d–211i (T) (*‘De Kock’*).

<sup>4</sup> *Tcoeb* (supra).

<sup>5</sup> *Ibid* at 397b (The court found that Levy J in *S v Nebemia Tjijo* (Unreported decision of 4 September 1991) had been wrong to equate the two. Mohamed CJ cites the 1977 decision of the German Federal Constitutional Court (45 *BVerfGE* 187) with approval at 398g–399a and 400a.)

<sup>6</sup> *Ibid* at 398b.

<sup>7</sup> *Ibid* at 399b, quoting D van Zyl Smit ‘Is Life Imprisonment Constitutional? The German Experience’ (1992) *Public Law* 263, 271.

<sup>8</sup> *Tcoeb* (supra) at 399b–400a.

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 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. Mohamed 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.’<sup>1</sup>

In *De Kock Van der Merwe J* found that an expectation of release was inherent in the provisions of the Correctional Services Act.<sup>2</sup> 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.<sup>3</sup> If this did not happen, the courts could be asked to intervene.<sup>4</sup> 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.<sup>5</sup>

The decision of the Supreme Court of Namibia in *Tcoeb* 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 FC.<sup>6</sup> However, the question of the constitutionality of a sentence of life imprisonment without parole is unlikely to come before the courts, given that the 1998 Act makes provision for the placement of parole in relation to life imprisonment.<sup>7</sup> Thus, although the 1998 Act states quite clearly that ‘an offender sentenced to life imprisonment remains in a correctional centre for the rest of his or her life’<sup>8</sup>, this, along with similar statements expressed in the past by the Appellate Division, does not reflect the full constitutionally-required reality. Thus, they should not be understood to mean that life sentences should be served without the prospect of parole.

<sup>1</sup> *Ibid* at 400c.

<sup>2</sup> See *De Kock* (supra) at 211b. See also *S v Smith* 1996 (1) SACR 250, 225b–256a (E).

<sup>3</sup> See *De Kock* (supra) at 211b.

<sup>4</sup> *Ibid*.

<sup>5</sup> *Ibid*. See also the argument for legality in the implementation of sentences in §49.3(b) infra. See also 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.

<sup>6</sup> Constitution of Namibia art 8 (human dignity) may be compared to FC s 10. 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).

<sup>7</sup> CSA 1998 s 73(6)(b)(iv). Prior to CSA 1998, CSA s 65(5) created a mechanism for the consideration of the release on parole of offenders serving sentences of life imprisonment. See also *S v Bull and Another*, *S v Chavulla* 2002 (1) SA 535 (SCA) at para 23; *S v Nkosi and Another* 2003 (1) SACR 91, 95d (SCA).

<sup>8</sup> CSA 1998 s 73(1)(b). In the past, the Appellate Division has also made it clear that life imprisonment means ‘imprisonment for the rest of an offender’s natural life’. See *S v Mda* 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 & andere* 1993 (2) SACR 180 (T), 183H.

The Supreme Court of Appeal has made clear on a number of occasions that life imprisonment is the ultimate penalty.<sup>1</sup> It should thus only be imposed on offenders who commit the most serious crimes.<sup>2</sup> Courts should not attempt to ensure that such offenders are detained for longer than the minimum period before prisoners serving life sentences are considered for release, either by declaring offenders dangerous criminals<sup>3</sup> or by imposing exorbitantly long fixed-term sentences.<sup>4</sup> It is important to note, however, that the courts' discretion not to impose sentences of life imprisonment has diminished somewhat by the minimum sentences legislation,<sup>5</sup> which introduced 'mandatory' life sentences for certain crimes that may not necessarily be the most serious.<sup>6</sup> As explained above, these sentences do not, however, have to be imposed when there are 'substantial and compelling' reasons for departing from them.

Since the coming into effect of the minimum sentences legislation, there has certainly been a trend by the courts to steer away from the routine imposition of sentences of life imprisonment. In *S v Sangweni*,<sup>7</sup> Steyn J emphasises the reader of the gravity of a life sentence. Referring to a report by the SALC, she states:

'Since the abolition of the death penalty life imprisonment is the most severe sentence that the courts can impose. In *S v T* the court explained that the sentence of life imprisonment authorises the State to keep offenders in prison for the rest of their natural lives. Unless this result is considered to be appropriate this sentence should not be imposed. The question is when is this option appropriate? It is clear though, that the crime has to be very serious and that mitigating factors should have little effect on the blameworthiness of the offender.'

<sup>1</sup> See *S v Nkosi* 2003 (1) SACR 91 (SCA) at para 7; *S v Thebus* 2002 (2) SACR 566 (SCA); *S v Van Loggenberg* 2012 (1) SACR 462 (GSJ); *S v Smith* (supra) at 251.

<sup>2</sup> The European Court of Human Rights, invoking art 3 of the European Convention on Human Rights (the right not to be subjected to torture or to inhuman or degrading treatment or punishment) stated 'life imprisonment for a small-value robbery might be so disproportionate as to amount to inhuman and degrading punishment.' *Weeks v United Kingdom* (1987) 10 EHRR 239.

<sup>3</sup> See *Bull* (supra).

<sup>4</sup> See *S v Nkosi II* (supra) at paras 9-10 (The trial judge imposed effective sentences of 120 years, 65 years and 45 years respectively. On appeal the court found that the sentences had been calculated to circumvent the relevant parole provisions and thus could not stand and substituted the sentences with life imprisonment.) See also *S v Maseola* 2010 (2) SACR 311 (SCA) (The appellant was sentenced to an effective 43 years imprisonment. The Supreme Court of Appeal held that the cumulative effect of the sentences was so harsh and disproportionate that it was entitled to interfere and substitute its discretion for that of the trial court); *S v Sihale* 1999 (2) SACR 102 (SCA).

<sup>5</sup> Cross reference to section on minimum sentences legislation.

<sup>6</sup> See *Mujizi* (supra) at 22-3.

<sup>7</sup> 2010 (1) SACR 419 (KZP).

(v) *Restorative Justice*

There are a number of different definitions of ‘restorative justice’.<sup>1</sup> Generally however, it describes an approach to justice in which the perpetrators of an offence and those affected by it come together for the purpose of ‘putting right’ the effects of the harm caused. In the process respecting they should enhance, if possible, the dignity of the victim and indirectly of the offender. Concerns for dignity are central to restorative justice.

An essential element of restorative justice is the notion that crime is a violation of people, relationships and communities. Accordingly, when an offence is committed, the wrongdoer is obliged to correct the wrong. This is to be achieved through a process which requires an encounter between the victim and offender, the making of amends, and the reintegration of both the offender and victim into the community.<sup>2</sup> A central aim, therefore, of restorative justice is the reconciliation of parties and the promotion of peace.

‘Restorative justice’ emerged in the 1970’s in the United States of America and Canada as a theory of an alternative form of justice altogether to the conventional accusatory, adversarial approach.<sup>3</sup> Inspired by the victims movement, ‘experiments’ in new, innovative ways of dealing with crime were undertaken in response to a growing dissatisfaction with the perceived shortcomings of the traditional criminal justice system.<sup>4</sup> The adversarial model of criminal justice, it was argued, ‘stole’ the healing process from the victim(s) of the offence and did nothing to assist in the prevention of crime or rehabilitation of the offender. An alternative practice developed according to ‘what worked’ in relation to impact on offenders and victim satisfaction.<sup>5</sup> As these practices developed, the role of the community in addressing crime came to be recognised as more important, an innovation inspired by non-Western cultures, such as the Maoris in New Zealand and Native Americans in North America.<sup>6</sup>

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<sup>1</sup> The United Nations Office on Drugs and Crime’s *Handbook on Restorative Justice Programmes* (2006) 6 (Defines it as: ‘any process in which the victim and offender, and where appropriate, and other individuals or community members affected by a crime participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator. ... Restorative processes may include mediation, conciliation, conferencing and sentencing circles.’) See also R Cormier ‘Restorative Justice: Directions and Principles — Developments in Canada’ (2002), available at <http://dsp-psd.pwgsc.gc.ca/Collection/J542-107-2002E.pdf> (Describes it as: ‘an approach to justice that focuses on repairing the harm caused by crime while holding the offender responsible for his or her actions, by providing an opportunity for the parties directly affected by a crime — victim(s), offender and community — to identify and address their needs in the aftermath of a crime, and seek a resolution that affords healing, reparation and reintegration, and prevents future harm.’)

<sup>2</sup> M Batley ‘Restorative Justice’ in Davis and Snyman (eds) *Victimology in South Africa* (2005) 117, 120.

<sup>3</sup> For a detailed discussion of the origins of restorative justice and the philosophies on which it is based, see B Tshela ‘The Restorative Justice Bug Bites the South African Criminal Justice System’ (2004) *SACJ* 1. For a wider international view, see G Johnstone *Restorative Justice: Ideas, Values, Debates* (2011).

<sup>4</sup> T Marshall ‘Restorative Justice: An Overview’ (1999), a report by the Home Office Research Development and Statistics Directorate.

<sup>5</sup> *Ibid* at 7.

<sup>6</sup> *Ibid*.

In the last 25 years there has been an ‘unprecedented emergence of restorative justice practices worldwide’.<sup>1</sup> Today the term is used to describe a variety of discrete processes that are utilised within, and are complementary to, the formal justice system. There are several restorative justice ‘models’ in New Zealand, Canada and the United States illustrating how such processes can be developed to complement the traditional, formal criminal justice process.<sup>2</sup> The United Nations has also drafted guidelines in this regard.<sup>3</sup>

From a sentencing perspective, restorative justice typically requires that there be an apology, a mediation process between the offender on the one hand, and the victim and community, on the other, and, where relevant, some form of restitution or compensation to the victim. These processes can be sentences themselves, or used in conjunction with the more typical sentences of imprisonment. Restorative justice also promotes the involvement of victims in determining the release of offenders from prison on parole.<sup>4</sup>

Notwithstanding the similarities between indigenous South African methods of dispute resolution and restorative justice,<sup>5</sup> the formal South African justice system was slower than those of several other countries to incorporate typical restorative justice processes into its legal system.<sup>6</sup> However, the Constitutional Court has linked restorative justice to the constitutional values of dignity and *ubuntu*.<sup>7</sup> The Child Justice Act makes a similar link when it states that one of its objectives is to ‘promote the spirit of *ubuntu* in the child justice system through...supporting reconciliation by means of a restorative justice response’.<sup>8</sup>

It is perhaps unsurprising, then, that sentencing courts, to the extent that the legislation permits, have begun to embrace this notion and to attach restorative

<sup>1</sup> Tshela (supra) at 1.

<sup>2</sup> Ibid at 15.

<sup>3</sup> United Nations *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters* (2002).

<sup>4</sup> CPA s 299A requires that the complainant of certain, serious offences or relatives of murder victims have the right to make representations when placement of the prisoner on parole.

<sup>5</sup> Courts and commentators alike have linked restorative justice to South African indigenous forms of dispute resolution. See Tshela (supra) at 13.

<sup>6</sup> In the mid-1990’s civil society organisations, as well as the SAPS, became increasingly cognisant of victim support and empowerment. This led to a number of workshops, and, importantly, the South African Law Commission’s *Issue Paper 7: Sentencing Restorative Justice (Compensation for Victims of Crime and Victim Empowerment (Project 82)* (1997). The issue paper considered the need for the establishment of a compensation fund for victims of crime as well as the broader issues of victim empowerment and a restorative justice approach to crime. See also *S v Maluleke* 2008 (1) SACR 49 (T) at para 31 (Bertelsmann J still described restorative justice in South Africa as being ‘in its infancy’).

<sup>7</sup> See also *Dikoko v Mokhatla* 2006 (6) SA 235 (CC), 2007 (1) BCLR 1 (CC), [2006] ZACC 10 at para 68 (Mokgoro J states in our constitutional democracy the basic constitutional value of human dignity relates closely to ubuntu or botho, an idea based on deep respect for the humanity of another. Traditional law and culture have long considered one of the principal objectives of the law to be the restoration of harmonious human and social relationships where they have been ruptured by an infraction of community norms. It should be a goal of our law to emphasise, in cases of compensation for defamation, the re-establishment of harmony in the relationship between the parties, rather than to enlarge the hole in the defendant’s pocket, something more likely to increase acrimony, push the parties apart and even cause the defendant financial ruin.)

<sup>8</sup> Child Justice Act 75 of 2008 s 2(b)(iii).

justice-type conditions to suspended sentences<sup>1</sup> and sentences of community corrections.<sup>2</sup> Section 300 of the Criminal Procedure Act includes a potentially restorative element by permitting an award of compensation or restitution where an offence has caused damage or loss of property, upon application by the injured party. *S v Shilubane*<sup>3</sup> was perhaps the first judgment to refer explicitly to restorative justice, and it did so in the context of s 300. The accused in this matter had been convicted of stealing seven chickens and sentenced by the trial court to nine months imprisonment. On appeal, Bosielo J remarked: ‘I have little doubt in my mind that, in line with the new philosophy of restorative justice, the complainant would have been more pleased to receive compensation for his loss.’<sup>4</sup> Moreover, a key aspect of restorative justice, namely an apology, has been used by criminal sentencing courts<sup>5</sup> as well as by the Constitutional Court in fashioning remedies in

<sup>1</sup> CPA s 297(1) states:

‘Where a court convicts a person of any offence, other than an offence in respect of which any law prescribes a minimum punishment, the court may in its discretion-

- (a) postpone for a period not exceeding five years the passing of sentence and release the person concerned —
  - (i) on one or more conditions, whether as to-
    - (aa) compensation;
    - (bb) the rendering to the person aggrieved of some specific benefit or service in lieu of compensation for damage or pecuniary loss;
    - (cc) the performance without remuneration and outside the prison of some service for the benefit of the community under the supervision or control of an organization or institution...’

<sup>2</sup> CSA s 52(1) states, in part:

‘When community corrections are ordered, a court, Correctional Supervision and Parole Board, the Commissioner or other body which has the statutory authority to do so, may...stipulate that the person concerned —

- (b) does community services...
- (e) pays compensation or damages to victims...and
- (g) participates in mediation between victim and offender or in family group conferencing...’

<sup>3</sup> *S v Shilubane* 2008 (1) SACR 295 (T)(‘*Shilubane*’)

<sup>4</sup> *Ibid* at para 4.

<sup>5</sup> See *S v Maluleke* 2008 (1) SACR 49 (T)(A case in which an offender had been convicted of murder, the sentencing court took into account a particular custom, relevant to both the offender and victim’s family in this case, in which an elder of an offender’s family apologises to the victim and his or her family and community. This, the court said, created the opportunity to introduce the principles of restorative justice into the sentencing process. It sentenced the accused to eight years of imprisonment, suspended for three years, on condition that the accused apologise according to custom to the mother and family of the deceased.)

defamation cases.<sup>1</sup> The guidelines implicit in the Constitutional Court's judgments on remedies for defamation may be of some (albeit limited) use in guiding the use of apology in criminal sentencing.

Although the courts' use of restorative justice sentences is generally welcomed by commentators, there is currently very little legislative or policy guidance regarding what type of restorative justice sentences are effective and appropriate in various circumstances. A recent case illustrates this problem. In *Director of Public Prosecutions v Thabethe*<sup>2</sup> the Supreme Court of Appeal considered whether a wholly suspended sentence imposed by the High Court<sup>3</sup> for the offence of rape, which, according to statute<sup>4</sup> is punishable by a minimum of ten years imprisonment, was appropriate. The 'extraordinary circumstances' of the case, Bertelsmann J concluded in the High Court, presented a case in which 'restorative justice provide[d] a just and appropriate sentence'.<sup>5</sup> Despite the High Court having attached many, rather onerous conditions to the suspended sentence, the Supreme Court of Appeal found that the High Court's sentence did not reflect adequately society's 'natural outrage and revulsion' at the crime of rape and cautioned against the use of restorative justice for serious crimes. The 'ill-considered application' of restorative justice, the court said, was likely to 'debase it and make it lose credibility as a viable sentencing option'.<sup>6</sup>

<sup>1</sup> See *Dikoko* (supra) at para 68. In two subsequent cases — *Le Roux and Others v Dey* 2011 (3) SA 274 (CC), 2011 (6) BCLR 577 (CC), [2011] ZACC 4 at para 197 and *The Citizen 1978 (Pty) Ltd and Others v McBride* 2011 (4) SA 191 (CC), 2011 (8) BCLR 816 (CC), [2011] ZACC 11 — the Court again considered the value of restorative justice, in particular, an apology, in relation to remedies for defamation. It noted that the common law, in recognising monetary awards only as remedial damages, did very little to remedy the hurt feelings and reputation of the applicant. In addition, *McBride* made it clear the Court would be likely to consider an apology inappropriate in circumstances where it was unwanted or insincere. Cameron J (at para 194) writing for the majority of the Court, considered the applicant's arguments against the ordering of an apology as reason enough to refrain from such an order. The applicant's argument, was that, firstly, an apology was not a remedy the applicant had, at any stage, requested from the defendant. Secondly, given that the defendant was a media house, it would serve no useful purpose since there was no personal relationship to restore. Thirdly, the defendants had never exhibited any remorse and an apology would thus be 'hollow' (at para 133).

<sup>2</sup> 2011 (2) SACR 567 (SCA).

<sup>3</sup> Reported as *S v Thabethe* 2009 (2) SACR 62 (T) ('*Thabethe HC*').

<sup>4</sup> Criminal Law Amendment Act s 51(2) read with Part III of Schedule 2.

<sup>5</sup> *Thabethe HC* (supra) at para 40 ('The 'substantial and compelling circumstances,' according to Bertelsmann J, in addition to the offender being a good candidate for rehabilitation, showing genuine remorse and apologising to the victim, included the following: he was in a relationship with the victim's mother, who, along with the victim and other children in the family, were financially dependent on him; he was employed and both willing and able to financially support them; the victim was aware that it was not in the family's interest that he be incarcerated; he and the victim had successfully participated in a victim/offender program; and it was also 'not in the interests of society to create secondary victims by the imposition of punishment upon the accused that would leave at least five indigent person dependent upon social grants'. Ibid at para 35.)

<sup>6</sup> *Thabethe SCA* (supra) at para 20. See also *S v Saayman* 2008 (1) SACR 393 (E) ('The magistrate in this latter matter, having convicted the accused of numerous counts of fraud, suspended a two year sentence of imprisonment on a number of conditions, one of which required that the offender stand in the foyer of the Commercial Crimes Court for 15 minutes, on a certain day, and hold a placard proffering her guilt and apologising to the victims. On review, the High Court found that this particular condition exposed the offender to ridicule and shaming in a manner that violated her constitutional right not to be treated or punished in a cruel, inhuman or degrading way. Moreover, the humiliation she would suffer offended her dignity, a value integral to restorative justice.)

Despite its relatively warm reception by South African courts, restorative justice is not a central component of sentencing. Rather, it tends to be considered only after a custodial option has been determined as being inappropriate through the application of the traditional *Zinn* triad.<sup>1</sup> Accordingly, restorative justice considerations in sentencing feature only if a court has already decided to impose a suspended sentence or correctional supervision. However, as Terblanche points out, courts are free to make recommendations when sentencing offenders to imprisonment.<sup>2</sup> They may recommend, for example, that the prison authorities include restorative elements in the implementation of their sentences.<sup>3</sup>

(vi) *Victims*

The South African FC makes no explicit mention of the rights of victims of crime.<sup>4</sup> The Child Justice Act, however, mandates a child justice court to take into account ‘the severity of the impact of the offence on the victim’ when considering a sentence of imprisonment.<sup>5</sup> Currently, the role of the victim at the sentencing stage is confined to evidentiary witness testimony, delivered personally or through expert opinion, for the purpose of assessing the nature and extent of the harm caused.<sup>6</sup> The Victim’s Charter, an official policy document approved by cabinet on 2 December 2004, also states that a victim may convey information on the effects of the offence to a probation officer, who, at the behest of the presiding

<sup>1</sup> See S Terblanche *Guide to Sentencing in South Africa* (2007) 177.

<sup>2</sup> *Ibid.*

<sup>3</sup> Whether imprisonment in itself could be compatible with restorative justice process is addressed in detail by N Stamatakis & T van der Beken in ‘Restorative Justice in Custodial Settings: Altering the Focus of Imprisonment’ (2011) 24(1) *Acta Criminologica* 44.

<sup>4</sup> Examples of countries with a legislative basis for victim impact statements include Canada, the United States of America and the Australian States of South Australia and New South Wales, which empower victims through statute to make victim impact statements for the purposes of sentencing. Clause 47(3) of the 2000 Draft Sentencing Framework Bill states that a prosecutor must tender evidence of a victim impact statement in circumstances where the victim has not been called to testify and such information is available. See also Department of Justice and Constitutional Development *Service Charter for Victims of Crime in South Africa* (2004) (approved by cabinet on 2 December 2004). See in general K Muller & A Van der Merwe ‘Recognizing the Victim in the Sentencing Stage: The Use of Victim Impact Statements in Court’ (2006) 22 *SAJHR* 637.

<sup>5</sup> Child Justice Act s 69(4)(c). A victim impact statement, for the purposes of the Child Justice Act, is a sworn statement by the victim or someone authorised by the victim to make a statement on behalf of the victim which reflects the physical, psychological, social, financial, or any other consequences of the offence for the victim. See also Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 s 66(2)(viii) (requires the National Commissioner of the South African Police Service, with the Minister of Safety and Security, the National Director of Public Prosecutions, the National Commissioner of Correctional Services and the Director-General: Health and Social Development to issue instructions to be followed by police officials regarding collection of information to be placed before a court during sentencing, including pre-sentence reports and information on the impact of the sexual offence on the complainant.)

<sup>6</sup> See *Rammoko v Director of Public Prosecutions* (2002) 4 All SA 731 (SCA).

officer, prosecutor or defence counsel, must compile a report on the effects of the offence on the victim prior to sentencing.<sup>1</sup>

The successful future incorporation of victim impact statements into the South African sentencing regime would need to be structured in a way that deals with the somewhat controversial issue of whether the victim should be permitted to express an opinion on the offender's sentence. In *S v Thabethe*, the SCA explained the different interests at play:<sup>2</sup>

'A controversial if not intractable question remains: do the views of the victim of a crime have a role to play in the determination of an appropriate sentence? If so what weight is to be attached thereto? That the victim's voice deserves to be heard admits of no doubt. After all it is the victim who bears the real brunt of the offence committed against him or her. It is only fair that he/she be heard on amongst other things, how the crime has affected him/her. This does not mean however that his/her views are decisive.'

Although the issue appears to remain unresolved in South Africa, the Report of the South African Law Commission on 'A New Sentencing Framework'<sup>3</sup> was supportive of the inclusion of victim impact statements. The Report was careful, however, to add that certain safeguards against 'an offender being prejudiced by a victim impact statement that is inaccurate [would be] required.'<sup>4</sup> In the case of sex offences, the Commission,<sup>5</sup> in another report, went further and suggested that a victim should be so entitled.<sup>5</sup>

### (e) Children

The FC acknowledges that children are physically and psychologically more vulnerable than adults. It affords them a specific set of rights designed to nurture and protect their particular interests and development. These rights impact on sentencing in a way that cuts across the general categories that have been used above to analyse the imposition of sentences.

<sup>1</sup> See *Service Charter for Victims* (supra) at para 20:

'Before sentence is passed, the presiding officer, the prosecutor or the defence may request that a probation officer or any other expert prepare a report on you or the accused. The report may include an assessment of the effect the crime has had on you. The information may be taken from the statement you made to the police, or the probation officer may interview you in person or you may be called to testify at the sentencing stage.'

The inclusion of victim impact statements into the sentencing process was proposed in South African Law Commission *Issue Paper 7: Sentencing Restorative Justice (Compensation for victims of crime and victim empowerment (Project 82))* (1997). Internationally, the United Nations General Assembly adopted the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power in 1985. Although the Declaration does not specifically refer to victim impact statements, art 6(b) states:

'The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by. ... [a]llowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system.'

<sup>2</sup> *Thabethe SCA* (supra) at para 21.

<sup>3</sup> South African Law Commission *A New Sentencing Framework* Discussion Paper 91, Project No. 82. (December 2000).

<sup>4</sup> *Ibid* at 119.

<sup>5</sup> South African Law Commission *Sexual Offences: Process and Procedure* Discussion Paper 102 (December 2001) 647.

In particular, the FC recognizes the fact that lengthy periods of imprisonment are, generally, harmful to children. In *Centre for Child Law v Minister for Justice and Constitutional Development and Others*, Cameron J eloquently describes why an additional set of principles is necessary when it comes to sentencing children:

‘We recognise that children’s crimes may stem from immature judgment, from as yet unformed character, from youthful vulnerability to error, to impulse, and to influence. We recognise that exacting full moral accountability for a misdeed might be too harsh because they are not yet adults. Hence we afford children some leeway of hope and possibility.’<sup>1</sup>

The basis for this analysis can be found in s 28 of the FC: both in the general provision that the best interests of the child are of ‘paramount importance’ in all matters involving children,<sup>2</sup> and in the more specific requirement that child should only be detained as a measure of last resort.<sup>3</sup>

There have been a number of judgments since the enactment of the IC from which sentencing guidelines have emerged in light of the child-specific provisions of the Bill of Rights and applicable international law.<sup>4</sup> *S v Z en vier ander sake*<sup>5</sup> was the first reported judgment in the new constitutional era which considered explicitly the principles relevant to the sentencing of children. In this case five matters came before the High Court on review, in which child offenders had been sentenced to suspended terms of imprisonment. The court considered the options and principles applicable to child offenders and laid down the following guidelines:

- a) diversion should be considered prior to trial in appropriate cases;
- b) age must be properly determined prior to sentencing;
- c) a court must act dynamically to obtain full particulars about the accused’s personality and personal circumstances;
- d) a court must exercise its wide sentencing discretion sympathetically and imaginatively;
- e) a court must adopt, as its point of departure, the principle that, where possible, a sentence of imprisonment should be avoided, and should bear in mind especially that: the younger the accused is, the less appropriate imprisonment will be; imprisonment is rarely appropriate in the case of a first offender; and short-term imprisonment is rarely appropriate; and
- f) a court must not impose suspended imprisonment where imprisonment is inappropriate for a particular accused.

Subsequent judgments, generally, have affirmed these guidelines. These are discussed in detail in the *Children’s Rights* chapter. In short, courts have been receptive to the idea that a sentence should be responsive to the

<sup>1</sup> 2009 (2) SACR 477 (CC), 2009 (6) SA 632 (CC), 2009 (11) BCLR 1105 (CC), [2009] ZACC 18 at para 28.

<sup>2</sup> FC s 28(2)

<sup>3</sup> FC s 28(1)(g). The provision in FC ss 28(1)(g)(i) and (ii) relating to the implementation of sentences imposed on children are considered at §49.2(e)(iii) below.

<sup>4</sup> These are discussed in detail in Adrian Friedman, Angelo Pantazis & Ann Skelton ‘Children’s Rights’ in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, RS1, 2009) §47.7.

<sup>5</sup> 1999 (1) SACR 427 (E).

individualized needs of the child, and, where possible, sentences of imprisonment should be avoided.<sup>1</sup>

The recent case of *S v Botes*,<sup>2</sup> however, is disappointing in its limited application of child-centred constitutional principles. The appellant, who was 17 years old at the time of the commission of a murder, was sentenced to 15 years imprisonment. Mavundla J, finding that the sentence imposed was not ‘shockingly inappropriate’ dismissed the appeal.<sup>3</sup> He stated that ‘[w]ith regard to the youth, because they are the future of this country, Courts must not hesitate to impose long sentences to ensure that this evil is not carried into the future’.<sup>4</sup> This statement cannot be reconciled with the notion that imprisonment should be avoided wherever possible, and used only as a measure of ‘last resort,’ and, if unavoidable, for the shortest period of time. Although an appeal court has very limited scope to overturn an initial sentence, it is Mavundla J’s fundamental approach and his failure to interrogate the possibility of alternative non-custodial options and rehabilitative measures that is of greater concern than the order itself.<sup>5</sup>

(i) *Caregivers and children*

One other aspect of sentencing in general in which the best interests of children have played a very important and controversial role in South African jurisprudence is the sentencing of adults who are the primary caregivers for children. In *S v M*<sup>6</sup> a single mother who was ‘almost totally responsible for the care and upbringing’ of her young children had been convicted of fraud. As a repeat offender she had duly been sentenced to a term of imprisonment. However, the Constitutional Court set her sentence aside and replaced it with a period of correctional

<sup>1</sup> See *S v Kwalase* 2000 (2) SACR 135 (C) and *Mocumi v S*. Unreported Northern Cape Division Case Number CASR 2/05, (30 May 2006). See also *S v N* 2008 (2) SACR 135 (SCA), [2008] 3 All SA 170 (SCA), [2008] ZASCA 30 (The appellant, who was 17 years old at the time of the commission of the offence, argued before the Supreme Court of Appeal that the High Court, in sentencing him to ten years imprisonment, of which four were conditionally suspended, had failed to investigate adequately the possibility of correctional supervision. Cameron JA, writing for the majority, found that in light of the gravity of the offence, rape, a prison sentence [was] unavoidable. Ibid at para 42. He disagreed with Maya JA’s minority view, however, that a six-year effective sentence was fitting. That sentence, he said: ‘disregards the youthfulness of the appellant when he committed the crime. It treats him too much like the adult he was not when he raped his victim. It may set him up for ruin, while foreclosing the possibility, embodied in his youth, that he will still benefit from resocialisation and re-education. It fails to individualize the sentence with the emphasis on preparing him, as a child offender, for his return to society.’ Ibid at para 42. A five-year prison sentence, Cameron J held, came closer to doing justice. He imposed the sentence under CPA s 276(1)(i), which permits the placement under correctional supervision ‘in the discretion of the Commissioner or a parole board.’) See also *Director of Public Prosecutions, Kwa-Zulu Natal v P* 2006 (1) SACR 243 (SCA) (The state appealed the non-custodial sentence imposed by the High Court for a murder a girl had committed when only twelve years old. Although the judgment of the SCA reiterates the last resort and shortest appropriate period of time principles, it delivers a sentence of suspended imprisonment, thereby weakening the principle laid down in *S v Z* that suspended prison terms should not be used in cases where imprisonment is adjudged to be inappropriate.)

<sup>2</sup> 2011 (1) SACR 439 (GNP).

<sup>3</sup> Ibid at para 30.

<sup>4</sup> Ibid at para 24.

<sup>5</sup> Cf. *Fredericks v S* 2012 (1) SACR 298 (SCA).

<sup>6</sup> 2008 (3) SA 232 (CC), 2007 (12) BCLR 1312 (CC), [2007] ZACC 18.

supervision on the basis that the sentencing court had failed to give sufficient independent and informed attention to the impact on the children of sending her to prison, as required by the children's rights provisions in the Bill of Rights.<sup>1</sup> The Constitutional Court articulated guidelines to be adopted by sentencing courts where a custodial sentence of a primary caregiver was in issue:

- (a) A sentencing court should find out whether a convicted person is a primary caregiver whenever there are indications that this might be so.
- (b) . . . The court should also ascertain the effect on the children of a custodial sentence if such sentence is being considered.
- (c) If on the *Zinn*-triad approach the appropriate sentence is clearly custodial and the convicted person is a primary caregiver, the court must apply its mind to whether it is necessary to take steps to ensure that the children will be adequately cared for while the caregiver is incarcerated.
- (d) If the appropriate sentence is clearly non-custodial, the court must determine the appropriate sentence, bearing in mind the interests of the children.
- (e) Finally, if there is a range of appropriate sentences on the *Zinn* approach, then the court must use the paramountcy principle concerning the interests of the child as an important guide in deciding which sentence to impose.<sup>2</sup>

The judgment in *S v M* was widely acclaimed by child rights activists,<sup>3</sup> but it raises difficult questions from the perspective of sentencing theory. It runs the risk of undermining proportionality-based desert as the primary basis for determining sentence, for it gives caregivers the possibly that, in some instances at least, they may get less severe sentences because of a factor that is extraneous to their personal moral blameworthiness. Arguably, this can be justified on the basis of the wider social good of providing children with care. However, even this justification is questionable if one considers that other equally deserving and socially valuable care-givers, of the elderly, for example, are not singled out constitutionally in the same way. In practice, much will depend on how generously these principles are applied. The indications are that they will be applied narrowly. In *S v S*<sup>4</sup> the Constitutional Court indicated that that application was relatively narrow, as it held that a mother could be sentenced to imprisonment if there were a father who could act as caregiver, even if in the past he had not been very active.

(ii) *Minimum Sentences for children*

The Criminal Law Amendment Act 105 of 1997<sup>5</sup> (CLAA), in the form that it was originally adopted, exempted children under 16 years of age from its application, and provided that if a court *were* to impose a prescribed sentence upon child who was older than 16 years of age but under 18 at the time of the commission of the offence, it had to enter reasons for doing so on the record of proceedings.<sup>6</sup>

<sup>1</sup> Ibid at para 48.

<sup>2</sup> Ibid at para 36.

<sup>3</sup> See A Skelton & M Courtenay 'Beyond *S v M*: Children of Perpetrator Who Are Primary Care Givers' (2012) *SACJ* 180.

<sup>4</sup> 2011 (2) SACR 88 (CC), 2011 (7) BCLR 740 (CC), [2011] ZACC 7.

<sup>5</sup> Act 105 of 1997.

<sup>6</sup> CLAA s 51(3) prior to amendment.

Various interpretations of these provisions emerged from the High Courts.<sup>1</sup> In *S v B*,<sup>2</sup> however, the Supreme Court of Appeal gave its definitive interpretation of the legislation. In that matter, the appellant, who was 17 years old at the time of the offence, was sentenced to life imprisonment by the High Court. The SCA held that the CLAA, interpreted in light of the values of the FC, did not invariably require courts to impose the statutorily-prescribed minimum sentence when sentencing children between the ages of 16 and 18 years of age.<sup>3</sup> A court was ‘generally free’ to apply the usual sentencing criteria in deciding on an appropriate sentence subject only to the ‘weighting effect’ of the legislation.<sup>4</sup> Unlike adult offenders, the court said, offenders in that age group are exempt from having to establish substantial and compelling circumstances to avoid minimum sentences.

On 31 December 2007, the Criminal Law (Sentencing) Amendment Act<sup>5</sup>, which was designed to reverse the judgment of the SCA in *S v B*, came into force.<sup>6</sup> It expressly made the minimum sentencing legislation applicable to 16 and 17 year olds.<sup>7</sup> Shortly thereafter, the constitutionality of this amendment was challenged.<sup>8</sup> Cameron J, writing for the majority of the Constitutional Court, declared the amendment unconstitutional. The minimum sentencing regime, he said, was ‘very far from the approach to sentencing that the Bill of Rights demands for children.’<sup>9</sup> Cameron J continued:

In short, section 28(1)(g) requires an individuated judicial response to sentencing, one that focuses on the particular child who is being sentenced, rather than an approach encumbered by the rigid starting point that minimum sentencing entails. The injunction that the child may be detained only for the shortest “appropriate” period of time relates to the child and to the offence he or she has committed. It requires an individually appropriate sentence. It does not import a supervening legislatively imposed determination of what would be “appropriate” under a minimum sentencing system.<sup>10</sup>

In his dissent, Yacoob J concluded that the 2007 Amendment Act did not amount to a limitation on the child’s right not to be detained except as a measure of last resort. Legislation, he said, was subordinate to the FC: thus, unless the effect of

<sup>1</sup> See *S v Nkosi* 2002 (1) SACR 135 (W); *Direkteur van Openbare Vervolging, Transvaal v Makwetsja* 2004 (2) SACR 1 (T); *S v Blaauw* 2001 (2) SACR 255 (C). See also *Brandt v S* (2005) JDR 0096 (SCA) (The Supreme Court of Appeal replaced a sentence of life imprisonment imposed by the High Court on an offender who was 17 at the time of the offence with a sentence of 18 years imprisonment.)

<sup>2</sup> *S v B* 2006 (1) SACR 311 (SCA).

<sup>3</sup> *Ibid* at para 11.

<sup>4</sup> *Ibid* at paras 10-12.

<sup>5</sup> Act 38 of 2007.

<sup>6</sup> *Government Gazette* 30638 GN 1257 (31 December 2007).

<sup>7</sup> CLAA s 51(6) exempted only children under the age of 16 from the ambit of the legislation.

<sup>8</sup> *Centre for Child Law v Minister of Justice & Constitutional Development and Others* unreported case no. TPD11214/2008 (4 November 2008); *Centre for Child Law v Minister for Justice & Constitutional Development and Others* 2009 (6) SA 632 (CC), 2009 (2) SACR 477 (CC), 2009 (11) BCLR 1105 (CC), [2009] ZACC 18 (“*Centre for Child Law*”).

<sup>9</sup> *Centre for Child Law* (supra) at para 41.

<sup>10</sup> *Ibid* at para 32. In considering whether the effect of the amending provisions could be justified by s 36 of the Final Constitution, the majority found that despite the government’s explanation that the Amending Act was intended to reduce the number of serious crimes being committed by juveniles it had failed to back up this argument with factual data. *Ibid* at para 52.

the 2007 Amendment Act was to compel courts to impose sentences in conflict with s 28(1)(g), the constitutionality of the impugned provisions should remain intact. According to Yacoob J:

It is only if the court concludes, after taking into account all the circumstances at the outset, that the minimum sentence would not be unjust that a court is authorised to impose it . . . The minimum sentencing regime is no authority for the imposition of unjust or disproportionate sentences.<sup>1</sup>

Interestingly, both Cameron J and Yacoob J agreed that the minimum sentencing regime steered the courts away from alternatives to imprisonment and increased the duration of sentences to imprisonment. According to Cameron J, this was enough of a violation of s 28(1)(g) to warrant the declaration of constitutional invalidity. For Yacoob J, it was not. In our view, Cameron J's position is the more constitutionally sound of the two. First, there is no good reason why s 28(1)(g) should be read simply to apply to laws that oblige sentencing officers to impose higher sentences of imprisonment. Any legislation that purports to increase sentences of imprisonment beyond what a court may otherwise impose is subject to constitutional scrutiny. Secondly, Yacoob J attached an interpretation to the amending provisions which cannot be supported directly by the text, an approach which should be avoided if a more direct and obvious interpretation exists.<sup>2</sup>

(iii) *The Child Justice Act*

As explained above, the IC and FC introduced child-specific provisions, which included the principle that the best interests of the child are of paramount importance in all matters concerning the child.<sup>3</sup> In the wake of the South African government's ratification of the United Nations Convention on the Rights of the Child (CRC) in June 1995,<sup>4</sup> the then Minister of Justice requested the South African Law Commission to research the prospect of establishing a child-specific justice system.<sup>5</sup> After several years of extensive research on child justice, costing exercises and the re-drafting of the Child Justice Bill, the Bill was passed in September 2008.

The Child Justice Act 75 of 2008 (CJA), which entered into force on 1 April 2010, introduced a new sentencing regime for children, repealing many of the provisions in the Criminal Procedure Act<sup>6</sup> regulating the sentencing of child

<sup>1</sup> Ibid at para 116.

<sup>2</sup> J Brickhill & M Bishop 'Constitutional Law' 2009(3) *Juta's Quarterly Review* §2.3.1.3. In *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC), 2000 (10) BCLR 1079 (CC), [2000] ZACC 12 at para 23 (Langa CJ stated that judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section.)

<sup>3</sup> FC s 28(2).

<sup>4</sup> One of the requirements of the CRC is that state parties 'promote the establishment of laws, procedures, and institutions specifically applicable to children' in conflict with the law. CRC art 40(3).

<sup>5</sup> C Badenhorst 'Overview of the Implementation of the Child Justice Act: Good Intentions, Questionable Outcomes' (2011) 2 *Open Society Foundation for South Africa, Criminal Justice Initiative Occasional Paper*.

<sup>6</sup> Act 51 of 1977.

offenders. Based on restorative justice principles, the CJA regulates the criminal justice processes applicable to children in conflict with the law. When it comes to sentencing, the CJA provides a range of available options designed to fulfil the ‘objectives of sentencing.’<sup>1</sup> These objectives are firmly rooted in the idea that children benefit from rehabilitative, individualized treatment and, if at all possible, should serve their sentences in circumstances involving the family and the community. To this end, a presiding officer may impose a combination of sentence<sup>2</sup> but must consider the recommendations of a probation officer.<sup>3</sup>

The CJA attaches a number of conditions to the imposition of a sentence of imprisonment on children. First, a presiding officer may not impose a sentence of imprisonment on a child who is under the age of 14 years, and, echoing a principle well renowned in international and constitutional law, may only sentence those older than 14 years of age to imprisonment as a measure of last resort and for the shortest appropriate period of time.<sup>4</sup> Secondly, it prohibits a sentence of imprisonment unless a child has been convicted of certain serious offences,<sup>5</sup> or, if convicted of a lesser offence, unless the child has a record of relevant, previous convictions.<sup>6</sup> Thirdly, a child may not be sentenced to a period exceeding 25 years.<sup>7</sup> Collectively, these provisions now reflect in legislation the constitutional principles that underpin the sentencing of juveniles.

### 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, for example, the Supreme Court of Zimbabwe<sup>8</sup> and the European Court of Human Rights<sup>9</sup> 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

<sup>1</sup> CJA s 69 lists the objectives of sentencing and factors to be considered. CJA ss 72-9 list the sentencing options. These are: community-based sentences, restorative justice sentences, fine or alternatives to a fine, correctional supervision, compulsory residence in a child and youth care centre and imprisonment. These objectives are echoed in international law. See, for example, arts 79-80 of the UN Rules for the Protection of Juveniles Deprived of the Liberty (JDL) and art 29(1) of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (‘the Beijing Rules’).

<sup>2</sup> Child Justice Act s 69(2).

<sup>3</sup> Child Justice Act s 71. Several judgments have emphasized the importance of sentencing reports. See *Kwalase* 2000 (2) SACR 135 (C); *S v J and Others* 2000 (2) SACR 310 (C); *S v Petersen en ’n Ander* 2001 (1) SACR 16 (SCA); *S v N and Another* 2005 (1) SACR 201 (CkH); *S v M and Another* 2005 (1) SACR 481 (E).

<sup>4</sup> CJA ss 77(1) and (2). See also Convention on the Rights of the Child art 37(b); UN Standard Minimum Rules for the Administration of Juvenile Justice (1985) rule 13.1; Beijing Rules art 19(1).

<sup>5</sup> These are listed in CJS schedule 3.

<sup>6</sup> CJA s 77(3).

<sup>7</sup> CJA s 77(5) also requires that a child justice court imposing a sentence of imprisonment must antedate the term of imprisonment by the number of days that the child has spent in prison or child and youth care centre prior to the sentence being imposed.

<sup>8</sup> *Catholic Commission for Justice & Peace in Zimbabwe v Attorney-General, Zimbabwe and Others* 1993 (4) SA 239 (ZS), 1993 (2) SACR 432 (ZS).

<sup>9</sup> *Soering v United Kingdom* (1989) 11 EHRR 439.

if the Constitution or international instrument that they were interpreting allowed the death sentence to be imposed.<sup>1</sup>

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, community corrections, 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.

### **(a) Dignity**

Section 35(2)(e) of the FC states:

‘Everyone who is detained, including every sentenced prisoner, has the right...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...’ (Emphasis added.)

Chapter three of the 1998 Correctional Services Act is entitled, ‘Custody of all inmates under conditions of human dignity’. The 1998 Act, coupled with the regulations made in terms of it, requires that various standards be met in relation to accommodation, exercise, nutrition, contact with the community, health care and recreation.<sup>2</sup> Assuming that these standards are consistent with the demands of human dignity, prison conditions that fall below these standards are a violation of s 35(2)(e) of the FC, and amount to ‘inhuman or degrading’ treatment or punishment, a violation of s 12(1)(e) of the FC.<sup>3</sup>

It is clear that for any limitations of prisoners’ rights to be accepted in South Africa, they have to be imposed by legislation and to meet the requirements of the limitations section of the FC.<sup>4</sup> It is therefore unclear as to what the full range of prisoners’ rights is or what limitations may legitimately be imposed on these rights. Case law, though limited, suggests that the answers will often depend on

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<sup>1</sup> Ibid (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.)

<sup>2</sup> Chapter two of the Correctional Services Regulations and ss 3-7 of the Correctional Services Regulations GN R914 in GG 22626 (30 July 2004).

<sup>3</sup> In *Strydom v Minister of Correctional Services* 1999 (3) BCLR 342 (W) (The High Court was called to determine whether 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. Schwartzman J stated (at para 15): ‘To deprive them entirely and in perpetuity of this prospect could also result in their being “treated and punished in a cruel or degrading manner” (s 12(1)(e) of the Constitution) or their being detained in conditions that are inconsistent with human dignity (s 35(2) of the Constitution)’).

<sup>4</sup> FC s 36.

the circumstances of the case or on whether more specific rights of individual prisoners are relevant as well.<sup>1</sup>

Prior to the coming into effect of the interim and then final constitutions, South Africa, like most rights-based legal systems recognised 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. In the 1979 case of *Goldberg and Others v Minister of Prisons and Others*, Corbett JA, in a dissenting judgment, described what is now referred to as the ‘residuum principle’:

‘It seems to me that fundamentally a... prisoner retains all the basic rights and liberties ... of an ordinary citizen except those taken away from him by law ... or those necessarily inconsistent with the circumstances in which he, as a prisoner, is placed... [T]here is a substantial residuum of basic rights which he cannot be denied; and if he is denied them, then he is entitled, in my view, to legal redress.’<sup>2</sup>

Corbett JA, in articulating this principle, recalled and relied to a large extent on the 1912 case, *Whittaker v Roos and Bateman, Morant v Roos and Bateman*.<sup>3</sup> In that matter, 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 the circumstances in which they had been placed’.<sup>4</sup> Corbett JA’s incorporation of the *Whittaker* decision was notable, for in the years since *Whittaker* a series of cases dealing with the rights of political detainees (and eventually sentenced political prisoners) had systematically eroded the *Whittaker* dictum.<sup>5</sup> In the well-known case of *Rossouw v Sachs*, for example, the Appellate Division questioned whether regulations made in terms of security detention legislation ‘conferred any legal rights upon prisoners,’<sup>6</sup> finding ultimately that prisoners were entitled only to ‘necessaries or basic rights’ and not to ‘comforts’.<sup>7</sup> The majority of the *Goldberg* Court applied the *Rossouw v Sachs* dictum, finding that sentenced prisoners were limited to a few basic rights.<sup>8</sup>

<sup>1</sup> See *C v Minister of Correctional Services* 1996 (4) SA 292 (T) (Prisoners’ rights to privacy and dignity infringed when tested to determine whether he was HIV positive without his fully-informed consent) and *Strydom v Minister of Correctional Services* (supra).

<sup>2</sup> 1979 (1) SA 14, 39D-E (A).

<sup>3</sup> 1912 AD 92.

<sup>4</sup> *Ibid* at 123.

<sup>5</sup> See *Rossouw v Sachs* 1964 (2) SA 551 (A); *Hassim & Venkatratnam v Officer Commanding, Prison Command, Robben Island* 1973 (4) SA 462 (C). See also 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.

<sup>6</sup> *Rossouw* (supra) at 562A. See also P De Vos ‘Prisoners’ Rights Litigation in South Africa Since 1994: A Critical Evaluation’ (2005) 16 *Law Democracy and Development* 89, 92.

<sup>7</sup> *Ibid* at 561F.

<sup>8</sup> *Goldberg* (supra) at 30H (The applicants, long term ‘political prisoners’, convicted under various Apartheid security laws, challenged their denial of access to newspapers and the restriction of visits and other forms of communication to ‘domestic matters.’ The majority of the Court found that such conditions of detention did not amount to an infringement of the Correctional Services Act 8 of 1959, which permitted that the Commissioner of Prisons make determinations in respect of the privileges and amenities individual prisoners or categories of prisoners were entitled.)

In *Minister of Justice v Hofmeyr*,<sup>1</sup> however, the Appellate Division recognised that all the fundamental rights of prisoners survived incarceration and effectively reinstated the 1912 *Whittaker* dictum on which Corbett JA had relied in dissenting in *Goldberg*. The applicant sued the Minister of Justice for damages suffered as a result of the manner in which he had been treated in prison, which, he argued, had amounted to effective solitary confinement.<sup>2</sup> The Appellate Division found the fact that the applicant had been segregated from the general prison population, had not been permitted to exercise and was prohibited from accessing books and radio broadcasts, amounted to ‘an infraction of his basic rights...and an aggression upon his absolute right to bodily integrity and right to mental and intellectual well-being.’<sup>3</sup> Hoexter J stated:

‘In most people the gregarious instinct is strongly implanted; and to deprive the average person of contact with his fellows is to cause him to suffer anguish of mind. It cannot be gainsaid that any enforced and prolonged isolation of the individual is punishment. It is a form of torment without physical violence.’<sup>4</sup>

The *Hofmeyr* judgment has continued to form the basis of South African jurisprudence on prisoners’ rights, which, since the advent of the new constitutional order, has been given fresh impetus by a number of our constitutional values such as dignity, equality and humanity.<sup>5</sup>

There have been relatively few South African cases on prisoner’s rights and conditions of detention.<sup>6</sup> The most recent one, however, was a direct and broad challenge to the conditions of detention at the Pollsmoor Remand Detention Facility (Pollsmoor RDF) in terms of ss 35(2)(e) and 12(1)(e) of the FC. In *Sonke Gender Justice v The Government of the Republic of South Africa and Another*<sup>7</sup> (Sonke), the court considered evidence of breaches constitutional and statutory standards regulating accommodation, health, sanitation, access to amenities as well as the persistent and large-scale overcrowding. Declaring the Respondents failure to adhere to statutory standards to be inconsistent with the FC, the court went on to hand down supervisory directions, which included the compilation of a

<sup>1</sup> 1993 (3) SA 131 (A) (*Hofmeyr*).

<sup>2</sup> The applicant was neither awaiting trial nor a convicted prisoner. He had been detained in terms of Emergency Regulations made in terms of the Public Safety Act 3 of 1953 which provided for detention ‘where it was considered necessary for the safety of the public, or for the safety of the detainee, or for the termination of the state of emergency.’

<sup>3</sup> *Hofmeyr* (supra) at 146.

<sup>4</sup> *Ibid* at 145.

<sup>5</sup> See *S v Makwanyane* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC), 1995 (2) SACR 1 (CC), [1995] ZACC 3 at para 142 (Chaskalson P affirmed the application of the residuum principle in the constitutional context: ‘Dignity is inevitably impaired by imprisonment or any other punishment, and the undoubted power of the state to impose punishment as part of the criminal justice system, necessarily involves the power to encroach upon a prisoner’s dignity. But a prisoner does not lose all his or her rights on entering prison.’)

<sup>6</sup> See generally, P De Vos ‘Prisoners’ Rights Litigation in South Africa Since 1994: A Critical Evaluation’ (2005) 16 *LDD* 89 and R Jansen & ET Achiume ‘Prison Conditions in South Africa and the Role of Public Interest Litigation since 1994’ (2011) 27 *SAJHR* 183.

<sup>7</sup> unreported case of the High Court, Western Cape Division, Case No: 24087/15 (23 February 2017), available at <http://www.genderjustice.org.za/publication/reasons-delivered-matter-sonke-gender-justice-pollsmoor-remand-detention-facility/>.

comprehensive plan addressing the breaches identified and reducing dramatically the level of overcrowding within six months.

Guidance generally may also be gleaned from other jurisdictions as well as that of various international adjudicatory bodies. Thus, 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 whether the sentence amounts to torture or a form of cruel, inhuman or degrading treatment or punishment.<sup>1</sup>

(i) *Comparative prison law*

We begin the discussion with foreign case law on prisoners' general right to dignity. In *Conjwayo v Minister of Justice, Legal and Parliamentary Affairs and Others*<sup>2</sup> 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 of the Zimbabwean Constitution that outlawed torture and inhuman or degrading treatment or punishment.<sup>3</sup> 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:

[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.<sup>4</sup>

Further away, but more recently, in *Brown v Plata*<sup>5</sup> the United States Supreme Court, in a 5-4 opinion, ruled that California's prisons were so overcrowded that they violated the US Constitution's ban on cruel and unusual punishment. The majority decision describes a prison system failing to deliver minimal care to prisoners with serious health needs, and producing 'needless suffering and death.'<sup>6</sup> Justice Kennedy states:

'Overcrowding has overtaken the limited resources of prison staff; imposed demands well beyond the capacity of medical and mental health facilities; and created unsanitary and unsafe conditions that make progress in the provision of care difficult or impossible to achieve. The overcrowding is the primary cause of the violation of [the ban against cruel and unusual punishment].'<sup>7</sup>

The remedy, in brief, was an order directing that approximately 36 000 prisoners be released or relocated within a two-year period or, put differently, a reduction in prison occupation from 200 per cent to 137.5 per cent.

<sup>1</sup> See FC s 12(1)(e) as discussed by M Bishop & S Woolman 'Freedom and Security of the Person' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 40.

<sup>2</sup> See *Conjwayo v Minister of Justice, Legal & Parliamentary Affairs and Others* 1992 (2) SA 56 (ZS).

<sup>3</sup> *Ibid* at 63D-E.

<sup>4</sup> *Ibid* at 60I.

<sup>5</sup> 563 US (2011).

<sup>6</sup> *Ibid* at 3.

<sup>7</sup> *Ibid* at 3-4.

In 2009, in *Masangano v Attorney General*<sup>1</sup> the High Court of Malawi found that overcrowding, which, according to official figures, was at approximately 200 per cent, coupled with poor ventilation, had contributed to the deaths of 259 prisoners in a space of about 18 months. The court held, consequently, that the severely overcrowded conditions of detention in certain Malawian prisons amounted to a violation of the right to be free from inhuman and degrading treatment. The court directed the State to reduce overcrowding by half within 18 months of the judgment and, with time, to eliminate overcrowding altogether.<sup>2</sup>

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.<sup>3</sup> Although the international instruments concerning conditions of detention, torture and ill-treatment do not lay down precise, binding rules in this regard, the jurisprudence that has emerged from the various international adjudicatory bodies has delivered far more exacting requirements regarding dignified treatment and what constitutes torture and ill-treatment and given extra weight and depth to international standards.<sup>4</sup>

In this regard the European Court of Human Rights (ECtHR) has been particularly active in combining the general wording of the European Convention on Human Rights with more detailed provisions of instruments such as the European Prison Rules that have a lesser status than Convention but contain more detailed provisions about what is required in prisons.<sup>5</sup> The ECtHR has held that conditions of imprisonment may amount to degrading treatment,<sup>6</sup> even where the authorities do not intend to degrade the prisoner.<sup>7</sup> Prison overcrowding may be degrading to prisoners in this sense.<sup>8</sup> In *Kalashnikov v Russia* the ECtHR considered the impact of prison overcrowding. At any given time, the ECtHR observed, 'there was 0.9-1.9 square metres of space per inmate in the applicant's cell.'<sup>9</sup> Compared to the approximate guideline of 6 square metres per prisoner, a standard set by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment, the ECtHR held that the severely overcrowded and unsanitary environment and the detrimental effect this had been shown to have had on the applicant's health and well-being amounted to

<sup>1</sup> *Masangano v Attorney General and Others* [2009] MWHC 31.

<sup>2</sup> A recent report indicates, however, that overcrowding in Malawian prisons remains a serious problem. See L Muntingh & J Redpath 'Pre-trial Detention in Malawi: Understanding Case Flow Management and Conditions of Incarceration' (2011) *OSIS/AP*.

<sup>3</sup> See N Rodley *The Treatment of Prisoners Under International Law* (2009); S Livingstone, T Owen & A MacDonald *Prison Law* (2008). 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).

<sup>4</sup> (Cross reference to cases discussed below).

<sup>5</sup> See D van Zyl Smit & S Snacken *Principles of European Prison Law and Policy: Punishment and Human Rights* (2009).

<sup>6</sup> European Convention on Human Rights art 3 provides: 'No one shall be subjected to torture or to inhuman treatment or punishment.'

<sup>7</sup> See *Peers v Greece* (2001) 33 EHRR 51; *Kalashnikov v Russia* (2003) 36 EHRR 34; and *Poltoratskiy v Ukraine* [2003] ECHR 216.

<sup>8</sup> See *Kalashnikov* (supra).

<sup>9</sup> *Ibid* at para 7.

a violation of the right not to be subjected to torture or to inhuman or degrading treatment or punishment.<sup>1</sup> The court also noted that poor sleeping conditions as well as the ‘general commotion and noise from the large number of inmates,’<sup>2</sup> all of which were caused by acute overcrowding, constituted a heavy physical and psychological burden on the applicant.<sup>3</sup>

Of more direct relevance to South Africa is the International Covenant on Civil and Political Rights which has been ratified by South Africa. The UN Human Rights Committee (HRC) has interpreted the Covenant to give content to the abstract prohibitions on torture and cruel, inhuman and degrading treatment, and has applied the Covenant to prisons. A recent matter before the HRC involved South Africa.<sup>4</sup> The complainant, McCallum, complained that he and other prisoners had been beaten severely and tortured by prison officials, had been subsequently denied medical treatment and were being accommodated in extremely overcrowded conditions.<sup>5</sup> The HRC found that the complainant had suffered treatment in violation of his right not to be tortured as well as his right to be detained in conditions respectful of his dignity, in violation of articles 7 and 10 of the Covenant.<sup>6</sup>

(ii) *Specific dignity based rights of South African Prisoners*

Of the range of dignity based rights enumerated in s 35(2)(e) and (f), ‘adequate accommodation’ and ‘medical treatment’ are perhaps the most important, but also the two provisions most open to interpretation. These and several other discrete rights are discussed below.

(aa) Adequate accommodation

The 1998 Correctional Services Act gives content to the constitutional right to adequate accommodation by stating specifically that a prisoner is entitled to an amount of space (cubic capacity) sufficient ‘to enable the prisoner to move

<sup>1</sup> Ibid at para 92.

<sup>2</sup> Ibid at para 8.

<sup>3</sup> Similarly, the UN Human Rights Committee has found that overcrowding constitutes a violation of art 10(1) of the International Covenant on Civil and Political Rights, which requires that ‘all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.’ See *Girjadat Sienpersaud v Trinidad & Tobago* HRC Communication No. 938/2000 (2004) at para 6.3.

<sup>4</sup> *McCallum v South Africa* HRC Communication No. 1818/2008 (2010).

<sup>5</sup> Ibid at paras 3.1-3.7.

<sup>6</sup> ICCPR art 7 states: ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.’ Article 10(1) states: ‘All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.’

freely and sleep comfortably within the confines of the cell.<sup>1</sup> Importantly, the Department of Correctional Services' own standing orders stipulate that the minimum permissible cell area per prisoner, excluding areas taken up by ablution facilities, walls and pillars and personal lockers must be 3.344m<sup>2</sup> in respect of ordinary communal cells. This regulation is just below the Committee for the Prevention of Torture's recommended minimum of 4m<sup>2</sup> per prisoner in a communal cell.<sup>2</sup> Where the actual accommodation radically exceeds a prison's capacity,<sup>3</sup> certainly, there is a case to be made that the extent of overcrowding is unconstitutional.<sup>4</sup> The impact of any successful constitutional challenge to the conditions of detention in South Africa, however, will necessarily turn on the likely effectiveness of the available remedies. Given the courts' understandable reluctance to quantify constitutional minimum standards,<sup>5</sup> the most likely and effective remedy would be a declaration, in broad terms, that the current state of prison overcrowding is a violation of constitutional standards for the treatment of prisoners and violates rights to health and not to be treated or punished in a cruel,

<sup>1</sup> CSA s 7(3). The regulations also require the following:

- i. cell accommodation must have sufficient floor and cubic space to enable the prisoner to move freely and sleep comfortably within the confines of the cell;
- ii. all accommodation must be ventilated according to regulation;
- iii. cells must be sufficiently lighted by natural and artificial light so as to enable the prisoner to read and write.

These provisions echo Rule 10 of the UN Standard Minimum Rules for the Treatment of Prisoners, which reads: '[a]ll accommodation provided for the use of prisoners and in particular all sleeping accommodation shall meet all requirements of health, due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation.'

<sup>2</sup> The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) is the torture prevention committee of the Council of Europe. The CPT was founded on the basis of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987), which came into force in February 1989. It allows the CPT to visit all 'places of detention' of the member states of the Council of Europe. The CPT has stated that 10m<sup>2</sup> of floor space per prisoner as a desirable standard. It has also stated (in the country reports cited below) that anything below 4m<sup>2</sup> per prisoner in a communal cell and 6m<sup>2</sup> for a single cell is 'not a satisfactory amount of living space'. See *Report to the Polish Government on the visit to Poland carried out by CPT from 30 June to 12 July 1996*, Council of Europe, CPT/Inf (1998) 13; *Report to the Albanian government on the visit to Albania carried out by the CPT from 9 to 19 December 1997*, Council of Europe, CPT/Inf (2003) 6.

<sup>3</sup> This is ample evidence that this indeed occurs. See generally C Ballard 'Prisons, the Law and Overcrowding' (2014) 4 *New South Africa Review*.

<sup>4</sup> See *Sonke Gender Justice* (supra).

<sup>5</sup> See, for example, *Maqibuko & Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC), 2010 (3) BCLR 239 (CC), [2009] ZACC 28. There is, however, international precedent for this approach. See J Steinberg 'Prison Overcrowding and the Constitutional Right to Adequate Accommodation in South Africa' (2005) *CSVR*:

'The Council of Europe's CPT has established four square metres per prisoner as a minimum in a communal cell, six square metres in single cells. In the United States, both the American Correctional Association and the American Public Health Association have set standards requiring a minimum of 60 square feet (18.18 square metres) for prisoners. These latter standards have found their way into United States federal regulations; the Bureau of Prisons has used them to establish the rated capacity of its prisons. (In the United States, rated capacity reflects the number of inmates that can be housed safely in a facility.) Courts have used these standards to establish judicially enforceable minima. In the state of Florida, for instance, it is illegal for a prison to exceed its rated capacity. A similar situation prevails in Norway and Holland. In these jurisdictions, the size of the prison population is directly determined by available space.'

inhuman or degrading way. If this were to happen, the internationally developed remedies for overcrowding, discussed above, should guide South African courts in crafting appropriate remedies of their own.<sup>1</sup>

The issue of accommodation was raised indirectly in the matter of *Dudley Lee v Minister of Correctional Services*.<sup>2</sup> Mr Lee was detained for four and a half years while on trial, during which time he contracted tuberculosis (TB). The Court found that the Department of Correctional Services, given their apparent awareness of the overcrowding and poor ventilation in Pollsmoor prison, had failed to take measures to prevent the spread of TB. The judgment relates the evidence of expert witnesses describing the conditions of detention:

‘the average overcrowding in 2003 was around 234% to 236%. Overcrowding meant that disease could be spread more easily and, as far as TB was concerned, the more people were packed into a cell, the greater the prospects that bacteria which were coughed up would infect other inmates. [The medical expert] regularly saw overcrowded cells in the maximum security prison and testified that his first impression was one of dinginess and squalor, because blankets are often used to protect or cover up places within a cell. He described the situation as dehumanising.’<sup>3</sup>

(bb) Medical treatment

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. Prison authorities must thus provide directly for them. The case of *Van Biljon and Others v Minister of Correctional Services*<sup>4</sup> illustrates this point well. In that matter the central issue was whether the applicants (and other HIV-infected prisoners) who had reached the ‘symptomatic stage’ of HIV/AIDS were entitled to anti-retroviral treatment in prison at state expense. Brand J rejected the idea that prisoners were not entitled to better medical treatment than ordinary citizens under s 35(2)(e) of the FC. On the contrary, the court pointed out that s 35(2)(e) provides greater protection to detainees than the FC did to the general population. Moreover, the fact that prisoners were kept in conditions that rendered them more susceptible to infection meant that the state must provide them with treatment ‘better able to improve their immune systems than that which the state provided for HIV patients outside.’<sup>5</sup> The court therefore ordered the state to provide the applicants with the necessary anti-retrovirals.<sup>6</sup>

<sup>1</sup> *Sonke Gender Justice* (supra) (In directing the Respondents to reduce the level of overcrowding to 150% within six months, did not provide any guidance as to how that should be achieved. It did, however, include in its order a direction that the Respondents provide a ‘status report’ to the Court after approximately four months.)

<sup>2</sup> 2011 (6) SA 564 (WCC). The High Court decision was ultimately upheld by the Constitutional Court in *Lee v Minister of Correctional Services* 2013 (2) SA 144 (CC), 2013 (1) SACR 213 (CC), 2013 (2) BCLR 129 (CC), [2012] ZACC 30.

<sup>3</sup> *Dudley Lee* (supra) at para 78.

<sup>4</sup> 1997 (4) SA 441 (C).

<sup>5</sup> *Ibid* at para 3.

<sup>6</sup> See also *B and Others v Minister of Correctional Services and Others* 1997 (6) BCLR 789 (C).

Courts have also made it clear that where a national policy on HIV treatment fails to accommodate the urgent needs of HIV positive prisoners, such policy cannot be relied upon. In *EN and Others v Government of South Africa*,<sup>1</sup> Pillay J ordered the government to attend to the specific needs of certain HIV positive prisoners by providing them with anti-retroviral treatment immediately. The Court noted that the government's national plan to realise progressively the needs of the 'less fortunate' HIV positive in the country was simply insufficient when it came to the needs of certain prisoners.<sup>2</sup>

(cc) Access to amenities

In *Minister of Correctional Services v Kwakwa*, the Supreme Court of Appeal drew on s 35(2)(e) of the FC and the residuum principle in determining whether a particular privilege system was lawful.<sup>3</sup> The applicants in this matter were unsentenced prisoners, who, until the determination of a new privilege system by the Commissioner, had enjoyed certain amenities and facilities, such as the use of radio equipment, contact visits, access to library facilities and the use of musical instruments. The SCA found that the Commissioner had fashioned a privilege system 'inconsistent with the core values of the Constitution' and, accordingly, the statutory regime from which he derived his powers.<sup>4</sup> Navsa JA, in setting aside the privilege system applicable to unsentenced prisoners, stated:

Prison authorities, if they intend to fashion a new privilege system for unsentenced prisoners, must take into account the residuum principle, act within the confines of their statutory powers and, most importantly, must respect the Constitution.<sup>5</sup>

The High Court has also found that access to electricity is a right where prisoners are been permitted to own and use equipment that requires it:

To deprive them entirely and in perpetuity of this prospect could also result in their being "treated and punished in a cruel or degrading manner" or their being detained in conditions that are inconsistent with human dignity.<sup>6</sup>

(dd) Education

The High Court considered a prisoner's right to education in *Thukwane v Minister of Correctional Service and Others*.<sup>7</sup> The Department of Correctional Services had prohibited the applicant from accessing the Internet and from using study facilities

<sup>1</sup> 2007 (1) BCLR 84 (D).

<sup>2</sup> Ibid at paras 29-31. Albertus makes a convincing argument in favour of the right to palliative care. C Albertus 'Palliative Care for Terminally Ill Inmates: Does the State have a Legal Obligation?' (2012) 25 *SACJ* 67.

<sup>3</sup> 2002 (4) SA 455 (SCA), [2002] 3 All SA 242 (A), [2002] ZASCA 17. The residuum principle is now captured in CSA s 4(b) which states: 'the duties and restrictions imposed on inmates to ensure safe custody by maintaining security and good order must be applied in a manner that conforms with their purpose and which does not affect the inmate to a greater degree or for a longer period than necessary.'

<sup>4</sup> Ibid at para 34.

<sup>5</sup> Ibid at para 35.

<sup>6</sup> *Strydom v Minister of Correctional Services* 1999 (3) BCLR 342 (W) at para 15. See also *Ebrlich v Minister of Correctional Services and Others* [2016] ZAECGHC 100.

<sup>7</sup> 2003 (1) SA 51 (T).

outside the prison for the purposes of furthering his education. The court was satisfied with the limitation on the applicant's right to education, finding that the prison's need to promote security provided sufficient justification for it. While we find the reasoning persuasive in relation to the prisoner's attendance of classes outside the prison, the prohibition on the use of the Internet seems unnecessary for security purposes. Monitoring the prisoner's use of and time spent on the Internet would be a less restrictive and more constitutionally acceptable measure of ensuring security.

(ee) Privacy

The High Court has considered the right to privacy of awaiting trial prisoners in *Pretorius and Others v Minister of Correctional Services*.<sup>1</sup> The applicants complained of the noise generated by centrally-controlled speakers in their cells broadcasting a radio channel at a 'considerable' decibel level for more than twelve hours per day. The court made it clear that as awaiting trial prisoners, the applicants were entitled to the full measure of their constitutional rights which are not lawfully restricted as a result of their incarceration.<sup>2</sup> This, the court reasoned, meant that the applicants were entitled to as much of their right to privacy as possible in the circumstances. The right to privacy, the court found, includes the right of choice of radio and television channels as well as the right not to have one's personal space invaded by a broadcast to which he or she has not consented.<sup>3</sup> In our view the right to privacy of sentenced prisoners should be recognised too. Although such a right may be restricted by security and other legitimate concerns of the prison authorities, it should be made clear that prisoners retain a core right to privacy.<sup>4</sup>

(ff) The right to vote

One particularly controversial question that has come before the Constitutional Court is the right of prisoners to vote. In *Minister of Home Affairs v NICRO*<sup>5</sup> the provisions of the Electoral Act were challenged on the basis that they excluded from voting prisoners who were serving terms of imprisonment without the option of a fine.<sup>6</sup> The Court dismissed the State's argument that prohibiting certain categories of prisoners from voting was necessary for both logistical reasons and

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<sup>1</sup> *Pretorius and Others v Minister of Correctional Services and Others* [2004] JOL 12496 (T).

<sup>2</sup> *Ibid* at para 38.

<sup>3</sup> *Ibid*.

<sup>4</sup> *Regina (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 (The rejection of even a residual right to privacy by a bare majority of the US Supreme Court in *Hudson v Palmer* 486 US 517 (1984) should not be followed in South Africa, where it is clear both from the common law and the Constitution that prisoners retain a residuum of all their rights.)

<sup>5</sup> 2004 (5) BCLR 445 (CC).

<sup>6</sup> The Court had previously recognised the fundamental constitutional importance of the right to vote in *August and Another v Electoral Commission and Others* 1999 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC), [1999] ZACC 3 (The Court declared unconstitutional administrative action that would have deprived prisoners of the right to vote. However, the Court carefully left open the question of whether legislation disqualifying prisoners or categories of prisoners from voting could be justified in terms of the limitations clause.)

in order to be seen as being ‘tough on crime,’ finding that the right to vote, ‘which must be vigilantly respected and protected,’ had been unjustifiably infringed.<sup>1</sup>

(gg) A right to rehabilitation?

One of the central tenets of the 1998 Correctional Services Act is the acknowledgment that the penal system should ensure the safety and protection of inmates. In addition, it must promote the ‘social responsibility and human development’ of all sentenced inmates.<sup>2</sup> The 1998 Act thus represents a fundamental shift in focus from its predecessor, the Correctional Services Act of 1959, which spoke little of the rights of inmates and dealt primarily with the administration of the prison system. Shortly after the commencement of the 1998 Act, the White Paper on Corrections was released. The White Paper made it abundantly clear that one of the central purposes of the penal system was now the rehabilitation of prisoners.<sup>3</sup> In his foreword to the White Paper the then Minister of Correctional Services said:

‘The White Paper on Corrections in South Africa presents the final fundamental break with a past archaic penal system and ushers in a start to our second decade of freedom where prisons become correctional centres of rehabilitation and offenders are given new hope and encouragement to adopt a lifestyle that will result in a second chance towards becoming the ideal South African citizen.’

Although South African courts no doubt appreciate the value of rehabilitation and reintegration in sentencing,<sup>4</sup> little has been said on whether a prisoner is *entitled* to be detained in conditions which promote his or her reintegration into society. Section 41 of the 1998 Act makes it clear, however, that an offender is, at the very least, entitled to ‘as full a range of programmes and activities, including needs-based programmes, as is practicable to meet the educational and training needs of sentenced offenders.’

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.<sup>5</sup> In doing so, the German Court

<sup>1</sup> Ibid at para 47. The Court referred to the renowned Canadian case, *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 SCR 519.

<sup>2</sup> CSA s 2(c).

<sup>3</sup> L Muntingh ‘Offender Rehabilitation and Reintegration: Taking the White Paper on Corrections Forward’ (2005) Civil Society Prison Reform Initiative Research Paper No. 10.

<sup>4</sup> See in general *S v Nkosi* 2002 (1) SA 494 (W); *S v M* 2008 (3) SA 232 (CC), 2007 (12) BCLR 1312 (CC), [2007] ZACC 18; and *S v Malgas* 2001 (2) SA 1222 (SCA).

<sup>5</sup> 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.’ See also the United Nations Standard Minimum Rules for the Treatment of Prisoners, which states: ‘From the beginning of a prisoner’s sentence consideration shall be given to his future after release and he shall be encouraged and assisted to maintain or establish such relations with persons or agencies outside the institution as may promote the best interests of his family and his own social rehabilitation.’

explored the Kantian notion that people should be treated as ends in themselves (as opposed to simply a means to achieving certain ends):<sup>1</sup>

‘Respect for human dignity especially requires the prohibition of cruel, inhuman, and degrading punishments. [The state] cannot turn the offender into an object of crime prevention to the detriment of his constitutionally protected right to social worth and respect.’

As in Germany, ‘the idea that human dignity precludes treating individuals as mere objects or means to an end has found favour with the [South African] courts.’<sup>2</sup> Given the Constitutional Court’s acknowledgment of this particular aspect of dignity, as well as its emphasis on the value of ‘self-actualization’, it is at least plausible that a South African court could, at some future point, make a similar finding to that of the German Federal Constitutional Court.

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 be placed on sentenced prisoners. As such duties restrict rights of sentenced prisoners, it must meet the requirements of the limitations clause of the FC. An example of legislative provision for such duties is s 37 of the 1998 Correctional Services Act, which 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’. However, the Act strictly limits these duties by providing, for example, that prisoners who are ill cannot be compelled to work and that the work may not be a form of punishment or disciplinary measure.<sup>3</sup> 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.<sup>4</sup>

## **(b) Legality**

### *(i) During imprisonment*

An important component of the principle of legality<sup>5</sup> 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 FC and the legislation regulating prisons in South Africa must therefore be scrutinized to see whether they provide the necessary authority for the restriction

<sup>1</sup> 45 BVerfGE 187, 228.

<sup>2</sup> H Botha ‘Human Dignity in Comparative Perspective’ (2009) *Stell LR* 171, 202. See in particular *Makwanyane* (supra) at para 313. *S v Dodo* 2001 (3) SA 382 (CC), 2001 (5) BCLR 423 (CC), [2001] ZACC 16 at para 38.

<sup>3</sup> 1998 Act ss 40(1)(a) and (5).

<sup>4</sup> 1998 Act s 40(4).

<sup>5</sup> See *Pharmaceutical Manufacturers’ Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC), [2000] ZACC 1.

of prisoners' rights.<sup>1</sup> In addition, the restrictions must be formulated sufficiently narrowly to ensure that prisoners are not subject to overbroad discretionary powers.<sup>2</sup>

A further requirement is that in all dealings with prisoners the requirements of administrative justice must be met.<sup>3</sup> The courts have held that these requirements encompass the legitimate expectations that prisoners may form as a result of the manner in which the prison authorities manage the privileges that they grant. In *Strydom v Minister of Corrections and Others*,<sup>4</sup> the court quoted Lord Fraser in the English decision *Council of Civil Servants Union and Others v The Minister for the Civil Services*:<sup>5</sup>

But even where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and if so, the Courts will protect the expectation by judicial review as a matter of public law . . . Legitimate or reasonable expectation may arise either from an express promise given on behalf of public authority or from *the existence of a regular practice which the claimant can reasonably expect to continue*.<sup>6</sup>

In *Nortjé en 'n Ander v Minister van Korrektiewe Dienste*<sup>7</sup> the SCA made it clear that legitimate expectations should also embrace the requirement of procedurally fair hearings when decisions are taken entailing a substantial limitation of privileges, such as, in this matter, the decision to transfer a prisoner from a medium security section of a prison to maximum security area. In *Zealand v Minister of Justice and Constitutional Development*<sup>8</sup> the Constitutional Court considered the lawfulness of detaining a person as a sentenced prisoner (and thus in a facility for sentenced prisoners only) in circumstances where the only basis for such detention was his

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<sup>1</sup> See *Minister of Correctional Services and Others v Kvakwa and Another* 2002 (4) SA 455, 473 (SCA), [2002] 3 All SA 242 (A), [2002] ZASCA 17 (The court emphasised that the Commissioner had to meet the requirements of legality in determining a system of privileges. The facts of the case are discussed in more detail above.)

<sup>2</sup> See the seminal decision of the German Federal Constitutional Court 33 *BVerfGE* 1 (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.)

<sup>3</sup> FC s 33. See *Ehrlich v Minister of Correctional Services and Another* 2009 (2) SA 373 (E) (The case arose out of the Head of Prison's refusal to allow the applicant, and other medium category offenders at Mdanstane Prison, access to the prison gymnasium located at the maximum-security section of the prison on the grounds that it was necessary to segregate the different categories of prisoners. Plasket J found that the Head of Prison's decision had been unreasonable and based on an error of law, for the 1998 Act requires strict separation in respect of sleeping accommodation only and specifically provides for the mixing of categories for the purpose of providing development services. The Court held, accordingly, that the applicant's right to just administrative action had been infringed and set aside the Head of Prison's decision.)

<sup>4</sup> *Strydom v Minister of Correctional Services* 1999 (3) BCLR 342 (W).

<sup>5</sup> *Council of Civil Servants Union and Others v The Minister for the Civil Services* (1984) 3 All ER 935 (HL).

<sup>6</sup> *Ibid* at 943j-944a.

<sup>7</sup> 2001 (3) SA 472 (SCA).

<sup>8</sup> 2008 (4) SA 458 (CC), 2008 (6) BCLR 601 (CC), 2008 (2) SACR 1 (CC), [2008] ZACC 3.

or her continued remand prior to trial for separate charges.<sup>1</sup> The Court noted the ‘great significance’ of the distinction between the awaiting trial and sentenced prison sections:

‘[They] reflect the fundamental difference in status between, on the one hand, persons who are merely awaiting the completion of their trials, and on the other hand, persons who have been convicted of a crime and consequently sentenced to punishment by a court of law. Crucially, the former bear the right to be presumed innocent; the latter do not. Respect for fundamental human dignity, which is entrenched in our FC, demands that this fundamental difference in status be always recognised, and that it be reflected in prisons wherever possible.’<sup>2</sup>

The Court found, therefore, that the right not to be detained arbitrarily and without just cause, which ‘requires not only that every encroachment on physical freedom be carried out in a procedurally fair manner, but also that it be substantively justified by acceptable reasons,’ had been unjustifiably infringed.<sup>3</sup>

(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 in respect of the final unconditional release of prisoners. Much more problematic are the decisions relating to conditional release on parole and the re-imprisonment of offenders under correctional supervision, for these decisions clearly affect the liberty of offenders. Prisoners have a very strong interest in liberty and, in certain circumstances, legitimate expectations in respect of their release.<sup>4</sup> This notion is reinforced in contemporary South Africa where the right to just administrative action is explicitly protected by the FC and statutory law.<sup>5</sup>

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<sup>1</sup> The applicant had been convicted and sentenced on charges, which were later overturned on appeal. The appeal was handed down whilst he was serving his sentence as well as on trial for separate charges. The registrar of the appeal court failed, negligently, however, to notify the prison of the applicant’s successful appeal and the applicant was eventually released more than five years after the date of the appeal.

<sup>2</sup> *Zealand* (supra) at para 30 (The court also emphasized the fact that separation between the two categories of prisoners is recognized in the International Covenant on Civil and Political Rights, which provides: ‘Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status.’ It also noted that the relevant legislation (the 1959 CSA, which was applicable to the facts of the case, and the 1998 CSA, which had since come into force) stipulated that certain restrictions imposed on sentenced prisoners were not to be applied to awaiting trial detainees. Section 46 of the 1998 Act states that unsentenced prisoners can only be subjected to those restrictions ‘necessary for the maintenance of security and good order in the prison and must, where practicable, be allowed all the amenities to which they could have access outside the prison.’)

<sup>3</sup> *Zealand* (supra) at para 43.

<sup>4</sup> D van Zyl Smit *South African Prison Law and Practice* (1992) 359–69 (Whether prisoners have legitimate expectations to be granted parole is disputed.)

<sup>5</sup> FC s 33 and the Promotion of Administrative Justice Act 3 of 2000.

(aa) Conversion and re-imprisonment

The provisions regulating the conversion of a sentence of incarceration to correctional supervision apply to the reconsideration of any punishment, including, therefore also the re-imprisonment of an offender serving a sentence of community corrections or parole.<sup>1</sup> Although the court is the ultimate arbiter on the reconsideration of sentences, it is up to the Correctional Supervision and Parole Board (Parole Board) or National Commissioner to apply to the court for such matters to be heard.<sup>2</sup> The courts have held that these functionaries, in determining whether such applications should be made, are bound by the requirements of just administrative action. Van Deventer J stated the following in *Roman v Williams*:<sup>3</sup>

‘A decision... to re-imprison a probationer... is reviewable administrative action within the purview of the Constitution ... and such a decision must be justifiable, *in relation to the reasons given for it*... The constitutional test embodies the requirement of proportionality between the means and the end. The role of the courts in judicial reviews is no longer confined to the way in which an administrative decision was reached but extends to its substance and merits as well.’<sup>4</sup>

The 1959 Act contained far less elaborate procedures than the 1998 Act and vested a wide discretion in the Commissioner when it came to decisions to re-imprison an offender on parole or serving a sentence of correctional supervision.<sup>5</sup> This rendered the legislation constitutionally suspect, particularly in light of the judgment *De Lange v Commissioner of Correctional Services*,<sup>6</sup> where it was emphasised that a prisoner has no enforceable right to compel the prison authorities to approach the court in order to ask for a variation of the sanction.

(bb) Parole

In the 1979 US Supreme Court case *Greenholtz v Inmates of Nebraska Penal and Correctional Complex*,<sup>7</sup> the majority of the Court described parole as a system that

<sup>1</sup> CPA s 276A(3).

<sup>2</sup> CPA s 276A(3)(a).

<sup>3</sup> 1997 (9) BCLR 1267 (C) at 1279.

<sup>4</sup> See also *Ex parte Department of Correctional Services in re S v Katsi* 2002 (1) SACR 497 (T); *S v Elliot* 1996 (2) SACR 531 (E); and *Ex parte Department of Correctional Services: In Re S v Mtshabe* 2012 (1) SACR 526 (ECM).

<sup>5</sup> 1959 CSA s 84B stated:

If the Commissioner is satisfied that a probationer has failed to comply with any condition to which he is subject in relation to correctional supervision either by agreement or as may be determined by the court or the Commissioner, he may issue a warrant for the arrest of such a probationer, which may be executed by any peace officer as defined in the Criminal Procedure Act s 1, and which shall serve as authorisation for the detention of such a probationer in a prison until he -

(a) is lawfully discharged or released therefrom;

(b) is again placed under correctional supervision by the Commissioner in his discretion

<sup>6</sup> 2002 (3) SA 683 (SE), 2002 (2) SACR 185 (SE). See also See D van Zyl Smit ‘Degrees of Freedom’ (Summer 1994) 13 *Criminal Justice Ethics* 31–7; PC Vegter ‘Stellen de Grondrechten Eisen Aan De Vrijheidsbeperkende Straf’ in TH van Veen & G van Essen (eds) *Sanktietoepassing Een Nieuwe Ordening* (1991) 35.

<sup>7</sup> 442 US 1, 99 SCt 2100 (1979).

‘provides no more than a mere hope that the benefit will be obtained.’<sup>1</sup> Justice Marshall, in a dissenting opinion, held, however, that ‘all prisoners potentially eligible for parole have a liberty interest of which they may not be deprived without due process.’<sup>2</sup> Even though no prisoner has a right to be released on parole in the US, South African case law is perhaps better captured by the findings in the *Greenholtz* dissent.

Prior to the coming into effect of the 1998 Act and certain amendments to the CPA, South African courts were varied in their willingness to impose non-parole periods when imposing sentences.<sup>3</sup> Those less willing voiced the concern that a sentencing court should not encroach on the domain of the executive by making an order regarding the way in which the sentence should be executed. In *S v Mhlakaza*<sup>4</sup> the SCA stated:

‘The function of a sentencing court is to determine the maximum term of imprisonment a convicted person may serve. The court has no control over the minimum or actual period served or to be served.’

The Court acknowledged that the courts’ lack of control over actual time served ‘may be interpreted as an infringement of the independence of the judiciary,’<sup>5</sup> but insisted that because the sentencing jurisdiction of courts was derived from statute, courts were therefore ‘bound to limit themselves to performing their duties within the scope of that jurisdiction.’<sup>6</sup> The same court went further in *S v Botha*,<sup>7</sup> stating that even a recommendation concerning the non-parole period from a trial court, ‘should not be underestimated ... [for] in making the recommendation which it did, the trial Court may have imposed, by a different route, a punishment which in truth and in fact was more severe than originally intended’. Such practice, the SCA said, was ‘not only undesirable but also unfair to both an accused person as well as the correctional services authorities.’<sup>8</sup>

The coming into effect of s 276B of the Criminal Procedure Act<sup>9</sup> and the 1998 Correctional Services Act empowered the courts to play a much more active role in determining parole outcomes. Section 276B provides that if a court sentences a person to imprisonment for a period of two years or more, it may ‘fix a period during which the person shall not be placed on parole’ but that the non-parole period ‘may not exceed two thirds of the term of imprisonment imposed or 25

<sup>1</sup> Ibid at para 11.

<sup>2</sup> Ibid at para 23.

<sup>3</sup> See *S v Mokoena* 1997 (2) SACR 502 (O); *S v Maseko* 1998 (1) SACR 451 (T); *S v Sidyno* 2001 (2) SACR 613 (T). See also JD Mujuzi ‘Unpacking the Law and Practice Relating to Parole in South Africa’ (2011) 14 *Potchefstroom Electronic Law Journal* 205 at 215–219.

<sup>4</sup> 1997 (1) SACR 515 (SCA) at 521.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

<sup>7</sup> 2006 (2) SACR 110 (SCA).

<sup>8</sup> Ibid at para 25-6. See also *S v Makena* 2011 (2) SACR 294 (GNP).

<sup>9</sup> Section 276B was brought into force by the Parole and Correctional Supervision Amendment Act 87 of 1997 which entered into force on 1 October 2004.

years, whichever is the shorter.<sup>1</sup> The 1998 Act, in turn, requires that an offender be considered for parole after having served the ‘stipulated non-parole period’ and if no such period was stipulated, then ‘half the sentence.’<sup>2</sup>

*S v Williams, S v Papier*<sup>3</sup> was the first case to deal, albeit indirectly, with s 276B of the CPA. In this matter the High Court refused to confirm the non-parole periods of two accused ordered by the trial court on the grounds that s 276B could only be invoked in ‘exceptional circumstances.’ Despite the only jurisdictional requirement necessary for the provision’s application being that the court sentence an offender to a period of two years imprisonment or longer, the court did not set out the specific justification underlying its refusal to confirm the non-parole periods. A couple of years after the *Williams* decision, the SCA, per Maya JA, in *S v Pakane and Others*<sup>4</sup> (upholding a trial court’s non-parole order) stated the following:

‘It seems to me that the legislature enacted [s 276B] to address precisely the concerns raised in [*Botha and Mhlakaza*] by clothing sentencing courts with the power to control the minimum or actual period to be served by a convicted person.’<sup>5</sup>

Nevertheless, since the *Williams* matter, courts dealing with s 276B have affirmed the ‘exceptional circumstances’ notion.<sup>6</sup> The most recent authoritative decision on the issue was the SCA case, *S v Stander*,<sup>7</sup> where Snyders JA made it abundantly clear that the ‘context’ of the *Pakane* matter meant that it could not be considered precedent for s 276B orders. Maya JA, she reasoned, had not considered the ‘circumstances under which it would be appropriate to make a non-parole order.’<sup>8</sup> Rather, the *Pakane* court found compelling mitigating factors, weighed those against the aggravating factors and confirmed the imposition of the prescribed minimum sentence of 15 years ‘imprisonment.’<sup>9</sup> Furthermore, Maya JA, in order to ensure that the appellant would not be released on parole until he had served a period of ten years, imposed a non-parole order in terms of 276B. Snyders JA found that Maya JA could simply have refrained from such an order, for in terms of the 1998 Act (prior to the 2011 Amendment), those sentenced in terms of the minimum sentences legislation (as the appellant in this matter was) were required to serve four fifths of the sentence before being eligible for parole.<sup>10</sup> Having established that *Pakane* could not be considered a precedent, Snyders JA held that past decisions on ‘exceptional circumstances’ remained relevant, and that 276B orders should be made only ‘when there are facts before the sentencing

<sup>1</sup> Section 276B(1)(a). While these provisions of the CPA contemplate non-parole periods, Chapter VII of the 1998 CSA stipulates the portion of each category of sentence that must be served before being eligible for parole, and provides that a person sentenced to life imprisonment must be considered for parole after having served 25 years.

<sup>2</sup> CSA s 73(6)(a).

<sup>3</sup> 2006 (2) SACR 101 (C).

<sup>4</sup> 2008 (1) SACR 518 (SCA).

<sup>5</sup> *S v Pakane and Others* 2008 (1) SACR 518 (SCA) at para 47. See also Mujuzi (*supra*) at 219.

<sup>6</sup> See *S v Mshumpa and Another* 2008 (1) SACR 126 (E); *S v Pauls* 2011 (2) SACR 417 (ECG); *S v Pakane and Others* 2008 (1) SACR 518 (SCA).

<sup>7</sup> 2012 (1) SACR 537 (SCA).

<sup>8</sup> *Ibid* at para 17-9.

<sup>9</sup> *Ibid*.

<sup>10</sup> *Ibid* at para 19.

court that would continue, after sentence, to result in a negative outcome for any future decision about parole.<sup>1</sup>

In our opinion, Māya JA in her exposition of s 276B captured the intention of the legislature in a constitutionally appropriate way. Given the timing of its introduction, s 276B certainly did at least attempt to resolve the problems expressed in *Mblaza* and *Botha*. Moreover, there is nothing in the section itself that suggests it can be applied in exceptional circumstances only. This does not mean that it can be applied without good reason. Certainly, in the absence of reasons from the sentencing court, an offender would be able to seek review of the sentence on the ground that he or she had a legitimate expectation to be considered for parole after having served half the sentence (in terms of the 1998 Act). But the courts have made it clear that a non-parole period may only be ordered if the sentencing court has had the opportunity to receive submissions on the issue from the defence (as well as the state) and that circumstances justifying

such an order are set out ‘explicitly in the judgment.’<sup>2</sup> Snyders JA, like many of the pre-276B decisions, seems concerned that the imposition of a non-parole period is a separation of powers issue and argues that courts are not equipped to deal with the release of an offender. However, s 276B is not a unique provision in this regard. Sentencing courts are also empowered to make predictive pronouncements in certain other respects based only on the evidence before it,

such as when declaring an offender to be a dangerous or habitual criminal.<sup>3</sup> As was the case with such provisions, the legislature saw fit to grant the courts such powers and it is unfortunate that the *Stander* judgment saw fit to revert to the reasoning which, arguably, led to the enactment of s 276B in the first place.

Prior to the coming into effect of the 1998 Act, the 1959 Act gave the executive wide powers to release prisoners before they had completed their sentences. For offenders sentenced to life imprisonment, the 1959 Act did not prescribe a minimum period of imprisonment that had to be served before an offender could be considered for parole. Instead, minimum periods of imprisonment were governed by ministerial policy, and these periods varied at different times.<sup>4</sup> This rendered the problem of expectations particularly acute where a court had

<sup>1</sup> Ibid at para 16.

<sup>2</sup> *S v Pauls* 2011 (2) SACR 417 (ECG), 421-2.

<sup>3</sup> CPA ss 286A and 286B.

<sup>4</sup> Between 1987 and 1994, an offender who had served ten years of imprisonment could be considered for parole, but absent ‘exceptional circumstances,’ could only be released after having served 15 years imprisonment. In March 1994, the minimum period was increased to 20 years.

determined, formally or informally, that a person should be considered for release after a set period.<sup>1</sup>

For offenders serving determinate sentences, the 1959 Act set out explicitly the minimum number of years that an offender was required to serve before being considered for parole. Section 65(4)(a), for example, required that a prisoner serving a determinate sentence, should not be considered for placement on parole ‘until he had served half of his term of imprisonment’, but that such a date could be brought forward by the number of credits earned by the prisoner. South African courts were divided on the question of whether the Commissioner of Correctional Services should be allowed to issue general directives requiring parole boards to consider offenders who have committed certain offences only after they have served two-thirds, three-quarters or even four-fifths of their sentences.<sup>2</sup> No such authority existed in the 1959 Act for the Commissioner to issue such directives to parole boards. Furthermore, systematic offence-based intervention by the Commissioner could never have been related to any of the purposes of parole. It amounted to a *de facto* resentencing by the Commissioner, thus disturbing the relative, ordinal proportionality of the sentences imposed by the courts.<sup>3</sup> Such additional penalisation infringed the right to procedurally fair and reasonable administrative action. It also undermined the prisoners’ legitimate expectations, created by the 1959 Act, that they would be considered for release after they had served half their sentences, reduced further by the number of the credits they had been awarded.<sup>4</sup>

The provisions of the 1998 Act are much more specific in relation to both indeterminate and determinate sentences than the 1959 Act, and thus address, for the most part, the concerns raised in the preceding paragraphs.<sup>5</sup>

(cc) Transitional provisions

The so-called ‘transitional provisions’ of the 1998 Act were inserted into the legislation with the intention of bridging the gap between the parole regime of the 1959 Act and 1998 Act. There have been two important cases concerning their

<sup>1</sup> *Thynne, Wilson & Gunnell v United Kingdom* (1991) 13 EHRR 666 (The ECtHR held that detaining prisoners serving discretionary life sentences 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, which prohibits detention without trial. Were this section to have been interpreted in a similar way to art 5(4), the constitutionality of s 65(5) of the 1959 Act would have been open to serious question.) The issue was raised but not decided in the Namibian case *S v Tcoeb* 1996 (1) SACR 390 (NmS), 402e-h.

<sup>2</sup> Compare *Winckler & Others v Minister of Correctional Services and Others* 2001 (2) SA 747 (C), 2001 (2) All SA 12 (C) (which finds that the Commissioner indeed has such authority) with *Combrink and Another v Minister of Correctional Services and Another* 2001 (3) SA 338 (D), 2000 JDR 0607 (D), [2000] JOL 7349 (D).

<sup>3</sup> See *S v Leboloane* 2001 (2) SACR 297 (T).

<sup>4</sup> See *Combrink* (supra), contra *Winckler* (supra).

<sup>5</sup> See 1998 CSA s 73.

interpretation, which raise issues of considerable constitutional significance.

The applicant in *Van Vuren v The Minister of Correctional Services*<sup>1</sup> had been sentenced to death in 1992, a sentence which was commuted to life imprisonment in 2000. During and after 2004, the applicant tried on a number of occasions to be considered for parole, but was unsuccessful. He eventually approached the courts in an attempt to get an order forcing the authorities to consider his parole application and the applicable parole policies by which his parole consideration should be governed. Ultimately, the matter turned on the interpretation of s 136 of the 1998 Act, the so-called ‘transitional provisions’, and it was this issue that came before the Constitutional Court.<sup>2</sup>

Nkabinde J, for the majority of the Court, found that s 136(1) applies to those serving life sentences.<sup>3</sup> She reasoned that the wording of the section gave it a specific meaning. The two phrases in the subsection, ‘immediately before’ and ‘prior to’ refer to different issues and time categories. The former, an adverbial phrase of time, refers to the category of persons serving custodial sentences whereas the latter refers to the applicable policy and guidelines. ‘Prior to’, argued Nkabinde J, has a broader meaning than ‘immediately before.’ Accordingly, it

<sup>1</sup> 2012 (1) SACR 103 (CC), 2010 (12) BCLR 1233 (CC), [2010] ZACC 17.

<sup>2</sup> CSA s 136 states:

- (1) Any person serving a sentence of incarceration immediately before the commencement of Chapters IV, VI and VII is subject to the provisions of the Correctional Services Act, 1959 (Act 8 of 1959), relating to his or her placement under community corrections, and is to be considered for such release and placement by the Correctional Supervision and Parole Board in terms of the policy and guidelines applied by the former Parole Boards prior to the commencement of those Chapters.
- (2) When considering the release and placement of a sentenced offender who is serving a determinate sentence of incarceration as contemplated in subsection (1), such sentenced offender must be allocated the maximum number of credits in terms of section 22A of the Correctional Services Act, 1959 (Act 8 of 1959).
- (3) (a) Any sentenced offender serving a sentence of life incarceration immediately before the commencement of Chapters IV, VI and VII is entitled to be considered for day parole and parole after he or she has served 20 years of the sentence.  
(b) The case of a sentenced offender contemplated in paragraph (a) must be submitted to the National Council which must make a recommendation to the Minister regarding the placement of the sentenced offender under day parole or parole.  
(c) If the recommendation of the National Council is favourable, the Minister may order that the sentenced offender be placed under day parole or parole, as the case may be.
- (4) If a person is sentenced to life incarceration after the commencement of Chapters IV, VI and VII while serving a life sentence imposed prior to the commencement, the matter must be referred to the Minister who must, in consultation with the National Council, consider him or her for placement under day parole or parole.

<sup>3</sup> This finding was based largely on the High Court decision of *Derby Lewis v Minister of Correctional Services* 2009 (3) All SA 55 (GNP). Although the judgment concerned the role of victims in parole determinations, the applicant had also challenged the constitutionality of CSA s 136(1) to the extent that it was in conflict with the 1998 parole provisions, in particular, the fact that the parole decisions regarding prisoners sentenced to life imprisonment would be dealt with, ultimately, by the Minister, whereas in terms of the 1998 CSA (prior to amendment) parole was dealt with by the court. That, the applicant argued, amounted to discrimination between prisoners sentenced to life imprisonment before October 2004, and those sentenced after that date. It was clear, based on the judgment, that the applicant feared an adverse decision from the Minister and hoped for a more favourable conclusion from the court. These arguments, the court held, were not convincing and it found that the applicant, like all prisoners in his position, was indeed subject to s 136(1) of the 1998 CSA.

refers to the policy and guidelines applicable at any time before 1 October 2004.<sup>1</sup> ‘Immediately before,’ therefore, must mean directly before commencement. This interpretation was strengthened, she argued, by s 136(4), which refers to life sentences imposed ‘prior to the commencement’ which ‘clearly embraces life sentences imposed at any time before the commencement of the Chapters.’<sup>2</sup> Principles of interpretation require that ‘prior to’ in subsections (1) and (4) must be consistent in their meaning, which led Nkabinde J to the conclusion that ‘prior to’ in s 136 means at any time before. Nkabinde J describes the effect of the majority’s interpretation:

‘Section 73(6), which subjects all offenders sentenced to life incarceration to 25 years before parole, applies to all life sentences imposed after the commencement of the Act. For those sentenced to life incarceration during the period of 1 March 1994 or 3 April 1995, when the 20-year pre-parole minimum was introduced, to the commencement of the Act, section 136(3)(a) preserves an entitlement to be considered after 20 years. Section 136(1), by contrast, preserves the position of those sentenced to life incarceration even further back — before 1 March 1994 or 3 April 1995 — for example, Mr Van Vuren.’<sup>3</sup>

Nkabinde J’s approach is confusing. Firstly, her reading of s 136 requires that ‘any prisoner,’ in s 136(3)(a) must be read as ‘any prisoner sentenced after March 1994.’ And ‘any person serving a sentence of imprisonment’ must be read as ‘any person serving a sentence of imprisonment, excluding prisoners sentenced to life imprisonment after March 1994.’ Secondly, the majority, as Yacoob J stated in his dissenting judgment, is faced with the problem of re-organising the complex web of institutional bodies which were responsible for parole applications at different points in time, depending on which parole regime was applicable.<sup>4</sup> This is not simply an exercise in interpretation, but rather, to use a description coined by O’Regan J, ‘an exercise in [legislative] drafting.’<sup>5</sup> Brickhill and Bishop suggest that there was an ‘obvious alternative [to the majority’s approach]...find that s 136(3) applies to Mr Van Vuren, then declare it unconstitutional and remedy the invalidity...’<sup>6</sup> The invalidity in this case would be in relation to s 35(3)(n) of the FC, which states:

‘Every accused has the a right to a fair trial, which includes the right to the benefit of the least severe of the prescribed punishments for the offence if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing.’

The practical effect of the majority judgment in *Van Vuren* is that applicant did benefit from the shorter time period prior to parole consideration that prevailed when he committed his offence. Whether s 136(3) would be in breach of s 35(3)(n) of the FC in circumstances where it could potentially prolong the non-parole

<sup>1</sup> *Van Vuren* (supra) at para 57.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid* at para 59.

<sup>4</sup> *Ibid* at para 129-131.

<sup>5</sup> *Bertie Van Zyl (Pty) Ltd v Minister of Safety & Security and Others* 2010 (2) SA 181 (CC), 2009 (10) BCLR 978 (CC), [2009] ZACC 11.

<sup>6</sup> J Brickhill & M Bishop ‘Constitutional Law’ (2010) 3 *Juta Quarterly Review* §2.1.1.2.

period beyond that which prevailed when the offence was committed is, however, a complex question. Certainly, it could be argued that increasing the period before parole consideration amounted to a de facto extension of punishment.

Such a reading is reinforced by the legitimate expectation to consideration of release that had been created by earlier legislation and policies. However, weighing against this is the alternative position that generally offenders do not have a 'right' to be considered for parole and therefore the opportunity that may have given for such consideration in the past can be removed again in the future. In our opinion the former position is preferable as a right to be considered for parole, although of course not a right to be granted parole automatically, is a cornerstone of a penal system that recognises a constitutionally based right for prisoners to be given the opportunity to rehabilitate themselves.

Some support for a liberal recognition of lifers' expectations about parole can also be found in the conclusion reached by Hiemstra AJ in *Van Wyk v Minister of Correctional Services and Others* that s 136 of the Correctional Services Act does not abolish 'rights of lifers that they enjoyed at the time of committing their offences or at the time that they were sentenced'.<sup>1</sup> In *Van Wyk's* case the applicant had been sentenced to life imprisonment. At the time of sentencing (prior to 1 October 2004), the applicable policy required that an offender could only be considered for parole after having served 20 years. In addition, according to the 1959 Act, the so-called 'credit system' allowed for the allocation of credits to offenders in return for their observance of the prison rules, thereby potentially lessening the number of days and months 'earned by a prisoner as credits'.<sup>2</sup> The credit system was abolished by the 1998 Act. Section 136(2), did state, however, in relation to determinate sentences, that a prisoner be allocated the maximum number of credits in terms of the 1959 Act when being considered for release on parole. A Departmental policy was then issued, stating that the consideration date for parole could not be 'advanced by credits allocated' in relation to prisoners serving life sentences.<sup>3</sup> The 1959 Act had not differentiated between prisoners serving determinate sentences and those serving life sentences, however. This, argued the applicant, had the effect of retrospectively removing a right he had previously enjoyed under the 1959 Act. The High Court, correctly in our opinion, agreed with the applicant and declared the Departmental Order unconstitutional, the result of which is that prisoners sentenced to life imprisonment prior to 1 October 2004 are now entitled to the benefit of the credit system of the 1959 Act.

(dd) Pardons

The constitutional powers of the President to pardon or reprieve offenders exists outside of, and in addition to, the parole system.<sup>4</sup> Although this power is traditionally used sparingly, its constitutional status is such that its application will

<sup>1</sup> *Van Wyk v Minister of Correctional Services & Others* 2012 (1) SACR 167 (GNP) at para 27, but see per contra *Broodryk v Minister of Correctional Services* 2014 (1) SACR 471 (GJ).

<sup>2</sup> CSA s 22A.

<sup>3</sup> The Department of Correctional Services Order BVI(1A)(22).

<sup>4</sup> See FC s 84(1)(j), read with the CPA s 327 and CSA ss 66 and 70.

not easily be subject to judicial supervision.<sup>1</sup> However, in *Hugo v President of the Republic of South Africa and Another*<sup>2</sup> the court held that the President was bound to act in accordance with the FC when granting special remission of sentence. He could not discriminate unfairly. Such discrimination would contravene s 8(2) of the IC.<sup>3</sup> 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.<sup>4</sup>

Since *Hugo*, two Constitutional Court cases have expanded on the constitutional requirements of presidential pardons. In *Chonco v Minister of Justice and Constitutional Development*<sup>5</sup> 384 prisoners sought to compel the Minister of Justice to process their applications for presidential pardons. The applicants alleged that the Minister had no intention of dealing with their respective applications, for none of them had received a response on their respective applications. The Court dealt with a range of issues: including whether it was the President or Minister who was ultimately responsible for processing such applications (as the applicants had cited only the Minister as respondent), and what the responsible party's duties were towards the applicants. The Chief Justice found that s 84(2)(j) of the Constitution vested the power to pardon solely in the President. Although the President may incorporate the skills and opinions of other members of the Cabinet, that was not the same as the collective action envisaged in s 85 of the FC. Accordingly, the responsibility ultimately lay with the President and the applicant should therefore have sued the President and the applicant therefore had to fail. Moreover, Langa CJ emphasised that any future challenge to the President's actions in respect of s 84(2)(j) had to be taken directly to the Constitutional Court as it concerned a 'constitutional obligation of the President' in terms of s 167(4)(e) of the FC. The Chief Justice did, however, express his disappointment with the Minister's and President's conduct, describing the delays in the decision-making process as 'unacceptable'.<sup>6</sup>

*Albutt v Centre for the Study of Violence and Reconciliation*<sup>7</sup> concerned an appeal against a decision of the High Court, holding that the victims of certain crimes ostensibly committed with a political motive during the apartheid era had a right to be heard by the President when he considered whether or not to grant a special pardon to the perpetrators. The High Court had reached this conclusion on the grounds that the exercise of the President's power to pardon constituted administrative action and was thus subject to the procedural fairness guarantees

<sup>1</sup> *Gerhardt v State President* 1989 (2) SA 499 (T); *Kruger v The Minister of Correctional Services and Others* 1995 (2) SA 803 (T), 1995 (1) SACR 375 (T); *Kommissaris van Korrektiewe Dienste v Malaza* 1996 (1) SA 1143 (W).

<sup>2</sup> *Hugo v President of the Republic of South Africa and Another* 1996 (4) SA 1012 (D), 1996 (1) All SA 454 (D), 1996 BCLR 876 (D).

<sup>3</sup> Act 200 of 1993. FC s 9(3) contains the comparable provision.

<sup>4</sup> *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC), [1997] ZACC 4.

<sup>5</sup> *Chonco v Minister for Justice & Constitutional Development* 2010 (7) BCLR 629 (CC), [2010] ZACC 9.

<sup>6</sup> *Ibid* at para 45.

<sup>7</sup> 2010 (3) SA 293 (CC), 2010 (2) SACR 101 (CC), 2010 (5) BCLR 391 (CC), [2010] ZACC 4.

imposed by the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The President appealed this aspect of the decision, requesting a direction from the Constitutional Court that the exercise of the pardon power did not amount to administrative action but, rather, executive action. Alternatively, the President submitted that to the extent that PAJA included in the definition of administrative action the s 84(2)(j) pardon power, PAJA was unconstitutional. Ngcobo CJ, for a unanimous court, held that the decision of the President not to permit victims to make representations was irrational and dismissed the appeal. It was therefore found to be unnecessary to determine whether PAJA was constitutional on the grounds pleaded. Nevertheless, Ngcobo CJ held that the High Court had erred in holding that the exercise of the s 84(2)(j) pardon power in general constitutes administrative action. He stated that the case dealt with the exercise of the presidential pardon in relation to a special process and it had thus been improper for the High Court to extend its holding to pardon powers in general.

### (c) Children

When it comes to the implementation of custodial sentences imposed on children it is clear that they have additional rights, which include but go beyond those enjoyed by all detained persons in terms of the FC and Chapter III of the 1998 Correctional Services Act.<sup>1</sup> The Correctional Services Act provides specifically that children are entitled to educational and recreational programmes, social and psychological services, religious care and, where practicable, additional visitation opportunities.<sup>2</sup> In addition, their specific accommodation and nutritional

<sup>1</sup> Chapter three is headed: 'Custody of all inmates under conditions of human dignity.'

<sup>2</sup> CSA s 19 reads:

- (1) (a) Every prisoner who is a child and is subject to compulsory education must attend and have access to such educational programmes;
- (b) Where practicable, children who are prisoners not subject to compulsory education must be allowed access to educational programmes;
- (2) The Commissioner must provide every prisoner who is a child with social work services, religious care, recreational programmes and psychological services.
- (3) The Commissioner must, if practicable, ensure that prisoners who are children remain in contact with their families through additional visits and by other means.

Similarly, international law requires the following:

Article 35 of the UN Rules for the Protection of Juveniles Deprived of the Liberty (JDL) states: 'Juvenile detention facilities should adopt specialized drug abuse prevention and rehabilitation programmes administered by qualified personnel.'

Article 56 of the JDL states: 'The director of the detention facility should notify immediately the family or guardian of the juvenile concerned, or other designated person, in case of death, illness requiring transfer of the juvenile to an outside medical facility, or a condition requiring clinical care within the detention facility for more than 48 hours.'

requirements must be met.<sup>2</sup>

Although cases on conditions of detention regarding sentenced children in prison have yet to be litigated, courts, on several occasions, have expressed a willingness to intervene on constitutional grounds in the implementation of their sentences, if it were necessary to do so on review. In *S v Z*,<sup>3</sup> for example, the High Court considered the situation of 24 child offenders who had been sentenced to a reform school.<sup>4</sup> Due to various administrative challenges, the children were unable to be transferred directly to the reform school to commence their sentences. They had thus been detained for ‘long periods of time’ in prison pending the transfer. The High Court held that the offenders’ rights to be protected from maltreatment, neglect, abuse or degradation,<sup>5</sup> not to be detained except as a measure of last resort<sup>6</sup> and not to be deprived of freedom arbitrarily<sup>7</sup> had been infringed. It ordered the immediate release of offenders who had been detained for a period of more than two years. In addition, the Department of Education was ordered to plan and present to the Court the building of a reform school. This latter step is particularly significant as it is an example of how ‘structural interdicts’, which have played a significant role in enforcing constitutional standards in US prisons,<sup>8</sup> could be used to shape the implementation of punishment in South Africa in the future.

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Article 64 of the JDL states: ‘Instruments of restraint and force can only be used in exceptional cases, where all other control methods have been exhausted and failed, and only as explicitly authorized and specified by law and regulation. They should not cause humiliation or degradation, and should be used restrictively and only for the shortest possible period of time.’

Article 9(3) of the CRC states: States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests.

Article 37(c) of the CRC states: [States Parties shall ensure that]: shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

Article 26(5) of the Beijing Rules states: ‘In the interest and well-being of the institutionalised juvenile, the parents or guardian shall have a right of access.’

<sup>2</sup> CSA s 7 and the Correctional Services Regulations reg 4(1)(c). There are also a number of requirements in International Law.

<sup>3</sup> *S v Z and 23 Similar Cases* 2004 (1) SACR 400 (E).

<sup>4</sup> Prior to repeal by the Child Justice Act 75 of 2008, CPA s 290(1)(d) read: ‘Any court in which a person under the age of eighteen years is convicted of any offence may, instead of imposing punishment upon him for that offence...order that he be sent to reform school as defined in s 1 of the Child Care Act (74 of 1983).’

<sup>5</sup> FC s 28(1)(d).

<sup>6</sup> FC s 28(1)(g).

<sup>7</sup> FC s 12(1)(a).

<sup>8</sup> M Feeley & E Rubin *Judicial Policy Making and the Modern State: How the Courts Reformed America’s Prisons* (1998).