A SHORT CRITIQUE OF MINIMUM SENTENCES

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SUMMARY

The state has a constitutional duty to respect, promote and protect the rights of citizens. To this end, every citizen has the right to dignity, the right to equality, and the right to freedom and security of the person. Allied thereto is that they will not be subjected to punishment that is cruel, inhuman, and degrading, among others. With the advent of democracy, South Africa inherited a host of challenges and one of these challenges was the explosion of violent crime. Mandatory minimum sentences were introduced by the Criminal Law Amendment Act 105 of 1997 to serve as a temporary, emergency crime-control measure based on the commonly-held belief that harsh punishment would reduce crime. Since minimum sentencing legislation has been in full operation for more than two decades, one would expect crime in South Africa to be relatively under control. However, violent crimes like murder and rape in our society have not abated. It is argued that minimum sentences do not serve as a deterrent to violent crime, instead, they exacerbate prison overcrowding. Lengthy prison terms and high imprisonment rates fuel the conditions for higher crime rates as it impedes the objectives of rehabilitation and promotes recidivism. The state's continued support for these increased sentences infringes on the constitutional rights of citizens. In this article, the author concludes that if we feel outraged by the high rate of violent crime, we need to find a sentencing regime that leads to the reduction rather than the exacerbation of crime in line with constitutional provisions.

1 INTRODUCTION

In 1997 the South African parliament adopted legislation[1] introducing severe mandatory minimum sentences. This was a political response to counter the escalating violent crime South Africa experienced when it transitioned to a new democracy. Minimum sentencing legislation was only supposed to be temporary and could be extended every two years.[2] However, after

[1] The Criminal Law Amendment Act 105 of 1997 (the Act).

[2] Van Zyl Smit "Mandatory Sentences: A Conundrum for the New South Africa?" 2000 2(2) *Punishment and Society* 197 203 where Dullah Omar, then Minister of Justice, conveyed to the Justice Portfolio Committee of the National Assembly, that if new minimum sentences were to be introduced, these would only be to "tide us over our transition period". The Minister stated that he was confident that the crime situation would be under control within a couple of years and once that happened the punitive sentences for serious crimes would be abolished. The Minister stated that these increased sentences were needed to "restore confidence in the ability of the criminal justice system to protect the public against crime"; see also Muntingh "Sentencing" 2009 *Criminal (In) Justice in South Africa* 178 180 with

substantive and procedural amendments by the Criminal Law (Sentencing) Amendment Act,[3] the minimum sentencing provisions are now permanently in force until repealed by Parliament. In doing so the legislature failed to intensely scrutinise whether minimum sentences have the desired impact on serious violent crime.

Despite minimum sentences being fully operational for more than two decades, violent crimes like murder and rape have not abated. This article provides a critique of the efficacy of minimum sentences with a primary focus on the Act's main aim of preventing or curbing crime, its relationship with prison overcrowding, and its continued constitutionality.

2 BRIEF BACKGROUND AND LEGISLATIVE FRAMEWORK

The essence of the prescribed minimum sentences is to ensure that courts impose sentences that are consistently heavier than before for the crimes specified in section 51 of the Act.[4] It requires the imposition of mandatory minimum penalties for a wide range of the more serious offences that can only be imposed by the High Courts and Regional Courts.[5] The Act mandates life sentences for certain serious offences, including premeditated murder, the murder of a law enforcement officer or a potential state witness, and various forms of rape. It further mandates a 15-year imprisonment sentence for a first-time offender convicted for crimes, such as murder (under circumstances that would not otherwise merit a life sentence), robbery, and certain drug-related offences (to name a few). Additionally, a repeat offender must be sentenced to no fewer than 20 years, and a third or further-time offender a sentence of no fewer than 25 years.

Included in the Act is the so-called "departure" or "escape" clause, which allows for the imposition of a lesser sentence than that prescribed by the Act if the sentencing court is satisfied that "substantial and compelling circumstances" exist.[6] In the seminal judgment of *S v Malgas*,[7] the Supreme

reasons given such as addressing public demand, restoring confidence, confirming government's policy, allowing discretion and effective sentencing.

3 38 of 2007. These amendments include greater powers for Regional Courts concerning life imprisonment. The jurisdiction also allows them to deviate from imposing a life sentence and to impose a sentence that does not exceed 30 years. S 53(1)(*aA*) now expressly excludes some factors that cannot rank as "substantial and compelling circumstances" in respect of the offence of rape as follows: "When imposing a sentence in respect of the offence of rape the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence: (i) The complainant's previous sexual history; (ii) an apparent lack of physical injury to the complainant; (iii) an accused person's cultural or religious beliefs about rape; or (iv) any relationship between the accused person and the complainant prior to the offence being committed."

4 *Centre of Child Law v Minister of Justice and Constitutional Development* 2009 (2) SACR 477 (CC) par 14 and par 45.

5 Terblanche *A Guide to Sentencing in South Africa* 3ed (2016) 49–75; see also Muntingh 2009 *Criminal (In) Justice in South Africa* 182–184.

6 S 51 of the Criminal Law Amendment Act 105 of 1997 states, in broad terms, that if a court has convicted a person of an offence specified in the schedules to the Act, then it shall

Court of Appeal gave extensive guidance on how the departure clause should be interpreted. The court decided that the provision should have the following effect:

Courts are required to consider the prescribed sentences as the benchmark (point of departure) which should ordinarily be imposed and should not be departed from lightly or for flimsy reasons.[8] However, if the cumulative effect of all the factors that a court would normally consider in respect of sentencing would justify the court to depart from the minimum sentence in a specific case, the court should consider deviating from the prescribed sentence.[9] When the prescribed sentence would amount to an injustice being disproportionate to the crime, the criminal, and the needs of society, the sentencing court should prevent the injustice and impose a lesser, appropriate sentence.[10] Thus, the legislature's intention was not to eliminate the courts' discretion when sentencing offenders for crimes specified in the Act.[11] The Constitutional Court in *S v Dodo*[12] confirmed the approach to the "substantial and compelling" formula adopted in *Malgas.*[13]

Offenders under the age of 18 years at the time when the crime was committed are excluded from the operation of the Act.[14] The court held that all persons under 18 are children and that life imprisonment as a starting point is not in line with the constitutional requirement in section 28. The court found that where incarceration is unavoidable it should be for the shortest possible period.[15]

Some of the provisions in the Act were subjected to constitutional scrutiny. In *Dodo*,[16] the court had to decide, among others, whether the interference with the court's sentencing discretion by the legislature infringed the separation of powers doctrine. In a criminal trial, it is the prerogative of the court as an independent judiciary to determine an appropriate sentence by

impose the minimum term of imprisonment unless it is able to find "substantial and compelling reasons" to impose a lesser sentence.

7 2001 (1) SACR 469 (SCA) (*Malgas*).

8 *Malgas supra* par 25B and par 25I.

9 *Malgas supra* par 22; see also par 25E–G.

10 *Malgas supra* par 22, see also par 25I, which *S v Dodo* 2001 (1) SACR 594 (CC) par 40 (*Dodo*) describes as the "determinative test"; see also *Centre of Child Law v Minister of Justice and Constitutional Development supra* par 40 (the question whether "substantial and compelling circumstances" exist is "answered by considering whether the minimum sentence is clearly disproportionate to the crime".

11 *Malgas supra* par 25A. S 51 of the Act "has limited but not eliminated the courts' discretion" concerning the imposition of the prescribed sentences for specified offences.

12 *Dodo supra* par 11.

13 *Supra*.

14 S 51(6) (as amended by s 26(6) of the Judicial Matters Third Amendment Act 42 of 2013), read with *Centre of Child Law v Minister of Justice and Constitutional Development supra* that declared the previous position in s 51(6) of the Act, that set the age limit at sixteen, as unconstitutional.

15 *Centre of Child Law v Minister of Justice and Constitutional Development supra* par 31.

16 *Supra*.

weighing and balancing all factors relevant to the crime, the accused, and the interest of society.[17]

The court pointed out that the legislature and the executive have a legitimate interest in the sentencing policy in that they can determine the severity of sentences to protect law-abiding citizens.[18] The court held that even though the Act limits the sentencing discretion of the court by prescribing minimum sentences it did not eliminate the court's discretion to impose a sentence that is consistent with the Bill of Rights.[19] The rights in section 12(1)(*e*)[20] of the Constitution of the Republic of South Africa[21] requires the sentencing court to impose punishment that is proportionate to the seriousness of the offence.[22] The rights of an offender will be infringed when the punishment is "grossly disproportionate" to the crime. Since the departure clause enables sentencing courts to depart from the prescribed sentences, where "substantial and compelling circumstances" exist, such disproportionality can be avoided and therefore section 51 of the Act prescribing minimum sentences is in general constitutional.[23]

3 MINIMUM SENTENCES PREVENTING AND CURBING CRIME

The object of mandatory minimum sentences is to ensure tougher and longer sentences to combat crime.[24] It is, therefore, necessary to determine whether mandatory minimum sentences promote some defensible purpose; in other words, whether it can be justified by any of the sentencing rationales for incarceration namely deterrence, incapacitation, rehabilitation, and retribution.

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17 Sloth-Nielsen and Ehlers "A Pyrrhic Victory? Mandatory and Minimum Sentences in South Africa" 2005 Paper 111 *Institute of Security Studies Papers* https://media.africaportal.org/documents/PAPER111.pdf (accessed 2018-09-23) 7; s 35(3)(*c*) of the Constitution of South Africa, 1996 (the Constitution) guarantees every person a public trial before a court.

18 *Dodo supra* par 24.

19 *Dodo supra* par 25–26; see also *Malgas supra* par 25A.

20 S 12(1)(*e*) states that "Everyone has the right to freedom and security of the person, which includes the right to – not to be treated or punished in a 'cruel, inhuman, or degrading way'".

21 The Constitution.

22 *Dodo supra* par 37. 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". This means that "the length of punishment must be proportionate to the offence."

23 *Dodo supra* par 40.

24 *Dodo supra* par 11 where the court held that the purpose of the regime is to make sure that "consistently heavier sentences" are imposed; see also *Centre of Child Law v Minister of Justice and Constitutional Development supra* par 14 and par 45 "the very essence [of] the minimum sentencing regime makes for tougher and longer sentences"; see also *S v Mabunda* 2013 (2) SACR 161 (SCA) par 4; and see also Baehr "Mandatory Minimums Making Minimal Difference: Ten Years of Sentencing Sex Offenders in South Africa" 2008 20 *Yale JL & Feminism* 224 where the author said that "mandatory minimum provisions … were introduced as a temporary, emergency measure to combat crime", citing previous Minister of Justice Dullah Omar who predicted that the minimum sentencing regime should cause a reduction in crime.

3 1 Deterrence

Advocates of mandatory minimum sentences argue that these penalties deter crime and stop people from harming others.[25] This perception is based on the rational-choice theory, which assumes that criminals, before committing a crime, consider the severity of the punishment and the probability of being caught. These prescribed sentences make punishment clear and well-known to the public. By increasing the severity of impending punishment, these sentences deter crime.[26] Former Constitutional Court Justice Cameron contends that the argument advanced by the rational-choice theory is not supported by any evidence. [27]

Van Zyl Smit[28] explains that even though punishment does have a deterrent effect, it is the certainty of punishment, rather than the severity of the sentence, that is likely to have the biggest deterrent effect. The author further points out:

> "There is certainly no evidence, empirical or even anecdotal, to suggest that increasing sentences from, say, six to 11 years for rape or robbery deters rapists or robbers generally. Or even discourages them individually from committing a crime that otherwise they would not have risked."[29]

The Constitutional Court in *S v Makwanyane*[30] held that it is the likelihood that a criminal will be apprehended, convicted, and punished that is more likely to deter than the severity of the sentence on its own. Furthermore, studies show that most active and violent offenders either do not think they will be caught or if they were to be apprehended, they do not have any idea what punishment to expect for their crimes.[31] Severe sentences can have little impact on these criminals as they do not consider the severity of the sentence they may face before committing a crime.[32]

Ballard[33] points out that it is the certainty of the prosecution that deters crime; however, the figures are not impressive. In 2000, when violent crime was close to its highest point in South Africa, only 610 000 of the 2.6 million

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25 Cameron "Imprisoning the Nation: Minimum Sentencing in South Africa" Paper presented on Minimum Sentences in South Africa, Dean's Distinguished Lecture, Faculty of Law, University of Western Cape (19 October 2017) https://www.groundup.org.za/media/uploads/documents/UWCImprisoningThe%20Nation19October2017.pdf (accessed 2018-08-13) 14.

26 *Ibid.*

27 *Ibid.*

28 Van Zyl Smit "Swimming Against the Tide: Controlling the Size of the Prison Population in the New South Africa" in Dixon, Scharf, and Van der Spuy (eds) *Justice Gained? Crime and Crime Control in South Africa's Transition* (2004) 248.

29 *Ibid*.

30 1995 (3) SA 391 (CC) par 122.

31 Cameron https://www.groundup.org.za/media/uploads/documents/UWCImprisoningThe%20Nation19October2017.pdf 16.

32 Anderson "The Deterrence Hypothesis and Picking Pockets at the Pickpockets Hanging" (18 April 2000) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=214831 (accessed 2018-10-01) 293–313.

33 Ballard "Crime and Punishment Don't Add Up" (8 May 2015) https://mg.co.za/article/2015-05-07-crime-and-punishment-dont-add-up/ (accessed 2019-01-17).

crimes recorded were referred for prosecution.[34] The National Prosecuting Authority[35] prosecuted only 271 000 of these matters, resulting in 210 000 convictions.[36] Even though the NPA's conviction rate was commendable, the convictions amounted to only eight percent of crimes recorded.[37] In 2019 the NPA reported that less than 20 percent of the estimated 21 000 cases of murder committed in the country annually end up in court. Additionally, out of a total of 52 450 sexual offences reported, the NPA secured only 4 724 convictions for the same period.[38] Based on the aforementioned research and figures, it is difficult to see how tough minimum sentences will deter thousands of criminals, who are not arrested and successfully prosecuted.[39]

Moreover, although deterrence is regarded as the most important punishment rationale in criminal law,[40] research proves that tougher and longer sentences as advocated by mandatory minimums have "either no deterrent effect or modest deterrent effect that soon wastes away".[41] The latest crime statistics paint a grim picture of the crime situation in South Africa with almost every single crime increasing significantly year on year since 2018.[42] There were 6 083 murders between January 2022 and March 2022 which amounts to over 67 murders per day.[43] In the same period, there were 10 818 rapes reported which meant 153 people were raped every single day.[44] Serious violent crime is therefore still a very real threat to the constitutional freedom and security[45] of citizens in the country.

International research findings clearly denote "the politicised nature of sentencing, and of responding to perceived demands for harsher punishment from the public", even though the available evidence demonstrates that punishment has little effect on crime rates.[46] Politicians

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34 *Ibid.*

35 Hereinafter referred to as "NPA".

36 *Ibid.*

37 See fn 33 above; see also Rademeyer "Conviction Rates an Unreliable Benchmark of NPA (12 April 2013) https://africacheck.org/reports/conviction-rates-an-unreliable-benchmark-of-npa-success/ (accessed 2018-10-01).

38 Versluis and De Lange "Rising Crime, Low Prosecution Rates: How Law Enforcement in SA Has All But Collapsed" (21 October 2019) https://www.news24.com/citypress/News/rising-crime-low-prosecution-rates-how-law-enforcement-in-sa-has-all-but-collapsed-20191021 (accessed 2022-06-30).

39 Muntingh 2009 *Criminal (In) Justice in South Africa* 190.

40 Cameron https://www.groundup.org.za/media/uploads/documents/UWCImprisoningThe%20Nation19October2017.pdf 16.

41 Tonry "Sentencing, Judicial Discretion and Training" 1992 as quoted in Terblanche "Mandatory and Minimum Sentences: Considering s 51 of the Criminal Law Amendment Act 1997: Sentencing" 2003 1 *Acta Juridica* 194.

42 Whitfield "SA Crime Stats: The 90 Day Bloodbath" (3 June 2022) https://www.da.org.za/2022/06/sa-crime-stats-the-90-day-bloodbath#:~:text=According%20to%20the%20latest%20crime,were%20raped%20every%20single%20day (accessed 2022-06-30).

43 *Ibid.*

44 *Ibid*.

45 S 12(1)(*c*) of the Constitution.

46 Terblanche and Mackenzie "Mandatory Sentences in South Africa: Lessons for Australia" 2008 41(3) *The Australian and New Zealand Journal of Criminology* 405. The authors are of

showing that they are "doing something" about rising crime rates and lenient sentencing by enacting such laws, reap significant electoral benefits.[47] As a result, they are quick to note that the public supports tougher punishments in the form of mandatory sentences.[48] However, to prove such public support, politicians usually cite correspondence from "concerned constituents" or unrepresentative polls rather than the results of scientific surveys.[49] It is submitted that criminals who commit horrible crimes should be dealt with harshly. However, minimum sentences are not the way because these sentences fail to have the desired impact on violent crime with a focus on the relatively small number of criminals who are arrested and successfully prosecuted.

3 2 Prevention or Incapacitation

The "incapacitation effect," is defined as the number of crimes averted by physically isolating an offender from society at large. The incapacitation argument works on the assumption that the criminal justice system has the capability to recognise and then incapacitate the most dangerous offenders, which has a deterrent effect on violent crime.[50] However, this does not explain or justify the way mandatory minimum sentences work in South Africa. The evidence is clear that incapacitative sentencing such as advocated by mandatory minimums attracts more "non-dangerous" than "dangerous" offenders, with a "false positive rate" of up to two out of three.[51] This means to imprison a large number of less dangerous people for lengthy periods, will not further reduce crime. [52]

To illustrate this, South Africa's minimum sentencing legislation provides for "broad and poorly defined crime categories".[53] For example, there is basically no difference between a bank robber who kills a bank teller and a woman who shoots and kills her abusive husband while asleep, where life imprisonment will be imposed on both, despite the latter being less dangerous and less likely to re-offend.[54] This is also applicable to certain non-dangerous offenders who commit non-violent offences like drug offences which is placed in the same category as violent offences such as murder as per Part II of Schedule 2.[55] Arguably, the relatively non-dangerous drug offenders are easily replaced when they are successfully prosecuted,

the opinion that it is not surprising that the number of supporters of minimum sentences legislation systems have clear political links.

47 Roberts "Public Opinion and Mandatory Sentencing" 2003 30(4) *Criminal Justice and Behaviour* 483 487.

48 *Ibid.*

49 *Ibid.*

50 Muntingh 2009 *Criminal (In) Justice in South Africa* 192.

51 Ashworth *Sentencing and Criminal Justice* 5ed (2010) 84.

52 Chattanooga "Criminal Justice and Mass Incarceration – The Moral Failures of America's Prison-Industrial Complex" (20 July 2015) https://www.economist.com/democracy-in-america/2015/07/20/the-moral-failures-of-americas-prison-industrial-complex (accessed 2019-06-28).

53 Muntingh 2009 *Criminal (In) Justice in South Africa* 192.

54 *Ibid*.

55 S 51 of the Act.

and therefore incarcerating them for long periods of time will not have a significant effect to curb violent crime and crime in general.

Another key point to consider is that the incapacitation rationale for violent offenders would be fully served by the time these offenders reach 50 or 60 years, the age where, statistically, it is unlikely that they would re-offend.[56]

Statistical evidence depicts that higher rates of incapacitation and longer sentences do not reduce crime.[57] A 2015 report issued by the Brennan Center for New York University shows that a high level of incarceration has not produced a reduction in crime in the United States.[58] On the other hand, a study from California indicates that reducing incarceration does not result in a notable increase in crime.[59] The United States Supreme Court, in *Brown v Plata*,[60] ruled that California's overcrowded prison system resulted in cruel and unusual punishment. California had to pass reforms that ended the practice of sending convicts back to prison for technical violations.[61] This resulted in about 20 000 offenders, who previously would have been sent to prison, not going there.[62] Studies found that the reduction in California's prison population caused by the reform modestly increased property crime but had little effect on violent crime.[63] This indicates that harshness in sentencing in many instances results in prison terms not justified by the risk posed by the offender.[64]

Finally, one should bear in mind that a large social network of criminal activity exists in our prisons, which in fact increases the incidence of crime.[65]

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56 Altbeker "The Impact of the Introduction of the Minimum Sentencing Legislation on Levels of Crime and Crime Prevention" Presentation at the OSF-SA Workshop Report on Minimum Sentence (January 2005) 7.

57 Cameron https://www.groundup.org.za/media/uploads/documents/UWCImprisoningThe%20Nation19October2017.pdf 17.

58 Roeder, Eisen and Bowling "What Caused the Crime Decline" (12 February 2015) https://www.brennancenter.org/sites/default/files/analysis/What_Caused_The_Crime_Decline.pdf (accessed 2019-06-28) 7. In the report, using an economic model with 13 years of data (2000–2013), it found that since 2000, the effect of increasing incarceration on the crime rate has been virtually zero.

59 Raphael and Stoll "A New Approach to Reducing Incarceration While Maintaining Low Rates of Crime" (1 May 2014) https://www.brookings.edu/wp-content/uploads/2016/06/v5_THP_RaphaelStoll-DiscPaper.pdf (accessed 2019-06-28) 11.

60 563 US 493 (2011).

61 Raphael and Stoll https://www.brookings.edu/wp-content/uploads/2016/06/v5_THP_RaphaelStoll-DiscPaper.pdf 10. See also Lofstrom and Raphael "Incarceration and Crime: Evidence from California's Public Safety Realignment Reform" 2016 664 *ANNALS of APPSS* 197.

62 *Ibid.*

63 Lofstrom and Raphael "Public Safety Realignment and Crime Rates in California" (December 2013) https://www.ppic.org/content/pubs/report/R_1213MLR.pdf (accessed 2019-06-28) 9. See also Lofstrom and Raphael 2016 *ANNALS of APPSS* 216.

64 Raphael and Stoll https://www.brookings.edu/wp-content/uploads/2016/06/v5_THP_RaphaelStoll-DiscPaper.pdf 14.

65 Cameron https://www.groundup.org.za/media/uploads/documents/UWCImprisoningThe%20Nation19October2017.pdf 18.

3 3 Rehabilitation

Rehabilitation is a third justification for incarcerating criminals. However, with mandatory minimum sentences prescribing extremely long prison sentences, offenders are left hopeless because their release is so far off in the future that they are not amenable to rehabilitation.[66]

Moreover, rehabilitation is lacking in the majority of South African prisons as overcrowding makes rehabilitation programmes impracticable.[67] Retired Judge Fagan[68] warns that overcrowding prevents proper rehabilitation and transforms prisons into places where criminality is nurtured. On paper, rehabilitation beyond punishment is promoted by the state to reduce recidivism; however, South Africa's reoffending rate is one of the highest in the world.[69] This illustrates very little or no rehabilitation in our prisons.

Ironically, of the Department of Correctional Services' estimated budget of R25.4 billion for 2019/20, only R2 billion is allocated for rehabilitation, which is about 8 percent of the budget.[70] The biggest share of the budget is allocated to incarceration, a massive R15.1 billion, which is about 60 percent of the budget.[71] This can be seen as an "incarceration philosophy" aimed at keeping prisoners behind bars, rather than striving to correct behaviour, by providing a "safe, secure and humane environment which allow for optimal rehabilitation and reduced offending", as stipulated in the Department of Correctional Services' mandate.[72]

3 4 Retribution

The fourth and last possible justification for mandatory minimum sentences is retribution.

The death penalty was declared cruel, inhuman, and degrading,[73] despite the retributive rhetoric in favour thereof being popular among politicians and

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66 Sloth-Nielsen and Ehlers "Assessing the Impact – Mandatory and Minimum Sentences in South Africa" 2005 14 *SA Crime Quarterly* http://repository.uwc.ac.za/xmlui/handle/10566/2199 (accessed 2018-08-14) 17.

67 Altbeker *A Country at War with Itself* (2007) 146 states that overcrowding in prisons has made rehabilitation (an unproven science) "impossible" states further at 150 that "our overcrowded prisons will rehabilitate no one ... They are also a potential time bomb that needs to be defused."

68 Fagan "Our Bursting Prisons" 2005 18(1) *Advocate* https://journals.co.za/doi/10.10520/AJA10128743_471 (accessed 2018-09-23) 33 35.

69 Arackathara *Light Through the Bars: Understanding and Rethinking South Africa's Prisons* (2019) 20.

70 National Treasury, Republic of South Africa *Estimates of National Expenditure 2019: Vote 18 – Correctional Services* http://www.treasury.gov.za/documents/national%20budget/2019/ene/FullENE.pdf (accessed 2019-07-11).

71 *Ibid.*

72 Karrim "How Our Focus on Punishment Fails Society and Inmates" (12 April 2018) https://www.businesslive.co.za/bd/opinion/2018-04-12-how-our-focus-on-punishment-fails-society-and-inmates/ (accessed 2019-07-11).

73 *S v Makwanyane supra* par 95, where Chaskalson J held "I am satisfied that in the context of our Constitution the death penalty is indeed a cruel, inhuman and degrading punishment."

the public. The court assumed that most South Africans agreed that the death penalty should only be imposed in exceptional cases of murder. However, it was not up to them to decide what the appropriate sentence for murder should be, but rather whether the sentence is allowed by the Constitution.[74] The court held that it will not be persuaded to deviate from its mandate "to act as an independent arbiter of the Constitution" by making decisions that will find approval with the public.[75] Public opinion is relevant, but it cannot replace the duty bestowed on the courts to interpret and uphold the provisions of the Constitution without fear and favour.[76]

Justice Chaskalson regarded retribution as of secondary importance, and that there was no need for the government to partake in the "cold and calculated killing of murderers", in pursuance of the expression of moral outrage.[77] Instead, he confirmed that there is no requirement that punishment is identical to the offence because the "eye for an eye" principle has long since been outgrown.[78] Also, a long prison sentence can achieve the same purpose of expressing outrage and inflicting retribution on the offender.[79] If a "less restrictive but equally effective form of punishment" is available in a specific case, it must be imposed,[80] because "a law which invades a right more than is necessary to achieve its purpose, is disproportionate."[81] Additionally, the objects of punishment must be balanced with the individual's rights.[82]

With mandatory minimum sentences, life imprisonment is now imposed for offences that would have rarely attracted the death penalty, even though life imprisonment as a "severe alternative punishment" was supposed to be a replacement for the death penalty.[83] In line with the disproportionality discussed concerning the death penalty above, it can be argued that in

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74 *S v Makwanyane supra* par 87.

75 *S v Makwanyane supra* par 89.

76 *S v Makwanyane supra* par 88, where the court commented that "If public opinion were to be decisive, there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order established by the 1993 Constitution."

77 *S v Makwanyane supra* par 129 where Chaskalson J points out that "retribution is one of the objects of punishment, but it carries less weight than deterrence", with reference to *S v J* 1989 (1) SA 669 (A) par 682G and *S v P* 1991 (1) SA 517 (A) par 523(G–H).

78 *S v Makwanyane supra* par 129. The need for retribution, therefore, did not justify the death penalty.

79 *Ibid*.

80 Ferreira and Steyn "The Limitation of Fundamental Rights by Imposition of Sentence" 2006 21(1) *SAPL* 96 107; see also *S v Makwanyane supra* par 212, where Justice Kriegler held "that the death penalty has no demonstrable penological value over and above that of long-term imprisonment" referring to a United States Supreme Court case.

81 Barrie "The Application of the Doctrine of Proportionality in South African Courts" 2013 *SAPL* 40 54.

82 Terblanche *A Guide to Sentencing in South Africa* 2ed (2007) 429; see also *S v Makwanyane supra* par 135: - "In the balancing process, deterrence, prevention and retribution must be weighed against the alternative punishments available to the state and the factors which taken together make capital punishment cruel, inhuman and degrading."

83 Muntingh "Op-Ed: Rethinking Life Imprisonment" https://www.dailymaverick.co.za/article/2017-03-02-op-ed-rethinking-life-imprisonment/.

cases that would not have attracted the death penalty, shorter sentences can be a significant alternative measure. These would be less restrictive, but equally effective forms of punishment, which would achieve the same purpose as the life sentence as prescribed by the minimum sentencing legislation.

Minimum sentencing legislation was drafted with its primary focus on punishment of the offender for the commission of specified offences, without proper gradation between categories of offences.[84] This is contrary to the widely expressed view of our courts and even the Constitutional Court, where retribution is regarded as of "lesser importance".[85]

It is evident from the above that the only logical rationale for long-term prison sentences, which are mandated by our minimum sentencing legislation, can be viewed along the same lines as the rationale for the death sentence (retribution). The death sentence is no longer part of our law so it can be argued that minimum sentencing legislation should also not be part of our law.

None of the previous sentencing rationales discussed justified mandatory minimum sentencing satisfactorily, leaving retribution as the only theory that can possibly warrant minimum sentences. However, under our constitutional dispensation, where retribution has been responsible for the cruellest of punishments throughout history, retribution alone cannot be the theory upon which we base our criminal punishments.[86]

4 IMPACT ON PRISON OVERCROWDING AND HUMAN RIGHTS

The Constitution mandates and acknowledges the right of people in prison (both remand detainees and sentenced offenders), to humane and dignified conditions of detention.[87] Inmates are protected by the Constitution against cruel, inhuman, or degrading treatment or punishment.[88] In this regard, the

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84 *S v Vilakazi* 2009 (1) SACR 552 (SCA) par 13. With reference to the offence of rape, the judge refers to the absence of gradation between 10 years' imprisonment and life imprisonment. Once any of the aggravating circumstances are present the minimum sentence of 10 years progresses immediately to life imprisonment no matter how many of the features are present, no matter the degree to which the feature is present, and no matter if the convicted person is a first-time or repeat offender. Which will see an "18-year-old boy who rapes his 15-year-old girlfriend on one occasion must receive the same sentence as a recidivist serial rapist … The 18-year-old boy who rapes his 15-year-old girlfriend must also receive the same sentence as the adult recidivist who rapes an infant. The offender who imprisons and rapes his victim repeatedly every day for a week is considered to be no more culpable than one who rapes his victim twice within ten minutes. It requires only a cursory reading of the Act to reveal other startling incongruities".

85 Terblanche *A Guide to Sentencing in South Africa* 185 where the author refers to a wide range of cases emphasising this point.

86 S 12(1)(*e*) provides that everyone has a right "not to be treated or punished in a cruel, inhuman or degrading way".

87 S 35(2)(*e*) of the Constitution.

88 S 12(1)(*e*) of the Constitution; see also *Lee v Minister of Correctional Services* 2013 (1) SACR 213 (CC) par 65 where the Constitutional Court recognised that "[p]risoners are amongst the most vulnerable in our society to the failure of the state to meet its

Correctional Services Act[89] regulates that prisoners must have sufficient "floor space, cubic capacity, lighting, ventilation, sanitary installations, and general health conditions," to protect and respect the human dignity of prisoners.[90] South African prison conditions are not in line with the aforementioned, as illustrated by the JICS 2019/2020 report stating that certain prison facilities were unsatisfactory, whereas others are clearly not fit for human occupancy.[91]

The official capacity at which South Africa's prisons were operating, as of the end of March 2020 has been recorded as 132.25 percent, with the number of prisoners at 154 437, which is more than the accommodation capacity of 118 572 bed spaces.[92] Furthermore, South Africa has one of the highest imprisonment rates in the world, namely 259 prisoners per 100 000 of the population,[93] ranking as the 12th highest prison population in the world and the highest in Africa.[94] This places a huge burden on the country's economy and its citizens.

This situation can be attributed to the prison population increasing by 39 percent since 1995.[95] The mandatory minimum sentencing regime increased the number of people serving life sentences from only 400 prisoners serving life in 1994 to more than 16 000 today which is an increase of over 2000 percent over 20 years.[96] Despite sentencing a lesser amount of people to terms of imprisonment, the prison population increased due to longer sentences served.[97] Thus, the increasing number of people serving life sentences in South African prisons, is a growing contributor to prison overcrowding.[98] Mandatory minimum sentences exacerbate prison overcrowding which in turn leads to human rights violations, bearing in mind that these sentences cause more offenders to receive prison sentences and for longer periods of time.[99]

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constitutional and statutory obligations," and that a "civilised and humane society demands that when the state takes away the autonomy of an individual by imprisonment it must assume the obligation … inherent in the right to "conditions of detention that are consistent with human dignity".

89 111 of 1998. Hereinafter referred to as "CSA".

90 S 7(1) of the CSA.

91 Van der Westhuizen "The Judicial Services for Correctional Services Annual Report 2017/18 Financial Year" (undated) https://static.pmg.org.za/JICS_Annual_Report_1718_Final.pdf 9; see also s 2 of the CSA.

92 The Judicial Inspectorate for Correctional Services (JICS) "Annual Report 2019/2020 Financial Year" http://jics.dcs.gov.za/jics/wp-content/uploads/2021/01/JICS_AR_2020-LOW-RES_compressed_compressed_compressed.pdf (accessed 2021-09-24) 24.

93 *JICS* http://jics.dcs.gov.za/jics/wp-content/uploads/2021/01/JICS_AR_2020-LOW-RES_compressed_compressed_compressed.pdf 27.

94 World Prison Brief "Highest to Lowest Prison Population Total" (undated) https://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All (accessed 2021-09-24).

95 JICS http://jics.dcs.gov.za/jics/wp-content/uploads/2021/01/JICS_AR_2020-LOW-RES_compressed_compressed_compressed.pdf 8–9.

96 *Ibid.*

97 Ballard https://mg.co.za/article/2015-05-07-crime-and-punishment-dont-add-up/.

98 Muntingh https://www.dailymaverick.co.za/article/2017-03-02-op-ed-rethinking-life-imprisonment/.

99 Ballard https://mg.co.za/article/2015-05-07-crime-and-punishment-dont-add-up/.

The above factors are worsened by the effects of 15 years of Bosasa-driven corruption within the prisons system as pointed out by the Zondo Commission of Inquiry into Allegations of State Capture, previously pointed out by the Jali Commission which is still being felt in ways that directly impact on the humane treatment of prisoners. Between 2004 and 2019 Bosasa won several contracts to supply services (IT, TV, and CCTV, fencing contracts, and guarding contracts) to South African prisons under the management of the DCS. Most notable is the prison catering service which Bosasa provided even though South African prisons had always produced their own meals. In exchange for these contracts, lucrative bribes were paid to top government officials and politicians. By 2013, when the contract was illegally extended for the third time, the value had risen to more than R420 million per year and at the end of the 2016/2017 financial year, the spending was beginning to affect the entire prison system.[100] Instead, these resources could have been used to reduce the negative effects of overcrowding and promote the rights of vulnerable prisoners to conditions of detention that are consistent with human dignity.[101]

5 CONSTITUTIONAL CHALLENGES

In *Dodo*,[102] the court noted that "the length of punishment must be proportionate to the offence." Also, a "mere disproportionate sentence" does not infringe on the right not to be subjected to cruel, inhuman, or degrading punishment.[103] This right is only violated when there is "gross disproportionality" between the punishment and the offence".[104] However, it remains unclear in the South African legal system as to what standard to apply to determine when a sentence can be typified as "gross".[105] In the United States[106] and Canada,[107] from where the Constitutional Court in *Dodo* found useful guidance in this regard,[108] the "gross disproportionality" standard is applied significantly differently from each other. The United States sets a high threshold before a sentence can be typified as "gross" whereas in Canada a much lower threshold applies.[109] Therefore, the "gross

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100 Davis "How State Capture Led to Human Right Abuses – The Case of Bosasa and the Prisons" (14 March 2022) https://www.dailymaverick.co.za/article/2022-03-14-how-state-capture-led-to-human-rights-abuses-the-case-of-bosasa-and-the-prisons/ (accessed 2022-06-15).

101 S 35(2)(*e*) of the Constitution.

102 *Dodo supra* par 37.

103 *Ibid.*

104 Terblanche "Twenty Years of Constitutional Court Judgements: What Lessons are there about Sentencing?" 2017 20 *PER/PELJ* 16.

105 *Ibid.* Even though the author states that "'gross' in this sense is probably best equated with 'blatant'", it remains unclear as it is applied so differently in North American jurisdictions.

106 *R v Latimer* 2001 SCC 1 par 76; *Rummel v Estelle* 445 US 263 (1980) 274–275*; Hamelin v Michigan* 501 US 957 (1991); *Ewing v California* 538 US 11 (2003).

107 *R v Nur* 2015 SCC 15 par 77; *R v Lloyd* 2016 1 SCR 130 par 22 and par 35.

108 *Dodo supra* par 28–31.

109 For example, in *Harmelin v Michigan* 501 US 957 (1991) where the court gave life imprisonment without possibility of parole for 672 grams of cocaine, where the possession was only a little more than the 650 grams limit. The US Supreme Court ruled that the prescribed sentence is not sufficiently disproportionate. In Canada in *R v Lloyd* (2016) 1

disproportionality standard" from a South African perspective needs more explanation.[110]

This is significant because, under the mandatory minimum sentencing regime, sentences imposed by the courts are now substantially higher, than those previously regarded as appropriate for similarly situated offenders before the Act was introduced.[111] Even when "substantial and compelling circumstances" are present the lesser sentences are higher than what normally would have been regarded as appropriate.[112]

If minimum sentences are found to violate certain rights,[113] the infringement must be justified for minimum sentences to be constitutional.[114] Taking into account the relative harshness of minimum sentences together with the temporary nature of the legislation it is common course that the main aim of the Act is to combat crime.[115] However, as set out in this article minimum sentences do not serve as a deterrent and therefore do not justify the infringement of rights.

SCR 130, the Canadian Supreme Court declared a provision that prescribes a minimum of 1-year imprisonment for "trafficking or possession" of certain drugs unconstitutional if the accused had another drug conviction within the previous ten years.

110 Terblanche 2017 *PER/PELJ* 1 24.

111 See fn 24 above.

112 In *S v Abrahams* 2002 (1) SACR 116 (SC) par 25, the Supreme Court of Appeal found that the sentence imposed by the sentencing court was too lenient and although the court refused to impose the life sentence, the court still increased the sentence by five years. The court referred to the Act as "a legislative standard that weighs upon the exercise of the sentencing court's discretion. This entails sentences for the scheduled crimes that are consistently heavier than before." See also *Centre of Child Law v Minister of Justice and Constitutional* 2009 (2) SACR 477 (CC) par 17 where the court aligned itself with the comments of the court in *Malgas* par 8 and par 25 stating that "[u]nder *Malgas*, the minimum sentencing legislation had two operative effects. First, the statutorily prescribed minimum sentences must ordinarily be imposed. Absent 'truly convincing reasons' for departure, the scheduled offences are 'required to elicit a severe, standardised and consistent response from the courts' through the imposition of the ordained sentences. Second, even where those sentences do not have to be imposed because 'substantial and compelling circumstances' are found, the legislation has a weighting effect leading to the imposition of consistently heavier sentences."

113 For example, the s 12(1)(*e)*: "Everyone has the right to freedom and security of the person, which includes the right … (e) not to be treated or punished in a cruel, inhuman or degrading way", which emphasises proportionate sentencing. All rights may, however, be limited in terms of s 36 of the Constitution which is summarised as follows: Constitutional rights may be limited for purposes that would be reasonable and necessary in "an open and democratic society based on freedom and equality"; see also Terblanche 2017 *PER/PELJ* 20; Terblanche 2017 *PER/PELJ* 19 where it is indicated that the prohibition against "degrading" punishment cannot be separated from the right to have even offenders' dignity protected and respected.

114 *Centre of Child Law v Minister of Justice and Constitutional Development supra* par 51 where the court commented that "in determining whether a limitation is reasonable and justifiable within the meaning of s 36 of the Constitution, 'it is necessary to weigh the extent of the limitation of the right, on the one hand, with the purpose, importance and effect of the infringing provision on the other, taking into account the availability of less restrictive means to achieve this purpose".

115 See fn 24 above.

Another important aim of the legislature, when introducing minimum sentencing provisions, was to achieve consistency in sentencing.[116] However, the Act contains unexplained inconsistencies, the worst being the sentencing "cliffs" that are evident in the prescribed sentences for rape.[117] If an offender is charged with rape, together with one of the aggravating factors listed in Part I of Schedule 2, such an offender will be sentenced to life. In the absence of such an aggravating factor, the court will start considering a sentence[118] from ten years upwards.[119] The inconsistencies in the Act with the high ceiling of minimum sentencing legislation, in combination with the sentencing discretion of courts, increase the possibility of sentences being arbitrary.[120] The increased disparity is obvious, as harsh judicial officers will impose minimum sentences, even if that sentence is much more severe than what would normally be regarded as fair and just.[121] This is in contrast with less harsh judicial officers, who would find the minimum sentence unreasonable and unjust.[122] In the latter cases, courts apply the departure clause as a rule and not the exception distinct from *Malgas*,[123] where the court held that the statutorily prescribed minimum sentences must ordinarily be imposed and not be departed from lightly.

However, even where courts apply "substantial and compelling circumstances" as a rule, especially in rape cases, consistency in sentencing remains elusive. This is so because some courts will acknowledge that sentences for scheduled crimes should still be consistently heavier than before, despite the presence of "substantial and compelling circumstances".[124] Others will impose a sentence that would normally have

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116 Sloth-Nielsen and Ehlers 2005 *SA Crime Quarterly* 20; see also *Malgas supra* par 8 where it was held that the legislature's aim was in a nutshell to make sure that the courts adopt a "severe, standardised and consistent" approach when passing sentencing for these offences except where there are compelling reasons to deviate; and see *S v Brown* 2015 (1) SACR 211 (SCA) par 118.

117 Baehr 2008 *Yale JL & Feminism* 213 226; see also Van der Merwe "Recent Cases: Sentencing" 2013 *SACJ* 399 411.

118 *Malgas supra* par 8; *S v Mabuza* 2009 2 SACR 435 (SCA) par 20 refers to "benchmark".

119 See fn 84 above.

120 *S v Makwanyane supra* par 164.

121 In this regard see *S v Matyityi* 2011 (1) SACR 40 (SCA) par 23; see *S v PB* 2011 SACR 448 (SCA) par 9; see *S v PB* 2013 (2) SACR 553 (SCA) par 24 where the Supreme Court of Appeal largely ignored the constitutional requirement of proportionality in favour of imposing the prescribed sentences.

122 A number of judgements emphasised proportionality and held that the "worst sentence" should be reserved for the "worst crime. Although the prescribed sentences, should be set as the benchmark, proportionality to the seriousness of the offence, is a higher value which overrides the minimum sentences - In this regard see *S v Mahomotsa* 2002 (2) SACR 435 (SCA) par 20; see *S v Abrahams* 2002 (1) SACR 116 (SCA) par 26, par 27; see *S v Dodo* 2001 (3) SA 382 (CC) par 38,40, see *S v Vilikazi* 2009 (1) SACR 552 (SCA) par 20; see also *S v SMM* 2013 (2) SACR 292 (SCA) par 18-19; and see also *S v Nkawu* 2009 (2) SACR 402 (E) par 14–17.

123 *Supra* par 8.

124 For example, in *S v Abrahams* 2002 (1) SACR 116 (SC) par 25, the Supreme Court of Appeal found that the sentence imposed by the sentencing court was too lenient and although the court refused to impose the life sentence, the court still increased the sentence by five years. The court referred to the Act as "a legislative standard that weighs upon the exercise of the sentencing court's discretion. This entails sentences for the scheduled

been regarded as appropriate, before the enactment of minimum sentences, where all the circumstances traditionally relevant to sentencing are taken into account.[125]

The constitutionality order in Dodo was made not long after minimum sentences came into operation, which means that *Dodo* could not gauge the effectiveness of the relatively harsh minimum sentencing regime. Other factors that make the Act vulnerable to a constitutional challenge include the fact that the Act is no longer temporary[126] and Regional Courts have greater powers concerning life imprisonment.[127]

6 A WAY FORWARD

A good starting point for sentencing reform would be a review of the report from the South African Law Commission which Parliament had at its disposal since December 2000.[128] The Commission investigated sentencing and its shortcomings extensively involving sentencing experts and other stakeholders and followed this investigation with a full set of recommendations.[129]

A review of the entire report falls beyond the scope of this article; but it may be useful to briefly consider some key findings included in the report as follows:

> "It is clear from the evidence presented to the Commission over a long period ... that the problems identified as having plagued sentencing in South Africa, continue to cause difficulties. It remains a problem that like cases are not being treated alike; that sentences do not give enough weight to certain

crimes that are consistently heavier than before; see also *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 (2) SACR 47 (CC) par 17.

125 *S v Vilakazi* 2009 (1) SACR 552 (SCA) par 15 and par 18; see also Terblanche *A Guide to Sentencing in South Africa* 79.

126 Before the Act became permanent judges recognised the poor drafting used in the Act, but excused it because of its temporary emergency nature; see Terblanche 2017 *PER/PELJ* 25; see also Terblanche *A Guide to Sentencing in South Africa* 91; see also Terblanche *A Guide to Sentencing in South Africa* 51 who states that "the scheme itself has variously been described as unsophisticated, as covering the field of serious crime in no more than a handful of blunt paragraphs', as providing for 'draconian sanctions,' as an invasive piece of legislation; The author points out that *Dodo* did not consider how the severity of the minimum sentences relates to the objective gravity of the different crimes in comparison with each other. In this regard, the Act provides for only four sentences for a wide range of serious offences namely life-, 15-years', 10-years' and 5-years' imprisonment.

127 See Terblanche 2017 *PER/PELJ* 26 who argues that the consequence is that life imprisonment is imposed by presiding officers with possibly less experience and competence, which could infringe on the equality and fair trial rights of the offender.

128 South African Law Commission "Sentencing (A New Sentencing Framework) Report Project 82" 2000 (Report); see also the preceding Discussion Paper 91. The Commission was renamed the South African Law Reform Commission in 2003 as per s 4 of the Judicial Amendments Act 55 of 2002.

129 Report par 1.42; see also *S v Vilakazi supra* at par 10: "A sophisticated system to construct guidelines for consistency in sentencing that would take care of the views of all interested parties was subsequently recommended by the South African Law Commission in December 2000. The recommendation was made after a comprehensive review of sentencing practice in the country and abroad, where sentencing guidelines in one form or another are common."

> serious offences; that imaginative South African restorative alternatives are not being provided for offenders that are being sent to prison for less serious offences; that sufficient attention is not being paid to concerns of victims of crime and that, largely because of unmanageable overcrowding, sentenced prisoners are being released too readily."[130]

From the above it is obvious that the Commission considered disparity in sentences as a major problem in the South African sentencing system, due to sentencers having a fairly wide discretion when sentencing offenders.[131] Furthermore, South Africa not having a comprehensive legislative framework for sentencing is a major contributor to the lack of consistency in sentencing because no legislative guidance is provided to the courts as to which approach to adopt when sentencing offenders.[132] To address this issue the Commission suggested that "one should have a clear idea of what the purpose of sentencing is and what principles should be applied to it."[133]

As a result, part of the recommendations was that the basic sentencing principles should be distinctly defined in legislation.[134] Furthermore, that a Sentencing Council be established that would produce sentencing guidelines that might better structure the exercise of sentencing discretion to counter the widely diverging sentencing practices of courts, thereby enhancing consistency in sentencing.[135] The Commission concluded that,

> "an ideal sentencing system should be seen to promote consistency in sentencing, deal appropriately with concerns that particular offences are not being regarded with an appropriate degree of seriousness, allow for victim participation and restorative justice initiatives and, at the same time, produce sentencing outcomes that are within the capacity of the State to enforce in the long term."[136]

Notably, the Commission excluded the mandatory minimum sentences as a possible option for sentencing policy reform.[137]

7 CONCLUSION

Despite being ineffective, mandatory minimum sentences remain prominent in South Africa's sentencing law.[138] This is contrary to the international trend

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130 Report par 2.1.

131 Report par 1.8; par 1.19–1.2; par 2.17 and par 3.14. See also Terblanche "Sentencing Guidelines for South Africa: Lessons from Elsewhere" 2002 120 *SALJ* 858–859.

132 Report par 1.16.

133 Report par 3.1.4.

134 Report par 1.44.

135 Report par 1.44; see also Report 3.1.17 where the Commission clearly stated the role and determination of sentencing guidelines together with their application upon conviction. Furthermore, it stated that a guideline may provide for a range of sentences, allowing for a 30 percent deviation upwards or downwards from the standard guideline. The criteria for reasonable departures from the basic guidelines was also specified.

136 Report par 2.5.

137 Roth "South African Mandatory Minimum Sentencing: Reform Required" 2008 17 *Minn J Int'l* 155 163.

138 Joubert *Criminal Handbook* 13ed (2020) 413. Even though these sentences are only applicable to offences specified in the Act and only applicable to High Courts and Regional

where governments are moving away from relating deterrence directly to sentencing.[139] The "incarceration philosophy" has electoral and crime benefits for politicians which can explain the lack of political will to abolish this misleading sentencing regime. There is therefore an urgent need for South Africa to de-politicise punishment and sentencing.

If we feel outraged by the high rate of violent crime, we need to find a sentencing regime that leads to the reduction of crime in line with the constitutional provisions, rather than the exacerbation of crime as is the case with the minimum sentencing regime. The primary focus should not be on punishment and sentencing to solve crime. Instead, the judiciary should be supported with the certainty of effective law enforcement and prosecution, meaning more arrests and more successful prosecution.

Additionally, South Africa urgently needs a sentencing system that can be justified by more than just retribution. The approaches recommended by the South African Law Reform Commission, to better structure the exercise of sentencing discretion to promote consistency in sentencing, amongst others as alluded to in this article, are supported.

Finally, it must be stressed that criminals who commit serious violent crimes should be punished severely but the ineffective and misleading minimum sentencing legislation is not the way.

Magistrates' Courts, "minimum sentences completely dominate court judgements reported about sentencing, and many discussions outside these courts."

139 Doob and Webster "Sentence Severity and Crime: Accepting the Null Hypothesis" 2003 30 *Crime and Justice* 149 191; see also Muntingh 2009 *Criminal (In) Justice in South Africa* 192; consider also the present situation in the United States that enacted the First step Act with the purpose of reforming "tough on crime" policies and reducing its overcrowded prisons. Some of the various reforms include widening federal judges' discretion to bypass mandatory minimum sentences, reducing sentences for drug offences, and reducing the three strikes penalty. The United States is where mandatory minimum sentences originated from, and which provided specifically the model for South Africa's statutory format.