

SENTENCING IN SOUTH AFRICA

CONFERENCE REPORT

25 – 26 October 2006, Commodore Hotel,
V&A Waterfront, Cape Town

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Acronyms and abbreviations

ATD	awaiting-trial detainee
DCS	Department of Correctional Services
MS	minimum sentencing
NPA	National Prosecuting Authority
OSF-SA	Open Society Foundation for South Africa
RJ	restorative justice
SALRC	South African Law Reform Commission
SAPS	South African Police Service
SCA	Supreme Court of Appeal

Introduction

The conference on sentencing in South Africa was organised by the Open Society Foundation for South Africa (OSF-SA) to: 1) present recent OSF-SA research on minimum sentencing (MS) and the impact of sentencing on the size of the prison population; 2) provide local and international perspectives on sentencing practice; and 3) provide an opportunity to further the debate on sentencing in South Africa.

The event was attended by 44 people, including academics from local and overseas universities; senior officials from the Department of Justice, the National Prosecuting Authority (NPA), the Office of the Inspecting Judge of Prisons and the Department of Correctional Services (DCS); members of Parliament's Portfolio Committee on Correctional Services; representatives from local and international NGOs; funders; and researchers, including the research team who did the OSF-SA research referred to in the previous paragraph.

1

Conference opening

Welcome and introduction

Sean Tait, Director: OSF-SA Criminal Justice Initiative



On behalf of the board and the staff at the OSF-SA it is my privilege to welcome you to this conference on sentencing in South Africa. We are particularly grateful to you for investing valuable time and of having come far distances to be here. We are confident that the collective wisdom of this gathering will be able to navigate these waters and lead us to appropriate insights that will guide the ongoing project of building and deepening democracy in South Africa.

Oversight with regard to sound sentencing practice is an important open society and rule of law issue. It is fundamental to ensuring that the constitutional rights of both accused and victims are upheld. Sentencing practice in South Africa has been criticised as being inconsistent and still influenced by issues such as race, gender and access to qualified counsel. We view this conference and its outcomes as one intervention in a range of interactions that will allow us to take the sentencing debate forward in the long term.

Minimum sentencing in South Africa will be a strong theme over the next two days. This has been the subject of two pieces of research commissioned by the Foundation, on the impact of sentencing on prison populations and on achieving the intentions of the legislation. The findings from this research will be presented and discussed later today and tomorrow. As you are all no doubt aware, MS was introduced into law by the Criminal Law Amendment Act 105 of 1997.

CHAPTER 1

The stated intention of the legislation was to promote consistency in sentencing, to address public concerns regarding the need to be 'tough on crime' and to reduce the levels of serious and violent crime. The legislation was intended as a temporary measure and is reviewed every two years. The relevant clauses in the Act were extended by the President for another two-year period in April 2005 and the next review is scheduled for April 2007. This makes the timing of conference particularly relevant.

However, this is not the sole focus of our discussion. Rather, we encourage you to use this opportunity to debate and discuss sentencing in South Africa more broadly, and Prof. Dirk van Zyl Smit will speak on the 2000 South African Law Commission report on sentencing frameworks and developments since the completion of that report.

Sentencing has been a source of much public debate. Minimum sentences were introduced to counter the perceived leniency in punishing serious offenders, coupled with the perception that offenders were not serving substantial enough portions of their sentences due to a lax parole policy. The public was also concerned about the nature and severity of sentences for heinous crimes after the abolition of the death penalty.

These debates continue and our discussions are not going to be any easier twelve years into our democracy. This conference is being held at a time when public opinion on safety, security and the response by the criminal justice system is particularly intense.

It is perhaps important to reflect on this before moving on to the substance of the days proceeding. Over the past few months South Africans have been increasingly vocal regarding their concerns on the state of policing in the country and for their safety. These concerns were backed by the recent release of crime statistics which show violent crime continuing at high levels and data from insurance and retail industry that show crime spiking over recent months. An August 2006 survey by Research Surveys revealed fear of crime is on the increase and, unbelievably, that three-quarters of urban South Africans live in fear of crime.

The police have been tasked to do whatever is necessary to provide safety and security for South Africans. Statements from government have increasingly called for a zero-tolerance approach to crime. Recently Minister of Safety and Security Charles Nqakula noted the increases in persons serving life terms as a success indicator of government's commitment to fighting crime. Meanwhile, in an editorial on 13 September, *Business Day* drew the stark comparison between our liberal Constitution and values it stands for and our increasingly illiberal approach to governance. On the one hand we preach restorative justice and on the other retribution and zero tolerance.

I will now hand over to Professor Michael Tonry to deliver our keynote address. Prof. Tonry is professor of Law and Public Policy at the University of Minnesota. He has been director of the Institute of Criminology, University of Cambridge, a visiting fellow of All Souls College, Oxford University, a senior fellow in the Meijers Institute of the Faculty of Law, University of Leiden

and a senior fellow of The Netherlands Institute for the Study of Crime and Law Enforcement. He has practised law in large commercial law firms in Chicago and Philadelphia and in rural Maine. He is the author or editor of a number of books on punishment and politics too numerous to mention here. Prof. Tonry is widely regarded as one of the leading international experts in sentencing and we are very privileged to have him with us today.

Dr Ann Skelton will respond to Prof. Tonry's presentation. She was admitted as an Advocate of the High Court of South Africa in 1988. Dr Skelton has been at the forefront of efforts to bring about changes to the system for children charged with crimes in South Africa for many years, and in this role has promoted restorative justice solutions. She was appointed by the South African Minister of Justice in 1997 to lead a project of the South African Law Commission to develop a comprehensive new statute regarding children accused of crimes. She achieved her doctorate in 2005 and is currently Director of the Centre for Child Law at the University of Pretoria. Dr Skelton has published a number of articles and books relating to children and the law. She has in recent years engaged closely in a range of litigation efforts related to sentencing of children and is thus able to provide new and interesting perspectives on jurisprudential developments in this regard.

Keynote address

Michael Tonry, Professor of Law and Public Policy, University of Minnesota



Introduction

My talk is based on ideas associated with three participants in this conference: Mark Mauer ('crime does not cause punishment'); Judge Johan Kriegler ('mandatory or minimum penalties do not have the benefits that are claimed for them') and Prof. Dirk van Zyl Smit ('sentencing policy should be reviewed to make it more predictable, accountable and transparent').

Crime does not cause punishment

Crime and imprisonment statistics from a number of First World countries over a 30-year period support Mark Mauer's proposition that 'crime does not cause punishment' – that incarceration rates are a matter of policy, and do not have significant effects on the level of crime.

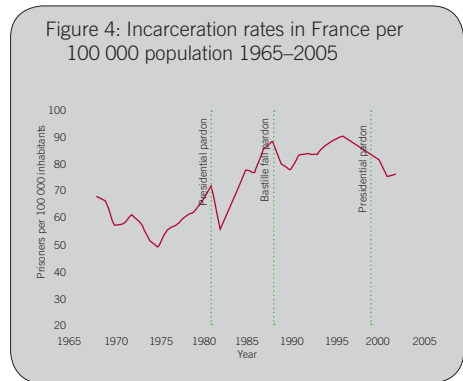
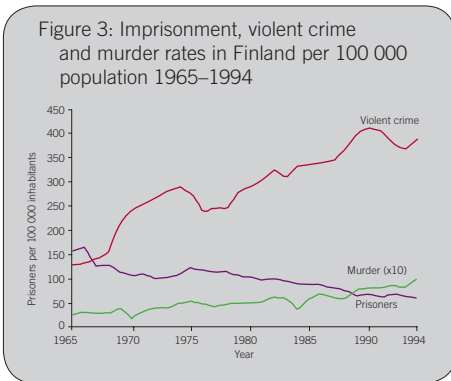
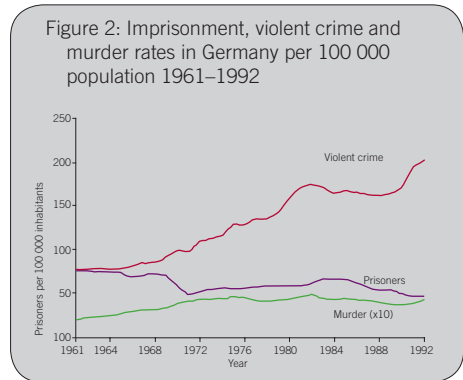
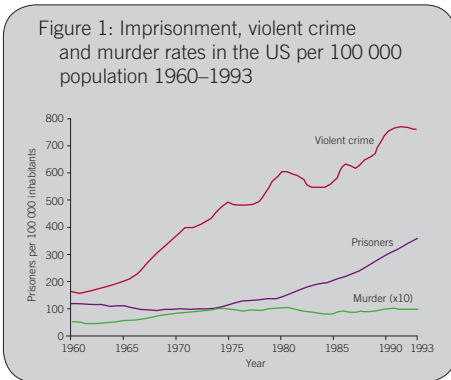
Over the period 1960–1993, violent crime in the US went up 4–5 times, the incarceration rate went up 3–4 times but the murder rate stayed fairly static (Figure 1). In Germany over a similar period (1961–1992), violent crime went up 3.5 times, the murder rate stayed at the same level, but imprisonment went down in the 1960s and stayed flat for 30 years (Figure 2). In Finland over the period 1965–1994, violent crime went up, murder rose substantially, but imprisonment went down (Figure 3). In France (Figure 4), the number of people in prison per 100 000 population zigzagged because there is a fundamentally different political culture and philosophy about crime and punishment. In that country, you are primarily a citizen. Everybody celebrates national events, and large numbers of prisoners are released every time there is a French presidential inauguration or a significant national event.

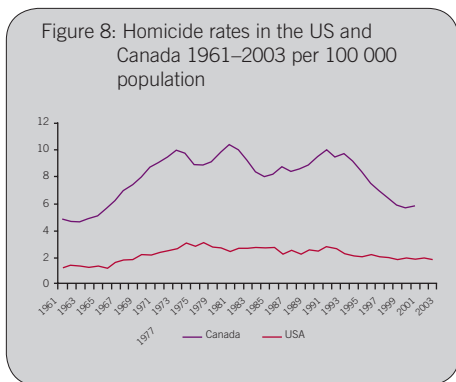
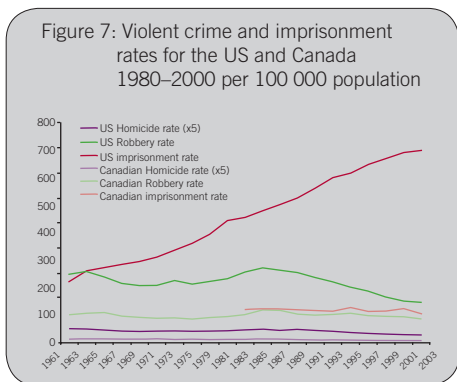
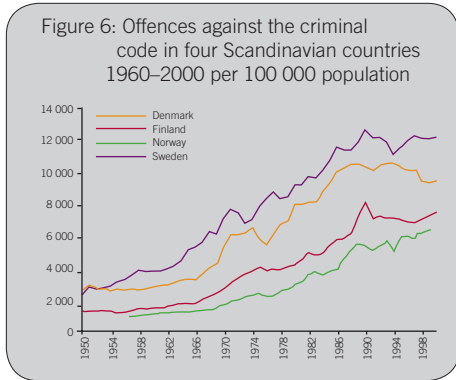
During the period 1950–2000, the incarceration rates in Denmark, Norway and Sweden were similar, and the imprisonment rate in Finland dramatically dropped over the period to a level similar to that of its neighbours (Figure 5). This is what the Finns wanted. They had been under Russian domination from the early 1800s to the mid-1900s, and had similar incarceration rates to the Soviet Union. By 1950, Finland decided it did not want to be eastern; it decided to look west instead, and wanted to demonstrate how Scandinavian it was by taking a deliberate policy decision to reduce the rate at which it incarcerated people. There was an enormous outbreak of crime in Finland when this decision was taken. However, if you look at comparative crime statistics across the four Nordic countries for the period 1960–2000,¹ the curves are almost exactly the same.

¹ Assuming these are actual crime rates – crime definitions vary from one country to another.

The US imprisonment rate has skyrocketed to about 4.5 times the Canadian rate, which has remained at about 100 per 100 000 since the 1950s (Figure 7). The homicide rates in the US over 40 years are far higher than those of Canada (Figure 8). But if you look at the relative change in homicide rates in the US and Canada (with the rates standardised at 1), you see the trends are very similar (Figure 9).

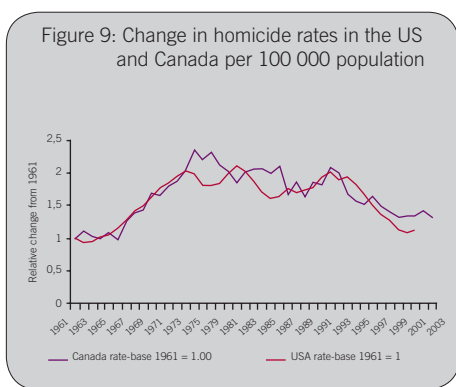
Again, this backs up the assertion that countries choose the rate at which their residents are incarcerated. France chooses from year to year what proportion of its people should be in prison. The US chose to increase its incarceration rate, but this has not affected its crime levels. The experience of Norway, Denmark, Sweden and Finland shows the level of imprisonment makes no difference to the level of crime – the Finns decided to stabilise their imprisonment rate and steadily drop it to the level of their neighbours as a matter of policy, but their crime rate curves were the same as those of their neighbours.





Minimum and mandatory penalties do not have the benefits that are claimed for them

As Judge Johan Kriegler has argued, the advocates of minimum and mandatory sentences claim that they act as a deterrent, and that they promote consistency in sentencing, but this is not supported by available evidence. Studies show judges and juries tend to avoid having to impose minimum/mandatory sentences, that such penalties have no deterrent effect (or a temporary one), and that sentences are not consistently applied. There are also cases where these sentences have led to profound injustices.



In 18th and 19th century England the death penalty was mandatory for about 150 crimes in the belief that this would reduce crime. Pick-pocketing was one such crime, but no deterrent effect was apparent – rampant pick-pocketing was reported at public executions of pick-pockets. Anybody found guilty of the theft of property worth more than £20 had to be executed. This was

later reduced to theft of only £5. In practice, when judges and juries felt uncomfortable about having to impose such a harsh sentence, they worked hard to evade minimum sentencing by finding thieves guilty of stealing only £4 and 19 shillings. Some thieves were pardoned. The pleading rules for a valid prosecution became increasingly technical to make it more difficult for this kind of whole-scale evasion to take place, but with little effect. The belief that minimum/mandatory sentencing would promote consistency in sentencing was also shown to be false. There was enormous inconsistency in what happened to individual thieves at that time. Some were convicted of stealing £4 and 19 shillings, some were executed, some were convicted and pardoned, and some convictions were overturned on technical grounds.

Mandatory penalties proliferated in the US over a long period of time for such offences as drug crimes, also motivated by the belief that this would act as a deterrent. The US experience indicates that these measures have no deterrent effect, and that large-scale evasion of having to impose such penalties has taken place. There have been cases where offenders have been imprisoned for 20 years on drug charges in circumstances where judges did not believe these sentences were appropriate. Several judges have resigned in protest, including two from the Federal Bench. The evasion finding is pretty consistent, as is the finding that minimum sentencing has no deterrent effect or that any short-term deterrent effect tends to wither away over time. Reducing particular crimes is a valid public objective, but minimum sentencing is not the way to achieve this goal.

Review sentencing policy to make it more consistent, accountable and transparent

There have been five or six ways that countries have reorganised their sentencing systems over the last 30 years to achieve systems that are more just – consistent, accountable and transparent. Some work, some do not. The best evidence points in one direction for South Africa.

Finland and Sweden have radically changed their sentencing laws in the last 30 years. They have sentencing principles which provide judges with guidance on most of the questions they are likely to be faced with, including the weight that should be accorded to a prior record; the extent to which a person is dangerous or can be changed through rehabilitation; and what difference it makes if a person is not really an adult (in Sweden anyone below 15 is legally incapable of committing a crime). Verbal statements of principle seem to produce a system that is highly consistent and they provoke stimulating debates about exactly how to apply a principle in a certain kind of case. In those countries, sentencing guidelines seem to make a difference.

In the UK, and to some extent in Canada and Australia, high courts may issue guideline judgments, but the jury is still out on whether this makes any difference to sentencing practice. There is no empirical evidence that this has an influence on what judges actually do in the UK.

In some US states, there are very detailed voluntary guidelines which tend to indicate sentences for every crime and every combination of prior record. Conscientious judges will look at these when considering a sentence. The evidence is that these have no demonstrable effect, although a major exception is in Delaware, where there are only 14 felony court judges, most of whom were involved in drafting the guidelines. Judges who disagreed with the guidelines left the bench, and new judges were influenced by sitting judges. Presumptive guidelines as in Minnesota, Washington, and Oregon seem to increase the consistency of sentencing in general and particularly in relation to race, gender, and geographical disparities.

Mandatory guidelines were part of the US Federal court system for about 20 years from 1987. These specified sentences such as robbery, with more and more serious penalties if, e.g., there was a firearm involved, if the firearm was fired, and so on. The official policy of the US Sentencing Commission was that judges ought to impose a very specific sentence. This meant that a number of potentially mitigating circumstances, e.g. a convicted person having family responsibilities, being a drug user, having a deprived childhood or making a contribution to the community, were not ordinarily regarded as a factor in sentencing. Sentencing became progressively harsher, frequently driven by the prosecution. This set of guidelines was resisted by the judiciary for the entire period that they were in force until 2004, when they were declared unconstitutional. The guidelines are now voluntary. Judges may impose what they consider to be an appropriate sentence, provided they give reasons for their decisions.

The Finnish and Swedish systems of sentencing principles tend to suggest very short periods of imprisonment – rarely more than a year, and often only for a week or two. The number of prisoners in those countries sentenced to more than three years is a fraction of 1%. The maximum sentence for most crimes is 14 years. This means the range of potential for inconsistency and disparity is very small. Those countries have a high-prestige career judiciary – a cadre of highly-talented professionals with a strong ethos about their duty to exercise justice. Students who want to be prosecutors or judges self-select in law school (although they may move back and forth between the two professions). The prosecution sees itself as a semi-judicial institution. The judiciary therefore puts strong professional and cultural norms into practice to preserve just sentencing principles. No US state could adopt Scandinavian principles because the political character of the US courts is so strong. But voluntary guidelines in US state courts can make a huge difference when there is a professional cadre of prosecutors and judges who share a professional ethos.

Conclusion

Crime does not cause punishment. There is nothing inherent in South Africa that suggests its incarceration rate should be 350–400 people per 100 000. Imprisonment rates are chosen by politicians; they are not the result of increased crime. The transitional character of South African politics makes it different from e.g. Sweden, but there is no reason to think that it is any different to any one of the countries where it has been shown that the level of imprisonment

makes no difference to crime. There is no evidence for the claim that mandatory/minimum sentencing has any impact on consistency of sentencing or the level of crime. The primary function of such sentences is for governments to symbolically say 'we are doing something about crime'. This does not seem to fool anybody. The percentage of people who say they are fearful to go out at night before and after the imposition of mandatory sentencing does not seem to change. The proposal of the South African Law Reform Commission for a structured approach is probably the only way to achieve reasonable consistency, predictability and transparency in sentencing. This also provides a potential mechanism for holding judges accountable – i.e. to ensure they apply a sentence appropriate to the offender rather than reflecting the personal attitudes of the judge. My suggestion to South Africa is: decide to reduce your imprisonment rate by 50%, persuade Parliament not to renew the minimum sentencing legislation, and follow Dirk van Zyl Smit's lead on a structured approach to sentencing.

Response from a restorative justice perspective

Dr Ann Skelton, Director: Centre for Child Law, University of Pretoria



Introduction

The modern theory of restorative justice is relatively new, and much of the writing about it has taken the form of description or advocacy. Some restorative justice (RJ) writers have been accused of taking a 'proselytising'² tone, and of 'promising too much',³ as they try to convince readers of the value of the approach.

Nevertheless, there are many thoughtful articles and books that critically explore RJ, question its theoretical basis, interrogate the claims made for it, and highlight its limitations.⁴ Recently, there has been an interesting development in the stance that modern retributivists or 'just deserts theorists' have taken towards restorative justice. Having initially engaged in academic arguments with advocates of RJ,⁵ it is apparent that such former critics now seek to find a way to reconcile the two approaches.⁶ This may be read as an endorsement from the critics that RJ is a force to be reckoned with, and I view it as grounds to suggest that any serious endeavour to reform the approach to sentencing in South Africa must include a full understanding of this form of justice.

- 2 Zedner 'Reparation and Retribution: Are They Reconcilable?' (1994) *Mod L R* 228.
- 3 Daly and Immarigeon 'The Past, Present and Future of Restorative Justice: Some Critical Reflections' (1998) *Cont J Rev* 21–46.
- 4 Walgrave (ed) *Restorative Justice for Juveniles: Potentialities, Risks, and Problems for Research* (1997); Daly and Immarigeon 'The Past, Present and Future of Restorative Justice: Some Critical Reflections' (1998) *Cont J Rev* 21–46; Ashworth 'Responsibilities, Rights and Restorative Justice' (2002) *Brit J of Criminol* 578–595; Johnstone (2002); Weitekamp and Kerner (eds) *Restorative Justice: Theoretical Foundations* (2002b); Zehr and Toews (eds) *Critical Issues in Restorative Justice* (2004).
- 5 Braithwaite and Pettit *Not Just Deserts: A Republican Theory of Criminal Justice* (1990); von Hirsch and Ashworth 'Not Not Just Deserts: A Response to Braithwaite and Pettit' (1992) *Oxford J Legal Stud* 83–98; Braithwaite and Pettit 'Not Just Deserts, Even in Sentencing: A Reply to von Hirsch and Ashworth' (1992) *Current Issues in Criminal Justice* 225–239; Ashworth and von Hirsch 'Desert and the Three Rs' (1993) *CICJ* 9–21; Van Ness 'New Wine in Old Wineskins: Four Challenges of Restorative Justice' (1993) *Crim L F* 251–276; Ashworth 'Some Doubts About Restorative Justice' (1993) *Crim L F* 277–299.
- 6 See von Hirsch et al. (eds) *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* (2003).

Definitions and elements

Because there are a number of different interpretations of what is meant by restorative justice, I feel that I must begin by clarifying which definition I am using as my starting point:

Restorative Justice is a process to involve, to the extent possible, those who have a stake in a specific offence and to collectively identify and address harms, needs and obligations, in order to heal and put things as right as possible.⁷

I see the essential elements of RJ as encounter, reparation, reintegration and participation. Recent writing appears to be adding new elements to the understanding of RJ such as harms and needs, obligations, retelling stories for the purposes of vindication and validation.

Contrasting models of restorative justice and retributive justice

In foundational writing, restorative justice was often explained by contrasting models of retributive and restorative justice. Howard Zehr's contrasting models of retributive and restorative justice, which he presented in 1990, were subsequently criticised. Zedner⁸ makes the interesting point that there has been a 'simultaneous renaissance of retributive and reparative models of justice'. She points out the two models are 'posed as antimonies whose claims rival one another and whose goals must be in conflict'. She views this as being counterproductive. In similar vein, Daly and Immarigeon⁹ comment that '[t]he rhetorics of crime and justice pull us towards simple understandings of 'good' and 'evil', whether in academia or popular culture'. They warn that restorative justice advocates wanting to supplant the 'evil' of repressive punishment with the 'good' of RJ may promise more than can be delivered. Brunk¹⁰ gives an account which stresses that restorative justice is not discordant with classical theories of punishment, and that it in fact shares some common ground with such theories.

7 Zehr (2002a) *Little Book of Restorative Justice* 37.

8 Zedner (1994) *Mod L R* 228–250.

9 Daly and Immarigeon (1998) *Cont J Rev* 37; Brunk (2001) 31–56; Barton 'Empowerment and Retribution in Criminal Justice' in Strang and Braithwaite (eds) *Restorative Justice: Philosophy to Practice* (2000) 55–76. See also Skelton (2002) *Brit J Criminol* 510, in which the author makes the point that a way must be found by restorative justice advocates to reconcile at least some aspects of the competing paradigms of justice.

10 (2001) 31–56.

In a recent publication Zehr acknowledges these criticisms and concedes as follows:¹¹

Zehr¹² recognises that both retributive and restorative theories of justice acknowledge ‘a basic moral intuition that a balance has been thrown off by the wrongdoing’. Where the two approaches differ is on the currency that will right the balance. Retribution as punishment seeks to vindicate and reciprocate, but it uses pain or punishment as its measure. RJ theory, on the other hand, provides the following:

[W]hat truly vindicates is acknowledgment of victims’ harms and needs combined with an active effort to encourage offenders to take responsibility, make right the wrongs and address the causes of their behaviour. By addressing this need for vindication in a positive way, restorative justice has the potential to affirm both victim and offender and help them transform their stories.¹³

Reconciling the paradigms

Recently, there has been an interesting development in the stance that modern retributivists have taken towards restorative justice. The early years of RJ debates were marked by intense exchanges highlighting the differences between the retributive and restorative justice approaches.¹⁴ Former critics now claim to be seeking a way to reconcile the two approaches.¹⁵ This could be read as an attempt to ‘co-opt’ RJ and redefine it within the retributive paradigm. Duff¹⁶ has contributed a chapter in a book edited by von Hirsch et al. dedicated to the question of

11 Zehr (2002a).

13 Zehr ‘Journey to Belonging’ in Weitekamp and Kerner (eds) *Restorative Justice: Theoretical Foundations* (2002b) 29.

14 *Ibid.*

15 Braithwaite and Pettit *Not Just Deserts: A Republican Theory of Criminal Justice* (1990); Von Hirsch and Ashworth ‘Not Not Just Deserts: A Response to Braithwaite and Pettit’ (1992) *Oxford J Legal Stud* 83–98; Braithwaite and Pettit ‘Not Just Deserts, Even in Sentencing: A Reply to Von Hirsch and Ashworth’ (1992) *CICJ* 225–239; Ashworth and Von Hirsch ‘Desert and the Three Rs’ (1993) *CICJ* 9–21; Van Ness ‘New Wine in Old Wineskins: Four Challenges of Restorative Justice’ (1993) *Crim L F* 251–276; Ashworth ‘Some Doubts About Restorative Justice’ (1993) *Crim L F* 277–299.

16 Von Hirsch et al. (eds) *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* (2003).

17 Duff (2003) 43–60. Duff has explored this idea previously: (2002) 82–100.

whether RJ can be reconciled with modern retributive approaches. Duff promises a reconciliation between the two approaches, but in fact spells out a vision in which restoration is demonstrated to occur through a retributive process of punishment. Braithwaite¹⁷ was persuaded to write a chapter for the same book. This might have come as a surprise to those who have followed the robust exchanges between Braithwaite and Pettit on the one hand, and von Hirsch and Ashworth on the other during the 1990s.¹⁸

Braithwaite finds himself at odds with many of the other contributors to the book, particularly on the issue of whether restorative justice embraces retribution, and the question of whether RJ includes punishment. He nevertheless finds some common ground: what liberal modern retributivists such as von Hirsch, Ashworth and Duff have in common with most RJ advocates is that they are all reductionists when it comes to punishment. They would all wish to place upper constraints or limits on the kinds of punishments that can be meted out for certain kinds of crimes, so that severe punishments, such as the use of imprisonment, should only be used for serious crimes.¹⁹ However, just deserts theory would also require the setting of lower limits, so that proportionality can be maintained, while RJ theorists would not require punishment, relying instead on the participants in the process to decide on the outcome. A restorative justice approach would allow mercy to trump proportionality.

The ‘How low can you go?’ question is one that bedevils a restorative justice approach to a sentencing framework. The emerging international jurisprudence has been somewhat disappointing for RJ advocates on this score. The first appeal court case to pronounce on the application of restorative justice was *R v Clotworthy*,²⁰ handed down by the New Zealand Appeals Court in 1998. In this matter a young family man, after a day of drinking, stabbed another man in an inexplicable display of aggression (which was entirely out of character). The wound was serious, having been perilously near the heart, and left a nasty scar. He was charged with wounding with intent to cause grievous bodily harm, and in the ordinary course, this offence was punishable by a maximum of 14 years’ imprisonment.

18 ‘Principles of Restorative Justice’ in Von Hirsch et al. (eds) *Restorative Justice and Criminal Justice: Competing or Irreconcilable Paradigms?* (2003) 1–20.

19 Braithwaite and Pettit *Not Just Deserts: A Republican Theory of Criminal Justice* (1990); Von Hirsch and Ashworth ‘Not Not Just Deserts: A Response to Braithwaite and Pettit’ 1992 *Oxford J Legal Stud* 83–98; Braithwaite and Pettit ‘Not Just Deserts, Even in Sentencing: A Reply to Von Hirsch and Ashworth’ (1992) *CICJ* 225–239; Ashworth and Von Hirsch ‘Desert and the Three Rs’ (1993) *CICJ* 9–21; Van Ness ‘New Wine in Old Wineskins: Four Challenges of Restorative Justice’ (1993) *Crim L F* 251–276; Ashworth ‘Some Doubts About Restorative Justice’ (1993) *Crim L F* 277–299.

20 In fact, a large part of the exchanges between Braithwaite and Pettit and Von Hirsch and Ashworth have been dedicated to arguing whose theory (Republican democratic or ‘just deserts’) provides the most coherent framework for the establishment and operation of those upper limits.

21 (1998) 15 *CRNZ* 651 (CA).

Prior to passing sentence, the sentencing judge referred the case to two barristers in Auckland who at that time organised restorative conferences.²¹ There was a ‘rich and emotional restorative justice meeting’²² between the two men, and the victim (who had previously spent time in prison himself) indicated that he could see no value to himself or to society in the offender going to prison. There was an agreement reached that the offender would pay a substantial amount for the victim to undergo plastic surgery to repair the scarring, and that he would undertake 200 hours of community work. In the light of this, the sentencing judge passed down a sentence of two years’ imprisonment, wholly suspended, on the condition that the terms of the agreement were carried out. On an appeal by the Crown, the Court of Appeal replaced the sentence with one of three years’ imprisonment, not suspended. Of particular relevance to the concept of restorative justice, the Court said:²³

We would not want this judgment to be seen as expressing any general opposition to the concept of restorative justice (essentially the policies behind ss 11 and 12 of the Criminal Justice Act). Those policies must, however, be balanced against other sentencing policies particularly in this case those inherent in s 5, dealing with cases of serious violence. Which aspect should predominate will depend on assessment of where the balance should lie in individual cases. Even if the balance is found, as in this case, to lie in favour of s 5 policies, the restorative justice application can have, as here, a significant impact on the length of the term of imprisonment which the Court is directed to impose. They find their place in the ultimate outcome that way.

Victims’ involvement in sentencing

This seems to relegate restorative justice to the status of a ‘mitigating factor’, an approach that most RJ advocates would find minimalistic. Braithwaite points out that the judgment disproves what modern retributivists presume about victims – that they will be inclined to be harsh in their approach to punishment. Ashworth²⁴ presents the ‘just deserts’ view that the victim’s involvement in sentencing is problematic, whether they are vindictive or merciful, and cites the United Kingdom Appeal Court case of *R v Nunn*²⁵ in support of this view. In this case the defendant had been sentenced to four years’ imprisonment for causing the death of a close friend by dangerous driving. When Nunn’s appeal against sentence came before the court, the court had before it written statements by the victim’s mother and sister, saying that although they recognised the need for some punishment, their own grief was being increased by the thought of the defendant having to spend four years in prison. They mentioned in their

22 Morris and Young ‘Reforming Criminal Justice: The Potential of Restorative Justice’ in Strang and Braithwaite (eds) *Restorative Justice: Philosophy to Practice* (2000) 11. The barristers carried out the conferences under the auspices of an organisation called ‘Justice Alternatives’.

23 Thorburn ‘Observing the Application of Restorative Justice in the Courts of New Zealand: A Brief Survey of Cases over 10 Years’ (2005) unpublished conference paper.

24 661.

25 2002 *Brit J Criminol* 588.

26 [1996] 2 *Cr. App. R* (S) 136.

statements that the victim's father and brother took a different view. The court dismissed the appeal, and had the following to say:

[T]he opinions of the victim, or the surviving members of the family, about the appropriate level of sentence do not provide any sound basis for reassessing a sentence. If the victim feels utterly merciful towards the criminal, and some do, the crime has still been committed and must be punished as it deserves. If the victim is obsessed with vengeance, which can in reality only be assuaged with a very long sentence, as also happens, the punishment cannot be made any longer by the court than would otherwise be appropriate.

This emphasises the essential clash of values between a retributive and restorative approach. The point of agreement is in the setting of upper limits (although there may be disagreement about where to set the upper limits). The retributive justice approach requires upper limits because of proportionality. The RJ approach favours upper limits because to allow a vengeful victim to weigh the balance in favour of an unreasonably harsh sentence only adds to the amount of harm in the world, and restorative justice promotes harm reduction. The point of disagreement is the setting of the lower limits. RJ would make room for the views of the victim who is merciful and the victim's views would be allowed to trump the 'just deserts' approach in appropriate cases.

The principle of proportionality is a major factor in deciding on a particular sentence in a criminal trial. Warner²⁶ asserts that in a criminal trial a sentence cannot be increased beyond a limit appropriate to the severity of the offence, neither on the grounds of possible future offending, nor on the grounds of the need to treat the offender. However, these considerations may tend to influence outcomes of RJ processes. Another concern relates to disparities in outcomes. RJ outcomes may be outside the range of penalties usually imposed by courts. Thus there is a risk that not only will there be internal inconsistency in RJ outcomes, but in addition there will be disparity between RJ outcomes and court outcomes for similar offences. Restorative justice as a theory is very much focused on processual issues – and the process in each individual case is viewed as part of a normative discourse in deciding what is just. In this it shares much common ground with indigenous justice systems, which are also largely processual in focus.²⁷ This emphasis on processual systems in RJ seems to pull in the opposite direction of pre-determined guidelines about what the outcome of a case should be. RJ processes, again like indigenous justice systems, do not place much store in precedents (there is no *stare decisis* principle) and are not greatly alarmed by disparity in outcomes. This is probably the area in which RJ most comes into conflict with sentencing framework systems that are based on just deserts theory, as one of the major aims of such framework systems is to reduce disparities in sentencing.

27 'Family Group Conferences and the Rights of the Offender' in Alder and Wundersitz (ed) *Family Conferencing and Juvenile Justice: The Way Forward or Misplaced Optimism?* (1994) 15–44.

28 Skelton 'The Influence of the Theory and Practice of Restorative Justice in South Africa with Special Reference to Child Justice' (2005, unpublished LLD thesis, University of Pretoria).

Restorative justice: An alternative punishment or an alternative to punishment?

The relationship of RJ to theories of punishment has been the subject of much debate. The definition of punishment by von Hirsch²⁸ is a useful starting point for the discussion. He describes punishment as the intentional infliction of a deprivation (hard treatment or pain) on someone, because he or she supposedly committed a wrong. Four crucial elements²⁹ can be identified within this understanding of punishment. The first is coerciveness (the fact that punishment must be obligatory), the second is the hard treatment inflicted, the third is the intention to cause suffering, and the fourth is the connection between the wrong that was done and the hard treatment. All elements must be present for a punishment to take place.

The main aspects of the debate may be summarised as follows: Duff³⁰ views RJ processes and outcomes as alternative forms of punishment. What is more, he says that not only is restoration compatible with retribution, he believes that it requires retribution. He acknowledges that this is controversial – after all most RJ advocates eschew retribution and punishment, while retributivists believe it is the state's responsibility to punish the offender to the extent that he or she deserves such punishment. Duff³¹ identifies elements of a RJ process as the offender feeling remorse, the offender experiencing censure from the victim and other persons present at the process and the offender coming under pressure to make reparation and then having to actually carry out such reparative action which may be costly in terms of time or money. All of these would be experienced by the offender as being painful, or at least 'burdensome', and according to Duff this is indeed punishment, which the offender deserves.

Braithwaite³² does not view RJ processes or outcomes as punishment. He is, however, realistic about the fact that participants in RJ processes may often be punitive. This is very likely, he observes, due to the fact that we are still in a stage of 'transition' between a punitive approach to crime and a restorative approach. His proposed solution is that by being involved in RJ processes they will learn about the merits of the new process. He also advocates standards to protect the rights of all participants.³³

29 *Censure and Sanctions* (1993) 9.

30 Walgrave 'On Restoration and Punishment: Favourable Similarities and Fortunate Differences' in Morris and Maxwell (eds) *Restorative Justice for Juveniles: Conferencing, Mediation and Circles* (2001) 19.

31 'Restorative Punishment and Punitive Restoration' in Walgrave (ed) *Restorative Justice and the Law* (2002) 82–100, (2003) 43–60.

32 (2003) 53.

33 (2003) 2: 'I part company with those who see punishment as a respectful way of raising our children, of dealing with criminals or with nations we disagree with. Compared with restorative dialogue, even non-restorative dialogue, it is less respectful.'

34 The issue of standards for restorative justice is discussed below.

McCold is one of the advocates of RJ who rejects punishment. He is even concerned about a RJ process that rests on the authority of the formal criminal justice system in cases where there is, for example, a failure to complete a RJ programme or plan. This will make the process coercive, and in McCold's purist³⁴ view, no restorative justice process should be coercive.

Walgrave³⁵ takes a more realistic view on coerciveness. He accepts that the restorative justice process will not always be voluntary, and that the state will then play the role of being the 'backup' to the RJ process in case of failure, or perhaps in cases where for some reason restorative justice is not appropriate.³⁶ Walgrave does not see restorative justice processes or outcomes as being punishment. Despite the fact that they may be experienced as painful or burdensome, the important distinction in Walgrave's view is that they are not *intended* as punishment.

The participative nature of RJ is key to its success. The victim, the offender and others present will all participate in deciding on the outcome.³⁷ The focus is on repairing the harm, and although there may be painful and burdensome side-effects of putting things right to the victim and to broader society, punishment is not the aim. The impersonal role of the sentencer in the criminal justice system is a starkly different one. The role of the sentencer is to mete out a punishment, and the only amelioration of this task is the fact that mitigating factors may be considered. The scope for really making a difference in the life of the victim, or a change in the offender, or in preventing future crime (except through incapacitation) is minimal within a mainstream criminal justice system that is rooted in a retributive approach. RJ, on the other hand, provides much better opportunities for constructive responses to crime which can result in more restoration for the victim,³⁸ a better chance of reintegration for the offender,³⁹ and a better chance of peace and safety for the community.⁴⁰

35 McCold ('Towards a Holistic Vision of a Restorative Juvenile Justice: A Reply to the Maximalist Model' 2001 *Cont J Rev* 357–414) is a proponent of the 'purist' version of restorative justice, which he refers to as a 'holistic vision'. The main point of departure between this purist approach and a maximalist one is the issue of coercion. McCold views any form of coercion as leading to punishment. In a purist restorative world, all actions would be voluntary. Walgrave ('How Pure Can a Maximalist Approach to Restorative Justice Remain?' 2000 *Cont J Rev* 415–432) rather amusingly calls this purist approach a 'national park for restorativists' that is not facing up to the realities of the outside world.

36 (2001) 19.

37 See further Bazemore 'Rock and Roll, Restorative Justice, and the Continuum of the Real World: A Response to 'Purism' in Operationalizing Restorative Justice' 2001 *Cont J Rev* 459–477; Braithwaite 'Decomposing a Holistic Vision of Restorative Justice' 2001 *Contemporary Justice Review* 433–440.

38 Some writers (Duff (2003) 58; Ashworth 'Responsibilities, Rights and Restorative Justice' 2002 *Brit J Criminol* 578–581) argue that this is problematic, that victims should not be involved in deciding on sanctions, as punishment is the domain of the state.

39 Wright 'The Court as a Last Resort' 2002 *Brit J Criminol* 654–657.

40 Johnstone (2002) 94.

41 Walgrave (2001) 30.

Does a RJ approach ever include harsh treatment imposed by the state such as imprisonment? I think it is accepted by most RJ advocates that society must in some cases have to resort to imprisonment – in cases where it would be more unjust not to do so – but that when we do imprison we should do so in the most respectful way possible. Restorative interventions should also be offered to the offender who is imprisoned, so the fact that a certain number of offenders will be imprisoned does not completely close the door on the benefits of RJ for them, nor for their victims.⁴¹

The SALRC Report and Sentencing Framework Bill

Where does all this theorising bring us in providing a restorative justice response to sentencing reform for South Africa – and in particular with regard to sentencing guidelines?

At first glance, the South African Law Reform Commission's (SALRC) report on sentencing and the draft Sentencing Framework Bill appears to be sensitive of restorative justice considerations. Indeed, the drafters should be commended for having incorporated these ideas into their work.

The report begins by explaining the key aspects of constitutional sentencing:

- 'Punishment must not be so severe as to infringe the human dignity of the offender.'⁴² Restorative justice advocates would not quibble with this.'
- 'Punishment must not be grossly disproportionate.'
- 'The problem of disparity must be dealt with, so that like cases are treated alike.'⁴³

The general idea that emerges here is that seriousness of the harm caused must be proportionate to the seriousness of the offence so that offenders can get their just deserts, and a focus on harm and culpability will enable a court to impose adequately severe sentences.

A fundamental departure point of RJ is that it focuses not on 'what crime has been committed?', but on 'who has been harmed, and what are their needs?' The focus on the seriousness of the crime, and the division of crimes into technical sub-categories does not, therefore, sit well with a restorative justice approach.

- Deterrence is a minor factor: 'general function of deterrence of crime is best served by the sentencing system if it is fair in that the penalties it inflicts are not disproportionate to the crime'.⁴⁴

42 Clairmont 'Penetrating the Walls: Implementing a System-Wide Restorative Justice Approach in the Justice System' in Elliot and Gordon (eds) *New Directions in Restorative Justice: Issues, Practice Evaluation* (2005) 245–265.

43 3.1.1 on p 35.

44 3.1.4 on p 35

45 3.1.6 on p 38.

I think RJ advocates would have no problem with this approach as they also do not set great store by deterrence, but just deserts theorists may well accuse the RJ approaches to lower limits of being likely to undermine proportionality and thereby also being of no assistance with general deterrence.

- ‘The restoration of the rights of victims’ must be accommodated, according to the report. The report says that ‘in principle, all sentences, even sentences of imprisonment, can be implemented in ways that grant opportunities for restorative programmes’.⁴⁵

It is necessary to examine the Bill to see how and if it achieves this. The report claims⁴⁶ that community penalties of correctional supervision and community service ‘will entrench principles of restorative justice in our criminal justice’. This is not necessarily true. Although community-based sentences may be alternatives to imprisonment in themselves, they do not qualify to be described as ‘restorative’ unless they include some or preferably all of the elements of restorative justice – encounter, reparation, reintegration and participation, (also harms and needs, obligations, retelling stories for the purposes of vindication and validation).

Correctional supervision and community service do not generally involve encounter, reparation for the victims, or participation for the victim. They do promote the reintegration of the offender, and stress the obligations of the offender in broad terms, though not specific for the victim.

Section 33 of the Sentencing Framework Bill lists a number of additional conditions to community penalties. One of these is ‘participates in mediation with the victim or in a family group conference’. Now we are talking the language of restorative justice. However, this is just a condition of the community sentence, the sentence has been set and so the victim does not have a say in the outcome. If the victim–offender or the family group conference indicates certain harms and needs, how are these to be factored in? The victim’s involvement seems to come too late in the process.

The section in the Bill dealing with reparation⁴⁷ does hold out some real hope to victims, but the victim is a rather passive role player in the scheme as it is set up. The court may, if it will not cause undue delay, direct that the victim be notified that he or she may attend the proceedings. It is not a requirement that that the victim participate, and the element of encounter is not part of the reckoning. Similarly, the inclusion of victim-impact statements,⁴⁸ although an improvement for victims compared with their situation in the current system, does not actually fully meet the elements of RJ, lacking as it does the element of encounter. Validation is often what the victim wants, as much as financial reparation.

46 3.1.8 on p 38.

47 3.3.34 on p 67.

48 Section 37.

49 Section 47.

The SALRC is unenthusiastic about suspended sentences, and doubtful about postponed sentences. Postponed sentences are included however, and this could possibly hold the key to a more direct and participative role for victims. If the passing of sentence is delayed for six months on the agreement that there will be a restorative justice process, the outcome of which is to be brought back to court, then the victim would feel that he or she is actually participating in the decisions about outcomes, and not being tagged on as ‘condition’, or his or her experience limited to being seen as ‘an aggravating factor’ in sentencing. The outcomes of the RJ process could be taken back to court to be endorsed as a sentence, or overruled if the framework limits have been exceeded. A true RJ approach, of course, would demand that outcomes be overruled only if they breach upper limits, not lower ones.

The big unknown is how the proposed Sentencing Council⁴⁹ will set up the sentencing guidelines – there is a danger that community penalties will only be available in less serious offences, which is not the case in our current law, in which correctional supervision can be and is used as a penalty for murder in appropriate circumstances.

Fledgling South African jurisprudence

Very quietly, a South African jurisprudence of restorative justice is growing, and I fear that the sentencing guidelines may cut across that. In the recent Constitutional case of *Dikoko*,⁵⁰ two separate but concurring minority judgments by Sachs J and Mokgoro J have referred expressly to restorative justice. This case dealt, interestingly, not with a criminal matter but a civil claim for damages arising from defamation. While the majority court awarded a hefty claim of financial damages, the dissenting judgments, focused instead on a restorative justice approach, made the point that dignity could not be restored through disproportionate punitive monetary claims, and that apology would have been a more powerful tool, more in keeping with African notions of ubuntu and our constitutional commitment to dignity.

Positive mention was made in the judgment to the recent and as yet unreported case of *S v Joyce Maluleke*.⁵¹ It arises from a case in which a woman was found guilty of murder in that she and her husband (who died before trial commenced) beat to death a young intruder who had broken into their house. She was destitute and a mother of four. The victim’s mother was hurt by the fact that no-one from the offenders’ family had come to their house to apologise for the wrongdoing, and she expressed a desire for this type of interaction. The sentence imposed was 8 years’ imprisonment, suspended for 3 years on condition, *inter alia*, that the offender should give an apology to the victim’s family.

50 Sections 8–12.

51 *Dikoko v Mokhatla* CCT 62/05.

52 TPD no CC 83/04.

Let me share with you the concluding words of Judge Bertelsman's judgment:

In addition, restorative justice, seen in the context of an innovative approach to sentencing, may become an important tool in reconciling the victim and the offender and the community and the offender. It may provide a whole range of supple alternatives to imprisonment.

The question that remains is whether, with a sentencing framework along the lines of the one described in the Sentencing Framework Bill, it will still be possible for innovative approaches to sentencing. Is it not likely that the outcome in the Maluleke case will be disallowed because it breaches the lower limits proportionality rule? Will RJ features in sentencing, then, be relegated to relatively minor offences, leading to the risk of a bifurcated system in which only the victims of some crimes can have the satisfaction of a restorative justice solution?

Conclusion

Ultimately, it must be recognised that sentencing policy in itself has limited power to reduce crime, and it almost certainly will not reduce the amount of harm that exists in the world. A reduction in crime is more likely to be brought about through social policy than through sentencing policy.⁵² A further problem in relying on sentencing policy to reduce crime is the fact that there is an arbitrariness in who gets caught and convicted and who does not.⁵³ Society does need to express a response to wrongdoing. Such response provides 'confirmation of the social norm by censuring transgression and/or positively influencing the offender'.⁵⁴

53 Sadurski 'Theory of Punishment, Social Justice and Liberal Neutrality' 1989 *Law and Philosophy* 351–373. Marxist criminologists and opportunity theorists do set their sights for crime reduction beyond the criminal justice system, but as Braithwaite (1989) (9) has observed: 'The world is yet to see a socialist revolution inspired by the desire to eliminate crime'.

54 Chaskalson P made this point clearly in *S v Makwanyane* (1995) (2) SACR 1 (CC) 122 when he said the following: 'The greatest deterrent to crime is the likelihood that offenders will be apprehended, convicted and punished. It is that which is presently lacking in our criminal justice system; and it is at this level and through addressing the causes of crime that the state must seek to combat lawlessness'. It was common cause in argument before the court that 60–70% per cent of offenders who commit serious crimes are not apprehended at all and a substantial proportion or those who are are never convicted. With regard to less serious crimes such as theft and housebreaking, the proportion of those not arrested and convicted is arguably higher.

55 Walgrave (2001) 28.

Censure has a symbolic role that signifies⁵⁵ and communicates the fact that society cares about wrongful actions. Some theorists define this perspective as ‘communicative’.⁵⁶ It is the idea that the criminal justice system has, as one of its central functions, the task of communicating to the accused that (if he or she is found to be guilty) he or she is guilty of some wrongdoing and that that wrongdoing is of the type that is appropriately responded to, by ‘censure’⁵⁷ or as some describe it, ‘reprobation’⁵⁸ Often referred to as ‘denunciation’, this perspective has gained recognition as a major function of and a justification for sanctioning. Denunciation is not intrinsically connected to any particular approach to or theory of punishment.⁵⁹ Furthermore, some argue that punishment is not the only means of expressing censure.⁶⁰

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- 56 Garland (*Punishment and Modern Society* (1990) 252–253) makes the point that the reach of symbolism in punishment goes far beyond the ambit of criminal justice: ‘[T]he practices, institutions and discourses of penalty all *signify*, and the meanings which are conveyed thereby tend to outrun the immediacies of crime and punishment and ‘speak of’ broader and more extended issues. Penalty is thus a cultural text – or perhaps better, a cultural performance – which communicates with a variety of social audiences and conveys an extended range of meanings’.
- 57 The communicative perspective appears to have developed from the idea that punishment serves an ‘expressive’ function, see Feinberg ‘The Expressive Function of Punishment’. (1965) *The Monist* 397–408. A communicative theory of punishment is shared by punishment theorists from across the philosophical spectrum. Duff (*Trials and Punishments* (1986)) and Von Hirsch (*Censure and Sanctions* (1993)) are both modern retributivists (though they differ on their approach to ‘hard treatment’), while others who ascribe to the communicative perspective; for example Braithwaite and Pettit (1990), are consequentialist or utilitarian in their approach to punishment theory.
- 58 Maltravers ‘What to Say? The Communicative Element in Punishment’ in Maltravers (ed) *Punishment and Political Theory* (1999) 108.
- 59 Braithwaite and Pettit (1990) 160–164.
- 60 Some writers (Braithwaite (1989) 88–90; Braithwaite and Pettit (1990); Oldenquist (1986) *The Public Interest* 72–80) support denunciation from a consequentialist or utilitarian perspective, while others (such as Duff (1986); Von Hirsch (1993)) support it from a retributive perspective. According to Bean (1981) 21–22) Lord Denning’s famous words ‘[t]he ultimate justification of any punishment is not that it is a deterrent, but that it is the emphatic denunciation by the community of a crime’, recorded in the *Report of the Royal Commission on Capital Punishment* (1984) s 53, were put forward in support of the death penalty. However, denunciation is also recognised as a legitimate policy approach by the South African Constitutional Court (which declared the death penalty unconstitutional in *S v Makwanyane* (1995) (2) SACR (CC)).
- 61 Braithwaite and Pettit (1990) 161–162.

In the South African Constitutional Court judgment of *Minister of Home Affairs v NICRO*⁶¹ Chaskalson CJ held that 'at the level of policy it is important for the government to denounce crime and to communicate to the public that the rights that citizens have are related to their duties and obligations as citizens'.⁶²

The court found that the power of denunciation, however important, is constitutionally constrained.⁶³ The means used to effect the denunciation must be compatible with the values society seeks to affirm. Thus brutal punishments such as hangings or whippings must be outlawed not because they are ineffective, but because they conflict with the values of dignity and humanity. In the landmark case of *S v Makwanyane*,⁶⁴ Mahomed DP⁶⁵ (concurring with the majority judgment) expanded on this idea by pointing out that it is not only the dignity of the person to be executed which is invaded. The dignity of everyone, in a caring civilisation, is compromised by systematically and deliberately repeating the act that we find to be repugnant in the offender.

RJ offers the means of allowing the community to feel that society cares and is doing something about crime. The victim is not only the object of restitution, but an agent in the process of denunciation. The offender is not only the object of the denunciation but expressly becomes a participant in it. The community does not merely observe the process, it has denunciatory obligations, and it engages with the rupture caused by the crime, and thus finds a way to 'heal' the harm that has been done. RJ is truer to its aim for justice in the manner in which its processes are carried out – by providing opportunities for the direct involvement of the victim, offender and members of the community in the resolution of disputes, and allowing a negotiation on the issue of how amends should be made, rather than one which is simply imposed by professionals. The process maintains the confidence of the victims and society more broadly to fulfil their function of denouncing crime and to do so with the minimum amount of coercion, restriction or exclusion.⁶⁶

62 2005 (3) SA 280 (CC).

63 The matter pertained to rights of sentenced prisoners to vote, and the Minister of Home Affairs contended that to allow sentenced prisoners to vote would send an incorrect message to the public that the government is soft on crime. The court roundly rejected this argument (par 56): 'A fear that the public may misunderstand the government's true attitude to crime and criminals provides no basis for depriving prisoners of fundamental rights that they retain despite their incarceration'.

64 On this point the court approvingly cited the Canadian case of *Sauvé v Canada (Chief Electoral Officer)* (2002) SCC 68.

65 1995 (2) SACR 1 (CC). This case declared the death sentence to be unconstitutional.

66 Par. 272.

67 See generally Cragg (1992), who claims that the main function of law is to provide a way of resolving conflicts in a manner involving the minimum use of force or violence.

I argue, therefore, that a restorative justice understanding of criminal justice creates the most appropriate framework for denouncing crime in South Africa. We must ensure that we look beyond Western models for the answers to how to solve our criminal justice problems. Restorative justice, understood within the context of its resonance with African justice processes, should be fully factored into our plans for reform in the field of sentencing.

Comments and questions to Session 1 speakers

The public's desire for punitive action

- How can we make people accept that imprisonment must be a last resort? There are 400 members of Parliament, most of whom believe that criminals should be locked up and the keys thrown away. If we do not come up with a convincing argument about why imprisonment is not the only answer, we will be in serious trouble.

Prof. Tonry: In the US every year since 1962, 80% of people consistently say that courts are too lenient, regardless of whether crime is going up or down. Some politicians have said they do not want to go against public opinion because they are concerned with the rights of victims. We have seen mandatory sentences rise from 1–2 years in the 1960s to life without the possibility of parole in the 1990s. Changing the minds of those who believe in imprisonment is a hard hill to climb.

The Finnish case

- Was the consistent decline of prisoners in Finland a result of incremental changes in penal policy, or did numbers steadily decline as people left the system? How did the political establishment in that country deal with the political repercussions of crime going up once the policy was announced?

Prof. Tonry: There were around 50 policy changes in the period 1965–2002 aimed at reducing imprisonment in Finland, including reducing sentences, changing parole rules and so on. Only about 10 policy changes went in the opposite direction. Finland stayed the course until it achieved the objective. There was never any public mass concern that imprisonment was going down at the same time that crime was going up. People deferred to professionals and drew great solace from being favourably compared with other Scandinavian countries.

Informal RJ

- There is strong informal RJ in urban communities, but law enforcement officials try to undermine those agreements. Families demand reparation. If reparation is paid, they withdraw charges. If not, they proceed with the case. Police resent this because they don't want to open a docket which may never be prosecuted because it has a negative impact on the statistics of that station. They resist opening a docket if they suspect this kind of thing is going on.

Dr Skelton: Crime victims often want conversation with perpetrators. Some people say that informal RJ should be allowed within the community; that not every dispute needs to go through the criminal justice system. Others say that this opens the door to sexual offences being settled with a payment without any regard for the well-being of the women and girls who have been damaged.

Disproportionate numbers of ethnic minorities in prisons

- Finland and Sweden are racially homogeneous, but in the US a disproportionate number of African Americans are in prison.

Prof. Tonry: US race relations are pretty awful, but racial disparities in many other countries are far worse. In the UK, the ratio of racial minorities is 8.5:1, in Australia it is 12:1, in Canada 16:1, in the Netherlands 10:1. Minorities tend to comprise different groups in different countries. In France, it is people from the Maghreb; in Germany, Turks; in the UK, Irish; in Sweden, Finns.

Financial pressures to reduce the US prison population?

- Some states in the US are changing mandatory sentences because of the financial pressure of having a large long-term prison population.

Prof. Tonry: All the states have financial pressures, but the federal government does not, so states are unlikely to reduce sentences. Even when US inflation was at an all-time high in the 1970s, the states did not pay attention to pleas to reduce imprisonment. If the political culture is such that elected representatives are like-minded, affordability is not a consideration. If they see it as a defence against crime, they spend the money anyway. We are in a period where there is some reduction of minimum sentencing laws in the US, and it is slightly easier to leave prison, but no state has repealed minimum sentencing. The Minnesota state legislature responded to a few murders by instructing the Sentencing Commission to double minimum sentences, and they did so at a stroke. Every year US imprisonment goes up. Even tiny percentage increases are huge absolute increases.

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The Criminal Law Amendment Act no. 105 of 1997

Sentencing policy developments in South Africa, 1994–2006

Deon Rudman, Deputy Director-General: Legislation and Constitutional Development, Department of Justice and Constitutional Development



Introduction

The aim of this paper is not to give a comprehensive overview of sentencing policy in South Africa, but to focus on two specific developments, namely the introduction of minimum sentences for certain serious offences in 1998 and the Sentencing Framework Bill as proposed by the South African Law Reform Commission (SALRC).

In order to locate the discussion around sentencing reform in South Africa within the realm of sentencing reform globally, this paper also makes reference to recent developments in certain other jurisdictions. Finally, this paper briefly raises some issues that should be considered in developing sentencing policy in South Africa.

Against the background of the abolition of the death penalty, in *S v Makwanyane* 1995 (3) SA 391 (CC), there was a need to ensure that persons who were convicted of serious offences were appropriately sentenced in a consistent manner. The Criminal Law Amendment Act, 1997 (Act no. 105 of 1997) came into operation on 1 May 1998, to provide for the setting aside of all sentences of death in accordance with the law and their substitution by lawful punishments such as imprisonment for life and to provide for minimum sentences in respect of certain serious offences. During the Second Reading Debate on the Criminal Law Amendment Bill, on 6 November 1997, the then Minister of Justice, Dr Dullah Omar, described the introduction of minimum sentences for certain serious crimes as ‘an important matter for our country and in the fight against crime in particular’.⁶⁷ The Minister observed that he was mindful of the fact that there were a number of arguments for and against the introduction of a minimum sentencing framework. He summarised the arguments against the introduction of minimum sentences as follows:⁶⁸

- A statutory obligation on courts to impose minimum sentences impinges on the independence of the judiciary.
- The introduction of minimum sentences will undermine, instead of strengthen, the administration of justice.
- Mandatory minimum sentences set the wrong tone for sentencing reform in South Africa.
- Mandatory minimum sentences have, in the past, elicited very severe criticisms.

He then continued by summarising the main arguments in favour of the introduction of minimum sentences as follows:⁶⁹

- There is a public demand for more stringent punishment for convicted offenders.
- The introduction of minimum sentences will help to restore confidence in the ability of the criminal justice system to protect the public against crime.
- The introduction of minimum sentences confirms the Government’s policy, which aims to curb the increasing crime rate and to protect the community against criminals.
- In terms of the proposed legislation, the courts are granted a discretion to deviate from the prescribed minimum sentences. The introduction of minimum sentences ... could therefore not be regarded, in this Bill, as being interference with the independence of the judiciary.
- And most importantly, these provisions relating to minimum sentences are designed to ensure that our courts are able to deal effectively, in terms of sentencing, with the kinds of serious crimes which we have witnessed in our country and which our people unfortunately still experience.

68 *Hansard* November 1997, cols. 6084–6120.

69 At 6086.

70 At 6086–7.

This paper will concentrate in some detail on the arguments that are often raised regarding the operation of minimum sentencing legislation in South Africa. But first, the focus briefly falls on the content and constitutionality of the minimum sentences provisions and their application in practice.

Sections 51(1) and (2) of the Act prescribe minimum sentences for persons convicted of offences referred to in Parts I, II, III, or IV of Schedule 2. Section 51(3) provides that should a regional court or a High Court be satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the prescribed minimum sentence, then it should enter those circumstances on the record of proceedings and may thereupon impose such lesser sentence. The identification of 'substantial and compelling circumstances' has been invoked on a regular basis in practice to justify a departure from the prescribed minimum sentences. Therefore, arguments to the effect that the Act limits the sentencing discretion of the courts or that the Act undermines 'individualised sentencing' are questionable, if weighed against the wide interpretation that the courts have given to the phrase 'substantial and compelling circumstances'. It should further be noted that, in a resolution of Parliament circulated amongst all stakeholders to outline the legislature's intention by providing for the application of the test of 'substantial and compelling circumstances', it was stated that the intention was 'to create a very stringent test, the application of which would not lead to unfair results in practice, and one from which the courts cannot deviate indiscriminately'.⁷⁰ Suggestions have been made, especially by women's rights groups on behalf of rape victims, that the legislature should stipulate circumstances which would not qualify as 'substantial and compelling' to ensure that judicial officers do not invoke factors which are irrelevant and which should not warrant a sentence less than the minimum prescribed.

Minimum sentences are not applicable to a child who was under the age of 16 when committing the offence. Should a court decide to impose a minimum sentence upon a child who, at the time of the commission of the offence, was 16 years or older, but under the age of 18 years, the court has, in terms of section 51(3)(b), to enter its reasons for its decision on the record of the proceedings.

71 Resolution adopted by the Portfolio Committee on Justice and Constitutional Development.

However, in Jan *Hendrik Brandt v The State*⁷¹ the Supreme Court of Appeal (SCA) held as follows:

To summarise:

- (a) The legislative scheme entails that the fact that an offender is under 18 although over 16 at the time of the offence automatically confers a discretion on the sentencing court which is more free to depart from the prescribed minimum sentence.⁷²
- (b) In consequence the sentencing court is generally free to apply the usual sentencing criteria in deciding on an appropriate sentence.
- (c) The offender under 18 though over 16 does not have to establish the existence of substantial and compelling circumstances because s51(3)(a) finds no application to him or her.
- (d) By contrast with the class of offender under 16, however, the statutory scheme requires that the sentencing court should take into account the fact that the legislature has ordinarily ordained the prescribed sentences for the offences in question. This operates as a weighting factor in the sentencing process.
- (e) It follows on this approach that where the provisions of s51(2) apply the regional court retains its competence to finalise the matter contrary to the conclusion in *Makwetsja*.⁷³

There is probably room for some debate regarding this interpretation of section 51(3)(b), but the result of the *Brandt* decision is nevertheless that children between 16 and 18 years of age are not subject to the imposition of minimum sentences.

Section 52(1) of the Act provides that where a regional court has convicted an accused of an offence referred to in Parts I–IV of Schedule 2 and the court is of the opinion that the offence concerned merits punishment in excess of the jurisdiction of a regional court, then the court must stop the proceedings and commit the accused for sentence as contemplated in section 51(1) or (2) by a High Court having jurisdiction.

72 Case number 513/03.

73 At par. 11 the SCA held as follows: 'It may decide in the exercise of its sentencing discretion to impose the minimum sentence prescribed by s51(2) for an offence of the kind specified in Schedule 2. That a discretion to impose the minimum sentence does indeed exist is clear from the use of the words 'decides' and 'decision' in s51(3)(b). The sentencing court is called upon in the exercise of its discretion to make a decision as to whether or not to impose the minimum sentence prescribed by the Act'.

74 In *Direkteur van Openbare Vervolgings, Transvaal v Makwetsja* (2004) (2) SACR 1 (T) it was held that 'Die streekhof moet alle gevalle waarin 'n skuldigbevinding aan 'n misdryf soos in Deel I van Bylae 2 tot die Wet vermeld uitgespreek word vir vonnis na die Hooggeregshof verwys: ook die gevalle waar die beskuldigde ten tye van die pleging van die misdryf tussen 16 en 18 jaar oud was' at par. 49.

Section 53(1) of the Act provides that sections 51 and 52 shall cease to have effect after the expiry of two years from the commencement of the Act, unless their operation is extended by the president by proclamation in the *Gazette* in terms of section 53(2), with the concurrence of parliament, for two years at a time. The operation of sections 51 and 52 of the Act was first extended for a 12 month period on 1 May 2000.⁷⁴ During this period, the Act was amended by the Judicial Matters Amendment Act, 2000 (Act no. 62 of 2000), which came into effect on 23 March 2001. Subsequent to the amendments made to sections 51 and 52 of the Act, the operation of the Act was extended, with effect from 1 May 2001, for a further 24 months.⁷⁵ On the expiry of this period the operation of sections 51 and 52 were extended for another 24 months with effect from 1 May 2003,⁷⁶ and in 2005 the operation of the minimum sentences provisions was again extended for a further 24 months until 30 April 2007.⁷⁷

The constitutional validity of both sections 51 and 52 of the Act was tested in 2000 and 2001.⁷⁸ The Constitutional Court in both instances dismissed the constitutional challenges against the provisions of the Act. In *S v Dzukuda*, the Constitutional Court had to deal with a referral from the High Court for confirmation of a declaration of constitutional invalidity of section 52 of the Act. The High Court had based its decision on four aspects of section 52 that allegedly infringed an accused's right to a fair trial in terms of section 35 of the Constitution, namely a) the fragmentation of the trial caused by the referral procedure in section 52; b) the nature of the sentence that could be imposed and the sentencing discretion within such fragmented trial; c) the adverse consequences for the accused of the procedures detailed in section 52(3); and d) the institutional delay inherent in section 52. The Constitutional Court held that 'it had not been established, either for the reasons furnished in the High Court judgment, or for any other reason, whether taken individually or collectively that the provisions of s 52 of the Act limited an accused's right to a fair trial under s 35(3) of the Constitution. It followed that the order made by the High Court ought not to be confirmed'.⁷⁹ In *S v Dodo*, the Constitutional Court had to deal with an application from the High Court for confirmation of a declaration of constitutional invalidity of section 51(1) of the Act.

75 Proclamation No. R23 of 2000, *Government Gazette* No. 21122.

76 Proclamation No. R29 of 2001. *Government Gazette* No. 22261.

77 Proclamation No. R40 of 2003. *Government Gazette* No. 24804.

78 Proclamation No. R21 of 2005, *Government Gazette* No. 27549.

79 *S v Dzukuda and Others* (2000) (4) SA 1078 (CC) and *S v Dodo* (2001) (1) SACR 594 (CC).

80 Par. J at 1083 and A at 1084.

The High Court declared the section in question to be constitutionally invalid, because it was inconsistent with s 35(3)(c) of the Constitution⁸⁰ and was also inconsistent with the separation of powers required by the Constitution. The Constitutional Court held that the declaration of invalidity could not be confirmed, and that s 51(1) does not compel the court to act inconsistently with the Constitution. The procedures under both sections 51 and 52 were therefore held to be constitutional by the Constitutional Court.

The introduction of minimum sentences legislation was accompanied by changes to the law governing the granting of bail and the placement of offenders on parole. Certain categories of serious offences, in terms of which minimum sentences could be imposed, were identified as instances in which the accused's right to bail could be limited. With regard to parole, it was suggested that 'section 52 of the Bill under consideration (minimum sentences legislation) will amount to nothing more than window dressing if urgent steps are not taken to control the early release of countless serious offenders'.⁸¹ In terms of section 65(4)(b) of the Correctional Services Act, 1959 (Act no. 8 of 1959) a prisoner could not be considered for placement on parole until half the period of imprisonment to which he or she was sentenced had been served. In reality however, due to credits earned by a prisoner under section 65(4)(a), prison sentences were cut by as much as three-quarters of the original term. The Correctional Services Act was amended, by section 9 of the Parole and Correctional Supervision Amendment Act, 1997 (Act no. 87 of 1997), which, in respect of the release on parole of a person who has been sentenced to life imprisonment or sentenced in terms of section 51 of the Act, provides as follows:⁸²

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- 81 The High Court reasoned that if it were not bound by the provisions of s 51(1) of the Act it would have imposed a sentence other than life imprisonment; on its construction of the phrase 'substantial and compelling circumstances' the discretion to depart from the imposition of mandatory life sentence arose when such sentence would occasion a shocking injustice, would be grossly disproportionate to the crime committed or startlingly inappropriate or the Court formed the view that such sentence was offensive to its sense of justice or when such sentence was disturbingly inappropriate; if it were bound by the provisions it would be obliged to impose a sentence of life imprisonment, the circumstances relating to the murder count on which the applicant had been convicted not being 'substantial and compelling' so as to warrant the imposition of a lesser punishment.
- 82 Written submission to the Portfolio Committee by the Office of the Attorney-General Western Cape, at page 12.
- 83 Regarding a person who has been sentenced to life imprisonment, section 63(2) of the Correctional Services Act, 1959, as substituted by section 7 of Act 87 of 1997, provides that a parole board must submit a report with recommendations on the possible placement of such a person on parole at the court which sentenced the person. In this regard section 64B(1), provides that a court, to which such a report has been submitted, may order that the person concerned be placed on parole on the conditions determined by the court. Provision is further made that if the court decides that the person should not be placed on parole, the court must determine the period of imprisonment which the person must serve before he or she may again be considered for placement on parole (section 64B(2)).

- (b) A person who has been sentenced to–
- (v) life imprisonment, shall not be placed on parole until he has served at least 25 years of his sentence: Provided that he may be placed on parole when he has reached the age of 65 years and has served at least 15 years of his sentence;
- (vi) imprisonment contemplated in section 52(2) of the Criminal Law Amendment Act, 1997, shall not be placed on parole unless he has served at least four fifths of the term of imprisonment imposed or 25 years, whichever is the shorter; ...

Although the minimum sentences provisions have been found to be constitutional, the legislation has been under attack since its inception from those opposed to the imposition of minimum sentences. The main arguments that have been formulated against the imposition of minimum sentences are briefly stated and analysed below.

Response to the assertion that minimum sentencing legislation limits judicial discretion

Already, during the Second Reading Debate on the Criminal Law Amendment Bill, the then Minister of Justice explained that, ‘In terms of the proposed legislation, the courts are granted a discretion to deviate from the prescribed minimum sentences ... The introduction of minimum sentences, ... , could therefore not be regarded, in this Bill, as being interference with the independence of the judiciary’.⁸³ The Criminal Law Amendment Act specifically provides presiding officers with the discretion to deviate from the prescribed minimum sentences. In comparing this feature of South Africa’s minimum sentences legislation with minimum sentences provisions in other countries, Roberts found that ‘this feature of the South African provisions – combined with the fact that the penalties are mandatory minimum sentences rather than mandatory sentences – provides courts with more discretion than might otherwise be the case’.⁸⁴ In 1995, Canada created a number of mandatory sentences of imprisonment, which apply to a number of serious offences when the crime was committed using a firearm.⁸⁵ In Canada there is no discretion for judges to reduce the sentence for anyone convicted of an offence carrying a mandatory minimum sentence.⁸⁶ A mandatory life sentence is imposed in Canada upon conviction of three offences: treason, first degree murder and second degree murder. In other words, there is no ‘judicial discretion’ clause in the Canadian legislation that permits judges to impose a lesser sentence than the prescribed minimum. From a survey of case law in South Africa, it is submitted that this particular concern regarding the alleged infringement of judicial discretion has not been borne out by practical experience. The discretion provided for in section 51(3)(a) of the Act has indeed led to a situation where

84 *Hansard* 6 November 1997, cols. 6086–6087.

85 *JV Roberts Mandatory Sentences of Imprisonment in Common Law Jurisdictions: Some Representative Models* (2005) compiled for the Research and Statistics Division, Department of Justice, Canada (at page 22).

86 As above at page v.

87 As above and at page 9.

'substantial and compelling circumstances' have been invoked in many cases to substantiate a sentence less than the minimum prescribed by the Act and has led to varying interpretations of this exception.

Response to the assertion that minimum sentencing legislation is a major cause of gross overcrowding of prisons

Firstly, as this Act has only been in operation for eight years, it follows that those prisoners who have been convicted of serious crimes and sentenced in terms of the Act would probably in any case have been imprisoned during this period.⁸⁷ Secondly, even if this argument is only made in regard to the possible future impact on the overcrowding of prisons (as is alleged in the 2005/6 Annual Report of the Inspecting Judge of Prisons), it would be difficult to determine whether or not the application of minimum sentence provisions is the major cause of prison overcrowding. Under the minimum sentence provisions, long-term prison sentences are only required to be imposed in respect of the most serious offences, and only if there are no substantial and compelling reasons why a lesser sentence should not be imposed. The question thus arises whether any of the murderers, rapists, etc. who, after May 1998, have been convicted and sentenced under the minimum sentence dispensation, would have received sentences that would have seen their release from prison substantively earlier than would have been the case, had it not been for the said provisions? No particulars have thus far been furnished of any case where such individual 'wrongdoing' has occurred. Since the full particulars of every prisoner who is incarcerated are available to the Department of Correctional Services, it might be useful to conduct an 'audit' to determine an estimate of the numbers of persons who would probably have been released by this time, had it not been for the minimum sentence provisions. This would be most helpful in order to establish the extent to which the minimum sentence provisions may have an impact on overcrowding in prisons.

While acknowledging the seriousness of the problems experienced with overcrowded prisons in South Africa, the following arguments should also be taken into account:

1. The SALRC, in its *Report on a New Sentencing Framework* (2000), found that stakeholders were 'almost unanimous in their opinion that the capacity of the correctional system to carry out sentences should not be considered when sentencing

88 Prof. Julian Roberts, from the Centre for Criminology at the University of Oxford, made the following observations in this regard: (1) The impact of minimum sentences in South Africa could not as yet have played a role in prison overcrowding in South Africa. (2) The number of prisoners sentenced in terms of the minimum sentences legislation makes up only a percentage of the prison population and could not be blamed for overcrowding of prisons. (3) Those prisoners sentenced under the minimum sentences legislation would in any case have been sentenced to terms of imprisonment, as no alternative sentences would have been appropriate due to the seriousness of the crimes committed. (Interview held with Prof. Roberts at SALRC conference in Cape Town, March 2005).

accused persons'.⁸⁸ This factor becomes more important when taking into account that minimum sentences are only prescribed for certain serious offences. It could therefore not be assumed that the repeal or lapsing of the minimum sentence provisions would result in lesser sentences being meted out to those convicted of serious crimes. Real solutions to the problem should perhaps lie in an alternative sentencing framework for less serious offences, the non-imprisonment of awaiting trial prisoners accused of less serious crimes, etc. It should also be borne in mind that the replacement of the minimum sentence provisions with a new sentencing framework is not likely to result in significantly fewer lengthy terms of imprisonment, as the focus of such legislation will be on promoting uniform sentencing practices and not on providing for more lenient sentences in respect of serious offences. The number of long-term prisoners depends mainly on the following factors:

- a. length of sentences imposed;
- b. number of serious crimes being committed; and
- c. number of convictions in respect of those crimes.

If we accept that the most serious offences would invariably be punished with long terms of imprisonment (regardless of the existence or not of minimum sentence provisions), the number of those crimes being committed, along with the arrests and conviction rate in respect thereof, become increasingly important.

2. It is an undeniable fact that the government has, over the past decade, invested vast resources (human and otherwise), in the combating of serious crime. This has resulted in the appointment of thousands more police officers, a considerable increase in the capacity of the NPA, more judicial officers and the establishment of a number of specialised courts. This has, in turn, led to more arrests (regardless of inclines or declines in the number of offences), more convictions and the imposition of more long-term sentences of imprisonment.
3. Calls have been made, by, amongst others, the previous Inspecting Judge of Prisons, for the deletion of provisions relating to the periods that must be served by sentenced prisoners before they can be considered for parole. In particular, a request has been made for the deletion of the requirement that those sentenced in terms of the minimum sentencing legislation must serve four-fifths of their sentence before they can be considered for parole. In this regard, note must be taken of the fact that in practice it seems that the four-fifths requirement is in any case not being applied. Prof. Terreblanche of Unisa highlighted the fact that 'very often the warrant of incarceration does not stipulate that the sentence has been imposed in consequence of Act no. 105 of 1997, in which case Correctional Services will probably not enforce the four-fifths rule'.⁸⁹ Women's rights organisations have highlighted the extremely

⁸⁹ Page 64 of the SALRC report.

⁹⁰ Speech delivered by Prof. SS Terreblanche of Unisa at the Centre for the Study of Violence and Reconciliation Conference 'A new decade of criminal justice in South Africa'.

negative effect that an early release of a convicted rapist has on a rape victim, who has not had a chance to completely heal.⁹⁰

4. Reference is frequently being made to the fact that it is 'the certainty of punishment rather than the severity of the sentence that is likely to have the greatest deterrent impact'. It follows naturally that, as the certainty of punishment, and thereby the number of those sentenced to terms of imprisonment, increase, then the problem of overcrowding will also be affected. According to the former Inspecting Judge's Report (par 6.5), the total prison population of the Republic in December 2005 was 157 402, of whom 111 075 were convicted prisoners serving their sentences (70 435 of whom were serving sentences longer than seven years). The South African Police Service (SAPS) crime statistics for 2004/5 show that during that period there were
 - a. 18 793 murders;
 - b. 55 114 rapes; and
 - c. 126 789 instances of robbery with aggravating circumstances,

That is a total of 200 696 offences just in respect of those three categories of offences. If, for example, 10% of those offenders could be apprehended and convicted, 20 600 persons would be added to the long-term prison population. The total number of those offences committed during the past five years amount to a staggering 988 574, which, at an arrest and conviction rate of 10%, would result in 99 000 people being incarcerated for a long term of imprisonment. A fluctuation of just 5% in the arrest and conviction rate in this regard would amount to an increase or decrease of no less than 49 500 prisoners. Furthermore, during the NPA's report to the Portfolio Committee on Justice and Constitutional Development for the 2006 budget hearings, the NPA indicated that its conviction rate improved from 80% in 1999/2000 to 86% in 2004/5. In addition, the NPA is planning to appoint 890 additional prosecutors over the next three years, which should contribute further towards increasing the conviction rate.

5. Finally, reference should be made to the observations made by Prof. Roberts in response to the apprehension expressed by criminal justice professionals in South Africa to the extent that mandatory sentences have contributed to the country's high (and rising) prison population. He came to the following conclusions in this regard:⁹¹

However, two reasons argue against the position that the mandatory sentences have played a role in this regard. First, as noted, most commentators agree (and the judiciary acknowledge) that courts frequently use their discretion to circumvent the prescribed sentence, and second, that the small number of offences included in the legislation could not account for the much larger number of admissions to custody.

91 Submission from the Western Cape Consortium on Violence against Women on file with author.

92 Roberts at page 23.

Response to the argument that the non-extension of the Act will not result in a legal vacuum

The first point to be made here is that the SALRC found that the South African sentencing system, before the enactment of minimum sentencing legislation, faced various problems.⁹² With the enactment of minimum sentencing legislation, at least two of the problems highlighted by the SALRC are receiving some attention, namely ‘that sentencers do not give enough weight to certain serious offences and that sufficient attention is not being paid to the concerns of victims of crime’. Apart from the SALRC’s *Report on a New Sentencing Framework*, no other research has been conducted to address the problems that our sentencing system has faced even before the enactment of minimum sentencing legislation. In the absence of research to this extent it is impossible to determine whether the non-extension of the Act will leave a legal vacuum or not.

The application of the minimum sentence provisions has given rise to a number of practical difficulties. The NPA and other commentators have highlighted specific problems experienced with the interpretation and application of the provisions of the Act, such as those relating to the referral of cases for sentencing from the regional courts to the High Court. Should the operation of these provisions be extended, the problem areas would need to be addressed through amending legislation.

The implementation of minimum sentences and changes to the law governing the placement of offenders on parole were not the only developments regarding sentencing policy in South Africa in the past decade. In 1996, the Minister of Justice asked the SALRC to investigate all aspects of sentencing in South Africa. A project committee under the leadership of Judge Van den Heever operated from late 1996 to March 1998, focusing on mandatory minimum sentencing and restorative justice. The Van den Heever committee completed its term of office without consolidating its work in a discussion paper or legislative proposals. In late 1998, a new committee was appointed by the Minister of Justice and Professor Dirk van Zyl-Smit was elected project leader. As the minimum sentencing legislation had been enacted in May 1998, this committee undertook to determine the impact that the new Act had had, both on the sentencing outcomes and on the perceptions of this form of sentencing by key role players in the criminal justice system. As a result two research projects were commissioned,

93 The SALRC identified the following problems that faced our sentencing system: ‘There is a perception that like cases are not being treated alike; that sentencers do not give enough weight to certain 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 the concerns of victims of crime; and that, largely because of unmanageable prison overcrowding, sentenced prisoners are being released too readily’ (page xix of the *Report on a New Sentencing Framework*).

one focusing on statistical data on sentencing practices before and after the enactment of the Act,⁹³ and the other on the attitudes of key role players to the Act.⁹⁴ The combined results of these two studies formed the background against which the SALRC developed a report on a new sentencing framework for South Africa.⁹⁵ In December 2000 the report was submitted to the Minister of Justice. The Sentencing Framework Bill was referred back to the SALRC by the Department of Justice in 2001 to address concerns regarding an appendix setting out amended and repealed legislation.⁹⁶

The Sentencing Framework Bill (hereinafter referred to as the Bill) presents numerous challenges of its own and the focus of this section of the paper is to briefly identify and discuss some of the issues. It is not intended to discuss the entire framework proposed by the Bill, since it is accepted that other presenters would do so in detail. The first issue to be highlighted is the fact that it is clear that the Bill does not foresee the continued operation of the minimum sentences legislation.⁹⁷ In England mandatory sentences for serious offences were created by the Crime (Sentences) Act of 1997. The Criminal Justice Act 2003 established, for the first time in England, a mechanism for generating sentencing guidelines to be issued by a Sentencing Guidelines Council. The establishment of a Sentencing Guidelines Council with a mandate to develop sentencing guidelines did not however lead to the repeal of the Crime (Sentences) Act of 1997. Therefore, apart from repealing the mandatory life sentence for a second conviction of a serious offence, all the other mandatory sentences are still in place in England notwithstanding the establishment of a Sentencing Guidelines Council.⁹⁸ The Minnesota Sentencing Guidelines Commission was established in 1978. Not only has provision been made in Minnesota for mandatory life sentencing, mandatory minimum sentences and maximum sentences, but the Sentencing Guidelines Commission is also required to report annually to the legislature on reports received from county attorneys on the operation of mandatory minimum sentences.⁹⁹ The conclusion could therefore be drawn that it is not uncommon for minimum sentences legislation to exist side by side with sentencing guidelines and that the one does not necessarily exclude the other.

94 These empirical studies focused on the period between June 1999 and January 2000.

95 Both research aspects were combined in a research paper: 'Empirical Study of the Sentencing Practices in South Africa', published in March 2000.

96 'Report on a New Sentencing Framework', Project 82, November 2000.

97 See clause 58 of the Bill, page 138 of the SALRC's Report.

98 Clause 58 of the Bill proposes the repeal of sections 51 to 53 of the Criminal Law Amendment Act, 1997.

99 See discussion in Roberts at page 14.

100 See clause 14 of Chapter 244 of the Minnesota Statutes 2005. Available at: <http://ros.leg.mn/stats/244/09.html>.

The SALRC listed the need to promote consistency in sentencing as the first aspect, out of a number of factors identified as part of an ideal system, which it strived to achieve through the Bill.¹⁰⁰ In clause 4 of the Bill, provision is however made for judges to depart from the sentencing guidelines and to give a lesser sentence than that stipulated by the guidelines where there are substantial and compelling circumstances that justify such reduction. Currently judges frequently identify ‘substantial and compelling circumstances’ in order to justify a departure from the prescribed minimum sentences and this has been identified as one of the main reasons why the minimum sentences legislation has not resulted in uniform sentencing practices in regard to at least serious offences. The possibility therefore exists that, through exercising the discretion to deviate from the sentencing framework, the objective of consistent sentencing practices might be frustrated. Another factor that seems to contradict any efforts at attaining consistency in sentencing relates to clause 5(4) of the Bill, where provision is made for the possibility of developing different sentencing guidelines for specified magisterial districts.¹⁰¹ Yet another factor to take into account in the quest for sentencing consistency is the fact that clause 5(7)(a) of the Bill provides for an increase or decrease of up to 30% in the severity of a sentencing option, apart from the fact that a judge could still find that substantial and compelling circumstances exist. This is not to mention that, in terms of clause 6(4) of the Bill, departures from the sentencing guidelines may also be made upwards if the seriousness of the offence requires a sentence that is substantially more than what the guidelines allow for.

With regard to the composition of the proposed Sentencing Council, it should be noted that the majority of members appointed represent the judiciary. It is interesting to note that the SALRC themselves identified the most obvious concern with having the council composed as such, namely the fact that ‘there might be some concern about whether judges should be involved in a policy-making organ, which would generate sentencing guidelines that the judiciary itself would later have to apply’.¹⁰² The SALRC then relied on a judgment from the Supreme Court of the United States to justify the appointment of judges to an independent commission.¹⁰³ The checks and balances built into the separation of powers model of the United States clearly differs from that followed in South Africa and it begs the question whether the SALRC took this aspect into account, especially in the light of the fact that the Sentencing Council is clearly not accountable to parliament.

That brings us to one of the main concerns with the proposed Bill, namely the fact that it not only takes away parliament’s powers to legislate on sentencing but it also does not give parliament an oversight role. Provision is merely made in the Bill for the Minister of Justice or the Minister of Correctional Services (the executive) and parliament to ask the council to consider the development of guidelines for a category of offences that the public might regard

101 At page 26.

102 See explanation at page 44.

103 Report at page xxi and 29.

104 At page xxi and 29.

as not being treated with the appropriate degree of seriousness. In other words, apart from asking the council (which consists mostly of members of the Judiciary) to consider developing guidelines, the executive and the legislature would have no means to influence the sentencing framework and would not be able to do so through the passing of legislation. The reason for not allowing the executive or legislature to influence the sentencing framework through legislation is, according to the SALRC, that it might 'disturb the balance of the sentencing system as a whole or result in sentences that could not be implemented in the long run'.¹⁰⁴ Provision is made for the Sentencing Council to submit an annual report to parliament (clause 12 of the Bill), but this is merely for parliament's information and does not require parliament's approval.

In looking at other jurisdictions where sentencing councils have been established to develop sentencing guidelines, it seems that oversight and accountability is firmly placed with the legislature. In Minnesota for instance, the Sentencing Guidelines Commission must submit any modification which amends the Sentencing Guidelines grid, including severity levels and criminal history scores, or which would result in the reduction of any sentence or the early release of any inmate, to the legislature for approval.¹⁰⁵ The legislature may also require a modification of the existing sentencing guidelines or it can adopt legislation to this effect.¹⁰⁶

It should be clear from the above that, in plotting the way forward towards further developing sentencing policy in South Africa, we are faced with a number of challenges and arguments in respect of which there are few 'clear cut, right and wrong' arguments and/or approaches. It is perhaps fitting that, being an official attached to the executive, I conclude by drawing attention to the following passage from the Constitutional Court's judgment in *Dodo*:

[33] On this part of the case I accordingly conclude as follows:

- 33.1 While our Constitution recognises a separation of powers between the different branches of the state and a system of appropriate checks and balances on the exercise of the respective functions and powers of these branches, such separation does not confer on the courts the sole authority to determine the nature and severity of sentences to be imposed on convicted persons.
- 33.2 Both the legislature and the executive have a legitimate interest, role and duty, in regard to the imposition and subsequent administration of penal sentences.
- 33.3 The concomitant authority of the other branches in the field of sentencing must not, however, infringe the authority of the courts in this regard.
- 33.4 It is neither possible nor, in any event, desirable to attempt a comprehensive delineation of the legitimate authority of the courts in this regard.
- 33.5 For purposes of this case it is sufficient to hold that the legislature is not empowered to compel any court to pass a sentence which is inconsistent with the Constitution.

105 At pages 29–30.

106 See clause 11 of Chapter 244 of the Minnesota Statutes 2005. Available at: <http://ros.leg.mn/stats/244/09.html>.

107 As above.

Notes on a new sentencing framework for South Africa

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Introduction

Current concerns are focused, quite rightly, on the shortcomings of the existing mandatory minimum sentencing legislation and the distorting effect that it has had on South African sentencing and criminal procedure. It is worth reminding ourselves, however, that there were, and still are, important positive reasons for a radical overhaul of the sentencing framework that existed prior to the introduction of the current mandatory sentencing legislation.

Participants at this meeting will have been given copies of the South African Law Commission's *Report on a New Sentencing Framework* (2000). At the end of the report is draft legislation for a Sentencing Framework Bill that would, as its title suggests, create such a positive framework. I would urge everyone concerned to study the details of this Bill and do not propose to repeat them in these notes. Nor do I propose to repeat the research on which the report is based, for much of that has been supplemented by more up-to-date studies that are before you. Instead, these brief notes will focus on the continuing case for positive reform and then turn to the key aspects of the Bill itself. The case for positive reform remains; indeed it is stronger than ever. It has not been seriously debated in South Africa. I also continue to believe that the draft Bill offers a logically coherent solution to the problems that bedevil sentencing in South Africa.

The continuing case for positive reform

In essence the Law Commission found that there were perceptions of a number of deep underlying problems:

- Like cases were not being treated alike.
- Sentencers were not giving enough weight to certain serious offences.
- Imaginative South African restorative solutions were not being provided for offenders that were being sent to prison for lesser offences.
- Sufficient attention was not being paid to the concerns of victims of crime.
- Prisoners were being released too easily from overcrowded prisons.

Even in 2000 when the SALRC reported, it was clear that the mandatory sentence legislation did not offer a solution to these problems. At best it increased the penalties for some serious crimes but at a cost of a great distortion to the criminal justice system. If anything, it exacerbated the other shortcomings. What is still required is a much more fundamental rebalancing of the

system as a whole. The proposals of the Law Commission represent a concerted attempt to develop such a rebalanced system and thus still deserve very careful consideration.

The commission recognised that, in the overall process of imposing and implementing sentences, all three branches of government – the legislator, the executive and the judiciary – had key parts to play, but that these needed to be looked at afresh.

- It is acceptable for the legislator to set up a framework within which sentences must be imposed as part of an overall criminal justice strategy but it must be sufficiently flexible to allow justice to be done in individual cases.
- It is acceptable for courts to impose individualised sentences but they must be imposed within the framework provided by the law.
- It is acceptable for the executive to administer a system of punishment that includes early release, particularly conditional release, to facilitate integration into the community and reduce recidivism, but it must not be administered in a way that undermines the authority of the courts. (The same applies to variations in non-custodial sentences.)

The key objective was to create a framework for a new partnership between the three branches of government. As the Law Commission was concerned with legislative reform, it was the legislator that should take the lead.

The Bill that the Law Commission asked the legislator to consider has three key elements:

- First, it seeks to set in legislative form the principles that should guide all sentencing and thus proposes to cut through a slough of conflicting jurisprudence in this area.
- Second, it seeks to create a mechanism that would guide the courts in imposing sentences that meet the sentencing principles and that would be within the capacity of the penal system to deliver, thus meeting the criticism that punishments that were being imposed were not being carried out.
- Third, it would replace the detailed and often confusing provisions on sentences in the current Criminal Procedure Act with a coherent system that would link with the progressive elements of the 1998 Correctional Services Act and provide sentencers and even the public with clear understanding of what various kinds of punishment meant. This third aspect is particularly important as a package of apparently technical legislative changes, and the repeal of some current provisions will go a considerable way towards dealing with many of the major faults of the current system.

My talk focuses primarily on the third aspect as I believe that in the search for a grand scheme we sometimes underestimate the detailed reforms that are required for a simple but effective sentencing system. However, some general comments need to be made about the other two aspects.

Sentencing principles

Section 3 that deals with sentencing principles is particularly important as it relates both to sentencing in general and to more specialised aspects of sentencing guidelines to which I will return. It sets the starting point of proportionality between the seriousness of the offence and the sentence. Seriousness in turn is defined in terms of harm and culpability. Once this point of departure has been established, concerns about rights of victims, protection of society and ‘rehabilitation’ (although the word is not used) come into play. There are two qualifications to this primary scheme: previous convictions may be considered to a moderate extent and downward departure resulting in a sentence that is less than proportionate to the offence is possible as a result of other ‘substantial and compelling’ factors (Section 4). At the general level there is no scope for upward departure: a heavier than proportionate sentence could not be imposed to deter others, for example. These provisions would codify much current jurisprudence, thus meeting a requirement for legal clarity, but more importantly they would provide a much clearer framework for reasoning about sentencing than has hitherto been available.

Sentencing guidelines

The second important area is the creation of sentencing guidelines. Here one must distinguish clearly between, on the one hand, the principles according to which guidelines will be developed and the manner in which they will be applied, and on the other hand the mechanism for creating them.

The principle is that guidelines for subcategories of offences should reflect the seriousness of offences in terms of Section 3. Once this has been done, the actual sentences that are prescribed for each subcategory should reflect the capacity of the correctional system to implement them. In order to deal systematically with capacity issues, guidelines would in practice have to be developed to cover all the major offences that make up the bulk of the prison population. Courts would have to apply the guidelines. The guidelines themselves would allow a measure of flexibility – the draft suggests a variation of 30% from the specific guidelines. Courts would have even more flexibility if the offences were substantially more or less serious than the norm. They would also be able to depart downwards from a guideline on substantial and compelling grounds other than seriousness.

The composition of the body responsible for developing the guidelines is not a matter of principle. It is a matter of establishing a body that will be able most effectively to draw up guidelines that will meet the objective of achieving fair and affordable sentencing outcomes. The Sentencing Council proposed in the Bill would have a strong judicial component but would include sentencing experts and representatives of the prosecution and the correctional services as well. The executive, through the Ministers of Justice and Correctional Services, would be able to compel the council to consider specific problem areas but would not be able to influence the outcomes directly. While the proposed composition of the council may be controversial, it still seems to me that a body composed more or less on these lines is

most likely in the South African context to have sufficient independence to withstand the pressures that are likely to be placed on it. In particular the large role given the judiciary on the council may be controversial. However, the structure of the Bill is such that they could not undermine the design and return to the previous system, which allowed judicial discretion to be exercised in individual cases without a wider understanding of the capacity of the criminal justice system as a whole. (The details of the composition and operation of the Sentencing Council are contained in sections 7 to 12 of the Bill.)

Sentencing options

The third area of reform proposed by the commission and contained in the Bill is the overhaul of the sentencing options and the detailed procedures for their implementation. In the South African debate hitherto, these areas have not received the attention they deserve. The sentencing options included directly in guidelines are only three: imprisonment, fines or community penalties, but each of these may be supplemented by a sentence of reparation – which will be discussed separately below. There is also provision for a caution and discharge.

Imprisonment, the Bill provides (sections 14 to 21), shall only be used for serious offences and shall not be used where the guidelines offer another option, except where it is required to protect society. Imprisonment for life is explicitly recognised as the most severe sentence and may be imposed only where the offence is extremely serious. These provisions taken together give clear guidance to sentencers (and to drafters of guidelines) that imprisonment should only be used as a last resort.

Many aspects could be highlighted (there is also provision for limited suspension of sentences, for example) but to focus only on life imprisonment for the moment: One of the features of sentencing in South Africa post the abolition of the death penalty has been the massive increase in the use of life imprisonment, a penalty which was hardly ever imposed directly while the death penalty was in operation but is now imposed very much more often than the death penalty ever was. As the empirical studies have demonstrated, the profligate use of life imprisonment preceded the introduction of the mandatory minimum sentencing legislation but was certainly aggravated by it. What should have happened is that life imprisonment as the ultimate penalty should have been imposed only for the most serious offences, those for which the death penalty had previously been imposed. These were mostly murders for which no extenuating circumstances could be found and a small handful, never as many as a dozen, other cases annually. The provision on the use of imprisonment, together with the guidelines, provides a framework for ensuring that life imprisonment is used only for such cases. This should have an important effect not only in reducing the number of lifers but also in providing a narrower anchoring point for the sentencing structure as a whole. This in turn will provide a logical basis for reducing proportionately the other very long sentences of imprisonment for offences of intermediate seriousness, which, as the empirical work has demonstrated, is the most important cause of prison overcrowding in South Africa.

The imposition of fines is another aspect of sentencing in South Africa that is ripe for reform. The Bill provides a modified system of day fines, or unit fines as they are sometimes called, in which the fine is first related to the seriousness of the offence in terms of units and a monetary value is then attributed to the units in terms of the financial means of the person being fined. Considerable thought has also been given to the suspension of fines and alternatives other than prison in the case of non-payment and this is reflected in the Bill.

The proposed legislative change relating to community penalties is perhaps the best example of removing unnecessary complexity from current South African law. Community penalties will be of two kinds only – correctional supervision and community service – but may be combined with a range of additional conditions that mirror those which the new Correctional Services Act allows for conditional release of various kinds. There is provision too for a flexible regime that can respond effectively to partial failures to adhere to the conditions of the penalty without having the person automatically sent to prison.

Finally, with regard to sentencing options, is the question of reparation: The Bill provides that reparation must be considered in every case. It may be imposed in lieu of any fine but also be imposed directly in addition to any penalty.

Procedures and repeals

Procedural matters and the repeal of other legislation may seem to be only lawyers' details but in fact they would hold the key to making the proposed Sentencing Framework Act an effective replacement for what we have now. Thus the procedure allows for detailed evidence on matters such as the financial status of the accused and the impact of the crime on victims to be brought before the court more easily. It also provides that victims may ask to be informed about subsequent parole procedures. The sentence must be clearer too with reasons for sentence in open court in all cases. Sentences of imprisonment will be backdated automatically to take account of time served awaiting trial and time served must be taken into account when other sentences are imposed too.

The key laws repealed would be the minimum sentencing provisions in the 1997 Criminal Law Amendment Act and amendment-encrusted Chapter 28 of the 1977 Criminal Procedure Act in its entirety. This simple device will have a liberating effect on the Correctional Services Act and remove a range of blockages in the penal system, which cause so much day-to-day misery. In particular it would mean:

- Conditional release on parole would be considered for all offenders after they had served half their sentences (as the special requirements that certain offenders serve four-fifths under the mandatory minimum sentencing legislation or a two-thirds non-parole period, which a court may at present impose on some [very unclear] criteria, would cease to exist). This would eliminate a major source of unfairness as the relative differentials in punishment are reflected in the initial sentences and the

- routine limitation of parole consideration in some cases amounts to an unjustified distortion.
- All offenders would have the time spent in detention prior to sentence taken into account, removing another unjustified and unjust distortion in the current mandatory minimum legislation that denies this consideration to some offenders and not others.
 - The Bill does not mention the sentencing jurisdiction of the various courts. However, the mere repeal of the current minimum sentencing legislation will remove the endless complications of having trials begun in the regional court referred to the High Court in theory for sentencing, but in practice, as the empirical studies have shown, for a costly and time-consuming retrial. It should be added that the Commission specifically declined to recommend an increase in the sentencing jurisdiction of the regional courts. With re-sentencing out of the way, and life imprisonment reserved for only the most serious cases, the High Courts will be able to focus on trying the grave and high-profile cases selected for their direct attention by the prosecuting authorities. In the hopefully rare instances where a case of extreme gravity is wrongly referred to a regional court, the practice could be revived of converting the trial into a preparatory examination as soon as the error becomes apparent, so that the case can be rerouted to the High Court to ensure that the appropriate sentence is eventually imposed.

Conclusion

The empirical evidence collected for the conference presents a picture of a sentencing system that is flawed both in its procedures and its outcomes. Sentencing has not been assisted by the supposedly temporary minimum sentencing legislation that has burdened South Africa for too long. However, the status quo that existed before the implementation of the minimum sentencing legislation was not satisfactory either.

I hope that the minimum sentencing legislation will die a quiet death by not being renewed next year and that it will be followed as soon as possible by a new sentencing framework. I hope that that framework will be based on the work that was done in 2000. The underlying conditions have not changed and the need for positive root and branch reform is more pressing than ever.

The impact of minimum sentencing legislation in South Africa¹⁰⁷

Jean Redpath, Hlakanaphila Analytics with Michael O'Donovan, Hlakanaphila Analytics



The Criminal Law Amendment Act no. 105 of 1997 was intended as temporary minimum sentencing legislation which was introduced in 1998. It has been renewed every two years since then. The law stipulates harsh penalties for certain crimes based on public fears about crime, but there has been no research into the

efficacy or desirability of minimum sentencing legislation.

Questions have subsequently been raised about its impact on judicial independence, consistency of sentencing, and overcrowding in prisons. This project was commissioned by OSF-SA to find the actual impact of the legislation compared to its stated objectives, and whether the concerns that have been raised are valid. Research involved: 1) interviews with role-players in the justice system; 2) a review of relevant case law; 3) analysis of data from SAPS, NPA and the Department of Correctional Services; and 4) a survey of closed cases involving serious offences in three regional courts.

Research findings

Judicial independence

Based on interviews, case law, NPA data and the court survey, concerns regarding judicial independence were not borne out after *Malgas v S* (which gives magistrates and judges the right to take all the traditional mitigating and aggravating circumstances into account, not only the individual circumstances).

Prison overcrowding

This is not a result of minimum sentencing (MS) because sentencing in respect of offences committed after the law came into effect take several years to be served. However, minimum sentencing and associated parole rules will have a profound future impact on overcrowding. Incarceration rates are particularly sensitive to the length of sentences rather than the number of sentences.

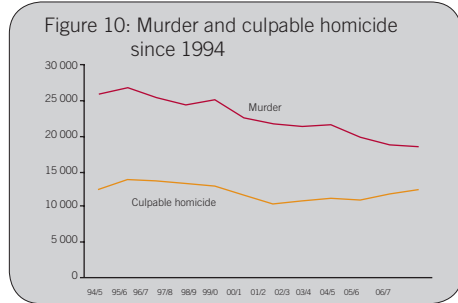
108 This presentation is based on research commissioned by the Open Society Foundation for South Africa. For the full research report, visit www.osf.org.za/publications.

Constitutionality

The Constitutional Court has spoken in *S v Dodo* and *S v Dzukuda*.

Crime levels

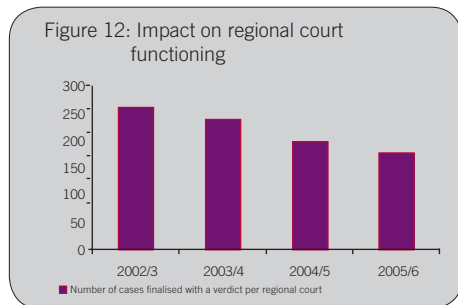
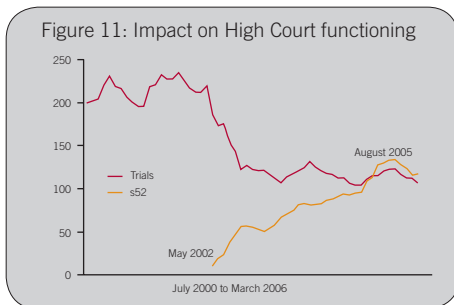
The impact of MS on crime levels is negligible. Detection drives deterrence, not punishment. There is some benefit from the incapacitation effect – taking serial offenders out of society for an extended length of time – but this is a small effect with diminishing returns. The reduction in crime levels (as measured in terms of the number of murders) appears unrelated to minimum sentencing. There has been a steady decline in the murder rate and the number of murders since 1994 (Figure 10), but this trend preceded the MS law which came into effect in 1998. The first cases affected by the legislation were heard in 2000/01. This also coincided with an overhaul of the way the SAPS collected data. In South Africa, we distinguish between murder and culpable homicide, but most jurisdictions talk about homicide. The current declining crime trend may have been overstated. Crime has stabilised, but it is likely to get worse again.



Impact on court congestion

The impact of the MS law on court congestion has been profound. Because regional courts may not impose the kinds of sentence required by the MS legislation, there is split procedure in which cases are heard in the regional court and referred to the High Court for sentencing. This is burdensome on the High Court. Both the regional court and the High Court have experienced an increase in case cycle length as a result of MS sentencing. Cases typically take about 27 months to be finalised, and in some areas the delay is 4–5 years.

Because minimum sentences are so severe, the first appearance of an accused is taken up by warning him or her of the seriousness of the offence. The number of ‘not guilty’ pleas is increasing, and there is increased use of legal aid. The increased processing time is



exacerbated by the fact that there are only 2 500 prosecutors and 1 000 Legal Aid Board attorneys available. MS leaves poor prospects for plea bargaining because the minimum sentence is so high that even a reduced sentence is high. Accused are therefore loath to bargain with the prosecution. There has been an increase in the number of accused absconding. The seriousness of sentencing has also seen an increase in the number of appeals, again creating a huge burden on the courts.

The proposed expansion of regional court sentencing jurisdiction to obviate the split procedure and thereby alleviate pressure on the High Court raises concerns. The quality of justice in the regional court is in question. Twelve per cent of regional court convictions are set aside by the High Court. The risk is that the safeguard of High Court oversight may mean that a person could be wrongly convicted and sentenced to life by the regional court.

Impact on the rights of victims

The impact of the MS legislation on the rights of victims is mixed. There has been an increase in the range of sentences applied (a success), but 'lenient' sentences are still applied in some cases. Sentences may be inconsistent, even within the same court – one court jailed a 13-year-old rapist for life and sentenced another rapist to a R3 000 fine with no custodial portion of sentence. The average sentence in serious rape cases and murder has been raised. But the many vulnerable rape victims (especially children) have their evidence tested twice and endure increasingly lengthy trials. This has a negative impact on the rights of victims and causes an increase in the number of withdrawals.

Impact on public confidence

The impact of MS on public confidence is negative, because court proceedings are slower and because sentencing focuses on deviations; i.e., a search for 'clemency' (minimum sentences are very harsh, but victim are being told that a convicted offender should be given 'only' 12 years).

Conclusions

- MS faces a potential crisis of constitutionality because court delays are so severe.
- The number of case-by-case challenges is likely to increase.
- There will be worsening prison overcrowding as the number of prisoners and length of sentences increase. Eventually, incarceration of any length may be declared unconstitutional because conditions are so bad that it is cruel and unusual punishment.
- The MS legislation should not be automatically renewed, or at least not renewed without amendment, in the awareness that procedural changes alone may be insufficient to ameliorate the problems with MS.
- Sentencing reform is insufficient to solve the crisis in our courts and prisons. Scarce resources should be directed at crime prevention rather than incarceration.

- Any consideration of a solution to this problem needs to be based on a clear understanding of what it is we want to achieve, based on research on ‘what works’. The various objectives should be specified and a solution found to each one. If we want consistency of sentencing, then let’s focus on that. If we want to resolve the problems in the courts, we should focus on that.

Comments and questions to Session 2 speakers

Heavy sentences for minor offences

- The Portfolio Committee on Correctional Services went on a site visit to a prison in the Eastern Cape and found a woman who had stolen a R99 pair of shoes for her child and had been sentenced to 12 months’ imprisonment. She should instead be cleaning the premises of the affected business in exchange for food.

Prof. van Zyl Smit: Most people would agree that this woman should not be in prison. The current system already makes provisions for sentences that do not involve imprisonment, and a sentencing framework should make it easier to ensure this kind of thing does not happen. It is easy to see what should happen in individual cases like this but it is important to see the bigger picture. The true increase in imprisonment has been from massively long sentences being imposed for medium-scale offences. Prisons are bursting at the seams and in the long term they will not be able to cope. Imprisonment is a scarce resource; let’s design a system which uses this scarce resource for the people who need it the most. One of the strengths of the South African system before 1998 was that we did not have mandatory sentences. A murderer was not always sentenced to death. There were about 5 000–6 000 murder cases a year before 1994, about 120 of whom were sentenced to death and the rest were sentenced to life imprisonment, but most were released after 8–9 years. When the death penalty was abolished, we should have looked into how we determined what constitutes a serious offence. Life imprisonment should be reserved only for very serious cases, e.g. the rape of a minor. Anybody who rapes a 3-year old is a strong candidate for life, but we need discretion to deal with marginal cases. We impose life so easily, the whole tariff has gone up, and that is the real problem. We need to rescale the tariff in terms of the seriousness of the offence, and then scale that in terms of the prison resource. We are already spending R10 billion a year on prisons; that is enough. Let’s cap it at that and make sure the framework provides the best way to apportion the resource.

If minimum sentencing has had no impact on overcrowding, what about the awaiting-trial detainees (ATDs)?

- There is an apparent contradiction in your research findings. You said minimum sentencing has had no impact on prison overcrowding, but then you said there were fewer plea bargains and prisoners spending long periods in prison waiting for sentencing.

Mike O'Donovan: We are restricting that comment to those who have been sentenced. There are many pre-sentenced people in prison. Awaiting-trial prisoners are a relatively small proportion of the total prison population because the state has been successful at aggressively reducing the number. My comment applies to sentenced prisoners; it is clear that trouble awaits us.

It is the certainty of punishment that counts, not the severity

- Trends in car hijacking dropped substantially in 1999 because vehicle owners started installing satellite tracking devices, not because of minimum sentencing. At the same time armed robbery increased, indicating that professional criminals were swapping one form of armed robbery for another. Tracking devices meant that it was more certain that they would be caught.

Alternative sentencing is hampered by limited capacity to implement such sentences

- The capacity of the Department of Correctional Services (DCS) should be considered in sentencing policy, but while the prison population has increased, the number of people under correctional supervision has stayed the same. Courts are repeatedly told that the capacity to supervise correctional supervision is limited. DCS says it does not appoint community corrections officers because there are too few community correction sentences.

The link between minimum sentencing and the increase in life imprisonment has not been proven

- The assertion has been made that life imprisonment has increased because of minimum sentencing, but available research does not prove that this is really the case.

3

Sentencing – sectoral perspectives

Minimum sentences and the prosecution in South Africa

Adv. Rodney de Kock, National Prosecuting Authority



The Criminal Law Amendment Act, 1997 (Act no. 105 of 1997) providing minimum sentences for certain offences came into operation on 1 May 1998 and applies only to offences committed on or after 1 May 1998.¹⁰⁸ The Act was originally only valid for a period of two years. Its validity, however, has been regularly extended by the president in terms of Section 53 and the latest extension¹⁰⁹ makes the minimum sentence provision valid until 30 April 2007.

The Act specifically lists certain serious crimes such as murder, robbery and rape and describes under which circumstances which mandatory sentences must be imposed, except where the court finds compelling and substantial circumstances justifying a lesser sentence.

109 This was confirmed in *S v Willemse* (1999) (1) SACR 450 where the court, after reference to various decisions, found that the Act cannot be applied retroactively.

110 Proclamation R21 in *Government Gazette* 25749 of 2005.

The rationale for mandatory sentences was to create uniformity in sentencing, and to reduce serious and violent crime.

Matters referred to the High Court for sentencing

The NPA's statistics¹¹⁰ of the minimum sentences finalised in the High Court show that the overwhelming majority of cases referred for sentence are rape matters. In fact, more than 90% of these cases involve rape charges, in more than 90% of which the complainants involved were under the age of 16 years. Conversely, fewer than 10% of all minimum sentence matters involved murder charges as described in Schedule 2 Part 1.

Certain aspects of the way in which these matters are handled in the lower courts, as well as the prevailing attitude of certain judges to the relevant legislation, are potentially creating a new form of secondary trauma for these vulnerable rape victims; one can almost be forgiven for regarding this new phenomenon as tertiary trauma (or the proverbial 'third degree').

The minimum sentence legislation leads to unnecessary duplication as more and more accused persons regard this second hearing as an opportunity to re-open the case against them. Witnesses then have to be recalled, which means the issuing of subpoenas, the paying of travelling costs and the further traumatising of these witnesses.

Included herewith are some of the problems commonly experienced at High Court sentencing stage.

Evidentiary problems

As a general rule, in all matters emanating from the lower court, which are taken on appeal, the Court of Appeal is wholly confined to what is contained in the record of the trial. A state advocate who has to defend a conviction or sentence, therefore, is utterly dependent on the conduct and decision(s) of the trial prosecutor regarding the evidence which forms part of the state case, the manner in which this evidence is led or presented to the court, and the way in which the cross-examination of the accused is handled.

In some ways, dependence on the record becomes most critical in minimum sentence proceedings, since any lacuna in the State's case, or irregularity in the proceedings, may result in the conviction being set aside.

111 See Annexures A and B

The following are a few of the evidentiary problems which frequently crop up during the High Court sentencing stage:

1. Many problems have arisen in regard to unrepresented accused persons. In this regard, section 73(2A) of the Criminal Procedure Act, 1977 requires a presiding officer not only to inform an accused of his or her right to legal assistance but also to inform an accused of the institutions that he or she can approach in this regard. Some cases have even gone so far as to suggest that, in certain instances, the accused should be actively encouraged to exercise this right.¹¹¹
2. Regardless of whether or not an accused person is legally represented, care should be taken that he or she is informed of the provisions of the minimum sentence legislation, and the relevant penalty provisions before the accused pleads. In this regard, the prosecutor has been instructed either to include a note on the charge sheet that the provisions of section 51 of Act 105 of 1997 are applicable, and/or specifically request the presiding officer to inform the accused of that fact.¹¹²
3. Prosecutors must therefore ensure that the necessary provision is brought to the attention of the accused wherever applicable.
4. It sometimes happens that either the charge sheet or plea statement fails to mention the age of the complainant, or the fact that she is below the age of 16 years. In terms of the prevailing case law, if the accused is convicted before this fact is proven (or admitted), the matter cannot be referred to the High Court for sentencing on this basis (i.e., that the complainant is under the age of 16 years).¹¹³

112 See *S v Mbambo*, (1999) (2) SACR 421 (W); *S v Mnguni*, (2002) (1) SACR 294 (T); *S v Ndlovu*, (2001) SACR 204 (W).

113 See *S v Dickson*, (2000) (2) SACR 304 (C); *S v Legoa*, (2003) (1) SACR 13 (SCA); *S v Ndlovu*, (2003) SACR 331 (SCA) at paragraphs 11 and 12; *S v Sukwazi*, (2002) (1) SACR 619 (N) at 264; *S v Mnguni*, *supra*. *CF S v Tshidiso*, (2002) (1) SACR 207 (W), where the court accepted that, although the accused had not been specifically warned of the possible minimum sentences applicable, he had been adequately informed of his rights and that the former omission did not amount to prejudice sufficient to vitiate the conviction.

114 In the matter of *S v Legoa*, *supra*, the SCA stated that for the minimum sentencing jurisdiction to exist in respect of an offence, the accused's conviction must encompass *all* the elements of the offence set out in the Schedule, except when the Schedule specifies an attribute of the accused and not of the offence. In the matter of *S v Jimenez*, (2003) (2) SACR 507 (SCA), this view was confirmed with the court remarking (in respect of the value of the drugs in *casu*) that, because the value of the cocaine had not been proved prior to conviction, *all the elements of the offence had not been proved and the courts did not have the jurisdiction to impose the minimum sentence*. See also *S v Nziyane*, (2000) (1) SACR 605 (T); *cf S v Qwati*, (2001) (1) SACR 378 (C), where the court found that it was not necessary for the evidence which would lead to the application of the provisions of s.51 of Act 105/1997 to be led before conviction.

5. Child witnesses are not properly sworn in. In many cases, the magistrate has conducted the most cursory of examinations into the witness's capacity to understand the difference between truth and fiction, or ability to testify accordingly, and convictions are overturned on this basis.
6. J88s and other reports are often just handed in with the consent of the defence without any evidence being led as to the contents. It must be noted that this is not a recognised form of adducing evidence and will not lead to the contents of the document being regarded as proven evidence. If the contents of the report are not in dispute, the contents of the report must be admitted in terms of section 220 of Act 51 of 1977.¹¹⁴
7. It is, in any event, almost always advisable for the doctor to testify. Invariably, some additional, helpful details will emerge during consultations which do not appear on the report. These can include the significance or seriousness of certain injuries, additional insights into the emotional state of the complainant, etc. It is also, at times, useful to have the doctor interpret his or her clinical findings and give an opinion based on these. Where the hymen is still intact, for example, the doctor must be called to explain the difference between legal vs medical penetration.
8. Almost without exception, an apparently remorseful, and candidly guilty, accused, in the lower court (who has made a section 112, Act 51 of 1977 statement) later becomes a morally outraged, innocent man in the High Court, and applications to have the previously guilty pleas altered to not guilty are brought. Besides the enormous waste of precious court time occasioned by entertaining these applications, the process also delays the finalisation of the matter by months. The judges usually grant these applications and the matter has to be postponed for re-trial.
9. More often than not judges request reasons for the conviction from the trial magistrate. The matter obviously has to be postponed and it is a fairly lengthy postponement because the High Court rolls are fully booked. NPA statistics show that the national average period from when the crime was committed to sentence is 24 months.
10. Where the prosecutor has accepted the plea, the state is bound by, or limited to, the facts contained in the section 112 statement. This leads to difficulties at the High Court, either in that the accused is not properly sentenced, or because a wholly different version emerges during evidence in aggravation, leading to much argument and legal confusion.
11. Many judges refuse to impose heavy sentences without first hearing the important witnesses such as the complainant in rape matters as well as the investigating officer and the doctor. For this reason and to prevent unnecessary postponements, the complainant and a social worker (having drafted an impact report on the complainant) are subpoenaed and present at court when the matter is heard for the first time.

115 See *S v Nkhumeleni*, (1986) (3) SA 102 (VSC) at 106 and *S v Ngwenya*, (1996) (1) SA 668 (N)

12. There is also duplication and added costs in the defence of these accused. Attorneys, who, in the main, are briefed by the Legal Aid Board to defend the accused in the regional courts, are often not qualified to appear in the High Court. This means that counsel has to be appointed to take over these matters and all the preparation has to be re-done.
13. Furthermore, some members of the Bar are disinclined to take these briefs, as they are not paid to read the records, or to consult, but only for the appearance in court. In many instances advocates at the Cape Bar only consult with the accused on the first day of the hearing. They argue that they are not being paid for travelling to the various correctional centres. If they requisition the accused to the Cape High Court cells for consultation the accused never arrives. One of the reasons given by Pollsmoor Prison is that the accused persons do not always reply to their names when being called to be taken to the various courts.
14. Of concern is the fact that the accused is prejudiced against because he or she has to wait, at times as long as 12 months, to be sentenced or acquitted at the end of that period. That person cannot appeal – he or she simply has to wait – convicted but unsentenced. The accused can also not partake in the various programmes of the Department of Correctional Services because he or she has not yet been sentenced. The national average period from conviction in the Regional Court to sentence in the High Court is 9 months. An audit on minimum sentences of the High Court of the Cape of Good Hope for the period July 2006 to 9 October 2006 indicates that 30 minimum sentences were finalised. Imprisonment for life has only been imposed in two of the 30 matters. In 24 matters a sentence was imposed that falls within the jurisdiction of a regional court. In four matters the convictions were set aside. The majority of the cases, by indication, could have been finalised by the regional court.
15. At the end of August 2006, the High Court of the Cape of Good Hope Court rolls for minimum sentence matters were fully booked until April 2007. There were 85 minimum sentence matters enrolled but not yet finalised. The office of the Director of Public Prosecutions, Cape Town received a further 60 minimum sentence matters that were not yet ready for enrolment, mainly because the records were not yet transcribed or the reports of a probation officer or social worker were still outstanding.
16. Further burdens created by this legislation include the cost and time involved in the typing of the records, an added burden placed upon social workers. They have to prepare updated social welfare reports on the victims because, by the time the cases reach the High Court, the reports are outdated.

The record of the proceedings

Besides problems experienced in relation to the way in which evidence is presented to the court, the other biggest headache in minimum sentences matters is the record.

Records are, more often than not, incomplete for a variety of reasons: for instance, one of the cassettes was not sent to the typists, or was damaged in some way, or was simply inaudible.

It has happened that judges have refused to hear matters in which the record is deficient in even the smallest detail. In one matter, a judge actually counted the number of 'inaudibles' appearing on the record, and gave a ruling on this topic, ordering the state to have the record reconstructed.

Reconstructions are not only very difficult to do, practically, but are also time-consuming. Where a reconstruction is requested (or ordered by the court), this must always be done in accordance with the strict guidelines laid down in *R van Wolmarans and Another*, 1942 TPD 279 at 282 *in fin* to 284.¹¹⁵

Juveniles

High Courts have given conflicting decisions regarding the application of the minimum sentences legislation to offenders under 18 years of age. In an attempt to resolve these conflicting interpretations the Supreme Court of Appeal, in *S v B* 2006 (1) SACR 311 (SCA), held as follows:

To summarise:

- (a) The legislative scheme entails that the fact that an offender is under 18 although over 16 at the time of the offence automatically confers discretion on the sentencing Court which is, without more, free to depart from the prescribed minimum sentence.
- (b) In consequence, the sentencing Court is generally free to apply the usual sentencing criteria in deciding on an appropriate sentence.
- (c) The offender under 18 though over 16 does not have to establish the existence of substantial and compelling circumstances because s 51(3) (a) finds no application to him or her.
- (d) By contrast with the class of offender under 16, however, the statutory scheme requires that the sentencing Court should take into account the fact that the Legislature has ordinarily ordained the prescribed sentences for the offences in question. This operates as a weighting factor in the sentencing process.
- (e) It follows on this approach that where the provisions of s 51(2) apply, the regional court retains its competence to finalise the matter contrary to the conclusion in *Makwetsja*.¹¹⁶

116 Quoted in *S v Zondi*, (2003) (2) SACR 227 (W) at 224.

117 In *Direkteur van Openbare Vervolgings, Transvaal v Makwetsja* (2004) (2) SACR 1 (T) it was held that 'Die streekhof moet alle gevalle waarin 'n skuldigbevinding aan 'n misdryf soos Deel I van Bylae 2 tot die Wet vermeld uitgespreek word vir vonnis na die Hooggeregshof verwys: ook die gevalle waar die beskuldigde ten tye van die pleging van die misdryf tussen 16 en 18 jaar oud was' at par. 49.

The judgment of the SCA in *S v B*, *supra*, clearly, with respect, did not follow the intention of the legislature. As a result of this judgment, it could follow that all offenders under 18 will in future be sentenced in regional courts to sentences much less than the prescribed minimum and without establishing the existence of ‘substantial and compelling circumstances’ apart from the youthfulness of the offender.

A possible solution to this problem is for the NPA to include in its guidelines to prosecutors certain factors, whose presence in a case involving an accused under the age of 18 but above 16 should lead to an appeal against a sentence less than the mandatory minimum, where such a case was decided by a regional court. In the alternative, the NPA could stipulate in its guidelines that cases involving an accused (or co-accused) above the age of 16 but below 18, where the circumstances might warrant the imposition of a minimum sentence, should be instituted *ab initio* in the High Court. Another possibility is to amend section 51(3) (b) of the Act so as to stipulate that, where a court decides not to impose a sentence prescribed in subsections (1) or (2) upon a child aged above 16 but under the age of 18, then it must enter its reasons on the record of the proceedings and such reason may not be limited only to the youth of the offender.

Proposed recommendations

It is suggested that the legislation be amended to introduce a return to the situation where magistrates have discretion to commit an accused for sentence by the High Court after a conviction in the regional court. Section 52(1)(i) leaves no discretion to the regional court magistrate to impose any other sentence than the prescribed minimum sentence if the accused was convicted for an offence mentioned in Part I of Schedule 2. This means that, even though substantial and compelling circumstances to impose another sentence are present, that case must still be referred to the High Court for sentence. Another sentence other than the prescribed minimum sentence will then in all probability be imposed by the High Court.

Perhaps a referral to the High Court for sentence should again be limited, the regional courts to be given higher sentencing jurisdiction in most of the matters that are presently referred to the High Court for purposes of sentence (e.g. 20 years’ imprisonment) with the High Courts still to be mandated to impose a sentence of life imprisonment.

It is thus suggested that section 52(1) of the Act be amended in order to allow regional court magistrates to decide on the presence or absence of substantial and compelling circumstances. Should a regional court find that substantial and compelling circumstances exist, it can then impose such lesser sentence without having to refer the case for sentencing to the High Court.¹¹⁷ The amendment should make it clear that magistrates must clearly indicate on the record of the proceedings the reasons for finding that substantial and compelling circumstances exist.

118 This amendment would not completely address the current problem of secondary victimisation as a result of referrals, but it would result in fewer matters being referred to the High Court.

This would assist prosecutors in deciding whether to appeal the sentences awarded by regional courts in such instances. It is further recommended that a savings clause should be inserted in section 53 of the Act to provide that, where a regional court referred a case to the High Court for sentencing, the regional court not having found any substantial and compelling circumstances, a case cannot be referred back to the regional court solely for purposes of an investigation into the existence of substantial and compelling circumstances.¹¹⁸

Conclusion

A positive outcome of the introduction of the minimum sentences Act is that it did succeed in sensitising most presiding officers, especially in matters involving child victims, to the abhorrence of the crimes committed and the need to impose heavy sentences. It can however not simply continue to be operative in its present form.

The NPA has embarked already on the following initiatives with its partners and other stakeholders towards a more victim-centred approach in its strategic directives:

- striving towards a culture of a restorative justice approach;
- focusing on crime prevention in partnership with the SAPS;
- community prosecutions in an attempt to reduce crime;
- reserving direct imprisonment for those offences justifying this harsh sentence;
- diversion and alternative sentencing of the trials; and
- The establishment of Community Courts.

119 If this proviso is accepted it does raise the question whether the proviso in section 53(3)(b) should not be revised as well. Section 52(3)(b) reads as follows: 'The High Court shall, after considering the record of the proceedings in the regional court, sentence the accused as contemplated in section 51(1) or (2), as the case may be, and the judgment of the regional court shall stand for this purpose and be sufficient for the High Court to pass such sentence: Provided that if the judge is of the opinion that the proceedings are not in accordance with justice or that doubt exists whether the proceedings are in accordance with justice, he or she shall, without sentencing the accused, obtain from the regional magistrate who presided at the trial a statement setting forth his or her reasons for convicting the accused'. The NPA has reported that many orders are given by the judges presiding, calling for reasons from magistrates, causing further delay.

Gender and sentencing proceedings in South Africa

Michelle O'Sullivan, Women's Legal Centre



Introduction

Today I will consider the application of minimum sentences – the Criminal Law Amendment Act ('the Act') in rape cases. Our courts have repeatedly pronounced that women's right to be free from violence should form part of the weighing process for sentencing purposes. The stark reality of the pandemic of violence against women forms the backdrop to this discussion.

Prior to the introduction of the Act, the sentences for sexual offences imposed by courts were particularly lenient. The research commissioned by OSF-SA as well as research conducted by the Civil Society Prison Reform Initiative, which are both presented at this conference, confirms that the Act has resulted in the 'average sentence length for crimes of sexual violence to increase sharply', and has resulted in greater consistency and predictability.

However, the limiting of judicial discretion in respect of certain rape cases by the Act has not rid such sentencing of outdated myths and stereotypical assumptions about rape. The provisions have also inevitably led courts to conduct a grading exercise in rape cases. Rather unpopularly, I argue for the retention of the Act in respect of sexual offences at least until a proper sentencing framework and sentencing guidelines are in place.

Although my presentation focuses on complainants in rape cases, I do not address the question of complainants who are required to testify in both the regional and High Court and the reality of secondary victimisation and trauma that may result from such a referral process; something which clearly requires attention.

I am indebted to work done in this regard by the Western Cape Consortium on Violence Against Women, of which the Women's Legal Centre is a member, but also includes Rape Crisis Cape Town Trust, the Gender Health and Justice Research Unit at the University of Cape Town and the Community Law Centre at the University of the Western Cape, as well as an article by Nicole Kubista.¹¹⁹

120 N Kubista, "'Substantial and compelling circumstances': Sentencing of rapists under the mandatory minimum sentencing scheme" *SACJ* 1 (2005) 77.

The context

As you are all aware, violence against women in South Africa is of pandemic proportions. In 1999, 8.8 per 100 000 women over the age of 14 years were killed by their intimate partners, meaning that one woman was killed every six hours.¹²⁰ Across three provinces surveyed in 2001, an average of 24.7% of women had been physically abused by a current or ex-partner.¹²¹ During 2003/04 a total of 52 733 cases of rape were reported to the South African Police Service,¹²² which estimates that only one in 35 rapes are reported.¹²³

In stark research published in 2006 by the Medical Research Council, 1 370 men aged between 15 and 26 were interviewed. Eight per cent of these men reported that they had sexually violated an intimate partner and 16.3% reported that they had sexually violated a non-intimate partner or participated in gang rape. The median age for a first rape was 17 years of age. The study concludes that one-fifth of South African men have raped a woman at least once in their lives. Although not sufficiently documented, the high rate of recidivism and repeat offences and limited opportunities for rehabilitation of offenders also forms part of this context.

The Act

The Act prescribes a minimum sentence of life imprisonment in cases where rape is committed where:

- (a) either aggravating circumstances exist relating to the offender such as:
 - (i) multiple rapes;
 - (ii) multiple offenders;
 - (iii) more than two prior convictions for rape;
 - (iv) knowledge of positive HIV/Aids; or
- (b) the victim has particular vulnerabilities, as she is—
 - (i) a girl under the age of 16 years;
 - (ii) a physically disabled woman who, due to her physical disability, is rendered particularly vulnerable; or

121 S Matthews, S Abrahams et al. 'Every six hours a woman is killed by her intimate partner: A national study of female homicide in South Africa'. *South African Medical Research Council Policy Brief*, no. 5 (June 2004) 2.

122 R Jewkes, L Penn Kekana, J Levin, M Ratsaka, M Schrieber 'Prevalence of emotional, physical and sexual abuse of women in three South African provinces' (2001) 91 *SA Medical Journal* 421 at 425. The provinces surveyed were the Eastern Cape, Mpumalanga and Northern Cape.

123 South African Police Service Crime Information Analysis Service *Rape in the RSA for the Financial Year 1994/1995 to 2003/2004* www.saps.gov.za/statistics/reports/crimestats/2004/%5Fpdf/crimes/rape.pdf Accessed 8 November 2005.

124 Beijing Conference Report: 1994 Country Report on the Status of Women (Pretoria, 1994) 44.

- (iii) a mentally ill woman as contemplated in section 1 of the Mental Health Act, 1973 (Act 18 of 1973); or
- (c) grievous bodily harm is inflicted.

The Act also prescribes a minimum sentence for:

- a first offender in a rape case, to imprisonment for a period not less than 10 years;
- a second offender to imprisonment for a period not less than 15 years;
- a third or subsequent offender of any such offence, to imprisonment for a period not less than 20 years.

These sentences are not mandatory. A court must apply the prescribed minimum sentence unless there are 'substantial and compelling circumstances' justifying a departure.

How has the Act been dealt with by our courts?

Although mandatory minimum sentences have been opposed on the basis that they restrict judicial discretion and independence and may result in injustice, the scheme of the Act has been generously interpreted by our courts.

In *S v Malgas* 2001 (2) SA 1222 the Supreme Court of Appeal interpreted the Act as follows:

A court was not to be given a clean slate on which to inscribe whatever sentence it thought fit. Instead, it was required to approach that question conscious of the fact that the legislature has ordained life imprisonment or the particular prescribed period of imprisonment as the sentence which should ordinarily be imposed for the commission of the listed crimes in the specified circumstances. In short, the Legislature aimed at ensuring a severe, standardised, and consistent response from the courts to the commission of such crimes unless there were, and could be seen to be, truly convincing reasons for a different response. When considering sentence the emphasis was to be shifted to the objective gravity of the type of crime and the public's need for effective sanctions against it. But that did not mean that all other considerations were to be ignored. The residual discretion to decline to pass the sentence which the commission of such an offence would ordinarily attract plainly was given to the courts in recognition of the easily foreseeable injustices which could result from obliging them to pass the specified sentences come what may.

The Court set out ten principles to guide lower courts:

- The court's discretion has been 'limited but not eliminated'.
- Guideline sentences should ordinarily be imposed.
- Minimum sentences should be imposed unless there are truly convincing reasons for a different response.
- Minimum sentences should not be departed from lightly for flimsy reasons.
- The Act deliberately left it to courts to decide whether the circumstances of a case call for a departure.

- Traditional sentencing factors must still be used in sentencing.
- The cumulative circumstances relevant to sentencing must be measured against the yardstick of 'substantial and compelling' to justify a departure from a minimum sentence.
- Concepts developed by courts to be used in appeals against sentence should not be used as the sole criterion.
- If the circumstances of a particular case render the prescribed sentence unjust as it is disproportionate to the crime, the court is entitled to impose a lesser sentence.
- The court must take account that the legislature has singled out the crime for severe punishment and the sentence to be imposed in lieu of the prescribed sentence should be assessed paying regard to the benchmark sentence.

In *S v Dodo* the Constitutional Court approved the test adopted in *Malgas* and confirmed that a test of 'gross disproportionality' must be used to determine if sentence is inconsistent with the Constitution.

How has the Act been applied in the context of sexual offences?

It is a long-established principle that in deciding on an appropriate sentence courts must take account of three factors: the seriousness of the offence, the personal circumstances of the accused and the interests of society. The impact of the crime on the victim is generally considered in assessing the seriousness of the offence. Courts also consider the impact of crime on survivors of sexual violence within the framework of the Bill of Rights:

In *S v Chapman* (1997 (3) SA 341 at 344 to 345) the Supreme Court of Appeal confirmed that:

- Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim.
- The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilisation.
- Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives ...
- The Courts are under a duty to send a clear message to the accused, to other potential rapists and to the community: We are determined to protect the equality, dignity and freedom of all women, and we will show no mercy to those who seek to invade those rights.

The Act gives effect to our constitutional and international treaty obligations which require the government and the courts to take special steps to protect women against violent crime and give weight to these obligations in the sentencing process.

But an analysis of the interpretation by courts of ‘substantial and compelling circumstances’ shows that the passage of new legislation does not automatically bring about change.

To avoid the imposition of minimum sentences, some judges revert to stereotypical assumptions about women and rely on rape myths. For example, in recent cases judges have considered factors such as the complainant’s previous sexual history¹²⁴ and the prior relationship between the accused and the complainant prior to the offence being committed¹²⁵ as providing ‘substantial and compelling’ reasons to deviate from the minimum sentence. Of equal concern is that apparent lack of physical¹²⁶ or psychological¹²⁷ harm to the complainant, the accused’s cultural beliefs about rape,¹²⁸ the accused’s use of intoxicating substances¹²⁹ and the accused’s lack of intention to cause harm to the complainant in committing the rape¹³⁰ have also been considered to be ‘substantial and compelling’ factors used to justify the imposition of lesser sentences.

In *S v Mahomotsa* (FPD) Case No 29/99 28 July 1999, unreported, two women under the age of 16 were raped by a 23-year-old man. Kotze J stated (and I quote a translation from the original judgment in Afrikaans):

Although there was intercourse with each complainant more than once, this was the result of the virility of a young man still at school who had intercourse with other school pupils against their wishes, and note, school pupils who had previously been sexually active. Where one is dealing with school pupils and where, in addition, it appears that the two girls concerned had already had intercourse before, one really shouldn’t lose perspective, especially not in relation to the first count, which dealt with a complainant who had in any event been naughty a few days earlier and had intercourse with someone else. The injustice which she suffered in this case does not demand an unusually severe sentence.¹³¹

125 *S v Mahomotsa* FPD, unreported.

126 In *S v Mvamvu* (2005) (1) SACR 54, the Supreme Court of Appeal considered an appeal by the State of a five-year prison sentence imposed on the accused for the abduction and repeated rape and assault of his estranged customary law wife, who had obtained a domestic violence protection order against him. The Court found the existence of the customary law marriage to be a relevant factor in determining sentence.

127 *S v G* (2003) (2) SACR 296 (W), *S v Njikelana* (2003) (2) SACR 166 (C) and *S v Shongwe* (1999) (2) SACR 220 (O).

128 *S v Mvamvu* (n 63) and *S v Shongwe* (n 64).

129 *S v Mvamvu*.

130 *S v Njikelana* (n 64).

131 *S v Mvamvu* (n 63).

132 ‘Ek bevind dat die volgende omstandighede in hierdie geval as ’n ‘wesentliche en dringende omstandigheid’, soos bedoel in art 51(3)(a), aangeteken moet word. Alhoewel daar hier met elke klaagster meer as een keer gemeenskap gehou is, was dit die gevolg van die viriliteit van ’n jongman wat nog op skool is wat met ander skoliere teen hulle sin gemeenskap gevoer het en, let wel, skoliere wat reeds tevore seksueel aktief was’. *Submission to the Minister of Justice and Constitutional Development in Response to the evaluation of the Criminal Law Amendment Act 105 of 1997*, prepared by the Western Cape Consortium on Violence Against Women, 4 March 2005, at page 15.

On appeal, Mpati JA overturned the sentences of six years and ten years and imposed sentences of eight years and twelve years respectively. He held that the trial court had misdirected itself in considering the man's virility as a mitigating factor.¹³²

In *S v Mvumvu* 2005 (1) SACR 54, the Supreme Court of Appeal considered an appeal by the State of a five year prison sentence imposed on the accused for the abduction and repeated rape and assault of his estranged customary law wife, who had obtained a domestic violence protection order against him. The Court found the existence of the customary law marriage, Mvumvu's honest belief that he had a right to conjugal benefits and the fact that he grew up and lived in a world of his own, shaped by customary norms and practices, to be mitigating factors.

In addition to perpetuating outdated and stereotypical perceptions about sexual assault,¹³³ the interpretation of these provisions have also led some courts to engage in a 'grading exercise' of rape matters falling within the prescribed categories for imposition of a minimum sentence. Where a particular case does not comply with the worst imaginable case in the category concerned, this appears to present a justification for departing from the set minimum sentence.¹³⁴

The courts have imported into section 51 what Nicole Kubista identifies as a false distinction between rape and rape that causes physical injury, ignoring the inherent violence in the act of rape.

But ironically one rationale reads:

[reason] for the continuation of the mandatory minimum sentencing legislation specifically in relation to sexual offences is provided by a thorough examination of the cases in which judges have departed from legislative benchmarks and their reasons for having done so. A survey of these judgments makes it clear that, notwithstanding pronouncements regarding the seriousness with which gender based violence must be treated, many members of the judiciary still do not understand the seriousness of sexual assault, particularly rape, or the impact and consequences thereof experienced by rape survivors. The continued reliance on and perpetuation of rape misconceptions and myths in justifying lower sentences is immensely concerning and indicative of precisely why minimum sentencing for sexual assault was considered important by the Legislature in the first place.¹³⁵

133 *S v Mahomotsa* (2002) (2) SACR 435 (SCA).

133 The ruling of the High Court in *S v Mahomotsa* (2002) (2) SACR 435 (SCA) provides a particularly unfortunate example. Kotze J found 'substantial and compelling circumstances' justifying a departure from the prescribed minimum sentence *inter alia* in the fact that the sexual assault of the two complainants had resulted from the accused's 'virility' as well as in the fact that the complainants had been sexually active prior to the incidents of rape – see par. 10–13 of the SCA judgment, where Kotze J's reasoning is recounted.

134 Kubista (n 1) 82–86 presents well-founded criticism of this development.

136 *Submission to the Minister of Justice and Constitutional Development in Response to the evaluation of the Criminal Law Amendment Act 105 of 1997* (n13) at 7.

While there may be judges who interpret ‘substantial and compelling factors’ to include misconceptions or rape myths, and thereby justify lesser sentences than those prescribed, the Act – at the very least the current framework – requires justification by judges for departures within a standardised framework. This allows for scrutiny of judicial reasoning and appeals where appropriate.

In conclusion, I support the retention of minimum sentences in respect of rape until legislation is introduced which provides for a comprehensive sentencing framework and sentencing guidelines.

Although increased sentences may not act as a deterrent or result in a reduction in crime levels, where rape is concerned, sentences of lengthy imprisonment render women safer on the streets and in their homes. This may be an unpopular and controversial response but in the context of a pandemic of violence against women it may be apposite.

Judicial discretion and minimum sentencing in Malawi

Austin Msowoya, Malawian Law Commission



Introduction

Malawi’s legal system derives from the English common law, which was applicable long before independence and which continues to powerfully influence the development of its jurisprudence. We are steeped in common law traditions, and the judiciary strongly considers sentencing as the exclusive preserve of judicial discretion.

Politicians have at times attempted to encroach on this discretion by enacting mandatory minimum sentence statutes with unanticipated, if not hilarious outcomes. All this happens against a background of a public perceptively disgruntled by rising rates of crime, baying for stiffer penalties in what it views as a justice system that is lenient on criminals.

When courts are restricted by technical mandatory minimum sentences, they tend to resist them on the pretext they compromise independence and discretion. One judge has said minimum sentences are necessary in designated cases such as sexual offences and burglaries on the grounds that these would ensure consistency and predictability, especially given that current disparities are exacerbated in part by the inefficiencies of the law reporting service.

The 2004 National Crime Victimization survey indicated that 85.5% of respondents were satisfied with the way courts sentence offenders and 59.7% expressed confidence in the sentencing practice, believing that courts impose sentences that fit committed offences. However, NGOs are dissatisfied with sentences for rape and defilement.

Mandatory minimum sentence statutes since 1964

There have been instances when parliament deliberately prescribed mandatory minimum sentences for designated offences. These efforts met with varying success and sometimes outright failures or tacit resistance from the judiciary. Judges, adhering to a strong common law tradition, are naturally disinclined to follow mandatory minimum sentence legislation. Generally uncomfortable with such laws, they have come to view their discretion as a matter of constitutional significance in view of the separation of powers.¹³⁶ They view such laws as a deliberate encroachment of their jurisdiction.¹³⁷

The most notable, and maybe the most successful, were the ‘theft by public servant’ and ‘theft by servant’ offences enacted from the late 60s to mid 70s.¹³⁸ These offences carried specific sentences depending on the values involved, and in the case of theft by public servant, there was mandatory seizure and sale of property of the offender as recovery for the misappropriated monies or property. The actual penalties ranged from two years’ imprisonment for values not exceeding £400 at the time to 14 years for values exceeding £10 000.¹³⁹

The Corrupt Practices Act of 1995 prescribed a mandatory minimum sentence of five years’ imprisonment for a conviction of a corruption offence.¹⁴⁰ The sentence was mandatory regardless of the value involved, antecedents of the offender or the actual damage caused by the offender’s conduct. The Act was ideally enacted and the penalties prescribed in ‘[direct] recognition of the worrying trend in the increase of cases related to corruption’.¹⁴¹

During the review of the Act by the Law Commission in 2001, one of the principal issues was the penalty for corruption offences.¹⁴² Experience during its infancy application demonstrated that the prescribed mandatory minimum sentence resulted in unjustified acquittals by courts that, less moved by the absence of guilt, chose rather to acquit the accused than impose a sentence they perceived harsher than the offence otherwise warranted.¹⁴³ The report stated at page 36:

... the Commission considered [...] the mandatory minimum sentence of five years [...] and was concerned, from well documented statistics of judicial records, that the advent of mandatory sentences without judicial discretion tended to result in unwarranted acquittals because courts are often reluctant to convict

137 See s. 7, 8, 9 and 11 of the Constitution of the Republic of Malawi.

138 Justice A. Nyirenda, Lilongwe District Registry, personal communication, 13 October 2006.

139 Sections 283 and 286 respectively.

140 s. 283 (4) enacted in 1973 and s. 286 (1) passed in 1976.

141 s. 34.

142 see Malawi Law Commission, *Report of the Law Commission on the Review of the Corrupt Practices Act*, (2002) Lilongwe, Malawi Government page 6.

143 *Op cit* p 7.

144 In one such case a magistrate was convicted of corruption when he received a bribe of the equivalent of \$3 and was sentenced to the 5-year minimum.

an offender where they are denied judicial discretion on sentencing to take account of the particular circumstances of the case or to give consideration to any mitigating factors about the offender. Such unwarranted acquittals erode public confidence in the law enforcement agency and the law itself.

Of course these acquittals must be considered in the light of other commentaries, such as those by prosecutors from the Anti Corruption Bureau who strongly argue that a good number of acquittals are the result of judicial officers' inability to appreciate the concept of corruption crimes and the whole purpose of corruption law and how it was intended to be interpreted and applied.¹⁴⁴

Sentencing in practice

After a conviction or guilty plea, the court must hear evidence to determine an appropriate sentence. The 'first offender' myth is often brought into evidence, and prosecutors are generally unwilling to do any research into an appropriate sentence. Sentencing remains at the discretion of the court, except for mandatory minimum sentences. There are major disparities in sentencing. These are partly influenced by media reporting and the way this affects public opinion. In *R v Payili*, a herbalist who was convicted of raping a patient after giving her a concoction which made her drowsy was imprisoned for five years. But in *R v Bizwick Mkoma*, a herbalist convicted of raping two patients received eight years. In *R v Chikwawa*, it was determined that an appropriate sentence for defilement for first offenders is six years.¹⁴⁵ But in *R v Peter Laiton* the offender was imprisoned for only four years for defilement with aggravating circumstances (serious injuries) because the girl was sexually active. In the Mchinji child trafficking cases which involved ten children aged 7–9 years, a Zambian national was fined \$50. There was a massive public outcry. The same magistrate responded by sentencing another Zambian national to seven years – the maximum for a child trafficking conviction.

The statute may not provide a detailed enough procedure for considering sentencing options, but there are a number of pertinent judgments.

R v Peter Laiton (1997), Banda CJ:

I would like to remind trial Courts that there are now prevalent in the country very serious offences of violence and serious frauds which are coming before the courts. It is important that the courts should remember the guiding principles in deciding upon the appropriate sentence to impose. Courts must be guided by certain principles. The first of these principles is the public interest. Criminal justice is publicly enforced with the intention of not only punishing crime but also with the hope of preventing it. The courts must, therefore, be vigilant to ensure that persons who commit these serious offences of violence and serious frauds are properly punished and therefore deter others who might be tempted to commit similar offences. Courts will help reduce the incidence of these violent crimes if meaningful sentences are imposed.

145 Gaston Mwenelupembe, Chief Legal and Prosecutions Officer, Anti Corruption Bureau, personal communication, 18 October 2006.

146 Defilement is sex with a child under the age of 13.

In *R v Andrew Chikatha*,¹⁴⁶ Mwaungulu J attempted to consolidate guidelines for sentencing, admitting that there are:

... competing and compelling and sometimes conflicting purposes and goals in sentencing policy ... Courts have to choose between conflicting and competing purposes. Heavy handedness, which is what the call is for, may increase and complicate rather than reduce crime. Offenders who know that death or disproportionately long sentences ... are likely punishment for rape will choose to eliminate the victims and witnesses to avoid detection. Yet more a deterrent purpose may have to give way to a corrective and rehabilitative purpose. If there is a chance for reform from a shorter sentence, a longer sentence may be regarded as a degrading and cruel treatment under the constitution.¹⁴⁷

Republic v Zagwa (1957), Wilkinson CJ:

I feel impelled to remind all magistrates that whatever their personal views may be in regard to any particular class of offence, they are bound by the decisions of the High Court, [...] and that where sentences are imposed which do not conform with the principles laid down by this court in its judgments or orders the result may be that the whole proceedings will be quashed.

However, the courts do not adhere to precedents, partly because the last law report covered a case that took place in 1993. There is a whole decade of unreported case law in Malawi. Even the High Court issues conflicting judgments through unintentional or deliberate ignorance of an existing authority. In the absence of reported case law, judicial officers are able to claim they are not aware of previous case law and are therefore effectively free to do as they wish. In *R v Phiri*¹⁴⁸ Mwaungulu J stated that he:

... never referred to the Msowoya guideline because of the difficulty encountered in this Court and courts subordinate to it of tracking loose leaf judgments. [The volume reporting *R v Msowoya*] was only published in 1994. It did not come into the country until several years later, after I had delivered the guideline in *R v Phiri*. I am not bound by [*R v Msowoya*]. Out of comity, this Court respects its own decisions and departs from them at the peril of reasons [sic]. Definitely I had [*R v Msowoya*] before me I would have followed it but for the doubts I have stated. (Author's emphasis.)

147 Confirmation Case No. 1602 of 1998, Principal Registry (Unreported).

148 At pp 2–3 of the judgment transcript.

149 (1993) 16 (2) MLR.

Conditions in prison

Maula prison is the largest correctional facility in Lilongwe and the Central Region of Malawi. It has a population of 1 733 inmates.¹⁴⁹ Of these, 31 are women, 16 serving sentences for various felonies and misdemeanours, 12 are on remand, and eight awaiting trial for homicide. At least one woman is serving a 17-year sentence for theft by public servant, and there are three children, all younger than 5 years old, whose mothers are serving sentences.

There are 1 702 men, 1 287 serving sentences, 413 on remand, and 186 awaiting trial for murder. The longest has been on remand a little over seven years. There are no juveniles at Maula prison. Juveniles have their own facility at Kachere Prison in the part of the City known as 'Old Town' and at Byanzi Prison in Dowa district.¹⁵⁰ Maula Prison was originally built to cater for 800 inmates at full capacity. At present, cells designed to hold 60 inmates hold at least 155 inmates. Needless to say, congestion is a serious problem. Prison authorities face numerous challenges, not least health concerns, contagious and infectious diseases, food scarcity, medical facilities and, of course, sanitation facilities.¹⁵¹

There is no parole board or other body that performs valuation of and assesses inmates to determine whether they have been fully rehabilitated to return to society, or those eligible for early release.¹⁵² The Malawi Prison Inspectorate is only mandated to monitor the conditions, administration and overall functioning of penal institutions in Malawi.¹⁵³ However, a third of every inmate's sentence is automatically remitted, and this means virtually every convicted prisoner in Malawi serves only two-thirds of the sentence imposed.

Community service

While s. 310 of the Criminal Procedure and Evidence Code¹⁵⁴ allowed courts to impose supervision orders,¹⁵⁵ parliament passed the Community Service (General) Rules in 2000.¹⁵⁶

150 The data were accurate as at 11:00 on 19 October 2006 when the author visited the Officer-in-Charge at Maula Prison.

151 Dezio Makumba, Senior Superintendent, Officer-in-Charge, Maula Prison, personal communication, 19 October 2006. See also Malawi Inspectorate of Prisons, *Fifth Annual Report to Parliament*, 2004, page 15.

152 Congestion was acknowledged as a serious problem by the Malawi Inspectorate of Prisons in its *Fifth Annual Report to Parliament*, 2004, at page 7. The inspectorate noted that a correctional facility was under construction in northern Malawi, but also designed to hold of 800 inmates at full capacity.

153 Dezio Makumba, personal communication, 19 October 2006.

154 s. 169, Malawi Constitution.

155 Cap 24, of the Laws of Nyasaland, in force prior to Malawi's attainment of independence.

156 See *Seneki v R* (1923–1960) 1ALR (Mal) 639.

157 Under s. 364A, Criminal Procedure and Evidence Code.

The rules were enacted to establish the legal and administrative framework for community service as alternative punishment, in part to ease congestion in prisons. While the rules appropriately established the administrative environment, they did not provide clear guidelines on what offences are appropriate for community service. They only provide for the court to make inquiry into the suitability of the offender for community service, to explain the aims and objectives of the community service order to the offender and his or her rights and to ascertain the offender's willingness to submit to the community service order.¹⁵⁷

The rules have been in force for some five years now but it cannot be determined without further survey whether the rules are successfully applied. What is true though is that the rules application for any one offender squarely remains the discretion of the court. In contrast, s. 6(1) of the Criminal Justice Act of England lays down thresholds and the criteria for consideration in deciding whether to impose a community service order as opposed to a custodial sentence.¹⁵⁸

Conclusions

Malawi's sentencing practice requires comprehensive and immediate reform. Experience from other countries clearly demonstrates that mandatory minimum sentence legislation seldom works to reduce levels of crime. Reforms should target the sentencing process and aim to relieve prison congestion.

Comments and questions to Session 3 speakers

Is minimum sentencing really necessary to keep women safe from sexual violence?

- There is a pandemic of violence against women by men who know them, but if minimum sentencing is necessary to keep women safe, why should it not be necessary to keep men safe from, e.g., assault with intent to cause grievous bodily harm?

Michelle O'Sullivan: Ninety per cent of offences by men against women are sexual. We need a fair system that recognises the severity of rape and does not allow judges to sentence based on their own preconceptions. It is only since judges have had to motivate wanting to deviate from imposing a minimum sentence on the basis of substantial and compelling circumstances that their reasoning has come to the fore. The minimum sentencing law keeps judges accountable in respect of sexual offences against women. It provides an appropriate level of punishment

158 r. 12.

159 S Seabrooke & J Sprack, *Criminal Evidence & Procedure: The Essential Framework* 1996, 382. See also I Bing, *Criminal Procedure and Sentencing in the Magistrate's Court*, 5th Edn, (London: Sweet & Maxwell, 1999) especially chapters 12–15 inclusive.

for rape. Very few cases are successfully prosecuted, societal attitudes have not changed, and rape survivors are traumatised during trials. Men who rape must be kept away from survivors. There have been cases of alleged rapists being given bail, even when the offence has been violent. Prison is no solution to a social problem, but what else can we do?

Austin Msowoya: Malawian courts hand down lenient sentences for rape and defilement. In one case, a judge sitting in a rape case said in Malawian culture women have been trained not to say no to sex; men must encourage them to say yes, and a bit of force is okay; she wanted sex, she was just not willing to express it.

- Minimum sentencing for rape could be seen as a statement of outrage in respect of sexual violence, a way of transmitting positive values in a society.

Why does the NPA consider crime prevention as part of its brief?

- Why does the NPA consider crime prevention to be part of its brief; surely it is busy enough already?

Adv. Alta Eksteen: Our vision statement is to bring about justice in our society so that everyone can live in freedom and security, and that stretches further than going to court. This includes, for example, restorative justice initiatives and prosecutors handing out pamphlets about what they can do for the public. In the Northern Cape, a prosecutor was getting tired of people dying on the highway every Easter weekend, so he acted with police to divert the road through the town. This forced people to stop for a while, and there was not a single fatality on the road that weekend.

Crime trends after democracy in Malawi

- Was there an upsurge in crime in Malawi after the advent of democracy?

Austin Msowoya: There was an exponential increase in crime after the Banda dictatorship, but to say that this was the cause of the rise in incarceration is to see only half the picture. Crime rose by almost the same amount in many different jurisdictions; it is a global trend. Before Banda fell, Malawi had a stable economy because of his friends in Western countries – he seemed to be the only one opposed to communism and socialism at that time. Once he lost his position, the underlying economic distress of the country became apparent.

4

Sentencing and prison overcrowding

Minimum sentencing and prison overcrowding in South Africa: A DCS perspective

Subashini Moodley, Deputy Commissioner: Personal Corrections, Department of Correctional Services



Introduction

The purpose of the correctional system is to contribute to maintaining and protecting a just, peaceful and safe society by 1) enforcing the sentences of the courts in the manner prescribed by the Act, 2) detaining all prisoners in safe custody while ensuring their human dignity, and 3) promoting the social responsibility and human development of all prisoners and persons sentenced to community corrections.¹⁵⁹

One of the criminal justice system's transformation challenges is to arrive at a common understanding of the purpose of sentencing of offenders to incarceration. The purpose of sentencing is two-fold: 1) to punish the offender for the crime committed (a critical element for

160 Section 2 of the Correctional Services Act no. 111 of 1998.

the victim and the community), and 2) to enable rehabilitation of the offender (thereby breaking the cycle of crime and enhancing crime prevention). The length of the sentence is definitely not a deterrent to crime.

Key concerns for DCS are: 1) is the sentence handed down the most appropriate route to the correction of offending behaviour, rehabilitation and social reintegration for that offender? and 2) what will the impact of the sentencing trends be on the offender population within our facilities and in our community correctional supervision system? Many offenders are serving sentences of less than two years. Perhaps judicial officers should be required to provide reasons for imprisoning people for less than two years.

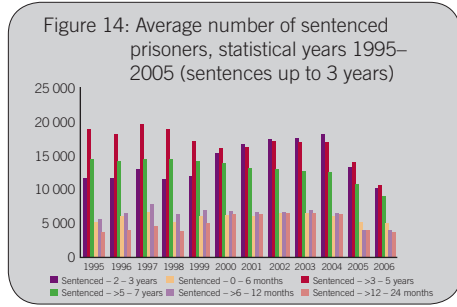
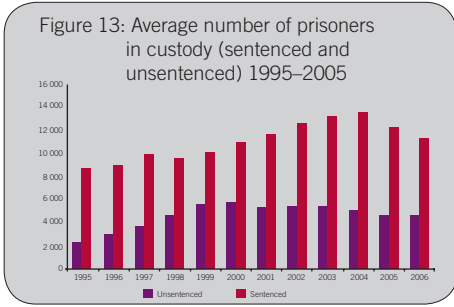
Analysis of prison overcrowding

DCS acknowledges and respects the rights and legitimate expectations of offenders regarding adequate accommodation and incarceration conditions consistent with human dignity. This is a prerequisite to building of offender's self-respect and positive participation in rehabilitation process. DCS strives to provide adequate accommodation in correctional centres, complying with accepted standards, including international instruments – while recognising these as goals still to be achieved. Unfortunately the reality of overcrowding in most correctional centres means the rights of offenders to adequate accommodation and humane conditions are being violated (Table 1).

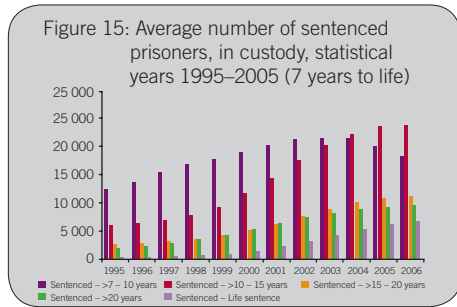
Table 1: Approved accommodation versus offender population per region on 31 March 2006

Region	Capacity	Unsentenced	Sentenced	In custody total	% occupation
Eastern Cape	12 717	5 340	14 306	19 646	154.49%
Gauteng	26 709	16 392	28 441	44 833	167.86%
KwaZulu-Natal	19 854	8 146	18 213	26 359	132.76%
Limpopo/Mpumalanga/North West	18 996	3 749	20 323	24 072	126.72%
Northern Cape/Free State	16 807	5 480	14 921	20 401	121.38%
Western Cape	19 422	7 286	17 616	24 902	128.22%
Total	114 505	46 393	113 820	160 213	139.92%

More needs to be done on regional and area management level to urgently address this problem through mobilising interdepartmental resources and external resources, as well as motivating the community to become more actively involved. There is scope for other regions such as Gauteng, KwaZulu-Natal and Limpopo/Mpumalanga/North West to use and market existing initiatives. The Western Cape is actively involved with internal and external role-players within the integrated justice system at regional and area management level to address overcrowding. While focus is not on awaiting-trial detainees (ATDs), suffice it to say there is a positive correlation between the categories of accused persons with offences that require minimum sentencing and the trends of admission of sentenced offenders in respect of the minimum sentencing framework.



The total number of people in custody has stabilised since 2001, but there has been a steady increase in the sentenced prison population, even though about 35 000 prisoners were released in a special remission of sentence in 2005 (Figure 13). Contributing factors include poor social and economic conditions, unemployment, an increase in undocumented persons, an increase in the number of police accompanied by more arrests, and more convictions for serious and aggressive offences with longer sentences being imposed.



The number of prisoners imprisoned for petty and minor crimes (less than two years) has stayed steady at about 13 000 (Figure 14). These are often economic and non-violent offences. This unnecessary incarceration contributes to overcrowding and costs R140 per prisoner per day, money which could be put to better use. The number of prisoners sentenced for more than two years is steadily going up and the number of people serving very long sentences has shown a dramatic increase (Figure 15). This is attributable to the increase in convictions for aggressive crimes.

The number of ATDs has slowly gone down. It seems that initiatives within the criminal justice cluster such as plea bargaining have succeeded in keeping the unsentenced prison population to less than 55 000 over the last five years. Another factor is that the average time for the finalisation of a case is 143 days, significantly lower than a year or two ago.

About 68% of the prison population falls into the age group 18–35 years. Even with minimum sentencing of ten years or more, many will be released young enough to make a significant contribution to society if they have been rehabilitated. The longer they stay in prison, the less likely they are to be rehabilitated and the more exposed they will be to gang influences and subversive behaviour.

The crime environment

SAPS statistics (2001–2005) show a relatively high rate of contact crimes, and there has been a notable increase in gender-based violence and domestic violence. In general, crime levels are decreasing but the complexity of criminal activities is increasing and more targeted. Activities are being orchestrated by organised and militarised syndicates who compromise the integrity of organisations using inside personnel and sensitive information. Individual incidences involve multiple forms of crimes such as cash-in-transit robberies, car hijackings, bribery, possession of illegal firearms, murder, assaults, etc.

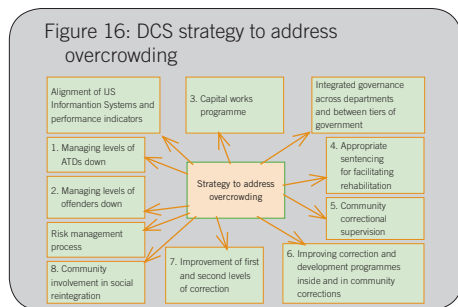
These categories are too broad and we have just introduced a system of 18 categories. This will enable us to provide needs-based services to prisoners. There has been a marked increase in the number of sexual offenders serving long sentences and the number of young people (sentenced and unsentenced) held for aggressive crimes. DCS cannot manage this matter alone – it is an issue for every South African irrespective of background or social standing.

Table 2: Prisoners in custody by crime category, 31 March 2006

	Unsentenced	Sentenced	Total
Economic	13 149	23 563	36 712
Aggressive	21 966	65 188	87 154
Sexual	8 125	18 174	26 299
Narcotics	1 094	2 530	3 624
Other	2 059	4 365	6 424
Total	46 393	113 820	160 213

Controlling prison overcrowding

DCS has a strategy to reduce overcrowding (Figure 16). Because we are at the tail end of the criminal justice system, we have little control over the number of ATDs or sentenced prisoners referred to correctional centres. There is, however, some scope for asking a court to convert a sentence, and to consider prisoners for early release on parole. The management of overcrowding must be the responsibility of the criminal justice system as a whole. Overcrowding requires crime prevention, correction, and social reintegration.



Causes of overcrowding (sentenced offenders)

- Shifts in sentencing trends. The number of prisoners and length of sentence have increased since 2001. This may be due to minimum sentencing, but there is not enough information to draw firm conclusions yet. DCS will be asking the NPA for its sentencing statistics. The introduction of minimum sentences for certain categories of crime will certainly slow the turnover of offenders.
- Inability to pay bail or fines. Many offenders are incarcerated simply because they are unable to pay fines or because they cannot make bail (even if it is R1 000 or R500). It costs the state R140 a day to have a person in prison.
- Inappropriate sentencing. Courts do not always hand down appropriate sentences and do not always consider alternatives to imprisonment for less serious offences.
- Inadequate utilisation of conversion of sentence legislation.
- Constraints of the parole framework. Sometimes prisoners cannot be considered for parole release because they do not have a monitorable address.
- Inadequate facilities. The DCS capital works programme is not aligned to offender population trends.

Impacts of overcrowding

- Overcrowding has a negative impact on the human rights of inmates; it is not conducive to rehabilitation; and it leads to increased stress and health risks for prisoners.
- Professional correctional officials must be deployed to manage and care for high numbers of ATDs.
- Staff are overstretched as the staff:inmate ratio is not based on actual offender figures; there are high levels of stress; and the work environment is unsafe.
- More costly and more sophisticated programmes need to be developed with more specialised staff needs. Rehabilitation programmes are being disrupted. Instead of staff and resources being focused on correction of offending behaviour, they are having to be focused on management, accommodation and care of offenders.
- Overcrowding creates a security risk for inmates, DCS staff and the public. There is greater potential for violence in prisons, and a greater risk of escape.
- Overcrowding encourages anti-social activities amongst inmates, and contributes to prisons being seen as 'universities of crime'.
- Appropriate separation of offenders is difficult. Ideally first offenders and repeat offenders should be separated; age groups should be kept separate; and inmates should be grouped by category of offence.
- Children in DCS care should not be held in prisons, they should be kept in a place of safety.

Conclusions

- The situation requires delivery on the White Paper on Corrections which identifies corrections as a societal responsibility and not the mandate of DCS alone. Incarceration has a social impact with a ripple effect into the community.

- We should be focusing on crime prevention and crime reduction, based on an understanding of what causes crime.
- We are finally seeing the political will to focus on rehabilitation, but success depends on a good alignment between sentencing policy and corrections policy.
- Sentencing legislation which allows consideration of parole only after four-fifths of the sentence has been served does not acknowledge the possibility of individual growth and development. Long-term institutionalisation increases the likelihood of continued negative behaviour and hopelessness.
- Very long sentences makes reintegration of offenders more difficult, which minimises the possibility of making a positive contribution. DCS supports the creation and implementation of opportunities for diversion.
- Sentencing guidelines should take into account the capacity of the correctional system to deliver and acknowledge that conditions in DCS will worsen. This requires co-ordinated planning, resourcing and monitoring across the integrated justice system.
- The gaps in respect of responsibilities for ATDs need to be closed.

The impact of sentencing on the size of the prison population in South Africa¹⁶⁰

Lukas Muntingh and Chris Giffard, Civil Society Prison Reform Initiative (CSPRI)



Introduction

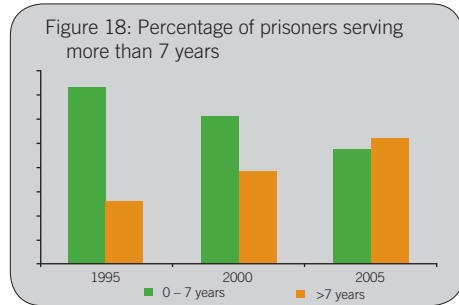
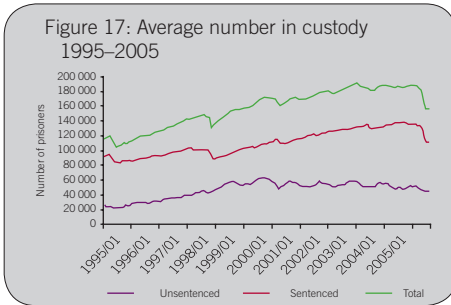
OSF-SA commissioned CSPRI to conduct research on the relationship between sentencing and the size of the prison population. This was motivated by an increasing prison population (a 60% increase from 1995 to 2004) resulting in overcrowding levels of 165% and more.

This has severe human rights implications on safety and security, health, human dignity, access to services etc.

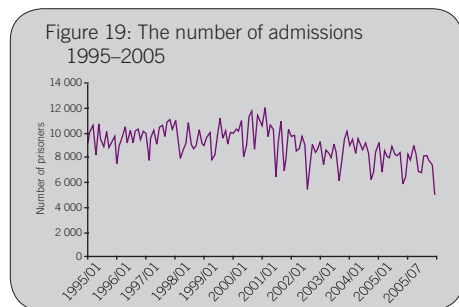
The study used data from the DCS Management Information System and we would like to thank the Department for its assistance and co-operation. Data covers a ten-year period from 1995 to 2005 and we chose to use the average number of prisoners in detention per month as the primary indicator of trends. Admissions to prison and date counts are other sources but there were some integrity problems in this regard in respect of admissions data, and date counts on the other hand may skew the picture. The fact that the data cover a ten-year period also makes comparisons possible with data prior to the promulgation of significant legislative changes, as well as the effect of amnesties and pardons prior to 2005.

¹⁶¹ This presentation was based on research commissioned by the Open Society Foundation for South Africa. For the full conference report, visit www.osf.org.za/publications.

Figure 17 provides an overview of the growth in the prison population from 1995 to 2005, indicating the increase in the unsentenced population from 1995 and reaching a peak in 2000, thereafter



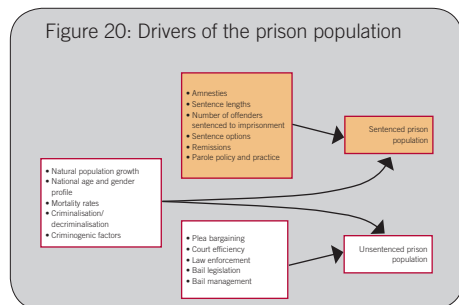
remaining relatively stable between 40 000 and 50 000. The sentenced population remained between 80 000 and 100 000 during the period 1995–2000, but since then it has steadily increased to a peak of 140 000 by 2005. The special remissions of 2005 made a significant impact on this category but all expectations are that the prison population will return to its previous level within 12–18 months.



A further very significant trend is the proportion of sentenced prisoners serving a sentence of longer than 7 years (Figure 18). In 1995, 26% of prisoners were serving a sentence of 7 years and longer, this climbed to 39% in 2000 and then to 52% by 2005. The implications of this in respect of managing overcrowding are obvious. The number of admissions is decreasing. Figure 19 shows the average number of admissions of sentenced prisoners per month and presents an apparent paradox if compared to Figure 17. The chart shows a steadily declining number of admissions from 2000 while the total number of sentenced prisoners continue to increase. The explanation is simple – fewer prisoners are being sentenced for longer periods. This study aimed to explain this relationship in more detail.

Drivers of the prison population

There is a multitude of factors or drivers of the prison population, ranging from macro-societal influences such as natural population growth to the criminalisation or decriminalisation of certain acts. There are also more specific factors that impact primarily on the sentenced and unsentenced prison population. In terms of this model, the research focused on the impact of the specific factors on the sentenced population, as shaded in Figure 20.



Overcrowding

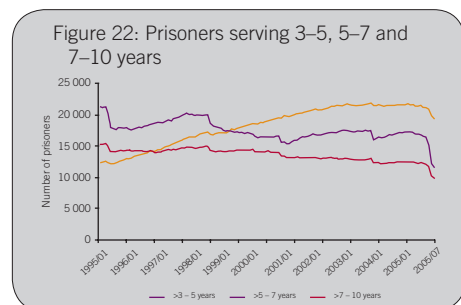
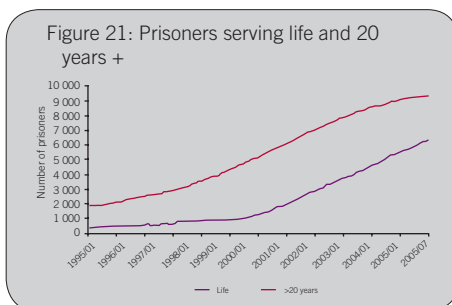
South Africa's measure for the amount of space per person is 3.344m² for a single cell and 5.5m² per person in a communal cell. Averages are misleading; there is great variation within prisons and within sections of prisons. Overcrowding has a strong qualitative impact and it is the management (or lack thereof) of prisoner density over time that ameliorates or exacerbates the situation. The Correctional Services Act and the Criminal Procedure Act enable the DCS to apply a number of measures to alleviate overcrowding

Changes in sentencing legislation

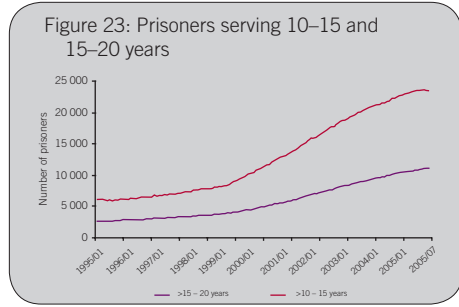
Two key legislative changes took place in 1997 and 1998 – the Magistrates Court Amendment Act (MCAA) and the Criminal Law Amendment Act (CLAA). The MCAA provided for the increase in sentence jurisdiction of the regional and district courts. The maximum sentence that can be applied by a regional court increased from 10 to 15 years and by a district court from 1 to 3 years' imprisonment. The CLAA created a complex schedule of mandatory minimum sentences (imprisonment and fines) primarily aimed at violent offences; but courts may deviate from these for substantial and compelling reasons. The trial court can also refer a case to a higher court for sentencing. If sentenced in terms of the CLAA, a prisoner must serve four-fifths of a sentence and life imprisonment increased to a minimum non-parole period of 25 years. There is no credit for the time spent in detention awaiting trial. The effect of the CLAA was delayed. Although it came into force in May 1998, its effects on the prison population were seen by 2000/1.

The effect of the MCAA was immediate. The increase in sentence lengths started before 1997 but, over the ten-year study period, the combined effect of the two pieces of legislation is significant. Using the imposition of sentences of longer than 20 years and life sentences as indicators, it can be seen that, prior to the increase in sentence jurisdiction and the promulgation of the CLAA, there was already a trend to impose longer sentences and this is particularly observable in the number of prisoners sentenced to serve prison sentences of longer than 20 years (Figure 21). The increase in the imposition of life sentences was less pronounced but still visible.

In the lower sentence categories this trend is also visible and Figure 22 shows how the 7–10 year sentence category increased between 1995 and 2003. The tapering down in the



category from 2003 can be ascribed to the increase in jurisdiction as well as the CLAA stipulating mandatory minimums that would in all likelihood now apply to cases that would formerly have received 10 years and are now receiving longer sentences and even life. The number of prisoners serving less than 7 years has stabilised and shown a marginal decline.

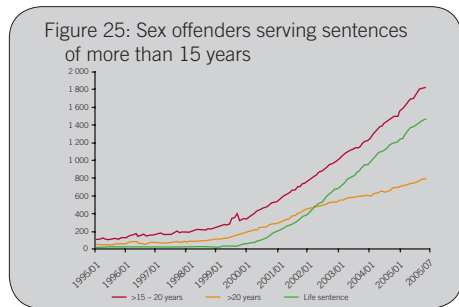
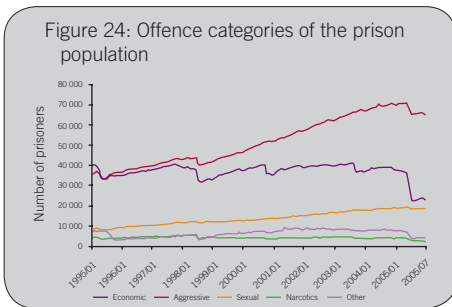


The study found that the category of prisoners serving sentences of between 10 and 15 years is a critical category. Figure 23 shows a drastic increase in prisoners serving sentences of 10–15 years and a noticeable surge coinciding with the change in sentence jurisdiction of the regional courts. The increase in prisoners serving 15–20 years is not as pronounced and continues roughly at the same rate prior to 1998.

Offence categories

The DCS management information system distinguishes five offence categories: ‘economic’, ‘aggressive’, ‘sexual’, ‘narcotics’ and ‘other’. The majority of prisoners fall into the economic and aggressive categories. The CLAA targets violent and sexual offences in particular and this has had a significant impact on the profile of the prison population.

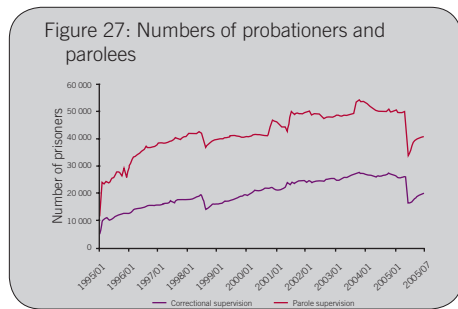
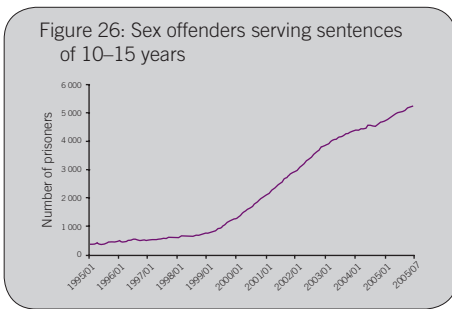
It is evident that the number of prisoners convicted of economic offences has remained stable and also benefited significantly from the 2005 remissions (Figure 24). Prisoners convicted of aggressive crimes have, however, increased dramatically from under 40 000 in 1997 to over 70 000 by 2005.



The number of prisoners serving sentences for sexual crimes increased from under 10 000 in 1995 to just below 20 000 by 2005. It is not only the fact that the number of prisoners serving sentences for sex offences is significant but also that their sentence profile has changed dramatically in a 10-year period. The 15–20 year category increased dramatically from numbers of approximately 100 to 1 800 in 10 years (Figure 25). Prior to 2000 there were virtually no prisoners serving life sentences for sexual crime, but by the end of 2002 the number of prisoners serving life sentences for sexual crimes overtook the prisoners serving

determinate sentences of longer than 20 years for sexual crimes. In view of this it has to be concluded that the CLAA had a very pronounced impact on the sentencing of sex offenders and that the courts did not hesitate to impose the maximum sentences. Figure 26 shows the number of prisoners serving sentences of 10–15 years for sex crimes. It is clear that the increase in sentence jurisdiction of the regional courts also had a very significant impact on the sentence profile of this category of prisoners.

While there have been significant changes in the size and composition of the prison population, the offender population under community corrections showed a marked increase from 1995 to 2001, and thereafter has remained relatively constant, save for the effect of the remissions programme.

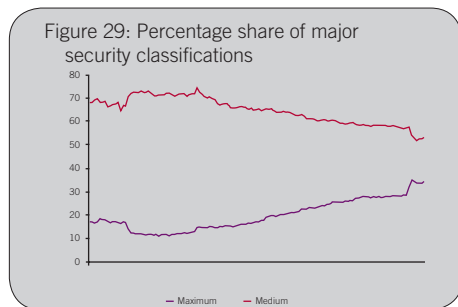
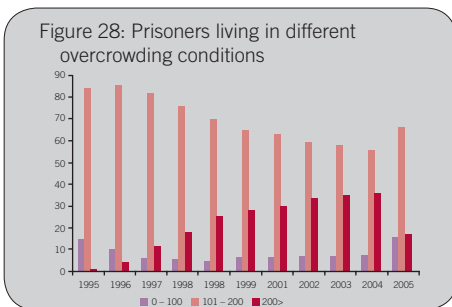


Non-custodial options

Figure 27 shows the daily average of offenders under community corrections, i.e. correctional supervision and parole. The trends should also be seen within the context of the longer non-parole periods resulting not only from the minimum sentence legislation but also from the generally longer sentences resulting from the MCAA.

Impact on prisons

Overcrowding statistics are usually based on national figures. These are just an average, and do not give a true picture of life in prison. Some regions are more overcrowded than others,

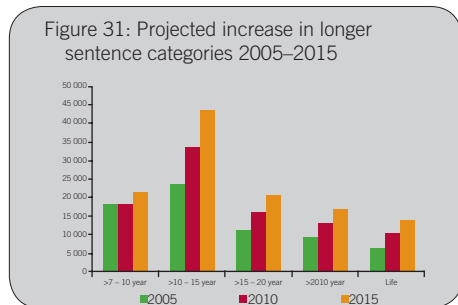


some prisons are more overcrowded than others and sections within prisons may be more overcrowded than other sections. Private prisons may not be overcrowded at all and, given that they hold only 6 000 prisoners, a national average overcrowding statistic of 150% means that state prisons are more overcrowded than the statistics suggest. Figure 28 is based on overcrowding figures at prison level. The second bar on the left is suggesting that 85% of the total prisoner population is living in prisons that are operating at between full capacity (100%) or double capacity (200%). The trends are very clear from 1995 onwards – prisoners living in conditions of 100%–200% full reached a high of 35%, before the trend was reversed by the special remission of 2005.

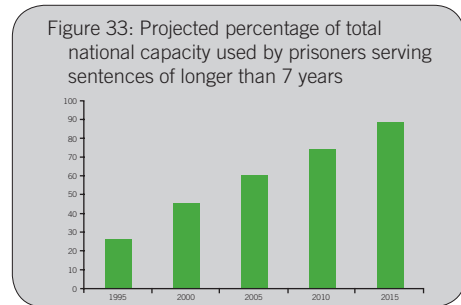
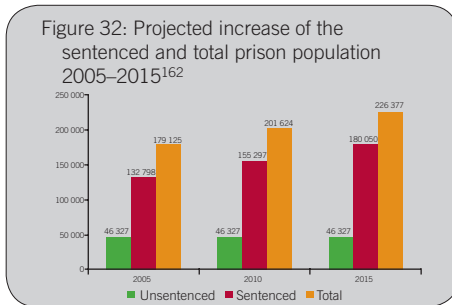
Security classification is a system to evaluate the risk associated with sentenced prisoners based on the nature of the offence, previous convictions, escapes and sentence length. Sentence length carries a heavy weighting, as longer term prisoners are likely to be a higher security risk than shorter term. Figure 29 shows a sharp increase in the number of maximum security prisoners, from 14 000 in 1995 to nearly 40 000 in 2005. An increasing number of medium security prisoners now fall into the maximum categories. In spite of the special remission of 2005, the two lines are converging, and are likely to meet and cross in the not too distant future. This pattern brings with it serious problems for DCS management. They now need more secure accommodation than they have available, and they find it difficult to engage prisoners in work because falling into a higher risk category means having more restrictions on movement.

Projections: Sentence categories

We have done projections only for sentence categories longer than 7 years because it was too difficult to predict what would happen in lower categories. The special remission reduced prison numbers significantly. We had a dilemma: whether to take the totals as they were in December 2005 after the remission, or to assume that total number of prisoners in these categories will return to where they were before the remission. We chose the latter because Figure 30 reflecting prisoners serving less than two years showed a clear trend back to the pre-remission levels. We assumed that, for the next ten years, sentences of less than 7 years will stay exactly the same as they were in January 2005 – the pre-remission total of 179 000 rather than the post remission total of 160 000



We did not project the prison population totals as a whole because the increase in the prison population is driven in different sentence categories in different ways and at different rates. So, besides assuming that lower sentences (7 years and less) remain the same, we did the projections by accepting that longer sentence categories increase at different rates, and should be projected separately. Please remember, these are mathematical projections: assuming everything else remains the same. Each sentence category has been adjusted on the basis of errors that we were able to measure using known data. Figure 31 shows the projections drawn



from much denser information in Table 4 in our written report. It is important here not to look only at the relative increases, but also to look at the actual numbers. Life sentences, for example, are expected to increase from the current level of about 6 500 now to over 10 000 in 2010 and 14 000 in 2015. The importance of this chart is it graphically shows the central role played by the >10–15 year sentence categories in driving up prison population, from 23 000 to 33 000 to 43 000, i.e., an increase of 20 000 prisoners over a ten-year period. The projected totals are 200 000 in 2010 and just over 225 000 in 2015. Figure 32 assumes stable pre-release totals of unsentenced prisoners and prisoners sentenced to 7 years and less.

Figure 33 shows how these projected figures impact on prison occupation and overcrowding for prisoners serving 7 years or more, taking into account a projected increased capacity of 6 000 places by 2010 and another 6 000 places by 2015. It is clear that those serving 7 years or more will use up all the available space in prisons soon after 2015.

Summary and conclusions

- From 1995 to 2000, the increase in the prison population was driven by massive increases in the unsentenced prisoner population. Around 2000, this number stabilised and then decreased slightly.
- From 2000 onwards, the increase in the prison population was driven by massive increases in the number of sentenced prisoners serving longer than 7 years. The longer sentence categories are increasing more rapidly than the shorter ones.

¹⁶¹ Assuming the numbers of sentenced prisoners serving seven years and less and unsentenced prisoners remain stable.

- The minimum sentence legislation is not directly responsible for the increase in the sentenced prisoner population. These trends are apparent before 2000 or 2001, when the delayed impact of the minimum sentence legislation can first be seen.
- The minimum sentence legislation had a consolidating impact on the increases in the total prisoner population.
- However, the minimum sentence legislation will have a serious impact on the prison population totals soon. The longer sentences will ensure that prisoners who would otherwise be released spend more time in prison.
- Longer sentences are exacerbated by the Correctional Services Act which specifies that offenders sentenced under the minimum sentence legislation may not be considered for parole before four-fifths of their sentences have been served.
- As time goes on, the impact of the minimum sentences is likely to be greater.
- The extension of the jurisdiction of the Magistrates Courts had a profound impact, in particular the regional court. Immediately after the extension, the numbers serving >10–15 year sentences increased rapidly. This sentence category is the most important driver of the increase in the prison population.
- There is a different pattern for sexual offences. There was no tariff increase prior to the legislation. Totals in the category >10–15 years increased at the time of the change in the regional court's jurisdiction.
- Equally noticeable was the increase in longer sentences as a result of the minimum sentence legislation. This suggests the High Court increased sentences for sexual offences as a direct result of minimum sentence legislation.
- The minimum sentence legislation has established tariff beacons for sentencing as has been argued by Dirk van Zyl Smit. Other lesser sentences have been sucked up into the vacuum created by the longer sentences established by minimum sentence legislation. Thus, even if the legislation were repealed now, there would likely be no immediate impact on sentencing patterns.
- Mathematical projections suggest that the prison population is likely to increase from its present total of around 160 000 to 200 000 by 2010, and to 225 000 by 2015.
- The bulk of this increase is provided by the >10–15 year sentence category. This category is likely to increase by 20 000 prisoners over the next 10 years.
- As most of these will be long-term prisoners, and thus classified as maximum security for longer periods of time, the DCS will face serious management challenges. These include the provision of maximum facilities, and keeping maximum security prisoners occupied in overcrowded conditions. Overall, this has created an antithetical environment for the rehabilitative ideal expressed in the 2005 White Paper on Corrections.

Sentencing in South Africa: Lessons from the United States

Marc Mauer, Executive Director: The Sentencing Project, Washington DC



Introduction

It is a great honour to be able to speak before such a distinguished group of policymakers, scholars, and advocates. I am, of course, humbled at the opportunity to be engaged with critical issues of crime and justice in a nation with such a rich and complex history of striving for democracy as South Africa. At the same time, it is more than a bit odd for a visitor from the United States to be discussing how to develop rational sentencing and incarceration policies.

As most of you are well aware, in recent decades the US has embarked upon what we can think of as an ‘experiment’ in the use of incarceration. This change in social policy has created what many are now describing as a situation of mass incarceration in the United States, one with far-reaching consequences.

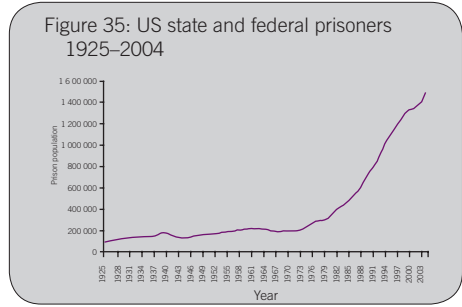
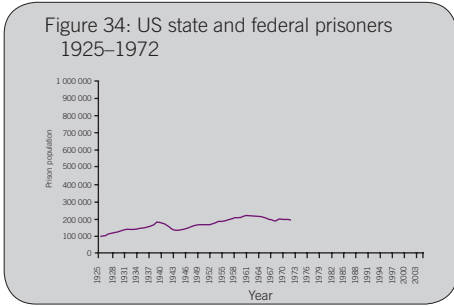
Why, then, should an observer from the US be assessing prison issues for an audience in South Africa (or anywhere else for that matter)? It seems to me that there are two reasons for doing so. First, for better or worse, American trends in culture, sports, politics, and other areas of life often receive worldwide attention and are influential, probably overly so, in other nations. Second, since we have in fact been engaged in what I have termed a ‘race to incarcerate’, it behoves us to examine the effects of these developments and to assess their implications for other nations.

Therefore, let me try to provide an overview and assessment of the following issues:

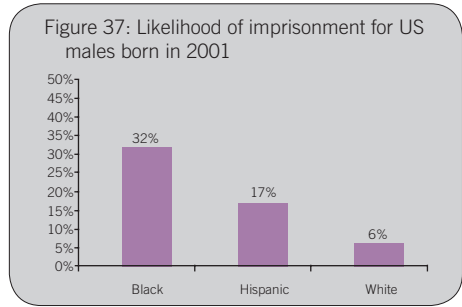
- The changes in sentencing policy and the use of incarceration in the United States over the past three decades;
- The relationship between sentencing policy and prison populations;
- The effect of imprisonment on crime;
- Advocacy strategies to change the public climate on crime and reduce the use of incarceration;
- Implications for policy in South Africa.

Incarceration in the US since 1970

For a period of nearly 50 years prior to 1970, the rate of incarceration in the US had fluctuated only modestly, rising somewhat during the Depression and declining during World War II. By the early 1970s, the United States had a combined prison and jail population of about 330 000.



At that point, the American ‘experiment’ with incarceration was launched, although of course it was not described so at the time nor could anyone have predicted the scale of change that was to come. But, beginning in 1972, the prison population began its historic rise, increasing now for 33 consecutive years, by a total of more than 500% to 2.2 million inmates today.



Our nation now leads the world in its rate of incarceration, at 738 per 100 000 population, and we lock up our citizens at 5–8 times the rate of other industrialised nations. And, of course, we need to recognise the irony of a nation that prides itself on its democratic traditions also maintaining the world’s largest prison population.

As is true in most nations, our prisons are primarily filled with minorities and people from the lowest socio-economic strata of society. About 60% of our inmates are black or Hispanic, far greater than their 27% share of the overall population. If current trends continue, one in three black males born today can expect to go to prison in his lifetime, as can one in six Hispanic males. The figures for women are lower overall, but the racial disparities are similar, and the number of women prisoners is increasing at nearly double the rate of men. These trends should be deeply disturbing to all caring citizens.

Looking at the characteristics of the people in prison tells us much about social structures and their impacts. Essentially, what we see is the failure of key institutions to effectively aid in the building of strong families and communities. Thus, among the prison population, two-thirds have not graduated from high school, three-quarters have a history of substance abuse, one in

six has a history of mental illness, and more than half the women have a history of physical or sexual abuse. None of these characteristics excuse or condone the crimes these people have committed, but at the very least they should provide us with some context to understand how these individuals came to be incarcerated.

The enhanced commitment to punitiveness results not only in a world record prison population, but in broad-scale application of the death penalty as well. Here, too, the United States is an international outlier, part of an increasingly smaller number of industrialised nations that still employ this barbaric punishment. Following legal challenges in the 1970s, the death penalty was held to be constitutional in 1976, and since then more than 1 000 people have been executed in our nation, with an additional 3 300 on Death Row today. It was not until 2002 that our Supreme Court banned the execution of mentally retarded people, and in 2005 finally prohibited the execution of juveniles, a policy that the United States had shared with only a handful of nations, including Iran and the Democratic Republic of Congo. While there has been increasing questioning of the death penalty in recent years, as well as a decline in the number of executions, the US is still a long way from joining with most other democratic nations in adopting an abolitionist policy.

Analysing the rise in the rate of incarceration

The story of the rise in imprisonment in the US is a complex one, involving the intersection of politics, economics, racism, media, and cultural patterns. Beginning in the late 1960s, political leaders of both major parties embraced 'tough on crime' policies that have created an environment in which punitiveness is almost an assumption of crime policy discussions. Often this has been done in rather cynical ways. In 1989 President George Bush Sr. delivered a primetime television address on the drug problem, highlighted by his holding up a bag of crack cocaine that had been sold to an undercover agent across the street from the White House. Only months later did an investigative journalist discover that the agent had enticed a young man to sell him the drugs at that location precisely to set up the dramatic television moment.

Three years later, as then Governor Bill Clinton was campaigning for president, he left the scene of the critical New Hampshire primary to fly back to Arkansas to oversee the execution of Ricky Ray Rector. Rector, a mentally impaired black man, had so little conception of his pending execution that he asked that the dessert from his last meal be saved for him until the following morning.

Politically inspired campaigns have been aided by media imagery of crime issues that has often been sensationalised and misleading. In the 1980s the emergence of crack cocaine was accompanied by news magazine cover stories proclaiming it as a new 'epidemic', 'crisis', and 'plague' that was 'eating away at the fabric of America'. Similarly, in recent years we have been treated to anecdotal stories of the new 'epidemic' of methamphetamine abuse. Both of these drugs are harmful, of course, but in both cases predictions of the scale of use and consequences have been dramatically overstated, while little attention has been focused on prevention and treatment options. Consequently, the rhetoric and imagery relating to the

drugs has contributed to a climate in which punitive policies have been adopted while largely neglecting the evidenced-based case for effective treatment strategies.

This broader political environment has created the context in which criminal justice policy changes have emerged over several decades. During the early years of prison expansion in the 1970s, some of the increase can be attributed to rising rates of crime. The US had experienced a rise in crime in the 1960s, much of this related to the substantial increase in the 'baby boom' population, young males in the 15–24 year age range. But since 1980, we find that changes in sentencing policy, and not crime rates, provide the explanation for the rise in imprisonment. A sophisticated study on this issue found that, from 1980–2001, the entire rise in imprisonment was explained by changes in sentencing policy; 53% through an increased likelihood of receiving a prison term upon arrest and 47% through an increased length of stay in prison.

The 'get tough' movement has taken many forms in recent decades. At the level of law enforcement, this has included a substantially expanded role in drug law enforcement, with nearly three times the number of drug arrests annually today compared to the 1980s. These figures have remained at peak levels even as arrests for some of the more dangerous drugs have declined, so that now nearly half of all drug arrests are for marijuana offences.

In the area of sentencing policy, we have undergone a profound shift toward restricting judicial discretion while imposing legislatively prescribed mandatory sentencing policies. Nearly every state as well as the federal government has some type of mandatory sentencing policy, most prominently used for drug offences. These often restrict judges from consideration of otherwise relevant circumstances of the offence and offender while requiring a fixed prison term. For example, in the federal court system, judges are obligated to impose a five-year prison term for possession of just five grams of crack cocaine, even for a first offence.

Mandatory sentencing has been adopted under the premise that by 'sending a message' to potential offenders they will be deterred from engaging in the prohibited actions. But as a theory of crime prevention, such a policy ignores a great deal of research that concludes that deterrence is more likely to be achieved by increasing the certainty, rather than the severity, of punishment. People who don't believe they will be apprehended for their criminal activities are not likely to be thinking about what type of punishment will be imposed. Indeed, in looking at the impact of mandatory sentencing on the drug trade, since the inception of the 'war on drugs' in the mid-1980s, there has been no significant reduction in drug use and prices of drugs have generally declined, contrary to what proponents of harsh punishments would have suggested.

At the extremes of such initiatives, we have policies such as 'three strikes and you're out' in half our states. The state of California has the most expansive of these policies, which led to Supreme Court consideration of whether the law represented 'cruel and unusual punishment'. The Court rejected the challenge to the law in 2003. The cases under consideration involved

one man whose 'third strike' was for stealing three golf clubs from a sporting goods store and another who stole \$153 worth of videotapes from a department store. The golf club thief is now serving a sentence of 25 years to life and the videotape thief 50 years to life. Each of these cases may easily cost taxpayers more than \$1 million in incarceration over their lifetime.

Cases such as these also contribute to our rising population of lifers, most of whom admittedly are serving time for far more serious offences. But the growing use of life sentences has resulted in 1 of every 11 prisoners now doing life, with one-quarter of this population serving life without parole. Thus, we have an increasingly aging prison population, with resultant high costs of health care, at a stage in life when few of these individuals would present any significant public safety threat if released.

Impact of incarceration on crime

Some people would argue that, while high rates of incarceration in the US are unfortunate, they have been necessary to deal with crime and in fact have been successful in reducing crime rates over the past decade. Indeed, rates of crime and violence have declined by about 30% since the early 1990s, coming during a period when rates of incarceration were rising.

There has been a great deal of analytical work examining the relationship between crime and incarceration in the US over many years. While there is still some controversy in this area, there is a growing consensus among researchers in several respects:

- Incarceration has some effect on crime rates, but the strength of this relationship is considerably more modest than the public and policymakers generally believe.
- As rates of incarceration increase, there is an effect of diminishing returns, primarily due to the imprisonment of increasingly less serious offenders.
- The deterrent effect of criminal justice sanctions is more a product of certainty, rather than severity, of punishment. Policy changes that enhance punishment without increasing the risk of apprehension are unlikely to contribute much to deterrence.
- Social investments, including preschool programmes, high school graduation incentives, and substance abuse treatment, have been demonstrated to be more cost-effective than incarceration in reducing crime.

In assessing the crime decline of the past decade, several studies have provided preliminary estimates of the relative contribution of expanded incarceration. The most generous estimates suggest that about one-quarter of the decline in violence may be attributed to increased incarceration; other studies conclude that incarceration may be responsible for as little as 10–15% of the decline. Let us assume for our purposes that the upper level of about 25% is on target; what are the policy implications of such data?

While one-quarter of the crime decline is hardly a trivial amount, this finding also tells us that three-quarters of the decline had nothing to do with expanded imprisonment. While we do

not yet have the full story of the crime decline, other factors that appear to be related are the following: a relatively strong economy in the 1990s, which created increased job opportunities for low-wage workers; the waning of the crack cocaine epidemic of the late 1980s, along with the violence associated with the drug trade; community policing that helped to reduce youth violence in some cities; and, the 'younger sibling' effect whereby teenagers viewed the toll that drug abuse and crime were taking on their older brothers and sisters, and turned away from situations of potential conflict.

Thus, expanded incarceration represents just one of a number of factors that may have contributed to the crime decline. We should note as well that this has come about at enormous expense, with the cost of corrections doubling from \$26 billion to \$52 billion annually between 1990 and 2000 (not adjusted for inflation). In addition, as noted above, at high rates of incarceration, continued expansion of the prison system will only result in increasingly diminished returns in crime control. Finally, even to the extent that incarceration has some impact on crime, this does not necessarily suggest that it is more effective than other interventions. Indeed, an increasing body of evidence suggests that social investments that address substance abuse and provide supports to families with preschool children are more likely to provide long-term crime control benefits.

Community-level effects of incarceration

In addition to examining the impact of imprisonment on crime, it is increasingly clear that there are a host of other ways in which prisons affect society. Some of these are broad societal impacts, while others are concentrated in the communities from which offenders are disproportionately incarcerated.

The fiscal cost of incarceration is a growing concern for policymakers at the state and local level. The vastly expanded prison system nationally has resulted in substantially increased costs for state corrections systems, rising to a level that now threatens support for vital state services. In California, for example, corrections spending quadrupled from 2% of the state budget in 1981–82 to 8.2% in 2005–06, approaching the level of 11.7% spent on higher education.

When people are sentenced to prison, in effect their family members receive a sentence as well. Most incarcerated people are parents, and today in the US we have 1.5 million children who have a parent in prison on any given day. For African American children, 1 in 14 is growing up with a parent in prison. These children, who have committed no crime themselves, must cope with the loss of emotional and financial support, along with the stigma of having a parent in prison.

While the rate of women's incarceration is increasing rapidly, it remains a fact that 93% of prisoners are men. Therefore, in high incarceration communities, the sheer numbers of 'missing' men contribute to a severe gender imbalance. In some neighbourhoods in Washington, DC, for example, there are only 62 adult men for every 100 adult women. These men are absent from the life of their community at a time when they would otherwise be starting families and

careers. Clearly, these dynamics will have a serious effect on family formation and parenting prospects.

Political participation is also increasingly affected by the scale of the criminal justice system. The United States maintains the most restrictive form of felony disenfranchisement among industrialised nations, and in almost all of our states the right to vote is lost for a period of time following a felony conviction. In 48 states, prisoners are not eligible to vote, and in two-thirds of the states persons on probation and/or parole also cannot vote. In the most extreme cases, 11 states permanently take away the right to vote for some or all felony offenders. As a consequence of the combined impact of these policies and the rise in the prison population, an estimated 5.3 million Americans will be unable to vote in this year's national elections, representing 1 of every 41 adults. Among black men, one of every eight is not eligible to vote, with this figure rising to as much as one in four in a number of states. Thus, increasingly harsh criminal justice policy has disproportionately affected poor communities through higher rates of imprisonment, which in turn strips these neighbourhoods of their political influence as well.

A changing climate on criminal justice

Despite the disturbing data and trends presented here, in fact there is reason for optimism in regard to the development of sentencing policy in the US. Since 2000, more than half the states have enacted some type of sentencing or drug policy reform, and political rhetoric on crime is much diminished. At the federal level, in 2005 the Supreme Court found the federal sentencing guidelines to be unconstitutional and applied a remedy that makes the guidelines advisory rather than mandatory, thus restoring a greater degree of judicial discretion at sentencing. Previously, the guidelines had been far more restrictive than any such systems at the state level, and generally were constructed with a rigid framework not unlike mandatory sentencing. National support has also grown substantially for alternatives to incarceration, drug treatment, and support services for prisoners returning to the community. How, then, has this come about?

The common explanation for this new opening on crime policy is that the cost of incarceration has become so significant that state governments can no longer fund an expanding prison system while also maintaining vital social spending. This is in large part correct, but expanded prison spending has been an unwise investment for quite some time without previously having had much impact.

Two additional factors have helped to shift the political climate in a direction that allows for greater consideration of the fiscal dynamics. First, because crime rates have been declining in the US, the issue of crime now has considerably less political and emotional resonance than it did not long ago, thus creating greater political space for policymakers to consider approaches to the problem based on evidence rather than rhetoric. In addition, a generation of development of alternative sentencing and community corrections programming has now resulted in the institutionalisation of these approaches in many jurisdictions. While one might critique the effectiveness of any given programme, the concept itself is now broadly accepted,

both in the courts and in communities. This development, too, opens up the political space for consideration of sentencing reform. In order to create the basis for such reform, reform organisations and practitioners have engaged in a variety of strategies to lay the groundwork for greater public support. These can generally be categorised in two areas: programmes and policies that have attempted to reframe the debate on crime and punishment; and communications strategies designed to provide a critique of current policies.

Reframing the debate on crime and punishment

Public opinion research over a long period of time has demonstrated that the American public does not necessarily believe that prisons are very effective in enabling offenders to lead productive lives upon release from prison. But in the absence of an alternative vision, prison communicates a message of punishment and consequences. In recent years, there has been sustained thinking and programme development directed toward changing public perceptions on crime and punishment by promoting models and themes that offer the prospect of more effective approaches to crime. These include the following:

Prisoner re-entry

Whereas rehabilitation, no matter how imperfectly implemented, was the guiding principle of corrections for a century, by the early 1970s it had come under attack from both the political right and left. Conservatives believed that prison programming represented a 'soft on crime' approach, while liberals feared the unchecked coercive power of the state. As a result, since that time prisons have largely operated under a model emphasising punishment and warehousing, despite the interests of many corrections leaders.

Beginning in the late 1990s, though, the concept of 're-entry' has developed broad support among policymakers and practitioners. Re-entry is based on the idea that, since 95% of prisoners will be released to the community at some point, it is in everyone's interest that the transition to the community be as successful as possible. If the goal of re-entry is to enhance public safety, this can be best accomplished by supporting programming in prison along with transitional services as the offender returns home. This framing of the issue has rapidly attracted support among broad parts of the political spectrum, and has led to experimentation with a variety of programming models.

Problem-solving courts

As traditionally constituted, our courts are charged with making a determination of guilt or innocence, but they do not necessarily attempt to address the sources of crime and conflict. Arguably, this lapse contributes to our high rates of recidivism. This failing became particularly pronounced in the 1980s, as massive arrests resulting from the 'war on drugs' contributed significantly to the escalation of the prison population while virtually neglecting the underlying problem of substance abuse. In order to respond to this gap, the first 'drug courts' were established in the early 1990s. The concept behind them is a simple one. In cases (generally drug or non-violent offences) where substance abuse is an underlying contributor to crime, the courts will refer the defendant to a supervised treatment programme for a period of time.

If the defendant completes the programme satisfactorily, there will generally be no further adjudication. If the defendant is noncompliant or violates conditions of the programme, then he or she may be brought to trial and/or sentenced to incarceration. Drug courts have become so popular that there are now well over 1 000 in operation or being planned nationally. The research findings to date provide us with cautious optimism that these courts can have positive effects on reducing crime and drug abuse. Due to the popularity of drug courts, other types of problem-solving courts have been established as well, including domestic violence courts and mental health courts. One can debate the degree to which such specialisation is appropriate or efficient, but it is clear that this movement is tapping into a strong desire to solve problems, rather than to just use the courts to determine guilt or innocence.

Restorative justice

American approaches to criminal justice are also now increasingly influenced by the concept of restorative justice. In essence, this represents a belief that there are multiple needs that go unaddressed in most criminal court proceedings. These include the financial and emotional harm to victims, the social and economic deficits of offenders, and the community failings that contribute to crime. Restorative justice models, often working in concert with the court system, attempt to promote resolution of disputes and concerns among these various parties. The early development of this concept often involved victim–offender mediation sessions, with a goal of having the offender make appropriate restitution or apology for the harm to the victim. As the model has evolved, it now includes community-wide approaches such as ‘circle sentencing’, based on Native American traditions of incorporating one’s family and community in the resolution of anti-social behaviour. And, whereas the early implementation of restorative justice was often led by church groups, it has now gained increasing support among judges and corrections leaders as well. The potential of restorative justice is that it can provide a means of solving problems of conflict while also addressing more fundamental contributing factors to crime.

Community-based practitioner strategies

Even as prison populations have continued to rise in recent decades, many practitioners have begun to rethink their roles and orientation in addressing crime and its consequences. One of the most significant developments in this regard is the law enforcement movement toward community policing. While this concept has been interpreted in a variety of ways, its basic principle suggests that law enforcement agencies will be most effective when they view themselves as working in partnership with, not over, the communities they police. This suggests that the police should place a greater emphasis on engagement with the community to both anticipate problems and respond to them using a variety of community resources. The strong interest expressed in this movement has led other practitioners to begin to reconsider their roles along these lines as well; thus, we see innovations in community prosecution and community probation initiatives, all under the guiding framework of increasing public support for criminal justice agencies while addressing local concerns about crime and safety in a more direct way.

Communications strategies to critique current policies

In order to develop more rational sentencing policies, it is necessary to change the prevailing political climate that has embraced 'get tough' policies for three decades. Advocacy organisations and practitioner allies have engaged in a range of strategies designed to encourage such a shift in the political debate. These include the following:

Identifying messengers as well as messages

In an emotional political climate, 'credibility' is as important as policy analysis in gaining support for reform. Therefore, The Sentencing Project and others have endeavoured to gain support from corrections and law enforcement leaders, who can hardly be thought of as 'soft on crime'. One such effort was the formation of the Campaign for Effective Crime Policy in the 1990s, an informal network of more than 1 000 criminal justice officials who signed onto a 'Call for a Rational Debate on Crime and Punishment'. This group achieved visibility in the national media and served to encourage their colleagues in the field to speak out as well. In addition, organisations such as Penal Reform International have established strong working relationships with the American Correctional Association and other leaders, finding common ground in their support for humane and effective corrections programming.

Developing conservative political support

In recent years, reform advocates have sought to gain allies among conservative political leaders and organisations as well. This has included joint efforts on such issues as prisoner re-entry and prison violence, and has proved successful in a number of areas. President Bush, for example, in his 2004 State of the Union address, called for funding for re-entry programmes, stating that 'We know from long experience that if they can't find work, or a home, or help, they are much more likely to commit crime and return to prison'. In Congress, one of the key sponsors of prisoner re-entry legislation, the Second Chance Act, is Senator Sam Brownback, arguably one of the most conservative legislators in the Senate. For Senator Brownback, as well as many others, their faith-based commitments have led them to articulate the need for forgiveness and redemption, and their connection to public safety. We should not exaggerate the degree of conservative political support in these areas, but it nonetheless represents a significant shift from the harsh climate on crime policy that prevailed not very long ago.

Incorporating international human rights perspectives

Americans have long been known to resist international guidance in the development of social policy, but in an increasingly globalised world, this resistance is softening. In the area of the death penalty, for example, the Supreme Court decision banning the execution of juveniles relied in part on an assessment of international norms documenting the outlying nature of US policy. Advocacy organisations have also been successful in securing international condemnation of US practices that violate human rights standards. In 2006, the United Nations Human Rights Committee described its concerns with American disenfranchisement laws as not complying with the International Covenant on Civil and Political Rights, and called upon jurisdictions to allow for voting rights for all felony offenders except those imprisoned. Finally, advocacy campaigns that have called attention to the fact that the US leads the world

in its rate of incarceration have been successful in raising fundamental questions regarding the causes and consequences of these developments.

Employing the power of personal stories

Mandatory sentencing and similar policies lend themselves to popular political slogans, but the reality of day-to-day sentencing is far more complicated than that. Any type of 'one size fits all' sentencing inevitably oversimplifies the complexity of individual sentencing cases. In the US, organisations such as Families Against Mandatory Minimums have had success in publicising egregious cases that illustrate the problems inherent in mandatory sentencing. Laws designed to punish harshly drug 'kingpins' inevitably are also used for the 'girlfriends' and other accomplices of the primary drug seller. By placing a human face on the issue, such stories draw an emotional connection to the policy which goes beyond the 'headline' of the crime itself.

Lessons for South Africa

Some policy ideas travel well across international boundaries; others are only relevant to a particular society or need to be modified substantially in order to be relevant in other nations. Policymakers and NGOs in South Africa will ultimately need to determine which of the lessons from the incarceration experience in the US are useful to your situation. Therefore, rather than my suggesting how to adopt or adapt our American strategies, let me try to draw the key lessons that I have incorporated through this experience.

The overall theme for a rational crime policy needs to be that we are all committed to public safety. This should be obvious to all, but it is discouraging how frequently the debate in the US becomes distracted by trying to determine who is the most 'tough on crime'. We are all opposed to crime, and we just differ on how to go about reaching that goal. But for reformers and policymakers alike, we need to stress continually our commitment to reducing both the number of victims and offenders. If public safety is our goal, then we need to assess the mix of policy initiatives that can best produce this outcome. We can all agree that this will include some combination of education, economic opportunity, social services, and criminal justice responses, but how much of each approach to emphasise is the challenge. Over the last 30 years in the United States, we have developed an approach that is very much imbalanced, with an unhealthy and ineffective weighting toward incarceration. This has contributed to a host of negative consequences which no nation should want to emulate.

Debate on reducing crime often becomes polarised between advocates of long-term solutions versus those who seek immediate results. Here, too, this is not a useful dichotomy. On the one hand, we would be foolish to believe that we can create a fair and just society without addressing systemic issues of poverty and racism. But if we only wait until those issues are resolved, we will fail to meet the urgent needs of improving safety and opportunity on a daily basis. In this regard, we need to seek models of programmes and policies that can provide short-term benefits while building constituencies and approaches for long-term systemic change.

In the US, reformers are often confronted with a hostile public and media environment, or at least that is the general perception. I am not convinced that the public is as uniformly opposed to reform as is commonly believed. The problem instead is that we do not always find appropriate ways to engage communities directly in developing approaches to neighbourhood safety. On those occasions when we do – whether through community policing, restorative justice, or other means – the response is often very welcoming of new initiatives and policies that don't rely on punishment as a primary approach. So the challenge in this regard involves creating models of engagement and problem-solving that do not rely on a professionalised criminal justice system, but rather a blending of resources from the justice system and the community. Finally, for myself, I have learned much over the years (albeit at a distance) from developments in Africa. From the model of the Truth and Reconciliation Commission in South Africa, those of us abroad gained an appreciation of the strength and wisdom required to provide a structure for healing and understanding. Similarly, through the development of the *gacaca* tribunals in Rwanda, we have seen how a society can attempt to address unspeakable horrors while also constructing a new future. I hope that both our societies can reflect on these uplifting models in order to create nations that encourage the development of strong families and communities.

Comments and questions to Session 4 speakers

DCS as the tail end of the criminal justice system

- DCS is confronted with wanting to move from just being a warehousing facility towards its objectives as stated in the White Paper on Corrections, but it has no control over the police and the justice system. Where are the points of intervention for non-state actors to influence this intervention?
- There will be 40 000 more police officers engaged mainly in detection and investigation, not crime prevention.

Subashini Moodley: The Minister and the Commissioner are trying to link up with the other bodies to work collectively on the problem; e.g. to point out that increasing the number of police on the streets will increase the number of people in prison. We are working on a national level on such issues as the impact of minimum sentencing on the prison population. Through working with the other departments, we have reduced the number of ATDs.

Lukas Muntingh: The budgets for the Department of Justice and the SAPS are increasing dramatically and in tandem in the run-up to the soccer World Cup, but the DCS budget has reached its peak and is in decline. The effect of more arrests and convictions on already crowded prisons has not been taken into account.

Mike O'Donovan: The number of prosecutions coming into the system is staying steady, the conviction rate is better, there are more courts, but court efficiency is coming down.

Private prisons

- Private prisons are run for profit, why should they not increase prisoner numbers to increase their profit?

Chris Giffard: Unlike the US where private prisons are a powerful lobby, there are two private prisons in South Africa with capacity to house 6 000 prisoners. These are not likely to become a powerful lobby which aims to increase the numbers for profit. These 6 000 prisoners eat up an enormous proportion of the DCS budget. For a long time the number of private prisons is likely to remain at two.

Sentencing and sexual offences

- Minimum sentencing has increased the severity of sentencing for sexual offences, indicating that these are taken more seriously, but the system has a dire lack of capacity to engage with those crimes. Victims and families of victims want to be heard, have an apology, be validated, and be protected from further offences. The system does not provide for that through rehabilitation or diversion. Minimum sentencing has done its work for now – the bar for punishing sexual offences has been set higher, and higher sentences are likely to continue even if the law is allowed to lapse.

Chris Giffard: I am not convinced that minimum sentencing has impressed on anybody how serious sexual offences are. There is a general societal problem around gender-based and sexual violence. This will not be solved by legislation.

Sentencing and the severity of the offence

- Very long sentences are not useful to anyone.

Mike O'Donovan: Neither a short sentence nor bail set at a low amount necessarily has any bearing on whether an offence is minor or not. Minimum sentencing is mainly aimed at violent crimes, and bail is set in accordance with the severity of the crime, the means of the accused, and the likelihood that he or she will stand trial. A person accused of murder may be released on R100 bail.

The effect of mass incarceration and the younger sibling syndrome on drugs in the US

- Did mass incarceration change the crack market in the US? Did younger siblings seeing their brothers and sisters going to jail achieve this?

Mark Mauer: Incarceration may have had some effect. But, looking at the history of drug epidemics, what we saw with crack was not unique. The heavy punishment usually comes after the epidemic has peaked.

5

Small group discussions

Summary of small group discussions

Participants discussed three questions in three small groups: 1) Are there any areas of consensus? 2) What is the future of the Sentencing Framework Bill? and 3) What needs to be done in the run-up to the review of minimum sentencing in April 2007 and beyond?

Areas of broad agreement¹⁶²

- When the regional court has to refer matters to the High Court for sentencing it creates an onerous burden on the High Court and the NPA (but participants did not agree on whether this meant that the sentencing jurisdiction of the lower courts should be increased or whether the whole system should be reviewed).
- The answer is not to make courts more punitive. Empirical evidence shows that a punitive approach does not reduce crime. Any proposal to review the punitive powers of courts should be based on research into what the impact of this is likely to be.
- Sentencing policy and legislation should take into account the capacity of DCS and of the criminal justice system as a whole.
- Minimum sentencing may have pushed up the severity of sentences handed down; i.e., 'sentencing inflation' has taken place. It is possible that harsh sentencing will remain even if minimum sentencing is discontinued.

163 Within individual small groups. There may have been differences of opinion between groups.

- The number of sentenced prisoners has gone up significantly over the last 5–10 years, and the proportion of prisoners serving long sentences has also increased.
- Any attempt to renew the minimum sentencing in 2007 should not merely be an administrative process. It should be based on a sincere and open discussion with all stakeholders (including academics and civil society) at portfolio committee, ministerial and inter-ministerial level.
- Parole provisions should be simplified.

The Sentencing Framework Bill

- It has been six years since formulation of the Bill. It is necessary to actively engage to see which changes are necessary to bring it up to date.
- Concerns identified by the Minister and the Department of Justice and Constitutional Development about the Bill are mainly technical and the SALRC should be asked to address these. The SALRC should be asked to complete the schedule to the Bill.
- The idea of periodical imprisonment has been omitted from the Bill, but this can be usefully applied in corrections.
- Some of the Bill's time-consuming procedures should be reviewed.
- The Bill's proposal for a framework which could allow a variation of 30% up or down should be reviewed because a 60% variation may be too large.
- The cost implications and the composition of the proposed Sentencing Council should be reviewed.

What needs to be done between now and April 2007

- A realistic, medium- to long-term approach to reviewing minimum sentencing should be developed to incrementally increase support for better alternatives.
- A task team should be formed to engender debate around alternatives to renewing the minimum sentencing legislation in 2007; alternatively suggesting that, if it is to be renewed, it should be renewed only one more time and a better solution be developed before 2009. The team should ensure that the process provides for a good consultative process.
- The findings of this conference should be summarised and effectively presented to institutions playing a role in deciding whether to renew the legislation or not.
- Every opportunity for advocacy should be grasped, e.g. making submissions to the portfolio committee, the various departments and the minister.
- Advocacy interventions focusing on politicians and bureaucrats at the policy level are useful, but the debate should be broadened by developing media around the real impact of minimum sentencing on prison overcrowding, recidivism, and individual prisoners and their families.
- Government should be asked to produce a White Paper on Sentencing Policy so that a wide variety of stakeholder views can be taken into account and so that a thorough review of sentencing policy can be done before any serious decisions are taken.

Closing

Prof. Dirk van Zyl-Smit, Professor of Comparative and International Penal Law, University of Nottingham

In 1994/95 I spent two days on Robben Island with members of the Portfolio Committee on Correctional Services to discuss what a different prison system, a more ideal and humane system, might look like in a democratic dispensation. Many members of the committee had themselves been in prison and the island was an operating prison at that time. But what would we have said if we knew there would be such massive overcrowding? We did not see that crime would become such a big issue in South Africa, that the country would become so violent, and that members of the ruling party would feel so threatened. How can we regain some of our idealism? Crime has increased but it is not nearly as serious as public opinion suggests. Government is secure. It is in a strong position compared to many other governments, so it can take bold initiatives to improve the prison situation. I am glad to have been able to discuss the sentencing issue so openly with people from such diverse backgrounds. When I came here, I said let's scrap minimum sentencing and take it from there, but I have changed my mind. We need a serious campaign of public education, informed by the kind of excellent research that was commissioned by OSF-SA into this issue and presented at this conference. The details of the proposed sentencing framework are open for negotiation, there is room for manoeuvre about, e.g., the percentage by which sentences could vary, the composition of the proposed Sentencing Council, and the provisions of the provisions. The details are not the point. Ultimately we must transform the current system into one that is fair and humane. We have an enormous looming problem in the prisons unless we address the issue now.

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