

# Twenty Years of Constitutional Court Judgments: What Lessons are there about Sentencing?



SS Terblanche\*

**P·E·R**

Pioneer in peer-reviewed,  
open access online law publications

## Author

Stephan S Terblanche

## Affiliation

University of South Africa

Email [terblss@unisa.ac.za](mailto:terblss@unisa.ac.za)

## Date published

5 December 2017

Editor Prof AA du Plessis

## How to cite this article

Terblanche SS " Twenty Years of  
Constitutional Court Judgments:  
What Lessons are there about  
Sentencing?" *PER / PELJ* 2017(20)  
- DOI

<http://dx.doi.org/10.17159/1727-3781/2017/v20i0a1499>

## Copyright



## DOI

<http://dx.doi.org/10.17159/1727-3781/2017/v20i0a1499>

## Abstract

This contribution considers the Constitutional Court of South Africa's judgments regarding aspects of sentencing. It starts with an overview of relevant judgments, before attending in more detail to judgments on the minimum sentences legislation and on sentencing when it affects children. On this foundation, the article then discusses the human rights that are affected by the imposition of sentences on offenders, before attempting to identify what the next instalment of Constitutional Court judgments might bring to the sentencing table.

This article offers a collection and collation of judgments that share one common element, namely that they have something to say about an aspect of sentencing. The value of such an approach is that it provides the first step to answering the following question: The Constitutional Court has been active for 20 years; what do we learn about sentencing from its judgments during this time?

## Keywords

Sentencing; criminal sentences in South Africa; cruel, inhuman or degrading punishment; dignity and sentencing; Constitutional Court

.....

## 1 Introduction

In 2015 it was 20 years since the official opening of the Constitutional Court in South Africa.<sup>1</sup> This was a significant milestone in the Court's history. Although not a dominant theme, some of the court's judgments directly influenced sentencing theory and practices. Some of the judgments had a profound influence on the development of constitutional jurisprudence and the new constitutional order.

This contribution considers the Constitutional Court's judgments regarding aspects of sentencing. It starts with an overview of relevant judgments, before attending in more detail to judgments on the minimum sentences legislation and on sentencing when it affects children. On this foundation, the article then discusses the human rights that are affected by the imposition of sentences on offenders, before attempting to identify what the next instalment of Constitutional Court judgments might bring to the sentencing table.

It is worth noting what this article is not intended to do. It does not attempt a major discussion of any specific aspect of sentencing, such as minimum sentences or the sentencing of child offenders. It is a collection and collation of judgments that share one common element, namely that they have something to say about an aspect of sentencing. The value of such an approach is that it provides the first step to answering the following question: The Constitutional Court has been active for 20 years; what do we learn about sentencing from its judgments during this time?<sup>2</sup>

## 2 Overview of judgments

The Constitutional Court's earliest pronouncements on sentencing considered the constitutionality of a specific kind of sentence. In short succession the Court declared unconstitutional the death penalty, in *S v Makwanyane*,<sup>3</sup> and corporal punishment for juvenile offenders, in *S v Williams*.<sup>4</sup> No other sentence has been declared unconstitutional since this

---

\* Stephan S Terblanche. B Juris (PU for CHE) LLD (Unisa). Professor, Department of Criminal and Procedural Law, UNISA, South Africa. Email: terblss@unisa.ac.za.

<sup>1</sup> The opening, by former President Nelson Mandela, took place on 14 February 1995: see Constitutional Court date unknown <http://www.constitutionalcourt.org.za/site/thecourt/history.htm>; Davis, Marcus and Klaaren 1995 *Annual Survey* 728.

<sup>2</sup> Such contributions are regular features when important courts, such as the Constitutional Court, reach important milestones. See Wilson, Dugard and Clark 2015 *SAJHR* 472-503; Bronstein 2014 *SAJHR* 24-40; Petersen 2014 *SAJHR* 405-429. There are even purer "overviews" of Constitutional Court judgments published regularly, of which Rautenbach 2008 *TSAR* 330-348 and Rautenbach 2017 *TSAR* 352-369 are but two examples.

<sup>3</sup> *S v Makwanyane* 1995 2 SACR 1 (CC).

<sup>4</sup> *S v Williams* 1995 2 SACR 251 (CC).

initial activity. It nearly happened when, in *S v Niemand*,<sup>5</sup> the Court ordered "a remedial reading-in"<sup>6</sup> of certain words into the *Correctional Services Act* 8 of 1959. As a result, declaration as a habitual offender now allows for detention of no more than 15 years.<sup>7</sup>

In a following series of judgments,<sup>8</sup> the Court considered the constitutionality of the sentences prescribed in the *Criminal Law Amendment Act* 105 of 1997, the so-called "minimum sentences legislation". The Court declined to declare unconstitutional any of its provisions.

The Constitutional Court has also been quite active with regard to the rights of children. In *Centre for Child Law v Minister of Justice*<sup>9</sup> the Court held that the minimum sentences did not apply to any children. Earlier, in *S v M*,<sup>10</sup> the Court had held that the best interests of the children of a primary caregiver had to be taken seriously when sentencing such caregivers. Both these judgments raised a number of issues pertinent to the treatment of children in general and of child offenders in particular.

### 3 The earliest judgments

#### 3.1 Introduction

As one of the Court's first judgments,<sup>11</sup> *S v Makwanyane*<sup>12</sup> touched on a wide spectrum of constitutional and human rights issues. Given this scope, and the fact that it dealt with a controversial topic, it is unsurprising that the judgment has been subjected to intense scrutiny, both in its immediate aftermath and subsequently, and both locally and internationally.<sup>13</sup> *S v Williams*<sup>14</sup> was a companion judgment: both judgments were decided by the

---

<sup>5</sup> *S v Niemand* 2001 2 SACR 654 (CC).

<sup>6</sup> See Du Toit *et al Commentary* 28–24.

<sup>7</sup> Release is possible after seven years – see s 73(6)(c) of the *Correctional Services Act* 111 of 1998; *S v Trichart* 2014 2 SACR 245 (GSJ) para 20. Before the *Niemand* judgment it was considered possible for a habitual offender to be held in prison indefinitely – see *R v Edwards* 1953 3 SA 168 (A); *S v Masisi* 1996 1 SACR 147 (O) 152d-e.

<sup>8</sup> See *S v Dzukuda* 2000 2 SACR 443 (CC); *S v Dodo* 2001 1 SACR 594 (CC).

<sup>9</sup> *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 2 SACR 477 (CC).

<sup>10</sup> *S v M (Centre for Child Law as Amicus Curiae)* 2007 2 SACR 539 (CC).

<sup>11</sup> It was the first case heard by the Court (see Davis, Marcus and Klaaren 1995 *Annual Survey* 728), but the judgment was preceded by *S v Zuma* 1995 1 SACR 568 (CC), dated 5 April 1995.

<sup>12</sup> *S v Makwanyane* 1995 2 SACR 1 (CC).

<sup>13</sup> See, eg, Carozza 2003 *Tex L Rev* 1031-1089; Daniels and Brickhill 2006-2007 *Penn St Int'l L Rev* 379-381; Roux *Politics of Principle* 238-248; Van der Walt 2005 *SAPL* 253-265; Milton *et al* 1995 *SACJ* 188-204; Mureinik 1995 *Annual Survey* 29-33; Terblanche *Guide to Sentencing (2)* 420-430.

<sup>14</sup> *S v Williams* 1995 2 SACR 251 (CC).

same judges, giving judgment only three days apart.<sup>15</sup> The *Constitution of the Republic of South Africa* 200 of 1993 (hereafter the *interim Constitution*) made no mention of either the death penalty or corporal punishment and the Court had to consider the complete context of the Bill of Rights in the process of determining the constitutionality of these sentences. In the process it touched upon many topics such as constitutional interpretation in general, the influence of foreign sources, the content and interpretation of various rights and, finally, the limitation clause.<sup>16</sup>

As others have commented on these judgments in detail, there is little need to add to those discussions here. However, I return to them when discussing the human rights affected by sentencing.

## 4 Developments since *Makwanyane*

### 4.1 *Minimum sentences legislation*

#### 4.1.1 *Minimum sentences legislation*

It is convenient to set out briefly the history of the minimum sentences legislation. The *Criminal Law Amendment Act* 105 of 1997 (hereafter the Act) came into operation in May 1998.<sup>17</sup> Before this happened, sentencing was almost exclusively within the discretion of the courts, subject to maxima contained in statutory penalty clauses. The Act introduced minimum sentences for a large number of the more serious crimes. It was originally intended as a temporary measure,<sup>18</sup> but has since become permanent.<sup>19</sup>

The Act applies to adult offenders convicted of any of the offences listed in Schedule 2. This schedule lists a substantial number of offences in four categories (or parts) of roughly descending severity. In terms of section 51(1) of the Act, life imprisonment is prescribed for the offences contained in part I of Schedule 2. Essentially this includes aggravated forms of murder and rape. The constitutionality of section 51(1) was the subject of the judgment in *S v Dodo*.<sup>20</sup> Section 51(2) prescribes minimum sentences for the offences listed in the other parts to Schedule 2, starting at 15 years' imprisonment<sup>21</sup> and decreasing to 5 years' imprisonment.<sup>22</sup> Increased

---

<sup>15</sup> On 6 and 9 June 1995 respectively.

<sup>16</sup> Section 33 of the *Interim Constitution* (now s 36 of the *Constitution of the Republic of South Africa*, 1996 – hereafter the *Constitution*).

<sup>17</sup> Proc R43 in GG 6175 of 1 May 1998.

<sup>18</sup> Section 53(1) of the Act. See *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 2 SACR 477 (CC) para 4.

<sup>19</sup> With the repeal of s 53(1) through the *Criminal Law (Sentencing) Amendment Act* 38 of 2007.

<sup>20</sup> *S v Dodo* 2001 1 SACR 594 (CC).

<sup>21</sup> For Part II-offences.

<sup>22</sup> For Part-IV offences.

minimum sentences apply when the offender has previous convictions.<sup>23</sup> Importantly, the sentencing courts are permitted to depart from the prescribed sentences when a reduced sentence is justified by "substantial and compelling circumstances".<sup>24</sup>

Originally, regional courts had the power to impose any of the minimum periods of imprisonment, even if such a sentence exceeded the regional courts' general jurisdiction.<sup>25</sup> However, when life imprisonment was prescribed, the case had to be committed for sentencing to a high court.<sup>26</sup> The referral process caused severe delays in the finalisation of cases,<sup>27</sup> came under heavy criticism for this reason, and resulted in the first consideration of the minimum sentences by the Constitutional Court.

#### 4.1.2 *The Constitutional Court and minimum sentences*

In *S v Dzukuda*<sup>28</sup> the Court considered whether the referral process was constitutional or not.<sup>29</sup> Its findings are contained in the following summary:<sup>30</sup>

Contrary to the findings in the court *a quo*, the Constitutional Court found that a sentencing court does not have to be in a position identical to that of the trial court, that there is nothing in section 52 that prevents the High Court from obtaining all the information necessary to enable it to impose sentence, and that any inadequacies in the trial-court record can be corrected by the obtaining of such information in the same way as the sentencing court.

Importantly, the Court stressed<sup>31</sup> that no

...provision in s 52, requires a High Court to act in a way which would impinge on an accused's right to a fair trial. It is for the High Court, in each case committed to it under s 52 for sentence, to ensure that the accused receives a fair trial and nothing in the section prevents the High Court from doing so.

With this finding, the Court placed the responsibility of ensuring that the trial remains fair, firmly in the hands of the courts.

---

<sup>23</sup> The detail of these provisions is discussed in Terblanche *Guide to Sentencing* (3) 49-91.

<sup>24</sup> Section 51(3) of the Act.

<sup>25</sup> Section 51(1)(b) of the Act. The legislation never applied to the district magistrates' courts: see Terblanche *Guide to Sentencing* (3) 65-66.

<sup>26</sup> Section 52(2) of the Act.

<sup>27</sup> See *S v Dzukuda*; *S v Tilly*; *S v Tshilo* 2000 2 SACR 51 (W) 56g ff and the cases referred to there. Also see O'Donovan and Redpath *Impact of Minimum Sentencing* 40-45.

<sup>28</sup> *S v Dzukuda* 2000 2 SACR 443 (CC).

<sup>29</sup> The trial court in *S v Dzukuda*; *S v Tilly*; *S v Tshilo* 2000 2 SACR 51 (W) held it was unconstitutional.

<sup>30</sup> Terblanche *Guide to Sentencing* (2) 73 (original in-text references have been deleted for the purposes of the present discussion).

<sup>31</sup> *S v Dzukuda* 2000 2 SACR 443 (CC) para 49; also see paras 38, 43 and 55.

In its second judgment on this legislation, *S v Dodo*,<sup>32</sup> the Court was called upon to consider the validity of section 51(1), the provision that prescribes life imprisonment. The judgment followed within a few weeks of the judgment in *S v Malgas*,<sup>33</sup> where the Supreme Court of Appeal considered the minimum sentences legislation in considerable detail, and particularly with respect to the "substantial and compelling circumstances" departure clause.<sup>34</sup> *Dodo* fully endorsed *Malgas*'s interpretation of the words "substantial and compelling circumstances", quoting the summary of the judgment in *Malgas*<sup>35</sup> verbatim and holding this to be "a practical method" of dealing with the minimum sentences.<sup>36</sup>

The essence of the summary in *Malgas* is the following:<sup>37</sup>

- Courts should ordinarily impose the prescribed sentences.
- The legislature "deliberately left it to the courts" to determine whether circumstances justify departure. All traditionally relevant factors have to be taken into account in this process.
- Departure is permissible only when there are "truly convincing reasons" for so departing.<sup>38</sup> If the prescribed sentence would be unjust, in being disproportionate to the crime, the offender and the needs of society, "so that an injustice would be done by imposing that sentence",<sup>39</sup> the court may depart.
- The result will be a "standardised response"<sup>40</sup> with consistently more severe sentences.

The Court concluded in *Dodo*<sup>41</sup> that section 51(1) was not unconstitutional, as it "does not compel the court to act inconsistently with the Constitution".

---

<sup>32</sup> *S v Dodo* 2001 1 SACR 594 (CC). The judgment was delivered on 5 April 2001.

<sup>33</sup> *S v Malgas* 2001 1 SACR 469 (SCA), decided on 19 March 2001.

<sup>34</sup> Section 51(3) of the Act. The words "substantial and compelling circumstances" have been subjected to a lot of debate (see Kubista 2005 SACJ 77-86; *S v PB* 2013 2 SACR 533 (SCA) para 21).

<sup>35</sup> *S v Malgas* 2001 1 SACR 469 (SCA) para 25.

<sup>36</sup> See *S v Dodo* 2001 1 SACR 594 (CC) para 11; also para 40 (the *Malgas* "construction ... is undoubtedly correct...").

<sup>37</sup> Also see *Centre for Child Law v Minister of Justice* 2009 2 SACR 477 (CC) paras 17-18.

<sup>38</sup> *S v Malgas* 2001 1 SACR 469 (SCA) para 25D. In other words, not lightly or for "flimsy" reasons.

<sup>39</sup> *S v Malgas* 2001 1 SACR 469 (SCA) para 25I.

<sup>40</sup> *S v Malgas* 2001 1 SACR 469 (SCA) para 25G.

<sup>41</sup> *S v Dodo* 2001 1 SACR 594 (CC) para 40.

#### 4.1.3 *The minimum sentences and separation of powers*

The high court in *S v Dodo*,<sup>42</sup> in finding that section 51(1) was unconstitutional, held that the legislature had gone too far in prescribing the minimum sentences. It found that this provision "undermine[d] the doctrine of separation of powers and the independence of the judiciary"<sup>43</sup> and that, especially life imprisonment, "the most severe penalty open to the High Court", is something that "falls within the heartland of the judicial power, and is not to be usurped by the Legislature".<sup>44</sup> The Constitutional Court disagreed with this assessment.

Stripped to its bare bones, the separation of powers "...requires the functions of government to be classified as either legislative, executive or judicial and requires each function to be performed by separate branches of government".<sup>45</sup> The Constitutional Court accepted that the legislature has a legitimate interest in the nature and severity of sentences in South Africa.<sup>46</sup> After all, the legislature has always been involved in creating offences and prescribing the sentences for such offences.<sup>47</sup> With the prescription of minimum sentences, because of the departure clause, the legislature had not forced the courts to act in violation of the *Constitution*, as noted above.

However, there are limits to what the legislature can prescribe with respect to sentences. The imposition of an appropriate sentence in a specific instance on an individual offender, the Constitutional Court explained, is undoubtedly the domain of the judicial power:<sup>48</sup>

In the field of sentencing, however, it can be stated as a matter of principle that the legislature ought not to oblige the judiciary to impose a punishment which is wholly lacking in proportionality to the crime. This would be inimical to the rule of law and the constitutional state. It would a fortiori be so if the legislature obliged the judiciary to pass a sentence which was inconsistent with the ... Bill of Rights.

#### 4.1.4 *Amendment of the legislation and subsequent judgments*

In an attempt to alleviate some of the criticism of the Act, the legislature amended it in 2007.<sup>49</sup> Arguably, the most dramatic amendment was to give regional courts the power to impose life imprisonment when it was

---

<sup>42</sup> *S v Dodo* 2001 1 SACR 301 (E).

<sup>43</sup> *S v Dodo* 2001 1 SACR 301 (E) 319j.

<sup>44</sup> *S v Dodo* 2001 1 SACR 301 (E) 319h-j.

<sup>45</sup> Currie and De Waal *Bill of Rights Handbook* 18.

<sup>46</sup> *S v Dodo* 2001 1 SACR 594 (CC) para 23.

<sup>47</sup> *S v Dodo* 2001 1 SACR 594 (CC) para 22.

<sup>48</sup> *S v Dodo* 2001 1 SACR 594 (CC) para 26.

<sup>49</sup> Through the *Criminal Law (Sentencing) Amendment Act* 38 of 2007.

prescribed by section 51(1). Some of the other amendments include the following:

- The legislation became permanent, as the amendment removed the renewal requirement.
- The position of children of 16 and 17 years old was changed. This amendment is discussed below.

These amendments mean that the Act is now substantially different from the legislation considered constitutional in *Dodo*. There is little reason, therefore, to accept that *Dodo* is the Constitutional Court's final word on the constitutionality of the Act.

## **4.2 Children and sentencing**

### *4.2.1 Introduction*

The inclusion in the *Constitution* of specific rights for children opened a new chapter in the development of children's rights, both generally and specifically when children intersect with the criminal justice system.<sup>50</sup> In particular the *Constitution* establishes the best-interests-of-the-child principle,<sup>51</sup> as well as the principles that imprisonment should be a last resort and, when imposed as a last resort, should be for the shortest appropriate term.<sup>52</sup>

The essence of the new chapter is that children are different from adults.<sup>53</sup> They are different for the following reasons, highlighted in *Centre for Child Law v Minister of Justice*:<sup>54</sup>

- Physical vulnerability: Children's bodies are "generally frailer", leaving them less "able to protect themselves" and more in need of protection; they are "less resourceful in self-maintenance".
- Psychological vulnerability: Children are more easily influenced and pressured by others; "their ability to make choices [is] generally more

---

<sup>50</sup> *S v Kwalase* 2000 2 SACR 135 (C) 139*g-i*. Also see, for a summary of the new chapter, *Brandt v S* 2005 2 All SA 1 (SCA) para 20; and *S v Nkosi* 2002 1 SACR 135 (W) 147*f-i*. Also see *S v M (Centre for Child Law as Amicus Curiae)* 2007 2 SACR 539 (CC) para 12 ff; the Preamble to the *Child Justice Act 75 of 2008*; Gallinetti "Child Justice in South Africa" 639-640.

<sup>51</sup> Section 28(2) of the *Constitution*. For an overview of the large number of sources on this standard, with some connection to the sentencing of children, see Terblanche 2012 *PELJ* 442-445.

<sup>52</sup> Section 28(1)(g) of the *Constitution*.

<sup>53</sup> *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 2 SACR 477 (CC) para 26.

<sup>54</sup> *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 2 SACR 477 (CC) paras 26-28.

constricted"; their "as yet unformed character" leaves them more prone to impulsive decisions.

- They have a greater capacity for rehabilitation.

Specifically relevant to sentencing, the crux of the matter is the following:<sup>55</sup>

We recognise that exacting full moral accountability for a misdeed might be too harsh because they are not yet adults. Hence we afford children some leeway of hope and possibility.

#### 4.2.2 *Children and minimum sentences*

When the *Criminal Law Amendment Act 105 of 1997* was originally passed, the minimum sentences appeared also to apply to children aged 16 and 17 years at the time of the offence. The main (only) difference was that section 51(3)(b) required the court to record its reasons for applying the minimum sentences to such a child. This provision was "the object of a remarkable range of judgments".<sup>56</sup> However, in *Brandt v S*<sup>57</sup> the Supreme Court of Appeal settled the matter. It held that child offenders had to be treated differently to adult offenders for all the reasons noted above.<sup>58</sup> This different treatment clearly includes the minimum sentences. As a result, when sentencing child offenders a court should start "with a clean slate" and not with the benchmarks that apply to adult offenders.<sup>59</sup>

One of the amendments sought by the *Criminal Law (Sentencing) Amendment Act 38 of 2007* was to reinstate the minimum sentences for child offenders aged 16 and 17.<sup>60</sup> This amendment, the Constitutional Court held in *Centre for Child Law v Minister of Justice*,<sup>61</sup> was unconstitutional. This judgment can be summarised as follows:

- The rights contained in section 28 of the *Constitution* (including the paramountcy of the child's best interests and the right not to be

---

<sup>55</sup> *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 2 SACR 477 (CC) para 28.

<sup>56</sup> Terblanche 2005 SACJ (2) 389. For an overview of such cases, see Terblanche 2005 SACJ (1) 112-113.

<sup>57</sup> *Brandt v S* 2005 2 All SA 1 (SCA) paras 9-12 [also reported as *S v B* 2006 1 SACR 311 (SCA)]. For a discussion, see Sloth-Nielsen 2005 *Stell LR* 98-103.

<sup>58</sup> *Brandt v S* 2005 2 All SA 1 (SCA) paras 14-15.

<sup>59</sup> *Brandt v S* 2005 2 All SA 1 (SCA) para 11.

<sup>60</sup> It was the "express object" of the amendment to "reverse" the *Brandt* decision: see *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 2 SACR 477 (CC) paras 6, 22, 53, 58.

<sup>61</sup> *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 2 SACR 477 (CC).

detained except as a last resort and then for the shortest appropriate period of time) have to be obeyed by Parliament.<sup>62</sup>

- The *Constitution* sharply distinguishes children from adults, and for good reasons.<sup>63</sup>
- Children who commit heinous crimes may be imprisoned and imprisonment remains possible under the best-interests standard.<sup>64</sup>
- Detention "must be a last, not a first, or even intermediate, resort".<sup>65</sup> Section 28(1)(g) requires individualised sentences – not the "rigid starting point that minimum sentencing entails".<sup>66</sup> The legislation prescribed life imprisonment as the point of departure – a sentence that "is very far from the approach to sentencing that the Bill of Rights demands for children".<sup>67</sup>
- The limitations to the rights in section 28 were not justified.<sup>68</sup>

The Court summarised its finding with the following:<sup>69</sup>

Legislation cannot take away the right of 16 and 17 year olds to be detained only as a last resort, and for the shortest appropriate period of time, without reasons being provided that specifically relate to this group and explain the need to change the constitutional disposition applying to them.

The court's remedy was to amend section 51(6) so that the minimum sentences legislation does not apply to anybody under the age of 18.

---

<sup>62</sup> *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 2 SACR 477 (CC) para 25.

<sup>63</sup> *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 2 SACR 477 (CC) paras 26-28.

<sup>64</sup> *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 2 SACR 477 (CC) para 29.

<sup>65</sup> *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 2 SACR 477 (CC) para 31.

<sup>66</sup> *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 2 SACR 477 (CC) para 32.

<sup>67</sup> *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 2 SACR 477 (CC) para 41.

<sup>68</sup> *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 2 SACR 477 (CC) para 60.

<sup>69</sup> *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 2 SACR 477 (CC) para 63.

### 4.2.3 Sentencing of primary caregivers

In *S v M*<sup>70</sup> Sachs J posed the following question: When the offender who stands to be sentenced is the primary caregiver of a child,<sup>71</sup>

... does the new constitutional order require a fresh approach to sentencing? More particularly, does s 28 of the Constitution add an extra element to the responsibilities of a sentencing court over and above those imposed by the *Zinn* triad, and if so, how should these responsibilities be fulfilled?

The reference to the *Zinn* triad<sup>72</sup> indicated that the Court would consider the general principles of sentencing. In effect, the Court found them to be acceptable from a constitutional perspective.

When it appears or is alleged that the offender in a specific case is taking care of a child, the obvious first issue is to determine whether the offender is a "primary caregiver".<sup>73</sup> The Court explained that<sup>74</sup>

a primary caregiver is the person with whom the child lives and who performs everyday tasks like ensuring that the child is fed and looked after and that the child attends school regularly.

The Court then concluded, considering its own jurisprudence on the best-interests-of-the-child standard,<sup>75</sup> that it is a right that can be limited, particularly with regard to its relationship with other rights.<sup>76</sup> How then, should a sentencing court give the best interests of the child their rightful place when sentencing a child's caregiver? In answering this question,<sup>77</sup> the court advised that it should be "a standard preoccupation" of sentencing courts to find a balance among all the different interests involved. If necessary, sentencers need to change their current mind-set, because the children need focussed attention whenever their interests arise during the sentencing process. However, the general approach that courts are expected to take when determining an appropriate sentence remains the approach established in *Zinn*, namely that the sentence is determined with reference to "the triad consisting of the crime, the offender and the interests of society".<sup>78</sup> When the offender is a primary caregiver of any children these

---

<sup>70</sup> *S v M (Centre for Child Law as Amicus Curiae)* 2007 2 SACR 539 (CC). See Skelton 2008 CCR 351-368; Mujuzi 2011 SACJ (1) 164-177; Gallinetti 2010 SAPL 108-123; Erasmus 2010 SAPL 124-136.

<sup>71</sup> *S v M (Centre for Child Law as Amicus Curiae)* 2007 2 SACR 539 (CC) para 11.

<sup>72</sup> See *S v Zinn* 1969 2 SA 537 (A) 540G-H.

<sup>73</sup> *S v M (Centre for Child Law as Amicus Curiae)* 2007 2 SACR 539 (CC) para 36(a).

<sup>74</sup> *S v M (Centre for Child Law as Amicus Curiae)* 2007 2 SACR 539 (CC) para 28.

<sup>75</sup> *S v M (Centre for Child Law as Amicus Curiae)* 2007 2 SACR 539 (CC) paras 15 and 16. According to Skelton 2008 CCR 351, 358-359, 360-363 the court gave more attention to the best interests' principle in this case than it did in any other previous case.

<sup>76</sup> *S v M (Centre for Child Law as Amicus Curiae)* 2007 2 SACR 539 (CC) para 26.

<sup>77</sup> *S v M (Centre for Child Law as Amicus Curiae)* 2007 2 SACR 539 (CC) para 33. For a useful summary of this judgment, see *S v GL* 2010 2 SACR 488 (WCC) para 18.

<sup>78</sup> *S v Zinn* 1969 2 SA 537 (A) 540G-H; see Rautenbach 2008 TSAR 341.

general principles should be applied in accordance with the following "guidelines":

- a) If the general approach ("the *Zinn*-triad approach") indicates that "the appropriate sentence is clearly custodial", the court must ensure that the children are cared for, through some alternative means.<sup>79</sup>
- b) If a non-custodial sentence is "clearly" appropriate, the court must take into account the interests of the children when determining the detail of such a sentence.<sup>80</sup>
- c) If the appropriate sentence is not clearly either custodial or non-custodial, then the best interests of the children standard becomes an important guiding principle in determining the sentence to impose.<sup>81</sup>

In terms of these guidelines, therefore, the interests of the children become an independent sentencing factor only when the application of the triad of *Zinn* does not clearly indicate whether the appropriate sentence is either custodial or non-custodial.<sup>82</sup> Sachs J also believed that these guidelines would "promote uniformity of principle, consistency of treatment and individualisation of outcome".<sup>83</sup>

The Court followed this theoretical assessment with a practical determination of the appropriate sentence in this case. It considered the aggravating features: that M was a repeat offender who deliberately defrauded different retailers with a third party's credit card, over a period of time, with greed as the motive.<sup>84</sup> The Court then confirmed the sentence of four years' imprisonment, but suspended 45 months thereof, in the process ensuring M's immediate release. In addition, it imposed three years' correctional supervision, including conditions such as that M had to perform community service, repay the victims, and undergo regular counselling.

The judgment prompted many positive responses. One such response was that<sup>85</sup>

*S v M* has revolutionised sentencing in cases where the person convicted is the primary caregiver of young children. It has reasserted the central role of the interests of young children as an independent consideration in the sentencing process.

---

<sup>79</sup> *S v M (Centre for Child Law as Amicus Curiae)* 2007 2 SACR 539 (CC) para 36(c).

<sup>80</sup> *S v M (Centre for Child Law as Amicus Curiae)* 2007 2 SACR 539 (CC) para 36(d).

<sup>81</sup> *S v M (Centre for Child Law as Amicus Curiae)* 2007 2 SACR 539 (CC) para 36(e).

<sup>82</sup> *S v M (Centre for Child Law as Amicus Curiae)* 2007 2 SACR 539 (CC) para 39.

<sup>83</sup> *S v M (Centre for Child Law as Amicus Curiae)* 2007 2 SACR 539 (CC) para 36.

<sup>84</sup> *S v M (Centre for Child Law as Amicus Curiae)* 2007 2 SACR 539 (CC) para 52. See also Cowling 2007 *Annual Survey* 356.

<sup>85</sup> See *MS v S (Centre for Child Law as Amicus Curiae)* 2011 2 SACR 88 (CC) para 62; also Skelton 2008 *CCR* 358.

In practice the belief of Sachs J that the guidelines would promote consistency was probably too optimistic. Sometimes these guidelines have simply been ignored.<sup>86</sup> In other cases the sentencing court decided that imprisonment was unavoidable because of the seriousness of the crime.<sup>87</sup>

This is also one of the rare instances where the Court found it necessary, within a few years only, to provide further guidance through a similar case. In *MS v S*<sup>88</sup> the Court imposed a very different sentence from that imposed in *S v M*, based on the facts of the case. It is really not clear what these distinguishing facts were.<sup>89</sup>

#### 4.2.4 Conclusion

With these judgments the Constitutional Court brought some clarity to the sentencing of child offenders, with a heavy emphasis on the need to treat child offenders differently from adults and for courts to take the best interests of children seriously. Much room remain for these considerations to make an impact on sentencing practices in our child justice courts.

## 5 Important human rights connected to sentencing

The focus of this contribution now needs to shift to the connection between sentencing and specific human rights. Two of the provisions of the Bill of Rights, which were also considered in *S v Makwanyane*,<sup>90</sup> are of particular importance to sentencing in general. These are the prohibition against cruel, inhuman or degrading punishment, and the right to dignity.

### 5.1 Cruel, inhuman or degrading punishment

Section 11(2) of the *Interim Constitution* prohibited "cruel, inhuman or degrading treatment or punishment".<sup>91</sup> The wording of the *Constitution* is slightly different,<sup>92</sup> in that section 12 first establishes the right to freedom and security of the person, and then includes, within this right, the "right not

---

<sup>86</sup> See *S v Pillay* 2011 2 SACR 409 (SCA); *S v Londe* 2011 1 SACR 377 (ECG); *S v Mthethwa* 2015 1 SACR 609 (GP).

<sup>87</sup> Eg, *S v Langa* 2010 2 SACR 289 (KZP) para 11 (the crimes included murder and kidnapping).

<sup>88</sup> *MS v S (Centre for Child Law as Amicus Curiae)* 2011 2 SACR 88 (CC) para 7.

<sup>89</sup> See the minority judgment (Khampepe J) para 47: "... the only conspicuous difference between M and Mrs S [MS] is that Mrs S is married to an almost absent father, whereas M was not married to any of the absent fathers of her children". See also Mujuzi 2011 SACJ (2) 402; Terblanche 2011 *Annual Survey* 1194.

<sup>90</sup> *S v Makwanyane* 1995 2 SACR 1 (CC).

<sup>91</sup> In *S v Niemand* 2001 2 SACR 654 (CC) fn 21 the Court noted equivalent terminology in international documents, such as art 7 of the *International Covenant on Civil and Political Rights* and art 3 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*.

<sup>92</sup> Some of the reasons for the change are detailed by Bishop and Woolman "Freedom and Security" 40-1-40-5, but none of them relate to sentencing.

to be treated or punished in a cruel, inhuman or degrading way".<sup>93</sup> The question is whether these changes make any material difference. As is indicated in what follows, the answer is almost certainly in the negative.

### 5.1.1 Freedom

Despite freedom's being the broader right protected by section 12(1) of the *Constitution*, the Constitutional Court has not really deliberated on this right in its assessment of what amounts to cruel, inhuman or degrading punishment. Freedom clearly is important in the realm of sentencing, because any form of detention inevitably infringes upon the right to be free.<sup>94</sup> Infringement upon the right to freedom is easily justified when such infringement follows the commission of a crime. However, such justification should be subject to the principles that apply to any limitation of rights, as discussed below. This scrutiny has been absent from our courts' discussions of section 12.

### 5.1.2 Cruel, inhuman, degrading

#### 5.1.2.1 General

The Constitutional Court itself noted that the wording of the provisions in the *interim Constitution* and the *Constitution* prohibiting cruel, inhuman or degrading treatment or punishment is essentially the same.<sup>95</sup> One consequence of this concession is that judgments on the *Interim Constitution* remain valid despite the slightly different wording of the final *Constitution*. Thus, in *S v Williams*,<sup>96</sup> the Court held that the prohibition should be read "disjunctively",<sup>97</sup> involving the following seven "modes of conduct": "torture; cruel treatment; inhuman treatment; degrading treatment; cruel punishment; inhuman punishment and degrading punishment".<sup>98</sup> Our courts have not yet considered it necessary to distinguish between cruel, inhuman, and degrading.<sup>99</sup> The Constitutional Court thought that a clear separation would be hard.<sup>100</sup>

---

<sup>93</sup> Section 12(1)(e) of the *Constitution*.

<sup>94</sup> It is clear that the restriction of freedom means the "restriction of physical movement", and that imprisonment "always constitutes a 'deprivation' [of freedom] for the purpose of FC s 12(1)(a)": Bishop and Woolman "Freedom and Security" 40-32. Also see *De Lange v Smuts* 1998 3 SA 785 (CC) para 28: any "restriction of physical movement" is covered.

<sup>95</sup> *S v Niemand* 2001 2 SACR 654 (CC) para 20.

<sup>96</sup> *S v Williams* 1995 2 SACR 251 (CC).

<sup>97</sup> Meaning "in the alternative" – see *Oxford South African Concise Dictionary*.

<sup>98</sup> *S v Williams* 1995 2 SACR 251 (CC) para 20. Also see Mahomed J in *S v Makwanyane* 1995 2 SACR 1 (CC) para 276; *S v Dodo* 2001 1 SACR 594 (CC) para 35; *Ex parte Attorney-General, Namibia: In Re Corporal Punishment* 1991 3 SA 76 (NmSC) 86.

<sup>99</sup> See Bishop and Woolman "Freedom and Security" 40-66.

<sup>100</sup> *S v Dodo* 2001 1 SACR 594 (CC) para 35. The *Makwanyane* court also did not distinguish the concepts – Chaskalson P (*S v Makwanyane* 1995 2 SACR 1 (CC))

The Court gave its most detailed discussion of the prohibition against cruel, inhuman or degrading punishment in *S v Dodo*.<sup>101</sup> In particular, it linked the prohibited punishment to two constitutional principles, namely those of proportionality and of dignity. Since dignity is itself a constitutional right, it is discussed below,<sup>102</sup> while proportionality is considered next.

#### 5.1.2.2 Proportionality

The importance of proportionality within the current enquiry is explained as follows in *S v Dodo*:<sup>103</sup>

The concept of proportionality goes to the heart of the inquiry as to whether punishment is cruel, inhuman or degrading, particularly where, as here, it is almost exclusively the length of time for which an offender is sentenced that is in issue.

Why would proportionality go "to the heart of the inquiry"? The logic runs as follows.<sup>104</sup> In terms of section 12(1)(a) of the *Constitution* a person may "not to be deprived of freedom ... without just cause". When a crime is committed, it provides the "just cause" to deprive the offender of his freedom. However, not every crime justifies the deprivation of liberty. This happens only when such deprivation is "reasonably necessary to curb the offence and punish the offender", having regard to all the personal and other factors "which could have a bearing on the seriousness of the offence and the culpability of the offender". This means that "the length of punishment must be proportionate to the offence".

This explanation in *Dodo* can be seen as a statement of the constitutional proportionality requirement for sentencing. Since it directly refers to the seriousness of the crime and the culpability of the offender, the question arises whether it is fundamentally different from the trite sentencing principles established in *S v Zinn*.<sup>105</sup> Notable differences include that *Dodo* does not refer explicitly to the interests of society, and that the personal "and other" circumstances appear to be limited to those with a "bearing on the seriousness of the offence and the culpability of the offender".<sup>106</sup> Focussing on the "seriousness of the crime" (*Dodo*) is certainly more specific than just "the crime" (*Zinn*), as is "the culpability of the offender" when compared with

---

para 95) concluded that the death penalty was cruel, inhuman *and* degrading punishment; also see Mahomed J paras 277-281. Also see Milton *et al* 1995 SACJ 195-197.

<sup>101</sup> *S v Dodo* 2001 1 SACR 594 (CC). For a summary, see Currie and De Waal *Bill of Rights Handbook* 284-285.

<sup>102</sup> See para 5.2.

<sup>103</sup> *S v Dodo* 2001 1 SACR 594 (CC) para 37. The Court also noted the connection in *S v Makwanyane* 1995 2 SACR 1 (CC) para 94, that proportionality is "an ingredient" of the cruel, inhuman or degrading enquiry.

<sup>104</sup> *S v Dodo* 2001 1 SACR 594 (CC) para 37.

<sup>105</sup> *S v Zinn* 1969 2 SA 537 (A) 540G-H.

<sup>106</sup> This language resembles that used in SALC *Sentencing* clause 2, regarding the main proposals for the reform of sentencing in South Africa.

just "the offender". So far, there has been little recognition that *Dodo* might contain a restatement of the trite sentencing principles.

### 5.1.2.3 Gross disproportionality and the position in the USA and Canada

Although *S v Dodo*<sup>107</sup> noted that "the length of punishment must be proportionate to the offence", it also noted that "mere disproportionality" would not violate the right not to be subjected to cruel, inhuman or degrading punishment. This could happen only when there is "gross disproportionality".<sup>108</sup>

When, or against which standards, would disproportionality become "gross"?<sup>109</sup> *Dodo* found useful guidance to the answer from judgments by the United States of America (USA) and Canadian supreme courts. Some of these judgments were attended to in some detail in Ackermann J's discussion of the separation of powers.<sup>110</sup> The Court referred, *inter alia*, to *R v Latimer*,<sup>111</sup> that "the test for determining whether a sentence is disproportionately long is 'very properly stringent and demanding ... [for] ... [a] lesser test would tend to trivialize the Charter' (emphasis in the original)".<sup>112</sup> This stringent and demanding test amounts to the following:<sup>113</sup>

The criterion which is applied to determine whether a mandatory minimum punishment is cruel and unusual is 'whether the punishment prescribed is so excessive as to outrage standards of decency;' the 'effect of that punishment must not be grossly disproportionate to what would have been appropriate'.

*Dodo* also includes several examples of cases in which the North American courts have held the prescribed sentences not to be grossly disproportionate. Here, however, Ackermann J noted that none of these references should be understood as "agreement ... with the application of the gross disproportionality test to the legislation or facts in such decision".<sup>114</sup> This is an important qualification, as the approaches followed in one country might give a totally foreign outcome to "standards of decency" in another.<sup>115</sup>

The gross proportionality standards in the USA and Canada are neither simple, nor equal in practical application, nor fixed in time. Much has been

---

<sup>107</sup> *S v Dodo* 2001 1 SACR 594 (CC) para 37.

<sup>108</sup> *S v Dodo* 2001 1 SACR 594 (CC) para 39. Also Bishop and Woolman "Freedom and Security" 40-71.

<sup>109</sup> "Gross" in this sense is probably best equated with "blatant" – see *Oxford South African Dictionary* vide "Gross".

<sup>110</sup> *S v Dodo* 2001 1 SACR 594 (CC) paras 28-31.

<sup>111</sup> *R v Latimer* 2001 SCC 1 para 76.

<sup>112</sup> *S v Dodo* 2001 1 SACR 594 (CC) para 31.

<sup>113</sup> *S v Dodo* 2001 1 SACR 594 (CC) para 30.

<sup>114</sup> *S v Dodo* 2001 1 SACR 594 (CC) para 39.

<sup>115</sup> As noted in *S v Dodo* 2001 1 SACR 594 (CC) para 31.

written about these standards. What follows is a brief overview of the current position.

The Eighth Amendment to the United States Constitution outlaws "cruel and unusual punishment".<sup>116</sup> The grossly disproportionate standard has been deduced from this Amendment. However, apart from some death penalty judgments,<sup>117</sup> the sentence prescribed in legislation has been declared invalid for violating the Eighth Amendment in only one example. This happened in *Solem v Helm*,<sup>118</sup> where life imprisonment without the possibility of parole for a seventh nonviolent felony<sup>119</sup> was declared unconstitutional.

Otherwise, the US Supreme Court has consistently held that prescribed sentences are not sufficiently disproportionate.<sup>120</sup> The following cases are all examples where the Court was not prepared to interfere with the prescribed sentences:

- In *Rummel v Estelle*<sup>121</sup> the defendant was sentenced to life imprisonment (with the possibility of parole after 12 years), for his third felony conviction. All his convictions were for economic offences, involving amounts between \$28 and \$121.
- *Harmelin v Michigan*<sup>122</sup> involved possession of 672 grams of cocaine, only a little more than the 650 grams limit above which life imprisonment without the possibility of parole was prescribed.
- California's "Three Strikes and You're Out Laws" were considered in *Ewing v California*:<sup>123</sup> In accordance with this legislation, the trial court imposed life imprisonment (without parole for the first 25 years) for the theft of golf clubs worth \$1 200.

Most of these sentences are more severe than the severest sentence that can be imposed in South Africa for the gravest crimes.

---

<sup>116</sup> US Const amend VIII.

<sup>117</sup> See *Gregg v Georgia* 428 US 153 (1976). Also see *Roper v Simmons* 543 US 551 (2005) (death penalty for children declared unconstitutional); *Atkins v Virginia* 536 US 304 (2002) (death penalty for mentally ill offenders declared unconstitutional).

<sup>118</sup> *Solem v Helm* 463 US 277 (1983).

<sup>119</sup> "Felony" is an Anglo-American term for more serious crimes where, very generally speaking, imprisonment without the option of a fine is a permissible sentence.

<sup>120</sup> Brennan 2004 *J Crim L & Criminology* 554-558.

<sup>121</sup> *Rummel v Estelle* 445 US 263 (1980) 274-75.

<sup>122</sup> *Harmelin v Michigan* 501 US 957 (1991).

<sup>123</sup> *Ewing v California* 538 US 11 (2003) – see 32. Also see Kurki "International Standards for Sentencing" 364: "In California, any felony counts as the third strike because only the first two convictions need to be from a list of more serious offenses ... Thus a minor theft or marijuana possession may result in a life sentence" (with parole after 25 years).

These sentences are also very different from the position in Canada. It used to be rare for the Canadian Supreme Court to declare "mandatory minimum sentences" unconstitutional. However, the Court has done so in the two recent cases of *R v Nur*<sup>124</sup> and *R v Lloyd*.<sup>125</sup>

In *Lloyd* the Court declared unconstitutional a provision prescribing a minimum sentence of one year's imprisonment for "trafficking or possession for the purpose of trafficking" of certain drugs, if the offender had had another drug conviction within the previous ten years. It is worth repeating that the prescribed sentence found to be unconstitutional was a sentence of *one* year's imprisonment. The Court's finding was based on the principle established in *Nur*<sup>126</sup> that a law violates the prohibition against cruel and unusual punishment if (1) "it imposes a grossly disproportionate sentence on the individual before the court", or (2) it "will impose grossly disproportionate sentences on others" when "reasonably foreseeable applications" are considered.<sup>127</sup> In other words, the Court considered not only the facts of the case before it but also the proportionality of the minimum sentence in other scenarios that could reasonably be foreseen. The Court added that,<sup>128</sup>

... mandatory minimum sentences that, as here, apply to offences that can be committed in various ways, under a broad array of circumstances and by a wide range of people are vulnerable to constitutional challenge.

The final words apply to South African minimum sentences too.

To conclude this discussion: Although the same words are used to determine the constitutionality of prescribed sentences in the USA and Canada, the practice is so different that these words are almost meaningless. In particular, when comparisons are made with the sentences imposed in the USA, it is important to realise that punishment in the USA tends to be much harsher than in most other countries with a constitutional dispensation.<sup>129</sup>

### 5.1.3 In conclusion: cruel, inhuman or degrading punishment

Many questions remain about proportionality and sentencing, and it remains unknown how the Constitutional Court will apply the grossly disproportionate standard. Given the increasingly long sentences that tend

---

<sup>124</sup> *R v Nur* 2015 1 SCR 773.

<sup>125</sup> *R v Lloyd* 2016 1 SCC 130.

<sup>126</sup> *R v Nur* 2015 1 SCR 773 para 77.

<sup>127</sup> *R v Lloyd* 2016 1 SCC 130 para 22.

<sup>128</sup> *R v Lloyd* 2016 1 SCC 130 para 35.

<sup>129</sup> See Tonry "Punishment Policies" 15 (US punishment policies are harsher than those of other countries), 21 (a large number of mandatory penalties are found only in the USA); Tonry and Hatlestad *Sentencing Reform* 249: "The severity of criminal penalties in the United States in the 1990s is unprecedented in American history and unequalled in any Western country in this century."

to be imposed by our courts and required by the legislature, these questions might well have to be answered in the not too distant future.

## 5.2 Dignity

Dignity is enshrined in the *Constitution* where it declares that "Everyone has inherent dignity and the right to have their dignity respected and protected."<sup>130</sup> It is barely possible to overstate its importance.<sup>131</sup> From the many examples that could be quoted, the Constitutional Court noted in *Mayelane v Ngwenyama*<sup>132</sup> that the right to dignity is "the most important of all human rights, and the source of all other personal rights". In relation to criminal law, dignity has been described as a "foundational value", being at the foundation of rights such as freedom and physical integrity.<sup>133</sup> Dignity is also closely related to the prohibition against cruel, inhuman and degrading punishment. Ackermann J wrote in *S v Dodo*<sup>134</sup> that "the impairment of human dignity ... must be involved in all three" of these adjectives.<sup>135</sup> Specifically on the proportionality between the crime and the sentence, Ackermann J continued that not to consider such proportionality would be "... to ignore, if not to deny, that which lies at the very heart of human dignity".<sup>136</sup>

It is submitted that the imposition of any sentence tends to impact the dignity of the person punished.<sup>137</sup> If this submission is debatable, it is at least clear that, logically, the prohibition against "degrading" punishment is inseparable from the right to have even offenders' dignity protected and respected.

---

<sup>130</sup> Section 10 of the *Constitution*.

<sup>131</sup> This is true even of *S v Makwanyane* 1995 2 SACR 1 (CC) where dignity played a secondary role in the court's decision (see Kende 2006 *Geo Wash Int'l L Rev* 223; Freedman 1995 *SACJ* 197-202). Most of the judges in *Makwanyane* stressed the value of human dignity and the right thereto: see Chaskalson P para 10; Mahomed J para 271; Mokgoro J para 309; Sachs J para 346; Langa J para 216; O'Regan J para 328, stating that dignity cannot be overemphasised. Also see *Ex parte Minister of Safety and Security: In re S v Walters* 2002 2 SACR 105 (CC) para 5, following the words "...a thread that ran through all [the considerations noted in *Makwanyane*] was the great store our Constitution puts on the two interrelated rights to life and to dignity".

<sup>132</sup> *Mayelane v Ngwenyama* 2013 8 BCLR 918 (CC) para 68, quoting *S v Makwanyane* 1995 2 SACR 1 (CC) para 144.

<sup>133</sup> See Hoctor 2004 *SALJ* 306.

<sup>134</sup> *S v Dodo* 2001 1 SACR 594 (CC) para 35.

<sup>135</sup> Ferreira and Steyn 2006 *SAPL* 109 argues that, logically, a sentence considered cruel, inhuman or degrading will also violate the right to dignity.

<sup>136</sup> *S v Dodo* 2001 1 SACR 594 (CC) para 38. Also see below, in connection with longer prison sentences.

<sup>137</sup> Also see Ferreira and Steyn 2006 *SAPL* 97 (the fundamental rights of an offender are clearly limited by the imposition of a sentence).

Dignity gains prominence with any long sentence.<sup>138</sup> Long prison sentences are often justified by their supposed deterrent effect.<sup>139</sup> In *S v Dodo*<sup>140</sup> the Court warned that, when "the length of a sentence ... bears no relation to the gravity of the offence", because of an attempt to add a deterrent effect, "... the offender is being used essentially as a means to another end and the offender's dignity assailed". In contrast, dignity reminds us that human beings have "inherent and infinite worth" and cannot be used "as means to an end".<sup>141</sup>

Exemplary sentences are, therefore, constitutionally problematic.<sup>142</sup> While it is clear that sentences cannot just be increased for their supposed deterrent effect, as if there were no constitutional consequences, it remains an open question in our law where the line should be drawn or where the tipping point would be reached.

### **5.3 Limitation clause**

#### *5.3.1 Overview and application to sentencing*

It is already trite that the infringement upon a right is only part of the constitutional issue, as it also needs to be established whether such a limitation might not be constitutionally acceptable. Legislation prescribing a sentence might infringe upon rights such as dignity and the prohibition against cruel, inhuman or degrading punishment, but such an infringement will not be unconstitutional if proven to be justified. This two-stage approach is required by the limitation clause in the *Constitution*<sup>143</sup> (and was required in the preceding *interim Constitution*).<sup>144</sup>

One of the most frequently cited dicta about the way in which courts should approach limitations comes from *S v Makwanyane*.<sup>145</sup> Its essence can be summarised as follows:

- Constitutional rights may be limited for purposes that would be reasonable and necessary in "an open and democratic society based on freedom and equality".
- There are no fixed standards, and the courts are required to determine the issue of limitation on a case by case basis.

---

<sup>138</sup> See Ferreira and Steyn 2006 *SAPL* 100-101.

<sup>139</sup> See para 5.3.4 below.

<sup>140</sup> *S v Dodo* 2001 1 *SACR* 594 (CC) para 38. For a similar warning, if in a somewhat different context, see *S v Williams* 1995 3 *SA* 632 (CC) para 85.

<sup>141</sup> The principle that no human being should ever be treated as a mere object is also known as the "Kantian" view of dignity – see Ackermann *Human Dignity* 100-101.

<sup>142</sup> See Mellon 2009 *SACJ* 341-342.

<sup>143</sup> Section 36 of the *Constitution*.

<sup>144</sup> Section 33 of the *Interim Constitution*.

<sup>145</sup> *S v Makwanyane* 1995 2 *SACR* 1 (CC) para 104. Also see Ferreira and Steyn 2006 *SAPL* 102-104.

- In the course of this determination the requirement of proportionality, "which calls for the balancing of different interests", is central.<sup>146</sup>

Given the topic of sentencing, it is useful to quote one more summary of what is at stake, from *Centre of Child Law v Minister of Justice*:<sup>147</sup>

In determining whether a limitation is reasonable and justifiable within the meaning of s 36 of the Constitution, 'it is necessary to weigh the extent of the limitation of the right, on the one hand, with the purpose, importance and effect of the infringing provision on the other, taking into account the availability of less restrictive means to achieve this purpose'.

### 5.3.2 *The balancing requirement of proportionality*

As noted above, the limitation assessment involves a proportionality requirement, which requires a balancing of various relevant considerations. According to *Makwanyane*<sup>148</sup> this process includes

... the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.

The sentencing of offenders lends itself well to the notion of more or less damaging measures. In Barrie's assessment, the court in *Makwanyane* "saw the effects of the death penalty as too drastic and saw life imprisonment as a less restrictive means which would achieve the same purpose".<sup>149</sup> More generally, the "less restrictive means to achieve the purpose" requirement means that "a less restrictive but equally effective form of punishment" must be imposed, if available in a specific case,<sup>150</sup> because "a law which invades rights more than is necessary to achieve its purpose is disproportionate".<sup>151</sup>

It is clear that the "proportionality" noted in the limitations assessment is substantially different from the "proportionality" required between the crime and the sentence.<sup>152</sup> The risk when using the same term for different concepts is that clarity is easily lost. Interestingly, and perhaps ironically, the Constitutional Court has not addressed this issue, nor has it really been called upon to do so. Roughly half of the cases discussed in this contribution

<sup>146</sup> For more detail on the balancing of interests, see para 5.3.2 below.

<sup>147</sup> *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 2 SACR 477 (CC) para 51. The quote is from *Richter v Minister for Home Affairs* 2009 3 SA 615 (CC) para 71.

<sup>148</sup> *S v Makwanyane* 1995 2 SACR 1 (CC) para 104. Also see Ferreira and Steyn 2006 SAPL 106-107.

<sup>149</sup> Barrie 2013 SAPL 54.

<sup>150</sup> Ferreira and Steyn 2006 SAPL 107.

<sup>151</sup> Barrie 2013 SAPL 54.

<sup>152</sup> See para 5.1.2.2 above.

did not involve the second phase, as no infringement was found to have occurred.<sup>153</sup> Apart from *S v Dodo*,<sup>154</sup> proportionality as a sentencing requirement has not been considered in detail in any other case, with the result that the Court has so far been able to avoid the need to carefully address both forms of proportionality in one case.<sup>155</sup>

### 5.3.3 *Practical examples of the limitation clause regarding sentencing*

In *Makwanyane* and *Williams* it was clear that rights were violated, including important rights such as life and dignity.<sup>156</sup> The respondent in *Makwanyane* offered as justification the fact that public opinion supported the death penalty, as well as all the purposes of punishment. These purposes of punishment include retribution, deterrence and incapacitation. However, the respondent could not provide sufficient data to satisfy the court that these reasons could justify the retention of the death penalty, especially given the availability of life imprisonment as "a severe alternative punishment", compared to the "destruction of life and dignity" involved in the death penalty.<sup>157</sup>

Similar arguments were offered in *S v Williams*.<sup>158</sup> The state argued that corporal punishment was justified, on the one hand, as a practical solution to the limited alternative options and shortage of resources and, on the other hand, as a deterrent.<sup>159</sup> The court rejected these arguments. First, it showed that significant alternative measures existed,<sup>160</sup> and found that the state failed to show that the deterrent effect of corporal punishment was significantly stronger than the deterrent effect of these other measures.<sup>161</sup>

In *Centre for Child Law v Minister of Justice*<sup>162</sup> the government argued that the minimum sentences legislation needed to apply to 16 and 17 year olds because of the harm caused by their crimes, which would be offset by these sentences.<sup>163</sup> Again the government was unsuccessful, as it could offer no

---

<sup>153</sup> See *S v Dzukuda* 2000 2 SACR 443 (CC); *S v Dodo* 2001 1 SACR 594 (CC); *S v Niemand* 2001 2 SACR 654 (CC).

<sup>154</sup> See para 5.1.2.2 above.

<sup>155</sup> In *S v Makwanyane* 1995 2 SACR 1 (CC) Chaskalson P dealt with proportionality only as a test for limiting violation of the rights (paras 104-109, 132); see also O'Regan J para 339; Sachs J paras 348-357.

<sup>156</sup> Life and dignity are "values of the highest order" and an infringement can only be justified given "a clear and convincing case" (*S v Makwanyane* 1995 2 SACR 1 (CC) para 111 Chaskalson P) or, the infringement must be "manifestly reasonable" (para 210 Kriegler J).

<sup>157</sup> *S v Makwanyane* 1995 2 SACR 1 (CC) para 145.

<sup>158</sup> *S v Williams* 1995 2 SACR 251 (CC).

<sup>159</sup> *S v Williams* 1995 2 SACR 251 (CC) paras 61-64.

<sup>160</sup> *S v Williams* 1995 2 SACR 251 (CC) paras 66-75.

<sup>161</sup> *S v Williams* 1995 2 SACR 251 (CC) paras 80-84.

<sup>162</sup> *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 2 SACR 477 (CC).

<sup>163</sup> *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 2 SACR 477 (CC) para 53.

facts to support these arguments.<sup>164</sup> It was finally rejected since "high crime levels and well-justified public anger do not provide justification for a legislative intervention overriding a specific protection in the Bill of Rights".<sup>165</sup>

These findings induce us to ask whether there could ever be a justification for a law that amounts to cruel, inhuman or degrading punishment. The view of Ferreira and Steyn<sup>166</sup> that "cruel, inhuman or degrading punishment of necessity constitutes an unreasonable and unjustifiable limitation of the fundamental rights of the offender in terms of section 36" might well prove to be correct.

In terms of the Canadian *Charter of Rights and Freedoms* a violation of its rights can also be justified.<sup>167</sup> Given the guidance that the Constitutional Court has already obtained from Canadian cases in determining the constitutionality of South African legislation,<sup>168</sup> it is useful to consider how the Canadian Supreme Court has dealt with the current issue. In *R v Lloyd*<sup>169</sup> it held as follows, before declaring unconstitutional a sentence of one year's imprisonment for dealing in certain drugs: although combatting drug dealing is an important objective, and although there is a rational connection between this objective and the prescribed sentence, the<sup>170</sup>

... Crown has not established that less harmful means to achieve Parliament's objective of combatting the distribution of illicit drugs, whether by narrowing the reach of the law or by providing for judicial discretion in exceptional cases, were not available. Nor has it shown that the impact of the limit on offenders deprived of their rights is proportionate to the good flowing from their inclusion in the law.

Even though the minimum sentence was one of only one year's imprisonment, and the crime quite serious, the Court still required of the state to show that the legislative measures would be functional.

#### 5.3.4 *The limitation clause: conclusion*

The Constitutional Court is yet to find a sentencing provision that violates human rights to be constitutionally justified.

---

<sup>164</sup> *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 2 SACR 477 (CC) para 54.

<sup>165</sup> *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 2 SACR 477 (CC) para 60.

<sup>166</sup> Ferreira and Steyn 2006 SAPL 108.

<sup>167</sup> Section 1 of the Canadian *Charter of Rights and Freedoms*.

<sup>168</sup> See Currie and De Waal *Bill of Rights Handbook* 152 (the Canadian Charter is the "principal model for the South African Bill of Rights").

<sup>169</sup> *R v Lloyd* 2016 1 SCC 130 – see para 5.1.2.3 above for a discussion of this case.

<sup>170</sup> *R v Lloyd* 2016 1 SCC 130 para 49.

## 6 Future developments related to sentencing

### 6.1 Introduction

The discussion above highlights certain areas that have either not received any attention, or insufficient attention, from the Constitutional Court. These can be summarised as follows:

- The right to freedom of the person, as the foundation of the prohibition against cruel, inhuman or degrading punishment, needs to be incorporated into discussions of the constitutionality of longer prison sentences.
- An explicit discussion of the relationship between the principles for a proportionate sentence, as formulated in *S v Dodo*,<sup>171</sup> and the traditional triad of elements that determine an appropriate sentence, as phrased in *S v Zinn*,<sup>172</sup> would add a lot of value to the Court's sentencing jurisprudence.
- Further development is still possible in connection with the meaning of "cruel, inhuman or degrading". Such further development might well show that the words "cruel" and "inhuman" are virtual synonyms, but that "degrading" is substantively different. After all, the connection between degrading punishment and the concept of dignity is immediately apparent, whereas this is not necessarily the case with cruel and inhuman punishment.
- The "gross disproportionality standard" and its connection with North American laws need further clarification. Until this has been done, the grossly disproportionate standard is not useful for South African purposes.
- Uncertainty remains as to whether a sentence that violates the prohibition against cruel, inhuman or degrading punishment could then be justified in terms of the limitations clause.

It is submitted that the minimum sentences legislation is the closest to being unconstitutional of any statutorily regulated aspect of sentencing and, therefore, a probable candidate for a next constitutional challenge. Several of the above-mentioned areas needing clarification would require attention in determining the continued constitutionality of this legislation.

---

<sup>171</sup> *S v Dodo* 2001 1 SACR 594 (CC) para 37.

<sup>172</sup> *S v Zinn* 1969 2 SA 537 (A) 540G-H.

## 6.2 *Minimum sentences legislation*

Since the constitutionality of this legislation has already been considered in *S v Dodo*,<sup>173</sup> one first needs to establish why a reconsideration might be on the cards.

### 6.2.1 *The legislation has been amended*

The first point is that the current minimum sentences legislation is not the same as that considered by *Dodo*. As noted in paragraph 4.1.4 above, following the amendment in 2007 it now contains several further troublesome elements. The following two are possibly the most troublesome of these.

#### 6.2.1.1 No longer temporary

Van Zyl Smit<sup>174</sup> argued that the mere fact that the legislation is not temporary any longer would justify a reconsideration on its constitutionality. This argument carries considerable weight. Several judgments noted the poor legislative language used in the legislation, but also noted the temporary, "emergency", nature of the measures.<sup>175</sup> Because of this factor, it is conceivable that they treated the legislation with more patience than they would have done otherwise.<sup>176</sup>

#### 6.2.1.2 Life imprisonment and the regional courts

Regional courts now have the power to impose life imprisonment when prescribed for the crimes listed in Part I of Schedule 2.<sup>177</sup> This means that regional magistrates have far greater powers for these crimes, because they are limited to 15 years' imprisonment for all other crimes. Why should this be the case? This raises the further question why higher courts (with presiding judges) normally have a higher punitive jurisdiction than lower courts (with presiding magistrates). Logically speaking, the most obvious answer is that greater power is justified by greater experience and knowledge. The appointment of judges is preceded by more careful scrutiny, during a more involved process, than is the case with magistrates.<sup>178</sup> Why then do regional magistrates get the same powers as judges, just for some of the offences covered by the minimum sentences legislation?

---

<sup>173</sup> *S v Dodo* 2001 1 SACR 594 (CC).

<sup>174</sup> See Van Zyl Smit "Sentencing" 49-14 (it is not a "relatively short-term response" any longer); also Terblanche *Guide to Sentencing* (3) 91.

<sup>175</sup> Cf *S v Malgas* 2001 1 SACR 469 (SCA) para 7 (due weight should be given to this fact).

<sup>176</sup> Terblanche *Guide to Sentencing* (3) 51.

<sup>177</sup> See para 4.1.4.

<sup>178</sup> See, on the selection and appointment of judicial officers, Hoexter and Olivier *Judiciary in South Africa* 123-141 (judges), 325-328 (magistrates).

Pragmatism appears to be the only answer. With the minimum sentences in place, there are now so many cases requiring life imprisonment that high courts cannot cope with the workload.<sup>179</sup> If this is so, then some offenders are being sentenced to the maximum sentence available to courts in South Africa by judicial officers who are potentially less competent than others, a situation that could violate the rights to equality and to a fair trial. It should be noted here that pragmatism does not have a good success rate as a justification for the violation of human rights.<sup>180</sup>

### 6.2.2 *Looking beyond the prescribed life imprisonment*

*Dodo* considered only the validity of section 51(1), prescribing life imprisonment. It did not consider the other provisions, and it did not consider the logic of the legislation internally – in other words, it did not consider how the severity of the prescribed sentences relates to the objective gravity of the different offences in comparison with one another.

The point is that the minimum sentences legislation contains just four sentences for a broad array of the most serious crimes that can be committed in terms of our criminal law: imprisonment for life, for 15 years, 10 years and 5 years.<sup>181</sup> It also contains several inexplicable inconsistencies, with the sentencing "cliffs" for rape a particularly notable example:<sup>182</sup> when accompanied by one of the aggravating features noted in Part I of Schedule 1, the sentence is life imprisonment; without such a feature, the point of departure<sup>183</sup> is a minimum sentence of 10 years' imprisonment.<sup>184</sup> Courts follow a rather different approach when sentencing. They have to carefully individualise their sentences by considering all the factors relevant to the matter, in particular those mitigating or aggravating the crime and those that affect the culpability of the offender.<sup>185</sup> To this end courts are endowed with a wide discretion, because every case is unique<sup>186</sup> and the sentence has to cater for each important unique feature of the

---

<sup>179</sup> See De Kock "Minimum Sentences" 33-37.

<sup>180</sup> See *R v Lloyd* 2016 1 SCR 130, as discussed in para 5.1.2.3 above.

<sup>181</sup> That there are increases when previous convictions are present (s 51(2) of the Act) does not change the position that in essence the legislation imposes only these four sentences.

<sup>182</sup> See Scurry Baehr 2008 *Yale J L & Feminism* 226; Van der Merwe 2013 *SACJ* 411.

<sup>183</sup> *S v Malgas* 2001 1 SACR 469 (SCA) para 8; *S v Mabuza* 2009 2 SACR 435 (SCA) para 20 ("benchmark"); *S v Tuswa* 2013 2 SACR 269 (KZP) para 63 ("starting point").

<sup>184</sup> See *S v Vilakazi* 2009 1 SACR 552 (SCA) para 13: "What is striking about that regime is the absence of any gradation between ten years' imprisonment and life imprisonment. The minimum sentence of ten years' imprisonment progresses immediately to the maximum sentence that our law allows once any of the aggravating features is present, irrespective of how many of those features are present, irrespective of the degree in which the feature is present, and irrespective of whether the convicted person is a first or repeat offender."

<sup>185</sup> See *S v Maake* 2011 1 SACR 263 (SCA) paras 19-20; *S v Mathebula* 2012 1 SACR 374 (SCA) para 10.

<sup>186</sup> See *S v S* 1995 1 SACR 267 (A) 272g-h; *S v Jimenez* 2003 1 SACR 507 (SCA) para 6; *S v M (Centre for Child Law as Amicus Curiae)* 2007 2 SACR 539 (CC) para 94.

case.<sup>187</sup> The resultant sentences also typically show that crime seriousness is properly reflected, not in a graph of four bars, but in a line that starts close to zero and smoothly rises to cater for even small increases in gravity. When the sentencing discretion is left with the courts, they impose sentences, for example in the case of murder, ranging from "detention until the rising of the court"<sup>188</sup> through correctional supervision<sup>189</sup> and totally suspended sentences, to imprisonment of every imaginable duration up to life imprisonment.

The courts also have to explain why they impose a specific sentence, and how they decided on the duration of the sentence. This requirement "has long been recognised", and is demanded by the interests of justice,<sup>190</sup> as explained by the Supreme Court of Appeal in *S v Maake*.<sup>191</sup>

It is not only a salutary practice, but obligatory for judicial officers to provide reasons to substantiate conclusions. ... In an article ..., ['Writing a Judgment' (1998) *SALJ* 115 at 116–128] former Chief Justice MM Corbett pointed out that this general rule applies to both civil and criminal cases. [20] When a matter is taken on appeal, a court of appeal has a similar interest in knowing why a judicial officer who heard the matter made the order which he did. Broader considerations come into play. It is in the interests of the open and proper administration of justice that courts state publicly the reasons for their decisions. A statement of reasons gives some assurance that the court gave due consideration to the matter and did not act arbitrarily. This is important in the maintenance of public confidence in the administration of justice. [21] Before the matter was dealt with statutorily the same general rule of practice applied in criminal matters, both in regard to conviction and sentence.

The court then referred to several cases in which the importance of a judgment is stressed as being "clearly in the interest of justice".<sup>192</sup> Specifically with respect to sentencing, the court quoted with clear approval<sup>193</sup> the following from *S v Immelman*:<sup>194</sup>

It seems to me that, with regard to the sentence of the Court in cases where the trial Judge enjoys a discretion, a statement of the reasons which move him to impose the sentence which he does also serves the interests of justice. The absence of such reasons may operate unfairly, as against both the accused person and the State. [Otherwise] ... there may be no indication ... on what factual basis the Court approached the question of sentence.

<sup>187</sup> See *S v PB* 2013 2 SACR 533 (SCA) para 18, *inter alia* noting that "... no two cases present exactly the same factual matrix".

<sup>188</sup> *S v Hartmann* 1975 3 SA 532 (C) 536-537.

<sup>189</sup> *S v Potgieter* 1994 1 SACR 61 (A); *S v Ingram* 1995 1 SACR 1 (A).

<sup>190</sup> Terblanche *Guide to Sentencing* (3) 162.

<sup>191</sup> See *S v Maake* 2011 1 SACR 263 (SCA) paras 19-24 (original in-text references have been deleted for purposes of the present discussion).

<sup>192</sup> See *R v Majerero* 1948 3 SA 1032 (A) 1033; *R v Van der Walt* 1952 4 SA 382 (A) 383; *R v Huebsch* 1953 2 SA 561 (A) 565.

<sup>193</sup> *S v Maake* 2011 1 SACR 263 (SCA) para 22.

<sup>194</sup> *S v Immelman* 1978 3 SA 726 (A) 729B–D.

*Maake* closed this aspect by noting that legislation requires both "superior" and magistrates' courts to give reasons for their decisions about the law or the facts.<sup>195</sup>

None of these considerations are satisfied when legislation prescribes sentences without giving reasons and without any explanation for the periods of imprisonment it prescribes.

Although the Constitutional Court considered the separation of powers in *Dodo* and concluded that parliament has an interest in the nature and duration of sentences that are imposed, it did not consider the arguments advanced above. In particular, it did not consider the inequality that results from the status quo, where the legislation imposed terms of imprisonment without any explanation or justification, while courts imposing sentence have to explain every fine detail thereof; nor the fact that the interests of justice inevitably suffer in the absence of such an explanation. The interests of justice also suffer because of the high benchmarks in the minimum sentences legislation. As noted by Scurry Baehr,<sup>196</sup> instead of using the language of aggravation to increase the sentence for serious instances of these crimes, the high starting points force the courts to employ the language of mitigation to get to a lower (proportional) sentence.

Even when the minimum sentences are found to violate certain rights, the justification of such infringements will have to be considered as well. Given the relative harshness of the prescribed sentences, combined with the temporary nature of the legislation, it has generally been agreed that it is the main aim of the Act to combat crime; in other words, to serve as a deterrent.<sup>197</sup> Recently it appears as if sentencing consistency is also considered an important objective,<sup>198</sup> although this view is, at best, debatable.<sup>199</sup> There is a massive body of research on the deterrent effect of

---

<sup>195</sup> *S v Maake* 2011 1 SACR 263 (SCA) paras 24, 25 (s 146 of the *Criminal Procedure Act* 51 of 1977 and s 93(3)(c), (d) and (e) of the *Magistrates' Courts Act* 32 of 1944 respectively).

<sup>196</sup> Scurry Baehr 2008 *Yale J L & Feminism* 239.

<sup>197</sup> *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 2 SACR 477 (CC) paras 16, 45: "...the very essence [of] the minimum sentencing regime makes for tougher and longer sentences... As this court noted in *Dodo*, the very object of the regime is to 'ensure that consistently heavier sentences are imposed.'" (See *S v Dodo* 2001 1 SACR 594 (CC) para 11). Also see *S v Mabunda* 2013 2 SACR 161 (SCA) para 4; *S v RO* 2010 2 SACR 248 (SCA) paras 40-41; Scurry Baehr 2008 *Yale J L & Feminism* 224, quoting the Minister of Justice's prediction that the minimum sentences would reduce crime.

<sup>198</sup> See Kubista 2005 *SACJ* 79; O'Donovan and Redpath *Impact of Minimum Sentencing* 13. This view is often deduced from the statement in *S v Malgas* 2001 1 SACR 469 (SCA) para 8 that, "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". Also see *S v Brown* 2015 1 SACR 211 (SCA) para 118.

<sup>199</sup> Terblanche *Guide to Sentencing* (3) 91; O'Donovan and Redpath *Impact of Minimum Sentencing* 51-57.

severe punishment<sup>200</sup> which, if proof existed that heavier punishment improved deterrence, should have provided ample authority to such claims. That it has proven virtually impossible to find such proof is a strong indication that it does not exist.<sup>201</sup>

## 7 Concluding remarks

It is appropriate to return to the question posed in the introduction to this contribution. What do we learn about sentencing from the Constitutional Court's judgments of the past 20 years?

Ironically, there is less to be learnt than one might have thought. This is probably due to the fact that, when it comes to constitutional development, 20 years is actually a brief period. There is room for clarification of many sentencing aspects, but probably none more so than the question about the point at which the legislative authority should hand over the sentencing reigns to the judicial authority. How and when this will happen, only time can tell.

## Bibliography

### Literature

Ackermann *Human Dignity*

Ackermann L *Human Dignity: Lodestar for Equality in South Africa* (Juta Cape Town 2012)

Barrie 2013 *SAPL*

Barrie G "The Application of the Doctrine of Proportionality in South African Courts" 2013 *SAPL* 40-57

Bishop and Woolman "Freedom and Security"

Bishop M and Woolman S "Freedom and Security of the Person" in Woolman S and Bishop M (eds) *Constitutional Law of South Africa* 2<sup>nd</sup> ed (Juta Cape Town 2003) (original service 2006) ch 40

Brennan 2004 *J Crim L & Criminology*

Brennan JJ "Supreme Court's Excessive Deference to Legislative Bodies under Eighth Amendment Sentencing Review" 2004 *J Crim L & Criminology* 551-586

Bronstein 2014 *SAJHR*

Bronstein V "Envisaging Provincial Powers: A Curious Journey with the Constitutional Court" 2014 *SAJHR* 24-40

---

<sup>200</sup> See Terblanche *Guide to Sentencing* (3) 172-173 for a summary of some of this body of research.

<sup>201</sup> Also see Lenta 2007 *SAPL* 385-404.

Carozza 2003 *Tex L Rev*

Carozza PG "My Friend is a Stranger': The Death Penalty and the Global *Ius Commune* of Human Rights" 2003 *Tex L Rev* 1031-1089

Cowling 2007 *Annual Survey*

Cowling MG "Criminal Procedure" 2007 *Annual Survey* 307-392

Currie and De Waal *Bill of Rights Handbook*

Currie I and De Waal J *Bill of Rights Handbook* 6<sup>th</sup> ed (Juta Cape Town 2013)

Daniels and Brickhill 2006-2007 *Penn St Int'l L Rev*

Daniels RN and Brickhill J "The Counter-Majoritarian Difficulty and the South African Constitutional Court" 2006-2007 *Penn St Int'l L Rev* 371-404

Davis, Marcus and Klaaren 1995 *Annual Survey*

Davis DM, Marcus GJ and Klaaren J "The Administration of Justice, Law Reform and Jurisprudence" 1995 *Annual Survey* 728-763

De Kock "Minimum Sentences"

De Kock R "Minimum Sentences and the Prosecution in South Africa" in Open Society Foundation for South Africa *Report on a Conference on Minimum Sentencing in South Africa* 25-26 October 2006

Du Toit *et al Commentary*

Du Toit E *et al Commentary on the Criminal Procedure Act* (Juta Cape Town 1987) (Service 57, 2016)

Erasmus 2010 *SAPL*

Erasmus D "There is Domething you are Missing; What about the Children?': Separating the Rights of Children from those of their Caregivers" 2010 *SAPL* 124-136

Ferreira and Steyn 2006 *SAPL*

Ferreira GM and Steyn M "The Limitation of Fundamental Rights by Imposition of Sentence" 2006 *SAPL* 96-110

Freedman 1995 *SACJ*

Freedman W "Demise of the Death Penalty: The Constitutional Court Pronounces: The Right to Life and Dignity" 1995 *SACJ* 197-202

Gallinetti 2010 *SAPL*

Gallinetti J "2kul2Btru: What Children would say about the Jurisprudence of Albie Sachs" 2010 *SAPL* 108-123

Gallinetti "Child Justice in South Africa"

Gallinetti J "Child Justice in South Africa: The Realisation of the Rights of Children Accused of Crime" in Boezaart T (ed) *Child Law in South Africa* (Juta Cape Town 2009) 635-664

Hoctor 2004 *SALJ*

Hoctor S "Dignity, Criminal Law, and the Bill of Rights" 2004 *SALJ* 304-317

Hoexter and Olivier *Judiciary in South Africa*

Hoexter C and Olivier M (eds) *The Judiciary in South Africa* (Juta Cape Town 2014)

Kende 2006 *Geo Wash Int'l L Rev*

Kende MS "The Constitutionality of the Death Penalty: South Africa as a Model for the United States" 2006 *Geo Wash Int'l L Rev* 209-250

Kubista 2005 *SACJ*

Kubista NJ "'Substantial and Compelling Circumstances': Sentencing of Rapists under the Mandatory Minimum Sentencing Scheme" 2005 *SACJ* 77-86

Kurki "International Standards for Sentencing"

Kurki L "International Standards for Sentencing and Punishment" in Tonry M and Frase RS (eds) *Sentencing and Sanctions in Western Countries* (Oxford University Press New York 2001) 331-378

Lenta 2007 *SAPL*

Lenta P "Deterrence and Capital Punishment" 2007 *SAPL* 385-404

Mellon 2009 *SACJ*

Mellon A "Sentencing White-collar Offenders: Beyond a One-dimensional Approach" 2009 *SACJ* 327-352

Milton *et al* 1995 *SACJ*

Milton J *et al* "Demise of the Death Penalty: The Constitutional Court Pronounces" 1995 *SACJ* 188-204

Mujuzi 2011 *SACJ* (1)

Mujuzi JD "Punishment in the Eyes of the Constitutional Court of South Africa: The Relationship between Punishment and the Rights of an Offender in the Sentencing of Primary Caregivers of Children" 2011 *SACJ* 164-177

Mujuzi 2011 *SACJ* (2)

Mujuzi JD "Recent Cases: Sentencing" 2011 *SACJ* 399-416

Mureinik 1995 *Annual Survey*

Mureinik E "Constitutional Jurisprudence" 1995 *Annual Survey* 25-42

O'Donovan and Redpath *Impact of Minimum Sentencing*

O'Donovan M and Redpath J *The Impact of Minimum Sentencing in South Africa* (Open Society Foundation for South Africa Newlands 2006)

*Oxford South African Concise Dictionary*  
*Oxford South African Concise Dictionary* 2<sup>nd</sup> ed (Oxford University Press  
Cape Town 2010)

Petersen 2014 *SAJHR*

Petersen N "Proportionality and the Incommensurability Challenge in the  
Jurisprudence of the South African Constitutional Court" 2014 *SAJHR* 405-  
429

Rautenbach 2008 *TSAR*

Rautenbach IM "Overview of Constitutional Court Decisions on the Bill of  
Rights – 2007" 2008 *TSAR* 330-348

Rautenbach 2017 *TSAR*

Rautenbach IM "Overview of Constitutional Court Judgments on the Bill of  
Rights – 2016" 2017 *TSAR* 352-369

Roux *Politics of Principle*

Roux T *The Politics of Principle: The First South African Constitutional  
Court, 1995-2005* (Cambridge University Press Cambridge 2013)

SALC *Sentencing*

South African Law Commission *Report: Project 82: Sentencing (A New  
Sentencing Framework)* (SA Law Commission Pretoria 2000)

Scurry Baehr 2008 *Yale J L & Feminism*

Scurry Baehr K "Mandatory Minimums Making Minimal Difference: Ten  
Years of Sentencing Sex Offenders in South Africa" 2008 *Yale J L &  
Feminism* 213-246

Skelton 2008 *CCR*

Skelton A "Severing the Umbilical Cord: A Subtle Jurisprudential Shift  
regarding Children and their Primary Caregivers" 2008 *CCR* 351-368

Sloth-Nielsen 2005 *Stell LR*

Sloth-Nielsen J "Juvenile Sentencing comes of Age" 2005 *Stell LR* 98-103

Terblanche 2005 *SACJ* (1)

Terblanche S "Recent Cases: Sentencing" 2005 *SACJ* 109-121

Terblanche 2005 *SACJ* (2)

Terblanche S "Recent Cases: Sentencing" 2005 *SACJ* 385-400

Terblanche *Guide to Sentencing* (2)

Terblanche SS *A Guide to Sentencing in South Africa* 2<sup>nd</sup> ed (LexisNexis  
Butterworths Durban 2007)

Terblanche *Guide to Sentencing* (3)

Terblanche SS *A Guide to Sentencing in South Africa* 3<sup>rd</sup> ed (LexisNexis Durban 2016)

Terblanche 2011 *Annual Survey*

Terblanche SS "Sentencing" 2011 *Annual Survey* 1186-1227

Terblanche 2012 *PELJ*

Terblanche SS "The *Child Justice Act*: A Detailed Consideration of Section 68 as a Point of Departure with Respect to the Sentencing of Young Offenders" 2012 *PELJ* 436-475

Tonry "Punishment Policies"

Tonry M "Punishment Policies and Patterns in Western Countries" in Tonry M and Frase RS (eds) *Sentencing and Sanctions in Western Countries* (Oxford University Press New York 2001) 3-28

Tonry and Hatlestad *Sentencing Reform*

Tonry M and Hatlestad K (eds) *Sentencing Reform in Overcrowded Times: A Comparative Perspective* (Oxford University Press New York 1997)

Van der Merwe 2013 *SACJ*

Van der Merwe A "Recent Cases: Sentencing" 2013 *SACJ* 399-418

Van der Walt 2005 *SAPL*

Van der Walt J "Vertical Sovereignty and Horizontal Plurality: Normative and Existential Reflections on the Capital Punishment Jurisprudence Articulated in *S v Makwanyane*" 2005 *SAPL* 253-265

Van Zyl Smit "Sentencing"

Van Zyl Smit D "Sentencing" in Woolman S and Bishop M (eds) *Constitutional Law of South Africa* 2<sup>nd</sup> ed (Juta Cape Town 2003) (original service 2003) ch 49

Wilson, Dugard and Clark 2015 *SAJHR*

Wilson S, Dugard J and Clark M "Conflict Management in an Era of Urbanisation: 20 Years of Housing Rights in the South African Constitutional Court" 2015 *SAJHR* 472-503

### **Case law**

*Atkins v Virginia* 536 US 304 (2002)

*Brandt v S* 2005 2 All SA 1 (SCA) (also reported as *S v B* 2006 1 SACR 311 (SCA))

*Centre for Child Law v Minister of Justice and Constitutional Development* 2009 2 SACR 477 (CC)

*De Lange v Smuts* 1998 3 SA 785 (CC)

*Ewing v California* 538 US 11 (2003)

*Ex parte Attorney-General, Namibia: In Re Corporal Punishment* 1991 3 SA 76 (NmSC)

*Ex parte Minister of Safety and Security: In re S v Walters* 2002 2 SACR 105 (CC)

*Gregg v Georgia* 428 US 153 (1976)

*Harmelin v Michigan* 501 US 957 (1991)

*MS v S (Centre for Child Law as Amicus Curiae)* 2011 2 SACR 88 (CC)

*Mayelane v Ngwenyama* 2013 8 BCLR 918 (CC)

*R v Edwards* 1953 3 SA 168 (A)

*R v Huebsch* 1953 2 SA 561 (A)

*R v Latimer* 2001 SCC 1

*R v Lloyd* 2016 1 SCC 130

*R v Majerero* 1948 3 SA 1032 (A)

*R v Nur* 2015 1 SCR 773

*R v Van der Walt* 1952 4 SA 382 (A)

*Richter v Minister for Home Affairs* 2009 3 SA 615 (CC)

*Roper v Simmons* 543 US 551 (2005)

*Rummel v Estelle* 445 US 263 (1980)

*S v Brown* 2015 1 SACR 211 (SCA)

*S v Dodo* 2001 1 SACR 301 (E)

*S v Dodo* 2001 1 SACR 594 (CC)

*S v Dzukuda; S v Tilly; S v Tshilo* 2000 2 SACR 51 (W)

*S v Dzukuda* 2000 2 SACR 443 (CC)

*S v GL* 2010 2 SACR 488 (WCC)

- S v Hartmann* 1975 3 SA 532 (C)
- S v Immelman* 1978 3 SA 726 (A)
- S v Ingram* 1995 1 SACR 1 (A)
- S v Jimenez* 2003 1 SACR 507 (SCA)
- S v Kwalase* 2000 2 SACR 135 (C)
- S v Langa* 2010 2 SACR 289 (KZP)
- S v Londe* 2011 1 SACR 377 (ECG)
- S v M (Centre for Child Law as Amicus Curiae)* 2007 2 SACR 539 (CC)
- S v Maake* 2011 1 SACR 263 (SCA)
- S v Mabunda* 2013 2 SACR 161 (SCA)
- S v Mabuza* 2009 2 SACR 435 (SCA)
- S v Makwanyane* 1995 2 SACR 1 (CC)
- S v Malgas* 2001 1 SACR 469 (SCA)
- S v Masisi* 1996 1 SACR 147 (O)
- S v Mathebula* 2012 1 SACR 374 (SCA)
- S v Mthethwa* 2015 1 SACR 609 (GP)
- S v Niemand* 2001 2 SACR 654 (CC)
- S v Nkosi* 2002 1 SACR 135 (W)
- S v PB* 2013 2 SACR 533 (SCA)
- S v Pillay* 2011 2 SACR 409 (SCA)
- S v Potgieter* 1994 1 SACR 61 (A)
- S v RO* 2010 2 SACR 248 (SCA)
- S v S* 1995 1 SACR 267 (A)
- S v Trichart* 2014 2 SACR 245 (GSJ)
- S v Tuswa* 2013 2 SACR 269 (KZP)

*S v Vilakazi* 2009 1 SACR 552 (SCA)

*S v Williams* 1995 2 SACR 251 (CC)

*S v Zinn* 1969 2 SA 537 (A)

*S v Zuma* 1995 1 SACR 568 (CC)

*Solem v Helm* 463 US 277 (1983)

### **Legislation**

*Child Justice Act* 75 of 2008

*Constitution of the Republic of South Africa*, 1996

*Constitution of the Republic of South Africa* 200 of 1993

*Correctional Services Act* 8 of 1959

*Correctional Services Act* 111 of 1998

*Criminal Law Amendment Act* 105 of 1997

*Criminal Law (Sentencing) Amendment Act* 38 of 2007

*Criminal Procedure Act* 51 of 1977

*Magistrates' Courts Act* 32 of 1944

United States Constitution

### **Government publications**

Proc R43 in GG 6175 of 1 May 1998

### **Internet sources**

Constitutional Court date unknown <http://www.constitutionalcourt.org.za/site/thecourt/history.htm>

Constitutional Court of South Africa date unknown *History of the Court* <http://www.constitutionalcourt.org.za/site/thecourt/history.htm> accessed 19 July 2017

### **List of Abbreviations**

Annual Survey  
CCR

Annual Survey of South African Law  
Constitutional Court Review

---

Geo Wash Int'l L Rev	George Washington International Law Review
J Crim L & Criminology	Journal of Criminal Law and Criminology
PELJ	Potchefstroom Electronic Law Journal
Penn St Int'l L Rev	Penn State International Law Review
SACJ	Southern African Journal of Criminal Justice
SAJHR	South African Journal of Human Rights
SALC	South African Law Commission
SALJ	South African Law Journal
SAPL	South African Journal of Public Law
Stell LR	Stellenbosch Law Review
Tex L Rev	Texas Law Review
TSAR	Tydskrif vir Suid-Afrikaanse Reg
US Const amend	United States Constitution Amendment
Yale J L & Feminism	Yale Journal of Law and Feminism