Structuring the exercising of sentencing discretion in South African criminal courts

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ABSTRACT

The imposition of a sentence in South African criminal courts takes place through the exercise of sentencing discretion by the tribunals. It is trite law that such discretion is broad, and belongs to the sentencing court. The courts derive the broad discretion from the sentencing legislation that provides for the different forms of punishment, sentencing jurisdictions for the various court levels, and those that deal with mandatory minimum sentences in South Africa. The courts consider various relevant factors based on the so-called triad, which consists of the severity of the crime, the offender's personal circumstances, and the interest of society, to extrapolate appropriate sentences for convicted offenders. The factors remain the same for every case, but there is little guidance as to how much weight the courts should attach to each element to promote consistency in sentencing. Sometimes the sentences are grossly disproportionate to the offence as a result of overemphasising the seriousness of the crime, or are too lenient because of overemphasising the personal circumstances of the offender. The sentencing legislation legitimises the subjective nature of the exercise of sentencing discretion, the outcome of which is an inconsistent approach to sentencing by courts for similar offences. Legislative intervention is needed to amend the sentencing legislation in a manner that assists in the structuring of the exercising of sentencing discretion and promotes consistency in sentencing. To this end, the South African Law Reform Commission in the year 2000 recommended the amendment of the sentencing legislation to make provision for the establishment of a Sentencing Council that would develop sentencing guidelines that might better structure the exercise of sentencing discretion, and which would promote consistency in sentencing. The sentencing guidelines models of England and Wales and the Federal Sentencing Guidelines of the United States of America are explored to determine the manner in which they structure the exercising of sentencing discretion to promote consistency in sentencing, with predictive predetermined sentences that minimise disparities in punishments.

In this research, specific recommendations are made to improve the South African sentencing system to promote greater consistency in sentencing. The basis of the recommendations emanate from the examination of sentencing models from the United States of America's Federal Sentencing Guidelines, the sentencing guidelines of England and Wales, and the work done by the South African Law Commission. Other recommendations emanate from sentencing legislation adopted by South Africa in which its primary objective sets a standard approach to sentencing for specific listed severe offences.

Keywords: sentencing; sentencing discretion; structuring sentencing discretion; proportionality, consistency and equality in sentencing; inconsistent and disparate sentencing; legality; principles; rules and sentencing guidelines.

DECLARATION

I, Vincent Isaac Jameson, do at this moment declare that this thesis is the result of my investigation and research and that it has not been submitted in part or in full for any degree or any other degree at any other University.

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VI Jameson Date

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CHAPTER 1

INTRODUCTION

1 Problem statement

Sentencing is the final, formal stage of a criminal trial after the conviction of an offender.[1] It is also often described as the most challenging facet of a criminal case, but it is the topic about which legal practitioners learn least and consequently with which they are least familiar.[2] Previous as well as current authorities indicate that there is a sense of neglect when it comes to the sentencing phase of a criminal trial.[3]

At the sentencing stage, as much information as possible about the perpetrator, the circumstances of the offence and the victim must be placed before the court to enable it to impose an appropriate sentence.[4] In some instances, the circumstances of the offender and the principles and purposes of sentencing are explored thoroughly by the court to arrive at a proper sentence.[5] There are cases where insufficient information is placed before the court to enable it to exercise its sentencing discretion properly.[6] This raises grave concerns, because the perception is that the sentencing phase is just a formality to finalise the criminal trial.

Legal practitioners seem to lose interest in the case, and fewer details than necessary of the crime and the convicted offender are put before the court,[7] although this phase is just as important as the evidential stage of a criminal trial, that enjoys the protection of the *Constitution of the Republic of South Africa*, 1996 (hereinafter the Constitution).[8] Sentencing requires a procedure that is inclusive of all the mitigating and aggravating factors which may have an effect in sentencing to

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1 Terblanche *A guide to sentencing in South Africa* 4.
2 Kruger *Hiemstra's Criminal Procedure* 28-1.
3 Walker *Sentencing in a rational society* 1; *S v Dlamini* 1991 2 SACR 655 (A) 666i-667a.
4 *S v Olivier* 2010 2 SACR 178 (SCA) at para 8.
5 *S v K* 1995 2 SACR at 557b-c 558i.
6 *S v Masis* 1996 1 SACR 147 (O) 151d-h.
7 *S v Gough* 1980 3 SA 785 (NC) 786F-G, and more recently *S v EN* 2014 1 SACR 198 (SCA) at para 14.
8 Section 35(3).

enable courts to determine an appropriate sentence.[9] The convicted offender should always be entitled to the full protection of the right to a fair trial, mainly when the penalty involves the loss of liberty.[10] In many cases, for instance, courts have been faulted for not informing the convicted offender as early as at the plea stage what minimum sentence would be applicable if the perpetrator is found guilty of a particular offence.[11]

The courts consider specific factors in the traditional approach to sentencing, which is the seriousness of the crime, the personal circumstances of the offender, and the interest of society. [12] The courts must consider these factors in conjunction with the purpose of punishment, which comprises of retributive, deterrent, rehabilitative, and restorative elements, and the need for incapacitation, to determine an appropriate sentence.[13] Courts must consider all the relevant factors in sentencing to give effect to the fair trial rights of offenders.[14] However, the factual circumstances of different cases differ, leading to the exercise of the sentencing discretion, which is often the most challenging part of any criminal trial.[15]

The courts have a broad sentencing discretion in sentencing an accused person convicted under the common law or a statute.[16] It is a free and unfettered exercise of sentencing discretion within the confines of the law. Examples of applicable legislation that regulate sentencing are the *Magistrates' Court Act* 32 of 1944 (hereinafter the MCA), which provides for the general jurisdiction of lower courts in respect of sentencing;[17] the *Superior Courts Act* 10 of 2013, which provides for the

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9 *S v Dzukuda; S v Tshilo* 2000 2 SACR 443 (CC) para 12.

10 Steytler *Constitutional Criminal Procedure A commentary on the Constitution of the Republic of South Africa* 212.

11 *S v WV* 2013 1 SACR 204 (GNP) para 25, *S v Legoa* 2003 1 SACR 13 (SCA) at para 12, *S v Ndlovu* 2003 1 SACR 331 (SCA), *S v Mthembu* 2012 1 SACR 517 (SCA) at para 17, *S v Mashinini* 2012 1 SACR 604 (SCA) at para 11 and *S v Kolea* 2013 1 SACR 409 (SCA) at para 19. The test is always whether or not the accused suffered any prejudice.

12 *S v Zinn* 1969 2 SA 537 (A) at 540G.

13 *R v Swanepoel* 1945 AD 444.

14 Section 35(3)(a)-(o) of the Constitution read with the *Dzukuda* case at para 12.

15 *S v Peterson* 2001 1 SACR 16 (SCA) para 18; *S v Sadler* 2000 1 SACR 331 (SCA) at para 10, *S v Eadie* 2 2001 1 SACR 185 (C) at para 186.

16 Section 276(1) CPA; *Director of Public Prosecutions, Western Cape v Prins* 2012 2 SACR 183 (SCA).

17 Section 92(1).

general jurisdiction of Superior Courts in respect of sentencing;[18] the *Criminal Law Amendment Act* 105 of 1997 (hereinafter the CLAA), which provides for mandatory minimum sentences for certain offences; and section 276(1) of the *Criminal Procedure Act* 51 of 1977 (hereinafter the CPA), which provides for the available penalties. The sentencing legislation provides the courts with the discretion to impose sentences.

The courts of review and appeal will not lightly interfere with the sentences imposed by the trial court.[19] Recently, the Supreme Court of Appeal was not prepared to use similarly sentenced cases as precedent in sentencing, because the sentencing court is in a better position to consider the merits of each case and determine a personalised sentence for each case.[20] Such a court is in a better position to appreciate the atmosphere of the case and to determine whether a severe or light sentence is appropriate than is the appellate tribunal.[21] The courts are of the view that this approach provides for the balance and fair sentencing that is a hallmark of a sophisticated criminal justice system and allows for the individualisation of punishment.[22]

The current South African sentencing system is not perfect and has inherent deficiencies. Different courts adjudicating different cases on somewhat similar facts and scrupulously applying their minds to the correct principles applicable to sentencing can come to very different conclusions as to what an appropriate sentence may be.[23] The Constitutional Court acknowledged the imperfection of the sentencing system, because of the existence of "severe" and "lenient" judicial officers.[24] It suggested that sometimes a personal approach is applied by courts, when one offender receives a sentence that is more severe than that imposed on another offender, due to the outlook and personality of the judicial officer imposing

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18 Section 21(1).

19 *S v Matlala* 2003 1 SACR 80 (SCA) at para 83; *S v Majodina* 1996 2 SACR 369 (A) at 373j-374a, and *S v Pillay* 1977 4 SA 531 (A) at 535E-F.

20 *Bailey v The State* (454/11) (2012) ZASCA 154 01 October 2012.

21 *R v Mapumulo* 1920 AD 56 AT 57.

22 Section 283 CPA; *S v Toms; S v Bruce* 1990 2 SA 802 (A) at 806H-I; *S v Vries* 1996 2 SACR 638 (Nm) at 641, and also see Terblanche *A Guide to Sentencing in South Africa* 146.

23 The *Dzukuda* case at para 35.

24 *S v Makwanyane* 1995 2 SACR 1 (CC) para 54.

the sentence, instead of on the offender's criminal deed.[25] It might lead to the unequal treatment of offenders convicted of similar offences by different courts, which suggests that discretionary sentencing causes inconsistency in sentencing.[26]

This raises the question of whether different sentencing results are inevitable, and the phenomenon that a constitutional democracy simply has to accept. Although the Supreme Court of Appeal demands that judicial officers must give reasons for the sentences imposed to substantiate their conclusions and show that they have not acted arbitrarily,[27] appeal and review tribunals will interfere with sentences only where a material misdirection of the trial court vitiates its sentencing discretion.[28]

The exercise of sentencing discretion makes it difficult to develop principles for sentencing to ensure consistency in sentences to avoid unfair discrimination.[29] Inconsistency in sentencing causes the unequal treatment of people in like cases.[30] To achieve uniformity in sentencing is to achieve equality before the law by imposing similar sentences for similarly positioned offenders.[31] Consistency in sentences is an indispensable requirement of justice to reach and sustain the right to equality.[32] It promotes legal certainty that improves respect for and trusts in the legal system.[33] However, to achieve consistency in sentencing will be difficult as long as the imposition of the sentence belongs exclusively to the discretion of the courts when equality before the law regarding sentencing will remain a remote ideal.[34]

The Constitution of South Africa affords everyone the right to equality and equal protection of the law.[35] Equality is the Constitution's focus and organising principle.[36] Equality, however, is a complicated and intensely controversial social ideal. At its most fundamental and abstract, it is a noble idea that people in like cases should

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25 The *Dzukuda* case at para 35.
26 Gottfredson and Gottfredson *Decision-making in criminal justice* 153-154.
27 *S v Maake* 2011 1 SACR 263 (SCA) para 19.
28 *S v Malgas* 2001 1 SACR 469 at 478e-f.
29 *S v Maree* 1964 4 SA 545 (O) at 560H.
30 The *Makwanyane* case at paras 163 and 214.
31 *S v Ntlele* 1993 2 SACR 610 (W) at 612e-f.
32 Kruger *Hiemstra's Criminal Procedure* 28-5. The aspects of consistency and equality in sentencing are discussed in Chapter Three of this thesis.
33 Du Toit *Straf* 119.
34 Ashworth *Sentencing and criminal Justice* 38.
35 Section 9(1).
36 *President of the RSA v Hugo* 1997 (1) SACR 567 (CC) para 74.

receive similar treatment.[37] Furthermore, equality is a binding constitutional norm and one of its three core values.[38] On the one hand, courts value their judicial discretion very highly, while there is a demand for equal treatment, rendering individualisation and consistency in sentencing uncomfortable bedfellows.[39]

The courts derive the exercise of sentencing discretion from the South African sentencing legislation. Better structuring of the exercise of the sentencing discretion of the tribunals to promote consistency in sentencing would require an amendment to the sentencing legislation in its current form. It raises the question of whether the State has a constitutional obligation to eradicate unequal treatment in respect of sentences imposed by the courts. On the one hand, the judiciary believes that sentencing belongs to the discretion of the sentencing court. On the other, the Constitution requires the State to eradicate unequal treatment wherever it exists.[40]

The Constitution recognises that the South African government consist of three arms, each with its separate functions and powers. These are the Legislature,[41] the Executive,[42] and the Judiciary.[43] The Constitution does not define the doctrine of the Separation of Powers. The definition of the doctrine is in the provisions outlining the functions and structure of various organs of state and their independence and interdependence.[44] It requires that the classification of the services of government either be as legislative, executive or judicial and that each separate branch of government performs a different function.[45]

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37 De Waal; Currie and Erasmus *The Bill of Rights Handbook* 198.
38 Sections 7(1); s 36(1) and s 39(1)(a).
39 Steytler *Constitutional Criminal Procedure* 412.
40 Section 9(2) of the Constitution.
41 Section 44(1).
42 Section 85(1).
43 Section 165(1)-(5).
44 *(Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) *SA* 744 (CC), 1996 10 BCLR 1253 (CC)(First Certification Judgment at par 112).
45 Currie and De Waal *The Bill of Rights Handbook* 20.

To this end, the enactment or amendment of any sentencing legislation that structures the exercise of sentencing discretion is pre-eminently a role of the Legislature.[46] The Executive implements the domestic law, and the courts apply it.[47]

The current sentencing system provides different techniques that can be used to guide the exercise of the court's sentencing discretion. They are judicial self-regulation, statutory sentencing principles, numerical guidelines, and mandatory minimum sentences.[48] Sentencing commissions such as those in the United States of America and the Sentencing Councils in England are judicial bodies that are specifically established to structure the exercise of sentencing discretion to provide a standard approach in sentencing that promotes its consistency. These aspects will be dealt with in greater detail in Chapter Four of this thesis.

The statutory sentencing principles provide the courts with maximum imprisonment and fines that courts may impose.[49] Generally, in South Africa sentencing discretion is structured through legislation like the CLAA, section 92 of the MCA, and sections 276(1), 112(1) (a) and 302 of the CPA. The legislation allows criminal courts broad sentencing discretion. The courts are free to exercise their sentencing discretion within the limits of the law save in circumstances where the scope to exercise sentencing discretion is narrow. When the range to use sentence option is wide within the statutory provision, the potential is great that inconsistency in penalties may occur. Unlike the other provisions of the sentencing legislation, the CLAA provides the courts with the lightest possible sentences that the tribunals may impose. The courts, therefore, have a consistent approach in sentencing, which has the potential to promote greater consistency in sentencing. A detailed discussion of statutory sentencing principles follows in Chapter Four of this thesis.

Judicial self-regulation, on the other hand, is a process whereby the courts structure the exercise of the sentencing discretion through appeal and review processes.[50] In South Africa, these procedures are governed mainly by the CPA, the *Child Justice Act*

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46 Section 44(1)(a)(ii) of the Constitution.
47 Section 165(2) of the Constitution.
48 Von Hirsch and Ashworth *Principled sentencing* 227-239.
49 *S v Mathabela* 1986 4 SA 693 (T) at 696E-F.
50 Terblanche *Guide to Sentencing in South Africa* 130.

75 of 2008 and the *Superior Courts Act*. Except for cases subject to so-called "automatic review",[51] these procedures are not automatically operational after the conviction and sentencing of the offender. The review and appeal processes control the exercise of the sentencing discretion of courts in South Africa.[52] The Review Court has the powers to confirm or reduce, alter or set aside the sentence.[53] Only the Appeal Court has the powers to increase the sentence.[54] The penalties from appeal and review courts would have played a significant role in the achievement of consistency in sentencing if the doctrine of precedent applied in the South African system. The doctrine of precedent is that the decisions of the courts are binding on the court that pronounced the judgment and all courts subordinate to that court.[55] This is because courts are obliged to follow only aspects of previous decisions that relate to their *ratio decidendi,* or the principle of the decision,[56] and not those that relate to points of fact.[57]

A guideline judgement is a judgment by either a Court of Review or an Appeal Court which begins by stating the current pattern of offending and sentencing.[58] It considers the basic framework applicable to sentencing in general and the offence in particular. It then provides a relatively exhaustive list of aggravating and mitigating factors associated with the crime. After that, in many instances, it provides minimum sentences for specific sub-categories of the particular offence.[59] Although guideline judgements were found to be useful in some cases in South Africa,[60] other courts reject them.[61] In England, the Court of Appeal has issued guideline judgments since the 1970s, which contribute immensely to promoting consistency in sentencing.[62] The guideline recommendations laid the foundation of the establishment of

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51 Section 302 of the CPA.
52 The *Makwanyane* case at paras 45 and 47.
53 Sections 304(2) (c), 309(3) and 322 of the CPA.
54 Sections 309(3) and 322(6) of the CPA.
55 Hosten *Introduction to South African law and legal theory* 163.
56 Hahlo and Khan *The South African Legal systems* 260.
57 *R v Wells* 1949 3 SA 83 (A) at 87-88.
58 *R v Brewster* [1998] 1 Cr App R (S) 181 at 184
59 Terblanche *Guide to Sentencing in South Africa* 131.
60 *S v Fraser* 1987 (2) SA 859 (A); *S v D* 1995 (1) SACR 259 (A).
61 *S v Koekemoer* 2002 (1) SACR 404 (ECD) at 405a-b.
62 Spigelman *Sentencing Guideline Judgments* 12.

sentencing guidelines for England and Wales.[63] In Australia, guideline sentences aer applied tentatively. Hence, the system did not find favour, as in the case of England. In New South Wales the first guideline sentence issued was in *R v Jurisic* (1998 45 NSWLR (209), and in Victoria in the case of *Boulton v The Queen* [2014] VSCA 342 (22 December 2014). The matter of guideline judgments is discussed in greater detail in Chapter Four of this thesis, under para 4.6.

The numerical guidelines find their origin in the United States in the 1970s, but have been rejected by many countries because sentences for offences are predetermined and presumptive.[64] The numerical guidelines consist of vertical and horizontal axes. The severity of the crimes is along the vertical axis with the least severe at the top and the worst at the bottom.[65] On the horizontal axis the criminal history of the offender is found, increasing in severity from left to right, and where the two axes intersect is to be found the suggested duration of the incarceration or the amount of the fine to be imposed. The Federal Sentencing Guidelines of the United States of America is an example of numerical guidelines. The guidelines have 43 offence levels with corresponding guideline sentencing ranges. The method recommends itself as a better way to structure the exercise of sentencing discretion of criminal courts because it is seen to reduce sentencing disparities.[66] A detailed discussion of the Federal Sentencing Guidelines follows in Chapter Five of this thesis.

A mandatory sentence requires the court to impose a particular penalty but permits the court to impose a different sentence if extenuating circumstances[67] or substantial and compelling circumstances exist.[68] In South Africa, through the CLAA, also known as the mandatory and minimum sentencing legislation, the legislature structured the exercise of sentencing discretion by introducing minimum sentences to be imposed for certain crimes like murder, rape, robbery, and serious economic crimes. Deviation from the mandatory minimum sentence is allowed if "substantial

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63 Section 81 *Crime and Disorder Act* 1998.

64 Roberts *Sentencing Guidelines in England and Wales: Recent Developments and Emerging Issues* 1.

65 Terblanche *Guide to sentencing in South Africa* 134.

66 Tonry *Sentencing matters* 10.

67 Du Toit *Straf* 208.

68 CLAA, which is discussed in detail in Chapter Four under paragraph 4.8 of this thesis.

and compelling reasons" exist to do so.[69] The courts do not depart from the specified penalties lightly or for flimsy reasons.[70] This thesis also investigates whether this legislation has indeed brought about greater consistency in the sentencing practices of South Africa.

Sentencing commissions give guidance to courts and are used by the government to structure the sentencing discretion of the tribunals.[71] They could be once-off investigative committees or commissions set up to research sentencing matters, or sentencing guideline commissions drafting guidelines for particular offences. The more recent developments have taken place in England and Wales, where Sentencing Councils have developed sentencing guidelines for specific crimes, to which courts must pay regard if they are relevant to the offender's case.[72] These guidelines are binding because courts must give reasons if they depart from them and impose sentences of a different kind. This thesis investigates the role a sentencing commission can play to ensure consistency.

1.1 Research question

The primary purpose of this thesis is to address the following research question: In what manner can the South African law of sentencing be improved to promote greater consistency in sentencing?

1.2 Objectives of the study

The following objectives are set to answer this question:

(a) Critically analyse the sentencing process in South Africa to establish whether the consideration of traditional factors and other related legal principles causes the unequal treatment of offenders convicted in different cases of similar crimes committed under similar circumstances.

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69 Section 51(3) CLAA.

70 The *Malgas* case at 481j.

71 Terblanche *Guide to Sentencing in South Africa* 135.

72 Roberts *Sentencing Guidelines in England and Wales: Recent Developments and Emerging Issues* 12.

(b) Determine whether discretionary sentencing infringes upon the right to a fair trial and the right to be treated equally before the law if similarly placed accused persons receive different sentences.

(c) Analyse different approaches aimed at ensuring consistency in sentencing.

(d) Make recommendations to ensure greater uniformity in sentencing.[73]

1.3 Research Methodology

The study presents an analytical survey of available literature, comprising an exploration of legislation, case law, electronic sources, textbooks and academic journals. The study will also make use of a comparative approach to analyse different techniques of ensuring greater consistency in sentencing. In this regard, reference is made to the Sentencing Guidelines of England and Wales and the Federal Sentencing Guidelines of the United States of America. Through a comparison of the legal rules and techniques of these different jurisdictions, possible solutions to the problem of consistency in sentencing are sought. Although various methods of comparative law exist, there is increasingly a school of thought that there is no exclusive method that comparative law research ought to follow, and that the method should depend on the purpose of the study. The chief objective of this research project is law reform, and a pragmatic approach to comparing law is therefore adopted.[74]

1.4 Layout

Apart from this introductory chapter, this thesis consists of a further six chapters. Chapter Two deals firstly with the statutory framework for sentencing in South Africa that provides the courts with the discretion to impose any sentence they deem fit within the limitations of the legislation, after the gathering of sentencing information. Secondly, the various aspects of the exercise of sentencing discretion are dealt with in detail to establish whether the imposition of sentences through discretionary sentencing exacerbates sentencing inconsistencies. Thirdly, the

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73 Chapter 7 para 7.3.

74 See in this regard Palmer 2004 Global *Jurist Frontiers* 1-29 and Collins 1991 *Oxford Journal Of Legal Studies* 397.

traditional approach in sentencing is explored to show the extent of the effect the triad factors and other factors have in the exercise of sentencing discretion, and whether they contribute to inconsistencies in sentencing.

In Chapter Three, the constitutional principles of sentencing, which are legality and proportionality, are discussed to determine the extent to which they assist the courts in the extrapolation of appropriate sentences, and if they do not, to identify their shortcomings. The section is followed by a discussion of the aspects of constitutional punishment, although any sentences those courts impose, whether legal or otherwise, are legitimised by the sentencing legislation of South Africa. The Separation of Powers doctrine is discussed to explore the roles the different arms of government must play to amend the current sentencing law or to enact new sentencing legislation that will better structure the exercise of sentencing discretion to promote consistency in sentencing. The roles of consistency, equality and discretion are also discussed to establish their part in a discretionary sentencing system.

In Chapter Four, the different techniques in the South African sentencing system are discussed to explore whether they are effective in structuring the exercise of sentencing discretion in such a way as to lead to consistency. This section is followed, significantly, by a discussion of the work of the South African Law Reform Commission about its recommendation of the establishment of a sentencing council that would develop sentencing guidelines for South Africa and would thus deal with inconsistencies in sentencing.

In Chapter Five, a discussion of the Sentencing Guidelines of England and Wales follows in greater detail, in particular, the manner in which they structure the exercise of the sentencing discretion of courts, and their contribution to consistency in sentencing.

In Chapter Six, the Federal Sentencing Guidelines of the United States of America are discussed to explore the manner in which the Guidelines contribute to consistency in sentencing.

Chapter Seven consists of a summary of the conclusions reached in the preceding sections and made recommendations designed to improve the law about sentencing in South Africa, thus answering the research question.

CHAPTER 2
SENTENCING DISCRETION

2 Introduction

Chapter 2 provides an overview of the broad legal framework for sentencing in South Africa. It introduces the legislation that affords courts the authority to impose sentences for a broad range of offences for which the sentencing jurisdictions of courts regulate the maximum penalty that the courts may impose. A brief discussion of the importance of the information needed by the tribunal to consider the imposition of appropriate sentences follows. The idea of sentencing discretion, and various aspects of it, as well as relevant factors courts must take into account in exercising their sentencing discretion receive discussion. The chapter concludes with a brief discussion of the purposes of punishment, which courts must also consider when imposing sentences.

2.1 The statutory framework for sentencing in South Africa

The South African sentencing system is known for the broad discretion it affords to courts when they consider penalties.[75] It provides the courts with legislation that regulates the sentencing jurisdiction for the different levels of courts, and legislation that provides the courts with various types of sentences which they may impose. The CPA requires the courts to hear evidence,[76] and in certain circumstances, to obtain a correctional supervision report before they may impose penalties.[77] A brief discussion of this empowering sentencing legislation is necessary to place the statutory sentencing framework in perspective.

2.1.1 Sentencing in terms of section 276(1)

The different sentencing options available to South African courts are primarily regulated by the provisions of Chapter 28 of the CPA and more specifically section 276(1) thereof, which provides that:

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75 Terblanche *A guide to sentencing in South Africa* 3.

76 Section 274(1)-(2).

77 *S v Le Roux* 2010 2 SACR 11 (SCA) at para 38.

> Subject to the provisions of this Act and any other law and of the common-law, the following sentences may be passed upon a person convicted of an offence.
>
> (a) ……
> (b) imprisonment, including imprisonment for life or imprisonment for an indefinite period as referred in section 268B(1);
> (c) periodical imprisonment;
> (d) declaration as an habitual criminal;
> (e) committal to any institution established law;
> (f) a fine;
> (g) ……
> (h) correctional supervision
> (i) imprisonment from which such a person may be placed under correctional supervision in the discretion of the Commissioner or a parole board.

Section 276(1) is the general empowering provision authorising courts to impose sentences in all cases, whether under common law or statute, where no other provision regulates the imposition of punishment.[78] The provisions of section 276, however, are subject to the penalty clauses appearing in other statutes.[79] If a statute refers only to imprisonment, courts cannot impose a fine for a contravention of that statute.[80]

Imprisonment is the best-known form of punishment, where the court imprisons someone for a particular duration determined by the court.[81] Punishment of this kind is commonly imposed to punish the offender[82] who has committed a serious offence to prevent further crime, and to rehabilitate the offender.[83]

Life imprisonment is the longest form of imprisonment that a South African court can impose.[84] It can last for the whole of the natural life of the offender.[85] The high courts have always been empowered to impose it.[86] The regional courts have jurisdiction to impose life imprisonment for specific offences listed in the CLAA in Part 1 of Schedule 2.[87] The possibility of release on parole mitigates life

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78 The *Prins* case at para 38).
79 Subsection 2
80 *S v Pretorius* 1980 4 SA 568 (T) at 571D.
81 Krugel and Terblanche *Pratiese vonnisoplegging* 204.
82 *Goldberg v Minister of Prisons* 1979 1 SA 14 (A) at 25E.
83 Du Toit *Straf* 253-254.
84 Terblanche *A guide to sentencing in South Africa* 268.
85 *S v Mdau* 1991 1 SA 169 (A) at 176G.
86 *S v Mzwakala* 1957 4 SA 273 (A) at 278D-E.
87 Section 51(1).

imprisonment, as provided for in the *Correctional Services Act* 8 of 1959.[88] The courts must obtain sufficient information to justify such a sentence.[89]

Imprisonment for an indefinite period is for offenders the court have declared to be dangerous criminals.[90] The offender must serve detention for an indefinite period.[91] The offender appears again before the court on the expiration of a period determined by the court, which shall not exceed the jurisdiction of the court.[92] An indeterminate sentence of imprisonment is potentially for life as long as the reasons for the penalty persist.[93] The declaration of offenders as dangerous criminals is considered by courts when the courts are satisfied that the offender represents a danger to the physical or mental well-being of other persons and that the community needs protection against such an offender.[94] Indeterminate imprisonment is not *per se* inappropriate provided that the constitutional principle against gross disproportionality is respected.[95]

A sentence of imprisonment should not be for less than four days unless the sentence in prison is until the rising of the court.[96] The total imprisonment imposed for more than one count may be less than four days for each count as long as the total is at least four.[97] But in another case it was held that the legislature intended four days for each count.[98] A sentence to detention until the rising of the court, or until the court adjourns is a form of punishment that remains imprisonment.[99] It may therefore not be imposed with another term in jail, since detention until the rising of the court is also imprisonment, and the accused is entitled to his release at the rising of the court.[100]

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88 Section 65, also see *S v De Kock* 1997 2 SACR 171 (T) 211g.
89 The *S v EN* case at para 14.
90 Section 286B of the CPA.
91 Section 286B(1)(a) of the CPA.
92 Section 286B(1)(b) of the CPA.
93 Steytler *Constitutional criminal procedure* 420.
94 Section 286A(1) of the CPA.
95 Van Zyl Smit *Sentencing and Punishment* 49-9.
96 Section 284 of the CPA.
97 *R v Kutoana* 1945 1 PH H48 (E).
98 *S v Idas* 1994 1 SACR 654 (C) at 656a-d.
99 *S v Letswalo* 1961 4 SA 350 (T) 351G-H.
100 *S v Msimango* 1972 3 SA 145 (N) 146A-B.

The imposition of periodic imprisonment by the tribunals is for a conviction for an offence other than crimes in respect of which any law prescribes a minimum punishment, for which the period of imprisonment must be not less than one hundred hours and not more than two thousand hours.[101] Periodic detention is distinct in form from imprisonment.[102] The offender is imprisoned periodically for short periods ranging from 24 to 48 hours at a time, usually over weekends.[103] The detention occurs at irregular intervals, and the offender may not be held for long periods at a time to accelerate the completion of the entire sentence.[104]

The declaration of an offender as a habitual criminal may be ordered by the superior or regional court if the court is satisfied that the offender habitually commits offences and that the community needs protection from him.[105] The maximum period of imprisonment that an offender may serve if declared a habitual criminal is 15 years.[106] Declaration as a habitual offender is not permissible if the perpetrator was under the age of 18 years during the commission of the offence;[107] or the court may impose a sentence of more than 15 years' imprisonment for all the crimes, if the court warrants it.[108]

Committal to an institution established by law[109] is to make provision for offenders the courts direct for committal as a sentence to treatment or rehabilitation centres.[110] The commitment to an institution is expressly meant to rehabilitate offenders who have a drug or alcohol dependency problem.[111] A committal order is a form of punishment[112] the court may impose.[113]

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101 Section 285(1) of the CPA.
102 *S v Visser* 1990 2 SACR 402 (E) at 406i.
103 Terblanche *A guide to Sentencing in South Africa* 281.
104 Du Toit *Straf* 281.
105 Section 286(1) of the CPA.
106 Section 65(4)(b)(iv) *Correctional Service Act* 111 of 1998.
107 Section 286(2)(a) of the CPA; *S v Hlope* 1971 2 SA 107 (T) 109H.
108 Section 286(2)(c).
109 Section 276(1)(e) of the CPA.
110 In terms of section 296 of the CPA.
111 Du Toit *Straf* 296.
112 The *Pretorius* case at 571D, 571F.
113 Section 276(1)(e) of the CPA.

A fine is a sentence in which the court orders the offender to pay a specified amount of money to the State.[114] The CPA explicitly empowers the courts to impose a fine as a form of a penalty.[115] The primary purpose of imposing a fine is not only to keep the offender out of prison,[116] but also to punish[117] him by crippling him financially and worsening his quality of life for some time.[118]

A correctional supervision sentence[119] is a community-based punishment which the offender serves in the community.[120] Correctional supervision is not so much a description of a particular sentence as a collective term for a broad range of measures sharing one standard feature, which is that the offender serves the time in the community.[121] The measures include house arrest, monitoring, community service, employment and rehabilitation programmes.[122]

There are also sentences that are the subject of the penalty clauses appearing in other diverse statutory provisions.[123] For example, courts may not suspend sentences imposed regarding mandatory minimum sentences,[124] but they may suspend the operation of a part of the sentence for a period not exceeding five years on certain conditions.[125] Nor can a sentencing court impose a fine if the statute prescribes sentences of imprisonment only.[126] If the law does not mention incarceration but a fine only, the court may impose an alternative of a term in jail within its jurisdiction.[127]

The courts can also conditionally or unconditionally postpone sentences,[128] and tribunals may suspend the imposition of a sentence on certain conditions.[129] The

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114 Du Toit *Straf* 261.
115 Section 276(1)(f).
116 *S v Molala* 1988 2 SA 97 (T) at 98D.
117 *S v Ncobo* 1988 3 SA 954 (N) at 955F.
118 *S v De Beer* 1977 2 SA 161 (O) at 163C.
119 Section 276(1)(h) of the CPA.
120 Section 93 ster(2)(b) of the MCA.
121 *S v S* 1993 1 SACR 209 (A) at 220h.
122 The *S v S* case at 221b-c.
123 Section 276(2)(a) of the CPA.
124 Section 51(5) of the CLAA
125 Section 297(4) of the CPA.
126 The *Pretorius* case at 571D.
127 Section 287(1) of the CPA.
128 Section 297(1)(a) of the CPA.

suspended or postponed part of the penalty is subject to the offender's fulfilling the terms of the suspension or postponed conditions.[130]

A caution and discharge are a sentence limited to a conviction for an offence other than an offence in respect of which any law prescribes a minimum punishment.[131] A warning and release sentence is usually appropriate only for crimes of a minor or technical nature,[132] or to give effect to highly extenuating factors.[133]

The CPA provides a procedure whereby the court may convict an offender for a petty offence only on the offender's simple plea of guilty, in which case the sentencing discretion of the courts is limited to imposing the penalty of a fine coupled with imprisonment, and not a term in prison alone.[134] The court is allowed on its own to impose a maximum sentence of R5000.00 and not direct incarceration. In this context, immediate imprisonment or another form of confinement without the option of a fine is an incompetent sentence.

The courts are also empowered to make compensatory orders or award restitution where the commission of an offence caused damage to or loss of property.[135] Such compensation or restitution is possible as a condition for the postponement or suspension of a sentence.[136] The payment of compensation or restitution can also be made part of a condition[137] to be attached to a sentence of community correction, which may include a correctional supervision sentence.[138]

2.1.2 Sentencing in terms of the Superior Courts Act 10 of 2013

The *Superior Courts Act*[139] empowers superior courts to impose any sentence as provided for in the CPA.[140] Terms of imprisonment and amounts of fines are

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129 Section 297(1)(b) of the CPA.
130 Section 297(3) of the CPA.
131 Section 297(1)(c) of the CPA.
132 Viljoen Commission para 5.1.6.14.2.
133 *S v Erasmus* 1970 4 SA 400 (NC) at 401H.
134 Section 112(1)(a).
135 Section 300 of the CPA.
136 Section 297(1)(a)(i) of the CPA.
137 Section 52(1) of the *Correctional Service Act* 111 of 1998.
138 Section 276(1)(h) or (i) CPA.
139 Section 21(1) of the *Superior Courts Act* 10 of 2013.
140 Section 276 of the CPA.

unlimited except that they are subject to the maximum amounts determined by particular statutes.[141]

2.1.3 Sentencing in terms of section 90(1) of the MCA

The Magistrates' Court Act provides for the general jurisdictional limits of lower courts. A regional magistrates' court is empowered to adjudicate offences committed in its regional division,[142] except a crime of treason.[143] Its general sentencing jurisdiction is 15 years and fines of up to R600 000.00.[144] A regional court can make compensatory[145] orders or award restitution to a maximum amount of R1 000 000.[146]

A district magistrates' court is empowered to adjudicate offences committed in its district, except for treason, murder and rape.[147] The crime of attempt to commit one of the offences of treason, murder, or rape are justiciable in the district court.[148] The sentencing jurisdiction of district magistrates' courts is those penalties mentioned in section 276(1), except for declaration as a habitual criminal.[149] Imprisonment is limited to three years, and fines to R120 000.00.[150] Other statutes dealing with particular offences, such as dealing in drugs, increase the sentencing jurisdiction of magistrates' courts, including the regional courts, to a maximum sentence of imprisonment for 25 years.[151]

2.1.4 Sentencing in terms of the Child Justice Act 75 of 2008

The *Child Justice Act* 75 of 2008 (hereafter the CJA) introduced a distinct manner in which sentencing courts ought to deal with juvenile offenders. The primary aims of the CJA are to protect the right to freedom,[152] the best interests of the child,[153] and

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141 Kruger *Hiemstra's Criminal Procedure* 16-8.
142 Section 90(1).
143 Section 89(2).
144 Section 92(1), GN 217 of 27 March 2014.
145 Section 300 of the CPA.
146 GN R62 in GG 36111 of 30 January 2013.
147 Section 89(1) MCA, GN 217 of 27 March 2014.
148 *S v M* 1980 1 SA 881 (O).
149 Kruger *Hiemstra's Criminal Procedure* 16-8.
150 Section 92 MCA, GN 217 of 27 March 2014.
151 Section 17(e) *Drugs and Drug Trafficking Act* 140 of 1992.
152 Section 28(1)(g) of the Constitution.

the child's right to family care or parental care.[154] Towards this end, the CJA ushered in a new set of objectives and factors a court must consider before imposing a sentence involving children.[155] The courts must primarily consider reformatory measures and use imprisonment as a form of punishment sparingly.[156] The CJA encapsulates non-custodial sentences in various provisions which include community-based sentences,[157] restorative justice terms,[158] fines,[159] correctional supervision,[160] and sentences of compulsory residence in a child and youth care centre,[161] which incorporates most of the punishments provided for in the CPA. The punishment prescribed by the CJA primarily focuses on non-custodial sentences and the integration of the child offender back into the community is the desired outcome.[162]

2.1.5 Sentencing in terms of the Criminal Law Amendment Act 105 of 1997

The primary purpose for the passing of the CLAA by the legislature is to deter offenders from committing the serious offences listed in it.[163] The provisions of the CLAA are dealt with in Chapter Four under paragraph 4.7 of this thesis.

Before the imposition of any of the sentences can take place, certain information must be put before the court so that it may consider an appropriate sentence. The court should take the initiative to glean this information if it is necessary for it to do so.[164]

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153 Section 28(2) of the Constitution.
154 Section 28(1)(b) oif the Constitution.
155 Section 69.
156 Section 77(1).
157 Section 72.
158 Section 73.
159 Section 74.
160 Section 75.
161 Section 76.
162 Section 69(1)(a)-(e).
163 *S v Mofokeng* 1999 1 SACR 502 (W) at 526.
164 The *Dlamini* case at 666h-667f.

2.2 Sentencing information

In South Africa, it is standard practice that in order to enable the courts to exercise their sentencing discretion properly, they have to receive sentencing information from the State and the defence.[165] The CPA expressly provides that:

> A court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.[166]

Sentencing courts have an inquisitorial function in the process of gathering information or evidence for sentencing purposes. The *Olivier* case formulated the inquisitorial role of the court where the Supreme Court of Appeal stated:

> It is trite that, during the sentencing phase, formalism takes a back seat and a more inquisitorial approach, aimed at collating all relevant information, is adopted. The object of the exercise is to place before the court as much information as possible regarding the perpetrator, the circumstances of the commission of the offence, and the victim's circumstances, including the impact which the commission of the offence had on the victim. The prosecutor, the defence counsel and the presiding officer all have a duty to complete the picture as far as possible at the sentencing stage. Material factual averments made during this phase of the trial ought, as a general proposition, to be proved on oath.[167]

The sentencing phase differs fundamentally from the settlement of factual or legal disputes, which is the usual business of a criminal court. It is essential that as much information as possible regarding the perpetrator, the circumstances of the offence, and the victim must be placed on record to enable the sentencing court to impose an appropriate sentence.[168]

The approach of the court to any information provided about the sentence the court must impose should be based on fairness to the offender, informing itself of a proper sentence in the particular circumstances of every case.[169] The prosecution and the defence have the opportunity to place relevant information before the court for sentencing purposes.[170] The court must be impartial when the parties put

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165 The *Dlamini* case 666i.

166 Section 274(1) of the CPA; also see *S v Nhlapo* 2012 2 SACR 358 (GSJ) 364 at para 19.

167 At 182d-e.

168 Steytler *The undefended accused* 183.

169 *S v Jabavu* 1969 2 SA 466 (A) at 472.

170 *S v Booysen* 1974 1 SA 333 (C) at 335E.

pertinent information in mitigation and aggravation before the court.[171] The court may itself call witnesses to give evidence during the sentencing phase.[172] In circumstances where the prosecution or the defence fails to comply with its duties, the court must see to it that the parties comply.[173] In cases where the convicted offender refuses to address the court at sentencing, the court must establish the personal circumstances of the convicted offender.[174]

It is only after all the necessary information is before the court that it will be in a position to impose an appropriate sentence.[175] Any failure to consider an essential fact in mitigation or aggravation may undoubtedly cause the imposition of an unjust sentence.[176] Hence, appeal and review tribunals will not hesitate to remit a matter back to the trial court, if necessary, to obtain the required information for sentencing.[177] Examples of such information can be the age; marital status; the level of education of the offender,[178] or the penalty clause in a statutory offence which indicates the severity of the offence.[179]

With all the information needed before the court, it must impose a sentence by exercising its sentencing discretion based on the information received. The notion of discretion will now receive attention.

2.3 Judicial discretion

Judicial discretion is ambiguous not only to the general public, but lawyers, academics, and to judges themselves.[180] The meaning of the term hides in judgements which do not succeed in articulating the methodology judicial officers follow as to how they have exercised their discretion in reaching their legal

171 *S v Rabie* 1975 4 SA 855 (A) at 865G-866C.
172 *S v Van de Venter* 2011 238 (SCA) at para 16.
173 *S v Pillay* 2011 2 SACR 409 (SCA) at 416d-e.
174 *S v Saule* 2009 1 SACR 196 (Ck) at 201g-h.
175 *S v Fazzie* 1964 4 SA 673 (A) 684B-C.
176 The *Pillay* case at 534H-535G.
177 The *Pillay* case at paras 24-25.
178 *S v Quandu* 1989 1 SA 517 (A) at 522E-F.
179 *S v Lowis* 1997 1 SACR 235 (T) at 240j.
180 Miller *The Supreme Court: Myth and Reality* 11.

conclusions. The meaning of the term, therefore, remains obscure,[181] causing uncertainty as to how the law operates.

In South Africa, criminal courts are required to make various decisions through the exercise of discretion. Examples might be determining: the amount of bail; the guilt or innocence of an accused;[182] or, whether to grant bail to the accused;[183] to postpone the proceedings;[184] to make rulings on unconstitutionally obtained evidence;[185] or to hear applications as to whether to delay criminal trials or not.[186] The criminal courts exercise such discretion during the proceedings of criminal cases up to the sentencing stage. The courts must judiciously use their discretion and be mindful of the supremacy of the Constitution and the rule of law.[187]

The exercise of judicial discretion should be clear from the judgment and not obscured. Otherwise, it creates doubt as to the appropriateness of the sentence imposed.[188] Frankfurter explains the obscurity and doubtfulness of the exercise of judicial discretion as follows:

> The power of searching analysis of what it is that they are doing seems rarely to be possessed by judges, either because they are lacking in the art of critical exposition or because they are inhibited from practising it. The fact is that pitifully little of significance has been contributed by judges regarding the nature of their endeavour, and, I might add, that which is written by those who do not judge is too often a confident caricature rather than a seer's vision of the judicial process of the Supreme Court.[189]

The value judgment should demonstrate the dichotomisation of the facts and the application of the laws applicable to a given set of circumstances. It must be clear why the court selects a particular sentence option instead of another, to allay any doubt about the appropriateness of that sentence.[190] Hence, the exercising of a

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181 Edward *"The Role of a Judge in Modern Society: Some Reflections on Current Practice in Federal, Appellate Adjudication"* 385, 388.
182 *S v Mbolombo* 1995 5 BCLR 614 (C).
183 *S v Mbele* 1996 1 SACR 212 (W) at 222a-b.
184 Section 50(3) of the CPA.
185 Schwikkard and Van der Merwe *Principles of Evidence* 201-202.
186 *S v Harris* 1997 1 SACR 618 (C) at 622c.
187 Section 1(c) of the Constitution.
188 Barak *Judicial Discretion* 4, also see The *Maake* case at para 19 and *S v Mathebula* 2012 1 SACR 374 (SCA) at 378b-d.
189 Frankfurter *Of Law and Men* 32.
190 The *Vries* case at 640g-h.

judicial discretion should be informative and indicative of the basis on which the court made certain decisions.[191]

Judicial officers execute a unique function independently, without interference from government or third persons, but the Constitution and the law guide them which guarantee their independence.[192]

2.3.1 The definition of sentencing discretion

"Sentencing discretion" is defined as the power given to the courts to choose between two or more alternatives of punishment when each of the options is lawful.[193] It is the freedom to choose amongst different possible solutions,[194] or to make a choice amongst various possibilities,[195] where no single one is the correct answer amongst others.[196] Baxter defines the exercise of discretion as follows:

> To exercise a discretion describes a psychological process which commences with the separation or distinguishing of subject-matter by the exercise of discernment and judgement, upon which is based a choice from amongst alternative courses of action, which choice is expected to be made in a judicious or sagacious manner.[197]

The exercise of sentencing discretion is the power the law bestows on judicial officers to carefully and consciously choose among several alternative forms of punishment, each of them is lawful.[198] The law empowers the sentencing officer to select from the forms of punishment[199] the one he deems fit for the crime.

Offenders may appeal their sentences, or their sentences may become the subjects of review proceedings where the tribunal will look into the appropriateness of the penalties of the sentencing courts.[200]

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191 The *Mathebula* case at 378b-d.
192 Section 165(1)-(5) of the Constitution.
193 Barak *Judicial Discretion* 7.
194 F.H. 16/61 *Registrar of Companies v. Kardosh*, 16 P.D. 1209, 1215.
195 Wiechers *Administratiefreg* 248.
196 Woolf and Jowell *Principles of judicial review* 152.
197 *Administrative Law* 80.
198 Barak *Judicial Discretion* 6.
199 Section 276(1) of the CPA.
200 Chapter 30 of the CPA.

2.3.2 Sentencing discretion belongs to the sentencing court

The principle that sentencing discretion belongs to the sentencing court was proclaimed many years ago in the *Mapumulo* case, where the court stated that:

> [t]he infliction of punishment is pre-eminently a matter for the discretion of the trial Court. It can better appreciate the atmosphere of the case and can better estimate the circumstances of the locality and the need for a heavy or light sentence than the appellate tribunal.[201]

The exercise of sentencing discretion is a principle deeply embedded in the South African sentencing system. Its application must be undertaken in a rational way and line with the established and sound principles governing sentencing.[202] The present position about sentencing discretion is vociferously defended by the judiciary whenever it comes across laws that threaten that discretion.[203]

Courts treasure their sentencing discretion and are opposed to the decree of any mandatory sentences, which they regard as detrimental to the proper administration of justice and the image and standing of the courts in sentencing.[204] The Constitutional Court has, however, held that it is the prerogative of the Legislature to decree mandatory sentences which the courts will be obliged to impose.[205] Such legislative interventions cannot *per se* be seen to be unconstitutional, because it limits the exercise of sentencing discretion of courts.[206]

Appeal and review tribunals will not too easily interfere with sentences that were imposed by trial courts, because:

> [die] bepaling van 'n spesifieke tydperk van gevangenisstraf in 'n gegewe geval [kan] nie volgens enige eksakte, objektief-geldende maatstaf geskied nie, en daar [kan] dikwels 'n area van onsekerheid bestaan waarbinne menings oor die gepaste termyn van gevangenisstraf geldiglik kan verskil.[207]

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201 At 57, also see *S v Kgosimore* 1999 SACR 238 (SCA) at 241 para 10 and *S v Matiwane* 2013 1 SACR 507 (WCC) at para 5.

202 *S v PB* 2013 2 SACR 533 (SCA) at para 19.

203 The Malgas case at para 20 where the Supreme Court of Appeal explained that the trial court's distaste for legislation that limits the exercise of sentencing discretion cannot justify an indulgent approach to the characterisation of circumstances as substantial and compelling.

204 *S v Mpetha* 1985 3 SA 705 (A) at 710E.

205 The *Toms; Bruce* case at 807E-F.

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

207 *S v Pieters* 1987 3 SA 717 (A) at 734G-H paraphrase to English- The determination of a

Similarly, in the *Malgas* case, it was held that appellate courts would interfere with the sentencing court's sentence only where material misdirection of the trial court vitiates its sentencing discretion and where the imposed sentence is shocking, startling or disturbingly inappropriate.[208] The purpose of the rule of non-interference with a penalty of a court of the first instance is to preserve the principle that sentencing is a matter for the sentencing court.

The case of *Prins* further bolsters the principle. The court held that in instances where statutory offences do not provide penalty clauses, the sentencing court is empowered by the provisions of section 276(1) of the CPA to impose any sentence for the commission of offences under the common law or statute.[209] This culminates in the need for courts to have sentencing discretion when they consider penalties.

2.3.3 The need for sentencing discretion

The nature of the sentencing legislation that deals with the forms of punishment and sentencing jurisdictions of the different levels of courts in South Africa necessitates that the courts select one kind of punishment from amongst many, and determine the extent of the penalty when it considers sentencing offenders. The courts exercise their sentencing discretion because:

> [s]uch a discretion permits of balanced and fair sentencing which is a hallmark of enlightened criminal justice. The second and somewhat related principle is that of the individualisation of punishment.[210]

The passage reiterates the fact that sentencing courts need the discretion to weigh up their options regarding an appropriate sentence for the offence committed. The courts must exercise their sentencing discretion within the confines of the sentencing legislation dealing with the forms of punishment and sentencing jurisdictions.[211] Sentencing discretion is necessary so as to enable the court to

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specific period of imprisonment in a given case cannot be done according to any exact, objectively valid criterion, and there can often be an area of uncertainty within which opinions about the appropriate term of imprisonment may differ.

208 At 478e-g.

209 At 204d.

210 The *Toms; Bruce* case at 820I.

211 Gottfredson and Gottfredson *Decision-making in criminal justice* 160.

consider various factors relevant to sentencing, in order to determine an appropriate sentence.

Legislation that structures the exercise of sentencing discretion curtails the court's latitude to achieve individual justice in sentencing, because some of the common mitigating and aggravating factors in sentencing are irrelevant, which frustrates the court's routine exercise of sentencing discretion.[212] Emphasis is place on the punitive and deterrent elements of the sentence, which emphasise negates the traditional approach to sentencing, and which promotes an objective approach when courts consider penalties.[213] In South Africa, the court attaches certain weight to each relevant factor that informs the decision on a proper sentence. In the United States of America, the court emphasises the importance of an objective approach to sentencing and requires that a sentence should not be determined solely by the views of an individual sentencing officer.[214]

Sentencing discretion is promoted and supported by South African judicial officers[215] and judges interviewed in Australia by Mackenzie, one of whom expressed himself in the following way:

> Judicial discretion is the quintessence of sentencing. A sentencing judge must have discretion to fix the appropriate sentence in all the circumstances within the proper range otherwise injustices will inevitably occur.[216]

Another judge said the following:

> It is important to have discretion as a judge in sentencing. The less discretion you give the sentencing tribunal, the more rigid the process, and the greater the risk of injustice in a particular case. What I mean by this is that if the judge had no discretion there would be no room for tailoring the case to meet the circumstances of the offender.[217]

It is a feature that advocates the notion that justice in sentencing is not achievable without courts having a broad sentencing discretion. Sentencing discretion enables the court to evaluate the circumstances and factors that are relevant to sentencing

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212 The *Vries* case at 641g-I quoted from the *Toms-Bruce* case.
213 *S v Gibson* 1974 SA 478 (A) at 482A.
214 *Coker v Georgia* 433 US (1977) at 592.
215 Section 276(1) of the CPA.
216 Mackenzie *How Judges Sentence* 46.
217 Mackenzie *How Judges Sentence* 46.

to be able to decide whether to impose a severe or a lenient sentence.[218] The court can view the offender and has access to all the relevant information for sentencing purposes.[219] The courts sometimes overemphasise the seriousness of the offence and negate the personal circumstances of the offender, imposing an unnecessary severe sentence, which is then corrected on appeal.[220]

The *S v Toms; S v Bruce* case expresses the view that the need for sentencing discretion serves two purposes.[221] Firstly, it is to determine a fair and balanced sentence, and secondly, it is to individualise punishment.

2.3.3.1 Fairness

The imposition of a penalty is about achieving the right balance between the offence, the offender, and the interest of society. These issues will invariably overlap, thus rendering the process unscientific. Even with a proper exercise of sentencing discretion, different courts will necessarily arrive at different conclusions.[222] Nevertheless, the consideration of these factors remains the focal point when courts extrapolate appropriate sentences, and the Constitutional Court has criticised courts for invoking these factors perfunctorily as something like a magical invocation.[223]

2.3.3.2 Individualisation

The individualisation process requires the consideration of numerous factors about the offender, such as his sociological circumstances, his experience of punishment, and his potential for rehabilitation.[224] The inference drawn is that the uniqueness of the individual will always produce a different observable profile to which a different form of punishment will be appropriate. It is for this reason that justice applied to the particular offender is not possible in sentencing without applying the

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218 The *Mapumulo* case at 57.
219 Mackenzie *How Judges Sentence* 45.
220 *S v Nkosi* 2012 1 SACR 87 (GNP) at 92b.
221 The *Malgas* case at 478e-g.
222 *S v RO* 2010 2 SACR 248 (SCA) at para 30.
223 *S v M* 2007 2 SACR 539 (CC) at para 10.
224 *S v Scheepers* 1977 2 SA 155 (A) at 158G-H.

individualisation principle, which allows the sentencing court to exercise its discretion.[225]

Individualisation implies that the sentencing discretion which a court has enable the court to select a sentence that will suit the individual, the crime, and society, based on the facts of each case.[226] However, because of the uniqueness of every profile, a different sentence is warranted in each case, although the offence may remain the same. [227]

Proponents of sentencing discretion argue that it is impossible to attach rules to govern sentencing, due to the complexity of human nature, as well as all the other factors that are relevant to sentencing.[228] The courts exercise their sentencing discretion and translate the variables into one currency by balancing the relevant factors. The individualisation of sentencing invariably gives rise to the need for the broad exercise of sentencing discretion, although the guidance of past decisions by superior courts may lead to some degree of consistency.[229]

2.3.4 How courts exercise sentencing discretion

In South Africa, the relevant principles applicable in sentencing are not exact,[230] because each case has its factual matrix and judicial fixation on past sentencing patterns.[231] It is necessary to strike a balance between the personal circumstances of the accused and the need of society as a whole.[232] The test the courts apply to measure the balance amongst these factors is whether the imposed sentence is disturbingly inappropriate, and whether the penalty of the trial court is unreasonable.[233] Reasonableness and the proper exercise of sentencing discretion

225 Gottfredson and Gottfredson *Decision-making in criminal justice* 160.
226 Davis *Discretionary justice* 17.
227 *R v Motsepe* 1923 TPD 380.
228 Du Toit *Straf* 447.
229 *R v S* 1958 3 SA 102 (A).
230 Terblanche *A guide to sentencing in South Africa* 132.
231 The *S v PB* case at para 18.
232 The *Rabie* case at 856E .
233 The *Rabie* case at 857E.

are the yardsticks the courts apply to determine the appropriateness of a sentence.[234]

The appeal and review tribunals will interfere with the penalty of a trial court where there was a misdirection on facts or the law.[235] The appeal and review courts also interferes with a sentence where the sentence is manifestly inappropriate and induces a sense of shock.[236] Interference with a sentence is also justified where a patent disparity exists between the penalty of the trial court and the punishment that the court of appeal would have imposed,[237] or where there is an overemphasis on the gravity of the particular crime and an underemphasis on the accused's circumstances.[238] The determination to establish whether a court misdirected itself, is usually a factual question.[239] The court explains the test for misdirection as follows:

> [n]ow the word 'misdirection' in the present context simply means an error committed by the Court in determining or applying the facts for assessing the appropriate sentence… [A] mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence.[240]

Examples of misdirection occur where the court over-emphasises the seriousness of the offence, at the expense of the personal circumstances of the offender or does not strike a balance among the factors.[241] The manner in which the courts are to exercise their sentencing discretion is not immediately apparent.

2.3.5 The complex nature of sentencing discretion

The imposition of an appropriate sentence in South Africa is a difficult task. Sentencing courts exercise their discretion amongst factual variables that are

234 *S v De Kock* 1988 1 SA 37 (A) at 41B-C.
235 *S v Shikunga* 1997 2 SACR 470 (NmSC) at 486d.
236 *S v Snyders* 1982 2 SA 694 (A).
237 *S v Van Wyk* 1992 1 SACR 147 (Nm) at 165d-g.
238 *S v Maseko* 1982 1 SA 99 (A) at 102.
239 *S v T* 1997 1 SACR 496 (SCA) at 500e-f.
240 The *Pillay* case at 534H-535G.
241 *S v Holder* 1979 2 SA 70 (A) at 75A.

inconsistent, with individual cases rendering sentencing outcomes unpredictable and inconsistent for offences of the same nature.[242] This is because every case has its colours and every sentencing court approaches the determination of an appropriate sentence subjectively, depending fundamentally on the court's assessment of the matter before it.[243]

The fact that the courts must consider "any relevant factors" in the sentencing further compounds the already complex nature of the exercise of sentencing discretion. For example, the courts may consider the ill health of the offender, and the courts must accommodate victim participation.[244] The latest factor which Supreme Court of Appeal considered was the offender's standing as a tennis icon, which was rejected by the tribunal, because the law knows no class distinction among offenders of the proposed nature[245] and the disability of the offender.[246] It follows that the traditional approach to sentencing is an approach that is susceptible to numerous additions and changes as long as the factors are relevant to sentencing. New developments in sentencing make it difficult for sentencing courts to strike a balance amongst the various factors relating to the case under consideration.

The advent of the Constitution brought about a new approach to sentencing which inevitably changes the traditional approach to sentencing and also adds other factors. Some of these are that the best interest of the child must be considered independently of the personal circumstances of the primary caregiver.[247] The child should be detained for the shortest possible period if imprisonment is the sentencing court's only sentencing option,[248]and that if caregivers are offenders who face the imposition of punishment, the court should not incarcerate them unnecessarily. This latter injunction is an attempt to protect the family environment of the child.[249]

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242 The *Peterson* case at para 18.
243 *Viljoen Commission* para 5.1.2.6.
244 *Wickham v Magistrate, Stellenbosch* 2017 1 SACR 209 (CC) at para 27.
245 *S v Hewitt* 2017 1 SACR 309 (SCA) at para 14.
246 *S v Pistorius* (Unreported) (CC113/2013) [2014] ZAGPPHC 294 21 October 2014 at 7.
247 Section 28(2) of the Constitution.
248 Section 28(g) of the Constitution.
249 The *S v M* case at 553g-554c.

Also, sentencing courts must consider the purposes of punishment, such as deterrence, prevention, retribution, and rehabilitation. Such consideration may influence the type of sentence imposed, in particular, whether the offender will receive a custodial or a non-custodial sentence.[250]

2.3.6 Sentencing discretion is not unfettered

The court is at liberty to choose from alternative forms of punishments and punishes the offender with the penalties provided for by the law. In some quarters sentencing, discretion is claimed to be free and unfettered,[251] but sentencing discretion must be exercised regularly, reasonably and judiciously,[252] within the confines of the law.[253] Examples of these legislative sentencing frameworks are discussed in paragraphs 2.2.1 of this thesis. The context of section 276(1) structures the discretion of the courts in the selection of the kind of sentences available, and no unfettered discretion exists in law.[254] The courts are not free to do as they please.[255] For example, no sentencing law empowers a court to order that an offender must be sterilised to prevent the abuse of children that the offender might give birth to in the future.[256]

The sentencing discretion can be broad or narrow, depending on the space between the minimum and the maximum, or anything in between, depending on the structure of the sentencing discretion within the sentencing jurisdiction.[257] The kind of sentencing options available to the sentencing court is limited. The sentencing court has great freedom to decide on a particular sentence.[258] The principles that regulate the exercise of sentencing discretion are very vague though. Hence, courts sometimes err in the search for an appropriate sentence. For example, a penalty of a

250 *Director of Public Prosecutions, KwaZulu-Natal v P* 2006 1 SACR 243 (SCA) at para 13.
251 *S v Stanley* 1996 2 SACR 570 (A) at 574j.
252 Du Toit *Straf* 126.
253 Du Toit *Straf* 447.
254 Baxter *Administrative law* 409.
255 Davis *Discretionary justice* 137.
256 *S v B* 1996 2 SACR 611 (O) at 615e.
257 Baxter *Administrative law* 88.
258 Terblanche *A guide to sentencing in South Africa* 132.

fine of R400 or two months' imprisonment for an offence involving R9.48 was imposed by a trial court, but altered to a caution and discharge on review.[259]

2.3.7 Safeguards to discretion

The South African sentencing system places no limitations on the exercise of the court's sentencing discretion during the consideration of a competent sentence. The sentencing provisions set restrictions and the jurisdictions of the different levels of courts. However, it held that:

> It is not only salutary practice, but obligatory for judicial officers to provide reasons to substantiate conclusions. 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 interest 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.[260]

The sentencing court is obliged to show how it exercised its sentencing discretion; in other words, how it dealt with the factors and other attributes relevant to the case and sentencing principles. Appeal courts will interfere with a sentence only in the event of disparity, or where material misdirections of the trial court vitiated its sentencing discretion.[261] This frequently happens where the punishment imposed is disturbingly inappropriate.[262]

It raises the question of whether the giving of reasons alone is enough to safeguard an arbitrary action by sentencing courts or the imposition of incompetent sentences. This issue became apparent in the light of the acknowledgement of Chaskalson J[263] postulating the existence of severe and lenient judges and that not all finalised criminal cases are the subject of automatic review or appeal to correct inappropriate sentences.[264] Appeal and review processes are mechanisms that are available after the fact. Delays in the prosecution of such matters may cause irreversible prejudice

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259 *S v Dandiso* 1995 2 SACR 573 (W) at 579b.
260 The *Maake* case at para 19 followed by the *Mathebula* case at 378b-d.
261 The *Malgas* case at 478e-f.
262 *S v Marx* 1989 1 SA 222 (A) at 225D-H.
263 The *Makwanyane* case at para 54.
264 Chapter 30 CPA.

to the offender.[265] Such procedures are not conducive to the assurance of the imposition of sentences that promote consistency where there is broad sentencing discretion, as in South Africa.

2.3.8 The achievability of uniformity in sentencing under broad sentencing discretion

Sentencing discretion today is regarded as a vital element of South African law of sentencing[266] and is the cornerstone of South Africa's sentencing tradition.[267] The problem with the traditional approach to sentencing is that there is no indication of how much weight ought to be attached to all the factors relevant to sentencing. The discretion the courts have to select any form of punishment further compound the problem.

The necessary information that relates to these factors must be placed before the sentencing court to enable it to exercise sentencing discretion properly. It will give meaning to the sentencing principles that lead to the imposition of a just sentence. However, there are numerous defects in the South African sentencing system that pose problems regarding sentencing discretion that can result in the implementation of different penalties.

2.3.8.1 An imperfect sentencing system

The sentencing system in South Africa is not perfect. The Constitutional Court stated that:

> (i)mperfection inherent in criminal trials … means that persons similarly placed may not necessarily receive similar punishment. This needs to be acknowledged. What also needs to be acknowledged is that the possibility of error will be present in any system of justice and that there cannot be perfect equality as between accused persons in the conduct and outcome of criminal trials. We have to accept these differences in the ordinary criminal cases that come before court, even to the extent that some may go to gaol when others similarly placed are acquitted or receive non-custodial sentences.[268]

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265 *S v Ramulifho* 2013 1 SACR 388 (SCA) at para 17.
266 Terblanche *A guide to Sentencing in South Africa* 140.
267 Du Toit *Straf* 127.
268 The *Makwanyane* case at para 54.

The dictum above affirms some of the problems that exist in the criminal justice system. One way or another these issues influence the sentencing outcome negatively, given the fact that the sentencing system includes broad sentencing discretion.

Firstly, it acknowledges the inequality in the imposition of sentences for people who are supposed to be treated the same in like cases under the principle of sentencing discretion.

Secondly, it refers to mistakes that may occur as a result of the manner in which sentencing officers exercise their sentencing discretion. It may, however, apply to instances where the court overemphasises one factor at the expense of others and imposes an inappropriate sentence. It highlights the lack of guidance as to how much weight ought to be attached to the different factors relevant to sentencing.

Thirdly, on the face of it, such mistakes may lead to similarly positioned offenders receiving unequal treatment at the sentencing phase. Unequal treatment at the sentencing phase is a manifestation of inconsistencies in sentencing, due to the employment of discretionary sentencing.

Fourth, the disparity in sentencing can be profound where one of two similarly positioned offenders receive a non-custodial sentence and the other a prison term. In such circumstances, it is evident that the exercise of sentencing discretion contributes to inconsistencies in sentencing.

The acknowledgement of differences in sentences by the Constitutional Court has taken place against the backdrop of the operation of the current South African sentencing system, which accepts that the results of the exercise of their discretion by different courts (even if applied reasonably) are diverse. The question this raises is as to whether it is acceptable to ignore the inconsistencies in sentencing, whereas consistency in sentencing is a concomitant of equal justice in sentencing, and allows the principle of the exercise of sentencing discretion to prevail to achieve individual justice in sentencing. Individualisation should not be the sole principle in sentencing,

and should not play a higher role in sentencing at the cost of consistency and equality before the law.[269]

There are other aspects of sentencing that contribute to the imposition of inconsistent sentences.

2.3.8.2 Sentencing: The neglected phase of a criminal trial

The sentencing stage of a criminal proceeding is a relatively neglected aspect of sentencing because criminal trials in South Africa are conducted up to the stage of conviction with scrupulous, time-consuming care, but the procedure at the sentencing stage is almost perfunctory.[270] The reason for this situation is that sentencing is a part of the law that does not receive as much attention by court officials, as for the other stages of a criminal trial when the court considers appropriate sentences.[271]

It follows that the scant information placed before the courts may in certain circumstances lead to the imposition of wrong sentences, because the courts do not have sufficient information to exercise their sentencing discretion properly. The review and appeal tribunals emphasise that this phase is just as important as any other phase of a criminal trial, and should receive the same attention and treatment as any other phase. The courts must have sufficient information before them to exercise their sentencing discretion properly, particularly when it concerns primary caregivers, to protect the best interest of children.[272] The reasons that the sentencing phase is neglected include the fact that the sentencing phase is sometimes dealt with quickly and shoddily without paying the necessary attention to detail.[273]

There have been instances where courts have been diligent in gathering enough sentencing information to make a proper decision on the sentence.[274] Terblanche is of the view that there has been a vast improvement, in that the sentencing phase is

269 The *Vries* case at 668b.
270 The *S v M* case at para 10.
271 Walker *Sentencing in a rational society* 1.
272 *S v Maliswane* 2017 1 SACR 26 (ECG) at paras 13-15.
273 The *Masis* case at 151d-e.
274 The *S v K* case.

receiving the necessary attention to enable the court to arrive at a reasonable sentence.[275] This view was recently placed in doubt, however, where the Supreme Court of Appeal held that the sentencing stage of a criminal trial was still a neglected phase of criminal proceedings.[276]

The Supreme Court of Appeal revisited the sentencing phase and ruled that formalism is not a requirement in sentencing when a more inquisitorial approach is adopted.[277] The primary aim of the sentencing phase is to gather information about the crime, the offender and the interest of society. Both the prosecutor and the defence must be allowed the opportunity to place relevant facts regarding sentence before the court.[278] The parties may introduce facts that are not contentious from the bar.[279] The parties must, under oath, prove material facts that relate to the nature and circumstances of the crime.[280] The state must place all the mitigating and aggravating factors before the court.[281] It is, therefore, necessary for the defence to call witnesses to prove specific facts from the bar, mainly when the prosecutor has made known that the prosecution does not agree with some of the averments.[282] In such instances, the defence runs the risk of the court's not accepting such facts when the court considers sentences.[283] It remains the duty of the presiding officer, the prosecutor and the defence counsel to complete the picture as far as possible at the sentencing stage.[284]

2.3.8.3 The subjective nature of sentencing discretion

When a judicial officer imposes sentences, his experience, wisdom, philosophy of law and background will inevitably come into play[285] and will ultimately influence the

275 Terblanche *A guide to Sentencing in South Africa* 3.
276 The *S v EN* case at para 14.
277 The *Olivier* case at para 9.
278 *S v Bresler* 1967 2 SA 451 (A) 455B.
279 The *Olivier* case at para 9.
280 The *Olivier* case at para 8-9.
281 The *Olivier* case at para 10.
282 The *Olivier* case at paras 5 and 16.
283 The *Olivier* case at para 17.
284 The *Olivier* case at para 8.
285 Terblanche *A guide to sentencing in South Africa* 129.

determination of a proper sentence.[286] However, in certain quarters the imposition of a penalty is regarded as being the result of the instinct of the judicial officer.[287]

For example, judges may be influenced by socioeconomic conditions and impose lenient sentences to avoid overcrowding the prisons.[288] The early release of violent offenders may often provoke demands for mandatory minimum sentences or sentencing guidelines which reduce the judicial officer's discretion to impose reduced penalties on people thought to be remorseful, or unlikely to commit another offence.[289] Therefore, the imposition of non-custodial sentences would not necessarily constitute an abuse of sentencing discretion.

Irrespective of the attributes of a judicial officer, sentencing discretion remains a tool which often produces inconsistent sentences, because it relies on normative judgment:

> which could lead different sentencing courts, on exactly the same facts and scrupulously applying their minds to the correct principles applicable, to different conclusions.[290]

Two judges were interviewed by Mackenzie in Australia on the issue of sentencing discretion as a tool for imposing consistent sentences, and they commented differently, but their comments amount to the same thing, which is an indication of the subjective nature of the exercise of sentencing discretion. The one judge ntoed:

> Judges are individuals, and if six different judges are given the same sentencing scenario, there will be six different sentences, although I believe they would not be far apart.

The other judge commented as follows:

> Discretion may be exercised differently by different judges. As pointed out in many cases, that does not mean that the particular judge is wrong if someone else would have exercised their discretion in a different way. It is probably the most unpredictable aspect of sentencing.[291]

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286 Baxter *Administrative law* 80.

287 Viljoen Commission para 5.1.2.6.

288 Von Hirsch, Knapp and Tonry *The Sentencing Commission and its Guidelines* at 13-14, see *S v Maluleke* 2008 1 SACR 49 (T) at 26, where the court proposed a sentence of restorative instead of imprisonment to alleviate prison overcrowding.

289 Roland *Abuse of Judicial discretion* http://www.constitution.org/abus/discretion/discretion/judicial/judicial-discretion.htm.

290 The *Dzukuda* case at para 35.

291 Mackenzie *How Judges Sentence* 44.

Another description of the subjective nature of the exercise of sentencing discretion is that such sentencing:

> … is an attempt to juggle objects of various sizes while walking a tightrope which is being shaken at both ends.[292]

The narrative of arriving at different results for the same set of facts suggests that even if all the necessary information is available to the sentencing court, this will not necessarily alleviate the problems. The sources of the problem are the manner in which the legislation that regulates the imposition of the different forms of sentences, the courts' sentencing jurisdiction, is formulated, and the traditional approach to sentencing, which validates the practice of sentencing discretion.

It is for this reason that the South African Law Commission[293] expressed its displeasure with the exercise of sentencing discretion in South Africa, specifically pointing to its unexpected and inconsistent outcomes. The Commission supported its point by referring to the case of *S v Young* 1977 1 SA 602 (A):

> [T]wo learned judges gave careful consideration to the same issues, arising out of a set of agreed facts, but arrived at diametrically opposed conclusions. It seems that the nature of our sentencing procedure makes this type of outcome virtually inevitable, because whereas the course of the trial is determined by clearly defined rules of law, the approach to sentence is left largely to chance. What this means – as the present case demonstrates – is that the point of view of the individual sentencer will largely determine his approach to a given set of facts, and there will therefore be as many different approaches as there are sentencers… This state of affairs is quite understandable, because judges are human beings: each one is a unique product of a unique combination of social, physical, psychological and economic influences, so each will inevitably go his own way in the absence of clearly articulated guidelines; as a consequence, uniformity in sentencing remains unattainable. The problem of uniformity has not yet been approached seriously and scientifically in our law, and until it is it will remain a murky and uncertain, albeit vital, problem.[294]

The South African Law Commission pronounced its dissatisfaction with discretionary sentencing in South Africa, citing uncertain sentencing outcomes. The Commission supported a sentencing system where clear rules regulate the exercise of sentencing discretion and a sentencing system which will promote consistency in sentencing. It acknowledged that the current sentencing regime was not ideal, particularly when

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292 Mackenzie *How Judges Sentence* 14.

293 *Issue Paper II*, *Project* 82, *Sentencing: Mandatory Minimum Sentences*, 1.2 1997 at 191.

294 At 191.

you have some severe and some lenient judges,[295] and it posed problems for the principle of uniformity in sentences.

The acknowledgement of inconsistencies in sentencing under the unfettered sentencing discretion is not uncommon, but is a discrepancy in the sentencing system that was observed 93 years ago, where the court stated:

> [i]n perusing the records of several cases that have recently come for review before this Court, and especially cases dealing with stock theft, I have been struck by the *extraordinary and ridiculous disparity* of punishments inflicted by different magistrates for practically the same offence. Now, this state of affairs is extremely undesirable and must affect the confidence of the community in the impartial and fair administration of justice.[296]

Ever since this judgement, the disparity in the imposition of sentences under a broad sentencing discretion has continued to surface.[297] The sentencing variation between courts occurs primarily as a result of individual differences amongst judicial officers.[298] Such variations are the result of the lack of guidance on a principle which allows each judicial officer to decide what sentence to impose.[299]

The South African Law Reform Commission alerted law-makers to the disparities in sentences and correctly pointed out that the exercise of sentencing discretion is a major stumbling block for consistency in sentencing.[300] Hence, there may at times be calls to limit sentencing discretion through the introduction of mandatory sentencing laws like the CLAA for certain offences.[301]

The case of *S v Thebus* 2002 (2) SACR 566 (SCA) best demonstrates individualism by sentencing officers, where the sentencing court imposed a sentence of eight years' imprisonment wholly suspended on certain conditions for murder and attempted murder. One judge in the Supreme Court of Appeal favoured a penalty of life imprisonment. However, the majority were of the view that a proper sentence

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295 The *Makwanyane* case at para 273.

296 The *Motsepe* case.

297 *Viljoen Commission* para 5.1.2.6

298 South African Law Commission's Report Project 82 Sentencing (A New Sentencing Framework November 2000) (hereafter the Report) at para 1.8.

299 Nicolas Consistency and Discretion in sentencing in the country in Migley *Crime and Punishment* 156.

300 The Report at para 3.1.4.

301 The Act came into operation on the 13 November 1998.

would be one of 15 years' imprisonment. The case represents an evidently wide divergence in sentences amongst four judges for one set of facts.

The problem with sentencing discretion in the absence of having safeguards in place to regulate it is that presiding sentencing officers find it easy to impose their respective personalities onto sentencing, rather than attempting to accurately use the principle of sentencing discretion to the benefit of the criminal justice system and the purpose of the principle.[302] One magistrate went so far as to show his predisposition conspicuously when he was imposing a sentence by saying:

> Let me say at once in a crime of such a nature as this certainly I would have imposed a death sentence; these personal circumstances play little part in the assessment of my sentence.[303]

It is apparent that the judicial officer misdirected himself when he was supposed to exercise his sentencing discretion and allowed his emotions to get the better of him. Capital punishment is no longer a valid form of punishment. It was therefore superfluous of the judicial officer to make comments on a legal position that no longer exists. In doing so, the judicial officer displayed a marked disrespect for the rule of law.

Another example is in *Ngomane v S* (GP) (unreported) case number A776/2012 25 April 2014. Before sentencing the accused to 30 years of incarceration (10 years for each of the three counts); the presiding magistrate officer who imposed the sentence in the case had this to say to the offender:

> There must be others [offences] for which you had never been caught of, because it is difficult for the police to apprehend offenders like you; it will not be wrong to assume that you were seemed to be running at full speed before you were stopped; even if I acquitted you in respect of counts numbers 3, 4 and 5, it appears to me that you were the one that were shooting at the police; I therefore now have to revenge on behalf of those two victims in count numbers 3 and 4 and you have been found guilty of two counts of robbery with aggravating factors. Possibly you were committing these heinous offences with this unlicensed pistol. We do not know how it came into your hands but it was stolen.

It is quite clear from the words of the judicial officer that he abandoned his function as a sentencing officer, that is to exercise his discretion judiciously, and rather chose

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302 *S v AM* 2014 1 SACR 48 (FB) at para 15.

303 *Malibe v S* (GP) (Unreported) case number A701/2013 25 April 2014.

to show a predisposed bias against the offender. Such bias is visible in the sentence of ten years' imprisonment on each of the three counts, which ultimately led to an imprisonment of 30 years, ignoring the cumulative effect of the sentences as a factor that the court has to consider in sentencing.[304] The approach of the judicial officers in both cases is contrary to the approach to sentencing set by Corbett JA, where he states:[305]

> A judicial officer should not approach punishment in a spirit of anger because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interest of society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor, on the other hand, surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressure of society which contribute to criminality.

The court in *Rabie* went further, explaining that a trial court should always be mindful of the general principles of sentencing, which are among other things that the punishment should fit the crime and be blended with an element of mercy, and should always consider the main aims of punishment.[306] The judicial officers in the *Malibe* and *Ngomane* cases illustrate how easy it is to abuse sentencing discretion to the benefit of the individual sentencing officer who wishes to use an offender as an end instead of a means.

2.3.8.4 The *stare decisis* rule

The *Stare decisis* rule in sentencing means that sentencing should rely on precedents, but as guidelines rather than as straightjackets.[307] In legal terms, the phrase refers to the fact that the decisions of courts are binding on the court that pronounces the judgement and on all courts subordinate to that tribunal.[308] The Supreme Court of Appeal noted that three earlier decisions of not imposing life imprisonment for rape did not constitute a benchmark or precedent binding other courts.[309] The slavish following "of a trend not to impose life imprisonment for rape

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304 *S v Madiba* 2015 1 SACR 485 (SCA).
305 The *Rabie* case at 866A-C.
306 At 861A.
307 The *S v D* case at 260e.
308 Hosten *Introduction to South African law and legal theory* 388.
309 The *PB* case at para 19.

is improper and amounts to an abdication by the court of its duty and discretion to consider sentence untrammelled by penalties imposed by another tribunal, albeit in a similar case."[310] A court must distinguish between the legal principles needed from definitive judgments and the detailed application of those principles to the facts of a particular instance.[311] The circumstances of each case differ and would justify the imposition of different sentences.[312]

Hahlo and Khan favour the doctrine of precedent where they state that:

> [i]n the family and in social organization… it is a product of regard for those of repute who went before, of the wish to profit from the distilled wisdom of the past, of innate conservatism, the yearning for certainty and antipathy to analyse problems afresh, of the desire to do justice.[313]

They further express the importance of the principle of law in the following way:

> [t]he maintenance of the certainty of the law and of equality before it, the satisfaction of legitimate expectations, entail a general duty on judges to follow the legal rulings in previous judicial decisions. The individual litigant would feel himself unjustly treated if a past ruling applicable to his case were not followed where the material facts were the same. This authority given to past judgements is called the doctrine of precedent.[314]

It would appear that a clear application of the principle of sentencing discretion would prove to be problematic. This is so because the example applies only to the legal principles set in earlier decisions,[315] and not to the finding of facts.[316] When sentencing courts exercise their discretion, they use their minds to address factual issues of the cases before them and to impose sentences. It is a known fact that the imposition of penalties in South Africa has no rules, but has principles that are not exact.

2.4 Factors to be considered by sentencing courts

The nature of the South African sentencing landscape suggests that there is no one sentencing option allocated to a particular offence. Case law informs us that

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310 The *PB* case at para 16
311 *S v GK* 2013 2 SACR 505 (WCC) at para 8.
312 *S v Mabaso* 2014 1 SACR 299 (KZP) at para 88.
313 Hahlo and Khan *The South African Legal system* 214.
314 Hahlo and Khan *The South African Legal system* 214.
315 The *Wells* case at 87-88.
316 *S v Kollet* 1971 4 SA 285 (RA) at 286H.

sentencing options must be proportionate to the offence concerned.[317] Courts must exercise their discretion by taking certain factors and attributes of the case into consideration. The factors that sentencing courts must consider are the so-called triad elements, which consist of the nature of the crime, the personal circumstances of the accused, and the interest of society.[318] These factors form the foundation of the determination of a proper sentence in the South African sentencing tradition.[319] A discussion of the factors follows below, as they are important considerations in the exercise of sentencing discretion.

2.4.1 The crime

The crime committed is the most important determining factor the courts consider when the imposition of sentences is under consideration, because it would impact most on the severity or leniency of the penalty.[320] It presupposes that the offence and the sentence are closely linked to serve justice. The more serious the crime, the more severe the punishment ought to be, and the less serious the crime, the more lenient the sentence ought to be.

Courts should be mindful of the principle that they must avoid a sentence of imprisonment, but in the case of serious offences, the element of punishment should always play a pivotal role in extrapolating a proper sentence, even if a term of imprisonment is the only appropriate sentence.[321] The inverse is also true for less severe offences because overly lenient and overly harsh sentences are equally wrong.[322] The interest of society requires that transgressors who have committed serious crimes must be punished severely, taking into consideration the mitigating factors and the personal circumstances of the offenders.[323]

The question that arises is as to how courts determine the seriousness of offences. It is a rather intriguing question, because the legislation does not provide specific

317 The *Dodo* case at 614f.
318 The *Zinn* case at 540G.
319 Kruger and Hiemstra: *Suid Afrikaanse Strafproses* 724.
320 Terblanche *A guide to Sentencing in South Africa* 163.
321 The *Holder* case at 81A.
322 Terblanche *A guide to sentencing in South Africa* 163.
323 The *Holder* case at 81B.

weighted sentences for common law and statutory crimes that are proportionate to the seriousness of crimes, but only provides sentencing ranges akin to the sentencing jurisdictions of the different levels of courts. The determination of the gravity of the offence is in the hands of the court, a fact which may pose problems for consistency in sentences. For example, a court regarded the crime of theft as serious where the value of the stolen item was R9.48,[324] but another court deemed the same offence where the value of the stolen item was R19.39 as petty theft.[325] The court classified the crime of fraud as an appalling crime.[326] The court regarded the falsification of banknotes, which is a contravention of section 2(u) of Act 90 of 1989, as a severe crime for which the maximum penalty is 15 years' imprisonment.[327] The highest sentence for dealing in dangerous dependence-producing substances is 25 years' imprisonment, as indicated in the penalty clauses,[328] which is indicative of the fact that the legislature views such offences as severe.

When considering the crime component, the court has to find in each instance the offender's particular crime and its seriousness,[329] and not make a generalised assessment that, for example, murder is a serious offence. Of course, it is, but one murder can be more vicious than another.[330] The courts have illustrated their grasp of the diversity in the seriousness crimes in many ways. One rape case can be more or less severe than the other,[331] and the gravity of an offence can show extensive variance.[332] It is, for example, wrong to rigidly see driving under the influence of liquor as a severe crime in every case,[333] and likewise, dealing in drugs varies widely in seriousness, depending on the amount involved and the harmfulness of the drugs in question.[334] It is necessary to take into account such factors as the large sums of

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324 The *Dandiso* case at 574i-j.
325 *S v Baartman* 1997 1 SACR 304 (E) at 305a.
326 The *Rabie* case at 862H.
327 *S v Lowis* 1997 1 SACR 235 (T) at 240j.
328 *S v Opperman* 1997 1 SACR 285 (W) at 864B.
329 *S v Ingram* 1995 1 SACR 1 (A) at 8j.
330 The *De Kock* case at 192i.
331 *S v A* 1994 1 SACR 602 (A) at 608c-d.
332 *S v Collins* 1990 1 SACR 577 (A) at 581c.
333 *S v Fredericks* 1986 4 SA 1048 (C) at 1049E.
334 *S v Shangase* 1972 2 SA 410 (N) at 416E.

money involved in drug dealing, whether a person who committed fraudulent acts had been doing so for extended periods of time, whether an offender took a conscious decision every time he committed a particular crime, and whether or not he had had ample time to reflect on the gravity of the offence.[335] Similarly, murder is a serious crime, but for sentencing purposes, it would be wrong to classify all murders as being equally severe without scrutinising its seriousness and its pedigree.[336] After the court has examined the gravity of the offence, it may consider appropriate sentences.[337]

The stratification of the severity of crimes is predominantly a function at the discretion of the courts across the spectrum of South African criminal tribunals. For instance, the court held that housebreaking alone is a serious crime, but that the aggravating circumstances compound the seriousness of the act;[338] which were that the victim was an elderly, helpless, 81-year-old woman.[339] In another case, housebreaking and theft involving property to the value of R1009.00 were declared to be severe offences justifying a sentence of imprisonment,[340] but housebreaking, where the value involved was R20.00, was not a serious crime warranting a prison sentence.[341]

There is no catalogue of penalties for crimes. The courts are expected to take into account the facts and circumstances of each particular crime.[342] Courts can therefore not impose the same punishment for all offenders who have committed the same offence, because the crimes may differ in their degree of seriousness.[343] Criminal tribunals ought to have a yardstick of some sort to determine the gravity of a crime.

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335 The *Zinn* case at 540H.
336 The *De Kock* case at 192g-h.
337 The *De Kock* case at 192i-j.
338 *S v Nkosi* 1992 1 SACR 607 (T) at 610b.
339 The *Nkosi* case at 609j.
340 *S v Mabingo* 1984 1 552 (AD) at 554H.
341 *S v Standaard* 1997 2 SACR 668 (KPA) at 669e-g.
342 *S v Nkosi* 1993 1 SACR 709 (A) at 715b.
343 The *Makwanyane* case at para 97.

The South African Law Reform Commission[344] proposed a modern approach to ascertain the seriousness of an offence, viz. the degree of harmfulness (or risk of harmfulness) of the offence, and the level of culpability.

2.4.2 The personal circumstances of the offender

The particular situation of an accused is probably the most complicated factors that courts have to consider because the conditions convicted offenders in South Africa are never identical. This element forms the core foundation of the individualisation process of the sentencing procedure.[345] The individual situation of the offender, together with the seriousness of the offence, plays a pivotal role in the imposition of an appropriate sentence in South African criminal courts.[346] The courts must consider the personal circumstances of the offender such as his psychological conditions, his criminal record, the possibilities of his rehabilitation, his age, gender, medical condition, physical condition and other surrounding circumstances; which may necessarily influence consistency in sentencing,[347] because each offender has a different profile.

2.4.2.1 Blameworthiness

An aspect that is close to the person of the offender is his blame-worthiness or culpability in committing the crime.[348] The determination of the blameworthiness of an offender is the harm his or her wrongdoing inflicts.[349] It is therefore useful in determining an appropriate sentence to establish how blameworthy the offender is. The modern view of the seriousness of the offence also has to do with the blameworthiness of the offender.[350] The gravity of the crime is affected by the extent to which the offender is blamed or held accountable for the harm caused or risked by the offence. A typical example is the youth of the offender.[351] Other factors

344 The Report at para 3.1.4.
345 The *Scheepers* case at 158G-H.
346 The *De Kock* case at 182h-j.
347 The *Scheepers* case at 158G-H.
348 Snyman *Criminal Law* 157.
349 *S v Wood* 1973 4 SA 95 (RA) at 97E-F.
350 The Report at para 5.3.3.
351 *S v Lehnberg* 1975 4 SA 533 (A) at 561A.

which reduce or diminish criminal capacity are a provocation, as much as a source of stress, and can be the cause of certain forms of mental illness, for instance.[352]

Some factors may increase the blameworthiness of the offender. Examples are the fact that the offender is a police officer, in which capacity he is meant to enforce the law and is supposed to protect the public. It would enhance the blameworthiness of the offender.[353] The fact that a medical doctor failed to attend to the injuries of a person he knocked down with his vehicle would count as an aggravating factor.[354] The different roles of offenders in the commission of an offence influence their blameworthiness.[355] The low intelligence of a criminal does not make the action of the offender less blameworthy.[356] Further examples of people's professions exacerbating their blameworthiness are school-teachers committing sexual offences against pupils, and medical doctors are committing similar crimes against their patients.[357]

If more than one offender is involved in a case and one is more blameworthy than the other, then the sentence of the former should reflect this and thus be more severe[358] so as to justify disparities in sentences.[359]

2.4.2.2 The effect of personal circumstances

The purpose of individualisation is to consider a sentence that will fit the offender and the crime as tightly as possible.[360] Therefore, the imposition of severe penalties to restrain the prevalence of certain offences and to satisfy the aims of punishment such as deterrence and retribution should not occur at the expense of an offender whose personal circumstances are grounds for the mitigation of a sentence.[361]

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352 Snyman *Criminal Law* 174.
353 *S v Somyalo* 1996 1 SACR 566 (Ck) at 569b.
354 *S v Andhee* 1996 1 SACR 419 (A) at 424e-f.
355 *S v Ndima* 1994 2 SACR 525 (D) at 536i.
356 *S v B* 1994 2 SACR 237 (E) at 251e.
357 *S v Daniels* 2008 1 SACR 597 (N).
358 *S v Erskine* 2008 1 SACR 468 (C) at 475j-476b and 476d.
359 *S v Matoewa* 2009 2 SACR 303 (ECG) at 309d.
360 Davis *Discretionary Justice* 17.
361 *S v Matoma* 1981 3 SA 838 (A) at 842H-843A.

To be able to take the individual situation of the offender into account, the sentencing court needs to get to know the offender's circumstances.[362] The factors concerned are characteristics like his character, life experience, marital status, career, religion, ideological convictions, previous convictions, and education. His behaviour in court during a lengthy trial is also significant.[363] It is therefore important that relevant information must be before the court: for example, age, gender, background, the motive for committing the offence, and whether friends influenced the offender.[364]

The case of *S v RO* best illustrates the fact that the personal circumstances of the offender can have a different impact on different presiding officers, where five judges were divided three-against-two. The majority judgment expressed the view that where an offender's conduct was explicable by mental defects, the consequences were almost always going to be mitigatory,[365] because although the offenders were adults in a physical sense, they were not equally mature in their minds.[366] The dissenting judgment took cognisance of the low levels of the intellect of the criminals, and[367] referred to the numerous aggravating factors present that did not warrant an interference with the sentence imposed by the trial court.[368] In the *Zinn* case, the offender received a reduction in his penalty of 15 years' imprisonment to one of 12 years' imprisonment, solely because of his age and medical condition, and the Appellate Division specifically referred to these attributes as mitigating factors that warranted a reduction in sentences.[369]

2.4.3 The interests of society

The third leg has several names, namely:

362 *S v Quandu* 1989 1 SA 517 (A) at 522E-F.
363 The *De Kock* case at 184a-c.
364 *S v Du Toit* 1979 3 SA 846 (A) at 857H-858A.
365 At 260d quoting from *S v S* 1977 3 SA 830 (A).
366 At 260g.
367 At 258 para 20.
368 At 259 para 23.
369 At 541C.

- the interests of society;[370]
- the interests of the community;[371]
- the public interest;[372]
- that punishment needs to be fair to society.[373]

Sentences that serve society should neither be too lenient nor too severe.[374] The categorical imperative of an appropriate sentence is that it is clear for all to see.[375]

The interests of society influence the imposition of a sentence in two distinct ways. Firstly, there is the reaction of the members of the community to the commission of a specified offence, whether this is true anger or annoyance,[376] or disgust or loathing,[377] as well as their subsequent expectation or demands relating to a sentence.[378] Secondly, the imposition of a sentence ought to serve the public interest primarily through the prevention of the commission of offences through deterrence, rehabilitation, or the protection of society by the removal of the offender from it.[379]

2.4.3.1 The community's reaction, demands or expectations

This element refers to the community's response to an offence and subsequent claims surrounding it, which revolve around the seriousness of the crime or to society's view of the severity of the offence.[380] By implication, it necessitates that the severity of the crime must play a significant role in the determination of a sentence because society expects that the courts will severely punish offenders that commit serious crimes.

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370 *S v Sinden* 1995 2 SACR 704 (A) at 708j.
371 *S v Xaba* 1996 2 SACR 288 (W) at 289j
372 *S v Mhlakaza* 1997 1 SACR 515 (SCA) at 518b.
373 The *Rabie* case at 862G.
374 *S v Martin* 1996 2 SACR 378 (W) at 382b-d.
375 Kruger *Hiemstra* 727, referring to the *S v Xaba* case at 289c-d.
376 *R v Karg* 1961 1 SA 231 (A) at 236A-C.
377 *S v Nkambule* 1993 1 SACR 136 (A) at 147h.
378 The *Holder* case at 81B.
379 The *Zinn* case at 542D.
380 Terblanche *A guide to sentencing in South Africa* 168.

The interest of the community demands harsh sentences for serious offences.[381] Whenever the court convicts an offender of a serious crime, the interest of the public will come to the fore.[382] The inverse is also true: that the benefit of society demands that offenders convicted of less serious crimes should receive sentences that are more lenient.[383] The advantage of the public is better protected where sentences are not too severe or too lenient, but appropriate.[384]

The interest of the community can be affected in cases with racial connotations, where it is of particular importance that courts take public interest into account in the determination of an appropriate sentence.[385] Racially motivated crime offends against the ethos and aspirations of people today and offends against the ethos of South Africa's nascent democracy. The courts must not tolerate it, regardless of the age of the offender. Instead, there must be a desire to deepen and strengthen the ethos of the Constitution.[386]

The commission of hate crimes provokes outrage from society. The court's function is to focus on the overriding principle, which is to serve the community's interest rather than its wishes.[387] It is, therefore, the court's duty to impose fearlessly appropriate and fair sentences, even if the sentences do not satisfy public opinion.[388]

2.4.3.2 Serving the interest of society

Fair sentences which incorporate an element of mercy best serve the interest of the public.[389] Offenders convicted of the offence of public violence are relevant for the sake of the public when courts impose penalties that fit the crime.[390] Thus, the sentence imposed must be to the advantage of the community, as in instances where the punishment reforms the offender and the perpetrator desist from re-

381 The *Sinden* case at 708j.
382 The *Quandu* case at 522D-E.
383 *S v Flanagan* 1995 1 SACR 13 (A) at 17e-f.
384 The *Martin* case at 382b-d.
385 *S v Combrink* 2012 1 SACR 93 (SCA) at 101g-h and 102b-d.
386 *S v Botes* 2011 1 SACR 439 (GNP) at 444g.
387 The *Makwanyane* case.
388 The *Mhlakaza* case at 518g.
389 The *Rabie* case at 862G-H.
390 The *Quandu* case at 522D-E.

offending.[391] The interest of society in sentencing is also best served, for example, by incapacitating the offender with long-term imprisonment for offences that affect the broader public.[392]

It follows that in certain circumstances, the interest of society may have an aggravating effect on sentencing. For instance, a fraudster may commit an offence over an extended period and be in a position of trust, so that the uninformed public does business with the offender unsuspectingly.[393] If the crime committed will potentially put the wider interest at risk, the interest of society will outweigh the personal circumstances of the accused and will justify the imposition of a harsher sentence.[394] It follows that when the commission of an offence influences the interest of society in a negative way, sentencing courts will be more inclined to impose more severe sentences to protect that interest.

The challenge for any sentencing court is how to reconcile the personal circumstances of the accused and society's interest.[395] In situations where the offence intrudes on the benefit of the community it is that interest that will come first, and the personal circumstances of the accused will take a back seat.[396]

In other cases, the benefit of the public can be a mitigating factor if the offender poses no danger to society, which may justify a non-custodial sentence.[397] Sentences disproportionate to the seriousness of the crime do not serve the interest of the public, because of their economic and social implications.[398] Offenders must deserve imprisonment. If they do not, they should receive non-custodial sentences.[399] It is only when the interest of society is relevant that the factor plays a role for sentencing purposes.[400]

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391 *S v Maki* 1994 2 SACR 414 (E) at 419h.
392 *S v Maarman* 1976 3 SA 510 (A) at 512F-G.
393 The *Zinn* case at 542D-E.
394 *S v Keyser* 2012 SACR 437 (SCA).
395 *S v Keulder* 1994 1 SACR 91 (A) at 110e-f.
396 *S v Banda* 1991 2 (SA) 352 (B) at 356H-357A.
397 *S v Mtshali* 2012 2 SACR 255 (KZN) at 262a-b.
398 The *Baartman* case at 305d.
399 *S v Brand* 1998 1 SACR 296 (C) at 306d-e.
400 The *S v Xaba* case at 289j.

2.4.4 The victim-centered approach

A victim-centred approach in sentencing is a factor that is relatively new in the South African sentencing system. This element was previously proposed by the South African Law Reform Commission[401] but did not materialise, for unknown reasons. The Supreme Court of Appeal held that the victim deserved a voice based on the right to human dignity, and specifically for sexual abuse cases,[402] to affirm the founding values of the Constitution.[403] Victim participation provides the sentencing court with information regarding the physical and psychological harm suffered and the social and economic effects that the crime has had and is likely to have in future.[404] Victim participation at the sentencing stage was re-affirmed by the Constitutional Court where the Court explained it as a way of showing empathy to the victim,[405] which may well have a negative effect on equality in sentencing in specific instances.

Victim assistance also has the influence that the tribunals may resort to restorative justice sentences where the court makes specific compensatory orders.[406] In the case of *S v Seedat,* the principle of victim participation affected that a sentence for restorative justice is imposed even for rape charges by the high court, which served as the court of appeal.[407] The Supreme Court of Appeal replaced the penalty of the high court with a sentence of four years of imprisonment based on the fact that a restorative justice sentence was an incompetent sentence for offences under the CLAA.[408]

The factors and aims of punishment are intertwined and are all part of the sentencing process when courts consider penalties.

401 The Report at para 7 Executive Statement.
402 *S v Matyityi* 2011 1 SACR 40 (SCA) at 49b-c.
403 Section 7(1).
404 The *Matyityi* case at 49b-d.
405 The *Wicham* case at 217e.
406 *S v Roux* (GP) (unreported) case number CC31/2011 11 September 2011.
407 2015 2 SACR 612 (GP) at 628d-e.
408 *S v Seedat* 2017 1 SACR 141 (SCA) at 155c-g.

2.5 The purpose of punishment

Sentencing in a criminal trial is a critical stage for the offender, the victim and society as a whole, because each sentence should express a general justifying aim.[409] The imposition of a sentence should reflect the general theories of punishment, which is retribution, just deserts, deterrence, rehabilitation, incapacitation or restorative justice.[410] Therefore, a sentence has five essential functions, which are that it must:

- act as a general deterrent;
- serve as a deterrent;
- enable the possibility of correction;
- protect society; and
- serve society's desire for retribution.[411]

2.5.1 Utilitarianism or deterrence

Deterrence is the avoidance of a given action through fear of the perceived consequences.[412] Proponents of the utilitarian theory of punishment argue that the primary aim of deterrence should be to prevent crime.[413] Deterrent punishment is forward-looking in that the objective is to avoid future crime.[414] Therefore, utility holds that punishment is justified when it leads to preventing further crime.

Deterrent punishment is warranted when it is conducive to the welfare of society.[415] Proponents of this view hold that a sentencing court must exercise its sentencing discretion by imposing a proactive sentence, which will limit the offender's

409 Hart *Punishment and responsibility* 8.
410 The *Swanepoel* case at 455.
411 *S v Loggenberg* 2012 1 SACR 462 (GSJ).
412 Beyleveld *Deterrence Research as a Basis for Deterrence Policies* 135.
413 Von Hirsch and Ashworth quote Bentham *Principled Sentencing* 45.
414 Von Hirsch and Ashworth *Principled Sentencing* 44.
415 Ten *Crime, Guilt and Punishment* 3.

opportunity of becoming recidivist. No scientific formulae exist to explain how this theory can rightly be said to contribute to the prevention of crime.[416]

The danger of the deterrent approach lies in the fact that offenders may suffer disproportionately severe punishment for petty offences like shoplifting,[417] in the court's hope that the penalty will deter the offender and others. Hence, suggestions are made that deterrent punishment should be limited only to those guilty and not those who are innocent, and should be proportionate to the gravity of the crime.[418] A criticism of deterrent punishment is that the quantum of the penalty depends on the possible future prediction of the criminal conduct of other people, rather than the instant offence.[419] A proper punishment in an efficient system is one that yields the optimum balance of the total benefit (the crime prevented) over the total cost (the pain inflicted on offenders coupled with the financial expenses of the criminal justice system).[420] The effectiveness of deterrence requires it to be not excessive in the quantum of punishment for the sake of threatening potential offenders. It should protect the criminal from unnecessarily enduring severe punishment.[421]

According to Van Den Haag and Conrad,[422] the primary objectives and purpose of deterrence are twofold. One objective is specific deterrence; that is, to inflict punishment directly on the offender to deter him from re-offending, with the aim of prevention. The other is to prevent others from offending. In general, then, punishment attempts to prevent an offender from repeating an offence and other members of society from committing the same crime.

2.5.1.1 Individual deterrence

Individual deterrence derives from the idea that an offender should receive punishment in such a manner that it will prevent or restrain him from committing future crimes.[423] A system which supports individual deterrence as its primary aim

416 Hudson *Understanding Justice* 23.
417 Ten *Crime, Guilt, and Punishment* 143.
418 Von Hirsch and Ashworth quoting Goldman *Principled Sentencing* 83.
419 Barbara *Penal policy and social justice* 36.
420 Von Hirsch *Recent Trends in American Criminal Sentencing Theory* Vol 2 at 18.
421 Von Hirsch and Ashworth quoting Beyleveld *Principled S*entencing 67.
422 *The Death Penalty A debate* 67.
423 Ashworth *Sentencing and Criminal justice* 62.

will increase the penalty based on the propensity of the offender to commit a crime.[424] Individual deterrence concentrates on teaching the individual perpetrator a lesson to deter him from repeating his acts of criminality.[425] When courts consider individual deterrents, such a sentencing theory perceives people as rational beings influenced by the penalty imposed by the courts, which therefore restrain the offender from committing a future crime.[426] It follows that sentencing courts are more inclined to impose harsher sentences for offenders with previous convictions.[427]

Three preventative scenarios have a deterrent effect on individual offenders.[428] Firstly, the individual offender's physical power may be taken away in the form of incapacitation through incarceration and capital punishment. Secondly, deterrent punishment may take away the desire to commit a crime, which relates to rehabilitation. Thirdly, personal deterrent punishment may induce the offender not to offend again by intimidation; that is, the penalty exacted may deliberately seek to inflict pain. These scenarios present the particular offender with the opportunity to conform to the rules of society through his personal experience of punishment.[429] But people react differently to punishment. Some may be fearful; others may be insensitive. Nevertheless, severe punishment is more likely to suppress the criminal behaviour of the individual than a lenient sanction.[430]

For example, a suspended sentence aims to modify the conduct of the convicted offender. If he behaves, the courts will not impose the suspended sentence, but if he repeats the offence, it becomes possible that he will have to serve the suspended part on an application by the state before the sentencing court. Such punishment has a substantial deterrent effect[431] and may deter the offender from becoming a recidivist.

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424 Ashworth *Sentencing and Criminal Justice* 62.
425 Rabie and Strauss *Punishment* 23; *S v Muller* 1962 4 SA 77 (N).
426 Von Hirsch and Ashworth quoting Bentham *Principled Sentencing* 45.
427 O'Donnel, Churgin and Curtis *Towards a just and effective sentencing system* 51.
428 Von Hirsch and Ashworth quoting Bentham *Principled Sentencing* 53.
429 Zimring and Hawkins *Deterrence* 226.
430 Zimring and Hawkins *Deterrence* 239.
431 Burchell and Hunt *South African Criminal Law and Procedure* 74.

Past studies indicate that individual deterrents are largely ineffective. The findings are that half of the offenders who have served prison terms become recidivists.[432] Thus, the empirical evidence suggests that punishment has no unique deterrent effect.[433] It is hard to distinguish between individual deterrence and rehabilitation, but collectively, the operations of the criminal justice system exert a substantial deterrent effect.[434]

Many empirical studies in this regard have been recorded in South Africa. For example, in June 1996, 94% of all prisoners who left prison reoffended.[435] Such studies strongly suggest that individual deterrence is not a satisfactory punishment theory for sentencing courts to subscribe to when they exercise their sentencing discretion, because its outcomes are unpredictable and because its use may contribute to inconsistencies in sentencing.

2.5.1.2 General deterrence

General deterrence conceptualises the infliction of punishment on the convicted offender as an example to intimidate other potential offenders that might be subjected to the same penalty if they are found guilty.[436] In this sense, the punishment imposed on the individual is utilised to deter other members of society from offending. To participate in acts of criminality is a matter of rational choice. If the pain from punishment is perceived to be greater than the pleasure derived from breaking the law, this might deter a potential offender from committing an offence.[437]

Hence, in this system of thought, the chief end of punishment is meant to be general deterrence.[438] It is the inhibiting effect of the threat of punishment, or of the imposition of punishment on others, which ought to cause a person to think twice before committing a crime.[439] Thus, the content of the punishment is used as a

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432 Rabie and Strauss *Punishment* 25.
433 Ten *Crime, Guilt, and Punishment* 9.
434 Nagin Deterrence and Incapacitation in Tonry *The Hanbook of crime and Punishment* 9.
435 Snyman *Criminal Law* 19 SAIRR Survey 1996/1997 63; Survey 1999/2000.
436 Von Hirsch and Ashworth quoting Bentham *Principled Sentencing* 54.
437 Von Hirsch, Ashworth and Roberts quoting Bentham *Punishment and Deterrence* 11.
438 Devlin *Sentencing offenders in magistrates' courts* 7.
439 Zimring and Hawkins *Deterrence* 92.

communicating instrument to reach other members of society. It follows that the sentence imposed should be adequate to dissuade the intended audience from re-offending. Thus, the increase of punishment or the increase of penalties by specific amounts is meant to lead to a decrease in offending by members of the general public.[440]

General deterrence theories focus on the issue of crime prevention. The legislators often agree that the best hope of controlling crime lies in "getting tough" with criminals by increasing penalties to achieve deterrence.[441] For general deterrence to be effective, advanced knowledge of the threat of punishment is required.[442]

Some criminologists unequivocally state that there is no factual, empirical data upon which to found a deterrent system.[443] There is no evidence which indicates that there is certainty that offenders desist from re-offending because of the punishment or because of the larger process of detection, conviction and sentencing.[444] There can be no claims that general deterrents work or that they are effective measures to control crime.[445]

Deterrent punishment, therefore, results in the ever-increasing undeserved imposition of punishment on an individual in the hope of deterring others.[446] It condemns a person, with the purpose of achieving a societal goal, without any certainty of the amount of punishment needed to achieve that goal.[447]

In concluding, deterrence may not have the desired effect, but can contribute to human suffering where the punishment imposed is overly severe, and therefore not proportionate to the offence committed.

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440 Ashworth *Sentencing and Criminal Justice* 75.
441 Nagin *Deterrence and incapacitation* 18.
442 Rabie and Strauss *Punishment* 36.
443 Ashworth *Sentencing and Criminal Justice* 62.
444 Mason *The Law of Sentencing* 43.
445 Ashworth *Sentencing and Criminal Justice* 65.
446 Ashworth *Sentencing and Criminal Justice* 65.
447 Ashworth *Sentencing and Criminal Justice* 65.

2.5.1.3 The reformative theory of punishment

The purpose of reformative punishment is to readjust the offender to the demands of society by individualising the penalty in such a way as to fit the punishment to his personality rather than by letting the punishment fit the crime.[448] The aim is to reform the offender as a person so that he or she may become an ordinarily productive member of the community once again.[449] Therefore, the adequate punishment theory should have reformative or therapeutic effects on the offender.[450]

According to reformative theory, an offender commits a crime because of some personality defect or psychological factors in his background.[451] The adherents of this theory rely on the values of forgiveness that ostensibly flow from Christian ethics. According to this view, it is wrong to allow the offender to suffer for what he has done, and they reject the "just desert" approach of retribution.[452]

2.5.1.4 Incapacitation

Incapacitation is consequentialist in the sense that it looks forward to predictive restraint.[453] It seeks to deal with offenders in a manner that makes them incapable of offending for a substantial period in the interests of the public.[454] The approach is that the incarceration of the offender, usually for extended periods of time, protects society from further crime.[455] The theory applies to particular groups such as dangerous criminals, career criminals or other persistent offenders, and is likely to call for the sentencing option of incarceration.[456]

An offender's movement is also restricted when he is released on parole under correctional supervision, as this keeps him from committing a crime.[457] It is doubtful whether the incapacitation theory can identify some offenders rather than others as

448 Burchell and Hunt *South African Criminal Law and Procedure* 78.
449 Snyman *Criminal Law* 21.
450 Ten *Crime, Guilt, and Punishment* 7-8.
451 Snyman *Criminal Law* 21.
452 Snyman *Criminal Law* 21.
453 Von Hirsch *Doing justice* 19.
454 Von Hirsch and Ashworth *Principled Sentencing* 54.
455 Morris *Paternalistic Theory of Punishment* 238.
456 Bagaric *Punishment and sentencing: A rational approach* 128.
457 Ten *Crime, Guilt, and Punishment* 8.

being more likely to commit serious crimes in the future.[458] The likely culprits will be offenders who present significant risks to victims, and then it is justifiable to incarcerate them for an extended period, particularly if they have committed heinous crimes.[459]

Thus, sentencing criminal courts may need to know an offender's previous convictions, social history, personality and other circumstances to be able to predict future re-offending.[460] It is also possible that potential recidivists or those who have previous convictions on record may be seen by the judicial officers or parole boards as presenting potential risks of committing further crime.[461]

2.5.2 Retribution

The system of retributive punishment is ancient, with the best-known example of it being the *lex talionis* of Biblical times, which calls for "an eye for an eye, a tooth for a tooth, and a life for a life".[462]

Proponents of the retributive theory hold that punishment is justified because it is the offender's just deserts.[463] The argument is that retribution restores the constitutional balance that was disturbed by the commission of the crime, and that now the offender has to settle his debt to society by paying what he owes to it. The retributive theory focuses on the necessity of punishing a wrongdoer for violating societal norms. The offender deserves punishment for his wrongdoings.[464] Retribution is therefore regarded as the main ground for sentencing someone on the presumption that society is bound together by its collective ability to denounce and repudiate certain conduct.[465]

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458 Ashworth *Sentencing and Criminal Justice* 68.
459 Zimring and Hawkins *Capital Punishment* 160.
460 Von Hirsch and Ashworth *Principled Sentencing* 88.
461 Von Hirsch *Doing Justice* 20.
462 Hudson *Understanding justice* 38.
463 Snyman *Criminal Law* 9.
464 Cryer, Friman, Robinson and Wilmshurst *An introduction to International Criminal Law and Procedure* 24; Murphy *Punishment and rehabilitation* 3.
465 Stephen A history of the Criminal Law of England vol. 2.

The rationale is that an offender is a person who took an unfair advantage of others in society by committing a crime, and that imposing punishment restores fairness.[466] Therefore individual rights in society should be respected. Acts of criminality are proscribed or prohibited in order to maintain individuals' rights, and as such, each person should refrain from interfering with those rights. Unlawful infringements of those rights constitute an unfair advantage to the offender and a loss or injury to the victim.

This system of thought links punishment and guilt, and to be punished is to take responsibility for your actions or to be held accountable for a criminal act.[467] A conviction for any crime is a prerequisite for punishment under the retributive system. Therefore, there can be no punishment without guilt. The retributive or ethical approach assumes that retribution is the proper object of punishment.[468] The commission of a crime cannot go unpunished. It follows that if an offender skips punishment for breaking the law, he would in itself break the very same law that demands discipline, and in doing so create two infringements of the law.

For some commentators, retribution is a justified reaction to the commission of a crime,[469] or a wrongdoer's just deserts.[470] After the conviction of any offence, the offender can expect punishment. A sentencing court imposes a proper sentence as prescribed by law. Such a sentence should, however, be in proportion to the crime committed by the offender. The focus is not on the beneficial consequences of punishment. In this instance, the sentencing courts are merely functionaries in the execution of an official duty bestowed on them by society through a particular political process under the auspices of a government. The sentencing court's function is to punish, which is a moral duty it is fulfilling in society.

The idea of retribution found support in the Constitutional Court, where the court held that the victim and society as a whole are entitled to enforce punishment as an

466 Ten *Crime, Guilt, and Punishment* 5.
467 Bean *Punishment* 14-15.
468 Ruby and Chan *Sentencing* 2.
469 Terblanche *A guide to Sentencing* 181; Snyman *Criminal Law* 14 attributes a similar meaning to the retributive theory.
470 Snyman *Criminal Law* 14.

expression of their moral outrage and sense of grievance.[471] In retrospect, retribution as a justification for punishment relies on the wrongfulness of the act of an offender that is forbidden by society, which caused harm to the victim or society, and as a result, the offender deserves punishment for his wrongdoing.

2.5.2.1 The operation of a retributive system

Retribution operates within a consensus model of society, where the community, acting through a legal system of rules, works "rightly" and the criminal "wrongly".[472] It is within this system of moral values that the offender deserves punishment, because the decision to transgress was taken consciously by the offender, and he is therefore worthy of punishment. Retribution involves holding someone accountable for his conduct and means conveying the message to the offender that he has willfully injured someone; now facing the disapproval of society for that reason, and therefore obliged to show remorse.[473]

In summary, the notion that society demands retribution derives from the idea that there is consensus or an agreement among those who live in it. They abide by a particular set of rules or norms and standards, which guide their behaviour at all times. Any breach of those standards by a wrongful act, upon conviction, will face retribution.

2.5.2.2 The aims of retributive punishment

Punishment in a retributive system aims at the criminal offender with the purpose of causing him to refrain from committing further crime, and points at would-be criminals as an instrument to discourage them from criminality. Therefore it is arguable that in a retributive system, a lenient sentence may not carry the same weight or have the same communicative powers to dissuade offenders or other law-abiding citizens from desisting from criminality in comparison with a sentence that is severe or harsh. Harsh treatment aims to cause the offender to understand and

471 The *Makwanyane* case.
472 Bean *Punishment* 17.
473 Von Hirsch *Censure and proportionality* 120.

repent for the crime committed.[474] Experiencing severe pain and suffering should make the offender realise that to commit an offence is wrong and that the punishment is something deserved.

Thus, retribution focuses only on the issue of the criminal act, and ignores social conditions or does not allow for social adaptation. It does not question the social causes of crime or the effectiveness of punishment. Hence, it is also known as the "justice" theory, because the injustice that was brought about by the commission of a crime is said to be wiped out by the imposition of an equivalent evil upon the offender.[475] As long as an offender committed a crime, he or she must be punished proportionately to the harm caused.[476]

Punishment in a retributive system not only expresses disapproval but also amounts to a typical method of hitting back at the convicted offender and of expressing "vindictive resentment".[477] To punish an offender is to teach him a lesson. The offender should learn that in future, he is to refrain from committing crimes and is to abide by the laws of society.[478] The desired effect of punishment in this system of thought is to persuade members of society to stay away from criminal activity, instead of manipulating the actions of members of society.

Retributive punishment as an open practice has developed over the last two decades.[479] It communicates to the criminal through making a response appropriate to the crime committed. It follows that the offender should be an active participant in the sentencing process. He should understand the communication and should react to that communication. The message delivered to the offender ought to be the degree of censure or condemnation the crime deserves.[480]

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474 Duff *Punishment, Communication, and Community* 51.
475 Rabie and Strauss *Punishment* 19.
476 The *Mantiwane* case at para 12.
477 Feinberg *The Expressive Function of Punishment* 76.
478 Morris *A Paternalistic Theory of Punishment* 92.
479 Duff *Punishment, Communication, and Community* 48.
480 Duff *Punishment, Communication, and Community* 50.

2.6 Summary and conclusion

The exercise of sentencing discretion affects every aspect of sentencing in South Africa. The imposition of an appropriate sentence in the South African sentencing system is a complicated function for various reasons. Firstly, the legislation that regulates sentencing provides the courts with the discretion to impose any form of sentence unless otherwise prescribed by statute. Secondly, the law that governs the sentencing jurisdictions of courts provides the courts with broad discretion to impose any length of imprisonment or any amount of a fine within the framework of its jurisdiction. The courts have discretion as to how they analyse the relevant factors in sentencing, together with the aims of punishment, and to impose sentences. The imposition of a sentence is not standardised, because every court is entitled to impose its sentence based upon the merits of each case. The courts interpret the relevant factors subjectively, which is why the results are often diverse for a similar set of facts. The relevant factors are different elements which compound the imposition of a sentence, which must espouse one of the many punishment theories. More often than not, then, the imposed sentence exemplifies an inability to dispense equal treatment to people similarly situated.

CHAPTER 3

CONSTITUTIONAL PERSPECTIVES ON CONSISTENCY/EQUALITY IN SENTENCING

3 Introduction

Discretionary sentencing primarily rests on the fair assessment by the sentencing officers of all the relevant factors as discussed in Chapter 2 in the determination of a proper sentence. Certain principles impact on the nature and the extent of the sentence the court imposes. The primary aim of the principles is to guide the courts to determine justly and equitably for offenders. The principles consist of the prohibition clause of punishment as provided for in the Constitution, legality, proportionality, equality, consistency, and discretion in sentencing. A brief discussion of these principles and the Bill of Rights follows shortly, to place sentencing in a constitutional perspective.

3.1 The Bill of Rights

The Bill of Rights enunciates the fundamental rights of individuals.[481] The fundamental rights place constraints on the execution of state power when people come into contact with organs of state,[482] such as when courts consider sentences for offenders. The Bill of Rights enjoys superior status in South African law, and it forms the cornerstone of the country's democracy.[483] It embodies all the rights of the people of the country and affirms the democratic values of human dignity, equality and freedom.[484] The rights in the Bill of Rights oblige all South African law to conform to the values enshrined in the Constitution,[485] and bind the political elite to society's preferred values, which are inherent to the societal fabric.[486]

To this end, the state must respect, promote and fulfil the rights in the Bill of Rights[487] and restrain any arbitrary limitation of fundamental rights that are not

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481 Chapter Two of the Constitution.
482 Cameron *Rights constitutionalism and the Rule of Law* 508.
483 Section 7(1) of the Constitution.
484 Section 7(1) of the Constitution.
485 Van Wyk and Dugard *Rights and constitutionalism: the new South African legal order* 1.
486 Van Wyk and Dugard *Rigts and constitutionalism: the new South African legal order* 2.
487 Section 7(2) of the Constitution.

consistent with the general limitation clause.[488] The expression of the Bill of Rights is broad and in general terms, a fact which implies that interpretation lies at the heart of the constitutional analysis.[489] The Bill of Rights, therefore, has a fundamental role to play in the manner in which courts exercise their discretion because the type and extent of the sentence imposed must be a reflection of South Africa's democratic values.

With regards to the kind and extent of the punishment the court selects, that punishment must conform to the principle of legality.

3.2 Legality

The Constitution provides for its supremacy and the rule of law.[490] Any law or conduct that is inconsistent with the Constitution and the rule of law can be declared invalid and struck down.[491]

The fundamental principle of the rule of law is that the exercise of public power is legitimate only when it is lawful.[492] The rule of law, therefore, expresses the principle of legality which is a fundamental principle of constitutional law.

For punishment, the principle of legality hinges on the two maxims, the *nullum crimen sine lege* (no crime without a law) and *nulla poena sine lege* (no punishment without a law), which can be traced back to the French Revolution,[493] and declared in a human rights declaration as follows:

> No person shall be accused, arrested, or imprisoned except in the cases and according to the forms prescribed by law.
>
> The law must prescribe only punishment that is strictly and evidently necessary, and no one may be punished except by virtue of a law drawn up and promulgated before the offence is committed, and legally applied. [494]

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488 Sections 7(3) and 36 of the Constitution.

489 Steytler *Constitutional Criminal Procedure* 7.

490 Section 1(c).

491 *United Democratic Movement v President of the Republic of South Africa* 2003 1 SA 495 (CC) para 19.

492 *Fedsure Life Assurance v Greater Johannesburg TMC* 1999 1 SA 374 (CC) para 56.

493 Mokhtar "*Nullum Crimen, Nulla Poena Sine Lege*: *Aspects and Prospects*" at 46-7.

494 Articles 7 and 8 Declaration of the Rights of Man and the Citizen of 26 August 1789.

These rights forms part of the main human rights instruments, are non-derogable,[495] and form part of the constitutional rights of an accused person in South Africa.[496] In simpler terms, the principle of *nullum* crimen *sine lege, nulla* poena *sine lege* means that:

> [N]o conduct may be held criminal unless it is precisely described in a penal law…. [N]o person may be punished except in pursuance of a state which prescribes a penalty.[497]

Burchell further explains the principle in the following terms:

> Punishment is an integral part of the concept of a crime. Without the liability to punishment, there would be no distinction between penal and non-penal laws. Thus it follows that 'to render any act criminal in our law, there must be some punishment affixed to the commission of the act and where no law exists affixing such punishment there is no crime in law'.[498]

The *nulla poena sine lege* principle, with its concomitant *nullum crimen sine lege* (no crime without a law), constitutes an essential element of the doctrine of legality in criminal law.[499] To this end, the law must be reasonably clear, so as to accord everyone its equal protection as provided for in the Constitution.[500]

The Constitution also guarantees that a person can be convicted and punished for an act or omission only if it is by law a criminal offence at the time of the commission of the act or omission.[501] Any act or omission must fulfil the requirements of the principle of legality.[502] Punishment must comply with two legal principles to pass the test of legitimacy. Firstly, penalties should be reasonably precisely defined; and secondly, legal rules should regulate the imposition of sentences to meet the requirements of the principle of legality.[503]

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495 Article 4(2) ICCPR; Article 15(2) ECHR; article 27(2) AmCHR.

496 Section 25(3) of the *Constitution of the Republic of South Africa* 200 of 1993 and section 35(3)(l) of the Constitution.

497 Hall *General Principles of Criminal Law* 28.

498 Burchell *Principles of Criminal Law* 99.

499 The *Prins* case at para 16.

500 Section 9.

501 Section 35(3)

502 Snyman *Criminal Law* 38.

503 Van Zyl Smit *Sentencing and punishment* 49-4.

3.2.1 Penalties

The sentencing framework and different sentencing jurisdictions of the various levels of courts are set out in Chapter Two of this thesis under paragraphs 2.2.1 to 2.2.5. The South African sentencing legislation defines the penalties and fines courts may impose using their sentencing discretion. The sentencing jurisdictions of courts limit the extent to which the courts may exercise their sentencing discretion. The type and the length of punishment, whether determinate or indeterminate, have to be found in the common or statute law, which is a requirement of the principle of legality *nulla poena sine lege.*[504] Courts are therefore powerless to punish in the absence of empowering legislation or law.[505]

3.2.1.1 Legal rules

Rules are specific prescriptions in comparison with principles are unspecific or vague prescriptions.[506] With rules, the courts read the penal legislation strictly,[507] which enable the public to predict to some degree how the courts will apply the law,[508] or the nature and extent of the sentence. Rules ensure that the legislative branch of government decides which conduct is criminal,[509] and curtails the abuse of discretion.[510] For example, the Supreme Court of Appeal in South Africa held that courts must ordinarily impose the mandatory minimum sentence prescribed by Parliament, and that tribunals should depart from them only when circumstances justify a departure.[511] Rules, therefore, apply to a particular situation and will determine the result. If they are not applicable, they have no role to play.[512]

Fixed rules may constrain the ability of the legislature to account for new forms of criminal conduct.[513] Strict rules negate the capacity to identify and appropriately

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504 The *Dodo* case at para 13.
505 Burchell, Hunt *South African Criminal Law and Procedure* 28.
506 Braithwaite *Rules and Principles: A Theory of Legal Certainty* 47.
507 *Busic v. United States* 446 U.S. 398, 406-07 (1980).
508 *Palmer v. City of Euclid* 402 U.S 544, 546 (1971).
509 Robinson *Legality and Discretion in the Distribution of Criminal Sanction* 394.
510 The *Dodo* case at para 23 -25, also see *Smith v. Goguen* 415 U.S. 566, 572-73 (1974).
511 The *Malgas* at para 481j-482a-c.
512 Lund *Discretion, principles and precedent in sentencing* 206-209.
513 *State v. Lee* 96 N.J. 156, 475 A. 2d 31 (1984).

shape mitigating factors and conditions,[514] but legal standards seek to ensure a degree of uniformity among courts in imposing criminal sanctions in similar cases.[515] Legal rules further make decisions more predictable and uniform than the decisions would be if courts enjoyed more discretion, and leave courts less able to adapt sentences to individual circumstances.[516]

On the other hand, legal rules tend to spawn technicalities that frustrate effective justice,[517] which causes the principle of legality to burden courts in simple, commonplace cases. Cases with meaningful differences are grouped into a single factual category and treated as if they are identical.[518] The allocation of discretion to courts avoids many of the difficulties that explicit written legal rules create,[519] which courts must follow to the letter, with the undesirable outcome that in some instances, the courts impose unjustly severe sentences.

Restrictions on the exercise of sentencing discretion exist in statutorily prescribed maximum and minima,[520] and for common law offences, courts move within the framework of the sentencing jurisdictions. From a sentencing perspective, courts are mandated to impose prescriptive sentences unless certain substantial and compelling circumstances exist that will authorise them to deviate from the mandatory maximum and minimum sentences. The position with rules is that it is more likely that different courts will arrive at the same results in similar cases. The absence of clear, written rules often undermines the principle of legality in sentencing.[521]

3.2.1.2 Principles

Statutes do not create general sentencing principles; courts develop sentencing principles.[522] They are factors that the courts must consider when the courts impose sentences. For example, the triad of *Zinn*, victim participation enunciated in the

514 *State v. Diana* 24 Wash. App. 908, 913, 604 P.2d 1312, 1315 (1979).
515 Robinson *Legality and Discretion in the Distribution of Criminal Sanction* 394.
516 Robinson *Legality and Discretion in the Distribution of Criminal Sanction* 394.
517 *People v. Nunez* 162 Cal. App. 3d 280, 208 Cal. Rptr. 450 (1984).
518 *Tennessee v. Garner*, 471 U.S. 1 (1985).
519 Robinson *Legality and Discretion in the Distribution of Criminal Sanction* 396.
520 Van Zyl Smit *Sentencing and Punishment* 49-2.
521 Robinson *Legality and Discretion in the Distribution of Criminal Sanction* 397.
522 Terblanche *A guide to sentencing in South Africa* 151.

Mashinini case, and any other relevant factor in sentencing in the *Malgas* case, are developed by the courts. The application of principles does not necessarily result in a particular decision, but they are sets of considerations which courts must take into account, and which steer the decision in a certain direction.[523] The outcomes from the application of principles are not predictive. For example, in sentencing, it is always accepted that being a first offender is a mitigating factor,[524] as a result of which a prison term is sometimes not a suitable form of punishment.[525] But, this does not mean that the offender is entitled to a suspended sentence or that imprisonment will not ensue.[526] The advantage of the use of principles is that it gives direction to courts in the exercise of their sentencing discretion and leads to the imposition of coherent and consistent sentences.[527] A comprehensive, diverse sentence between a non-custodial sentence and a statutory maximum may violate the offender's expectation of a lesser sentence when the court imposes a severe sentence instead of the expected lenient sentence.[528]

3.3 Proportionality

One of the primary aims of proportionality in sentencing is that the punishment should fit the crime.[529] This is the dominant driving force in the determination of a sentence.[530] Proportionality in sentencing achieves fundamental justice, asserts respect for the law, and safeguards society through the imposition of just sentences.[531] Sentences of imprisonment should not exceed what is proportionate to the gravity of the offence under the circumstances in which the crime was committed.[532] Similarly, the idea is that punishment should make an "efficacious and

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523 Terblanche *A guide to sentencing in South Africa* 138.

524 *S v Goitsemang* 1997 1 SACR 99 (O) at 105c.

525 *S v Soelola* 1996 2 SACR 616 (O) at 620c-d.

526 *S v Victor* 1970 1 SA 427 (A) at 429C-D.

527 Lund *Discretion, principles and precedent in sentencing* 209.

528 *Hutto v. Davis,* 454 U.S. 370 (1982) (forty years imprisonment and $20.000 fine for the sale of nine ounces of marijuana); *O'Neil v. Vermont*, 144 U.S. 323 (1892) (fifty-four years imprisonment for selling intoxicating liquor without authority); *Ford v. State,* 182 Ind. App. 224, 394 N.E.2d 250 (1979) ($10.000 fine for tending a store in which obscene material was sold until the owner returned).

529 Bagaric *Proportionality in Sentencing: Its Justification, Meaning and Role* 147.

530 *R v Arcand* [2010] AJ No 1383 (Alta CA) 55 [*R v Arcand*].

531 The *Arcand* case at 52.

532 *Hoare v The Queen* [1999] HCATrans 170 (354).

lasting impression on the minds of men, and the least painful impressions on the body of the criminal".[533] Proportionality in punishment depends on the court's consideration of the triad factors and the blameworthiness of the offender and the harm caused.[534] The gravity of punishment should be proportionate to the seriousness of the crime committed.[535]

Goh identifies some of the problems that relate to the application of proportionality in sentencing.[536] Firstly, the vague definitions and theories of proportionality in law cause problems in determining what "proportionate" might mean, the gravity of the crime and the degree of responsibility, or how such a proportionate sentence may be determined. Secondly, the aims of punishment and the principle of proportionality are irreconcilable, because the objectives of punishment may lead to the imposition of a different sentence, which might be disproportionate to the offence, so as to deter others. Thirdly, the inherently different nature of crimes makes them incomparable on a scale of proportionality against one another, and courts have divergent views on the nature and extent of the penalties relevant to the offences. Lastly, the underlying character of the proportionality principle is a manifestation of mere opinions and sentiments, which are often racially based, and for particular types of crimes.[537]

Proportionality in sentencing is a well-established principle in South African sentencing law, where the term translates into a close connection between the punishment and the seriousness of the offence.[538] The Constitutional Court holds that the relationship between the crime and the term of imprisonment must consist all the elements relating to the nature and gravity of the offence, as well as all the relevant personal circumstances of the perpetrator, which could have an effect on the seriousness of the crime and the blameworthiness of the offender.[539]

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533 Beccaria *Of Crimes and Punishment* 49.

534 Mason *The Law of Sentencing* 84-91.

535 Von Hirsch *Proportionality in the Philosophy of Punishment: From "Why Punish?" to "How Much"* 1.

536 Goh *Proportionality- An Unattainable Ideal in the Criminal Justice System* 45.

537 Barkan and Cohn *Racial Prejudice and Support for the Death Penalty by Whites* 31.

538 The *Rabie* case at 861A.

539 The *Dodo* case para 37.

Proportionality in sentencing is an element that courts must take into account in deciding whether a penalty is cruel, inhuman or degrading.[540] The Constitutional Court has said no more than that severe punishment must be meted out where deserved but should never be excessive,[541] without bringing such punishment into the context of the offence. Foreign case law also expatiates only peripherally about proportionality in sentences. For instance, the US Supreme Court held that excessive punishment is disproportionate, and that a lenient sentence is unnecessary if it is not adequate to achieve its aim.[542]

South African case law also refers to the importance of proportionality in sentencing only for its purpose in doing justice to the victim and the offender through the exercise of sentencing discretion.[543] When the courts apply proportionality in sentencing, they consider the purpose of the punishment, which is not limited to deterrence, rehabilitation and retribution, as the sentence should also reflect the seriousness of the offence and respect for the justice system.[544] Proportionate sentencing, therefore, consists of the severity of punishment, the severity of the crime and the blameworthiness of the offender.[545] The branches of government have an interest in how severe or lenient a sentence should be relevant to the seriousness of the offence.[546] The idea is that the courts, in doing justice in sentencing, use the principle of proportionality to determine the length of imprisonment.[547]

In Canada, the Supreme Court recognised that a sentence that is grossly disproportionate attracts constitutional censure, which occurs when the sentence is so excessive as to outrage standards of decency.[548] It leaves significant flexibility to the legislature and the courts to determine penalties,[549] but disproportionate or excessive sentences are not necessarily a constitutional violation. Review and appeal

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540 The *Makwanyane* case at para 94.
541 The *Makwanyane* case at para 232.
542 *Furman v Georgia* 408 US 238 279 (1972).
543 *S v Phama* 1997 1 SACR 485 (E) at 487c.
544 *S v B* 1996 2 SACR 543 (C) at 555c-d.
545 The *Vries* case at 642h.
546 The *Dodo* case at para 25.
547 The *Makwanyane* 197.
548 *R v Smith* (1987) 40 DLR (4th) 435 (SCC) at 477.
549 The *Smith* case at 475.

courts should determine the suitability of such sanctions.[550] The Canadian Supreme Court formulated a test for proportionality to be a fair measure to determine the length of imprisonment, which reads:

> [T]he court must first consider the gravity of the offence, the personal characteristics of the offender and the particular circumstances of the case in order to determine what range of sentence would have been appropriate to punish, rehabilitate or deter this particular offender…. The other purposes which may be pursued by the imposition of punishment, in particular the deterrence of other potential offenders, are thus not relevant at this stage of the enquiry. This does not mean that the judge or the legislator can no longer consider general deterrence or other penological purposes that go beyond the particular offender in determining a sentence, but only that the resulting sentence must not be grossly disproportionate to what the offender deserves.[551]

In the United States of America, the Eighth Amendment to the US Constitution prohibits the infliction of cruel and unusual punishment.[552] Such punishment would include punishment which, by its excessive length or severity, is grossly out of proportion to the seriousness of the crime.[553]

The regular test consists of asking if a sentence imposed is "disturbingly or startlingly inappropriate",[554] or induces a sense of shock.[555] This is the basis on which appeal and review tribunals in South Africa interfere with a sentence.[556] The subjective nature of discretionary sentencing may lead appeal and review tribunals to different sentencing outcomes when the courts apply the principle of proportionality.[557] It is difficult, if not impossible, to draw an accurate distinction between the degrees of a "sense of shock" required by the tests.[558]

The Constitutional Court in the *Dodo* case started by reaffirming that proportionality in sentencing plays a leading role in the determination of whether a punishment is cruel, inhumane, and degrading.[559] The Court held that proportionality as a principle in sentencing consists of all factors relevant to the nature and seriousness of the

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550 The *Smith* case at 477.
551 The *Dodo* case at 610g-611a quoting from the *Smith* case at 139.
552 The *Dodo* case at 609h.
553 The *Dodo* case at para 29 quoting from *O'Neil v Vermont* 144 US 323 (1892).
554 *R v Reece* 1937 TPD 242 243-244.
555 *S v Hlapezula* 1965 4 SA 439 (A) at 444.
556 The *Pieterse* case at 734.
557 *S v Tcoeib* 1993 1 SACR 274 (Nm) at 403.
558 The *Smith* case 477.
559 The *Dodo* case at 614e.

offence committed, and the relevant personal circumstances of the offender, which may have a bearing on the sentence.[560] It effectively gave recognition to the principle of individualised sentencing that is well established in South African sentencing law.

For courts to respect, protect, promote and fulfil the right to human dignity, there should be proportionality between the seriousness of the offence and the length of imprisonment.[561] This necessarily implies that courts must regard offenders as people and not as commodities or a means to an end,[562] which would be the case where a lengthy sentence is imposed to satisfy punishment theories, without considering the gravity or lack of seriousness of the offence.[563] Disproportionality between the crime and the period of imprisonment amounts to treating an offender as a means to an end, eroding the criminal's humanity.[564]

The Constitutional Court found support for the approach to the test of proportionality in the US and Canadian Supreme Courts.[565] The principle in a proportionate sentence is that courts must consider independent factors that sometimes mitigate or aggravate the sentence.[566] For example, an offender may still be punished severely for having an extensive list of previous convictions, irrespective of the fact that this particular conviction was for a petty offence.[567] Such a punishment is a threat to the right to human dignity and does not solve the problems with discretionary sentencing.

3.4 The role of the right to human dignity

The characteristics of cruelty, inhumanity and degradation are antipathetic to human dignity, and the presence of any one of the three attributes in a sentence is an infringement on the right to human dignity.[568] Human dignity is an individual right

560 The *Dodo* case at 614f.
561 The *Dodo* case at 614g.
562 The *Dodo* case at 614h.
563 The *Dodo* case at 615a.
564 The *Dodo* case at 615b.
565 The *Dodo* case at 615c.
566 *S v N* 2007 2 SACR 398 (E) at 400e-f.
567 The *Matiwane* case at para 14.
568 The *Dodo* case at 614b.

and is inherent in all people.[569] It is also one of the foundational values of the Constitution.[570] The right to human dignity is the central right from which all individual rights flow.[571] Every person possesses it in equal measure, and all are equally worthy of respect.[572] One function of the right to human dignity is to protect individual freedom against state power, and another is to ensure that state power is used to secure the goals of dignity and equality.[573]

The wording in the South African Constitution of the expression of the right to human dignity is similar to that of comparable clauses in other constitutions[574] and international instruments.[575] The existence of the right means that value judgments must be made to establish whether a particular form of punishment is fundamentally repugnant to the rights guaranteed by the Constitution.[576] The courts must assess the information and evidence at their disposal to determine the nature and extent of an appropriate sentence, considering these rights as they do so.[577]

3.4.1 The death penalty

In international law, there is no consensus that the death penalty is inherently unconstitutional, but there is a strong bias towards its abolition.[578] The Constitutional Court applied the comparative law and international law to determine the acceptability of the death penalty as a form of punishment in South Africa.[579] The wording of foreign constitutions is different from that of the South African Constitution in this respect, and the right to life as formulated in the South African Constitution led to the decision to abolish the death penalty.[580]

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569 Section 10 of the Constitution.
570 Section 7(1) of the Constitution.
571 The *Makwanyane* case at 329.
572 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) at 30.
573 Chaskalson *Human dignity as a Foundational Value of the Constitutional order* 204.
574 Article 8 Constitution of Namibia and section 15 Constitution of Zimbabwe.
575 Article 7 International Covenant of Civil and Political Rights, article 3 European Convention for The Protection of Human Rights and Fundamental Freedoms
576 Van Zyl Smit *Sentencing and Punishment* 49-22.
577 The *Tcoeib* case.
578 Schabas *The Abolition of the Death Penalty in International Law.*
579 The *Makwanyane* case 37-9.
580 The *Makwanyane* case paras 38, 78, 80 and 85.

In the *Makwanyane* case, the state argued in favour of the death sentence for its deterrent effect, which argument the Constitutional Court rejected because there was no clear proof that the death penalty served efficiently to deter murder.[581] The deterrence argument ignored the existence of alternative sentences to the death penalty,[582] and it ignored the State's duty to act as a role model in the development of a culture of rights.[583] The Constitutional Court rejected the argument that the death penalty has a retributive function as it stops criminals from killing again,[584] it rather had a preventive service.

3.4.2 Corporal punishment

While the legitimacy of corporal punishment originates in the CPA,[585] that legitimacy was challenged in 1995, because whippings are contrary to human dignity and are cruel, inhuman or degrading forms of punishment.[586] It was not the first time that the courts raised the concern about corporal punishment, due to its incompatibility with human dignity.[587]

In the Williams case, the Constitutional Court found that corporal punishment was rejected in international law[588] and in the jurisprudence of numerous foreign states, including some in Southern Africa, which had made pronouncements on the constitutionality of corporal punishment.[589] The Constitutional Court summarised the dehumanising nature of corporal punishment in the following way:

> The severity of the pain inflicted is arbitrary, depending as it does almost entirely on the person administering the whipping. Although the juvenile is not trussed, he is helpless. He has to submit to the beating, his terror and sensitivity to pain

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581 The *Makwanyane* case, Chaskalson P at paras 116-25, Didcott J at paras 181-3, Kentridge J at 202, Kriegler J at paras 212-13, Mahomed J at paras 286-94, Mokgoro J at para 317, and O'Regan J at para 340.

582 The *Makwanyane* case Chaskalson P at para 123, Didcott J at para 181, and Mahomed J at para 287.

The *Makwanyane* case Chaskalson P at para 124, Langa J at para 222, and Mokgoro J at para 316.

584 The *Makwanyane* case Chaskalson P at para 128.

585 Section 294 was subsequently repealed by section 2 of *Act* 33 of 1997.

586 *S v Williams* 1995 2 SA 251 (CC).

587 *S v Kumalo* 1965 4 SA 565 (N) at 574F-H, *S v Motsoetsoana* 1986 3 SA 350 (N), and *S v Ndaba* 1987 1 SA 237 (T) at 245A-C

588 Rodley *The Treatment of Prisoners under International Law* 309-324.

589 *S v Petrus* [1985] LRC (const) 699 *(Botswana CA), S v Ncube; S v Tshuma; S v Ndhlovu; Ex Parte Attorney-General, Namibia: In re Corporal Punishment* 1991 3 SA 76 (Nms)

> notwithstanding. Nor is there any solace to be derived from the fact that there is a prior examination by the district surgeon. The fact that an adult is stripped naked merely accentuates the degradation and humiliation. The whipping of both is, in itself, a severe affront to their dignity as human beings.[590]

The Constitutional Court rejected any culture of authority which legitimises the use of violence, as violence is inconsistent with the values of the Constitution.[591] The state submitted that juvenile whipping was a justifiable limitation of the right against cruel, inhuman and degrading punishment,[592] due to its deterrent value, and noted that it provided a convenient and beneficial alternative to other socially more undesirable forms of punishment.[593] The Constitutional Court rejected these arguments in favour of the development of new sentencing options, which did not require the sacrifice of decency and human dignity.[594]

3.4.3 Imprisonment

A sentence in prison is not *per se* a violation of the right to freedom,[595] or the right against cruel, inhuman or degrading punishment.[596] It is so because the state is empowered by law to impose imprisonment, irrespective of the fact that such punishment infringes upon a person's dignity.[597] Ackerman J wrote:

> Section 11(1) [of the interim Constitution], which pointedly refers to detention without trial, does not include within its scope imprisonment consequent upon the sentence of a court. Legislation invariably makes provision for sanctions, including the possibility of imprisonment, and it could never have been the intention of the framers of the Constitution to require all laws which contain such a sanction to meet the test of necessity prescribed by section 33(1) for any limitation of a section 11(1) right.[598]

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590 The *Williams* case at para 45. The Court found support in the dissenting opinion in the case *Campbell and Cosans v United Kingdom* (1980) 3 EHRR 531 at 556 to the effect that corporal punishment amounts to a lack of respect for the humanity of the offender, irrespective of the age of the person.

591 The *Williams* case at para 52.

592 Sections 10 and 11 of the *Constitution of the Republic of South Africa* 200 of 1993.

593 *S v Vakalisa* 1990 2 SACR 88 (Tk) at 94G-J.

594 The *Williams* case at paras 64-75.

595 Section 12(1) of the Constitution.

596 *Chinamora v Angwa (Pvt) Limited (Attorney-General intervening)* 1997 2 BCLR 189 (ZS) 205D-E and the Makwanyane case at para 123.

597 *Bernstein v Bester* 1996 4 BCLR 449 (CC) at para 54.

598 The *Bernstein* case at para 53.

Imprisonment as a form of punishment is necessary to make legislation efficient and to prevent people from breaking the law with impunity.[599] It is only when imprisonment as a sentence is excessive relative to the offence committed that the right against cruel, inhuman and degrading punishment will be impaired, rather than the right to freedom.[600] For example, a statutory penalty clause that prescribed a disproportionate mandatory sentence of 10 years' imprisonment[601] for a relatively minor offence[602] was found to amount to the cruel, inhuman and degrading punishment[603] which the court rejected.[604]

Similarly, a prison term that is so long that a prisoner would have absolutely no chance of being released at the expiry of the sentence or on parole after serving half the sentence amounts to cruel, inhuman or degrading punishment. The absence of the possibility of being released on parole makes it unconstitutional.[605]

3.4.4 Life imprisonment

The literal meaning of life imprisonment denies the offender the opportunity to be returned to society. In the *Tcoeib* case, the court equated a term of life imprisonment to the death penalty, and the death penalty is unconstitutional in Namibian law.[606] That Court further stated that:

> Life imprisonment, as a sentence, is in conflict with article 8(2) (b) of the Constitution in that it is a 'cruel, inhuman and degrading punishment'. It removes from a prisoner all hope of his or her release. When a term of years is imposed, the prisoner looks forward to the expiry of that term when he shall walk out of gaol a free person; one who has paid his or her debt to society. Life imprisonment robs the prisoner of this hope. Take away his hope and you take away his dignity and all desire he may have to continue living. Article 8 of our Constitution entrenches the right of all people to dignity. This includes prisoners. The concept of life

599 The *Bernstein* case at para 54.
600 The *Bernstein* case at para 54.
601 Section 38(2)(a) of the *Arms and Ammunition Act* 7 of 1996.
602 Section 29(1)(a) of the *Arms and Ammunition Act* 7 of 1996.
603 Section 8(2)(b) Constitution of Namibia.
604 *S v Likuwa* 1999 2 SACR 44 (NmHC) at 50f.
605 *S v Nkosi* 2003 1 SACR 91 (SCA) at para 9.
606 Quoted from the *Tcoeib* case at 275g-h Article 6 Constitution of Namibia.

> imprisonment destroys human dignity reducing a prisoner to a number behind the walls of a gaol waiting only for death to set him free.[607]

The court did not accept the possibility of parole because that was entirely at the discretion of the executive, rather than at the discretion of a judicial officer.[608] In South Africa, the position is different, as life imprisonment does not infringe on human dignity significantly more than another long-term imprisonment, and it is deemed justifiable as a maximum penalty, especially as the death penalty does not exist.[609]

The South African Constitutional Court did not consider life imprisonment to be a form of punishment that infringes on the right to human dignity.[610] South African jurisprudence has subjected life imprisonment to a comprehensive review.[611] Life imprisonment in South Africa is not a sentence that leaves the offender without a prospect of release and is inherent in the provisions of the Correctional Service Act.[612] The courts can always be asked to intervene for the liberation of an offender on parole if the executive is reluctant to do so.[613] The possibility of parole saves the sentence of life imprisonment from being a cruel, inhumane, or degrading form of punishment.[614]

3.4.5 Fines

The imposition of a sentence consisting of an excessive penalty, where the primary purpose is to have the offender serve a period of imprisonment, is cruel and contrary to the interests of justice.[615] The court may, of its own volition, defer the payment of a penalty to ensure that the accused does not face detention.[616] The imprisonment of offenders who fail to pay their fines as an effective sanction to enforce court

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607 *S v Nehemia Tjijo* Unreport 4 September 1991 quoted in the *Tcoeib* case at 275i.
608 The *Tcoeib* case at 275j-276d.
609 The *Makwanyane* case at paras 172-2.
610 The *Makwanyane* case at paras 170-2.
611 The *De Kock* case at 204d-211i.
612 The *De Kock* case at 211b.
613 The *De Kock* case at 211b.
614 *S v Bull* 2002 1 SA 535 (SCA) 695c.
615 *S v Nkosi* 2014 2 SACR 212 (GP) at para 7.
616 *S v Zerky* 2010 1 SACR 460 (KZP) at 464c-e.

orders does not *per se* violate the right against cruel, inhuman and degrading treatment if it is not disproportionate.[617]

3.4.6 Suspended conditions

A suspended condition to the imposition of a sentence should be consistent with the right to dignity. A sentence that requires a convicted person to stand in public, under the watch of a police officer, carrying a placard proclaiming his guilt, constitutes a degrading form of punishment.[618] Such a suspended condition to the imposition of a sentence exposes the convicted person to public ridicule and humiliation.

3.5 The separation of powers

From 1910 to 1993, the South African government consisted of a fused executive and legislature in a parliamentary system of government, where the courts did not have the power to scrutinise the substance of any legislation passed by Parliament. This position changed dramatically from 27 April 1993, when the Interim Constitution[619] was adopted, and the change was reaffirmed later, on from 4 February 1997, when the final Constitution came into force as the supreme law of South Africa.[620]

3.5.1 The definition and nature of the separation of powers

The Constitutional Principle VI, contained in Schedule 4 of the interim Constitution, provides that:

> [t]here shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.

To this end, the final Constitution creates three spheres of government, each with its mandate. Parliament has the legislative authority,[621] where the executive power rests

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617 *Coetzee v Government of South Africa; Matiso v Commanding Officer, Port Elizabeth Prison* 1995 10 BCLR 1382 (CC) at para 66.

618 *S v Saayman* 2008 1 SACR 393 (ECD) 397d-399c.

619 Act 200 of 1993.

620 Section 2 of the Constitution.

621 Section 44(1) of the Constitution.

with the President of South Africa,[622] and the judicial authority rests with the courts.[623]

In *De Lange v Smuts* 1998 3 SA 785 (CC) the Constitutional Court described this dispensation as:

> … a delicate balancing, informed both by South Africa's history and its new dispensation, between the need, on the one hand, to control government by separating powers and enforcing checks and balances and, on the other, to avoid diffusing power so completely that the government is unable to take timely measures in the public interest.[624]

The Constitutional Court pointed out that the separation of powers is under the provisions outlining the functions and structure of various organs of state and their independence and interdependence.[625] The three arms of government unify to form one state; hence there can be no absolute separation of powers.[626] The function of the doctrine of the separation of authority rests on the necessity of preventing the arms of government from encroaching on one another's terrain.[627]

About punishment, the Constitutional Court has stated:

> There is under our Constitution no absolute separation of powers between the judicial function, on the one hand, and the legislative and executive on the other. When the nature and process of punishment is considered in its totality, it is apparent that all three branches of the state play a functional role and must necessarily do so. No judicial punishment can take place unless the person to be punished has been convicted of an offence which either under the common law or statute carries with it punishment. It is pre-eminently the function of the legislature to determine what conduct should be criminalised and punished. Even here the separation is not complete, because this function of the legislature is checked by the Constitution in general and by the Bill of Rights in particular, and such checks are enforced through the courts.[628]

The arms of government share a common interest in the nature and severity of the punishment imposed by tribunals, as well as in the sentencing policy, the

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622 Section 85(1) of the Constitution.

623 Section 165(1) of the Constitution.

624 At para 60. This was subsequently endorsed by a unanimous court in *South African Association of Personal Injury Lawyers v Heath* 2001 1 SA 883 (CC) at para 24.

625 The *Ex Parte Chairperson of the Constitutional Assembly* case at para 112.

626 Carpenter *Introduction to South African constitutional law* 157.

627 Dicey *Introduction to the study of the Constitution* 337.

628 The *Dodo* case at para 22.

punishment, and the length to which correctional institutions are used under the different aims of sentencing.[629]

The Appellate Division recognised that sentencing is not solely a function of the courts, where it stated that:

> The Legislature is of course at liberty to subjugate these principles [relating to the infliction of punishment by the courts] to its sovereign will and decree a mandatory sentence which the courts in turn will be obliged to impose. To do so, however, the Legislature must express itself in clear and unmistakable terms…. Courts will not be astute to find that a mandatory sentence has been prescribed.[630]

The powers of legislatures to define crimes and to formulate penalty clauses are internationally recognised and are not seen to be in breach of the separation of powers principle. Courts will not interfere with such powers unless the court has exercised its discretion in a manner which violates the Constitution.[631] Similarly, in the United States of America, the legislature has the authority to adapt its sentencing legislation to conditions as they may exist and punish offenders in accordance with the forms and frequency of crimes.[632]

Each branch of government does not stand alone in the execution of its duties; there are overlapping responsibilities which make them interdependent upon each other and separate responsibilities, which make them independent of one another in the performance of their functions.[633] The aim of determining the scope and extent of punishment for offences was never the function of only one branch of government. The legislature fixes the sentence and controls judicial discretion in sentencing.[634] The powers of the legislature to enact sentencing legislation; of the courts to impose sentences; and of the executive to execute such penalties, checks and balances; link the branches of government.[635]

The limitation is also aimed at protecting the offender against the imposition of a grossly disproportionate sentence in relation to his offence.[636] Similarly, in Canada,

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629 The *Dodo* case at para 23.
630 The *Toms and Bruce* case at 807E-F.
631 *Weems v. United States* 217 U.S. 349, 378 (1910).
632 The *Weems* case at 379.
633 *Mistretta v. United States* 488 U.S. 361, 381 (1989).
634 The *Mistretta* case at 364.
635 *United States v. Brown* 381 U.S. 437, 443 (1965).
636 The *O'Neil* case quoted with approval in the *Weems* case at 371.

the Supreme Court held that mandatory minimum sentences are not inconsistent with the separation of powers doctrine.[637] The court in the *Latimer* case held that:

> It is not for the court to pass on the wisdom of Parliament with respect to the gravity of various offences and the range of penalties which may be imposed upon those found guilty of committing the offences. Parliament has broad discretion in proscribing conduct as criminal and in determining proper punishment.[638]

Indian courts enjoy a broad discretion in imposing sentences. It is canalised and guided by law.[639] The permissible sentence range for murder varies between life imprisonment and the death penalty.[640] However, the lack of legislative guidelines to direct courts in choosing between the two alternative punishments in section 302 amounts to an unlawful delegation of a legislative function to the judiciary.[641] The argument is unaccepted because the structuring of sentencing relative to the discretion of courts is a legitimate legislative function.[642]

In Australia, when the Parliament prescribes a mandatory minimum sentence, leaving the courts with no room for discretion, this is not a violation of the separation of powers doctrine.[643] There is a restriction on the imposition of cruel, inhuman or degrading punishment, but there is nothing unusual in a penalty's following the conviction of a person and the imposition of a prescribed mandatory minimum sentence for that particular offence.[644]

The legislature in principle cannot oblige a court to impose a punishment which is wholly lacking in proportionality to the crime, or sentences that are inconsistent with an accused's right not to be sentenced to a penalty which is cruel, inhuman or degrading.[645]

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637 *R v Smith* (1987) 34 CCC (3d) 97, also see *R v Latimer* 2001 SCC 1. File No: 26980, 18 January 2001, unreported.

638 At para 73-4, also see Smith at 144-6.

639 Kelkar *Criminal Procedure* 3rd edition 430.

640 Section 302 Penal Code.

641 *Jagmohan Singh v State of Utar Pradesh* (1973) 1 SCC 20 and *Bachan Singh v State of Punjab* (1980) 2 SCC 684.

642 The *Bachan Singh* case at para 74-5.

643 *Palling v Corfield* (1970) 123 CLR 52 at 58-9.

644 *Wynbyne v Marshall* (1997) 117 NTR 11 at 276 (Ct of the Northern Territory).

645 The *Dodo* case at 608h-j, 609a.

Legislative interventions and other measures[646] that enable the state to eradicate unfair discrimination in sentencing,[647] and the structuring of sentencing discretion in such a way as to allocate specific forms of sentences for specific offences, fall squarely in the domain of the legislature.[648] Where the objective of the government is to ensure consistency in sentencing, it must possess the authority to legislate in this area.[649] The Authority's interest in penal sentences is implicitly recognised by the Constitution, which provides that:

> Every accused person has … the right-
>
> to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing.[650]

The Legislature is authorised by the Constitution to determine what conduct should be criminalised and punished.[651] Judicial punishment can proceed only after the conviction of an offender for an offence under the common law or a statute that carries with it a sentence.[652]

3.5.2 The relationship between the executive and the judiciary

The courts have the exclusive power to impose sentences, which are executed by the executive. It is the function of the executive, and specifically that of the Department of Correctional Services, to decide on the release of prisoners.[653] The sentencing court is the institution that determines the maximum period of imprisonment, but the court has no control over the actual time the offender has to serve.[654] Courts cannot prescribe to the executive in what way and for how long a prisoner ought to be in prison.[655] The principle of the separation of powers demands that the tribunals should refrain from determining dates when sentenced offenders

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646 Section 9(2) of the Constitution.
647 Section 9(3) of the Constitution.
648 Section 44(1) of the Constitution.
649 The *Dodo* case at 608e.
650 Section 35(3)(n).
651 The *Dodo* case at 607i.
652 The *Dodo* case at 607d-h.
653 The *Dodo* case at para 23.
654 The *Mhlakaza* case at 521d.
655 *S v Nkosi* 1984 1 SACR (T) at 98A.

must be set free from prison by factoring in an additional period of imprisonment to cover for the release date.[656]

The principle of the separation of powers curtails the sentencing discretion of courts to pre-determine the release dates of offenders.[657] The sentencing discretion of courts is not extended post the sentencing stage, when the offender serves the imposed sentence in prison.[658] The executive has the discretion to determine the release of an offender on parole, and it is not for the court to cater for such possibilities by increasing the period of imprisonment.[659] It is not appropriate for the sentencing court to make orders that relate to the release of the offender on parole,[660] or to interfere with the date of release of the offender on probation.[661] Such interference undermines the principle of the separation of powers.[662]

The CPA, however, later empowers the courts to fix a non-parole period. If the court imposes a sentence of at least two years, it may set at least two-thirds of the term of imprisonment or 25 years, whichever is shorter, as having to be served before the executive considers the prisoner for parole.[663] Ordinarily, the function of the court is to determine the duration of imprisonment, and the tribunals cannot prescribe to the executive branch of government how long a convicted person should remain in detention,[664] thereby usurping the function of the executive.[665] The consideration of the suitability of an offender to be released on parole requires the assessment of facts relevant to the conduct of the offender after the imposition of sentence.[666] Courts should not lightly resort to the provisions of section 276B, and should rather allow the parole board and officials of the Department of Correctional Services to make parole assessments and decisions.[667]

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656 The *Mahlakaza* case at 521h-i.
657 The *Matlala* case at 82g-h.
658 *S v Bull; Chavulla* 2001 2 SACR 681 (SCA) at 694b.
659 *S v S* 1987 2 SA 307 (A) at 313H-J.
660 *S v Mokoena* 1997 2 SACR 502 (O) at 504f.
661 *S v Williams* 1997 1 SACR 217 (C) at 220e.
662 *S v Smith* 1996 1 SACR 250 (E) at 255e-g.
663 Section 276B(1)(b) CPA.
664 *S v Botha* 2006 2 SACR 110 (SCA) at para 25.
665 The *Mhlakaza* case at 521f-i.
666 *S v Stander* 2012 1 SACR 537 (SCA) at para 12.
667 *S v Strydom* [2015] ZASCA 29 (unreported) case no 20215/2014 23 March 2015 at para 15.

3.5.3 The role of the judiciary

Before the advent of the Constitution, during the era of parliamentary sovereignty, the punishment did not fall solely in the domain of the judiciary, particularly when it concerned the structuring of sentencing discretion.[668] With the nature of the separation of powers that was ushered in by the Constitution, it is even clearer that all three arms of government share a common interest in the imposition of sentences.[669] Sentencing discretion derives from the empowering sentencing legislation enacted by the legislature.[670] Even in the instances where a mandatory minimum sentence reduces the sentencing discretion of courts to that of a rubber stamp,[671] the courts are obliged to conform with the legislation.[672]

The courts possess judicial authority and are vested with authority to make pronouncements of the law.[673] It is not for the legislature to compel the judiciary to impose punishment that lacks proportionality to the offence, the consequence of which would be inimical to the rule of law and the constitutionality of the state.[674] The Constitution protects the independence of the courts, and the courts are subject only to the Constitution and the law and must execute their duties impartially without fear, favour or prejudice.[675] What is crucial to the separation of powers and the independence of the judiciary is that the courts should enforce the law impartially and function independently of the legislature and the executive.[676]

3.6 Fair trial rights

Fair trial rights enjoy recognition in international instruments. Examples of such instruments are the Universal Declaration of Human Rights (hereinafter the UDHR);[677] the International Covenant on Civil and Political Rights (hereinafter the

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Also see *S v Jimmale* 2 SACR 691 (CC) at 698e-g.

668 The *Mapumulo* case at para 57.

669 The *Dodo* case 607g-h.

669 The *Dodo* case 607g-h.

670 The *S v Toms; S v Bruce* case at 860H-I.

671 The *S v Toms; S v Bruce* case at 807A-C.

672 The *S v Toms; S v Bruce* case at 807E-F.

673 Section 165(1) of the Constitution.

674 The *Dodo* case at para 26.

675 Section 165(2) Constitution.

676 *First Certification Judgment* at para 123.

677 Adopted by the UN General Assembly on 10 December 1948.

ICCPR);[678] the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the ECHR);[679] and the African Charter on Human and Peoples' Rights (hereinafter AfCHPR).[680] In South Africa, fair trial rights are part of the Bill of Rights in the Constitution.[681]

Before the state can intrude on the core rights of a person, namely, dignity (through a public denunciation as guilty in a status-degrading ceremony); liberty (through detention or incarceration) and property (through the imposition of a fine or forfeiture), the trial must be procedurally fair.[682] The convicted person should always enjoy the full protection of the law, especially in the circumstances involving the loss of liberty. Hence, before the state can impose a criminal sanction on an individual, that person must have been accorded a fair trial.[683]

Fairness in sentencing requires a procedure that does not prevent any factor that is relevant to the sentencing process, and which could have a mitigating effect on the imposition of punishment from being considered by the sentencing court.[684] The sentencing stage is part of a criminal trial, which means that every right to a fair trial applicable at the evidential phase of the trial is also relevant at the sentencing stage.[685] The determination of whether an accused's fair trial right at the sentencing stage has been breach requires a careful factual examination of the relevant circumstances of each case.[686]

3.6.1 The right to be informed of the charge in sufficient detail to be able answer them

At international law level, the ICCPR provides that the state must notify the accused adequately, in a language in which the defendant is conversant, of the nature and cause of the charge against him.[687] The ECHR[688] and AmCHR[689] have identical

678 Adopted by the UN General Assembly on 16 December 1966.
679 Adopted by the UN General Assembly on 04 November 1950.
680 Adopted by the OAU on 27 June 1981, and ratified by South Africa on 9 July 1996.
681 Section 35(3)(a) to (o).
682 Steytler *Constitutional Criminal Procedure* 208.
683 *S v Coetzee* 1997 1 SACR 379 (CC) 445 at para 186c-d.
684 The *Dzukuda* case at para 12.
685 Mr Justice Stephen quoted in the *Dlamini* case at 667c-d.
686 The *Legoa* case at para 21.
687 Article 14(3)(a).

provisions. The South African Constitution provides that an accused person has the right to a fair trial, which includes the right to be informed of the charge in sufficient detail to be able to answer it.[690]

Sufficient information must be entered into the charge sheet[691] to afford the offender the opportunity to decide whether and to what extent to join issue with the state and properly prepare a defence.[692] The information in the charge sheet must enable the offender to appreciate the type of sentence he might face if a conviction should ensue.[693] The test is always whether or not the accused suffered any prejudice, and the outcome will determine whether the court's sentencing discretion is limited to an individually prescribed sentence under the circumstances of each case.[694] However, a court cannot convict an offender for a less serious offence,[695] and impose a sentence mend for a conviction for a more serious offence,[696] the court has no jurisdiction to impose such a sentence.[697]

From a different perspective, once a court has convicted an accused person of an offence, it is improper for the court to use evidence in aggravation as proof of a more serious crime for which the accused was not convicted, and subsequently to impose a sentence meant for that more serious offences.[698] The evidence does not authorise the court to extend its sentencing discretion to opt for a harsher sentence based on the new evidence after the conviction of a lesser offence.[699]

Of equal importance, the accused must also be alive to "competent verdicts" [700] at the plea stage. This includes competent verdicts for attempted crimes,[701] which

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688 Article 6(3)(a).
689 Article 8(2)(b).
690 Section 35(3)(a).
691 Section 35(3)(a) of the Constitution.
692 *S v Thobejane* 1995 1 SACR 329 (T) at 334a-337d.
693 The *Kolea* case at 411j-412a.
694 The *Kolea* case at para 19. Also see *S v Tshoga* 2017 1 SACR 420 (SCA) at para 25.
695 Section 51(2) of the CLAA which prescribed a minimum sentence of 10 years' imprisonment.
696 Section 51(1) of the CLAA which prescribed a minimum sentence of life imprisonment.
697 *S v Ndlovu* 2017 2 SACR 305 (CC) at para 46.
698 *S v LM* 2015 1 SACR 422 (ECG) at 424i.
699 The *S v LM* case at 425g.
700 Joubert *Criminal Procedure Handbook* 302.
701 Sections 256 to 270 of the CPA.

should form part of the charge sheet.[702] The accused person needs to know already at the plea stage whether a court may convict him for a competent verdict.[703] Competent verdicts are "lesser" offences which, sometimes in descending order, at other times next to each other, are included in the main charge.[704]

Therefore, it is an irregularity to convict an accused on a competent verdict if a person was unaware of such charges at the plea stage.[705] The other aspect closely related to the prosecution is the accusation that a person is an accessory after the fact, which gives sentencing courts broad discretion to impose sentences.[706] However, in practice, an accessory is punished more leniently than the actual perpetrator.[707] His blameworthiness in committing the crime is probably far less than that of the primary culprit.

3.6.2 The right to an open trial before an ordinary court

The right to a public trial has enjoyed recognition in South Africa since 1813, when the public could attend criminal trials in a public hearing.[708] The right to a public trial before an ordinary court is part of an individual's right to a fair trial.[709] The right enjoys recognition at international law level. The UDHR provides for "public hearing" in the determination of any criminal charge,[710] a right reiterated in the ICCPR,[711] the ECHR,[712] and the AmCHR.[713] The rules of procedure must be the same in all courts for all accused persons.[714]

The purpose of the "open justice principle" (which results in trials being public) is that public participation is crucial to the administration of criminal law in a

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702 *S v Velela* 1979 4 SA 581.
703 *S v Kester* 1996 1 SACR 461 (B) 469i; also see *S v Fielies* 2006 1 SACR 302 (C) at paras 7-9, where the legal position of competent verdicts is set out.
704 Kruger *Hiemstra's Criminal Procedure* 26-1.
705 *S v Dlamini* 2006 2 SACR 594 (ECD) 598c-e.
706 Section 257 of the CPA.
707 Du Toit and De Jager *Commentary* 26-6.
708 Schutz *Open Doors* 110.
709 Section 35(c) of the Constitution.
710 Article 10.
711 Article 14(1).
712 Article 6(1).
713 Article 8(5).
714 Steytler *Constitutional procedure* 267.

democratic society.[715] The explanation to the accused person of the right to a fair trial should be in an open court with sufficient particulars, and it's having done should transpire from the record of the proceedings.[716] Democratic values require protection,[717] and the accused needs protection from being subjected to a secret trial. Also, the public nature of the administration of justice is likely to enhance public confidence in the administration of justice.[718]

The gathering of information for sentencing purposes in the chambers of the judge without the parties present is wrong.[719] The conducting of a conversation with the complainant in chambers is in breach of the accused's constitutional fair trial right, which includes the right to a public trial before an ordinary court.[720] Evidence and arguments that influence the exercise of a court's sentencing discretion should happen in an open, regular court.

3.6.3 An accused's right to be presumed innocent, to remain silent, and not to testify, and the right against self-incrimination

A defendant has the right to be presumed innocent, to remain silent, not to give evidence during the proceedings, and not to be compelled to give self-incriminating evidence.[721] The first set of rights enjoys recognition in international law, as in the UDHR,[722] the ICCPR,[723] the ECHR,[724] the AmCHR,[725] and the AfCHPR.[726] The right against self-incrimination is supported internationally under the ICCPR,[727] the Convention on the Rights of the Child,[728] and the AmCHR.[729]

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715 *Klinck v Regional Court Magistrate* 1996 3 BCLR 402 (SE) 4141.
716 *S v GR* 2015 2 SACR 79 (SCA) at 83i.
717 *Press-Enterprises Co v Superior Court* II 478 US 1 7 (1986).
718 *Sanderson v Attorney-General, Eastern Cape* 1997 12 BCLR 1675 (CC) at 23
719 *Director of Public Prosecutions, North Gauteng v Thabethe* 2011 2 SACR 567 (SCA) at 578f-g.
720 The *Thabethe* case at 578f-g.
721 Section 35(3)(j) of the Constitution.
722 Article 11(1).
723 Article 14(2).
724 Article 6(2).
725 Article 8(2).
726 Article 7(1)(b).
727 Article 14(3)(g).
728 Article 40(2)(b)(iv).
729 Article 8(2)(g).

The presumption of innocence does not apply after conviction. The right against self-incrimination remains relevant at the sentencing stage, because any self-incriminating evidence at the sentencing stage may aggravate punishment.[730] While the sentencing stage is inquisitorial, the courts must respect an accused's right to remain silent and safeguard the accused's right against self-incrimination.[731] It is irregular and unconstitutional for the court to ask an accused whether he or she has previous convictions.[732]

The right not to testify and to remain silent during the proceedings also applies to the sentencing stage of a criminal trial.[733] It is not inappropriate for a presiding judicial officer to indicate to the offender that to determine an appropriate sentence, evidence under oath would carry more weight than a legal representative's submissions from the bar.[734]

3.6.4 The right to the least severe punishment if the prescribed punishment changes between the commission of the offence and sentencing

The right to the least severe punishment if the specified penalty changes between the time of the commission of the crime and the time of sentencing enjoy constitutional protection.[735] The right precludes the sentencing court from imposing a "new" severe punishment prescribed in a new penalty clause. The general rule of the provision is that whenever there is a variation in the sentence, whether an increase or a decrease, the accused gets "the benefit of the least severe punishment".[736] If the penalty for particular crime increases after the commission of the same offence, the offender is entitled to the benefit of the least severe punishment; that is, the punishment applicable on the date the commission of the crime. The right provides constitutional status to the common law rule against the

730 Steytler *Constitutional Criminal Procedure* 342.
731 The *Masisi* case at 159f-g.
732 *S v Khambule* 1991 2 SACR 277 (W) at 283.
733 The *Dzukuda* case at 466d-e.
734 *S v Khumalo* 2013 1 SACR 96 (KZP) at paras 3 and 14.
735 Section 35(3)(n) of the Constitution.
736 McDonald *Legal Rights in the Canadian Charter of Rights and Freedoms* 556.

retroactive application of a more severe penalty.[737] The court's sentencing discretion is limited to the least severe punishment.

3.6.5 The right to appeal, or to review by a higher court

In the post-sentencing stage, the review and appeal tribunals have the power to interfere with the sentence of the trial court. The accused person's fair trial right is also constitutionally protected.[738] The right to a fair trial and the right to appeal require that the practice of giving notice of a possible increase in a sentence on appeal be elevated to a legal requirement.[739] To err is human; thus, protection against error is necessary.[740] Judicial officers are individuals and may in some instances make an error of judgement in the imposition of a sentence. Thus, the appeal[741] and review[742] proceedings are intended to ensure consistency and uniformity in the application of the law, and in particular, the imposition of appropriate penalties in the furtherance of equality before the law to maintain the supremacy of the Constitution and the rule of law.[743]

3.7 Equality in sentencing

Equality in sentencing has a direct impact on the manner in which courts exercise their sentencing discretion. The debate about equality in sentencing started in the landmark case of *Furman v. Georgia 408* U.S. 238 (1972) and played a pivotal role in the birth of the sentencing guidelines revolution.[744] The debate places equality and individualisation in sentencing at two different poles of comparison, each with two different sentencing outcomes.[745] Equality in sentencing espouses like treatment for like cases, emphasising on similar punishment for similarly positioned offenders, whereas the individualisation of a sentence is an attempt to tailor the sentence to fit all the relevant factors that apply in a case.

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737 *R v Mazibuko* 1958 4 SA 353 (A); *R v Sillas* 1959 4 SA 305 (A).
738 Section 35(3)(o) of the Constitution.
739 *S v Bogaards* 2013 1 SACR 1 (CC) at para 45.
740 Bassiouni *Duke Journal of Comparative and International Law* 235 286.
741 Sections 309 to 324 of the CPA.
742 Sections 302 to 306 of the CPA.
743 Section 1(c) of the Constitution.
744 Frase *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues* 105.
745 Bierschbach and Bibas *What's Wrong With Sentencing Equality* 1447.

The argument is that equality in sentencing and individualised sentencing stand at opposite poles of more fundamental and more complicated debates about "who" decides sentencing issues, "how" they do so, and "what" purposes their decisions "should" serve.[746] In practice, equality in sentencing centralises punishment and concentrates power,[747] meaning that decisions on sentencing outcomes are predetermined and objective. For example, mandatory minimum sentences might eliminate disparities in sentencing and achieve a formal equality of punishment among offenders convicted of similar offences. [748] Individualised sentencing, on the other hand, tends towards decentralisation, fragmentation, devolution, and difference;[749] meaning that sentencing outcomes are dependent on the discretion of individual sentencing officers. This makes the imposition of a sentence subjective.

3.7.1 The importance of the right to equality

The Constitution states that every person is equal before the law, and has the right to equal protection and benefit of the law.[750] The importance of the right to equality in South Africa was articulated in the case of the *President of the RSA* as follows:

> [t]he South African Constitution is primarily and emphatically an egalitarian constitution… [The] Constitution was written with equality as its centre. Equality is our Constitution's focus and organising principle.[751]

The right to equality has a significant role to play in South Africa's new democratic dispensation. One of the primary aims of the right to equality is the eradication of inequalities created by an apartheid government system that discriminated against blacks.[752] The right to equality includes by implication the elimination of discriminatory sentencing practices, where sentences were selected and imposed based on race.[753] The right to equality is, therefore, a direct consequence of the sentencing system of South Africa, which is not immune to the right to equal justice.

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746 Bierschbach and Bibas *What's Wrong With Sentencing Equality* 1451.
747 Stith and Cabranes *Fear of Judging: Sentencing Guidelines in the Federal Courts* at 39-40.
748 Bierschbach and Bibas *What's Wrong With Sentencing Equality* 1447.
749 *McCleskey v. Kemp*, 481 U.S. 279, 310 (1987).
750 Section 9(1).
751 At para 74 by Kriegler.
752 *Brink v Kitshoff* 1996 4 SA 197 (CC) para 40 (O'Regan J).
753 The *Scheepers* case at 158D and 158F.

In this context, the word "equality" means the state of being equal, especially in status, rights, or opportunities.[754] Equality can be referred to as a challenging and deeply controversial social ideal, which at its fundamental level is an abstract moral idea describing that people who are in the same position, in relevant ways, ought to receive similar treatment.[755]

3.7.2 The right to equality in respect of sentencing

The right to equality is one of the rights in the Bill of Rights and applies to sentencing. The Constitutional Court has pronounced on the topic as follows:

> [I]t is the logical corollary of the principle that 'like should be treated like', that treating unlike alike may be as unequal as treating like unlike.[756]

At a general level, equality simply means treating likes equally,[757] and not treating people differently on account of their race,[758] or other attributes irrelevant to sentencing.

In the United States of America, the Supreme Court expressed the opinion that the right to equal protection of the law requires, in the administration of criminal justice, that no different or higher punishment is necessary for one offender than for other similar offenders.[759] The courts of the United States of America grappled with the problem that equal treatment at the sentencing stage may focus on the notion of the ill-treatment blacks received at the sentencing stage. For example, there was the invalidation of the death penalty on the grounds that it was a cruel and unusual punishment in the context of three black offenders convicted of raping white women;[760] there was the right to appoint counsel to protect a black youth allegedly raping young white women;[761] and struck down void for vagueness was a vagrancy ordinance used to target young black males who were cruising around with young

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754 www.oxforddictionaries.com
755 De Waal; Currie and Erasmus *The Bill of Rights Handbook* 198.
756 The *Makwanyane* case at para 92.
757 Stuntz *Unequal Justice* 121.
758 Carbado and Harris *Undocumented Criminal Procedure* 1573-78.
759 *Barbier v Connolly* 113 US 27, 31, 5 SCt 357 (1884).
760 *Furman v. Georgia* 408 US 238 279 (1972) at 49-52.
761 *Powell v. Alabama* 287 U.S. 45, 49-52 (1932).

women.[762] The desire of legislators to ensure equality in the imposition of a sentence by making sure that factors irrelevant to sentences were not taken into account therefore translated into a desire to reduce or eliminate the sentencing discretion of courts.[763]

Racial sentencing is a hidden bias and difficult to prove, but unstructured sentencing left courts free to discriminate, apply their personal beliefs, or to be merely arbitrary.[764] This assertion is based mainly on survey evidence and anecdotes unrelated to race.[765] The argument is that individualised justice is at odds with concepts such as equality, objectivity and consistency in the law,[766] that discretionary sentencing is going unchecked and circumvents the rule of law on sentencing,[767] and that rules are the best means of keeping sentencing courts in check.[768]

The right to the imposition of a similar sentence for similarly positioned offenders would seem to derive from the fact that equality is one of the founding values of the Constitution that underpins the South African democracy.[769] Discretionary sentencing is subjective, due to sentencing dependent on the personality of the presiding officer of the trial, and on the review or appeal tribunal selected to hear the case. Race and poverty are factors that play a role in the outcomes of cases,[770] and in particular, in the determination of sentences.

Equality in sentencing received the Constitutional Court's attention in the *Makwanyane* case, where the arbitrariness of the imposition of the death penalty led to the declaration of the death penalty as unconstitutional.[771] The Constitutional Court further acknowledged that discretionary sentencing causes unequal treatment

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762 *Papachristou v. City of Jacksonville* 405 U.S. 156, 158 (1972).
763 Von Hirsch, Knapp and Tonry *Sentencing Commissions and their Guidelines*
764 Frankel *Criminal Sentence: Law Without Order* 5-11.
765 Frankel *Criminal Sentence: Law Without Order* 17-24, 32-34, 42-43.
766 Frankel *Criminal Sentence: Law Without Order* at 10.
767 Frankel *Criminal Sentence: Law Without Order* at 5.
768 Frankel *Criminal Sentence: Law Without Order* at 121-22.
769 Section 1(a), Section 7(1), Section 39(1)(a)
770 The *Makwanyane* case at para 48.
771 The *Makwanyane* case at para 51.

of offenders at the sentencing stage.[772] It accepted, however, that arbitrariness is unavoidable in sentencing, that in sentences other than the death penalty society must tolerate such penalties,[773] and that arbitrariness conflicts with the idea of a right to equality, and in particular, equality before the law.[774] Arbitrariness in the imposition of any sentence is fatally inconsistent with the demand for equality,[775] which section 9 of the Constitution grants.[776]

Equality in sentencing is, however, a very complicated concept in sentencing for a number of reasons. To start with, on the issue of punishment means that people have different views about the purpose and and goals of punishment, which makes it difficult to sentence similarly positioned offenders in the same way.[777] Under certain circumstances, specific cases are categorised as similar upon conviction for which a similar sentence is expected from the courts to impose.[778] Different offences and the existence of criminal history are accepted factors for variations of sentences, but differences in motives and intent are contentious in fact finding and normatively,[779] as well as the issue of harmfulness.[780] The fact of the matter is that there is no agreement on the factors that must count, or to what extent and why they ought to play a role in sentencing.[781]

The Constitution requires the State to intervene legislatively or introduce other measures to promote or achieve equality[782] in sentencing. The achievement of equality in sentencing requires a consistent approach by courts when the courts consider sentences.

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772 The *Makwanyane* case at para 273.
773 The *Makwanyane* case at 164.
774 The *Makwanyane* case at para 163.
775 The *Makwanyane* case at para 214.
776 The *Vries* at 1666-1698 per O'Linn J.
777 Bierschbach and Bibas *What's Wrong With Sentencing Equality* 1462.
778 Bowers *Legal Guilt, Normative Innocent, and the Equitable Decision Not to Prosecute* 1673-78, 1703.
779 Hessick *Motive's Role in Criminal Punishment* 80.
780 Markel and Flanders, Bantham on Stilts: *The Bare Relevance of Subjectivity to Retributive Justice* 98.
781 Bierschback and Bibas *What's Wrong With Sentencing Equality* 1463.
782 Section 9(2).

3.8 Consistency in sentencing

Consistency in sentencing refers to "uniformity" in sentencing,[783] whereas "disparity"[784] refers to inconsistency in sentencing.[785] The inverse of consistency in sentencing is to avoid undue disparity and is regarded as a basic principle of criminal law and sentencing.[786] Consistency in sentencing requires the sentencing courts to apply the same purpose and principles of sentencing and to take into account the same factors when the courts impose sentences.[787] It is a procedure that a court must follow in a prescribed sequence of steps, resulting in imposing a sentence.[788] In a discretionary sentencing framework, the approach suggests that there is no correct sentence, but a variety of correct sentences.[789] Uniformity of sentence revolve around consistency of outcomes of sentence category and quantum.[790] There must be a predictive outcome of sentence predetermined by considering factors to which a certain range of predetermined weight is allocated by independent bodies,[791] such as sentencing grids.

In the *Makwanyane* case, the Constitutional Court used the term "arbitrariness" to illustrate the inconsistent selection of the death penalty for certain offenders as the punishment for certain serious offences. Consistency in sentencing is necessary to avoid extreme disparity in sentencing, the avoidance of which is fundamental to criminal law and sentencing.[792] Uniformity in sentencing was one of the primary purposes cited for the promulgation of judicial sentencing guidelines,[793] yet the

783 *S v Giannoulis* 1975 4 SA 867 (A) at 873F
784 *S v B* 1965 3 SA 17 (E) at 18A.
785 Terblanche *A guide to sentencing in South Africa* 139.
786 Victorian Sentencing Committee, *Sentencing: Report of the Victorian Sentencing Committee,* Attorney-General's Department, Victoria Melbourne 146.
787 Astralian Law Reform Commission:Report 103: *Same Crime, Same Time: Sentencing of Federal Offenders* 119 (2006) 152.
788 Krasnostein and Freiberg *Pursuing consistency in an individualistic sentencing framework: If You know where you're going, how do you know when you've got there* 271.
789 Krasnostein and Feiberg *Pursuing consistency* 271.
790 Krasnostein and Feidberg *Pursuing consistency* 271.
791 Krasnostein and Freiberg *Pursuing consistency* 271.
792 *Wong v The Queen* [2001] HCA 64, (2001) 185 alr 233, at 89.
793 *R v Jurisic* (1998) 45 NSWLR 209.

reasoning is that there should be a link between consistency in sentencing, doing justice to the circumstances of a particular case, and achieving public confidence.[794]

3.8.1 The primary function of consistency

There are two fundamental features of uniformity. Firstly, similarly placed offenders must receive similar sentences; and secondly, courts must impose more severe sentences on offenders who have committed serious offences than on those offenders who have committed less serious crimes.[795] Consistency in sentencing requires that there should not be any wide divergence in the sentences imposed on offenders in similar cases. The primary aim of uniformity is to avoid unwarranted disparities in sentences. This should be the central goal of any sentencing system.[796]

Disparities in sentencing can occur when a court treats like cases in an unlike manner, or when the courts treat similar cases differently in different localities within a jurisdiction or between high court divisions.[797] Disparities in sentencing can also exist between co-offenders,[798] due to their different personal circumstances or blameworthiness in the commission of the crime. The cause of disparities in sentencing could be the application of various penal philosophies, or legislative inconsistency in sentencing policy.[799]

The differences could also result from variations in the triad factors, institutional and social factors, and the particular perspectives and decision-making skills of the individual judicial officer.[800] Disparities in sentences between offenders charged with similar offences may be justified in individual cases based on their different personal circumstances, particularly in the event of criminals with various criminal records.[801] Such disparities are warranted, but the existence of unwarranted disparities in

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794 The *Jurisic* case at 221.
795 Terblanche *A guide to Sentencing in South Africa* 139.
796 Mackenzie *How Judges Sentence* 44.
797 Fox and Freiberg *Sentencing: State and Federal Law in Victoria* para 1.220.
798 *Lowe v The Queen* (1984) 154 CLR 606.
799 Fox and Freiberg *Sentencing* 30.
800 Lawrence and Homel "Sentencing in the Magistrate' Courts: The Magistrate as Professional Decision Maker" in Ivan Pottas Sentencing: *Problems and Prospects, Proceedings of a Seminar held at Australian Institute of Criminology* 18-21 March 1986.
801 The *Lowe* case at 606.

sentencing does not promote the notion that like cases should be treated in a like manner.[802]

3.8.2 Consistency as part of sentencing

Uniformity in sentencing is considered an essential requirement of justice.[803] The achievement of uniformity in sentencing will promote legal certainty, and improve respect for and trust in the legal system,[804] because society will know beforehand the likely outcomes of litigation.

A rare assessment of the relationship between consistency and sentencing discretion was made by Smit JP where he stated:

> [e]en van die basiese probleme in die ontwikkeling van beginsels in verband met straftoemeting, is om konsekwent te wees met die behandeling van plegers van soortgelyke misdade of van mededaders, en, tegelykertyd die noodsaaklikheid om die karakter, geskiendenis en aandeel van die individuele oortreder nie oor die hoof te sien nie. Die doel is om onregverdige diskriminasie te vermy, maar dit is nie inkonsekwent om een oortreder ligter as 'n ander te vonnis waar daar faktore is in die omstandighede waaronder die misdaad gepleeg is of in die karakter en geskiedenis van so 'n veroordeelde, wat dit regverdig nie.[805]

The fundamental problem in the achievement of consistency in sentencing is the absence of uniform principles that guide courts in the imposition of a sentence. The idea is not that every sentence must be the same for all offenders in similar positions,[806] but that there should not be a broad divergence in sentences for offenders similarly placed.[807] Too much uniformity in the interest of equality and predictability would lead to constraints on the court's ability to account for significant individual differences.[808]

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802 Victorian Sentencing Committee Report at 146.

803 Hiemstra *Criminal Procedure* 28-5.

804 Du Toit *Straf* 119.

805 The *Maree* case at at 560, paraphrase to English- One of the basic problems in the development of principles of punishment is to be consistent with the treatment of perpetrators of similar crimes or fellow prisoners and, at the same time, the need to avoid the character, history and share of the offender and take the lead. The purpose is to avoid unfair discrimination, but it is not inconsistent to judge one offender lighter than another where there are factors in the circumstances in which the crime was committed or in the nature and history of such a convicted, which justifies it.

806 Nicolas in Midgley *Crime and punishment* 151.

807 Terblanche *A guide to sentencing in South Africa* 125.

808 Ohlin and Remington *Discretion in criminal justice* 3.

The unjustified disparity in sentencing is:

> the imposition of disposition of differing severity in sentences or the same disposition, but of differing severity on two or more individuals who have, or the same individual who on two or more occasions has, committed an offence of the same degree of seriousness where that difference in disposition is caused by factors other than the one which gives a legitimate reason for differentiating the dispositions in a manner which has occurred.[809]

The dilemma arises where the imposition of a sentence is discretionary. The exercise of discretion leads to disparities in sentencing.[810] Unstructured discretion results in unwarranted sentence disparity.[811] Judicial discretion is highly valued, but there is a demand for equal treatment, rendering individualisation and consistency in sentencing uncomfortable bedfellows.[812] The elimination of discretionary sentencing would eliminate individual justice in sentencing in a particular case.[813] It is for that reason that consistency in sentencing in South African law does not trump the principle of individualisation.[814]

The unjustifiable disparity between the sentences handed down by different courts has been a primary concern, which led to a breakdown of confidence in the system, particularly among the public as a whole.[815] Disparity in sentencing has been the "inevitable result" of the failure to set out the principles governing the exercise of discretion, resulting in an inconsistent application of policy; of the lack of a framework for courts to follow when making sentencing decisions; and of a complexity of sentencing where the court must process a large volume of information, with the potential for the inappropriate omission or inclusion of factors.[816]

During the individualisation process of a sentence, the possibility exists that the courts may overemphasise the severity of the crime at the expense of all the other

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809 Mackenzi *Achieving Consistency in Sentencing: Moving to Best Practice* 76 quoting from Victorian Sentencing Committee Report 146.

810 Tonry Sentencing *Reform across National Boundaries* 271.

811 Tonry *Sentencing Matters* 177.

812 Steytler *Constitutional Criminal Procedure* 412.

813 Ashworth *Reflections on the Role of the Sentencing Scholar* 260.

814 The *Giannoulis* case at 873F-G.

815 Weatherburn *Sentence Disparity and its Impact on the NSW District Criminal Court, New South Wales Bureau of Crime Statistics and Research,* Sydney, 1994.

816 Lovegrove *Sentencing Guidance and Judicial Training in Australia* 208-209.

relevant factors.[817] The lack of a scale of weighted values that the courts can attach to the relevant factors causes the courts to relegate the principle of consistency to a subservient role relative to the individualisation principle. The courts have the sole discretion to determine the nature and the extent of the factors that may influence the final sentence.

Firstly, based on the seriousness of the crime, the court must decide on the point of departure within its sentencing jurisdiction, to find an appropriate sentence.[818] The degree of severity of an offence is not correlated with a starting point sentence or with the type of the penalty, because the courts rely on their sentencing jurisdictions and the penalty clauses of statutes when they consider penalties. The effect hereof is that the tribunals can decide from any starting point, which hurts consistency.

Secondly, the court has the discretion to determine how the personal circumstances of the offender will influence the sentence.[819] These consist of various attributes such as blameworthiness,[820] previous convictions,[821] the youth of the offender,[822] the age of the offender,[823] ill-health,[824] and family or dependants.[825] The list is not exhaustive, but the degree of influence these characteristics have on the sentence is incalculable.

Thirdly, the court has the discretion to determine the role of the interest of society in determining the sentence.[826] The court must reconcile the interest of society with the personal circumstances of the offender.[827] The influence of the benefit of the public in the sentencing is diverse. This can include rehabilitation, deterrence[828] or

817 Kriegler and Kruger *Hiemstra Suid-Afrikaanse Strafproses* 654.
818 Van der Merwe *Sentencing* 1-12.
819 *S v Harding* 1996 1 SACR 503 (C) at 509e.
820 *S v Davids* 1995 1 SACR 365 (A) at 366d.
821 *S v Scheepers* 2006 1 SACR 72 (SCA) at para 11.
822 *S v Lengane* 1990 1 SACR 214 (A) at 219i.
823 *S v Heller* 1971 2 SA 29 (A) at 55C-D.
824 *S v Berliner* 1967 2 SA 193 (A) at 199G.
825 The *Shangase* case at 427H-428A.
826 *S v Reay* 1987 1 SA 873 (A) 877D.
827 The *Keulder* case at 110e-f.
828 The *Maki* case at 419h.

prevention,[829] but the court cannot take into account an interest of society which is not relevant to the sentencing function.[830]

Fourthly, the courts must also exercise their discretion regarding the purposes of punishment.[831] The courts must focus their choice on the primary purposes of punishment, which are deterrence, prevention, reformation and retribution.[832] Each court stresses a different purpose, which results in various sentencing outcomes. Retributive punishment theories find application in serious crimes like rape and murder, where deterrent punishment has a lesser role to play.[833]

The court's sentencing discretion must translate into a form of punishment that relates to one of the theories of punishment. The sentencing legislation provides the courts with different forms of punishment to choose from for any offence.[834] Due to the subjective nature of sentencing, the courts do not have a consistent approach to sentencing, which makes sentencing outcomes unpredictable. Hence, the right to equality and to have equal protection of the law in sentencing will remain unattainable,[835] unless there are legislative interventions that structure the sentencing discretion of courts in a manner that promotes consistency in sentencing.

3.9 Discretion

In South Africa, the imposition of a sentence hinges on the manner in which a court exercises its broad sentencing discretion, save for instances where mandatory minimum sentences apply. In most cases:

> Sentencing … is founded upon two premises that are in perennial conflict: individualized justice and consistency. The first holds that courts should impose sentences that are just and appropriate according to all of the circumstances of each particular case. The second holds that similarly situated offenders should receive similar sentencing outcomes. The result is an ambivalent jurisprudence that

829 *S v Bezuidenhout* 1991 1 SACR 43 (A) at 51d-e.
830 The *Xaba* case at 289.
831 Terblanche *A guide to sentencing in South Africa* 171.
832 The *Makwanyane* case at para 46.
833 *Director of Public Prosecutions, Pretoria v Mtshali* 2016 2 SACR 463 (GP) at 470g.
834 Section 276(1) of the CPA.
835 Ashworth *Sentencing and Criminal Justice* 38.

> challenges sentencers as they attempt to meet the conflicting demands of each premise.[836]

One of the reasons why discretionary sentencing is a very complicated function is that courts must balance heterogeneous, complex, abstract, and often competing considerations in achieving the indefinable and equally abstract notion of justice.[837]

Based on these numerous factors, the court has to decide whether the offender must be removed from society, whether to impose a fine, and how much it should be, and whether to suspend the sentence of the offender wholly or in part. The court has, therefore, a broad discretion to arrive at a proper sentence within the consideration of whether it should be an individualised sentence or a sentence that matches those determined in similar cases.

In *Dawood v Minister of Home Affairs; Salabia v Minister of Home Affairs; Thomas v Minister of Home Affairs* the court said:

> Moreover, if broad discretionary powers contain no express constraints, those who are affected by the exercise of the broad discretionary powers will not know what is relevant to the exercise of those powers or what circumstances they are entitled to seek from an adverse decision.[838]

The exercise of a broad discretion in the imposition of a sentence poses a problem for convicted offenders and society as a whole, because offenders may not know how the court has arrived at a particular sentence based on its nature and extent. Nevertheless, the Constitutional Court stated that:

> Discretion plays a crucial role in any legal system. It permits abstract and general rules to be applied to specific and particular circumstances in a fair manner. The scope of discretionary powers may vary. At times, they will be broad, particularly where the factors relevant to a decision are so numerous and varied that it is inappropriate or impossible for the legislature to identify them in advance. Discretionary powers may also be broadly formulated where the factors relevant to the exercise of the discretionary power are indisputably clear. A further situation may arise where the decision-maker is possessed of expertise relevant to the decision to be made.[839]

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836 Krasnostein and Freiberg *Pursuing Consistency in an Individualist Sentencing Framework: If You Know Where You're Going, How do You Know When You've Got There?* 265.

837 *S v Kibido* 1998 2 SACR 213 (SCA) at 216g-h.

838 2003 3 SA 936 (CC) at para 47.

839 The *Dawood* case at para 53.

Courts derive their sentencing discretion from sentencing legislation, and the tribunals are empowered to exercise their sentencing discretion judiciously within the realm of the law. In essence, the exercise of sentencing discretion is lawful, irrespective of the kind of sentence a court imposes, as long as that sentence is within the sentencing jurisdiction of the tribunal and the confines of the sentencing legislation.[840]

To this end, the State has an affirmative constitutional obligation towards its citizens to eradicate inequalities where they exist.[841] The State may intervene legislatively, or use other measures to promote equality.[842] It is therefore within the power, scope and functions of the legislature to modify the discretion of the courts in a manner that will promote consistency in sentencing, given the reality that cases are unique and require individualised justice.[843]

The need arises because presiding officers are only human, and will analyse a case consistently with their personal beliefs and experiences.[844] This view is expressed in greater detail as follows:

> Sentencing is not a rational mechanical process, it is a human process and subject to all the frailties of the human mind. A wide variety of factors, including the Judge's background, experience, social values, moral outlook, penal philosophy and views as to the merits or demerits of a particular penalty influence the sentencing decision.[845]

To address the high rate of serious crime and to bring about parity in sentencing for serious offences, the South African government enacted the CLAA, which was introduced on a temporary basis and later became permanent. See Chapter Four of this thesis, under paragraph 4.8 for a further discussion.

One way of structuring discretionary sentencing was the introduction of mandatory minimum sentences for particular offences in New Zealand,[846] Western Australia, the Northern Territory, New South Wales, Queensland, and Victoria.[847] A discussion of

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840 Rosenberg *Judicial Discretion of the Trial Court, Viewed from Above* 637.
841 Section 9(1) of the Constitution.
842 Section 9(2) of the Constitution.
843 Von Hirsch, Ashworth and Roberts *Principled Sentencing: Reading on Theory and Policy* 229.
844 Mallet *Judicial Discretion in Sentencing: A Justice System that is no longer Just?* 542.
845 Hall *Sentencing Law and Practice* [2.1].
846 Roche *Mandatory Sentencing* (1999) 138 Trends and Issues in Crime and Criminal Justice 1.
847 Roth *Mandatory Sentencing Laws* (NSW Parliamentary Research Service, Jan 2014), http://

guideline judgments and sentencing guidelines as alternative mechanisms in structuring discretionary sentencing follows in Chapters 4, 5 and 6 of this thesis.

3.10 Summary and conclusion

Discretionary sentencing proves to be a complicated function of courts and makes it difficult for them to provide similar treatment for similar cases. It is an issue requiring thorough consideration in the light of the constitutional imperative that places a high premium on equal justice in sentencing. The primary functions of the moral and legal principles are to ensure that courts have a more significant potential to impose appropriate sentences. The legislatively provided discretion in sentencing in criminal courts is not conducive to the promotion of equality and consistency in sentencing. Legislative interventions and other measure are needed to police the manner in which courts exercise their sentencing discretion.

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www.parliament.nsw.gov.au/prod/parlment/publications.nsf/key/Mandatorysentencinglaws/$File/mandatory+sentencing+laws.pdf.

CHAPTER 4

TECHNIQUES TO STRUCTURE SENTENCING DISCRETION

4 Introduction

This chapter introduces the reader to the different methods available in the sentencing system to intervene in the inappropriate sentencing processes of trial courts, as well as legislative interventions that structure the exercise of sentencing discretion. The techniques that structure sentencing discretion number four in total. They are judicial self-regulation, statutory sentencing principles, numerical guidelines, and mandatory minimum sentences.[848]

4.1 Judicial self-regulation

Judicial self-regulation occurs where the judiciary itself structures the exercise of its sentencing discretion through the appeal and review processes.[849] The CPA authorises the superior courts to interfere with inappropriate sentences and replace them with penalties they deem fit.[850] The judicial self-regulation processes[851] regulate the exercise of the sentencing discretion of the courts below on application, noting that some matters are subject to automatic review.[852] Appeal and review procedures are not automated processes which apply after the imposition of a sentence. Automatic review processes are available only in cases where certain circumstances exist which qualify matters as the subject of automatic review.[853]

Other instruments of judicial self-regulation are guideline judgments utilised in England[854] and Australia.[855] South Africa uses previously decided cases to guide courts to structure their sentencing discretion in line with the sentences previously

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848 Ashworth "Four techniques in reducing sentencing disparity" in Von Hirsch and Ashworth (eds) *Principled sentencing* 227-239.

849 Terblanche *Guide to sentencing in South Africa* 130.

850 Sections 302-314 Reviews and Appeals in Cases of Criminal Proceedings in Lower Courts and Sections 315-324 Appeals in Cases of Criminal Proceedings in Superior Courts.

851 Section 304(2) read with section 309(3) CPA. Section 1 of *the Superior Courts Act* 10 of 2013 regulates appeals from the high courts to the Supreme Court of Appeal.

852 Section 302(1) of the CPA.

853 Section 302 of the CPA.

854 Ashworth *Sentencing and criminal justice* 38.

855 Terblanche *Guide to sentencing in South Africa* 131.

imposed for specific offences, but courts are not obliged to follow them where the circumstances of a case differ from those before the court.[856]

4.1.1 Appeal and review

The CPA establishes an elaborate statutory framework that deals with review and appeal procedures. The methods include the framing of administrative rules which the applicants are required to comply with excluding those cases that are subject to automatic review. The legislation empowers the review or appeal tribunal to interfere with a sentence where the court did not exercise its discretion properly, by replacing the imposed sentence with one of its own.[857]

4.1.2 The available remedies

The appeal and review procedures are distinct from one another. They serve different purposes and are not mutual alternatives.[858] Applicants follow the appeal procedures if they are dissatisfied with the conviction and sentence, and review is for cases that relate to an irregularity in the process during the criminal trial.[859] Superior courts can also consider cases when the lower court declines to exercise the function entrusted to it.[860] In appeal matters, the applicant must adhere to specific time frames, whereas reasonableness regulates review issues.[861] The reviewing court has the powers to set aside or to remit the case back to the trial court and to impose stringent conditions to a sentence.[862] An appeal court can interfere with a sentence of the tribunal of the first instance only if the penalty is "shocking", "startling" or "disturbingly inappropriate".[863]

856 The *Fraser* case at 863C.
857 The *Bogaards* case at para 41.
858 *S v Khumalo* 2009 1 SACR 503 (T).
859 Du Toit *Commentary* 30-1.
860 *S v Bushebi* 1996 2 SACR 448 (NmS) at 450c-g.
861 *R v Mbokazi* 1958 3 SA 742 (N)
862 *S v November* 2006 1 SACR 213 (C) 219e-f.
863 The *Madiba* case at para 10.

4.2 Sentences subject to automatic review

The automatic review procedure is a remedy available in the South African criminal justice system,[864] with the primary purpose of addressing the high percentage of undefended accused in the lower courts who receive relatively severe sentences.[865] Unsophisticated, undefended offenders may suffer grave prejudice, especially in cases of a serious nature, where a term of imprisonment is the more likely form of punishment.[866] The primary purpose of the procedure is to ensure the validity and fairness of the convictions and sentences, in particular of categories of lower-court proceedings.[867] The courts dealing with cases on automatic review have the powers to investigate irregularities, and may also devote attention to all matters that are subject to appeal.[868] Convicted offenders do not apply in cases subject to automatic review to have their cases considered by higher courts. Their cases come before the reviewing court by way of the operation of law.[869]

4.2.1 Section 302 of the CPA

There are specific requirements for sentences that are the subject of automatic review. In a case of imprisonment, if the penalty is more than three months, and imposed by a magistrate who has held the substantive rank of a district court judicial officer for less than seven years, this sentence will be taken on automatic review.[870] The same process applies if the imprisonment exceeds six months and is imposed by a magistrate of the district court with seven years or more experience as a district court judicial officer.[871] The suspension of some of the sentence does not affect the threshold determining whether the sentence is the subject of automatic review.[872] Any interruptions in the career of the magistrate relating to his years of experience

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864 *S v Mboyany* 1978 2 SA 927 (T).

865 *S v Mafikokoane; S v Mokhuane* 1991 1 SACR 597 (O) at 598j-600c.

866 *S v Radebe; S v Mbonani* 1988 1 SA 191 (T) at 195B.

867 *S v Mokubung; S v Lesibo* 1983 2 SA 710 (O) 714.

868 *S v G* 1990 2 SA 22 (T) 26H; Kriegler & Kruger *Hiemstra Suid-Afrikaanse Strafproses* (2002) 799.

869 Section 302 of the CPA.

870 Section 302(1)(a)(i) CPA including detention in a child and youth care centre providing a programme contemplated in section 191(2)(j) of the *Children's Act* 32 of 2005.

871 Section 302(1)(a)(i) of the CPA.

872 *S v Mathebola* 1984 4 SA 113 (T) 117B.

in the calculations of the length of his experience do not affect the period of his experience for these provisions.[873]

The procedure applies if the penalty exceeds the amount of R6000.00 and is imposed by a district court judicial officer, who has held the substantive rank of a district court magistrate for less than seven years. The same also applies if the fine is more than R12000.00 and imposed by a district court judicial officer who has held the substantive rank of a district court judicial officer for seven years or more.[874] If the punishment imposed with an alternative of imprisonment and the court suspended part of the sentence, this does not influence the fact that the penalty is reviewable.[875]

A precondition for a sentence to be subject to automatic review is that the accused must not have had legal representation at the trial,[876] which includes the sentencing stage.[877] Where offenders had legal counsel, the sentence is not subject to automatic review, irrespective of the nature and severity of the punishment.[878] Matters that are the subject of automatic review differ from appeal cases in that the review tribunal has no power to increase the offender's sentence.[879] The reviewing court has broad discretion in matters where a court imposed an incompetent sentence. An example of this would be where legislation directs the court to impose a fine coupled with imprisonment and not one of the two types of sentences alone when the court convicts an offender solely on his or her simple plea of guilty.[880] The second exclusionary rule exists where a sentence is the subject of the pending outcome of an appeal matter.[881]

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873 *S v Nxumalo* 2006 1 SACR 1 (N) 2g-3b.
874 Section 302(1)(ii) of the CPA; Government Gazette 36111 30 January 2013.
875 *S v Melani* 1991 2 SACR 611 (NC) 613d.
876 Section 302(3) of the CPA.
877 The *Mboyany* case at 930D-F
878 Section 302(3)(a) of the CPA.
879 The *November* case at 219e-f.
880 Section 112(1)(a)(ii) CPA and the cases of *S v Tolmay* 1980 1 SA 182 (NC) and *S v Sharp* 2002 1 SACR 360 (Ck) 370i.
881 Section 302(1)(a) of the CPA.

The automatic review is a conventional post-sentencing process in the lower courts of South Africa.[882] For that reason, it is an efficient technique by means of which to interfere with the manner in which trial courts exercise their sentencing discretion. There is a danger, though, that specific practices could prevent penalties from becoming the subject of automatic review. It would be the case where sentences imposed below the threshold that relates to a term of imprisonment and some fines connected to the substantive rank of the magistrate.

Secondly, if an undefended offender is convicted, but asks for legal representation at the sentencing stage, that this will place whichever sentence imposed out of the purview of the automatic review procedure.[883] Thirdly, legal aid attorneys are now to be found all over South Africa, minimising the likelihood that matters will go undefended, and therefore be subject to automatic review.[884] The right to legal representation is deeply embedded in the South African criminal justice system, and finds rigorous application in courts.[885] This makes it unlikely that offenders will appear undefended in criminal trials.

4.2.2 Section 85 of the Child Justice Act 75 of 2008

The CJA creates a right of automatic review for children under the age of 16 years during the commission of an offence.[886] Where an offender was 16 years old or older, but under the age of 18 years at the date of the crime; and the sentence is a term of imprisonment not wholly suspended or a term of compulsory residence in a Youth Centre, the case is subject to automatic review.[887] This is so irrespective of whether the offender had legal representation at the trial or not.[888] Where the court imposed a wholly suspended sentence[889] in circumstances where the offender had legal representation, such a sentence is not the subject of automatic review.[890] If the

882 Terblanche *Guide to sentencing in South Africa* 408.
883 The *Mboyany* case.
884 Holness *Coordinating Free Legal Service in Civil Matters for Improved Access to Justice for Indigent People in South Africa* 6.
885 The *S v GR* case at 82d-j – 83a-i.
886 Section 85(1)(a) of the CJA.
887 Section 85(1)(b) of the CJA.
888 *S v LM* 2013 1 SACR 188 (WCC) at paras 37-42.
889 Section 78 of the CJA.
890 Section 85(1)(b) of the CJA see the *S v LM* case at para 46.

child is still under 18 years when a suspended sentence becomes operational after a breach of the conditions of suspension, the term of imprisonment is reviewable.[891]

There are conflicting decisions on the reviewability of penalties imposed on children where there was legal representation. One school of thought is that in cases where a child had legal representation during the trial, the sentence is subject to automatic review.[892] Another school of thought is that if a child had legal representation that case is not subject to automatic review.[893]

The procedure is a fair and just method to guard against children exposed to wrongful conviction and sentences. The sentencing discretion of courts is consistently under scrutiny in cases involving children.

4.2.3 Section 304(4) special review procedures

These procedures are available to both the offender and the State if any of the parties are aggrieved about the process followed by the court in the imposition of a sentence. Section 304(4) of the CPA provides:

> If in any criminal case in which a magistrate's court has imposed a sentence which is not subject to review in the ordinary course in terms of section 302 or in which a regional court has imposed any sentence, it is brought to the notice of the provincial or local division having jurisdiction or any judge thereof that the proceedings were not in accordance with justice, such court or judge shall have the same powers in respect of such proceedings as if the record thereof had been laid before such court in terms of section 303 or this section.

The courts are quick to warn that the provisions of section 304(4) are not designed to entertain a "cheap alternative" to an appeal.[894] A magistrate who approaches the high court under the provisions of section 304(4) should at least explicitly submit that the proceedings were not procedurally or substantively fair.[895] The High Court entertains reviews under this provision only if the irregularities are a threat to the administration of justice - for example, where a magistrate's court failed to deal with

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891 The *S v LM* case at para 51.

892 *S v FM* 2013 1 SACR 57 (GNP) full court, *S v CS* 2012 1 SACR 595 (ECP) and *S v Fortuin* (NCK) (unreported) case number 38/2011 11 November 2011.

893 *S v Nakedi* (NWM) (unreported) case number 12/2011 2 January 2012, *S v TS* 2013 2 SACR 92 (FB), but *S v TS* was overruled by *S v Sekoere* 2013 2 SACR 426 (FB) at paras 28.2 and 30.

894 *S v Singh* 2013 2 SACR 372 (KZD).

895 *S v De Wee* 2006 1 SACR 210 (NC) 212d-e.

an accused as a child under the provisions of the CJA.[896] The rules give the superior courts broader scope to interfere with the sentencing discretion of trial courts.

Magistrates have used the procedures prescribed in section 304(4) because an error occurred which could no longer be rectified by them because they are *functus officio*.[897] For example, the offender is convicted and sentenced in a case where the charges neither created an offence nor punishment for the conduct from which the conviction flowed.[898] The special review procedures are also used to intervene in matters where, for instance, a competent sentence imposed by a trial court cannot be executed, and the reviewing court is asked to give direction as to how the court of the first instance must deal with the matter.[899]

High courts will not hesitate to use their review powers *mero motu* in cases where the proceedings disclose a failure of justice,[900] or in cases where there was an appeal against the convictions but the sentences imposed reveal a failure of justice.[901] Courts have the power not only to interfere with a sentence, but may set aside the conviction as well.[902]

Section 304(4) procedures are frequently utilised to set aside incompetent sentences. An example would be where offenders are convicted solely on the basis of their bare pleas,[903] as provided for in section 112(1)(a).[904] Section 112(1)(a) prescribes that the court should impose a sentence of a fine coupled with imprisonment, and not a prison term or fine on its own. The "special review" procedure is not automatic. The reliance thereon depends on the vigilance of a court and other parties involved in such matters. For these reasons, "special review" matters may come before the review courts while the offender serves a sentence.[905]

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896 *S v Gxaleka* 2013 SACR 399 (ECB).
897 *R v Van Greunen* 1939 TPD 167; *S v Hlongwane* 1990 1 SACR 310 (NC)
898 *S v Williams* (WCC) (unreported) case number C512/2011 para 5.
899 *S v Mahlangu* 2000 2 SACR 210 (T) at 211e.
900 *Brandfort Garage v R* 1954 2 PH H162.
901 *S v Nel* 1987 4 SA 950 (W).
902 *S v Rothman* 1990 1 SACR 170 (O).
903 *S v Cedars* 2010 1 SACR 75 (GNP) at 77b-e.
904 CPA.
905 The *Dandiso, Matiwnae* and *Baartman* cases.

4.2.4 Superior Courts Act 10 of 2013

Section 19(1)(a)(ii) of the *Superior Courts Act* 10 of 2013 empowers superior courts to review any proceedings of an inferior court on a variety of grounds. Firstly, the high court may review the lower court's proceedings because the inferior court did not have jurisdiction to hear the matter. Secondly, the superior tribunal may review the procedures because the presiding officer was for some reason not impartial during the adjudication of the trial. Thirdly, the superior tribunal may consider the procedures because a gross irregularity occurred, due to the admission of inadmissible evidence, or because the admissible evidence was not accepted, as provided for in section 24(1) of the *Superior Courts Act*. These grounds can be used to attack the imposition of a sentence as a part of the proceedings that are reviewable.[906]

4.2.5 Section 173 of the Constitution

The Constitution empowers the Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa to protect and regulate their processes and to develop the common law.[907] Thus, these provisions were used in the case of *Parbhoo v Getz* 1997 4 SA 1095 (CC) to meet an extraordinary procedural situation. However, it was held in *Phillips v NDPP* 2006 1 SACR 78 (CC) that the provisions cannot be used merely to ignore an Act of Parliament that is in place to regulate a particular position.[908]

4.3 Review and appeal processes as techniques to interfere with a court's sentencing discretion

Chapters 30 and 31 of the CPA provide a variety of appeal procedures for convicted and sentenced offenders. The level of the court where the offender was convicted and sentenced determines the level of the tribunal that will hear the appeal.[909]

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906 Du Toit *Straf* 423.

907 Section 173.

908 At para 51.

909 Section 309(1) of the CPA.

4.3.1 An appeal against a sentence imposed by chiefs and headmen

Chiefs and headmen are empowered to conduct trials and upon conviction punish persons to pay an amount of penalty which is not more than R100,[910] and such a person is entitled to appeal such a conviction and sentence to the magistrate's court.[911] The magistrates' court has the powers to hear appeal matters from chiefs and headmen.[912] The court may hear and record available evidence which may be relevant to any question in issue. A court of a chief or headman is not a court of record, with the result that during the appeal hearing in the magistrate's court, the court may hear evidence.[913] The magistrates' court may confirm the sentence imposed, set aside the sentence, and impose a penalty of imprisonment not exceeding three months with or without the option of a fine.[914] The magistrate's court may also set aside the conviction and sentence.[915]

4.3.2 An appeal from a sentence imposed by a lower court

The superior court has the power to hear appeals from sentences imposed by a lower tribunal.[916] Ordinarily, an application for leave to appeal is required, except for persons sentenced to life imprisonment by a regional court.[917]

Typically, if the request for permission to appeal is not successful in the regional court and lower court, the accused may petition the Judge President of the high court having jurisdiction to apply for condonation, for further evidence, or for leave to appeal.[918] The Director of Public Prosecutions may also appeal against the sentence of a lower court,[919] or to the Supreme Court of Appeal.[920]

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910 Section 20(2) *Black Administration Act* 38 of 1927.

911 Section 20(6) *Black Administration Act* 38 of 1927 as amended by section 2 of *Act* 34 of 1996.

912 Section 309A(1) of the CPA.

913 Terblanche Guide to Sentencing in South Africa 409.

914 Section 309A(1)(a)(i)-(iv) of the CPA.

915 Section 309A(2) of the CPA.

916 Section 309(1)(a) of the CPA.

917 Section 309B, also see section 309(1)(a) as amended by section 10 (and read with section 309B(1)(a) as amended by section 11) of the *Judicial Matters Amendment Act* 42 of 2013, which came into operation on 22 January 2014; GG37254 of 22 January 2014.

918 Section 309C of the CPA.

919 Section 310A of the CPA.

920 Section 311 of the CPA.

4.3.3 An appeal from a sentence imposed by a superior court

An accused convicted in the High Court of any offence may apply to that court for leave to appeal against such a conviction or any resultant sentence or order.[921] If the application is not successful, the accused may petition the Judge President of the Supreme Court of Appeal for leave to appeal.[922]

4.3.4 Appeals by the prosecution

The CPA outlines the powers of the prosecution to appeal from a lower court against a decision on a question of law.[923] The Director of Public Prosecutions is entitled to appeal against any sentence from any court.[924] Leave to appeal must be granted by a judge in chambers[925] or by the presiding judge.[926] In respect of a penalty of the lower court, the offender requires permission to appeal from the High Court. The prosecutor should require the presiding magistrate to state a case, after which he will decide whether to prosecute the appeal or not.[927] The CPA does not provide a procedure for an appeal by the Director of Public Prosecutions for an order made in the High Court replacing a sentence imposed by a magistrate's court.[928]

4.4 Powers of the court of review or appeal

The high courts have statutory powers to interfere with sentences from appeals from the magistrates' courts to the high court.[929] The *Superior Courts Act* 10 of 2013 regulates further appeals from the superior courts.[930] The review and appeal courts have the powers to confirm a sentence[931] if there are no sufficient reasons to interfere with the penalty or order. The appeal court, comprising three high court judges that sit as a court of appeal, dealing with an appeal from the sentencing

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921 Section 316(1)(a) of the CPA.
922 Section 316(8)(a) of the CPA.
923 Section 310(1).
924 Section 310A of the CPA.
925 Section 310A(1) of the CPA.
926 Section 316B(2) read with 316(1)(b) of the CPA.
927 Section 301(1) and (2) of the CPA.
928 *Director of Public Prosecutions v Olivier* 2006 1 SACR 380 (SCA) at para 18.
929 Sections 304(2) and 309(3) of the CPA.
930 Section 1.
931 *Gasa v Regional Magistrate* 1979 4 SA 729 (N) at 732A-B.

judgment of a single judge, has the power to increase the sentence.[932] Secondly, it can set aside the sentence and replace it with an amended or reduced sentence, or remit it to the trial court with instructions on how the court of the first instance should deal with the matter further.[933] In the case of appeals only, appeal courts may increase the sentence.[934] In automatic review cases, courts may not make the sentence more onerous on the accused, whether through a more severe punishment or more difficult conditions of suspension.[935]

4.4.1 Powers to interfere with a sentence

The South African law expects a court of appeal or review not simply to replace the sentence imposed by a trial court with its own.[936] The imposition of a sentence is pre-eminently the function of the sentencing court.[937] The appeal and review tribunals interfere with the imposed sentence only if there are cogent reasons to interfere[938] and the court of the first instance exercised its sentencing discretion improperly or unreasonably.[939] The improper or unreasonable exercise of a sentencing discretion occurs where a court committed a misdirection that relates to the determining or applying of the facts for assessing the appropriate sentence.[940]

The misdirection may lead to penalties being inappropriate.[941] Misdirection occurs where the trial court overemphasises the offence and underemphasises the personal circumstances of the offender,[942] or vice versa. The unreasonableness of the exercise of sentencing discretion takes place where the appeal or review court finds convincing reasons why the trial court

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932 *S v Ndzima* 2010 2 SACR 501 (ECG) at para 10.
933 Sections 304(2)(c), 309(3) and 322 of the CPA.
934 Sections 309(3) and 322 of the CPA.
935 The *November* case at para 16.
936 The *Matlala* case at 83.
937 The *Mapumulo* case at 57.
938 The *Pieters* case at 728B-C.
939 The *Pieters* case 727H-728A.
940 The *Pillay* case at 535E
941 The *Malgas* case 478i-j and 479a.
942 The *Zinn* case at 540F-G.

ought not reasonably have imposed the sentence it did.[943] The tribunals have developed some tests to determine the reasonableness of a sentence. A penalty is unreasonable if it "induce[s] a sense of shock"[944] or is "startlingly (manifestly) inappropriate";[945] or if there is a "striking (patent) disparity" between the imposed sentence and the one that would have imposed by the appeal or review court.[946,947] The review and appeal courts would not interfere with a sentence if the trial court exercised its sentencing discretion reasonably and correctly.[948]

The formulation of the fundamental principle to test the reasonableness to interfere with a penalty of a tribunal of the first instance is whether or not the sentence is "startling" or "disturbingly" inappropriate.[949]

4.4.2 An increase of sentence

Previously, the power of a court of appeal to increase a sentence was not limited to appeals against a sentence which was imposed by a trial court. The court of appeal might interfere with the sentence, irrespective of whether the appeal was only on the conviction or not.[950] However, the Constitutional Court considered it improper to increase a sentence based on the State's request in an argument where an accused person had appealed against the conviction only.[951] As the Supreme Court of Appeal lacks jurisdiction to increase the sentence of a trial court, there could be no appeal by the State against the penalty.[952]

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943 The *Pieters* case at 734E.
944 The *Shikunga* case at 486d.
945 The *Shikunga* case at 486d.
946 *S v Birkenfield* 2000 1 SACR 325 (SCA) at para 8.
947 The *Pieters* case at 733E-G.
948 Kruger *Hiemstra's Criminal procedure* 30-50.
949 *S v L* 1998 1 SACR 463 (SCA) at 469a and the *Kibido* case.
950 *S v F* 1983 1 SA 747 (O) at 753G-H.
951 *S v Nabolisa* 2013 2 SACR 221 (CC) at para 73.
952 The *Nabolisa* case at paras 64, 82-83 (previous citation in SCA *S v Cwele* 2013 1 SACR 478 (SCA).

Appeal courts have, on numerous occasions, increased the sentences of offenders, for example, where the trial court had overestimated the personal circumstances of the accused, and underestimated the gravity of an offence committed under the influence of racism.[953] The Supreme Court of Appeal did the same where the Court replaced a suspended sentence of imprisonment with one of direct imprisonment, in circumstances, a suspended term of imprisonment was held to be inappropriate and contrary to the interests of justice.[954]

Where the court that is due to an appeal is *prima facie* of the view that there is a prospect that the appeal court may increase the sentence on appeal, High Courts have adopted a practice of notifying the appellant that such an increase may eventuate.[955] The accused person's right to withdraw his appeal is limited to create a balance between the right of an appellant to a fair trial and the duty of the court to ensure that sentences are appropriate.[956]

4.4.3 A reduction of sentence

The approach to a possible reduction of a trial court's sentence is identical to that when an appeal court considers increasing a sentence.[957] Appeal courts will be cautious to reduce a sentence that was properly imposed, save in exceptional circumstances where the interest of justice requires it.[958] The appeal tribunal will consider what the appropriate punishment ought to be and compare it with the sentence the trial court imposed. If the difference between the two sentences is great and the appeal court draws the inference that the trial court acted unreasonably, then the appeal court will interfere with the penalty.[959] The appeal court notes the difference as a striking

953 *S v Salzwedel* 1999 2 SACR 586 (SCA) at 591h-i.
954 The *Sadler* case.
955 *S v Sonday* 1994 2 SACR 810 (C) at 817c-e.
956 The *Bogaards* case at para 57.
957 *S v De Vos* 1970 2 SA 590 (C) at 591C.
958 *R v Ramanka* 1949 1 SA 417 (A) at 419-420.
959 The *S v L* case at 468f-g.

difference or disparity.[960] For example, a sentence of life imprisonment may be imposed, with all its disadvantages, although the court of appeal regards imprisonment for 10 years as the maximum appropriate punishment.[961] A sentence may also be reduced in circumstances where the appeal tribunal is of the view that the penalty appealed against is grossly disproportionate to the offence itself.[962]

4.4.4 The hearing of further evidence

The court of appeal can itself hear further evidence on appeal,[963] or remit the matter to the court *a quo* with directions regarding the hearing of further evidence.[964] The hearing of evidence at the appeal tribunal for sentencing purposes is rare. The general rule is set out in *S v Immelman* 1978 3 SA 726 (A), where the Court stated that:

> The general rule is that this Court must decide the question of sentence according to the facts in existence at the time when the sentence was imposed and not according to new circumstances which came into existence afterwards and, even if there are exceptions to this rule, this case does not appear to constitute such exception.[965]

The accused must adduce evidence in mitigation during the trial. Appeal courts are not inclined to allow further evidence at the appeal tribunal if the offender was negligent, based on *mala fides* and unnecessary denials.[966]

The appeal court permits further evidence in exceptional circumstances where the offender must meet the following prerequisites:

(a) there should be some reasonable sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial;
(b) there should be a *prima facie* likelihood of the truth of the evidence; and

960 *S v Michele* 2010 1 SACR 131 (SCA) at para 11.
961 *S v Masala* 1968 3 SA 212 (A) at 214H.
962 *S v Fhetani* 2007 2 SACR 590 (SCA) at para 5.
963 Section 304(2)(b) of the CPA.
964 Section 304(2)(c)(v) of the CPA.
965 At 730H.
966 The *Andhee* case at 423e-f.

(c) the evidence should be materially relevant to the outcome of the trial.[967]

Facts that have become known after the trial court imposes the sentence are allowed; for example, if the offender's HIV-status becomes known after the trial court imposed the sentence.[968] Another example occurred in S v Barnard, in circumstances where the offender made full payment of the money stolen from the employer after a successful appeal to the Transvaal Provincial Division, but before his appeal to the Supreme Court of Appeal.[969] The primary consideration is that the appellate court is entitled to consider all available sentencing options at the time of imposing its sentence, even if these choices differ from those offered at the date of sentencing in the trial court.[970]

4.5 Guideline judgments

Empirical research shows that the exercise of broad sentencing discretion directly correlates with unwarranted sentencing disparities for similar offences.[971] These variations occur due to the subjective nature of discretionary sentencing; each court is entitled to impose its sentence.[972] In South Africa, no data exist on the number of sentences imposed for convicted offenders,[973] it is therefore not possible to determine the magnitude of consistent or inconsistent sentences are imposed for similarly positioned offenders. One of the remedial measures taken by foreign jurisdictions such as England,[974] Canada,[975] and New Zealand[976] is guideline judgments, the purpose of which is to promote the right to equality in sentencing by elevating the principle of consistency, while respecting the importance of individualisation.

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967 *S v De Jager* 1965 2 SA 612 (A) at 613C-D.

968 *S v Magida* 2005 2 SACR 591 (SCA).

969 *S v Barnard* 2004 1 SACR 191 (SCA) at para 19.

970 *Prokureur-Generaal, Noord-Kaap v Hart* 1990 1 SA 49 (A).

971 Kramer and Ulmer *Sentencing Guidelines: Lessons from Pennsylvania* 114.

972 Homel and Lawrence *Sentence Orientation and Case Details: An Interactive Analysis* 534.

973 Terblanche *Guide to sentencing in South Africa* 1.

974 Ashworth and Roberts *Origins and Nature of the Sentencing Guidelines in England and Wales* 1-11.

975 Roberts *Structuring Sentencing in Canada, England and Wales: A Tale of Two Jurisdictions Criminal Law Reform* 319-45.

976 Young and King *The Origins and Evolution of Sentencing Guidelines* 202-16.

4.5.1 Definition

Appellate courts draft guidelines judgments when they formulate general rules to guide trial courts by structuring the sentencing discretion of tribunals for specific crimes.[977] It is also described as a decision containing the general parameters for several variations of a particular type of the offence containing the main aggravating and mitigating factors, and suggesting an appropriate starting point or range of sentence.[978] The technique contributes immensely to the reduction of inconsistencies I sentences if utilised optimally by the courts. Countries like England and to a certain extent, Australia, use guideline judgments.[979] In South Africa, guideline recommendations remain *obiter dicta*. The Supreme Court of Appeal refuses to impose a similar sentence for a similar offence of a previous judgment of that court.[980]

4.5.2 Guideline judgments in England

The English Court of Appeal has been handing down guideline sentences since the -1970s initiated by the Lord Justice Lawton and further developed by Lord Chief Justice Lane.[981] The English guideline judgment model sets a tariff and differentiates among, and analyses different factors relevant to the offence, which may have an upward or downward movement effect on the sentence.[982] The guideline would provide starting points for sentences for particular sub-categories of the particular crime, where drivers caused death while racing on highways, or where they were found to be driving recklessly after taking alcohol or drugs. Such offenders could expect two years' imprisonment or more, and to be disqualified from driving for an extensive period of time.[983]

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977 Ashworth *Four Techniques for Reducing Disparity* 228-229.
978 Ashworth *Sentencing and criminal justice* 38.
979 Terblanche *Guide to sentencing in South Africa* 131.
980 The *Bailey* case.
981 Spigelman *Sentencing Guideline Judgments Address to the National Conference of District and County Judges* 11.
982 Ashworth *Techniques of Guidance on Sentencing* 518.
983 *R v Boswell* (1984) 6 Cr App R (S) 257 at 261.

The Court of Appeal in England stressed that the existence of a guideline judgment did not deprive the trial court of its sentencing discretion where it stated:

> But the sentencer retains his discretion within the guidelines, or may even depart from them if the particular circumstances of the case justify departure.[984]

Sentencing courts must still determine appropriate sentences by considering the merits of a case.[985] The influence of guideline judgments has been substantial, and contributes successfully to reducing disparities in sentences for specific offences where they were relevant.[986] The synergies and values of:

> [g]uideline judgements are an innovation of which the senior judiciary can be proud. They show how guidance can be fashioned, in a judge-friendly way, based on experience, and shaping discretion without constraining it too tightly. It might also be claimed that guideline judgements are capable of changing judicial sentencing practices… although where there is a strong judicial culture, the guideline may be less than fully successful in altering sentencing practice.[987]

By implication, guideline judgments streamline the sentencing discretion of courts for particular offences in a particular direction, and reduce the imposition of inconsistent sentences for those crimes. Regardless of their tremendous value to sentencing, guideline sentences also have their deficiencies.

The system of appeals within the English sentencing system allowed the Court of Criminal Appeal to guide judges and magistrates about sentencing.[988] It has been a longstanding practice for the Court of Criminal Appeal in England to develop guideline judgments to assist courts dealing with serious offences that attracted long terms of imprisonment.[989] The guideline recommendations emphasised that the appropriate sentence was a matter for the discretion of the sentencing court, while they suggested guidelines for sentences dealing with a particular category of offence or a specific type of

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984 *R v de Havilland* [1983] 5 Cr App R (S) 109 at 114.
985 Ashworth *Sentencing and criminal justice* 31.
986 Ashworth *Four Techniques for Reducing Disparity* 229.
987 Terblanche *Guide to Sentencing in South Africa* 131.
988 The *Criminal Appeal Act* 1907.
989 Wasik *Sentencing Guidelines in England and Wales* 253-263.

offenders.[990] The court would set out the general parameters for dealing with variations of a particular kind of crime, considering aggravating and mitigating factors, and suggest an appropriate starting point or sentencing range.[991] The contextual notion of principled sentencing adopted a comprehensive and relatively binding set of guidelines.[992]

The Magistrates' Association initiated the production of sentencing guidelines for road traffic offences for lower courts during the 1980s.[993] The sentencing guidelines gave advice and guidance on sentencing matters for magistrates[994] and published in the year 2000.[995]

Elsewhere, in countries like Canada and New Zealand, guideline judgments were also developed, but the Victorian Sentencing Committee introduced binding guideline judgments, which were rejected by Parliament. The parliamentary opposition's support of a majority of Supreme Court judges was the result of the view that guideline sentences were not only unnecessary, but that they would unduly restrict discretionary sentencing.[996]

4.5.3 Guideline sentences in Western Australia

The enactment of legislative provisions for guideline recommendations was done in Western Australia and New South Wales in 1995[997] and 1998,[998] respectively.[999] Although having the powers to issue guideline

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990 The *De Havilland* case at 114.

991 Ashworth *Sentencing and Criminal Justice*.

992 Roberts *Structuring Sentencing in Canada* 319.

993 Wasik *Sentencing Guidelines in England and Wales* 253-263.

994 Ashworth *Sentencing and Criminal Justice* 74-5.

995 www.magistrates-association.gov.uk/publications/general_publication.htm [10 Dec 2002]. New Sentencing Guidelines (the 6th ed) implemented on 1 January 2004.

996 Fox and Freiberg *Sentencing; State and Federal Law in Victoria* 34.

997 The *Sentencing Act* 1995 (WA) section 143. The Western Australian Court of Criminal Appeal has thus far refused to give guideline judgments despite requests to do so.

998 The original legislative provision was contained in the *Criminal Procedure (Sentencing Guidelines) Act* 1998 (NSW), which inserted the provisions in the Criminal Procedure Act 1986 (NSW). This was later replaced by the *Crimes (Sentencing Procedure) Act* 1999 (NSW), Part 3 Division 4.

999 South Australia is also in the process of introducing such legislation, see *Criminal Law (Sentencing) Guidelines Amended Bill* 2002, which amends the *Criminal Law (Sentencing) Act* 1998, and allows the Full Court to give judgment establishing sentencing guidelines.

recommendations, the Western Australian Court of Criminal Appeal refused to release them on four occasions, as per the request of the prosecution. The refusal was a lack of experience in a new offence, a lack of error in the court below, the self-evident nature of the proposed guideline, the restrictive effect of directives, the inappropriateness of the proposed guidelines, and the high degree of factual variations possible. Guidelines had limited force and did not stand up to rigorous scrutiny.[1000] It was a clear opportunity missed by the court to seize an opportunity to formulate proper guidelines, which reflected "tensions" as to the very nature of sentencing decision-making, which was part of a judicial culture.[1001] The decision was also influenced by the introduction of sentencing matrix legislation in Western Australia for the first time.[1002]

4.5.4 Guideline judgments in New South Wales

The first guideline judgment used in Australia was used in New South Wales when the Court of Criminal Appeal delivered the landmark decision of *R v Jurisic* (1998 45 NSWLR (209), which dealt with dangerous driving occasioning grievous bodily harm. Most commentators welcomed the guideline judgment, albeit that some did so with reservation.[1003] Overall, guideline sentences were satisfactorily received by the public and trial judges in New South Wales,[1004] with reports that the courts applied the guideline judgments.[1005]

The New South Wales Court of Criminal Appeal has subsequently issued some other guideline recommendations. They are *R v Henry*[1006] armed robbery

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1000 Morgan and Murray *What's in a name? Guideline Judgment in Australia* 105.

1001 Morgan and Murray *What's in a name?* 105.

1002 Morgan and Murray *What's in a name* 106.

1003 Spears *Structuring Discretion: Sentencing in a Jurisic Age* 299-300, McWilliams *Sentencing Guidelines: Who Should be the Arbiter* 48, *Cowdery Guideline Sentencing:* 56, 61.

1004 Spigelman *Sentencing Guideline Judgments* 5.

1005 Cowdery *Guideline Sentencing* 56.

1006 (1999) 106 A Crim r. 149 for armed robbery offences.

offences, *R v Wong and Leung*[1007] drug trafficking offences, *R v Ponfield*[1008] breaking to gain entrance crimes, and *R v Thompson*[1009] for guilty pleas. In the case of *Jurisic,* the court said that guideline sentences are:

> … having a useful role to play in ensuring that an appropriate balance exists between the broad discretion that must be retained to ensure justice is done in each individual case, on the one hand, and the desirability of consistency in sentencing and the maintenance of public confidence in the sentences actually imposed, and in the judiciary as a whole, on the other.[1010]

The usefulness of guideline judgments in structuring sentencing discretion is that they are a "mechanism for structuring discretion, rather than restricting it".[1011] Guideline recommendations serve as relevant indicators or pointers, instead of binding courts in the formal sense.[1012] They operate on previous sentencing practices, where the court would highlight the principles of general application for particular offences, the original statements having in part the characteristics of guideline judgments.[1013] This made the guideline sentences nothing strange to the sentencing system, but an extension of previous practices.[1014]

The guideline recommendations took preference in New South Wales to legislative minimum sentences or sentencing grids, which would have had a more restrictive effect on the exercising of sentencing discretion.[1015] There was a strong recommendation from the New South Wales Law Reform Commission against legislative interventions in the limitation of sentencing discretion through the implementation of minimum sentences.[1016] Hence, the

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1007 (1999) 48 NSWLR 340 for drug trafficking offences. See, however, the decision of the High Court in *Wong v The Queen* [2001] HCA 64, (2001) 185 ALR 233, in which the decision of the NSW CCA was successfully appealed.

1008 [1999] NSWCCA 435

1009 [2000] NSWCCA 294, (2000) 115 A Crim R 104

1010 Mackenzi *Achieving Consistency in Sentencing* quoting from the *Jurisic* case at 86.

1011 The *Jurisic* case at 221.

1012 The *Jurisic* case at 220-221.

1013 The *Jurisic* case at 217-220.

1014 The *Jurisic* case at 217.

1015 Sigelman *Sentencing Guideline Judgments* 876.

1016 *NSWLRC Sentencing Discussion Paper No* 33 27 and NSWLRC Sentencing (Report No 79).

guideline judgments were adopted instead, on the initiative of the judges of the Court of Criminal Appeal.

The primary reasons for the Chief Justice to issue guideline recommendations were as follows. Firstly, this was a logical development building on previous practice. Secondly, past sentencing practices required re-evaluation against the backdrop of sentences being increased by the legislature. And thirdly, such judgments were an appropriate method of balancing the desire for consistency with the discretion required to accommodate the circumstances of individual cases.[1017] It was necessary to retain sufficient sentencing discretion, which meant that unwarranted restrictions in the exercise of sentencing discretion were unacceptable.[1018] Guideline judgments were a mechanism for structuring discretion, rather than for restricting choice.[1019]

The guideline recommendations are persuasive, and the appellate court expected an explanation for not following them in the sentencing remarks in the *Henry* case,[1020] but the failure to sentence by a guideline never constituted grounds for appeal. One of the features of the guideline judgments of New South Wales is that they are never intended to promote the same outcomes, and nor are they designed to support the same approach to sentencing, given what was said by the Court, that:

> [t]he existence of multiple objectives in sentencing – rehabilitation, denunciation and deterrence – permits individual judges to reflect quite different penal philosophies. This is a bad thing in a field in which 'the only golden rule is that there is no golden rule'.[1021]

This broad approach came in for adverse criticism, which effectively failed to promote consistency.[1022] It therefore seems that the court was in the invidious position of being criticised for not sufficiently constraining discretion,

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1017 Morgan and Murray *What's in a name?* 106.
1018 Morgan and Murray *What's in a name?* 106.
1019 The *Jurisic* case 221.
1020 At 357; also see *R v Romanic* [2000] NSWCCA 524 (28 November 2000) at para 16.
1021 The *Jurisic* case at 221, quoting from *R v Geddes* [1936] NSWStRp35; (1936) 36 SR (NSW) 554 at 555.
1022 Morgan and Murray *What's in a name?* 96.

and for constraining it too much.[1023] The quintessential is to keep sentencing practices within a broad but not infinitely large permissible range of variation.[1024]

The New South Wales guideline judgments received intense criticism in the case of *Wong v The Queen*.[1025] The Court's findings were that guideline recommendations were inappropriate because of incompatibility with the statutory scheme under the Customs Act (Cth) and section 16A of the Crimes Act (Cth).[1026] Further, the guideline judgment was too restrictive because it referred to only one consideration, namely the weight of the prohibited substance.[1027] The Court went further and made critical comments about guideline judgments in general in the following way:

> Again, for the reasons given earlier, there is an important distinction between a court articulating the principles which do, or should, underpin the determination of a particular sentence and the publication of the expected or intended results of future cases. Articulation of applicable principle is central to the exercise of jurisdiction in the particular matters before the court. By contrast, the publication of expected or intended results of future cases is not within the jurisdiction or the powers of the court.[1028]

It is in stark contrast to what Kirby J said about the intended purpose of guideline judgments:

> The court [in giving guidelines judgments] was clearly motivated by the laudable aim of removing the badge of unfairness, so far as that was possible and consistent with decisions made by judicial officers in a judicial proceeding. The purpose of 'guideline judgments' is to replace informal, private and unrevealed judicial means of ensuring consistency in sentencing with a publicly declared standard.[1029]

The two other dissenting views did not speak favourably about the future permanency of guideline sentences in New South Wales, because their formulation was problematic, and because of the lack of the presence of a

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1023 Zdenkowski *Limiting Sentencing Discretion: Has there been a Paradigm Shift* 66.
1024 The *Jurisic* case at 221.
1025 [2001] HCA 64, (2001) 185 ALR 233.
1026 The *Wong* case at para 31 (dissenting judgment).
1027 The *Wong* case at paras 67-78.
1028 MacKenzie *Achieving Consistency in Sentencing* quoting from *the Wong* case at para 83.
1029 MacKenzie *Achieving consistency in Sentencing* quoting from the *Wong* case at para 92.

contradictory.[1030] The Court did express support for guideline judgments provided that they remained guidelines and that the sentencing discretion of the court remained.[1031]

The comments of the Court brought about a reassessment of guideline recommendations,[1032] but subsequent New South Wales Court of Criminal Appeal decisions have affirmed the use of guideline sentences.[1033]

4.5.5 Guideline sentences in Victoria

The guideline recommendations of New South Wales were of practical utility and demonstrated their effectiveness in correcting sentencing practices to promote reasonably consistent outcomes.[1034] The Victorian Court of Appeal can hear an application by the Director of Public Prosecutions to issue guideline judgments.[1035] Upon hearing an appeal against sentence, the Court of Appeal may decide on its initiative, or if any of the parties to apply to give a guideline judgment setting out guidelines for sentencing generally or about a particular type of offender, court, offence, or penalty.[1036]

The court issued a guideline judgment primarily on community correction orders. It was a new sentence, with the potential to transform sentencing in Victoria.[1037] There was a need that sentencing courts be given as much guidance as possible about how a community correction order could serve the various purposes for which courts impose a given sentence.[1038] The Court mentioned the inherent difficulty of the sentencing task that involves balancing a range of conflicting purposes in formulating a punishment that adequately matches the particular facts of each case, and where the potential

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1030 The *Wong* case at para 165.
1031 The *Wong* case at para 168.
1032 Craigie *Guidelines Judgments Patched Up* 52.
1033 *R v Sharma* [2002] NSWCCA 142, and *R v Whyte* [2002] NSWCCA 343.
1034 Barnes and Poletti *Sentencing Trends for Armed Robbery and Robbery in Company*.
1035 *Nash v The Queen* [2013] VSCA 172 (1 July 2013) and *Ashdown v The Queen* [2011] VSCA 408 (7 December 2011).
1036 Sections 6AB and 6AA of the *Sentencing Act* 1991 (Vic).
1037 At paras 4 and 24.
1038 At para 4.

for inconsistency is particularly acute when a radically new sentencing option such as a community correction order becomes available.[1039]

4.5.6 The deficiencies of guideline judgments

Guideline sentences are generated slowly and are more reactive than proactive.[1040] The guidance they offer is piecemeal, which means that they cannot take a methodical, system-wide approach to reducing disparity.[1041] Because appeal courts deliver them, they are likely to concentrate on more serious offences that do not constitute the bulk of sentencing.[1042] This is an indication that the judiciary lacks the time, the resources, and arguably the mandate to undertake systemic policy reform.[1043] The judgments portions of the guideline recommendations are not binding but advisory, making them strictly *obiter dicta*.[1044] The guideline sentences are not entirely reliable as a source of authority, although the legislation does allow for a guideline judgment to be issued, even in the absence of a case.[1045] With regards to their practical application, they have met robust interventions by the High Court [1046] geared at limiting their impact, because they went too far in limiting discretion and by the government because they did not go far enough.[1047]

4.5.7 Guideline judgments in South Africa

In South Africa, the principle that sentencing discretion belongs to the sentencing court[1048] leaves little room to experience the value of guideline recommendations in sentencing, even in cases where guideline sentences or decided cases with similar facts are available. Rules that bind courts are

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1039 At paras 35-36.
1040 Fox *Controlling Sentencers Australia and New Zealand Journal of Criminology* 227.
1041 Krasnostein *Boulton v The Queen: The Resurrection of Guideline Judgments in Australia?* [2015] CICrimJust 10; (2015) 27(1) Current Issues in Criminal Justice 10.
1042 Young Sentencing Reform in New Zealand in A Freiberg and K Gelb, *Penal Populism, Sentencing Councils and Sentencing Policy* 182-3.
1043 The *Boulton* case.
1044 Ashworth *Sentencing and Criminal Justice* 36-7.
1045 Section 6AB (3) *Sentencing Act* 1991 (Vic).
1046 Freiberg and Sallmann *Courts of Appeal and Sentencing: Principles, Policy and Politics* 68.
1047 The *Boulton* case.
1048 The *Mapumulo* case at 57.

deemed to be out of place in the field of sentencing.[1049] Every case should be dealt with on the basis of facts,[1050] because no two cases are the same.[1051] Hence, the courts view it as an "idle exercise" to try to match the facts of one instance with those of another.[1052] In one case, the court regarded it as pointless to compare cases,[1053] because cases do not have the same merits.[1054]

Courts can use decided cases if they exercise great caution in comparing the sentences in seemingly similar situations.[1055] They provide guidelines for courts' exercise of sentencing discretion where courts impose sentences for similar offences.[1056] For example, a court developed a "norm" penalty for drunken driving, which was a fine of R4000.00 to R6000.00, with alternative imprisonment of not more than eight months, meant for a particular division and time frame.[1057]

Irrespective of the value that the consideration of decided cases brings to sentencing, the "norm" sentence was found to be unacceptable as a "standard" sentence to be arbitrarily imposed in every event of similar cases.[1058] The judgment in *Serabo* is a guideline judgment not delivered by the Supreme Court of Appeal, and even if it had been, the differences in the degree of seriousness between instances of the same kind of offence which the courts must take into account that may justify differences in the sentences imposed.[1059]

1049 The *R v S* case at 104D.
1050 The *Karg* case at 236G.
1051 *S v Jimenez* 2003 1 SACR 507 (SCA) at para 6.
1052 The *Fraser* case at 863C-D.
1053 *S v S* 1995 1 SACR 267 (A) at 272g-h.
1054 *S v Di Blasi* 1996 1 SACR 1 (A) 10h-i.
1055 The *Martin* at 384g.
1056 The *S v D* case at 263.
1057 *S v Serabo* 2002 1 SACR 391 (E) at 399a and 400c.
1058 The *Koekemoer* case at 405a-b.
1059 *S v Naicker* 1996 2 SACR 557 (A) at 561.

4.6 Mandatory minimum sentences

A mandatory minimum sentencing law requires binding prison terms of a particular length for people convicted of certain crimes, but permits the court to impose a different sentence in the light of the presence of extenuating circumstances,[1060] or of substantial and compelling circumstances.[1061] The opinion of mandatory minimum sentences is that the legislature places a total restriction on the sentencing discretion of sentencing courts through the enactment of mandatory sentencing,[1062] but restores the sentencing discretion when the circumstances above exist.

In South Africa, courts treasure their sentencing discretion because of the value, they attach to individualised sentencing, which justifies the courts' criticism of mandatory minimum sentences as an undesirable intrusion on their sentencing discretion, limiting their ability to do justice in sentencing.[1063] The view is that mandatory minimum sentences remove sentencing discretion, which led to the repeal of such penalties in the Northern Territory of Australia,[1064] due to their severity.[1065] Such minimum compulsory sentences threaten the separation of powers doctrine, where the legislature unjustifiably intrudes on the domain of the judiciary by obliging it to impose sentences that are unjust under the circumstances of a particular case.[1066] Prescribing harsh sentences is a response by the State on behalf of its citizens, aimed at protection against perpetrators of serious offences.[1067]

4.7 Mandatory sentences under the CLAA

The CLAA came partly into operation on 1 May 1998.[1068] Regarding its sentencing provisions, it requires the courts to ordinarily impose the penalties listed in the CLAA

1060 Du Toit *Straf* 208; also see *S v Van Wyk* 2000 1 SACR 45 (C) at 50.
1061 Section 51(3) of the CLAA.
1062 Terblanche *A guide to Sentencing in South Africa* quoting the *Toms and Bruce* cases 48.
1063 The *Toms and Bruce* case at 822C-D.
1064 Mackenzie *How Judges Sentence* 50.
1065 Quoting Johnson and Zdenkowski *Mandatory Injustice; Compulsory Imprisonment in The Northern Territory.*
1066 The *Toms and Bruce* case 806H-807D.
1067 *S v Boer* 2000 2 SACR 114 (NCD) at 121a-b.
1068 Proclamation R43 GG 6175 of 1 May 1998.

to the similar offences recorded therein.[1069] The CLAA leaves the imposition of discretionary sentences to the courts only if there are particular circumstances present in a case.[1070] The operation of the CLAA was introduced as a temporary measure, leaving its purpose open for debate.[1071] The permanency of the CLAA was secured by the *Criminal Law (Sentencing) Amendment Act* 38 of 2007 on 31 December 2007, and at the same time sections, 52 and 53 were repealed by the same Act.

4.7.1 The purpose of the CLAA

The courts and commentators interpreted the purpose of the enactment of the CLAA by the Legislature as two-fold, in that the CLAA hinges on the imposition of deterrent and retributive punishment coupled with the achievement of consistency in sentencing.

One view is that the prescription of severe and mandatory sentencing deters potential offenders from committing a crime.[1072] Harsh sentences serve the purpose of remedying crime rates, increasing public satisfaction, and decreasing sentencing disparities.[1073] The dominant use, however, is that harsh penalties deter offenders from the commission of the offences listed in the Schedules.[1074]

The deterrent punishment was the primary concern of the Legislature, because severe minimum sentences have an apparent deterrent effect on potential offenders.[1075] Perpetrators of serious offences must be punished harshly, which was undoubtedly the intention of the Legislature when it enacted the CLAA.[1076] The Constitutional Court asserted this view - that the

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1069 Section 51(1) and subsection 2.
1070 Section 51(3).
1071 Section 53(1) and subsection (2) before their deletion by *Act* 38 of 2007.
1072 Tonry *Sentencing matters* 159-61.
1073 Roth *South African Mandatory Minimum Sentencing: Reform Required* 155.
1074 *S v Willemse* 1999 1 SACR 450 (CPD) at 454a.
1075 The *Mofokeng* case at 526h.
1076 *S v Snyders* 2000 2 SACR 125 (NC) at 129e.

purpose and effect of the minimum sentencing statute are to impose a severe sentencing system for the offences listed in the Schedules.[1077]

The Supreme Court of Appeal asserted the deterrent effect of harsh sentences for particular crimes and called for harsh, standardised and consistent responses from courts to the commission of serious offences.[1078] The greatest deterrent to crime was the possibility that the offender would be arrested, convicted and punished severely.[1079] The punishment theories of deterrence and retribution are some of the aspects of which the courts are mindful when they impose severe sentences to combat crime.[1080]

That the deterrence and retribution punishment theories were the foundation of the CLAA was endorsed in *S v Homareda*.[1081] The court held the view, however, that these purposes cannot be achieved only through obligatory sentencing or prescribed minimum sentences, which had failed in the past in respect of drugs and drug trafficking.[1082] This was because severe prescriptive sentences do not deter offenders or prevent the commission of a serious crime.[1083]

The other view is that the purpose of normative sentences is to avoid situations where different courts impose surprisingly disparate sentences for a particular offence.[1084] This view was held in the case of *S v Majalefa* (WLD) (unreported) case number 365/1998 22 October 1998, which is quoted with approval in the case of *S v Blaauw* 1999 2 SACR 295 (WLD).[1085]

In *S v Zitha* 1999 2 SACR 404 (WLD) the court discarded the view that the purposes of the CLAA were to promote consistency in sentences, due to its

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1077 *Centre for Child Law v Minister for Justice and Constitutional Development* 2009 2 SACR 477 (CC) at para 16.
1078 The *Malgas* case at para 25.
1079 The *Makwanyane* case at para 122.
1080 *S v Kgafela* 2001 2 SACR 207 (B) at para 23.
1081 1999 2 SACR 319 (W) at 324h.
1082 The *Homareda* case at 325e.
1083 Tonry *Sentencing, judicial discretion and training* 137.
1084 *S v Montgomery* 2000 2 SACR 318 (NPD) at 322i.
1085 At 303c.

temporary nature.[1086] The preventive element of sentencing in the guise of the imposition of severe minima convinced the court that the CLAA had been introduced to combat serious and violent offences, to achieve uniformity in sentencing, and to allay the fears of the public that the tribunals do not punish offenders sufficiently severe.[1087] A similar view is held by Tait,[1088] that the legislation intended to promote consistency in sentencing, to address public concerns regarding the need to be harsh on crime, and to reduce the levels of serious and violent crime.

The discussion of the purpose of the CLAA extrapolates at least some fundamental issues allied to sentencing. Firstly, there is the need to combat crime through the imposition of severe minimum sentences to deter potential offenders from committing serious offences listed in the schedules of the CLAA. Secondly, there is the need to gain public confidence and trust by showing that government is serious about crime. Thirdly, the protection of the rights of victims of severe and violent offences through the imposition of harsh minimum sentences is significant. Fourthly, there is the need to impose the prescribed minimum sentences consistently for the crimes listed in the CLAA. The submission is that neither of the first two objects is achievable if sentences are consistent, whether the minimum sentence is imposed, or is considered to be less appropriate than the less severe sentence for the offences listed in the schedules.

4.7.2 The structure of the CLAA

The provisions of subsections 51(1) and (2) of the CLAA impact in numerous ways on the sentencing discretion of courts. Firstly, the rules apply "notwithstanding any law". This means that if any other law provides differently, sections 51(1) and (2) will apply. Any other law includes statutory

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1086 At 409e-g.

1087 Sloth-Nielsen and Ehler *A Pyrrhic Victory? Mandatory and minimum sentences in South Africa ISS Paper* 111 July 2005.

1088 Report on the Conference on Sentencing in South Africa held at the Commodore Hotel, V & A Waterfront Cape Town on 15-26 October 2006.

law, including subordinate legislation,[1089] but excluding the common law, because the imposition of punishment is subject to the common law.[1090]

Secondly, the only sentence that the court must impose is that of life imprisonment on conviction for offences specified in Part I of Schedule 2 to section 51(1) of the CLAA. The Part I of Schedule 2 do not proffer other crimes. Section 51(2) relates to the offences referred to in Parts II to IV of Schedule 2.

It also prescribes specific minimum terms of imprisonment for such crimes. The specified sentences impact on the range of penalties that courts can impose in complying with the CLAA. The CLAA does not create new offences or new types of crime.[1091] When it comes to offenders convicted for any of these crimes, the court's sentencing discretion is limited to the penalty clauses of section 51(1) and (2) of the CLAA.

4.7.3 Notification of the minimum sentence

The Supreme Court of Appeal has laid down a marker of the notification of an undefended accused person of any minimum sentences that apply to the charges in the charge sheet.[1092] The regional and high court may invoke the maximum penalty of life imprisonment in cases where the state charged the accused erroneously of a less severe offence,[1093] instead of the more severe crime,[1094] provided the evidence proves the more severe offence,[1095] and the court convicts the offender for the more serious offence.[1096]

This is because if the offenders were charged, convicted and sentenced for the crime of rape, the CLAA does not create any new category of statutory

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1089 Section 2 *Interpretation Act* 33 of 1957.
1090 Section 276 of the CPA.
1091 The *Legoa* case at para 18, dissenting judgment.
1092 The *Ndlovu* case at para 12, *S v Makatu* 2014 2 SACR 539 (SCA) at paras 23-24.
1093 Section 51(2) of the CLAA.
1094 Section 51(1) of the CLAA.
1095 The *Kolea* case at 19.
1096 The *Ndlovu* case

offence.[1097] The sentencing discretion of the court to impose life imprisonment is therefore not affected if the state charged the offender erroneously under the provisions of section 51(2) of the CLAA, and the state proves the more severe charge. The charge sheet must make mention of the provisions of the CLAA, notwithstanding its factual framework. The court must inform the accused of the sentencing rules of the CLAA whether the offender has legal representation or not.[1098] This is important because the offences in the CLAA have no retroactive effect and they are not applicable to crimes committed before 1 May 1998.[1099]

4.7.4 Sentencing discretion and departures from the prescribed sentence

A court which has convicted an accused person of an offence listed in Part I or II of Schedule 2 shall, if

> is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence…[1100]

"Substantial and compelling circumstances" is a term that is new in the South African sentencing system, which the CLAA does not define. It originates from the modern American sentencing practice,[1101] in particular from Minnesota sentencing guidelines, which provide guidanceas to the meaning of 'substantial and compelling circumstances'.[1102]

The vague "substantial and compelling circumstances" standard and the failure of Parliament to define the term have undermined the CLAA's endeavour to promote consistency in sentencing.[1103] On previous occasions when confronted with mandatory sentences for murder without extenuating

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1097 The *Legoa* case at para 44, dissenting judgment, followed by Kolea case.
1098 *S v Mseleku* 2006 2 SACR 574 (D).
1099 The *Willemse* case at 456a-b.
1100 Section 51(3)(a) of the CLAA.
1101 Van Zyl Smit *Mandatory sentences and departures from them in substantial and compelling circumstances* at 271.
1102 The *Malgas* case at para 18.
1103 Roth *South African Mandatory Minimum Sentencing: Reform Required* at 167.

circumstances, presiding officers in South African courts proved to be skilled in the development of criteria for identifying mitigating circumstances by including all those conditions that diminished the moral blameworthiness of the accused person.[1104] The discretion a court had to determine the presence or absence of such circumstances contributed to the imposition of inconsistent sentences under the CLAA.

4.7.5 The interpretation of "substantial and compelling circumstances"

The courts considered the interpretation of the phrase "substantial and compelling circumstances" in the context of the conditions in which particular offences were committed where the minimum sentence of the CLAA was applicable. Before the *Malgas* case, which is the seminal judgment on the subject, the courts developed three different extreme versions of what constitutes "substantial and compelling circumstances".

The first case presented itself in the Western Cape High Court Division, where Stegmann J expressed the view that the term "substantial and compelling circumstances" left the trial court with almost no discretion and compelled the court to impose the minimum sentence. The court held:

> Therefore, I consider it to be clear enough that, for substantial and compelling circumstances to be found, the facts of the particular case must present some circumstance that is exceptional in nature and that so obviously exposes the injustice of the statutorily prescribed sentence in the particular case, that it can rightly be described as 'compelling' the conclusion that the imposition of a lesser sentence than that prescribed by Parliament is justified.[1105]

The learned judge equates "substantial and compelling circumstances" to factors that are so unusual and of such an extraordinary kind that Parliament cannot be supposed to have had them in contemplation when prescribing standard penalties for certain crimes committed in the circumstances described in Schedule 2.[1106] A similar view was held in the same high court division, that "substantial and compelling circumstances" are circumstances so

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1104 Van Zyl Smit *Mandatory minimum sentence* at 275-276.

1105 The *Mofokeng* case at 523c-d.

1106 The *Mofokeng* case at 524c-d.

exceptional and so apparently exposing of the injustice of the statutorily prescribed sentence, that this compells the conclusion that a lesser sentence than that prescribed is justified.[1107] Goldstone J was of the view that the Legislature had laid down harsh minimum sentences for most if not all cases, which would seem substantially more than those imposed by the courts at that time.[1108] Roth held a different view, namely that such an approach was a rather strict interpretation of "substantial and compelling circumstances".[1109]

The submission is that the rigorous approach formulated in the *Mofokeng* case borders on the elimination of the sentencing discretion of courts. Courts may impose unjust sentences for particular instances in which the traditional relevant factors in sentencing have a minimal role to play where the Legislature reduce the courts to a rubber stamp. The imposition of sentences will be consistent, because exceptional elements may not be frequently available in cases which render sentences grossly disproportionate to the offences.

The second extreme is where the court held the view that "substantial and compelling circumstances" symbolise relevant sentencing factors of solid material significance above all other component factors which courts must consider in sentencing.[1110] This approach finds support in *S v Cimani,* where the court held that:

> in every case, however, the nature of the circumstances must convince the reasonable mind that a lesser sentence is a proper sentence and that it is justified when regard is had to the aggravating and mitigating features attendant upon the commission of what it already classified by the law-giver as among the most serious of offences and the interest of society weighed against the interest of the offender.[1111]

1107 *S v Segole* 1999 2 SACR 115 (W)
1108 The *Zitha* case at 409E.
1109 *South African Mandatory Minimum Sentence* 167.
1110 The *Majalefa* case at 6.
1111 Unreported judgment ECD Case number CC11/99 28 April 1999.

Parliament did not intend that the phrase signify stricter criteria than those previously regarded as mitigating factors.[1112] It is a soft approach to the interpretation of what "substantial and compelling circumstances" might be.[1113] Courts that adopt this more lenient approach would be inclined to find "substantial and compelling circumstances" in cases triggering the imposition of more lenient sentences.

The third approach is one that falls somewhere between the two extremes.[1114] Borcherds J expressed the following opinion after a comprehensive analysis of the decisions on the meaning of "substantial and compelling circumstances":

> the legislature had not seen fit to describe what factors may or may not be considered. Consequently a Court is, in my view, still able to have regard to all the factors that would traditionally have been considered in imposing sentence. Moreover, in my view, a Court should not consider each factor in isolation, but view them cumulatively in order to determine if substantial and compelling circumstances exist for departing from the prescribed sentence of life imprisonment. I do not believe that in such circumstances a Court would be substituting its own discretion for that of the legislature. I do not believe that the legislature intended that unfair or grossly disproportionate sentences should be imposed.[1115]

The court still considers all the traditional factors relevant in sentencing to assess whether the maximum sentence is appropriate for the offence.[1116] These factors must be of substantial weight to enable the court to exercise its discretion to provide for a reduced sentence.[1117] Thus, the test could not be one based on a significant disparity "between the minimum sentence and that which previously operated under the informal tariff", since this would fail to take account of the yardstick created by the legislation.[1118]

1112 *S v Mthembu* Unreported case Case number 365/98.

1113 Roth, referring to *SA Law Commission Discussion Paper* 91 *Sentencing* 29-30.

1114 Roth *Discussion Paper* 91 at 30.

1115 The *Blaauw* case at 296c-e.

1116 *S v Dithotze* 1999 2 SACR 324 (W) at 315b-d.

1117 *S v Jansen* 1999 2 SACR 368 (C) at 377h-i. Also see *S v Swartz* 1999 2 SACR 380 (C) at 386b.

1118 The *Van Wyk* case at 48g-h.

It is insightful to note that when adopting this approach, courts tend to look primarily for mitigating factors rather than to apply the minimum sentence. It is self-evident in the case of *S v Abrahams,* where the court found that the fact that the offender raped his daughter and was not a threat to society was a "substantial and compelling circumstance" permitting the court to deviate from a sentence of life imprisonment.[1119] Similarly, in *S v Shongwe* the court regarded the ordinary personal circumstances of the offender as "substantial and compelling circumstances" enabling it to deviate from the imposition of life imprisonment. The aggravating factors were that the victim was a nine-year-old girl; the stepdaughter of his son; incurred minor injuries as a result of the rape.[1120] Furthermore, the submission that the three approaches affirm the notion that individual sentencing discretion for courts culminates in the imposition of different sentences. The courts lose the primary purpose of the CLAA among the different interpretations emanating from courts' subjective views of the definition of "substantial and compelling circumstance", as well as how they are supposed to influence the sentencing discretion of the tribunals.

The *Malgas* case presented the courts with a standard approach to the interpretation of the phrase "substantial and compelling circumstances" to give effect to the intentions of the legislature and the manner in which it should affect the sentencing discretion of courts. The Court discarded the idea that to determine the presence of "substantial and compelling circumstances" exceptionality was the correct criterion for the departure from minimum sentences.[1121] The Legislature had left it to the courts to decide whether the circumstances of any particular case called for a departure from the prescribed sentence.[1122]

1119 2001 2 SACR 116 (C) at 121e.
1120 1999 2 SACR 220 (O) at 221h-I and 222a.
1121 At para 9.
1122 At 482 b.

In sentencing, the courts must ordinarily impose the prescriptive sentence and should not depart from it for light or flimsy reasons.[1123] If there were weighty reasons to deviate from the normative sentence, the courts should not hesitate to do so. To determine the presence of "substantial and compelling circumstances", the court should weigh all the considerations that would traditionally be relevant to sentencing.[1124] If the court felt uneasy with a prescriptive sentence, which would amount to injustice, the court should impose an alternative form of sentence.[1125] The test for "substantial and compelling circumstances" was a composite, and not a disjunctive one.[1126] The Court went on to summarise the step-by-step procedure that courts should follow in applying the test to the actual sentencing situation.[1127]

The *Malgas* interpretation of "substantial and compelling circumstances" was affirmed in the *Dodo* case.[1128] The Constitutional Court in the *Dodo* case held that that interpretation was an overarching guideline that the court endorsed as a practical method to be employed by all judicial officers faced with the application of minimum sentences of the CLAA.[1129] The Legislature decided to ensure that courts impose consistently heavier penalties about the serious crimes covered by the CLAA,[1130] while at the same time, promoting values that underpin the South African democracy.[1131]

After the *Malgas* enunciation on "substantial and compelling circumstances", the courts took a confident approach in the interpretation of the phrase. Once a court had found the existence of "substantial and compelling circumstances", it was within the trial court's sentencing discretion, subject to the obligation cast upon it by the CLAA to impose severe sentences than that

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1123 At para 8.
1124 At para 9-10
1125 At para 22.
1126 At para 19.
1127 A t para 25.
1128 At para 40.
1129 At 603h-i.
1130 At 603i-j.
1131 Sections 7(1) and 39(2) of the Constitution.

which may have been thought to be appropriate in the p1ast.[1132] The Court further stressed the fact that one offence might be more serious than another and that subject to the caveat that follows; it was only right that the differences in seriousness receive recognition when it came to the imposition of punishment.[1133]

The factors advanced as constituting "substantial and compelling circumstances", which was enough to lead to a lesser sentence, could not be considered *in vacuo*. Due weight had to be given to them in the context of the case, together with all the aggravating factors and the interests of the community.[1134] With the guidelines in the *Malgas* case in mind, the court must give due weight to the aggravating and mitigating circumstances and the exceptional situation of a particular instance.[1135] A departure from the prescribed minimum sentence is justified if an injustice would result from imposing it.[1136] Thus, under the CLAA, the sentencing discretion entrusted to courts of law was not expunged, but was substantially constrained.[1137]

4.7.6 Amendments to the CLAA

Certain changes to the CLAA were introduced to bolster consistency in the imposition of sentences after the *Malgas* case promoted a consistent approach in the interpretation of "substantial and compelling circumstances".[1138] Section 51(3Aa) directs courts not to consider specific factors in a case when the court determines whether there are "substantial and compelling circumstances in a case to impose a lesser sentence. Those factors are: the complainant's prior sexual history; lack of physical injury to the victim; the accused cultural or religious beliefs about rape; and the

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1132 *S v Mahomotsa* 2002 2 SACR 435 (SCA) at para 18.
1133 The *Mahomotsa* case at 444a-b.
1134 *S v Vermeulen* 2004 2 SACR 174 (SCA) at para 28.
1135 *S v Mvamvu* 2005 1 SACR 54 (SCA) at para 18.
1136 *Director of Public Prosecutions, KwaZulu-Natal v Ngcobo* 2009 2 SACR 361 (SCA) at para 14.
1137 The *Centre of Child Law* case at 516b-c.
1138 Section 51(3aA) *Criminal Law (Sentencing) Amendment Act* 38 of 2007, which came into effect on the 31 December 2007.

relationship between the offender and the victim,[1139] which eliminates the court's discretion to consider them.

This places any rape case where the aggravating factor is present as required by the CLAA within the ambit of life imprisonment, unless there are other factors present qualifying as "substantial and compelling circumstances". The prohibitions would have affected the sentencing discretion of the courts in the *Abrahams* and *Mahomotsa* cases.

Perhaps it is prudent to explore the effects of the subsection on subsequent cases of rape. In the case of *S v PB*, the court convicted the accused of raping his daughter of 12 years old, and sentenced the offender to life imprisonment. Some factors were advanced that qualified as "substantial and compelling circumstances" in the case in the trial court.[1140] Firstly, that remorse emanated from his guilty plea, and secondly that he was a candidate for rehabilitation and that he had started to use medication. A further factor was that life imprisonment was grossly disproportionate compared to a sentence imposed for a similar offence in the *Abrahams* case.[1141] The Supreme Court of Appeal held that the rape of young girls by their fathers is scandalous, and had become prevalent.[1142] The Supreme Court of Appeal refuses to elevate the sentences imposed in the cases of *Abrahams* and *Mahomotsa* to the status of precedents for rape offences as provided for in the CLAA.[1143]

Decided cases merely provide guidelines on sentencing, and are not straitjackets.[1144] Courts are expected to make value judgments to determine whether there are "substantial and compelling circumstances" in a case.[1145] The court found that the rape was incestuous, the accused performed

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1139 Subsections (i)-(iv) *Criminal Law (Sentencing) Amendment Act.*
1140 At para 5.
1141 At para 9.
1142 At para 13.
1143 At para 16.
1144 Quoting from the *S v D* case at para 17.
1145 At para 21.

improper sexual practices on the victim twice, and the victim suffered emotional and psychological harm as a result of the rape.[1146] The Supreme Court of Appeal found an absence of "substantial and compelling circumstances" in the case. The court dismissed the accused's appeal against life imprisonment.[1147] The Supreme Court of Appeal views incestuous rape as a most serious threat to our social and moral fabric.[1148]

The case of *S v MDT* 2014 2 SACR 630 (SCA) has striking similarities with that of the *Abrahams* case. The accused, a 55-year-old first offender, was convicted of raping his 14-year-old daughter and was sentenced to life imprisonment as required by the CLAA.[1149] The factors advanced to constitute "substantial and compelling circumstances" were that he was a first offender and that the victim had not suffered any physical injuries.[1150] The Supreme Court of Appeal referred to its earlier decision in *S v PB,* where the Court had refused to interfere with a sentence of life imprisonment for a similar offence.[1151] The Court remarked, "what could be considered more heinous than the rape of a child by the father?"[1152] Consequently, the Court dismissed the appeal against life imprisonment.[1153]

The insertion of section 51(3Aa) and the sentencing judgments of the *S v PB* and *S v MDT* cases marked a seismic shift from the former position in the imposition of sentences, as required by the CLAA for rape cases. Notably, courts cannot rate the seriousness of rape cases by considering the presence or absence of the factors in the prohibition clause.

4.7.7 The effect of section 51(6) on a court's sentencing discretion

Section 51(6) provides that:

1146 At para 24.
1147 At para 25.
1148 At para 13.
1149 At para 1.
1150 At para 5.
1151 At para 7.
1152 At 632b.
1153 At para 8.

> This section does not apply in respect of an accused person who was under the age of 16 years at the time of the commission of an offence contemplated in subsection (1) or (2).[1154]

Courts exercise their traditional sentencing discretion in matters for offenders in this category.[1155] The paragraph seems to conflict with the provisions of the Constitution that specifically safeguard the interests of children. The rules exclude children between the ages of 16 and 18 years old, who qualify as children,[1156] on whom the courts should not impose sentences of long terms of imprisonment if other sentencing options are appropriate.[1157] The child's best interest rule supreme in every matter concerning the child.[1158]

The subsection empowers the courts to exercise their sentencing discretion for children who are 16 years of age, and above but under the age of 18 years when the offence was committed. Courts use their traditional sentencing discretion in matters for offenders in this category.[1159] The legal position is common law - that for children convicted of offences listed in the CLAA, the court starts a "clean slate".[1160] The cases under discussion took place before the Legislature could further extend the CLAA.

On the 31 December 2007 the Legislature introduced the *Criminal Law (Sentencing) Amendment Act* 38 of 2007, which does not exclude children of 16 and 17 years from the sentences of the CLAA. However, the Constitutional Court held that the CLAA should not apply to an accused person younger than 18 years old at the time of the commission of the offence.[1161]

4.7.8 The suspension of the prescribed minimum sentence

The CPA provides the courts with sentencing discretion to suspend the operation of any sentence for not more than five years, including a minimum

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1154 *Criminal Law (Sentencing) Amendment Act.*
1155 *S v Nkosi* 2002 1 SACR 135 (W) at 141b-c.
1156 Section 28(3) of the Constitution.
1157 Section 28(1)(g) of the Constitution.
1158 Section 28(3) of the Constitution.
1159 The *Nkosi* case at 141h-j.
1160 *S v B* 2006 1 SACR 311 (SCA) at para 11.
1161 The *Centre for Child Law* case.

penalty mandated by any law.[1162] The CLAA provides that the courts may not suspend a sentence prescribed in the CLAA[1163] as contemplated in the CPA.[1164] However, if the court establishes the presence of "substantial and compelling circumstances" in a case, it retains its ordinary sentencing jurisdiction, and only then should a sentence be suspended. The courts cannot impose a sentence of correctional supervision[1165] in cases where they are obliged to impose a sentence prescribed in the CLAA.[1166] The courts are allowed to suspend half of the prescribed minimum sentence if the accused was 16, but younger than 18 years old at the time of the commission of the offence in question.[1167]

4.7.9 Consistency in sentencing under the CLAA

In the early stages of the operations of the CLAA, it is understandable that the minimum sentences legislation, if anything, worsened the disparities and inconsistencies that prevailed about the offences targeted by the law.[1168] The primary reasons were that courts interpreted "substantial and compelling circumstances" exceptions in ways that often circumvented the mandatory minimum sentencing.[1169]

For example, courts who viewed the CLAA as merely a nominal attempt to increase sentencing uniformity could justify departures from mandatory minimum provisions by engaging in the traditional weighing of factors.[1170] In cases where courts tried to balance the "strict" and "lenient" approach, they ran the risk of circumventing the intention of the CLAA by weighing all the

1162 Section 297(4).
1163 Section 51(5).
1164 Section 297(4).
1165 Section 276(3)(b) of the CPA.
1166 Section 51(1) or (2).
1167 Section 51(5)(b) of the CLAA.
1168 Terblanche *A guide to sentencing in South Africa* 146.
1169 Roth *South Africa Mandatory Minimum Sentencing* 169.
1170 *Discussion Paper* 91 at 29-30 (discussing the Cimani case).

aggravating factors in a given case.[1171] Courts could also avoid the CLAA by reasoning that it did not apply to them.[1172]

The submission is that, since the critical judgment of *Malgas,* courts are on the steadier ground with regards to the interpretation of "substantial and compelling circumstances". The Constitutional Court applauded the guidelines of *Malgas* in the *Dodo* case. The Supreme Court of Appeal in cases like *Vermeulen, Mvamvu, Mtyityi* and *Ndlovu,* which affirm the adoption of a consistent approach towards the finding of factors in a case that equates with "substantial and compelling circumstances"*.*

The enactment of section 51(3Aa) of the CLAA further bolsters consistency in sentencing that obliges courts to negate certain factors the courts previously saw as elements that qualified as "substantial and compelling circumstances". A consistent trend of uniformity in sentencing in the cases of *S v PB* and *S v MDT,* where life imprisonments were imposed for similar offences by the trial court and confirmed by the Supreme Court of Appeal.

4.8 The establishment of basic sentencing guidelines

The South African sentencing system consists of the traditional approach of the famous triad of *Zinn*. Courts may consider any information they deem fit for sentencing. The effect is that it complicated for different courts to exercise their sentencing discretion in the same way. Hence, the application of the principles does not assist in the promotion of consistency in sentencing. In an attempt to address the problems arising from sentencing discretion, the South African Law Reform Commission investigated the position of sentencing and to come up with particular solutions.

1171 *Discussion Paper* 91 at 30 (discussing the risk of the 'moderate' approach).

1172 Isaacs *The Challenges Posed by Mandatory Minimum Sentence Legislation in South Africa* (discussing *S v Arias* 2002 1 SACR 518 (W)).

4.8.1 The sentencing reform in South Africa proposed by the South African Law Commission

The South African Law Commission published its findings during 2000 in *Report: Sentencing: (A new sentencing framework)* (hereafter the Report). The recommendations remain shelved. The Report is important because its findings and proposals touch on contentious issues that address the current problems in the South African sentencing system. Among other things the Commission stated:

> [T]he functions of a reformist intervention must be to address the major faults of the current system. It was for this reason that a decision was taken at an early stage to develop sentencing legislation that would deal as comprehensively as possible with the law relating to sentencing.[1173]

> An ideal system should be seen to promote consistency in sentencing, deal appropriately with concerns that particular offences are not being regarded with an appropriate degree of seriousness, allow for victim participation and restorative initiatives and, at the same time, produce sentencing outcomes that are within the capacity of the State to enforce in the long term. The Commission, therefore, proposes a framework that in its view can meet all these desiderata to the greatest extent possible.[1174]

The South African Law Commission identified specific defects within the sentencing system of South Africa. It proposed that the best way to address the errors was to introduce sentencing legislation to deal with the law in sentencing. The legislation must address the problems that cause inconsistencies in sentencing to promote uniformity in the imposition of sentences. In the achievement of an ideal sentencing system, it would be necessary to state the basic principles in legislation. Courts would be obliged to apply the principles strictly as prescribed by the law. Secondly, it was intended to set up a Sentencing Council to provide sentencing guidelines.[1175]

1173 The Report at para 1.6; and para 1.16.

1174 The Report at para 7 of the Executive Summary

1175 The Report at para 1.44.

4.8.2 Legislative sentencing guidelines

The legislation would transfer sentencing discretion from the courts to the sentencing council that would draft sentencing guidelines based on the fundamental principles.[1176]

> A sentencing guideline specifies sentencing options and their severity for a particular category… or sub-category of offence.[1177]

The offences would be rated in their degree of seriousness and ranked accordingly.[1178] The draft legislation proposed a new range of sentences, namely imprisonment, fines, community penalties, reparation, and caution and discharge.[1179] Courts should not impose imprisonment where a community sentence or a fine was an option unless detention was for the protection of society against the offender.[1180] When both reparation and a fine were considered appropriate, reparation ought to receive preference.[1181]

The guideline provided for a range of sentences, allowing a 30 percent variation in quantum up or down from the primary instruction,[1182] and for the suspension of the whole or a part of a sentence.[1183] The guidance might make provision for previous convictions as long as some relationship with the current offence was factored in, which is always a problem for any guideline system.[1184] The use of the guideline was to take into account the capacity of the correctional system, both that of prisons and community corrections.[1185]

The South African Law Commission made specific recommendations about sentencing reform, which did not find favour as legislative sentencing principles for unknown reasons. The principles filtered through in cases and are manifest as part of the triad. For example, in the *Matiwane* case, the

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1176 Section 5(3).
1177 Section 5(1).
1178 Section 5(3)(a).
1179 The Report at para 3.3.9.
1180 Clause 14 of the draft legislation.
1181 Clause 37(5).
1182 Section 5(7).
1183 Section 5(7)(b).
1184 Ashworth *Sentencing and criminal justice* 162-74.
1185 Section 5(3)(a).

reviewing court stressed that the court must not punish the offender for his previous criminal history, but for the offence of his present conviction; and the *Matyityi* case introduces victim participation into sentencing.

It is noteworthy that the recommendations or the principles do not include aspects of the personal circumstances of the offender save for previous convictions. The proposals explicitly exclude irrelevant information that would lead to the imposition of different sentences. It follows from the following extract:

> Like cases are not being treated alike because there is unfair discrimination against some offenders, in particular, on grounds of race and social status. Such allegations are difficult to deal with, for a system in which there are no clear sentencing guidelines results in sentencers having a very broad discretion. This makes it difficult to rebut such accusations. In such a system, justice is not easily seen to be done.[1186]

The South African Law Commission identified the principle of individualisation as a stumbling block in the achievement of consistency in sentencing.

4.9 Summary and conclusion

The appeal and review processes in the South African sentencing system is available to restructure the exercise of sentencing discretion of trial courts. It is an effective technique available to an aggrieved convicted and sentenced the offender, but they occur sporadically. Convicted offenders must go through a rigorous process to have their matters reviewed or heard on appeal. Sentencing courts are not obliged to follow previously decided cases, which exacerbate the imposition of inconsistent sentences. The mandatory minimum sentences of the CLAA was unsuccessful to improve consistencies in sentences in its infant's stage, because of certain technicalities that relate to the interpretation of the phrase, "substantial and compelling circumstances". Once the Supreme Court of Appeal provides clear guidance to the interpretation of the phrase, it is an efficient technique to structure the exercise of sentencing discretion of courts, which promote consistency in sentencing.

1186 The Report at para 1.8(a).

CHAPTER 5

SENTENCING GUIDELINES IN ENGLAND AND WALES

5 Introduction

The chapter introduces the reader to the sentencing guidelines system in England and Wales. The reader is acquainted with the legislation that governs the sentencing process as well as the applicable guidelines. The Sentencing Council is also introduced, whose responsibility it is to develop guidelines for the different categories of an offence and corresponding sentences, which structure the sentencing discretion of courts. A critical analysis of the format and structure of the sentencing guidelines will take place and compare to the South African system. The idea is to learn lessons from the guidelines that will help to shape the South African system into one that promotes consistency in sentencing and equality before the law.

5.1 The development of sentencing guidelines

The need to structure sentencing discretion found resonance in some foreign jurisdictions such as England, Minnesota, New Zealand, Australia, and India. Except for the United States of America, in other jurisdictions, guidelines retain the courts' sentencing discretion. England and Wales have taken a fundamentally different approach to the various forms of sentencing guidelines that exist in these other foreign jurisdictions. Sentencing guidelines in England and Wales reveal a regular addition or contribution to adapt them to the requirements of law developments in sentencing.[1187]

5.1.1. The Sentencing Advisory Panel

The solid foundation laid by guideline judgments in the English sentencing regime led to the formation of the Sentencing Advisory Panel on the 1 July 1999.[1188] The function of the Sentencing Advisory Panel was to structure draft

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1187 Roberts *Structuring Sentencing in Canada, England and Wales: A Tale of Two Jurisdictions* 23.

1188 Section 81 *Crime and Disorder Act* 1998.

guidelines for particular offences.[1189] The drafting of guidelines is a consultative process, involving the public and the profession and referred for adoption, rejection, or amendment to the Court of Appeal.[1190] The Sentencing Advisory Panel advised the Court of Appeal, which then considered the advisory guideline judgment,[1191] and if the Court of Appeal examined the guideline review favourably, it had to advise the Sentencing Advisory Panel of its intention to issue a guideline judgment.[1192] The power of the Court of Appeal to give guideline sentences was a constraint to offences on advice from the Sentencing Advisory Panel.[1193] The Sentencing Advisory Panel consulted with particularly predetermined organisations and formulated its views; thereafter, communicating to the Court of Appeal.[1194] The Sentencing Advisory Panel is:

> intended to operate as a source of guidance, ideally assisting the Court by researching the subject more thoroughly and bringing a wider range of views to it than the Court is able to do but… the powers of the Court of Appeal in respect of guideline judgments are little altered.[1195]

The Sentencing Advisory Panel was entitled to propose sentencing guidelines of its own accord.[1196] Besides the Sentencing Advisory Panel's view, the Court of Appeal considered the current sentencing practice for cost-effectiveness of the sentence options, for consistency, and to foster public confidence in the sentencing system.[1197] The Sentencing Advisory Panel, for instance, advise the Court of Appeal to adopt guideline judgments in cases of racially aggravated offences;[1198] dealing in opium,[1199] and handling stolen goods.[1200] It has reviewed extended sentences,[1201] and rape cases.[1202] The practice that

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1189 Section 80 *Crime and Disorder Act* 1998.
1190 Roberts *Structuring Sentencing in Canada, England and Wales* 23.
1191 Ashworth *Sentencing and criminal justice* 38.
1192 Section 81(2) *Crime and Disorder Act*.
1193 Ashworth *Origin and Nature of the sentencing guideline system in England and Wales* 2.
1194 Section 81(4) of the *Crime and Disorder Act.*
1195 Ashworth *Sentencing and criminal justice* 48.
1196 Section 81(3) of the *Crime and Disorder Act.*
1197 Section 80(3) of the *Crime and Disorder Act.*
1198 *R v Kelly and Donelly* [2001] Crim LR 411; [2001] 2 Cr App R (S) 73.
1199 *R v Mashaollahi* [2001] 1 Cr App R (S) 330.
1200 *R v Webbe* [2002] 1 Cr App R (S) 82.
1201 *R v Nelson* [2002] 1 Cr App R (S) 565.

statutory sentencing bodies draft advisory guideline judgments for appeal or review tribunals is foreign to South Africa.

In 2000, another group of advisors under the leadership of John Halliday was tasked by the British government with conducting a review of the sentencing framework.[1203] On consideration of this sentencing structure review, the government decided in favour of the creation of a Council responsible for setting guidelines for the full range of criminal offences.[1204]

5.1.2 The Sentencing Guidelines Council

The government enacted the *Criminal Justice Act* of 2003, which established the Sentencing Guidelines Council, which came into operation on 20 November 2003.[1205] This was chaired by the Lord Chief Justice[1206] and consisted of himself and eleven other members.[1207] The Sentencing Advisory Panel remained in place[1208] and continued to devise draft guidelines, to consulted members of society and its statutory consultees, and then to prepare its proposed sentencing guidelines.[1209] The draft sentencing guidelines would not be brought before the Court of Appeal but before the Sentencing Guideline Council, which had the power to issue guidelines.[1210]

The Sentencing Guidelines Council produced sentencing guidelines since March 2004 after consultation with the Sentencing Advisory Panel.[1211] Up to April 2010, many definitive sentencing guidelines had been published by the Sentencing Guideline Council. Examples include offences such as theft and burglary in a building other than a dwelling,[1212] causing death by driving,[1213]

1202 *R v Millberry* [2003] 1 WLR 546 (CA); [2003] 2 ALL ER 939; [2003] 1 Cr App R 25.

1203 Ashworth *Origin and Nature of the sentencing guideline system in England and Wales* 3.

1204 Halliday Report -Making Punishments Work: Review of the Sentencing Framework for England and Wales at paras 8.1-8.22.

1205 Section 167(1)

1206 Section 167(1)(a) of the *Criminal Justice Act* 2003.

1207 Section 167(1)(a)-(b) of the *Criminal Justice Act.*

1208 Section 169(1) of the *Criminal Justice Act.*

1209 Section 171(1) of the *Criminal Justice Act.*

1210 Sections 170(2) and 171(1) of the *Criminal Justice Act.*

1211 Sections 170(4) and 171(1) of the *Criminal Justice Act.*

1212 Sentencing Guidelines Council, Theft and Burglary in a building other than a dwelling (2008)

assault and other crimes against the person,[1214] robbery,[1215] and manslaughter by provocation.[1216] Other guidelines covered overarching principles such as the severity of the offence,[1217] as well as principles for dealing with domestic violence,[1218] assaults on children, and cruelty to a child.[1219] Some guidelines covered the reduction of a sentence for a guilty plea,[1220] breaches (for example, of an anti-social behaviour protective order),[1221] and failure to surrender to bail.[1222]

5.1.3 Sentencing Council

The Sentencing Guideline Council replaced the Sentencing Advisory Panel, and the Sentencing Guidelines Council were later superseded by the Sentencing Council, after the revision of the then sentencing system in 2010.[1223] The revision was firstly prompted by the high and rising prison population in England and Wales, as a result of the use of the sentence of

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https://www.sentencing.org.uk/wp-content/uploads/Theft and Burglary of a building other than a dwelling.

1213 Sentencing Guidelines Council, Causing Death by Driving (2008), available at https://www.sentencingcouncil.org.uk/wp-content/uploads/web causing death by driving definitive guideline.pdf.

1214 Sentencing Guidelines Council, Assault and other offences against the person (2008), available at http://www.sentencingcouncil.org.uk-content/uploads/Assault definitive guideline-Crown Court.pdf.

1215 Sentencing Guidelines Council, Robbery (2006), available at https://www.sentencingcouncil.org.uk/publications/item/Robbery-definitve-guideline-2/.

1216 Sentencing Guidelines Council, Manslaughter by reason of provocation (2005), available at https://sentencingcouncil.org.uk/wp-content/uploads/Manslaughter by reason of Provocation. pdf.

1217 Sentencing Guidelines Council, Overarching principles: Seriousness (2004), available at https://www.sentencingcouncil.org.uk/wp-content/uploads/web Seriousness guideline.pdf.

1218 Sentencing Guidelines Council, Overarching Principles: Domestic Violence (2006), available at https://www.sentencingcouncil.org.uk/wp-content/uploads/web Domestic violence.pdf.

1219 Sentencing Guideline Council, Overarching Principles: Assaults on Children and Cruelty to a Child (2008), available at https://www.sentencingcouncil.org.uk/publications/item/ Overarching-principles-assault-on-children-and-cruelty-to-a-child-definitive-guideline/.

1220 Sentencing Guidelines Council, Reduction in Sentence for a Guilty Plea (2007), available at https://www.sentencingcouncil.org.uk/publications/item/reduction-in-sentence-for-a-guilty-plea-guideline-consultation.

1221 Sentencing Guidelines Council, Breach of a Protective Order (2006), available at https://www.sentencingcouncil.org.uk/wp-content/uploads/web breach of protective order. pdf.

1222 Sentencing Guidelines Council, Failure to Surrender to Bail (2007), available at https://www.sentencingcouncil.org.uk/wp-content/uploads/web Fail to Bail.pdf.

1223 Sections 118, 135 of the Coroners and Justice Act 2009.

imprisonment as provided for in the sentencing guidelines.[1224] Secondly, a Working Group recommended a revamp of the current sentencing position, rather than the adoption of a new guidelines system.[1225]

The production of sentencing guidelines involves seeking advice, performing research, and consulting the public.[1226] Through a process of seeking information, research, and public consultation,[1227] and consultation with various interest groups, including victim services, police, prosecution, magistrates' courts, and the Crown Court, sentencing guidelines were developed by the Sentencing Council[1228] for offences committed after 6 April 2010.[1229] For crimes perpetrated before that date, courts take into account previous sentencing guidelines that were in place when the crime was committed, and for instances where no guidelines existed, the court must consult similar review cases of the Court of Appeal.[1230]

The guidelines provide the relevant factors in sentencing, promote transparency, and ensure that the tribunals across the country are consistent in sentencing offenders.[1231] The application of the sentencing guidelines remains largely voluntary, because the courts must consult different guidelines, unless the interest of justice demand otherwise.[1232] The

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1224 Lord Carter of Coles, *Securing the future: Proposals for the efficient and sustainable use of custody in England and Wales* (2007), http://news.bbc.co.uk/2/shared/bsp/hi/pdfs.

1225 Sentencing Commission Working Group, Sentencing Guidelines in England and Wales: An Evolutionary approach (2008), http://www.parliament.wa. Gov.au/intranet/libpages/WebFiles /IT.

1226 Our Work Sentencing Council http://sentencingcouncil.judiciary.gov.uk/about/ourwork.htm

1227 Sentencing Council, http://sentencingcouncil.judiciary.gov.uk/about/ourwork.htm.

1228 Sentencing Council, http://sentencingcouncil.judiciary.gov.uk/about/council-members.htm.

1229 *Coroners and Justice Act* 2009 c. 25, pt. 4, http://sentencing.legislation,gov.uk/ukpga/2009/25.

1230 Sentencing Guidelines, Sentencing Council, http://sentencingcouncil.judiciary.gov.uk/sentencing-Guidelines.htm

1231 Sentencing Guidelines, Sentencing Council, http://sentencingcouncil.judiciary.gov.uk/sentencing- Guidelines.htm

1232 Section 25 of the *Coroner and Justice Act* 2009.

sentencing guidelines, therefore, provide judges with the flexibility to deviate from them provided the interest of justice demand it.[1233]

The *Coroners and Justice Act* provides certain recommendations on the development of the new guidelines, although the Sentencing Council only has "regard to the desirability" of these proposals.[1234] In particular, the guidelines must provide examples of varying degrees of the seriousness of the crime, of which culpability, harm, and other factors determine the gravity of the offence.[1235] Furthermore, the guidelines provide sentencing range and category ranges that indicate the seriousness of the offence range.[1236]

The guidelines should further specify the starting point of the sentences for the offence or category ranges that apply to offenders who pleaded not guilty, and before aggravating and mitigating factors are considered.[1237] The sentencing guidelines ought to list the aggravating and mitigating factors relevant for judging the seriousness of the offence, and also list other mitigating factors relevant to sentencing and previous convictions, and the effect they should have on sentencing.[1238] Finally, the Sentencing Council must develop guidelines dealing with the reduction in sentences for guilty pleas, and with the totality of penalties in cases in which an offender faces sentencing for more than one offence.[1239]

5.2 General provisions and principles of sentencing in England and Wales

In England and Wales, sentencing guidelines regulate the imposition of sentences linked with other sentencing legislation and principles of which the primary legislation is the *Criminal Justice Act* 2003*,* which creates a framework for sentencing decisions in courts. When the courts extrapolate an appropriate sentence, the courts

1233 Section 125 of the *Coroners and Justice Act.*
1234 Section 121(1) of the *Coroner and Justice Act.*
1235 Section 121(3) of the *Coroner and Justice Act.*
1236 Section 121(4) of the *Coroner and Justice Act.*
1237 Section 121(5) of the *Coroner and Justice Act.*
1238 Section 121(6) of the *Coroner and Justice Act.*
1239 Section 120(3) of the *Coroner and Justice Act.*

allude to specific provisions of the sentencing legislation which are part of the sentencing guidelines. The types of punishment available are discharge, fines, community sentences and incarceration, of which the purpose of punishment inform the choice of the penalty.[1240]

5.2.1 The purposes of sentencing

The purpose of sentencing for any offence is to punish the offender, crime prevention, rehabilitation, the protection of the public and the consideration of atonement in particular cases.[1241] Courts must have regard to rehabilitation as an aim of any sentence they are imposing.[1242]

5.2.2 Determining the seriousness of an offence

In considering the severity of a crime, the court must focus on two fundamental issues that relate to the offender and the offence, viz. the culpability of the offender and the injury; damage the offender caused; or intended to cause.[1243] A previous conviction is a factor that a court must consider as an aggravating factor, depending on whether the previous conviction has relevance to the offence convicted [1244] and the time that has elapsed since the conviction.[1245] Another factor the courts must treat as an aggravating factor is the fact that the offender committed the offence while on bail.[1246]

5.2.3 Reduction in sentences for guilty pleas

A guilty plea is one of the factors that the courts must consider in the determination of an appropriate sentence, considering at which stage the

1240 Chapter 44 Part 1 Matters to be taken into account in sentencing Section 142
1241 Section 142(1)(a)-(e) *Criminal Justice Act.*
1242 *R v Rakib* [2011] EWCA Crim 870; [2012] 1Cr. App. R. (S) 1 (p. 1).
1243 Section 143(1) of the *Criminal Justice Act.*
1244 Section 143(2)(a) of the *Criminal Justice Act.*
1245 Section 143(2)(b) of the *Criminal Justice Act.*
1246 Section 143(3) of the *Criminal Justice Act.*

offender pleaded,[1247] and the circumstances the offender indicates the intention plead guilty.[1248]

5.2.4 An increase in sentences for racial or religious aggravation

The racially and religiously motivated offences enhance the severity of a crime for which courts impose harsh penalties,[1249] of which the courts must state that such factors are aggravating factors for sentencing.[1250] The demonstration of hostility towards the complainant, because of the sexual orientation of the victim[1251] or disability,[1252] or that the sexual orientation[1253] or the disability motivated the commission of the crime count as aggravating factors for sentencing.[1254] There are numerous factors courts must take into account when imposing sentences, such as the factors that determine the seriousness of the offence,[1255] statutory aggravating factors,[1256] and factors reducing the gravity or reflecting personal mitigation.[1257]

5.2.4.1 Sentencing options in South African

Similarly, in South Africa, the sentencing system provides courts with numerous sentencing options to choose from when they select an appropriate sentence for convicted offenders.[1258] The South African sentencing system does not assign sentencing options to specific offences, as in England and Wales. The courts are at liberty to impose any sentencing options for any offence. The sentencing jurisdictions of courts pertain to the length of imprisonment and amount of fines courts may impose.[1259] In this sense, the sentencing discretion of the tribunals in South Africa is considerable, whereas

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1247 Section 144(1)(a) of the *Criminal Justice Act.*
1248 Section 144(1)(b) of the *Criminal Justice Act.*
1249 Section 145(2)(a) of the *Criminal Justice Act.*
1250 Section 145(2)(b) of the *Criminal Justice Act.*
1251 Section 146(2)(a)(i) of the *Criminal Justice Act.*
1252 Section 146(2)(a)(ii) of the *Criminal Justice Act.*
1253 Section 146(2)(b)(i) of the *Criminal Justice Act.*
1254 Section 146(2)(b)(ii) of the *Criminal Justice Act.*
1255 Section 143 of the *Criminal Justice Act.*
1256 Section 28 of the *Crime Disorder Act.*
1257 Sections 73 and 74 of the *Serious Organised Crime and Police Act* 2005.
1258 See Chapter 2 at para 2.2.1 of this thesis.
1259 See Chapter 2 at para 2.2.2-2.2.6 of this thesis.

in England and Wales courts have starting point sentences and category ranges in which to move up or down. In South Africa, there are statutory provisions that limit the court's sentencing discretion, as explained in Chapter Four of this thesis.

The aggravating and mitigating factors must find expression in the sentences imposed by the courts. The elements are embedded in the principles of sentencing and do not have the effect of legal rules, as they do in England and Wales. Some of them are strikingly similar to those of England and Wales. Some of the aggravating factors include the vulnerability of victims,[1260] the fact that the offence was premeditated,[1261] the violence used in the commission of the crime,[1262] the lack of remorse,[1263] racial connotations,[1264] the abuse of trust[1265] and a professional criminal disposition.[1266] Examples of mitigating factors are remorse,[1267] provocation,[1268] a plea of guilty,[1269] the accumulative effect of sentences[1270] and the youth of the offender.[1271] The aggravating and mitigating factors are not exhaustive, because courts may consider any other factor that is relevant to sentencing.

The sentencing guidelines of England and Wales provide an approach to sentencing that is different from that of South Africa. The sentencing guidelines structure the discretion of courts to categorise an offence according to its seriousness, and thus arrive at the appropriate sentence.

1260 The *Qamata* case at 481e-g.
1261 *S v Matola* 1997 1 SACR 321 (B) at 325c.
1262 *S v Mosemeng* 1994 1 SACR 591 (A) at 595g-h.
1263 *S v Mnguni* 1994 1 SAC 579 (A) at 583e.
1264 The *Combrink* case at para 25.
1265 Du Toit *Straf* 91.
1266 *S v Naryan* 1998 2 SACR 345 (W) at 357h-i.
1267 The *Brandt* case at 304b.
1268 *S v Mandela* 1992 1 SACR 661 (A) at 664i.
1269 The *Martin* case at 383h.
1270 *S v Muller* 2012 2 SACR 545 (SCA) at para 9.
1271 *S v Mazibuko* 1997 1 SACR 255 (W) at 259f-g.

5.3 The operation of Sentencing Guidelines in England and Wales

There is now a Sentencing Council for England and Wales,[1272] which prepares "sentencing guidelines"[1273] for the imposition of sentences. The Sentencing Council must develop sentencing guidelines that set out the duties of the court as required by section 144 of the *Criminal Justice Act* 2003 (c. 44) (reduction in sentences for guilty pleas),[1274] and sentencing guidelines that relate to the application of any rule of law as to the totality of sentences.[1275]

The Sentencing Council's first definitive guideline, covering the offence of assault, came into effect on 13 June 2011.[1276] The guideline replaced the final assault guideline issued by the Sentencing Guideline Council in 2008. The guideline assumes a new structure and serves as a model for all future guidelines issued by the Sentencing Council.[1277] The application of the guidelines incorporates the consideration of some of the sentencing laws applicable in England and Wales, which shape not only the end product of the sentence but structure the exercise of the courts' sentencing discretion.

Thus, the Assault Definitive Guideline issued by the Sentencing Council covers six types of assault offences.[1278] It applies to all offenders 18 years of age sentenced on or after 13 June 2011, irrespective of the date of the crime. For offences committed after 6 April 2010, the court must consider any guidelines relevant to the crime, unless the court is satisfied that it would be contrary to the interest of justice to do so.[1279]

The guidelines provide offence range and the range of sentences appropriate to each kind of crime. Further, the guidelines stratify three crime categories that reflect varying degrees of seriousness. The assault range splits into group fields and

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1272 Section 118(1) of the *Coroners and Justice Act.*
1273 Section 120(1) of the *Coroners and Justice Act.*
1274 Section 120(3)(a) of the *Coroners and Justice Act.*
1275 Section 120(3)(b) of the *Coroners and Justice Act.*
1276 Assault Definitive Guideline http://www.sentencingcouncil.org.uk.
1277 Roberts *Sentencing Guidelines in England and Wales: Recent Developments and Emerging Issues* 4.
1278 Section 120 of the *Coroners and Justice Act.*
1279 Section 125(1) of the *Coroners and Justice Act.*

provides appropriate sentences for each level of severity. The Sentencing Council has also identified a starting point within each category.

A point of a departure sentence is a position within a group range from which to start calculating a preceding sentence. The initial or point of departure penalty applies to all offences within the corresponding category and all accused persons in all cases, irrespective whether the offender pleaded guilty or not and how many previous convictions the offender has. After the establishment of the starting point sentence, the court ought to consider further aggravating and mitigating factors and prior convictions, so as to adjust the sentence within the range.

The guidelines provide a uniform approach to sentencing, which is set out in nine steps. The nine steps encapsulate the court's sentencing discretion. The sentencing guidelines place specific duties on courts in the search for an appropriate sentence.[1280] One of the six assaults the sentencing guideline identifies, namely assault with the intention to inflict serious injuries/wounding on the person, is chosen to illustrate below how the sentencing discretion of courts operates within the sentencing guideline.

5.3.1 Determine the offence category (Step One)

The sentencing guideline for this particular offence provides three types, with varying degrees of seriousness with which the crime may be committed.[1281] There are three crime categories which are Groups 1, 2 and 3, detailed in Table 1 below. Each category has its corresponding factors that the court must consider, such as the offender's culpability in committing the offence, the harm caused or intended purpose; the harm which might foreseeably have been caused by the offence; or any other factors relevant the seriousness of the infringement in question.[1282] The court must establish the crime category using Table 1.

1280 Section 125 of the *Coroners and Justice Act.*

1281 Section 121(2) of the *Coroners and Justice Act.*

1282 Section 121(3) of the *Coroners and Justice Act.*

Table 1.

Category 1	Greater harm (serious injury must normally be present) and higher culpability
Category 2	Greater harm (serious injury must normally be present) and lower culpability; or lesser harm and higher culpability
Category 3	Lesser harm and lower culpability

The court is required to match the case bar to one of the three categories of seriousness.[1283] They reflect gradations in harm and culpability, with the most severe category, Category 1, requiring greater harm and enhanced culpability. Category 2 is appropriate if either more significant damage or injury and or higher blameworthiness is present, while Type 3 includes both harm and a lower level of culpability.

The guideline does not define greater harm as connoting a serious injury, but reflects the fact that the offence is in the *Offence against the Person Act* 1861, which involved causing grievous bodily harm or a wound, which would include disfiguring or disabling a person.[1284] The guideline also declares that the offence under discussion is one that is a specified serious offence in relation to the *Criminal Justice Act*, which carries a sentence of life imprisonment,[1285] or imprisonment of ten years or more.[1286] The *Criminal Justice Act* describes "serious harm" as serious personal injury, whether physical or psychological.[1287]

Case law defines a "wound" as existing where there is a break in the continuity of the skin,[1288] but holds that an internal rupture of blood vessels will not constitute an injury.[1289] "Grievous bodily harm" means severe

1283 Section 125(3) of the *Coroner and Justice Act*.
1284 Section 18.
1285 Section 224(2)(b)(i).
1286 Section 224(2)(ii).
1287 Section 224(3).
1288 *Moriarrty v Brookes* [1834] EWHC Exch J79.
1289 *C (a minor) v Eisenhower* [1984] QB 331.

injury,[1290] or psychiatric injury,[1291] or the court can consider the vulnerability of the victim to assess the seriousness of the injury.[1292] The courts must evaluate 'serious harm' in an objective manner.[1293]

In step one, the guideline identifies an exhaustive list of factors to determine which of the three categories is most appropriate for the case for sentencing. The step one factors relate to harm and culpability.

5.3.1.1 Primary factors

In the determination the offender's culpability, and the harm caused or intended, the court must refer only to the elements (as demonstrated by the presence of one or more of them). These factors comprise the principal factual elements of the offence and should determine the category.[1294]

Table 2

Factors indicating greater harm	**Factors indicating higher culpability**
Serious injuries inflicted (which includes disease transmission and psychological harm) which is serious in the context of the offence must normally be present	*Statutory aggravating factors:* Race and religious factors that aggravate the offence
The vulnerability of the complainant caused by the victim's circumstances	The offence is motivated by or demonstrates hostility to the victim based on the victim's disability (or presumed disability)
The offender assaulted the complainant over and over again	The offence is motivated by or demonstrates hostility to the victim based on his or her sexual orientation (or presumed sexual

1290 *DPP v Smith* [1961] AC 290.
1291 *R v Burstow* [1997] 3 WLR 534.
1292 *R v Bollom* [2004] 2 Cr App R 6.
1293 *R v Brown and Stratton* 1997 EWCA Crim 2255.
1294 Section 121(3)(c) of the *Coroners and Justice Act.*

	orientation)

The legislation defines "racially or religiously aggravated" as an aggravating factor is to show unfriendliness to people of a particular race or religion, or that the commission of the crime was encouraged by those factors.[1295] The factors of harm and culpability constitute the "principle factual elements of the offence", and their primordial status reflects the fact that the determination of the category range has the most effect on the gravity of the sentence.[1296] For example, the highest level of seriousness offence level for assault carries a sentence range of between 9 and 16 years in prison, and the lowest level carries a sentence range of between three and five years in jail.[1297]

5.3.1.2 Secondary factors

The guideline lists other secondary aggravating factors, such as a significant degree of premeditation; the use of a weapon; the intention to commit more serious harm than actually resulted from the offence; the deliberate causing of more harm than was necessary for the commission of the crime; the deliberate targeting of a vulnerable victim; playing a leading role in a gang or group; or committing a crime motivated by or demonstrating hostility based on the victim's age, sex, or gender. These factors are used to determine culpability.[1298]

Factors indicating lesser harm are injuries that are less severe in the context of the offence.[1299] Factors indicating lower culpability are: playing a subordinate role in a group, a greater degree of a provocation than is usually expected, lack of premeditation, or mental disorder or learning disability, were linked to the commission of the offence.[1300]

1295 Section 28(1)(a) and (b) of the *Criminal Disorder Act* 1998.
1296 Roberts *Sentencing Guidelines in England and Wales* 6.
1297 Assault Definitive Guideline.
1298 Section 121(6)(b) of the *Coroners and Justice Act.*
1299 Assault Definitive Guideline.
1300 Assault Definitive Guideline.

After the categorisation of the crime range, the guideline provides a range of sentences ("the offence range") for a court to impose on an offender convicted of assault,[1301] as well as a starting point in the offence range.[1302]

The courts use the starting point in the offence range to shape a sentence which the remaining steps in the guideline further changes the sentence. The justification of starting point sentences derives from guideline judgments of the Court of Appeal, which has been an element of appellate jurisprudence in England for many years.[1303] The incorporation of the starting point links the guidelines to the traditional source of guidance for courts of the first instance, and this, in turn, may enhance the acceptability of the guidelines to courts.[1304] Further, it reflects the psychology of human decision-making;[1305] while eliminating the opportunity for courts to enter the sentence range from different points in the offence range, which may have an adverse impact on consistency in sentencing. Starting point penalties apply to all offenders, irrespective of a guilty plea or the presence of previous convictions.[1306] The reception of the idea of having a starting point sentence is favourable within the legal fraternity, the profession and respondents.[1307]

5.3.1.2.1 South African position

In South Africa, stratification of the offence of assault (and many others) into different levels, such as 1, 2 and 3 do not exist. Stratified offences are, to some degree, part of the CLAA. After the conviction of the offender, the courts are not preoccupied with a sentence, because there is no corresponding preceding sentence available for the offence. There is no obligation on the court to categorise the crime at that stage. The level of harm and the culpability of the offender are known to the court to a certain extent at that stage. A proper sentence for the offence, let alone a starting point sentence, is not relevant at that point. The court is seized only with its sentencing jurisdiction.

1301 Section 121(a) of the *Coroners and Justice Act.*
1302 Section 121 (5)(a) of the *Coroners and Justice Act.*
1303 Roberts *Sentencing Guidelines in England and Wales* 7.
1304 Roberts *Sentencing Guidelines in England and Wales* 7.
1305 Roberts *Sentencing Guidelines in England and Wales* 7.
1306 Assault Definitive Guideline.
1307 Sentencing Council, Assault Guideline 5 (2011).

The discretion to determine the seriousness of the offence is left entirely to the discretion of the courts. This approach poses a few problems for sentencing. South African courts are in the same position as those in England and Wales under the guidelines, where they have the discretion to consider the seriousness of the offence on their own. The South African courts rely on common law principles and the penalty clause to determine the gravity of the crime which creates an inconsistent approach to sentencing.

Firstly, any crime can be described as a serious offence and yet some are punished more severely than others.[1308] Secondly, the courts categorise some offences as severe only in name. Thus, the courts have repeatedly said that driving under the influence of liquor is a serious crime, which calls for severe punishment, yet they do not always treat it as such.[1309] The dangers of such an approach are that a premature conclusion is reached to adjust the sentence upwards.[1310]

The proper approach is for the courts, in considering the crime component, to consider in each instance the offender's particular crime and its seriousness,[1311] and not to make a generalised assessment of the severity of a certain kind of offence.[1312] This is because the gravity of a crime can take many shades and grades.[1313] It is therefore wrong to merely regard driving under the influence of liquor as a serious offence, as this is a generalisation that the courts must not elevate into a principle that the tribunals must rigidly apply in every case.[1314] The seriousness of dealing in drugs, for example, varies widely, depending on the amount involved and the harmfulness of the drugs.[1315]

So too, in South Africa, because of the lack of clarity in the statutory provisions or legislative guidelines to determine the seriousness of an offence, the matter is left in limbo. Consequently, the gravity of a crime is determined subjectively, which is not

1308 The *De Kock* case at 192g-i.
1309 The *Fraser* case at 864B.
1310 *S v R* 1993 1 SACR 209 (A) at 220e-f
1311 The *Ingram* case at 8j.
1312 The *De Kock* case at 192i.
1313 The *Collins* case at 581c.
1314 The *Fredericks* case at 1049E.
1315 The *Shangase* case at 416E.

conducive to consistency in sentencing. The starting point and category range sentence in the sentencing guidelines of England and Wales promote uniformity in sentencing. In South Africa, courts have a broad discretion based on their sentencing jurisdiction.

In contrast to what the guidelines in England and Wales require, serious injuries need not be present to constitute an assault offence. The slightest contact with the offender's hand with a person's body constitutes harm and the offence of common assault.[1316] Assault may also be committed indirectly by derailing a train and causing a collision or accident,[1317] by having children drink alcohol,[1318] or by having someone drink any harmful substance,[1319] or driving a truck and deliberately swerving towards a person, even when you do not hit the person.[1320] The injuries need not be dangerous.[1321] A persistent attack on a victim resulting in the infliction of injuries[1322] or giving electrical shocks to the body[1323] constitutes the offence of assault to do grievous bodily harm in South Africa.

The blameworthiness or culpability of the offender is an accepted factor in South African sentencing law that influence a sentence either downwards or upwards.[1324] In England and Wales, the guidelines direct the courts to two sets of primary and secondary factors that affect culpability, which subdivide into factors for higher and lower liability factors. In South Africa, where such directives are absent at the sentencing stage, courts may overlook some of them and neglect to consider the blameworthiness of the offender.[1325] In South Africa, England and Wales alike, these factors are among the aggravating and mitigating factors that influence the seriousness of the offence.

1316 *R v Gosain* 1928 1928 TPD 516.
1317 *R v Jolly* 1923 AD 176.
1318 The *Marx* case.
1319 *S v A* 1993 1 SACR 600 (A) 607d.
1320 *S v Joseph* 1964 4 SA 54 (RA).
1321 The *Mdau* case.
1322 *S v Mapasa* 1972 1 SA 524 (E) 525.
1323 *S v Mtimunye* 1994 2 SACR 482 (T) 484i-j.
1324 The *Somyalo* case at 569b.
1325 The *Wood* case at 97E-F.

The culpability of offenders should be spread proportionately according to the role they have played in the commission of the crime, which should reflect in their sentences. Examples include the youth of an offender,[1326] stress, provocation and some form of mental illness,[1327] or in the case of a woman, being abused.[1328] The level of culpability or blameworthiness in the commission of the crime is the general criterion the courts must consider to determine the negligence of the offender.[1329]

The approaches to sentencing in South Africa, England and Wales are markedly different regarding the methodology they employ. The courts in England and Wales are obliged to pause at the corresponding starting point and category range of a sentence after they have categorised the seriousness of the offence. The category of the offence predetermines the preceding sentence, after that the court will follow step two.

5.3.2 Step Two: Shaping the Provisional Sentence

In Step Two, the court should use the corresponding starting point to reach a sentence within the category range.[1330] The preceding sentences apply to all offenders, irrespective of their pleas or prior criminal records.[1331] In cases of a particular severe nature, reflected by multiple features of culpability in Step One, may justify an upward deviation from the preceding sentence before further adjustment for aggravating or mitigating factors.[1332] These two concepts reflect in Table 3 below.

Table 3

Offence Category	**Starting Point** (Applicable to all offenders	**Category Range** (Applicable to all offenders)
Category 1	12 years' custody	9-16 years' custody

1326 The *Peterson* case at para 19.
1327 Snyman *Criminal law* 174.
1328 *S v Engelbrecht* 2005 2 SACR 163 (W).
1329 *S v Nxumalo* 1982 3 SA 856 (A) at 861H.
1330 Section 121(4) of the *Coroners and Justice Act.*
1331 Assault Definitive Guideline.
1332 Section 121(6)(a) of the *Coroners and Justice Act.*

Category 2	6 years' custody	5-9 years' custody
Category 3	4 years' custody	3-5 years' custody

In Step Two the guideline requires the court to fine-tune its provisional sentence based on the category starting point by referring to a list of aggravating or mitigating factors which relate to the seriousness of the offence, culpability, or personal mitigation.[1333] The preceding sentence excludes the aggravating and mitigating factors at the initial stage. They come into play only after the determination of the offence category, which would relate to the crime category to a corresponding starting point sentence and a total offence range.[1334] The guideline provides a non-exhaustive list of these aggravating and mitigating factors, including factors relating to the offender.[1335] The court must consider these factors and determine whether they justify an upward or downward deviation from the starting point sentence.[1336] These factors are given below in Table 4.

Table 4

Factors increasing seriousness ***Statutory aggravating factors:***	**Factors reducing gravity or reflecting personal mitigation**
Previous criminal records, having regard to (a) the nature of the offence to which the conviction relates and its relevance to the current crime, and (b) the time that has elapsed since the conviction	No prior criminal records or no relevant/recent convictions
Offence committed while on bail	Single blow
Other aggravating factors include:	Remorse
Location of the offence	Good character and exemplary conduct
Timing of the offence	Resolute of the offender to take steps to address addiction or offending behaviour

1333 Section 121(6)(a) and (b) of the *Coroners and Justice Act.*
1334 Section 121 (10)(i) of the *Coroners and Justice Act.*
1335 Assault Definitive Guideline.
1336 Roberts *Sentencing Guidelines in England and Wales* 7.

On-going effect upon the victim	The offender has a serious medical condition which requires urgent, intensive or long-term treatment
Offence committed against those working in the public sector or providing a service to the public	Isolated incident
The offender perpetrated the offence while his family members were present	The youthfulness of the offender or lack of maturity where it affects the responsibility of the offender
Gratuitous degradation of victim	The period of the lapse of time since the offence where this is not the fault of the offender
In domestic violence cases, the victims forced to leave their home	The offender has a mental disorder or learning disability, it is irrelevant to the commission of the offence
Failure to comply with current orders	Sole or primary care for dependent relatives
The offender committed the offence while on licence	
An attempt to conceal or dispose of evidence	
Ignorance to react to alerts or concerns expressed by others about the offender's behaviour	
Commission of offence while under the influence of alcohol or drugs	
Abuse of power and position of trust	
Exploiting contract arrangements with a child to commit an offence	
Previous violence or threats to the same victim	

Established evidence of impact on the community
The offender prevented the complainant from reporting an incident or obtaining assistance and from assisting or supporting the victim

5.3.3 Step Three (Considering any factors which indicate a reduction, such as assistance to the prosecution)

In Step Three the guideline directs the court to take into account provisions in the *Serious Organized Crime and Police Act* 2005.[1337] The rules permit a court to reduce a sentence following a guilty plea and if the accused is convicted of an offence in proceedings in a Superior Court (Crown Court), or is committed to the Superior Court for sentence.[1338] The other instance is when the offender has under a written agreement provided (or offered to provide) assistance to the prosecution or police about that or any other offence.[1339] In passing sentence, the court has discretion to reduce the sentence it would originally have imposed, considering the length and type of the assistance given or offered.[1340]

The guideline also provides the court with discretion to reconsider an imposed sentence where the offender provided the prosecution or the police with the help relating to the commission of an offence, in which entitles the offender to a reduction in sentence.[1341] The court also has discretion in considering the reduction to take into account the extent and nature of the assistance.[1342]

1337 Sections 125(5)(b) of the *Coroners and Justice Act.*
1338 Section 73(1)(a) of the *Serious Organised Crime and Police Act.*
1339 Section 73(1)(b) of the *Serious Organised Crime and Police Act.*
1340 Section 73(2) of the *Serious Organised Crime and Police Act.*
1341 Section 74(2) of the *Serious Organised Crime and Police Act.*
1342 Section 74(6) of the *Serious Organised Crime and Police Act.*

The requirements for a reduction in sentence is there must first be a guilty plea followed by the offender's assisting in the investigation of the case. Secondly, the offender must be a sentenced offender, and this must be followed by the giving of aid by the offender to the prosecution or the investigating officer.

5.3.3.1 South African position

In South Africa, the criminal justice system does not allow for a reduction in sentence based on any assistance given by the offender. A guilty plea and aid in the solving of that particular offence, to which the offender pleaded guilty count as one factor showing remorse.[1343] Assisting the police in solving the crime or related crimes,[1344] and offering to pay compensation to the victim count as mitigating factors in sentencing.[1345]

5.3.4 Step Four (Reduction for a guilty plea)

In Step Four, the guidelines require the court[1346] to reduce sentences where the offenders have pleaded guilty.[1347] It coincides with the duty of the Sentencing Council to issue a definitive guideline for guilty pleas.[1348] Currently, there is a guideline, namely "Reduction in Sentence for a Guilty Plea Draft Guideline", that was published on the 11 February 2016.[1349] The draft guideline sets out a five-stage approach to the application of the future guideline. Firstly, determine the appropriate sentence for the offence(s) about any offence-specific sentencing guideline. Secondly, determine the level of reduction for a guilty plea as per the guideline. Thirdly, state the amount of that reduction, apply the discount to the appropriate sentence. Fourthly, follow any further steps in the offence-specific guideline to determine the final

1343 *S v Labuschagne* 1997 2 SACR 6 (NC) at 17g.
1344 *S v Els* 1979 3 SA 413 (RA) at 414H.
1345 *S v Schutte* 1995 1 SACR 344 (C) at 350h.
1346 Section 125(5) of the *Coroners and Justice Act.*
1347 Section 144 of the *Criminal Justice Act*.
1348 Section 120 *Coroner and Justice Act*.
1349 https://www.sentencingcouncil.org.uk/publications/item/reduction-in-sentence-for-a-guilty-plea-guideline-consultation/.

sentence. The stage in the criminal proceedings where the offender indicated of to plead guilty,[1350] as well as the circumstances, provide the court with discretion.[1351]

5.3.4.1 South African position

The CPA in South African intricately link a guilty plea in South Africa to remorse, and that factor alone need not necessarily count as a mitigating factor in sentencing because an offender is entitled to tender a plea of not guilty and challenge the state's case.[1352] A plea of not guilty should never be held against him when sentence becomes relevant,[1353] because it may also infringe on the fair trial rights of the offender.[1354]

A guilty plea does not necessarily translate into remorse where the state has an open and shut case against the offender, in which situation the rendering of a guilty plea may not be genuine, but self-serving.[1355] In other instances, guilty pleas tendered where the evidence is overwhelming may not signify genuine remorse, and may not mitigate the sentence.[1356]

In some cases, guilty pleas do translate into genuine remorse. This is so in circumstances where the accused of his volition opens up about the commission of the crime and undertakes to compensate the victim. It would be a substantial mitigating factor that courts would consider in the imposition of a sentence.[1357] Real remorse is, for example, where the offenders, immediately after the commission of a robbery, realise that they made a mistake, and the next day informed the police that they had lied about the

1350 Section 144(1)(a) of the *Criminal Justice Act.*
1351 Section 144(1)(b) of the *Criminal Justice Act.*
1352 *S v Furlong* 2012 2 SACR 620 (SCA) at [16] Petse AJA referring to The Barnard case at 197g-h.
1353 Du Toit *Straf* 71.
1354 Section 35(3) of the Constitution.
1355 *De Villiers v S* Unreported, GSJ case no A168/2012, 27 February 2014.
1356 *S v Limo* 1995 1 SACR 404 (O) 407i-j.
1357 *S v Volkwyn* 1995 1 SACR 286 (A) at 289g-i.

robbery, where the money was retrieved, and where they pleaded guilty at their subsequent trial.[1358]

A guilty plea, therefore, does not serve as a factor that always mitigates an offender's sentence in South African sentencing law.

5.3.5 Step Five (Dangerousness)

Step Five requires courts to consider the criteria contained in Chapter 5 of the *Criminal Justice Act* 2003, whether the offence of burglary was committed with the purpose to (a) cause severe injury on a person; or (b) do unlawful damage to a building or anything in it. A conviction on a charge of burglary carries a prison term of between 10 and 14 years.[1359] A burglary offence is a specified offence[1360] for which an offender is liable to life imprisonment or imprisonment for public protection against dangerous criminals.[1361] This step creates considerable discretion for the court, which may impose a lengthy prison sentence that falls outside the category range, provided that the threshold of the seriousness of the offence or injury justifies such a sentence.

Where offenders meet the criterion of having committed a dangerous act, the courts may use the pronounced sentence as the basis for the setting of a minimum term. The criterion requires that it must relate to an offence as prescribed in the legislation,[1362] and the offender must have caused death or an injury of a serious nature, whether physical or psychological.

In South Africa, sentencing legislation provides instances where offenders may be committed to long terms of imprisonment. The court may declare them to be dangerous criminals,[1363] commit them to treatment centres,[1364] and declare them to be habitual offenders.[1365]

1358 *S v Mooketsi* 2015 1 SACR 295 (NCK).
1359 Section 9 *Theft Act* 1968.
1360 Section 224 of the *Criminal Justice Act.*
1361 Section 225 of the *Criminal Justice Act.*
1362 Section 229(4) of the *Criminal Justice Act.*
1363 See Chapter Four para 4.7.2.3 of this thesis.
1364 See Chapter Four para 4.7.2.1 of this thesis.
1365 See Chapter Four para 4.7.2.2 of this thesis.

5.3.6 Step Six (Totality Principle)

Step Six requires the court to invoke the totality principle[1366] for cases in which the court sentences an offender for more than a single offence, or where the offender is currently serving a sentence. The court is required to adjust the sentence to ensure that the total sentence is just and proportionate to the offending behaviour. This step ensures that the offender does not endure unnecessary hardship by serving each sentence independently or separately.

The effect of the principle is that it obliges the court to exercise its discretion by taking all the offences together as one and sentence the offender. The court does this by ordering that some of the sentences run concurrently with the longest period of imprisonment.[1367] The effect thereof is that the offender serves only one sentence.[1368]

5.3.6.1 South African Position

It addresses the situation where the court sentence the offender for more than one offence, with the effect that the offender would have to serve an excessively long term of imprisonment if he were to serve each term in jail separately instead of concurrently.[1369] South African courts must be alert to the situation of an offender whom the court sentence for multiple counts. The cumulative effect of the sentences must receive priority to ensure that the punishment is not harsh and disproportionate to the offences.[1370] A jail term must be reasonable and courts must not use it to satisfy public opinion but must serve the interest of justice.[1371]

1366 Sentencing Council, Offenses taken into consideration and totality (2012), available at http://sentencingcouncil.judiciary.gov.uk/docs/Definitive_guideline_TICs_totality_Final_web.Pdf.

1367 Section 166(1) of the *Criminal Justice Act.*

1368 Section 166(3) of the *Criminal Justice Act.*

1369 The *Mhlakaza* case at 519g.

1370 *S v Maseola* 2010 2 311 (SCA) at 314d.

1371 The *Mhlakaza* case at 524a.

In the *Young* case,[1372] Trollip JA stated:

> Where multiple counts are closely connected or similar in point of time, nature, seriousness, or otherwise, [concurrency] is sometimes a useful, practical way of ensuring that the punishment imposed is not unnecessarily duplicated or its cumulative effect is not too harsh on the accused.

The running of sentences concurrently is desirable even if the offences were committed at different places and at different times.[1373] Sentencing courts ought to tirelessly balance the mitigating and aggravating factors to reach an appropriate sentence, by factoring in the cumulative effect of the ultimate sentence imposed.[1374]

In the imposition of a sentence for multiple counts, the court needs to ask itself what the appropriate punishment should be for all the offences together.[1375] If the penalty is disproportionate and harsh, measured against the crimes convicted upon, then it has to be accepted that such sentences are inappropriate.[1376]

5.3.7 Step Seven (Compensation and ancillary orders)

In Step Seven, the court must consider making an order that the accused must pay compensation where someone suffered personal injury, loss or damage as a result of the crime.[1377] It can either be an ancillary order or a sentence in its right, which does cause the victim to pay additional charges. The court must provide justification where it decides not to order compensation. There is no statutory limit to the amount of compensation that the courts may impose for crimes where the accused is 18 years and older. The courts may also make payment orders considering the offences.[1378] The effect thereof mitigates sentences for direct imprisonment if circumstances in a case are conducive. Courts in South Africa do not necessarily consider compensation and ancillary orders. The CPA make provisions for courts to

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1372 At 610E.
1373 *S v Kruger* 2012 1 SACR 369 (SCA) at 372f.
1374 The *Kruger* case at 372g.
1375 *S v Johaar* 2010 1 SACR 23 (HHA).
1376 *S v Dube* 2012 2 SACR 579 (ECG) 584j.
1377 Section 130 *Powers of Criminal Courts (Sentencing) Act* 2000.
1378 Section 131 *Powers of Criminal Courts (Sentencing) Act* 2000.

consider compensation orders,[1379] where such an award has the effect of a civil judgment[1380] of a magistrates' court and the regional court.[1381] Money taken from a person during his arrest[1382] may, upon an order of the court, be used to satisfy the award.[1383]

5.3.8 Step Eight (Reasons)

In Step Eight the court is required to provide reasons for and explain the effect of the sentence.[1384] The court must give reasons in a public hearing, in ordinary language, using general terms.[1385] The court must elaborate in detail to the offender the nature of the sentence in a language that the offender understands.[1386] The court must also explain the effect of non-compliance with orders that are part of the penalty, the powers of the court to amend the order on application by the offender and if the sentence includes a fine, the effect of a failure to pay the fine.[1387]

5.3.8.1 South African position

In South Africa, the position is the same. When courts determine an appropriate sentence, the court has to make a value judgment objectively, so that it can explain the sentence.[1388] The reasons should also make clear to the public and the victims why the court has acted with some restraint in imposing sentence.[1389] Courts must look not only at the past but also to the future and must operate with mercy.[1390] The court should also explain, especially if there is a significant difference between the sentence imposed and that proposed by the defence, a probation officer or a presentence

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1379 Section 300.
1380 *S v Medell* 1997 1 SACR 682 (C) at 686f-687j.
1381 Government Gazette No. 374477 1 June 2014.
1382 Du Toit *Commentary* 29-2.
1383 Section 300(4) of the CPA.
1384 Section 174 f the *Criminal Justice Act.*
1385 Section 174(1)(a) of the *Criminal Justice Act.*
1386 Section 174(1)(b) of the *Criminal Justice Act.*
1387 Section 174(1)(b)(i)-(iv) of the *Criminal Justice Act.*
1388 The *Vries* case at 640g-h.
1389 The *Martin* case at 381h-i.
1390 The *Rabie* case at 861A.

report, why such suggested penalties were deemed inappropriate.[1391] These factors as all other factors which a court must consider in sentencing, may have a negative influence for equal treatment in sentencing.

5.3.9 Step Nine (Consideration for remand time)

Step Nine involves the court considering whether to give credit for time spent on remand or bail.[1392] When the court considers a sentence, the court must take into account any period the offender spent in custody while waiting for the finalisation of the trial.[1393] It is irrelevant that the offender was in custody in connection with other offences,[1394] or detained in connection with other matters.[1395] The court must record the time spent in custody on the record, and it entitles the offender that the court record such time as time served by the offender as part of the sentence.[1396]

Regarding the time spent on bail while awaiting trial for a crime that preceded the date of the operation of section 21 of the *Criminal Justice Act* 2008,[1397] for an offence perpetrated on or after 4 April 2005,[1398] that time count as time served by the accused as part of the sentence.[1399] The "credit period" is the total number of days represented by half of the sum of the day the court granted the offender bail on certain conditions,[1400] which include the days where the bail of the accused was subject to particular circumstances, rounded up to the nearest whole number.[1401]

5.3.9.1 South African position

1391 The *Martin* case at 381i-j.
1392 Sections 240 and 240A of the *Criminal Justice Act.*
1393 Section 240(1)(a)-(b) of the *Criminal Justice Act.*
1394 Section 240(2)(a) of the *Criminal Justice Act.*
1395 Section 240(2)(b) of the *Criminal Justice Act.*
1396 Section 240(3) of the *Criminal Justice Act.*
1397 Section 240A(1)(b) of the *Criminal Justice Act.*
1398 Section 240A(1)(a) of the *Criminal Justice Act.*
1399 Section 240A(2) of the *Criminal Justice Act.*
1400 Section 240A(3)(a) of the *Criminal Justice Act.*
1401 Section 240A(3)(b) of the *Criminal Justice Act.*

In South Africa, the time spent in custody while awaiting trial is a factor that courts consider in the imposition of a sentence.[1402] The time spent while on bail, with or without conditions or curfews attached, is something unknown in the sentencing law of South Africa and is not taken into account when courts consider sentences. The computation of the discount in a sentence is inconsistent because there is no rule of thumb in respect thereof.[1403] Courts have had various ways of making this calculation, such as an inexact subtraction of the time spent awaiting trial,[1404] a more or less exact deduction of the period spent awaiting trial,[1405] the total duration spent in prison,[1406] or the period spent in custody.[1407]

Later, a more revolutionary method surfaced, which is to treat the time spent in custody as equivalent to about twice the length of the awaiting trial period spent in detention, because of the harsher conditions that awaiting-trial prisoners have to endure in comparison with the conditions of sentenced prisoners.[1408] In one case this period was not even considered when the court imposed a sentence. The reasons therefor are not clear.[1409] Courts have different ways of factoring the length in custody while awaiting trial into the penalty. For example, the time may be taken into account in the sentence as a suspended sentence.[1410] The position was unsure until the Supreme Court of Appeal revisited the situation and determined a better approach, which is that the period in detention pre-sentencing is but one of the factors that come into play when the sentencing courts consider the appropriateness of sentences.[1411] The Supreme Court of Appeal stated that:

> A better approach, in my view, is that the period in detention pre-sentencing is but one of the factors that should be taken into account in determining whether the effective period of imprisonment to be imposed is justified: whether it is

1402 The *Dlamini* case 11a.
1403 *S v Seboko* 2009 2 SACR 573 (NCK) at para 22.
1404 The *Njikelana* case at 108.
1405 *S v Vilikazi* 2009 1 SACR 552 (SCA) at 396.
1406 *S v Hawthorne* 1980 1 SA 521 (A) at 523F-G.
1407 *S v Brophy* 2007 2 SACR 56 (W) para 18.
1408 The *Brophy* case at para 18.
1409 The *Maseola* case at 314a.
1410 *S v Bhadu* 2011 1 SACR 487 (ECG) 489h.
1411 *S v Radebe* 2013 2 SACR 165 (SCA) 170b-d.

> proportionate to the crime committed. Such an approach would take into account the conditions affecting the accused in detention and the reason for a prolonged period of detention.[1412]

The result thereof is that the extent to which the courts take such terms into account is obscured due to the fact that this factor now forms one of many factors courts consider in sentencing.[1413]

The right to be released on bail[1414] and the right against cruel, inhuman and degrading punishment[1415] are among the freedom rights that apply before and after conviction respectively. A person must be released from detention on bail if the interest of justice permits[1416] or if "exceptional and compelling circumstances"[1417] permit such a release before trial. If an offender is in custody because he could not convince the court to grant him bail,[1418] that person must remain in custody or use other procedures like review and appeal,[1419] or make application for bail on new facts.[1420] It is therefore submitted that to consider the waiting trial period as a mitigating factor seems to be at odds with the principles of bail, where the interest of justice demands that the offender ought to remain in custody under circumstances where the pre-sentence period mitigates the sentence.

5.4 The binding powers of the sentencing guidelines

Currently the *Coroners and Justice Act* creates the following duty on a court with respect to the guidelines:

> (1) Every court-
> (a) Must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender's case, and
> (b) Must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of that function

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1412 The *Radebe* case at para 14.
1413 *S v Mawase* 2011 2 SACR 462 (FB) 470d-e.
1414 Section 35(1)(f) and (2)(d) of the Constitution.
1415 Section 12(1)(e) of the Constitution.
1416 Section 60(11)(b) of the CPA.
1417 Section 60(11)(a) of the CPA.
1418 Section 60 of the CPA.
1419 Chapter 30 of the CPA.
1420 Section 65(2) of the CPA.

Unless the court is satisfied that it would be contrary to the interests of justice to do so.

(2) Subsections (3) and (4) apply where-
(a) a court is deciding what sentence to impose on a person ('P') who is guilty of an offence, and
(b) sentencing guidelines have been issued in relation to that offence which are structured in the way described in section 121(2) to (5) ('the offence-specific guidelines').

(3) The duty imposed on a court by subsection (1)(a) to follow any sentencing guidelines which are relevant to the offender's case-
(a) In all cases, a duty to impose on P, in accordance with the offence-specific guidelines, a sentence which is within the offence range, and
(b) Where the offence-specific guidelines describe categories of case in accordance with section 121(2), a duty to decide which of the categories most resembles P's case in order to identify the sentencing starting point in the offence range;
but nothing in this section imposes on the court a separate duty, in a case within paragraph (b), to impose a sentence which is within the category range.[1421]

The peremptory nature of the language in the provisions, "must… follow" indicates that the prescriptive sentence in the guidelines takes preference. A deviation from the normative sentence is justifiable only if it is in the interest of justice to so deviate. If the court deviates from the penalty in the guideline, it restores the discretion of the court the court is at liberty to impose a sentence in the category range.[1422] The structure of the guidelines requires the courts to follow a particular methodology in sentencing. The question remains, to what extent are the courts needed to comply with the guidelines. In other jurisdictions, the duty of the courts to follow instructions is usually strict.

The *Criminal Justice Act* directs the courts that in sentencing an offender, they must consider any guidelines relevant to the accused's matter.[1423] It further provides that where the guidelines indicate that a sanction of a particular kind, or within a specific range, would normally be appropriate for the offence, and the sentence is different or is outside that range, the court needs to state the reasons for punishing the offender outside that range.[1424] The court just needs to consider the Sentencing

1421 Section 125 of the *Coroners and Justice Act.*
1422 Roberts *Sentencing Guidelines and Judicial Discretion* 51.
1423 Section 172(1).
1424 Section 172(2) of the *Criminal Justice Act.*

Council's guidelines; and if it departs from them, to give reasons why it has done so.[1425]

5.4.1 Sentencing outside the Total Offence Range

The guidelines stratify most of the offences into several levels of seriousness and different category fields. Each category has its own range starting point sentence and group range. The courts must sentence within the total offence range, rather than the narrow range associated with any particular seriousness.[1426] The whole crime range is relatively wide, and naturally increases to reflect the gravity of the offence. For example, the criminal offence of assault causing grievous bodily harm/with intent to do grievous injury/wounding with intent to do grievous bodily harm carries a lower level range of four years' imprisonment, and the maximum penalty is 16 years' imprisonment, but the total offence range is life imprisonment. A custodial "zone" therefore exists between the guideline range ceiling of three years and the statutory limit of life imprisonment. It follows that a court may sentence anywhere in this range and still be compliant with the guidelines.[1427]

What is clear about the guidelines is that they provide courts with guidance as to the appropriate disposals for cases; they do not encompass cases falling at the extremes of mitigation or aggravation. The anticipation is that the guidelines will accommodate most cases within the total offence range specified in the directive. However, there will be a small number of cases that fall into the most severe category (Category 1), yet for whom a term of custody more than 16 years is proportionate. The inverse is also true, where some cases conforming to the lowest level of seriousness (Category 3) may warrant a disposal less punitive than a fine. In the event of the imposition of a sentence beneath a low-level community order, the court must explain why it would be "contrary to the interest of justice" to impose a sentence within the guideline total offence range.[1428]

1425 Section 172 of the *Criminal Justice Act.*

1426 Roberts *Sentencing Guidelines and Judicial Discretion.*

1427 Sentencing Council, Assault Definitive Guideline.

1428 Section 125(1)(b) of the *Coroners and Justice Act.*

5.5 Emerging issues and challenges to the guidelines

5.5.1 Compliance rate

One of the aims of the guidelines is to promote a consistent approach to sentencing, and ultimately to achieve consistency in sentencing.[1429] The collection of data is crucial to establishing the compliance rate of the courts about the enforcement of the provisions in the guidelines, but the data for the application of the directives of the Sentencing Advisory Panel and the Sentencing Guideline Council are not available. The new Sentencing Council has a statutory duty to monitor the "operation and the effect" of its sentencing guidelines.[1430] The Sentencing Council must "discharge its duty under the provisions of subsection (1)(a) to concluding the frequency of which, and the extent to which, courts depart from sentencing guidelines."[1431]

Regarding its statutory duties to monitor sentencing guidelines, the Sentencing Council published a document, the "Sentencing Council Annual Report 2014/15", wherein it records individual data relating to the trends in sentencing for particular offences.[1432] The yearly report covers the period from 1 April 2014 to 31 March 2015. The report consists of data for Sentencing Council definitive guidelines that have been in force long enough for the monitoring of departures in assault, burglary, drugs and dangerous dog offences.[1433]

The analysis below present's data on sentences imposed between January and December 2014 for assault, burglary, drugs, and dangerous dog offences from a discussion of the CCSS and the Ministry of Justice's Court Proceedings Database.

1429 Section 125 of the *Coroners and Justice Act.*

1430 Section 128(1)(a) of the *Coroners and Justice Act*.

1431 Section 128(2)(a) of the *Coroner and Justice Act.*

1432 Sentencing Council, Crown Court Sentencing Survey (2015), available at http://sentencingcouncil.Judiciary.gov.uk/docs/CCSS_Annual-Report-2014-15WEB.pdf. (hereafter the CCSS)

1433 http://www.sentencingcouncil.org.uk/analysis-and-research-survey/ccss-annual-2014-results/

5.5.1.1 Assault crimes (Definitive guideline in force 13 June 2011)

Assault occasioning actual bodily harm: 97 percent of the sentences imposed fell within the guideline offence range; two percent were above, and one percent was below range.[1434]

Causing grievous bodily harm with intent to do grievous injury/wounding with intent to do serious injuries: 92 percent were within the range; two percent were above, and seven percent were below range.[1435]

Common assault: 98 percent were within the range, and two percent above the range.[1436]

Inflicting grievous bodily harm/unlawful wounding: 98 percent were within the range, two percent were above, and less than one percent was below the range.[1437]

Assault on a police officer in the execution of his duty: 86 percent were within the range, one percent was above, and 13 percent were below the range.[1438]

5.5.1.2 Burglary offences (Definitive guideline in force 16 January 2012)

Domestic burglary: 96 percent of the sentences imposed fell within the guideline offence range, three percent were above, and one percent was below the range.[1439]

Non-domestic burglary: 96 percent of the sentences imposed fell within the guideline offence range, less than one percent was above, and four percent were below the range.[1440]

5.5.1.3 Drug crimes (Definitive guidelines in force 27 February 2012)

Owning or keeping of a controlled drug - Class A: 84 percent of the sentences imposed fell within the guideline offence range; less than one percent was above, and 16 percent were below the range.[1441]

1434 CCSS at the first bullet 18.
1435 CCSS at the second bullet 18.
1436 CCSS at the third bullet 18.
1437 CCSS at the fourth bullet 18.
1438 CCSS at the fifth bullet 18.
1439 CCSS at the first bullet 18.
1440 CCSS at the second bullet 18.

Owning or keeping of a controlled drug - Class B: over 99 percent of the penalties fell within the guideline offence range, and less than one percent was above the range.

Owning or keeping of a controlled drug - Class C: 89 percent of the sentences imposed fell within the guideline offence range, and 11 percent were above range.[1442]

Production of a controlled drug - Class B/cultivation of a cannabis plant: over 99 percent of the sentences imposed fell within the guideline offence range, and less than one percent was above the range.[1443]

Providing or offering to provide a controlled drug/possession of a controlled drug with intent to supply it to another - Class A: 99 percent of the sentences imposed fell within the guideline offence range, one percent was above, and less than one percent was below the range.[1444]

Providing or offering to supply a controlled drug/possession of a controlled drug with the intent to deliver it to another – Class: B 99 percent of the sentences imposed fell within the guideline offence range, one percent was above, and less than one percent was below the range.[1445]

Providing or offering to supply a controlled drug/possession of a controlled drug with intent to supply it to another - Class B: 99 percent of the sentences imposed fell within the guideline offence range, less than one percent was above, and one percent was below the range.[1446]

5.5.1.4 Dangerous Dog offences (Definitive guideline in force 20 August 2012)

The keeper, possessor or holder of a dangerous dog in a public place, or allow the dog in a private area without permission, and the dog injuring any person. Over 99

1441 CCSS at the first bullet 18.
1442 CCSS at the second bullet 18.
1443 CCSS at the third bullet 19.
1444 CCSS at the fourth bullet 19.
1445 CCSS at the fifth bullet 19.
1446 CCSS at the sixth bullet 19.

percent of cases sentenced within the guideline range and less than one percent was above the range.[1447]

The data for the three crimes reveal a high percentage compliance rate where the imposed sentences fell within the guideline offences range. A tiny percentage was below and above the range. The statistics indicate that a consistent approach to sentencing for all courts in the England and Wales system promotes consistent outcomes in sentences. This is highly encouraging, irrespective of the considerable discretion courts have when they consider penalties for specific offences in the guidelines.

The positive outcomes regarding consistency in sentences are as a result of the statutory factors courts take into account when categorising crimes, and bracket the offence category with a corresponding starting point sentence and group range. Less movement is allowed within the class range when the courts consider secondary factors for sentencing. The narrow grid in which courts have to manoeuvre in the category field becomes inconsequential. Hence, the high percentage margin of compliance with the range.

The courts are allowed by the guidelines to use their discretion only within the offences category, the starting point sentence, and the group range.

5.5.2 Responding to Punitive Surges

The function of the guidance is to guard against local or general outbursts of punitiveness from affecting sentencing practices.[1448] The sentencing courts sometimes impose exemplary sentences when there is an increase in the prevalence of a particular offence. The guidelines guard against such practices.[1449] The riots of August 2011, which were extraordinary mass riots in some English cities, created an unexpected and unwelcome challenge for the guidelines.

Over three consecutive nights, scores of individuals participated in mass looting in several cities like Birmingham, Manchester, London and Bristol. An unusual number

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1447 CCSS at the first bullet 19.

1448 Roberts *Sentencing Guidelines in England and Wales* 15.

1449 Roberts *Sentencing Guidelines in England and Wales* 16.

of offenders arrested overnight, where offending was so far removed from convention as to render sentencing guidelines irrelevant. After noting that the severity of the offences committed took them "completely outside the usual context of criminality", the court assumed the view that the existing sentencing guidelines could be departed from because the criminal justice system could not fault for being slow to respond.[1450]

Many offenders were located, charged, brought to court, and having entered guilty pleas were sentenced less than a week after the offences had been committed. The court then outlined new starting point penalties and sentencing ranges for a broad variety of crime. In those cases, the court viewed the riots as an overwhelming aggravation and averred that the "interest of justice" factor justified a deviation from the guidelines to impose sentences of prison terms recognising the offenders' early guilty pleas.

The Manchester Crown Court issued some "guidelines" (called the Carter guidelines) after the trials, which are:

a.	Organiser of riot or commercial burglaries	From 8 years and up
b.	Accomplice to a housebreaking	4-7 years
c.	Arson - lives of others in actual danger	6 years and upwards
d.	Arson; otherwise	3-7 years
e.	Robbery	
	i. With firearm, or where serious injury caused	7-9 years
	ii. With another weapon	3-7 years
	iii. No weapon/no significant injury	2-5 years
f.	A person entering a burgled premises	2-5 years
g.	Theft of goods in street	1-4 years
h.	Handling	
	i. Professional fence	2-5 years
	ii. Receiving on streets	1-4 years
	iii. Receiving elsewhere	Community penalty –

1450 *R. v. Carter and Ors (Sentencing Remarks)* [2011] EW Misc 12 (CrownC).

		3 years imprisonment
i.	S 47/s 20 Assault on Police/Firefighters/Paramedics/Those trying to prevent crime or protect property	
	i. If significant injury/weapon used	3-4 years
	ii. No significant injury	1-3 years
j.	Violent disorder	2-4 years
k.	Affray	1-2.5 years

The Carter "guidelines" were immediately followed by some judgments from other courts, all of which endorsed those ranges.[1451] The relevant definitive guideline for burglary in a building other than a dwelling in effect at the time has three levels of seriousness. The lowest level applies to burglary involving goods valued at 2000 pounds and carries a range of a penalty to six months custody, with a starting point sentence of a community order. The court sentenced the offender to 24 months imprisonment, reduced to 18 months, to reflect the early guilty plea.

The *ad hoc* sentencing ranges pose challenges to the existing guidelines, which reflect a high degree of aggravation that undermines the integrity of the guidelines. Secondly, by prescribing a new set of starting points and sentence ranges for a raft of offences, the judgment creates an additional level of directives authority for local courts.

5.5.2.1 The impact of aggravating factors on proportionate sentencing

The aggravating factors in sentencing have an upward effect on sentences in South Africa, as in England and Wales. The enhanced quantum of punishment should be in proportion to the elevated harm of the offence or the culpability of the offender. The extent to which a factor aggravates the sentence in a particular case is at the discretion of the courts. It is therefore important for courts to be mindful of the role of proportionality in sentencing, because this guides the court to determine a proper

1451 *R. v. Twemlow and Ors (Sentencing Remarks)* [2011] EW Misc 14 (CrownC).

sentence. The Legislature is not in a position to develop a particular calculus to extrapolate the portion to which a penalty is increased or decreased. Hence, courts are afforded some level of sentencing discretion to individualise the offence about the offender.

The guideline offers some guidance as to the appropriate range of sentence resulting from an aggravating circumstance. The reduction for a guilty plea is a good example. The courts retain the discretion to award a greater reduction in exceptional cases, but such cases are rare, and will entail the court's invoking the interest of justice provision in the *Coroners and Justice Act* to step outside the guideline maximum of one-third.[1452]

Courts cannot select any random magnitude of discount. This would threaten consistency and indeed proportionality in sentencing. The gravity of the predicate conduct of the offence of conviction should also constrain aggravating factors. For example, the tariff for the offence of common assault without injury to the victim is a community order; the sentence should not rise to several years in prison if the attack were racially motivated, which aggravates the offence.[1453]

In South Africa, the district courts commonly adjudicate the crime of assault, where the courts may impose a maximum sentence of three years' of imprisonment, compared with a maximum of 16 years' imprisonment in England and Wales.

5.5.2.2 A threat to ordinal proportionality

Ordinal proportionality is one of the requirements of desert-based sentencing. Desert-based sentencing requires offences of differing seriousness to receive sentences of comparable severity.[1454] Rank-ordering is one of the sub-requirements of ordinal proportionality. Crimes ranked differently regarding their relative severity should receive commensurable distinguishable penalties.

The aggravating and mitigating factors in a case increase and decrease the gravity of the sentence to a great extent, which is a threat to ordinal proportionality. It may

1452 Section 125(1).
1453 Robert *Sentencing Guidelines in England and Wales* 18.
1454 Von Hirsch *Censure and Sanction* 18-19.

happen that for a petty offence, the aggravating factor increases the penalty to one more usually associated with a serious crime. This causes the ranking of the seriousness of crimes to scramble, and blurs justice in sentencing. It will exacerbate the position, because proportionality is not only relevant for similar crimes, but covers the entire spectrum of offending. For example, to punish assault more harshly than standard assault preserves proportionality across powerful attacks, but if the attack results in the imposition of a harsher disposal than murder, ordinal proportionality is threatened.

The Sentencing Council did not react to the guidelines issued in *Carter* and advised that matters relating to the riots and the sentences imposed referred to the Court of Appeal.[1455] For the Sentencing Council to issue a new or revised guideline would require the fulfilment of several statutory duties and public consultation, which would not have helped the cause of reacting to the *ad hoc* guidelines.[1456] The Court of Appeal can respond much quicker, once it has received an appeal, as it pronounced in a lengthy judgment.[1457]

The Court of Appeal in *Blackshaw* noted that Crown Court judges are not in a position to issue sentencing guidelines.[1458] But both courts agreed that the riot-related offending was of nature not envisaged by and therefore not encompassed within the existing guidelines. The Court of Appeal held that the current guidelines for specific offences were of less weight in the context of the sudden riot-related incidents, and could rightly depart from those guidelines.[1459] The *Blackshaw* case, therefore, reinforced the provision that only the Sentencing Council and the Court of Appeal have the authority to issue guidelines.

1455 Statement Following Council Discussion on Sentencing for Offences Committed During the August Riots, Sentencing Council (16 September 2011). http://sentencingcouncil.judiciary.gov.uk/news-Stories.htm.

1456 Section 120(5)-(6) of the *Coroners and Justice Act*.

1457 *R. v. Blackshaw,* [2011] EWCA (Crim) 2312.

1458 The *Blackshaw* case at para 20.

1459 The *Blackshaw* case at para 17.

5.6 Achieving consistency in sentencing

The sentencing guidelines of England and Wales espouse the ideal of the achievement or promoting uniformity in sentencing by structuring the court's sentencing discretion in a particular direction. The context and format of the sentencing guidelines encourage a consistent approach to the sentence, rather than consistency of outcome. The quintessential is that the same method adopted by all courts in sentencing will promote consistent outcomes. It is likely because the first two critical stages of the guideline ensure that the tribunals will arrive at the same result for the same offence. The submission is that there is not much leverage for courts to move up or down within the category range; that is, if the courts follow the guidelines stringently.

The guidelines offer a great deal of latitude for courts in sentencing. Firstly, the sentencing guideline permits courts to impose a sentence outside the guideline, if it would be in the interest of justice not to follow the instructions. Secondly, compliance with the guideline is defined by the statute as imposing a sentence within the relatively broad total offence range, and not the restrictive category range, the difference between the two ranges being very large. Thirdly, movement between the categories of seriousness is permitted. This will happen in cases where a particular group range is determined appropriately. A court may nevertheless later move into a higher or lower category if there is a sufficient constellation of aggravating or mitigating factors.

The submission is that the guidelines and the statutory provisions regulating their application allow for a degree of flexibility, which results in gains regarding the consistency and predictability of sentence outcomes. The courts may also escape the guidelines using the "interest of justice" test. Consistency in sentences is therefore not achieved by the construction of restrictive limits on the exercise of sentencing discretion, but by the imposition of a step-by-step methodology as provided for by the sentencing guidelines. It is therefore clear that a more restrictive regime with a tighter compliance requirement would culminate in greater consistency of outcomes in sentences.

5.7 Criticism of the sentencing guidelines

The purpose of sentencing guidelines is to structure the sentencing discretion in a particular direction in order eventually to achieve consistent outcomes in sentencing. There are specific criticisms against the guidelines that suggest that that does not always happen, which leads to divergence in sentences when the guidelines are not in use. The evidence indicates the imposition of penalties when not using the guidelines to be determined by such factors as the offender's gender, race, and age.[1460] Contextual factors, such as the disposition of the court and the geographic region in which the court sits, or its jurisdiction, may influence sentences.[1461] The characteristics of the judicial officer, such as his age, race, education, or training, may also affect sentences.[1462] This suggests that the existence of sentencing discretion may in some cases lead to unwanted disparities and unfairness in sentencing.

The submission is that the application of sentencing guidelines remains voluntary, mainly because the guideline system requires that a court follow any relevant guidelines, unless it is satisfied that it would be contrary to the interest of justice to do so.[1463] A close perusal of the guidelines poses problems for the sentencing officer. The guidelines provide little protection for first-time offenders, because the courts do not consider when the courts categorise the offence. Only at a later stage in which the courts consider the category range is this factor taken into account, where it has a minimal role to play in the determination of sentences.

The guidelines are lengthy and contain a great deal of text that often includes unnecessary, redundant information unrelated to specific cases. In many ways, the information in the guidance is disorganised. For example, if an incident is isolated, this counts as a factor reducing seriousness or reflecting personal mitigations, for sentencing purpose but the timing of the offence and the location of the crime increased severity. The "isolated incident" factor can fit into the other two factors,

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1460 Daly and Bordt *Sex Effects and Sentencing: An Analysis of the Statistical Literature* 141.

1461 Johnson *Contextual Disparities in Guidelines Departures: Courtroom Social Context, Guidelines Compliance, and Extralegal Disparities in Criminal Sentencing*, 43 *Criminology* 761-781.

1462 Spohn *How Do Judges Decide?* 105.

1463 Section 125(1) of the *Coroners and Justice Act.*

and yet they work in opposite directions. If they are present in a case, they will, therefore, factor one another out of the equation of sentencing.

The terms in the guideline remain undefined or open to subjective interpretation. For example, an element that indicates greater harm is "sustained or repeated assault on the same victim". If the victim is slapped twice on the face, this amounts to repeated assault, as required by the guideline, but no visible injuries may be present, which may lead to the offence of assault to fall either in category 1 or 2 crimes, which would trigger severe sentences in the group range.

The guidelines do not contain the full list of factors that courts must consider at each stage of the decision-making, and how they should be weighted and integrated to formulate sentences. The normative nature of sentencing discretion may lead to inconsistent sentence outcomes that impair fairness and proportionate sentencing. The clustering of the factors is such that that they either play a weighty role in the offence category, or a lesser role in the group range.

The courts consider the application of community penalties or ancillary orders. Moreover, the guideline does not also provide a formula for how the courts should calculate community penalties and ancillary orders. The guidelines empower the court to order the accused to compensate victims for any harm caused as a result of the perpetrated offence. The magistrates' courts have only upper limits, and are allowed to impose any fine to that limit and lower.

The submission that the existing sentencing guidelines are neither "user-friendly" nor capable of helping sentencing courts achieve the aims of the SC.[1464] A lengthy, disorganised presentation of information requiring the user to refer to other documents for amplification is complicated. Guidelines covering only part of the decision-making process with essential aspects of the process missing or open to subjective interpretation cannot lead to consistency and transparency in sentencing. Consequently, they cannot reduce the potential for biased decisions or increase public confidence in the criminal justice system.

[1464] Dhami *Sentencing Guidelines in England and Wales: Missed Opportunities?* 294.

5.8 Summary and conclusion

The sentencing guideline system adopted by England and Wales has had an immense impact on the sentencing discretion of the courts. Firstly, the guidelines judgments structured the choice of tribunals over a period which influenced and shaped the discretion of the courts very early. Through legislative intervention, the sentencing guidelines provide legal rules that the courts must apply when they consider appropriate sentences. The guidelines offer considerable discretion to courts, but the limitation on the court's discretion is within the nine-step approach to sentencing. The guidelines use legal rules to structure the court's discretion; where the first two steps comprise of the offence category, the corresponding starting point sentences, and the class range. There are numerous secondary aggravating and mitigating factors that the court considers, but their role is not very weighty as a result of the class range. The group range allows minimal movement up and down in the sentencing grid. Consequently, the individualisation principle is subdued by legal rules, without necessarily erasing it from the sentencing system. In extraordinary circumstances, courts may deviate from the sentence range. The sentencing approach is consistent, and the penalties are consistent. South Africans that value sentencing discretion and individualisation can learn lessons from the English and Welsh sentencing systems.

CHAPTER 6

FEDERAL SENTENCING GUIDELINES OF THE UNITED STATES OF AMERICA

6. Introduction

In this chapter, acquaint the reader with the origins of the Federal Sentencing Guidelines (hereinafter the Guidelines) to address disparities in sentences imposed on offenders through an unstructured exercise of sentencing discretion,[1465] known as indeterminate sentencing, based on rehabilitation or medical models.[1466] This was made possible by the Sentencing Reform Act, which empowers the establishment of the United States Sentencing Commission (hereinafter the Commission) that directed the Commission to promulgate binding guidelines.[1467] The purpose is to learn lessons from the operation of the guidelines about the manner in which they structure sentencing discretion, and to find lessons that may be of assistance in alleviating inconsistencies in South African sentencing.

6.1 Historical perspective on sentencing guidelines

The nineteenth century brought with it scalable punishment penitentiaries and, in time, reformatories; and thus, a more complex set of sentencing outcomes.[1468] At that time, the dominant penal philosophy was rehabilitation, and an indeterminate sentencing regime.[1469] The courts were tasked to cure the evil of crime through the imposition of indeterminate sentences.[1470] In this period, appellate actions and reviews of sentences were extremely limited in the American courts.[1471] There was a

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1465 Stith and Cabranes *Fear of Judging: Sentencing Guidelines in the Federal Courts* 111.

1466 Stith and Koh *The Politics of Sentencing Reform* 227-28.

1467 Stith and Cabranes *Fear of Judging* 2.

1468 Morris *The Future of Imprisonment* 4-5, see also Bayley *The Future of Imprisonment*. *By* Norval Morris 161.

1469 Gerner *Sentencing Reform: When Everyone Behaves Badly* 570, 571.

1470 Lear *Is Conviction Irrelevant* 1179, 1187.

1471 Gertner *A short History of American sentencing:Too Little Law, Too Much Law, or Just Right* 159, 159-60

lack of substantive sentencing law for reasoned sentence appeal decisions,[1472] which led to unchecked disparities in sentences.[1473]

From 1920 to 2002, the thinking of Judge Marvin E. Frankel played a pivotal role in the formation of sentencing guidelines.[1474] According to him, courts had too much power to act arbitrarily, and to be discriminatory in sentencing.[1475]

Frankel regarded broad sentencing discretion of the type that existed in the pre-guideline system of indeterminate sentencing as "lawless".[1476] He wanted the system of sentencing to be humane,[1477] one in which the rule of law required of courts to have a standard approach that relied on standard rules in the imposition of a sentence.[1478] Such a model would involve legislatures and administrative agencies in enacting rules, and judges in resolving questions by applying such rules.[1479] The government had not provided sufficiently certain directives to sentencing courts concerning sentencing or created sentencing commissions that provided such guidelines. The courts had too much sentencing discretion and as a result, made decisions based on subjective factors; making the decisions arbitrary.[1480]

To this end, Frankel argued that the imposition of sentences must be objective and based on objectively ascertainable criteria.[1481] He envisaged the creation of a sentencing table which encapsulated all the elements relevant to sentencing.[1482] The chart would include, wherever possible, some form of numerical or another objective grading that would limit sentencing discretion. Sentencing commissions would be

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1472 Tonry *Structuring sentences* in Tonry and Morris *Crime and Justice: A Review of Research* 283.

1473 Zimring, Hawkins and Kamin *Punishment and Democracy: Three Strikes and You're Out in California* 212.

1474 Stith and Cabranes *Fear of Judging* at 35.

1475 Frankel *Criminal Sentence: Law without order* 49.

1476 Criminal Sentence 8.

1477 Frankel and Orland *A Conversation about Sentencing Commissions and Guidelines* 655, 659.

1478 Frankel *Criminal Sentence* 3-11.

1479 Frankel *Criminal Sentence* 113, 119.

1480 Frankel *Criminal Sentence* 3-11.

1481 Frankel *Criminal Sentence* 11.

1482 Frankel *Criminal Sentence* 113.

created to decrease individualisation in sentencing, and as a result, reduce sentencing disparity.[1483]

He placed great emphasis on the formal equality of offenders facing sentencing,[1484] and proclaimed that treating persons "as … bland, fungible 'equal[s]'"[1485] through the application of guidelines would replace lawless with lawful sentencing. Frankel advocated a sentencing system where courts' power to impose sentences arbitrarily be reassigned to sentencing commissions.[1486] It would eliminate possible "punitive, patriotic, self-righteous, guilt-ridden, and more than customarily dyspeptic" motivations for punishments.[1487] The absence of sentencing commissions constraining sentencing discretion resulted in "arbitrary cruelties perpetrated daily".[1488] He advocated legislative interventions that would create agencies to promulgate rules governing sentencing, aided by computers that would facilitate orderly thought to make sentencing more rational.[1489]

Frankel envisioned a "codified [system of] weights and measures"[1490] with "binding" rules,[1491] which is now known as "sentencing guidelines". He further proposed an expert "commission on sentencing" to create the guidelines,[1492] which placed emphasis on the necessity of appellate review to enforce the guideline uniformly throughout the country.[1493] His view was that both before and after the *Sentencing Reform Act,* federal sentences were often more severe than they needed to be in order to achieve the purpose of punishment.[1494]

1483 Frankel *Criminal Sentence* 114.
1484 Frankel *Criminal Sentence* 11.
1485 Frankel *Criminal Sentence* 11.
1486 Frankel *Criminal Sentence* 118-24.
1487 Frankel *Criminal Sentence* 23.
1488 Frankel *Criminal Sentence* 103.
1489 Frankel *Criminal Sentence* 115-16.
1490 Frankel *Criminal Sentence* 111-15.
1491 Frankel *Criminal Sentence* 122-23.
1492 Frankel *Criminal Sentence* 118-24.
1493 Frankel *Criminal Sentence* 75-85.
1494 Frankel *Criminal Sentence* 75-85.

6.2 Sentencing Reform Act

Under Frankel's idea of guideline sentencing, Congress enacted the *Sentencing Reform Act* of 1984 (hereinafter the SRA), it abolished parole, provided for appellate reviews of sentences, and created the United States Sentencing Commission (hereinafter the Commission),[1495] in which it directed the Commission to promulgate binding guidelines.[1496] Primarily the SRA responded to a federal sentencing system that was tainted with sentencing disparities caused by discretionary sentencing by courts and discretionary parole release by correctional authorities that went virtually unchecked.[1497] A progressive motivation for the existence of the SRA was that sentencing courts had too much sentencing discretion, and as a result, there were significant disparities in sentences, the most glaring difference being evident along racial lines.[1498] The empirical studies repeatedly showed that similarly situated offenders were not similarly sentenced, and were serving widely disparate sentences.[1499]

The view was that without Congressional intervention, discretionary sentencing would continue to prevail, and likewise, situated offenders would continue to receive different sentences.[1500] This was so because the sentencing statute set broad ranges of minimum and maximum punishments, without listing the purpose of sentencing, leaving the courts with the discretion to assess the relevant factors and to determine a particular sentence.[1501]

The courts at different ends of the spectrum held widely divergent views on the purpose of sentencing, with some judges emphasising rehabilitation and others emphasising "just deserts".[1502] Federal judges were left to apply their notions of the purpose of sentencing, which resulted in the imposition of unjustifiably broad ranges

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1495 1 November 1987.

1496 Stith and Cabranes *Fear of Judging* 2.

1497 Sentencing Report No. 97-307 at 956 (1981).

1498 Paternoster *Racial disparity under the federal sentencing guidelines pre-and post- Booker Lessons not learned from research on the death penalty* 1063.

1499 Sentencing Guidelines: Hearings before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 100th Congress, 1st session 661-731 (1983).

1500 House of Representatives Report No. 98-1017 at 34 (1984).

1501 Stith and Koh *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines* 223 and 225.

1502 Sentencing Report No 41.

of sentences to offenders convicted of similar crimes.[1503] Sentencing lacked transparency and certainty, because no statute required judges to explain the reason for a sentence imposed, and the period offenders would serve in prison was not announced in an open court.

6.2.1 The purposes of sentencing

The purpose of the enactment of the SRA was to address unwarranted disparities and inequalities in sentencing created by indeterminate sentencing.[1504] Congress identified four purposes of sentencing,[1505] as enacted in the SRA:

> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> (B) to afford adequate deterrence to criminal conduct;
> (C) to protect the public from further crimes of the defendant; and
> (D) to provide the defendant with needed educational or vocational training, medical care or other correctional treatment in the most effective manner.[1506]

The purposes of punishment do not necessarily promote imprisonment alone as an appropriate means of correction and rehabilitation,[1507] although rehabilitation was an especially important consideration in formulating the conditions for persons placed on probation.[1508] The imposition of sentences ought to be proportionate, and not greater than necessary to address their purpose, including deterrence, protection of the public, and correctional treatment.[1509]

6.2.2 The appeal and review of sentences

The SRA provides for a robust right of appeal,[1510] and meaningful appellate reviews of federal sentences for the first time, because before the

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1503 Sentencing Report No. 98-225, at 38 (1983), reprinted in 1984 U.S.C.C.A.N., 3182. The Senate Judiciary Committee's report.
1504 Sentencing Report 97-307; House of Representatives Report No. 98-1017 (1984); 28 U.S.C. §994(k).
1505 Sentencing Report No 98-225 at 75-77.
1506 18 U.S.C. §3553(a)(2).
1507 18 U.S.C. §3582(a) and *Tapia v. United States*, 131 S. Ct 2382, 2388 (2011).
1508 Sentencing Report No. 98-225 at 76.
1509 18 U.S.C. §3553(a).
1510 18 U.S.C. §3742.

establishment of the guideline system, federal criminal sentencing within statutory limits was not reviewable on appeal.[1511] The general proposition was that if the sentence was within the boundaries outlined in the statute, appellate review was at an end.[1512] The SRA specifies that a defendant may appeal against a sentence in particular circumstances.[1513] It is in the case where the court imposed a sentence and at the same time, violate a law. Another ground for an appeal against a sentence is in cases where the court misuses the guidelines. Thirdly, if the court imposed a sentence that is more than the sentence specified in the applicable guideline range. An offender may also appeal a sentence if that sentence is for an offence not covered by the guidelines, and that penalty is inappropriate.

The state had the same right to appeal on the same basis, except that it could appeal only those sentences that were lesser than the sentence specified in the applicable guideline range.[1514] For the proper application of the guidelines, district courts were required to state on the record the reasons for the sentence imposed so that the courts of appeals would have full information about how courts reached their sentencing decisions.[1515] The guidelines make provision for superior courts to deviate from the guideline sentences if an aggravating or mitigating factor in a case justifying for such a deviation.[1516]

6.2.3 Departure from the guidelines

To allow for downward departures to provide for flexibility in individual sentencing, the SRA provided the courts with limited authority to impose sentences outside the sentencing guideline range:

> [The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into

1511 *Koon v. United States*, 518 U.S 81 (1996) at 96.
1512 *Dorszynski v. United States*, 418 U.S. 424, 413 (1974).
1513 18 U.S.C. § 3742(a).
1514 18 U.S.C. § 3742(b).
1515 18 U.S.C. §3553(c).
1516 18 U.S.C. §3553(b)(1).

consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.[1517]

The SRA specifically empowered the Commission by establishing federal sentencing guidelines that provided certainty, fairness, and national uniformity, and that avoided unwarranted disparities among defendants with similar criminal records found guilty of similar conduct.[1518] The guidelines were intended to provide the courts with sufficient flexibility to permit the courts to impose sentences that match individual cases when justified by the presence of mitigating or aggravating factors not adequately provided for in the guidelines.[1519] The SRA also charged the Commission with assessing whether sentencing, penal, and correctional practices were meeting the purposes of sentencing.[1520] The anticipation was that the guidelines would reflect, to the extent practicable, advancement in the knowledge of human behaviour as it related to the criminal justice process.[1521]

6.2.4 Seven factors for consideration at sentencing

In respect to the sentencing process, the SRA set forth seven factors that a sentencing court had to consider which are the severity of the crime and the personal circumstances of the accused person.[1522] The courts must consider the purposes of punishment, which are retribution, deterrence, incapacitation, and rehabilitation,[1523] and other types of sentences that the SRA provides.[1524] Further, the courts must consider the sentencing range prescribed by the guidelines and the different forms of punishment available,[1525] as well as policy statements of the Commission.[1526] Moreover, the courts must avoid the imposition of unwarranted inconsistent sentences for similarly positioned

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1517 18 U.S.C. §3553(b)(1).
1518 28 U.S.C. §991(b)(1)(A).
1519 28 U.S.C. §991(b)(B).
1520 28 U.S.C. §991(b)(2).
1521 28 U.S.C. §991(b)(1)(C).
1522 18 U.S.C. §3553(a)(1).
1523 18 U.S.C. §3553(a)(2).
1524 18 U.S.C. §3553(a)(3) whether probation is prohibited or that a mandatory minimum sentence is required by a statute.
1525 18 U.S.C. §3553(a)(4).
1526 18 U.S.C. §3553(a)(5).

offenders.[1527] In particular cases, the courts must consider restitution to victims of crimes.[1528]

6.2.5 Categories of crimes and offenders

The Commission must take into account seven factors when it formulates offence categories as required by the SRA. The elements constitute of the seriousness of the crime; any factor that can be seen as a mitigating or aggravating to the severity of the offence; the kind and level of the harm caused by the offence; the interest of society, and the individual and general deterrent effect of the sentence.[1529]

The SRA directs the Commission to develop sentencing ranges applicable for specific categories of crimes involving particular classes of offenders.[1530] There had to be various guideline ranges, each range describing different combinations of offender characteristics and offence circumstances, including several guidelines ranges for a single crime, varying according to both aggravating and mitigating circumstances.[1531] Sentencing ranges must be consistent with all the relevant prescripts of title 18 of the United States Code, of which the sentencing ranges must not include sentences more than the statutorily prescribed maximum penalty.[1532] The SRA also directed that for sentences of imprisonment, the maximum range established for such a term should not exceed the minimum by more than the greatest of 25 percent or 6 months, except that, if the period of the range was 30 years or more, the maximum might be life imprisonment.[1533]

1527 18 U.S.C. §3553(a)(6).
1528 18 U.S.C. §3553(a)(7).
1529 28 U.S.C. §994(c)(1)-(7).
1530 Report on the Continuing Impact of *United States v. Booker* on Federal Sentencing 16.
1531 Sentencing Report No. 98-225 at 168
1532 Report on the Continuing Impact of *United States v. Booker* on Federal Sentencing 16, see 28 U.S.C. §994(b)(1) and *Mistretta v. United States*, 488 U.S. 361, 375 (1989)
1533 28 U.S.C. §994(b)(2).

6.2.6 Sentence length

The SRA required the Commission to ensure that the guidelines reflected the fact that sentences do not accurately reflect the seriousness of the offence.[1534] The Commission was not to be bound by average sentences; it was required to develop a sentencing range that was consistent with the purposes of sentencing.[1535] The sentencing guidelines required a term of confinement at or near the statutorily prescribed maximum sentence for certain crimes of violence and drug offences, particularly for recidivists.[1536]

The SRA requires courts to impose harsh sentences for offenders convicted of a third felony. This includes a career felon; those that played a leading part in fraudulent business dealings; offences of physical force induced to injure or cause damage by an offender release from a previous felony conviction; or cases in which a substantial quantity of narcotics are involved.[1537] Various aggravating and mitigating circumstances, like multiple offences and substantial assistance to the government, were to be reflected in the sentencing guidelines.[1538]

6.2.7 Offender characteristics

The SRA requires the Commission must consider eleven factors in formulating the guidelines and policy statements. These factors are the age; education; vocational skills; mental and emotional condition; physical condition; previous employment record; family ties and responsibility; community ties; role in the offence; criminal history; and degree of dependence upon criminal activity for a livelihood.[1539]

1534 28 U.S.C. §994(m).

1535 Section 3553(a)(2) of title 18, United States Code.

1536 28 U.S.C. §994(h).

1537 Report on the Continuing Impact of *United States v. Booker* on Federal Sentencing 16, 28 U.S.C. §994(i).

1538 28 U.S.C. §994(1) and (n) respectively.

1539 Report on the Continuing Impact of *United States v. Booker* on Federal Sentencing 17, see also 28 U.S.C. §994(d)(1)-(11).

The SRA required the Commission to ensure that the guidelines excluded factors such as the sex, race, creed, national origin and socio-economic status of the criminal.[1540] The inappropriateness of considering factors such as the offender's education, vocational skills, employment record, family connections and responsibilities, including community connections, had to be part of the guidelines.[1541] The courts had to take into account the history and characteristics of the offender when they considered a sentence.[1542] Also, the courts had to consider the guidelines, policy statements, and the applicable guideline range. Courts are entitled to consider factors not considered by the Commission when formulating the guidelines, which may have either an aggravating or mitigating effect on sentence.[1543]

The SRA empower the courts to take into account any information relevant to sentencing when they impose penalties.[1544] The guidelines provide that in calculating a sentence within the guideline range, or whether a departure from the guidelines is necessary, the court have the discretion to consider the relevant information that relates to the background, character and conduct of the defendant unless otherwise prohibited by law.[1545]

6.2.8 Relevant conduct as the cornerstone of the guideline system

Closely related to the imposition of a sentence is the "relevant conduct" of the offender when the crime was committed. It focuses on the *modus operandi* of the offender in the commission of the offence. The guidelines consider the defendant's actual conduct, and not merely the crime the court convicted the offender, along with his counts of conviction, to calculate his sentencing guideline range.[1546] The relevant conduct has become the cornerstone of the

1540 28 U.S.C. §994(d).
1541 28 U.S.C. §994(e).
1542 18 U.S.C. §3553(a)(1).
1543 18 U.S.C. §3553(b)(1).
1544 18 U.S.C. §3661.
1545 Report on the Continuing Impact of the *United States v. Booker* on Federal Sentencing 17 see also USSG §1B1.4.
1546 USSG §1B1.3.

federal sentencing system in the USA.[1547] The guidelines merge the constraints of the crime of conviction with the reality of the offender's actual offence conduct to measure the seriousness of that conduct for sentencing purposes.[1548]

The relevant conduct encompasses all the elements that relate to the crime, which gives the court a broader view of the manner in which the crime is committed. The factoring in of the relevant conduct into the guidelines is consistent with the pre-guidelines practices of federal sentencing courts.[1549] Considering the relevant conduct allows the courts to consider all the factors relevant to sentencing. The guidelines preclude the prosecution to formulate charges that do not reflect the offender's actual conduct, which may have a bearing on the court's sentencing decision.[1550]

In federal offences, relevant conduct also includes other crimes committed as part of the same course of conduct or common scheme or plan.[1551] The guidelines define "relevant conduct" to include:

> (1)(A) all acts and omissions committed, aided, abetted, counselled, commanded, induced, procured, or willfully caused by the defendant; and
>
> (B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavour, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;
>
> (2) solely with respect to offences of a character for which §3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) above that were part of the same course of conduct or common scheme or plan as the offence of conviction; [and]

1547 Wilkins and Steer *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines* 495.

1548 Wilkins and Steer *Relevant Conduct* 497.

1549 *United States v. Brock* 211 F.3d 88. (4th Cir. 2000).

1550 Nagel and Schulhofer *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines* 66.

1551 USSG §1B1.3(a).

(3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions.

The relevant conduct, therefore, need not have formed part of the charge sheet, or have been formally proved at the trial or admitted by the offender in a guilty plea, as long as the sentencing court finds the conduct relevant by a preponderance of the evidence using information that has sufficient indicia of reliability.[1552]

The courts apply the various factors in the *Guideline Manual* to determine whether a particular conduct increases a sentence. For example, the courts consider whether an offender used a dangerous weapon during a bank robbery;[1553] or calculate the amount of loss in fraud-related proceedings.[1554] In drug-related cases, the courts take into account the number of the drugs involved in drug-trafficking proceedings.[1555] Another example is the courts consider a felon who unlawfully possessed a firearm and used the firearm in connection with another felony offence.[1556]

The Commission listed the relevant conduct in the guidelines to constrain any exercise of discretion by the court to a mechanical calculus in the determination of a sentence. To this end, it is expected of courts only to establish the facts related to the offence convicted for, add or deduct the numerical values allocated to each element, and impose a sentence that correlates with the answer of the calculation.

6.2.8.1 The South African position

In South Africa, the CLAA list specific offences of which their level of seriousness is aggravated by the circumstances under which the offender commits the offence. The CLAA lists offences in Part I, II, and III of Schedule 2 with corresponding mandatory minimum sentences from which courts may

1552 USSG §6A1.3.
1553 USSG §2B3.1(b)(2).
1554 USSG §2B1.1(b)(1).
1555 USSG §USSG2D1.1(a)(5).
1556 USSG §2K2.1(b)(6).

only deviate from if substantial and compelling circumstances exist to do so.[1557] The aggravating factors inform the mandatory minimum sentence, which also include whether the offender has a previous conviction which is similar as the one currently convicted upon. Substantial and compelling circumstances can include any factor that a court may take into account in sentencing. The court's sentencing discretion is not eliminated, but constraint provided those factors justify a deviation from imposing the mandatory minimum sentences as prescribed by the CLAA. When it comes to all the other offences not covered by the CLAA, their categorisation into the different levels of seriousness are left to the discretion of the courts.[1558]

6.2.9 The establishment of the Commission

The SRA provided for the creation of the Commission as an independent body within the judicial branch[1559] and directed it to promulgate guidelines that require sentencing within the prescribed statutory maxima.[1560] The Commission's task was primarily to publish mandatory sentencing guidelines to structure the discretion of federal judges to address the problem of disparities in sentences and provide a more just and efficient sentencing system.[1561] The Commission is currently composed of seven members. A Chief Judge (Chair), U.S. District Court for the District of Massachusetts; a Senior Judge (Vice-Chair), United States District Court for the Northern District of California; a former White House Assistant Counsel (Commissioner); a Professor (Commissioner), New York University School of Law; a Judge (Commissioner), of the Eleventh Circuit United States Court of Appeals; the Chair (non-voting), United States Parole Commission; and a Director (non-voting) of the Office of Policy and Legislation, Criminal Division, U.S. Department of Justice.[1562] A challenge to the constitutionality of the

1557 See discussion in Chapter 4 see paragraphs 4.7.3 to 4.7.5 of this thesis.
1558 See Chapter 2 paragraphs 2.1 to 2.1.5 of this thesis.
1559 28 U.S.C §991(a) and 18 U.S.C. §3551.
1560 28 U.S.C. §991(a) and 18 U.S.C. §3551.
1561 28 U.S.C. §994.
1562 28 U.S.C. §991(a) current members available at https://wwwussc.gov.

Commission as a congressional encroachment on the power of the executive was unsuccessful.[1563]

In the execution of its functions, the Commission finds guidance in the "intelligible principles" outlined in the SRA, because Congress did not grant the Commission excessive legislative discretion in violation of the non-delegation doctrine in the promulgation of the guidelines.[1564] The Commission must develop the guidelines from sentencing data, empirical research, and in consultation with frontline participants.[1565] As a result of securing the Commission's independence, the Commission would be able to engage in an "essentially neutral endeavour",[1566] and would not be coerced or co-opted by the political branches.[1567]

One of the reasons why the Commission is attached to the judiciary is Congress's strong feeling that the sentencing of convicted criminals is a judicial function, which ought to remain in the domain of the courts.[1568] Secondly, the executive branch had no constitutional or historical authority to make sentencing policy or to impose sentences.[1569] Thirdly, to place sentencing authority within the executive branch would violate the constitutional principle of the separation of powers.[1570]

The promulgation of sentencing guidelines remains a function of the Commission that courts are obliged to consider, and adequately establish guideline ranges in all federal criminal cases.[1571] Before enacting amendments, the Commission carefully considers data, public comment, and other relevant information.[1572] The collection, analysis of sentencing data, the compilation of federal criminal trends, the evaluation of federal crime policies

1563 *Mistretta v. United States* 488 U.S. 361.
1564 *Mistretta v. United States,* 488 U.S. 361, 371-79 (1989).
1565 Section 217(a) SRA, §991(b)(1), 98 Stat. at 2017-18.
1566 The *Mistretta* case at 407.
1567 The *Mistretta case* at 408.
1568 Sentencing Report No. 98-225, at 54, 159 (1983).
1569 *Ex parte United States,* 242 U.S. 27, 41 (1916).
1570 House of Representatives Report No. 98-1017, at 95 (1984).
1571 28 U.S.C. §3553(a)(4).
1572 28 U.S.C. §994(o).

and the achievement of their goals, remain the function of the Commission.[1573]

The Guidelines appear in the *Guidelines Manual* of 2016, which came into force on 1 November 2016.[1574] In the *Booker* case, which is discussed later in this chapter, the Guidelines were deemed to be advisory, and not of a mandatory nature. Irrespective thereof, the SRA changed the sentencing landscape of the USA, in that it transferred the powers that were traditionally vested in the court's discretion in formulating sentences to the Commission. The rehabilitative model of sentencing made way for sentencing that focused on the seriousness of the offence and deterrent punishment. Sentences were to be regularly subject to appeal and review to ensure their fairness.

The SRA empowered the Commission in the drafting of guidelines that encapsulate all relevant factors, such as the seriousness of the offence, aggravating and mitigating factors, proportionality in sentencing, and the consideration of which factors that relate to the person of the accused need to be considered or negated in the determination of a sentence.

6.3 Sentencing discretion under the Federal Sentencing Guidelines before the Booker case

The Federal Sentencing Guidelines (hereinafter the Guidelines) in the United States were not something new. Sentencing guidelines were in use from 1980, when Minnesota became the first state to implement sentencing guidelines,[1575] followed by Pennsylvania in 1982 and Washington in 1984.[1576] Nearly half of the states have sentencing commissions and sentencing guidelines.[1577] The guidelines of Minnesota, Washington, Oregon, Kansas and North Carolina have been in operation for several

1573 28 U.S.C. §995(a)(12-(16).

1574 http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2016/GLMFull.pdf

1575 Von Hirsch, Knapp and Tonry *Sentencing Commission and its Guidelines* 152-63.

1576 Minn. Stat. Ann. §244app. (West 1992) (discussing first implementation of sentencing guidelines In Minnesota in 1978); see 42 Pa. Const. Stat. Ann. §9721 (West 19900 (discussing initial Sentencing guidelines effective in Pennsylvania in 1982; Wash. Rev. Code Ann. §9.94A.030 (West 1999) (discussing Washington's first sentencing guideline system in 1984).

1577 Weisberg *The Sentencing Commission Model, 1970s to Present. In The Oxford Handbook of Sentencing and Corrections.*

decades, and are widely respected.[1578] The guidelines in other states like Alabama, Arkansas, Delaware, Maryland, Missouri, Ohio, Pennsylvania, Utah, Virginia and Washington DC, are advisory models with little or no active appellate review, placing few legal limits on judicial and parole discretion.[1579]

The Federal Sentencing Guidelines were established to replace the indeterminate sentencing regime, and become operational on 1 November 1987.[1580] The Guidelines were controversial, and as such, were subject to considerable resistance. Hence Congress's introduction of a bill to delay its implementation.[1581] The opposition of the judges further delayed the implementation of the Guidelines.[1582] They were upheld by the Supreme Court only in January 1989, thereby removing the major constitutional impediment to their full implementation.[1583] The Guidelines are the product of the Commission, the primary goal of which has been to alleviate the sentencing disparities created by the exercise of sentencing discretion based on race.[1584]

The Guidelines take into account both the seriousness of the offence and the offender's criminal history.

6.3.1 The seriousness of the offence

One of the measures the Commission put in place to achieve the objectives of the SRA was to create 43 crime levels rated from 1 to 43 with the least severe at the top end and the most severe at the bottom end of the scale.[1585] It follows that the more serious the offence, the higher the crime level. The offence level is an indication of the seriousness of the crime, and serves as an indicator of where on the Sentencing Table the crime is to be found. The browsing of Chapter Two Offence Conduct of the *Guidelines Manual* informs the decision in this respect. The Guidelines already

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1578 Frase *Just Sentencing: Principle and Procedure for a Workable System* 4.

1579 Frase *Just Sentencing* 161.

1580 Stith and Cabranes *Fear of Judging: Sentencing Guidelines in the Federal Courts.*

1581 House of Representatives 3307, 100th Congress, 1st Session, 133 Congressional Record H8107 (1987).

1582 Miami Herald, October 13, 1987, at 1B; Murphy U.S Sentencing Rules to Stress Punishment, Los Angeles Times, Nov. 1, 1987, part I, at 1, col. 4 (final Sunday ed.).

1583 The *Mistretta* case at 647.

1584 Howard *Racial Discrimination in Sentencing* 121.

1585 Guidelines Manual Chapter Two.

categorise the gravity of the crime, taking from the courts the discretion which they had enjoyed before their introduction.

An extract of the sentencing table from the Guidelines is depicted below to give a clear understanding of some of the different offence levels, with their corresponding predetermined sentence ranges, as well as the various sentencing zones that structure the discretion of courts regarding punishment options for different crimes.[1586]

Sentencing Table (extract from United States Federal Sentencing Guidelines 1 November 2016 at page 404)

Crime level	**Criminal history category (criminal history points)**					
	I (0 or 1)	**II (2 or 30**	**III (4,5,6)**	**IV (7,8,9)**	**V (10,11,12)**	**VI (13 or more)**
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	0-6	0-6	0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
5	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	0-6	2-8	4-10	8-14	12-18	15-21
8	0-6	4-10	6-12	10-16	15-21	18-24
9	4-10	6-12	8-14	12-18	18-24	21-27
10	6-12	8-14	10-16	15-21	21-27	24-30
11	8-14	10-16	12-18	18-24	24-30	27-33
12	10-16	12-18	15-21	21-27	27-33	30-37
13	12-18	15-21	18-24	24-30	30-37	33-41

There are four sentencing Zones which are A (black shaded), B (grey shaded), C (red shaded, and D (yellow shaded down to level 43).[1587] The imposition of a

1586 Ch. 5 Pt. A Guidelines Manual 404.

1587 §5B1.1.(a)(1). Zone A provide for sentencing ranges of between 0-6 months, whereas Zone B

sentence of probation is authorised if the applicable guideline range is in Zone A of the Sentencing Table,[1588] or in Zone B if the penalty consists of conditions subject to a periodical, community or home detention.[1589]

Apart from the sentences in the sentencing table, United States federal law provides a sentencing classification of offences as depicted in the following chart.[1590]

Type	**Class**	**Maximum Prison term**	**Maximum fine**	**Probation Time in years**	**Maximum Supervised Release time in year**	**Maximum prison term upon supervised release revocation in years**	**Special assessment**
Felony	A	Life imprisonment (death)	Two Hundred and fifty Dollars		Five (5)	Five (5)	One Hundred Dollars
	B	Twenty-five years or more	Two Hundred and Fifty Dollar		Five(5)	Five (5)	One Hundred Dollars
	C	Less than but more than ten years	Two Hundred and Fifty Dollars	One(1)-Five(5)	Three(3)	Two (2)	One Hundred Dollars
	D	Less than ten years but 5 or more years	Two Hundred and fifty Dollars		Three(3)	Two(2)	One Hundred Dollars
	E	Less than five years but more than one year	$100 000		One(1)	One(1)r	One Hudred Dollars
Misdemeanour	A	Between twelve and six months	$100 000	0-five(5)	One(1)	One(1)	Twenty five Dollars

provide sentencing ranges above Zone A but with a maximum penalty of no more than 12 months imprisonment. Zone C includes sentencing ranges above Zone B but whose minimum sentence is less than 12 months. Zone D consist of sentencing ranges above Zone C. A defendant in Zone A is eligible for Federal Probation, and no term of imprisonment is required

1588 PART B-PROBATION §5B1.1

1589 Subsection (c)(3) of §5C1.1 (Imposition of a Term of Imprisonment).

1590 18 U.S.C. §3559.

	B	Six month or less but more than 30 days	$5 000		One(1)	One(1)	10
	C	30 days or less but more than five days	$5 000		One(1)	One(1)	5
Infraction	N/A	5 days or less	$5 000	0-one(1)	N/A	N/A	N/A

The definition of a felony is a crime sufficiently serious to be punishable by death or incarceration in a state or federal prison, as distinguished from a misdemeanour, which is punishable only by confinement to a county jail and a fine.[1591] Felonies are "high crimes" as described in the U.S. Constitution.[1592]

A misdemeanour is a petty offence for which a court may impose a fine or county jail time of one year. Misdemeanours differ from felonies, which can be punished by a state prison term. The lowest local court, such as a municipal or justice court, hears matters concerning misdemeanours. The District Attorney has the discretion to charge as a felony or misdemeanour depending on the circumstances.[1593] The "high crimes and misdemeanours" referred to in the U.S. Constitution are felonies.[1594]

The infraction, on the other hand, is defined as a violation or infringement of law or agreement.[1595]

An example of a Class A offence is "assault with intent to commit rape",[1596] Class B offence is "arson",[1597] Class C is "extortion",[1598] Class D is "firearm use",[1599] and Class E is "kidnapping".[1600] A sentence of probation is prohibited if the conviction is for a Class A offence or Class B offence,[1601] or the crime of conviction expressly

1591 http://legal-dictionary.thefreedictionary.com/felony.
1592 http://legal-dictionary.thefreedictionary.com/felony
1593 http://legal-dictionary.thefreedictionary.com/misdemeanor.
1594 http://legal-dictionary.thefreedictionary.com/misdemeanor.
1595 www.dictionary.com.
1596 §3559(2)(A).
1597 §3559(2)(B).
1598 §3559(2)(C).
1599 §3559(2)(D).
1600 §3559(2)(E).
1601 18 U. S. C. § 3561(a)(1).

precludes probation[1602] along with the simultaneous sentencing of the offender to imprisonment for the same or a different crime.[1603] Terms of probation are imposed for at least one year, but not more than five years if the offence is Level 6 or greater, or no more than three years in another case.[1604]

The rating of the offence in Chapter Two of the *Manual* gives the court the exact numerical number in the sentencing table in which the court has to find the offence and its sentence range. The guideline predetermines the seriousness of the crime. The court must consider the position of the offence in the sentencing table and its applicable sentence range as a starting point. The court does not have to ponder what other factors are relevant to the infringement at this stage to determine the length of the sentence. In doing so, the court is applying the first step as provided for by the Guidelines after it has convicted the offender.

The offence of the robbery of a post office[1605] will serve as an example to illustrate the operation of the Guidelines:

6.3.2 Base offence level

Crime level	**Criminal history category (criminal history points)**					
	I (0 or 1)	**II (2 or 30**	**III (4,5,6)**	**IV (7,8,9)**	**V (10,11,12)**	**VI (13 or more)**
20	33-41	37-46	41-51	51-63	63-78	70-87

The guideline provides as follows:

§2B3.1. Robbery

(a) Base Offence Level: 20

Of the sentencing table, the first column to the right, there is an indication that the starting sentence range is between 33-41 months of imprisonment, which may be

1602 18 U. S. C. § 3561(a)(2).
1603 18 U. S. C. §3561(a)(3).
1604 §5B1.2.
1605 18 U.S.C. §2113(a).

affected by a maximum penalty range of between 70-87 months in prison, where the factors the court considers might influence that sentence as prescribed in the Guidelines. The sentence range may also be affected downwards if specific prescriptive guidelines factors are present.

Each box on the grid in the sentencing table prescribes a series with a high end not more than twenty-five percent longer than the low end. This allows the government to elect to move for a downward adjustment based on a defendant's cooperation with law enforcement, or for departures that will enable courts to go above or below the guideline range which applies to the case, or if the court finds that the case falls outside "the heartland" of circumstances and factors considered by the Commission.

The vertical axis of the grid indicates the offence level (and offence-related characteristics). Every crime is assigned an initial base offence level. Additional factors can then raise or lower the crime level; for example, the defendant's role in the offence or the defendant's acceptance of responsibility, or the guilty plea of the offender.[1606]

The horizontal axis of the Guidelines quantifies the defendant's criminal history. The allocation of points is for prior convictions based on factors such as seriousness, remoteness, and whether the current offence was committed while on parole or probation. Based on the total number of criminal history points, a defendant's category varies in the Criminal History Category I-VI, with the applicable sentencing range escalating in the higher classes. Once a defendant's adjustment offence level and criminal history are determined, the Guidelines direct the sentencing court to the field on the grid.

6.3.3 Specific crime characteristics

The offence characteristic for the robbery of the post office is in the applicable guideline.[1607] The fact that a post office was robbed counts as an aggravating factor to which the courts have to add 2 levels[1608] to the already determined 20 levels for

1606 US.S.G. §3E1.1, or obstruction of justice U.S.S.G. §3C1.1.
1607 §2B3.1.(c)(1)-(7).
1608 §2B3.1.(c)(1).

the seriousness level of the offence of robbery. The sentence range will, therefore, increase to offence level 22, increasing the sentence range to a minimum of 41 and a maximum of 51 months of imprisonment in the sentencing table. The court has no discretion at all, but to move the offence level to the applicable level throughout this process, as per the Guidelines instructions.

The next mechanical step for the court to execute is to consider the manner in which the crime was committed.[1609] The guideline provides the court with a variety of offence characteristics that might have formed an integral element when the offender committed the crime. The components include the discharging of a firearm during the commission of the crime, which may increase the offence level with 7 levels.[1610] That will bring the tally to 29 crime levels. The corresponding sentence range increases to from a minimum of 87 to a maximum of 108 months of imprisonment as per the sentencing table.

If the criminal used a firearm, the levels are increased by 6 levels,[1611] or by 5 levels if he only brandished the gun.[1612] The offence levels increase with 4 levels,[1613] or if only a dangerous weapon were brandished or possessed, the levels increased with 3 levels,[1614] or with 2 levels if the victim received death threats.[1615] In this example of the precise operation of the Guidelines, the offender only brandished a dangerous weapon (but did not use it), which means that the offence levels increased by 25 levels, for which the corresponding sentence range is between 57 and 71 months of imprisonment, as per the sentencing table.

The next offence characteristics that the court must factor into the crime levels are the seriousness of the bodily injuries inflicted on the victim. This is an aggravating

1609 §2B3.1(c)(2).
1610 §2B3.1(c)(2)(A).
1611 §2B3.1(c)(2)(B).
1612 §2B3.1(c)(2)(C).
1613 §2B3.1(c)(2)(D).
1614 §2B3.1(c)(2)(E).
1615 §2B3.1(c)(2)(F).

factor that elevates crime levels. The Guidelines specify individual increases of crime levels depending on the degree of the injuries sustained, as quoted below:[1616]

Degree of Bodily Injury	Increase in Level
(A) Bodily Injury	add **2**
(B) Serious Bodily Injury	add **4**
(C) Permanent or Life-Threatening Injury	add **6**

(D) If the degree of injury is between that specified in subdivision (A) and (B), add **three** levels; or

(E) If the degree of injury is between that specified in subdivisions (B) and (C), add **five** levels.

Provided, however, that the cumulative adjustments from (2) and (3) shall not exceed **11** level

If the characteristics of the Degree of Bodily Injury are not applicable, the offence levels will, therefore, remain at 25 crime levels as per the sentencing table.

The Guidelines require the court to increase the levels by 4 points if the offender abducted someone in the furtherance of the commission of the offence or to facilitate the escape.[1617] The Guidelines also provide for the crime levels to increase with 2 levels if the offender prevented someone from doing something in the furtherance of the commission of the offence or to facilitate the escape.[1618] If none of these characteristics apply, the crime levels remain at 25 levels.

The offence levels would have increased 2 levels if the commission of the offence involved carjacking,[1619] and with 1 level where a firearm, destructive device or controlled substance was used.[1620] If the offence levels increased by 3 levels, this would increase the offence level to 40 levels. If none of these characteristics applied, the crime levels, would remain at 25.

1616 §2B3.1.(b)(3).
1617 §2B3.1(b)(4)(A).
1618 §2B3.1(b)(4)(B).
1619 §2B3.1(b)(5).
1620 §2B3.1(b)(6).

The Guidelines provide level increases to the offence level, which are dependent on the amount of money taken during the commission of the crime.[1621]

(1) If the loss exceeded $20,000, increase the crime level as follows:

Loss (Apply the Greatest)	Increase in Levels
(A) $20 000 or less	no increase
(B) More than $20 000	add 1
(C) More than $95 000	add 2
(D) More than $500 000	add 3
(E) More than $1.500 000	add 4
(F) More than $3 000 000	add 5
(G) More than $5 000 000	add 6
(H) More than $9 500 000	add 7

The offence levels increase by the corresponding amounts listed. If the amount stolen is more than $20 000 (A) but less than $95 000, a single level is added, which increasing the total offence level to 26 levels.

6.3.4 Calculate the offence level after Chapter Three adjustment

At this stage, the court is obliged to determine whether the guideline application process provides for any adjustments as provided for in Chapter Three of the *Guidelines Manual.*

If an accomplice was recruited by the offender before the robbery to drive a getaway car, the offender receives a 2-level upward adjustment as an Aggravating Role,[1622] bringing his offence level to 28. If the perpetrator used a minor as the getaway driver, the offence level increases by two additional levels, which brings the offender's offence level to 30,[1623] as a person under the age of 18 years was involved in committing the crime.

If the offender has accepted responsibility for the crime by pleading guilty promptly and admitting the conduct constituting the offence of conviction, his offence level is dropped by 2 or 3 levels.[1624] The third level of reduction requires the prosecution to

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1621 §2B3.1(b)(7).
1622 USSG §3B1.1.
1623 USSG §3B1.4.
1624 USSG §3E1.1 (Acceptance of Responsibility).

bring a motion for a downward departure from the guidelines.[1625] If the offender receives a three-level downward adjustment, the offender's offence level would be 27.

6.3.5 Determining the criminal history category

In concluding the determination of the crime level of the offender, the next step is to calculate the offender's criminal history points, which in turn determine the offender's criminal history category. The Criminal History Rules appear in Chapter Four of the Guidelines. The extent of a sentence imposed for a prior conviction in a local, state, or the federal court determines the criminal history points.[1626] The guidelines provide for three criminal history points for each prior conviction receiving a sentence of imprisonment exceeding 13 months;[1627] and two points for a minimum of 60 days to a maximum of 13 months in prison for each prior conviction.[1628] The Guideline excludes tribal and foreign convictions.[1629]

The guidelines exclude prior convictions, which exceed 13 months imposed within 15 years of the offender's commencement of the instant offence count.[1630] A previous sentence counts in cases where the sentence was imposed within the 10 preceeding years of the offender's commencement of the present crime.[1631] Lastly, sentences that are not within the time periods specified above are not considered,[1632] as well as the applicable period for appropriate punishment resulting from crimes committed by the offender, before reaching the age of 18 years.[1633]

The guidelines provide a list of several minor prior convictions which the court must exclude from the court's consideration,[1634] including prior convictions, such as careless or reckless driving, contempt of court, disorderly conduct, or disturbing the peace. The guidelines also exclude prior convictions for juvenile offences if they

1625 USSG §3E1.1(b).
1626 USSG §4A1.1.
1627 USSG §4A1.1(a).
1628 USSG §4A1.1(c).
1629 USSG §4A1.2(g)-(i).
1630 USSG §4A1.2(e)(1).
1631 USSG §4A1.2(e)(2).
1632 USSG §4A1.2(e)(3).
1633 USSG §4A1.2(e)(4) which are regulated by §4A1.2(d)(2).
1634 USSG §4A1.2(c).

occurred within five years of the offender's commission of the instant federal crime.[1635]

The offender would not receive any points for previous convictions that fall outside Chapter Four's time limits, for example, if he received a six-month sentence over ten years earlier. If the offender has a prior drug-trafficking conviction which falls well within the time limits, the offender will receive one point based on the length of the sentence imposed if it is less than 60 days. He would also receive an additional two points if he were on supervision at the time of the robbery offence.[1636] The other three criminal history points would place the offender in Criminal History Category II on the Sentencing Table.

6.3.6 Determining the Guideline Sentencing Range from the Sentencing Table

The offender's offence level is 27, and he is in Criminal History Category II. The applicable guideline for the range falls between 78 and 97 months on the Sentencing Table. The relevant statutory range is 0-240 months under the statute of conviction.[1637] In some instances, an offender's guideline range is affected by either a statutory mandatory minimum penalty, which raises the floor, or a statutory maximum penalty, which lowers the ceiling. For example, if a bank robber had a guideline range, before considering the 20-year (240-month) statutory maximum of 210-262 months, the offender's guideline sentencing range would be 210-240 months,[1638] for which the only sentences in Zone D is imprisonment. [1639]

After the district courts have correctly calculated the guideline range, the court has the discretion to consider imposing a sentence within or outside the guideline range. The discussion on departures and variances from the federal sentencing guidelines assists the court in contemplating this aspect. Since the inception of the Guidelines, federal courts were required to impose sentences within the applicable guideline

1635 USSG §4A1.2(d)(2).
1636 USSG §4A1.1(c) and (d).
1637 18 U.S.C. §2113(a).
1638 USSG §5G1.1(c)(1).
1639 USSG §5C1.1(f).

range,[1640] by which act the court would uphold the constitutionality of the Commission and of guidelines for developing proportionate penalties for relevant offences. [1641]

6.3.6.1 South African position

In South Africa, the imposition of a sentence by the courts does not happen mechanically, or by any rule of thumb. This is primarily because in South Africa, courts do not use sentencing guidelines or sentencing grids, as it is the case in the United States of America, or England and Wales. The courts primarily consider all the factors relevant in sentencing when they impose sentences, as discussed in Chapter 2, paragraphs 2.4 to 2.5 of this thesis. The sentencing discretion of the courts are not barracaded by offence levels and sentencing ranges, save for the different levels of sentencing jurisdictions of the different levels of courts discussed in Chapter 2, paragraphs 2.1 to 2.1.5 of this thesis. The courts are not guided by a step-by-step process, which may have a decrease or increase effect of the sentence that the courts want to impose. The courts consider all the sentencing factors at once, and must try and strike a balance amongst them and impose a sentence. In the case of the Federal Sentencing Guidelines of the United States of America, the factors are weighted and translate into specific sentencing ranges.

6.4 Constitutional challenges

Constitutional challenges to the Guidelines were unsuccessful in a number of cases in the Supreme Court. For example, to court allow the use of acquitted conduct to enhance the defendant's sentence,[1642] and where the offender's claim rejected that the enhancement prescript for the obstruction of justice violated the offender's right to testify in his or her defence.[1643] In *Koon v. United States,* the court issued an important decision regarding the appellate review of sentences.[1644] The Supreme Court rejected the notion that appellate courts have the authority to review the sentencing judgments of the district courts from the start, to ascertain the manner in

1640 *Mistretta v. United States,* 488 U.S. 361, 379, 391 (1989).
1641 The *Mistretta* case at 379, 391.
1642 *United States v. Watts*, 519 U.S. 148 (1997).
1643 *United States v. Dunnigan,* 507 U.S. 87 (1993).
1644 518 U.S. 81 (1996).

which the district courts applied the guidelines to the facts. The lower trial court is in a far better and more favourable position than the high court[1645] to establish facts, whether a deviation from the guideline ranges is warranted or not.[1646] The court further held that the SRA does not vest courts with wide-ranging authority over the district courts' sentencing judgments.[1647]

The Supreme Court further held that district courts are in a better position to establish the credibility of witnesses, which appellate courts should accept unless the credibility finding of the trial court is wrong.[1648] The application of the guidelines by the district courts must, therefore, be respected by the appeal courts.[1649] The appeal court's function is to see to it that district courts exercise their discretion judiciously, and do not deviate from the applicable guidelines for insufficient reason.[1650]

The Supreme Court held that the Sixth Amendment right to trial by jury requires from courts only to impose sentences beyond the prescribed maximum when there are facts that are proven by a jury beyond a reasonable doubt to impose such a sentence.[1651] Therefore, an aggravating factor which provides the court with discretion to impose a death penalty, become an integral element of the offence and should be proven by a jury beyond a reasonable doubt. Superior Courts could not sentence first offenders to a period of imprisonment that is more than the prescribed maximum for that offence convicted by a jury.[1652]

The appellate review standard established in the *Koon* case changed in 2003 when the *Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act* came into operation,[1653] and amend 18 U.S.C. §3742(e), which pave the way for deviations from the guideline range be subject to a new process.[1654] Washington State's sentencing guidelines were held to violate the Sixth

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1645 The *Koon* case at 98-99.
1646 The *Koon* case at 100.
1647 The *Koon* case at 97.
1648 The *Koon* case at 97.
1649 The *Koon* case quoting 18 U.S.C. §3742(e).
1650 The *Koon* case at 100.
1651 *Ring v. Arizona,* 536 U.S.584 (2002).
1652 *Apprendi v. New Jersey* 520 U.S. 466 (2000).
1653 Report on the Continuing Impact of *United States v. Booker* on Federal Sentencing, see also Pub. L. No. 108-21 (2003).
1654 Pub. L. No 108-21, section 401, codified in 18 U.S.C. §3742(e).

Amendment's guarantee of trial by jury in criminal matters.[1655] The Washington State guidelines allowed judges, rather than juries, to make certain findings of fact that increased an offender's sentence. The Court held that the statutory maximum for the *Apprendi* case was the maximum sentence a judge might impose solely based on the facts reflected in the jury verdict, or where admitted to by the defendant. Soon after the *Blakely* decision, federal courts faced with arguments that the Commission had violated the Sixth Amendment.[1656] The Court held for constitutional analysis that the federal sentencing guidelines were indistinguishable from those in *Blakely* case.

6.5 The United States v. Booker 543 U.S. 220 (2005) case

The *Booker* case has far-reaching consequences for federal sentencing. The judgment renders the guidelines "effectively advisory". The Supreme Court in *Booker* held that any factor relevant to sentencing, which may justify a sentence exceeding the maximum authorised by the events, which transpire from guilty pleas or a decision reached by a jury, where the offender must admit such facts beyond a reasonable doubt before a jury.[1657]

The Court further held that the Sixth Amendment requirement that empowers the jury to establish sentencing information could not coexist with a particular part of the SRA, and consequently, removed that part of the guidelines that made the sentencing guidelines compulsory.[1658] The Court did not agree with the State's proposed partial remedy, to allow judicial factfinding, but leave the Guidelines mandatory in all other cases.[1659]

The Court further held that to abandon the guidelines obligatory in some cases, but advisory in others, would empower judges to reduce sentences, but it would not allow judges to increase sentences.[1660] The Court held that to enable judges only to

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1655 *Blakely v. Washington* 542 U.S. 296 (2004).
1656 *U.S. v. Fanfan,* 2004 WL 1723117, *2 (D.Me June 28, 2004).
1657 The *Booker* case at 244.
1658 The *Booker* case at 245.
1659 The *Booker* case at 266.
1660 The *Booker* case at 266.

reduce sentences, coupled with a sometimes complicated federal sentencing system would not promote consistency in sentencing.[1661]

The Court did not agree that the Court insert onto the SRA a jury fact-finding proviso because the modification onto the SRA would change the scheme of the SRA.[1662] The Court further held advisory guidelines to be preferable, because this links the sentence with the offender's real conduct, than to have an instruction system that focuses on a jury trial requirement.[1663] The Court held that Congress' important objectives included honesty, uniformity, and proportionality in sentencing.[1664]

The Court shaped a remedy to the Sixth Amendment violation, where it excised only two of the SRA's provisions.[1665] Firstly, it excised the provision that makes it obligatory for courts to impose sentences within the guideline range if there is no reason to deviate.[1666] The Court was of the view that the "existence of this section is a necessary condition of the constitutional violation."[1667] Secondly, the Court excised 18 U.S.C. §3742(e), which the PROTECT Act had amended to provide a *de novo* standard of review for departures from the guidelines. The Court perceived no problems removing the standard for reconsideration because the statute does not outline a standardised review process.[1668]

Further, the Court focus on the pre-PROTECT Act design of section 3742, which provided for the consideration of sentences for reasonableness in the light of on the §3553(a) factors.[1669] The Court noted that Commission data showed that reasonableness reviews of departures and sentences imposed for non-guidelines offences accounted for 16.7 percent of appeals in 2002.

The Court further rejected the argument that the application of the reasonableness standard of review would '"produce a discordant symphony' leading to 'excessive

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1661 The *Booker* case at 267-67.
1662 The *Booker* case at 249.
1663 The *Booker* case at 248.
1664 The *Booker* case at 264.
1665 The *Booker* case at 258-61.
1666 U.S.C. §3553(b)(1).
1667 The *Booker* case at 259.
1668 The *Booker* case at 260.
1669 The *Booker* case at 260-61.

sentencing disparities,' and 'wreak havoc' on the judicial system".[1670] The Court acknowledged that the reasonableness review might not "provide the uniformity that Congress originally sought to secure," but noted that a reasonableness review "would tend to iron out sentencing differences."[1671]

Concerning the continued role of the Commission, the Court pointed out that:

> The Sentencing Commission will continue to collect and study appellate court decision making. It will continue to modify its Guidelines in the light of what it finds to be better sentencing practices. It will thereby promote uniformity in the sentencing process.[1672]

After excision, while lacking the mandatory features that Congress had enacted, the system retains other features that help to further these objectives.[1673]

6.6 The sentencing process after Booker

A proper procedure in sentencing after the Booker case was set out in the case of *Gall v. United States*.[1674] Firstly, the court must correctly determine the guideline range.[1675] Secondly, the court must consider whether any of the guidelines' departure policy statements apply.[1676] Thirdly, the court must examine the factors taken as a whole before ascertaining a proper sentence, and whether a divergent is justified.[1677] The Guidelines currently incorporate the three-step process,[1678] but courts take different approaches to applying it, especially with regard to the consideration of the departure provisions and offender characteristics.

6.6.1 Proper determination of the Guideline Range

The courts must start the sentencing process by correctly determining the applicable guideline range.[1679] This includes the dictum that in the determination of the guideline range, courts must follow a fact-finding process to resolve disputed

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1670 The *Booker* case at 263.
1671 The *Booker* case at 263.
1672 The *Booker* case at 263.
1673 The *Booker* case at 263.
1674 552 U.S. 38, 49-50 (2007).
1675 18 U.S.C. §3553(a)(4).
1676 18 U.S.C. §3553(a)(5).
1677 18 U.S.C. §3553(a.
1678 USSG §1B1.1(a)-(c) (Application Instruction).
1679 *Rita v. United States* 551 U.S. 338 (2007) at 351; USSG §1B1.1(a).

issues.[1680] The burden of proof for judicial fact-finding is proof by a preponderance of the evidence, and not proof beyond a reasonable doubt, as many thought after the *Booker* case.[1681] District courts may still consider reliable hearsay evidence and rule that a sentencing court may base the sentencing determination on such evidence.[1682] The *Booker* case changes the manner in which courts treat evidence for sentencing.[1683] The district courts may also accept acquitted conduct to settle factual disputes and determine the guideline range.[1684]

The first step remains virtually unchanged after the Booker case, but courts had conflicting views of whether a court can apply a guideline range that increased after the offender committed the offence due to the *Ex Post Facto* clause. The Seventh Circuit held that the courts apply the *Guideline Manual* that was in operation at the time of sentencing, irrespective whether the guideline range is higher than the range of the *Guideline Manual,* which was in operation on the date of the offence.[1685] The *ex-post facto* clause, therefore, only finds application to laws and regulations that bind rather than advise in the Seven Circuit.[1686]

Five other circuits had a different view, and held that the *ex-post facto* clause bars such increases in sentences.[1687] The Third, Fifth, and Ninth Circuits had imposed sentences of a later version of the guidelines that prescribed more severe penalties than the earlier version which was in operation when the offence was committed.[1688] Two other circuits, the Eight and the Tenth, have, in *dicta,* agreed with the majority

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1680 *United States v. Gonsalves,* 435 F.3d 64 (1st Cir. 2006), also see *United States v. Sheik*, 433 F.3d 905 (2d Cir. 2006).

1681 *United States v. Baker,* 432 F.3d 511 (5th Cir. 2005) and *United States v. Garcia-Gonon*, 433 F.3d 587 (8th Cir. 2006).

1682 *United States v. Baker,* 432 F.3d 1189 (11th Cir. 2005).

1683 *United States v. Brown,* 430 F.3d 942 (8th Cir. 2006). brown

1684 *United States v. Lynch,* 437 F.3d 902 (9th Cir. 2006) (*en banc*).

1685 *United States v. Demaree,* 459 F.3d 791 (7th Cir. 2006).

1686 The *Demaree* case at 795.

1687 See *United States v. Turner,* 548 F.3d 1094 (D.C. Cir. 2008); *United States v. Ortiz*, 621 F.3d 82 (2nd Cir. 2010); *United States v. Lewis*, 606 F.3d 193 (4th Cir.2010); *United States v. Lanham*, 617 F.3d 873 (6th Cir. 2010) and *United States v. Wetherald,* 636 F.3d 1315 (11th Cir. 2010).

1688 *United States v. Wood,* 486 F.3d 781 (3d Cir. 2007); *United States v. Reasor*, 418 F.3d 466 (5th Cir. 2005); *United States v. Forrester,* 616 F.3d 929 (9th Cir. 2010).

view and rejected the view in the *Demaree* case.[1689] If the sentence of the guidelines increase before sentencing can take place, courts frequently impose the sentences of the guidelines that were in operation when the offence was committed.[1690]

The Supreme Court finally settled the different views of the *ex-post facto* clause and enunciated that the clause forbids the government from enhancing the measure of punishment by altering the substantive formula used to calculate the applicable sentencing range.[1691] The Court held that although the Guidelines are no longer mandatory, the guidelines still fulfil a fundamental role in sentencing.[1692] The district court must start by correctly calculating the applicable guideline range,[1693] and then consider the parties' arguments and relevant factors.[1694] The court must not speculate that the Guidelines range is fair and sensible, it must give detail as to why the sentence is appropriate on the record.[1695]

On appeal, the court reviews the sentence for reasonableness under an abuse-of-discretion standard.[1696] The Supreme Court enunciated that lower courts must apply the Guidelines in effect on the date the court imposes the sentence,[1697] but as per the Guidelines, is to use the Guidelines in effect on the date the offence was committed should the Guidelines in effect on the sentencing date be found to violate the clause.[1698] The clause was, therefore, design to serve fundamental justice.[1699]

6.6.2 The Second Step: Consideration of the departure provisions

In the second phase, the court must determine whether it is necessary to invoke the guidelines departure policy statements placed before the court by the respective

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1689 *United States v. Carter,* 490 F.3d 641 (8th Cir. 2007) and *United States v. Thompson*, 518 F.3d 832 (10th Cir. 2008).
1690 *United States v. Ricardo-Rodriguez*, 630 F.3d 39 (1st Cir 2011).
1691 *Peugh v. United States*, 569 U.S. (2013).
1692 The *Booker* case.
1693 The *Gall* case at 38
1694 The *Peug* case at 49-50.
1695 The *Peug* case at 50.
1696 The *Peug* case at 51.
1697 §3553(a)(4)(A)(ii).
1698 The *Peug* case at 4-7.
1699 The *Peug* case at 20.

parties involved.[1700] After hearing both arguments, the court must rule on both cases and place on record how the departure will affect the Guidelines calculation.[1701] The commonly known departures are, for example, substantial assistance departure,[1702] the fast track departure,[1703] the departure for overstatement of a criminal history,[1704] and the cultural assimilation departure for illegal entry offenders.[1705]

According to the Eighth Circuit, the court must, after determining the appropriate sentencing range, decide whether a traditional departure is necessary.[1706] The Third Circuit requires that the entirety of the Guidelines calculation be done correctly, including rulings on Guideline departures.[1707] This is because the Guidelines are still part and parcel criminal punishment.[1708]

Departures in the Guidelines are necessary considerations in federal sentencing; this assists in applying the Guidelines appropriately and accurately and has a bigger role to play when matters are considered n appeal or review.[1709] Departures, upward or downward, is necessary, because the court can decide whether the guideline sentence is in line with the sentencing factors.[1710]

To effectuate the Supreme Court's mandate, districts are still required to consider the appropriate guideline sentencing range wherein the guideline calculation is the determination of whether a Chapter 5 departure is necessary.[1711] Sentencing factors are important factors to be considered, including the applicable guideline's range and available departure authority.[1712]

1700 *United States v. Gunter*, 462 F.3d 237, 247 (3rd Cir. 2006).
1701 *Tapia v. United States,* 131 S. Ct. 2382 (2011).
1702 §5K1.1.
1703 §5K3.1.
1704 §4A1.3.
1705 USSG §1B1.1(b).
1706 *United States v. Hawk Wing,* 433 F.3d 622, 631 (8th Cir. 2006) referring to departures under Part K or §4A1.3.
1707 *United States v. Jackson,* 467 F.3d 834, 838 (3d Cir. 2006).
1708 The *Jackson* case citing section 3553(a) and Booker case.
1709 The *Jackson* case at 838-39.
1710 *United States v. Wallace,* 461 F.3d 15, 32 (1st Cir. 2006).
1711 *United States v. McBride,* 434 F.3d 470, 476 (6th Cir. 2006)
1712 *United States v. Selioutsky,* 409 F.3d 114, 118 (2d Cir. 2005).

Deviation from the Guidelines sentences based on departures declined, because variances in penalties, parties have increasingly relied on the sentencing factors, rather than on guideline departure provisions. The Seventh Circuit regards departures as obsolete, and has held that sentences based on exit provisions, the court should examine them like variances based on factors outside the guidelines under provisions of section 3553(a).[1713] The Sixth Circuit held that a district court's consideration of departures is less important after *Booker*:

> [B]ecause the Guidelines are no longer mandatory and the district court need only consider them along with its analysis of the section 3553(a) factors, the decision to deny a Guidelines-base downward departure is a smaller factor in the sentencing calculus. Furthermore, many of the very factors that used to be grounds for a departure under the Guidelines are now considered by the district court – greater latitude – under section 3553(a).[1714]

Another view of downward or upward Guidelines departures from the Ninth Circuit reads as follows:

> We think the better view is to treat the scheme of downward and upward 'departures' as essentially replaced by the requirement that judges impose a 'reasonable' sentence… The use and review of post-*Booker* departures would result in wasted time and resources in the courts of appeal, with little or no effect on sentencing decisions. After all, if a district court were to employ a post-*Booker* 'departure' improperly, the sentencing judge still would be free on remand to impose exactly the same sentence by exercising his discretion under the now-advisory guidelines. Such a sentence would then be reviewed for reasonableness, in which case it is the review for reasonableness, and not the validity of the so-called departure, that determines whether the sentence stands.[1715]

The Fifth Circuit has held a viewpoint different from that of the Ninth Circuit, where it annulled a sentence, remanding the case to the district court because the court erred in the application of the departure provisions.[1716] The same Circuit upheld a sentence that was more than twice the upper end of the guideline range, even though the district court did not utilise departure methodology in reaching its decision.[1717]

1713 *United States v. Moreno-Padilla,* 602 F.3D 802 (7TH Cir. 2010).

1714 *United States v. McBride,* 434 F.3d 470, 476 (6th Cir. 2006).

1715 *United States v. Mohamed* 459 F3.D 979, 986-87 (9TH Cir. 2006)

1716 *United States v. Gutierres-Hernandez* 581 F.3D 251, 255-256 (5TH Cir. 2009).

1717 The *Gutierres-Hernandez* case at 152.

6.6.3 The Third Step: Consideration of §3553(a)

In this step, the court must consider the factors outlined in 18 U.S.C. §3553(a) taken as a whole before imposing a sentence,[1718] and impose a sentence sufficient but not greater than necessary to meet the purpose of sentencing.[1719] The adaptation of the section, to the *Booker* case, reads as follows:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
> (2) the need for the sentence imposed-
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> (B) to afford adequate deterrence to criminal conduct;
> (C) to protect the public from further crimes of the defendant; and
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
> (3) the kinds of sentences available;
> (4) the kinds of sentence and the sentencing range establish for-
> (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that are in effect on the date the defendant is sentenced; or
> (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title IN 28, United States Code;
> (5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. §994(a)(2) that is in effect on the date the defendant is sentenced;
> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
> (7) the need to provide restitution to any victim of the offense.[1720]

The Supreme Court[1721] held that the requirement of the Federal Rule of Criminal Procedure, courts must give notice for guideline departures,[1722] and not for the post-*Booker* variances.

Further, the Court needs no longer to recite each of the factors on the record when it imposes a sentence.[1723] The *Booker* case does not require district courts to record

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1718 USSG §1B1.1(c); also see *United States v. Hughes,* 401 F.3d 540, 546 (4th Cir. 2005).
1719 18 U.S.C. §3553(a)(2).
1720 18 U.S.C. §3553(a)(1)-(7).
1721 *Irizarry v. United States* 553 U.S. 708, 714 (2008).
1722 Rule 32(h).
1723 *United States v. Dicken,* 432 F.3d 906 (8th Cir. 2006).

on the record whether the court considered the sentencing factors.[1724] The requirement is that the record must include sufficient evidence to demonstrate the court's consideration of these factors, which have become the essential part of the sentencing process.[1725]

However, no circuit has specified what weight to give the Commission's guidelines, and policy statements; nor has the circuits given district courts uniform direction on this issue. The Eleventh Circuit rejected "any across-the-board prescription regarding the appropriate deference to give the Guidelines" and opted to allow sentencing courts to "determine, on a case-by-case basis, the weight to give the reference to the remaining factors the court must also consider in calculating the defendant's sentence."[1726] If the district court has ignored or slighted a factor that Congress has deemed pertinent, it has abused its discretion.[1727]

6.6.3.1 The consideration of offender characteristics

A sentencing court must consider all the factors and must make an individualised assessment based on the facts presented.[1728] The courts must take respectful account of the Guidelines;[1729] the *Booker* case provides the court with discretion to extrapolate sentences taking into consideration of other statutory provisions.[1730] The courts must take all the relevant factors in sentencing into account when they consider penalties.[1731]

Sentencing courts may hear arguments by prosecution or defence that the Guidelines sentence should apply, in cases that fall outside the "heartland" to which the Commission intends individual Guidelines to apply.[1732] The Guidelines promulgated must be consistent with the SRA's proscriptions and limitations on

1724 *United States v. Scott,* 426 F.3d 1324, 1329 (11th Cir. 2005).
1725 *United States v. Till*, 434 F.3d 880, 887 (6th Cir. 2006).
1726 *United States v. Hunt,* 459 F.3d 1180, 1184-85 (11th Cir. 2006).
1727 *United States v. Stewart,* 590 F.3d 93, 167-68 (2nd Cir. 2009).
1728 The *Gall* case at 49.
1729 Section 994 of title 28.
1730 *Kimbrough v. United States,* 552 U.S. 85(2007) at 101.
1731 *United States v. Pepper* 131 S Ct. 1229 (2011)
1732 The *Rita* case at 351.

offender characteristics.[1733] It is not clear whether the proscriptions and restrictions imposed by Congress to which the Commission must adhere in considering the sentencing factors also limit the consideration of offender characteristics.

The Constitution restricts sentencing courts from considering the "forbidden factors" of race, sex, national origin, and creed.[1734] But courts now freely consider, for example, a defendant's educational background and employment record, factors that Congress deemed "generally inappropriate" for the Commission to consider in recommending a term of imprisonment or the length of a sentence in prison. For example, the Court affirmed a downward variance, in part based upon a defendant's prior record as the operator of a significant and fruitful plumbing company that employed more than 300 people.[1735] Another court affirmed a downward variation in part based upon defendant's post-offence record of creating a successful house-painting business.[1736] A below-the-guideline-range sentence was imposed and affirmed in part based on the defendant's recent educational and vocational endeavours, and the court imposed a sentence below the guidelines based on the effort of the accused to better herself through a college education.[1737] The factors that pertain to socioeconomic status can be the same as a forbidden factor under section 994(e).[1738]

Offender characteristics such as the situation of a young adult are another factor that courts view differently. Youth is sometimes regarded as a mitigating factor, whereas before other tribunals, this is a moot factor. For example, in *Gall,* the court considered the scientific facts that the human brain does not conclude to develop until the age of 25 years, and compared the offender's sale of ecstasy when he was a 21-year-old to someone who was under the age of 18 years old.[1739] The Supreme Court did not find any fault with the reasoning of the sentencing court that the

1733 Section 994(d) and (e).
1734 The *Pepper* case at 1240.
1735 *United States v. Tomka,* 562 F.3d 558, 572 (3d Cir 2009).
1736 *United States v. Whitehead,* 532 F.3d 991, 993 (9th Cir. 2008).
1737 *United States v. Crocker*, 2007 WL 2757130, *1 (D. Kan. 2007).
1738 *United States v. Peltier*, 505 F.3d 389, 393 (5th Cir. 2007).
1739 At 57-58.

offender's immaturity at the time of the offence as a mitigating factor, and thought that such consideration "find support in [the Court's] case."[1740]

Other courts do not view a defendant's status as a young adult as a mitigating factor. For example, the Eighth Circuit in the case of *United States v. Maloney,* the court reversed a 22-year-old accused's downward variances in part based on the accused possibility of being rehabilitated.[1741] The variation was substantial, which may lead to inconsistencies in sentencing in the district courts.

A judge of the Eighth Circuit in the case of *United States v. Feemster* had a different view of youth as a mitigating factor, where he expressed himself in the following terms:

> [The defendant's] age does not distinguish him in any meaningful way from other defendants. In fact, 34.1% of all males arrested in the United States in 2007 were between the ages of 20 and 29. In 2007, even more narrowly, males between the ages of 25 and 29 made up the largest demographic group – an estimated 17.24% - of all state and federal prisoners in the United States…. [The defendant's] age has no significant or 'appreciable probative value' in this sentencing and is irrelevant[.][1742]

Another Eighth Circuit judge expressed the view that whether or not the relative youth of an offender will count as a mitigating factor is dependent on the subjective and reasonable mind of the sentencing officer.[1743]

As required by 18 U.S.C. §3553(a), the courts must consider the offender's background and features by stating that:

> [I]f a defendant had a job, a supportive family, and friends, those factors were sometimes viewed as justifying a harsher sentence on the ground that the defendant had squandered the opportunity to lead a law-abiding life. Alternatively, those same factors were sometimes viewed as justifications for a more lenient sentence on the ground that a defendant with a job and a network of support would be less likely to return to crime.[1744]

The different views of the courts on certain aspects of sentencing have increased since the *Booker* case, making sentencing outcomes less certain. For example, the

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1740 At 58.

1741 466 F.3d 663, 669 (8th Cir. 2006).

1742 572 F.3d 455, 465-66 (8th Cir. 2009).

1743 The *Feemster* case at 468.

1744 The *Gall* case at 70.

Third Circuit supported a substantial variance based on the defendant's prior record of employment.[1745] The Circuit split over the substantive reasonableness of the sentence. The Court affirmed the difference; the majority concluded that the district court appropriately relied in part on the defendant's prior employment when imposing a sentence.[1746]

The dissent, while acknowledging that a previous record of work may in some cases be a mitigating factor, emphasised that a previous record of employment might not distinguish an offender that committed tax evasion from other tax evaders, which will have little influence on a sentence.[1747] The judge viewed that white-collar crime criminals always have incredible employment records, using their business as an umbrella under which to commit crime.[1748] White-collar criminals leverage good work records to commit crime.[1749]

Uncertainties were raised by district court judges in public hearings before the Commission, that it is the legion of offender characteristics that fall outside a guideline departure, which leads to the imposition of inconsistent sentences.[1750] The argument put forward was that the authority of district court judges to take account of offender characteristics results in a fairer and more just sentencing outcome, allowing judges to mitigate otherwise harsh guidelines or unwarranted sentencing disparities.[1751]

Grave concerns were raised by the Department of Justice that judges had increased sentencing discretion after the *Booker* case, including the option to consider offender characteristics, and that this had led to increasing the number of unwarranted sentencing disparities.[1752] Probation officers made certain suggestions regarding the amendment of the guideline that relates to offender characteristics and history. The

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1745 The *Tomko* case at 572.
1746 The *Tomko* case.
1747 The *Tomko* case at 583-84.
1748 The *Tomko* case at 584.
1749 The *Whitehead* case at 559.
1750 USSC Public Regional Hearing on the 25th Anniversary of the Passage of the Sentencing Reform Act of 1984, TX (Nov. 19-20, 2009) (hereinafter USSC Public Regional Hearing.
1751 USSC Public Regional Hearing.
1752 USSC Public Hearing on Federal Sentencing Options After Booker, Washington, DC (Feb. 16, 2012).

attributes must be consistent as required by section 3553(a), because those factors that the guidelines discourage courts from considering might be relevant to assessing the risk of recidivism,[1753] or merely because section 3553(a) suggests that such factors are relevant, while the *Guidelines Manual* categorises them as not ordinarily relevant.[1754]

The Commission removed some of the offender characteristics like age; mental and emotional condition; physical condition, and military service from the list of features in 2010 in Chapter Five, Part H, which the Commission considered not ordinarily relevant.[1755] Other offender characteristics might be relevant in determining whether a departure is warranted if the combination of the features of an offender is of such an extraordinary nature that distinguishes the case from other matters under the guidelines.[1756]

6.7 Sentencing of organisations

The SRA created the Commission[1757] that promulgated guidelines by means of which to direct federal sentencing, and produced the organisational guidelines seven years after its creation.[1758] The Federal Sentencing Guidelines provide for the sentencing of organisations, guidelines for which came into effect on 1 November 1991, and formed part of the *Guidelines Manual* of 2016, which entered into force on 1 November, 2016. The Guidelines for organisations are part of Chapter Eight of the current *Manual*. The SRA created a new statutory system of organisational fines, increasing all criminal fines for corporations and distinguishing between individual and corporate penalties to a degree uncommon in the earlier law.[1759]

Before the Guidelines, penalties for companies were small enough for large corporations, which they disregard, and encourage them in the commission of

1753 USSC Public Regional Hearing.
1754 USSC Public Regional Hearing.
1755 USSG App. C, amend. 739 (effective Nov. 1, 2010).
1756 USSG §5H1.1, p.s. (Age).
1757 28 U.S.C §§991-995.
1758 Commission's Supplementary Report on Sentencing Guidelines for Organisations (1991).
1759 18 U.S.C. §§3551, 3553, 3571-3572.

crimes against a significant profit.[1760] Before 1984, a company faced a penalty of no more than $1000 for each count of felony mail fraud.[1761] The SRA and related legislation, determine that for all offences committed by organisations now carry a potential penalty of at least $500 000.[1762]

The SRA defines an "organisation" as any person other than an individual,[1763] and includes groups of people that establish corporations, partnerships, associations, joint-stock companies, unions, trusts, pension funds, unincorporated groups, governments… and non-profit groups.[1764]

Under the provisions of the SRA, mandatory organisational guidelines were formulated by the Commission to bring about greater consistency and certainty to all areas of sentencing.[1765] The corporate guidelines gave judges broader sentencing ranges than did the Guidelines, giving the court broad discretion to account for unusual or complicated aspects of sentencing organisations.[1766] Commission members believed that only mandatory guidelines would encourage agencies to take institutional steps to prevent employee crime.[1767]

The corporate guidelines were mandatory when promulgated in 1991,[1768] until the *Booker* case. Under these guidelines, the court determines an organisation's sentence by beginning with a "base fine," which is then adjusted using a "culpability score."[1769] When the court calculates a fine, the court must determine the offence level of the crime in Chapter Two of the sentencing guidelines.[1770] The court then refers to the "Offense Level Fine Table" in Chapter Eight, which gives a corresponding penalty to a maximum of $5000, while a level thirty offence

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1760 Sentencing Report No. 98-225 at 103-05 (1983).
1761 18 U.S.C. §1341 (2000).
1762 Pub. L. No. 98-473, §211, ch. C, 98 Stat. 1987, 1995-97 (codified at 18 U.S.C. §3571 (2000)).
1763 18 U.S.C. §18 (2000).
1764 U.S. Sentencing Guidelines Manual § 8A1.1 cmt. 1 (2005).
1765 Supp. Report at 6-7.
1766 Nagel and Swenson *The Federal Sentencing Guidelines for Corporations: Their Development, Theoretical Underpinnings, and Some Thoughts About Their Future at* 241-44.
1767 Nagel and Swenson *The Federal Sentencing Guidelines for Corporations* at 243-44.
1768 Supp. Report at 8.
1769 Supp. Report at 5-6.
1770 Guideline Manual §8C2.3 (2005).

corresponds to a maximum $10.5 million fine.[1771] A comparison between the two amounts, the organisation's pecuniary gain from the crime and the loss caused by the offence.[1772] The largest of the three values is the base penalty.[1773]

The prior history of the institution determines the culpability score, whether upper-level personnel merely tolerated or were involved in the crime, whether the body cooperated with the government and accepted responsibility, and whether the organisation had an "effective compliance and ethics program[me]" designed to prevent employee wrongdoing.[1774] An agency's culpability score, in turn, determines a minimum and maximum multiplier: the highest multiplier range (corresponding to the maximum culpability score) is 2.00 to 4.00, and the lowest range is 0.05 to 0.20.[1775] The court multiplies the base penalty by each of these multipliers, yielding penalty variety.[1776]

The organisational guidelines also direct the court to deviate upward or downward from the recommended sentencing range in certain exceptional circumstances, including when the organisation would be unable to pay the fine imposed. For example, a court may depart downward if the defendant gave substantial assistance to the authorities, or may deviate if the offence was life-threatening or posed a threat to national security, the environment, or the integrity of a market.[1777] A court may also reduce a fine that would impair the organisation's ability to make restitution to its victims, or that would substantially jeopardise the continued viability of the institution.[1778] The court may also reduce a fine if an individual who owns at least a five percent interest in the corporation with a prior sentence in a federal criminal proceeding for the same offence conduct.[1779]

The court may also impose restitution, probation, disgorgement, and other remedies as required to compensate the organisation's victims and to prevent a recurrence of

1771 Guideline Manual §8C2.4(d).
1772 18 U.S.C. §3552 (2000); Fed. R. Crim. 32 (c)-(d).
1773 Guideline Manual §8C2.4.
1774 Guideline Manual §8C2.5.
1775 Guideline Manual §8C2.6.
1776 Guideline Manual §8C2.7.
1777 Guideline Manual §8C4.1.5.
1778 Guideline Manual §8C3.3.
1779 Guideline Manual §8C3.4.

the crime.[1780] The information needed for the purpose of sentencing is provided by the pre-sentencing report.[1781]

The probation officer conducts a pre-sentence enquiry and to submit a report with a provisional calculation of the defendant's sentencing range, under the guidelines and sufficient information for the court to make the guidelines calculation itself.[1782] The information can also be obtained from a qualified consultant who has studied the organisation,[1783] or through a sentencing hearing.[1784]

6.8 The effect of the advisory guidelines on sentencing discretion

The advisory guidelines have had a profound effect on the sentencing discretion of the courts since the *Booker* judgment. The Supreme Court has reset the balance of authority in federal sentencing.[1785] The *Booker* ruling dismantled the provisions of the PROTECT Act, where the Court held that courts may find that "the Guidelines reflect an unsound judgment, or … do not generally treat certain defendant characteristics in the proper way".[1786]

The Court further held that offender characteristics "not ordinarily considered under the Guidelines" are "matters that §3553(a) authorises the sentencing judge to consider".[1787] The sentencing discretion of courts is less restrictive. For example, district courts may find evidence of post-sentencing rehabilitation in varying from the guideline range, despite a policy statement prohibiting departure on that ground.[1788] A variance based on offender characteristics that are relevant to the purpose of sentencing, though disapproved by the policy statement, was upheld.[1789]

Judges have treated the advisory guideline range as the "starting point and the initial benchmark", but must also consider all relevant circumstances of the offence

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1780 Guideline Manual §§8B1.1-.3, 8C2.9 AND 8D1.1.
1781 18 U.S.C. §3552 (2000).
1782 *Federal Rule Criminal Procedure* 32(c)(d).
1783 18 U.S.C. §3552(b).
1784 *Federal Rule Criminal Procedure* 32(i).
1785 Stith *The Arch of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion* 1477.
1786 At 259-60.
1787 At 364-65.
1788 The *Pepper* case at 1241-44, 1247-50.
1789 The *Gall* case at 56-60.

and the characteristics of the defendant, including factors the guidelines omit, prohibit, or discourage.[1790] Policy statements that disapprove consideration of individualised circumstances relevant under §3553(a) may not be elevated over such relevant factors and may be freely disregarded.[1791]

In the case of policy disagreements, judges may deviate from the guideline range, where the guideline recommendation embodies a policy judgment that fails to achieve the aims of punishment, unless there other factors that justify a deviation.[1792] The availability of such variance is a constitutional requirement.[1793] Courts may not employ a "legal presumption" that the guidelines should apply, and hence, in order hear evidence that the Guidelines do not adequately reflect a §3553(a) consideration.[1794]

It is acceptable for courts to deviate from Guidelines ranges based solely on policy considerations, including disagreements with the Guidelines.[1795] The guidelines that regulate cocaine are advisory. When a court sentence an offender for crack, it is within the discretion of the court to conclude that the penalty justifies an out of range sentence to achieve §3553(a)'s purpose, even in a mine-run case.[1796]

District courts are entitled to deviate from the crack cocaine guidelines in mine-run situations in the absence of specific factors that would justify a deviation from the guideline sentencing range.[1797] Similarly, district courts may disagree with the Commission's views regarding the relevance of offender characteristics, especially when those beliefs rest on wholly unconvincing policy rationales not reflected in the sentencing statutes Congress enacted.[1798]

The *Booker* judgment created a dialogue between the courts and the Commission, which made possible the development of the Guidelines on a continuous basis,

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1790 The *Gall* case at 49-50.
1791 The *Pepper* case at 1247-50.
1792 The *Kimbrough* case at 101-02.
1793 *Cunningham v. Californis* 549 U.S. 270, 278-81, 292-93 (2007).
1794 The *Rita* case at 338, 351.
1795 The *Kimbrough* case at 101-02 citing Rita.
1796 The *Kimbrough* case at 91, 109-10.
1797 *Spear v. United States,* 555 U.S. 261, 267 (2009).
1798 The *Pepper* case at 1229, 1247.

assisted by sentencing decisions of the tribunals;[1799] which the SRA's framers envisioned.[1800] The courts can be persuaded by the Commission to follow the Guidelines through properly considered reasoning and consistency in sentencing judgments of previous cases.[1801] In turn, the courts can convince the Commission to revise guidelines that they find to be unsound by deviating from them and explaining why.[1802]

Before the *Booker* judgment, courts were not permitted to depart from the guideline range, due to their dissatisfaction with the guidelines, no matter how well-founded their dissatisfaction was or how ill-considered the particular guideline.[1803] Courts were required to follow the guidelines, because an unjust disparity did not constitute permissible grounds for departure under the Commission's departure standard.[1804] The *Booker* case allowed judges more frequently to impose reduced sentences in crack cases, some based on individual circumstances and others on the unjustified severity of the guideline itself.[1805]

District courts can now consider well-reasoned decisions of other district courts and the tribunals of appeal in other circuits regarding the soundness of particular guidelines.[1806] The *Shull* case agreed with the analysis from the Northern District of Iowa relating to the unsoundness of the current crack guidelines and of adopting a one-to-one ratio in crack cases.[1807] Courts of appeal have held that district courts must consider non-frivolous arguments raised by a party based on relevant analysis provided by other tribunals.[1808] The court reversed for the failure to address a challenge to the child pornography guideline after setting forth an extensive study and agreeing with principles stated by other courts of appeal.[1809] Similarly, the court

1799 The *Rita* case at 350.
1800 The *Rita* case at 30-35
1801 *Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944).
1802 The *Rita* case at 357-58.
1803 The *Booker* case at 136-39.
1804 *United States v. Fike*, 82 F.3d 1315, 1326 (5th Cir. 1996).
1805 The Booker Report at 126-31.
1806 *United States v. Shull,* 793 F. Supp. 2d 1048, 1064 (S.D. Ohio 2011).
1807 *United States v. Williams,* 788 F. Supp. 2d 847, 891-92 (N.D. Iowa 2011).
1808 *United States v. Henderson,* 649 F.3d 955, 958, 963 9th Cir. 2011).
1809 The *Henderson* case.

reversed for the failure to consider a challenge to the stolen-gun enhancement under §2K2.1, concerning a decision from the Eastern District of New York.[1810]

On a concluding note, although the court's discretion focuses on the guideline range as a starting point for sentencing, or as a normative sentence, the courts are allowed to freely exercise their discretion about any factor that relates to sentencing. The court's discretion is enhanced to go beyond the guidelines and consult other judgments from other circuits, and the court may disregard policy statements that are unsound. It becomes inevitable that the tribunals will come to different sentence conclusions for matters based on the same facts.

6.9 Criticism of the Federal Sentencing Guidelines

The first Guidelines came under heavy criticism in the draft stage, the criticism being prepared by Professor Paul Robinson.[1811] The criticism was that the Guidelines was mathematical and complex, with "harm values" and "sanction units" that account for a broad range of aggravating and mitigating factors.[1812] The guidelines were an attempt to achieve something approaching "perfect justice".[1813]

6.9.1 The constitutionality of the Federal Sentencing Guidelines

The Guidelines were not favourably received and stakeholders reacted negatively to them.[1814] At that time, more than 200 federal judges ruled that the new Guidelines were unconstitutional, while 120 federal judges declared them to be constitutional.[1815] The legal controversy was finally settled in *Mistretta v. United States*,[1816] where the majority of the judges upheld the constitutionality of the Commission and its new Guidelines. Sixteen years later, after the judgment in the *Mistretta* case, in the *Booker* case the Supreme Court invalidated the mandatory Guidelines as violating the right to

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1810 *United States v. Davy*, 433 F. Appendix 343, 349-52 (6th Cir. 2011) citing *United States v. Handy,* 570, F. Supp. 2d 437, 478-80 (E.D.N.Y. 2008).

1811 Nagel *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines* 80.

1812 Proposed Sentencing Guidelines Manual (April 17, 1986).

1813 Fleming *The Price of Perfect Justice* 3.

1814 *United States v. Davern* 970 F.2d 1490

1815 Nagel *Structuring Sentencing Discretion* at 906.

1816 488 U.S. 361, 364 (1989).

a jury trial under the Sixth Amendment. A different majority of that Court directed as a temporary measure that the Guidelines could continue to operate as being advisory, but the remedial opinion told Congress that the "the ball lies in [its] courts" to come up with a workable and constitutional guidelines system.[1817] To this end, the guideline short-term remedy remains advisory.

6.9.2 The complexity of the Federal Sentencing Guidelines

The prediction of the Guidelines in its original phase was that their complexity would create ample grounds for error in application and grounds for appeals, which is typical of a system that tries for ultimate precision in sentencing.[1818] For the Guidelines to achieve such perfection, they should provide enough sentencing factors for aggravation and mitigation for courts to consider, and also indicate the weight the courts must attach to each factor.[1819] The warning was that:

> the gains from seeking perfection are an illusion. [t]he relevant comparison between simple and complex rules should be conducted not in the language of aspiration, but in the language of realizable achievement… Simple rules are adopted by people who acknowledge the possibility of error up front, and then seek to minimize it in practice. Complex rules are for those who have an unattainable vision of perfection.[1820]

The Guidelines are perceived to be complex, "rigid", "harsh" and too "mechanical", and are unduly restrictive of judicial discretion concerning mitigating factors.[1821] Currently, the Guidelines still require numerous mathematical calculations, for example, a "base offence level" plus or minus a myriad of "specific crime characteristics," plus or minus several "adjustments," followed by the calculation of the influence of the offender's prior convictions on the sentencing range.

1817 The *Booker* case at 265.

1818 Nagel *Structuring Sentencing Discretion* at 919 (quoting from Judge Newman's letter to the Commission).

1819 Epstein *Simple Rules for a Complex World* 38.

1820 Epstein *Simple Rules for a Complex World* 38-39.

1821 Frankel *Sentencing Guidelines A Need for Creative Collaboration* at 2046-50.

6.9.3 The restriction of judicial discretion

The Federal Sentencing Guidelines constrained judicial discretion to sentence outside those narrow ranges up to the time of the legal intervention of the *Booker* case. Previously, as long as the Commission had considered a particular issue about offence conduct in the Guidelines, a departure from a guideline in a case was justifiable if the sentencing factors were of extraordinary nature.[1822] The *Guidelines Manual* also restricted the consideration of offender characteristics, such as an offender's age, mental illness, drug addiction, or family responsibilities as a basis for departing from the sentencing range.[1823]

Much of the rigidity is the manner in which Congress directed the Commission to narrow sentencing discretion:

- Create a "detail[ed] set of sentencing guidelines" that "reflect every important factor relevant to sentencing";[1824]
- Forbid courts to consider some personal characteristics of defendants;[1825]
- Restrict the breadth of the original sentencing ranges of the Guideline in a manner that the upper limit of the guideline range is not more than 25% or 6 months - what is known as the "25% rule".[1826]

It would swiftly become the most controversial and unpopular sentencing reform initiative in United States' history.[1827] The Guidelines were prescriptive, and the courts had to apply them strictly in a specific order or sequence.[1828] They were not favourably received:

1822 USSG §5K2.0 (1987).
1823 USSG §§5H1.1, 5H1.3, 5H1.4 and 5H1.6 (1987)
1824 Report of the Committee of the Judiciary, United States Senate, on S. 1872, No. 98-225, at 168-69 (September 14, 1983).
1825 28 U.S.C. §994(d).
1826 28 U.S.C. §994(b)(2).
1827 Tonry *Sentencing Matters* 72.
1828 18 U.S.C. § 3553(a)(4).

> The federal guideline system has been subject to an extraordinarily voluminous amount of judicial and academic labour,[1829] much of it predictable in view of the defects inherent in the original conception. Few would regard the system as a suitable model for future reforms.[1830]

Tonry further stated his dissatisfaction with the guidelines:

> They are commonly criticized on policy grounds (that they unduly narrow judicial discretion and shift discretion to prosecutors), on process grounds (that they foreseeably cause judges and prosecutors to circumvent them), on ethical grounds (that by forcing key decisions behind closed doors, they foster hypocrisy and undermine the integrity of federal sentencing), on technocratic grounds (that they are too complex and are hard to apply accurately), on fairness grounds (that, because only offense elements and prior criminal records are taken into account, very different defendants receive the same sentence), on outcome grounds (that they have not reduced sentencing disparities), and on normative grounds (that they are too harsh).[1831]

The statement emphasises the extreme restrictiveness and severity of the pre-Booker Federal Guidelines and the characteristics which differentiated them from "well-regarded" state guideline systems, despite the fact that the latter also utilised sentencing grids.[1832]

6.9.4 Prison overcrowding

The Guidelines were and are still severe. In 1992, the average federal prison term was 66.7 months,[1833] and the average federal jail sentence was 65.2 months,[1834] but the real term of imprisonment served was lower, because of the possibility of parole, which the Guidelines abolished. [1835]

Currently, the average federal prison sentence is 53 months, over a year less than the mean in 1992, but still more than the average time served by federal

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1829 Freed *Federal sentencing in the wake of guideline: Unacceptable limits on the discretion of Sentencers* 1685. Doob The United States Sentencing Commission Guidelines: If you don't know where you are going, you may not get there in Clarkson and Morgan *The politics of Sentencing Reform* 199-250.

1830 Ashworth Four techniques for reducing sentence disparity in Von Hirsch and Ashworth *Principled Sentencing: Readings on Theory and Policy* 234.

1831 Tonry *Sentencing Matters* 72.

1832 Tonry *Sentencing Matters* 76.

1833 USSC Annual Report 63 (1992) (Table 21).

1834 Annual Report of the Director of the Administrative Office of the United States Court 282 (1987) (Table D-5).

1835 Stokes *Sixteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals* 1985-86 (IV. Sentencing, Probation, and Parole).

prisoners before the guidelines.[1836] It is more than a year longer than the average sentence for a felony conviction in a state court, where an offence such as murder or rape is worse than most federal crimes in which the release of the offender on parole is more likely.[1837]

The adverse effects of the guidelines on the prison population came about as a result of Congress (through the SRA) abolishing parole and encouraging severe sentences, particularly for white-collar offenders and drug-traffickers, and initially, the USSC faithfully followed Congress's directives.[1838] The enactment of mandatory minimum penalties for drug-trafficking, firearm and child pornography offences since the mid-1980s also contributed to an increase in the federal prison population.[1839] Notably, in recent years the USSC has reduced the penalties modestly for some crimes, especially for drug-trafficking,[1840] but did not decrease the prison population.[1841]

6.9.5 Sentence disparities

The Supreme Court invalidated the mandatory Guidelines in *Booker.* The SRA initially required judges, not juries, to find sentencing enhancements by a preponderance of the evidence. That was unconstitutional, and the Guidelines are now only advisory.[1842] Federal district judges still find those facts, by a preponderance of proof, but the superior courts have the discretion to deviate from the advisory Guidelines.[1843] In a sense, this worsens the sentencing in

1836 USSC, Sourcebook of Federal Sentencing Statistics (2015) (Table 14).

1837 Rosenmerkel, Durose and Farole *U.S. Department of Justice, Bureau of Justice Statistics, Felony Sentences in State Courts*, 2006 6 (2009) (Table 1.3) (38-month average sentence on Incarceration).

1838 Stith and Koh *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines* 223-268.

1839 USSC Report of the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System 81 (2011).

1840 USSC, USSG, App. C, Amends. 706, 713 (2008) (reducing guideline penalties for crack cocaine (offenders).

1841 USSC Recidivism Among Offenders Receiving Retroactive Sentence Reduction: The 2007 Crack Cocaine Amendment AT 1-2 (2014).

1842 At 243-44 (majority opinion of Stevens J).

1843 At 258-68 (separate majority opinion of Breyer J).

some respects, because judges now enjoy the discretion to vary from the advisory guidelines to consider offender characteristics.[1844]

This freedom has led to growing disparities in sentencing. Data analysed by the Commission has established that inconsistencies in sentences exist among the different court levels and that the extent of penalties also exists along racial lines and gender.[1845] Whites males receive shorter prison terms than their Black counterparts, and women receive lower sentences than men, even after the application of other factors.[1846]

Sentencing under the mandatory Guidelines has shown that inter-judge disparity in the average sentence length fell by one month or less.[1847] Some view this as a sign of progress,[1848] but it is considered by others as marking a failure, and evidence that the guidelines are not sufficiently beneficial to outweigh the more problematic kinds of disparity that they introduced.[1849] The inter-judge disparity is only one form of variation, and though the Guidelines reduced inter-judge disparity, other kinds of disparity were left unchecked.[1850]Some of the rules were not necessary to satisfy the legitimate purposes of sentencing.[1851]

Offenders who differed significantly in their culpability, danger to the public, the risk of recidivism, and rehabilitative needs receive the same treatment.[1852] The guideline range for similar offenders convicted of similar offences can be, and is, calculated very differently for any number of reasons, including

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1844 The *Gall* case and 18 U.S.C. §3553(a)(1).

1845 USSC, Report on the Continuing Impact of United States v. Booker on Federal Sentencing, Part E (Demographic Differences in Sentencing) (2012). Available http://www.ussc.gov/site/default/files/Pdf/news/congressional-testimony-and-reports/2012-booker/Part_E.pdf#page=1.

1846 USSC, Demographic Differences in Sentencing at 9 (Figure E-3)

1847 Anderson, Kling and Stith *Measuring Interjudge Sentencing Disparity: Before and After the Federal Sentencing Guidelines* 271, 294.

1848 U.S. Sentencing Commission. Fifteen Years of Guidelines Sentencing at 99.

1849 Alschuler *Disparity: The Normative and Empirical Failure of the Federal Guidelines* at 301-04.

1850 Fifteen Year Review at 79-92, 131-35.

1851 Fifteen Year Review at 131-34.

1852 Schulhofer *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity* 851-70.

happenstance.[1853] There is lack of clarity in the Guidelines where the relevant conduct rule is inconsistently applied, in part due to ambiguity in the language of the rule;[1854] because of different interpretations;[1855] because of various views of the evidence;[1856] and due to varying prosecutorial practices.[1857]

Sentences within the guideline range do not pick up these disparities, because they are variations in the calculation of the guideline range.[1858] Furthermore, measuring differences solely concerning judicial decision-making ignores inequalities inevitably created by differing prosecutorial charging and plea-bargaining policies and strategies across cases and districts.[1859] Moreover, it is standard practice in some quarters for law enforcement officers to manipulate the guideline range by determining, for instance, the quantity or type of drugs bought, sold, or agreed upon before an arrest.[1860]

The *Booker* remedy is not to render the Guidelines superfluous, but it is to maintain Congressional sentencing, to assist in the achievement of consistency in sentencing, while providing courts with the leverage to individualise sentences where necessary.[1861] Guidelines sentencing is the foundation of federal sentencing in federal courts.[1862] Since the *Booker* judgment, the "within-range" rate penalties has decreased and remain close to 50% in recent years.

Quarterly data for "within-range" and "out-of-range" sentences for the Fiscal Years 2011 to 2016 released on 8 September 2016 show that "within-range" sentences have decreased from 54.5 percent in 2011 to 49.5 percent on

1853 *United States v. Emmenegger,* 329 F. Supp. 2d 416, 427 (S.D.N.Y. 2004).
1854 Fifteen Year Review at 50, 87.
1855 Hinkle *District judge Statement before the U.S. Sentencing Commission* (Feb. 11, 2009).
1856 *United States v. Quinn*, 472 F. Supp. 2 104, 105-06 (D. Mass. 2007).
1857 Hinkle at 3.
1858 Hinkle at 3.
1859 Fifteen Year Review at 82-85.
1860 Newman *The New Commission's Opportunity* 44.
1861 The *Peugh* case at 2079-80.
1862 The *Peugh* case at 2084.

average in the fourth quarter of 2016.[1863] The "below-range" sentences increased from 17.4 percent in 2011 to 20.5 percent on average for the same period.[1864] The "above-range" sentences also rose from 1.7 percent to 2.3 percent on average for the same period.[1865]

It is of note that of cases in which courts impose "below-range" sentences is just over 40 percent, as a result of grounds for downward departure correctly recognised by the *Guideline Manual,* including offenders' "substantial assistance to the authorities" or guilty pleas under an "early disposition" programme.[1866] The mean sentence imposed for cases has closely tracked the average guideline range, both before and after the *Booker* case.[1867]

The Guidelines have increased certainty and fairness in meeting the purpose of punishment, have reduced unwarranted sentencing disparities, and have found favour with the majority of judges.[1868] Overall 22 percent of judges strongly agree, and 55 percent agree with the notion that the Federal Guidelines reduced unwarranted sentencing disparities among defendants with similar records, who had been found guilty of similar forms of conduct.[1869]

Regarding the question of whether the Federal Sentencing Guidelines have increased certainty in meeting the purpose of sentencing, 21 percent strongly agree, and 53 percent agree.[1870] On the question of whether the Federal Guidelines had increased fairness in meeting the purpose of sentencing, 15

1863 U.S. Sentencing Commission, 2001-2015 Datafiles, USSCFY15, and preliminary Data from USSCFY16 (October 1, 2015, through June 30, 2016) (hereinafter Source Book) (Table 12) at 20.

1864 Sourcebook Table 12 at 20.

1865 Sourcebook Table 12 at 20.

1866 Of all departures from the applicable guideline range, 40.1% were pursuant to USSG §§5K1.1 (substantial assistance departures) or 5K3.1 (early disposition departures) U.S. Sentencing Commission Datafiles Table 13 at 21.

1867 USSC Report on the continuing impact of United States v. Booker on federal sentencing, Part A, at 60 (2012). Also see Peugh, 133 S. Ct at 2084 (The Sentencing Commission's data indicate that when a Guideline's range moves up or down, offenders' sentences move with it).

1868 USSC, Result of 2014 Survey of United States District Judges http://www.ussc.gov/sites/default/Files/pdf/research-and-publications/research-project-and-surveys/surveys/20150225 Judges Survey. pdf (2015) (hereinafter the Judges survey) .

1869 Judges' Survey Table 44 at 29.

1870 Judges' Survey Table 44 at 29.

percent strongly agree, and 47 percent agree.[1871] On the preference of the sentencing system before the *Booker* case where the federal guidelines were mandatory, two percent prefer the earlier system, and 77 percent prefer the Guidelines in their current form.[1872]

A fair inference, therefore, is that discretionary sentencing is the primary cause of inconsistencies in sentences correlated when it comes to race, class, and gender. It explains why the original Commission constrained departures from the guideline range based on individual characteristics.[1873] The Guidelines went from one extreme to the other (from their original mandatory form to their advisory form after Booker).

6.10 Summary and conclusion

The Federal Sentencing Guidelines represent a gallant effort by the Commission to deal with disparities in sentences efficiently and restricted the free exercise of sentencing discretion by courts until the judgment in the *Booker* case. The mandatory Guidelines presented a fundamentally different sentencing system from that of South Africa. One of the fundamental differences was that principles govern the South African sentencing system, except in those instances where sentencing is precisely regulated by statutory rules, as with the mandatory Guidelines. Now that the Guidelines are only advisory, courts have broad sentencing discretion as in the era of the indeterminate sentencing system in the USA.

1871 Judges' Survey Table 44 at 29.
1872 Judges' Survey Table 45 at 30.
1873 United States v. Wilson, 355 F.Supp.2d 1269, 1276-77 (D. Utah 2005 (Cassell, J.).

CHAPTER 7

FINDINGS AND RECOMMENDATIONS

7 Findings

7.1 The purpose of the research

Chapter One presented the primary objective of the thesis to answer the following research question: in what manner can the South African law of sentencing be improved to promote greater consistency in sentencing?[1874]

The setting of specific secondary objectives was necessary, the attainment of which would lead to achieving the primary aim of the study.[1875] Before discussing the findings of the study and making recommendations arising out of it, it would probably be prudent to address the results obtained from the secondary objectives.

7.1.1 To critically analyse the sentencing process in South Africa to establish whether the consideration of traditional factors and other related legal principles causes the unequal treatment of offenders convicted in different cases of similar crimes committed under similar circumstances

The exercise of a broad sentencing discretion when courts determine sentences has a solid base of support in the South African judiciary. Proponents of discretionary sentencing justify the method as fair because the courts achieve individual justice in sentencing. Discretionary sentencing is also known for its inconsistent imposition of sentences that undermine the offenders' right to equal justice. The imposition of inconsistent sentences for offenders similarly positioned is relatively more conspicuous in democratic states like South Africa that treasure the right to human dignity, equality, and freedom. Discretionary sentencing impacts on all aspects of sentencing in the South African sentencing system.

1874 See 1.2 above.

1875 See 1.3 above.

7.1.1.1 Sentencing legislation

Firstly, the South African sentencing legislative framework provides the courts with various kinds of sentences.[1876] The type of penalty ranges through imprisonment, life imprisonment, imprisonment for an indefinite period, the declaration of an offender as a habitual criminal, committal to an institution established by law, a fine, ad correctional supervision, to a caution and discharge. A court is at liberty to impose any sentence for any offence, as the court deems fit. It is self-evident that the courts in this regard have broad discretion as to what manner of penalty to choose when they impose sanctions.

Secondly, the legislation that regulates the sentencing jurisdictions of the different court levels provides the courts with a broad range between the upper and lower limits of the severity of a sentence.[1877] The high courts have an unlimited sentencing jurisdiction, the regional magistrates' courts have a general sentencing jurisdiction of 15 years' imprisonment and a maximum fine of R600 000.00, and the district magistrates' courts have a general sentencing authority of three years' imprisonment and may impose a maximum fine of R120 000.00. Certain statutory offences such as those in the *Drugs and Drug Trafficking Act*, 140 of 1992 enhance the sentencing jurisdiction of the regional and district magistrates' courts beyond their general sentencing authority to 25 years' imprisonment. The courts are at liberty to determine the extent of the term in prison or the amount of a fine at their discretion.

7.1.1.2 Sentencing information

The CPA in Section 274 specifically provides a process whereby a court may hear certain evidence before imposing sentences.[1878] South African case law shows in some instances that the tribunals explore the sentencing stage at length and receive adequate information before sentencing the offender. In other cases, the courts treat the gathering of information for sentencing in a very shoddy manner. The approaches of the courts are inconsistent, resulting in the imposition of inappropriate sentences in certain cases. Despite the fact that the appeal and review

1876 See 2.2.1 above.
1877 See 2.2.2 – 2.2.5 above.
1878 See 2.3 above.

tribunals emphasise the importance of the gathering of sentencing information, the process remains problematic in certain cases.

7.1.1.3 Sentencing discretion

The South African sentencing legislation does not provide a rule of thumb or any formula that the courts must use to impose sentences. The courts impose sentences by exercising their sentencing discretion.[1879] The sentencing legislation does not prescribe to the tribunals what manner of sentence to impose. The sentencing court has the sole discretion in this regard. A court is not obliged to follow the sentencing judgment of another court, even if the conviction of the offender is for a similar offence.[1880] The justification put forward by case law is that no one case is the same as any other, nor that individual justice is necessary. This is a cause for concern among those who wish to see consistency and equality in sentencing.[1881]

Discretionary sentencing is a broad-based exercise of authority, because the courts must balance numerous unweighted factors relevant to sentencing, and extrapolate an appropriate sentence from them.[1882] Hence, the imposition of penalties that are consistently similar for similarly placed offenders is highly desirable.[1883] The relevant factors in sentencing come in different currencies, which the courts must translate into a single measure.[1884] When the courts determine sentences, they do not attach the same weight to the various factors they are required to consider, so the exercise of discretion often results in the imposition of the different sentences for similar offences.[1885] It follows that the achievement of consistency in sentencing is a remote ideal.[1886] The conclusion is that the South African sentencing system is flawed[1887] in that it hinges largely on the subjective views of the presiding officer.[1888]

1879 See 2.4.1 above.
1880 See 2.4.2-2.4.3 above.
1881 See 2.4.3.1-2.4.3.2 above.
1882 See 2.4.4 above.
1883 See 2.4.5 above.
1884 See 2.4.4 above.
1885 See 2.4.6-2.4.7 above.
1886 See 2.4.8 above.
1887 See 2.4.8.1-2.4.8.2 above.
1888 See 2.4.8.3 above.

The courts are free to impose any form of punishment or determine the extent or length thereof provided the exercise of the tribunal's discretion is within the realm of the sentencing legislation.[1889] Hence, the achievability of consistency in sentencing under a broad discretion is not possible.[1890]

7.1.1.4 The triad factors in sentencing

The *Zinn* judgment exemplifies the traditional approach to sentencing, which consists of considering the crime, the personal circumstances of the offender, and the interest of society.[1891] The law does not stratify offences in their seriousness. The courts have the discretion to stratify the gravity of the crime, which quantifies the severity of the offence. A court has discretion in how much weight it attaches to the personal circumstances of the offender, such as his age, gender, educational qualifications, socioeconomic background, and previous convictions. The list is not exhaustive. The interest of society affects sentences in different ways. Society expects courts to punish offenders severely for serious offences or crimes that have racial connotations. The court has the discretion to determine to what degree the interest of society should influence the form and quantum of the punishment. The courts must balance these factors without emphasising one element at the expense of the others.

In conjunction with the relevant factors, the court must consider the purpose of punishment,[1892] which could be retribution, just desert, deterrence, rehabilitation, incapacitation, and restorative justice.[1893] It is not a light task to do this, because each theory of punishment has its purpose. For example, the use of deterrent punishment is to prevent the commission of a further crime, and the substance of the sentence must, therefore, be such as to instil fear in the offender and others.[1894] Reformative punishment concentrates on the personality of the offender, rather than on the fact that the penalty must fit the crime.[1895] Incapacitation involves removing

1889 See 2.4.6-2.4.7 above.
1890 See 2.4.8 above.
1891 See 2.5.1-2.5.4 above.
1892 See 2.6 above.
1893 See 2.6.1-2.6.2 above.
1894 See 2.6.1.1-2.6.1.2 above.
1895 See 2.6.1.3 above.

the offender from society, thus preventing him from committing further crime.[1896] If the sentence espouses on retribution, the offender does not always receive a term of imprisonment.[1897] The various objectives of punishment have different influences on what sentencing officers want to achieve when they impose sentences.

7.1.1.5 Legality

There are principles that courts must also consider when they determine a proper sentence. The current forms of punishment in South Africa conform to the principle of legality. Thus, the imposition of a sentence occurs after the conviction of an offender of common law or statutory offence.[1898] After that, if courts determine sentences through the application of principles the sentencing outcomes are diverse, because the principles in themselves are varied, having been developed by the courts as against being defined by statute.[1899]

If the courts apply rules when they impose sentences, the sentencing results are consistent.[1900] The South African Supreme Court of Appeal approved of this practice when it held that the mandatory minimum sentence, as established in the CLAA, is the starting point sentence courts must ordinarily impose. Criticism against sentencing rules is that they are inclined to prevent the courts from considering the aggravating and mitigating factors in their determination of a sentence. Rules in sentencing ensure consistency in sentencing for offenders similarly positioned and therefore protect the right to equality of criminals, as against the outcomes, where the courts apply discretionary sentencing principles.

7.1.1.6 The role of the right to human dignity

The Constitution legitimises punishment, provided that such punishment is not inhuman, cruel, and degrading.[1901] The main aim of the prohibition clause of punishment is to protect the human dignity of the offender at the sentencing stage, yet numerous examples exist of courts imposing sentences that are contrary to the

1896 See 2.6.1.4 above.
1897 See 2.6.2 above.
1898 See 2.2.1 above.
1899 See 3.4.1.2 above.
1900 See 3.4.1.1 above.
1901 See 3.6 above.

prohibition clause of punishment.[1902] For example, the court may intentionally impose a penalty of a fine where it is clear that the offender is not in a financial position to pay, and therefore must do a gaol term, or expect a criminal to ridicule himself by standing in public proclaiming his guilt. It proves that discretionary sentencing is not only a problem for consistency and equality in sentencing, but also infringes upon the right to human dignity.

7.1.1.7 The role of proportionality

The primary aim of the principle of proportionality in sentencing is that courts must impose sentences that fit the crime.[1903] This means that the tribunals must extrapolate appropriate sentences which focus on the gravity of the offence, as framed by the retributive punishment theory. The imposition of sentences that are too lenient to deter the offender or the public undermines the principle of proportionality. Such sentences flout the prohibition clause, and do not protect the values espoused in the Constitution.

Proportionality in sentencing is a noble idea, and should lead to consistency in sentencing, but it is sometimes forgotten when courts impose grossly disproportionate sentences. This is mainly because the South African system provides the courts with broad discretion to determine the nature and the extent of a sentence. Further, it is difficult for a court to decide which quantum of a sentence is appropriate for an offence because the sentencing legislation does not attach proportionate penalties to specified crimes.

7.1.1.8 The role of the right to equality in sentencing

Equality in sentencing means that the courts should, as far as possible, impose a similar sentence for offenders convicted of a similar offence.[1904] Those convicted of similar crimes ought to receive the same punishment, irrespective of their race, religion, gender, or any other characteristic.[1905] The right to equality in sentencing is also a focal point in sentencing, given the abhorrence of South African society to the

1902 See 3.6.3-3.6.6 above.
1903 See 3.5 above
1904 See 3.9.2 above.
1905 See 3.9.1 above.

inequalities that existed before 1994. The right to equality is now one of the values that underpin the South African democracy.

The Constitution specifically empowers the State to intervene legislatively or to introduce measures to eradicate inequalities wherever they exist. The death penalty and corporal punishment were the only kinds of punishment that the Constitutional Court dealt with in the *Makwanyane* and *Williams* cases respectively, by declaring them unconstitutional. Therefore, for the State to protect the right to equality in sentencing, it must create an environment that is conducive for courts to impose sentences that are consistent for similarly positioned offenders.

7.1.1.9 The role of consistency in sentencing

The principle of uniformity in sentencing requires that similarly placed offenders must receive similar sentences, and that courts must impose severe sentences for offenders that commit serious offences.[1906] Consistency in sentencing is a fundamental requirement of justice.[1907] The South African sentencing system is not conducive to courts imposing similar sentences for offenders convicted of similar offences. The imposition of penalties is not predictive, and there is no certainty in sentencing outcomes. The principle of consistency in sentencing is concomitant to equal justice in sentencing, but seems to be subservient to the principle of individualisation in sentencing in South African courts.

7.1.1.10 Discretion

Discretionary sentencing forms the foundation of the South African sentencing tradition, and it seems that the only way of changing this would be legislative intervention. The reality is that the sentencing legislation does not regulate the exercise of sentencing discretion in such a manner as to induce courts to have a standard and consistent approach in the imposition of sentences.

Without realistic boundaries that better structure the exercise of sentencing discretion, critical questions linger about the extent of the courts' powers in

1906 See 3.10.1 above

1907 See 3.10.2 above.

sentencing, and what exactly it is that they consider when they come to impose specific penalties.[1908] Instead of the current dispensation's requiring courts to impose sentences that allow for equal treatment, it places the principle of individualisation and the principle of consistency in sentencing at opposing poles.[1909] The effect is that the principle of coherence as a concomitant of the protection of the right to equality is often forgotten.

The Constitutional Court in the *Dawood* case made it abundantly clear that where discretion exists, as in sentencing, rules must apply to regulate the manner in which courts exercise their discretion. In discretionary sentencing, the courts have to consider numerous heterogeneous factors and translate them into a sentence. This makes it impossible for them to impose similar sentences for similarly positioned offenders. Consistency in sentencing falls by the wayside, because courts concentrate on individualising the penalty to the offender and the crime. Under such a broad discretion it is necessary for the legislature to set out clear rules regulating the manner in which courts are to consider the relevant factors, and the weight they must attach to such factors to determine a sentence.

Discretionary sentencing focuses on the manner in which the presiding officer views the case. It concentrates primarily on the presiding officer as a human being, his cultural background, experience, social values, moral outlook, penal philosophy and views as to the merits or demerits of a particular penalty. Case law suggests that not only does discretionary sentencing cause the imposition of inappropriate sentences, but that discretionary sentencing may result in courts imposing sentences that are inhuman, cruel or otherwise degrading.

1908 See 3.11 above.

1909 See 3.11 above.

7.1.2 To determine whether discretionary sentencing infringes upon the right to a fair trial and the right to be treated equally before the law if similarly placed persons receive disparate sentences

7.1.2.1 Fair trial rights

The right to a fair trial enjoys recognition in numerous international instruments such as the Universal Declaration of Human Rights, the Covenant on Civil and Political Rights, and the European Convention for the Protection of Human Rights and Fundamental Freedoms.[1910] The main aim of the fair trial rights is to protect offenders from procedurally and substantively unfair trials, including at the sentencing stage.[1911] This means that the right to a fair trial applicable in the evidential phase of the trial is also relevant at the sentencing stage.[1912]

7.1.2.2 The right to be informed of the charges in sufficient detail to be enabled to answer them

The right to know the accusations in enough detail to answer them is an internationally acclaimed right[1913] that has a direct correlation with one of the triad factors, which is the seriousness of the offence. The state must inform the offender as early as at the plea stage about the charges proffered against him, for various reasons. This is an aspect that received attention in some cases that served in the Supreme Court of Appeal concerning sentencing under the CLAA.

In the cases of *Legao* and *Mashinini,* the Supreme Court of Appeal held that the charge sheet must explicitly state the sentence the offender face upon conviction of an offence list in the CLAA. It is, therefore, an infringement on the fair trial right of an offender if the court invokes a penalty prescribed for a more serious crime than the one mentioned in the charge sheet.[1914] In the *Kolea* case, the Supreme Court of Appeal took a different view. The Court consisting of five judges unanimously held that a minimum sentence under the CLAA does not preclude a court to impose life

1910 See 3.8 above.
1911 See 3.8 above.
1912 See 3.8 above.
1913 See 3.8.1 above.
1914 See 3.8.1 above.

imprisonment simply because the charge sheet mentioned a less serious offence, provided the evidence before court proof the more severe offence mentioned in the CLAA where the accused is convicted for that more serious offence. The CLAA does not create a different offence; the test is rather whether the offender suffered prejudice as a result of the error in the charge sheet. The Supreme Court of Appeal confirmed this view in the *Tshoga* case, provided the conviction was not for the less serious offence as discussed in the *Ndlovu* case.

7.1.2.3 The right to an open trial in an ordinary court

The right to a public trial in a regular court as part of the fair trial rights of the accused is designed to protect the accused against secret trials.[1915] The right is also designed to garner public confidence in the administration of justice. It is wrong, and it also an infringement on the fair trial right of an offender, for the court to gather information from the complainant for sentencing in the chambers of the presiding judge without the presence of the parties and the public.[1916] The public and the parties involved are entitled to see and to know the manner in which the court collects information for sentencing purposes.

7.1.2.4 The presumption of innocence, and the rights to remain silent, not to testify, and against self-incrimination

The right to remain silent, the right not to testify, and the right against self-incrimination are fair trial rights that seem to be at odds with some of the provisions of the CPA. Firstly, the CPA empowers the court to hear evidence in mitigation and aggravation before the court imposes a sentence.[1917] The review and appeal tribunals in some of the cases have held that the sentencing phase is dealt with shoddily.[1918] If the accused refuses to testify or remains silent at the sentencing stage, and his attorney elects not to address the court from the bar, the court may not have received a sufficient weight of information for sentencing. However, the offender is entitled to remain silent and not to testify in mitigation of sentence,

1915 See 3.8.2 above.
1916 See 3.8.2 above.
1917 See 2.3 above.
1918 See 2.4.8.2 above.

because his production of self-incriminating evidence at the sentencing stage may aggravate punishment. It is therefore *prima facie* unconstitutional for the court to ask the accused whether he or she has previous convictions.[1919] The court is obliged to inform the offender about the advantages of testifying under oath for sentencing purposes.

7.1.2.5 The right to the least severe punishment if the prescribed punishment changes between the commission of the offence and sentencing

The right to the least severe punishment if the specified sentence changes between the commission of the crime and sentencing correlate with the principle of legality.[1920] The Legislature must first promulgate the penalty for a particular offence before the crime is committed and legally applied. A person can be convicted and punished only for an act or omission that is by law a criminal offence at the time of the commission of such an act or omission.[1921] The right precludes the court from imposing a "new" severe punishment prescribed in the new penalty clause. If there is a variation in the sentence, whether an increase or a decrease, the accused receives the "benefit" of the least severe punishment. The court's sentencing discretion is limited to the least severe punishment.[1922] It is, therefore, an infringement of the fair trial right of the offender if the court imposes the new severe punishment enacted after the commission of the offence.

7.1.2.6 The right to appeal or review by a higher court

The right of appeal or review by a superior court correlates with the provision of the CPA, which is that convicted and sentenced offenders have a right that their conviction and sentences be reconsidered or taken on appeal.[1923] The Constitution protects the right, and a higher court is empowered to interfere with sentences in cases where the trial court did not exercise its sentencing discretion properly. An appeal tribunal should also deliver a notice to the offender if it is of the view that it might increase the sentence of the offender, which was imposed by the trial

1919 See 3.8.3 above.
1920 See 3.3 above.
1921 See 3.8.3 above.
1922 See 3.8.3 above.
1923 See 4.3-4.5 above.

court.[1924] Among the primary reasons for the existence of review and appeal tribunals are to ensure that the law is consistently applied, and in particular, in the imposition of appropriate sentences, in the furtherance of equality before the law, so as to maintain the supremacy of the Constitution and the rule of law.

7.1.3 To analyse different approaches aimed at ensuring consistency in sentencing

In South Africa, the CPA provides two methods of judicial self-regulation, namely review and appeal procedures.[1925] The CPA empowers the superior courts to engage in review and appeal procedures to interfere with inappropriate sentences and replace them with those sentences they deem fit.[1926] Review procedures and appeal procedures are not the same. Both processes require an application from the applicant, and in particular circumstances, the processes are automatic, but they serve different purposes.[1927]

7.1.3.1 Automatic review processes

The first automatic review of sentences depends on the presence of specific conditions in a case before they are the subject of automatic review. The factors are the nature and the extent of the sentence as well as the rank and years of experience of the judicial officer of the magistrate district court that imposed the sentence. A district court judicial officer who held that position for fewer than seven years and imposed a sentence of more than 3 months imprisonment coupled with a fine of more than R6000.00,[1928] or a district court judicial officer who held that rank for more than seven years and imposed a jail term of more than six months and a fine of more than R12 000.00.[1929] The last requirements are that the offender must not have had legal representation during the criminal trial, including at the sentencing stage, and there must not be any appeal pending in that case.[1930]

1924 See 3.8.4 above.
1925 See 4.2 above.
1926 See 4.2 above.
1927 See 4.2.4 above.
1928 See 4.3.1 above.
1929 See 4.3.1 above.
1930 See 4.3.1 above.

A second automatic review process applies to children under the age of 16 years at the time of the commission of the offence.[1931] Cases are subject to automatic review also where the offenders are 16 years or older, but younger than 18 years during the commission of a crime, where the court imposes a term of direct imprisonment. The CPA also provides for instances where an offender is convicted and sentenced, and any of the parties are of the view that an irregularity took place during the proceedings. Those proceedings may be brought by way of a special review to a superior court of that division.[1932] The high court hearing the matter will have the power to review the whole proceedings, including interfering with sentences that are deemed inappropriate.

The automatic and special review processes are useful techniques to interfere with sentences, but the downside of these methods is that they take place post-sentencing and very sporadically, and do not cover all cases. The restructuring of the trial court's sentencing discretion happens after the sentence was imposed and not while the court considers a sentence. The review tribunal has the power only to decrease a sentence and not to increase a sentence.

7.1.3.2 Appeal processes

The CPA empowers the superior courts to hear appeal matters against penalties imposed by chiefs and headmen,[1933] sentences imposed by lower courts,[1934] penalties imposed by higher courts,[1935] and appeals by the prosecution.[1936] Unlike automatic review processes, appeal matters are heard on the application and do not cover all cases where an accused is convicted and sentenced. Review and appeal tribunals have the power to confirm a sentence,[1937] reduce a sentence,[1938] or set

1931 See 4.3.2 above.
1932 See 4.3.3 above.
1933 See 4.4.1 above.
1934 See 4.4.2 above.
1935 See 4.4.3 above.
1936 See 4.4.4 above.
1937 See 4.5 above.
1938 See 4.5.3 above.

aside a sentence and replace it with a sentence the court deems fit;[1939] but only appeal courts may increase a sentence.[1940]

Superior courts hearing an appeal matter are not at liberty simply to set aside a sentence of the trial court and replace it with a sentence they deem fit, because the imposition of a sentence is pre-eminently the function of the sentencing court.[1941] Superior courts interfere with a sentence of a trial court only if there are cogent reasons to interfere, and the court of the first instance exercised its sentencing discretion improperly or unreasonably.[1942] An improper or unreasonable exercise of a sentencing discretion occurs where the court of the first instance committed a misdirection by overemphasising the offence at the expense of the personal circumstances of the offender or the interest of society.[1943] A sentence is unreasonable if the penalty induces a sense of shock, is startlingly inappropriate, or if there is a striking disparity between the imposed sentence and that which the review or appeal court would have imposed.[1944]

The court of appeal is entitled to hear further evidence or remit the matter back to the court *a quo,* with directions regarding the hearing of further evidence.[1945] An application for the hearing of further evidence before the appeals tribunal is not granted easily, because the accused person must provide proof in mitigation during the trial at the sentencing stage. Only facts or evidence that has become known after the trial court imposed the sentence are admissible.

In conclusion, the appeal process is a useful technique to structure the exercising of the sentencing discretion of the tribunals by replacing an inappropriate sentence with one the appeal court deems fit. The downside of the appeal process is that it is dependant on the success of the appeal application, which is dependent on administrative issues and the merits of the appeal.

1939 See 4.5.1 above.
1940 See 4.5.2 above.
1941 See 2.4.2 above
1942 See 4.5.1 above.
1943 See 4.5.1 above.
1944 See 4.5.1 above.
1945 See 4.5.4 above.

7.1.3.3 Guideline judgments

Appellate courts produce guideline sentences by formulating general rules to guide trial courts regarding the structuring of the sentencing discretion of tribunals for specific offences.[1946] England has utilised guideline sentences successfully since the 1970s when the Court of Appeal of England and Wales issued rules providing a tariff and differentiating between as well as analysing aggravating and mitigating factors relating to particular offences.[1947] The court *a quo* retains its sentencing discretion and must still determine a sentence on the merits of a case.

The courts in Western Australia, New South Wales and Victoria, were not eager to issue guideline judgments although the tribunals were legally empowered to do so, with particular reference to Western Australia.[1948] In South Africa, guideline sentences have no application due to the principle that the prerogative to determine a sentence belongs to the sentencing court.[1949]

7.1.3.4 Mandatory minimum sentences

A mandatory minimum sentencing law as an instrument for use in structuring the sentencing discretion of legal tribunals provides binding prison terms of a particular length for people convicted of certain crimes; but permits courts to impose different sentences in the light of the presence of extenuating circumstances, or of substantial and compelling circumstances.[1950] Initially, the CLAA in South Africa served as a temporary measure capacitating courts to address serious crime by empowering them to impose severe sentences for offences listed in the CLAA and to achieve consistency in sentencing.[1951]

The CLAA contains serious crimes with corresponding mandatory minimum sentences for offenders convicted of those offences listed. If the courts find "substantial and compelling" circumstances in a case, the courts must place such grounds on record, and in doing so, may deviate from the mandatory minimum

1946 See 4.6.1 above.
1947 See 4.6.2 above.
1948 See 4.6.3 above.
1949 See 4.6.7 above.
1950 See 4.7 above.
1951 See 4.7.1 above.

sentences. From the outset of the coming into operation of the CLAA, courts had difficulty in interpreting what "substantial and compelling circumstances" were.[1952] The *Mofokeng* case provided a strict interpretation by interpreting the phrase to mean exceptional factors empowering the tribunal to impose a sentence other than those prescribed in the CLAA. The *Cimani* case provided a lenient interpretation which would make it easy for courts to depart from the minimum sentence, and the *Blaauw* case gave a reading between the two extremes.[1953]

The most famous argument, and that which provides clear guidance on how the courts must interpret "substantial and compelling circumstances", was made in the *Malgas* case. The Supreme Court of Appeal in *Malgas* stated that the tribunals must ordinarily impose the mandatory minimum sentence as a starting point sentence.[1954] Courts must not deviate from the mandatory minimum sentence for flimsy reasons. If the courts find weighty reasons to depart from the prescriptive sentence, they must not hesitate to depart from the mandatory minimum sentence. The court in *Malgas* made it clear that the CLAA limits the court's sentencing discretion, but does not eliminate the court's sentencing discretion.

The *Malgas* judgment provides a standard approach to the interpretation of the phrase "substantial and compelling circumstances". The Constitutional Court in the *Dodo* case endorsed the Malgas approach, and the legislature has further bolstered this standard approach in the interpretation of "substantial and compelling circumstances" by amending the CLAA. The amendment restricts the courts from considering certain factors when they determine the absence or presence of "substantial and compelling circumstances". These factors are the complainant's previous sexual history, the lack of wounds inflicted on the victim, the offender's cultural or religious beliefs about rape, and the relationship between the offender and the complainant before the offence was committed.[1955]

1952 See 4.7.5 above

1953 See 4.7.5 above.

1954 See 4.7.5 above.

1955 See 4.7.6 above.

In the early stages of the CLAA's operation, disparities and inconsistencies in sentencing were prevalent.[1956] Such discrepancies and inconsistencies in sentences occurred because courts did not have a standard approach to interpreting the phrase "substantial and compelling circumstances". After the seminal judgment of *Malgas,* the courts followed a consistent approach confirmed by the Constitutional Court in the *Dodo* case and later cases of the Supreme Court of Appeal like *Vermeulen*, *Mvamvu, Mtyityi and Ndlovu, S v PB* and *S v MDT.*

It is therefore evident in case law that mandatory minimum sentences are helpful in structuring sentencing discretion without necessarily eliminating it. In foreign jurisdictions like the USA, England and Wales, the sentencing discretion of the tribunals is structured by sentencing guidelines.

7.1.3.5 Sentencing guidelines in England and Wales

The guideline judgment of England laid a solid foundation for consistency in the English sentencing regime.

The sentencing legislation of England established the Sentencing Advisory Panel, the primary function of which was to draft guidelines for specific offences for the Court of Appeal.[1957] The Sentencing Guideline Council was established by the *Criminal Justice Act* 2003 to produce sentencing guidelines, after a recommendation from the Sentencing Advisory Panel.[1958] The Sentencing Council replaced the two institutions in 2009 and has the sole purpose of developing sentencing guidelines.[1959]

The offence of assault was the first definitive guideline released by the Sentencing Council.[1960] The sentencing directives specify offence ranges and the range of penalties appropriate for each type of crime. Within each charge, the Sentencing Council has determined three categories that reflect varying degrees of seriousness. The sentencing guideline splits the offence range into class fields – sentences

1956 See 4.8.9 above.
1957 See 5.2.1 above.
1958 See 5.2.2 above.
1959 See 5.2.3 above.
1960 See 5.4 above.

appropriate for each level of severity. The sentencing guideline also identifies a starting point sentence within each category.[1961]

Starting points define the position within a group range from which to start calculating a provisional sentence. They apply to all offences within the corresponding category and apply to all offenders in all cases, irrespective of the plea, or previous convictions. After establishing the starting point sentence range, the court considers further aggravating and mitigating factors and prior convictions to adjust the penalty within the range.[1962]

Most notably, the court does not have the discretion to categorise the offence of assault. The court must select the offender conviction category. The court does not also have discretion regarding determining a sentence. The sentencing guideline provides the court with a starting point sentence, which serves as a provisional sentence for each category. The court considers the aggravating and mitigating factors; after that, the tribunal may move the point of departure either upward or downward within the class range.[1963] The courts' sentencing discretion is within the scope level to the maximum and minimum allowed within the range class. The discretion, then, is very nominal.

Further, the guideline provide nine steps the court has to follow. Each level is indicative of what the court has to consider, such as, in Step Three, whether a reduction in sentence is applicable for the offender's having assisted in the prosecution;[1964] or for a guilty plea;[1965] or if an increase shall apply because the offender is a danger to society.[1966] The court must consider the totality principle[1967] and an ancillary compensation order.[1968] The sentencing guidelines require the

1961 See 5.4 above.
1962 See 5.4 above.
1963 See 5.4.2 in table 4 above.
1964 See 5.4.3 above.
1965 See 5.4.4 above.
1966 See 5.4.5 above.
1967 See 5.4.6 above.
1968 See 5.4.7 above.

courts to provide a reason for the sentence,[1969] and in Step Nine, the court must consider the remand time.[1970]

The sentencing guidelines of England and Wales offer a standard approach to the imposition of punishment for all offences. The compliance rate for the different assault crimes achieves a consistency in the sentencing of 94.2 percent,[1971] for burglary offences 96 percent,[1972] for drug crimes 95 percent,[1973] and for dangerous dog offences over 99 percent.[1974]

7.1.3.6 The Federal Sentencing Guidelines of the United States of America

During the nineteenth century, the sentencing system of the USA produced a great deal of disparities in sentencing.[1975] The primary reasons were that the imposition of sentences was in the sole discretion of the courts,[1976] where the chief purpose of punishment was rehabilitation. Sentencing was indeterminate, and the review of penalties and appellate action in sentencing were limited.[1977] To ameliorate the situation, Congress introduced the Sentencing Review Act (SRA), which created the Commission to promulgate binding guidelines.[1978] The sentencing guidelines transferred the sentencing discretion from the courts to Congress to guarantee that similarly, situated offenders received similar treatment.[1979]

The SRA set forth four purposes of sentencing, namely: deterrence, prevention and rehabilitation;[1980] and provided for robust appeal and review procedures for sentences imposed outside the limitations outlined in the statute.[1981] It provided for limited authority to impose penalties outside the sentencing guidelines to promote

1969 See 5.4.8 above.
1970 See 5.4.9 above.
1971 See 5.6.1.1 above.
1972 See 5.6.1.2 above.
1973 See 5.6.1.3 above.
1974 See 5.6.1.4 above.
1975 See 6.1 above.
1976 See 6.1-6.2 above.
1977 See 6.1-6.2 above.
1978 See 6.2-6.3 above.
1979 See 6.3 above.
1980 See 6.3.1 above.
1981 See 6.3.2 above.

certainty, fairness, and consistency in sentencing and avoid unwarranted disparities among defendants with similar records for a conviction for similar conduct.[1982]

The SRA set forth the seven factors that the courts must consider in sentencing,[1983] as well as the aggravating and mitigating factors,[1984] and also made provision for the length of sentences, depending on the seriousness of the offences.[1985] The penalty is increased or decreased depending on the manner the offender committed the crime, and is the cornerstone of the Guideline System.[1986] To this end, the Federal Sentencing Guidelines provide for 43 offence levels with the least severe at the top end and the worst at the bottom end.[1987] The SRA specifically identifies offender characteristics that the courts must not consider, Congress believing that personal prejudices are among the main reasons for disparities in sentencing.[1988] The factors the courts may not consider are the race, gender, national origin, creed and socioeconomic status of offenders.

The Guidelines provide a step-by-step approach to sentencing, where the courts are expected to find the offence level or the seriousness of the crime in the Sentencing Table in which the 43 offence levels appear.[1989] They guide the courts mechanically through the sentencing process, in adding and deducting points from the crime level, depending on the elements that are relevant to the offender and offence characteristics.[1990] The method of imposing a sentence within the matrix of the Guidelines was rigid, and the courts had limited space to deviate from them to ensure consistency in sentencing.[1991]

The Court in *Booker* held that any fact which is necessary to support a sentence's exceeding the maximum authorised by the Guidelines, whether the verdict translates from a plea of guilty or a jury decision, must be admitted by the defendant or

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1982 See 6.3.3 above.
1983 See 6.3.4 above.
1984 See 6.3.5 above.
1985 See 6.3.6 above.
1986 See 6.3.8 above.
1987 See 6.4.1 above.
1988 See 6.3.7 above
1989 See 6.4.2 above.
1990 See 6.4.3-6.4.6 above.
1991 See 6.9 above.

proved to a jury beyond a reasonable doubt.[1992] The Court further held that the sentence enhancement violates the Sixth Amendment right to a trial because the court can find facts not admitted by the defendant nor found by the jury. The Court subsequently excised the provisions that made the sentencing guidelines mandatory. The effect thereof was that the courts were no longer expected to impose sentences within the Guideline range, and the *de nova* standard of review for departures from the guidelines was also struck down.

Federal sentencing after the Booker case was set out in the case of *Gall v. United* States.[1993] Firstly, the court must determine the applicable guideline range and must follow a fact-finding process to resolve disputes, proof being arrived at by a preponderance of the evidence.[1994] Secondly, the court must consider whether to apply any of the guidelines departure policy statements raised by the parties.[1995] The court must make a ruling on any departure and on how the departure affects the Guidelines calculation. Thirdly, the court must consider the factors outlined in 18 U.S.C. §3553(a) taken as a whole before imposing a sentence and must impose a sentence that is appropriate, but not grossly disproportionate than what is necessary to meet the purpose of sentencing.[1996] When the court considers offender characteristics, the court must take into account all the factors and make an individualised assessment based on the facts presented before the court.[1997]

The *Booker* case therefore mostly restored the sentencing discretion of the courts. The Guideline range has become a set of starting point sentences, and the tribunals may now take into account any factor of the offence and offender characteristics, including factors that the guidelines omit, prohibit, or discourage, in determining a sentence.[1998]

The freedoms the courts now enjoy has led to growing disparities in sentencing, and statistics show increasing differences in sentence length associated with race,

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1992 See 6.6 above.
1993 See 6.7 above.
1994 See 6.7.1 above.
1995 See 6.7.2 above.
1996 See 6.7.3 above.
1997 See 6.7.3.1 above.
1998 See 6.9 above.

gender, and inter-judge disparity. There has been a decrease in the number of "within-range" sentences, and an increase in the number of "below-range" sentences.[1999] The fact remains that although the Guidelines sentencing system was rigid and restricted the sentencing discretion of courts,[2000] consistency and equality in sentencing were better protected under that system than under a sentencing system with a broad sentencing discretion. Prison overcrowding as a result of the severe sentences prescribed by the Guidelines need not have had led to return to individualised sentencing and the restoration of the sentencing discretion of the courts.

7.2 Recommendations

7.2.1 To make recommendations to ensure greater uniformity in sentencing

7.2.1.1 Structuring the exercising of sentencing discretion

The nature and extent of sentencing discretion within the South African sentencing system are profound. The sentencing discretion impacts on all aspects of sentencing, including the triad factors and all other relevant factors of sentencing, including the kind and the extent of a sentence. The South African sentencing tradition elevates the principle of individualisation in sentencing above the principle of consistency and equality in sentencing. The result is that uniformity in sentencing, which is a concomitant of equality in sentencing, plays a subservient role, which causes similarly positioned offenders to receive different sentences.

Sentencing principles like proportionality and the rejection of cruel, inhuman or degrading punishment do not seem to find a clear and binding application in sentencing. It is because the principle of proportionality in sentencing lacks a precise definition. Such a definition would relate the quantum and nature of a sentence to the seriousness of the offence, whereafter the other relevant information would be factored in to produce a sentence that would be appropriate and that would avoid being grossly disproportionate, cruel, inhuman or degrading. The discretion that the courts have to categorise a crime in its seriousness and the discretion that they have

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1999 See 6.10.5 above.

2000 See 6.10.5 above.

as to which kind of sentence to impose is monumental. It makes one wonder if the State is not failing in its constitutional obligation to prevent the imposition of grossly disproportionate sentences that are inconsistent, unequal, cruel, inhumane, or degrading, by not implementing measures that better structure the exercise of the sentencing discretion of courts.

The methods presently in use in the South African sentencing system that structure the sentencing discretion of the tribunals in such a way as to promote consistency in sentencing are the appeal and review procedures. The recommendation is that the two processes remain in place without any amendments.

The Legislature has provided another legislative intervention, which is the CLAA, the primary aim of which is to punish severely those offenders found guilty of the serious offences listed therein. The CLAA provides a limitation on the court's sentencing discretion by directing that the courts impose the mandatory minimum sentence, unless the court has found "substantial and compelling circumstances" in a case to deviate from the prescribed sentence.

In the early stages of the operation of the CLAA, courts found the application of the phrase "substantial and compelling circumstances" difficult, especially in the absence of a definition. They were unsure which factors in a case constituted "substantial and compelling circumstances", enabling them to deviate from the mandatory minimum sentences. The result was that tribunals that dealt with matters listed in the CLAA had various interpretations of the meaning of the phrase, which led to different sentencing outcomes. The temporary nature of the CLAA at the time gave the courts the impression that the aim of the CLAA was not to bring about consistency in sentencing.

Parts I to IV of Schedule 2 of the CLAA cover most of the serious offences that trigger mandatory minimum sentences which vary between five years', and life imprisonment. These crimes are heard either in the superior courts or the regional magistrates' courts. The judicial officers of the district courts adjudicate the so-called "petty crimes", for which the maximum punishment is R120 000.00, and a maximum term of imprisonment is three years. The exercise of sentencing discretion in the

district magistrates' court is not structured. These tribunals have a broad sentencing discretion.

The Federal Sentencing Guidelines of the United States of America and the Sentencing Guidelines of England and Wales provide specific options as to how the sentencing system of South Africa can be better adapted to promote consistency in sentencing. At this stage, it would not be practical or cost-effective to attempt to revamp the whole South African sentencing system with either of the two available options, where sentencing discretion is a tradition of the sentencing system. The techniques of the two foreign countries' sentencing guidelines systems can assist in the development of sentencing guidelines for offences that the district magistrates' courts adjudicate.

The recommendations are first that the Legislature amend section 92(1)(a) of the MCA to increase the sentencing jurisdiction of the district magistrates' court to a maximum penalty of R200 000.00, and a maximum term of imprisonment of five years. The ratio of proportionality in a sentence of a fine coupled with imprisonment will remain in place. It will also cover offences that may carry a penalty of five years imprisonment, where the crimes are not in the CLAA. The superior and the regional magistrates' courts will adjudicate matters listed in the CLAA, and the district magistrates' court will settle the cases not currently enumerated in the CLAA.

The recommendation is therefore that sentencing guidelines regulate the structuring of the exercise of sentencing discretion in the district magistrates' courts. The South African judiciary is fond of its sentencing discretion, and any sentencing guidelines as rigid as the Federal Sentencing Guidelines of the pre-*Booker* judgment may receive a hostile reception. The Sentencing Guidelines of England and Wales are less hostile to the South African sentencing system, as they are flexible regarding the offence conviction, crime starting point sentences, and category ranges.

The recommendation is, therefore, the development of sentencing guidelines that deal with the structuring of the exercise of sentencing discretion in the district magistrates' courts. The South African Law Reform Commission in its 2000 Draft Sentencing Framework, recognised the significant faults that exist in the South

African sentencing system, which produces significantly varying sentencing outcomes. The South African Law Reform Commission proposed the development of sentencing legislation that deals comprehensively with the ills of the South African sentencing system.

The Legislature must enact laws that authorise the establishment of a Sentencing Council, as per the proposal of the South African Law Reform Commission, to promote consistency in sentencing. In Chapter Two of the Bill, the South African Law Reform Commission requires that the Sentencing Council must consist of specific members, including members of the judiciary, representatives of individual law enforcement agencies, sentencing experts, and citizens that represent the victims.

The Sentencing Council must state the basic sentencing principles and guidelines in legislation. The courts must strictly apply the sentencing principles and guidance as per the prescription of the law. The sentencing guidelines must have a particular category or sub-category of an offence and specify a sentencing option that the district magistrates' courts must impose, as well as the quantum of the sentence. The sentencing guidelines must rate the crimes regarding their degree of seriousness, and rank them accordingly.

The gravity of the offence committed is to be determined by the level of harmfulness or risked harmfulness of the offence, and the extent of culpability of the offender for the crime committed. The sentences of the sentencing guidelines must, therefore, support a retributive sentencing system. The reason for this is that the South African Constitutional Court endorses the principle of proportionality in sentencing because the gravity of the offender's criminal conduct is a fundamental requirement of fairness in severe sentences. The other reason is that there are no empirical studies proving that deterrent punishment is working.

The proposed sentencing guidelines must mirror the sentencing guidelines of England and Wales, and must provide sentences of imprisonment, fines, community penalties, atonement, and caution and discharge. The sentencing guidelines must direct that the courts not impose imprisonment where a community sentence or a fine is an option, unless the imposition of imprisonment is for the protection of

society against the offender. The sentencing guidelines must also direct that the courts must impose sentences of reparation instead of a fine when both penalty options are appropriate.

The recommendation is further that sentencing guidelines must provide for a range of sanctions, allowing a 30 percent variation in quantum up or down from the basic instruction, and for the whole or a partial suspension of a sentence. As is the case with sentences provided for in the CLAA, the sentencing guidelines must make provision for previous convictions that are relevant to the current offence. The sentencing guidelines must take into consideration the capacity of the correctional system, both in prison and community corrections.

7.2.1.2 Sentencing model for district courts

To this end, the recommendation is that the legislature must enact legislation which authorises the establishment of a sentencing council that is under the auspices of judicial branch of government. Section 173 of the Constitution provide the courts with inherent powers to protect and regulate their own process. This will ensure greater constitutional judicial independence in terms of the kind of sentences which are proportionate for those specific offences prescribed in the sentencing guidelines. It will also ensure that the district magistrates' court impose sentences that are not seen to be inconsistent, and which does not comply with prohibition clause of punishment in the constitution. The superior courts are the tribunals which deals with appeal and review cases from the district magistrates' courts and have the power to interfere with sentences imposed by those courts. It is therefore important that the sentencing council consist of members of the judiciary working in the review and appeal courts. The Chief Justice must chair the council consisting of the Deputy Chief Justice, Judge President and Deputy Judge President of the Supreme Court of Appeal, the Judges Presidents of the different High Court Divisions, members of the legislature and the executive, members of the law fratinity, criminologists, and other professionals who have an interest in sentencing.

The sentencing guideline model for the district courts in South Africa should provide three categories for both common law and statutory offences. Harm and culpability

as the primary components should determine the different classification of offence categories like either as a category 1, 2 or 3 as the example below.

Category 1	Greater harm and higher culpability
Category 2	Greater harm and lower culpability; or lesser harm and higher culpability
Category 3	Lesser harm and lower culpability

For example, for the offence of assault, serious injury must be present to qualify as either a category 1 or 2 offence, coupled with higher culpability and a less serious injury, and lower culpability for a Category 3 offence for assault. For economic offences such as theft, fraud and house breaking, and theft, which are not covered by the CLAA, a high monetary value will determine whether such an offence is classified as either category 1, 2 or 3 offence, coupled with a corresponding degree of culpability.

The offence category will determine the sentences (for up to five years' imprisonment=60 months imprisonment) as indicated in the table below

Offence Category	**Starting point sentence**	**Category Range**
Category 1	42 months imprisonment	29 months – 60 months (imprisonment)
Category 2	20 months imprisonment	26 months – 14 months (imprisonment)
Category 3	10 months imprisonment	7 months imprisonment Fines coupled with imprisonment Community penalties Reparation Caution and discharge

The starting point sentences of the offence category, allows for a 30 percent upward or downward deviation in the category range. The sentencing guidelines will allow the South African district magistrates' courts to have a common starting point sentence. As illustrated in the table above, sentence of direct imprisonment are prescribed for category 1 and 2 offence categories. It is only for offence Category 3 the guidelines provide a variety of sentences.

To cater for individualised, and to ensure the imposition of just sentences for all offence categories, the sentencing guideline must provide a clause to allow courts to deviate from those prescribed sentences when 'substantial and compelling

circumstances' exist to do so, similar to operations of the CLAA in the regional magistrates' courts and the superior courts.

The first two steps mirror those prescribed in the Sentencing Guidelines for England and Wales. It is also where the similarities stop when comparing how the mitigating and aggravating factors are taken into account. In order not to devise a totally different sentencing regime for the district magistrates' courts than what is in use in the regional and superior courts, the sentencing guidelines must allow the district magistrates' courts to consider all the relevant factors in sentencing when they consider sentences. The guidelines must therefore not be prescriptive which factors the district magistrates' courts must consider in sentencing.

The new sentencing model will easily adapt to the current sentencing system of South Africa, because the only improvisation factored in, is the categorisation of the offences with corresponding starting point sentences. This method ensures a consistent provisional sentence for a specific offence in the guidelines. The final sentence is determined by the consideration of the district magistrates' court of all the factors relevant in sentencing. Depending on the weight the district magistrates' courts attached to the factors, the court may adjust the final sentence either upward or downward in the category range.

7.3 Summary and conclusion

The fair trial rights of offenders in criminal trials receive the constitutional attention of the highest order while the law on procedural and substantive issues receive adequate attention. Any deviation from these legal prescripts is struck down as unconstitutional, in favour of the party concerned. There is sufficient evidence in case law to prove that the sentences imposed by courts through the exercise of their broad sentencing discretion vary to such an extent that they could sometimes be deemed to undermine the constitutional imperatives of punishment. The right to equality before the law in sentencing serves a subservient role to create space for the operation of the principle of individualisation, which is one of the leading causes of inconsistencies in sentences. A legislative intervention structures the exercise of the sentencing discretion of courts efficiently in such a way as to elevate the

principle of consistency in sentencing to its rightful place in a democratic society, thus protecting the right to equality in sentencing.

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Abbreviations

AJLP - Australian Journal of Legal Philosophy

Am. J. Crim. L. Rev. – American Journal of Criminal Law Review

Cal. L. Rev – California Law Review

CCSS – Crown Court Sentencing Survey

CICrimJust – Current Issues in Criminal Justice

CJA – Child Justice Act 75 of 2008

CLAA – Criminal Law Amendment Act 105 of 1997

Clev. St. L Review – Cleveland State Law Review

Colum L. Rev - Columbia Law Review

CPA – Criminal Procedure Act 51 of 1977

Duke J. Comp. & Int'l L.- Duke Journal of Comparative & International Law

Geo. L. J. – Georgetown Law Journal

Harv. J. on Legis. – Harvard Journal on Legislation

Harv. L. Rev – Harvard Law Review

Hofstra L. Rev. – Hofstra Law Review

How. L. J. – Howard Law Journal

J. Crim. L. & Criminology – Journal of Criminal Law and Criminology

J. L. & Econ. – Journal of Law and Economics

Law and Contemp. Probs. – Law and Contemporary Problems

Law & Hum. Behav. – Law and Human Behavior

MCA – Magistrates' Court Act 32 of 1944

Md. L. Rev. – Maryland Law Review

Me. L. Rev – Maine Law Review

Minn. J. Int'l L – Minnesota Journal of International Law

Minn. Stat. Ann. – Minnesota Statutes Annotated

NSW Crime Statistics and Research – New South Wales Crime Statistics and Research

NSWLRC – New South Wales Law Reform Commission

Nw. U. L. Rev – Northwestern University Law Review

Pac. L. J – Pacific Law Journal

Pa. Const. Stat. Ann. - Pennsylvania Consolidated Statutes Annotated

Pub. L. No – Public Law Number

SACC – South African Journal of Criminal Law and Criminology

SAJHR- South African Journal of Human Rights

SALJ – South African Law Journal

S. C. L. Rev – South Carolina Law Review

Stan. L. Rev. – Stanford Law Review

Syracuse L. Rev – Syracuse Law Review

Tex. L. Rev – Texas Law Review

UCLA L. Rev- University of California at Los Angeles Law Review

U. Cin. L. Rev. – University of Cincinnati Law Review

U. Colo. L. Rev. – University of Colorado Law Review

UNSW L. J – University of New South Wales Law Journal

U. S. C. C. A. N – United States Code Congressional Administrative News

U. S. S. C – United States Sentencing Commission

U. S. S. G – United States Sentencing Guidelines

Va. Law Rev. – Virginia Law Review

VUWLR – Victoria University of Wellington Law Review

Wake Forest L. Rev – Wake Forest Law Review

Wasburn L. J – Wasburn Law Journal

Wash. Rev. Code Ann. – Washington Revised Code Annotated

Wash. U. L. Q – Washington University Law Quarterly

Yale L. J – Yale Law Journal