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Sentencing and Punishment

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Punishment often infringes the rights and violates the human dignity of the individual. Yet the Constitution assumes that the state may punish offenders, for s 12(1)(e), the provision dealing most directly with punishment, only protects individuals against being ‘treated or punished in a cruel, inhuman and degrading way’. The state may punish individuals only by means of sentences imposed by the courts following criminal trials which themselves are subject to rigorous constitutional requirements.

The important question relating to the constitutionality of sentencing and punishment is the extent to which the power of the state to punish is shaped and restricted by the fundamental rights recognized by Chapter 2 of the Constitution. The protection of these rights is in turn constrained by s 36, which allows entrenched rights to be limited by law of general application. Such limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

In order to answer the primary question about the constitutional restraints on the power of the state to punish, one must consider briefly the existing legal framework for sentencing decisions. In South Africa an exceptionally wide discretion is granted to courts imposing sentences. No general legislation prescribes the approach which courts must adopt to sentencing.

The restrictions on the exercise of judicial sentencing discretion which do exist are imposed by different means. For many crimes there are statutorily prescribed maximum sentences. More rarely, and controversially, there are also prescribed minima. For many common-law offences though, there are no direct statutory limits. Overall, the range of discretion which remains to the sentencing courts is large.

Indirect statutory restriction is achieved by limitations on the punishment jurisdiction of specific courts. Thus the Supreme Court, which has no general restrictions on its punishment jurisdiction, can impose any sentence which it regards as appropriate in terms of general principles of punishment as long as the sentence does not include a form of punishment which is restricted to particular offences. There is a jurisprudence which has attempted to develop guidelines within this broad discretionary framework, but it is relatively unformed and has only a limited impact on sentencing discretion.

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2 See also the reference to sentenced prisoners in s 35(2). The provisions of the Constitution of the Republic of South Africa Act 200 of 1993 (‘the interim Constitution’) corresponding to ss 12(1)(e) and 35(1) were ss 11(2) and 25(1) respectively.
3 See above, Snyckers ‘Criminal Procedure’ ch 27.
4 Section 36(1), which goes on to stipulate that ‘all relevant factors’ must be taken into account including:
   (a) the nature of the right;
   (b) the importance of the purpose of the limitation;
   (c) the nature and extent of the limitation;
   (d) the relationship between the limitation and its purpose; and
   (e) less restrictive means to achieve the purpose’.
28.2 Legislation and Constitutional Principles

Constitutional norms add a new dimension to the debates about punishment. They address themselves in the first instance to the question of whether the legislative framework of the sentencing system is constitutionally valid. Two questions arise at this stage. The first is the immediate issue of whether statutorily authorized forms of sentence are constitutionally acceptable. The second is the wider issue of whether legislative provisions for the imposition and implementation of sentences observe general constitutional norms, such as legality, equality, proportionality, and the protection of human dignity.

(a) Legality

In order for there to be even the possibility of the equal protection of the law, guaranteed by s 9 of the Constitution, the law has to be reasonably clear. In the area of criminal law this is a trite proposition of the common law: *nulla poena sine lege.* In respect of punishment the principle has at least two implications. First, penalties themselves should be reasonably precisely defined. Secondly, the imposition of such penalties should be governed by clear legal rules, which themselves should meet the requirements of the principle of legality.

(i) Defining penalties

The definition of specific forms of punishment may at first glance appear not to be a problem in South Africa. Whatever the constitutional shortcomings of the sentence of death or of corporal punishment, their ambit was clear. Fines too are unambiguous in their penal content. At a conceptual level the same applies to sentences of imprisonment. Since the abolition of imprisonment with hard labour, the length of time to be served has been the only factor which distinguishes one sentence of imprisonment from another, from the perspective of the sentencing court.

Correctional supervision is far more problematic in this regard. South African legislation defines this form of punishment indirectly. Although correctional supervision is formally defined by s 1 of the Criminal Procedure Act, that section refers only to a ‘community-based punishment’ in accordance with the Correctional Services Act. The key provision, s 84 of the Correctional Services Act, provides that

> ‘every probationer shall be subject to such monitoring, community service, house arrest, placement in employment, performance of service, payment of compensation to the victim and rehabilitation or other programmes as may be determined by the court or the Commissioner [of Correctional Services] or prescribed by or under this Act, and to any such other form of treatment, control or supervision, including supervision by a probation officer, as the Commissioner may determine after consultation with the social welfare authority concerned in order to realize the objects of correctional supervision’.

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2 By the Criminal Law Amendment Act 16 of 1959. A punishment of hard labour would be subject to direct constitutional challenge in terms of s 13 of the Constitution, which prohibits forced labour.
4 Act 8 of 1959.
The implication is that when someone is sentenced to correctional supervision any of the divergent forms of community-based punishment mentioned may be imposed by a court, which may also impose ‘other programmes’. Moreover, the Commissioner of Correctional Services may add ‘any other form of treatment, control or supervision’ which will realize the objects of correctional supervision. Add to this the fact that the content of some of the forms of correctional supervision which are mentioned is unclear, and it becomes apparent that correctional supervision includes a large variety of punishments which appear not to be defined precisely enough to meet the standards of legality.

There are various potential solutions which may be adopted to ensure that standards of legality are met. One solution was suggested by Kriegler AJA in S v R. In that case the judge recognized the perilous position of the person subject to correctional supervision:

‘Tydens die uitdiening van sy straf is die toesiggeval in groot mate uitgelewer aan die amptenare van die Departement van Korrektiewe Dienste; om die bepaling daarvan ook aan hulle oor te laat, sou pligsversaking wees.’

The solution was for the sentencing court to determine the content of the sentence of correctional supervision and then for the correctional authorities to ensure that it was adhered to. This solution meets the objections against leaving an unstructured and overboard discretion to the correctional authorities. However, it does not constrain the courts themselves. The question of whether the requirements of legality are met where courts have so very wide a sentencing discretion is usually posed in respect of the length of sentence. However, it arises equally strongly in instances where the sentencing court is determining the content of the sentence itself.

One way in which this latter difficulty can be overcome is for the legislature to provide for a limited number of community-based sentences and to define their content relatively closely. In practice this may be done by a combination of primary and secondary legislation. For example, an Act of Parliament may specify community service as a sentence which may be imposed and regulations may lay down what form it should take in order to ensure that it is not unduly punitive or unduly lenient. It therefore does not follow automatically that all community sentences are open to constitutional challenge. There may be serious doubts, however, whether current legislation defines community sentences precisely enough to meet the constitutional requirement of legality. This applies particularly to the ‘programmes determined by the court’, but may also apply to other forms of community sentence mentioned in s 84 of the Correctional Services Act.

1 1993 (1) SA 476 (A).
2 At 492G. Emphasis in the original.
3 At 492A. See also S v Tsanshana 1996 (2) SACR 157 (E) at 160g–h. In S v Sebakoane 1997 (2) SACR 32 (T) the necessity of precisely formulated conditions was stressed, but at the same time it was noted that, by analogy with parole, there could be no objection to allowing the Commissioner to mitigate the conditions of sentence as this could only be to the advantage of the offender and better serve his or her rehabilitation.
4 It is an established rule of South African law that courts cannot directly create new forms of punishment: Du Toit Straf in Suid-Afrika xxv.
5 It is noteworthy that s 33(1) allows rights to be limited by ‘law of general application’ rather than and not only by ‘a law of general application’, i.e. an Act of Parliament, as is the case in art 19 of German Basic Law, on which this aspect of s 33 is otherwise modelled.
(ii) **Sentencing guidelines**

In most legal systems the sentence to be imposed for a specific offence is determined by a court within a range set by the legislature. The wider the range, the greater scope there is for the sentencing court to exercise discretion and the less certainty the individual offender has about the sentence which he or she may expect for a particular offence. Very wide ranges may be justified by the argument that the narrower the range, the greater the risk that a sentence which is disproportionate to the gravity of the offence and the guilt of the individual offender may have to be imposed. The question arises, however, whether a sufficient accuracy meets the requirement of the principle of legality.

As we have seen, South African sentencing law has traditionally allowed courts a wide discretion in selecting appropriate sentences. A direct challenge to a sentence on the basis that the punishment was not specified in advance may therefore not succeed on the ground of lack of legality alone. In the future, however, when consideration is given to the need for sentencing guidelines, or for another sentencing framework which reduces discretion and therefore the risk of arbitrariness, the requirements of legality may well influence legislation.

(b) **Equality**

Legislative guidelines for sentencing are subject not only to the requirement of legality but also to the related requirements of equality before the law and equal protection of the law. One of the primary motivations in the campaign for legislation to reduce or even eliminate the discretion of sentencing courts in the United States of America was a desire to ensure that factors irrelevant to the sentence were not taken into account and thus to ensure equality in the imposition of sentence.

In the context of the death penalty the US Supreme Court has wrestled with the question of what legislative framework the Constitution requires in order to ensure equal protection of the law. As the US Supreme Court has never found the sentence of death to be inherently unconstitutional, particular attention has been paid to the question of equal protection. The jurisprudence which has emerged in this context is of wider significance, as it can be applied to sentences other than the death penalty. It is particularly salient in South Africa because of the similarity of the constitutional provision ensuring equal protection of the law in this country to that in the United States.

In the famous decision of *Furman v Georgia* the US Supreme Court set aside a death sentence on the basis that it was cruel and unusual only in the narrow sense that it had been imposed according to a procedure which allowed too much discretion to the sentencers.

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1. Among other things, the right to equal protection of the law requires that ‘in the administration of criminal justice no different or higher punishment should be imposed upon one than such is prescribed to all for like offences’: *Barbier v Connolly* 113 US 27 at 31, 5 SCt 357; *Truax v Corrigan* 257 US 312 at 334–5, 42 SCt 124.
3. The phrase ‘equal protection and benefit of the law’ is used in s 9(1) of the South African Constitution and ‘equal protection of the laws’ in the Fourteenth Amendment to the Constitution of the United States of America. See further above, Kentridge ‘Equality’ § 14.4(a).
There was therefore an element of arbitrariness to the procedure, with the result that equal protection of the law could not be ensured.¹

Equal protection of the law could not be ensured by the opposite extreme either: by legislation providing for mandatory death sentences when certain specified ‘objective’ criteria were present. In 1978, therefore, the same Supreme Court ruled in *Lockett v Ohio* that a procedure which prevented a sentencer from considering every possible mitigating factor would be unconstitutional.² Since then the hunt has been on for a legislative framework for the imposition of capital punishment which would ensure equality by avoiding the arbitrariness of a totally unstructured discretion, whilst at the same time allowing sufficient flexibility to ensure that all the appropriate information is placed before the court.³

More difficult questions are raised by the claim that inequalities in sentencing are structural, for it is then more difficult for the legislature to intervene effectively. Prominent examples are American cases in which it has been suggested that the criminal justice system in a particular state is racially biased as a whole, and therefore statistically more likely to produce the death penalty for blacks than for whites, or more subtly, for the killers of whites than the killers of blacks. In *McCleskey v Kemp*⁴ this argument was rejected by the US Supreme Court on the basis that bias would have to be shown in a particular case and that evidence of systematic bias was insufficient; but this decision was reached by the narrowest of majorities: five against four. The view adopted by the minority, that systematic bias meant that a particular trial could not be fair, could well be resurrected in South Africa, where the limited evidence available suggests a similar bias, at least where the race of victims is concerned.⁵

(c) **Proportionality**

It is often said that the power of the state to create punishments is limited by the constitutional principle of proportionality. While the principle that ‘the punishment must fit the crime’ is well established in South Africa, the Constitution itself does not refer to this principle explicitly. Nevertheless, proportionality in sentencing is clearly required by the Constitution. In *S v Makwanyane* Chaskalson P identified proportionality as a factor to be considered when

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¹ In *S v Makwanyane & another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) several of the judgments of the Constitutional Court endorsed the reasoning in *Furman*. See in particular, the judgments of Chaskalson P at paras 41–56, Ackermann J at paras 153–66 and Mahomed J at paras 273–4. See also *S v Williams & others* 1995 (3) SA 332 (CC), 1995 (7) BCLR 861 (CC) at paras 45 and 89, where Langa J stressed the arbitrary element in the severity of the pain inflicted by the execution of a sentence of whipping.


deciding whether a particular punishment was cruel, inhuman or degrading. Discussing the German Constitution, the leading authority on the Constitution and punishment, Stree, has explained:

‘The legislator has to determine penalties which stand in a just relationship to the gravity of the offence and to the blameworthiness of the offender. This principle is derived from the general principles of the Constitution, particularly the Rechtsstaatsprinzip. It is, however, quite justifiably also deduced from art 1.I of the Basic Law (inviolability of human dignity). For an excessively heavy or gruesome punishment or minimum punishment amounts to a disregard of the human personality and therefore infringes against art 1.I of the Basic Law. To some extent further support for the proposition that punishment must be oriented to the degree of blameworthiness can be derived from the equality principle contained in art 3.I of the Basic Law and the related requirement of material justice. However, it is questionable whether such a far-reaching general proposition which binds the legislator can be derived from art 3.I of the Basic Law.’

A general principle of proportionality can be deduced from the South African Constitution by a similar process of analysis. The principle of the Rechtsstaat is also part of South African constitutional law, while human dignity is explicitly protected by s 10 of the South African Constitution.

There is also international support for the principle of proportionality. Thus the Recommendation by the Council of Europe on Consistency in Sentencing has stipulated:

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

(i) Mandatory minimum sentences

The recognition of a strong doctrine of proportionality derived from the Constitution raises several practical questions regarding South African sentencing legislation. One of these is whether legislation may prescribe mandatory minimum sentences for certain offences. A wide-ranging survey of judicial decisions on this question in the Commonwealth and the United States suggests that courts in these jurisdictions are reluctant to declare that all mandatory minimum sentences are unconstitutional per se.

1 S v Mukwanyane & another 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at para 94. The provision in the Canadian Constitution outlawing cruel and unusual punishment or treatment has been interpreted as outlawing both punishments which are inherently contrary to human dignity and punishments which are grossly disproportionate to the gravity of the offence. There is of course a link between the two, as a disproportionately heavy punishment may be seen as denying the human dignity of an offender. For a Canadian formulation see P W Hogg Constitutional Law of Canada 3 ed (1992) 1130, who states that ‘it is clear that the phrase [cruel and unusual] includes two classes of punishment: (1) those that are barbaric in themselves, and (2) those that are grossly disproportionate to the offence’. See also the United States case of Weems v United States 217 US 349, 30 SCt 544 (1910), in which the court referred to O’Neil v Vermont 144 US 323, 12 SCt 693 (1892) and held that the prohibition against cruel and unusual punishments operated also ‘against all punishments which, by their excessive length or severity, are greatly disproportionate to the offences charged’ (at 371). The prohibition against legislative disproportionality is still recognized by the US Supreme Court, although it has been interpreted very narrowly in the recent Supreme Court decision in Harmelin v Michigan 111 SCt 2680 (1991).


3 Recommendation No R (92) 17 of the Committee of Ministers of the Council of Europe, which was adopted on 19 October 1992. The recommendation explicitly takes into account arts 3, 5 and 6 of the European Convention of Human Rights and Fundamental Freedoms.

4 D Hubbard ‘Should a Minimum Sentence for Rape be Imposed in Namibia?’ 1994 Acta Juridica 228.
Of particular relevance to South Africa in this regard are the decisions of the Supreme Court of Canada. In Canada, as in South Africa, courts have been allowed an exceptionally wide discretion in deciding on sentence. The leading Canadian decision is that in Smith’s case.\(^1\) The court was asked to consider the constitutionality of a mandatory minimum seven-year sentence for importing narcotics into Canada. The majority held that if a hypothetical case could be imagined for which the minimum sentence would be grossly disproportionate, the legislation which created the minimum would be unconstitutional. In this instance such a hypothetical case was easily imaginable. The mandatory minimum seven-year sentence was therefore unconstitutional. The court came to this conclusion even though on the facts before it a sentence of seven years or more might not have been inappropriate.

On the basis of Smith’s case it seemed as if all minimum sentences might be open to challenge, as it would always be possible to imagine some hypothetical set of facts on which the mandatory minimum sentence would inhibit the discretion of the judge to impose an appropriate sentence. However, in 1991, in the case of \(R\ v\ Goltz,\)\(^2\) the Supreme Court of Canada adopted a more nuanced stance. Before it was the question of the constitutionality of a mandatory sentence of seven days’ imprisonment for driving a motor vehicle when prohibited from doing so. The prohibition which could give rise to the mandatory sentence could be imposed only on an offender who had committed several traffic offences. In Goltz’s case the Canadian Supreme Court, again by a majority, upheld the mandatory sentence. Smith’s case was qualified by holding that the hypothetical facts on which the legislation could lead to an unjust result had to be ‘reasonable’ and not ‘far-fetched’.\(^3\) The result in Canada is that whilst it is now clear that not all mandatory minimum sentences are unconstitutional, legislative minima which might result in gross disproportionality will not pass constitutional muster.

The Namibian High Court drew on Canadian case law in \(S\ v\ Vries,\)\(^4\) which dealt with s 14(1)(b) of the Stock Theft Act.\(^5\) The section provided for a mandatory three-year sentence of imprisonment for a second or subsequent conviction of stock theft. The accused, Vries, was convicted of stock theft in May 1995. His case was covered by s 14(1)(b) because he had been convicted of stock theft more than 25 years previously in 1969. The High Court found that the effect of s 14(1)(b) in the circumstances of the existing case was shocking in that it was grossly disproportionate to the offence committed by the accused. It accordingly struck down s 14(1)(b) as unconstitutional. In the judgment Frank J sets out a general approach to the constitutionality of minimum sentences which is closely based on the approach of the Canadian courts.\(^6\)

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\(^1\) *Smith v the Queen* 34 CCC (3d) 97 (1987).
\(^3\) At 503.
\(^4\) 1996 (12) BCLR 1666 (Nm).
\(^5\) Act 12 of 1990 (Nm).
\(^6\) At 1676G–1677A (footnotes added by the author).
1. A statutory minimum sentence is not per se unconstitutional.
2. It will be unconstitutional if it provides for a punishment which will be shocking in the circumstances of the specific case before court.
3. Where a statutory minimum sentence results in a shocking sentence there are four options available to the court, namely:
   (a) to declare the provision of no force or effect for all purposes,
   (b) to declare the provision to be of no force and effect only in a particular class of cases i.e. to down-read it,
   (c) to declare the provision to be of no force or effect in respect to the particular case before court i.e. apply a constitutional exemption,
   (d) to allow the legislature to cure the defects in the impugned legislation pursuant to the provisions of Article 25(1)(a) of the Constitution.
4. Where the statutory minimum sentence is found to be shocking in the case before the Court the Court must then enquire whether it will be shocking ‘with respect to hypothetical cases which . . . can be foreseen as likely to arise commonly’. If the answer to the second enquiry is in the affirmative then the Court must act in one of the respects set out in 3(a), (b) or (d) above. If the answer to the second enquiry is in the negative the court must act as set out in 3(c) above.

The approach adopted by Frank J in S v Vries was followed closely in another Namibian case, S v Likuwa, where Hanna J found that a minimum sentence of ten years’ imprisonment for contravention of s 29(1)(a) of the 1996 Arms and Ammunitions Act was unconstitutional ‘because it was grossly disproportionate when seen in the light of the very wide net cast by s 29(1)(a) of the Act’. This section prohibited, amongst other things, the possession of machine rifles. The court found that many rural people possessed such rifles merely in order to protect themselves and their livestock. Infringement of the section in such circumstances was ‘likely to be quite common’ and ten years’ imprisonment an unacceptably harsh sentence for it. The court accordingly applied the general approach suggested by Frank J and struck out the words ‘of not less than ten years’ that qualified the sentence of imprisonment prescribed by the section. This solution meant that not only the accused before the court but also all future offenders of this section would not be subject to a minimum sentence of imprisonment.

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1 Note that this option would not fall within ‘reading down’ as it is understood in South African law. The Constitutional Court has emphasized that a statute can be read down only so far as the reading down is consistent with a reasonable interpretation of the language of the statute. See for example S v Bhulwana 1996 (1) SA 388 (CC), 1995 (12) BCLR 1579 (CC) at para 28. However, the option contemplated by Frank J would be one within the power of the Constitutional Court to define a class of situations to which a law cannot be applied consistently with the Constitution. See for example the order made in Ferreira v Levin NO & others 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC). The Constitutional Court describes this remedial power as notional severance. See above, Klaaren ‘Judicial Remedies’ § 9.3(c).
2 The corresponding provision of the South African Constitution is s 172(1)(b)(ii).
3 1999 (5) BCLR 599 (Nm), 1999 (2) SACR 44 (Nm).
4 With whom Mtambanengwe J and Mainga AJ concurred.
5 At 604H.
6 At 604D–I.
The South African Constitutional Court has declared itself opposed to the notion of a constitutional exemption in individual cases. In *S v Bhulwana*1 O'Regan J emphasized that ‘the litigants before the court should not be singled out for the grant of relief, but relief should be afforded to all people who are in the same situation as the litigants’. Paragraph 3(c) of the *Vries* formulation is therefore unlikely to be adopted in South Africa. However, subject to that proviso South African law is likely to follow an approach to minimum sentences broadly similar to that of Namibian and Canadian law. Legislative minima were used in the past, in terrorism2 and drug legislation3 for example, deliberately to limit the discretion of the courts. Given the opposition of South African courts to restrictions on their sentencing discretion,4 they may be expected to examine the constitutionality of legislation which might result in disproportionate sentences even more critically than their Canadian counterparts. Relatively few mandatory minimum sentences remain on the statute book in South Africa.5 However, compulsory confiscation orders or compulsory suspension of driving licences, which are not formally regarded as punishments,6 may have the same disproportionate effect on the offender. Their constitutionality will also have to be examined critically.

In late 1997 the Criminal Law Amendment Act7 created a range of minimum sentences for a long list of ‘serious offences’.8 The minimum sentences range from life imprisonment for specified aggravated forms of murder and rape9 to set numbers of years for first offenders and recidivists for offences listed in the schedules to the Act.10 The sentences have to be

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1 1996 (1) SA 388 (CC), 1995 (12) BCLR 1579 (CC) at para 32.
2 Section 2(1) and s 3 of the Terrorism Act 83 of 1967 provided for a compulsory sentence of five years, but was repealed by s 73 of the Internal Security Act 74 of 1982, which made no provision for compulsory minimum sentences.
3 Section 2(1) of the Abuse of Dependence-producing Substances Act 41 of 1971 laid down a compulsory five-year sentence for the offence of dealing in drugs, and a similar provision existed in s 2(III) and (iv) for the offence of possession of drugs. In addition to these measures, s 8 of the Act provided for compulsory forfeiture. However, this Act was repealed by s 52 of the Prevention and Treatment of Drug Dependency Act 20 of 1992, which did not re-enact the compulsory minimum sentence provisions or the provision relating to compulsory forfeiture.
4 See the comment of Holmes JA in *S v Gibson* 1974 (4) SA 478 (A) at 482 to the effect that the imposition of a mandatory sentence ‘cuts across traditional considerations of mitigating and reformative factors in a particular case . . . [and] unduly puts all the emphasis on the punitive and deterrent factors of sentence, and precludes the traditional consideration of subjective factors relating to the convicted person’. See also *S v Khumbisa & others* 1984 (2) SA 670 (N) at 684. Because of their belief that minimum sentence requirements are fundamentally unsound, South African courts have shown considerable ingenuity in interpreting them narrowly: See, for example, *S v Nel* 1987 (4) SA 950 (W); *S v Toms; S v Bruce* 1990 (2) SA 802 (A).
5 Section 283(2) of the Criminal Procedure Act 51 of 1977 explicitly excludes the discretion of the sentencing court where legislation prescribes a minimum penalty of a term of imprisonment or a fine. Examples of legislation providing minimum sentences are s 27 of the Explosives Act 26 of 1956 and s 39 (2)(a)(ii)(aa) of the Arms and Ammunition Act 75 of 1969, substituted by s 1 of the Arms and Ammunition Amendment Act 65 of 1993.
6 See Du Toit *Straf in Suid-Afrika* 345.
7 Act 105 of 1997. Section 54 provides that the Act is to come into operation on a date fixed by the President by proclamation in the *Gazette*. At the date of going to printing there had been no such proclamation.
8 The heading to s 51 refers to ‘Minimum sentences for certain serious offences’. The provision is not designed to be a permanent feature of South African law. Section 53 provides that ss 51 and 52 shall cease to have effect two years after the commencement of the Act. However, the President may extend this period with the concurrence of Parliament, by proclamation in the *Gazette*, for one year at a time.
9 Section 51(1) read with Part I of Schedule 2.
10 Section 51(2) read with Parts II, III and IV of Schedule 2.

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imposed on adult offenders\(^1\) unless ‘substantial and compelling circumstances exist which justify the imposition of lesser sentences’,\(^2\) and are therefore not fully mandatory.

There can be no constitutional objection to the legislature’s indicating to the courts that it requires severe punishments for serious offences. However, in this instance the legislature has gone further and has restricted severely the ability of sentencing courts to deviate from specified minimum sentences. Much will depend on how the courts interpret the words ‘substantial and compelling circumstances’. South African courts have not yet considered the interpretation of these words in any depth. In *S v Mofokeng*\(^3\) Stegmann J complained that his conscience and sense of justice were challenged by the new legislation.\(^4\) Inspired by the report of the Truth and Reconciliation Commission that encouraged judges to speak out against unjust laws, he expressed his ‘sense of affront at the inappropriate procedure devised by Parliament for the infliction on offenders, through the instrumentality of the courts, of arbitrary punishments of its own devising’.\(^5\) In spite of this protest, however, Stegmann J did not consider the impact of the constitutional requirement of proportionality on what should be regarded as ‘substantial and compelling circumstances’. His interpretation of the words was in fact extremely narrow. Stegmann J held that

‘for “substantial and compelling circumstances” to be found, the facts of the particular case must present some circumstance that is so 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.’\(^6\)

In this exposition Stegmann J seems to have confused circumstances that are ‘exceptional’ with those that are ‘substantial and compelling’. This is apparent also from his pronounce-ment that ‘ “substantial and compelling” circumstances must be factors of an unusual and exceptional kind that Parliament cannot be supposed to have in contemplation when prescribing standard penalties for certain crimes committed in circumstances described in Schedule 2 [of the Act]’.\(^7\)

In substance Judge Stegmann’s interpretation does not differ from that advanced in *S v Madondo*\(^8\) by Squires J, who was not critical of the legislation but who sought simply to ascertain what Parliament might have meant by ‘substantial and compelling’ in the context of its apparent desire for heavy, deterrent sentences. Judge Squires too set a very high standard for departure. He focused not so much on the type of circumstance that would be ‘substantial and compelling’ but commented that only if the prescribed sentence was so inappropriate that no reasonable court would have imposed it, would there necessarily be a compelling reason not to do so. The result in both the *Mofokeng* case and the *Madondo* case was that the

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1 There is a widely phrased exception for children between the ages of 16 and 18 years (s 51(3)(b)), and children under the age of 16 are excluded completely (s 51(6)).
2 Section 51(3)(a).
3 1999 (1) SACR 502 (T).
4 At 525g.
5 At 527b.
6 At 523c.
7 At 524d.
8 Unreported judgment in Case no 22/99 delivered in the Natal Division of the High Court on 30 March 1999.
A much wider interpretation was given to ‘substantial and compelling circumstances’ by Jones J in *S v Mkhulinicimani*.\(^1\) Jones J declined to give a comprehensive definition of the words. Nevertheless, he expanded on the words by holding that:

“In every case, however, the nature of the circumstances must convince a reasonable mind that a lesser sentence is a proper sentence and that it is justified when regard is had to (a) the aggravating and mitigating features attendant upon the commission of what is already classified by the lawgiver as amongst the most serious of offences, and (b) the interests of society weighed against the interests of the offender.”

This qualification is in fact so broad that it allows a sentencing court a virtually free hand to consider all the factors it would normally regard as relevant to sentence and to impose the sentence of its choice. In *Mkhulinicimani*’s case, as in *Madondo*’s case, the offence was rape of a woman younger than 16 years, an offence for which the Act requires a life sentence unless the statutory grounds for departure from this sentence are present. A comparison of the facts of the two cases would suggest the former was a more serious offence: not only did the accused in *Mkhulinicimani* face two charges of rape but the complainants were younger and one of them a virgin. The only significant aspect in which the offender differed from his counterpart in *Madondo*’s case was that he was a younger man. Yet in *Mkhulinicimani* Jones J held that there were ‘substantial and compelling circumstances’ justifying the imposition of a lesser sentence. He recorded these circumstances as ‘the absence of physical injury or damage to the complainants, the youthfulness of the accused, his lack of previous convictions for crimes of violence, his remorse, and his prospects of rehabilitation’.\(^2\) It is significant that the narrower interpretation adopted by Squires J in *Madondo* specifically excluded factors such as the degree of harm to the complainant and by implication would have excluded the others as well.\(^3\) In *Mofokeng* Stegmann J, too, did not regard the absence of previous convictions, the comparative youthfulness of the offenders and the fact that the complainant had not suffered serious injury as ‘substantial and compelling circumstances’ justifying a lesser sentence.\(^4\)

None of the interpretations is ideal. From a constitutional point of view the interpretation given to the words ‘substantial and compelling circumstances’ by Jones J in *S v Mkhulinicimani* is unexceptionable, as it empowers the courts to avoid the Act being used to require the imposition of grossly disproportionate sentences. It may legitimately be asked, however, whether it gives any real meaning to the attempt by the legislature to set a minimum sentence that has to be imposed except where limited grounds for departure are present. On the other hand, the very restrictive interpretation given to the words in *Mofokeng* and *Madondo* may

\(^1\) Unreported judgment in Case no 11/99 delivered in the Eastern Cape Division of the High Court on 28 April 1999.

\(^2\) At 6.

\(^3\) See also *S v Ngubane* (unreported judgment CC 31/99 delivered in the Natal Provincial Division of the High Court on 30 March 1999), in which the offender was 60 years of age and the likely effect of the sentence was that he would die in prison. In the context of the case these facts were not regarded as a ‘substantial and compelling circumstances’.

\(^4\) *Mofokeng* (supra) at 523–524b.
require a court to impose sentences that are grossly disproportionate to the offence. If this were to be the result, the new Act will be open to constitutional challenge in the same way as if the sentences specified by the legislature were entirely mandatory.

(ii) Preventive sentences

Legislative provision for preventive sentences may provide a framework which encourages the courts to impose sentences which are disproportionate to the offence committed and to the blameworthiness of the offender. A recent amendment to the Criminal Procedure Act provides that where a court exercises its discretion to declare a convicted offender to be a ‘dangerous criminal’ it shall ‘sentence such person to undergo imprisonment for an indefinite period’. The danger of disproportionality is particularly great, as an offender may be declared ‘dangerous’ after being convicted of any offence. The question is whether the need to protect society from ‘dangerous criminals’ is a sufficient reason to override requirements of proportionality between the crime of which the accused has been convicted and the punishment.

The question cannot be answered simply. Protecting society by preventing crime is a key purpose of punishment. Such protection might be achieved by detaining dangerous individuals and thus removing them from society. However, it is clear from a constitutional perspective that the individual may not simply be sacrificed for the greater good. Indefinite detention of someone who has not been convicted of an offence, merely because there was evidence that he was ‘dangerous’, would be unconstitutional. Similarly, if someone were to be convicted of a minor offence and were then to be sentenced to indefinite detention because there was evidence of his dangerousness, the constitutionality of the sentence would be suspect because of the gross disproportionality of the sentence.

This does not mean that sentences may not be legitimately influenced by considerations of prevention. A violent offender with previous convictions for violence will invariably be given a longer sentence than a first offender. The reasoning may be that because of his previous convictions his personal blameworthiness is increased and that he is therefore liable for a heavier punishment. However, a court may use the scope that this finding gives it to impose a sentence which prevents, for a time at least, the individual from committing further crimes of violence. The preventive sentence would still bear some relationship to present and previous offences of the offender.\footnote{See the argument developed from first principles in this regard by Stree Deliktsfolgen und Grundgesetz 57. In S v Makwanyane & another 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at para 128 the Constitutional Court recognized prevention as a legitimate object of punishment, but found that it was an object which could be achieved without capital punishment.}

\footnote{1 For a discussion of the impact of the Constitution on sentences imposed by courts, see below, § 28.3.}

\footnote{2 Section 286B of the Criminal Procedure Act 51 of 1977 introduced by s 22 of the Criminal Matters Amendment Act 116 of 1993.}

\footnote{3 See the argument developed from first principles in this regard by Stree Deliktsfolgen und Grundgesetz 57. In S v Makwanyane & another 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at para 128 the Constitutional Court recognized prevention as a legitimate object of punishment, but found that it was an object which could be achieved without capital punishment.}
A provision allowing for the potentially indefinite detention of dangerous offenders has been upheld in Canada. The Canadian legislation provides that when someone is convicted of a ‘serious personal injury offence’ and the offender is a threat to the life, safety, physical or mental well-being of other persons then, subject to procedural protections, the culprit may be declared a dangerous offender and detained indefinitely.¹

In Lyons v The Queen the Supreme Court of Canada held that a sentence which was based ‘in part’ upon preventive considerations was not unconstitutional.² However, the court did not reject the test of proportionality to the crime entirely. It emphasized that the offender had to be convicted of a serious violent offence for him to be considered for an indefinite sentence and that there were other safeguards to protect offenders from being falsely declared to be dangerous or from being detained when they had ceased to be dangerous. Moreover, the court found that there was a degree of flexibility in the constitutional notion itself. A sentence would be unconstitutional only if it were grossly disproportionate. ‘The word “grossly”,’ La Forest J explained, ‘reflects this court’s concern not to hold Parliament to a standard so exacting . . . as to require punishments to be perfectly suited to accommodate to moral nuances of every crime and every offender.’³

The Canadian decision can be criticized for watering down the requirement of proportionality. However, even if this restricted test is adopted in South Africa, the South African legislation would be subject to challenge, as a court may consider declaring someone a dangerous criminal after conviction of any offence at all.⁴ The initial requirement of the Canadian law, that the offence which triggers the inquiry must involve serious violence, does not apply. In theory, a parking offender could find himself subjected to an inquiry into whether he is a dangerous criminal.⁵

The detailed procedures for determining dangerousness go some way towards meeting this criticism, as they are designed to ensure that the status of ‘dangerous criminal’ is not lightly attributed. Similarly, procedures for the reconsideration by the courts of findings of dangerousness and the detention of the dangerous criminals offer further safeguards. These latter procedures do not, however, address the primary problem that proportionality may be ignored when the initial attribution is made, for they are designed solely to establish whether the dangerous criminal is still so dangerous that he requires further detention. These procedures do not ensure even a very elastic proportionality between the offence and the time served in prison.

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1 Section 688(a) of Part XXI of the Canadian Criminal Code.
3 At 33.
4 The same constitutional objection could be advanced against detention of someone as a state patient in terms of s 78 of the Criminal Procedure Act. The practical effect of this provision is that someone who is acquitted of a crime because of lack of criminal capacity may be detained indefinitely; see S v McBride 1979 (4) SA 313 (W). In a recent working paper of the South African Law Commission it has been proposed that only persons who have committed serious crimes of violence should in future be detained as state patients. See South African Law Commission Working Paper 55, Project 89 The declaration and detention of persons as state patients under the Criminal Procedure Act, Act 51 of 1977, and the discharge of such persons under the Mental Health Act, Act 18 of 1973, including the burden of proof with regard to the mental state of an accused or convicted person.
5 The openness of the standard triggering the inquiry may be subject to the challenge that it is insufficiently precise to meet standards of legality: cf above, § 28.2(a). There is also the further and related question of whether the term ‘dangerous criminal’ is defined with sufficient precision.
The same question of proportionality arises in a less drastic form when a court exercises its discretionary power to declare someone an habitual criminal, which has the effect of imposing a sentence of between seven and fifteen years’ imprisonment. Such a declaration may be made if the court is satisfied that the said person habitually commits offences and that the community should be protected against him. From this formulation it is clear that the offender is not being punished primarily for his current offence. However, the necessity of finding that the criminal ‘habitually’ commits offences means that close attention is paid to his previous record. In this way the general blameworthiness of the accused is taken into consideration, making this special provision to protect the community less open to constitutional objection.

(iii) Exemplary sentences
The imposition of exemplary sentences by the courts raises similar problems in relation to the principle of proportionality as those discussed above. Hitherto the courts have cautioned that exemplary sentences are to be imposed with circumspection. It is acknowledged that inherent in the notion of an exemplary sentence is an element of injustice to the individual accused. The imposition of an exemplary sentence by definition privileges the interests of society in deterrence over the principle of proportionality in relation to the individual offender. The courts have nevertheless countenanced exemplary sentences in the past, but have said that they are justified only in a limited range of circumstances and only to the extent that the injustice to the individual does not outweigh the broad interest of society. In the light of the constitutional principles of equality and proportionality, the test for whether and when an exemplary sentence is justified could well become stricter.

(iv) Punishment for specific crimes
Legislation which permits the imposition of a specific punishment for a crime for which such punishment is inappropriate under all circumstances is another form of disproportionality between crime and punishment which is unacceptable under the Constitution. In South Africa only the use of capital and corporal punishment is restricted to specific offences. If these punishments had not been declared to be unconstitutional, the question might have arisen

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1 In terms of s 286 of the Criminal Procedure Act 51 of 1977.
2 The minimum is specified by s 38 of the Correctional Services Act. The maximum may be deduced from s 286(2) of the Criminal Procedure Act, which specifies that a court should not declare someone an habitual criminal if it would otherwise have imposed a sentence of more than fifteen years.
3 Section 286(1).
4 An interesting parallel is to be found in § 62 of the German Penal Code, which provides that preventive detention (eine Maßregel der Besserung und Sicherung) may not be imposed when it is disproportionate to the offences which have been committed, and which are likely to be committed by the offender, as well as to the degree of danger which he poses. Commentators (see, for example, Lackner Strafgesetzbuch mit Erläuterungen 23 ed (1993) 466–7) have suggested that this provision incorporates the principle of proportionality to a satisfactory degree, as long as it is interpreted with the further principle of minimum intervention in mind.
5 S v Khulu 1975 (2) SA 518 (N) at 521B–H.
6 S v Khulu 1975 (2) SA 518 (N) at 521B–H; S v Matoma 1981 (3) SA 838 (A) at 842H–843A; S v Collett 1990 (1) SACR 465 (A) at 470A–471H; S v Maseko 1992 (1) SA 100 (A) at 102F; S v Rees 1987 (1) SA 873 (A) at 877C; S v Sobandla 1992 (2) SACR 613 (A) at 617F–H; S v Potgieter 1994 (1) SACR 61 (A).
whether their imposition was not grossly disproportionate to the gravity of some of the specific offences for which they might have been imposed. Such an argument has been accepted by the United State Supreme Court in respect of the death sentence for rape, which, in the view of that court, would always be disproportionate to the gravity of the offence.\(^1\) Similarly, South African courts (which of course did not have the power to declare legislation unconstitutional) held that corporal punishment, because of its drastic nature, was inappropriate for crimes not involving elements of violence.\(^2\)

\((d)\) **Dignity: human dignity and cruel, inhuman or degrading punishment**

The most direct challenges to legislation on punishment are likely to be directed against specific forms of punishment which may be fundamentally incompatible with a Constitution which guarantees human dignity. As many, if not all, forms of punishment undermine human dignity to some degree, it will have to be argued that such punishments are so fundamentally repugnant that they cannot be considered even for the most heinous crimes.

The determination of which punishments are so repugnant is a difficult question. In the South African Constitution there is a number of fundamental rights which are of significance in this regard. Most important is undoubtedly the right to human dignity, which is protected by s 10 and by the specific prohibition in s 12(1)(d) of torture in any way, and of cruel, inhuman or degrading treatment or punishment in s 12(1)(e). The latter is essentially an elaboration of the former. The wording of s 12(1)(e) is important. Of particular significance for the interpretation of legislation allowing specific forms of punishment is the use of ‘or’ in linking the adjectives describing the types of punishment which are prohibited. It means that a form of punishment (or a form of treatment) is unconstitutional when it is ‘cruel’, or when it is ‘inhuman’, or when it is ‘degrading’.\(^3\) The wording of s 12(1)(e) is similar to that in other Constitutions\(^4\) and international instruments,\(^5\) which may assist greatly in its interpretation.

Value judgments are unavoidable in deciding whether particular forms of punishment are fundamentally repugnant to the rights guaranteed in the Constitution. In a number of jurisdictions judges have agreed that these value judgments cannot merely reflect the predilections of the judges concerned, but that the reasoning and the information on which

\(^1\) *Coker v Georgia* 433 US 584, 97 SCt 2861 (1977). It is noteworthy that even the dissenting judges, who regarded rape as an offence which was so serious that the court could not intervene if the legislature chose to make it punishable by the sentence of death, accepted in principle that the ‘concept of disproportionality bars the death penalty for minor crimes’ (Burger CJ, with whom Rehnquist J concurred, dissenting at 604).

\(^2\) *S v P* 1985 (4) SA 105 (N).

\(^3\) See *S v Makwanyane & another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at paras 93 and 276 and *S v Williams & others* 1995 (3) SA 332 (CC), 1995 (7) BCLR 861(CC) at para 20. See also the interpretation given by Mahomed AJA to the similar provision in the Namibian Constitution in *Ex parte Attorney General, Namibia: In re Corporal Punishment by Organs of State* 1991 (3) SA 76 (NmS) at 86, and by Gubbay JA to the similar provision in the Zimbabwean Constitution in *S v Ncube; S v Tshuma; S v Ndhlovu* 1988 (2) SA 702 (ZS) at 715. In South African law, therefore, the debate which has dogged American and Canadian jurisprudence, about whether punishment has to be both ‘cruel’ and ‘unusual’ in order to be unconstitutional, will not arise: See Hogg *Constitutional Law of Canada* 1130.

\(^4\) See in particular art 8 of the Constitution of Namibia and s 15 of the Constitution of Zimbabwe.

\(^5\) Article 7 of the International Covenant of Civil and Political Rights; art 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The latter refers only to ‘inhuman or degrading treatment or punishment’, but the absence of the word ‘cruel’ does not mean that its scope is significantly different.
they are based should be clearly articulated. The issue has been complicated further by the
recognition that such decisions cannot be made once and for all, but that they are based on
evolving standards of decency.\(^1\) One element of the evolving standards of decency is
international practice. The specific provision in the South African Constitution\(^2\) which
requires the courts to have regard to public international law, where applicable, and which
permits them to look to comparable foreign case law means that South African courts, like
those in Namibia and Zimbabwe, will pay considerable attention to such sources.\(^3\)

The Namibian courts in particular have suggested that when deciding whether a form of
punishment is fundamentally unconstitutional, primary attention must be paid not only to
the text of the Constitution and to comparative material in interpreting it but also to the ‘social
conditions, experiences and perceptions of the people’ of the country concerned. In
\(S \ v \ Tcoelb\) O’Linn J analysed earlier *dicta* and pointed out that these latter factors required the
presentation of wide-ranging evidence.\(^4\) There is still some uncertainty as to what evidence,
if any, would be presented about objective factors of this kind and how they would be related
to the fundamental value judgment.\(^5\)

(i) **The sentence of death**

Much has been written about the constitutionality of various aspects of the sentence of death
in many jurisdictions. As has been seen above, the death penalty has inspired close analysis
of the importance of equality and proportionality in sentencing.\(^6\) On the direct question of
whether the death penalty is inherently unconstitutional, international law is equivocal,
although there is a tendency to favour abolition.\(^7\)

When the constitutionality of the death penalty was raised in *S v Makwanyane*\(^8\)
Chaskalson P surveyed much of the comparative jurisprudence, but observed that there was

\(^1\) See the judgment of Kentridge AJ in *S v Makwanyane & another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665
(CC) at para 199. In *S v Williams & others* 1995 (3) SA 332 (CC), 1995 (7) BCLR 861 (CC) at paras 36–7 Langa J
suggested that the relationship between public opinion and ‘contemporary standards of decency’ was not clear and
questioned whether it was necessary to adopt the American concept of ‘contemporary standards of decency’.
However, he also stated in the judgment (at para 77) that ‘the Constitution ensures that the sentencing of offenders
must conform to the standards of decency recognised throughout the civilised world’.

\(^2\) Section 35(1).

\(^3\) This is illustrated by the judgments in *S v Makwanyane & another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665
(CC) and *S v Williams & others* 1995 (3) SA 332 (CC), 1995 (7) BCLR 861 (CC).

\(^4\) 1993 (1) SACR 274 (Nun).

\(^5\) In *S v Williams and Five Similar Cases* 1994 (4) SA 126 (C) the court gave counsel for the state time to consider
whether he wished to lead evidence, in terms of s 102(1) of the Constitution. This may be evidence of the kind
referred to in *Tcoelb’s* case. On the difficulties of providing relevant evidence on these questions, see *S v A Juvenile*
1990 (4) SA 151 (ZS) at 171B; and on the limited relevance of ‘public opinion’, see *S v Makwanyane & another*
1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at paras 87–9.

\(^6\) See above, § 28.2(b) on equality and § 28.2(c) on proportionality.

\(^7\) For an overview, see W A Schabas *The Abolition of the Death Penalty in International Law* (1993). An example
of the balance which is being struck is art 6 of the International Covenant on Civil and Political Rights, which lays
down detailed requirements which the death penalty has to meet, but adds, in art 6(6), that nothing in art 6 ‘shall
be invoked to delay or prevent the abolition of capital punishment’. There is also an optional protocol to the
International Covenant which aims at the abolition of capital punishment. It has been signed only by a limited

\(^8\) 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC).
little of it which could be applied directly to the question of whether death is an acceptable form of punishment in South African constitutional law.\textsuperscript{1} He emphasized that the court had to pay due regard to the South African legal system, to South African history and circumstances, and to the language of the South African Constitution.\textsuperscript{2} The latter point was particularly important because of differences in the wording of Constitutions.\textsuperscript{3} Many Constitutions either outlaw capital punishment\textsuperscript{4} or, conversely, guarantee its existence,\textsuperscript{5} thus removing the issue from direct constitutional debate. In other instances the wording of the Constitution is substantially different from our own. The Canadian and United States Constitutions, for example, do not specifically guarantee human dignity or protect the right to life substantively. In these jurisdictions punishments are only unconstitutional if they are cruel and unusual. As a result there has been no clear finding that the death sentence per se is an unconstitutional form of punishment in either jurisdiction, despite the fact that the matter has often come before the courts in those countries and judicial opinion on the issue has been divided.\textsuperscript{6}

In \textit{Makwanyane} the Constitutional Court held that capital punishment infringed the rights to life and dignity and constituted cruel, inhuman or degrading punishment.\textsuperscript{1} The crucial question was whether s 277(1)(a) of the Criminal Procedure Act,\textsuperscript{8} which made it a competent sentence for murder, created a legitimate limitation of these rights. The state’s principal argument in this regard was that capital punishment was justified by its deterrent effect. This argument was rejected by the court on the grounds that there was no clear proof that capital punishment served effectively to deter murder.\textsuperscript{9} It was pointed out that the deterrence argument tends to ignore the existence of alternative sentences to capital punishment\textsuperscript{10} and that it ignored the state’s duty to act as a role model in the development of a culture of rights.\textsuperscript{11}

The court also rejected arguments of the Attorney-General which sought to justify capital punishment for its retributive function or as a measure necessary to prevent criminals from killing again.\textsuperscript{12} In particular, the court emphasized that the retributive element of punishment had to be given less weight under a human rights regime which placed a particular emphasis on the value of \textit{ubuntu}.\textsuperscript{13} Cumulatively the interests of retribution and prevention and the

\begin{itemize}
    \item\textsuperscript{1} See paras 37–9 of the judgment of Chaskalson P.
    \item\textsuperscript{2} See para 39 of the judgment of Chaskalson P.
    \item\textsuperscript{3} In particular, the substantive protection given to the right to life by s 9 was stressed by Chaskalson P at paras 38, 78, 80 and 85. See also the judgments of Ackermann J at para 154 and O’Regan J at para 324.
    \item\textsuperscript{4} For example, art 102 of the German Basic Law or art 6 of the Constitution of Namibia.
    \item\textsuperscript{5} Article 5(1) of the Constitution of Malaysia or art 9 (1) of the Constitution of Singapore.
    \item\textsuperscript{6} In Canada the constitutionality of the death penalty under the old bill of rights was upheld in \textit{R v Miller and Cockrell} (1977) 31 CCC (2d) 177. However, the sentence was abolished by parliamentary legislation shortly thereafter. In the more recent case of \textit{Kindler v Canada (Minister of Justice)} (1992) 67 CCC (3d) 1 a minority of the court ruled that the death sentence was cruel and unusual and therefore unconstitutional. The majority did not consider the point, as the sentence of death arose in the context of the accused facing the sentence of death if he were to be extradited to the USA. In their view it was not necessary to consider whether the death sentence would be constitutional in Canada.
    \item\textsuperscript{7} See judgment of Chaskalson P at para 95.
    \item\textsuperscript{8} Act 51 of 1977.
    \item\textsuperscript{10} See the judgments of Chaskalson P at para 122, Didcott J at para 181, and Mahomed J at para 287.
    \item\textsuperscript{11} See the judgments of Chaskalson P at para 124, Langa J at 222, and Mokgoro J at para 316.
    \item\textsuperscript{12} See the judgment of Chaskalson P at para 128.
    \item\textsuperscript{13} See the judgments of Chaskalson P at paras 129–31, Kentridge J at para 203, Langa J at paras 222–7, Madala J at paras 237–43, Mahomed J at para 296, Mokgoro J at paras 307–13, and O’Regan J at para 341.
\end{itemize}
possibility that the implementation of a death sentence rather than a lengthy term of imprisonment may have a marginal deterrent effect on potential murderers was held to be insufficient to justify the factors ‘which taken together make capital punishment cruel, inhuman and degrading: the destruction of life, the annihilation of dignity, the elements of arbitrariness, inequality and the possibility of error in the enforcement of the penalty’.¹

(iii) Corporal punishment

In *S v Williams & others*² the provisions of s 294 of the Criminal Procedure Act,³ which allow for juvenile whippings, were challenged on the grounds that such whippings were contrary to human dignity and were cruel, inhuman or degrading. The South African courts had long expressed reservations about corporal punishment and its compatibility with human dignity,⁴ but had not previously been able to strike down the primary legislation which allowed it to be imposed. In *Williams* the Constitutional Court noted the rejection of corporal punishment at international law⁵ and in the jurisprudence of many national states⁶ and declared juvenile whippings to be unconstitutional. The court emphasised the dehumanising nature of whippings:

‘The severity of the pain inflicted is arbitrary, depending as it does almost entirely on the person administering the whipping. Although the juvenile is not trussed, he is as helpless. He has to submit to the beating, his terror and sensitivity to pain notwithstanding . . . The fact that the adult is stripped naked merely accentuates the degradation and humiliation. The whipping of both is, in itself, a severe affront to their dignity as human beings.’⁷

Langa J proceeded to reject ‘any culture of authority which legitimates the use of violence . . . [as] inconsistent with the values of the Constitution’.⁸ In so doing he rejected the argument of the state that the dignity of juveniles is not necessarily infringed by the infliction of corporal punishment.⁹

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¹ Chaskalson P in *S v Makwanyane* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at para 135.
² 1995 (3) SA 332 (CC), 1995 (7) BCLR 861 (CC).
³ Act 51 of 1977.
⁴ See, for example, *S v Kumalo & others* 1965 (4) SA 565 (N) at 564F–H; *S v Motsoesoana* 1986 (3) SA 350 (N); *S v Ndaba & others* 1987 (1) SA 237 (T) at 245A–C.
⁵ See *Williams* at para 39. International law usually contains only a general rejection of cruel, inhuman or degrading punishment which has to be interpreted. Secondary instruments do outlaw corporal punishment explicitly. Examples are the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), which outlaw corporal punishment of juveniles (Rule 17.3), and the United Nations Standard Minimum Rules for the Treatment of Prisoners, which outlaw corporal punishment of prisoners (Rule 31). In 1993 South African practice was brought into the line with the latter rule, when corporal punishment ceased to be a punishment which could be imposed on prisoners. (See s 17 of the Correctional Services Amendment Act 68 of 1993, which amended s 54 of the Correctional Services Act 8 of 1959).
⁶ See *Williams* at para 40. For pronouncements of the constitutionality of corporal punishment for adults in Southern African countries, see *S v Petrus & another* [1985] LRC (Const) 699 (Botswana CA); *S v Ncube; S v Tsiamo; S v Nhlovu* 1988 (2) SA 702 (ZS); *Ex parte Attorney-General, Namibia: In re Corporal Punishment* 1991 (3) SA 76 (NmS).
⁷ *S v Williams* 1995 (3) SA 332 (CC), 1995 (7) BCLR 861 (CC) at para 45.
⁸ *Williams* at para 52.
⁹ *Williams* at paras 41–7. See contra McNally JA (dissenting) in *S v A Juvenile* 1990 (4) SA 151 (ZS) at 171E–H.
The state argued that juvenile whippings were a justifiable limitation of the rights protected by ss 10 and 11 of the 1993 Constitution because of their deterrent value and because they provided a convenient and beneficial alternative to other socially more undesirable forms of punishment which would have to be imposed if corporal punishment was prohibited. These arguments were rejected by Langa J, who pointed to the need to utilize new sentencing options which did not require the sacrifice of decency and human dignity.

Although S v Williams addressed only juvenile whippings in the context of s 294 of the Criminal Procedure Act, the judgment has obvious implications for all forms of corporal punishment. Following Williams it is clear that the corporal punishment of adults in execution of criminal sentences will be unconstitutional. It seems likely that corporal punishment at schools will be similarly struck down. Although the Constitutional Court was at pains to stress that the issue of corporal punishment of scholars was not before it, dicta in Williams suggest that the Constitution will not countenance the caning of school children. The extent of the horizontal impact of the Constitution will determine whether corporal punishment inflicted in private schools and by parents chastising their children will be unconstitutional as well.

(iii) Life imprisonment

Imprisonment, even for a short period, is undoubtedly a harsh form of punishment. The circumstances of imprisonment may mean not only that the offender loses his liberty but that his human dignity is infringed in many other ways. However, this is a criticism of the manner in which imprisonment is often implemented rather than of legislation allowing its imposition. In theory at least imprisonment properly organized offers the offender the possibility of retaining his dignity, of reflecting on his conduct, and of returning to society as a full participant.

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1 That is, the rights to human dignity and freedom from cruel, inhuman, or degrading punishment (cf ss 10 and 12(1)(e) of the 1996 Constitution). The court found it unnecessary to consider the appellants’ argument that these rights were incapable of limitation. See Williams at paras 55–6. In the important Canadian case on sentencing, Smith v the Queen (1987) 34 CCC (3d) 97 Lamer J notes at 140 that there are some punishments which will always ‘outrage our standards of decency’. He includes in this obiter pronouncement ‘corporal punishment, such as the lash, irrespective of the number of strokes’. An even wider version of this proposition is developed by Stuart, who argues that no punishment which in the Canadian context is cruel and unusual, either because of its nature or because it is grossly disproportionate in a particular case, should ever be regarded as being justifiable in terms of the Canadian limitations clause; D Stuart Charter Justice in Canadian Law (1991) 308–9.

2 See S v Valakisa 1990 (2) SACR 88 (Tk) at 94G–J and McNally JA (dissenting) in S v A Juvenile 1990 (4) SA 151 (ZS) at 171I–172A.

3 See Williams at paras 64–75.

4 This was common cause between the parties in Williams. See para 10.

5 See Williams at para 49.

6 See Williams at paras 47 and 52 in particular. Corporal punishment in Namibian schools was prohibited in Ex parte Attorney-General, Namibia: In re Corporal Punishment 1991 (3) SA 76 (NmS).

7 See above, Woolman ‘Application’ ch 10.

8 It is noteworthy that even Mahomed J, whose condemnation of corporal punishment in In re Corporal Punishment 1991 (3) SA 76 (NmS) was very wide, noted that parental chastisement may be distinguishable from state-inflicted punishment.
Life imprisonment is different. If given its literal meaning, it denies the offender the possibility of returning to society. As Levy J explained in the Namibian case of S v Nehemia Tjijo, \(^1\) the effects may be disastrous.

‘Life imprisonment robs the prisoner of . . . hope. Take away his hope and you take away his dignity and all desire he may have to continue living . . . The concept of life imprisonment destroys human dignity reducing a prisoner to a number behind the walls of a gaol waiting only for death to set him free.’

For Levy J the logic of these propositions was inescapable. Life imprisonment was unconstitutional because it infringed the human dignity of the offender. Nor was he impressed by the fact that offenders might be released on parole or unconditionally before completing their sentences. It was not sufficient to rely on the wide discretion of the executive to ensure that a sentence which on the face of it infringed the human dignity of the offender was ameliorated.\(^2\)

The argument that life imprisonment is a cruel, inhuman or degrading punishment is often rejected outright. It is argued that it does not infringe human dignity significantly more than other long prison sentences and that it is justifiable as a maximum penalty, particularly where the death sentence has been abolished.\(^3\) A much more subtle approach to the question of life imprisonment was developed by the German Federal Constitutional Court in 1977.\(^4\) It recognized that the state was entitled to legislate for harsh punishments for serious offences. It said, however, that a punishment which placed the individual permanently in prison and made his release subject to the exercise of executive power was an unconstitutional violation of the human dignity of the offender.\(^5\) What was required, said the court, was a mechanism which gave the offender the assurance that his release would be considered by a judicial body after a set period. This would allow the person serving the sentence to retain the prospect of such release and thus to preserve his dignity. Judicial review of all life sentences after a maximum of fifteen years had been served by the prisoner was subsequently introduced by legislation.\(^6\) The constitutionality of that legislation has been upheld in principle by a later decision of the German Court.\(^7\)

In S v Tcoeib\(^8\) the Supreme Court of Namibia held that life imprisonment could not be equated with the sentence of death.\(^9\) Chief Justice Mahomed, who gave the judgment of the court, adopted the same approach to life imprisonment as had the German Federal

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\(^1\) Unreported decision of 4 September 1991; quoted extensively in S v Tcoeib 1993 (1) SACR 274 (Nm) at 275i.

\(^2\) Unreported decision of 4 September 1991; quoted extensively in S v Tcoeib (supra) at 275j–276d.

\(^3\) See the judgment of Ackermann J in S v Makwanyane 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at paras 170–2. See also S v Tcoeib (supra) and the review of international practice conducted there. It should be noted, however, that life imprisonment is outlawed in a number of countries and that there is a small but active movement which is pressing for its total abolition. For an overview of the international position, see United Nations Crime Prevention and Criminal Justice Branch *Life Imprisonment* (1994).

\(^4\) 45 BVerfGE 187.

\(^5\) It would also fail to meet the requirements of legality.

\(^6\) A new section, art 57a, was added to the German Penal Code in 1982. In its decision of 3 June 1992 (86 BVerfGE 288) the Federal Constitutional Court held that it was acceptable to take into account whether the offender had been particularly blameworthy in respect of the offence for which he had been sentenced when subsequently considering his release in terms of art 57a. However, the trial court should make a finding in this regard in order to guide the tribunal which would eventually decide on his release.

\(^7\) 86 BVerfGE 288.

\(^8\) 1996 (1) SACR 390 (NmS).

\(^9\) At 397b. It found that Levy J in S v Nehemia Tjijo (supra) had been wrong to equate the two.
Constitutional Court in 1977.\(^1\) Life imprisonment could be justified only if the prisoner retained some hope of eventually being released from prison. Mahomed CJ explained that life imprisonment

‘... cannot be justified if it effectively amounts to a sentence which locks the gates of the prison irreversibly on the offender without any prospect whatever of lawful escape from that condition for the rest of his or her natural life and regardless of circumstances which might subsequently arise’.\(^2\)

Like the German Federal Constitutional Court, the Supreme Court of Namibia emphasized that the constitutionality of life imprisonment depended on the recognition of the human dignity of the prisoner. Such dignity would be undermined unless the prisoner had a ‘concrete and fundamentally realizable expectation’\(^3\) of release. The difficult question was whether the existing release mechanisms were sufficient to meet that requirement. Mahomed CJ conceded that ‘if the release of the prisoner depends entirely on the capricious exercise of the discretion of the prison or executive authorities, leaving them free to consider such a possibility at a time which they please or not at all and to decide what they please when they do, the hope which might yet flicker in the mind and heart of the prisoner is much too faint and much too unpredictable to retain for the prisoner a sufficient residue of dignity which is left uninvaded’\(^4\).

Mahomed CJ ruled that the procedures for the consideration of the release of life prisoners created by the Namibian Prisons Act were sufficient, notwithstanding the fact that they gave wide discretionary powers to officials of the Namibian prison administration and empowered the President to make the final decision to release a prisoner serving a life sentence when a Release Board had made a positive recommendation. In this respect the Namibian court did not set as strict standards as had the German court, which required that decisions about the release of prisoners serving life sentences not be left to the executive but be made by a judicial body. Mahomed CJ did emphasize, however, that:

‘The relevant authorities entrusted with these functions have not only to act in good faith but they must properly apply their minds to each individual case, the relevant circumstances impacting on the exercise of a proper discretion, the objects of the relevant legislation creating such mechanisms and the values and protections of the Constitution.’\(^5\)

The decision of the Supreme Court of Namibia in Tcoeib’s case may be regarded as strong persuasive authority in South Africa, as the relevant provisions of the Namibian Constitution, in particular the key article relating to human dignity, are mirrored by similar provisions in the South African Constitution.\(^6\) One may predict with some confidence that a life sentence without the prospect of parole or other form of release would be unconstitutional in South Africa.

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\(^1\) The 1977 decision of the German Federal Constitutional Court (45 BVerfGE 187) is referred to with approval by Mahomed CJ in S v Tcoeib 1996 (1) SACR 390 (NmS) at 398a–399a and 400a.

\(^2\) At 398b.


\(^4\) At 399h–400a.

\(^5\) At 400c.

\(^6\) Article 8 (human dignity) of the Constitution of Namibia may be compared to s 10 in the Constitution of South Africa. Also relevant are the similar provisions relating personal liberty (art 7 and s 12 in Namibia and South Africa respectively) and to administrative justice (art 18 and s 33 in Namibia and South Africa respectively).
Africa as it is now in Namibia and in Germany. South African prison law does create a
mechanism for the consideration of the release on parole of prisoners serving sentences of
life imprisonment.\(^1\) The repeated statements of the South African Appellate Division that,
as far as the courts are concerned, life means life,\(^2\) do not therefore reflect the full,
constitutionally required reality.

Life imprisonment has not yet been considered fully by the South African Constitutional
Court.\(^3\) However, in \(S v\ De Kock\)\(^4\) Van der Merwe J subjected the Southern African
jurisprudence on life imprisonment to a comprehensive review.\(^5\) He cited the decision of
Mahomed CJ in \(S v\ Tcoeib\)\(^6\) with approval and concluded that a decision on whether to impose
life imprisonment should be taken on the basis that it was not a sentence that left the offender
without a prospect of release. Van der Merwe J found that an expectation of release was
inherent in the provisions of the Correctional Services Act.\(^7\) He explained that the responsible
authorities had to act fairly, justly and responsibly in the light of all the factors that existed
at the time of sentence and might come to the fore in the future.\(^8\) If this did not happen, the
courts could be asked to intervene.\(^9\) One could not proceed from the position that the
responsible authorities would act irresponsibly and in a manner contrary to the Constitution
and the Correctional Services Act.\(^10\)

28.3 THE IMPOSITION OF SENTENCE BY THE COURTS

In the South African criminal justice system a very wide sentencing discretion is left to the
courts by the legislature.\(^11\) To what extent should sentencers be influenced by general
constitutional norms when imposing sentence? At the most general level the answer is that
in terms of s 39(2) of the Constitution the law of sentencing, like any other area of law, must
be interpreted with due regard to the spirit of the Constitution. This does not mean that a
specific philosophy of sentencing can be deduced directly from the Constitution.\(^12\) It does

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\(^1\) Section 65(5) of the Correctional Services Act 8 of 1959.
\(^2\) \(S v\ Mdau 1991 (1) SA 169 (A) at 177B; S v Ooosthuizen 1991 (2) SACR 298 (A) at 302A; S v W 1993 (2)
SACR 74 (A); S v Melhaep en andere 1993 (2) SACR 180 (T) at 183H.
\(^3\) See \(S v\ Makwanyene & another 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at paras 170--2.
\(^4\) 1997 (2) SACR 171 (T).
\(^5\) At 204d--211f.
\(^6\) Supra.
\(^7\) At 211h. See also \(S v\ Smith 1996 (1) SACR 250 (O) at 225b--256a.
\(^8\) \(S v\ De Kock\) (supra) at 211h.
\(^9\) Ibid.
\(^10\) Ibid. See also the argument for legality in the implementation of sentences, below § 28.4(b) and D van Zyl
Smit 'Taking Life Imprisonment Seriously' in Ellison Kahn (ed) \textit{The Quest for Justice: Essays in Honour of Michael
\(^11\) See above, § 28.1. It is a moot point whether the legislature must necessarily grant a wide sentencing discretion
or indeed any sentencing discretion at all to the courts. In \textit{Mistretta v US} 488 US 361, 109 SCt 647 (1989) the
US Supreme Court held that the branches of government have an overlapping responsibility for sentencing and that
therefore the determination of sentences by a commission which included judges, rather than by the courts directly,
was not an unconstitutional division of powers. One may expect that a similar attempt to restrict the powers of South
African courts would be resisted by the judiciary.
mean, though, that the Constitution directs that particular attention be paid to the human dignity of the individual offender. This implies that offenders must be recognized as rational and sentient individual human beings who should be awarded the protection of the rule of law. They should be treated on an equal footing with others who have committed equivalent offences and who are equally blameworthy, and who should not be punished more heavily than can be justified in terms of the offence and their individual blameworthiness.

A type of punishment which is constitutionally unexceptionable, in that it may in principle be imposed for a particular type of offence, may still be subject to constitutional challenge. This may happen if on the facts of a particular case the imposition of such a punishment would be grossly disproportionate to the seriousness of the offence actually committed. Sentences which are grossly disproportionate on the facts of the case constitute cruel, inhuman and degrading punishments in the circumstances or impermissibly invade the dignity of the offender.

It also means that where a choice of sentences, all of which meet other criteria, is available the sentencer should attempt to choose the option which the offender will be able to serve with dignity. This should provide the offender with an opportunity to reflect rationally on his offence and, it is hoped, choose a more socially acceptable way of life. This fast desideratum may be interpreted as a constitutionally informed plea for increased use to be made of non-custodial sentences. Such sentences are not as restrictive or as intrusive on freedom of the individual as imprisonment, but are designed to allow offenders to think rationally about their offences and to choose different courses of action in the future.

Because of their very general nature, the guidelines for sentencers which can be drawn from the Constitution may not be easily enforceable. In one specific instance, though, they may be directly applicable. In the critique of the current legislation dealing with correctional supervision it was argued that there was insufficient detail in the legislation about what the punishment should entail. The Appellate Division has suggested that the courts should use their discretionary powers to fill this gap. Similarly, the courts have a very wide discretion to suspend sentences on condition that certain requirements are met. The question which the courts face is: what may be regarded as an ‘acceptable penal content’ for such sentences or conditions of suspension? The answer is again related to human dignity and the prohibition of degrading punishment. The sanction should be ‘of the kind which can be endured with self-possession by a person of reasonable fortitude’.

1 This is a principle which runs through all of the judgments in S v Makwayane 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC). See also Stee Deliktsolgen und Grundgesetz at 37: ‘Der Strafrichter, der die Würde des Angeklagten nicht achtet, handelt somit dem Grundgesetz zuwider.’ (‘The penal judge who does not recognize the dignity of the accused, acts contrary to the Basic Law.’) See also H Jung Sanktionensysteme und Menschenrechte (1992) 21–3.

2 For the principle of proportionality in sentencing, see § 28.2 (c) above.

3 See S v Tcoeib 1996 (1) SACR 390 (NMS) at 402g, where this proposition is developed in the context of the sentence of life imprisonment. The same principle can be applied to other sentences which on the facts of a particular case may be regarded as disproportionately heavy. See in general D van Zyl Smit ‘Constitutional Jurisprudence and Proportionality in Sentencing’ (1995) 3 European Journal of Crime, Criminal Law and Criminal Justice 369–80.


5 See above, § 28.2(a)(i).

28.4 THE IMPLEMENTATION OF SENTENCE

A sentence which is otherwise constitutionally acceptable may be implemented in a manner which is unconstitutional. In the case of the sentence of death this was recognized both by the Supreme Court of Zimbabwe and by the European Court of Human Rights, which declared that the manner in which the death penalty was implemented could amount to inhuman or degrading treatment. Where this had been (or could be) the case the courts could intervene to ensure that the sentence of death was not carried out, even if the Constitution or international instrument which they were interpreting allowed the death sentence to be imposed. If the constitutionality of the sentence of death is upheld in South Africa, the constitutionality of the way in which it is implemented may be challenged along the same lines.

Constitutional challenges relating to the implementation of sentences are more likely to be directed against those forms of punishment in which the state plays an active part in the supervision and control of the offender over a long period of time, and which require decisions to be made about the termination of the sentence. Imprisonment and, to a lesser extent, correctional supervision, are such forms of punishment. This relationship between the state and the offender lends itself to a wide range of specific constitutional challenges, not all of which can be discussed here. Most challenges are likely to be concentrated on the recognition given to the overarching principles of human dignity and legality during the implementation of these sentences.

(a) Dignity

Infringements of the human dignity of sentenced offenders may take the form of the denial of a range of individual rights. The sentence of imprisonment negates the fundamental right to liberty. It ought not to deny prisoners other rights except those the negation of which is the necessary consequence of incarceration.

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1 For example, be compelled to drive a car with a notice declaring that the driver was convicted of drunken driving (US) or to confess publicly to having remorse for a crime (GDR).

2 For example, not fall pregnant as a condition of probation; see SL Arthur 'The Norplant Prescription; Birth Control, Woman Control or Crime Control?' (1992) 40 UCLA LR 1–101.


5 In the Soering case the intervention took the indirect form of preventing extradition to the United States where the court feared that the accused would be subject to treatment which would infringe the European Convention.

6 'Imprisonment is a severe punishment; but prisoners retain all the rights to which every person is entitled under chapter 3, subject only to limitations imposed by the prison regime that are justifiable under s 33': S v Makwanyane & another 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) per Chaskalson P at para 143. See also Woods v Minister of Justice, Legal and Parliamentary Affairs & others 1995 (1) SA 703 (ZS) at 705 G–H, 1995 (1) BCLR 56 (ZS).
In South Africa the recognition granted to prisoners’ rights has in the past been less than complete. In 1993, however, in the case of Minister of Justice v Hofmeyr,¹ the Appellate Division finally recognized that the fundamental rights of all prisoners survive incarceration. This decision will now have to be interpreted in the light of the Constitution. The principled approach is important because s 35(2) of the Constitution mentions a number of specific rights which all prisoners have. Amongst these are detention in conditions of human dignity. These conditions are stated to include ‘at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment’.² The danger is that this list, together with the other rights mentioned in s 35(2),³ may be considered to be the sum of prisoners’ rights.

Some guidance on how prisoners’ rights generally may be protected by focusing on their essential human dignity may be gleaned from the extensive jurisprudence on prisoners’ rights in other jurisdictions.⁴ Thus, for example, in Conjwayo v Minister of Justice, Legal and Parliamentary Affairs & others⁵ the Zimbabwean court held that the lawfulness of the actions of the authorities in drastically limiting the exercise period allowed to a condemned prisoner should be judged against ‘[the] broad and idealistic notion of dignity, humanity and decency’, which it derived directly from the provision in the Zimbabwean Constitution, which outlaws torture and inhuman or degrading treatment or punishment.⁶ As a general approach the court emphasized that it was ill-equipped to make decisions regarding the administration of prisons. However, Gubbay CJ, who gave the judgment of the court, continued:

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¹ 1993 (3) SA 131 (A). See also Van Biljon & others v Minister of Correctional Services & others 1997 (4) SA 441 (CC), 1997 (6) BCLR 789 (C) at para 42.
² For a thoughtful discussion of a prisoner’s right to adequate medical treatment, see Van Biljon & others v Minister of Correctional Services & others 1997 (4) SA 441 (CC), 1997 (6) BCLR 789 (C), where Brand J ordered the prison authorities to provide HIV-positive applicant prisoners with the anti-viral medication which had been prescribed for them.
³ Section 35(2) provides:
   (a) to be informed promptly of the reason for being detained;
   (b) to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;
   (c) to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
   (d) to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released;
   (e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment; and
   (f) to communicate with, and be visited by, that person’s —
      (i) spouse or partner;
      (ii) next of kin;
      (iii) chosen religious counsellor; and
      (iv) chosen medical practitioner.
⁵ 1992 (2) SA 56 (ZS).
⁶ At 63D–E.
‘But a policy of judicial restraint cannot encompass any failure to take cognizance of a valid claim that a prison regulation or practice offends a fundamental constitutional protection.’

It is important to note that the recognition of the right of prisoners to constitutionally acceptable treatment means that prisoners may claim positive performance by the authorities. Prisoners are dependent on the authorities in ways that ordinary citizens are not. The prison authorities therefore have to provide directly for them. On this basis the German Federal Constitutional Court has held that the constitutionally protected human dignity of sentenced prisoners gives them an interest in ensuring that prisons are administered in a way which provides them with an opportunity to be resocialized, and to lead a crime-free life. Such an approach will have far-reaching implications for the way in which sentences of imprisonment are implemented in South Africa.

(b) Legality

A key requirement of the principle of legality is that even those rights of prisoners which are restricted as a necessary consequence of incarceration may only be limited if this is done by legislation, either expressly or by necessary implication. The laws regulating prisons in South Africa must therefore be scrutinized to see whether they provide the necessary authority for the restriction of prisoners’ rights. The restrictions must, in addition, be formulated sufficiently narrowly to ensure that prisoners are not exposed to overbroad discretionary powers which deny them protection of the law.

The requirements of legality in respect of the implementation of sentences relate also to the rules determining the release of offenders from the restrictions of their sentence. Difficulties in this regard rarely arise with respect to the final unconditional release of prisoners or those offenders subject to correctional supervision. Much more problematic are the decisions relating to conditional release on parole or correctional supervision. These decisions clearly affect the liberty of offenders. Even though it may be argued that no one has a right to parole, prisoners have a very strong interest in liberty and may often have

1 At 60f.
2 See Van Biljon & others v Minister of Correctional Services & others 1997 (4) SA 441 (CC), 1997 (6) BCLR 789 (C) at para 53 in particular: ‘Unlike persons who are free, prisoners have no access to other resources to assist them in gaining access to medical treatment.’
3 35 BVerfGE 203 at 235–6. For further comparative material, see E Rotman ‘Do Criminal Offenders have a Constitutional Right to Rehabilitation?’ (1986) 77 Journal of Criminal Law and Criminology 1023–68.
4 The Correctional Services Act 8 of 1959 and the regulations made in terms of it.
5 See the seminal decision of the German Federal Constitutional Court of 14 March 1972 (33 BVerfGE 1), which declared the necessity of a statutory framework of sufficient precision to be a constitutional requirement for all restrictions of prisoners’ rights. This decision led directly to the enactment of the German Prison Act of 1976.
legitimate expectations in this regard as well.\textsuperscript{1} Procedures for release on parole will therefore have to comply with the standards of administrative justice.\textsuperscript{2} Where a prisoner has already been released on parole the interest is even stronger. It may even be argued that he cannot be returned to prison without a full trial-like procedure being followed to determine whether he has in fact infringed his conditions of parole.\textsuperscript{3}

\textsuperscript{1} Van Zyl Smit \textit{South African Prison Law and Practice} 359–69. The problem of expectations is particularly acute where a court has determined, formally or informally, that a person should be considered for release after a set period. This aspect was highlighted by the European Court of Human rights in \textit{Thynne, Wilson and Gunnell v United Kingdom} (1991) 13 EHRR 666. In this case it was held that detaining prisoners serving discretionary life sentences beyond the tariff period indicated by the trial judge, without having their release considered by a ‘court’, would be a contravention of art 5(4) of the European Convention. An administrative inquiry by a parole board, which left the final decision to a government minister, was held to be inadequate. Article 5(4) of the European Convention is analogous to s 12(1)(b) of the South African Constitution, which outlaws detention without trial. If this section is interpreted in a similar way to art 5(4), the constitutionality of current South African procedure for the release of prisoners serving life sentences is open to serious question. The issue will arise with particular force where the sentencing court has given an indication of what may properly be regarded as the punitive part of a life sentence and the prisoner subsequently completes that part of the sentence. The question was raised but not decided in Namibia, where the release procedures are similar to those currently in force in South Africa, in \textit{S v Tcobe} 1996 (1) SACR 390 (NmS) at 402e–h.

This particular question of procedural probity may now have been settled by s 8 of the Parole and Correctional Supervision Amendment Act 87 of 1997, which provides (somewhat impractically) that a decision on parole of a prisoner sentenced to life imprisonment must be made by the court that sentenced him. No such prisoner may be released on parole until he has served at least 25 years, or 15 years in the case of a prisoner who has reached the age of 65 years (s 9 of the Parole and Correctional Supervision Amendment Act, 1997). If applied to existing prisoners, these new time periods may create problems, for it may be argued that prisoners are having their legitimate expectations to consideration of their cases at an earlier stage under the current administrative dispensation denied. They are thus running the risk that their sentences may effectively be extended by \textit{ex post facto} legislation. The issue is still moot as s 25 provides that the Parole and Correctional Supervision Amendment Act 1997 is to come into operation on a date to be fixed by the President by proclamation in the \textit{Gazette}.

Whether prisoners have legitimate expectations to be granted parole is disputed: the European Court has denied the expectations of prisoners serving mandatory life sentences: \textit{Wonne v UK} [1995] 19 EHRR 333. In \textit{Greenholtz v Inmates of Nebraska Penal and Correctional Complex} 422 US 1, 99 SCt 2100 (1979) the majority of the US Supreme Court ruled that a parole system ‘provides no more than a mere hope that the benefit will be obtained’ (at 11). The liberty interest of parolees was recognized by Marshal J in his dissent in \textit{Greenholtz}’s case (at 23). This latter approach may prove persuasive in terms of the new South African Constitution.

The constitutional powers of the President to pardon or reprieve offenders exists outside of, and in addition to, the parole system: see s 84(1)(j) of the Constitution, read with s 327 of the Criminal Procedure Act and ss 66 and 70 of the Correctional Services Act 8 of 1959. Although this power is traditionally used sparingly, its constitutional status will be such that its application will not easily be subject to judicial supervision: \textit{Gerhardt v State President} 1989 2 (SA) 499 (T); \textit{Kruger v The Minister of Correctional Services & others} 1995 (2) SA 803 (T); \textit{Kommissaris van Korrektiewe Dienste v Malaza} 1990 (1) SA 1143 (W). However, in \textit{Hugo v President of the Republic of South Africa & another} 1996 (2) SA 1012 (D) it was held that the President was bound to act in accordance with the Constitution when granting special remission of sentence. This meant that he could not discriminate unfairly as such discrimination would contravene s 8(2) of the 1993 Constitution (cf s 9(2) of the 1996 Constitution). Accordingly, it was held that the President could not grant remission only to mothers of children under the age of 12 years and thus discriminate against fathers. On appeal the Constitutional Court confirmed that the President could not exercise his power of pardon so as to violate the Bill of Rights, but held, on the facts, that there had been no unfair discrimination against fathers. See \textit{President of the Republic of South Africa & another v Hugo} 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC).

\textsuperscript{2} \textit{Steele v Warden Mountain Institution} (1991) 60 CCC (3d) 1.

\textsuperscript{3} The constitutional requirement for such a procedure has been widely recognized: see \textit{Morrissey v Brewer} 408 US 471, 92 SCt 2593 (1972).
The same applies to prisoners serving sentences of correctional supervision. The current position is that prisoners who were sentenced initially to correctional supervision cannot have their sentences converted to imprisonment without the matter being heard by a court.\(^1\) In this respect the requirements of due process of law are met. However, prisoners who are initially sentenced to imprisonment, and then have part of their sentences converted to correctional supervision, may subsequently be sent back to prison without the safeguard of a determination of the facts by a court.\(^2\) The constitutionality of this latter procedure is dubious.\(^3\) In general the increased flexibility of sentences, which allows offenders to be subject to different forms of control, will require the developments of new procedural mechanisms to give the protection which the Constitution demands against arbitrary exercise of power.\(^4\)

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\(^1\) Section 276(1)(h), 286B(4)(b)(ii) or 297(1)(a)(ii)(ccA), (1)(b) or (4) of the Criminal Procedure Act 51 of 1977 read with s 84B(2) of the Correctional Services Act 8 of 1959.

\(^2\) Section 276(1)(i) or 287(4)(a) of the Criminal Procedure Act 51 of 1977 and s 84B(1) of the Correctional Services Act 8 of 1959.


\(^4\) At the very least the decision to send a person back to prison must be subject to some form of substantive review under s 33(d), the administrative justice right, so as to ensure that it satisfies the requirements of proportionality. See in this regard Roman v Williams NO 1997 (9) BCLR 1267 (C), where Van Deventer J confirmed the decision of the Commissioner under s 84B(1) of the Correctional Services Act to re-imprison the applicant, but only because the decision was substantively justifiable in relation to the reasons given for it.