8 SENTENCING

Lukas Muntingh

INTRODUCTION

Mandatory minimum sentences are a feature of the South African criminal justice system. They were introduced as a political response to the escalating crime rate in the 1990s, based on the commonly held belief that harsh punishment would reduce crime. To date there is no evidence to support this belief.

It is important therefore to re-examine the philosophy behind setting minimum sentences for particular categories of offenders, and at the same time to ask some fundamental questions about how punishment relates to the Constitution. If we feel outraged by the high rate of violent crime in South Africa, this should not affect our purpose, which is find a sentencing regime that leads to the reduction rather than the exacerbation of crime.

This chapter examines South Africa's Criminal Law Amendment Act (105 of 1997) which first established the legal framework for minimum sentences. The first part of the chapter assesses the inherent tension between an independent judiciary and a legislature that sets boundaries about sentencing. The second part provides a critique of the efficacy of minimum sentences by drawing primarily on international research.

THE WILL OF THE LEGISLATURE *V.* THE DISCRETION OF THE COURTS

When imposing punishment, courts do not have unfettered discretion. It is a well-established principle and practice that it is the legislature that can and does create and abolish crimes, and also develop and set parameters to the sentences that can be imposed for specific crimes by the courts. This does not mean that the legislature removes all discretion from the court's jurisdiction, but it undoubtedly limits it. Prescripts by the legislature limiting judicial discretion are, as can be expected, often met with judicial hostility.[1] However, to argue that there is and must be absolute separation of powers is unconvincing as the Supreme Court of Appeal (SCA) found in *Malgas v S* when it was seized with an appeal against a mandatory life sentence for murder:

> No court exercising criminal jurisdiction in South Africa could convincingly claim to be the sole constitutional repository of power to do such things. Indeed, the courts have no inherent power to do any such thing. They cannot create new crimes. Nor can they invent a new kind of penalty such as, for example, physical detention under lock and key at some place other than a prison.[2]

That the legislature can limit, in line with the Constitution, the discretion of the courts in respect of sentencing must be accepted. This should, however, be seen as different from 'a legislative provision which does in truth deprive a court of any sentencing discretion at all, or so attenuates it that its existence is illusory'.[3] It is with these issues in mind that we need to consider the minimum sentences legislation in South Africa.

The 1997 minimum sentence legislation,[4] the Criminal Law Amendment Act (105 of 1997), was a response to the high rate of violent crime in the country. It gave a clear message that the legislature wished to see the courts impose harsher prison sentences for the serious crimes specified (see Table 9 for a summary of offences and sentences). The legislation prescribes mandatory minimum sentences for offenders convicted of certain offences, unless the court finds that there are 'substantial and compelling' reasons to deviate from the prescribed minimum sentence. Given its controversial nature, the legislation was given a renewable two-year life span.

In essence, the legislature sent a clear political instruction to the courts, but left the door of discretion open to the courts to ensure that the minimum sentences legislation passes constitutional muster, which it did in *S v Malgas*.

The 1997 Act differed from other sentencing legislation in that it prescribed a minimum period of imprisonment while not setting an upper limit. To the courts the Act communicated appropriate minimum punishments for certain serious crimes, but it left the conditions under which a court could deviate from the prescripts unclear, citing merely that 'substantial and compelling reasons' were needed.[5] The South African legislature, in passing this legislation, took a similar approach to of the British Parliament in the late 1990s and the early 2000s[6] and several United States state legislatures.[7] All reflected an international trend towards the imposition of longer prison sentences and limiting the discretion of the courts.

HISTORY OF MINIMUM SENTENCES LEGISLATION

In 1996 the then Minister of Justice, Advocate Dullah Omar, appointed a project committee in the SA Law Reform Commission (SALRC) to investigate all aspects of sentencing. The committee produced an issue paper in 1997 dealing mainly with mandatory minimum sentences; an issue that the government was then considering.[8] However, even before public comment on the issue paper was received, the Criminal Law Amendment Act (105 of 1997) was before Parliament.[9] Clearly, the soaring violent crime rate was placing the young South African democracy under immediate threat, the government had to be seen to do something. In effect the SA Law Reform Commission's process was sidestepped and a policy shift in government led to the National Crime Prevention Strategy (NCPS) being downgraded to enable a tougher and more punitive approach to dealing with crime.[10] Simultaneously government had to contend with a judiciary inherited from the previous regime, which appeared willing to perpetuate injustices of the past and indulge in preferential treatment of some. It was a difficult balancing act.

Shortly after releasing its issue paper, the first SALRC committee on sentencing reform was disbanded. Another committee was appointed in 1998. After extensive research, and consultation with a range of stakeholders, the second committee produced a discussion paper and draft legislation on comprehensive sentencing reform in 2000. However, the draft bill produced by this committee was never been placed before Parliament.[11]

Despite the flawed process, the Criminal Law Amendment Act was adopted by Parliament in 1997, coming into force in early 1998. Until 2007, the Act was duly renewed every two years. Then in December 2007 it was replaced by the Criminal

Law (Sentencing) Amendment Act (38 of 2007), which had no renewal requirement. In a parallel development, the jurisdiction of district and regional courts in relation to sentencing was increased. The Magistrates Amendment Act (66 of 1998) increased the sentence jurisdiction of district courts from 12 months to three years imprisonment, and of regional courts, from 10 to 15 years. The courts' jurisdiction in respect of fines was also increased to R60 000 for the magistrates' courts and R500 000 for the regional courts.

Taken together, the minimum sentences legislation and the increase in sentence jurisdiction create a far more punitive sentencing regime. The increase in sentence jurisdiction and the minimum sentences affirmed the policy shift in government-thinking based on a belief that harsher punishments would deter would-be criminals and therefore reduce crime levels. This belief ignores extensive research done over the past 30 years in Europe and the United States which has consistently found that sentence severity has no demonstrable effect on crime levels.[12]

Minimum sentences 1997-2007

Section 51 of the Criminal Law Amendment Act states, in broad terms, that if a court (High Court or regional court) has convicted a person of an offence specified in the schedules to the Act, then it shall impose a minimum term of imprisonment unless it is able to find 'substantial and compelling reasons' to impose a lesser sentence. In such instances, these reasons must be entered on the record.

The amendment of the sentencing jurisdiction of the regional courts was clearly regarded by the legislature as insufficient to ensure harsh sentencing, because section 51(2) allows a regional court to impose a sentence of up to five years *above* the minimum sentence that it can impose in respect of section 51(2).

Table 9 provides a summary of the offences and stipulated sentences. It should also be noted that the offences are not clearly defined. For example, 'aggravating circumstances' in relation to a robbery is left to the prosecution and courts to define. In another example, the case of *S v Malgas* highlighted uncertainties around pre-meditation.

Section 52 of the Criminal Law Amendment Act allows for a split sentencing procedure. If a regional court has convicted a person of an offence listed in Schedule 2 (see Table 1) but before sentencing believes that the case warrants a harsher sentence than the court is entitled to impose (as set out in section 51), it must stop

Table 9: Summary of the minimum prescribed sentences to be imposed[13]

Offence Description	Prescribed sentence in Years		
Part I			
	1st offence	**2nd offence**	**3rd offence**
Murder when i. Planned or pre-meditated ii. The victim is a law-enforcement officer or a potential state witness iii. The death was connected to a rape or robbery with aggravating circumstances; or iv. It was committed as part of common purpose or conspiracy	Life		
Rape when i. Victim is raped more than once by accused or others ii. By more than one person as part of common purpose or conspiracy iii. The accused has been convicted of more than one rape offence and not yet sentenced iv. The accused knows he is HIV positive; or when the victims is Under 16 years of age; A vulnerable disabled woman; Is a mentally ill woman; or Involves the infliction of grievous bodily harm	Life		
Part II			
Murder in circumstances other than those above	15	20	25
Robbery when i. There are aggravating circumstances ii. Taking of a motor vehicle is involved	15	20	25

Offence Description	Prescribed sentence in Years		
Drug Offences if i. The value is greater than R50 000 ii. The value is greater than R10 000 and is part of a conspiracy or common purpose iii. The offence is committed by law enforcement officers	15	20	25
Any offence related to i. Dealing in or smuggling of arms and ammunition ii. Possession of automatic or semi-automatic firearms, explosives, etc	15	20	25
Any offence relating to exchange control, corruption, extortion, fraud, forging, uttering or theft when i. It amounts to more than R500 000 ii. It amounts to more than R100 000 if committed in common purpose or as conspiracy; or iii. If committed by a law enforcement officer when iv. It involves more than R 10 000; or v. As part of common purpose or as conspiracy.	15	20	25
Part III			
Rape, other than in circumstances in Part 1 above	10	15	20
Indecent assault on a child under age of 16, involving infliction of bodily harm;	10	15	20
Assault with GBH on a child under age of 16	10	15	20
Possession of more than 1 000 rounds of ***ammunition***.	10	15	20
Part IV			

Offence Description	Prescribed sentence in Years		
Any offence in Schedule 1 of the Criminal Procedure Act (51 of 1977) not referred to above, if the accused was armed with a firearm intended for use in the offence.	5	7	10

Source: Gifford and Muntingh Open Society Foundation, 2007

the proceedings and refer the case to the High Court for sentencing. The record of the regional court can then, under certain circumstances, be accepted as a record of the High Court, and the High Court must sentence the convicted person (as required by section 51). If, based on the record, or other reasons, the High Court is not satisfied with the plea or the finding of guilty, it may proceed with a summary trial and come to its own conclusions. The judge may also enquire from the magistrate the reasons for the finding of guilty. The High Court may therefore choose one of several courses of action:

- confirm the conviction and then impose a sentence (as contemplated in section 51)
- alter the conviction to a conviction of another offence (referred to in Schedule 2) and then impose a sentence (as contemplated in section 51)
- alter the conviction to a conviction of an offence other than an offence referred to in Schedule 2 and then impose the sentence the Court may deem fit
- set aside the conviction
- send the case back to the regional court with the instruction to deal with any matter in such manner as the High Court may deem fit; or
- make any such order in regard to any matter or thing connected with such person or the proceedings in regard to such person as the High Court deems likely to promote the ends of justice[14]

This new sentencing regime introduced four additional features which add to its already punitive nature. Firstly, it applied to children who were 16 years or older at the time of the offence, although this was later successfully challenged in the Supreme Court of Appeal (SCA) (*Brandt v S*). Secondly, the sentence imposed by either the regional or High Court starts on the date of sentencing, and time spent in prison awaiting trial cannot be deducted from the prescribed minimum

as time served already. Thirdly, the sentence (or part of it) cannot be suspended.[15] Fourthly, the Correctional Services Act requires that a person sentenced under the Criminal Law Amendment Act (sections 51 and 52) must serve four fifths of the sentence before he or she can be considered for placement on parole, compared to the general rule of one half of the sentence.[16]

Even before it was passed, the new minimum sentences legislation was contentious. Challenges to its constitutionality followed soon after it was signed into law. Two Constitutional Court challenges and two decisions from the Supreme Court of Appeal were significant during this period. I consider the main conclusions and their impact on the interpretation of the Criminal Law Amendment Act.

The first Constitutional Court challenge came in August-September 2000 in *S v Dzukuda*.[17] This case was referred by the High Court – Witwatersrand, which found that the split procedure (provided for under sections 51 and 52) amounted to an unfair trial for the accused. The High Court sought confirmation from the Constitutional Court for the order of constitutional invalidity. The Constitutional Court was unconvinced, based on the evidence before it, and did not confirm the order of the High Court. The split procedure remained, and continued to lead to great dissatisfaction. Some of the consequences were: long delays in finalising cases, the repeating of trials in the High Court, overturned convictions, and repeat testimonies by already traumatised victims.

In the case of *S v Malgas*[18] the Supreme Court of Appeal had to decide in February 2001 whether the term of life imprisonment imposed by the high court, as required by law, was appropriate for a young woman (22 years of age) who shot and killed her abusive husband while he was sleeping. The Supreme Court of Appeal used the opportunity in two significant ways. It firstly dealt with the general relationship between legislature and the discretion of the courts, as alluded to above, and then proceeded to deal with the issue of the trial court's discretion by providing guidance on the 'substantial and compelling circumstances' referred to in section 51(3) of the Act. As the legislation itself gave no specific guidance in this regard, the Supreme Court of Appeal provided guidelines.[19]

Referring to these guidelines, as well as the facts of the case, the Supreme Court found that the imposition of life imprisonment on the appellant was too severe, and that the trial court had erred in not finding substantial and compelling reasons based on the facts before it. The sentence of life imprisonment was replaced with a term of 25 years.

The judgment was important because it drew attention to the severity of life

imprisonment. It was also important in giving consistency to the wide-ranging interpretations of 'substantial and compelling' found in preceding High Court judgments. Nevertheless, consistency in sentencing has remained elusive.[20] The debate about 'substantial and compelling' reasons has not been settled, although in the 2008 amendment (discussed below) the legislature attempted to narrow down the factors involved.

The next Constitutional Court challenge came in *S v Dodo*[21] (March-April 2001). In this case the constitutionality of the legislation was attacked 'on the basis that interference with the trial Court's sentencing powers by the legislature breached the separation of powers doctrine, as a criminal trial before a court requires an independent judiciary to weigh and balance all factors relevant to the crime, the accused, and the interests of society in the sentencing process'.[22] The Constitutional Court dealt with the issues in detail. It concluded that the constitutional rights of the accused were not violated and made specific reference to the discretion that the trial court had under the 'substantial and compelling' provision, concluding that a disproportional sentence could be avoided.

In *Brandt v S* (November 2004) the Supreme Court of Appeal had to consider whether the imposition of life imprisonment for murder was appropriate for an offender who was under 18 years of age but older than 16 years at the time of the offence. Drawing on the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child, the Court found that the rules and guidelines set out in these instruments lay the foundation for child justice to be (newly) approached from a children's rights perspective. Important in this regard is that detention must be used as a measure of last resort and then for the shortest appropriate period (see Chapter 7: *Policy Issues in Child Justice*). In addition, the court noted the principle of proportional and individualised responses to offending and the emphasis in the Convention on the Rights of the Child in preparing the child offender for his or her return to society where detention has been deemed necessary. In addition, the Supreme Court of Appeal noted the principle of proportional and individualised responses to offending. It noted the emphasis in the Convention on the Rights of the Child on preparing the child offender for his or her return to society where detention has been deemed necessary. Taking into account all these factors, the court determined:

> that sentence should be imposed under section 51(3)(b) where an offender is aged below 18 years. Thus the fact that an offender is aged below 18 but over

> 16 at the time of the offence automatically confers discretion on the sentencing court, which is then free to depart from the prescribed minimum and to impose sentence in accordance with ordinary sentencing criteria.[23]

What then, is the current status of minimum sentences legislation, taking into account the Acts of 1998 and 2007 and substantive issues dealt with by the Constitutional Court and the Supreme Court of Appeal? In summary, we can say that:

- the legislation does not impede the right to a fair trial
- it does not violate the separation of powers doctrine underlying the Constitution
- despite an effort by the Supreme Court of Appeal to provide clarity on 'substantial and compelling' circumstances, consistency of sentencing has not been secured
- when imposing sentence on a child convicted of an offence under the minimum sentences legislation, the court is free to depart from the prescribed minimums

In the Anna Juries case the offender who was 16 at the time of the offence received an eight-year sentence. It was not clear from the Anna's account of the trial whether his sentence was shorter than those of his co-accused (who each received 15 years), because he was 16 at the time of the offence, or because he denied being physically involved in the stabbing. The two older offenders each received the prescribed 15 years for a first offence robbery with aggrevating circumstances.

Minimum sentences after 2008

As mentioned, the legislation was renewed every two years since 1997, and subjected to more intense review in 2007, the year that the Criminal Law (Sentencing) Amendment Act (38 of 2007) was passed. This Act, which included substantive and procedural amendments, waived the requirement that it had to be renewed every two years.

In an attempt to address the problems arising from the split procedure (i.e. conviction in regional court and then referral to the high court for sentencing), regional courts since 2007 have been given the jurisdiction to impose life imprisonment. However, an amendment to the Criminal Procedure Act (section 309) gives a convicted person sentenced in a regional court an automatic right of appeal to the high court.

The jurisdiction of the regional court has been further bolstered by allowing it to deviate from imposing life imprisonment (which would result in an automatic appeal), and to impose a sentence not exceeding 30 years. Applying the four-fifths non-parole period requirement applicable to minimum sentences, this is effectively a sentence of 24 years before the offender can be considered for parole – one year shorter than for a sentence of life imprisonment. The difference is that when an offender sentenced to life imprisonment is released on parole, he/she would be on parole for the rest of his/her life, whereas an offender sentenced to 30 years imprisonment would be on parole only for a further six years.

The debate around 'substantial and compelling' circumstances did not escape the attention of parliament. In fact it was with particular reference to the offence of rape that the legislation was tightened. The following are now explicitly excluded from being considered 'substantial and compelling' circumstances in rape cases:

- the complainant's previous sexual history
- an apparent lack of physical injury
- the accused person's cultural or religious beliefs about rape
- any prior relationship between the complainant and the accused[24]

Despite the *Brandt* decision, the legislature persisted in bringing children who were aged 16 and 17 years at the time of the offence within the ambit of minimum sentences. The prescribed minimum sentences still apply to 16 and 17 year olds. In what was probably intended as a magnanimous gesture, the amendment now enables the court to suspend as much as half of the sentence if the accused was aged 16 to 17 years at the time of the offence. At the time of writing the provisions dealing with 16- and 17-year-old offenders had already been successfully challenged in the Pretoria High Court[25] and had been referred to the Constitutional Court.[26]

The Amendment to the legislation showed that the legislature had no intention of dealing with the fundamental issues regarding sentencing reform raised by the SA Law Reform Commission and advocated for by several civil society organisations. Some of the most important recommendations from the SALRC included:

- basic sentencing principles to be set out in legislation
- factors such as deterrence and rehabilitation to no longer to be specific aims of sentencing
- sentencing guidelines to become the basis for more consistent sentencing

- sentencing guidelines to be developed by a Sentencing Council
- existing sentencing options to be overhauled, resulting in reparation as a substantive sentence
- victims to be given a greater role through the provision of victim impact statements[27]

Instead the legislature preferred to focus on practical and procedural issues within a criminal justice system that had become increasingly dysfunctional and at times very close to collapse.

Less than a year after the legislation was adopted, the then Deputy Minister of Justice, Mr J De Lange, former chairperson of the Justice Portfolio Committee and a strong proponent of the minimum sentences legislation, admitted that the criminal justice system was in desperate need of an overhaul.[28]

A SHORT CRITIQUE OF MINIMUM SENTENCES

Policy uncertainty

Ten years after the introduction of minimum sentence legislation, it is important to ask why it was originally introduced. According to D Rudman during the second reading of the Bill in November 1997, Advocate Dullah Omar, who was Minister of Justice and Constitutional Development at the time, cited the following reasons for the legislation:

- there is a public demand for more severe punishments for serious offences
- minimum sentences will restore confidence in the criminal justice system to protect the public
- minimum sentences will confirm government's policy which aims to curb the increasing rate of violent crime and to protect the public against criminals
- the courts will retain discretion to deviate from the prescribed minimums
- the minimum sentences are designed to ensure that the courts will deal effectively, in terms of sentencing, with serious crimes[29]

The reasons articulated by Minister Omar require closer scrutiny. Addressing 'public demand', 'restoring confidence', 'confirming government's policy', 'allowing discretion' and 'effective sentencing' say more about politicians' needs to ap-

pease the public than they do about reducing crime. The message reinforced the popular view that removing offenders from society and waving the stick of long prison sentences would reduce crime.

The legislature had at its disposal a valuable resource in the form of the SA Law Reform Commission, but chose to ignore it, perhaps because the findings of the Commission did not support the policy direction that it wished to take. The SALRC had conducted its own empirical research; done extensive literature reviews of existing research; consulted extensively; and developed a comprehensive proposal for sentencing reform. For the SALRC, sentencing was the wrong place to focus. The SALRC project committee observed in its 2000 discussion paper:

> It remains to be seen whether the minimum sentence approach prescribed by the Act will lead to a noticeable reduction in serious crime. However, one of the most telling findings of this study is that a mere 5.4 per cent of more than 30 000 randomly sampled cases reported to the police resulted in a conviction. The question of sentencing therefore remains irrelevant to the vast majority of people who committed those crimes. Until the conviction rate improves dramatically, it is difficult to see how tough minimum sentences will be an effective deterrent to thousands of criminals who evidently do not get apprehended and successfully prosecuted.[30]

The manner in which Parliament dealt with the minimum sentences legislation is not uncommon and one may in fact indulge politicians for wanting to appease 'public demand' and to be seen to be 'tough on crime' by believing that tougher penalties would reduce crime. The problem, as Tonry notes, is that mistaken beliefs lead to seriously mistaken policies.[31] Despite having access to the 2000 SA Law Reform Commission discussion paper, the legislature persisted in renewing the minimum sentences legislation and did not amend it or critically interrogate its purpose. The 2007 amendments only aimed to resolve problems around the split procedure and limit the scope of 'substantial and compelling' circumstances.

The cost-of-committing-crime theory

Advocates of tough minimum sentences argue that heavy sentences act as a deterrent because the cost of crime to the criminal begins to outweigh the benefits of the crime. They would argue, for example, that a would-be hijacker, knowing that hijacking a car would result in a prison sentence of 15 years for a first offence and 20 years for a second offence, would decide that hijacking is simply not worth the

risk. This cost-benefit balance is an economist's approach, and thus the criminal, thinking like an economist, will thus refrain from hi-jacking cars.

This argument is flawed in several important ways. Firstly, a far wider range of social controls influence criminal decision-making than the cost-deterrence model allows for. According to Ellickson's five-level model of social control these are:

1. First party control (self control)
2. Second party control (other persons in direct contractual relations)
3. Social controls (informal social controls through norms)
4. Organisational controls (enforcement of organisational rules)
5. Government (legal) controls (state enforcement through law)[32]

The Ellickson model shows us that law enforcement (the fifth level) is only part of the picture.

Secondly, the economist perspective assumes that would-be criminals are familiar with and knowledgeable about the punishment. It assumes that they carefully weigh up the options and risks and come to an informed conclusion that the risks of severe punishment outweigh the potential benefits. But do criminals study the applicable changes in legislation and then draw calculated conclusions? Would they for example decide that 15 years for armed robbery is an affordable risk, but that killing a police official in the process may result in life imprisonment and should therefore be avoided at all costs? The answer is clearly no. The British Home Office came to the same conclusion in a 1990 White Paper on sentencing: 'It is unrealistic to construct sentencing arrangements on the assumption that most offenders will weigh up the possibilities in advance and base their conduct on rational calculation. Often they do not.'[33]

Thirdly, the economists' perspective assumes that detection and conviction has a high probability. The reality, of course, is different. South African crime detection rates are extremely low, as alluded to by the SA Law Reform Commission. With such a low detection and conviction rate (5,4 per cent) the severity of the punishment becomes almost irrelevant. All it means is that a tiny group of offenders experience the maximum impact of law enforcement.[34] While severe punishments may satisfy an emotive yearning for revenge, this is far removed from the logical cost-of-crime argument forwarded by the economists' perspective.

For a harsher sentencing regime to have the desired deterrent impact the following conditions need to be met:

> individuals must first believe that there is a reasonable likelihood that they will be apprehended for the offence and receive the punishment that is imposed by a court. Second, they must know that the punishment has changed. It does no good to alter the sanction if potential offenders do not know that it has been modified. Consequences that are unknown to potential offenders cannot affect their behaviour. Third, the individual must be a person who will consider the penal consequences in deciding whether to commit the offence. Finally, the potential offender who knows about the change in punishment and perceives that there is a reasonable likelihood of apprehension must calculate that it is 'worth' offending for the lower level of punishment but not worth offending for the increased punishment.[35]

At policy level it has important consequences to accept that harsh sentencing has no deterrent effect as it nullifies a well established objective of sentencing. This is being done in some countries, such as Finland, Canada and Ireland. These governments are moving away from relating deterrence directly to sentencing.[36]

The incapacitation theory

An important motivation underlying minimum sentences is the incapacitation argument: if we imprison dangerous offenders for lengthy periods they will be incapable of committing further crimes and therefore serve the purpose of public protection. Because we know that they are dangerous, either because of the specific crime they had committed or the number of crimes they had committed in the past, incapacitating them by means of a lengthy prison term would have a positive effect on the crime rate. Again the argument is neat and logical, and thus in need of critical examination.

The argument assumes that the criminal justice system is able to identify and then incapacitate the most dangerous offenders. However the evidence, as Ashworth points out, is that 'incapacitative sentencing draws into its net more "non-dangerous" than "dangerous" offenders, with a "false positive rate" up to two out of every three.'[37] The broad and poorly defined crime categories in the South African minimum sentences legislation make little distinction between the robber who kills a bank teller and the woman who shoots her abusive husband in his sleep; both will receive life imprisonment, as was the case in *S v Malgas*.[38] Even when there are no substantial and compelling circumstances motivating a deviation from the prescribed minimum sentence, the question needs to be asked

about how dangerous the offender is, and the risk for re-offending, especially when imposing life imprisonment.

Extensive research in the United States[39] as well as the United Kingdom[40] has demonstrated that most persistent offenders reach their crime peak in their late teens to mid-twenties. Their incapacitation thereafter, especially if they are imprisoned for the rest of their lives, serves little purpose in reducing crime. A double risk arises here: a person who is not 'dangerous' is imprisoned for a lengthy period or for life, and an offender is imprisoned at such an age that his imprisonment has little effect on the crime rate. In both instances enormous costs are incurred, human and monetary, with little effect on the crime rate.

The US state of California's 'three strikes and you're out' legislation requiring the imposition of 25 years to life for a third felony conviction, present probably the best example to study the effects of incapacitation. The sentencing trends following from this legislation have been studied extensively and analysed to see whether the three strikes system has had any effect on California's crime rates. The results are remarkably unimpressive.

Perhaps the most significant finding is that the counties that most aggressively enforced the three strikes legislation experienced a *lower* decline in violent crime than the counties that enforced it least:

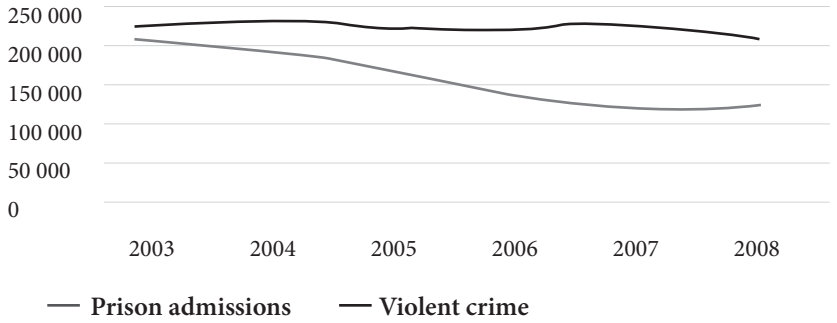
> The six large counties using Three Strikes least frequently had a decline in violent crime that was 22.5% greater than was experienced by the six large counties using Three Strikes the most frequently...The six heavy-using counties also experienced slightly smaller declines in homicide rates (-51.2% vs. -53.4%) and index crime (-37.3% vs. -39.1) compared to those counties using Three Strikes less frequently.[41]

Two conclusions can be drawn from this. Firstly, that factors other than incapacitation were influencing the crime rate, as both heavy-using and light-using counties experienced declines in the crime rate. Secondly, that incapacitation itself does not have the desired effect on the crime rate – the counties that implemented three strikes legislation aggressively showed a smaller decline in their crime rates. These findings are not restricted to California. Studies of the three strikes legislation elsewhere in the United States report that the legislation has not had any noticeable effect on crime trends.[42]

South African evidence also shows the absence of a link between crime and incapacitation. South African data reported in *South African Crime Quarterly* in

2008[43] compares the number of violent crimes[44] reported annually to the police with the number of offenders admitted annually to serve prison sentences for the period 2003 to 2008.[45] The two data sets are presented in Figure 4.

Figure 4: Violent crime and imprisonment, 2003-2008



As can be seen, from 2003 to 2008 violent crime remained fairly stable, deviating no more than 6 per cent in any one year from the full-term average. The number of sentenced admissions to prisons, however, dropped from 178 569 in 2003 to 94 566 by 2007/8, a drop of 47 per cent. The trends raise an important question: How can violent crime remain stable if nearly 50 per cent fewer offenders are sent to prison?

From the graph there does not appear to be any link between the number of violent crimes reported annually and the number of sentenced offenders admitted to prison. The number of offenders imprisoned does not appear to have any direct impact on the rate of violent crime. One would expect that from 2002 to 2008 the rate of violent crime should have climbed steadily because fewer offenders were imprisoned, but this did not happen either. We can conclude that incapacitation has no demonstrable effect on crime rates, even when sentencing legislation prescribes lengthy prison terms for serious offences.

There is also reason to believe that certain geographical communities and sub-areas in communities contribute disproportionately to the prison population.[46] Communities experiencing high imprisonment rates exhibit a range of problems, from higher rates of teenage pregnancy and higher rates of sexually transmitted infections, to criminal involvement.[47] In these communities the social cost of imprisonment needs to be critically examined: community instability,

fragile parental authority, strained power relations, lack of public safety, and lack of social cohesion fundamentally undermine efforts to create safer communities and prevent young men from becoming young prisoners. South Africa's imprisonment rate is calculated to be 342 per 100 000 of the population, placing it in the top ten countries in the world, excluding non-democratic states and island states.[48] A high incarceration rate is achieving exactly the opposite of creating a safer society: it continues to fuel conditions for crime and re-offending.

CONCLUSIONS

The history of the minimum sentences legislation has shown that it was conceived and delivered in policy vagueness with little, if any, reference to the available evidence at the time. The subsequent renewal of the legislation in 2007 continued to ignore the recommendations of the SA Law Reform Commission as well as civil society in-puts.[49]

The implementation of minimum sentences resulted in the number of prisoners serving life imprisonment climbing from approximately 400 in 1995 to over 8 000 by March 2008.[50] During that period, violent crime trends have remained fairly stable. There is no evidence to indicate that minimum sentences have had any impact on the rate of violent crime. In fact there is substantial evidence indicating that lengthy prison terms and high imprisonment rates fuel the conditions for higher crime rates.

A number of policy implications emerge from this review.

Firstly, the need for comprehensive sentencing reform remains. The continuous amendment of sentencing legislation in a piecemeal manner should be avoided, and the process should rather question the fundamentals of punishment and sentencing.

Secondly, even if the proposals of the SA Law Reform Commission Discussion Paper (of 2000) do not find broad acceptance, there is sufficient reason to reintroduce the ideas and proposals raised there. The review of the criminal justice system will suffer a critical deficiency if it ignores the work of the SA Law Reform Commission on sentencing.

Thirdly, sentencing reform cannot continue in a manner that marginalizes evidence on what works and what does not. The strained relationship between the reality and political interests has already caused great harm. There is a strong need to de-politicise punishment and sentencing.

Fourthly, it must be accepted that punishment and sentencing can only play a small role in managing crime. The emphasis must be placed on other efforts by government and civil society to reduce crime. Particular attention should be paid to social conditions that contribute to crime. There needs to be acceptance of the limited potential of punishment and sentencing to manage crime.

NOTES

1. *S v Malgas* 117/2000 SCA, paragraph 1.
2. Ibid, paragraph 2.
3. Ibid.
4. Criminal Law Amendment Act, 1997 (Act 105 of 1997).
5. Section 51 of the Criminal Law Amendment Act states, in broad terms, that if a court has convicted a person of an offence specified in the schedules to the Act, then it shall impose a minimum term of imprisonment unless it is able to find 'substantial and compelling reasons' to impose a lesser sentence.
6. A Ashworth, *Sentencing and criminal justice*, 4th ed, Cambridge: Cambridge University Press, 2005, 32.
7. By 2004, a total of 23 US states as well as the federal government had adopted some form of 'three strikes' legislation applicable to repeat offenders: S Ehlers, V Schiraldi and J Ziederberg, Still striking out: ten years of California's three strikes, San Francisco: Justice Policy Institute, 2004, 16.
8. S Terblanche, *Research on the Sentencing Framework Bill,* Cape Town: Open Society Foundation (SA), 2008.
9. J Redpath and M Donovan*, The impact of minimum sentencing in South Africa*, Cape Town: Open Society Foundation (SA), 2006, 11.
10. Ibid.
11. Ibid.
12. See A N Doob and C M Webster, Sentence severity and crime: accepting the null hypotheses, in Michael Tonry, *Crime and justice*: *a review of research* 30, Chicago: University of Chicago Press, 2003; A von Hirsch, A Bottoms, E Burney and P-O Wikstrom, *Criminal deterrence and sentence severity – an analysis of recent research*, Oxford: Hart, 1999; D Nagin, Criminal deterrence research at the outset of the twenty-first century, in Michael Tonry (ed), *Crime and justice: a review of research* 23, Chicago: University of Chicago Press, 1998; Michael Tonry Learning from the limitations of deterrence research, *Crime and justice: a review of research* 37, Chicago: University of Chicago Press, 2008; M Males, D Macallair K Taqi-Eddin, *Striking out: the failure of California's 'Three Strikes and You're Out' Law*, San Francisco: Justice Policy Institute, 1999; Ehlers, Schiraldi and Ziederberg, *Still striking out*.
13. C Giffard and L Muntingh, *The effect of sentencing on the size of the prison population*, Cape Town: Open Science Foundation (SA), 2007, 50-51.
14. Section 52(3)(e).
15. Section 297(4) of the Criminal Procedure Act.
16. Section 73(6)(b)(v). Section 73(6) of the Correctional Services Act states the general rule that one half of the sentence must be served when the court has not stipulated a

minimum non-parole period and/or the person has already served 25 years.

17. (2000)(4) SA 1078 (CC).
18. Case No 117/2000.
19. (A) Section 51 has limited but not eliminated the courts' discretion in imposing sentence in respect of offences referred to in Part 1 of Schedule 2 (or imprisonment for other specified periods for offences listed in other parts of Schedule 2); (B) Courts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should *ordinarily* and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances; (C) Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts; (D) The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded; (E) The Legislature has, however, deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored; (F) All factors (other than those set out in D above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process; (G) The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ('substantial and compelling') and must be such as cumulatively justify a departure from the standardised response that the Legislature has ordained; (H) In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against sentence as the sole criterion; (I) If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence; [and] (J) In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the bench mark which the Legislature has provided (*S v Malgas* at paragraph 25).

20. J Sloth-Nielsen and L Ehlers, *A pyrrhic victory: mandatory and minimum sentences in South Africa*, ISS Research Paper 111, Pretoria: Institute for Security Studies, 2005, 12.
21. CCT 1/01.
22. Sloth-Nielsen Ehlers, *A pyrrhic victory,* 7.
23. Do minimum sentences apply to juveniles? The Supreme Court of Appeal rules 'No', *Article 40* 7(1) (May 2005), p 2.
24. Section 1 of the Criminal Law (Sentencing) Amendment Act, 2007 (Act 38 of 2007).
25. *Centre for Child Law v Minister of Justice and Constitutional Development and Others* (11214/08 TPD).
26. *Centre for Child Law v Minister of Justice and Constitutional Development and Others* CCT98/08.
27. Terblanche, *Research on the Sentencing Framework Bill,* 5.
28. De Lange: Criminal justice review a priority, *Cape Times*, 5 August 2008, http://www.capetimes.co.za/index.php?fSectionId=3531&fArticleId=nw20080805124336141C987825 (accessed 11 January 2009).
29. D Rudman, The Criminal Law Amendment Act No 105 of 1997, in *Sentencing in South Africa – Conference Report*, 25-26 October 2006, Commodore Hotel, Cape Town, Report 1, Cape Town: Open Science Foundation (SA), 2006, 27.
30. South African Law Commission, *Sentencing (a new sentencing framework)*, Discussion Paper 91, Project 82, 2000, 16.
31. Tonry, Learning from the limitations of deterrence research, 282.
32. R Ellickson, in Tonry, Learning from the limitations of deterrence research, 291.
33. Ashworth, *Sentencing and criminal justice*, 79.
34. Doob and Webster, Sentence severity and crime, 174.
35. Ibid, 190.
36. Ibid, 191.
37. Ashworth, *Sentencing and criminal justice*, 80.
38. The life sentence imposed by the High Court (South-eastern Cape) on the 22 year old Ms Henna Malgas for shooting her sleeping husband was only overturned by the Supreme Court of Appeal.
39. Males, Macallair and Taqi-Eddin*, Striking out*.
40. A R Piquero, D P Farrington and A Blumstein, *Key issues in criminal career research*, Cambridge: Cambridge University Press, 2007.
41. Ehlers, Schiraldi and Ziederberg, *Still striking out,* 15.
42. See Peter W Greenwood, Susan S Everingham, Elsa Chen, Allan F Abrahamse, Nancy Merritt and James Chiesa, *Three strikes revisited: an early assessment of implementation and effects*, Santa Monica, Calif: Rand Corp, 1998; James Austin, John Clark,

Patricia Hardyman and D Alan Henry, *'Three strikes and you're out': the implementation and impact of strike laws*, US Department of Justice, 2000.

43. L Muntingh, Punishment and deterrence: don't expect prisons to reduce crime, *SA Crime Quarterly* 26 (December 2008), 3-9.
44. Violent crime is defined as murder, rape and aggravated robbery and used collectively as an indicator of violent crime in South Africa. Prison admissions refer to all sentenced admissions.
45. Figures on prison admission were supplied by the Judicial Inspectorate for Correctional Services. Figures for the second half of 2008 were projected as these were not yet available.
46. T Clear, Imprisoning communities: how mass incarceration makes disadvantaged neighbourhoods worse, New York: Oxford University Press, 2007; L M Muntingh, *Prisoner re-entry in Cape Town: an exploratory study*, CSPRI Research Paper 14, Bellville: CSPRI, 2008.
47. J Thomas and E Torrone, Incarceration as forced migration: effects on selected community health outcomes, *American Journal of Public Health* 96(10) (2006), 1762-1765.
48. International Centre for Prison Studies.
49. Submissions were made by the following civil society institutions and individuals: Southern African Catholic Bishops' Conference; Open Society Foundation for South Africa, Tshwaranang Legal Advocacy Centre, Cape Bar Council, Child Justice Alliance, Centre for the Study of Violence and Reconciliation, Unisa Department of Criminal and Procedural Law (Prof S Terblanche), South African Human Rights Commission, Association of Regional Magistrates, Hlakanaphila Analytics, and Mr B J King: Minutes of the Portfolio Committee on Justice and Constitutional Development, 27 July 2007, Parliamentary Monitoring Group, http://www.pmg.org.za/report/20070731-criminal-law-sentencing-amendment-bill-public-hearings (accessed 23 March 2009).
50. D Mujuzi, *The Changing face of life imprisonment in South Africa*, CSPRI Research Report 15, Bellville: CSPRI, 2008, 6.