

# The discourse and policies around sentencing and punishment in South Africa: 1994 - 2014

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## 1. Introduction

Two ‘snapshots’ of South African sentencing and penal conditions, in 1994 and 2014 respectively, reveal the important changes in the South African penal reality that this paper seeks to address.

### *Snapshot (1):1994*

In 1994, at the time of the radical change of the South African political order, sentencing law and practice still followed a typical common law pattern, albeit one distorted by the workings of the apartheid system. With some exceptions, sentencers had extremely wide sentencing discretion. Most sentences were imposed in the lower courts by stipendiary magistrates in local and regional magistrates’ courts. Their jurisdiction was restricted by the exclusion of some of the most serious offences<sup>1</sup> and by length of the terms of imprisonment they could impose.<sup>2</sup> Appeal on sentence lay to the Provisional Division of the Supreme Court, which also acted as a trial court with unlimited sentencing jurisdiction for the most serious offences. Further appeals from the magistrates’ courts, as well as appeal from a trial in a Provincial Division, were possible to the Appellate Division of the Supreme Court. Appellate courts intervened relatively seldom in sentencing matters and did not set clear sentencing guidelines.

On 31 December 1994 prisons were occupied at the relatively moderate rate of 119 per cent of the official capacity of 95 695:<sup>3</sup> 113 856 prisoners of whom 91 853 were sentenced offenders.<sup>4</sup> The newly enacted interim Constitution,<sup>5</sup> which was to come into force at the end of April 1994, guaranteeing the human dignity of prisoners and setting out explicitly the

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<sup>1</sup> Magistrates’ Courts Act 32 of 1944 ss. 89-90.

<sup>2</sup> Magistrates’ Courts Act 32 of 1944 s. 92.

<sup>3</sup> See the note on sources of statistical information in Appendix 1.

<sup>4</sup> Statistics are sourced from the following article: Steve Pete ‘Prisoners’ Rights’ 7 S. Afr. Hum. Rts. Y. B. 231 1996, at 234.

<sup>5</sup> S. AFR. (Interim) CONST. 1993. (referred to hereinafter as the ‘interim Constitution’).

rights of accused and detained persons,<sup>6</sup> was yet to make its presence felt. The almost entirely unfettered power that courts at that time enjoyed to sentence offenders as they saw fit,<sup>7</sup> included statutory authority to impose the death penalty<sup>8</sup> and corporal punishment.<sup>9</sup> The majority of the judiciary at the time probably believed that the sentences they imposed were just, and on occasion would use their discretion to impose relatively lenient sentences on opponents of the government with whom they had some sympathy.<sup>10</sup> Based on the number of offenders then serving court-imposed community-based sentences, it is clear that the courts rarely made use of such sentences.<sup>11</sup>

Despite the country's high official crime rate, in 1994 there was a sense in that it would probably decrease, for it was believed that rampant crime was a result of the political violence associated with the anti-apartheid struggle.<sup>12</sup> Criminal offenders would it was hoped in the future be dealt with by a 'fair criminal justice system that followed the precepts of the new Constitution and the imposition of relatively mild punishments'.<sup>13</sup>

By 1994 the last execution had occurred almost five years earlier, in November 1989,<sup>14</sup> before the then President, FW de Klerk, had declared a moratorium on all executions, also for 'ordinary' criminals, in his speech announcing the dawn of the new political order on 2 February 1990.<sup>15</sup> Despite this, judges continued to sentence offenders to death, albeit less

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<sup>6</sup> S. Afr. (Interim) CONST. 1993 s. 25. This was a response, no doubt, to the apartheid state's regime control tactics of the 80's and 90's which resulted in the mass, and often, indefinite, detention of thousands of blacks. Certainly, the new government and those South Africans that supported regime change acknowledged that the deplorable manner in which the black prison population had been detained 'was illustrative of the attitudes of a racist minority government that did not have the interests of all its citizens at heart.' Dirk Van Zyl Smit, *Swimming Against the Tide: Controlling the Size of the Prison Population in the New South Africa*, in *Justice Gained? Crime and Crime Control in South Africa's Transition* (B. Dixon & E. Van der Spuy eds., 2004) 227.

<sup>7</sup> Criminal Procedure Act 51 of 1977 s. 276.

<sup>8</sup> Criminal Procedure Act 51 of 1977 ss. 276(1) and 277(1) prior to amendment by Act 105 of 1997.

<sup>9</sup> Criminal Procedure Act 51 of 1977 s. 294 prior to amendment by Act 105 of 1997.

<sup>10</sup> For example *S v Toms*; *S v Bruce* 1990 (2) SA 802 (AD) where the Court set aside an ostensibly compulsory prisons sentence some young men who on ground of conscience refused to do military service.

<sup>11</sup> L Muntingh and C Giffard 'The effect of sentencing on the size of the prison population' (2006) CSPRI and OSF Occasional Paper, 34.

<sup>12</sup> See generally Martin Schönteich, ISS Occasional Paper No. 4, *Crime in South Africa: A country and cities profile*, 2001.

<sup>13</sup> Dirk van Zyl Smit, *Swimming Against the Tide: Controlling the Size of the Prison Population in the New South Africa*, in *Justice Gained? Crime and Crime Control in South Africa's Transition* 227, 228 (B. Dixon & E. Van der Spuy eds., 2004).

<sup>14</sup> See *S v Makwanyane* 1995 (3) SA 391 (CC) at 6 (S. Afr.).

<sup>15</sup> Address to Parliament on 2 February 1990. In this speech it was said that the last execution in South Africa had been on 14 November 1989.

frequently, and, in 1994 there were almost 150 prisoners on death row.<sup>16</sup> In contrast, the number of those serving sentences of life imprisonment was approximately 50. Terblanche makes the important point that longer sentences - particularly those of more than 25 years - were 'rarely imposed in South Africa' at that time, for it was a 'basic principle' that such sentences 'should be imposed only in cases of exceptional severity'.<sup>17</sup>

#### *Snapshot (2): 2014*

By 2014 South Africa had been a constitutional democracy with a justiciable bill of rights for more than 20 years. The overall court structure was essentially the same. Local and regional magistrates' courts continued to impose the bulk of criminal sentences. The old Provincial Divisions had been renamed High Courts and the Appellate Division was now the Supreme Court of Appeal, but their functions remained largely unaltered. In addition, a new Constitutional Court had been created as court of final instance on all matters of constitutional interpretation. It had declared capital and corporal punishment unconstitutional and had intervened in many other aspects of sentencing law. Legislation had also constrained the sentencing discretion of the courts quite radically.

On 31 March 2014 South Africa's prisons were occupied by 148 210 prisoners (of whom 107 696 were sentenced offenders) against an official capacity 117 814, which meant that the prisons were operating at 125 per cent of their official capacity, that is, at a 6 per cent higher rate than in 1994.<sup>18</sup> In 2013 the reported crime rate was the lowest it had been for ten years. The rate of sentenced admissions to prison, having peaked in 2004 at 134 487, has dropped steadily since, and, at 107 696, is only slightly higher than it was in 2013, when, at 104 670, it was at its lowest.<sup>19</sup> Nevertheless, this still represents an increase of 17 per cent since 1994. Importantly, the drop in sentenced admissions to prison does not appear to be a result of a

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<sup>16</sup> This figure those incarcerated in the former Bantustans of Transkei, Bophuthatswana and Venda. See J Mujuzi *Life imprisonment in South Africa: yesterday, today and tomorrow* 22 (2009) *SACJ* 1, 6. When taking into account those incarcerated in the former Bantustans, the number, according to the Constitutional Court in *S v Makwanyane* (supra at para 6), was as much 400. Terblanche makes the point that at that point in South African history, 'the death penalty was still regularly imposed for the most serious crimes.' S Terblanche *Guide to Sentencing in South Africa* (2007) 222.

<sup>17</sup> S Terblanche *Guide to Sentencing in South Africa* (2007) 222.

<sup>18</sup> The average percentage is rather misleading, however, for several prisons are extremely overcrowded. The Inspectorate's 2010/2011 Annual Report indicated that 18 prisons were at between 190 and 250 per cent capacity. See Annual Report of the Office of the Judicial Inspectorate 2010/2011, p 13. The remand detention population, at a stable 30 per cent of the prison population (and thus far below most other African and Middle East countries),<sup>18</sup> is a significant contributing factor to overcrowding.

<sup>19</sup> Statistics sourced from the Department of Correctional Services. See note 3 above. See also J Redpath (2013) *Presentation on Remand Detention in South Africa*, delivered at CSPRI round-table event on 23 May 2013.

decrease in referrals from the South African Police Service to the prosecuting authorities, but instead a reduction in prosecutions on the part of the National Prosecuting Authority.<sup>20</sup> And, with 10 868 prisoners serving sentences of life imprisonment – a stunning 2353 per cent increase since 1995 - sentenced offenders are serving longer sentences than ever before. (The figures in relation to this are set out in Table 1 of the Appendix.) Community sentences and restorative justice, in spite of some new legislation about them, continue to be used only relatively rarely, although caregivers and children are treated more sympathetically than before.

In the sections that follow we seek to provide a more detailed account of key elements in the two snapshots and of the processes that led to the differences in the pictures they present. We begin by focusing on the constitutional changes that followed directly from the change in regime in South Africa, for the Constitution soon assumed extraordinary salience in the wider South African law reform project. Its generally benign influence is contrasted with mandatory minimum sentencing legislation, which was introduced to deal temporarily with a perceived rise in crime rates, but which has become a permanent feature of the South African penal system. Our attention then shifts to failed reforms. These include an attempt to introduce comprehensive sentencing guidelines and more modest initiatives to promote community sanctions, restorative justice and victims' rights. These unsuccessful reforms are contrasted with the successful initiatives to protect caregivers and particularly children from a harsh sentencing regime. In the final section we attempt to draw these images together and discuss briefly the forces that are likely to shape South African sentencing policy in the future.

## **2. The justiciable Bill of Rights**

One prominent change to the South African legal landscape was the Bill of Rights, which was incorporated in both the 'interim' Constitution and, with minor alterations, in the 'final' Constitution<sup>21</sup> that came into effect on 4 February 1997. The Bill of Rights had implications for the imposition of punishment on criminal offenders, both in relation to substantive sentencing law and sentencing decisions themselves.<sup>22</sup> The Bill of Rights' provision on

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<sup>20</sup> See J Redpath (2012) *Failing to prosecute? Assessing the state of the National Prosecuting Authority in South Africa*. Institute for Security Studies Monograph 186.

<sup>21</sup> S. AFR. CONST. 1996.

<sup>22</sup> In *S v Dzukuda and Others; S v Tshilo* 2000 (4) SA 1078 (CC) at para 12 Justice Ackermann J stated:  
[W]hat the right to a fair trial requires, amongst other things, is a procedure which does not prevent any factor which is relevant to the sentencing process and which could have a mitigating effect on the

liberty states, in its current form,<sup>23</sup> that ‘everyone has the right...not to be tortured’ or ‘treated or punished in a cruel, inhuman or degrading way.’<sup>24</sup> It also requires equality before the law, the prohibition of discrimination<sup>25</sup> and that people’s inherent right to dignity be respected.<sup>26</sup> The common law principles of legality and proportionality, although not addressed directly in the Bill of Rights, are nevertheless considered to be conveyed implicitly by the text.<sup>27</sup> These constitutional provisions were tested soon after the Constitutional Court’s establishment with two renowned cases on the constitutionality of two types of sentences.

### *Abolition of the death penalty*

The first hearing of the newly established Constitutional Court was about the death penalty. It came before the Court in 1995, by which time the moratorium on executions had been in effect for almost six years. The impugned provision stated that the sentence of death could be imposed following a conviction for ‘murder, treason committed when the Republic is in a state of war; robbery or attempted robbery if the court finds aggravating circumstances to have been present, kidnapping, child-stealing and rape’.<sup>28</sup> It could not be imposed on offenders under the age of 18.

The first test case, *S v Makwanyane and others*<sup>29</sup> arose from several years of building abolitionist sentiment, rooted in the fight against the apartheid state’s use of the death penalty as a means of ‘controlling and punishing opponents of apartheid’.<sup>30</sup> The number of capital crimes had risen steadily during the, explicitly pro-apartheid National Party’s reign from

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punishment to be imposed, from being considered by the sentencing court. In the present circumstances a fair trial would also have to ensure that, in the process of the sentencing court being put in possession of the factors relevant to sentencing, the accused is not compelled to suffer the infringement of any other element of the fair trial.’

<sup>23</sup> All references below are to the ‘final’ 1996 Constitution unless otherwise indicated.

<sup>24</sup> S. AFR. CONST. 1996 s. 12(1)(d).

<sup>25</sup> S. AFR. CONST. 1996 ss. 9(1) and (3).

<sup>26</sup> S. AFR. CONST. 1996 s. 10.

<sup>27</sup> See *Pharmaceutical Manufacturers Association of SA & another: In re Ex parte President of the Republic of South Africa & others* 2000 (2) SA 674 (CC) and *S v Makwanyane and Another* 1995 (3) SA 391 (CC).

<sup>28</sup> Criminal Procedure Act s. 277(1). Prior to Act 107 of 1990 section 277 mandated a court to impose a sentence of death on a person convicted of murder. Discretion was permitted only if the offender was a woman who had murdered her infant child; was under 18, or could establish that there were extenuating circumstances that ‘a reasonable person would conclude reduced his moral blameworthiness.’ The amendment removed the mandatory requirement and introduced both discretion on the part of the sentencing court and automatic review by the Appellate Decision. See generally Dirk van Zyl Smit *Judicial Discretion and the sentence of death for murder* 99 S. African L.J. 87 (1982).

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<sup>30</sup> Peter N Bouckaert, 32 *Stan. J. Int’l L.* 287 1996, at 291.

1948 onwards.<sup>31</sup> In addition, there was also evidence that racial discrimination was a significant factor when it came to sentencing in capital cases.<sup>32</sup> In 1980 already, the acclaimed critic of South African capital sentencing practices, Prof. Barend van Niekerk,<sup>33</sup> had noted, that since 1910 only three executions had taken place of whites for the rape of children, whereas the figure for blacks was nearing 200.<sup>34</sup> Additionally, during the same time period, not one death penalty sentence had been imposed on a white person for the rape of a black person, whereas ‘the almost 200 executions of blacks seem to have been for the rape of whites.’<sup>35</sup> During the period thereafter, Bouckaert notes:

‘[i]t appears that between 1981 and 1990 alone, approximately 1100 people were executed in South Africa, [t]he previous decade (1971-1980) [having claimed] the lives of 841 people. Between 1978 and 1988, the number of executions fell below 100 per year only once. These numbers placed South Africa near the top of the executing countries of the world. The number of executions per year continued to rise in the late 1980s, reaching a stunning 164 in 1987, the equivalent of almost one execution every two days.’<sup>36</sup>

These figures put South Africa ‘near the top of the executing countries of the world’ at the time.

The Constitution did not expressly prohibit the retention of the death penalty.<sup>37</sup> Thus, the death penalty provisions in the Criminal Procedure Act’ were challenged against the general

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<sup>31</sup>Id.

<sup>32</sup> Id 292-3.

<sup>33</sup> During 1968 and 1969, Prof Van Niekerk had been prosecuted for contempt of court after having published an article in the South African Law Journal criticizing the death penalty in South Africa. See Barend Van Niekerk, Hanged by the neck until you are dead. 87 *S. AFR. L.J.* 60 (19970). The criminal cases were reported as *S v van Niekerk* 1970 (3) SA 655; *S v van Niekerk* 1972 (3) SA 711

<sup>34</sup> Barend van Niekerk ‘Sentencing in a multi-racial and multi-ethnic society’ Address to the Law Reform Conference at Sun City, Bophuthatswana, August 2013, 1980, at 7.

<sup>35</sup> Id.

<sup>36</sup> ID at 293-294. These figures may well have had something to do with the fact that prior to a 1990 amendment section 277(1) of the Criminal Procedure Act mandated a court to impose a sentence of death on a person convicted of murder. Discretion was permitted only if the offender was a woman who had murdered her infant child; was under 18, or could establish that there were extenuating circumstances that ‘a reasonable person would conclude reduced his moral blameworthiness.’ See also Franklin Zimring, Johannes van Vuren and Jan van Rooyen, ‘Selectivity and racial bias in a mandatory death sentence dispensation: a South African case study’ 28 *Comp. & Int’l L. J. S. Afr.* 107 1995.

<sup>37</sup> Marius Pieterse notes the following in RS3, 05-11, ch39-p1:

In South Africa, a similar lack of consensus among the constitutional drafters resulted in the deliberately broad and unqualified formulation of the right in the interim Constitution. The open texture of the provision meant that controversies related to the normative content of the right, and its application to controversial social issues such as the death penalty and abortion, were deferred, and left largely, though not exclusively, to judicial resolution.

rights to life,<sup>38</sup> dignity,<sup>39</sup> equality<sup>40</sup> and the prohibition against cruel and unusual treatment or punishment.<sup>41</sup> All eleven judges wrote separate judgments setting out their respective bases for declaring the death penalty unconstitutional, making it somewhat difficult to determine the ultimate *ratio* of the decision.

All of the judges agreed, however, that the death penalty fell foul of the prohibition on cruel, inhuman or degrading punishment. The President of the Court, Justice Chaskalson, who gave what is regarded as the leading judgment in the case, made it clear that it was the rights to dignity and life - the 'source of all other rights'<sup>42</sup> - that lay at the foundation of an examination of the death penalty against this prohibition. The state, he said, must demonstrate this recognition 'in everything it does...including the way it punishes criminals.'<sup>43</sup> This would mean that offenders cannot be put to death, for to do so would amount to his or her objectification and use as an example for the purpose of deterrence.<sup>44</sup> Such a purpose could never limit justifiably the negation of these foundational rights.<sup>45</sup> Justice Langa echoed this:

The Constitution constrains society to express its condemnation and its justifiable anger in a manner which preserves society's own morality. The State should not make itself guilty of conduct which violates that which it is in the community's interests to nurture. The Constitution, in deference to our humanity and sense of dignity, does not allow us to kill in cold blood in order to deter others from killing. Nor does it allow us to kill criminals simply to get even with them.<sup>46</sup>

Justice Ackermann spoke of the right to equality and the nature of punishment. As South Africa had become a constitutional state, all state action, he found 'must be such that it is capable of being analysed and justified rationally'.<sup>47</sup> Given that it is virtually impossible to avoid elements of arbitrariness in the imposition of punishment, the death penalty must be unconstitutional, for 'the consequences of the death sentence, as a form of punishment, differ

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<sup>38</sup> S. AFR. (Interim) CONST. 1993 s. 9.

<sup>39</sup> S. AFR. (Interim) CONST. 1993 s. 10.

<sup>40</sup> S. AFR. (Interim) CONST. 1993 s. 8.

<sup>41</sup> S. AFR. (Interim) CONST. 1993 s. 11(2)

<sup>42</sup> *Makwanyane* para 144.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at para 45. Justice Chaskalson, at para 141-143, also used dignity to reject the notion that a sentence of life imprisonment and death were essentially the same.

<sup>46</sup> *S v Makwanyane* 1995 (3) SA 391 CC at para 233.

<sup>47</sup> At para 156.

so radically from any other sentence that it does so not only in degree but also in substance from any other form of punishment'.<sup>48</sup>

### *Abolition of corporal punishment*

South African courts had long expressed reservations about corporal punishment and its compatibility with human dignity,<sup>49</sup> but until the coming into effect of the Constitution, had not had the opportunity to strike down such a punishment. In 1994 six boys received sentences that included judicial whipping.<sup>50</sup> Although the whipping aspect of such sentences were ordinarily not reviewable - the whipping usually being administered directly after a pronouncement on sentencing - the presiding magistrate, doubting the constitutionality of judicial whipping, suspended the carrying out of the sentence pending a special review by the Constitutional Court. *S v Williams and Others*<sup>51</sup> came before the Constitutional Court in 1995. The applicants challenged section 294 of the Criminal Procedure Act on the grounds that whippings were contrary to human dignity and were cruel, inhuman or degrading. The Criminal Procedure Act, in addition to permitting 'juvenile whipping,' allowed for the whipping of males between the ages of 21 and 30 years. Both the state and applicants had acknowledged, however, that the whipping of adults was inconsistent with the Constitution.<sup>52</sup>

In its judgment in *Williams*, handed down on the same day as its death penalty decision, the Constitutional Court noted the clear rejection of corporal punishment in international law<sup>53</sup> as well as foreign jurisdictions, most notably those neighbouring South Africa, such as Namibia and Zimbabwe.<sup>54</sup> Justice Langa found, for a unanimous Court, that corporal punishment was an obvious violation of the right to dignity and to be free from cruel and unusual treatment of punishment. He 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

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<sup>48</sup> Justice Ackermann found support for these contentions in United States jurisprudence on the death sentence.

<sup>49</sup> See, for example, *S v Kumalo & others* 1965 (4) SA 565 (N), 574F-H; *S v Motsotsoana* 1986 (3) SA 350 (N); *S v Ndaba & others* 1987 (1) SA 237 (T), 245A-C.

<sup>50</sup> Section 294 of the Criminal Procedure Act stated the following:

<sup>51</sup> 1995 (3) SA 632 (CC).

<sup>52</sup> In this regard, the Constitutional Court noted that '...over the last thirty years at least, South African jurisprudence has been experiencing a growing unanimity in judicial condemnation of corporal punishment for adults.' See for example *S v Myute and Others* and *S v Baby* 1985(2) SA 61 (Ck); *S v Zimo en Andere* 1971(3) SA 337 (T); *S v Seeland* 1982(4) SA 472 (NC) *S v Staggie* 1990(1) SACR 669 (C).

<sup>53</sup> *Williams* supra at para 26-27, 40.

<sup>54</sup> *Williams* supra at paras 31-32.

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.<sup>55</sup>

Justice Langa also rejected 'any culture of authority which legitimates the use of violence . . . [as] inconsistent with the values of the Constitution',<sup>56</sup> thus rejecting too the state's argument that the dignity of juveniles was not necessarily infringed because of whipping's deterrent value and because it provided a convenient and beneficial alternative to other socially more undesirable forms of punishment.

### 3. Key legislative developments of the 1990s

Two notable legislative developments occurred during the latter half of the 1990s. Both of these were important factors in the *increase* in the prison population in South Africa and in both instances the courts, even backed by the Bill of Rights in the Constitution did not, and arguably could not, blunt their impact significantly.

#### *Jurisdiction*

The first of these was the increase in jurisdiction of the magistrates'. In 1998 the sentencing jurisdiction of the district magistrates' courts was increased from one to three years imprisonment, and that of the regional magistrates' courts from ten to 15 years imprisonment, and, in limited circumstances, even to life imprisonment.<sup>57</sup>

The amendment was challenged in the Constitutional Court but only on the basis that an offender in the change-over period had been disadvantaged by it. In *Veldman v DPP*<sup>58</sup> the applicant argued before the Constitutional Court that his right to a fair trial, in particular, his right to 'the benefit of the least severe of the prescribed punishments',<sup>59</sup> had been infringed when he was sentenced to 15 years imprisonment in terms of the jurisdictional amendment, which had come into force after his conviction but prior to sentencing. The Court drew a distinction between 'prescribed' punishments and sentencing jurisdiction.<sup>60</sup> The former, Justice Mokgoro said, amounted to a 'peremptory measure relating to the applicable

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<sup>55</sup> *Williams* supra at para 45.

<sup>56</sup> *Williams* supra at para 52.

<sup>57</sup> See section 92 Magistrates' Courts Act 32 of 1944 and GG 19435 of 30 October 1998 as amended by GN R63 in GG 36111 of 30 January 2013.

<sup>58</sup> 2006 (2) SACR 319 (CC).

<sup>59</sup> S. AFR. CONST. 1996 s. 35(3)(n).

<sup>60</sup> *Veldman* supra at para 21.

punishment for specific crimes'.<sup>61</sup> The latter was simply a discretionary power 'with upper limits'<sup>62</sup> and thus not protected from retrospective application. The accused was nevertheless entitled to the protection 'under a general fair trial right.'<sup>63</sup> Justice Mokgoro went on to find, that the application of the new jurisdictional amendment would expose the accused to a more severe sentence, which, in turn, would undermine the general right to a fair trial and the rule of law.<sup>64</sup> The concurring judgments took a much broader approach to fairness, having foreseen, perhaps, future obstacles that the majority's reasoning had not addressed, such as the real prejudice suffered where the rules governing the outcome of a trial change. In such circumstances, Justice O'Regan found, accused persons had an expectation that the law would not alter and that their decisions concerning the conduct of the trial might be made on the reliance that the law would not alter in a manner which would prejudice them during the course of the trial.<sup>65</sup>

This dispute about the immediate effect of the change should not cloud our insight that this development effectively diminished the indirect statutory restriction regarding the sentencing powers of the lower courts. In reality many more prisoners were now exposed to potentially higher sentences. And indeed the prison population reflected these changes, with a marked spurt, in the period after the increase in the jurisdiction of lower courts, in the number of prisoners serving longer sentences. See Charts 1 and 2 directly below.

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<sup>61</sup> Id.

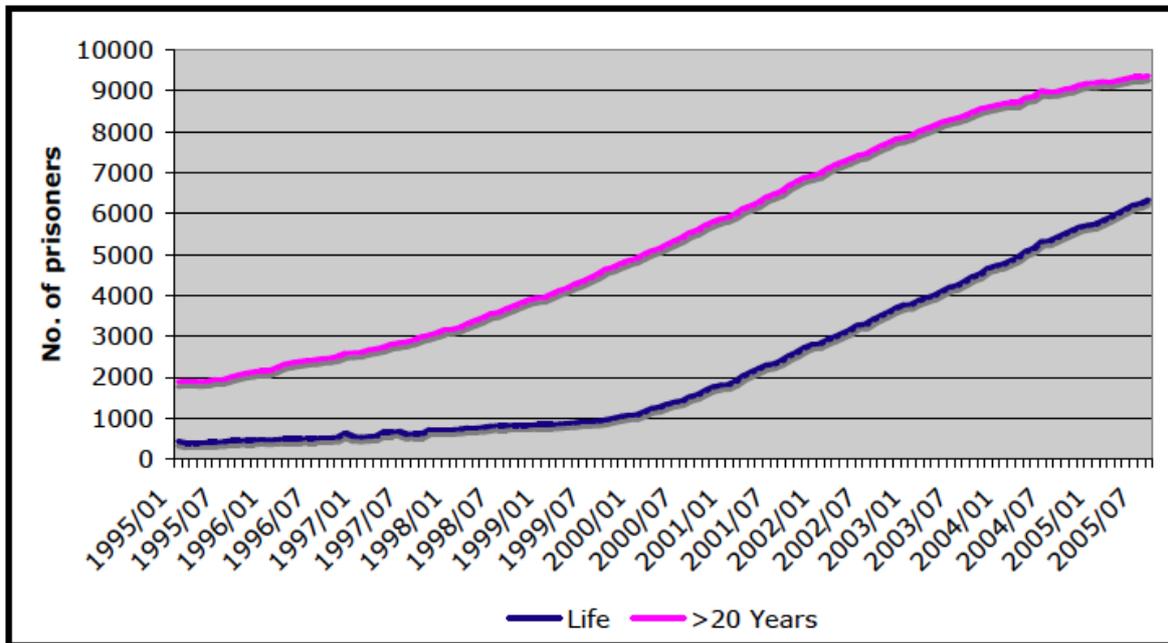
<sup>62</sup> Id.

<sup>63</sup> Veldman *supra* at para 22.

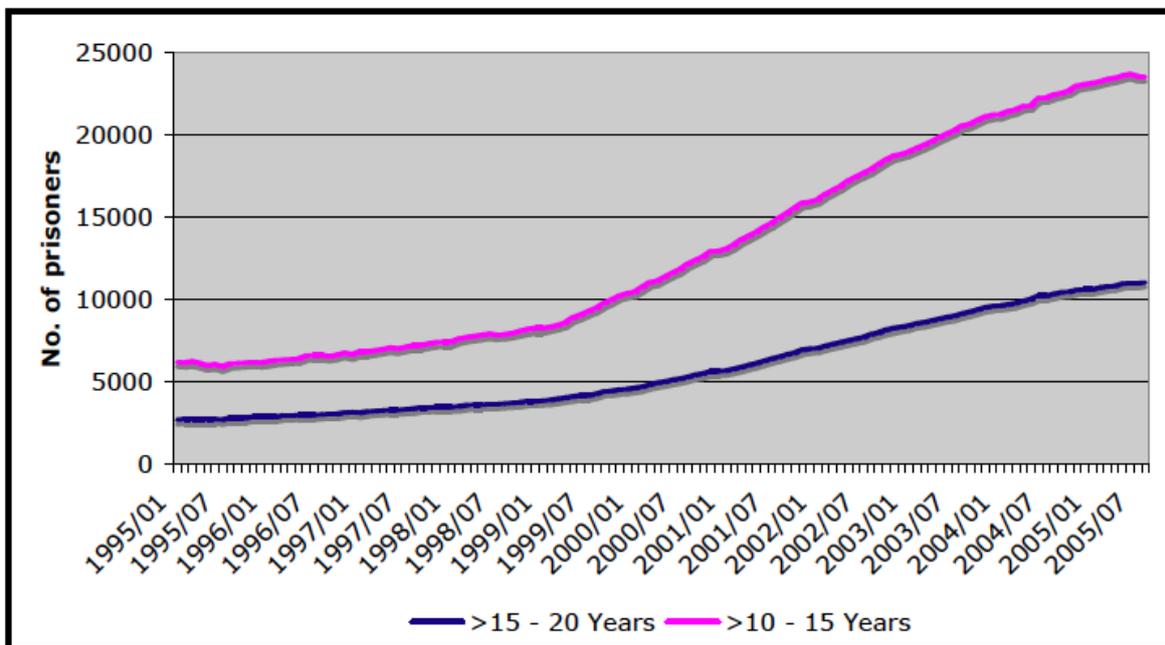
<sup>64</sup> Id at para 37.

<sup>65</sup> O'Regan judgment at para 61.

**Chart 1: Prisoners serving sentences of life and >20 years 1995 - 2005<sup>66</sup>**



**Chart 2: Prisoners serving sentences of >10 - 20 years imprisonment<sup>67</sup>**



1995 - 2005

<sup>66</sup> Chart 1 appeared in Chris Giffard and Lukas Muntingh (2006) 'The effect of sentencing on the size of the South African prison population', Open Society Foundation for South Africa publication, 31. It is documented here with the permission of the authors.

<sup>67</sup> Chart 2 appeared in Chris Giffard and Lukas Muntingh (2006) 'The effect of sentencing on the size of the South African prison population', Open Society Foundation for South Africa publication, 33. It is documented here with the permission of the authors.

### *Criminal Law Amendment Act of 1997*

The second major legislative development was the Criminal Law Amendment Act of 1997 (1997 Act), which introduced mandatory minimum sentences into South African sentencing law on a large scale for the first time.<sup>68</sup> This intervention reduced radically the range of the sentencing discretion of courts in cases involving serious, mostly violent offences and pressed them towards imposing longer terms of imprisonment. Prior to this, courts enjoyed an almost entirely unfettered discretion when it came to sentencing, all the more so as earlier the country had been governed by a sovereign parliament.<sup>69</sup> As Justice Ackermann explained with hindsight:

In order to do justice under a system of parliamentary sovereignty, where the Court [formerly] could not review the constitutionality of a parliamentary statutory provision in the absence of a Bill of Rights, it is not surprising that the Court vigorously asserted its sentencing power, even one which, in its extent, might have gone beyond that considered necessary or appropriate under a constitution such as our present one.<sup>70</sup>

However, prior to the 1997 Act sentencing patterns had already begun to take on a more punitive character. During the course of the 1990s, the levels of reported crime escalated dramatically, leaving the public deeply concerned.<sup>71</sup> The Police Independent Complaints Directorate reported, at that time, that there was a ‘growing, popular perception that constitutional rights for criminals [were] being protected above those of their victims’.<sup>72</sup> The government responded with militarised police force, leading to the arrest of more than

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<sup>68</sup> FOOTNOTE ON FAILED MANDATORY SENTENCING LEGISLATION DURING APARTHEID TO FOLLOW.

<sup>69</sup> See *R v Mapumulo* 1920 AD 56 at 57; *S v Mazibuko* 1978 (4) SA 563 (A) at 570; *S v Pillay* 1977 (4) SA 531 (A) at 534; *S v Rabie* 1975 (4) SA 855 (A) at 875.

<sup>70</sup> *S v Dodo* supra at para 21.

<sup>71</sup> In 1998 the South African Police Service (SAPS) reported crime figures included: 88 319 instances of aggravated robbery, 24 875 murders, 49 754 rapes, 256 434 assaults with intent to inflict grievous bodily harm, and 360 919 burglaries. And it seems that the country’s criminal justice system did little to assuage the perception that the government was failing to respond effectively to the problem. In 2000, only 610 000 of the 2.6 million crimes recorded by the SAPS were referred to the National Prosecuting Authority. Moreover, although the NPA achieved convictions in the majority of cases they prosecuted, this represented only eight per cent of the 2.6 million reported crimes. See Schönteich, M. (2003) Criminal Justice Policy and Human Rights in the New South Africa, *Queensland University of Technology Law and Justice Journal*, 3(2), pp 333-348.

<sup>72</sup> Ibid. Sekhonyane and Louw (2001) discuss in detail the history of South African vigilantism and, in particular, its rise in the post-1994 period as a response to ‘poor delivery of services associated with safety’. Sekhonyane M and Louw A (2002) *Violent Justice, Vigilantism and the State’s Response*, Institute for Security Studies, Monograph 72.

300 000 suspects during 1996 and 1997.<sup>73</sup> Unsurprisingly, the prison population, driven, in part, by the rise in the number of people arrested and detained, increased dramatically, from 120 000 in 1995 to 190 000 in 2002.<sup>74</sup> The sentenced population also contributed to the general growth of the prison population, albeit more incrementally than the remand detainee group, for it is clear that judges were beginning to impose harsher sentences in response to the rise in violent crime,<sup>75</sup> resulting in the growth of the sentenced population through the imposition of longer sentences, as opposed to an increase in prosecutions.<sup>76</sup>

In 1996, the Minister of Justice appointed a committee chaired by Judge van den Heever, under the auspices of the South African Law Commission (SALC), to investigate the ‘desirability of the legislative determination of minimum and maximum sentences’<sup>77</sup> This move was a response to the public’s dissatisfaction with the sentencing regime<sup>78</sup> as the SALC’s final report on the work of the Van den Heever Committee acknowledged:

The public renewed claims for sentences which give expression to the desire for retribution and that concern for the offenders must give way to concern for the

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<sup>73</sup> Matthews I (2000) Government Responses in South Africa: Policy and Implementation (2000), *Crime and Policing in Transitional Societies*, 30 August – 1 September 2000, Jan Smuts House, University of Witwatersrand, Johannesburg.

<sup>74</sup> Ballard C and Subramanian R (2013) Remand Detention and Pretrial Services: a Few Lessons from the Past, *South African Crime Quarterly* No. 44; Matthews I (2000) Government Responses in South Africa: Policy and Implementation (2000), *Crime and Policing in Transitional Societies*, 30 August – 1 September 2000, Jan Smuts House, University of Witwatersrand, Johannesburg. The rise in numbers happened notwithstanding several mass presidential sentence remissions. On 27 April 1995, one year after South Africa’s first open and democratic election, President Mandela announced that there would be a six month remission of sentence for almost all categories of prisoners. The announcement, no doubt motivated in part by extreme prison overcrowding, resulted in the immediate release of approximately 15 000 inmates and the decrease in the prison population from about 117 000 to just over 110 000. See Steve Pete The Politics of Imprisonment in the aftermath of South Africa’s first democratic election. 11 *S. Afr. J. Crim. Just.* 51 1998, at 65. Several more remissions were granted during the course of that year, one of which was a remission for the remainder of the sentences of all women prisoners with children under the age of twelve. Interestingly, a male, single parent challenged the constitutionality of the remission on the grounds of gender (See *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC). In a ground-breaking judgment on the nature of public power, the Constitutional Court held that presidential powers were bound by the Constitution and were thus reviewable. The majority held, however, that the remission had not been discriminatory

<sup>75</sup> See *S v Mhlakaza and Another* 1997 (1) SACR 515 (SCA) and *S v Mashiane en Andere* 1998 (2) SACR 664 (NC).

<sup>76</sup> Chris Giffard and Lukas Muntingh (2006) The effect of sentencing on the size of the South African prison population Report three, Open Society Foundation for South Africa publication, 10-11.

<sup>77</sup> South African Law Commission, Issue Paper 11, Project 82, Sentencing: Mandatory Minimum Sentences, 1.2. 1997.

<sup>78</sup> Sekhonyane M and Louw A (2002) Violent Justice, Vigilantism and the State’s Response, Institute for Security Studies, Monograph 72.

protection of the public. There is also general dissatisfaction with the leniency of sentences imposed by the courts for serious crimes.<sup>79</sup>

The SALC's report lamented the nature of sentencing in South Africa, in particular, its rather haphazard and inconsistent outcomes. The report illustrated the need for reform through its account of the 1977 case of *S v Young*:<sup>80</sup>

[T]wo learned judges gave careful consideration to the same issues, arising out of a set of agreed facts, but arrived at diametrically opposed conclusions. It seems that the nature of our sentencing procedure makes this type of outcome virtually inevitable, because whereas the course of the trial is determined by clearly defined rules of law, the approach to sentence is left largely to chance. What this means - as the present case demonstrates - is that the point of view of the individual sentencer will largely determine his approach to a given set of facts, and there will therefore be as many different approaches as there are different sentencers... This state of affairs is quite understandable, because judges are human beings: each one is a unique product of a unique combination of social, physical, psychological and economic influences, so each will inevitably go his own way in the absence of clearly articulated guidelines; as a consequence, uniformity in sentencing remains unattainable. The problem of uniformity has not yet been approached seriously and scientifically in our law, and until it is it will remain a murky and uncertain, albeit vital, problem.<sup>81</sup>

The SALC's report concluded with a number of 'options for reform'.<sup>82</sup> Interestingly, only one of the Commission's suggestions was 'the enactment of mandatory minimum sentences combined with a discretion to depart from the sentences under certain conditions'.<sup>83</sup> In practice though, Parliament pre-empted the report of the Commission. By the time the report had been finalised and published, draft legislation providing for mandatory minimum sentences that went much further than anything the Commission proposed had already done the rounds in Parliament.

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<sup>79</sup> South African Law Commission, Issue Paper 11, Project 82, Sentencing: Mandatory Minimum Sentences, 1.2. 1997.

<sup>80</sup> *S v Young* 1977 1 SA 602 (A).

<sup>81</sup> *Ibid* at 191.

<sup>82</sup> South African Law Commission, Issue Paper 11, Project 82, Sentencing: Mandatory Minimum Sentences, 1997 at 60.

<sup>83</sup> *Ibid* at 60-62.

On 13 November 1998 the Criminal Law Amendment Act 105 of 1997 (1997 Act) came into force, providing for minimum sentences that ranged from 15 years to life imprisonment for murder, rape and certain narcotics and aggressive offences.<sup>84</sup> The 1997 Act requires that, where applicable, minimum sentences must be imposed unless 'substantial and compelling circumstances exist which justify the imposition of lesser sentences.'<sup>85</sup> In that sense they are not strictly mandatory. Interestingly, the minimum sentencing provisions of the 1997 Act were intended to be a temporary measure only, coming to an end after having been in force for two years. The President was authorised to extend this period, however, by two years at a time, which he did on three occasions. The renewal provision was eventually repealed entirely on 31 December 2007, and the mandatory sentences became a permanent feature of the South African sentencing landscape.<sup>86</sup>

Although there could be no meaningful constitutional complaint regarding the legislature indicating to sentencing courts that certain punishments are required for serious offences,<sup>87</sup> the 1997 Act went further than this. It restricted rigorously the ability of sentencing courts to depart from specified minimum sentences. The 1997 Act's emphasis on aggravating factors, coupled with the fact that it was intended as a temporary measure only, meant that it could never have been intended to have reduced disparity in sentencing. High Courts in various commented on these shortcomings, criticising the failure of the new law to address the question of sentencing disparities,<sup>88</sup> and highlighting the danger that mandatory minimum sentences might compel courts to impose disproportionately severe sentences.<sup>89</sup> High Court decisions also varied widely on their interpretation of the key phrase, 'substantial and compelling circumstances', as the test from departing from the statutory minima. Some read it as having limited sentencing discretion to cases where 'unusual and exceptional' factors were present, others to cases of 'gross disproportionality', while others left the previous sentencing discretion virtually unaffected.<sup>90</sup>

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<sup>84</sup> Section 51(1) read with Part I of Schedule 2 and

<sup>85</sup> Section 51(3)(a).

<sup>86</sup> Criminal Law (Sentencing) Amendment Act 38 of 2007.

<sup>87</sup> Terblance notes that Judges did lament frequently, however, the 1997 Act's erosion of the separation of powers. See for example *S v Budaza* 1999 (2) SACR 491 (E) at 502; *S v Khanjwayo* 1999 (2) SACR 651 (O) at 659*i*; *S v Dlamini* 2000 (2) SACR 266 (T) at 269*c*. Stephan Terblance Aspects of minimum sentence legislation: judicial comment and the courts' jurisdiction 2001 (14) SACJ 1, 2-3.

<sup>88</sup> *S v Zitha* 1999 (2) SACR 404 (W) at 409.

<sup>89</sup> *S v Mofokeng* 1999 (1) SACR 502 (W)

<sup>90</sup> See *S v Mofokeng* 1999 (1) SACR 502 (W) at 523; *S v Blaauw* 1999 (2) SACR 295 (W) at 305; *S v Madondo* (unreported judgment of the NPD, CC22/99, 30 March 1999; *S v Cimani*, unreported judgment of the DCPD,

In 2001 in *S v Malgas*<sup>91</sup> the Supreme Court of Appeal (SCA), the court of final instance in all but constitutional matters, sought to put to rest any concerns regarding the 1997 Act's compatibility with the constitutional principle of proportionality. Purporting to adhere to the principle that legislation be interpreted 'in the light of the values enshrined in the Constitution and [where that would be impossible] interpreted in a manner which respects those values,'<sup>92</sup> Judge Marais, writing for the SCA as a whole, found that where a sentencing court felt an 'injustice' had been done, it would certainly be a result of the prescribed sentence being 'disproportionate to the crime.' This, he said, could be 'characterised' as substantial and compelling reasons to depart from the prescribed minima.<sup>93</sup> Judge Marais equated 'injustice' with both 'substantial and compelling' grounds for departure from the prescribed sentences, as well as 'disproportionality,' resulting, as we have explained more fully elsewhere, in the somewhat tautologous explanation of the legislation.<sup>94</sup> The Court set out its findings without any direct reference to the High Court judgments that had dealt with the issue. In brief, the SCA found that the prescribed sentences should *ordinarily* and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances. However, according to the SCA, this test left sentencing courts with sufficient discretion to ensure that they did not have to impose grossly disproportionate sentences.<sup>95</sup>

The constitutionality of the minimum sentencing provisions of the 1997 Act were further tested in the Constitutional Court case of *S v Dodo*, which concluded that the *Malgas* decision was 'undoubtedly correct'.<sup>96</sup> It did so on the grounds that the 1997 Act made it clear that 'the power of the court to impose a lesser sentence than that prescribed can be exercised well before the disproportionality between the mandated sentence and the nature of the offence

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CC11/99, 28 April 1999. See also Justice Ackerman in *S v Dodo* 2001 (3) SA 382 (CC) at para 10 referring to cases cited in the footnotes therein.

<sup>91</sup> *S v Malgas* 2001 (2) SA 1222 (SCA).

<sup>92</sup> *Ibid* at para 7.

<sup>93</sup> *Ibid* at para 22.

<sup>94</sup> Reference sentencing chapter. See *Malgas* *supra* at para 22:

'What that something more must be it is not possible to express in precise, accurate and all-embracing language. The greater the sense of unease a court feels about the imposition of a prescribed sentence, the greater its anxiety will be that it may be perpetrating an injustice. Once a court reaches the point where unease has hardened into a conviction that an injustice will be done, that can only be because it is satisfied that the circumstances of the particular case render the prescribed sentence unjust or, as some might prefer to put it, disproportionate to the crime, the criminal and the legitimate needs of society. If that is the result of a consideration of the circumstances the court is entitled to characterise them as substantial and compelling and as such to justify the imposition of a lesser sentence.'

<sup>95</sup> *Malgas* *supra* at para 25.

<sup>96</sup> *Dodo* *supra* at para 40.

becomes so great that it can be typified as gross'.<sup>97</sup> Accordingly, an offender's right not to be treated or punished in a cruel, inhuman or degrading way was not infringed, as all that the 1997 Act required was the prohibition of gross disproportionality between the punishment and the crime.<sup>98</sup>

Since *Malgas*, the SCA has developed its position in relation to cases of rape, making it clear that life imprisonment, the most severe of penalties, cannot be imposed simply because the rape falls into a category where the prescribed minimum sentence is life imprisonment.<sup>99</sup> Terblanche notes that because only a small proportion of rapes are in or near the 'worst category', 'the prescribed sentence will ordinarily be departed from'.<sup>100</sup> The inevitable effect, he says, is that the 1997 Act has exacerbated 'disparities and inconsistencies in sentencing'.<sup>101</sup>

Despite the frequent departures from the 1997 Act, the rate at which offenders were sentenced to longer sentences increased once the implementation of the 1997 was underway.<sup>102</sup> See Table 1 in the Appendix.

Parliament remained indifferent to this effect. Indeed some of its pronouncements make one think that it welcomed the longer sentences that were the direct result of this legislation.

#### **4. A failed sentencing law reform process**

Concerns about the sentencing process and its outcomes continued, even before the 1997 Act had been given a chance to take effect. And soon after the completion of the Van den Heever

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<sup>97</sup> Ibid.

<sup>98</sup> Ibid at para 51.

<sup>99</sup> See *S v Mahomotsa* 2002 (2) SACR 435 (SCA) and *S v Abrahams* 2002 (1) SACR 116 (SCA).

<sup>100</sup> S Terblanche 'Mandatory and minimum sentences: Considering s 51 of the Criminal Law Amendment Act 1997' (2003) *Acta Juridica* 194, 215.

<sup>101</sup> Ibid. Redpath and Donovan's research seems to confirm this position. They make the observation that 'judges seem to depart from the mandatory minima 'in the majority of cases'. M O'Donovan and J Redpath (2007) 'Reaching a verdict: the impact of minimum sentencing' 19 *South African Crime Quarterly*, 7, 12. See also Elizabeth Macharia-Mokobi (2011) Defining exceptional extenuating circumstances: statutory omission or judicial opportunity? 24 *S. Afr. J. Crim. Just.* 113.

<sup>102</sup> Ron Paschke and Heather Sherwin analysed quantitative data on sentencing patters for the purposes of the Sentencing Framework Paper. The data indicated that the minimum sentences of the 1997 Act were excessive in relation to the national sentencing practice before the implementation of the Act and the prescribed minimum sentences for murder, rape and robbery with aggravating circumstances were generally in excess of the median sentencing practices in all eight police areas studied. Sentencing Framework, Annexure B at 33.

committee, the SALC established another committee, chaired by Prof. Dirk van Zyl Smit.<sup>103</sup> This committee was tasked with addressing similar concerns to those of the Van den Heever committee: that similar cases were not treated alike, that sentencing courts were not giving sufficient weight to certain serious offences, that restorative justice solutions were under-utilised and that prisoners were being released too readily, thereby diminishing the effect of the sentence itself.<sup>104</sup> The committee released its final discussion paper in 2000, entitled 'Sentencing (A New Sentencing Framework)' (Sentencing Framework paper). The Sentencing Framework paper included a draft Sentencing Framework Bill (the Bill) along with a commentary and empirical data. The Bill establishes a framework for the development of comprehensive sentencing guidelines, a task that would be shared by the Supreme Court of Appeal through so-called 'guideline judgments' and an independent sentencing council.<sup>105</sup> The report and the attached bill were duly tabled in Parliament, but there the matter rested. Indeed, when the 'temporary' mandatory sentences were made mandatory, it became clear that Parliament had no intention to act on the more comprehensive proposals of the Van Zyl Smit Committee.

Why were these proposals allowed to die? A simple reason would be that politicians were determined to maintain a 'tough on crime' line and would therefore not wish to be associated with a proposal that was designed to reduce the overall prison population. However there was an important contributing factor. Although some judges favoured the proposals of the SALC<sup>106</sup> and were prepared to say so publicly, many remained suspicious of any proposal that would (further) limit their sentencing discretion. This was true even of some 'liberal' judges, who still saw their unfettered sentencing discretion as a brake on possible State abuse of power.<sup>107</sup>

## 5. Other failed changes

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<sup>103</sup> South African Law Reform Commission, Sentencing (A New Sentencing Framework), Discussion Paper 91 (Project 82).

<sup>104</sup> Ibid at 1.

<sup>105</sup> Ibid at 42.

<sup>106</sup> In 2006 Judge Conradie of the SCA stated broad sentencing guidelines were indeed 'desirable.' Moreover, they could be adjusted gradually so that offenders would know what to expect: *S v Gerber* 2006 (1) SACR 618 (SCA) at para 11

<sup>107</sup> . See generally SS Terblanche (2003) Sentencing Guidelines for South Africa: Lessons from Elsewhere 120 S. African L.J. 858; Bill Dixon (2001) From Cafeteria to A la Carte The Law Commission's New Sentencing Framework 14 S. Afr. J. Crim. Just. 168.

The legislation of the late 1990s and the failure of comprehensive sentencing reform can be seen as the defining moments in the development of the South African sentencing system. However it is not the complete story. Various other reform initiatives have taken place both before and after this period. They cut across the simple linear account given above. This section discusses those that have not succeeded, while the next section focuses on those that, seemingly against the odds, have succeeded.

### *Correctional Supervision.*

The attempts to introduce community sanctions were a liberal initiative that preceded the new Constitutional order. Correctional Supervision was formally established as a sentencing option in 1991 through the Correctional Services and Supervision Matters Amendment Act.<sup>108</sup> The Act also established the Department of Correctional Services as the primary state organ responsible for the implementation of such sentences, which meant it was up to the courts to develop further the use of correctional supervision as a viable sentencing option.<sup>109</sup> The response of the courts to such sentences was varied, however. The first judgment to be handed down after the 1991 Act came into force embraced enthusiastically the idea of correctional supervision. In the SCA Judge Kriegler in *S v R*<sup>110</sup> stated:

'the legislature has unequivocally indicated by the shift of emphasis which is apparent from the amending Act as a whole, that punishment, reformatory but if necessary highly punitive, is not necessarily or even primarily to be achieved by incarceration.'<sup>111</sup>

But as the body of relevant case law grew over the years, so too did the SCA's response to correctional supervision become more cynical, with frequent findings that a sentence like

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<sup>108</sup> 122 of 1991. Prior to this Act the courts had had the option of imposing sentences similar to correctional supervision by suspended sentence of imprisonment subject to the fulfillment of conditions, such as community service etc. Terblanche notes that such sentences were 'not a practical option' for courts since sentencing courts were required to source the suitable agencies - frequently experienced ones - to enforce them. See Stephan Terblanche *Guide to Sentencing in South Africa*, Second edition, 279. Act 122 was the result of the work of the Interdepartmental Working Group on Overcrowding of Prisons, appointed by the Minister of Justice during the late 1980s, for the purposes of researching correctional supervision as a sentencing option. Terblanche supra at 279.

<sup>109</sup> Act 122 of 1991 amended the 1959 Act so as to include the chapter, Correctional Supervision, comprising ss 84, 84A, 84B, 84C, 84D and 84E. See also Terblanche supra at 279.

<sup>110</sup> 1993(1) SACR 209 (A). See also *S v D* 1995 (1) SACR 259 (A)

<sup>111</sup> Ibid at 488. The English version of the quote was set out by Nicholas AJA in *S v D* 1995 (1) SACR 259 (A) at 265.

correctional supervision was simply inappropriate when it came to serious crimes.<sup>112</sup> The decisions of the SCA on correctional matters depended largely on which members of the bench happened to be hearing a particular matter.<sup>113</sup>

In 2004, when the 1998 Correctional Services Act came into force, a new section concerning 'community corrections' - the new term used to describe all forms of sentences served within the community - was introduced. Section 52 expanded correctional supervision significantly, providing the court or responsible officials with a wider range of options to impose as conditions, with additional conditions being added through legislative amendments over the years.<sup>114</sup> Despite the legislative expansion, the courts' use of correctional supervision did not increase in any meaningful way. Perhaps, as the dictum from Judge Mthinyane the Deputy President of the SCA in *KwaZulu-Natal v P*<sup>115</sup> suggests, the initial intention behind the introduction of correctional supervision has been lost:

'[w]hen correctional supervision was introduced, courts embraced it enthusiastically as a real sentencing option, something that will have a substantial effect on the prison

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<sup>112</sup> See for example *S v Maritz* 1996 (1) SACR 405 (A); *S v Sinden* 1995 (2) SACR 704 (A); *S v S* 1995 (1) SACR 267 (A).

<sup>113</sup> Terblanche supra at 280.

<sup>114</sup> Section 52 of the 1998 Act currently reads:

When community corrections are ordered, a court, the Correctional Supervision and Parole Board, the National Commissioner or other body which has the statutory authority to do so, may, subject to the limitations contemplated in subsection (2) and the qualifications of this Chapter, stipulate that the person concerned-

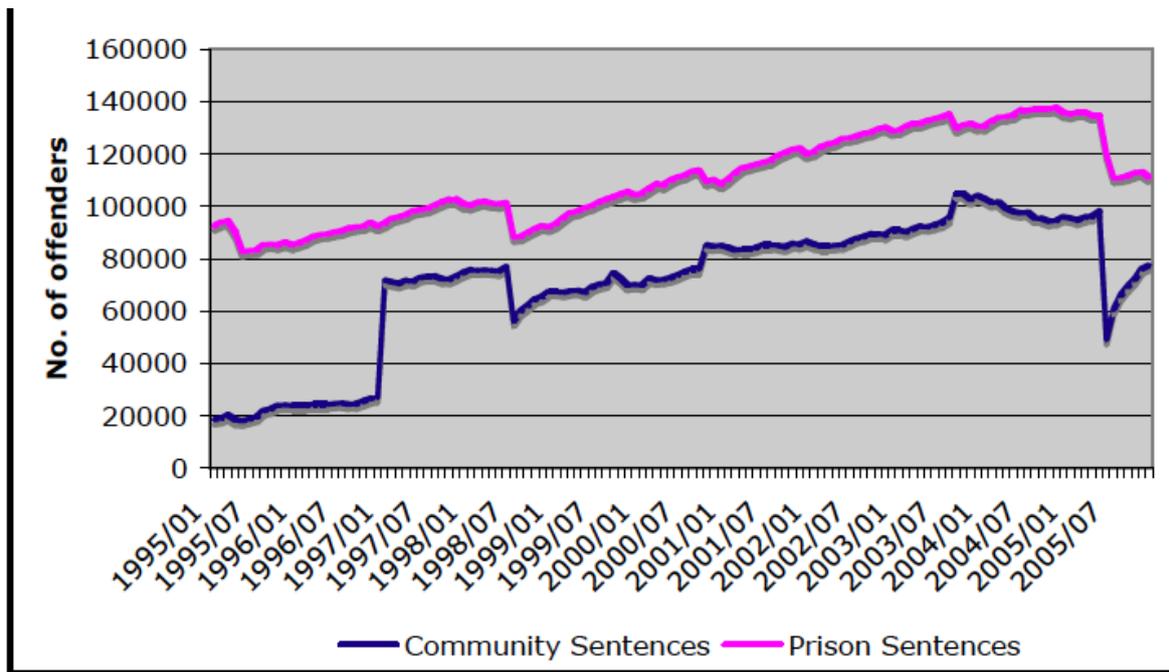
- a) is placed under house detention;
- b) does community service in order to facilitate restoration of the relationship between the sentenced offenders and the community;
- c) seeks employment;
- d) where possible takes up and remains in employment;
- e) pays compensation or damages to victims;
- f) takes part in treatment, development and support programmes;
- g) participates in mediation between victim and offender or in family group conferencing;
- h) contributes financially towards the cost of the community corrections to which he or she has been subjected;
- i) is restricted to one or more magisterial districts;
- j) lives at a fixed address;
- k) refrains from using alcohol or illegal drugs;
- l) refrains from committing a criminal offence;
- m) refrains from visiting a particular place;
- n) refrains from making contact with a particular person or persons;
- o) refrains from threatening a particular person or persons by word or action;
- p) is subject to monitoring;
- q) in the case of a child, is subject to the additional conditions as contained in section 69; or
- r) is subject to such other conditions as may be appropriate in the circumstances.

<sup>115</sup> 2006 (1) SACR 243 (SCA).

population in this country. As time went on courts became more sceptical but I am now completely disillusioned.'<sup>116</sup>

The statistics (depicted in Chart 4 directly below) reflect this disillusionment, for correctional supervision has not really taken root to the extent that its proponents had hoped.

**Chart 4: Offenders undergoing court imposed correctional supervision 1995 - 2005<sup>117</sup>**



*Life imprisonment*

The place of life imprisonment in the sentencing system, unlike the place of correctional supervision, is almost entirely an issue that emerged post-1994, as before it had been imposed only rarely. The *Makwanyane* judgment of the Constitutional Court had a direct impact on the rise of life sentences, for it included the requirement that all persons in prison as a result of having been sentenced to death would remain so until 'such sentences had been set aside and substituted by lawful punishments'.<sup>118</sup> It was thus not a retrospective order of invalidity. Two years later the Criminal Law Amendment Act 105 of 1997 was passed. One objective of

<sup>116</sup> Ibid at para 52.

<sup>117</sup> Chart 3 appeared in Chris Giffard and Lukas Muntingh (2006) 'The effect of sentencing on the size of the South African prison population', Open Society Foundation for South Africa publication, 2006, 47. It is documented here with the permission of the authors.

<sup>118</sup> *Makwanyane* at para 151.

the 1997 Act was to provide for the setting aside of all sentences of death and their substitution by lawful punishments. The Minister of Justice was required to refer the case of every person who had been sentenced to death and exhausted all appeal and review procedures to the court in which the sentence of death was imposed.<sup>119</sup> The court was required to consider arguments and evidence from the prisoner before converting the sentence.<sup>120</sup> Those that were in the process of appealing their sentence to the SCA were redirected by the 1997 Act to a hearing before a full high court in the division from which the appeal was initially noted.<sup>121</sup>

After the death penalty was declared to be unconstitutional, life imprisonment became the most severe sentence available to sentencing courts.<sup>122</sup> Initially, judicial dicta associated with the meaning of life imprisonment emphasised a literal interpretation: the remainder of the offender's natural life.<sup>123</sup> In the SCA matter of *S v T*,<sup>124</sup> for example, Judge Streicher described the trial court's sense of 'comfort' that the appellant might be released on parole in terms of legislation as a significant 'misdirection':<sup>125</sup>

A sentence of life imprisonment authorises the State to keep the person sentenced in prison for the rest of his life. Unless this result is considered to be appropriate, life imprisonment is not appropriate and should not be imposed. The fact that the Judge

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<sup>119</sup> Section 1(1) of the 1997 Act.

<sup>120</sup> Ibid.

<sup>121</sup> Sections 1(5)-(7) of the 1997 Act. ON the procedures to be followed, see *Sibiya and Others v The Director of Public Prosecutions and Others* 2005 (5) SA 315 (CC).

<sup>122</sup> In *S v Martin* 1996 (2) 378 (W) at 385 Deputy Judge President Fleming stated:

[T]here is also an aspect of cruelty to a life sentence. A casual reaction to a comparison with the death penalty may be that detention for the duration of a person's life seems less drastic. It is also less irreversible. But those are qualities which linger only with the observer who does not die. The person who was put to death has a different vantage point. Death brings a supervening unawareness both of the drastic impact and of all injustices, unfairness and other blemishes of this world. But the man who is incarcerated for life does not have a curtain drawn on awareness. There is no dividing date which ends his subjective suffering and renders him unaware of the past, or of the futility of the future. What he is subjected to is an unending punishment, day after day. It is life without future hope, coupled with a permanence of suffering. It is extremely unpleasant while it lasts - which is interminable.

<sup>123</sup> *S v Mdau* 1991 (1) SA 169 (A); *S v Oosthuizen* 1991 (2) SACR 298 (A), 302A; *S v W* 1993 (2) SACR 74 (A); *S v Mehlape en andere* 1993 (2) SACR 180 (T), 183H. Although its constitutionality has never been challenged directly, Justice Ackerman in the *Makwanyane* judgment raised the issue of his own accord:

I do not believe that the two issues [of life imprisonment and the death penalty] can be kept in watertight separate juristic compartments. If the death penalty is to be abolished, as I believe it must, society is entitled to the assurance that the state will protect it from further harm from the convicted unreformed recidivist killer or rapist. If there is an individual right not to be put to death by the criminal justice system there is a correlative obligation on the state, through the criminal justice system, to protect society from once again being harmed by the unreformed recidivist killer or rapist. The right and the obligation are inseparably part of the same constitutional state compact.

<sup>124</sup> 1997 (1) SACR 496 (SCA).

<sup>125</sup> Ibid at 498.

sought comfort in the fact that the appellant could in future be released... is in my view an indication that she thought that life imprisonment could prove not to have been the appropriate punishment.<sup>126</sup>

Importantly, however, the courts have since made it clear that it is the possibility of parole that saved a sentence of life imprisonment from being cruel, inhuman and degrading punishment”.<sup>127</sup> Accordingly, any efforts on the part of the courts to circumvent legislative parole determinations through the imposition of extremely long sentences would be unlawful.<sup>128</sup> In *S v De Kock*,<sup>129</sup> Judge Van der Merwe, having considered the available South African case law on life imprisonment, noted that additional guidance was needed in order to understand fully the meaning of life-imprisonment, particularly since the abolition of the death penalty.<sup>130</sup> Looking to Namibia, he cited with approval the case of *S v Tcoelib*<sup>131</sup>. In that matter Chief Justice Mohamed found that a decision on whether to impose a sentence of life imprisonment must be made on the basis that it was not a sentence that left the offender without a prospect of release. Chief Justice Mohamed had 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'.<sup>132</sup>

In *De Kock* Judge Van der Merwe found that an expectation of release was inherent in the provisions of the Correctional Services Act.<sup>133</sup> It was thus not a sentence that could be

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<sup>126</sup> Ibid.

<sup>127</sup> *S v Bull* 2001 (2) SACR 681 (SCA) at para 23.

<sup>128</sup> *S v Nkosi and Others* 2003 (1) SACR 91 (SCA) para 9. See also *S v Silvale* 1999 (2) SACR 102 (SCA).

<sup>129</sup> *S v De Kock* 1997 (2) SACR 171 (T) (*'De Kock'*). This case is a memorable one for South Africans. The offender, Eugene de Kock, is a former police colonel who was active under the Apartheid government during the 1980s and early 90s. In October 1996 he was convicted of 89 various charges connected with apartheid atrocities and sentenced to 212 years imprisonment, to run concurrently.

<sup>130</sup> Ibid at 204-211.

<sup>131</sup> *S v Tcoelib* 1996 (1) SACR 390 (NmS)

<sup>132</sup> Ibid at 398b.

<sup>133</sup> See *De Kock* (supra) at 211h. See also *S v Smith* 1996 (1) SACR 250 (E), 225b–256a. The Correctional Services Act 8 of 1959 had different parole procedures for persons sentenced to life imprisonment and offenders sentenced to determinate periods of imprisonment. For those serving life sentences minimum periods of imprisonment were governed by ministerial policy, and these periods varied. Between 1987 and 1994, an offender who had served ten years of imprisonment could be considered for parole, but absent “exceptional circumstances,” could only be released after having served 15 years imprisonment. In March 1994, the minimum period was increased to 20 years. The 1998 Act requires that an offender serve half of his or her sentence before being eligible for parole, and 25 years if sentenced to life imprisonment. Prior to the Correctional Matters Amendment Act 5 of 2011, which came into force on 1 March 2012, the 1998 Act required that those sentenced under the 1997 Act were required to serve four

equated with the sentence of death.<sup>134</sup> 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 that might come to the fore in the future.<sup>135</sup> If this did not happen, the courts could be asked to intervene.<sup>136</sup> He made the point, however, that life imprisonment, the ultimate deterrent, would be an appropriate sentence if the objective was to protect society effectively from a particular offender. It was thus an unsuitable alternative to the death penalty.

The 1997 Act introduced 'mandatory' life sentences for crimes that may not necessarily be the most serious, and, as with other mandatory sentences, the rate at which life sentences were imposed increased (See graph above).<sup>137</sup> Since its introduction, however, the SCA has, on several occasions, been at pains to make it clear that life imprisonment remains the ultimate penalty.<sup>138</sup> In *S v Vilakazi*,<sup>139</sup> Judge Nugent said:

It is plain from the determinative test laid down by *Malgas*... and consistent with what was said by the Constitutional Court in *Dodo*, that a prescribed sentence cannot be assumed a priori to be proportionate in a particular case. It cannot even be assumed a priori that the sentence is constitutionally permitted. When the prescribed sentence is indeed proportionate, and thus capable of being imposed, is a matter to be determined upon a consideration of the circumstances of the particular case.... For the essence of *Malgas* and of *Dodo* is that disproportionate sentences are not to be imposed and that courts are not vehicles for injustice.'

More recently there has been a noticeable tendency on the part of High Courts to avoid having to impose sentences of life imprisonment simply as a matter of course. In 2010 in *S v Sangweni*,<sup>140</sup> Judge Steyn revisited the earlier SCA cases dealing with life imprisonment. She also drew attention to the 2000 SALC report, noting the following passage:

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fifths of the sentence before being eligible for release. The amendment also reduced the 25 years requirement to 20 years.

<sup>134</sup> Ibid at 397b. The Court found that Judge Levy in *S v Nehemia Tjiro* (Unreported decision of 4 September 1991) had been wrong to equate the two.

<sup>135</sup> See *De Kock* (supra) at 211h.

<sup>136</sup> Ibid.

<sup>137</sup> See Mujizi supra at 22-3. See also *S v Schoeman* 1995 (1) SACR 423 (T) at 428 where Judge Van der Walt suggested that circumstances had changed since the declaration of the death penalty was unconstitutional. Long terms of imprisonment were no longer reserved for exceptional cases.

<sup>138</sup> See *S v Nkosi* 2003 (1) SACR 91 (SCA) para 7; *S v Thebus* 2002 (2) SACR 566 (SCA); *S v Van Loggenberg* 2012 (1) SACR 462 (GSJ);

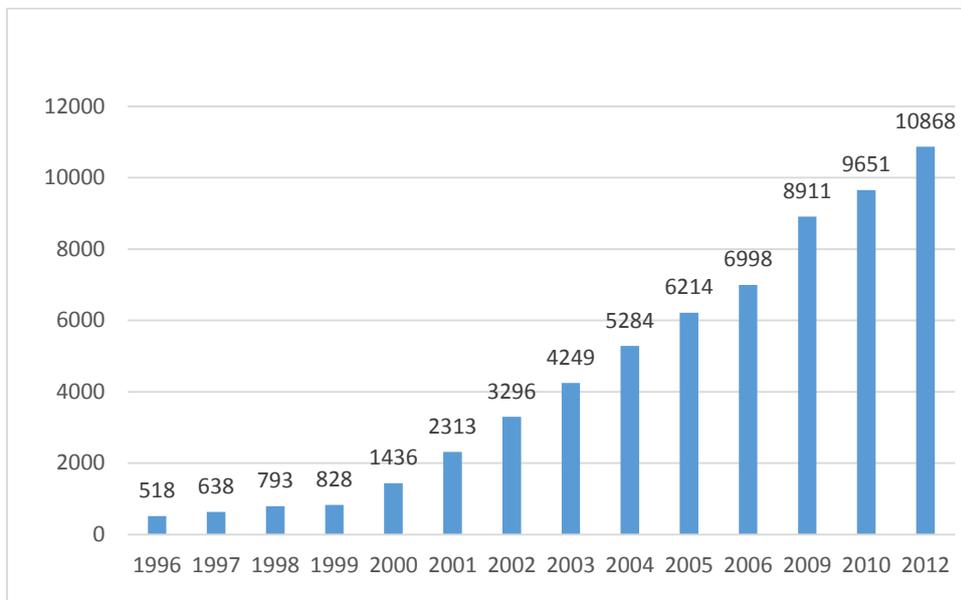
<sup>139</sup> 2009 (1) SACR 552 (SCA), at 562. See also *S v Mahomotsa* 2002 (2) SACR 435 (SCA); *Rammoko v Director of Public Prosecutions* 2003 (1) SACR 200 (SCA); *S v Nkomo* 2007 (2) SACR 198 (SCA).

<sup>140</sup> 2010 (1) SACR 419 (KZP).

Since the abolition of the death penalty life imprisonment is the most severe sentence that the courts can impose... The question is when is this option appropriate? It is clear though, that the crime has to be very serious and that mitigating factors should have little effect on the blameworthiness of the offender.<sup>141</sup>

All these judicial attempts to place restrictions on the use of life imprisonment have had little effect on reducing its use, which, as the statistics show, has soared. Allowing regional magistrates' courts to impose life sentences has certainly contributed to this phenomenon. See Chart 3 directly below:

**Chart 3: Persons serving sentences of life imprisonment<sup>142</sup>**



### *Restorative Justice*

There are fairly obvious similarities between indigenous South African methods of dispute resolution and what is formally understood as restorative justice, which has made it particularly attractive to penal reformers.<sup>143</sup> In 2006 Justice Mokgoro of the Constitutional

<sup>141</sup> Id at para 7.

<sup>142</sup> Statistics are sourced from the 2006/2007 Annual Report of the Judicial Inspectorate for Correctional Services.

<sup>143</sup> B Tshela The restorative justice bug bites the South African criminal justice system (2004) *SACJ* 1, at 13. See generally Ann Skelton Tapping indigenous knowledge: traditional conflict resolution, restorative justice and the denunciation of crime in South Africa 2007 (1) *Acta Juridica* 228 (2007), 228-246.

Court made the important link between the constitutional values of dignity and the traditional notion of *Ubuntu*.<sup>144</sup>

‘In our constitutional democracy the basic constitutional value of human dignity relates closely to *ubuntu or botho*, an idea based on deep respect for the humanity of another. Traditional law and culture have long considered one of the principal objectives of the law to be the restoration of harmonious human and social relationships where they have been ruptured by an infraction of community norms. It should be a goal of our law to emphasise, in cases of compensation for defamation, the re-establishment of harmony in the relationship between the parties, rather than to enlarge the hole in the defendant’s pocket, something more likely to increase acrimony, push the parties apart and even cause the defendant financial ruin.’<sup>145</sup>

The formal justice system took longer than most other Western nations, however, to recognise the value of restorative methods, possibly because of its general exclusion from global developments during apartheid. In the 2008 case of *S v Maluleke* Judge Bertelsmann could still describe restorative justice in South Africa as being ‘in its infancy’.<sup>146</sup>

Nevertheless, certain developments had begun to emerge during the mid-1990s when the issue of victim empowerment gained recognition and support amongst civil society organisations, academics and even the South African Police Service. This led to the publication of the SALC’s issue paper, ‘Sentencing restorative justice (Compensation for victims of crime and victim empowerment)’ (Restorative Justice Paper). The Restorative Justice Paper considered, amongst other things, the establishment of compensation and restitution funds for victims of crime and, drawing heavily on the experience of foreign jurisdictions like Canada and Australia, examined the various types of restorative justice

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<sup>144</sup> *Dikoko v Mokhatla* 2006 (6) SA 235 (CC).

<sup>145</sup> Id at para 68. More recently the law of delict has featured the use of an apology in the resolution of delictual matter. The guidelines implicit in these judgments may be of use in criminal cases. In two subsequent cases, *Le Roux and Others v Dey* 2011 (3) SA 274 (CC) at para. 197 and *The Citizen 1978 (Pty) Ltd and Others v McBride* 2011 (4) SA 191 (CC), the Court again considered the value of restorative justice, in particular, an apology, in relation to remedies for defamation. It noted that the common law, in recognising monetary awards only as remedial damages, did very little to remedy the hurt feelings and reputation of the applicant. In addition, the *McBride* decision made it clear the Court would be likely to consider an apology inappropriate in circumstances where it was unwanted or insincere. Justice Cameron writing for the majority of the Court, considered the applicants arguments against the ordering of an apology as reason enough to refrain from such an order (at para 194). The applicant’s argument, in part, was that, firstly, an apology was not a remedy fwhich the applicant had, at any stage, requested from the defendant. Secondly, given that the defendant was a media house, it would serve no useful purpose since there was no personal relationship to restore. Thirdly, the defendants had never exhibited any remorse and an apology would thus be ‘hollow’ (para 133).

<sup>146</sup> 2008 (1) SACR 49 (T) at para 31.

interventions that could be incorporated into the South African penal structure.<sup>147</sup> Such methods have never been incorporated into any legislation (with the exception of the Child Justice Act, discussed below). Rather, it was the courts that forged the way for the growth of restorative justice.

Although courts had long been empowered to order compensation and restitution,<sup>148</sup> since the coming into effect of the Correctional Services Act 111 of 1998 Act (the 1998 Act) in 2004, sentencing courts were authorised to impose a variety of conditions to such sentences, including, for example, an order to participate in mediation with the victim, or a family group conference.<sup>149</sup> Since a 2008 amendment to the 1998 Act, a sentencing court may impose any consideration thought to be 'appropriate'.<sup>150</sup> Thus, more recently, sentencing courts have appeared willing to impose restorative type conditions on suspended sentences and correctional supervision.

The 2008 judgment in *S v Shilubana*<sup>151</sup> was perhaps the first reported case to refer specifically to restorative justice. The accused had been convicted of stealing seven chickens and sentenced to nine months imprisonment by the trial court. Judge Bosielo of the High Court noted on appeal that the complainant would most likely have been more appreciative of a sentence of compensation.<sup>152</sup> In the same year, in *S v Maluleke*<sup>153</sup>, the sentencing court took into account a particular 'custom,' (relevant to both the offender and victim's family) in which an elder of an offender's family apologises to the victim and his or her family and community. According to the court, this created the opportunity to introduce the principles of restorative justice into the sentencing process.<sup>154</sup> It thus suspended an eight year sentence on condition that the accused apologise to the mother and family of the deceased.

Although restorative justice interventions are generally well received, they appear to occur only haphazardly. Moreover, they are usually introduced into the sentencing process only

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<sup>147</sup> Such 'interventions' included victim-offender mediation, family group conferencing, circle sentencing and community youth conferences. See Issue Paper 7, 18-21.

<sup>148</sup> Section 300 of the Criminal Procedure Act 51 of 1977.

<sup>149</sup> Section 52(e)-(g).

<sup>150</sup> Correctional Matters Amendment Act 25 of 2008, which came into force on 1 October 2009.

<sup>151</sup> 2008 (1) SACR 295 (T).

<sup>152</sup> *Ibid* at para 4.

<sup>153</sup> 2008 (1) SACR 49 (T)

<sup>154</sup> *Ibid* at para 24.

after it has been decided that a custodial option would be inappropriate.<sup>155</sup> In addition, there is very little legislative or policy guidance on what type of restorative justice sentences would be effective for particular purposes. The case of *Director of Public Prosecutions v Thabethe*<sup>156</sup> illustrates this point well. The SCA considered whether a wholly suspended sentence imposed by the High Court<sup>157</sup> - a radical departure from the required minimum sentencing legislation - for the offence of rape was appropriate. The 'extraordinary facts' of the case, Judge Bertelsmann said, had presented a case for which 'restorative justice provide[d] a just and appropriate sentence'.<sup>158</sup> The complainant, a 15 year old girl, was raped by her stepfather. The Court, having heard from the complainant that she was no longer afraid of the offender and did not want him to go to prison, referred the matter to a family conference, the results of which confirmed the complainant's testimony.<sup>159</sup> Judge Bertelsmann stated:

If restorative justice is to be recognized in South Africa – and in the light of the serious challenges faced by our country's criminal justice system and the perennial overcrowding of our correctional institutions there can be little doubt that its application and integration into our law is essential – then it must find application not only in respect of minor offences, but also, in appropriate circumstances, in suitable matters of a grave nature.<sup>160</sup>

The SCA, although generally welcoming of the clear trend towards the courts' acceptance of restorative justice, described the High Court's sentence as an 'ill-considered application' of it, likely to 'debase it and make it lose credibility as a viable sentencing option'.<sup>161</sup> The Court

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<sup>155</sup> See S Terblanche (2007) *Guide to Sentencing in South Africa* at 177.

<sup>156</sup> 2011 (2) SACR 567 (SCA).

<sup>157</sup> Reported as *S v Thabethe* 2009 (2) SACR 62 (T)

<sup>158</sup> Supra at para 40. The 'compelling facts,' according to Bertelsmann J, in addition to the offender being a good candidate for rehabilitation, genuinely remorseful and apologetic, included the following: he was in a relationship with the victim's mother, who, along with the victim and other children in the family, were financially dependent on him; he was employed and both willing and able to financially support them; the victim was aware that it was not in the family's interest that he be incarcerated; he and the victim had successfully participated in a victim/offender program; and it was also 'not in the interests of society to create secondary victims by the imposition of punishment upon the accused that would leave at least five indigent person dependent upon social grants'.<sup>158</sup>

<sup>159</sup> *S v Thabethe* 2009 (2) SACR 62 (T) at para 33.

<sup>160</sup> *Ibid* at para39.

<sup>161</sup> SCA judgment supra at para 20. See also *S v Saayman* 2008 (1) SACR 393 (E). The magistrate in this matter sentenced an accused convicted of numerous counts of fraud to a two year suspended sentence of imprisonment on a number of conditions, one of which required that the offender stand in the foyer of the Commercial Crimes Court for 15 minutes, on a certain day, holding a sign that conveyed her guilt and apologising to the victims. On review, the High Court found that this exposed the offender to ridicule and shaming in a manner that violated her right not to be treated or punished in a cruel, inhuman or degrading way. Moreover, the humiliation she would suffer offended her dignity, a value "integral to restorative justice".

also found that a sentence of that nature had failed to reflect adequately society's 'natural outrage and revulsion' at the crime of rape.<sup>162</sup> Skelton and Miller also make the interesting point that the SCA, aware of the country's extremely high rate of violent crime against women and children, was probably 'discomfited by the possible power imbalance inherent in a restorative justice process that involved a girl who was, together with her family, financially dependent on her stepfather'.<sup>163</sup>

All the debate and judicial activity around restorative justice in South Africa has had very little impact on sentencing in South Africa. Rather, restorative justice, in relation to adults, appears to be rarely implemented at the sentencing stage.

### *The rights of victims*

South African legislation, the Constitution included but with the exception of the Child Justice Act, does not make specific mention of the rights of victims of crime at the sentencing stage of criminal proceedings, despite the attention it has received from the SALC over the years in various discussions.<sup>164</sup> The Restorative Justice Paper, for example, considered in detail the need for legislation dealing with victim services generally, including the use of impact statements at the sentencing stage of criminal proceedings.<sup>165</sup> The Sentencing Framework paper also included a section regulating their use as evidence during sentencing in the Bill<sup>166</sup>. In 2004 the Service Charter for Victims of Crime, developed by the Department of Justice, was approved by Cabinet. A persuasive policy document at best, the Charter states that a victim may convey information on the effects of the offence to a probation officer, who must then compile a report on the effects of the offence on the victim prior to sentencing.<sup>167</sup> It is thus altogether silent on the victim's view on sentencing, however.

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<sup>162</sup> *Thabete SCA* at para 20.

<sup>163</sup> Ann Skelton and Annette Miller (2014) *Oxford Journal of Legal Studies* (forthcoming), awaiting page reference etc. from authors.

<sup>164</sup> It was victims themselves, dissatisfied with their neglected position in the criminal justice system, who ultimately succeeded in getting their concerns on the SALC's agenda. See generally Karen Müller and Annette van der Merwe (2006) 'Recognising the Victim in the Sentencing Phase: The Use of Victim Impact Statements in Court' *SAJHR* 647

<sup>165</sup> Issue Paper 7, at 38: "The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by. ... [a]llowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system."

<sup>166</sup> Sentencing Framework Paper at 117-119.

<sup>167</sup> See paragraph 20 of *Service Charter for Victims of Crime in South Africa* (2004) Department of Justice and Constitutional Development (approved by Cabinet on 2 December 2004):

"Before sentence is passed, the presiding officer, the prosecutor or the defence may request that a probation officer or any other expert prepare a report on you or the accused. The report may include an

Despite their being a dearth of legislative guidance on victims' rights courts have accepted the use of victim impact statements in the sentencing process. The lack of any regulation, however, means that the practice is implemented haphazardly.<sup>168</sup> It also means that courts have had to grapple with determining the weight to give to a victim's opinion in relation to sentencing, the High Court *Thabethe* matter being a case in point. Judge Bosielo in *Thabethe* (SCA) stated:

A controversial if not intractable question remains: do the views of the victim of a crime have a role to play in the determination of an appropriate sentence? If so what weight is to be attached thereto? That the victim's voice deserves to be heard admits of no doubt. After all it is the victim who bears the real brunt of the offence committed against him or her. It is only fair that he/she be heard on amongst other things, how the crime has affected him/her. This does not mean however that his/her views are decisive.<sup>169</sup>

## 6. Successful reforms

### *Caregivers*

Restorative justice may not be major sentencing option in its own right but restorative justice ideals have played an important role in the development of sentencing jurisprudence in relation to adults who are the primary caregivers to children. In *S v M*<sup>170</sup> a single mother of three was convicted of fraud, and, because she was a repeat offender, sentenced by the regional court to a four year term of imprisonment. Although, on appeal, the High Court replaced most of the custodial sentence with correctional supervision, she nevertheless was required to spend a short amount of time in prison. The Constitutional Court set the sentence aside and replaced it with correctional supervision, arguing that the lower courts had failed to give sufficient attention to the impact of a custodial sentence on her children as required by the children's rights provisions in the Bill of Rights.<sup>171</sup> The Constitutional Court set out guidelines to be used by sentencing courts when the custodial sentence of a primary caregiver was in issue:

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assessment of the effect the crime has had on you. The information may be taken from the statement you made to the police, or the probation officer may interview you in person or you may be called to testify at the sentencing stage.”

<sup>168</sup> *Rammoko v Director of Public Prosecutors* 2003 (1) SACR 200 (SCA), 205E.

<sup>169</sup> At para 21. See also *S v Matyityi* 2011 (1) SACR 40 (SCA).

<sup>170</sup> 2008 (3) SA 232 (CC).

<sup>171</sup> *Id* at para 48.

- (a) A sentencing court should find out whether a convicted person is a primary caregiver whenever there are indications that this might be so.
- (b) . . . The court should also ascertain the effect on the children of a custodial sentence if such sentence is being considered.
- (c) If on the *Zinn*-triad approach the appropriate sentence is clearly custodial and the convicted person is a primary caregiver, the court must apply its mind to whether it is necessary to take steps to ensure that the children will be adequately cared for while the caregiver is incarcerated.
- (d) If the appropriate sentence is clearly non-custodial, the court must determine the appropriate sentence, bearing in mind the interests of the children.
- (e) Finally, if there is a range of appropriate sentences on the *Zinn* approach, then the court must use the paramountcy principle concerning the interests of the child as an important guide in deciding which sentence to impose.<sup>172</sup>

Justice Sachs, writing for the majority of the Constitutional Court, revisited the Sentencing Framework paper, noting, in particular, its observation that correctional supervision is a ‘multifaceted approach to sentencing’ that incorporates important aspects of restorative justice into traditional sentencing methods.<sup>173</sup> He also reminded of SALC’s finding that:

There is increasing recognition that community sentences, of which reparation and service to others are prominent components, form part of an African tradition and can be invoked in a unique modern form to deal with many crimes that are currently sanctioned by expensive and unproductive terms of imprisonment.

Correctional supervision, Judge Sachs found, was much more flexible than other forms of sentences, since it could be fashioned to meet the needs of a specific offender. It was this ‘striking diversity’, he argued, that had ‘ushered in a new sentencing phase’.<sup>174</sup> In addition, correctional supervision kept open the option of restorative justice in a way that

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<sup>172</sup> Id at para 36.

<sup>173</sup> *S v M* at para 59.

<sup>174</sup> Id at para 64.

imprisonment could not do.<sup>175</sup> He thus urged the rigorous development of correctional supervision as a sentencing option, emphasising, in the same way as the SALC's recommendation in the Sentencing Framework, the incorporation of reparation for victims into the country's sentencing arrangement.<sup>176</sup> Although this has not happened, the recognition of the role of caregivers may be regarded as a (modest) successful reform.

### *Children*

In the area of the law relating to the sentencing of children the reforms have been much more dramatic. To a large extent they commenced when the new constitutional order revived a flagging general children's rights movement, which had initially gained momentum in the early 1990s in response, primarily, to the arrest and detention of children by apartheid-era security police during student uprisings and protests.<sup>177</sup> Although South African criminal law had long treated age as a mitigating factor in sentencing,<sup>178</sup> the Bill of Rights specifically mentioned the principles of 'imprisonment as a last resort' and for 'shortest appropriate period of time', and 'treatment that is age appropriate' in relation to children.<sup>179</sup> The Constitution acknowledged that children are physically and psychologically more vulnerable than adults and afforded them a specific set of rights designed to nurture and protect their development. It also said that a 'child's best interests are of paramount importance in every matter concerning the child'.<sup>180</sup> These principles came directly from international law, codified clearly in the Convention on the Rights of the Child, which the South African government ratified in 1995.

Following the coming into effect of the interim constitution sentencing guidelines based on the child-specific provisions emerged from the courts. The first of these was *S v Z en vier ander sake*.<sup>181</sup> Five individual cases in which child offenders had been sentenced to suspended terms of imprisonment came before the High Court on review. Having considered the new constitutional principles applicable to child offenders the Court set out the following guidelines:

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<sup>175</sup> Ibid at para 62.

<sup>176</sup> Ibid.

<sup>177</sup> See generally Julia Sloth-Nielsen (2001) 'The role of international law in juvenile justice reforms in South Africa' 1 *Law Democracy and Development*, 59-83

<sup>178</sup> A Skelton and M Courtenay (2014) forthcoming 'South Africa's new child justice system' in J Winterdyk (ed) *Juvenile Justice: International perspective, models and trends* Taylor and Francis: Boca Raton at 417.

<sup>179</sup> S 28(1)(g) of the Constitution.

<sup>180</sup> Section 28(2) of the Constitution.

<sup>181</sup> 1999 (1) SACR 427 (E).

- a) diversion should be considered prior to trial in appropriate cases;
- b) age must be properly determined prior to sentencing;
- c) a court must act dynamically to obtain full particulars about the accused's personality and personal circumstances;
- d) a court must exercise its wide sentencing discretion sympathetically and imaginatively;
- e) a court must adopt, as its point of departure, the principle that, where possible, a sentence of imprisonment should be avoided, and should bear in mind especially that: the younger the accused is, the less appropriate imprisonment will be; imprisonment is rarely appropriate in the case of a first offender; and short-term imprisonment is rarely appropriate; and
- f) a court must not impose suspended imprisonment where imprisonment is inappropriate for a particular accused.

The judgments that followed generally abided by these principles, for courts were receptive to the notion that sentences must respond to the needs of each child and that imprisonment, generally, must be used as a measure of last resort.<sup>182</sup> In *Ntaka v The State*<sup>183</sup>, the appellant, 17 years old at the time of the commission of the offence, argued on appeal before the SCA that the trial court failed to investigate the possibility of correctional supervision when sentencing him to ten years of imprisonment (of which four were conditionally suspended). Judge Cameron, writing for the majority, found that in light of the gravity of the offence, rape, that a prison 'a prison sentence [was] unavoidable.'<sup>184</sup> He disagreed with Judge Maya, however, that a six-year sentence was fitting. That sentence, he said:

disregards the youthfulness of the appellant when he committed the crime. It treats him too much like the adult he was not when he raped his victim. It may set him up for ruin, while foreclosing the possibility, embodied in his youth that he will still benefit from

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<sup>182</sup> See *S v Kwalase 2000 (2) SACR 135 (C)* and *Mocumi v S* Unreported Northern Cape Division Case Number CASR 2/05, 30 May 2006).

A five-year prison sentence, Justice Cameron held, came closer to doing justice. He imposed the sentence under section 276(1)(i) of the Criminal Procedure Act 51 of 1997, which permits the placement under correctional supervision "in the discretion of the Commissioner or a parole board."

See also *Director of Public Prosecutions, Kwa-Zulu Natal v P* (2006 (1) SACR 243 (SCA)) where the state appealed the non-custodial sentence imposed by the High Court for a murder a girl had committed when only twelve years old. Although the judgment of the SCA reiterates the 'last resort' and 'shortest appropriate period of time' principles, it delivers a sentence of suspended imprisonment thereby weakening the principle laid down in *S v Z* that suspended prison terms should not be used in cases where imprisonment is adjudged to be inappropriate.'

<sup>183</sup> (unreported, [2008] ZACSA 30, 28 March 2008).

<sup>184</sup> *Id* at para 42.

resocialisation and re-education. It fails to individualize the sentence with the emphasis on preparing him, as a child offender, for his return to society.<sup>185</sup>

In *Centre for Child Law v NDPP*,<sup>186</sup> Justice Cameron explained the need to steer children away from the formal criminal justice system, where possible:

We recognise that children's crimes may stem from immature judgment, from as yet unformed character, from youthful vulnerability to error, to impulse, and to influence. We recognise that exacting full moral accountability for a misdeed might be too harsh because they are not yet adults. Hence we afford children some leeway of hope and possibility.<sup>187</sup>

The renewed emphasis on children made itself felt particularly in respect of the interpretation of the 1997 Criminal Law Amendment Act that introduced mandatory minimum sentences. Initially, the 1997 Act provided that only children under the age of 16 were specifically exempted from the application of its terms.<sup>188</sup> For children between the ages of 16 and 18, it required that a decision by a court to impose a sentence in terms of the 1997 Act had to be entered onto the record of proceedings along with reasons for doing so.<sup>189</sup> Unsurprisingly, courts varied in their interpretation of this provision.<sup>190</sup> In 2006, however, the SCA considered its interpretation in *S v B*.<sup>191</sup> The SCA, making it quite clear that it was guided by the constitutional principles of 'last resort' and 'shortest appropriate period of time', found that the 1997 Act did not require courts to impose the statutorily-prescribed minimum sentence when sentencing children between the ages of 16 and 18 years of age.<sup>192</sup> They were thus 'generally free' to apply the usual sentencing criteria when determining the appropriate

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<sup>185</sup> Ibid.

<sup>186</sup> 2009 (2) SACR 477 (CC).

<sup>187</sup> Supra at para 28.

<sup>188</sup> Section 51(3) of the 1997 prior to

<sup>189</sup> Prior to amendment by Act 38 of 2002 the 1997 Act section 51(3)(b) provided as follows:

If any court... decides to impose a [minimum sentence] upon a child who was 16 years of age or older, but under the age of 18 years, at the time of the commission of the act which constituted the offence in question, it shall enter the reasons for its decision on the record of the proceedings.

<sup>190</sup> See *S v Nkosi* 2002 (1) SACR 135 (W); *Direkteur van Openbare Vervolging, Transvaal v Makwetsja* 2004 (2) SACR 1 (T); *S v Blaauw* 2001 (2) SACR 255 (C). See also *Brandt v S* 2005 JDR 0096 (SCA) where the SCA replaced a sentence of life imprisonment imposed by the High Court on an offender who was 17 at the time of the offense.

<sup>191</sup> *S v B* 2006 (1) SACR 311 (SCA).

<sup>192</sup> *S v B* supra at para 11.

sentence for this sub-category of children, subject only to the ‘weighting effect’ of the legislation.<sup>193</sup>

In December 2007 the 1997 Act was amended so as to expressly include 16 and 17 year olds within its purview.<sup>194</sup> The constitutionality of the amendment was challenged shortly thereafter in *Centre for Child Law v Minister of Justice and Constitutional Development*.<sup>195</sup> The majority of the Constitutional Court found the amendment to be unconstitutional. Justice Cameron described the 1997 Act as being ‘very far from the approach to sentencing that the Bill of Rights demands for children’:<sup>196</sup> He explained:

In short, section 28(1)(g) [of the Constitution] requires an individuated judicial response to sentencing, one that focuses on the particular child who is being sentenced, rather than an approach encumbered by the rigid starting point that minimum sentencing entails. The injunction that the child may be detained only for the shortest “appropriate” period of time relates to the child and to the offence he or she has committed. It requires an individually appropriate sentence. It does not import a supervening legislatively imposed determination of what would be “appropriate” under a minimum sentencing system.<sup>197</sup>

Movement in the courts on children’s rights in sentencing was paralleled by law reform. Following the ratification of the CRC, a project committee was established in 1997 by the SALC to research the prospect of establishing a child-specific justice system.<sup>198</sup> The consultation process was fraught with ideological differences and it took almost ten years to present a draft Child Justice Bill to Parliament. The Bill was passed in September 2008 and on 1 April 2010 the Child Justice Act 75 of 2008 finally entered into force.

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<sup>193</sup> *S v B* supra at paras 10-12.

<sup>194</sup> Section 51(6) exempted only children under the age of 16 from the ambit of the legislation.

<sup>195</sup> 2009 (6) SA 632 (CC).

<sup>196</sup> *Centre for Child Law* supra at para 41.

<sup>197</sup> *Centre for Child Law* supra at para 32. In considering whether the effect of the amending provisions could be justified by section 36 of the Final Constitution, the majority found that despite the government’s explanation that the Amending Act was intended to reduce the number of serious crimes being committed by juveniles it had failed to back up this argument with factual data.

<sup>198</sup> C Badenhorst (2011) *Overview of the Implementation of the Child Justice Act: Good Intentions, questionable outcomes*. Open Society Foundation for South Africa, Criminal Justice Initiative Occasional Paper, 2.

The Child Justice Act established an entirely new sentencing regime for children, repealing many of the provisions in the Criminal Procedure Act<sup>199</sup> and providing a range of options designed to fulfil the ‘objectives of sentencing’ it specified for children<sup>200</sup> These objectives are rooted firmly in restorative justice principles and the notion that children benefit from rehabilitative, individualized treatment and, if at all possible, should serve their sentences outside of custodial settings. A presiding officer is given the discretion to impose a combination of sentences<sup>201</sup> and is obliged to heed the recommendation of a probation officer.<sup>202</sup> Custodial sentences may only be imposed if certain conditions are met. First, a child under the age of 14 may not be sentenced to a term of imprisonment.<sup>203</sup> Secondly, such a sentence may only be imposed if it follows a conviction for a certain category of serious offences,<sup>204</sup> or where there is a record of previous convictions.<sup>205</sup> Thirdly, a child may not be sentenced to a term of imprisonment exceeding 25 years.<sup>206</sup>

The Child Justice Act introduced another important change to the law: the age of criminal capacity. Prior to the Child Justice Act the minimum age of criminal capacity and thus imprisonment was seven. The age of criminal capacity is now ten.<sup>207</sup> This is still law by international standards but, combined by the prohibition on sentences of imprisonment for under-fourteens, has had considerable impact. The number of child in prison which had increased drastically between the mid-1990s to 2003, along with the adult prison population , after which it began to decrease steadily, a process accelerated by the new Child Justice Act.<sup>208</sup> See Table 2 in the Appendix.

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<sup>199</sup> 51 of 1977

<sup>200</sup> Section 69 of the Child Justice Act lists the objectives of sentencing and factors to be considered. Sections 72-9 list the sentencing options. These are: Sentencing options are: community-based sentences, restorative justice sentences, fine or alternatives to a fine, correctional supervision, compulsory residence in a child and youth care centre and imprisonment. These objectives are echoed international law. See, for example Articles 79-80 of JDL and Article 29(1) of the Beijing Rules.

<sup>201</sup> Section 69(2) of the Child Justice Act.

<sup>202</sup> Section 71 of the Child Justice Act. Several judgments have emphasized the importance of sentencing reports. See *S v Z* supra; *Kwalase* supra; *S v J & Others* 2000 (2) SACR 310 (C); *S v Petersen & 'n Ander* 2001 (1) SACR 16 (SCA); *S v N & Another* 2005 (1) SACR 201 (CKH); *S v M & Another* 2005 (1) SACR 481 (E).

<sup>203</sup> Section 77(1) and (2) of the CJA. See also article 37(b) of the Convention on the Rights of the Child, Rule 13.1 of the UN Standard Minimum Rules for the Administration of Juvenile Justice (1985) and Article 19(1) of the Beijing Rules.

<sup>204</sup> These are listed in schedule 3 of the Act.

<sup>205</sup> Section 77(3).

<sup>206</sup> Section 77(5) of the Child Justice Act also requires that a child justice court imposing a sentence of imprisonment must antedate the term of imprisonment by the number of days that the child has spent in prison or child and youth care centre prior to the sentence being imposed.

<sup>207</sup> Section 31 of the Child Justice Act.

<sup>208</sup> 75 of 2008.

## **7. Conclusion**

What can one learn from a more detailed look at the evolution of South African sentencing policy over the last 20 years? At one level it can be seen as an account of the thwarted aspirations of sentencing reformers. In the early heady days of post-apartheid South Africa a new Constitution was deployed to sweep away capital and corporal punishment. There was much optimism that it would be followed by more fundamental reforms to the sentencing framework as a whole. Proponents of community sanctions (particularly correctional supervision), restorative justice and victims' rights all thought that their day in the sun had arrived. They were soon to be proved wrong. Popular punitiveness surprisingly quickly became a feature of the rhetoric of the former liberation movement now in government; and on occasion it was joined by the judiciary keen to defend its own interests.,

The sentencing reform picture is not all doom and gloom, however. Determined child rights activists were able eventually push through key reforms in the area of juvenile justice in particular. The entrenched rights recognised by the Constitution have remained an important resource. Liberal interpretations of constitutional rights by some key judges continue to matter (which is why we have paid so much attention to judicial pronouncements in this paper).

In short, the two snapshots reveal that South Africa has become very much like other countries in which the shape of sentencing policy is determined by the ebb and flow of the exercise of power during which formal political structures, legal frameworks and civil society interact. This relative stability is the 'new normal'. We do not expect major changes in the South African sentencing framework in the immediate future.

