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South African Mandatory Minimum Sentencing: Reform Required

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Note

South African Mandatory Minimum Sentencing: Reform Required

Sandra M. Roth*

In 1997, the South African Parliament enacted Section 51 of Criminal Law Amendment Act 105 of 1997 ("the Act") in an effort to remedy increasing crime rates, increase public satisfaction with the criminal justice system, and decrease sentencing disparities.[1] The Act requires the imposition of mandatory penalties for specified serious criminal offenses, but allows for departures when a judge determines that "substantial and compelling circumstances" exist.[2] In theory, the Act provides a strict sentencing scheme that protects South African citizens and values.[3] In practice, a father convicted of raping his fourteen-year-old daughter receives a "substantial and compelling circumstances" downward departure because he does not pose a significant threat to society.[4]

This Note addresses the implications of the Act and

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* J.D. Candidate, University of Minnesota Law School, 2008; B.A., Bradley University, 2003. I would like to dedicate this Note to the memory of my father, Merle Roth, who might not have been happy with my decision to become a lawyer, but would be proud of me nonetheless. I would like to give special thanks to my family and friends, especially my mother, Jan; my brother, Scott; and my nieces and nephew, Adiline, Cassius, and Ophelia. I would also like to thank the Journal; my editors, Patrick Mahlberg and Brett Eilander; and all others who contributed to and supported this Note, especially Kate McKnight and Scott Sonbuchner. Responsibility for any errors belongs solely with me.

1. *See* SA Law Commission Issue Paper 11 Sentencing: Mandatory Minimum Sentencing (Mar. 1997) 10 [hereinafter Issue Paper 11].

2. Criminal Law Amendment Act 105 of 1997 s. 51.

3. *See id.*

4. *See* SA Law Commission Discussion Paper 91 Sentencing (A New Sentencing Framework) (Mar. 2000) 31 [hereinafter Discussion Paper 91] (citing *S v Abrahams* SS 99 unreported judgment (CDP Sept. 20, 1999) (S. Afr.)).

proposes that South Africa should revamp its current sentencing system. Part I discusses the history and debate surrounding South African sentencing, focusing on the Act and its extensions. Part I also details the Act's specific provisions. Part II analyzes the effectiveness of the mandatory minimum sentencing regime set forth in the Act and specifically discusses the Act's failure to achieve South Africa's punishment objectives. Part III analyzes several sentencing alternatives and their respective capacities to help South Africa achieve its punishment goals. This Note concludes that South Africa should discard the Act's mandatory minimum provisions and develop a system of sentencing principles and guidelines that utilize restorative justice methods and processes.

I. ENACTING CRIMINAL LAW AMENDMENT ACT 105 OF 1997

South African apartheid ended when South Africa adopted an interim constitution in 1993.[5] The permanent South African Constitution ("the Constitution") took effect in February of 1997.[6] South Africa adopted these constitutions in an attempt to transition South Africa from a divided country to a united people. The Preamble to the Constitution expresses this intent:

> We therefore, . . . adopt this Constitution as the supreme law of [South Africa] so as to
>
> Heal the divisions of the past and establish a society based on democratic values, *social justice* and *fundamental human rights*;
>
> Lay the foundations for a democratic and open society in which government is based on the will of the people and *every citizen is equally protected by law*;
>
> Improve the quality of life of all citizens and free the potential of each person; and,
>
> Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.[7]

The Constitution, still in effect today, also guarantees certain fundamental rights, including equality, human dignity, and political rights, and further provides that some of these

5. S. AFR. (Interim) CONST. 1993.
6. S. AFR. CONST. 1996.
7. *Id.* pmbl. (emphasis added).

rights (e.g. equality and human dignity) are non-derogable.[8]

Unfortunately, however, the Constitution itself did not remedy the racial distinctions that plagued South Africa during apartheid. In 1997, the white population in South Africa still had most of the legislative and judicial power—both Parliament and the Judiciary retained their overwhelmingly-white compositions.[9] Remnants of the legal system used to enforce apartheid also remained.[10] Furthermore, given the substantial changes produced by eradicating apartheid, previously repressed segments of South African society had little knowledge of their new legal rights.[11]

A. THE SENTENCING PROBLEM

Prior to May 1, 1998 (the date on which the Act became

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8. *Id.* ch. 2. The text reads:

> Everyone is equal before the law and has the right to equal protection and benefit of the law, [which] includes the full and equal enjoyment of all rights and freedoms. . . . The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. . . . Everyone has inherent dignity and the right to have their dignity respected and protected. . . . Every citizen is free to make political choices . . . .

Id. The South African judicial system is divided into four different courts or groups of courts: magistrates' courts (includes district courts and regional courts), high courts, a Supreme Court of Appeal, and a Constitutional Court. MICHAEL O'DONOVAN & JEAN REDPATH, OPEN SOC'Y FOUND. FOR S. AFR., THE IMPACT OF MINIMUM SENTENCING IN SOUTH AFRICA 36 (2006), *available at* http://www.osf.org.za/File_Uploads/docs/SENTENCINGREPORT2MinimumSentencing.pdf. The district and regional courts preside over about ninety-two percent of cases and differ with respect to which cases they can hear. *Id.* at 45. District courts do not have jurisdiction over murder, rape, and treason offenses, so district courts do not handle offenders charged with Section 51 offenses. *Id.* Regional courts have jurisdiction over all offenses except treason. *Id.* at 36. Regional courts, however, cannot impose life sentences and must transfer cases meriting a life sentence to a high court. *Id.* High courts have jurisdiction over "any case not assigned to another court by legislation" and are authorized to impose life sentences. *Id.* The Court of Appeal is the intermediate appellate court, playing a role similar to that played by the U.S. Circuit Courts. Similar to the U.S. Supreme Court, the South African Constitutional Court has the final say on constitutional interpretation and is the court of last appeal. *See* S. AFR. CONST. ch. 8 1996.

9. Daisy M. Jenkins, *From Apartheid to Majority Rule: A Glimpse into South Africa's Journey Towards Democracy*, 13 ARIZ. J. INT'L & COMP. L. 463, 465 (1996).

10. *Id.* at 484–87.

11. *Id.* at 487 ("[T]he government must ensure that the general population understands the full implications of their legal rights under the new constitution."). For more on the effects of apartheid, see generally Tony Roshan Samara, *State Security in Transition: The War on Crime in Post Apartheid South Africa*, 9 SOC. IDENTITIES 277 (2003).

effective), South African judges had unfettered discretion to determine offender sentences:[12] "Like cases [were] not being treated alike because there [was] unfair discrimination against some offenders on grounds of race and social status in particular."[13] The South African community voiced concerns regarding this discretion, specifically claiming that judges imposed sentences that were too lenient and disproportionate to the crime.[14] In response, the Minister of Justice and Constitutional Development requested that a project committee with the South African Law Reform Commission investigate South African sentencing practices and the desirability of enacting mandatory minimum sentencing legislation.[15] The Van den Heever Committee, named after the judge under whose leadership the committee operated, compiled its findings in *Issue Paper 11 Sentencing: Mandatory Minimum Sentencing* ("*Issue Paper 11*").[16]

B. ISSUE PAPER 11

Issue Paper 11 began with a discussion of South African punishment objectives.[17] Prior to 1997, these objectives primarily included deterrence, incapacitation, reformation, and retribution.[18] While retributive notions of justice remained important in 1997, objectives such as deterrence, denunciation of blameworthy behavior, redress of harm, and rehabilitation had begun to overshadow retributive concerns.[19] Restorative

12. However, South Africa had previously endeavored to curb judicial discretion in some respects. Parliament enacted legislation proscribing mandatory corporal punishment (1952) and compulsory imprisonment (1959) in certain circumstances. JULIA SLOTH-NIELSEN & LOUISE EHLERS, INST. FOR SEC. STUDIES PAPER 111, A PYRRHIC VICTORY?: MANDATORY AND MINIMUM SENTENCES IN SOUTH AFRICA 3 (July 2005), *available at* http://www.iss.co.za/dynamic/administration/file_manager/file_links/PAPER111.PDF?link_id=3&slink_id=404&link_type=12&slink_type=23&tmpl_id=3. The abuse of Dependence Producing Substances and Rehabilitation Centres Act 41 of 1971 also contained mandatory minimum provisions. *Id.*

13. Discussion Paper 91, *supra* note 4, at 26.

14. For example, in *S v Young*, two judges examined the same issues, facts, and offender yet imposed drastically different sentences. *See* SLOTH-NIELSEN & EHLERS, *supra* note 12, at 2 (discussing *S v Young* 1977 (1) SA 602 (SACC) (S. Afr.)).

15. *See* SLOTH-NIELSEN & EHLERS, *supra* note 12, at 1.

16. Issue Paper 11, *supra* note 1.

17. *Id.*

18. *Id.* at 24 (quoting *S v Khumalo* 1984 (3) SA (A) at 330 (S. Afr.)).

19. Issue Paper 11, *supra* note 1, at 23–27, 62 (discussing punishment objectives). Traditionally, justifications of punishment emanate from two schools of thought: retributivism and utilitarianism. *See generally* EDMUND L. PINCOFFS, THE RATIONALE OF LEGAL PUNISHMENT (1966) (discussing retributivism and

justice had also come to the forefront.[20]

The Van den Heever Committee examined the sentencing regimes of the United States, Sweden, Germany, England and Wales, Canada, and Greece.[21] The Committee's research indicated that general justifications for these nations' guideline and mandatory minimum sentencing regimes included the following: retribution, incapacitation, reducing disparity, and inducement of cooperation.[22] Taking into account both this research and South Africa's concerns regarding sentencing leniency and disparity, the Committee proposed the following possible solutions:[23]

- Presumptive sentencing guidelines;[24]
- Voluntary sentencing guidelines;[25]

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utilitarianism). Retributivism stands for the idea that a person should receive his or her "just desert": punishment should be proportionate to the offense, and an offender must not receive more or less than his or her due. *Id.* at 14. Utilitarianism stands for the proposition that punishment should maximize pleasure and minimize pain for society in general. *Id.* at 29. If punishing an offender will not benefit society, then that punishment is not justified. Notions of deterrence generally appeal to utilitarian motives. *Id.* In recent decades, justifications of punishment have taken rehabilitation, treatment, and other considerations into account. There are two types of deterrence: specific deterrence (deterring the offender being sentenced from committing future crime), and general deterrence (deterring persons other than the offender being sentenced from committing future crime). ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE 75 (4th ed. 2005). "Deterrence . . . relies on threats of fear" to prevent future crime. *Id.*

20. Restorative justice is based on the premise that "[c]rime is fundamentally a violation of people and interpersonal relationships." RESTORATIVE JUSTICE: CRITICAL ISSUES 41 (Eugene McLaughlin et al. eds., The Open Univ. 2003). These "[v]iolations create obligations and liabilities." *Id.* The community controls the restorative justice process and attempts to balance "[t]he needs of victims for information, validation, vindication, restitution, testimony, safety, and support" with "[o]ffenders' needs and competencies." *Id.* at 42. Adherents of restorative justice contend that the criminal justice system should "involve, to the extent possible, those who have a stake in a specific offense [and allow them] to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible." HOWARD ZEHR, THE LITTLE BOOK OF RESTORATIVE JUSTICE 37 (Good Books 2002). Restorative justice sessions attempt to repair the harm resulting from the criminal offense and to restore the individuals and relationships affected by the offense. *See id.*

21. *See* Issue Paper 11, *supra* note 1, at 32–59.

22. *See id.*

23. *Id.* at 60–62.

24. *Id.* at 60. The presumptive sentencing guidelines option allows for a sentencing commission to create sentencing guidelines.

> In such a system specific principles are used as determinants of the presumptive correct sentence . . . . The court is allowed to depart from the presumptive correct sentence if special circumstances exist. The court is, however, required to record such circumstances and in such cases the sentence is subject to review or appeal.

Id.

- "Adoption of legislative Guidelines which assist in determining the choice and length of punishment;"[26]
- "Enactment of principles of sentencing, including guidelines which determine the imposition of imprisonment;"[27]
- "Enactment of presumptive sentencing guidelines to *guide* the imposition of custodial and non-custodial sentences;"[28] and,
- "Enactment of mandatory minimum sentences combined with a discretion to depart from the sentences under certain conditions."[29]

Specifically seeking to deter violent crime and reduce sentencing disparity, the South African Parliament chose the mandatory minimum option and specified the reform in Section 51 of the Act, which went into effect on May 1, 1998.[30]

C. THE CHOSEN REMEDY: SECTION 51

Section 51 dictates "[m]inimum sentences for certain serious offenses," with the most serious offenses yielding the most severe penalties.[31] Under specified circumstances, an

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25. *Id.* at 60–61 ("This option requires the development of sentencing guidelines which are not required by law to be followed, but which simply guide the courts in the exercise of their discretion.").

26. *Id.* at 61. This option approximates the Swedish model in which "the legislature determine[s] the nature of punishment" and attributes a specified penal value for each offense. Under this regime, "[t]he penal value is determined with special regard to the harm, offense, or risk which the conduct involved and what the accused realized or should have realized about the conduct including his intentions or motives." *Id.*

27. *Id.* This option mirrors the Canadian Sentencing Commission, which provides for "principles governing the determination of the sentence, i.e. that the sentence should be proportionate to the gravity of the offence and the degree of responsibility of the offender for the offence." *Id.* The court can also consider other factors, including, but not limited to, aggravating and mitigating circumstances and the need for sentencing consistency. *Id.* at 61–62.

28. *Id.* at 62 (emphasis added). This option provides "[p]resumptive guidance [via] statutory orders which impose a predetermined sentence range." However, this option also allows for continued sentencing discretion under certain circumstances. *Id.*

29. *Id.* The project committee provides examples of fifteen, twenty, and twenty-five year sentences for first, second, and third convictions, respectively. The sentencing court can deviate "from the prescribed sentence if special circumstances exist. In such circumstances the sentencing court is required to record the circumstances and to give written reasons for departure from the prescribed sentence." *Id.*

30. SLOTH-NIELSEN & EHLERS, *supra* note 12, at 5.

31. Criminal Law Amendment Act 105 of 1997 s. 51.

offender found guilty of murder, rape, or terrorist activities[32] must receive a mandatory life sentence.[33] Sentences for the remaining serious offenses addressed by Section 51 take the accused's criminal history and the severity of the offense into consideration.[34] For example, Section 51 mandates that a South African high court must impose a fifteen-year sentence on a first-time offender convicted of any of the following offenses: murder (under circumstances not meriting a life sentence),[35] robbery,[36] certain drug-related offenses,[37] weapons-related

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32. As noted in the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004, terrorist activities:

> require a life sentence when it is proved that the offense has—
> (a) endangered the life or caused serious bodily injury to or the death of, any person, or any number or group of persons;
> (b) caused serious risk to the health or safety of the public or any segment of the public; or
> (c) created a serious public emergency situation or a general insurrection.

Criminal Law Amendment Act 105 of 1997 sched. 2.

33. *Id.* at s. 51. A life sentence applies to murder when (a) the offender planned or premeditated the murder; (b) the victim qualifies as "(i) a law enforcement officer performing his or her functions as such, whether on duty or not; or (ii) a person who has given or was likely to give material evidence" regarding [again, the statute lists a number of applicable offenses related to terrorist activities]; (c) the accused, "in committing or attempting to commit or after having committed or attempting to commit one of the following offenses," caused the death of the victim by: "(i) Rape; or (ii) robbery with aggravating circumstances; or "(d) a person, group of persons or syndicate acting in the execution or furtherance of a common purpose or conspiracy" committed the offense. Criminal Law Amendment Act 105 of 1997 sched. 2, pt. I.
Section 51 requires a life sentence for rape:

> (a) when committed—
>
> (i) in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice;
>
> (ii) by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy;
>
> (iii) by a person who has been convicted of two or more offences of rape . . . ;
>
> (iv) by a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus;
>
> (b) where the victim—
>
> is a girl under the age of 16 years;
>
> is a physically disabled woman who, due to her physical disability, is rendered particularly vulnerable; or
>
> is a mentally ill woman . . . ; or
>
> (c) involving the infliction of grievous bodily harm.

Id.

34. Criminal Law Amendment Act 105 of 1997 s. 51.

35. Criminal Law Amendment Act 105 of 1997 sched. 2, pt. I.

36. Only robberies "(a) when there are aggravating circumstances; or (b)

offenses,[38] or "[a]ny offence relating to exchange control, extortion, fraud, forgery, uttering, theft."[39] The second-time offender of any such offense must receive a sentence of not less than twenty years, and a third- or subsequent-time offender must receive a sentence of not less than twenty-five years.[40]

Judges may, however, depart from the mandatory minimum regime if the court "is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence."[41] If a judge exercises such discretion, he or she must enter into the record the factors supporting the decision.[42]

D. EXTENDING SECTION 51

Initially, the South African Parliament intended Section 51 to remain in effect for only twenty-four months.[43] However, Parliament has extended Section 51's period of operation five times, most recently extending the provision for another two years in 2007.[44] Nonetheless, Section 51 has not evaded scrutiny. In 2000, the South African Reform Commission issued

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involving the taking of a motor vehicle" receive a mandatory minimum sentence. *Id.*

37. Whether commission of these offenses requires a mandatory minimum sentence depends on the type and value of the substance at issue, whether "the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy," and whether "the offence was committed by any law enforcement officer." *Id.*

38. Such offenses include "[a]ny offense relating to—(a) the dealing in or smuggling of ammunition, firearms, explosives or armament; or (b) the possession of any automatic or semi-automatic firearm, explosive or armament." *Id.*

39. *Id.*

40. Criminal Law Amendment Act 105 of 1997 s. 51. A first-time offender receives a mandatory minimum sentence of ten years, a second-time offender a sentence of fifteen years, and a third- or subsequent-time offender a sentence of twenty years for the following offenses: "[r]ape in circumstances other than those [requiring a life sentence]"; "[i]ndecent assault on a child under the age of 16 years, involving the infliction of bodily harm" or the "intent to do grievous bodily harm"; or weapons related offenses where the offender has more than 1000 rounds of ammunition in his possession . *See id.*; *id.* sched. 2, pt. III. "[I]f the accused had with him or her at the time [of an offense not otherwise addressed by the mandatory minimum provisions] a firearm, which was intended for use as such, in the commission of such offense," a first-time offender receives a mandatory minimum sentence of five years, a second-time offender a mandatory minimum sentence of seven years, and a third- or subsequent-time offender a mandatory minimum sentence of ten years. *See id.*; *id.* sched. 2, pt. IV.

41. *Id.* s. 51.

42. *Id.*

43. *Id.* s. 53.

44. Proclamation R21/2005. In 2000, Parliament extended the period of operation for another twelve months; in 2001, 2003, and 2005, Parliament extended the Act's period of operation for another twenty-four months. *Id.*

Discussion Paper 91.[45] Among other things, Discussion Paper 91 examined judicial perceptions of mandatory minimums and proposed a Sentencing Framework Bill, which excluded the mandatory minimum sentencing regime.[46] Additionally, although the mandatory minimum provisions did not receive much attention during the 2000, 2001, and 2003 review periods, intense lobbying efforts and public debate surrounded these provisions during the 2005 and 2007 pre-review periods.[47]

In enacting the Act, the South African Parliament did not adequately consider the proposals set forth in *Issue Paper 11*.[48] Critics of the mandatory minimum sentence regime assert that, in failing to carefully examine *Issue Paper 11*, Parliament created a sentencing regime that does not further the expressed aims of South African punishment or address the sentencing disparities that initially prompted the Act.[49] However, 2009 may be the year Parliament seriously reconsiders South Africa's mandatory minimum sentencing regime. While Parliament extended the Act for another two years in April of 2007, the Ministry of Justice and Constitutional Development stressed the temporary nature of the Act.[50] The Governance and Administration Cabinet Committee also introduced the Criminal Law (Sentencing) Amendment Bill, which attempts to address some of the unintended consequences of the Act.[51]

II. TIME FOR CHANGE

The time has come for South Africa to renovate its sentencing system. Mandatory minimum sentencing has failed to adequately address sentencing problems in South Africa—mandatory minimums have not significantly deterred violent

45. *See* Discussion Paper 91, *supra* note 4.

46. *Id.*

47. *Id.* Julia Sloth-Nielsen and Louise Ehlers characterized the 2007 pre-review period as "a more fertile climate for considering sentencing reform may be in the cards." SLOTH-NIELSEN & EHLERS, *supra* note 12, at 17. The 2007 pre-review period included a conference held by the Open Society Foundation for South Africa in October of 2006 to discuss the Act and the effects of mandatory minimum sentencing. Several of the articles and presentations referenced in this Note came from that conference.

48. O'DONOVAN & REDPATH, *supra* note 8, at 11.

49. *See id.* at 11.

50. Ministry of Justice and Constitutional Dev., Republic of S. Afr., Media Statement: Minimum Sentencing Legislation (Mar. 13, 2007), *available at* http://www.doj.gov.za/2004dojsite/m_statements/mst2007.htm.

51. *Id.*

crime or significantly reduced sentencing disparities.[52] Persons within the judicial and criminal justice systems are dissatisfied with the current regime, which has resulted in attempts to circumvent and thus undermine the entire mandatory minimum sentencing scheme.[53] The Act has also led to prison overcrowding,[54] procedural delays,[55] and revictimization.[56]

A. FAILURE TO ACHIEVE INTENDED GOALS

Research examining the effects of the Act suggests that Section 51's mandatory minimums have not achieved South Africa's sentencing goals.[57] Crime has risen, not declined, since May 1, 1998;[58] sentencing inconsistency still pervades the South African judicial system;[59] and satisfaction with the criminal justice system remains elusive.[60]

1. Failure to Deter Violent Crime

One of the reasons that Parliament decided to adopt a mandatory minimum sentencing regime stemmed from its belief that mandatory minimums would deter violent crime.[61] However, increasing sentence severity does not necessarily increase the deterrent effect of sentencing.[62] In South Africa, for example, the mandatory minimum scheme has not had the expected deterrent effect.[63] After declining from 1994 to 1998,

52. Discussion Paper 91, *supra* note 4.

53. *Id.*; *see also* SLOTH-NIELSEN & EHLERS, *supra* note 12, at 14–17.

54. Jonny Steinberg, Centre for the Study of Violence and Reconciliation, Prison Overcrowding and the Constitutional Right to Adequate Accommodation in South Africa (Jan. 2005).

55. Court procedure and efficiency have suffered since promulgation of the Act because the Act provides for split trials. SLOTH-NIELSEN & EHLERS, *supra* note 12, at 13–14; *see also* O'DONOVAN & REDPATH, *supra* note 8, at 35–50.

56. *See* O'DONOVAN & REDPATH, *supra* note 8, at 69–72.

57. *See generally* Julie Berg & Wilfried Schärf, *Crime Statistics in South Africa 1994-2003*, 17 S. AFR. J. OF CRIM. JUST. 57 (2004) (suggesting that the violent crime rate has increased since 1998).

58. SLOTH-NIELSEN & EHLERS, *supra* note 12, at 11.

59. *Id.* at 12–13.

60. Discussion Paper 91, *supra* note 4, at xviii–xx; *see also* SLOTH-NIELSEN & EHLERS, *supra* note 12, at 1.

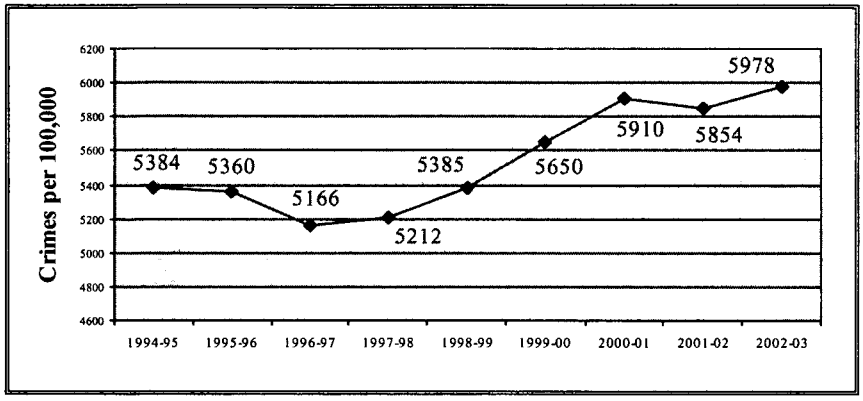
61. *See* SLOTH-NIELSEN & EHLERS, *supra* note 12, at 12.

62. *See* ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE 381 (4th ed. 2005) ("The idea that sentencing policy . . . can have a significant effect on overall crime rate is difficult to sustain."); *see also id.* at 76–77, 79–80; *cf.* THOMAS GABOR, THE PREDICTION OF CRIMINAL BEHAVIOR: STATISTICAL APPROACHES 56–59 (1986) (noting studies suggesting that longer sentences may actually increase recidivism).

63. *See* Berg & Schärf, *supra* note 57.

the overall crime rate in South Africa has risen since 1998 (see Chart 1).

Chart 1: Total Recorded Crimes per Capita in South Africa—March 1994 to March 2003[64]



The violent crime rate in South Africa has also risen since the Act became effective in 1998 (see Chart 2).[65] From 1998 to 2003, the rate of violent crime per 100,000 people increased from 1546 to 1743.[66] While the rate of violent crime per 100,000 people decreased slightly from 1,720 in 2001 to 1,703 in 2002, the violent crime rate increased to 1,753 per 100,000 in 2003 and has not significantly declined since 1998.[67]

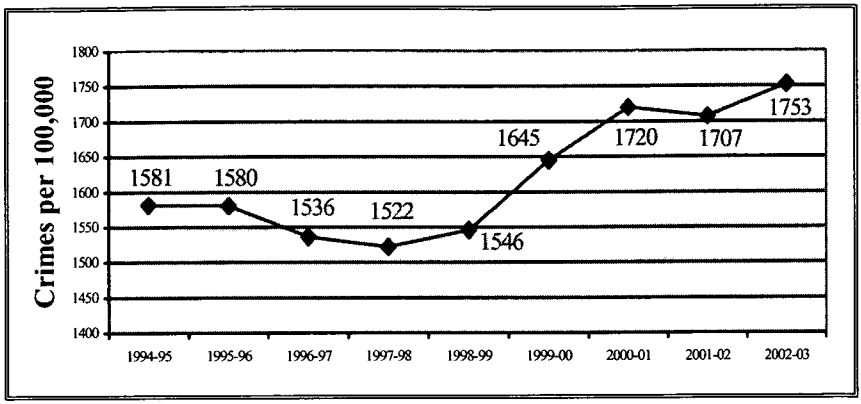
64. *Id.* at 62.

65. Julia Sloth-Nielsen & Louise Ehlers, *Assessing the Impact: Mandatory and Minimum Sentences in South Africa*, 14 S. AFR. CRIME Q. 15, 16 (2005); *see also*, Berg & Schärf, *supra* note 57, at 67; Tony Roshan Samara, *State Security in Transition: The War on Crime in Post Apartheid South Africa*, 9 SOC. IDENTITIES 277, 285 (2003).

66. Berg & Schärf, *supra* note 57, at 67.

67. *Id.*

Chart 2: Total Recorded Violent Crimes per Capita in South Africa—March 1994 to March 2003[68]



The deterrent effect of mandatory minimum sentences has been called into question outside of South Africa as well.[69] Regarding mandatory minimum sentencing in the United States, Michael Tonry states:

> The evidence is clear and weighty that enactment of mandatory penalty laws has either no deterrent effect or a modest deterrent effect that soon wastes away. Equally clear and consistent are findings that mandatory minimum laws provoke judicial and prosecutorial stratagems, usually by accepting guilty pleas to other non-mandatory penalty offences or by diverting offenders from prosecution altogether, that avoid their application.[70]

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68. *Id.*

69. Marc Mauer, Executive Director, The Sentencing Project, Address at the Open Society Foundation International Conference on Sentencing in South Africa, Sentencing in South Africa: Lessons from the United States 5 (Oct. 25-26, 2006) (on file with author).

70. Michael Tonry, *Judges and Sentencing Policy—The American Experience*, *in* SENTENCING, JUDICIAL DISCRETION AND TRAINING 137, 152 (Colin Munro & Martin Wasik eds., 1992). While sentencing practices may not have the capacity to achieve general deterrence, criminal justice systems are not without other mechanisms to decrease crime rates. Increasing the certainty of getting caught, for example, does have a deterrent effect on crime. Christopher Mascharka, *Mandatory Minimum Sentences: Exemplifying the Law of Unintended Consequences*, 28 FLA. ST. U. L. REV. 935, 946 (2001). In his article *Certainty vs. Severity of Punishment*, 29 ECON. INQUIRY 297, 308 (1991), Jeffrey Grogger states that "[t]he results [of the statistical analysis of California criminal offenders] point to large deterrent effects emanating from increased certainty of punishment, and much smaller, and generally insignificant effects, stemming from increased severity of sanction." Grogger's observation indicates that addressing other aspects of the criminal justice system, via social policy and enforcement mechanisms, may lead to greater

2. *Failure to Reduce Sentencing Disparities*

Parliament expected mandatory minimums to reduce sentencing disparities as well. Nevertheless, the opportunity to depart from mandatory minimums where "substantial and compelling circumstances" exist has perhaps "worsened the disparities and inconsistencies that prevail in relation to the offences targeted by [the Act]."[71] While the Act has had some effect on sentencing disparity, the vague "substantial and compelling circumstances" standard and the failure of Parliament to define that term have undermined the Act's endeavor to promote uniformity.[72]

a. Three Approaches

The ambiguous "substantial and compelling circumstances" exception has led to three different interpretations of the standard: (1) a strict interpretation,[73] (2) a lenient interpretation,[74] and (3) an interpretation that falls somewhere between the two extremes.[75]

The strict and lenient interpretations advocate the extremes of the spectrum. In *S v Mofokeng*, the sentencing judge stated that

> for 'substantial and compelling circumstances' to be found, the facts of the particular case must present some circumstance that is *so exceptional in nature, and that so obviously exposes the injustice of the statutorily prescribed sentence* in the particular case that could be described as 'compelling' the conclusion that the imposition of a lesser sentence that that prescribed by Parliament is justified.[76]

The court further held that traditional mitigating factors compel departure from mandatory minimum sentences only when they are of an "*unusual and exceptional kind* that

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deterrent and preventative effects. *See* Ann Skelton, Paper Presented at the Open Society Foundation International Conference on Sentencing in South Africa: Response to the Keynote Address from a Restorative Justice Perspective 19 (Oct. 26, 2006) (on file with author). Social policy and law enforcement, however, are beyond the scope of this article.

71. SLOTH-NIELSEN & EHLERS, *supra* note 12, at 12.

72. *Id.*

73. *See, e.g.*, SLOTH-NIELSEN & EHLERS, *supra* note 12, at 6 (discussing *S v Mofokeng* 1999 (1) SACR (W) 502 (S. Afr.)).

74. *See, e.g.*, Discussion Paper 91, *supra* note 4, at 29–30 (discussing *S v Cimani*, CC11/99, unreported judgment (ECPD Apr. 28, 1999) (S. Afr.)).

75. Discussion Paper 91, *supra* note 4, at 30 (discussing *S v Blaauw* 1999 (2) SACR (W) 295 (S. Afr.)).

76. *Id.* at 98 (emphasis added) (quoting *S v Mofokeng* 1999 (1) SACR (W) at 523c (S. Afr.)).

Parliament cannot be supposed to have had in contemplation when prescribing standard penalties for certain crimes."[77] Proponents of the lenient interpretation posit that Parliament intended only to "introduce a measure of conformity in the sentencing process" and that "notwithstanding the new legislation the starting point remained that consideration had to be given to all aggravating and mitigating factors in the traditional way."[78]

In *S v Blaauw*,[79] the sentencing judge provided a more balanced approach to interpreting "substantial and compelling circumstances." He found that Parliament intended to narrow judicial discretion in sentencing when violent crimes are the offenses at issue.[80] The Act narrows judicial discretion "more rigorously than if the court had merely to find that there were 'circumstances' that justified it departing from the prescribed minima."[81] However, courts have more leeway than the strict approach suggests:

> [T]he legislature had not seen fit to describe what factors may or may not be considered. Consequently, a Court is . . . still able to have regard to all the factors that would traditionally have been considered in imposing sentence [sic]. Moreover, . . . a Court should not consider each factor in isolation, but view them cumulatively in order to determine if substantial and compelling circumstances exist for departing from the prescribed sentence of life imprisonment. . . . [I]n such circumstances a Court would [not] be substituting its own discretion for that of the legislature. . . . [T]he legislature [did not] intend that unfair or grossly disproportionate sentences should be imposed.[82]

The existence of these three varying interpretations indicates that the Act's mandatory minimum provisions have not attained the goal of reducing sentencing disparity.[83]

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77. *Id.*

78. *Id.* at 28.

79. 1999 (2) SACR (W) 295 (S. Afr.).

80. Discussion Paper 91, *supra* note 4, at 30.

81. *Id.*

82. Alfred Eugene Isaacs, The Challenges Posed by Mandatory Minimum Sentence Legislation in South Africa and Recommendations for Improved Implementation 39–40 (Nov. 2004) (unpublished paper), *available at* http://etd.uwc.ac.za/ (search "Author" for "Isaacs, Eugene") (citing *S v Blaauw* 1999 (2) SACR (W) 295, 296(c)-(3) (S. Afr.)); *see also* Discussion Paper 91, *supra* note 4, at 28–30.

83. Discussion Paper 91, *supra* note 4, at 14 (noting that the Act does not appear to have impacted regional inconsistency in sentencing). Additionally, former United States District Court Judge John Martin commented that: "under mandatory minimums, offenders seemingly not similar nonetheless receive similar sentences. It thus appears that an unintended effect of mandatory minimums is *unwarranted*

b. Circumvention

Judges also interpret the "substantial and compelling circumstances" exception in ways that often circumvent the mandatory minimum sentencing. For example, judges who view the Act as merely a nominal attempt to increase sentencing uniformity can justify departures from the mandatory minimum provisions by engaging in the traditional (i.e. pre-Act) weighing of factors.[84]

Even those judges who attempt to balance the "strict" approach and the "lenient" approach run the risk of circumventing the intention of the Act by weighing all the aggravating and mitigating factors in a given case.[85] In *S. v Mahomotsa*, one judge noted the following:

> Even in cases falling within the categories delineated in the Act there are bound to be differences in the degree of their seriousness. There should be no misunderstanding about this: they will all be serious but some will be more serious than others and, subject to the caveat that follows, it is only right that the differences in seriousness should receive recognition when it comes to the meting out of punishment. As this Court observed in *S v Abrahams*, "some rapes are worse than others and the life sentence ordained by the Legislature should be reserved for cases *devoid of substantial factors compelling the conclusion that such a sentence is inappropriate and unjust.*"[86]

This passage indicates that perhaps the exception has swallowed the rule. Julia Sloth-Nielsen and Louise Ehlers assert that, "rather than justifying departures from mandatory minimum sentences, judges should justify failures to depart therefrom."[87]

Judges can also circumvent the Act's mandatory minimum provisions by the way they interpret the mandatory minimum provisions and the crimes to which they apply. For example, in

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sentencing uniformity." John S. Martin, Jr., *Why Mandatory Minimums Make No Sense*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 311, 314 (2004). In other words, while mandatory minimum sentencing schemes treat all commissions of premeditated murder the same, they also require that other offenses (for example, rape) receive the same penalty as premeditated murder. Criminal Law Amendment Act 105 of 1997 s. 51 (requiring life sentences for both murder and rape when certain circumstances exist). While the public may view rape as a serious crime in need of tough sanctions, the public may not view rape as similar to, or as severe as, murder.

84. *See, e.g.*, Discussion Paper 91, *supra* note 4, at 29–30 (discussing *S v Cimani*, CC11/99, unreported judgment (ECPD Apr. 28, 1999) (S. Afr.)).

85. *See id.* at 30 (discussing the risks of the "moderate" approach).

86. SLOTH-NIELSEN & EHLERS, *supra* note 12, at 12 (quoting *S v Mahomotsa*, 2002 (2) SACR (SCA) 435 (S. Afr.)) (emphasis added).

87. *Id.* at 13.

S v Sukwazi, a high court determined that applying the mandatory minimum sentence of fifteen years—required by the Act for offenses involving automatic and semi-automatic firearms—to a pistol with a semi-automatic firing mechanism was absurd, even though the plain language of the Act indicated the mandatory minimum sentence should apply in this situation.[88] "To give the words [of the Act] their ordinary grammatical meaning, would lead to the absurd result that, unlawful possession of powerful weapons such as high caliber revolvers and shotguns would attract a far lesser sentence than small caliber semi-automatic pistols."[89]

Judges have also found ways to circumvent the Act by reasoning that it does not apply to them.[90] *S v Arias* held that because the Act refers only to regional and high courts, the Act does not apply to district courts and thus does not require them to impose the Act's mandatory minimum provisions.[91] The high courts recognized the absurdity of (1) allowing district courts to impose any sentence they choose while requiring the regional and high courts to forego judicial discretion and impose the prescribed mandatory minimum[92] and (2) interpreting the Act in a way that would effectively give prosecutors the right to determine the likely sentence of an offender would receive—something not even a high court judge has the power to do.[93] Nonetheless, the Court held that applying the Act to district courts would constitute legislating, not interpreting, and thus exceeded the scope of the Court's judicial power.[94]

Plea bargaining, a mechanism added to the South African criminal justice system in 2001,[95] also has the potential to thwart implementation of the Act's mandatory minimum sentencing provisions.[96] Consequently, the Act may lose its capacity to reach offenders charged with violent crimes who are allowed to plea to lesser offenses.[97]

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88. Isaacs, *supra* note 82, at 21 (citing *S v Sukwazi*, 2002 (1) SACR (N) at 622(c)-(f), 623(g) (S. Afr.)).

89. *Id.* at 22 (citing *S v Sukwazi*, 2002 (1) SACR (N) at 624(a)-(d)).

90. Discussion Paper 91, *supra* note 4, at 27.

91. Isaacs, *supra* note 82, at 24 (discussing *S v Arias*, 2002 (1) SACR (W) 518 (S. Afr.)).

92. *Id.* at 24.

93. *Id.*

94. *Id.* at 25–26.

95. The Criminal Procedure Second Amendment Act 62 of 2001.

96. *See* Open Society Foundation for South Africa, Roundtable Discussion on Sentencing and Prisons 14–15 (Aug. 25, 2003).

97. *Id.* at 15.

3. *Failure to Increase Satisfaction with Criminal Sentencing*

One of the factors that persuaded Parliament to implement the mandatory minimum sentencing regime emanated from public concerns regarding lenient sentencing practices.[98] However, neither the South African judiciary nor the South African community has wholeheartedly accepted Section 51's mandatory minimum provisions.[99] Although multi-national studies have shown that the general public supports the idea of mandatory sentencing in the abstract, many people remain unaware of when and how the provisions actually apply.[100] Additionally, public support for mandatory minimum sentencing practices decreases when given specific examples of sentences.[101]

Not surprisingly, South African judges have not taken to the idea of mandatory minimums either.[102] In theory, the Act severely limits judicial discretion in regard to sentencing decisions for violent crimes.[103] Prior to the Act, South African judges had complete discretion regarding all offender sentences.[104] After the Act took effect, however, judges had to sentence offenders convicted of certain enumerated violent crimes to a specified number of years unless "substantial and compelling circumstances" indicated otherwise.[105]

Even persons who support mandatory minimums are not satisfied with how judges use them in practice. Some victim and advocacy groups support the extension of the Act, believing that, especially with respect to sexual offenses, mandatory minimum sentencing provisions protect women.[106] However,

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98. Isaacs, *supra* note 82, at 1.

99. Discussion Paper 91, *supra* note 4, at xviii–xx (discussing judicial resentment for loss of sentencing discretion); *see also* SLOTH-NIELSEN & EHLERS, *supra* note 12, at 1 (discussing the political climate in South Africa leading up to the passage of manadatory minimum sentences).

100. JULIAN V. ROBERTS, DEP'T OF JUSTICE CAN., MANDATORY SENTENCES OF IMPRISONMENT IN COMMON LAW JURISDICTIONS: SOME REPRESENTATIVE MODELS 5 (2005).

101. Surveys gauging public opinion regarding mandatory minimum sentencing practices in the United States and Britain indicate that public support for mandatory minimum sentencing is on the decline. *Id.* at 6.

102. Isaacs, *supra* note 82, at 2; *see also supra* Part II.A.2.

103. *See* Criminal Law Amendment Act 105 of 1997.

104. Bianca A. Poindexter, *The War on Crime Increases the Time: Sentencing Policies in the United States and South Africa*, 22 LOY. L.A. INT'L & COMP. L. REV. 375, 377 (2000).

105. Criminal Law Amendment Act 105 of 1997 s. 51.

106. SLOTH-NIELSEN & EHLERS, *supra* note 12, at 13. The Western Cape Consortium on Violence Against Women analyzed several South African cases in which judges departed from the mandatory minimum sentencing regime. *Id.* They assert that factors such as "the previous sexual history of the complainant" and "an

victims often pay a price for this protection because the sentencing regime often forces them to relive their experiences more than once.[107]

B. CONSTITUTIONAL PROBLEMS

The mandatory minimum sentencing regime has also resulted in several potential constitutional problems.[108] The South African Constitution requires an independent judiciary to weigh the evidence against an accused and render a sentence accordingly.[109] Parliament's imposition of mandatory minimums and its attempt to curb judicial discretion thus threaten the judiciary's independence and an offender's constitutional rights.[110]

In *S v Dodo*, the Constitutional Court circumvented the separation of powers issue. The Court connected the constitutional challenge to an accused's right not to suffer cruel, inhuman, or degrading punishment.[111] The Court held that the ability to modify sentences where "substantial and compelling circumstances" exist rectifies the constitutional concern regarding proportionality.[112]

C. PRACTICAL CONSEQUENCES

While mandatory minimum penalties have arguably achieved South Africa's incapacitation aim, they have also led to

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accused's cultural beliefs about sexual assault" are "consistently and erroneously used to justify lesser sentences." *Id.*

107. *See* O'DONOVAN & REDPATH, *supra* note 8, at 72; *see also infra* Part II.C.1.

108. This section addresses only the separation of powers issue. Constitutional issues resulting from procedural delays are discussed in Part II.C.1.

109. S. AFR. CONST. 1996 ch. 2; *see also* SLOTH-NIELSEN & EHLERS, *supra* note 12, at 7–8; *cf.* John Milton et al., *Procedural Rights*, *in* RIGHTS AND CONSTITUTIONALISM: THE NEW SOUTH AFRICAN LEGAL ORDER 401, 432 (David van Wyk et al. eds., 1994) ("Convicted persons are entitled to constitutional protection in relation to the process, the rules, and the principles by which the sentence is determined in relation to the type of punishment that is imposed and in relation to the way in which that punishment is executed.").

110. SLOTH-NIELSEN & EHLERS, *supra* note 12, at 7–8. Increasing the severity of a sentence also violates the Kantian (retributivist) maxim that a person should never be treated merely as a means to an end. ASHWORTH, *supra* note 19, at 78. *See also infra* Part II.C.1.

111. SLOTH-NIELSEN & EHLERS, *supra* note 12, at 7 (citing *S v Dodo* 2001 (1) SACR (CC) 593 (S. Afr.)). The Court also noted: "The concept of proportionality goes to the heart of the inquiry as to whether punishment is cruel, inhuman or degrading, particularly where . . . it is almost exclusively the length of time for which an offender is sentenced that is in issue." *Id.* at 8 (quoting *Dodo* para. 37).

112. *Id.*

several unanticipated problems. Because regional courts cannot impose life sentences, victims and offenders must often endure split-trials, which create procedural problems for the judicial system.[113] The mandatory minimum prison sentences have also exacerbated the problem of overcrowded prisons.[114]

1. Procedural Issues and Delays

In an effort to increase the high courts' efficiency, Section 51 expanded the sentencing jurisdiction of the regional courts.[115] Unfortunately, the expansion has not had its intended effect.

Regional courts now hear cases previously falling under the high courts' jurisdiction, which included most minimum sentencing cases presently under regional court jurisdiction.[116] However, the Act does not give regional courts the power to sentence offenders to life in prison. Consequently, while the expansion of jurisdiction initially decreased the high courts' docket loads, the prevalence of cases requiring life sentences[117] soon required the high courts to take on more cases and review a great number of regional court decisions. The high courts' increasing caseload resulted in court congestion and an increase in the time between an offender's first appearance in court and sentencing.[118]

Regional court magistrates cannot make a "substantial and compelling circumstances" analysis of Part I offenses either. Once a court convicts the offender of a Part I offense, the regional court "must immediately stop the case and refer it to the high court for confirmation of the verdict and sentencing by a judge."[119] In effect, the high courts often have to rehear evidence and testimony given at the regional court level to determine if "substantial and compelling circumstances" exist.

The split-trial system frequently leads to potential revictimization and potential constitutional violations.[120]

113. O'DONOVAN & REDPATH, *supra* note 8, at 35–50, 69–80.

114. Chris Giffard & Lukas Muntingh, Civil Soc'y Prison Reform Initiative, Report Commission by the Open Society Foundation for South Africa, The Effect of Sentencing on the Size of the South African Prison Population 2 (Oct. 2006) (on file with author); *see also* SLOTH-NIELSEN & EHLERS, *supra* note 12, at 8–14 (discussing prison overcrowding). However, persons receiving life sentences are eligible for parole after twenty-five years. *Id.*

115. O'DONOVAN & REDPATH, *supra* note 8, at 43.

116. *Id.* at 45.

117. Regional courts cannot impose life sentences. *See supra* note 8.

118. O'DONOVAN & REDPATH, *supra* note 8, at 42.

119. *Id.* at 38.

120. *Id.* at 69–80; *see also supra* note 107 and accompanying text.

Because the high courts must determine if "substantial and compelling circumstances" merit a downward departure, victims often have to retell their story in the high courts. Not only does this force victims and witnesses to relive the crime yet again, it places them in the uncomfortable position of having their credibility questioned a second time.[121]

The constitutional problem stems from the increased and substantial delays between the offender's first appearance in court and the sentencing.[122] Even if a high court rehears evidence, it will not likely rehear all the evidence. This puts the sentencing court (the high court) in a worse position than the trial court (the regional court) to fashion an appropriate sentence when "substantial and compelling circumstances" exist.[123]

2. Prison Overcrowding

South Africa has had issues with prison overcrowding since 1994. Mandatory minimum sentencing—especially the mandatory life sentences,[124] coupled with parole reform provisions which require convicted offenders to serve at least eighty percent of their sentence—has aggravated this problem.[125] While the extent of the effect mandatory minimum sentences will have on the prison population has not yet been fully realized, mandatory minimum sentences will have a significant adverse impact on the prison population in the near future if South Africa does not alter its current sentencing regime.[126]

In 2005, the percentage of prisoners serving sentences longer than seven years (fifty-two percent) exceeded the percentage of prisoners serving sentences less than seven years

121. *Id.* at 69–72.

122. *Id.* at 42.

123. *Id.*

124. In regard to prevention, mandatory minimums have prevented some crimes, specifically recidivist crime on the part of offenders sentenced under the mandatory minimum regimes. *Cf.* SLOTH-NIELSEN & EHLERS, *supra* note 12, at 11–12.

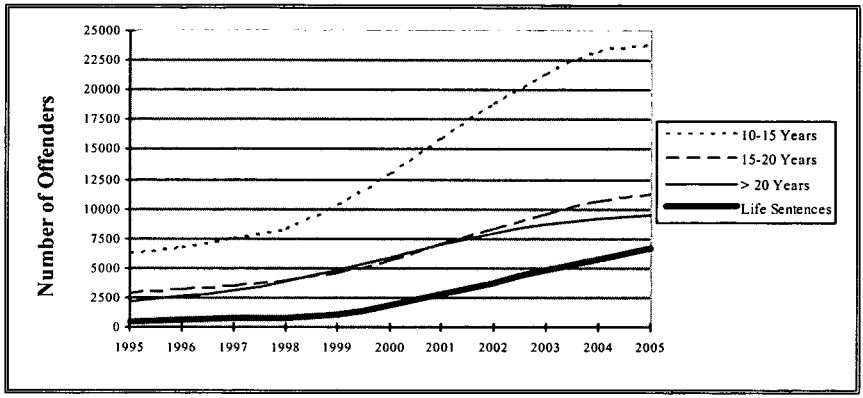
125. Giffard & Muntingh, *supra* note 114, at 2; *see also* SLOTH-NIELSEN & EHLERS, *supra* note 12, at 8–14.

126. *Cf.* O'DONOVAN & REDPATH, *supra* note 8, at 59–64. Offenders convicted of Section 51 offenses would likely have received five to ten year sentences regardless of whether or not they were sentenced under the Act. Consequently, the actual effect of mandatory minimum sentencing on prison overcrowding cannot yet be determined. *Id.* at 79.

(forty-eight percent).[127] Additionally, offenders detained in prisons which have more than twice as many prisoners than they were intended for increased from just one percent in 1995 to thirty-six percent in 2004.[128] Overall, prisoners in South Africa are serving longer sentences.

The Act's mandatory minimum sentencing provisions also had the unintended effect of increasing the prison population so that not only are prisoners serving longer sentences, but more offenders are imprisoned.[129] As Chart 3 illustrates, the percentage of prisoners serving longer sentences (10 years or more) has increased while the percentage of prisoners serving sentences between five and ten years has decreased.[130]

Chart 3: Average Number of Offenders in Custody During the Month of December from 1995 to 2005[131]



In theory, mandatory minimum sentences seemed like the answer to South Africa's sentencing disparities and public

127. Giffard & Muntingh, *supra* note 114, at 11. In both 1995 and 2000 the percentage of sentenced prisoners serving sentences less than seven years (seventy-four and sixty-one percent, respectively) exceeded the percentage of sentenced prisoners serving sentences longer than seven years (twenty-six and thirty-nine percent, respectively). *Id.*

128. *Id.* at 36.

129. Steinberg, *supra* note 54, at 4. According to Steinberg, the increase in prisoners has not resulted from increased prosecution or convictions rates: "Between 1991 and 2000, the number of prosecutions dropped by twenty-three percent, while the number of convictions dropped by nineteen percent. There is little evidence that they have increased appreciably since then. So, the problem was not that more and more people were coming into prison: it is that they were staying there for longer." *Id.*

130. SLOTH-NIELSEN & EHLERS, *supra* note 12, at 9.

131. Giffard & Muntingh, *supra* note 114, at 84.

disfavor.[132] In practice, the following deficiencies demonstrate that mandatory minimums have not served their purpose: (1) the inability of mandatory penalties to achieve South African sentencing goals; (2) the vague "substantial and compelling circumstances" standard; (3) judicial and prosecutorial circumvention; and (4) the Act's practical impact.[133] The time has come for South Africa to transform its sentencing regime so that South Africa can achieve its punishment objectives.

III. PAVING THE WAY FOR A MORE EFFECTIVE SENTENCING REGIME

In determining which course South African sentencing reform should follow, one must consider the aims of South African sentencing: deterrence (general and specific), retribution, denunciation of blameworthy behavior, incapacitation, restoration, and rehabilitation.[134] Recently, the role victims play in the criminal justice process and restorative justice has also factored into sentencing discussions.[135] One must recognize, however, that sentencing policy alone will not be able to achieve all of these goals.[136] In order to attain this particular goal, the criminal justice system must examine and address other facets of the system, such as certainty of apprehension, conviction, and punishment, which likely fall outside the scope of sentencing policy jurisdiction.[137] Nonetheless, sentencing policy does have the potential to make progress towards South Africa's other sentencing goals, namely, specific deterrence, retribution, denunciation of blameworthy

132. The Act imposes "tough" sentences by providing sentencing ranges from which judges should not deviate. *See* Criminal Law Amendment Act 105 of 1997 s. 51.

133. *See* Discussion Paper 91, *supra* note 4, at 1–37.

134. *See supra* Part I.B.

135. Discussion Paper 91, *supra* note 4, para. 1.14.

136. Skelton, *supra* note 70, at 19 ("A reduction in crime is more likely to be brought about through social policy than through sentencing policy."). The failure of South Africa's mandatory minimum scheme to reduce serious crime, as noted in Part II, also suggests that mandatory minimum sentencing alone has had little to no general deterrent effect in regard to violent crime. *Id.*

137. *Id.* at 19 n.54 ("'The greatest deterrent to crime is the likelihood that offenders will be apprehended, convicted and punished. It is that which is presently lacking in our criminal justice system; and it is at this level and through addressing the causes of crime that the state must seek to combat lawlessness. '" (quoting *S v Makwanyane* 1995 (2) SACR 1 (CC) 122)); *see also* Mauer, *supra* note 69, at 5 (noting that the United States' "war on drugs," which provided for mandatory minimum sentences for drug crimes, did not significantly reduce drug related offenses).

behavior, restoration, and rehabilitation.[138] South African sentencing reform should focus on these areas and allow social policy reform to address the objectives of general deterrence and overall reduction in crime. Social policy reform, however, is beyond the scope of this Note. Consequently, the following proposal only addresses sentencing policy and its ability to achieve the above discussed goals.

South African sentencing policy reform also needs to address specific areas of concern raised by the judiciary, the public, and the criminal justice system. Judges are specifically concerned with their ability to exercise sentencing discretion, and they oppose mechanisms that would unduly limit their discretion.[139] The public wants a system that factors victim participation and reparation into the sentencing equation.[140]

As noted in Part I of this Note, the South African Law Commission proposed six potential sentencing schemes in *Issue Paper 11*: (1) presumptive sentencing guidelines developed by a sentencing commission; (2) voluntary sentencing guidelines; (3) adoption of legislative sentencing guidelines; (4) enactment of sentencing principles and guidelines; (5) enactment of presumptive sentencing guidelines; and (6) mandatory minimum sentences combined with judicial discretion to depart from these sentences under certain circumstances.[141] Part II of this Note focused on discounting the sixth option, mandatory minimum sentencing with judicial discretion to depart under certain "substantial and compelling circumstances." The remainder of this Note analyzes the other five suggestions and proposes that South Africa should adopt option four and incorporate the use of restorative justice processes.

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138. Andrew Ashworth contends that sentencing policy should not endeavor to exceed its usefulness but should "aim to be fair and proportionate." ASHWORTH, *supra* note 19, at 381. "But this does not mean that the constitutional requirement of equality requires the imposition of equal sentences for apparently equal crimes[.]" Milton et al., *supra* note 109, at 432–33.

139. *See* Discussion Paper 91, *supra* note 4, para. 2.3.

140. Research regarding restorative justice performed by the South African Law Reform Commission indicates "near universal support for giving victims an increased, although still not dominant, role in the sentencing process" and improving "current measures of compensation for the compensation of victims." *See* Discussion Paper 91, *supra* note 4, para. 2.4. The South African Law Reform Commission stated that the improvement should include "reparation that could be obtained in the sentencing process." *Id.*

141. Issue Paper 11, *supra* note 1, at 60–62.

A. SENTENCING GUIDELINES

1. Legislative Sentencing Guidelines

Of the sentencing guidelines options, legislative sentencing guidelines have the most promise. Regarding the legislative guidelines option, *Issue Paper 11* states the following:

> This option is based on the Swedish model which provides that the legislature determine the nature of punishment and the penal value attributed to the particular offense. The penal value is determined with *special regard to the harm, offence or risk which the conduct involved and what the accused realized or should have realized about the conduct including his intentions or motives.*[142]

This particular option provides a better mechanism than presumptive sentencing guidelines to achieve South Africa's sentencing goals because it takes into account not only the severity of the offense, but also the harm resulting from the offense and the offender's perceptions regarding the offense.[143] These factors appeal to restorative and rehabilitative goals as well as retributive and incapacitation aims. Nonetheless, the legislative guidelines option lacks an important element: sentencing principles and availability of restorative justice *processes*. While the legislative guidelines option takes harm and potential offender remorse—both restorative justice principles—into account, it does not make available restorative justice *processes*, such as the opportunity to reconcile relationships between the victim and the offender or the opportunity of the victim, the community, and the offender to participate in sentencing determination.[144]

2. Presumptive Sentencing Guidelines

The presumptive guideline options—presumptive sentencing guidelines decided by a sentencing commission or the legislature—will not likely achieve South African sentencing goals either. These options cater to retributive and incapacitation objectives at the expense of other objectives, such as deterrence and reformation.[145] These schemes have persons outside the judicial process drafting sentencing guidelines, but the specific facts and circumstances presented by a given case

142. *Id.* at 61 (emphasis in original).
143. *See id.*
144. *See supra* notes 19–20 and accompanying text.
145. *See* Issue Paper 11, *supra* note 1, at 39.

often determine conclusions such as the severity of the offense and the culpability of the offender.[146] Any group developing sentencing guidelines in the abstract cannot possibly account for all the different circumstances that could occur. Consequently, presumptive sentencing guidelines, whether developed by a sentencing commission (without significant judicial representation) or a legislature, could lead to disproportionately harsh sentences by handcuffing judges to preordained sentencing ranges even if they feel the specific facts and circumstances of the case merit departure. Conversely, judges could circumvent the sentencing guidelines similar to the way in which they circumvented mandatory minimum provisions.[147] This could lead to arbitrary sentencing practices and undermine the consistency goal.

3. Voluntary Sentencing Guidelines

Although judges would likely feel less constrained by voluntary sentencing guidelines, this approach would not likely be effective for South Africa. Past experience indicates that South African judges need at least some form of binding sentencing guidance.[148] Sentencing disparities were one of the concerns that initially prompted the Parliament to enact the Act.[149] Even if voluntary sentencing guidelines could work at some time in the future, the immediately preceding system emphasizing mandatory minimum sentencing poses a threat to promoting such a system at this juncture. Developing mere voluntary sentencing guidelines could lead South Africa to revert to pre-Act practices and sentencing disparities.

B. SENTENCING PRINCIPLES AND GUIDELINES

In the end, however, enactment of sentencing principles and guidelines presents the best option.[150] Sweden's legislative

146. *See* Discussion Paper 91, *supra* note 4, at 38–44, 61–69.

147. *See supra* Part II.B.

148. *See S v Young* 1977 (1) SA 602 (S. Afr.).

149. *See* O'DONOVAN & REDPATH, *supra* note 8, at 4–5.

150. In 2000, the South African Law Reform Commission proposed a draft Sentencing Framework Bill, which proposed that South Africa should repeal mandatory minimum sentencing provisions and adopt sentencing principles and guidelines. The Bill provides for a sentencing council, composed mostly of judges, but also including correctional services persons and prosecutors. *See* Discussion Paper 91, *supra* note 4, pt. III, ch. 2. In October 2006, the Open Society Foundation South Africa hosted an International Conference on Sentencing in South Africa and several of the presenters supported the Bill. *See, e.g.*, Dirk Van Zyle Smit, Notes

sentencing guidelines at least consider restorative justice principles; sentencing principles, however, provide a way to encourage the use of restorative justice processes in appropriate situations and supply guidance to ensure judicial discretion does not go too far.

In *Sentencing and Criminal Justice*, Ashworth notes that there is a difference between free reign regarding sentencing decisions and adjusting sentences based on the circumstances of the case.[151] Ashworth further states that sentencing disparity results when judges choose sentences based on different rationales.[152] Because punishment rationales and objectives often conflict with each other, judges need established sentencing priorities and principles to help them determine appropriate and proportionate sentences.[153] Combining sentencing guidelines and sentencing principles supplies a mechanism to address the specific offense and offender (sentencing guidelines) and the role that individual sentences should play in achieving overreaching sentencing objectives (sentencing principles).[154] Consequently, both sentencing guidelines and sentencing principles are essential components for sentencing policy in South Africa.

C. DETERMINING THE PRINCIPLES AND GUIDELINES

Determining who decides these principles and guidelines presents a difficult task, especially given judicial opposition to the use of binding guidelines determined either by the legislature or by an independent sentencing commission.[155] In its 2000 Draft Sentencing Framework Bill, the South African Law Reform Commission proposed that the legislature should enact legislative sentencing principles and a Sentencing Council should determine sentencing guidelines.[156] Chapter Two of the Bill requires that the council have specific members, including certain members of the judiciary, representatives of certain law enforcement agencies, sentencing experts, and victim

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151. ASHWORTH, *supra* note 19, at 72–73.
152. *Id.*
153. *Id.* at 73.
154. *See* Discussion Paper 91, *supra* note 4, para. 2.11.
155. *Id.* para. 2.3.
156. *Id.* pt. III, chs. 1–2.

representatives from the public.[157] While South African judges generally oppose sentencing guidelines, research performed by the South African Law Reform Commission suggests that some judges would support a system similar to the Minnesota Sentencing Guidelines.[158] Along with sentencing principles, guidelines provide the direction sentencers need and the discretion sentencers desire.

The composition of the council would also aid the consideration and discussion of all of South Africa's sentencing goals. Not only would judges have a say in sentencing policy, but others affected by sentencing policy would have the opportunity to participate as well. Sentencing experts could provide input on effective sentencing strategies. Victim representatives would be able to promote incorporating restorative justice alternatives. Law enforcement officers could help ensure that the criminal justice system actually has the capacity to carry out the sentencing policy.[159]

The sentencing principles should establish a sentencing hierarchy and include restorative justice processes.[160] If South Africa decides that proportionate sentencing is the most important goal, it should be the most important factor in determining offender sentences. The principles should then proceed in order of preference.[161]

Considering the breadth of applicability and the composition of the Sentencing Council, establishing sentencing principles and guidelines stands out as the best available option to revamp South African sentencing policy.

CONCLUSION

Prior to the Criminal Law Amendment Act 105 of 1997, sentencing disparities and public concerns regarding crime plagued the South African criminal justice system. While the severity of sentences for violent offenses has increased somewhat, the current picture of the South African criminal justice system does not differ much from its 1997, pre-Act state. In practice, the Act has not achieved South Africa's sentencing objectives and has resulted in several unintended consequences. Mandatory minimums have not provided the resolution South

157. *Id.* pt. III, ch. 2.
158. *See id.* para. 2.3.
159. Van Zyle Smit, *supra* note 150, at 4.
160. *Cf.* ASHWORTH, *supra* note 19, at 73–74.
161. *See* Discussion Paper 91, *supra* note 4, pt. III, ch. 1.

Africa needs.

Nevertheless, South Africa has alternatives available that have the potential to achieve South African punishment objectives and strike the appropriate balance between judicial discretion, public sentiment, and legislative oversight. Enacting a system of sentencing principles and guidelines, which includes restorative justice alternatives, will help the South African criminal justice system achieve deterrent, rehabilitative, retributive, and restorative goals. Such a system provides a framework within which judges can fashion sentences appropriate to the offender, victim, and society.[162]

162. Nonetheless, the sentencing regime is not the sole facet of the South African criminal justice system and does not exist in isolation. Consequently, South Africa needs to address other aspects of the criminal justice system, such as police enforcement and rehabilitation programs, to maximize the system's efficacy.