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PROJECT 82

SENTENCING
MANDATORY MINIMUM SENTENCES

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INTRODUCTION

The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).

The members of the Commission are -

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The project leader responsible for this project is the Honourable Ms Justice L van den Heever.

PREFACE

This issue paper (which reflects information gathered up to the end of March 1997) was prepared to elicit responses and to serve as a basis for the Commission's deliberations, taking into account any responses received. The views, conclusions and recommendations in this paper are accordingly not to be regarded as the Commission's final views. The issue paper is published in full so as to provide persons and bodies wishing to comment or to make suggestions for the reform of this particular branch of the law with sufficient background information to enable them to place focused submissions before the Commission.

The Commission will assume that respondents agree to the Commission quoting from or referring to comments and attributing comments to respondents, unless representations are marked confidential. Respondents should be aware that the Commission may in any event be required to release information contained in representations under the Constitution of the Republic of South Africa, Act 108 of 1996.

Respondents are requested to submit written comments, representations or requests to the Commission by **30 August 1997** at the address appearing on the previous page. The researcher will endeavour to assist you with particular difficulties you may have. Comment already forwarded to the Commission should not be repeated; in such event respondents should merely indicate that they abide by their previous comment, if this is the position.

The researcher allocated to this project, who may be contacted for further information, is Mr W van Vuuren. The project leader responsible for the project is The Honourable Ms Justice L van den Heever.

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CHAPTER 1

ORIGIN OF THE INVESTIGATION

Introduction

1.1 During 1996 the Minister of Justice appointed a new project committee for the Commission's investigation, on an ongoing basis, of all aspects of sentencing. He asked the committee to include in its enquiry the desirability of the legislative determination of minimum and maximum sentences. At meetings on 19 October 1996 and 10 January 1997 the committee approved the incorporation of this issue in the ambit of its task.

Background

1.2 Sentencing in South Africa has recently been the focus of much attention in the media. There has been an outcry from the community, both for more stringent punishment and that offenders should serve a more realistic portion of the sentences imposed by courts of law. **The public also 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 protection of the public.** There is also general dissatisfaction with the leniency of sentences imposed by the courts for serious crimes.

1.3 The reasons for the public's dissatisfaction with sentences imposed by the courts appear from various newspaper reports:

> "The liberal press call it "Public Enemy No 1." Many social sectors are calling to end the moratorium on the death penalty. The well-off and poor communities are scared. Blacks and whites are talking about crime. In the mean time the new government is trying to find a solution to the "crime" problem, advocating a lot of "tough" measures to deal with criminals and the apparent lawlessness that is taking over the country**".** (Daniel Nina **Mail and Guardian** January 6-12 1995).
>
> "People are being murdered, raped, abused and hacked, either through political, recreational or gangster violence. Chaos reigns without control." (**The Citizen** Thursday, 26 October 1995).
> "We will never be in a position to bring the epidemic of serious economic crime and

corruption in South Africa to an end if we do not bring in new structures to deal with it". (**Pretoria News** Thursday, October 26 1995).

"You all talk about the philosophy behind crime and give reasons for it. But I... (cannot use) reason or the constitution with a man holding a gun to my head". **(The Star** October, 26 1995).

"Die straf wat opgelê word vir kindermolestering en kindermishandeling is absoluut onbevredigend. Daarom neem dit so drasties toe." (**Beeld** Donderdag, 26 Oktober 1996).

"Tough jail sentences should be imposed on child abusers and this could be the only deterrent against child abuse.

We have told Mr Omar that the sentences meted out for offenders were too lenient and that new laws with stiffer sentences had to be introduced". (**Sowetan** Friday, 10 November 1995).

"'n Minimum vonnis en strawwer vonnisse kan vir kindermoleesterders ingestel word omdat huidige vonnisse nie 'n voldoende afskrikmiddel vir die gemeenskap blyk te wees nie". (**Beeld** Woensdag, 22 November 1995).

"One reads in the newspapers every day about aggrieved parties who more and more start taking the law into their own hands said Mr Justice T Grobbelaar. "Years ago the Appeal Court already warned that if serious crimes were not punished with severe sentences it would cause people to take the law into their own hands, at the end of the day leading to total chaos". (**Pretoria News** Thursday, 23 November 1995).

"A judge yesterday sentenced three young men to an effective 60 years imprisonment for murdering and robbing a farmer near Witbank. It was tragic, Mr Justice T Grobbelaar said, that the slaughter of innocent people, robbery and the use of illegal fire arms has taken on epidemic proportions. An increasing number of people were taking the law into their own hands because they felt that the courts were not imposing strict enough sentences, he said. This could lead to chaos and anarchy. The public wanted to see that the sanctity of life was protected and respected, the judge added. We have noted before that judges are being forced to impose cricket score sentences because the sentences they impose are being ignored in prisons, life sentences being cut to 20 years, with a further maximum remission of ten years for good behaviour. In a leading article on August 17, we said some judges were imposing such severe sentences that the mind boggled.

We quoted the example of three armed robbers who were sentenced in the Rand Supreme Court to 135 years' imprisonment for an attack on a security van during which two policemen were killed. The sentences will not run concurrently with sentences of more than a 100 years each, for similar crimes, imposed on the robbers by the Pretoria Supreme Court last year.

One of the robbers, previously sentenced to 105 years, will now serve a total of 240 years. The two others each sentenced to 140 years, will now serve a total 275 years. In theory of

course, though not in practice .

A Correctional Services official told a court that a person with a life sentence would automatically be considered for parole after 20 years". (**The Citizen** Saturday, 25 November 1995).

"Criminals tend to inhabit their own subculture, a culture which sanctions and reinforces violent behaviour. It is vital to establish a public campaign telling criminals that their behaviour will result in prosecution and conviction.

There is also a need for an educational campaign telling gangsters that gang membership frequently leads to serious injury and death. Such campaigns must be designed to sabotage the sense of omnipotence that characterises offenders and which encourages the belief that they will escape the consequences of their actions. This information, in combination with other measures, may lead to a substantial withdrawal from these violent subcultures.

The simpler the message, the greater the possibility that it will be imbibed. **For example, messages such as "Individuals found guilty of rape will receive a minimum sentence of 15 years**" on billboards or pamphlet drops, clearly spell out the consequences of crime. **One way to avoid leniency in sentencing is to have mandatory sentences for violent offences. Appropriate mandatory sentences give the public a sense that justice is being served. Mandatory sentences are also an explicit communication of the implications of engaging in violence - an important consideration as many criminals don't assess the consequences of their violent conduct."** (Lloyd Vogelman "Campaign for a crime-free South Africa").

1.4 From these excerpts it is clear that the public is dissatisfied with sentencing practices in South Africa, and aspects of this dissatisfaction are shared by members of the judiciary. Against this background the Commission is considering the question whether mandatory sentences for certain offences should be introduced in South Africa.

CHAPTER 2

IDENTIFYING THE ISSUES

Introduction

2.1 Ashworth[1] points out that sentencing is the stage after the determination of criminal liability and may be characterised as a **public, judicial assessment of the degree to which the offender may rightly be ordered to suffer legal punishment.** It is therefore important not to lose sight of the fact that the values which society wishes to uphold should be those which inform any reform of the sentencing system.

2.2 The approach of our courts to sentencing and the need for reform is illustrated by the facts in **S v Young**[2] and the comment thereon by RG Nairn.[3] Young, a man aged 57 with a clean record, was convicted by a regional court magistrate on 9 counts of contravening the Prevention of Corruption Act, 6 of 1958. His crime was soliciting and accepting bribes in relation to the award of contracts by the petrol company for whom he worked. He was sentenced to a total of 90 months imprisonment, of which half was suspended on conditions. The sentence was confirmed on appeal to the then Transvaal Provincial Division, but on further appeal to the then Appellate Division an entirely new sentence, (the sentence on certain accounts having been reduced), of 64 months imprisonment of which half was suspended, was imposed. Commenting on these facts[4] Nairn criticises current practices as follows:

> ... two 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

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1 AJ Ashworth "Criminal justice and deserved sentences" **Criminal Law Review** 1989 36 340-55.

2 1977 1 SA 602 (A).

3 "Sentencing S v Young 1977 1 SA 602 (A)" 1977 **SACC** 189-191.

4 Nairn 1977 **SACC** 189 et seq.

> 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,

and:[5]

> This judgment, despite the canvassing of relevant factors, is with respect, almost as bare of reasons as was that of the court **a quo** and a number of questions are left unanswered:
>
> (i) How exactly does one draw the line between a crime warranting a fine and one warranting imprisonment? No principle was laid down and no general test was suggested, and yet this was the most important issue in the appeal. The question of seriousness was dealt with, but not sufficiently exhaustively to provide one with a general guide - one is still left wondering how serious a case has to be before the scales tip from fine to imprisonment.
>
> (ii) Was this intended to be a deterrent punishment, or what object was it designed to achieve? It is suggested at 609E that deterrence is an important consideration, but nowhere is it suggested that this type of offence is sufficiently prevalent to warrant passing a sentence which is so severely deterrent that it approaches the category of an exemplary sentence. (It is submitted, with respect, that a sentence of imprisonment passed on a man of 57 with a clean record, for an offence of this nature, can only be classified as exemplary).
>
> (iii) Did the court consider the effect that this sentence would have on the appellant, and weigh this against the general needs of society? One cannot help wondering whether the need to protect society warranted such a drastic and destructive punishment ...
>
> It seems, as has been pointed out elsewhere ... that a serious and systematic approach to punishment is long overdue. With the greatest respect, cases like Young demonstrate that our courts have not yet begun to take this problem seriously. **It is no longer enough to list aggravating and mitigating factors and then move straight on to a generalised conclusion. The lower courts are now in**

5 At 191.

desperate need of a comprehensive set of principles which can be used as basic guides. Ideally these principles should be formulated by the Appellate Division so as to ensure their uniform application throughout the country. Upon these principles could be built a comprehensive body of sentencing law - our only road out of the quagmire.

Main characteristics of punishment in South Africa

2.3 It should be pointed out that the issue of mandatory sentences cannot be discussed without reviewing sentencing practices in South Africa as a whole because when one is considering reform in this regard, the approach to be adopted will be influenced by one's approach to sentencing as a whole.

*** Justification for punishment**

2.4 Punishment is the sanction of the criminal law and there is general consensus on the two outstanding characteristics of punishment, namely the intentional infliction of suffering upon an offender and the expression of the community's condemnation and disapproval of the offender and his conduct[6]. Criminal punishment is, however, more than the infliction of suffering. It is the infliction of suffering on account of the commission of a crime. According to Van der Merwe[7] criminal law is inherently moral and punishment is essentially justified as the moral reproach of the community.

*** Aims of punishment**

2.5 The aims of punishment describe the result that is expected to be achieved by means of punishment. There are a number of aims, also called theories, of punishment recognised by the courts in South Africa. In **S v Khumalo**[8] these aims are stated as follows:

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6 MA Rabie SA Strauss **Punishment: An introduction to principles** fourth edition Lex Patria 1985 6.

7 DP van der Merwe **Sentencing** Juta Johannesburg 1-7.

8 (1984 3 SA 327 (A) at 330 D-E).

> In the assessment of an appropriate sentence, regard must be had inter alia to the main purposes of punishment mentioned by Davis AJA in **R v Swanepoel** 1945 AD 444 at 455, namely, **deterrent, preventative, reformative and retributive** (see **S v Whitehead** 1970 4 SA 424 (A) at 436 E-F; **S v Rabie** 1975 4 SA 855 (A) at 862).

2.6 For the purpose of this paper a detailed discussion is not deemed necessary and a brief reference to what is understood by these aims or theories would suffice. A popular view is that the ultimate aim of punishment is to protect the community against crime. The main differences of opinion arise as to the best method to achieve this. One method of doing this is by directly incapacitating the offender, for example by imposing the death penalty. This method of coercing the offender directly can be described as **direct prevention**. A second method is so-called **indirect prevention** where the aim is to persuade the offender to cease his activities voluntarily.

2.7 In principle the aims or theories of punishment belong to one of two groups, namely the **absolute theory of retribution or the relative theories of prevention or a combination of these theories.**

(i) The absolute theory - retribution

2.8 In terms of the absolute theory of retribution, punishment is justified because a crime was committed. It is also known as the "justice" theory, because the injustice that has been brought about by the commission of a crime is said to be wiped out by the imposition of an equivalent evil upon the offender. **Punishment is imposed because it has been deserved**. It has also been described as the desire to make the offender suffer, not because it is good for him, not because suffering might deter him from further crime, **but simply because it is felt that he deserves to suffer.**

(ii) Relative theories

2.9 In terms of the relative theories punishment is justified by the value of its consequences, namely the prevention of crimes and crimes are to be prevented in order to protect society. The basic idea is that offenders **should become,** and citizens generally **should remain** law-abiding.

Two types can be distinguished from this, namely individual prevention and general prevention.

(a) Individual prevention

2.10 Individual prevention is aimed at offenders who have already been convicted of crimes. The idea is that the offender should be prevented from repeating his criminal behaviour, be it through incapacitation or intimidation by the threat of punishment or through his rehabilitation. Thus the simplest way in which an offender can be prevented from repeating his crime is to render him permanently or temporarily incapable thereto (for example by imposing the death penalty or imprisonment).

2.11 A further aim is individual deterrence. The underlying idea is that a person who has already been subjected to the pain which punishment brings about will be conditioned in the future to refrain from criminal behaviour.

2.12 A third aim under this heading which has become increasingly popular, is that the personality of the offender be influenced so that he can become a law abiding citizen (rehabilitation theory). Forms of punishment aimed at achieving this are periodical imprisonment or committal to a rehabilitation centre. Under this aim it has become customary to replace the unpleasant word “punishment” with “treatment” for the latter option.

(b) General prevention

2.13 General prevention as an aim of punishment is regarded as justified in that it is calculated to discourage people in general from committing crimes. People are thus restrained from committing crimes by the threat of punishment rather than by the imposition of punishment.

2.14 General deterrence is the classical aim underlying the theory of general prevention. The underlying idea is that people refrain from criminal activities because they know that unpleasant consequences of punishment follow the commission of crime.

2.15 One of the most important facets of general prevention is that the threat and imposition of

punishment fulfills an educative, socialising or moralising function - punishment is a concrete expression of society's disapproval of the act and this helps to form and strengthen the public's moral code. Secondly, criminal laws are probably complied with by most law-abiding citizens because compliance with the law ensues automatically for them. Thirdly, the general preventive effect of the criminal sanction can also be seen in the role of the criminal law as an informer of the limits of legitimate and acceptable behaviour. Citizens also require orientation as to what conduct would expose them to punishment. Rules of conduct are unlikely to be followed unless they are reinforced by a sanction. Thus the threat of punishment is added to criminal provisions to provide a persuasion for persons to comply with these provisions.

(iii) Integrative theories

2.16 Considerable criticism has been levelled against the retributive theory and the theories of prevention, pursued to their logical conclusion, also led to unacceptable results. Accordingly attempts have been made to integrate these different theories into a single theory. Retribution is thus taken as the basis in order to ensure that justice is done and the principle of proportionality between punishment and the gravity of the offence is applied in order to prevent the aims propagated by the supporters of the prevention theories, from violating principles of justice as regards the offender.

*** The legislative framework of sentencing in South Africa**

2.17 The Criminal Procedure Act, 51 of 1977 makes provision for different types of punishment[9]. This section is the general enabling statutory provision as far as the various forms of punishment in criminal trials are concerned. Provision is, **inter alia,** made for the following forms of punishment-

* the death sentence[10]**;**

9 Section 276.

10 Ruled to be unconstitutional by the Constitutional Court in **S v Makwanyane and another** 1995 2 SACR 1 (CC).

* imprisonment, including imprisonment for life or imprisonment for an indefinite period;
* periodical imprisonment;
* declaration as a habitual criminal;
* a fine;
* a whipping[11];
* correctional supervision; and
* imprisonment from which a person may be placed under correctional supervision in the discretion of the Commissioner.

2.18 That section is, however, subject to the provisions contained in the Criminal Procedure Act itself, as well as those contained in other laws or the common law. Courts of law may therefore impose the punishments they are entitled to impose under other legal provisions, or under the common law and section 276 is merely complementary to other penal provisions in the statute and common law. It is, however, not a general provision enabling courts to impose forms of punishment which do not fall within their jurisdiction. A court of law is still limited to its own prescribed sentencing jurisdiction.

2.19 The Criminal Procedure Act also contains certain specific provisions regarding the crimes for which, or the circumstances under which certain forms of punishment may be imposed, for example periodical imprisonment, correctional supervision, declaration as a habitual criminal and declaration as a dangerous criminal.

2.20 Periodical imprisonment may, for example, be imposed for any offence, but a minimum of 100 hours and a maximum of 2000 hours is provided for in the Act and no other punishment may accompany it. Correctional supervision may be imposed for any offence, but it may only be imposed for a fixed period of 3 years. Declaration as a habitual criminal means that the offender will spend an unspecified period in prison which will be at least 7 years, it may only be imposed

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11 Ruled to be unconstitutional by the Constitutional Court in **S v Williams and Others** 1995 (2) SACR 251 (CC).

by a regional or high court, it is incompetent where the accused is under the age of 18 years and where the punishment which may, by itself or together with other sentences, be imposed, would entail imprisonment for a period exceeding 15 years.

2.21 Declaration as a dangerous person may be imposed by a regional court and a high court if the offender represents a danger to the physical or mental well-being of other perons and if the community must be protected against the offender. The offender is sentenced to an indefinite period of imprisonment and the court is obliged to direct that the offender shall be brought before the Court on the expiration of a period deterimined by it and which does not exceed the jurisdiction of the court. A life sentence may also be imposed. Imprisonment for life may literally mean incarceration for the natural life of the offender. Current practice is that a prisoner is not considered for release until he has served at least twenty years (previously such consideration took place sooner). Such a person is considered for release after the Minister of Correctional Services has requested the advice of the National Advisory Council on Correctional Services. The approval of this Council is required before the prisoner may be released.

2.22 In respect of common law crimes such as assault, theft, rape, et cetera there is no statutory provision which specifies the type of punishment. In such cases the courts may impose sentences up to the maximum provided for in the Act governing their criminal jurisdiction. The punishment jurisdiction of magistrates' and regional courts is determined in terms of section 92 of the Magistrates Courts Act, 32 of 1944.

2.23 The range of punishment which may be imposed on a person convicted of a statutory crime is usually stipulated in the statute which creates the offence, stipulated either in the definition itself or in a separate penalty clause. The regular punishment for statutory crimes is normally a fine or a period of imprisonment which may not exceed a fixed maximum or both.

2.24 Apart from the regular punishments provided for an offence, some statutes make allowance for an increased or further punishment in addition to the normal punishment prescribed, while other statutes provide for certain penalties and orders other than the regular or increased punishment, for example:

* In respect of certain crimes provision is made for increased punishment (fine and/or imprisonment) in the case of a second or subsequent conviction.[12]

* In respect of certain crimes the court is empowered, or even obliged, upon conviction, to enquire into and assess the monetary equivalent of any advantage which the convicted person may have gained in consequence of the commission of the crime, and in addition to any punishment which may be imposed, to impose a fine equal to the amount so assessed, or, in default of payment, imprisonment for a certain maximum period.[13]

*** The court's discretion in sentencing**

2.25 The legislature's primary task is to define what conduct will be criminal and to provide a threat of punishment. It will ordinarily also prescribe the nature of the punishment that may be imposed and the maximum that may not be exceeded. The court's function is to impose punishment on offenders found guilty of the commission of crime. It is generally accepted that the South African Courts have a discretion to determine the **nature** and **extent** of the punishment

12 See for example section 170 (1) and (2) of the Water Act, 54 of 1956; section 46 of the Atmospheric Pollution Prevention Act, 45 of 1965.

13 See for example section 11 (2) of the Physical Planning Act, 88 of 1967.

to be imposed within this framework.

2.26 Sentencers are also restricted by the framework of punishment created by the legislator. While judges have more freedom (except for maxima set by statutory penalty clauses, no other statutory limits apply to the criminal jurisdiction of the High Court), magistrates are more restricted. Within the legislative framework presiding officers are allowed much freedom, but the principles in terms of which they have to act have often been criticised as imprecise and vague. Certain statutory rules apply for example to the suspension and conditions of sentences. While it is frequently alleged that sentencers have a wide discretion, one should not lose sight of the limitations that do exist and that sentencers do not have an unlimited discretion as is sometimes alleged. In the sentencing process the sentencer is required to make a number of decisions and the freedom to do so differs, depending on the circumstances of the case, the particular legislative framework and the principles developed by the courts.

2.27 There are therefore two institutions which control the exercise of the sentencing discretion, namely relevant legislation and control exercised by the courts of appeal or review. It should, however, be noted that control by the courts has also been subjected to criticism. For example, in **S v Pieters**[14] it was stated that a court of appeal will only reverse a decision of the trial court if it appears that trial **court has exercised its discretion in an improper or unreasonable manner.** With regard to the latter, the courts have developed a number of tests for determining when it is appropriate to interfere with the trial courts' decision: for example, if the sentence imposed "induces a sense of shock" or if the sentence is "startlingly inappropriate" or if it reveals a "striking disparity" compared to the sentence which the court of appeal would have imposed as court of first instance[15]. These tests have been described as vague and unprecise.

2.28 In addition to the modes of control by appelate courts which has been described in the previous paragraph, these courts also exercise control by highlighting certain principles which have to be taken into account when deciding on the appropriate sentence. In the case of

14 1987 3 SA 717 (A).

15 See **S v M** 1976 3 SA 644 (A); **S v N** 1988 3 SA 450 (A) at 465 I-J; **S v Petkar** 1988 3 SA 571 (A).

imprisonment, for example, the following principles have been developed by the courts:

* the sentence must be authorised through statute or common law.[16]

* it must be unaffected by misdirection;

* it must not be so severe that no reasonable court would have imposed it.[17]

* it is not to be imposed lightly or without serious reflection, this is especially true where all the requirements of punishment, as well as the aims thereof, can be satisfied by another form of punishment;

* for the first offender, imprisonment is usually not desirable and alternatives should be considered[18];

* youth is a factor against imprisonment;

* first offendership or youth does not as a rule mean that imprisonment should not be imposed[19]; and

* high age is usually a factor against imprisonment.

2.29 Both the courts and the legislature have been criticised for the manner in which they control the sentencing discretion. The appelate courts have been criticised for their reluctance to

16 **S v Pillay** 1977 4 SA 531 (A).

17 **S v De Jager and Another** 1965 2 SA 616 (A).

18 **Persadh v R** 1944 NPD 357, **S v M** 1990 2 SACR 509 (E); **S v George** 1992 1 SACR 250 (W).

19 **S v Victor** 1970 (1) SA 427 (A).

interfere with the sentencing discretion exercised by the courts of first instance. Van Rooyen[20] states that in the absence of legislative guidelines, the Supreme Court finds itself in the position where it has to play an important role and fulfil a leadership function in developing a sound penal policy through the shaping of guidelines in respect of the sentencing discretion. However, rules are binding but principles are merely guidelines pointing in a general direction, compelling a court to give attention and consideration to certain matters, **but not compelling it necessarily to follow that direction.** By way of illustration, the principle that first offenders should not be sent to prison does not mean that first offenders may never be sent to prison. Other principles may well outweigh this particular principle.

2.30 Guidance by our appellate courts has also been described as vague and unsatisfactory. In **S v Scheepers**[21] Viljoen JA, for example expressed the view that imprisonment is justified only when it is necessary for the protection of the community to remove the offender from society and where the aims of punishment cannot be achieved through the imposition of an alternative sentence. This view was, however, rejected in **S v Holder**[22] where the court held that no court can prescribe to another court when to impose imprisonment.

2.31 The guidance provided by the courts is furthermore complicated by the different approaches in the case law to the so-called theories or aims of punishment, which are discussed below. In **S v Khumalo**[23] the court held that:

> In the assessment of an appropriate sentence, regard must be had **inter alia** to the main purposes of punishment ... namely deterrent, preventive, reformative and retributive ... **Deterrence has been described as the 'essential', 'all important', 'paramount' and 'universally admitted' object of punishment.**

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20 J H van Rooyen "The decision to imprison - the courts' need for guidance" 1980 **SACC** 228.

21 1977 2 SA 155 (A).

22 1979 2 SA 70 (A).

23 1984 3 SA 3 SA 327 (A) at 330 D-E

2.32 In **S v Baptie**[24] the court observed that offences which have a background in the disordered mental conditions of a perpetrator can usually be cured by **psychiatric treatment**. Therefore, in dealing with first offenders of that type, it seems proper that the court should suppress its dismay and disgust at the nature of the offences and should, in the interest of justice, endeavour to investigate such matters as the accused's social background, his domestic state, the sort of work that he does and his intellectual ability. It should also ascertain whether, if a suspended sentence is imposed, the accused is prepared to undergo psychiatric treatment to aid in addressing his or her particular condition.

2.33 In **S v B**[25] the court of appeal confirmed a sentence of 5 years imprisonment for attempted rape. The court subscribed to the view that, although in ancient times the emphasis was on retribution, **in modern times the retributive aspect has tended to yield ground to the aspect of prevention and correction.** However, having regard to the circumstances of the case, the complainant, a girl of 16 years, was seriously manhandled by the appellant who showed no remorse afterwards, the court took the view that the magistrate did not overemphasise the retributive aspect and correctly applied the deterrent aims of the sentence both as far as the appellant himself, as well as others were concerned. The court confirmed the sentence of imprisonment.

2.34 In **R v S**[26] the accused was convicted of committing unnatural sexual acts with a number of boys. With regard to a proper sentence the court observed that, whilst appreciating the great importance of reformative measures in this type of cases, persons who have been guilty of depraved practices should not escape gaol sentences. The court should not encourage the belief that depraved conduct can be embarked upon with no consequence other than that of psychiatric treatment. **The court stated that the public will feel alarmed if no real punitive sanction is attached to such conduct.**

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24 1963 1 PH 96 (N).

25 1985 2 SA 120 (A).

26 1956 1 SA 649 (T).

2.35 In **S v S**[27] the court of appeal accepted that the appellant was a sick man and that he required psychiatric treatment. However, the court observed that having regard to the serious nature of the offences committed, a period of imprisonment should nevertheless be imposed. The court also emphasised that **prevention is one of the main objects of punishment**, but emphasised that **imprisonment should serve as a warning to others not to indulge in similar conduct**.

2.36 In **S v B**[28] the court accepted that the accused had psychosexual problems in his marriage and that he needed treatment. Having regard to the special circumstances of the case the court imposed a term of imprisonment suspended on condition that he underwent treatment. In **S v D**[29] the court of appeal held that the magistrate erred in emphasising imprisonment of the accused as means of removing him from contact with children. The court found that on the evidence it appeared that paedophilia was at least partially curable and incarceration was therefore not the only option. The court stated that the paedophile's sickness, by definition leads to the commission of crimes against an extremely vulnerable segment of society. Thus, if there were no known form of treatment for paedophilia, then incarceration would be the only option to safeguard children from a paedophile's predations.

2.37 **S v D**[30] involved sexual abuse of children within family context. The court observed that this conduct is often a manifestation of family pathology and it requires that attention should be given to the family, its composition and dynamics. Furthermore, in a criminal justice system a sentence should also address the future. Of importance is the court's observation that the sexual molestation of children represents a special form of criminal conduct. The person imposing

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27 1977 3 SA 830 (A).

28 1980 3 SA 851 (A).

29 1989 4 SA 209 (C).

30 1989 4 SA 709 (T).

sentence should ask himself whether, both as regards the particular individual he is dealing with as well as in regard to the interests of the community, it is possible to act in a reconstructive manner. The court set aside the sentence of imprisonment imposed by the magistrate and referred the matter back to the magistrate's court for reconsideration of sentence. The court of appeal also indicated that in the circumstances of the case it was far more likely that some or other form of compulsory treatment of the accused and the family under the sanction of a totally suspended sentence of imprisonment would be preferable.

2.38 In **S v E**[31] the trial court approached punishment for the indecent acts committed by the accused from the view that he needed urgent extra-custodial treatment, but because some term of imprisonment was unavoidable, it should be a short term so as not unduly to delay the commencement of treatment. On appeal the Appellate Division stated that the violation of the innocence of young children arouses the community's indignation and prompts it to call for measures to protect its youth. The penalties provided for therefore understandably reflect the seriousness with which the legislature viewed these contraventions. However, the obvious need to deter would-be offenders, and society's desire for retribution, must be balanced against the primary need in this type of case to achieve in the long-term interest of society, the offenders' rehabilitation**.**

2.39 Finally, considering sentence in **S v R**[32] the Appellate Division highlighted the introduction of correctional supervision as sentencing option and considered its appropriateness as a proper sentence for sexual offences. The court concluded that correctional supervision was a particularly appropriate sentence having regard to the circumstances of the case. The court held that as the accused had strong family ties and a stable job, his criminality had its origin in his personality defects which responded favourably to therapy, while imprisonment would have a negative impact on the accused. Although the offences were regarded as serious and the accused had a relevant previous conviction, **the court was of the opinion that the sentence should emphasise remedial treatment rather than retribution.**

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31 1992 2 SACR 625 (A).

32 1993 1 SACR 209 (A).

*** Mandatory sentences**

2.40 It is clear from the above that, for some kinds of offences at least, the treatment model has a great deal of support in South Africa. The legislative framework for each sentencing option has been criticised as leaving too wide a discretion to the courts and, as a result, in the history of our penal system, a number of attempts were made to limit the sentencing discretion by providing for mandatory minimum sentences. By way of illustration, in 1952 the imposition of corporal punishment was mandatory under certain circumstances. In 1959 imprisonment for the prevention of crime and imprisonment for corrective training were introduced, the imposition of which were compulsory if certain requirements were met. The Abuse of Dependence-Producing Substances and Rehabilitation Centres Act, 41 of 1971, for example also contained a number of mandatory sentences.

2.41 In the past the provisions containing mandatory sentences were subject to strong criticism. In **S v Toms; S v Bruce**[33] Chief Justice Corbett observed that:

> **... the imposition of a mandatory minimum prison sentence has always been regarded as an undesirable intrusion by the Legislature upon the jurisdiction of the courts to determine the punishment to be meted out to persons convicted of statutory offences and as a kind of enactment that is calculated in certain instances to produce grave injustice.**

and Botha JA[34] expressed the following view**:**

> It is not for me to comment on the policy of the legislature when once I have found an unavoidably clear expression of it in the Act. **But I am qualified, entitled and obliged to speak my mind on the effect of that policy on the administration of justice in the courts of the country, which is the sphere in which I function and on that level I find a legislative provision like s 126 A (1) (a), which reduces a sentencing court to a mere rubber stamp, to be wholly repugnant.**

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33 1990 2 SA 802 (A) at 817 C-D.

34 At 822 C-D.

*** The methodology in sentencing adopted by our courts**

2.42 South African courts have often been criticised for adopting an intuitive approach to sentencing. There is a perception that most officials in the magistrates' courts pass sentence on an unscientific basis. Most magistrates have done what their more experienced colleagues did-impose sentences on the basis of a "feeling". In **S v Makhele** [35] this view was confirmed. The court ruled that it is unsatisfactory that responses to queries from reviewing judges regarding sentence amount to a mere repetition of the trite principles of sentencing together with the well known cases without the facts of the case and the personal circumstances of the accused having been determined.

2.43 At present the well-known dictum in **S v Zinn**[36] is regarded to be the point of departure in the sentencing process:

> **What has to be considered is the triad consisting of the crime, the offender and the interests of society.**

2.44 The triad has been criticised as elementary, vague and unsophisticated. One of these criticisms is that the role of victims of crime is not emphasised. In subsequent decisions the triad has been referred to in somewhat different terms:[37]

> Punishment must fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances.

and:[38]

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35 1994 1 SACR 7 (0).

36 1969 2 SA 537 (A) at 540G.

37 **S v Khumalo** 1973 3 SA 697 (A) at 698A.

38 **S v Sparks** 1972 3 SA 396 (A) at 410H.

> In addition to the matter of punishment, the deterrent aspect calls for a measure of emphasis, lest others think the game is worth the candle. Nevertheless, the appellants must not be visited with punishments to the point of being broken. Punishment should fit the criminal as well as the crime, be fair to the State and to the accused, and be blended with a measure of mercy.

2.45 However, failure by the legislature to provide a clear and unambiguous legislative framework for the exercise of the sentencing discretion, failure by the courts to develop firm **rules** for the exercise of the sentencing discretion and failure by the courts and the legislature to give firm guidance as to which sentencing theories or aims carry the most weight, brought much uncertainty and inconsistency into the sentencing process in South Africa.

PROBLEMS IN RESPECT OF THE SENTENCING PROCESS IN SOUTH AFRICA

2.46 A detailed discussion of criticism of the penal system in South Africa is not appropriate for the purpose of this issue paper. Some points of criticism are summarised below without claiming the list to be complete:

* **The existence of a sentencing discretion is the source of inconsistency and disparity in sentencing practices in South Africa .**
* **The legislative framework for control of the sentencing discretion is too broad and it enhances inconsistency and disparity in sentencing practices.**
* **The principles developed by the courts to limit or control the sentencing discretion are ineffective.**
* **The principles upon which a superior court will interfere with a sentence imposed by the court of first instance are vague and the lower courts are in desperate need of a comprehensive set of principles which can be used as basic guidelines in sentencing.**
* **There is great uncertainty as to which sentencing aim or theory should be pursued. In some cases it is suggested that deterrence is the most important consideration while others emphasise retribution or rehabilitation.**
* **There is a clear absence of a systematic approach to sentencing.**
* **Attempts by the legislature to control the sentencing discretion by the**

introduction of mandatory minimum sentences elicited strong criticism. In the Viljoen Commission's report[39] the Commission expressed its opposition to interference with the judicial discretion in the form of prescribing minimum sentences and sentences for corrective training (2-4 years), prevention of crime (5-8 years) and the indeterminate sentence (9-15 years). It recommended that minimum sentences be abolished (and sentences for corrective training and prevention of crime were subsequently removed from the statute book).

* **There is a clear absence of a structured sentencing policy and sentencing guidelines.**
* **Most sentencers appear to approach the question of sentencing in an intuitive and unscientific manner.**
* **Sentencing practices fail to protect the community from criminals committing serious offences.**
* **Release of convicted prisoners by the Parole Board before expiration of their sentences is severely criticised. It is regarded as interference by the Executive in the functions of the courts.**
* **Academics have highlighted a number of factors which were in the past regarded as justification for discrimination in sentencing, for example race, gender, class, ecomomic position and political background.**
* **Many sentencers imposed sentences with a specific political backgroud as point of departure.**

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39 **Commission of Enquiry into the Penal System of the Republic of South Africa.**

CHAPTER 3

OPTIONS FOR SENTENCING REFORM - AN INTERNATIONAL PERSPECTIVE

Background

3.1 Until two decades ago sentencers in most countries enjoyed a wide discretion to impose whatever sentence they deemed appropriate, subject only to prescribed maximum penalties. Furthermore, in many states sentences for serious offences comprised indeterminate or partially indeterminate periods of custody the duration of which was determined by parole authorities. In some countries, for example in England, a 'tariff' was developed by the judiciary which broadly indicated a range of sentences for normal cases, defendants had a right of appeal where an excessive penalty beyond the tariff was imposed. In Australia the idea of a "tariff" was objectionable to judges in some states and sentencing was alleged to involve an intuitive synthesis.[40]

3.2 Internationally the existence of a sentencing discretion led to criticism similar to the criticism levelled against the approach followed in South Africa. Different sentences were imposed for different reasons without having to explain the sentence imposed by the court. Some sentences were imposed for deterrent reasons, others to rehabilitate offenders. Even the same judges were not consistent in sentencing. There was no agreement as to what criteria ought to be taken into account in the sentencing decision and what weight ought to be given to factors such as prior record, age, dangerousness, et cetera. The criticism of a lack of consistency was met with the response that sentences were individualized, they were tailored to meet the needs of the accused and therefore that consistency in sentencing was not to be expected. The result was predictable, widespread sentencing disparity with similar cases being treated differently.

3.3 Another feature of the sentencing practices was the development of the so-called exemplary sentences. This resulted in offenders receiving sentences in excess of those imposed

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40 C Clarkson, R Morgan **The Politics of Sentencing Reform** Clarendon Press: Oxford 1995 at 4.

on others committing similar crimes. There also a absence of “truth in sentencing” because offenders sent to prison were entitled to remission of sentence by parole boards. These disparities and inconsistencies were regarded unjust and unacceptable.

3.4 Furthermore, research evidence failed to demonstrate that individualized sentencing worked in terms of subsequent law abiding behaviour. Faith in the rehabilitative ideal was also undermined from the 1970's onwards and increasing knowledge of the extent of crime and the marginal inroads which policing and justice interventions made to detecting and punishing criminals, called into question the doctrine of deterrence.

3.5 In many jurisdictions concerns about the rising prison population fed a reformulation of opinion. In some states it was believed that imprisonment extensively used, can serve to control and reduce crime. In Australia, in both New South Wales and in Victoria, an administration came to power which perceived a rise in the prison population to be the inevitable consequence of their adopting tough law and order policies. However, at the same time these politicians encouraged more generous use of executive release. As a result disparities arose as to the sentences imposed and the sentences actually served. This development gave a renewed impetus towards “truth in sentencing”.

3.6 A combination of the factors outlined above provided fertile soil for the growth of the ‘justice’ or ‘just deserts’ movement. This meant that sentencing disparity had to be eliminated. This involved eliminating disproportionately long sentences, emphasising the need for truth in sentencing and that equal sentences had in practice to mean the same thing for different offenders. It was suggested that what was needed was a mechanism for ensuring that judicial discretion was controlled by **forcing judges to sentence in accordance with agreed and objective standards of desert.**

3.7 **Thus, on the international scene, a number of factors - rising crime rates, prison crowding, fiscal crises, loss of faith in the treatment paradigm, concern that just deserts be delivered, the need for public protection against dangerous offenders - have in recent years sharpened the debate about sentencing policy.**

3.8 With the incidence of violent crime continuing to rise and public demands for

harsher and more certain punishment increasing, many countries are examining sentencing of offenders with the view of instituting reforms. These reforms are primarily a response to criticism of rehabilitation attempts, but they also seek to accomplish differing goals, including reducing disparity that results from discretionary sentencing, increasing sentencing fairness, establishing truth in sentencing and balancing sentencing policy with limited correctional resources.

SENTENCING REFORM IN THE UNITED STATES OF AMERICA.

* Background

3.9 Prior to 1972 the practice of sentencing convicted criminals in federal courts was rarely criticized. Although legislatures prescribed either maximum lengths or specific ranges for sentences the practice of sentencing was largely left to the discretion of federal judges. In fact there was a trend towards expanding judicial discretion in sentencing.

3.10 In 1972, District Court Judge MF Frankel sounded the alarm on the long established system of sentencing in the United States. He stated that **the almost wholly unchecked and sweeping powers** given to judges in the fashioning of sentences are terrifying and intolerable for a society that professes devotion to the rule of law. According to Frankel the source of the problem was the practice of indeterminate sentencing in which judges sentenced convicted criminals to vaguely specified ranges of time (for example five to ten years) and the fact that an unaccountable Parole Commission determined when the sentence should expire.[41] He argued that the form of the sentence which judges imposed provided no check on arbitrary decision-making. As a result there was a wild array of sentencing judgments without any semblance of the consistency demanded by the ideal of justice. Frankel demanded that the **legislature** determine the value - laden issue of the basic purposes that punishment and sentencing should accomplish. He argued that, whatever individual preferences might be, **it was for the legislature to decide and prescribe the legitimate bases for criminal sanctions.** Therefore,

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41 M A Adams "The Federal Sentencing Guidelines as Legal Process Jurisprudence" **American Criminal Law Review** Vol 31 259 at 262.

once these issues of societal values were settled by the legislature, it would constrain the judiciary's role to that of implementing the democratically determined policy.

3.11 Senator Edward Kennedy responded to Frankel's call and three years after the initial call, Kennedy introduced his first sentencing reform Bill. Doubting the legitimacy of rehabilitation as a proper systematic rationale for sentencing, Kennedy propagated that the legislature should guide the judiciary in choosing a new rationale. A second notion underlying the sentencing reform was the problem of disparity in sentences and the underlying problem of persistence of discrimination in sentencing, most notably racial and class discrimination. These reform efforts resulted in the enactment of legislation which allowed the promulgation of the Federal Sentencing Guidelines in 1987.

3.12 Sentencing guidelines developed by an independent sentencing commission, have since the late 1970's, represented the dominant approach to sentencing reform in the United States. Many States have replaced the indeterminate sentencing with **structured sentencing schemes** such as determinate sentencing, mandatory minimum penalties, and sentencing guidelines.

3.13 The goals of **structured sentencing** are -

* to increase sentencing fairness;
* to reduce unwanted disparity, either in the decision to imprison or in the length of the sentence;
* to establish truth in sentencing; and
* to establish a balance of sentencing policy with limited correctional services.

3.14 It was furthermore claimed that **structured sentencing reforms** could be used to **deter potential offenders and incapacitate dangerous offenders** and it could also be used to reduce the likelihood and length of imprisonment for the so-called non-dangerous offenders.

3.15 For the purpose of understanding these reforms it is necessary to have a clear understanding of certain definitions. The following terms are therefore explained:

Determinate sentencing: Sentences of incarceration in which an offender is given a fixed term that may be reduced by good time or earned time.

Indeterminate sentencing: Sentences in which an administrative agency, generally a parole board, has the authority to release an offender and determine whether an offender's parole will be revoked for violations of conditions of release.

Mandatory minimum sentences: A minimum sentence that is specified by the State and that may be applied for all convictions of a particular crime with special circumstances, for example robbery with a fire-arm or selling drugs to a teenager within 1000 feet of a school.

Presumptive sentencing guidelines: Sentencing that meets the following conditions: (1) the appropriate sentence must be authorized by sentencing guidelines developed by a legislatively created body, usually a sentencing commission; (2) sentencing judges are expected to sentence within the range or provide written justification for departure from the range; (3) the guidelines must provide a mechanism for review of the departure. Presumptive guidelines may employ determinante or indeterminate sentencing structures.

Voluntary advisory sentencing guidelines: Recommended sentencing policies that are not required by law. They are usually based on past sentencing practices and serve as guide to judges. Legislation has not mandated their use. They may also employ determinate or indeterminate sentencing structures.

*** Current sentencing practices in the USA**

3.16 An unprecedented number of structured sentencing reforms have taken place over the past two decades in the United States of America. To date, 16 States and the Federal Government have implemented or are about to implement **presumptive or advisory sentencing guidelines**. Five states adopted determinate sentencing systems.

3.17 All states employ some version of **mandatory minimum sentencing laws** which target **habitual offenders and the crimes of possessing a deadly weapon, driving under the**

influence of alcohol and possessing and distributing drugs.

3.18 In all the States where sentencing guidelines were adopted a sentencing commission was appointed with the mandate to develop sentencing guidelines. In the enabling legislation these commissions are required to meet the multiple goals of punishment, i.e just deserts, deterrence, incapacitation and rehabilitation. Of concern is the ability to individualize sentencing and to consider a wide range of sentencing purposes. Most States have attempted to control the individualization of judicial practices while maintaining that sentences should consider the full range of traditional sentencing purposes. In Pennsylvania, for example, judges are required to consider the offenders' rehabilitive potential and community protection as well as the guidelines. In Washington the enabling legislation mandates that sentencing guidelines incorporate the goals of retribution, incapacitation, rehabilitation and frugal use of correctional resources.

3.19 **It is claimed that under the system of sentencing guidelines repeat offenders and offenders convicted of violent crimes are much more likely to be imprisoned and thereby and serve longer prison terms. Conversely, first-time offenders charged with property crimes are less likely to be imprisoned**.

3.20 It should be noted that the development of sentencing guidelines is a long and expensive process. Before guidelines can be developed, detailed data on current sentencing practices are obtained and analyzed and a simulation model is established for estimating the impact of the proposed guidelines on prison, parole, probation and jail populations,

3.21 In the USA the sentencing guidelines in Minnesota have been in effect the longest and have generated the most extensive body of sentencing data, case-law, amendments and evaluative literature and is therefore regarded to be the best model for reference.

*** The Minnesota sentencing guidelines[42]**

42 R S Frase "Sentencing Guidelines in Minnesota and other American States: A Progress Report" in The **Politics of Sentencing Reform** 1995 169 et seq.

3.22 In 1978 the Minnesota Sentencing Guideline Commission was created to develop sentencing guidelines. The new guidelines were to govern sentencing in all felony cases (crimes punishable by more than one year of imprisonment). The Commission had two specific directions, namely (1) to develop guidelines which were to specify presumptively correct prison-commitment and prison duration rules for each combination of appropriate offence and offender characteristics and (2) the Commission was to take previous sentencing practices and existing correctional resources into consideration. Furthermore, the enabling statute abolished parole and provided that the entire term of imprisonment must be served, subject only to limited reductions for good behaviour.

3.23 The Commission subsequently developed a set of guidelines centred around a sentencing grid (for an illustration see the table below). **The two major determinants of the presumptive sentence are the severity of the most serious conviction offence and the defendant's criminal - history score** (based on prior felony convictions). These two factors place each defendant in one of the cells of the grid. The numbers in the cells represent the duration of the recommended prison sentence in months. The black line across the grid is the disposition line, in cells below this line, the guidelines recommend that the prison sentence be executed immediately. The single number at the top is the recommended best sentence, but a range is also provided within which the sentence could fall without being deemed a departure.

3.24 Above the disposition line, the guidelines generally recommend a stayed (suspended) prison sentence equal to the number of months shown in the cell. Such stayed sentence is normally accompanied by several conditions such as incarceration in a local jail for up to a year.

3.25 The prescribed sentence is presumed to be correct, but the court may depart form the recommendation if it finds that substantial and compelling circumstances call for a different sentence. In that case the judge must state reasons for departure from the sentence. If the accused goes to prison the term imposed will be reduced by a third for good behaviour. Thus a 36 - month guidelines sentence becomes a 24-month sentence.

The Minnesota Sentencing Grid - presumptive sentencing lengths in months

Severity levels of conviction offence	0	1	2	3	4	5	6 or more
Sale of a simulated controlled substance	I	12[a]	12[a]	12[a]	13	15	17	19 18-20
Theft-related crimes ($2.500 or less) Cheque forgery	II	12[a]	12[a]	13	15	17	19	**21** **20-22**
Theft crimes ($2.500 or less)	III	12[a]	13	15	17	**19** **18-20**	**22** **21-23**	**25** **24-26**
Non-residential burglary Theft crimes (over $2.500)	IV	12[a]	15	18	21	**25** **24-26**	**32** **30-34**	**41** **37-45**
Residential burglary simple burglary	V	18	23	27	**30** **29-31**	**38** **36-40**	**46** **43-49**	**54** **50-58**
Criminal sexual conduct, 2nd degree (a) and (b)	VI	21	26	30	**34** **33-35**	**44** **42-46**	**54** **50-58**	**65** **60-70**
Aggravated robbery	VII	**48** **44-52**	**58** **54-62**	**68** **64-72**	**78** **74-82**	**88** **84-92**	**98** **94-102**	**108** **104-112**
Criminal sexual conduct, 1st degree Assault, 1st degree	VIII	**86** **81-91**	**98** **93-103**	**110** **105-115**	**122** **117-127**	**134** **129-139**	**146** **141-151**	**158** **153-163**
Murder, 3rd degree Murder, 2nd degree (felony murder)	IX	**150** **144-156**	**165** **159-171**	**180** **174-186**	**195** **189-201**	**210** **204-216**	**225** **219-231**	**240** **234-246**
Murder, 2nd degree (with intent)	X	**306** **299-313**	**326** **319-333**	**346** **339-353**	**366** **359-373**	**386** **379-393**	**406** **399-413**	**426** **419-433**

3.26 It is important to note that the **presumptive sentences are almost entirely based on prior record and current offence severity** (which research showed to be the two most important factors in previous judicial and parole decisions). The Commission stated that it adopted a sentencing theory of 'Modified just deserts'. **Thus retributive values were the primary determinant of the presumptive sentence and criminal history plays an important role.**

3.27 A further important development was the fact that maximum penalties for violent crimes were raised in 1989 and again in 1992 after a round of public hysteria prompted by two highly publicized rape-murders. Drug penalties were also increased steadily and the legislature periodically displayed impatience with presumptive sentencing rules by creating or expanding

statutes requiring a mandatory minimum prison term (eg for use of a dangerous weapon and for certain recidivists). Some of these statutes are truly mandatory - the court has no power to impose any lesser sentence, others have been interpreted merely to prescribe the minimum sentence if the court choose prison. An important development was that the guidelines enabling statute was amended in 1989 to specify that the Commission's **primary goal in setting guidelines should be public safety while correctional resources remain a factor but no longer a substantial consideration.**

*** Sentencing in the US federal jurisdiction**

3.28 In 1984 Congress enacted sweeping and dramatic reforms of the federal sentencing practices through the passing of the Sentencing Reform Act. The Act was part of a comprehensive Crime Control Act the purpose of which was to address the problem of crime in society. **The goals of the Sentencing Reform Act were to reduce disparity in sentencing, increase certainty and uniformity and to correct past patterns of undue leniency in sentencing.**

3.29 To this end the United Stated Sentencing Commission was created with an overriding mandate to determine the appropriate type and length of sentences for each of the federal offences. At the same time parole was eliminated so that sentences announced would be sentences served. Discretion previously vested in the federal judiciary to set sentences were to be vastly curtailed by mandatory guidelines promulgated by the Commission. The first set of guidelines was implemented in January 1989.

3.30 The Sentencing Reform Act had clear goals and for the purpose of this paper it is deemed necessary to refer to the provisions dealing with the imposition of a sentence:

Section 3553 Imposition of a Sentence:

(a) **Factors to be considered in imposing a sentence.** The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed shall consider-

(1) The nature and circumstances of the offence and the history and characteristics of

the defendant;

(2) The need for the sentence imposed -

(A) to reflect the seriousness of the offence, to promote respect for the law, and to provide just punishment for the offence;
(B) to afford adequate deterrence to criminal conduct:
(C) to protect the public from further crimes of the defendant; and
(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentence available;
(4) the kinds of sentence and sentencing range established ... (by the United States Sentencing Commission guideline)
(5) any pertinent policy statement issued by the Sentencing Commission ...
(6) the need to avoid unwarranted sentence disparity among defendants with similar records who have been found guilty of similar conduct; and
(7) the need to provide restitution to any victim of the offence.

(b) The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that an aggravating or mitigating circumstance of a kind or to a degree not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing Guidelines, policy statements, and official commentary of the Sentencing Commission...

(e) Upon motion of the government, the court shall have the authority to impose a sentence below a level established by the statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offence. Such a sentence shall be imposed in accordance with the Guidelines and policy statement issued by the Sentencing Commission...

3582 (a) **The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation ...**

3.31 The sentencing guidelines drafted by the US Sentencing Commission seek to address the key aspects of the sentencing decision where unwarranted disparities were allowed in the past. To this end similar offences are grouped together and assigned the same offence level. Offence characteristics are considered to help determine the seriousness of the offence. Certain adjustments are allowed to gauge the offence seriousness and to allow for individualisation of

punishment, for example the defendant's role in the commission of the crime and his degree of culpability. The guidelines also credit a defendant who is truly remorseful. On the other hand the sentence is increased where the defendant has a significant record of prior criminal activity. The guidelines provide for a range of appropriate sentences within which the sentencer may consider factors such as family ties, community involvement and degree of sophistication. If the sentencing judge finds an unusual mitigating or aggravating circumstance not reflected in the guidelines he may depart form the prescribed sentencing range for valid reasons stated in open court and such decision is subject to review or appeal.

*** Mandatory minimum sentencing in the USA**

3.32 In the US Federal Code over 60 criminal statutes contain mandatory minimum sentences. However, only those related to drug offences and weapon offences account for the most convictions. In mandating minimum sentences one of the goals was to eliminate sentencing disparity for certain offences. Certain categories of offences were identified and Congress designated appropriate penalties below which defendants were not to be sentenced.

3.33 A number of reasons are advanced as justification for the enactment of mandatory minimum sentencing. These motivations include:

> **Retribution/Just deserts** - In simple terms it is argued that the punishment should fit the severity of the crime.
> **Incapacitation** - It is vital to make use of incapacitation of serious offenders to protect the community.
> **Disparity** - Mandatory minimum sentences reduce unwarranted disparity in sentencing.
> **Inducement of cooperation** - Mandatary minimums may help induce defendants to cooperate with authorities.

3.34 In the USA Congress persistently targeted drug related and violent crimes to receive mandatory minimum sentences. It was stated that there is **a need for the continuation of the policy of punishment of a severe character as a deterrent to narcotic law violations. In order to define the gravity of that class of crimes, mandatory sentences were regarded as**

an essential element of the desired deterrents.

3.35 However, during 1991 the US Sentencing Commission was requested to examine the continued use of mandatory sentences.[43] After empirical research, the US Sentencing Commission concluded in its report that despite the expectation that mandatory minimum sentences would be applied to all cases that meet the statutory requirements, the available data suggested that it was not case. In a vast number of cases defendants were sentenced below the applicable statutory minimum, resulting in sentencing disparities. Mandatory minimum sentences were wholly dependent upon defendants being charged with and convicted of the specified offence under the mandatory minimum statute. To the extent that prosecutorial discretion was exercised with preference to some offences, and to the extent that some defendants were convicted of conduct carrying a mandatory minimum penalty while others who engage in similar conduct were not so convicted, the use of mandatory minimum penalties again introduced sentencing disparity.

3.36 In contrast the guidelines promulgated by the Sentencing Commission were regarded a self correcting and ever-improving system which reflected amendments to the guideline system in an iterative fashion. Therefore, amendments reflected changes in statutory maximums, directives received from Congress, empirical research on the effect of the guidelines, emergent case law, the changing nature of crime, changing priorities in prosecution and developments in knowledge about effective crime control. Mandatory penalties on the other hand were single-shot efforts at crime control intended to produce dramatic results but they lacked a built-in mechanism for evaluating their effectiveness and adjustment.

3.37 **The Sentencing Commission concluded that the guideline system, because of its ability to accommodate the vast array of relevant offence-offender characteristics and because of its self-correcting potential, was regarded to be superior to the mandatory approach. The most efficient and effective way for Congress to exercise its powers to direct sentencing policy was therefore through the established process of sentencing guidelines**.

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43 United States Sentencing Commission **Special Report to the Congress**: **Mandatory Minimum Penalties in the Federal Criminal Justice System 1991.**

3.38 **Not only the Sentencing Commission but also the courts criticised mandatory sentences.** In **United States v Madkour**[44] the court commented as follows on the sentencing practice of mandatory penalties:

> This type of statute ... does not render justice. This type of statute denies the judges of this court and of all courts, the right to bring their conscience, experience, discretion and sense of what is right into sentencing procedure, and it, in effect, makes a judge a computer, automatically imposing sentences without regard to what is right and just. **It violates the rights of the judiciary and of the defendants, and jeopardizes the judicial system.**

*** Three strikes legislation in the USA**

3.39 In a referendum in 1993 voters in the state of Washington approved a proposition calling for the introduction of a **"three strikes and you're out"** law, that is, a law imposing mandatory life sentences on offenders with two previous felony convictions who are subsequently convicted of a third felony. The law was duly passed and subsequently several other states considered and in some instances adopted similar laws. The **Federal Violent Crime Control and Law Emforcement Act of 1994** also contains a three strikes provision. Over the past few years such legislation gained widespread acceptance in the United States as a means of combatting serious crime.

3.40 In 1994 the California legislature responded to public pressure to enact legislation that would mandate longer sentences for recidivists by approving the "Jones-Costa Three Strikes Bill".[45] This Bill has been an influentialis an example of "Three Strikes" legislation. For first time felony offenders the statute leaves in tact the sentencing guidelines, for second time offenders the new law doubles the minimum required sentence. The centrepiece of the legislation is, however, its "Three Strikes" provision which mandates that state courts sentence to an "indeterminate term of life imprisonment" those individuals previously convicted for two or more serious and/or violent felonies. Section 667 (e)(2)(A) of the California Penal Code reads as

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44 930 F. zd 234 (2d Cir. 1991).

45 See "Recent Legislation" **Harvard Law Review** Vol 107:2123.

follows:[46]

> If a defendant has two or more prior felony convictions ... that have been pled and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of: (i) Three times the term otherwise provided as punishment for each current felony conviction subsequent to the two or more prior felony convictions. (ii) Imprisonment in the state prison for 25 years. (iii) The term determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement applicable under [Section 1170], or any period prescribed by Section 190 or 3046.

3.41 Three Strikes legislation has been criticised on a number of grounds. The California legislation has been criticised for being over-inclusive as it extends its reach to non- violent offences by treating property crimes in the same way as violent crimes. It is also criticised as an imprecise method of incapacitating truly dangerous criminals because a two-time cheque forger caught committing a non-violent residential burglary must, under the Act, receive a life term in prison. It is argued that it does not promote long term crime prevention since it fails to address the socio-economic roots of the crime problem and it places a huge financial burden on the taxpayers because it increases the number of years that convicts will have to spend in prison.

3.42 Judges are frustrated because the mandatory nature of the law means that they have to impose a sentence which they may not regard as just in the particular circumstances. For prosecutors the law removes the ability to offer a shorter sentence as an incentive for a plea of guilty to a lesser offence and thus impedes the efficient disposal of cases through plea bargaining. From the defendants' point of view the fact that they cannot expect a lesser sentence in exchange for a plea of guilty encourages such offenders to take their chances in court in an attempt to avoid life imprisonment. In Washington the legislation has increased the incidence of resistence to arrest as offenders seek to avoid the inevitable life imprisonment. The result is an increase in the human and financial costs of law enforcement. Because of their inflexibility, such laws sometimes result in the imposition of sentences in individual cases which everyone involved believes to be unjustly severe. Furthermore, they encourage hypocrisy on the part of prosecutors and judges, since officials engage in adaptive responses and circumventions to avoid injustices, for example, in plea bargaining armed robbery is reduced to robbery or aggravated

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46 See **Harvard Law Review** 2124.

assault to assault. When judges and prosecutors engage in circumventions to sidestep mandatory sentences, important values are being sacrificed. In a sense such practices are dishonest and they undermine the integrity of the judicial system.

SENTENCING IN SWEDEN

* Background

3.43 In Sweden new provisions covering the determination of sanctions i.e choice of sanction and determination of punishment were introduced into the Penal Code's provisions on January 1 1989 with the aim of increasing the predictability and consistency of penal decision-making.[47] In terms of these provisions **the punishment is determined by-the penal value attributed to the offence which requires special consideration to be given to the harm, wrong or danger occasioned by the criminal act, what the offender realised or ought to have realised about it, as well as his intentions or motives. A number of aggravating circumstances are provided, for example whether the offender exploited some other persons' vulnerability. Special consideration must also be given to a number of mitigating circumstances in assessing the penal value. Guidance is also given on the impact of previous criminality and factors over and above the penal value of the crime to which the court may give consideration. Imprisonment is used where the penal value is high and when the offender's previous record is such that it precludes consideration any other sentence.**

3.44 For the purpose of this paper the relevant provisions are quoted in some detail:[48]

Section 1

The punishment shall be imposed within the statutory limits according to the penal value of the crime or crimes, and the interest of uniformity in sentencing shall be

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47 See R Henham "The European Context of Sentencing Violent Offenders" **International Journal of Sociology of Law** 1993 Vol 21 265 -280; Nils Jareborg "The Swedish Sentencing Reform" in **The Politics of Sentencing Reform** edited by C Clarkson and R Morgan Clarenden Press: Oxford 1995.

48 Nils Jareborg "The Swedish Sentencing Reform" 101 etcetera.

taken into consideration.

The penal value is determined with special regard to the harm, offence, or risk which the conduct involved, what the accused realized or should have realized about it, and the intentions and motives of the accused.

Section 2

Apart from circumstances specific to particular types of crime, the following circumstances, especially, shall be deemed to enhance the penal value:

1. whether the accused intended that the criminal conduct should have considerably worse consequences than it in fact had;
2. whether the accused has shown a special degree of indifference to the adverse consequences of the offence;
3. whether the accused made use of the victim's vulnerable position, or his other special difficulties in protecting himself;
4. whether the accused grossly abused his rank or position or grossly abused a special trust;
5. whether the accused induced another person to participate in the deed through force, deceit, or abuse of the latter's youthfulness, lack of understanding, or dependent position; or
6. whether the criminal conduct was part of criminal activity that was especially carefully planned, or that was executed on an especially large scale and in which the accused played an important role.

Section 3

Apart from what is elsewhere specifically prescribed, the following circumstances, especially, shall be deemed to **diminish the penal value:**

1. whether the crime was provoked by another's grossly offensive behaviour;
2. whether the accused, because of mental abnormality or strong emotional inducement or other cause, had a reduced capacity to control his behaviour;
3. whether the accused's conduct was connected with his manifest lack of development, experience, or capacity for judgment; or
4. whether strong human compassion led to the crime.

The court may sentence below the statutory minimum when the penal value obviously calls for it.

Section 4

Apart from the penal value, the court shall in measuring the punishment, to a reasonable extent take the accused's **previous** criminality into account**,** but only if this has not been appropriately done in the choice of sanction or revocation of parole. In such cases, the

extent of previous criminality and the time that has passed between the crimes shall be especially considered, as well as whether the previous and the new criminality is similar, or whether the criminality in both cases is especially serious.

Section 5

In determining the punishment, the court shall to a reasonable extent, apart from the penal value, consider:

1. whether the accused as a consequence of the crime has suffered serious bodily harm;
2. whether the accused, according to his ability, has tried to prevent, or repair, or mitigate the harmful consequences of the crime;
3. whether the accused voluntarily gave himself up;
4. whether the accused is, to his detriment, expelled from the country in consequence of the crime;
5. whether the accused as a consequence of the crime has experienced or is likely to experience discharge from employment or other disability or extraordinary difficulty in the performance of his work or trade;
6. whether a punishment imposed according to the crime's penal value would affect the accused unreasonably severely, due to advanced age or bad health;
7. whether, considering the nature of the crime, an unusually long time has elapsed since the commission of the crime; or
8. whether there are other circumstances that call for a lesser punishment than the penal value indicates.

If, in such cases, special reasons so indicate, the punishment may be reduced below the statutory minimum.

Section 6

The sanction is to be remitted entirely when, with regard to circumstances of the kind mentioned in section 5, imposing of a sanction is manifestly unreasonable.

Section 7

If someone has committed a crime before the **age of 21, his youth shall be** considered separately in the determination of the punishment, and the statutory minimum may be disregarded. Life imprisonment is never to be imposed in such cases.

SENTENCING IN GREECE[49]

49 R Henham "The European Context of Sentencing Violent offenders" **International Journal of the Sociology of Law** 1993 Vol 21 265 at 274 - 276.

3.45 The Greek Penal Code (Chapter 16) details a considerable number of offences classed as Bodily Injury viz. Article 308, **Simple Bodily Injury**; Article 309, **Grievous Bodily Injury**; Article 310, **Severe Bodily Injury**; Article 311, **Deadly Injury (i.e bodily injury causing death**); Article 312, **Bodily Injury of Minors**; Article 313, **Brawling**; Article 314, **Negligent Bodily Injury**. Guidance is given as to the meaning of severe illness to the mind or body of the victim which constitutes the offence of Severe Bodily Injury under Article 310 i.e **it exists if, as a result of the offence, the victim is in danger of his life or contracts a severe and lengthy illness or is seriously mutilated or in any way prevented from using his mind or body for a long period of time and to a serious extent.**

3.46 The Penal Code also details **several articles dealing with how the court should fix a sentence within the parameters identified** by the Code. Article 79 of the Penal Code (Judicial Computation of Punishment) **provides that the court, when fixing sentence, must in determining the nature of the offence consider:**

(a) the injury resulting or the danger presented;

(b) the quality, type and purpose of the offence as well as circumstances attending its preparation or commission; and

(c) the extent of intent or degree of negligence of the offender.

3.47 The court must also give reasons justifying the imposed punishment. These are particularly important and their absence may theoretically result in a successful appeal to the Supreme Court. In practice the Supreme Court has held that general reference to the appropriate legal terminology is sufficient without any specific reference to particular circumstances. Greek provisions do not attempt to detail specific guidance on degrees of seriousness within offence categories which can be directly related to sentencing provisions. Calculation of punishment is confined to issues which are dealt with in England in the context of the Court of Appeal's sentencing principles. **One important goal of Greek criminal policy during recent years has a direct bearing on sentencing violent offenders. This is to expand the alternatives to prison in common with most Western European countries. Non-custodial penalties are not**

expressly provided by the Greek Penal Code although a number of unrelated alternatives are mentioned. Hence, for less serious offences (petty violations) resulting in custody, Article 82 provides that all custodial sentences not exceeding 6 months will as a rule be converted into pecuniary penalties. The court must give specific reasons for its decision and must take into account the financial circumstances of the offender when setting the specific pecuniary penalty. However, non-custodial sanctions are not available for felonies and most misdemeanours, but, if the imposed sentence for any offence i.e the sentence fixed following mitigation, does not exceed 18 months imprisonment conversion is possible.

SENTENCING IN GERMANY[50]

3.48 The German Penal Code (GFR, Section 17) **distinguishes a number of offences according to their relative seriousness** (viz. paragraph 223) for example **bodily harm** (paragraph 223a), **dangerous bodily harm** (paragraph 224), **aggravated bodily harm** (paragraph 225), **intentional aggravated bodily harm** (paragraph 230) and **negligent bodily harm**. **Dangerous bodily harm involves the use of a weapon, or sneak attack, or action by several persons acting in concert, or by life endangering act.** The possible use of a weapon is also contemplated by the English offence of malicious wounding and inflicting grievous bodily harm under section 20 of the Offences against the Persons Act (1861), although no guidance is provided as to what constitutes grievous bodily harm. Paragraph 225 of the Penal Code states that **aggravated assault is committed if the victim suffers loss of an important part of his body, sight in one or both eyes, hearing, speech or his procreative capacity, or the assault results in a serious permanent deformity or deteriorates into invalidity, paralysis or mental illness.**

3.49 **Judicial sentencing** is circumscribed by legislative scaling of penalties which provides for cases which differ in gravity from the average type of offence and do not fit within the normal levels provided. In such cases judges may evaluate aggravating or mitigating circumstances according to guideline examples or exercise complete discretion if necessary. As Huber (1982:

50 Op cit 276.

21) argues-

> "**this statute therefore ensures through careful gradation of the different forms of commission of the offence that a certain uniformity is achieved in sentencing and, at the same time, that the judge retains his discretion to consider the actual case under trial with regard to individuality of the act and the actor."**

3.50 There is still, however, considerable scope for judicial discretion in fixing the actual prescribed sanction within the upper and lower limits although the Penal Code provides explicit principles for determination of punishment in paragraph 46. Apart from stating in paragraph 46(1) that the **foundation of punishment is guilt and that the judge must consider the effects of the punishment on the offender's future life, many factors circumscribe how the nature and extent of any penalty is decided with reference to the purpose of punishment in the individual case.**

3.51 **The principles of punishment in paragraph 46 state that all the circumstances, both mitigating and aggravating, must be taken into account by examining certain listed factors. For example, the motives and aims of the offender, the manner of perpetration and the wrongfully caused effects of the act, the offender's conduct after the crime are cited as relevant. It is significant that paragraph 46(3) specifically states that circumstances which already represent the statutory constituent elements of the crime may not be taken into account. Mitigation rules are presented in paragraph 49 which provide margins for replacing the sanction originally imposed.**

SENTENCING IN ENGLAND AND WALES

3.52 Sentencing law in England is complex and maximum penalties for criminal offences are scattered among a large number of criminal statutes dating back in some cases to 1861. **It is generally criticised for its lack of any logical structure or coherence in their arrangement**. It has been the habit of Parliament to change maximum penalties for individual offences in a piecemeal manner, usually by increasing them in response to a particular clamour. This resulted in a number of anomalies, for example **a man who fondles the breasts of a 15 year-old girl with her consent commits indecent assault punishable with ten years imprisonment. If he**

goes further and has sexual intercourse with her consent, he is guilty of unlawful sexual intercourse, an offence punishable with a maximum of two years imprisonment.

3.53 A piecemeal approach to law reform in respect of sentencing has characterised English sentencing legislation. It has resulted in a maze of statutory provisions spread among a large number of statutes, many of which were amended so frequently that they bear little or no relationship to the provision enacted originally. Establishing the law that should be applied in a particular case is accordingly very difficult and this is complicated by the fact that statutory provisions are frequently enacted, but not brought into force.

3.54 The Criminal Justice Act, 1991 provided for the first time in England and Wales a reasonably coherent statutory framework for the selection of financial, community and custodial sentences. In line with the White Paper, Crime Justice and Protecting the Public,[51] the sentencing principles in the Act are primarily based on just deserts while other traditional sentencing objectives such as deterrence, rehabilitation and incapacitation are given less prominence.

3.55 In the White Paper which preceded the Act it was explicitly stated that **the severity of the sentence should be directly related to the seriousness of the offence. However, this principle was abandoned in the case of violent offenders posing a threat to public safety in favour of protective sentencing. The main objective of sentencing was to express the principles of denunciation and retribution.**

3.56 The **criteria for the imposition of a custodial sentence** and for determining its length are set out in the Act. A court **is allowed to impose a custodial sentence only if the offence committed by the offender, considered in isolation or in combination with other offences, is so serious that only a custodial sentence can be justified for the offence.** No definition or explanation of seriousness is provided, but it is stated that in assessing the seriousness of an offence, a court may have regard only to the circumstances of the offence and in particular that

51 Cm 965, 1990 HMSO.

previous convictions and the offender's response to previous sentences must be disregarded for this purpose.[52]

3.57 In **determining the length of a custodial sentence** the court is to impose a sentence which is **commensurate with the seriousness of all the offences for which the offender is being sentenced[53],** again, previous conviction are to be disregarded in assessing the seriousness of the offences. In relation to the imposition of a custodial sentence, and the determination of the length of a custodial sentence, the court is allowed to take account of aggravating factors of an offence disclosed by the circumstances of other offences committed by the offender. Courts are allowed to mitigate a sentence by reference to any factors which are considered relevant in mitigation.[54]

3.58 Corresponding rules were enacted to govern the imposition of community orders. A unit fine system was enacted so as to apply to the magistrates' courts only. In determining the amount of a fine in all but a few exceptional cases, the court is required to determine the number of units which is commensurate with the seriousness of the offence or offences and then calculate the value of the unit in the case of defendant. The unit represents the offender's weekly disposable income: it would be at least £4 in the case of an adult and never more that £100.

3.59 In 1996 a new White Paper on sentencing reform titled **Protecting the Public: The Governments Strategy on Crime in England and Wales[55]** was published. The White Paper contains far reaching proposals in respect of sentencing. The White Paper **proposed the abolition of parole and proposes that any term of imprisonment imposed by the court should be served in full**. However, for the first 12 months of a sentence, or all of a sentence of

52 See sections 3(3) and 29(1).

53 See section 2(2)(a).

54 See section 28.

55 Cm 3190 London: HMSO, 1996.

less than 12 months, a prisoner would be able to earn a small discount of six days a month by co-operation with the prison authorities. Furthermore, **it is proposed that as a matter of general principle a sentencer should not have regard to the possibility of releases when determining the length of a fixed term of imprisonment.**

*** Mandatory sentences**

3.60 The White Paper contains a number of proposals on mandatory sentences. It is, for example, proposed that **serious violent and sexual offenders convicted a second time would automatically receive a life sentence,** with the tariff fixed by the judge. The tariff would be based on objectives of retribution and deterrence, and release would be permitted only when the offender is no longer considered to be a risk to the public. Furthermore it is proposed that previous convictions **for relevant** offences will count as qualifying convictions, including convictions as a young offender. The second offence must be committed after the commencement of the new legislation and after he/she has been convicted of a previous qualifying offence. The proposals, however, fail to delineate the distinctions of gravity. In exceptional cases the courts will have a discretion not to pass an automatic life sentence. This is intended to allow for the occasional unforeseen circumstances where it would be unjust and unnecessary to impose the life sentence.

3.61 The White Paper also proposes a **mandatory minimum sentence for drug dealers**. The mandatory minimum sentence of seven years imprisonment is reached where the third qualifying conviction is reached. Qualifying convictions include any previous convictions for relevant offences and these must relate to separate court appearances. As with automatic life sentences the mandatory sentence might be avoided in genuinely exceptional cases. Further repetition following a mandatory sentence would result in a further mandatory sentence, although the proposals fall short of prescribing a higher mandatory sentence in such circumstances.[56] These proposals for mandatory sentences have been highly controversial and have been severely criticised by the judiciary in particular.

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56 See R Henham "Back to the Future on Sentencing: The 1996 White Paper" **The Modern Law Review** Vol 59 November 1996 861 et seq.

3.62 **Mandatory minimum prison sentences are also proposed for persistent repeat burglars**. The relevant offences are burglary or aggravated burglary of a dwelling. The mandatory minimum of three years imprisonment can only be imposed where the three qualifying convictions all relate to offences after the commencement of the Act. Again, the court is given the discretion not to impose the mandatory sentence in genuinely exceptional cases.

SENTENCING IN CANADA

3.63 In 1987 the Canadian Sentencing Commission[57] investigated the process of sentencing and recommended that the following principles should govern sentencing practices in Canada:

> **4. Principles of Sentencing**
>
> Subject to the limitations prescribed by this or any other Act of Parliament, the sentence to be imposed on an offender in a particular case is at the discretion of the court which, in recognition of the inherent limitations on the effectiveness of sanctions and the practical constraints militating against the indiscriminate selection of sanction, shall exercise its discretion assiduously in accordance with the following principles:
>
> (a) **The paramount principle governing the determination of a sentence is that the sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender for the offence.**
>
> (b) Second, the emphasis being on the accountability of the offender rather than punishment, a sentence should be the least onerous sanction appropriate in the circumstances and the maximum penalty prescribed for an offence should be imposed only in the most serious cases.
>
> (c) Subject to paragraphs (a) and (b) the court in determining the sentence to be imposed on an offender shall further consider the following:
>
> (i) any relevant aggravating and mitigating circumstances;
> (ii) a sentence should be consistent with sentences imposed on other offenders for similar offences committed in similar circumstances;
> (iii) the nature and combined duration of the sentence and any other sentences

57 Canadian Sentencing Commission **Sentencing Reform: A Canadian Approach** February 1987 at 154-155.

imposed on the offender should not be excessive;

(iv) a term of imprisonment should not be imposed, or its duration determined, solely for the purpose of rehabilitation;

(v) a term of imprisonment should be imposed only:

(aa)to protect the public from crimes of violence,

(bb)where any other sanction would not sufficiently reflect the gravity of the offence or the repetitive nature of the criminal conduct of an offender, or adequately protect the public or the integrity of the administration justice,

(cc)to penalize an offender for wilful non-compliance with the terms of any other sentence that has been imposed on the offender where no other sanction appears adequate to compel compliance.

(d) In applying the principles contained in paragraphs (a), (b), and (c), the court may give consideration to any one or more of the following:

(i) denouncing blameworthy behaviour;
(ii) deterring the offender and other persons from committing offences;
(iii) separating offenders from society, where necessary;
(iv) providing for redress for the harm done to individual victims or to the community;
(v) promoting a sense of responsibility on the part of offenders and providing for opportunities to assist in their rehabilitation as productive and law-abiding members of society.

3.64 With regard to mitigating and aggravating factors the Commission recommended the following:[58]

11.8 The Commission recommends that the following list of aggravating and mitigating factors be adopted as the primary grounds to justify departures from the guidelines:

Aggravating factors

1. Presence of actual or threatened violence or the actual use or possession of a weapon, or imitation thereof.
2. Existence of previous convictions.
3. Manifestation of excessive cruelty towards victim.
4. Vulnerability of the victim due, for example, to age or infirmity.
5. Evidence that a victim's access to the judicial process was impeded.
6. Existence of multiple victims or multiple incidents.
7. Existence of substantial economic loss.
8. Evidence of breach of trust (e.g., embezzlement by bank officer).
9. Evidence of planned or organized criminal activity.

58 At 320.

Mitigating Factors

1. Absence of previous convictions.
2. Evidence of physical or mental impairment of offender.
3. The offender was young or elderly.
4. Evidence that the offender was under duress.
5. Evidence of provocation by the victim.
6. Evidence that restitution or compensation was made by the offender.
7. Evidence that the offender played a relatively minor role in the offence.

3.65 The Commission also recommended the adoption of sentencing guidelines and amending the Criminal Code to grant to the Courts of Appeal the power to establish sentencing policy governing the application of sentencing guidelines. It was furthermore proposed that judges be required to give written reasons if a sentence which departs from the guidelines, is imposed. As point of departure four presumptions are used to guide the imposition of custodial and non-custodial sentences; they are:[59]

* **unqualified presumptive disposition of custody;**
* **unqualified presumptive disposition of non-custody;**
* **qualified presumptive disposition of custody; and**
* **qualified presumptive disposition of non-custody**.

3.66 The Commission conceded that sentencing guidelines can take many forms and be implemented in varied ways. **The Commission recommended presumptive guidelines which would be statutory in nature, but which would not be mandatory in the sense that the sentencing judge would have the discretion to deviate from the adopted range in appropriate cases**. Presumptive guidance is in effect statutory orders which impose a predetermined sentence range to the judge. A system of guidelines present the court with an approach based on general sentencing practices and trends in an attempt to assist in identifying the factors most relevant to the case. (The proposals of the Commission were much debated in Cananda but never enacted).

* **Mandatory sentences**

59 At 329.

3.67 The Commission also considered the **continued existence of mandatory minimum sentences and concluded that, with the exception of those prescribed for murder and high treason, minimum penalties serve no purpose that can compensate for the disadvantages resulting from their continued existence. The Commission raised two important constitutional considerations against the continued existence of mandatory sentences, namely the concern that the imposition of a mandatory sentence of imprisonment may constitute "cruel and unusual punishment" and that they authorise "arbitrary" imprisonment.**

3.68 Both these objections raise the issue of the constitutionability of mandatory sentences. The Canadian Charter (section 12) stipulates that "everyone has the right not to be subjected to cruel and unusual treatment or punishment". In terms of section 5(2) of the Narcotic Control Act the prescribed sentence for importing any narcotic into Canada is "imprisonment for life but not less than seven years". In **R v Smith**[60] five of the six supreme court judges held that the mandatory minimum sentence offends section 12 (and is not saved by section 1, the limitation clause).

3.69 The court held that, though a state may impose punishment (minimum or maximum), "**the effect of that punishment must not be grossly disproportionate to what would have been appropriate"**.[61] The test is **"whether the punishment prescribed is so excessive as to outrage standards of decency"**. Such punishment will have one or more of the following features:

(1) The punishment is of such character or duration as to outrage the public conscience or be degrading to human dignity;
(2) The punishment goes beyond what is necessary for the achievement of a valid social aim ...; or

60 1987 1 SCR 1045.

61 1072.

(3) The punishment is arbitrarily imposed."[62]

3.70 Though section 12 may be infringed, section 1 could "salvage" it if some "important societal objective" will be achieved. In casu, the court fails the "proportionality test because the means chosen to achieve the object is disproportionate. The impairment of rights is not a "minimum" one, but its "indiscriminate nature" casts its net too wide: sentencing the "small offender" to seven years imprisonment in all cases is not necessary to deter the serious offender.

3.71 After careful consideration the Canadian Commission recommended the abolition of mandatory minimum penalties for all offences except murder and high treason.

62 1097-98.

CHAPTER 4

POSSIBLE SOLUTIONS

SENTENCING PRACTICES - OPTIONS FOR REFORM

* ENACTMENT OF SENTENCING GUIDELINES

PRESUMPTIVE SENTENCING GUIDELINES

4.1 One option is **to set up a sentencing commission to develop sentencing guidelines in respect of certain offences**. In this regard the best example is the Minnesota sentencing guidelines where the enabling statute directed the sentencing commission to **develop guidelines which were to specify presumptively correct prison commitment and prison duration rules. In such a system specific principles are used as determinants of the presumptive correct sentence, for example the severity of the offence and the accused's criminal record. 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. In addition to the guidelines legislation can also provide for the factors to be considered in imposing a sentence, see for example the provisions of the Sentencing Reform Act in the USA where the following factors are **inter alia** listed -

* the nature and seriousness of the offence;

* the need for the sentence -

(a) to reflect the seriousness of the offence to promote respect for the law and to provide just punishments for the offence;
(b) to afford adequate deterrence to criminal conduct;
(c) to provide the defendant with educational or vocational training.

VOLUNTARY SENTENCING GUIDELINES

4.2 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. Such policies are based on past sentencing practices but may be elaborated either by appelate courts or more formally by a sentencing commission or council**.

THE ADOPTION OF LEGISLATIVE GUIDELINES WHICH ASSIST IN DETERMINING THE CHOICE AND LENGTH OF THE PUNISHMENT.

4.3 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 offence. 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.**

4.4 A number of aggravating and mitigating factors are listed which enhance or diminish the penal value.

THE ENACTMENT OF PRINCIPLES OF SENTENCING INCLUDING GUIDELINES WHICH DETERMINE THE IMPOSITION OF IMPRISONMENT.

4.5 This option is based on the proposals of the Canadian Sentencing Commission which recommended **the enactment of the principles of sentencing**. Provision is **inter alia** made 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. In addition a number of factors are listed which the court has to consider in determining the sentence and it includes -**

* **aggravating and mitigating circumstances;**

* **the need for consistency in sentencing of offenders for similar offences committed;**

* **the need not to impose excessive sentences;**

* **the fact that imprisonment should not be imposed solely for the purpose of rehabilitation; and**

* **the circumstances under which imprisonment should be imposed.**

* **consideration of aims of punishment such as denouncing blameworthy behaviour, deterrence, incapacitation, redress of harm done to victims and rehabilitation.**

THE ENACTMENT OF PRESUMPTIVE SENTENCING GUIDELINES TO GUIDE THE IMPOSITION OF CUSTODIAL AND NON- CUSTODIAL SENTENCES.

4.6 **Presumptive guidance is statutory orders which impose a predetermined sentence range to the judge.** Although presumptive guidelines are statutory in nature they can allow the continued existence of a sentencing discretion if the judge is allowed to deviate from the adopted range under certain circumstances.

THE ENACTMENT OF MANDATORY MINIMUM SENTENCES COMBINED WITH A DISCRETION TO DEPART FROM THE SENTENCES UNDER CERTAIN CONDITIONS.

4.7 This option implies **the enactment of a mandatory minimum sentence for example 15, 20 and 25 years imprisonment for a first, second and third conviction respectively coupled with a discretion to the sentencing officer to depart 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.

CHAPTER 5

THE WAY FORWARD

5.1 The issues and options outlined above ought to be debated thoroughly before any particular direction is embarked upon. Based on the outcome of such discussions legislation in respect of the treatment of victims of crime in the criminal justice system will be proposed. The comments of all parties who feel that they have an interest in this topic or may be affected by the type of measures discussed in this paper are therefore of vital importance to the Commission. All respondents are invited to indicate their preferences in respect of the options examined and to indicate whether there are other issues or options that must be explored. All the relevant role players and institutions that are likely to be affected by the proposed measures and any interested member of the public should therefore participate in this debate.

5.2 To facilitate a focussed debate, respondents are requested to formulate crisp submissions with the following in mind:

- Is there a need for legislation to regulate the imposition of sentence in respect of certain serious crimes?

- If so, which crimes should be targeted for this purpose?

- How should the questions of lenient or excessive sentencing and inconsistency and disparity in sentencing be addressed?

- Is it agreed that the principal issues are those set out in this paper?

- What, specifically, is proposed in relation to those issues (or any further issues) as an effective basis for reformatory legislation?

5.3 The Minister of Justice has indicated that the matter is regarded as one of great importance to restore legitimacy to the criminal justice system and to assist in the fight against crime. Interested parties are requested to consider this paper and to respond before 30 August 1997.