

## ARTICLES

# Life imprisonment in South Africa: yesterday, today, and tomorrow

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### ABSTRACT

Life imprisonment has been part of South Africa's penal regime for decades. This article analyses how this form of punishment has changed in meaning in since 1906. The author looks at life imprisonment during the death penalty period; life imprisonment in the aftermath of the abolition of the death penalty; life imprisonment under the Criminal Law Amendment Act, when it could only be imposed by the High Courts; and life imprisonment during the Criminal Law Amendment Act, when the regional courts were also empowered to impose this sentence. The author discusses the laws and circumstances which prevailed in the above four periods. With life imprisonment now being the severest sentence that can be imposed in South Africa, the author highlights the challenges associated with it and calls upon the government, courts and civil society to think seriously about how this form of punishment should be administered so as to avoid confusing inmates and exposing the government to litigation.

### 1. Introduction

Life imprisonment (life sentence)<sup>1</sup> is probably the most confusing sentence in South Africa, as it does not mean what it actually says. If many

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<sup>1</sup> 'Life imprisonment' and 'life sentence' are used interchangeably in this paper.

people, including lawyers and, let it be whispered, some judicial officers, were asked for the meaning of life imprisonment, they would say that it means that a person sentenced to life imprisonment will spend the rest of his or her natural life in prison. This, however, has never been the meaning of life imprisonment in South Africa.<sup>2</sup> While life imprisonment has never meant life imprisonment in the literal sense in South Africa, its meaning has changed substantially in the past decades. This article investigates the meaning and use of life imprisonment in South Africa in four major legal historical eras: life imprisonment at the time when the death penalty was still lawful in South Africa (including life imprisonment as early as 1906); life imprisonment in the immediate aftermath of the abolition of the death penalty (1994-1998); life imprisonment following the introduction of the minimum sentences legislation (1998-2007); and life imprisonment after December 2007, when the sentencing jurisdiction of the regional courts was extended to include life imprisonment. In assessing the meaning and use of life imprisonment during these four historical periods, the article looks at the law in place at the time and at how courts interpreted it to justify the imposition of life imprisonment. It also looks at the relevant statistics to assess the extent to which life imprisonment was imposed. The article illustrates that, despite the term's evident simplicity, the meaning of life imprisonment in South Africa has changed over time and particularly in the last 20 years. These changes, especially since the early 1990s, were the result of two macro-political forces. On the one hand, was the democratisation of South Africa with the enactment of a new Constitution, with a progressive Bill of Rights including the right to life and the right not to be subjected inhumane and degrading punishment or treatment. Pulling in the other direction, was government's reaction to crime, characterised by its over-emphasis on punishment and retribution. By 31 October 2008, South Africa's prisons were home to 8634 prisoners serving life sentences.<sup>3</sup> In the last 10

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<sup>2</sup> Diemont JA observed in *S v Qeqe and another* 1990 (2) SACR 654 (CkA) at 659 that '[d]oes a "life sentence" mean that the appellants must remain incarcerated in prisons until they die? The answer is no. It has been widely accepted for many years [in the former Ciskei] that a life sentence will not exceed 25 years and that even 25 years is an exceptionally long sentence. . . [section] 18(1)(b) of the Police and Prisons Act 36 of 1983 (Ck) provided that any person sentenced under the provisions of any law to imprisonment for life, shall be detained in a prison for a period not less than 10 years and not more than 25 years.' In *S v Siluale en ander* 1999 (2) SACR 102 (SCA) at 103 the Court observed that '[i]f the circumstances of a case require that an offender should receive a sentence which for all practical purposes removes him permanently from society, life imprisonment is the only appropriate sentence. It is intended to be the most severe sentence that can be imposed, although there are acknowledged procedures which make parole possible in appropriate circumstances, eg where the offender (contrary to all expectations) genuinely reforms.'

<sup>3</sup> See <http://www.dcs.gov.za/WebStatistics/>, accessed on 1 December 2008.

years South African courts sentenced more people to life imprisonment than they had done in the previous century.<sup>4</sup> The meaning of life imprisonment has also changed drastically during this period. The increase in the number of prisoners serving life and the consequent changes in the meaning of life imprisonment did not happen without reason, and this issue will be interrogated in this article.

## **2. Life imprisonment during the period of the imposition of the death penalty (1906-1994)**

Life imprisonment has been part of the South African legal system for many decades. South African case law indicates that as early as the beginning of the 20th century, courts started granting divorce decrees based on the fact that one spouse proved that the other was serving a life sentence. In *Nefler v Nefler*<sup>5</sup> the High Court of the Orange Free State was petitioned by Mrs Nefler for a divorce decree on the ground that Mr Nefler had been found guilty of assault with intent to cause grievous bodily harm and ‘sentenced to be imprisoned and kept to hard labour for the term of his natural life’.<sup>6</sup> The Court held that ‘[e]quity will demand that . . . in this case where the man is imprisoned for life’ it necessitated the granting of ‘a divorce on the ground of imprisonment for life’.<sup>7</sup> The reasoning in *Nefler v Nefler* would later be followed in the cases of *Jooste v Jooste* (1907)<sup>8</sup>, *Van Broemsen v Van Broemsen* (1933)<sup>9</sup> and *Smith v Smith* (1943).<sup>10</sup> From these cases it is also clear that in the early 20th century courts rarely imposed life imprisonment. In all the cases cited above, except *Nefler v Nefler*, the defendants had been sentenced to death and their sentences commuted to life imprisonment. It is also important to note that life imprisonment in South Africa in the late 19th century and the early 20th century was not as long as the terms would later become in the first decade of the 21st century. It was reported by one of the prison officers in the early 20th Century that the longest period he had known for a person to have served life imprisonment was 20 years and that in one case a prisoner who had been sentenced to life imprisonment served only one year and two months.<sup>11</sup> In *R v Mzwakala* the Court observed that there were ‘two *Government Notices* (GN 1551

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<sup>4</sup> In 1995 there were 443 prisoners serving life sentences in South Africa. See C Giffard & L Muntingh *The Effect of Sentencing on the Size of the South African Prison Population* (2006) 10.

<sup>5</sup> *Nefler v Nefler* (1906) ORC 7.

<sup>6</sup> *Nefler* supra (n5) at 7.

<sup>7</sup> *Nefler* supra (n5) at 12.

<sup>8</sup> *Jooste v Jooste* (1907) 24 SC 329.

<sup>9</sup> *Van Broemsen v Van Broemsen* (1933) SR 58.

<sup>10</sup> *Smith v Smith* (1943) CPD 50.

<sup>11</sup> *Jooste* supra (n8) 330.

of the 8th September 1911, and GN 286 of the 28th February, 1936) in terms of which a sentence of imprisonment for life [was] deemed for the purposes of remission to be a sentence of imprisonment for twenty years'.<sup>12</sup> However, the Court observed in 1968 that

[T]he provisions of those *Government Notices* were, however, subsequently repealed. No such provision [was] to be found in the consolidated regulations issued under sec. 94 of the Prisons Act of 31st December 1965 (published under *Government Notice* R 2080 in Regulation Gazette 604 of that date) which repealed all prior regulations governing remission of sentences or release of prisoners on parole or on probation.<sup>13</sup>

It appears that even before 1965, when the above-mentioned government notices were repealed, the meaning and length of life imprisonment was determined by the Executive. For example, a person sentenced to life imprisonment (or whose death sentence was commuted to life imprisonment), or sentenced to another term of imprisonment under section 41(2) of the Prisons and Reformatories Act,<sup>14</sup> was required to serve both the life sentence, which was always fixed, and the additional sentence of imprisonment imposed for another offence, unless the court ordered otherwise. For example, in November 1945 in *Attwood v Minister of Justice and Another*, the applicant was sentenced to death in addition to 10 years' imprisonment. The Governor-General-in-Council commuted his death sentence to life imprisonment in terms of which, according to the Prisons Board, 'the Executive Council had decided that the life imprisonment sentence should be determined as imprisonment for a period of 30 years'.<sup>15</sup> After serving 14 years and 2 months of the 30-year sentence, the prison authorities did not release him, as they opined that he was supposed to serve 40 years, since the 10-year sentence had to run consecutively with the life sentence of 30 years. Attwood applied to the court and argued that he was entitled to be released, as the 10-year sentence ran concurrently with the life sentence. The Court dismissed his application, holding that this was not the legal position.

The *Attwood* case shows that in practice it was up to the Governor to determine what life imprisonment meant and that the prison authorities

<sup>12</sup> *R v Mzwakala* 1957 (4) SA 273 (A) at 278.

<sup>13</sup> *S v Masala* 1968 (3) SA 212 (A) at 216 7.

<sup>14</sup> Act 13 of 1911. Section 41(2) provided that 'when a person receives more than one sentence of imprisonment or additional sentences while serving a term of imprisonment, each such sentence shall be served the one after the expiration, setting aside, or remission of the other in such order as the Director may determine, unless the court specifically direct otherwise, or unless the court direct that such sentences shall run concurrently': As reproduced in *Viljoen v Minister of Justice and Another* 1948 (3) SA 994 (T) at 997.

<sup>15</sup> *Attwood v Minister of Justice and Another* 1960 (4) SA 911 (T) at 912.

had to await the decision of the Executive Council on the meaning of life imprisonment; that life imprisonment was a fixed sentence; and that a person sentenced to life imprisonment was entitled, through earning credits as a result of good industry, to the remission of the sentence like any other prisoner serving a fixed sentence (which meant that the prisoner could serve less than half of the equivalent prison term). Further, a person sentenced to life imprisonment could be sentenced to an additional imprisonment term or terms and the sentences would run consecutively.

However, the 1959 Correctional Services Act<sup>16</sup>, under s 32(2) read together with s 97(2), provided that any determinate sentence imposed had to run concurrently with a life sentence. Nevertheless, the Act did not stipulate what a life sentence meant in practical terms. This led courts to conclude that the 1955 Criminal Procedure Act, which provided for the sentence of life imprisonment ‘containe[d] no indication that the duration of such a sentence [was] to be anything other than that conveyed by the plain meaning of the words “imprisonment for life”’.<sup>17</sup> Thus, by 1968, persons sentenced to life imprisonment were released in line with section 64(1) of the Prisons Act<sup>18</sup> in terms of which the Prison Board submitted a report to the Commissioner of Prisons recommending the release of the prisoner. The Commissioner would submit such a report to the Minister of Prisons who had the discretion to authorise the release of the prisoner on parole. The practice at the time was that such a report was submitted after a prisoner had served ten years.<sup>19</sup> Effectively this meant that a person sentenced to life imprisonment could be released after 10 years.

The 1960s saw South African courts becoming increasingly punitive due, presumably, to political instability. This punitive attitude was evident in the manner in which courts approached sentencing. Dugard, a celebrated South African legal scholar, observed that ‘since the early 1960’s [sentences in general] have been more severe than those imposed in other periods of South African history’.<sup>20</sup> He adds that during this period, ‘the number of sentences of life imprisonment imposed has been great.’<sup>21</sup> After giving a summary of prisoners sentenced to life imprisonment in South Africa, Dugard cites one case which shows that some South African judges did not want prisoners sentenced to life imprisonment to be released.

*In S v Tubadeleni and others*<sup>22</sup> the trial judge, Ludorf J, sought to

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<sup>16</sup> J Dugard *Human Rights and the South African Legal Order* (1978).

<sup>17</sup> Act No 8 of 1959.

<sup>18</sup> *S v Masala* supra (n13) at 216.

<sup>19</sup> Act 8 of 1959.

<sup>20</sup> *Masala* supra (n13) at 216 8.

<sup>21</sup> Dugard op cit at 239 40.

<sup>22</sup> *S v Tubadeleni and others* 1969 (1) SA 153 (A).

emphasize that such sentences were really ‘for life’ when he sentenced the prisoners to ‘imprisonment for the rest of their natural lives’, but on appeal it was held that such a formulation could only mean imprisonment for life and could not exclude the power of the authorities, acting on recommendation from a prison board, to release a person serving a sentence of life imprisonment.<sup>23</sup>

The punitive nature of the South African courts in the 1960s is also evidenced by the statistics on people sentenced to both death and life imprisonment before and after that, as shown in Chart 1.

Chart 1<sup>24</sup>

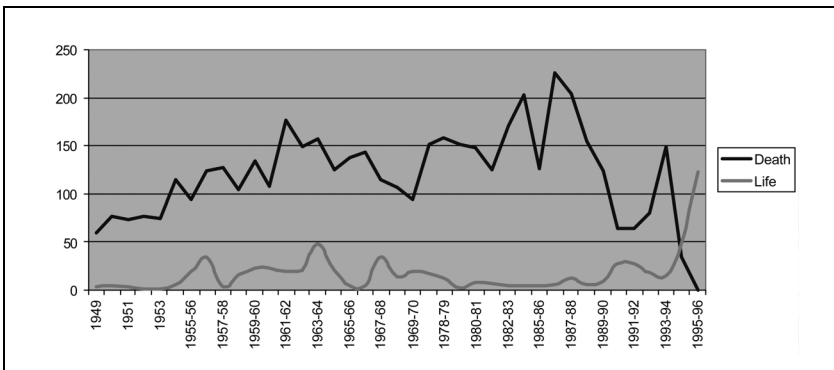


Chart 1 shows that between 1947 and 1970 courts consistently imposed more death penalties than life sentences. From 1949 to 1994 there was a maximum of 50 offenders sentenced to life imprisonment in any one year. It also appears that the number of offenders sentenced to death and the number sentenced to life imprisonment mirror each other in broad terms, often with a few years delay. This could be a result of death penalty sentences being commuted to life imprisonment. Both sentences saw a spike in the early 1960’s but then declined until the early 1970’s. In contrast to the previous spike, death penalties imposed climbed sharply from the early 1970’s but the number of life sentences imposed remained stable and low for the next 20 years. It was only from 1990 onwards that the number of offenders sentenced to life imprisonment started to increase and in 1994/5 the numbers shot above the historical ceiling of 50 cases per year, as a result of the abolition of the death penalty in 1995/6. It is also interesting to note that, despite the democratisation of South Africa since 1990, there was an initial drop in

<sup>23</sup> Dugard op cit (n16) at 240.

<sup>24</sup> The data presented in Chart 1 is based on numerous government reports dating back to 1949. For detailed statistics see Appendix 2.

the number of death sentences imposed, but that numbers quickly climbed back to the historical average of 150 cases per year, until the death penalty was finally abolished.

Before section 277 of the Criminal Procedure Act was amended by the 1990 Criminal Law Amendment Act<sup>25</sup>, 'where an accused had been convicted of murder and the court found no extenuating circumstances, it was obliged to impose the death penalty'.<sup>26</sup> Put differently, before the aforementioned amendment, the death penalty, as an ultimate sentence, was obligatory for murder.<sup>27</sup> Terblanche argues that the 'final major overhaul' of the death penalty before it was abolished in 1995 'was effected through the Criminal Law Amendment Act, 1990'.<sup>28</sup> Du Toit *et al* illustrate that although the death penalty could still be imposed after the 1990 amendment to the Criminal Procedure Act, in cases of murder, courts were now not required to establish whether there were no 'extenuating circumstances,' but rather whether there were 'mitigating or aggravating factors'.<sup>29</sup> This was a positive development in that many offenders who would otherwise have been sentenced to death in the absence of extenuating circumstances could now be sentenced to lesser sentences such as life imprisonment. '[T]he term "mitigating factor" ha[d] a wider connotation than an extenuating circumstance and [could] include factors unrelated to the crime, such as the accused's behaviour after the crime he ha[d] committed or the fact that he ha[d] a clean record'.<sup>30</sup> In other words, after the 1990 amendment to the Criminal Procedure Act, the death penalty for murder became discretionary and could only be imposed when it was 'the only proper sentence'.<sup>31</sup>

Much as the government was tough on crime and the courts were punitive before the 1990s, Terblanche argues that 'life imprisonment was expressly inserted into section 276 of the [Criminal Procedure] Act by the Criminal Law Amendment Act, 1990'. But that even before then the 'supreme courts' had 'always been empowered to impose it'.<sup>32</sup> Du Toit

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<sup>25</sup> Amendment to section 277 of the Criminal Procedure Act by section 4 of the Criminal Law Amendment Act, Act 107 of 1990.

<sup>26</sup> E Du Toit *Commentary on the Criminal Procedure Act* (1993) s 277. The death penalty could be, and indeed was, imposed and offenders were executed for other serious offences such as rape. See Dugard *op cit* (n16) at 124-130.

<sup>27</sup> Du Toit *op cit* at 277 (28-11).

<sup>28</sup> S Terblanche *Guide to Sentencing in South Africa* (2007) 434.

<sup>29</sup> Du Toit *op cit* (n26) at 277.

<sup>30</sup> *Ibid.* Footnotes omitted.

<sup>31</sup> *Ibid.*

<sup>32</sup> Terblanche *supra* (n28) at 232. Footnotes omitted. It has also been argued that 'life imprisonment was expressly inserted into section 276 of the Criminal Procedure Act by the Criminal Law Amendment Act 107 of 1990, although it was available to the High Courts before that as well': See JJ Joubert (ed) *Criminal Procedure Handbook* (8ed) (2007) 290.

*et al* are of the view that the reason why '[s]ection 276(1)(b) was amended to read imprisonment, *including imprisonment for life*,' was to ensure that 'where the court imposed the sentence of life imprisonment, it would be the manifest intention that the offender should be removed from society for the rest of his life. . . ' unless released by the Minister of Correctional Services.<sup>33</sup> However, it should be recalled that as early as 1955, life imprisonment was expressly recognised in the Criminal Procedure Act.<sup>34</sup> Much as the supreme court had the discretion to impose life sentences during the time of the death penalty, and indeed some offenders were sentenced to life imprisonment, Terblanche reminds us that:

'Until the early 1990s more than 25 years' imprisonment was rarely imposed in South Africa, and it was a basic principle that such longer sentences should be imposed only in cases of exceptional severity. At that stage the death penalty was still regularly imposed for the most serious crimes and life imprisonment almost non existent.'<sup>35</sup>

Joubert *et al* argue that during the period when the death penalty was still lawful in South Africa, 'life imprisonment was considered to be a valuable alternative to the death sentence and was imposed in cases of extreme seriousness . . . but where the death penalty was not considered to be the only proper sentence.'<sup>36</sup>

<sup>33</sup> Du Toit op cit (n26) at s 277 (chapter 28 at 14A). Footnotes omitted. Emphasis in original.

<sup>34</sup> Act 56 of 1955. Section 334(1) of the Criminal Procedure Act, 1955 provided that '[a] person liable to a sentence of imprisonment for life or for any other period, may be sentenced to imprisonment for any shorter period. . . ' as reproduced in CWH Lansdown *South African Criminal Law and Procedure* 6th ed (1957) Vol 1 877; see also AV Lansdown *Outlines of South African Criminal Law and Procedure* 5ed (1960) 284. In *Masala* supra (n13) at 216 the Court observed that '[a] sentence of imprisonment for life [was] referred to in sec.334 of the Criminal Procedure Act, 56 of 1955.'

<sup>35</sup> Terblanche op cit (n28) at 222. However, as early as 1960, when the Court was confronted with the question of the meaning of life imprisonment, it was observed that '[t]he Chairman of the Transvaal Prison Board informed the Court that, generally speaking, his board would only make a recommendation for release on a parole [of a prisoner serving a life sentence] after the prisoner had completed at least ten years of his sentence, while a recommendation for release on probation might only be given after he had completed 12 years of his sentence. Certain statistics covering the last five years, furnished to the Court by the Commissioner [of Prisons], indicate[d] that, while releases during that period [had] in contrast with former years some times occurred before the prisoner [had] served ten years, the majority [had] been required to serve at least ten years before being released on parole or probation and, in a number of cases, considerably longer.' See *S v Masala* supra (n13) at 218. ●ne has to recall that as at 31 December 1947, there were 204 prisoners serving life sentences in South Africa. See *Statistics of Criminal and other Offences and of Penal Institutions for the Year ended 31st December, 1947, Special Report No 178*, (Government Printer, Pretoria) Table 34(c) *Race and Sex of Sentenced Offenders in Penal Institutions According to the Nature of Sentence, as at 31st December 1947*.

<sup>36</sup> Joubert op cit (n32) at 290 1. In *S v Shabalala and others* 1991 (2) SACR 478 (A) the accused murdered an elderly recluse and mutilated and partially burnt his body and occupied his house. The court in sentencing them to death held that even life imprisonment was not an appropriate sentence in the circumstances.



The following examples from the case law, in which life imprisonment was imposed during this period, demonstrates some of the factors that courts took into consideration in 'cases of extreme seriousness' to impose life imprisonment instead of the death penalty: where the court thought that the accused was 'to be imprisoned for the rest of her life' in the sense that like the death penalty, life imprisonment would permanently remove him from society;<sup>37</sup> where the appellant was young, had no previous criminal record, and committed murder while intoxicated;<sup>38</sup> and where there was a 'reasonable prospect' of the appellant's rehabilitation.<sup>39</sup> Courts also imposed life imprisonment because the appellant was unlikely to commit murder again as the circumstances that led him to commit such murder were unlikely to happen again;<sup>40</sup> because the appellant was immature;<sup>41</sup> and because the offender had no previous record for 'serious' convictions and none of the victims of his rapes suffered severe or prolonged psychological effects.<sup>42</sup> Courts also considered the fact that the interests of justice demanded the imposition of a life sentence instead of a death penalty, for example where the prisoner's detention would enable the prison authorities to treat him for his mental condition<sup>43</sup> and where the murder had not been accompanied by cruel and humiliating acts.<sup>44</sup>

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<sup>37</sup> *S v Phillips and another* 1985 (2) SA 727(N) at 747.

<sup>38</sup> *Masala* supra (n13) at 215.

<sup>39</sup> *S v Sampson* 1987 (2) SA 620 (A).

<sup>40</sup> See *S v Cele* 1991(1) SACR 627 (A) in which the appellant, a 40 year old man, had paid two young men to murder his former employee who had caused trouble for his business which led him to lose his customers.

<sup>41</sup> *S v Cotton* 1992 (1) SACR 531 (A).

<sup>42</sup> *S v D* 1991 (2) SACR 543 (A). Where the accused was found guilty of various crimes, including six counts of rape (in which some of his victims contracted sexually transmitted diseases), one count of attempted rape and one count of indecent assault. See also *S v P* 1991 (1) SA 517 (A) where the court set aside the death penalty that had been imposed on the appellant and substituted it with life imprisonment on the grounds, among others, that the women the appellant had raped were not virgins, that they had not experienced serious psychological problems as a result of rapes, and that the appellant could be rehabilitated during his long term of imprisonment. In *S v W* 1993 (2) SACR 74 (A) the Court substituted the appellant's death sentence for life imprisonment on amongst other grounds that the victim of his rape had suffered no serious physical injuries.

<sup>43</sup> *S v Lawrence* 1991(2) SACR 57 (A) at 59 where the appellant, a psychopath with previous convictions, had murdered a 19 year old girl, the court in sentencing him to life imprisonment and held that there was 'no doubt that if the Court sentences a person suffering from severe psychopathy to life imprisonment the prison authorities would take active and adequate steps to ensure that he was appropriately detained and treated. In any event the failure to do so, for whatever cause, does not commend itself. . . as a reason, in itself, for imposing the [death] penalty.'

<sup>44</sup> *S v Mda* 1991 (1) SA 169 (A).

In cases of murder, the circumstances under which it was committed and the accused's level of participation were important factors in determining whether the accused should be sentenced to life imprisonment or to death. Where the circumstances were not cruel and the accused had not directly participated in the murder, life imprisonment was imposed;<sup>45</sup> where the accused, though found guilty of murder with no extenuating circumstances was close to 80 years' old, the court held that society did not expect such an old person to be sentenced to death and sentenced the accused to life imprisonment, even though the two co-accused who were younger and were sentenced to death.<sup>46</sup> The fact that a dangerous accused may be released on parole if sentenced to life imprisonment did not justify the imposition of a death penalty on him.<sup>47</sup> However, it should be stressed that in most cases where the accused were sentenced to life imprisonment instead of to death, the youthfulness of the accused was highlighted. For example, in *S v Bosman*, although the court observed that the 'nature and circumstances of the murder . . . [were] so heinous' and that retributive and deterrent elements were decisive and the death penalty the only appropriate sentence, the accused was sentenced to life imprisonment.<sup>48</sup>

The above cases show that one factor alone, for example, the youthfulness of the offender, was normally not sufficient for the court to depart from imposing the death penalty. Courts had to consider other factors such as the prospect of rehabilitation, whether the accused had previous criminal records, and the nature of the crime. A closer examination of the cases above in which the accused were sentenced to life imprisonment instead of to death, also shows that most of these were decided in the early 1990s. As mentioned earlier, the amendment to the Criminal Procedure Act in 1990 gave courts the discretion to impose a life sentence in cases that would otherwise have attracted the death penalty.<sup>49</sup> In all the cases from the 1990s cited above, courts, before sentencing the accused to life imprisonment, referred to s 4 of the Criminal Law Amendment Act.<sup>50</sup>

For example, the court observed:

[The] provisions [of the Criminal Law Amendment Act 107 of 1990] brought about a radical change in the law relating to death sentences. The effect thereof has been considered in a number of judgments. . . Broadly speaking the following principles have emerged from these judgments. The imposition of the death sentence is no longer, as in the past, mandatory in certain circum

<sup>45</sup> *S v Mthembu* 1991 (2) SACR 144 (A).

<sup>46</sup> *S v Munyai and others* 1993 (1) SACR 252 (A).

<sup>47</sup> *S v Oosthuizen* 1991 (2) SACR 298 (A).

<sup>48</sup> *S v Bosman* 1992 (1) SACR 115 (A) at 116.

<sup>49</sup> See nn 21 35.

<sup>50</sup> Act 107 of 1990.

stances, but rests entirely in the discretion of the trial Judge. This discretion is exercised with due regard to the presence or absence of any mitigating or aggravating factors (as found by the trial Court). The death sentence is only authorised where the trial Judge is satisfied that it is 'the proper sentence', which has been interpreted to mean 'the only proper sentence'. Its imposition is therefore to be confined to exceptionally serious cases – cases where the death sentence 'is imperatively called for'.<sup>51</sup>

What should also be noted about the above cases is that the accused had either committed murder combined with robbery with aggravating circumstances or combined with rape. After 1990, even in cases where the accused was found guilty of murder with no extenuating circumstances, courts held that they could not sentence the offender to death because the death penalty was not the only appropriate sentence. This was mostly after courts had considered factors such as the manner in which, and the purpose for which, the murder was committed, the age of the accused, whether the accused was capable of rehabilitation and whether the objectives of punishment would be achieved and the interests of society protected by imposing a life sentence instead of the death penalty. In cases of rape, on the other hand, an accused was more likely to be sentenced to life imprisonment instead of to death when in the opinion of the court the victim did not sustain serious physical or psychological injuries as a result of the rape.<sup>52</sup> This paper does not discuss the circumstances under which prisoners serving life sentence were being released before 1995, as Van Zyl Smit has dealt with this question exhaustively.<sup>53</sup>

### **3. Life imprisonment in the aftermath of the abolition of the death penalty (1995-1997)**

The discussion on life imprisonment in the aftermath of the *Makwanyane* decision, in which the Constitutional Court declared the death penalty unconstitutional, is divided into two parts. The first part deals with what is called 'The Constitutional Court supervised life sentences' and the second part with the ordinary life sentences. The first part deals with the death sentences imposed prior to 1994 but not executed and consequently commuted to various prison sentences, including life imprisonment. The second part analyses cases in which courts imposed life

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<sup>51</sup> *S v Mthembu* supra (n45) at 145.

<sup>52</sup> Statements and sentiments of this nature would in due course, rightly, attract the ire of gender rights activists.

<sup>53</sup> Dirk Van Zyl Smit *South African Prison Law and Practice* (1992) 378-80; and also 135-9. See also *S v Bull and another*; *S v Chavulla and others* 2002 (1) SA 535 (SCA) at para 23.

imprisonment as it was the severest sentence available following the abolition of the death penalty in 1995.

### 3.1 The Constitutional Court supervised sentences

On 6 June 1995, in the famous *Makwanyane* case,<sup>54</sup> the Constitutional Court declared the death penalty to be unconstitutional on the grounds that it violated the right to life and the right not to be subjected to cruel, inhuman and degrading treatment or punishment.<sup>55</sup> The Court ordered, amongst other things, that all death sentences be ‘set aside in accordance with the law, and substituted by appropriate and lawful punishments’.<sup>56</sup> In dismissing the Attorney General’s argument that the death penalty was the most deterrent sentence, the Court emphasised that life imprisonment was an equal deterrent to the death penalty.<sup>57</sup> However, it took Parliament another two years to pass the Criminal Law Amendment Act<sup>58</sup> the objectives of which included ‘to make provision for the setting aside of all sentences of death in accordance with the law and their substitution by lawful punishments’.

Under section 1(1) of the Criminal Law Amendment Act, the Minister of Justice was obliged to ‘as soon as possible after the commencement of the Act, refer the case of every person who [had] been sentenced to death and [had] in respect of that sentence exhausted all the recognised legal procedures pertaining to appeal or review, or no longer [had] such procedures at his or her disposal, to the court in which the sentence of death was imposed’. The court had to consist of the judge who had imposed the death sentence upon the prisoner and if that was not possible, the Judge President of the court in question was required to designate any other judge of that court to deal with the matter.<sup>59</sup> The court was required to consider arguments and evidence from, or on behalf of, the prisoner, before converting the sentence and based on this to ‘advise the President, with full reasons . . . of the need to set aside the sentence of death, of the appropriate sentence to be substituted in its place and if, applicable, of the date to which the sentence shall be antedated’.<sup>60</sup> The President was required to set aside the sentence of death and substitute it with the punishment advised by the court.<sup>61</sup> All appeals pending before the Supreme Court against the sentence of death were to be

<sup>54</sup> *S v Makwanyane* 1995 (6) BCLR 665 (CC).

<sup>55</sup> *Makwanyane* supra (n54) at para 344.

<sup>56</sup> *Makwanyane* supra (n54) at para 150.

<sup>57</sup> *Makwanyane* supra (n54) at para 128.

<sup>58</sup> Act 105 of 1997.

<sup>59</sup> Section 2.

<sup>60</sup> Section 1(3).

<sup>61</sup> Section 1(4).

heard by the full bench of the division which would have heard the appeal had the Supreme Court directed such a division to hear the appeal.<sup>62</sup> The full bench was empowered to set aside the sentence of death and substitute it with the appropriate sentence.<sup>63</sup> On the other hand, all appeals that had been partly heard or were pending before the Supreme Court of Appeal were to be disposed of by that court in terms of section 322(2) of the Criminal Procedure Act<sup>64</sup> with the powers to substitute death sentences for appropriate sentences.<sup>65</sup> Courts were required to antedate the sentence of imprisonment substituted with the one of death to a specified date which was not to be earlier than the date on which the sentence of death was imposed.<sup>66</sup>

Despite the existence of the legal framework for substituting death sentences with lawful sentences, the process of dealing with these cases was slow and eventually gave rise to a constitutional challenge in *Sibiya and others v The Director of Public Prosecutions and others*.<sup>67</sup> The Constitutional Court lamented the fact that for the preceding 10 years, since the *Makwanyane* decision, all death sentences had not yet been converted to other sentences. It ordered the Department of Justice, which was one of the respondents, to update the Court, within a stipulated time, on the measures it had taken to convert all the death sentences and in cases where such sentences had not been converted, to provide reasons why.<sup>68</sup> Table 1 below shows the number of death sentences converted to life sentences in the light of the *Makwanyane* decision and enabled by the above outlined provisions of the Criminal Law Amendment Act.<sup>69</sup> The new sentences are also categorised according to the six different mechanisms for conversion.

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<sup>62</sup> Section 1(7).

<sup>63</sup> Section 1(9).

<sup>64</sup> Act No. 51 of 1977. Section 322(2) provides that 'upon appeal . . . against any sentence, the court of appeal may confirm the sentence or may delete or amend the sentence and impose such punishment as ought to have been imposed at the trial'.

<sup>65</sup> Section 1(10).

<sup>66</sup> Section 1(11).

<sup>67</sup> *Sibiya and others v the Director of Public Prosecutions and others* 2006 (1) SACR 220 (CC).

<sup>68</sup> *Supra* n67 at para 64.

<sup>69</sup> As at 5 June 2005, 465 prisoners were on death row in South Africa. As of October 2005, 378 sentences had been converted to other sentences, seven prisoners had died and 80 prisoners were waiting for their sentences to be converted. The author relies on the statistics available as of October 2005 because attempts to get the statistics from the Constitutional Court on what sentences were imposed on the 80 prisoners who were waiting the conversion of the sentences were not successful. The statistics are based on the submissions of the Department of Justice to the Constitutional Court for the October 2005 judgment.

Table 1

Category	Same judge	Different judge	SCA to Court a quo	SCA	Full bench	SCA s 322
Nr. of prisoners on death row	123	108	49	68	64	6
Converted to life imprisonment	74	90	26	63	60	6
Converted to other terms of imprisonment	49	18	23	5	4	0
	%	%	%	%	%	%
Converted to life imprisonment	60.2	83.3	53.1	92.6	93.8	100.0
Converted to other terms of imprisonment	39.8	16.7	46.9	7.4	6.3	0.0

Table 1 illustrates that the majority of prisoners who had been sentenced to death had their sentences converted to life imprisonment (including those who were sentenced to more than one life sentence) and those who were not sentenced to life imprisonment were sentenced to prison terms ranging from 15 to 50 years. However, a prisoner whose sentence was reviewed by the same judge who had sentenced him to death, or by the lower court at the order of the Supreme Court of Appeal, stood a better change of being sentenced to a sentence other than life imprisonment than did a prisoner whose sentence was reviewed by the other four mechanisms.

This raises a question of what the courts consider relevant in converting most of the death sentences to life imprisonment. The author was unable to access the High Court decisions in this regard as they were unreported. However, those of the Supreme Court of Appeal were accessible and these were used to establish which factors the courts considered when they converted death sentences to life imprisonment. The following trends were noted in the cases reviewed: in all cases the Court reviewed the facts of the case, that is, the nature of the offence committed by the accused, the personal circumstances of the accused, for example whether he was capable of rehabilitation or not, the aggravating and the mitigating factors. When the aggravating factors outweighed the mitigating factors, which was generally the case, the death penalty was converted to life imprisonment.<sup>70</sup> In the few cases where the death

<sup>70</sup> In *Khaba v S* [1999] JOL 5758 (A) the Supreme Court of Appeal, before converting the appellant's death sentence to life imprisonment, held that '[i]t had been noted . . . that the aggravating circumstances were such that only the maximum sentence [of life imprisonment] was appropriate'. See page 1 of 5758; in *Kruger and another v S* [1999] JOL 5341(A), the Court observed that '[i]n prior proceedings, mitigating and aggravating factors had been considered and Court had concluded that death penalty was the only ap

penalty was converted to a shorter prison term, like 16 years, the court held that the mitigating factors outweighed the aggravating factors. For example in *Musingadi and others v S*, the Court held that the first appellant's death sentence be converted to 16 years' imprisonment because of following mitigating factors: the appellant was relatively young (31 years old); he was a first offender; he had a wife and a child whom he supported; his level of education was low (Standard 5); and he had not played a leading role in the murder and robbery.<sup>71</sup>

In some cases the Court gave particular attention to the character of the accused. For example, in *Boy and another v S*, the sentence of death was converted to life imprisonment because the Court was of the view that the appellants 'were irretrievably beyond any possibility of rehabilitation.'<sup>72</sup> In *December v S*, the Court justified the imposition of life sentence on the ground that 'the appellant's removal from society should be permanent and that life imprisonment [was] the only fitting sentence.'<sup>73</sup> In *Mokoena v S*, the court converted the death penalty into life imprisonment because, in addition to the offence of which the appellant was

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appropriate sentence. For these reasons Court considered that life imprisonment was an appropriate sentence.'; see also *Mafumo and another v S* [1999] J●L 5342(A); *Mashego v S* [1999] J●L 5525(A); *Motshwedi v S* [1999] J●L 5511(A); *Ndigungweni and another v S* [2001] J●L 7324(A); *Ngcobo v S* [1999] J●L 5731(A); *Nkala en 'n ander v S* [1999] J●L 5515(A); *Nortje v S* [1999] J●L 5756(A); *Pekeer v S* [1999] J●L 5528(A); *Rasmeni v S* [1999] J●L 5510(A); *Shabalala and another v S* [2000] J●L 7270(A); *Smith v S* [1999] J●L 5730(A); *Stotenkamp v S* [1999] J●L 5753(A); *Swarbboo v S* [1999] J●L 5509(A); *Van Der Merwe v S* [1999] J●L 5524 (A); *Walus and another v S* [2001] J●L 7629(A); in *Mblongo v S* [2000] J●L 5891(A) the Court held that "the facts and circumstances of the case warranted the imposition of the most extreme sentence available to the courts. The substitute sentence now had to be likewise' the court imposed life imprisonment. In *Naidoo v S* [1999] J●L 5340 (A) the Court held that 'the offence was so heinous that this was a case in which the destruction of the appellant was imperatively called for. In view of this it follows that his removal from society should be permanent and accordingly the possibility of rehabilitation is not a relevant factor . . . [T]he proper sentence in this case would be one of life imprisonment' at p 4 of 5340; in *Pbaleng en andere v S* [1999] J●L 4629 (A) the Court in converting the appellant's sentence from death to life imprisonment held that its decision had been influenced by 'constitutional developments regarding the death penalty'.

<sup>71</sup> *Musingadi and others v S* [2004] 4 All SA 274 (SCA) at para 52. However, in *Nogqala v S* [1999] J●L 5527(A), the Court held that even though the accused was young (30 years old), was a first offender, came from an impoverished background, and had the prospect of rehabilitation, his death sentence had to be converted to life imprisonment because of the callous nature of the murder he had committed. The Court held that in such a case of heinous murder (the murder of an elderly man in the most brutal of circumstances) the retribution and deterrence objectives of punishment outweighed the prospect of rehabilitation. See also *Plaatjies and another v S* [1999] J●L 4626(A) where the appellant's death sentence was converted to 30 years' imprisonment.

<sup>72</sup> *Boy and another v S* [1999] J●L 5392 (A) at 1.

<sup>73</sup> *December v S* [1999] J●L 5508 (A) p 3 of 5508.

found guilty, a particularly violent murder, the Court also ‘took into account the fact that the accused also had previous convictions’.<sup>74</sup>

●ne could argue that in cases where the Supreme Court of Appeal dismissed the appellant’s appeal against the sentence and ordered the lower courts to impose a ‘competent’ or ‘appropriate’ sentence, such courts had to ensure that the offenders were sentenced to the penalty that the Supreme Court of Appeal would have imposed had it not referred the matter to the lower court. This could explain why in such cases, as illustrated in Table 1 above, the majority of the death penalties were converted to life imprisonment and in cases where they were not converted to life imprisonment, lengthy prison terms were imposed. In *Malefane and others v S*, for example, the Supreme Court of Appeal, after dismissing the appellants’ appeal against their conviction for murder, substituted their death sentence with life imprisonment on the ground that the trial judge who would have been ordered to re-sentence them had died during the pending of the appeal. The Court held that it imposed life imprisonment because that was the ‘sentence that the court *a quo* would have imposed’ for the purpose of rendering the accused ‘incapable of endangering law and order in the community ever again’.<sup>75</sup>

●ne also realises that, like the Supreme Court of Appeal, the full bench of the High Court weighed the mitigating factors against the aggravating factors in determining the appropriate sentence that should be substituted with the death penalty. In *Lukbele v S*, the full bench of the Transvaal, before converting the appellant’s sentence from death to life imprisonment, took into consideration the ‘overwhelming’ aggravating circumstances and said that it had ‘little sympathy with the appellant’ and sentenced him to life imprisonment which it understood to mean that the prisoner was to be ‘detained in prison for as long as [the authorities] considered reasonable’.<sup>76</sup>

### 3.2 Life sentences not directly supervised by the Constitutional Court in the aftermath of the abolition of the death penalty but prior to the Criminal Law Amendment Act of 1998

After the abolition of the death penalty, courts that imposed life sentences considered different factors, such as the nature of the offences and the character of the accused, for the purpose of imposing life imprisonment as a sentence. This was because the Criminal Procedure Act<sup>77</sup>

<sup>74</sup> *Mokoena v S* [1999] J●L 5396 (A) at 1.

<sup>75</sup> *Malefane and others v S* [1998] J●L 2431 (A) at pp 1 and 26.

<sup>76</sup> *Lukbele v S* [2001] J●L 8647 (T) at 5.

<sup>77</sup> Act 51 of 1977.



gave courts wider discretion with regard to the imposition of life sentences. Section 283(1) of the Criminal Procedure Act provides that 'a person liable to a sentence of imprisonment for life or for any other period, may be sentenced to imprisonment for any shorter period. . .' However, s 283(2) puts a proviso to s 283(1) to the effect that 'the provision of subsection (1) shall not apply with reference to any offence for which a minimum penalty is prescribed in the law creating the offence or prescribing a penalty therefore'. Before 1998 the courts had wide discretion in deciding who was to be sentenced to life imprisonment. This explains why, when the minimum sentences legislation was introduced in 1998 directing courts to sentence persons convicted of specified scheduled offences to life imprisonment unless there were substantial and compelling circumstances for not doing so, some courts felt that their discretion to determine who was to be sentenced to life imprisonment, or not, had been eliminated.<sup>78</sup>

How did the courts exercise their discretion before 1998? In the first place, the courts considered the nature of the offence that the accused had committed. If it was a serious offence, such as multiple murders, courts were more likely to sentence the accused to life imprisonment.<sup>79</sup> In *Martin v S*, where the appellant was convicted of four counts of murder and two counts of attempted murder, the Supreme Court of Appeal held that life imprisonment 'must be accountable to the reality that as equal increments are added to duration of sentence, there comes a point where the marginal value of a further increment tends to be less than that of every previous increment. A law of diminishing returns operates'.<sup>80</sup> The Court cautioned that 'the court must hesitantly exceed the optimum point for the sake of striving for more or for guaranteed effectiveness. So it is that in this case long imprisonment, but for less than a lifetime, may not be left out of consideration'.<sup>81</sup> The Court was also alive to the fact that one-size-fits-all life sentences may cause discrepancies between offenders and that before a life sentence was imposed, factors such as the age of the offender and his or her likely future contribution to society could not be ignored. The court held that:

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<sup>78</sup> See for example *S v Dodo* 2001 (3) BCLR 279 (E) at 292, where the judge observed that under s 51(1) of the Criminal Law Amendment Act, 'an accused convicted of a serious charge before the High Court, unless the Court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence, faces a life sentence which was decided upon before the commencement of the trial, not by the Court itself, but by the Legislature. . . In my view, this is not a trial before an ordinary court. It is a trial before a court in which, at the imposition of the prescribed sentence, the robes are the robes of the judge, but the voice is the voice of the Legislature.'

<sup>79</sup> See *Martin v S* [1998] JOL 268 (W).

<sup>80</sup> *Martin* supra (n79) at 13.

<sup>81</sup> *Martin* supra (n79) at 14.

'An approach that life imprisonment is what is appropriate for a bad man committing a bad crime disregards that such a norm tends to create disparity. *Life sentence imposed upon a lively man of 30 imposes a much longer and harsher sentence than the nominally identical sentence when imposed on a man of 65 who has lost interest in everything around him. Little else but the established need to use detention as a means of preventing repetition of crime by the accused can justify ignoring such discrepancies. But there is also an aspect of cruelty to a life sentence . . . the man who is incarcerated for life does not have a curtain drawn on awareness. There is no dividing date which ends his subjective suffering and renders him unaware of the past, or of the futility of the future. What he is subjected to is an unending punishment, day after day. It is life without future hope, coupled with a permanence of suffering. It is extremely unpleasant while it lasts which is interminable.*<sup>82</sup>

From the above comment one observes that the Supreme Court considered life imprisonment to be a sentence so severe that before its imposition the court had to weigh various factors. These factors, as mentioned earlier, included the heinous nature of the offence committed, the age of the accused,<sup>83</sup> and most importantly, these factors had to be balanced against the cruel nature of the sentence of life imprisonment — a sentence by which the offender was being punished in 'an unending' manner 'day after day' which was also 'coupled with a permanence of suffering.' This meant that courts had wider discretion to determine whether, irrespective of the heinous nature of the offence committed, the circumstances required the imposition of such a severe sentence. Thus in *S v Matolo en 'n ander* the High Court, before sentencing the accused to life imprisonment for the offence of murder, made it clear that 'it had a very wide discretion with regard to the passing of sentence' but that discretion had 'to be exercised in a legal or judicial manner at all times'.<sup>84</sup> The Court considered life imprisonment to be the 'appropriate sentence,' it gave 'particular attention' to the following factors: '(i) the seriousness of the crime; (ii) the personal circumstances of the accused; and (iii) the interests of the community at large'.<sup>85</sup>

<sup>82</sup> *Martin* supra (n79) at 14. Emphasis in original.

<sup>83</sup> In *S v M* 1994 (2) SACR 24 (A) the appellant had been sentenced to death for the rape of an 8 month old baby leading to her death. ●n appeal, the court substituted his death sentence to life imprisonment on the grounds that though the offence was callous, the accused was of young age (20 years old) and committed the offence under the influence of alcohol.

<sup>84</sup> *S v Matolo en 'n ander* [1997] 4 All SA 225 (0) at 225 6.

<sup>85</sup> *Ibid.* In *S v Stonga* 1997 (2) SACR 497 (●) at 498 where the appellant was found guilty of the rape and murder of an 8 year old girl in a gruesome manner, that is, he choked her until she was lifeless, raped her and dumped her, head first, in a toilet. The court in sentencing him to life imprisonment held that although the appellant was young (25 years' old), cooperated with the prosecution and had shown remorse after his conviction, his personal characteristics had to be 'subordinated to the inter

One could conclude that courts considered the following variables or a combination thereof in deciding whether to impose life imprisonment or not: the seriousness or otherwise of the offence; the need to protect the community from the accused;<sup>86</sup> the fact that life imprisonment would achieve the objectives of punishment such as retribution, deterrence and protection of the society;<sup>87</sup> the extent to which the crime the accused committed was prevalent in society in that, where the offence was serious and prevalent the accused was more likely to be sentenced to life imprisonment;<sup>88</sup> the conduct of the accused in committing the offence and 'whether the conduct of an accused in, during and preceding the commission of the offence was of so grave and repulsive a nature, that the community has to be protected against the onslaughts of such an unscrupulous aggressor by his removal from society for the rest of his life'.<sup>89</sup>

In some cases, even if the accused committed offences such as murder and robbery and was vengeful, courts avoided life imprisonment or 'extremely long sentences' such as 60 years imprisonment because of the 'law of diminishing returns'.<sup>90</sup> In *S v De Kock* the court sentenced the accused to life imprisonment because, amongst other grounds, he was not susceptible to rehabilitation.<sup>91</sup> Life imprisonment was also imposed in cases so serious that they demanded the imposition of the 'heaviest sentence permissible' and these were cases where, for example, the accused played a leading role in the commission of a heinous offence, and where there were no mitigating factors for the court to impose a lesser sentence.<sup>92</sup> In the same vein, life imprisonment was avoided if the imposition of a lesser sentence would accord with the 'notions of fairness and equity'.<sup>93</sup>

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ests of society' and the latter required that he had to be effectively and permanently removed from society and that to achieve that life imprisonment was the only available sentence.

<sup>86</sup> *S v Ngongo and another* 1996 (1) SACR 557 (N).

<sup>87</sup> *Ibid.*

<sup>88</sup> *S v Matolo en 'n ander* 1998 (1) SACR 206 (●) 208.

<sup>89</sup> *Ibid.*

<sup>90</sup> *S v Naryan* [1998] J●L 4132 (W) at 47. Where the accused was sentenced to 27 years for various offences which included murder, car robberies, and the unlawful possession of a firearm and ammunition.

<sup>91</sup> *S v De Kock* 1997 (2) SACR 171 (T).

<sup>92</sup> *S v Magoro* 1996 (2) SACR 359 (A) at 365. Where the accused were found guilty of burning to death an old woman whom they suspected of being a witch, one of them was sentenced to life imprisonment because he had played a leading role in the murder. In *S v Van Wyk* 1997 (1) SACR 345 (T) at 347 where the accused, aged 21 years' old, was found guilty of committing various murders and sentenced to life imprisonment, the court in justifying the imposition of the sentence, placed emphasis on the heinous nature of the offences committed and on the fact that 'the appellant had not shown any real remorse particularly in respect of the murders'.

<sup>93</sup> *Magoro supra* n92 at 365.

Another important factor that influenced sentencing in the aftermath of the abolition of the death penalty was the manner in which some courts imposed excessively long prison terms on the offenders to prevent them from being considered for parole on the basis that, because of the callous nature of the offences they had committed, they would have been sentenced to death had it not been declared unconstitutional. Put differently, courts were aware that if they sentenced offenders to life imprisonment, they would be considered for parole after serving a certain number of years in prison. In an effort to prevent their release, courts imposed sentences that were longer than actual life sentences.<sup>94</sup> In reacting to this sentencing trend, the High Court observed in *S v Smith*, where the accused was found guilty of murdering his employer, his employer's wife and daughter, that it was 'inappropriate, when considering a proper sentence, to take into account that the death penalty would be the appropriate sentence if it had been available as a sentencing option' and the court added that it was 'similarly inappropriate for the court to impose lengthy, non-concurrent periods of imprisonment in an attempt to eliminate any possibilities of parole'.<sup>95</sup>

### 3.3 The release of prisoners serving life sentences

In 1996 the Department of Correctional Services published its Release Policy in the *Government Gazette* in which it stipulated that a prisoner sentenced to life imprisonment was to be considered for parole after serving at least 20 years of the sentence or, once he had reached the age of 65 years, after serving 15 years.<sup>96</sup> In the following year, the Parole and Correctional Supervision Amendment Act (PCSAA)<sup>97</sup> amended s 65(5) and (6) of the Correctional Services Act by providing under section 9(d)(v) that a prisoner serving a life sentence shall not be released on parole before serving at least 25 years of the sentence. However, the same section included a proviso to the effect that parole could be granted to a prisoner who reached the age of 65 years while serving his sentence on condition that such a prisoner had served at least 15 years

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<sup>94</sup> For example in *Mhlakaza and others v S* [1997] 2 All SA 185 (A) the accused were convicted of a number of offences including the murder of a police officer. The first accused was sentenced to an 'effective' sentence of 47 years and the second to 38 years. The reason the court gave for such sentences was that they would serve as a deterrent to potential criminals.

<sup>95</sup> *S v Smith* 1996 (1) SACR 250 at 251.

<sup>96</sup> See the Department of Correctional Services Release Policy published in *Government Gazette* 17386 of 30 August 1996 by Notice 1222 of 1996 as referred to in *S v Bull and another*; *S v Chavulla and others* 2002 (1) SA 535 (SCA) at para 23.

<sup>97</sup> Act 87 of 1997 (assented to by the President on 26 November 1997 and came into force on 12 December 1997. See *Government Gazette* 18503).

of his prison term.<sup>98</sup> The PCSAA also substituted s 63 of the Correctional Services Act to give the parole board the following functions in relation to prisoners serving life sentences:

**Section 63(2)** ‘A parole board shall, in respect of any prisoner serving a sentence of life imprisonment, submit a report with recommendations on the possible placement of the prisoner concerned on parole or on day parole, and the conditions under which the prisoner may be so placed to the court which sentenced the prisoner.’

The PCSAA also inserted s 64B(1) into the Correctional Services Act which gave the court (to which the report mentioned in s 63(2) was to be submitted) the power to ‘order that the prisoner concerned be placed on day parole and determine the conditions on which the prisoner shall be so placed.’ Section 64B(2) provided that should the court decide that a prisoner serving a life sentence ‘should not be placed on parole or day parole, it shall determine the period of imprisonment which the prisoner shall serve before the prisoner may again be considered for placement on parole or on day parole’. Therefore, prisoners who were sentenced to life imprisonment before 12 December 1997, the date on which the PCSAA came into force, are governed by the law and policies which were operational during that time, that is, s 65 of the Correctional Services Act and the 1996 Release Policy. This fact is also acknowledged under s 24 of the PCSAA which provides that any person serving a prison sentence immediately before the commencement of the PCSAA shall have his sentence and release governed by the law that was in place at the time he was sentenced. Consequently the PCSAA governs those offenders who were sentenced to life imprisonment on or after 12 December 1997. In practice, the first prisoner serving a life sentence whose parole is governed by the 1996 Release Policy will have to be considered for release in 2016 and the one whose parole is governed by the PCSAA will have to be considered for release in 2022.

#### **4. Life imprisonment in the minimum sentences legislation era (imposed by High Courts) 1998-2007**

The Criminal Law Amendment Act, or the minimum sentences legislation (MSL), as it became popularly known, has been a subject of various studies and reports.<sup>99</sup> Its drafting history and impact on the prison population in general are beyond the scope of this article. It was meant to be

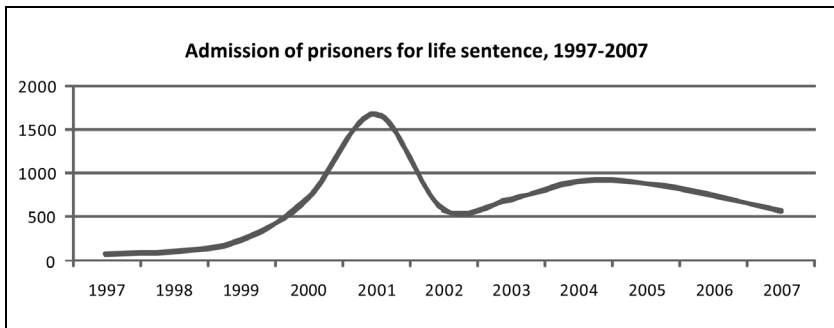
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<sup>98</sup> *S v Bull; S v Chavulla* supra n96 at para 23.

<sup>99</sup> See for example Michael ●Donovan and Jean Redpath *The Impact of Minimum Sentencing in South Africa* (2006) ●open Society Foundation for South Africa (Report 2). C Giffard and L Muntingh *The Effect of Sentencing on the Size of the South African Prison Population* (2006) ●open Society Foundation for South Africa (Report 3).

short-lived as a 'response to a situation which was hoped would not persist indefinitely' but that the 'situation does and remains notorious'.<sup>100</sup> The situation was and still is the 'alarming burgeoning in the commission of the crimes of the kind specified [in the MSL] resulting in the government, the police, prosecutors and the courts constantly being exhorted to use their best efforts to stem the tide of criminality which threatened and continues to threaten to engulf society'.<sup>101</sup>

Chart 2<sup>102</sup>



The impact the MSL has had on the number of prisoners sentenced to life sentences is evident in Chart 2 above. Since the coming into force of the MSL in 1998, the number of prisoners serving life sentences has increased dramatically. The skyrocketing in the numbers of prisoners subjected to life imprisonment between 2000 and 2001 is attributable to the fact that it was during that period that the majority of death sentences were commuted to life imprisonment. As mentioned earlier, by end of October 2008, 8634 prisoners were serving life sentences. The wide discretion that courts had before the coming into force of the MSL was affected. The Supreme Court of Appeal acknowledges this fact and

<sup>100</sup> *S v Malgas* 2001 (2) SA 1222 (SCA) at para 7. Under s 53(1) of the Criminal Law Amendment Act, the Act was to cease to be law after two years but the President has the powers to extend its operation. Since its coming into force on 19 December 1997, the applicability of the Act has been annually renewed and in December 2007 the Act was amended to, *inter alia*, give jurisdiction to regional courts to impose life sentences (this aspect is discussed in detail below). Also, the requirement of biannual extension has been removed, so that the MSL now assumes a permanent place on the statute book.

<sup>101</sup> *S v Malgas* supra (n100) at para 7.

<sup>102</sup> Statistics acquired from the Judicial Inspectorate of Prisons, Cape Town (2006). For the exact number of prisoners serving life sentences in each year between 1996 and 2007 see Judicial Inspectorate of Prisons, *Annual Report for the period 1 April 2007 to 31 March 2008* (2008) at 23 at <http://judicialinsp.pwv.gov.za/Annualreports/Annual%20Report%2007%2008.pdf>, accessed on 30 November 2008.

explains why this is the case in the following terms: '[i]t was, of course, open to the High Courts even prior to the enactment of the [minimum sentences] legislation to impose life imprisonment in the free exercise of their discretion. The very fact that [the MSL was] . . . enacted indicat[ed] that Parliament was not content with that and that it was no longer to be "business as usual" when sentencing for the commission of the specified crimes.'<sup>103</sup> The coming into force of the MSL meant that courts did not have their hitherto wide discretion of imposing life sentences when they deemed it suitable. Differently put, the MSL ensured that 'court was not to be given a clean slate on which to inscribe whatever sentence it thought fit.'<sup>104</sup> The law requires courts to approach sentencing in respect of some of the scheduled offences with the mindset that life imprisonment should be the starting point upon conviction unless there are 'substantial and compelling' circumstances to justify the imposition of a lesser sentence.

Before proceeding to discuss the various ways in which the MSL-era substantially transformed the institution of life imprisonment in South Africa, it should also be noted that since 1993 South Africa passed a range of laws whose breach empowers courts to sentence the offender to life imprisonment. These laws include: the Non-Proliferation of Weapons of Mass Destruction Act (1993);<sup>105</sup> the Defence Act (2002);<sup>106</sup> the Nuclear Energy Act (1999);<sup>107</sup> the Implementation of the Rome Statute of the International Criminal Court Act (2002);<sup>108</sup> the Protection of Constitutional Democracy against Terrorist and Related Activities Act (2004);<sup>109</sup> the Preventing and Combating of Corrupt Activities Act (2004);<sup>110</sup> and the Prevention of Organised Crimes Act (1998).<sup>111</sup> However, at the time of writing, December 2008, there was no known case in which an offender had been sentenced to life imprisonment other than in cases of murder and rape. One could argue that whereas under all the aforementioned pieces of legislation a court could sentence an offender to life imprisonment, in practice it is the MSL which has been enforced.

#### 4.1 The constitutional challenge to the MSL

South African case law attests to the fact that as early as 1943 some the

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<sup>103</sup> *S v Malgas* supra (n100) at para 7.

<sup>104</sup> *Malgas* supra (n100) at para 8.

<sup>105</sup> Act 87 of 1993, s 26(1)(k)(v).

<sup>106</sup> Act 42 of 2002, s 24(3).

<sup>107</sup> Act 46 of 1999, s 56(2)(d).

<sup>108</sup> Act 27 of 2002, s 4(i).

<sup>109</sup> Act 33 of 2004, s 18(1)(a).

<sup>110</sup> Act 12 of 2004, s 26(1)(a).

<sup>111</sup> Act 121 of 1998, s 3.

accused have in general challenged minimum sentencing legislation. Their arguments have, among other things, been that minimum sentences interfere with the judiciary's powers to exercise its discretion when it comes to sentencing.<sup>112</sup> The 2001 case of *S v Dodo*<sup>113</sup> challenged the imposition of the life sentence as a minimum and also maximum sentence in cases where the accused has been found guilty of one or more of the scheduled offences in circumstances that do not allow the court to impose a lesser sentence. In *Dodo* the issue was whether s 51(1) of the Criminal Law Amendment Act (1997), which allows a judge to sentence an accused found guilty of one or more scheduled offences, to life imprisonment, unless there are substantial and compelling circumstances, was unconstitutional. It was alleged to violate the right of everyone to be tried by an ordinary court and also to be inconsistent with the separation of powers principle. The Constitutional Court observed that

[t]he construction of the phrase 'substantial and compelling circumstances' in s 51(3)(a) goes to the heart of these issues. The existence of these circumstances permit the imposition of a lesser sentence than the one prescribed. Establishing their true meaning has proved to be intractably difficult and has led to a series of widely divergent constructions in the High Courts'.<sup>114</sup>

This ambiguity was settled by the Supreme Court of Appeal in *S v Malgas* (discussed below at 4.2). The court held that courts still have a limited discretion whether to impose a life sentence or not and that such a discretion depended on the existence or not of substantial and compelling circumstances and that in such a situation the MSL was not unconstitutional. ● On the separation of powers, the Constitutional Court held that even though the Constitution recognises this principle, it does not envisage a strict separation of powers but rather one in which one arm of government, through checks and balances, would check on the functions and powers of the other but not cripple its functions and that South Africa will develop its own understanding of separation of powers principles in due course.<sup>115</sup> The MSL therefore remained on the statute books through the periodical renewals by Parliament.

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<sup>112</sup> See *Rex v Beyers* [1943] AD 404 in which the accused unsuccessfully challenged the reasonableness of his conviction and sentence under the regulations that imposed a minimum sentence of five years on a person found in possession of unauthorised explosives, the Court (Appellant Division) held (at 410) that '... it cannot be regarded as unreasonable in existing circumstances to make a regulation imposing a minimum penalty for the possession of unauthorised explosives under a power to provide "for the defence of the Union, the safety of the public, the maintenance of public order and the effective prosecution of the war".'

<sup>113</sup> *S v Dodo* 2001 (1) SACR 594 (CC).

<sup>114</sup> *Dodo* supra n113 at para 10.

<sup>115</sup> *Dodo* supra n113 at paras 15-33.



## 4.2 What should be taken into consideration before sentencing a person to life imprisonment?

Under the MSL, a court is required to impose a life sentence on an accused for committing one or more of the scheduled offences,<sup>116</sup> unless there are substantial and compelling circumstances. Like any other legal term which is undefined, courts were justified in attributing to the phrase ‘substantial and compelling circumstances’ what they thought to its meaning.<sup>117</sup> Various interpretations were given which the Supreme Court of Appeal considered to have been ‘discordant’ and to necessitate intervention and guidance on what substantial and compelling circumstances means.<sup>118</sup> Thus in *S v Malgas*, the Supreme Court of Appeal held that in determining whether substantial and compelling circumstances exist, courts have to consider the following factors:

‘(A) Section 51 has limited but not eliminated the courts’ discretion in imposing sentence in respect of offences referred to in Part 1 of Schedule 2 (or imprisonment for other specified periods for offences listed in other parts of Schedule 2); (B) Courts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should *ordinarily* and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances; (C) Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts; (D) The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation and marginal differences in personal circumstances or degrees of participation between co offenders are to be excluded; (E) The Legislature has, however, deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored; (F) All factors (other than those set out in D above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process; (G) The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick (‘substantial and compelling’) and must be such as cumulatively justify a departure from the standardised response that the Legislature has ordained; (H) In applying the statutory

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<sup>116</sup> See Appendix 1 to this article.

<sup>117</sup> The Supreme Court of Appeal observed that ‘[t]he absence of any pertinent guidance from the Legislature by way of definition or otherwise as to what circumstances should rank as substantial and compelling or what should not, does not make the task [of establishing its meaning] any easier.’ See *Malgas* supra (n100) para 18.

<sup>118</sup> *Malgas* supra (n100) at 1229.

provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against sentence as the sole criterion; (I) If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence; [and] (J) In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the bench mark which the Legislature has provided.<sup>119</sup>

The above quotation clearly shows what courts should consider in establishing whether there are indeed substantial and compelling circumstances to justify not imposing a life sentence. Courts have to judge whether the circumstances of a particular case justify their departure from imposing a life sentence. This means that courts have to weigh carefully every important aspect of the case to ensure that if life imprisonment is not imposed, there truly are substantial and compelling circumstances.<sup>120</sup> However, if the offender was above the age of 16 but below the age of 18 at the time the offence was committed, s 51(3)(b) has been interpreted to mean that life imprisonment should be the exception. The Supreme Court of Appeal held in *Brandt v S* that when sentencing a child offender, the court should be guided by the constitutional and international law principles that any punishment imposed should be in the best interest of the child offender, that such punishment should be proportional to the offence committed and that imprisonment should only be used as measure of last resort and for the shortest time possible.<sup>121</sup> The Court concluded that:

‘The effect of the provision is . . . that section 51(3)(b) automatically gives the sentencing court the discretion that it acquires under section 51(3)(a) only where it finds substantial and compelling circumstances. It follows that the “substantial and compelling” formula finds no application to offenders between 16 and 18. A court is therefore generally free to apply the usual sentencing criteria in deciding on an appropriate sentence for a child between the ages of 16 and 18. As in a case where section 51(3)(a) finds application, the court in arriving at an appropriate sentence must, however, not lose sight of the fact that offences of the kind specified in Schedule 2 of the Act have been

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<sup>119</sup> *Malgas* supra (n100) at para 25.

<sup>120</sup> The Supreme Court of Appeal held that ‘[a]lthough there is no *onus* on an accused to prove the presence of substantial and compelling circumstances, it must be so that an accused who intends to persuade a court to impose a sentence less than that prescribed should pertinently raise such circumstances for consideration.’ See *S v Roslee* 2006 (1) SACR 537 (SCA) at para 33.

<sup>121</sup> *Brandt v S* [2005] 2 All SA 1 (SCA) at para 20.

singled out by the Legislature for severe sentences. The gravity of the offence must accordingly receive recognition in the determination of an appropriate sentence.<sup>122</sup>

What emerges here is that in cases of adult offenders, the individualisation in sentencing as a legal principle is largely being substituted with an emphasis on substantial and compelling circumstances. The question is what have the courts considered to be substantial and compelling circumstances? A look at some of the cases will provide an answer.

Where a 17-year old child committed an offence in circumstances contemplated under Part 1 of Schedule 2 it was held that the 'youthfulness [of the offender] per se is a substantial and compelling circumstance.'<sup>123</sup> In *S v Ferreira and others*<sup>124</sup>, the first appellant, a woman in an abusive relationship, contracted the second and third appellants to murder her partner, believing that his death was the only way she could escape the abusive relationship. The Supreme Court of Appeal held that the belief that the only way to escape an abusive relationship was to kill her partner was a substantial and compelling circumstance which necessitated the imposition of a term of imprisonment of six years instead of life imprisonment. However, the court warned that its ruling was not a licence to all women in abusive relationships to kill their partners.

Courts have also found the following to be substantial and compelling circumstances: in a case of rape, where the rape was 'not one of the most serious manifestations of rape,'<sup>125</sup> the absence of previous convictions; and the fact that the accused had 'displayed remorse and was a good candidate for rehabilitation'.<sup>126</sup> In *S v Riekert* where the accused

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<sup>122</sup> *Brandt v S* supra n121 para 12. For a brief discussion of this judgment see 'Do Minimum Sentences Apply to Juveniles? The Supreme Court of Appeal Says "No"' *Article 40* (2005) Vol 7: 1, 1 2. For the earlier decisions on imposing the life sentence as minimum sentence on child offenders see *Direkteur van Openbare Vervolgings, Transvaal v Makwetsja* 2004 (2) SACR 1(T); and *S v Nkosi* 2002 (1) SA 494 (W). The 2007 amendments to the MSL and how they relate to children are dealt with later in this article.

<sup>123</sup> *Direkteur van Openbare Vervolgings, Transvaal v Makwetsja* 2004 (2) SACR 1(T) at 3. See also *Brandt v S* [2005] 2 All SA 1 (SCA)

<sup>124</sup> *S v Ferreira and others* 2004 (2) SACR 454 (SCA).

<sup>125</sup> *S v G* 2004 (2) SACR 296 (W). However, in *S v M* 2007 (2) SACR 60 (W) where the accused was found guilty of raping his 14 year old granddaughter on two occasions, the court in sentencing him to life imprisonment held that the facts that the victim did not sustain grievous bodily harm and that the accused did not use any force during the rape were not substantial and compelling circumstances. In *S v Ncheche* 2005 (2) SACR 386 (W) at 386 the court held that 'cases of rape may be so serious that, regardless of emotional *sequelae* for complainant, they justify imposition of life imprisonment and finding of absence of "substantial and compelling circumstances".'

<sup>126</sup> *S v Malan en 'n ander* 2004 (1) SACR 264 (T) at 267. However, in *S v Obisi* 2005 (2) SACR 350 (W), where the accused was convicted of murder during the robbery, the court in sentencing him to life imprisonment held that even if he was young and a first offender, the brutality with which he committed the offences weighed in favour of a life

was convicted of murder in circumstances in which the court was justified in sentencing him to life imprisonment, it was held that his low IQ was one of the substantial and compelling circumstances.<sup>127</sup> The Supreme Court of Appeal held that the fact that the appellant had a dependant wife and children and was gainfully employed were substantial and compelling circumstances.<sup>128</sup> The Supreme Court of Appeal also held in *S v Thebus and another*<sup>129</sup> that the fact that the accused had played a minimal role in the commission of the crime was one of the substantial and compelling circumstances justifying departure from the prescribed minimum sentence.<sup>130</sup>

The inference one draws from the above jurisprudence on substantial and compelling circumstances is that when a court embarks on the journey of trying to establish whether such circumstances exist, it weighs the mitigating factors in the light of the aggravating factors and where the former outweighs the latter, it is very likely that the court will conclude that substantial and compelling circumstances do exist. It is also vital to note that in an attempt to establish whether substantial and compelling circumstances exist, courts look at the personal circumstances of the accused, the likely implications of his imprisonment to his dependants, and most importantly at the nature and circumstances under which the crime was committed. In cases of rape, courts have sometimes referred to the effect it had on the victim. If the effect was not 'that serious' some courts have imposed lesser sentences instead of life imprisonment. This understandably aggrieved women's rights activists and the MSL was later to be amended (as discussed shortly) to address this.

### 4.3 The release of prisoners serving life sentences

In 1998, the new Correctional Services Act was enacted but the provision relevant to the release only came into force in October 2004. Section

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sentence rather than a lesser sentence. See also *S v Nkomo* 2007 (2) SACR 198 (SCA). In *Rommoko v Director of Public Prosecutions* 2003 (1) SACR 200 (SCA) it was held that life imprisonment, being the heaviest sentence that could be imposed, it was vital that the court, in cases of rape, considered the effects of rape on the complainant because such effects constituted 'important information' upon which the court could base its finding of whether there were substantial and compelling circumstances.

<sup>127</sup> *S v Riekert* 2002 (1) SACR 566 (T).

<sup>128</sup> *S v Sikhupha* 2006 (2) SACR 439 (SCA). However, in *S v Boer en andere* 2000 (2) SACR 114 (NC) it was held where the three accused were found guilty of raping a 14 year old girl that their 'clean records and youthfulness' were not substantial and compelling circumstances.

<sup>129</sup> *S v Thebus and another* 2002 (2) SACR 566 (SCA).

<sup>130</sup> However, in *S v Vuma* 2003 (1) SACR 597 (W) the appellant was sentenced to life imprisonment for murder even though it was proved before court that the following favourable circumstances existed: he was employed; had a family to assist financially; he attended church regularly; was not a violent person; and had no previous convictions.

73(6)(b)(iv) provides that a prisoner serving a life sentence 'may not be placed on parole until he or she has served at least 25 years of the sentence but a prisoner on reaching the age of 65 years may be placed on parole if he or she has served at least 15 years of such a sentence.' Under s 73(5)(a)(ii), read together with s 75(1)(c), before the court releases the prisoner on parole, such a prisoner's release has to be recommended to the court by the Correctional Supervision and Parole Board.<sup>131</sup> The latter, before recommending to the former that a prisoner may be released on parole, has to study the Case Management Committee's report on that prisoner.<sup>132</sup> Under s 73(5)(a)(ii) it is for the court to determine the date on which a prisoner sentenced to life imprisonment on or after 1 October 2004 should be placed on day parole or parole. Terblanche submits that the above

[A]mendments should lay to rest most of the concerns judges may have that life prisoners will be released early. However, this procedure may not necessarily be popular. The judge considering the release of the prisoner will rarely be the same judge who presided over the trial, simply because of the time that will have lapsed. This means that the procedure will simply add to the workload of judges.<sup>133</sup>

Under s 136(3)(a) of the Correctional Services Act<sup>134</sup> 'any prisoner serving a sentence of life imprisonment immediately before [1 October 2004] is entitled to be considered for day parole and parole after he or she has served 20 years of the sentence'.<sup>135</sup> Such prisoners 'may only be released on parole by the Minister of Correctional Services, after the recommendation by the National Council'.<sup>136</sup> This means that 'specific regard [has] to be given to the interests of society and to the reports of the parole board'.<sup>137</sup> Terblanche adds that with regard to prisoners sentenced to life imprisonment before 1 October 2004,

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<sup>131</sup> For a brief historical discussion of this provision see A Dissel, *A Review of Civilian Oversight over Correctional Services in the Last Decade* (CSPRI Research Paper No 4, 2003) 26–28.

<sup>132</sup> Terblanche op cit (n28) at 234.

<sup>133</sup> Terblanche op cit at 234–5.

<sup>134</sup> The Act deals with transitional arrangements.

<sup>135</sup> This provision is subject to confusing interpretation in the light of the fact that immediately before 1 October 2004, there were prisoners serving life sentences whose release was regulated by the 1997 PCSAA (see detailed discussion under 3.3 above). It is argued that this ambiguity could be escaped by invoking the 'later in time' rule which dictates that when an earlier legislative provision conflicts with the subsequent legislative provision, the latter prevails. The effect would be that even prisoners sentenced at the time when the PCSAA was in force should be released after 20 years instead of 25 years.

<sup>136</sup> Terblanche op cit (n28) at 235.

<sup>137</sup> Terblanche loc cit.

'The discretion really rests with two bodies: the National Council and the Minister of Correctional Services. If the [National Council] does not recommend release, the Minister has no say in the matter. But if the National [Council] . . . does recommend release, the Minister has the final say and is authorised not to accept the recommendation. There are, therefore, at least some checks and balances in the exercise of the discretion. The final responsibility to protect society lies with the Minister.'<sup>138</sup>

What one observes is that the parole regime governing prisoners serving life sentences went through different and at times unclear and confusing changes. There were prisoners who were serving life sentences each and every time a new change in the parole regime was effected. This meant that the Department of Correctional Services had prisoners serving the same sentence, life imprisonment, but with varying durations/tariffs and different release procedures and bodies. This, as one would expect, caused confusion among many prisoners who did not know which policy applied to them and which body was responsible for their release, or whether to recommend their release and under what circumstances. This could explain why there have been various applications before courts in which prisoners challenged their continued imprisonment arguing that it was illegal because according to the parole regime that was applicable at the time of their imprisonment they were entitled to an earlier release than that contemplated by the relevant authorities.<sup>139</sup> The 1998 Correctional Services Act also established a new Parole Board system involving civilians. One could argue that this added confusion to the existing complex set of rules and procedures.<sup>140</sup>

## 5. Life imprisonment after December 2007 and beyond

The 1997 MSL provided, *inter alia*, that if the Regional Court found the accused guilty of an offence that required the imposition of a life

<sup>138</sup> Terblanche *ibid*.

<sup>139</sup> See for example in *S v Matolo en 'n ander* 1998 (1) SACR 206 (●) where it was held that the court does not have jurisdiction to order the Department of Correctional Services never to release a prisoner serving a life sentence on parole; in *Van Vuren v Minister of Justice and Constitutional Development and another* 2007 (8) BCLR 903 (CC) the applicant who had been sentenced to life imprisonment petitioned court for his release arguing that the parole policies that applied to him were those that existed at the time of his sentence in 1992 and not those that were adopted after.

<sup>140</sup> See J Sloth Nielsen *Submission to the Parliamentary Portfolio Committee on Correctional Services relating to Parole and the Proposed Amendments concerning parole in the Correctional Services Amendment Bill* 31 August 2007, at [http://www.pmg.org.za/docs/2007/070905sloth\\_nielsen.htm](http://www.pmg.org.za/docs/2007/070905sloth_nielsen.htm), accessed on 21 May 2008.

sentence, it was to commit the accused to the High Court for sentencing.<sup>141</sup> But if the High Court thought that the accused had been incorrectly convicted, it was empowered to re-try the accused, establish guilt or innocence, and impose the relevant sentence where applicable.<sup>142</sup> This meant that the accused had to adduce evidence and the witnesses had to be summoned again to testify against the accused. This process had obvious problems. Firstly, it created a backlog of cases in the High Courts<sup>143</sup> and most importantly, witnesses had to repeat evidence given in the Regional Court. This was especially traumatising for rape victims. It was observed in *S v Gqamana* where the High Court before sentencing the accused for the rape of a minor had to call the rape victim and her mother to give the same evidence they had adduced before the Regional Court that:

'[i]t is, incidentally, an unfortunate consequence of this legislation that, as happened in this case, it will often be necessary to put the complainant in a rape case yet again through the unpleasant experience of having to go into the witness box and re live the trauma of the crime by testifying on matters which are relevant to sentence. Sometimes . . . the complainant will have to travel a long way in order to do so. However, this is an inevitable result of the apparent determination of the legislature to achieve a situation where a man is to be convicted in one court and sentenced in another. The latter court cannot reasonably be expected, without having been steeped in the atmosphere of the trial, to decide whether or not to pass a sentence of imprisonment for life on a man without making some attempt to immerse itself in that atmosphere. No doubt that was an unintended consequence which did not occur to Parliament when it passed the Act.'<sup>144</sup>

Other criticisms were also levelled against the legislation by some courts, holding that it violated the accused's right to a fair trial. This was because the accused was subjected to 'a two-stage-trial' when he appeared before the High Court for the sentencing hearing after his trial before the Regional Court. It also violated the accused's right to be tried within a reasonable time because of the delay between conviction in the Regional Court and sentencing by the High Court.<sup>145</sup> After realising the

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<sup>141</sup> Section 52(1). It was held in *Direkteur van Openbare Vervolgings, Transvaal v Makwets ja* 2004 (2) SACR 1 (T) that regional courts did not have the discretion to determine whether the offence with respect to which the accused was found guilty justified the imposition of life imprisonment when such an offence was one listed under Part I of Schedule 2 or whether substantial and compelling circumstances existed. If the accused pleaded guilty or was found to have committed the offence under Part I of Schedule 2, the regional court was supposed to commit the accused to the High Court for sentencing.

<sup>142</sup> Section 52(2) (3).

<sup>143</sup> See ●Donovan and Redpath op cit (n99).

<sup>144</sup> *S v Gqamana* 2001 (2) SACR 28 (C) at 33 4.

<sup>145</sup> See *S v Dzikuda; S v Tilly; S v Tshilo* 2000 (2) SACR 51 (W).

shortcomings of the MSL, Parliament embarked on a process of amending it. The Criminal Law (Sentencing) Amendment Bill was introduced in 2007<sup>146</sup> and passed into law later that year and became the Criminal Law (Amendment) Act.<sup>147</sup>

The amendment introduced four fundamental changes with regard to life imprisonment. The first was that the jurisdiction of the Regional Courts was extended to empower them to impose life imprisonment.<sup>148</sup> The objective of increasing the jurisdiction of the Regional Courts, according to the *Memorandum on the Objects of the Criminal Law (Sentencing) Amendment Bill*, was ‘...to expedite the finalisation of serious criminal cases, punish offenders of certain serious offences appropriately, and to avoid secondary victimisation of complainants, which, *inter alia*, happens when vulnerable witnesses have to repeat their testimony in more than one court<sup>149</sup> and endure cross examination.

The second major amendment relates to the applicability of the minimum sentences to juvenile offenders. Section 51(1) and (2) provides that ‘any person’ who commits one or more of the scheduled offences shall be sentenced, where applicable, to life imprisonment, unless there are substantial or compelling circumstances. Section 51(6) provides that section 51(1) and (2) do ‘not apply in respect of an accused person who was under the age of 16 years at the time of the commission of an offence...’ This means that as from the date the Amendment Act came into force, children above the age of 16 years, even children aged 16 years and one day, who commit the offences under section 51, have to be sentenced to the prescribed minimum sentences, including life imprisonment, unless there are substantial and compelling circumstances. The amendment is inherently flawed because it is an affront to the children’s rights and the amendment was challenged in the Transvaal High Court Division on, *inter alia*, the following grounds: ‘that subjecting children to ...life imprisonment, is in breach of children’s constitutional rights and in breach of South Africa’s international law obligations.’<sup>150</sup> In agreeing with the applicant, Potterill AJ of the Transvaal High Court held that the impugned provision violated s 28 of the South African Constitution (which requires that a child should only be detained as a measure of last resort and for the shortest time possible) because it effectively

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<sup>146</sup> Criminal Law (Sentencing) Amendment Bill (B 15 – 2007).

<sup>147</sup> Act 38 of 2007 which came into force on 31 December 2007.

<sup>148</sup> Section 51 (1)(a b).

<sup>149</sup> See para 2.1

<sup>150</sup> See Founding Affidavit in Centre for *Child Law v Minister of Justice and Constitutional Development and others* paragraph 8. See also paragraph 35 of the Affidavit for the detailed arguments relating to the impugned provisions and why they violate the Constitution and international law. Unreported judgment on file with author.



eliminated the 'clean slate approach' which is fundamental in sentencing children in conflict with the law. In Potterill AJ's words:

'... with a clean slate approach the Court has many sentencing options to consider, although imprisonment is conceivable it is an option of last resort, but with the Amended Act the Court must start with the minimum sentence of life imprisonment ... as an option of first resort and then look to compelling and substantial circumstances and proportionality. The result will not always be the same and it is not purely academic. The Amended Act must adhere to the principles enshrined in the Constitution. . .'<sup>151</sup>

The third significant change was that of an automatic right to appeal in cases where a person is sentenced by a Regional Court to life imprisonment.<sup>152</sup> The fourth regards the manner in which courts interpret substantial and compelling circumstances in cases of rape. The discussion above illustrates that some courts have held that where a victim of rape had not sustained serious physical injuries or psychological effects, this amounted to substantial and compelling circumstance to justify the imposition of a lesser sentence. The amendment expressly provides, *inter alia*, that when imposing a sentence in respect of the offence of rape 'any apparent lack of physical injury to the complainant' shall not constitute a substantial and compelling circumstance.<sup>153</sup> One needs to ask whether these amendments will address some of the inherent problems associated with the implementation of the MSL, such as the case delays and backlogs in courts and the unlikely possibility that minimum sentences will reduce the violent crime rate in South Africa.<sup>154</sup> One would also need to investigate the likely effect of the amendments on the size of the South Africa prison population. It is more likely that the number of prisoners sentenced to life imprisonment will increase further when Regional Courts also impose life sentences. In this scenario the quality of legal representation of persons facing life imprisonment becomes critical.

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<sup>151</sup> *Centre for Child Law v Minister of Justice and Constitutional Development and others* (Case No 11214/08, judgment of 4 November 2008) at para 20.

<sup>152</sup> Section 6 (ii).

<sup>153</sup> Section 51(3)(aA)(ii). The amendment also provides that that courts should not consider the following as substantial and compelling circumstances in cases of rape: (i) the complainant's previous sexual history; (iii) an accused person's cultural or religious beliefs about rape; or (iv) any relationship between the accused person and the complainant prior to the offence being committed.

<sup>154</sup> For a detailed discussion of the problems associated with the minimum sentence legislation see ●Donovan and Redpath op cit (n99).

## 6. The release of prisoners serving life sentences after the coming into force of the Correctional Services Amendment Act of 11 November 2008

On 8 November 2008, the South African President assented to the Correctional Services Amendment Act<sup>155</sup> which at the time of writing, December 2008, was yet to come into force.<sup>156</sup> The Act was published in the Government Gazette on 11 November 2008.<sup>157</sup> It should be noted that when this Act comes into force, it will introduce two fundamental changes with regard to prisoners serving life imprisonment. In the first place, the prisoners would cease to be called prisoners but 'offenders'; a prison would cease to be called a prison but rather a 'correctional centre' and the sentence of life imprisonment would become known as 'life incarceration'.<sup>158</sup> Secondly, and most importantly, the Amendment Act provides a different regime under which offenders incarcerated for life would be released. It is vital to note that it would be the Minister of Correctional Services (and no longer the Court), on the recommendation of the Correctional Supervision and Parole Board that decides to parole an offender incarcerated for life;<sup>159</sup> that the duration to be served before an offender serving a life sentence is released will be determined by National Council in line with the incarceration framework that it would develop;<sup>160</sup> and that the Amendment Act will be applicable to all prisoners sentenced to life imprisonment since 1 October 2004.<sup>161</sup> It is appropriate to outline below section 78 which details the manner in which offenders serving life sentences will be released on the coming into force of the Amendment Act:

**78.** (1) Having considered the record of proceedings of the Correctional Supervision and Parole Board and its recommendations in the case of a person sentenced to life incarceration, the National Council may . . . recommend to the Minister to grant parole or day parole and prescribe the conditions of community corrections in terms of section 52. (2) If the Minister refuses to grant parole or day parole in terms of subsection (1), the Minister may make recommendations in respect of treatment, care, development and support of the sentenced offender which may contribute to improving the likelihood of future placement on parole or day parole. (3) Where a Correctional Supervision and Parole Board . . . recommends, in the case of a person sentenced to life incarceration, that parole or day parole be withdrawn or that the condi

<sup>155</sup> Correctional Services Amendment Act 25 of 2008.

<sup>156</sup> See section 87 of the Correctional Services Amendment Act for the circumstances under which the Act will come into force.

<sup>157</sup> *Government Gazette* 31593 Vol 521 11 November 2008.

<sup>158</sup> See ss 73, 75, and 78.

<sup>159</sup> Section 78.

<sup>160</sup> Section 73A.

<sup>161</sup> Sections 85 and 136(4).

tions of community corrections imposed on such a person be amended, the Minister, on advice of the National Council, must consider and make a decision upon the recommendation. (4) Where the Minister refuses or withdraws parole or day parole the matter must be reconsidered by the Minister, on advice of the National Council, within two years.

Two important features, amongst others, should be noted here with regard to section 78. First of all, the Minister, when he refuses to release the offender on parole, has discretion (in s 78(2) the word 'may' instead of 'shall' is used) to make recommendations to ensure that that offender attends or participates in programmes that would improve his chances of being placed on parole in the near future. One could argue that if the Minister's refusal to place an offender on parole is based on the reason that the offender has to participate in a particular rehabilitation programme, for example, an anger management course, it becomes obligatory that the Minister introduce such a programme in the correctional centre where that offender is being incarcerated so that he or she can participate in the programme, or the Minister must make sure that that offender is transferred to a correctional centre where such a programme exists. Another important aspect introduced by the Amendment Act is that, should the Minister decline to put the offender on parole, the Minister is under a duty, on the advice of the National Council, to reconsider that offender's case for parole after two years. It is argued that even then the Minister is at liberty to refuse to release the offender on parole. The Act is silent on what other remedy an inmate may have if the Minister refuses parole, but it may be assumed that the Minister would be in a position to advise the offender as to when he would be considered for placement on parole again and would give reasons for why parole has been denied again. Some prisoners may petition courts for intervention.

## **7. Conclusion**

This article has dealt with the changing face of life imprisonment in South Africa since 1906. It has illustrated that as early as 1906, prisoners serving life sentences were not expected to, nor did they in fact, spend the rest of their lives in prison. Laws and policies have always been in place to ensure that such prisoners were released after serving a specified number of years. Life imprisonment has been reserved for the most serious offences. The article has also demonstrated that when the death penalty was abolished, most of these sentences were converted into life sentences and many into lengthy determinate prison terms. It has been pointed out that the parole regime under which prisoners serving life sentences are released has changed at different times and is often confusing. The effect that the Criminal Law Amendment Act has had on the

explosion of prisoners serving life sentences has also been canvassed. It has been predicted that with the Regional Courts now having the jurisdiction to impose life imprisonment, the number of prisoners serving life sentences is likely to increase rapidly. The above discussion has also demonstrated that various factors have influenced the ‘changing face of life imprisonment in South Africa’. These include the policies and attitudes of the government in power towards punishment, the politics of the day, crime trends and demanding particular interest groups.

## **Appendix 1: Offences under Part 1 of Schedule 2 of the MSL**

### **Murder — When**

- (a) it was planned or premeditated;
- (b) the victim was —
  - (i) a law enforcement officer performing his or her functions as such whether on duty or not; or
  - (ii) a person who has given or was likely to give material evidence with reference to any offence referred to in Schedule 1 to the Criminal Procedure Act, 1977 (Act No. 51 of 1977)<sup>162</sup> at criminal proceedings in any court;
- (c) the death of the victim was caused by the accused in committing or attempting to commit or after having committed or attempted to commit one of the following offences:
  - (i) Rape: or
  - (ii) Robbery with aggravating circumstances: or
- (d) The offence was committed by a person or group of persons or syndicate acting in the execution or furtherance of a common purpose or conspiracy.

### **Rape**

- (a) when committed —
  - (i) in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice;
  - (ii) by more than one person where such persons acted in the execution or furtherance of a common purpose or conspiracy;
  - (iii) by a person who has been convicted of two or more offences of

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<sup>162</sup> There offences are: treason, sedition, murder, culpable homicide, rape, indecent assault, sodomy, bestiality, robbery, kidnapping, child stealing, assault when dangerous wounds inflicted, arson, malicious injury to property, breaking or entering any property with intent to commit an offence, theft, receiving stolen property, fraud, forgery or uttering a forged document knowing it to have been forged, any offence punishable with the period of imprisonment exceeding six months without the option of fine, offences relating to the coinage, escaping from lawful custody, any conspiracy, incitement or attempt to commit any of the offences mentioned above.

- rape, but has not yet been sentenced in respect of such convictions: or
- (iv) by a person, knowing that he has the acquired immune deficiency syndrome or the human immune deficiency virus:
- (b) where the victim—
- (i) is a girl under the age of 16 years;
  - (ii) is a physically disabled woman who, due to her physical disability, is rendered particularly vulnerable: or
  - (iii) is a mentally ill woman as contemplated in section 1 of the Mental Health Act 1973 (Act No. 18 of 1973): or
- (c) Involving the infliction of grievous bodily harm.

## **Appendix 2 (detailed statistics for footnote 24).**

In 1949, 60 offenders were sentenced to death and 3 to life imprisonment; in 1950, 77 offenders were sentenced to death and 4 to life imprisonment; in 1951, 73 offenders were sentenced to death and 3 to life imprisonment; in 1952, 77 offenders were sentenced to death and 1 to life imprisonment; in 1953, 75 offenders were sentenced to death and 1 to life imprisonment; in 1954, 115 offenders were sentenced to death and 1 to life imprisonment; 1955-56, 94 offenders were sentenced to death and 19 to life imprisonment; 1956-57, 123 offenders were sentenced to death and 34 to life imprisonment; in 1957-58, 128 offenders were sentenced to death and 3 to life imprisonment; 1958-59, 105 offenders were sentenced to death and 16 to life imprisonment; in 1959 -60, 134 offenders were sentenced to death and 23 to life imprisonment; 1960 -61, 108 offenders were sentenced to death and 23 to life imprisonment; 1961-62, 177 offenders were sentenced to death and 20 to life imprisonment; in 1962-63, 149 offenders were sentenced to death and 21 to life imprisonment. See *Special Report No 272, Statistics of Offences and Penal Institutions, 1949-1962* (Bureau of Statistics, 1964) Table 10 — Convicted Prisoners Admitted According to Nature of Sentence, 1949-1963. In 1963-64, 157 offenders were sentenced to death and 48 to life imprisonment; in 1964-65, 124 offenders were sentenced to death and 21 to life imprisonment; 1965 -66, 138 offenders were sentenced to death and 5 to life imprisonment; 1966-67, 143 offenders were sentenced to death and 5 to life imprisonment; 1967-68, 115 offenders were sentenced to death and 34 to life imprisonment; in 1968 -69, 107 offenders were sentenced to death 13; in 1969-70, 95 offenders were sentenced to death and 19 to life imprisonment. For the respective years, see *Statistics of Offences and Penal Institutions, 1963-64, Report No 08-01-01* (Table 10); *1965-66, Report No 08-01-02* (Table 15); *1965-66, Report No 08-01-02* (Table 15); *1966-67, Report No 08-01-03* (Table 16); *1967-68, Report No 08-01-04* (Table 14); *1968-69, Report No 08-01-05* (Table 16);

and 1969-70, *Report No 08-01-06* (Table 16). All the Reports were printed by the Government Printer, Pretoria. In the year 1977-78, 151 offenders were sentenced to death and 17 to life imprisonment; in 1978-79, 158 offenders were sentenced to death and 12 to life imprisonment; 1979-80, 151 offenders were sentenced to death and 2 to life imprisonment; 1980-81, 148 offenders were sentenced to death and 8 to life imprisonment; 1981-82, 124 offenders were sentenced to death and 7 to life imprisonment; 1982-83, 171 offenders were sentenced to death and 4 to life imprisonment; 1985-85, 203 offenders were sentenced to death and 4 to life imprisonment; 1985-86, 126 offenders were sentenced to death and 4 to life imprisonment; 1986-87, 226 offenders were sentenced to death and 6 to life imprisonment. See *Statistics of Offences 1968-1969 to 1978-1979, Report No 08-01-10* (Table 5.1); *1968-1969 to 1978-1979, Report No 08-01-10* (Table 5.5); *1979-1980, Report No 08-01-11* (Table 5); *1980-81, Report No 08-01-12* (Table 5); *1981-1982, Report No 08-01-13* (Table 5); *1982-1983, Report No 08-01-14* (Table 5); *1984-1985, Report No 08-01-16* (Table 5); *1985-1986, Report No 08-01-17* (Table 5); *Report No 00-11-01 (1986/87)* (Table 5) respectively. All the reports from 1977- 1986, were printed by the Government Printer, Pretoria. However, that of 1986/87 was printed by the Central Statistics Services. In 1987-88, 204 offenders were sentenced to death and 12 to life imprisonment; 1988-89, 154 offenders were sentenced to death and 6 to life imprisonment; 1989-90, 123 offenders were sentenced to death and 9 to life imprisonment; 1990-91, 64 offenders were sentenced to death and 28 to life imprisonment; 1991-92, 65 offenders were sentenced to death and 28 to life imprisonment; 1992-93, 80 offenders were sentenced to death and 18 to life imprisonment; 1993-94, 149 offenders were sentenced to death and 15 to life imprisonment; 1994-95, 35 offenders were sentenced to death and 49 to life imprisonment; and 1995-96 no offender was sentenced to death but 122 were sentenced to life imprisonment. See *Crimes: Prosecutions and Convictions with Regard to Certain Offences, Report No 00-11-01 (1987/88)* (Table 5); *Report No 00-11-01 (1988/89)* (Table 5); *Report No 00-11-01 (1989/90)* (Table 5); *Report No 00-11-01 (1990/91)* (Table No 5); *Report No 00-11-01 (1991/92)* (Table 5); *Report No 00-11-01 (1992/93)* (Table 5); *Report No 00-11-01 (1993/94)* (Table 5); *Report No 00-11-01 (1994/95)* (Table 5); and *Report No 00-11-01 (1995/96)* (Table 5) respectively). All the reports from 1987-1995 were printed by the Central Statistical Services.