

Punishment in the eyes of the Constitutional Court of South Africa: The relationship between punishment and the rights of an offender in the sentencing of primary caregivers of children

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ABSTRACT

Punishment has mostly focused on achieving its objectives without considering the impact a sentence will have on the rights of the offender and those under the offender's care. Drawing on the jurisprudence of the Constitutional Court, the author illustrates how the Court, relying on the Constitution of the Republic of South Africa, 1996, has shifted the punishment discourse from one that emphasises the objectives of punishment to one that calls upon sentencing officers to not only emphasise the objectives of punishment, but also to consider the effect the punishment will have on the children if their primary caregiver was sentenced to imprisonment.

1. Introduction

'... [T]he subject of punishment is complex, and ... it has inspired a rich body of philosophical, sociological and criminological literature ... The quality of our civilization is also gauged by how we treat those whom we define as wrongdoers ... [S]ince punishment is, after all, the deliberate imposition of pain and deprivation by the state on individuals, it behoves society to ensure that this imposition is kept within proper limits, and is inflicted only for proper purposes.'¹

'Disagreements about just punishments, like disagreements about the death penalty or abortion, are often in the end disagreements about powerful intuitions or deeply embedded values.'²

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¹ BA Hudson *Understanding Justice: An Introduction to the Ideas, Perspectives and Controversies in Modern Penal Theory* (2ed) (2003) 13.

² M Tonry 'Parsimony and Desert in Sentencing' in A von Hirsch and A Ashworth (eds) *Principled Sentencing: Readings on Theory and Policy* 2ed (1998) 200.

The subject of punishment³ is complex. Also complex is ‘the relationship between human rights and sentencing’.⁴ The Constitutional Court observed that ‘[s]entencing is innately controversial’⁵ and ‘always difficult’.⁶ For decades, scholars, judges and penal reformers of different backgrounds, have approached this contentious subject from different angles in an attempt to answer three important questions. First, ‘[w]hat justifies the general practice of punishment? [Second], [t]o whom may punishment be applied? [Third], [h]ow severely may we punish?’⁷ In attempting to answer these questions, various objectives of punishment have emerged. These have included retribution, deterrence, rehabilitation (sometimes referred to as reform),⁸ and restorative justice. The first three are considered to be the traditional objectives of punishment,⁹ and restorative justice is considered to be relatively new although some South African courts have emphasised it.¹⁰ South African courts, including the Constitutional Court, have held in various decisions that punishment should be aimed at serving one or more of the above objectives.¹¹ The history, meaning, strengths and weaknesses of the above objectives of punishment have been written about extensively for generations and it is against that backdrop that a conscious decision has been made to exclude the discussion of those issues in this paper.

In 1996, South Africa adopted a new Constitution which includes a progressive Bill of Rights which guarantees several rights that are directly and indirectly inseparable from the subject of punishment.

³ It falls outside the ambit of this paper to deal with the definition of the concept of punishment.

⁴ D van Zyl Smit ‘Human rights and sentencing guidelines’ in J Sarkin *et al* (eds) *Resolving the Tension between Crime and Human Rights: An Evaluation of European and South African Issues* (2001) 296.

⁵ *M v The State (Centre for Child Law Amicus Curie)* 2007 (12) BCLR 1312 (CC) at para [10], 2008 (3) SA 232 (CC), 2007 (2) SACR 539 (CC).

⁶ *M v The State* supra (n5) at para [66].

⁷ HAL Hart *Punishment and Responsibility: Essays in the Philosophy of Law* (1968) 3.

⁸ The Constitutional Court referred to the following as the ‘main purposes of punishment’: deterrence, prevention, rehabilitation and retribution. However, it held that ‘mercy as distinct from mere sympathy to the offender’ should also be added as an objective of punishment. See *M v The State* supra (n5) at para [10] (quoting the Supreme Court of Appeal in *Director of Public Prosecution, KwaZulu Natal v P* 2006 (3) SA 515 (SCA)). See also *M v The State* supra (n5) at para [109], where Madala J held that ‘the general objectives of sentencing are retribution, deterrence, prevention and rehabilitation.’

⁹ The Constitutional Court held that ‘deterrence, prevention, reformation and retribution’ are the ‘main objectives of punishment’, see *S v Makwanyane and Others* 1995 (3) SA 391 (CC) at para [46].

¹⁰ SS Terblanche *Guide to Sentencing in South Africa* 2ed (2007) 176 – 177 (on restorative justice).

¹¹ Terblanche *op cit* (n10) 155–178.

The purpose of this article is to demonstrate how the Constitutional Court has approached the issue of punishment from a human rights perspective,¹² and in particular the question of sentencing primary caregivers of children.

2. Human dignity versus the objectives of punishment

The objectives of punishment approach punishment from three different perspectives, each placing emphasis on one aspect. This approach was succinctly captured over four decades ago by Armstrong in his attempt to define punishment:

'Irrespective of which problem or problems it sets out to solve, a theory of punishment can usually be put under one of three headings: Retributive, Deterrent, or Reformatory. When the problem is to define punishment these theories provide roughly the following answers:

1. *Retributive*: Punishment is the infliction of pain, by an appropriate authority, on a person because he is guilty of a crime, i.e. *for* a crime that he committed. ...
2. *Deterrent*: Punishment is the infliction of pain on a person in order to deter him from repeating a crime or to deter others from imitating a crime which they believe him to have committed ... here ... deterrence of the person punished is not reform. Reform means that the man intends to avoid repeating the crime, not from fear of punishment but because he sees that it was wrong.
3. *Reformatory*: Punishment is the infliction of pain on a person in order to reduce his tendency to want to commit crimes or to commit crimes of a particular sort.¹³

However, human rights considerations have eventually modelled the way punishment should be understood and imposed, and they have directed the role punishment should play in society. Without questioning the relevance or otherwise of each of the above theories of punishment, human rights activists have been successful, to a large extent, especially with regard to the death penalty and corporal punishment, in arguing and demonstrating that punishment can achieve one or

¹² The Constitutional Court has also dealt with other important questions relating to the issue of punishment, the discussion of which fall outside the scope of this article. See for example, *Mohamed and Another v President of the Republic of South Africa and Others* 2001 (3) SA 893 (CC), where the Court dealt with the issue of deporting a terrorist suspect to a country where he could be sentenced to death and executed; *Kaunda and Others v President of the Republic of South Africa* 2004 (10) BCLR 1009 (CC), where the court dealt with the question of whether South Africa had a duty to protect its citizens who might be sentenced to death in a foreign country for offences committed in that country; and *August and another v Electoral Commission and others* 1999 (3) SA 1 (CC), in which the Court dealt with the prisoners right to vote.

¹³ KG Armstrong, 'The retributivist hits back' (1961) 70 (280) *Mind: New Series* 478-479.

more of the above objectives without violating some of the fundamental rights, such as the right not be subjected to cruel, inhuman or degrading treatment or punishment.¹⁴ The Constitution expressly prohibits cruel, inhuman and degrading treatment or punishment,¹⁵ as do some of the international human rights treaties to which South Africa is a state party.¹⁶ The question being turned to at this juncture is: To what extent has the constitutional prohibition of inhuman punishment impacted on the manner in which the Constitutional Court has dealt with the question of punishment in the light of the above-mentioned theories or objectives of punishment?

3. The objectives of punishment in the light of the Constitution

Without giving details, the Constitutional Court held that ‘the traditional aims of punishment [have] been transformed by the Constitution’,¹⁷ thus necessitating a fresh look at the question of punishment in light of the new constitutional dispensation. The Court’s jurisprudence has introduced a different approach to the punishment debate. Its jurisprudence, as discussed below, shows that before punishment is inflicted, the sentencing officer should at least have the following issues in mind. The first issue is whether the intended punishment does not violate the right to human dignity within the meaning of the Constitution. The second question is whether the punishment will achieve its intended objective or objectives. It is submitted that if the answer to the first question is positive, then that form of punishment should not be imposed even if it could serve the intended objective or objectives in the second question. However if the answer to the first question is negative, then the punishment may be imposed even if it may not achieve the objective or objectives contemplated in the second question. It is against this background that the Court held that the death penalty and corporal punishment were cruel, inhuman

¹⁴ The death penalty as a deterrent or retributive form of punishment has been held in some jurisdictions to amount to cruel, inhuman or degrading treatment or punishment. See generally L Chenwi *Towards the Abolition of the Death Penalty in Africa: A Human Rights Perspective* (2007) 97-147.

¹⁵ Section 12(e) of the Constitution of the Republic of South Africa, 1996.

¹⁶ For example, Article 7 of the International Covenant on Civil and Political Rights (which South Africa ratified on 10 December 1998); and Article 5 of the African Charter on Human and Peoples’ Rights (which was ratified by South Africa on 9 July 1996).

¹⁷ *M v The State* supra (n5) at para [10] (quoting the Supreme Court of Appeal in *Director of Public Prosecution, KwaZulu Natal v P* 2006 (3) SA 515 (SCA)).

or degrading forms of punishment.¹⁸ Unlike the approach taken by some philosophers whereby they emphasise the moral justifications of punishment,¹⁹ the Court's point of departure is the protection of human dignity and whether the contemplated form of punishment is in line with the Constitution. If the Court finds that the form of punishment would violate the offender's right to human dignity, that form of punishment may be declared unconstitutional and the punisher will be ordered to devise other forms of punishment that would achieve the intended objectives without violating the offender's right not to be subjected to inhuman treatment. When the death penalty was declared unconstitutional, the Court held that other forms of punishment, such as long-term imprisonment, could achieve the same objectives which the State argued the death penalty was serving.²⁰

4. Proportionality

Following from the above is the issue of proportionality between punishment and the offence committed. One of the criticisms of the deterrence and rehabilitation objectives of punishment is that the former may justify severe punishment, even in cases where the offence is not the most callous, so as to deter others from committing the same offence, and that the latter may justify indeterminate incarceration even in cases of minor offences if the state is of the view that this is what it would take to rehabilitate the offender. The above two examples raise the issue of proportionality. Van Zyl Smit opines that, although the principle of proportionality is not specifically mentioned in the Constitution, it is nevertheless 'well established in South African sentencing

¹⁸ See *S v Makwanyane and Others* 1995 (3) SA 391 (CC) on the question of the death penalty and *S v Williams and Others* 1995 (3) SA 632 (CC) on the question of corporal punishment.

¹⁹ See for example, I Kant *Rechtslehr*, Part Second, (1887) 49 translated by E Hastie (cited in EL Pincoffs *The Rationale of Legal Punishment* (1966) 2-3); MA Drumbl 'The expressive value of prosecuting and punishing terrorists: *Hamdan*, The Geneva Conventions, and International Criminal Law' (2006-2007) 75 *George Washington Law Review* 1170; DA Crocker, 'Punishment, reconciliation, and democratic deliberation' (2002) 5 *Buffalo Criminal Law Review* 509-549; D Markel, 'State, be not proud: A retributivist defense of the commutation of death row and the abolition of the death penalty' (2005) 40 *Harvard Civil Rights-Civil Liberties Law Review* 438; J Brittan and RA Posner, 'Classic revisited: Penal theory in *Paradise Lost*' (2006-2007) 105 *Michigan Law Review* 1056; Y Lee 'The constitutional right against excessive punishment' (2005) 91 *Virginia Law Review* 740; J Brooks 'Addressing recidivism: Legal education in correctional settings' (1991-1992) 44 *Rutgers Law Review* 712.

²⁰ *S v Makwanyane* supra (n9) at paras [115]-[127].

law' and that 'proportionality in sentencing is clearly required by the Constitution.'²¹ In *Dodo v S* the Court confirmed this:

'To attempt to justify any period of penal incarceration ... without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity. Human beings are not commodities to which a price can be attached; they are creatures with inherent infinite worth; they ought to be treated as ends in themselves, never merely as means to an end. Where the length of a sentence, which has been imposed because of its general deterrent effect on others, bears no relation to the gravity of the offence ... the offender is being used essentially as a means to another end and the offender's dignity assailed. So too where the reformatory effect of the punishment is predominant and the offender sentenced to lengthy imprisonment, principally because he cannot be reformed in a shorter period, but the length of imprisonment bears no relationship to what the committed offence merits. Even in the absence of such features, mere disproportionality between the offence and the period of imprisonment would also tend to treat the offender as a means to an end, thereby denying the offender's humanity.'²²

The Court's dictum above shows that even in cases where severe punishment would deter the criminal (specific deterrence) or potential criminals (general deterrence) such punishment must be proportional to the seriousness of the offence committed. In the case of rehabilitation, lengthy prison terms cannot pass the constitutional test if they are disproportional to the seriousness of the offence. Even though the Court does not specifically mention the other objectives of punishment, the measures taken to punish the offender to achieve those objectives must also be proportional to the seriousness of the offence.²³

²¹ D van Zyl Smit 'Sentencing and punishment' in S Woolman et al *Constitutional Law of South Africa* (2ed looseleaf) (2006) 49-9.

²² *Dodo v The State* 2001 (3) SA 382 (CC) at para [38].

²³ It has to be recalled that proportionality is embodied in retribution. In rejecting the view that retribution is the same as revenge, the International Criminal Tribunal for the Former Yugoslavia held that 'Retribution is not a desire for revenge but an expression of the outrage of the international community at these crimes. Accordingly, it should be seen as an objective, reasoned and measured determination of an appropriate punishment which properly reflects the [...] culpability of the offender, having regard to the international risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct. Furthermore, unlike vengeance, retribution incorporates a principle of restraint; retribution requires the imposition of a just and appropriate punishment, and nothing more.' *Prosecutor v Vujadin Popovic and others*, Case No. IT-05-88-T (Judgment of 10 June 2010) at para [2128], available at <http://www.unbcr.org/refworld/country,LEGAL,ICTY,,BIH,,4c1f69fe2,0.html>, accessed on 29 June 2011. (Emphasis in original. Footnotes omitted). It has also been argued that "... (a) retribution ends cycles of violence, whereas revenge fosters them; (b) retribution limits punishment to that which is in proportion

5. The rights and interests of offenders' children

Traditionally, punishment has always focused on the offender and the victims of his crime. The well-known *Zinn* triad requires that before imposing a sentence, the court should evaluate the following three factors: Firstly, the nature of the crime; secondly, the circumstances of the offender and, lastly, the interests of society.²⁴ Van Zyl Smit, while suggesting a sentencing framework for South Africa that integrates human rights in sentencing, observes that '[a]n attempt is ... made to give an indication from a human rights perspective of what a sentencing framework should seek to achieve both for the offender and for the public at large, including the victims of crime.'²⁵ He looks at punishment both from the offender's perspective and that of the victims of his crime and the public. This is an approach that all the above objectives of punishment take. The negative social consequences of punishment on the offender's dependants have never been a major concern of the objectives of punishment or retribution, deterrence, rehabilitation and restorative justice.

The Constitutional Court has reviewed this approach to punishment in cases where the imprisonment of a person who has not committed a very serious offence, who happens to be the primary caregiver of young children, would negate the constitutional requirement that in matters concerning children, the children's interest shall be paramount. In *M v The State*,²⁶ M was a 35-year-old single mother of three boys aged 8, 12 and 16 years. The Regional Court convicted her on several counts of fraud which she had committed over a period of years and sentenced her to four years' direct imprisonment despite 'strong pleas from her counsel' and the fact that the correctional supervision report indicated that she 'would be an appropriate candidate for a correctional supervision order.'²⁷ On appeal, the High Court quashed one of the convictions and reduced her sentence to that of imprisonment under section 276(1)(i) of the Criminal Procedure Act 51 of 1977, in terms of which she would be eligible for placement on correctional

to the wrongdoing, whereas revenge is limitless in principle; (c) retribution is impartially administered by the state, whereas revenge is often personal; (d) retributivists seek the equal application of the criminal law, whereas no generality attaches to the avenger's interest; and (e) retribution is cool and unemotional, whereas revenge has a particular emotional tone of taking pleasure in the suffering of another.' See R Nozick *Philosophical Explanations* (1981) 366-368 as quoted in D Markel 'State, be not proud: A retributivist defense of the commutation of death row and the abolition of the death penalty' (2005) 40 *Harvard Civil Rights-Civil Liberties Law Review* 438.

²⁴ See *S v Zinn* 1969 (2) SA 537 (A) at 540G-H.

²⁵ Van Zyl Smit op cit (n4) 296.

²⁶ *M v The State* supra (n5).

²⁷ *M v The State* supra (n5) at para [2].

supervision after serving eight months imprisonment.²⁸ The High Court dismissed her application for leave to appeal to the Supreme Court of Appeal against the substituted sentence. The Supreme Court of Appeal, without furnishing reasons, also rejected her petition for leave to appeal against the sentence of imprisonment imposed by the High Court. She thereafter applied to the Constitutional Court 'for leave to appeal against the refusal of the Supreme Court of Appeal to hear her oral argument, as well as against the sentence imposed by the High Court.'²⁹

The Constitutional Court enrolled her application for leave to appeal against the decision of the High Court.³⁰ The issue at stake related to the duties of the sentencing court in light of section 28(2),³¹ of the Constitution and other relevant statutory provisions when the person to be sentenced to imprisonment is the primary caregiver of minor children.³² The Court held that '[t]he unusually comprehensive and emancipatory character of section 28 presupposes that in our new constitutional dispensation the sins and traumas of fathers and mothers should not be visited on their children.'³³ The Court added that 'section 28 requires the law to make best efforts to avoid, where possible, any breakdown of family life or parental care that may threaten to put children at increased risk.'³⁴ However, the Court drew a distinction between a 'primary caregiver'³⁵ and a 'breadwinner', and held that the inquiry should focus on whether the offender is a primary caregiver. This is clearly a departure from the traditional ways that philosophers, and even the Court itself, had previously looked at punishment and its role in society with regard to the offender. What the Court is saying here is that punishment may not violate the offender's right to human dignity and may achieve one or more of the known objectives of punishment, but the sentencing court is required to extend its investigation to establish the effect that imprisonment, as a form of punishment, will have on the offender's dependants (where the offender is a primary caregiver of minor children). What the Court acknowledged is that there exists a social dimension to punishment

²⁸ *M v The State* supra (n5) at para [3].

²⁹ *M v The State* supra (n5) at para [4].

³⁰ *M v The State* supra (n5) at para [5].

³¹ Section 28(2) of the Constitution of the Republic of South Africa Act, 1996 provides that '[a] child's best interests are of paramount importance in every matter concerning the child.'

³² *M v The State* supra (n5) at paras [6] & [7].

³³ *M v The State* supra (n5) at para [18].

³⁴ *M v The State* supra (n5) at para [20].

³⁵ The court held that 'a primary caregiver is the person with whom the child lives and who performs everyday tasks like ensuring that the child is fed and looked after and that the child attends school regularly.' (*M v The State* supra (n5) at para [28]).

within the prescripts of the Constitution as they refer to the rights of children. The Court added the interests of the children placed at risk, if their primary caregiver is imprisoned, should not be ignored during sentencing. In the Court's words, '[s]pecific and well-informed attention will always have to be given to ensuring that the form of punishment imposed is the one that is least damaging to the interests of the children, given the legitimate range of choices in the circumstances available to the sentencing court.'³⁶

The above pronouncement is a clear message to sentencing courts: Courts must 'adequately' balance all the interests involved, especially those of the children who would be placed at risk should their primary caregiver be imprisoned. The judicial mindset is not only required to be flexible but must, as a necessity, 'change' to accommodate constitutional requirements in every sentence imposed in order to ensure that the best interests of the child receive 'focused and informed attention.' The Court is therefore alive to the fact that any form of punishment imposed on the primary caregiver of minor children will directly or indirectly impact on the interests of the child. However, if courts have to choose between two forms of punishment to decide which one to impose on the primary caregiver of minor children, they should lean towards the one that is the least restrictive on the interests of the children. However, the Court cautioned that,

'[t]he purpose of emphasising the duty of the sentencing court to acknowledge the interests of the children ... is not to permit errant parents unreasonably to avoid appropriate punishment. Rather, it is to protect the innocent children as much as is reasonably possible in the circumstances from avoidable harm.'³⁷

The Court thus set the following guidelines that every court must follow when it comes to sentencing:

(a) A sentencing court should find out whether a convicted person is a primary caregiver whenever there are indications that this might be so. (b) A probation officer's report is not needed to determine this in each case. The convicted person can be asked for the information and if the presiding officer has reason to doubt the answer, he or she can ask the convicted person to lead evidence to establish the fact. The prosecution should also contribute what information it can; its normal adversarial posture should be relaxed when the interests of children are involved. The court should also ascertain the effect on the children of a custodial sentence if such a sentence is being considered. (c) If on the *Zinn* triad approach the appropriate sentence is clearly custodial and the convicted person is a primary caregiver, the court must apply its mind to whether it is necessary to take steps to ensure that the children will be adequately cared for while the caregiver is incarcer-

³⁶ *M v The State* supra (n5) at para [33].

³⁷ *M v The State* supra (n5) at para [35].

ated. (d) If the appropriate sentence is clearly non-custodial, the court must determine the appropriate sentence, bearing in mind the interests of the children. (e) Finally, if there is a range of appropriate sentences on the *Zinn* approach, then the court must use the paramountcy principle concerning the interests of the child as an important guide in deciding which sentence to impose.³⁸

In justifying suspending the four-year sentence that the High Court had imposed on M, the Constitutional Court held that it did so in the best interests of her three children because there was evidence that all 'three boys [relied] on M as their primary source of emotional security, and that imprisonment of M would be emotionally, developmentally, physically, materially, educationally and socially disadvantageous to them.'³⁹ As the discussion above has illustrated, there are various points to be noted from the *M* judgment and it will remain a very important case on sentencing primary caregivers of young children for many years to come.⁴⁰

5.1 The limited scope of *M v S*

Courts have considered the fact that an accused has dependants not only as one of mitigating circumstances,⁴¹ but also as one of the substantial and compelling circumstances within the meaning of the Criminal Law Amendment Act,⁴² to avoid sentencing an offender to

³⁸ *M v The State* supra (n5) at para [36].

³⁹ *M v The State* supra (n5) at para [67] & [68]-[69].

⁴⁰ In *J Pillay v The State* 739/10 [2011] ZASCA 111 (1 June 2011), available at <http://www.saflii.org/za/cases/ZASCA/2011/111.pdf>, accessed on 30 June 2011. In which the appellant, a 32-year-old mother and primary caregiver of six children of which two were aged eight and four years respectively, was convicted of fraud and attempted fraud and sentenced by the regional court to five years' imprisonment, the Supreme Court of Appeal relied on, amongst other things, the reasoning in the Constitutional Court decision of *M v S* to set aside the sentence and remit the case to the regional court for re-sentencing. The facts of the case disclosed that the two reports which had been submitted to the magistrate at sentencing did not disclose how the imprisonment of the appellant would impact of the children (see paras [17] & [18]). In the light of the above, the Supreme Court of Appeal held that '[i]n order for a court to arrive at an informed decision concerning sentence the information ... [relating to the impact the imprisonment of the appellant would have on her children] ... was required. A court having all that information before it might still decide ... that incarceration is called for. Even if it does so it might with the information at hand be able to fashion an order that will ensure the continued well-being of the children, albeit in trying circumstances. On the other hand, it might, having all the information at hand decide against incarceration.' See para [24]. Some of the decisions in which *M v S* has been followed include *S v EB* 2010 (2) SACR 524 (SCA); *S v GL* 2010 (2) SACR 488 (WCC); *S v Londe* 2011 (1) SACR 377 (ECG) and *S v Marais* 2009 (1) SACR 299 (E).

⁴¹ *Terblanche* op cit (n10) 197-198.

⁴² Criminal Law Amendment Act 105 of 1997.

a minimum prescribed sentence.⁴³ However, as the Constitutional Court majority recently held in *S v The State*,⁴⁴ the reasoning in *M v The State* is only applicable to primary caregivers of children because they are the ones protected under section 28 of the Constitution which formed the basis of the ruling. Thus where there is evidence that the children's father, who is employed and stays in the same house with them and their mother, 'is willing to care for them during [the mother's] incarceration' or that he will 'be able to engage the childcare resources needed to ensure that the children are well looked after during his absence at work',⁴⁵ then the mother will not escape imprisonment. The reasoning in *M v The State* also excludes primary caregivers of elderly and disabled people. The impact is that breadwinners who are not the primary caregivers of children are excluded from the ambit of the judgment. The rationale is that, where possible, primary caregivers of young children should not be imprisoned because children need them for their survival and proper guidance.

6. South Africa's prisons in the eyes of the Constitutional Court

Many prisons in South Africa are overcrowded and plagued by gangs which make rehabilitation of offenders almost an unachievable objective.⁴⁶ The prison system is also plagued by a significant number of unnatural deaths which happen in circumstances that mostly remain

⁴³ For example in *S v Thebus and Another* 2002 (2) SACR 566 (SCA), the appellants, who were members of a vigilante group, were convicted of murder. The Supreme Court of Appeal held that they had to be sentenced to life imprisonment unless there were substantial and compelling circumstances to justify the imposition of a lesser sentence as required by the Criminal Law Amendment Act 105 of 1997. In sentencing them to 15 years' imprisonment, the Supreme Court of Appeal considered the fact that they had families to support was one of the substantial and compelling circumstances. In *S v Makatu* 2006 (2) SACR 582 (SCA) the accused was convicted of murder and in sentencing him to 12 years' imprisonment, instead of the ordained life imprisonment, the Supreme Court of Appeal considered the fact that he was responsible for the support of his children as one of the substantial and compelling circumstances that justified the imposition of a lesser sentence.

⁴⁴ *S v S* 2011 (2) SACR 88 (CC).

⁴⁵ *S v S* supra (n44) at para [63].

⁴⁶ *Annual Report of the Judicial Inspectorate for Correctional Services* (2009/2010) 10, 15 & 60, available at <http://judicialinsp.pwv.gov.za/Annualreports/Annual%20Report%202009%20-2010.pdf>, accessed on 30 June 2011.

unknown to members of the public,⁴⁷ such as sexual violence,⁴⁸ inter-prisoner violence,⁴⁹ and assaults by warders on prisoners.⁵⁰ Overcrowding could be attributed to factors such as the large number of prisoners awaiting trial,⁵¹ and also that prisoners are serving longer prison terms.⁵² Corruption remains a challenge that the Department of Correctional Services (DCS) is yet to address.⁵³ This gloomy picture is compounded by the fact that only 3% of the DCS's R12 billion annual budget is allocated to the social integration programmes.⁵⁴ The DCS is also facing acute shortages of professionals (i.e. social workers and psychologists) who are essential to the rehabilitation of offenders.⁵⁵ The question that remains to be answered is: How does the Constitutional Court view the role of imprisonment as a form of punishment in light of the picture of South African prisons painted above?

The Court has looked at the prison system from two angles. In the first place, it recognises that prisons are overcrowded and that where a non-custodial sentence could be imposed, courts should do so because '[i]t is in the public interest to reduce the prison population wherever

⁴⁷ *Annual Report of the Judicial Inspectorate for Correctional Services* op cit (n46) 26-30. The Supreme Court of Appeal held in *S v Magida* 2005 (2) SACR 591 (SCA) that the sentencing court should take the health status of the offender into consideration before sentencing him/her to imprisonment, especially in cases where the offender was HIV positive and the Department of Correctional Services could not properly take care of the offender's condition. While commenting on the *Magida* judgment, Sloth-Nielsen observed that '... the reality of prison conditions in South Africa must be factored into the sentencing process. After all, it is not solely the HIV status of the appellant that impelled the Supreme Court of Appeal to its decisions – it is this fact viewed in tandem with the actual conditions in prisons, such as prison overcrowding, exposure to infection, poor diet, and lack or [sic] proper medical treatment.' See Julia Sloth-Nielsen 'A new sentencing principle in the context of HIV/AIDS?' (2005) 13 *Society Prison Reform Initiative Newsletter* 1, available at <http://www.communitylawcentre.org.za/clc-projects/civil-society-prison-reform-initiative/newsletters/newsletter/newsletter%2013.pdf>, accessed on 30 June 2011.

⁴⁸ *Annual Report of the Judicial Inspectorate of Prisons* (2007/2008) 42, available at <http://www.communitylawcentre.org.za/clc-projects/civil-society-prison-reform-initiative/publications-1/other-resources/Annual%20Report%202007-2008.pdf>, accessed 30 June 2011.

⁴⁹ *Annual Report of the Judicial Inspectorate for Correctional Services* op cit (n46) 30.

⁵⁰ *Annual Report of the Judicial Inspectorate of Prisons* op cit (n48) 17.

⁵¹ *Annual Report of the Judicial Inspectorate for Correctional Services* op cit (n46) 11-14.

⁵² *Annual Report of the Judicial Inspectorate for Correctional Services* op cit (n46) 14-15.

⁵³ *Annual Report of the Judicial Inspectorate of Prisons* op cit (n48) 17. See also *Annual Report of the Judicial Inspectorate for Correctional Services* op cit (n46) 37.

⁵⁴ L Muntingh 'Correctional Services Budget 2007/08 to 2009/10' (2007) 21 *Civil Society Prison Reform Initiative Newsletter* 1, available at <http://www.communitylawcentre.org.za/clc-projects/civil-society-prison-reform-initiative/newsletters/newsletter/newsletter%2021.pdf>, accessed 30 June 2011.

⁵⁵ *Annual Report of the Judicial Inspectorate of Prisons* op cit (n48) 39 & 40.

possible.⁵⁶ The Court is thus of the view that in order to reduce prison overcrowding in South Africa, the judiciary also has a role to play. Judicial officers should only impose direct imprisonment when it is absolutely called for. The Court also opines that the community still has a role to play in reforming offenders, meaning that judicial officers should not close their eyes to the fact when a choice has to be made between a custodial and a non-custodial sentence. The Court held that where an offender is suitable for community service but is sentenced to imprisonment, it is an indication that 'community resources are incapable of dealing with her moral failures.'⁵⁷

The Constitutional Court has also emphasised correctional supervision for a number of reasons. In the first place it aims at achieving the objective of the legislature, that it is not only those 'who ought to be removed from society and imprisoned' that should be sentenced to custodial sentences but that correctional supervision should be imposed on those offenders who 'although deserving of punishment, should not be so removed [from society]'.⁵⁸ The Court added that correctional supervision has the primary focus of rehabilitating offenders as opposed to emphasising retributory objectives and it aims at 'humanising the criminal justice system.'⁵⁹ It gives the sentencing court wide discretion in imagining several sentencing measures,⁶⁰ such as house arrest, monitoring, community service and placement in employment; it discourages 'imprisonment with all its known disadvantages for both the prisoner and the broader community.' Correctional supervision should not be misunderstood as indicative of a criminal justice system that has 'gone soft' on crime, it is evidence that '[a]n enlightened society will punish offenders [appropriately and effectively] but will do so without sacrificing decency and human dignity,'⁶¹

'It is an innovative form of sentence, which if used in appropriate cases and if applied to those who are likely to respond positively to its regimen, can

⁵⁶ *M v The State* supra (n5) at para [75]. This was not the first time a South African court considered the issue of prison conditions and their relevance to sentencing. In *S v Holder* 1979 (2) SA 70 (A) at 71, the court observed, inter alia, that South Africa's prisons were 'overfull' and that in cases where direct imprisonment is not necessary, courts should consider alternatives to imprisonment. It was held that '[t]he approach that imprisonment ought not to be lightly imposed, especially if the objects of punishment can be met by another form of punishment, e.g. a fine with or without suspended imprisonment, is a healthy approach.'

⁵⁷ *M v The State* supra (n5) at para [75].

⁵⁸ *M v The State* supra (n5) at para [58]. Chapter IV of the Correctional Services Act 111 of 1998 provides for a detailed regime governing correctional supervision.

⁵⁹ *M v The State* supra (n5) at para [58].

⁶⁰ *M v The State* supra (n5) at para [64].

⁶¹ *S v Williams and Others* 1995 (3) SA 632 (CC) at para [68], quoted with approval in *M v The State* supra (n5) at para [58].

serve to protect society without the destructive impact incarceration can have on a convicted criminal's innocent family members. Thus, it creates a greater chance for rehabilitation than does prison, given the conditions in our overcrowded prisons.⁶²

The Court held that '[c]orrectional supervision is a multifaceted approach to sentencing comprising elements of rehabilitation, reparation, and restorative justice.'⁶³ Correctional supervision serves both rehabilitative and deterrence objectives of punishment. Correctional supervision 'is geared to punish and rehabilitate the offender within the community leaving his or her work and domestic routines intact, and without the negative influences of prison.'⁶⁴

7. Conclusion

This article has demonstrated that the Constitutional Court is of the view that punishment should serve one or more of the objectives of punishment (i.e. deterrence, retribution, and rehabilitation) but that it should not violate the offender's right to human dignity. The jurisprudence discussed above shows that the Constitution has brought, as it should, a new perspective to the manner in which courts should approach the question of punishment. Forms of punishment that infringe the offender's right to human dignity may not be imposed regardless of how effective they may be in achieving one or more of the above objectives of punishment. The Constitutional Court has also not been blind to the collateral impact of imprisonment. If a court is to impose a sentence on a primary caregiver of young children, it should pay sufficient attention to the impact the sentence is likely to have on the interests of those children. Punishment in this case is not only focusing on the offender and the interests of society, but also on the offender's children or dependants. The Court is aware of the conditions in the prison system and is of the view that imprisonment should be avoided as far as possible in order to ameliorate overcrowding in the prisons and also to give the community an opportunity to rehabilitate the offender. It highlights the importance of community corrections as alternatives to imprisonment. One of the most important questions that the Court may have to answer in the near future is whether the state of overcrowding in many South African prisons does not amount to inhuman and degrading treatment.

⁶² *M v The State* supra (n5) at para [61].

⁶³ *M v The State* supra (n5) at para [59].

⁶⁴ *M v The State* supra (n5) at para [62].