THE CHALLENGES POSED BY MANDATORY MINIMUM SENTENCE LEGISLATION IN SOUTH AFRICA AND RECOMMENDATIONS FOR IMPROVED IMPLEMENTATION

(A research paper submitted in partial fulfillment of the requirements for the degree of LLM Constitutional Litigation in the department of law, University of the Western Cape.)

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7. Two-stage procedure
8. Authoritative guidelines
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ABSTRACT

The challenges posed by mandatory minimum sentence legislation and recommendations for improved implementation.

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ABSTRACT

Towards the end of 1997 Parliament unanimously enacted legislation that prescribe severe mandatory sentences for a large number of serious offences. Sections 51, 52 and 53 of the Criminal Law Amendment Act[1] (hereinafter referred to as the Act) came into effect. Sections 51 and 52 of the Act were to have effect for two years from the date, save that the operation could be extended for one year at a time by Proclamation of the President with the concurrence of Parliament (sections 53(1) and 53(2)). The operation of the sections has in fact been extended for one year.[2]

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The legislation came in the wake of an outcry from the community for severe punitive and exemplary sentences to be imposed by our courts. Public dissatisfaction with the crime situation in the country and the lenient sentences imposed was reflected in various television and newspaper reports. The public outcry, coupled with the problems experienced in the sentencing process, compelled the lawmakers to take action. This unhealthy state of affairs prompted the Minister of Justice in 1996 to appoint a new project for the South African Law Commission's (SALC)[3] investigation of all aspects of sentencing. The use of mandatory minimum sentences for certain serious crimes is one of the options being considered to address crime in this country.

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[1] Act 105 of 1997.
[2] From 1 May 2000 Proclamation R23, 2000, regulation gazette 6792, government gazette 21122, 28 April 2000.
[3] Project 82. *Sentencing-Mandatory Minimum Sentences.* L. van den Heever (project leader). Issue Paper 11, August 1997. Pretoria: SA Law Commission.

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The main objectives of the minimum sentence legislation were to deter criminal activity, avoid disparities in sentencing and to deal harshly with perpetrators of serious offences. Since the promulgation of the Act, the meaning and implications of section 51 have been adjudicated upon in a variety of cases in different High Courts. These cases have been concerned, inter alia, with the interpretation of Schedule 2 and the references to the circumstances under which certain offences attract a sentence of life imprisonment and the meaning of 'substantial and compelling circumstances'. The minimum sentence provision has been opposed and supported by two divergent views.

This paper will analyse the provisions in the Criminal Law Amendment Act relating to the imposition of minimum sentences for certain serious offences. It will also, based on case law, establish the extent to which the Legislator allows a sentencing court to depart from the prescribed minimum sentencing provisions; and discuss the applicability of the minimum sentence provisions to juvenile offenders. Finally, it will establish whether the minimum sentence provisions bind the district magistrates' courts and discuss the implications of the provisions relating to referral on the jurisdiction of the courts as contained in section 52. Recommendations for the improved implementation of the Act are also made.

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DECLARATION

I declare that '*The challenges posed by mandatory minimum sentence legislation and recommendations for improved implementation*' is my own work, that it has not been submitted for any degree or examination in another university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

Alvin Saptoe November 2003

Signed:___________________

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TABLE OF CONTENTS

TITLE	PAGE
Title page	i
Keywords	ii
Abstract	iii-iv
Declaration	v
Table of Contents	vi-vii
Chapter 1: Background and Introduction	**1-9**
Objectives of Sentencing	
• Deter criminal activity	4-7
• Avoid Disparities in sentencing	7-8
• Deal harshly with perpetrators of serious offences	8-9
Chapter 2: Legislative Basis For The Imposition Of Minimum Sentences	**10-16**
2.1 Anti-Minimum Sentence Argument	10-14
2.2 Pro- Minimum Sentence Argument	14-16
Chapter 3: The Interpretation And Application Of The Phrase "Substantial And Compelling Circumstances"	**17-32**
3.1 Background	17-20
3.2 How the courts interpreted the phrase 'substantial and compelling circumstances'	20-31
3.3 Concluding remarks	31-32
Chapter 4: Sentencing Jurisdiction	**33-40**
4.1 Is the Regional Court's jurisdiction ousted to try crimes for which a sentence in Part I of Schedule 2 must be imposed?	34-35
4.2 Does section 52(1) implicitly empower the Regional Court to commit cases for sentencing by the High Court?	35-36
4.3 Section 52: The split procedure	36-38
4.4 Amendments to the Criminal Law Amendment Act	38-39
4.5 Concluding remarks	39-40
Chapter 5: The applicability of Minimum Sentence legislation to juvenile offenders.	**41-46**

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5.1 The interpretation of section 51(3)(b)	41-45
5.2 Concluding remarks	45-46
Chapter 6: The District Courts and Minimum Sentence Legislation	**47-52**
6.1 Interpretation by the courts	47-50
6.2 Concluding remarks	50-52
Chapter 7: Recommendations	**53-55**
Conclusion	**56**
Bibliography	**57-60**

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Chapter 1: Background and Introduction

Towards the end of 1997 Parliament unanimously enacted legislation that prescribe severe mandatory sentences for a large number of serious offences. Sections 51, 52 and 53 of the Criminal Law Amendment Act[4] (hereinafter referred to as the Act) came into effect. Sections 51 and 52 of the Act were to have effect for two years from the date, save that the operation could be extended for one year at time by Proclamation by the President with the concurrence of Parliament (sections 53(1) and 53(2)). Their operation has in fact been extended for one year.[5]

The legislation came in the wake of an outcry from the community for severe punitive and exemplary sentences to be imposed by our courts. Public dissatisfaction with the crime situation in the country and the lenient sentences imposed was reflected in various television and newspaper reports such as:

1. "People are being murdered, raped, abused and hacked, either through political, recreational or gangster violence. Chaos reigns without control" [The Citizen, 26 October 1995].
2. "We will never be in a position to bring the epidemic of serious economic crime and corruption in South Africa to an end if we do not bring in new structures to deal with it". [Pretoria News, 26 October 1995].
3. "'n Minimum vonnis en strawwe vonisse kan vir kinder molesteerders ingestel word omdat huidige vonisse nie 'n voldoende afskrikmiddel vir die gemeenskap blyk te wees nie". [Beeld, 22 November 1995].
4. "We have told Mr. Omar that the sentences meted out for offenders were too lenient and that new laws with stiffer sentences had to be introduced". [Sowetan, 10 November 1995].

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[4] Act 105 of 1997.
[5] From 1 May 2000 Proclamation R23, 2000, regulation gazette 6792, government gazette 21122, 28 April 2000.

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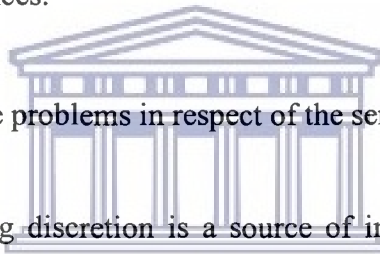
5. "A correctional services official told a court that a person with a life sentence would automatically be considered for parole after 20 years". [The Citizen, 25 November 1995].
6. "Die straf wat opgelê word vir kinder molestering en kindermishandeling is absoluut onbevredigend. Daarom neem dit so drasties toe". [Beeld, 26 Oktober 1996].

This unhealthy state of affairs prompted the Minister of Justice to appoint a new project for the South African Law Commission's (SALC)[6] investigation of all aspects of sentencing in 1996. The then Minister of Justice, Mr. Dullah Omar, requested the Committee to include in its inquiry the desirability of the legislative determination of minimum and maximum sentences.



The Committee summarised the problems in respect of the sentencing process as follow:

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

[6] Project 82. *Sentencing-Mandatory Minimum Sentences.* L. van den Heever (project leader). Issue Paper 11, August 1997. Pretoria: SA Law Commission.

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- Most sentences appear to approach the question of sentencing in an intuitive and unscientific manner.
- Sentencing practices fail to protect the community from criminals committing serious offences.
- Many sentencers imposed sentences with a specific political background as point of departure.[7]

The public outcry, coupled with the problems experienced in the sentencing process, compelled the lawmakers to take action. The use of mandatory minimum sentences for certain serious crimes is one of the options being considered to address crime in this country. This is reflected in the parliamentary publication *Hansard*[8] as follows:

"Eerstens is daar openbare aandrang of strenger straf vir oortreders wat skuldig bevind is. Tweedens sal die instelling van minimum vonisse die vertroue help herstel in die vermoë van die strafreg stelsel om die publiek teen misdaad te beskerm. Derdens bevestig die instelling van minimum vonisse die regering se beleid en ek hoop dit is Parlement se sienswyse-wat beoog om die stygende misdaad syfer aan bande te lê en die gemeenskap teen misdadigers te beskerm. Vierdens word ingevolge die voorgestelde wetgewing diskresie aan die howe verleen om van die voorgeskrewe vonisse af the wyk. Soos ek gemeld het, kan die instelling van minimum vonisse in die wetsontwerp, nie beskou word as inmenging in die onafhanklikheid van die regbank nie. Vyfdens, en alle belangriks, is die bepalings in verband met minimum vonisse ingestel om the verseker dat ons howe by vonnis oplegging op 'n doeltreffende wyse kan optree teen die soort ernstige misdaad wat ons in ons land waarneem, en wat ons mense ongelukkig steeds ondervind."

The aim of this paper is to:

- Analyse the provisions in the Criminal Law Amendment Act relating to the imposition of minimum sentences for certain serious offences.

[7] SALC Issue Paper 11, op cit at 21-22.
[8] 6 November 1997, paragraph 6421.

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- Establish the extent to which the legislator allows a sentencing court to depart from the prescribed minimum sentencing provisions. In particular, the aim is to draw attention to the various ways in which the courts have interpreted the phrase "substantial and compelling circumstances" referred to in the Act.
- Discuss the applicability of the minimum sentence provisions to juvenile offenders.
- Establish whether the minimum sentence provisions bind the district magistrates' courts. Discuss the implications of the provisions on referral on the jurisdiction of the courts as contained in section 52.
- Make recommendations for the improved implementation of the Act.

Objectives of minimum sentence legislation

The main objectives of the minimum sentence legislation were to deter criminal activity, avoid disparities in sentencing and to deal harshly with perpetrators of serious offences.

This section will explore how the courts in various judgments interpreted and applied the objectives of the Act.

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a) Deter criminal activity.

In *S v Mofokeng*[9] Stegmann J. held that "Deterrence appears to be the principal concern of the legislature in the imposition of the severe minimum sentences upon which it has decided even before the offences are committed."

Foxcroft J. in *S v Willemse*[10] held that "Another, and cogent, reason for the amendment was the deterrent effect of the new minimum sentences."

[9] 1999 (1) SACR 502 (W) at 526h.
[10] 1999 (1) SACR 450 (C) at 454a.

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In *S v Segole*[11], Jordaan AJ. opined that "This was done by Parliament in a desperate attempt to stop the crime wave that is threatening to destroy the whole South African society."

In *S v Cimane*[12] Jones J., held that "The interests of society are primarily served by the preventive and deterrent elements of criminal punishment, and, perhaps to a lesser extent in modern times, by considerations of retribution and atonement, so that in the eyes of society, justice is done." He also pointed to the need to impose sentences that operate as a meaningful deterrent to others that might be tempted to commit a particular crime.[13]

Objections to the deterring effect of minimum sentence legislation

The deterrent objective of minimum sentence legislation has been criticised as being misguided by the courts and legal writers as follows:

Stegmann J. in *S v Mofokeng*[14] found that "There is good reason to believe that effective deterrence requires, first and foremost, effective policing that creates a high risk for every criminal that he will be caught, and brought to justice, and punished with condign severity. It is to the implementation of such policing that the efforts of the Legislature and the Executive should be directed. There is no good reason to believe that the Legislature's punishments of arbitrary severity, imposed in circumstances in which it seems that no more than a small minority of offenders run the risk of being caught, convicted and punished, can serve as more effective deterrents than just punishments arrived at in the balanced judicial manner that was usual until Act 105 of 1997 was recently brought into operation."

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[11] 1999 (2) SACR 115 (W) at 122a.
[12] Unreported judgment of the ECPD, Case CC11/99, delivered on 28 April 1999.
[13] See further *S v Homareda* 1999 (2) SACR 319 (W) at 325; *S v Blaauw* 1999 (2) SACR 295 (W) at 311.
[14] Op cit at 526h-j.

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Chaskalson P. in *S v Makwanyane & Another*[15] held that "The greatest deterrent to crime is the likelihood that offenders will be apprehended, convicted and punished. It is that which is presently lacking in our criminal justice; and it is at this level and through addressing the causes of crime that the State must see to combat lawlessness.

In *S v Homareda*[16] the court held that "There is no reason to believe that such an approach to use prescribed minimum sentences to deal with a crime problem will now be successful".

S v Khanjwayo, S v Mihlali[17] Cillie R. held that "Dit is nie die eerste keer dat die Wetgewer dit goed geag het om sekere minimum vonnisse voor te skryf nie. In die verlede het dit nie die gewenste uitwerking gehad nie en is daarmee weggedoen. Of die vonisse voorgeskryf in Wet 105 van 1997 die oogmerke waarvoor dit ingestel is in hierdie geval sal verwesenlik, sal die toekoms maar moet leer".

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Conklin[18] avers that increasing the severity of punishment does not necessarily impact on behaviour. In fact, Chamblis[19] has shown that offenders who are highly committed to a life of crime (which probably represent a large percentage of the offenders suggested in this proposal) are more difficult to deter than marginal offenders…most addicts and some murderers and sex offenders are not easily deterred. According to Von Hirsch,[20] empirical studies concerning the effect of severity on deterrence have had mixed results…with some studies showing that increases in severity have a modest effect, and others showing no effect at all.

[15] 1995 (2) SACR 1 (CC): 1995 (3) SA 391: 1995 (6) BCLR 665 at par 122.
[16] Op cit at 325e-f.
[17] 1999 (2) SASV 651 (O) at 659h.
[18] Conklin JE, (1992), *Criminology (4th Ed),* New York: MacMillan at 442.
[19] Chambliss WJ. (1969), *Crime and the legal process*. New York: McGraw-Hill.
[20] Von Hirsch, A. (1976). *Doing justice: The choice of punishments*. New York: Hill and Wang at 40-41.

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The learned author Du Toit,[21] in his *Commentary on the Criminal Procedure Act,* notes that: "In the past, experimenting in obligatory sentencing or prescribed minimum sentences was not a great success. History showed that the prescribed sentence approach failed in respect of drugs and drug trafficking, and more particularly, in respect of cannabis".

b) Avoid disparities in sentencing.

In the case of *S v Blaauw*[22] the court made reference to the judgment in *S v Majalefa and Another*[23] where the learned judge Leveson expressed the view that the purpose of the legislation was to avoid disparities in sentencing.

In *S v Montgomery*[24] the court found a dual purpose behind the imposition of minimum sentences, notably 1) emphasis on deterrence and retribution and 2) to avoid disparate sentences by different courts.

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However, this view has been criticised as being incorrect by several courts and legal writers. In the case of *S v Zitha*[25] Goldstone J. had the following to say:

> "With respect, I have difficulty in accepting that the purpose of the legislature, in enacting the provisions concerned, was to address disparity in sentencing, whether arising from racial circumstances or otherwise. The legislature has laid down heavy minimum sentences in most if not all the cases, it would seem, substantially in excess of those imposed by the courts until now. Furthermore, in terms of section 53 of the Act, the sections are to cease to have effect two years after they became operative, unless there are extensions for periods of one year at a

[21] Du Toit E., 1999 (Service 23). *Commentary on the Criminal Procedure Act*: 28-16D and 16E, Cape Town: Juta.
[22] 1999 (2) SACR 295 (W) at 303b-c.
[23] (Unreported) Delivered on 22 October 1998 (WLD).
[24] 2000 (2) SACR 318n at 322h.
[25] 1999 (2) SACR 404 (W) at 409e.

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time of the operation of such sections. It follows that the legislature intends to increase the severity of the sentences imposed by the courts for a limited period or periods."

This position was supported in the judgment of *S v Blaauw*[26] where the court, in discussing this objective of the legislation, opined that "These provisions will fall away within two years after the commencement of the Act. That fact, as well as the stress placed in the legislation on defining what may loosely be called aggravating features in the more serious offences, leads me to agree with Goldstone J's view, to wit, that the intention of the legislature was to ensure that heavy sentences are passed in the cases referred to in an attempt to curb the presently unacceptable prevalence of violent crime."

Dale P. *et al*[27] avers that mandatory sentencing laws do not achieve certainty and predictability because officials circumvent them if they believe that the results are unduly harsh.

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c) Deal harshly with perpetrators of serious offences (retribution)

In *S v Snyders*[28] the court held that the retributive aspect of punishment clearly comes to the fore in these sections.

However, this aspect of minimum sentencing has been rejected as misleading of the true nature of retribution. Since retribution primarily requires the imposition of an appropriate sentence which is in proportion to the seriousness of the crime, and in view of the fact that the Act is criticised for its very severe, often unfair

[26] Op cit at 303b-c.
[27] Dale P. et al., "*Key Legislative Issues in Criminal Justice: Mandatory Sentencing*", National Institute of Justice Research in Action, January 1997.
[28] 2000 (2) SACR 125 (NC) at 129d.

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sentences, which often have little proportion to the seriousness of the crime, it is hard to see the role of retribution here.[29]

[29] Terblanche, *The Guide to Sentencing in South Africa*, 196.

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Chapter 2: The Legislative basis for the imposition of minimum sentences

Section 51 of the Criminal Law Amendment Act (hereinafter referred to as the Act) states that persons convicted of certain serious offences listed in Schedule 2 of the Act must be given a mandatory minimum sentence, unless the judicial officer imposing the sentence is 'satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence'. Section 51(2) imposes a duty similar to section (1), in the sense that it requires a minimum term of imprisonment to be imposed for certain crimes under specific described conditions (the details of these crimes are contained in part II to IV of Schedule 4).

Since the Act has been promulgated, the meaning and implications of section 51 have been adjudicated upon in a variety of cases in different High Courts. These cases have been concerned, inter alia, with the interpretation of Schedule 2 and the references to the circumstances under which certain offences attract a sentence of life imprisonment and the meaning of 'substantial and compelling circumstances'. The minimum sentence provision has been opposed and supported by two divergent views.

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2.1 Anti-minimum sentence argument

The minimum sentence legislation was viewed with displeasure by several High Court judges and legal writers. Their basic objection against such sentences is that they:

- Reduce the courts to rubber stamps.
- Violate the independence of the courts.
- Violate the principle of the separation of Constitutional powers.

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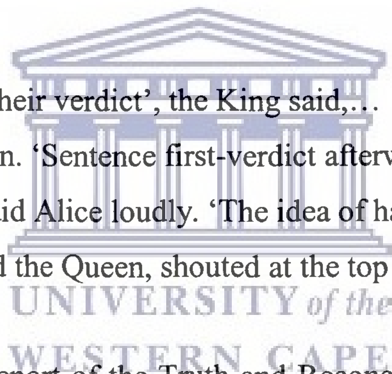
In *S v Toms*[30] Corbett CJ. held that "the infliction of punishment is a matter for the discretion of the trial court. Mandatory sentences reduce the court's normal sentencing function to the level of a rubber stamp..........The imposition of mandatory sentences by the Legislature has always been considered as an undesirable intrusion upon the sentencing function of the courts.[31] ...A provision, which reduces a court to a mere rubberstamp, is wholly repugnant.[32]

This view was confirmed in *S v Mofokeng*[33] where justice Stegmann, at the very outset of his judgment, quotes from the adventures of Alice in Wonderland (by Lewis Carol) where the following was said on the trial of the knave of hearts for the alleged theft of a tray of tarts:

> "'Let the jury consider their verdict', the King said,...
> 'No, No!' said the Queen. 'Sentence first-verdict afterwards'.
> 'Stuff and nonsense!' said Alice loudly. 'The idea of having the sentence first!'...
> 'Off with the head!' said the Queen, shouted at the top of her voice'".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The Judge also refers to the Report of the Truth and Reconciliation Commission[34] where the judiciary is, inter alia, reminded to speak out against unjust legislation. In this regard, the judge found the provisions of sections 51, 52 and 53 of the Act to have challenged his conscience and sense of justice. The learned judge continues to describe his unhappiness as follows:

"For the Legislature to have imposed minimum sentences...severely curtailing the discretion of the courts, offends against the fundamental constitutional principles of the separation of the powers of the Legislature and the judiciary".[35] "That the Legislature has seen fit to use the courts as rubberstamps that must apply the Legislature's arbitrary

[30] 1990 2 SA 802 A at 806h-807b.
[31] At 822 c-d.
[32] At 830J – 831b.
[33] Op cit at 502.
[34] Volume 4, Chapter 4.
[35] At 525h.

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sentences...is an unfortunate breach of the separation of powers. It tends to undermine the independence of the courts and to make them mere cat's paws for the implementation by the Legislature of its own inflexible penal policy that is capable of operating with serious injustice in particular cases.

Accordingly, and apparently with reluctance, justice Stegmann made the following orders in respect of the matter under discussion. In terms of section 52(3)(b) of the Act, the sentence imposed by section 51(1), the prisoner is sentenced to imprisonment for life. Notable is his reference to prisoners and not to accused because they were (already) convicted persons.

The principle of the *separation of powers* also received considerable attention in *S v Budaza*[36]. After referring to section 165 of the Constitution,[37] (which provides, inter alia, that the judicial authority of the Republic is vested in the courts, that they are independent and subject only to the Constitution and the Law) Smuts AJ. refers to the various sources on the importance of the separation of powers.[38] He concludes that *the Act represents grave tampering with the role and independence of the judiciary*. The court should not be party to any injustice-a little bit of injustice to satisfy the Legislature is simply not an option.[39] In this decision, the court found obiter that the Act is unconstitutional based both on the accused's right to a fair trial and by virtue of the constitutional structure established therein and the separation of powers between the Legislature and the judiciary enshrined therein.

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Further support for this position can be found in *S v Montgomery*[40] where the court held that "...most judges regard section 51 as disconcerting". Also, in *S v Jansen*[41] Davis J. held that "Prescribed minimum sentences disregard all individual characteristics and each

[36] 1999 2 SACR 491 (E) at 502f.
[37] Constitution of the Republic of South Africa, Act 108 of 1996.
[38] Including some classical texts from Montesquieu (de l' esprit des lois book xi, chapter 6 as quoted in MJC. Vile, Constitutionalism and the separation of powers. (1967 90) and an address by a former chief justice published in SALJ 1998 (115) 111 at 112.
[39] At 504 e-f.
[40] 2000 2 SACR 318 (N) at 322f-h.
[41] 1999 (2) SACR 368 (CPD).

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case is treated in a factual vacuum, leaving no room for an examination of the prospect of rehabilitation and of the incarceral method to be adopted. Such a system can result in a gross disregard of the right of dignity of the accused.

Treating those who are unequal in a uniform manner might also compromise the constitutional commitment to equality. In support of his argument, the learned judge referred to foreign judgments, notably *Coker v Georgia 433 US 584 (1977) and Smith v The Queen (1987) 34 CCC (3d) 97.* In the latter judgment, the question arose as to the constitutionality of a mandatory minimum sentence for the importation of narcotics into Canada. The majority of the Canadian Supreme Court held that if a hypothetical case could be imagined, for which the minimum sentence would be grossly disproportionate, the legislation, which created minimum sentences, would be unconstitutional.

The stance against mandatory minimum sentences has also featured in the American Courts. In the case of the *United States v Madkour*[42] the court criticised mandatory sentences as follow: "This type of Statute…does not render justice. This type of Statute denies the judges of this court and of all courts, the right to bring their conscience, experience, discretion and sense of what is right into sentencing procedure, and it, in effect, makes a judge a computer, automatically imposing sentences without regard to what is right and just. It violates the rights of the judiciary and of the defendants, and jeopardises the judicial system".

The US Sentencing Commission[43], which was requested to examine the continued use of mandatory minimum sentences, concluded in its report that despite the expectation that mandatory minimum sentences would be applied to all cases that meet the statutory requirements, the available data suggested that it was not the case. In a vast number of cases, defendants were sentenced below the applicable statutory minimum, resulting in sentencing disparities. Mandatory minimum sentences were wholly dependent upon defendants being charged with and convicted of the specified offence under the mandatory

[42] 930 F 2d 234 (2d CIR 1991).
[43] United States Sentencing Commission Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System, 1991.

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minimum statute. To the extent that prosecutorial discretion was exercised with preference to some offences, and to the extent that some defendants were convicted of conduct carrying a mandatory minimum penalty while others who engage in similar conduct were not so convicted, the use of mandatory minimum penalties again introduce sentencing disparity.

Furthermore, in *S v Gibson*[44], Holmes JA. held that "A mandatory sentence unduly put all the emphasis on the punitive and deterrent factors of sentence and precludes that traditional consideration of subjective factors relating to the convicted person".

Galgut AJA. also knocked the minimum sentence provisions in *S v Mpetha*[45] as follows: "The facts of this case serve to underline the *unwisdom* of mandatory sentences, and one can only hope that the appellant's sentence will be ameliorated by administrative action".

In its report, the Viljoen Commission[46] objects to the mandatory minimum sentence legislation on two grounds, i.e.:

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1. It precludes the sentencing officer from individualising in the sense of having regard to the criminal.
2. It precludes him from applying, as a stabilising factor, a retributively just penalty.

2.2 Pro-minimum sentence argument

While acknowledging that the courts do not like minimum sentences, *S v Boer*[47] appears to justify the provisions of the Act when Steenkamp J held that "...dit is derhalwe 'n bose kringloop wat moeilik hanteerbaar is. In sulke omstandighed het die wetgewer, in sy wysheid, drastiese maatreëls en minimum vonisse voorgeskryf wat, glo ek, slegs tydelike maatreëls is wat later weer weggeneem sal word wanneer tye normaal raak. Abnormale

[44] 1974 (4) SA 478 (A) at 482a.
[45] 1985 (3) 702 AD at 710d-e.
[46] Commission of Inquiry into the Penal System of the Republic of South Africa. Appointed on 30 September 1974.
[47] 2000 2 SACR 114 (NC) at 121a-ff

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tye verg abnormale maatreëls om weer orde te herstel om juis te verseker dat die demokrasie en vryheid van die individu beskerm word".

Support for this view can be found in the decision of Van der Walt J in *S v Dlamini*[48] where he noted, "...die hof, in sy funksie as onafhanklike regspreker, moet seker maak dat aan die Wetgewer se oogmerk voldoen word, maar ook dat die beskuldigde beskerm word teen ongebreidelde verpligte vonisse... Voor die inwerkingtrede van die Wet, en na die verloop van die 2 jaar, is dit teoreties moontlik dat hy kan wegkom met 'n opgeskorte vonnis, (whereas the prescribed minimum sentence is 15 years) en dit is seersekerlik nie wat die Grondwet end Handves vir Menseregte oor billike strawwe en regverdige regsoptredes beoog nie."

The minimum sentence legislation found further support in the words of Cloete J. in *S v Homoreda*[49] where the court held that "The starting point must be that the sentence prescribed by Parliament has to be imposed and the sentencing process cannot be the same as it was before the Act was passed."

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On the international front, as early as 1972, District Court Judge M.F. Frankel spoke out against the almost wholly unchecked and sweeping powers given to judges traditionally in the fashioning of sentencing as intolerable and terrifying for a society that professes devotion to the rule of law. He opined that the form of sentence which judges imposed provided no check on arbitrary decision-making and thus insisted that the Legislature should take the responsibility to decide and prescribe the legitimate basis for criminal sentence. Senator Edward Kennedy responded positively to this call by Judge Frankel by introducing legislation which allowed the promulgation of the Federal Sentencing Guidelines in 1987. These sentencing guidelines have since the late 1970's represented the dominant approach to sentencing reform in the United States.

[48] 2000 2 SACR 266 D.
[49] Op cit at 321I-j.

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The mandatory sentence of life imprisonment for certain offences has also been argued to be unconstitutional. In *S v Jansen*[50] Davis J. held that "since section 51 does not create a *per se* system of minimum sentencing, there was not, on the face of it, any unconstitutionality. Davis J. reaffirmed this view in *S v Swartz*[51] where he held that "...the entire sentencing scheme does not introduce a *per se* mandatory sentence and it is only after the exercise of the discretion (or refusal) that the sentence can be tested. In short, I do not consider that the section is unconstitutional. By contrast, a sentence imposed by a court pursuant to this provision can be unconstitutional where it is so disproportionate to constitute cruel and degrading punishment."

In arguing for the constitutional validity of the minimum sentence legislation, Davis J. referred to the approach followed by the Namibian Courts. In the Namibian judgment of *S v Vries*[52] Frank J. held that "a statutory minimum sentence of imprisonment is not *per se* unconstitutional. It will be unconstitutional, however, if it prescribes imprisonment as a punishment which is 'grossly disproportionate' to the circumstances of the offender and the offence". The Namibian Supreme Court confirmed this approach in *S v Tcoeib*[53] where Mohammed CJ. held "...it may very well be that even if the sentence of life imprisonment is not *per se* unconstitutional, its imposition in a particular case may indeed be unconstitutional if the circumstances of that case justify the conclusion that it is so grossly disproportionate to the severity of the crime committed that it constitutes, cruel, inhuman or degrading punishment in the circumstances or impermissibly involves the dignity of the accused."

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50 1999 (2) SACR 368c at 374e-f.
51 Op cit at 383g-h.
52 1996 (2) SACR 638 (Nm).
53 1996 (1) SACR 390 (NmS) at 402f-g.

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Chapter 3: The interpretation and application of the phrase "substantial and compelling circumstances"

3.1 Background

Whilst High Court dicta suggested that section 51 was probably valid, uncertainty remained, partly because of the divergent views on the interpretation of the phrase 'substantial and compelling circumstances', the escape clause-and the section's constitutionality had not been comprehensively considered until Smuts AJ declared it invalid in his High Court judgment in the case of *S v Dodo*[54].

Before dealing with the Constitutional Court's finding in the Dodo decision, it is prudent to deal with the divergent interpretations of the term 'substantial and compelling circumstances'. After the introduction of the minimum sentencing legislation, sentencing patterns revealed significant departures from this legislation in sentences imposed by our courts. The pattern exposed a series of differences in sentences which were regional in nature. The all-important question that arises is what is meant by the term 'substantial and compelling circumstances'?

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Section 51(3)(a) of the Criminal Law Amendment Act[55] provides that:

> "If any court referred to in ss (1) or (2) is satisfied that substantial and compelling circumstances exist, which justify the imposition of a lesser sentence than the sentence prescribed in those sub-sections, it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence".

The term 'substantial and compelling circumstances' appears to have been borrowed from the Minnesota legislation in the United States of America. The Sentencing Commission in this state developed sentencing guidelines to guide the courts in the exercise of their discretion. These guidelines set a parameter

[54] 2001 SACR 594 CC, 2001 (5) BCLR 423 CC.

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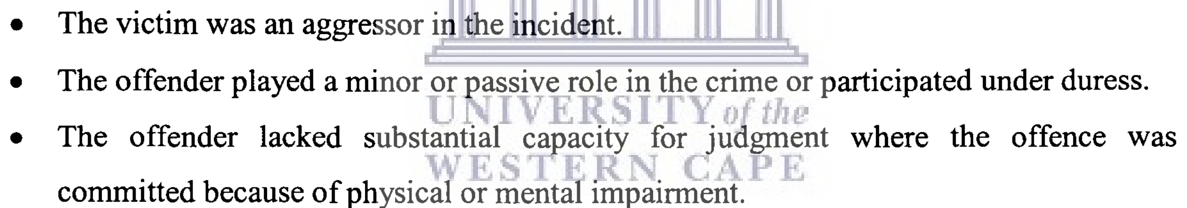
within which sentences should be imposed. Courts are at liberty to choose sentences, but if they wish to depart, they are free to do so if they find substantial and compelling circumstances present to justify a departure. A departure from the 'guideline' range is therefore the equivalent of a departure in South Africa from the legislated minimum.[56]

The Minnesota Guidelines spelt out what may be regarded as substantial and compelling circumstances. According to the Guidelines, certain circumstances may not be considered as grounds of departure. These are: race, sex, employment factors (including employment history, employment at time of offence, impact of sentence on the occupation), as well as social factors (including marital status, educational attainment, and length of residence). Furthermore, a non-exclusive list of mitigating factors are provided in these Guidelines, namely: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- The victim was an aggressor in the incident.
- The offender played a minor or passive role in the crime or participated under duress.
- The offender lacked substantial capacity for judgment where the offence was committed because of physical or mental impairment.

The Guidelines also provide a non-exclusive list of aggravating factors such as:

- The victim was particularly vulnerable owing to age, reduced physical or mental capacity which was known to the offender.
- The victim was treated with particular cruelty.
- The current conviction is for an offence in which the victim was injured and there is a prior felony conviction for an offence in which the victim was injured.
- The offence was a major economic offence.
- The offender committed, for hire, a crime against a person.
- The offender committed a crime against a person in furtherance of a criminal activity

[55] Act 105 of 1997.

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by an organised gang.

A sterling feature of these Guidelines was that they focussed directly on the seriousness of the offence and the blameworthiness of the accused in respect of the offence. It is thus quite evident that the above-mentioned lists provided for in the Guidelines are generally in accord with a desert rationale.[57]

The South African lawmakers, by opting for the phrase 'substantial and compelling circumstances', displayed a relatively liberal standard for deviation. This position seems to be different to that of several Unites States jurisdictions, which advocated a more inflexible mandatory sentencing attitude. In fact, in several American states mandatory sentences are prescribed directly by the legislature and do not allow for deviation. For example, in *Harmelin v Michigan*[58] the US Supreme Court upheld the constitutionality of a mandatory life sentence without parole for the possession of a large quantity of drugs by a first offender.

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Furthermore, the 'substantial and compelling circumstances' standard is definitely a more flexible standard than the 'exceptional circumstances' standard that was considered and rejected by the South African Legislature as a possible standard for departure.[59] The English jurisprudence adopted the exceptional circumstances standard as a test for departure from mandatory minimum sentence legislation. In *R v Kelly*[60] Lord Bingham, in determining the meaning of exceptional circumstances, said the following, "... we must construe exceptional as an ordinary, familiar English adjective, and not as a form of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary or unusual, special or uncommon. To be exceptional, a circumstance need not be unique, or unprecedented or very rare, but it cannot be one that is regularly or normally

[56] Van Zyl D. et al., *"Mandatory Minimum Sentences and Departure from them in Substantial and Compelling Circumstances"*, 1999 (15) SAJHR p272.
[57] Von Hirsch et al, *The Sentencing Commission and its Guidelines* (1987) North East University Press, Boston.
[58] 501 US 957 (1991).
[59] Working Document on Proposed Amendments to the Criminal Law Amendment Bill (B46-97), dated 22/8/97.
[60] 1999 (2) WLR 1100 (CA).

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encountered." By opting for the phrase 'substantial and compelling circumstances', and not exceptional circumstances, our lawmakers, who could easily have employed the exceptional circumstances standard, marked a radical difference between the South African and English jurisprudence.

3.2 How the Courts interpreted the term 'substantial and compelling circumstances'

In *S v Mofokeng*[61], Stegmann J held that "...for substantial and compelling circumstances to be found, the facts of the particular case must present some circumstances that are so exceptional in nature, and that so obviously exposes the injustice of the statutory prescribed sentence in the particular case, that it can rightly be described as compelling the conclusion that the imposition of a lesser sentence than that prescribed by Parliament is justified. He further added that "...as I understand this legislation, substantial and compelling circumstances must be factors of an unusual and exceptional kind that Parliament can not be supposed to have had in contemplation when prescribing standard penalties for certain crimes committed in circumstances described in schedule 2".

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This approach was supported in *S v Boer*[62] where Steenkamp R. opined that "Na my mening moet wesenlike en dwingende omstandighede gesoek word in alle tersaaklike omstandighede van die misdryf self, en die persoonlike omstandighede van die beskuldigdes. Wesenlike en dwingende omstandighede moet so buitengewoon en uitsonderlik wees dat 'n hof daardeur gedwing word om 'n ligter vonnis op te lê omdat die verpligte vonnis 'n wesenlike onreg teenoor die beskuldigde sal laat geskied. Anders gestel, 'n hof moet tevrede wees dat die omstandighede so dringend van aard is dat 'n hof 'n regskending sal pleeg deur 'n verpligte vonnis op te lê. Ek vereenselwig my met respek met die benadering van Stegmann R in *S v Mofokeng*".

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[61] Supra.
[62] 2000 (2) SASV 114 NKA 121e-f.

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The approach of Stegmann J. has been adopted in a number of cases. For example, in *S v Zitha and others*[63], Goldstone J. held that "the Legislature has laid down heavy minimum sentences in most if not all the cases, it would seem, substantially in excess of those imposed by the courts until now. Furthermore, in terms of section 53 of the Act, the sections are to cease to have effect two years after they became operative, unless there are extensions for periods of one year at a time of the operation of such section. It follows that the Legislature intends to increase the severity of the sentences imposed by the courts for a limited period/s. I can surely take judicial notice of the fact that our country is currently engulfed by an unacceptably high crime rate. Clearly, in my view, the Legislature envisaged the imposition of extraordinarily heavy sentences which, if they have the desired effect of bringing down crime, may be jettisoned later".

Further support for this view can be found in the judgment of Jordaan AJ. in *S v Segole*[64] *and another* where the court held itself to be bound to the provisions of section 51 of the Act and obligated to give effect to it. The court fully agreed with the sentiment expressed by Stegman J. that the circumstances in the case that it dealt with, and also the circumstances of the present case, do not create compelling circumstances as envisaged by Parliament. "I therefore have no discretion left but to sentence each of you to life imprisonment on count 4".[65]

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The Natal Division of the High Court further supported this view in *S v Madondo*[66]where Squires J. emphasised that a court would not easily intervene to impose a lesser sentence as compelling reasons, for doing so would not be lightly found. He opined that a 'compelling' reason was "clearly more than just a disparity between what the court feels may be sufficient and the prescribed minimum". He goes further by saying that to consider such a difference alone as constituting compelling reasons would be subversive of the Legislature's intention. He warned against any attitude by a sentencing court to substitute

[63] 1999 2 SACR 404 W at 409e-g.
[64] 1999 2 SACR 115 W at 123j.
[65] At 126e.
[66] Unreported judgment of the NPD, Case CC22/99, delivered on 30 March 1999.

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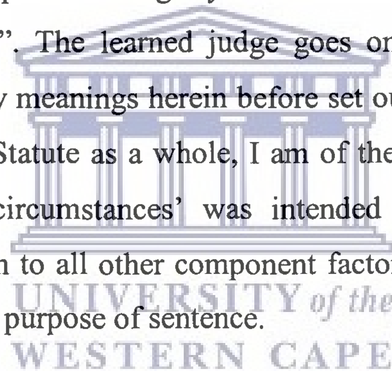
its own discretion for that of Parliament. Squires J. also displayed the same attitude in his judgment in the case of *S v Ngubane.*[67]

In analysing these decisions it becomes clear that this school of thought, led by Stegmann J, considers the Minimum Sentence Legislation to strip the Courts of its discretion to impose a sentence of choice. According to this school of thought, the ordinary mitigating and aggravating circumstances cannot simply be weighed to see if there are substantial and compelling grounds for departure, unless they are of an unusual and exceptional kind.

On the other hand, Leveson J in *S v Mthembu and others*[68] was of the opinion that "...the Legislature did not intend the phrase to signify a stricter criterion than those previously regarded as mitigating factors". The learned judge goes on to say[69] that "drawing my conclusions from the dictionary meanings herein before set out, and after having carefully considered the context of the Statute as a whole, I am of the opinion that the expression 'substantial and compelling circumstances' was intended to denote factors of solid material significance in relation to all other component factors which must irresistibly be taken into consideration for the purpose of sentence.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This trend was carried through in the case of *S v Majalefa*[70] where Leveson J. held that, notwithstanding the minimum legislation, the starting point remains that consideration had to be given to all aggravating and mitigating factors. The learned judge expressed the view that the purpose of the Legislation was to avoid disparity.

This approach, which suggests that the Minimum Sentence Legislation has changed little in the traditional approach to sentencing, found further support in *S v Cimani*[71] where Jones J. held that "in every case, however, the nature of the circumstances must convince the reasonable mind that a lesser sentence is a proper sentence and that it is justified when regard is had to the aggravating and mitigating features attendant upon the commission of

[67] Unreported judgment of the NPD, Case CC31/00, delivered on 30 March 1999.
[68] Unreported Case, Case No 365/98.
[69] At page 6-7.
[70] (Unreported) Delivered on 22 October 1998 (WLD).

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what is already classified by the law-giver as among the most serious of offences, and the interest of society weighed against the interests of the offence.

Borcheds J formulated a middle approach to these two opposing views in *S v Blaauw*[72]. After a comprehensive analysis of the decisions on the meaning of substantial and compelling circumstances, the judge held that:

> "...The Legislature has not seen fit to describe what factors may or may not be considered. Consequently a court is, in my view, still able to have regard to all the factors which would traditionally have been considered in imposing sentence.
>
> Moreover, in my view, a court should not consider each factor in isolation, but view them cumulatively and if, in doing so, the court forms the view that, bearing in mind all the factors, aggravating as well as mitigating, the sentence of life imprisonment would be grossly disproportionate to the crime committed or, to put it differently, starkly inappropriate or offensive to its sense of justice, then it should find that substantial and compelling circumstances exist for departing from the prescribed sentence of life imprisonment.
>
> I do not believe that in such circumstances a court would be substituting its own discretion for that of the Legislature, for I do not believe that the Legislature intended that unfair or grossly disproportionate sentences should be imposed".

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This approach was adopted, and elaborated on by a full bench of the Witwatersrand Local Division *in S v Homareda*[73], *S v Shongwe*[74], as well as *S v Dithotze*[75]

[71] Unreported judgment of the ECD, Case CC11/99, delivered on 28 April 1999.
[72] 1999 2 SACR 295W.
[73] 1999 2 SACR 319 W.
[74] 1999 2 SACR 220 O.
[75] 1999 2 SACR 315 W.

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Substantially the same approach was adopted in the Free State Province where the matter has been settled by a full bench decision in *S v Khanjwayo; S v Mihlali*[76] where Cillie J. concluded that:

"Die vonisse in Wet 105 van 1997 voorgeskryf, beoog ook veral afskrikking en kan derhalwe seker ook as 'exemplary sentences' beskou word. Die diskresionere bevoegdheid word egter verleen om 'n mindere vonnis op te lê. Dit behoort wel gedoen te word wanneer die minimum vonnis in die besondere omstandighede so wesenlik sal verskil van 'n billike straf dat dit tot 'n skokkende onreg teenoor die veroordeelde sou lei. Alhoewel dit duidelik is dat die Wetgewer met die voorgeskrewe minimum vonisse wou toon in welke ernstige lig sekere misdrywe deur die howe bejeen moet word, kon dit nooit die bedoeling van die Wetgewer gewees het nie dat die oplegging van sodanige vonisse in elk geval moet geskied, nieteenstaande die feit dat dit tot 'n skokkende onreg teenoor die veroordeelde sou lei". This confirms the view expressed by Cillie J. in the earlier decision of *S v Shongwe.*[77]

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Whilst the Borcheds approach allows the courts some discretion to deviate from the prescribed minimum sentence without undermining the intention of the lawmakers, it also brought some uncertainty and inconsistency in the sentencing process. This flexible standard of departure evoked some severe emotional outbursts in reaction to certain judgments. A case in point is *S v Abrahams*[78] where Foxcroft J. held that the offender, who had raped his own daughter, was not a threat to society as a whole and that this was a mitigating factor that could be considered along with others in deciding not to impose the prescribed minimum sentence.

Another interpretation of the phrase 'substantial and compelling circumstances' is to be found in three Cape judgments delivered by Davis J. In these judgments, Davis J. uses the *severity* of the crime and the principle of *just desert* as a point of departure for applying the principle of substantial and compelling circumstances. These judgments are:

[76] 1999 2 SACR 651 O at 658f-g.
[77] 1999 (2) SACR 220 O.
[78] 2001 (2) SACR 358 C.

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S v Jansen[79]- "I consider the words substantial and compelling go to weight rather than to exception. The use of the word substantial means something more than prima facie in the ordinary legal context, and thus the words substantial and compelling would appear to me to compel the court to consider all the available mitigating factors to see whether they are of substantial weight to enable the court to exercise a discretion and hence provide for a reduced sentence".

S v Swartz[80] - "The key to the application of substantial and compelling must be the crime". Furthermore, the judge concludes that the phrase substantial and compelling is indicative of its meaning; the factors must be considered together and they must be substantial. When taken together, they must compel a court to exercise discretion to impose a lesser sentence than that prescribed in the schedule.

S v Van Wyk[81] - In this case Davis J. held that the test could not be one based on significant disparity "between the minimum sentence and that which previously operated under the informal tariff", since this would fail to take account of the new yardstick created by the Legislation. He also rejected the approach that if the minimum sentence induces a sense of shock, this would justify a conclusion that there were substantial and compelling circumstances.[82] He concluded that substantial and compelling circumstances include those that were previously referred to as mitigating circumstances, and which include all the circumstances which might indicate a diminished moral blameworthiness on the part of the offender. This approach limits the range of factors that can legitimately be considered in determining whether there are substantial and compelling circumstances present that can justify a departure from the minimum.

The decision of *S v Malgas*[83] now provides much needed authoritative guidance to the interpretation of section 51 of the Act, especially in relation to the central issue of deciding whether there are, in terms of section 51(3)(a), substantial and compelling circumstances

[79] Op cit at 377h-i.
[80] 1999 (2) SACR 380 CPD at 386b.
[81] 2000 (1) SACR 45 C.
[82] At p49a-b.

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that justify the imposition of a lesser sentence than the minimum prescribed sentence. Marais AJ concluded that "…the courts are a good deal freer to depart from the prescribed sentence than has been supposed in some of the previously decided cases; but at the same time, the prescribed sentences are to be taken as ordinarily appropriate for the crimes in question". The learned Judge of Appeal provides a useful step-by-step summary of the correct approach. The principles to interpreting the phrase 'substantial and compelling circumstances were laid down in the judgment as follows:

1. 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.
2. 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.
3. 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.
4. The specified sentences are not to be departed from lightly and for flimsy reasons.
5. 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.
6. All factors 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.
7. 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.

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[83] 2001 1 SACR 469 SCA, 2001 2 1222 SCA.

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8. In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against sentence as the sole criterion.
9. If upon consideration of the circumstances of a particular case, the sentencing court is satisfied the prescribed sentence would be so disproportionate to the crime that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.
10. In imposing such lesser sentence, account has to be taken of the fact that the particular kind of crime had been singled out for severe punishment and that the sentence imposed in place thereof should be assessed paying due regard to the benchmark set by the Legislature.

In the case of *S v Dodo*[84] the Constitutional Court endorsed the interpretation provided in *S v Malgas* as a practical method to be employed by all judicial officers facing the application of section 51. In *S v Dodo* 2001 3 BCLR (E), the Eastern Cape Division struck down section 51(1) of the Act. It held that the provision was inconsistent with section 35(3)(c) of the Constitution and with the principle of the separation of powers, and is therefore invalid.

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There is a close link between Erasmus AJ's reasons for finding that the section is inconsistent with the constitutional separation of powers and his finding that it constitutes an unjustifiable limitation of section of section 35(3)(c) of the Constitution. The learned judge held that "…sentencing is preeminently the prerogative of the courts that the section of the Act in question 'constitutes and invasion of the domain of the judiciary not by the Executive, but by the Legislature', and that a criminal trial before an ordinary court requires, among other things, 'an independent court which is empowered…in the event of a conviction, to weigh and balance all factors relevant to the crime, the accused and the interests of society before the imposition of sentence."

What was new about the 'trial envisaged by section 51(1) of the Act', Smuts AJ held, is that 'an accused convicted of a serious offence charged before the High Court, unless the

[84] 2001 (1) SACR 594 CC; 2001 (5) BCLR 423 CC.

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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 crime, not by the court itself, but by the Legislature'. This, the learned judge found, in truth directs the High Court 'to consider principles more relevant to the functions of a court of appeal in dealing with the issue of sentence. He concluded that this-'…is not a trial before an ordinary court…but 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'. The Judge consequently found that 'such a trial…constitutes a limitation of…the fair trial envisaged in section 35(3)(c) of the Constitution, which could not be justified under section 36 thereof'.

In dealing with the separation of powers, the High Court's reasoning for coming to the conclusion that the provisions of section 51(1) of the Act undermine the doctrine of the separation of powers and the independence of the judiciary and are inconsistent therewith, relies on certain passages from the first Certification judgment[85], the judgment in *Bernstein*[86] and *Heath*[87]. This order of unconstitutionality was referred to the Constitutional Court for confirmation in terms of section 172 (2) of the Constitution.

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The Constitutional Court considered the validity of section 51 in relation to:

- *The separation of powers principle.* The contention that section 51 was contrary to the separation of powers principle was rejected since it required the courts to have virtually exclusive and unlimited sentencing discretion, coupled with a strict separation of powers, neither of which was or could be. A court's sentencing discretion is not unfettered, but must be judicially exercised within the options permitted by law; and the Legislature and the Executive have legitimate interests in penal policy, including the nature and severity of sentences, and in ensuring consistency.

[85] *In re Certification of the Constitution of the Republic of South Africa*, 1996 10 BCLR 1253 CC: 1996 4 SA 744 CC paras 106 to 113 and 123.
[86] *Bernstein and others v Bester NO and others* 1996 4 BCLR 449 CC: 1996 2 SA 751 CC para 105.

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However, Ackermann J warned that the Legislation ought not wholly to exclude the court's function and power 'to apply and adapt a general principle to the individual case'. Accordingly, 'the Legislature ought not to oblige the judiciary to impose a punishment which is wholly lacking in proportionality to the crime'.

- *The right against cruel, inhuman or degrading punishment-section 12(1)(e) of the Constitution.* The right against cruel, inhuman or degrading punishment requires that the punishment must be proportionate to the offence, including all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant circumstances relating to the offender which have a bearing on the seriousness of the offence and the offender's culpability.

  Accepting the gross disproportionality-test adopted by the United States and Canadian Supreme Court as the approach that should be employed under our Constitution, Ackerman J held that section 51(1), as interpreted in *Malgas*, did not compel a court to act inconsistently with section 12(1)(e)[88] of the Constitution, since it did not require a court to impose a sentence disproportionate to the offence.

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- *The right to a public trial before an ordinary court-section 35(3)(c) of the Constitution.* In light of the court's decision on the above two aspects, there was little to support the contention that a court bound by section 51(1) of the Act was not an 'ordinary court as contemplated by section 35(3)(c) of the Constitution, which gives every accused the right 'to a public trial before an ordinary court'. This argument, which included issues of the independence of the judiciary, was accordingly rejected.

On these grounds the Constitutional Court declined to confirm the order made by the Eastern Cape High Court declaring section 51(1) of the Act to be constitutionally invalid.

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[87] *SA Association of Personal Injury Lawyers v Heath and others* 2001 1 BCLR 77 CC: 2001 1 SA 883 CC paras 23-26.
[88] Which guarantees to everyone the right not to be treated or punished in a cruel, inhuman or degrading way.

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Criticism against Malgas-approach

Friedman J.P, in the case of *S v Kgafela*[89], criticised the approach adopted by the Supreme Court of Appeal in the Malgas-decision. The learned Judge was of the opinion that instead of interpreting the phrase substantial and compelling circumstances in their context and giving them some definition, the Supreme Court of Appeal had relegated the term to the effect of an instinctive reaction, and response, taking refuge in the notion of injustice. In the opinion of the Judge, the approach of the Supreme Court of Appeal had a dual effect. Firstly, it failed to deal adequately with the stringent provisions of the legislation and the great stress on the deterrent aspect of the punishment. Secondly, it reversed the normal sentencing process by requiring a court to work retrogressively from the prescribed benchmark. The judge held that in his view, this could result in the domination of prescribed sentence at the expense of a vital circumstance, as the emphasis might be inordinately directed at the mandated sentence. The court reluctantly came to the conclusion that he was unable to find 'any weighty, influential or significant circumstances, which irresistibly or imperatively persuaded him to impose any sentence other than the minimum of life imprisonment.

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Du Toit AJ also came out strongly against the minimum sentencing legislation in the recent case of *S v Vuma*[90] when he held that: "Since section 51 of the Act has received the nod of approval from both the Supreme Court of Appeal in, for example, S v Malgas, and the Constitutional Court in S v Dodo, I am precluded from questioning its validity or constitutionality, and must per force interpret it as best I can and give effect to the intention of the legislature in enacting it. But I would be failing in my duty if, in doing so, I did not also voice my protest at what is surely the most invasive piece of legislation enacted since the advent of the democratic South Africa, and I respectfully associate myself with the sentiments expressed by Stegmann J. in S v Mofokeng".

[89] 2001 (2) SACR 207 (B).
[90] 2003 (1) SACR 597 WLD 599c-d.

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In imposing sentence, the learned judge went on to state[91] "... in the result I am compelled, most reluctantly and under protest, to sentence you to imprisonment for life, as I hereby do".

3.3 Concluding remarks

Case law relating to the minimum sentence legislation has illustrated the tension between individualisation and uniformity of sentencing practices by the South African Judiciary. Vague terminology within the Criminal Amendment Act has led to the inconsistent and highly controversial interpretation of mandatory minimum sentences. The core problem is the phrase 'substantial and compelling circumstances' used in the Act. Establishing the true meaning of the phrase has led to a series of widely divergent constructions in the courts.

On the one hand, some courts have interpreted the phrase to mean that any deviation from the prescribed minimum sentence require circumstances that are so exceptional in nature, and that so obviously expose the injustice of the statutory prescribed sentence in the particular case, that it can rightly be described as compelling the conclusion that the imposition of a lesser sentence than that prescribed by the legislation is justified. On the other hand, some courts are of the view that the minimum sentence legislation has changed little in the traditional approach to sentencing, in that the legislature did not intend the phrase to signify a stricter criterion than those previously regarded as mitigating factors.

A more flexible approach to the discretion of courts to deviate from the prescribed minimum sentence has resulted in some very controversial judgments. For example, in the case of *S v Abrahams,* Judge John Foxcroft caused major controversy with his very wide interpretation of the phrase by not imposing the prescribed minimum sentence on a 54-year old father convicted of raping his 14-year old daughter. The judge found that the minimum sentence was not justified in this case as substantial and compelling circumstances existed to justify a more lenient sentence. These circumstances included the

[91] At 605e.

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man's age (54); the fact that he was a first offender; and the fact that he did not pose a threat to the community, since the rape was committed in his own family environment.

What has become clear through the divergent interpretations is the fact that there cannot be a uniform interpretation of the phrase "substantial and compelling circumstances", but that a court must assess each case on the merits of that particular case. At best, a court can apply the principles contained in the step-by-step approach to interpretation that were laid down in the *Malgas decision* in deciding on the presence or absence of "substantial and compelling circumstances" that would justify the imposition of a lesser sentence.

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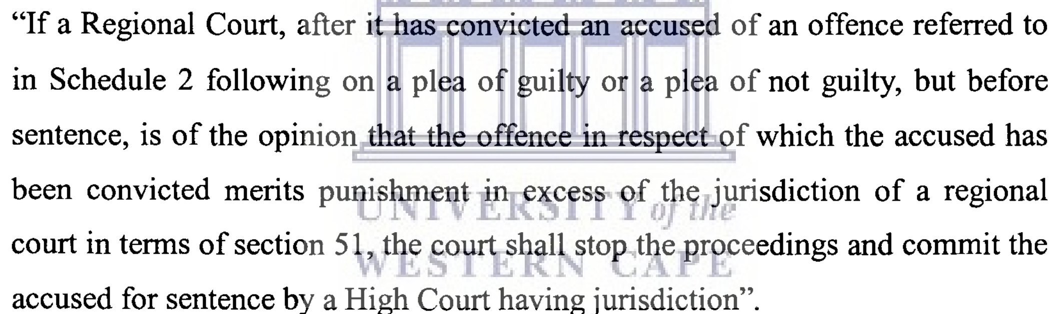
Chapter 4: Sentencing Jurisdiction

Concern has been raised with regard to offenders in the Regional Court who are accused of crimes for which the Criminal Law Amendment Act prescribes mandatory life imprisonment. Section 51(1) provides that:

> "Notwithstanding any other law, but subject to ss3 and 6, a High Court shall, if it has convicted a person of an offence referred to in Part I of Schedule 2, sentence the person to imprisonment for life".

Furthermore, section 52(1) states that:



> "If a Regional Court, after it has convicted an accused of an offence referred to in Schedule 2 following on a plea of guilty or a plea of not guilty, but before sentence, is of the opinion that the offence in respect of which the accused has been convicted merits punishment in excess of the jurisdiction of a regional court in terms of section 51, the court shall stop the proceedings and commit the accused for sentence by a High Court having jurisdiction".

Upon examining the wording of section 51(1) it becomes clear that an obligation is cast on a High Court, i.e. an obligation to impose a sentence of life imprisonment where an offender had been convicted of a Part I, Schedule 2 offence (such as murder and rape under aggravating conditions). This obligation belongs exclusively to a High Court, and not to any other court. The obligation is, however, qualified by the provisions of sub-section 51(3)(a) (the escape clause) which empowers a court to deviate from imposing the prescribed minimum sentence if substantial and compelling circumstances exist to justify such deviation. The provisions of this section have led to the emergence of a number of questions regarding its interpretation. These include:

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4.1 Is the Regional Court's jurisdiction ousted to try crimes for which a sentence in Part I of Schedule 2 must be imposed?

A Full Bench of the Transvaal Provincial Division[92], as well as a Full Bench of the Cape Provincial Division[93] concluded that the regional court's authority to try Part I, Schedule 2 offences (murder and rape) is not affected by the Act. In other words, the regional court has retained its jurisdiction to try offences referred to in Part I of Schedule 2 of the Act.

In the *Mdatjiece-decision*, the Full Bench came to the conclusion that there had been no implicit repeal of the jurisdiction of the regional courts to try cases of rape referred to in Part I of Schedule 2. In the case of *S v Mofokeng,* Stegmann J. supported this conclusion as the correct conclusion.[94]

This view was confirmed and adopted in the case of *S v Ibrahim* where the court, per Cleaver J found that the provisions of this section do not expressly exclude the jurisdiction of the Regional Court to try offences which are subject to the provisions of Part I of Schedule 2 to the Act. The judge further drew attention to the fact that the Regional Court's authority to try Part I, Schedule 2 offences is enshrined in section 89(2) of the Magistrates' Courts Act,[95] which provides that "The court of a Regional Division shall have jurisdiction over all offences, except treason".

In support of his conclusion, Cleaver J. referred to the wording of section 52(1) which provides that if an accused has been convicted, and before sentence the Regional Court is of the opinion that the offence in respect of which the accused has been convicted merits punishment in excess of the jurisdiction of the Regional Court, it shall stop the proceedings and commit the accused for sentence by a High Court. The judge argued that if interpreted in a holistic manner, instead of reading the provisions of section

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[92] *S v Mdatjiece* unreported (W) as quoted in *S v Mofokeng* 1999 (1) SACR 502(W) at 515.
[93] *S v Ibrahim* 1999 (1) SACR 106c.
[94] At 515, para b.
[95] Act 32 of 1944, as amended by section 17 of Act 107 of 1990.

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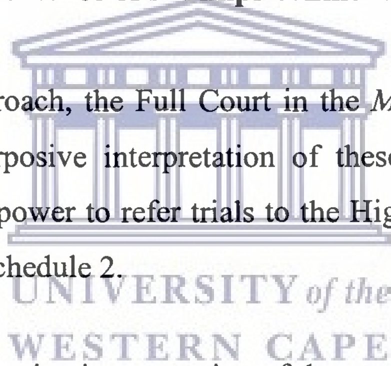
51(1) in isolation, the logical conclusion that can be arrived at is that the Act did not intend to take away the jurisdiction of the Regional Court to try cases falling within the ambit of this provision.

I respectfully agree with and support the views expressed by the Full Benches of the Transvaal and Cape Provincial Divisions.

4.2 Does section 52(1) implicitly require and empower the Regional Court, after convicting an accused of a Part I, Schedule 2 offence, to commit the accused for sentence by a High Court, and is a High Court in such circumstances empowered and required to impose a sentence of life imprisonment?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Favouring a purposive approach, the Full Court in the *Mdajietce-case*[96] held that "A strict as opposed to a purposive interpretation of these words would lead to the conclusion that there is no power to refer trials to the High Court for sentence if they are referred to in Part I of Schedule 2.

The court found that a purposive interpretation of the words 'is of the opinion that the offence in respect of which the accused has been convicted merits punishment in excess of the jurisdiction of a Regional Court in terms of section 51…' would give a cohesive meaning to what it referred to as an appalling worded section, in fit with the balance of the indications in section 52. Such a purposive interpretation would mean that the Regional Court may try and the High Court may sentence in respect of offences in Part I, Schedule 2. On that interpretation, section 52(1) authorises the referral of the proceedings to the High Court for sentence in the case of an offence contained in Part I of Schedule 2.

Further support for this view can be found in the judgment of the court in *S v Snyders*[97] where the court came to the conclusion that the clear intention of the Legislature was

[96] Op cit at 114b-h.
[97] 2000 (2) SACR 125 NC.

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to imprison those who rape women under the age of 16 years for life. In the opinion of the court, a person should not be allowed to escape this consequence solely because the Prosecutor chose to prosecute him in a Regional Court.

A dissenting view to this interpretation was expressed in the *Mofokeng-case*.[98] However, the judge in this case failed to provide any reasons for his dissenting view, which makes it impossible to gauge the argument upon which this dissent is based. The judge did however acknowledge the fact that he is bound by the principles of the law of precedent to give effect to the law as stated in the above-mentioned decision.

The dissenting view expressed in the *Mofokeng* case found support in the judgment of Smuts A.J. in *S v Budaza*[99]

4.3 Section 52: The split procedure

Upon closer examination of the wording of section 52(1), it becomes clear that the section introduces a two-stage procedure, i.e. stage one where the Regional Court tries a case and stage two where the High Court imposes the sentence.

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The question that arose in this regard is whether this procedure is fair and just in relation to the fair trial rights of the accused. Davis J. was very critical of this procedure in *S v Swartz*[100] where he opined that; "This court now finds itself in a position of a chained novelist. The first chapter has been written by another court and this court is now expected to complete the work on the basis of a framework determined by another author. It is a most unsatisfactory system. I well understand that in the lower courts this has occurred previously, but that does not militate against my conclusion. As a result of this chained novel system of criminal justice, which has been chosen by the Legislature, much of the evidence led in this court appeared to go more to conviction than to sentence in order to reduce the impact of the offence on which the accused had been convicted".

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[98] Op cit at 518a-b.
[99] Op cit at 500f-g.

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This concern was also expressed by Lewis AJ. in *S v Dzukuda; S v Tilly; S v Tshilo*[101] where she declared section 52 as inconsistent with an accused's right to a fair trial and therefore invalid on the following grounds:

- The two-stage procedure is a fragmented procedure where the High Court must impose the most severe sentence despite the fact that it has not tried the accused, is not steeped in the atmosphere of the trial and is faced with little other than the bare record of proceedings.
- In deciding whether substantial and compelling circumstances exist to justify a deviation from the prescribed minimum sentence (in terms of section 51(3)(a)) the High Court is required to exercise a sentencing discretion when it has not conducted the trial. In the opinion of the court, the unfairness entailed in this provision cannot be remedied by the court's power to hear evidence in terms of section 52(3)(d).
- The hearing of additional evidence by the High Court may in itself lead to unfairness in that the accused is subjected to examination and cross-examination twice.
- The process created by section 52 inevitably leads to unreasonable delay in the conclusion of the trial.

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The case was then referred to the Constitutional Court in terms of section 172(2)[102] of the Constitution for confirmation of the order of invalidity. The Constitutional Court,[103] per Ackermann J., declined to confirm the order of invalidity. In dealing with the split-procedure, the court held that the test was not whether the procedure was ideal, but whether it was fair. In the opinion of the court a deviation from the perfect did not by that reason alone result in the accused not being afforded a fair trial. Furthermore, the court found that the provision in question did not compel a court to infringe an accused's fair trial right. In fact, the High Court has a duty to ensure that the accused receives a fair trial

[100] Op cit at 383c-d.
[101] 2000 (2) SACR 51 W.
[102] Empowers the Supreme Court of Appeal, a High Court or a court of similar status to make an order concerning the Constitutional validity of an Act of Parliament. However, such order has no force unless the Constitutional Court confirms it.
[103] *S v Dzukuda; S v Tilly; S v Tshilo* 2000 (2) SACR 443 CC.

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and judges should thus construe the wording of section 52 in a manner consistent the fair trial rights of an accused.

Ackermann J. concluded that the High Court, per Lewis AJ, incorrectly assessed the High Court's sentencing function under section 52. In the opinion of the Court, the High Court enjoys original sentencing jurisdiction, which was designed to place the High Court in the same position as the trial court after it has convicted the accused. This sentencing jurisdiction is not comparable to that exercised by a Court on appeal.[104]

Moreover, the court held that the procedure provided for in section 52 does not prevent any factor which is relevant to the sentencing process, and which could have a mitigating effect on the punishment to be imposed, from being considered by the sentencing court. This provision thus allows an accused to place any factor relevant to his sentencing before the High Court, thereby giving expression to his fair trial right.

4.4 Amendments to the Criminal Law Amendment Act

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In order to address some of the difficulties associated with the appalling drafting of the Act and subsequent divergent interpretations of its provisions by the courts, the Act was amended in 2000 by the Judicial Matters Amendment Act.[105]

With regard to the jurisdiction of the courts, sections 33 and 34 of the Judicial Matters Amendment Act amended sections 51 and 52 of the Criminal Law Amendment Act respectively. The aim of the amendment to section 52 is to clarify the position where a Regional Court convicts an accused of an offence referred to in Part I of Schedule 2 of the Act, i.e., an offence for which section 51(1) prescribes the imposition of life imprisonment by a High Court upon conviction. The amendments now make it clear that if the Regional Court has convicted an accused of an offence referred to in Part I of Schedule 2, it *must* stop the proceedings and commit the accused for sentence by the High Court. The opinion

[104] At 458g.
[105] Act 62 of 2000.

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of the High Court as to the deserved punishment is no longer relevant if the offence falls within Part I.

4.5 Concluding remarks

I fully support the conclusion of the two Full Benches, i.e. that the provisions of the Act do not oust the jurisdiction of the Regional Court to try Part I, Schedule 2 offences. Although no reference is made to Regional Courts in section 51(1), section 52(1) empowers the Regional Court to refer a case to the appropriate High Court for sentencing.

On closer screening of section 52, it becomes quite evident that this section was specifically created to commit a Part I, Schedule 2 offence upon conviction in the Regional Court (which has no jurisdiction to impose a sentence of life imprisonment) to a High Court. In fact, the whole of section 52 would have little practical purpose if it were not intended specifically for this purpose.[106]

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Furthermore, it is common knowledge that the High Court rolls are already overburdened, which is caused by factors such as lengthy trials and more in-depth analysis of various issues. It could thus not have been the intention of the Legislature to add to this burden on the High Courts by appointing them as the sole adjudicator in cases of this nature. This view is also vindicated by the amendments effected to the Criminal Law Amendment Act to remedy certain difficulties as discussed in 4.4 above.

It is acknowledged that this procedure could result in practical difficulties. For example, a rape complainant may have to relive her experience in the High Court. However, it remains imperative that our courts apply a fair and just procedure in order to reach a fair and just outcome before they decide to impose the ultimate penalty (life imprisonment). Moreover, from the perspective of an accused, this could be seen as a way of further

[106] Terblanche S., *"Aspects of Minimum Sentence Legislation: judicial comment and the court's jurisdiction"*, SACJ (2001) 14 1.

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giving expression to the fair trial rights of the accused by ensuring that all outstanding issues are addressed.

To remedy the situation, I submit that, instead of interpreting the provisions of the Act as stripping the Regional Court of its powers to try offences referred to in Part I of Schedule 2, consideration should be given to reviewing the sentencing jurisdiction of Regional Courts upwards, which would enable a Regional Court to try such cases and impose the minimum sentence of life imprisonment.[107]

[107] See further recommendation 6.5 in Chapter 6 below.

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Chapter 5: the applicability of minimum sentence legislation to juvenile offenders

The Criminal Law Amendment Act creates exceptions with regard to the applicability of the minimum sentence rule provided for in section 51(1) and 51(2)(b) in relation to children.[108] They are:

1. Section 51(6) states that children, who are under the age of 16 at the time of committing the offence, may not be sentenced to life imprisonment.

2. Section 51(3)(b) places an obligation on a court who decides to impose a prescribed sentence on a child who is 16 years of age or older, but not yet 18 years old at the time of the commission of the offence, to enter the reason for its decision on the record of the proceedings.

The initial draft of the minimum sentence legislation[109] included offenders under the age of 18 years within its scope of application. Arguing that this piece of legislation is in direct conflict with the United Nations Convention, child law activists vigorously petitioned the portfolio committee on Justice. As a result of this petitioning, the Criminal Law Amendment Act was adopted. The final version of the Act excludes children under the age of 16 years from its scope of application. Furthermore, while children between the ages of 16 and 17 years old are included in the scope of application of the Act, they are afforded differential treatment with regard to sentencing.

5.1 The interpretation of section 51(3)(b)

The meaning of this section appears not to feature prominently in the courts' pronunciation on the minimum sentence legislation. The vexed question that arose is what the position of children who were between the ages of 16 and 18 years at the time of the

[108] Section 28(3) of the Constitution defines a child as a person under the age of 18 years.
[109] Criminal Law Amendment Bill, B46 of 1997.

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commission of the offence is in relation to this section. In *S v Mofokeng*[110] Stegmann J interpreted section 51(3)(b) as implying that, in respect of children age 16 and 17 at the time of the commission of the offence, "the court is not obliged to pronounce the minimum sentence imposed by Parliament, but is left free to sentence them in accordance with its own discretion, according to the ordinary criteria usually applicable to the determination of a fair sentence; except only that if the court should decide to pronounce the sentence imposed by Parliament (or presumably any more severe sentence), the reasons for doing so must be entered on the record".

The court held further that even though the comparative youthfulness of the prisoners would in the ordinary course of sentencing have weighed up as a substantial mitigating factor relevant to the assessment of a just sentence, this factor "substantial though they are, are matters that Parliament must have taken to have had in mind as everyday circumstances that would be found present in many or most of the crimes referred to in Part I of Schedule 2 to Act 105 of 1997".[111] In the opinion of the court, this factor cannot be thought of as compelling the conclusion that a sentence lesser than that prescribed by Parliament should be substituted for the prescribed sentence. On this basis, the court proceeded to impose a life sentence on the youthful prisoner.

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The decision in *S v Mofokeng* was supported by Goldstone J. in *S v Zitha*[112] where the court found the youthfulness of the accused as not constituting a circumstance which is compelling and substantial to justify the imposition of a lesser sentence. In the opinion of the court, the Legislature itself provided the answer that the minimum sentence Act is applicable to children of 16 years and older. The court went so far as to say that if it should consider the youthfulness of an accused as a factor to depart from the minimum sentence legislation, it would limit the effect of the legislation to an extent that the Legislature could not have intended.

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[110] Op cit at 520g-h.
[111] Ibid at 523I-j.
[112] Op cit at 418e-g.

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However, Labe J. expressed a contrary view in *S v N*[113]. In this case, the accused was 16 years old at the time of the commission of the offence. He committed murder, which conduct falls within Part I of Schedule 2 to the Act, i.e. murder committed by the accused in the execution or furtherance of an offence, *in casu* housebreaking and theft. Although the court found the accused liable to the minimum punishment prescribed by the Act, it considered the youthfulness of the accused as a very important factor that could not be ignored in deciding whether substantial and compelling circumstances exist justifying a lesser sentence. On the basis of, particularly the youthfulness of the accused, the court departed from the prescribed minimum sentence.

This contrary position found support in *S v Daniels.*[114] In this case, the accused', the majority of whom were youthful offenders, had been convicted on charges of murder, robbery and kidnapping. The State and the defence were *ad idem* that section 51(3)(b) found no application in relation to the accused between 16 and 18 years of age. The court, per Griesel J., approached the issue at hand on the basis of consent between the State and the defence, and concluded that section 51(3)((b) did not apply to child offenders between the ages of 16 and 18 years old.

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In a further unreported decision in *S v K,*[115] the court dealt with the applicability of the minimum sentence legislation where the accused was aged 16 years and 3 months, and convicted of a Schedule 2: Part IV offence. The court interpreted section 51(3)((b) as meaning that the court is not obliged, but has a discretion to impose a sentence prescribed in sub-sections (1) and (2) of section 51 of the Act.

Van Heerden J. took this issue to another level in *S v Blaauw.*[116] The accused in this case was an 18-year-old boy convicted of the rape of a 5-year old girl. It was common cause that section 51(1), read with section 51(3) and (6) of the Criminal Law Amendment Act was applicable, which could result in the imposition of a sentence of life imprisonment.

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[113] 2000 (1) SACR 209 WLD.
[114] Unreported decision of 7 May 2001 (case EC75/2001).
[115] Unreported decision of 27 January 2000 (case SS50/1999).
[116] Op cit at 2001 (2) SACR 255c.

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In considering whether the imposition of a sentence to life imprisonment would be appropriate, the learned judge Van Heerden concluded that the accused was at the time of the commission of the offence 18 years plus 6 weeks. This implies that the onus is on the accused to show the existence of "substantial and compelling circumstances" that would merit a deviation from the prescribed minimum sentence.

In interpreting section 51(3)(b) of the Criminal Law Amendment Act, which provides that if the court decides to impose a prescribed sentence upon a child aged 16 to 18 years, it shall enter the reasons for its decision on the record of proceedings, the judge referred to the writing of Ann Skelton[117] and the unpublished paper of Professor Sloth-Nielsen.[118] She supported their interpretation that the idea of minimum sentencing for children would go against the UN Convention on the Rights of the Child and the South African Constitution which both state that the detention of children should be a matter of last resort, and that minimum sentences for children would in fact make imprisonment a first resort.

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Thus, the court interpreted the wording of section 51(3)(b) to mean that the court is not obliged to impose the minimum sentence on children falling in this category, unless the State persuades the court that the circumstances justify such a sentence.[119] After giving due consideration to the impact of international instruments, the interests of the community and that of the accused, the court elected not to impose life imprisonment, but instead imposed 25 years imprisonment and recommended that the accused be placed, as soon as possible, in a psychiatric treatment and rehabilitation programme in the prison.

This question was finally settled in the case of *S v Nkosi.*[120] In this case, the appellant, who was 16 years old at the time of commission of the offence, was charged and convicted on 3 counts, namely murder and 2 counts of housebreaking with the intent to steal. He was acting pursuant to common purpose.

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[117] Juvenile Justice Reform: *Children's Rights and Responsibilities v Crime Control*, in Davel (ed) Children's Rights in a Transitional Society (1999) 88.
[118] The role of international law in juvenile justice reform in South Africa.
[119] Lund J., *"Sentencing"*, SACJ (2002) 14(3) at 431.

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In his judgement, Cachalia J held that a court is free to apply the usual sentencing criteria on deciding on an appropriate sentence for a child between 16 and 18 years old. In doing so, the court examined the Constitutional provisions relating to the sentencing of children. In particular, he referred to section 28(2) of the Constitution, which reinforces 'the child's best interest' as of paramount importance. In fact, he opined that the best interest of the child stretches far beyond the provisions of section 28, and is applicable to all matters involving the deprivation of a child's liberty, such as the determination of sentencing a child offender.

The court also interpreted the provisions of section 28(1)(g), which contains a presumption against institutionalisation and requires a detained child to be treated in a manner and kept in conditions that take account of the child's age, read with sections 12 (e)[121] and 35 of the Constitution, to mean that the right not to be detained must include the right not to be sentenced to a term of imprisonment as a form of punishment, except as a measure of last resort, and then only to the shortest possible period. According to the court, this interpretation supports the best interest principle.

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The learned judge concluded at page 142, paragraphs c to d, "It therefore must be accepted that despite the peculiar wording of section 51(3)(b), the Legislature intended children of between 16 and 18 years of age to be treated more leniently than those offenders who have turned 18, and are consequently deemed to be more mature".

On this basis, the court found youthfulness a compelling factor that would justify a deviation from a prescribed minimum sentence.

5.2 Concluding Remarks

I respectfully disagree with judge Van Heerden's interpretation of section 51(3)(b) as meaning that the state bears the onus of proving substantial and compelling circumstances that would justify the imposition of a minimum sentence by a court with regard to children

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[120] 2002 (1) SACR 135 WLD.
[121] Prohibits cruel and inhumane punishment.

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aged 16 to 18 years. Placing such an onus on the state is, in my opinion, problematic, as it appears to be in conflict with the intention of the lawmakers.

Given the backdrop against which this legislation was promulgated, (i.e. to address the public outcry against lenient sentences and curbing serious crimes in an attempt to restore people's faith in the justice system), the Legislature had clearly not intended to overload the State with the undue burden of proving the existence of factors that are substantial and compelling in nature to warrant a deviation from the prescribed minimum sentence. If this had been the intention of the Legislature, it would have been easy for them to include a provision to this effect in the Legislation. What was also striking about the judgment was the fact that the learned judge did not elaborate on the nature of the onus.

In my opinion, the requirement that reasons should be entered onto the record of proceedings where the minimum sentence is imposed on a juvenile offender merely serves as a safeguard to ensure that courts are extra cautious when imposing prescribed minimum sentences upon youth offenders in this category.

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The cases reviewed in this section illustrate that statutory developments, legislation and regulations are not the only means by which the principles and norms of international law can be used to shape legal developments in municipal law. Case law can also play a vital role in interpreting legislation, setting standards and laying down guidelines for those involved in the administration of justice.[122]

[122] Sloth-Nielsen J., *"Minimum Sentences for Juveniles Cut Down to Size"*, SALJ p432.

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Chapter 6: The district courts and minimum sentence legislation

6.1 Interpretation by the courts

Section 51(2) lays down the prescribed minimum sentences to be imposed by a Regional or High Court in particular circumstances. This sub-section imposes a duty that is similar to that contained in sub-section (1), in the sense that it requires a minimum term of imprisonment to be imposed for certain crimes under specific prescribed conditions. The details of the crimes are contained in Parts II to IV of Schedule 2. From the wording of the provision and its subsequent interpretation by the courts, the duty is not only conferred upon High Courts, but also on Regional Courts. The Legislation makes no reference to District Magistrates' Courts. The question that thus arises is whether the Minimum Sentence Legislation affects District Courts.

In *S v Khanjwayo; S v Mihlali*[123] the appellants were convicted in separate cases of dealing in dagga in contravention of section 5(b) of the Drugs and Drug Trafficking Act, 140 of 1992. The Regional Court Magistrate applied the provisions of section 51(2)(a) of the Criminal Law Amendment Act, and sentenced the appellants to 15 years imprisonment each. On appeal, the learned Judge Cillie dealt with the meaning of substantial and compelling circumstances and concluded that the 15 years imprisonment was out of proportion and substituted it with 6 years imprisonment. With regard to the fact that the Legislation contains no reference to the District Magistrates' Court, the learned judge failed to deal with this question. He at no stage mentioned that the Act contained no reference to District Magistrates' Courts, and the court passed no remarks in this regard. The learned judge clearly missed this fact in the appeal hearing.

In *S v McCoulagh*[124] the appellant was charged in a District Court with dealing in dagga in contravention of section 5(b) of the Drugs and Drug Trafficking Act. In passing sentence, the Magistrate invoked the provisions of section 51(2)(a) of the Criminal Law Amendment Act, which provides that "a Regional Court or a High Court shall" impose certain

[123] Op cit at 651.
[124] 2000 (1) SACR 542 WLD.

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minimum sentences in respect of the offences listed in Part II of Schedule 2 of that Act. One of the offences so listed was the offence of which the appellant had been convicted. The Magistrate, considering himself as obliged to apply the provisions of section 51 of the Minimum Legislation, stated[125] that "...die hof moet miskien net noem dat alhoewel in die Wetgewing as sulks, praat dit nie van die Distrikshof nie. Dit praat net van 'n Streekhof, Hoer Hof en is dit duidelik dat die Wetgewer nagelaat het om 'Distrikshof' ook in te sluit, maar dat dit inderdaad die bedoeling van die Regering was. Om dit enigsins anders te interpreteer, bedoel dat ek wat 'n distrikshof is, hoef nie die minimum vonnis op te lê nie, maar hoer howe, soos die Streekshof en die Hooggeregshof, word geforseer deur hierdie Wetgewing om dan die minimum vonnis op te lê. Dit is belaglik as so daarna gekyk word, en dan is dit ooglopend dat dit ook Distrikshof insluit".

On appeal, the High Court, per Shakenovsky AJ., *remarked* that "furthermore, in my view, it is also reasonably arguable that there is a reasonable prospect of success that the Magistrate erred in regarding himself as bound by the Act and being limited only to being able to reduce the sentence by reasons of the provisions of section 51(3) of the said Act, that is the exceptional circumstances approach referred to by Stegmann J. in the *Mofokeng* case. I therefore am of the view that an Appeal Court may hold (without my expressing any view thereon as this is the function of the court hearing the appeal and which I do not wish to preempt) that the Magistrate wrongly decided that he was bound, as a District Court, to apply the provisions of that Act".

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The question as to whether the provisions of the Minimum Sentence Legislation is applicable to the District Courts arose in the case of *S v Arias*[126] where the appellant was convicted in a Magistrates Court of contravening section 5(b) of the Drugs and Drug Trafficking Act. The District Magistrate concluded that, despite sitting as a District Magistrate and not as a Regional or High Court:

[125] At page 16.
[126] 2002 (1) SACR 518 W.

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- He was under an obligation to impose a minimum sentence of 15 years, unless substantial and compelling circumstances exist to justify a departure.
- It is absurd that a Regional Court or a High Court would be bound to impose a minimum sentence, whereas the District Court would be free to impose any sentence within its extended jurisdiction, even less than the prescribed sentence.
- The lawmakers intended to include the Magistrates' Courts within the categories listed in section 51(2) of the Minimum Sentence legislation.

It therefore concluded that the Magistrates' Courts are bound by the Act. However, in dismissing the Magistrate's arguments, the Appeal Court, per André Gautschi AJ., opined that the Magistrate misguided himself in adopting the approach which he followed. The learned judge agreed with the Magistrate about the absurdity of the legislation mentioned by the District Court. The learned judge also referred to another absurdity[127] that "the prosecuting authority enjoys the power (which even a High Court judge does not enjoy) to determine the likely sentence which will be imposed on any particular offender by choosing the court in which he is to be prosecuted. The learned judge said further "there is another absurdity which the learned Magistrate has not contemplated and which arises not out of the Criminal Law Amendment Act, but out of the Drugs Act, and that is that the District Court, which should try the more menial cases could be given jurisdiction up to 25 years imprisonment".

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However, the judge alluded to the fact that these absurdities could not justify the reading of words into section 51(2) of the Minimum Legislation in order to add Magistrates' Courts to the categories of courts listed therein...for to do so would be to legislate and not to interpret. In his judgment, he also referred to the case of *S v Sitole*[128] in which a full bench of the Orange Free State Provincial Division held that there is a *casus omissus* in the legislation which can only be corrected by the Legislature.

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[127] At page 520h.
[128] 2000 (2) SACR 402.

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The court further referred to the case of *R v Venter 1907 TS 915* where the court held that "the rule is that, where the language of a Statute is unambigious, and its meaning is clear, the court may only depart from such meaning 'if it leads to absurdities so glaring that it could never have been contemplated by the Legislature, or if it leads to a result contrary to the intention of Parliament, as shown by the context or by such other considerations as the court is justified in taking into account'". He further referred to the Appeal Court's decision in *R v Jacobson and Levy 1931 AD 466 at 480* where it was said "the function of a court of law is to construe the language of the Legislature and arrive at its intention in that way; it has no power to redraft or alter the language". Reference was also made to the sentiments expressed by Viscount Kilmuir LC in *Inland Revenue Commissioners v Hinchi 1960 AC at 762* "I am content to say that to add the necessary words would, in my opinion, be legislation and not construction".

The judge in the present case concluded that the court is not empowered to extend the meaning of section 51(2) of the Criminal Law Amendment Act by adding Magistrates' Court as the intention of the lawmakers was to exclude Magistrates Courts from hearing and imposing minimum sentences in serious cases such as those listed in the Schedule in question.

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6.2 Concluding remarks

In my view, the legislator should have been much more specific with regard to the applicability of minimum sentence legislation to District Courts. I acknowledge that the wording of section 51 is quite clear, in that it specifically mandates a High Court or Regional Court to impose minimum sentences, to the exclusion of District Courts. However, I submit that the prescribed minimum sentences in respect of offences contained in Part IV of Schedule 2 of the Criminal Law Amendment Act might create practical problems in terms of jurisdiction. Part IV of Schedule 2 encompasses all offences contained in Schedule 1 of the Criminal Procedure Act,[129] (other than those listed in Parts I to III of Schedule 2 of the Criminal Law Amendment Act) if the accused had a fire-arm with him or her at the time of the commission of an offence, and which was intended for

[129] Act 51 of 1977.

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use in the commission of such offence. The list of offences covered by Schedule 1 of the Criminal Procedure Act is fairly wide, and includes any offence that would warrant a period of imprisonment of more than six months, without the option of a fine. In *Areff v Minister van Polisie*[130] the court held this category of offences to refer solely to statutory offences. An example of such a statutory offence would be discharging a firearm in a public place in contravention of section 39(1)(n) of the Arms and Ammunition Act of 1969.[131] This offence, which is currently punishable by a fine or 12 months' imprisonment, is now subject to a minimum sentence of 5 years for a first offender, as a firearm must be used to commit the offence and the accused must have had it on him or her. Similarly, the statutory offence of pointing a firearm would be punishable by the prescribed minimum sentence. In fact, the courts will have to be on the lookout for other offences listed under Schedule 1 of the Criminal Procedure Act where the accused has a firearm with him or her with the intention of using it in the commission of an offence. These include offences such as malicious damage to property, attempted murder, attempted rape, or assault where a dangerous wound is inflicted.

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The problem lies in the fact that these offences are normally heard by the District Courts. However, with the District Courts not having jurisdiction to impose the prescribed minimum sentences, they will have to refer cases to the Regional Court for sentencing if they are of the opinion that the sentences warranted are in excess of their jurisdiction. The same problem arises as with the referral of cases for sentencing by the Regional Court to the High Court, in that the Regional Court is not sensitised to the issues of a particular case, but has to impose sentence at the end of the day. Furthermore, this situation exacerbates the problem of overloaded court rolls at Regional Court level, and the process of referral can become cumbersome.

I therefore suggest that the legislator considers tightening up the provisions of the minimum sentence legislation, by either providing limited jurisdiction to District Courts to

[130] 1977 (2) SA 900 (A).
[131] Act 75 of 1969.

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impose sentences in cases such as those discussed above, or by revising the wording of Part IV of Schedule 2 of the Criminal Law Amendment Act.

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Chapter 7: Recommendations

7.1 Improved Drafting of Legislation

One of the main criticisms that has been leveled against the legislation is the poor manner in which it was drafted. This resulted in various divergent interpretations of the Act, which necessitated further amendments to the Act, which could have been prevented if the lawmakers had from the outset provided a clear and simple legislative framework. Considering all the stages of potential quality control that legislation is subjected to before it is finally passed by Parliament (i.e. certification by State law Advisors as well as Parliamentary Law Advisors, and committee stage) it is quite amazing that such a weakly drafted piece of legislation could have reached the Statute books.

The achievement of sentence uniformity and proportionality depends on relatively clear and unambiguous policies and legislation. It is thus recommended that Parliament, in enacting legislation that has such far reaching implications for the rights of the accused and the interests of victims, should endeavour to carefully and meticulously undertake the drafting process. This would inevitably require the active and in-depth participation of experts in the field such as trained lawyers and academia in the writing process.

7.2 Publicity

One of the mechanisms that could be employed to encourage compliance with the authoritative guidelines set out in the *Malgas-decision* and adopted in the Dodo-decision is publicity. The names and court of the judges and regional court magistrates who departed most frequently from these guidelines could be diarised and circulated within the judiciary.

The social pressure that would be exerted through such a measure could be seen as a way of encouraging adherence to the authoritative guidelines. This is not a new phenomenon in South Africa, as certain judges were in the past labeled as 1) hanging judges and 2) enlightened judges. The names falling within either of these categories were circulated in

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the corridors of the courts and published in journal articles by legal writers. Furthermore, in the corridors of courts certain magistrates are labeled as "straf landdroste" and "uitstel landdroste". Many of them are aware of this labeling practice, but I am not aware of any opposition expressed to such "publicity".

Since sentencing officers are also mandated to represent the interests of society, I fail to see what possible fear or objection they could have against such publication. This could also address the problem experienced in the imposition of the minimum sentence legislation resulting from sentencing officers' personal aversion (this problem was specifically raised by the Supreme Court of Appeal in the Malgas-decision) to the legislation.

Enforcing this practice should not pose any practical difficulties. In this regard, I would recommend that this information be captured at basic level. For example, at present magistrates are required to submit monthly statistics with regard to the amount of court hours, convictions, acquittals, etc. To this end, a pro-forma form has been developed in which this information must be captured and forwarded to the relevant Regional Court President . It is recommended that this pro-forma form simply be expanded to include an additional column (e.g. "Departure Clause") in which a Regional Court Magistrate would indicate cases in which he or she had deviated from the prescribed minimum sentence and a brief summary of the reasons therefor. The same procedure could be made applicable to judges and prosecutors.

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7.3 Establishing a Sentencing Council

In its Empirical Study of the Sentencing Practices of South Africa,[132] the South African Law Commission recommended the establishment of a Sentencing Council which would, inter alia, collect and publish comprehensive sentencing data on an annual basis. It is recommended that priority be given to the establishment of the Sentencing Council, as this would assist in uniformity in the sentencing process. It would also assist with the

[132] Research Paper 17, Project 82.

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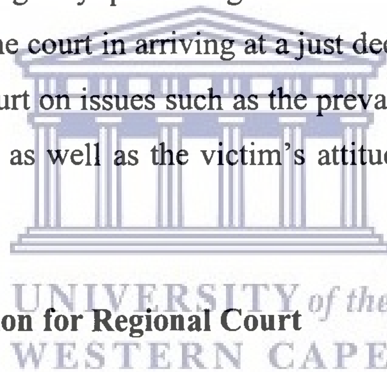
enforcement of the recommendation on publishing contained in section 6.2. in that the Regional Court President would be required to forward the mentioned statistics to the Sentencing Council to be captured on its database.

7.4 Active participation by Prosecutors

A common phenomenon that prevails amongst prosecutors is that they are less active in the proceedings when it comes to the sentencing stage. The phrase "ek laat dit maar in die hande van die hof" is often voiced in court at this stage. It is recommended that an obligation be written into the Act which would compel prosecutors to actively participate in the proceedings at this stage by presenting the court with as much as possible information that would assist the court in arriving at a just decision. The prosecutor should be compelled to address the court on issues such as the prevalence of the offence; harm or suffering caused to the victim; as well as the victim's attitude towards the imposition of the minimum sentence.



7.5. Increased penal jurisdiction for Regional Court

In its present form, the Criminal Law Amendment Act provides the Regional Court with a maximum penal jurisdiction of 15 years for first offender convicted of murder. However, in many cases, the nature of the crime warrants a much stricter penalty, which the Regional Court would not have jurisdiction to impose on murder first offender.

It is recommended that the penal jurisdiction of the Regional Court in dealing with minimum sentence legislation be reviewed upward.

This would also be to the advantage of the High Courts, as increasing the penal jurisdiction of the Regional Court could reduce the number of cases referred to the High Court for sentencing of those crimes that do not appear in Part I of Schedule 2.

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8. Conclusion

It is quite evident that a state has been reached where criminals, especially violent criminals, threaten the basic foundation of our society. This is precisely why a responsible and firm sentencing framework is required to deal effectively with violent crimes.

It is my view that the Criminal Law Amendment Act (minimum sentence legislation) provides an ideal solution to deal effectively with this problem. The legislation does not preclude the sentencing officer from carefully and meticulously balancing the interests of the accused and society as a whole. In fact, the sentencing officer is called upon to harmonise the theories which call for application and pronounce a sentence from which both the accused and the community derive the greatest benefit.

It further appears that this piece of legislation is slowly but surely fulfilling its intention of causing parity and certainty in the sentencing process. As the sentencing officers are acquainting themselves with the intention of the Act, their personal aversion against the efficacy of the Act is slowly easing down. A review of the Criminal Law Reports reveals that the radical criticism leveled against the Act during its infant stages appears to be evaporating and is being substituted with a more constructive interpretation.

Current progress in this regard, coupled with the recommendations for improvement in chapter 6, should ensure smooth implementation of the Act in due course. I therefore submit that the application of the Act should be made permanent.

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