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"About The Constitutionality of Mandatory Minimum Sentences"

Dissertation submitted in partial fulfilment of the requirements of the Master Degree at the University of Cape Town

Supervisor

Prof Dirk van Zyl Smit,
Dean at the Faculty of Law
of the University of Cape Town

from

Anna Oppert
Student number: oppann002
Degree: Master of Law (LL.M.)
University of Cape Town, Faculty of Law
1995

University of Cape Town

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"Injustice is done at once if there is one lash too many, or one dollar or one cent, one week in prison, or one day, too many or too few."[1]

1) Introduction

As difficult as the task of reaching a reliable verdict may be, the second half of a criminal court's procedure, that of imposing sentences on those who have been found guilty or who have themselves admitted their guilt[2] raises even more fundamental questions. What are we trying to do, what is the object of this exercise?[3]

Traditionally there have been four approaches to the sentencing of an offender which correspond to the four "objects" or "purposes" of sentencing, namely retribution, rehabilitation, deterrence or incapacitation, i.e. the offender should be punished for the crime; the offender should be punished to be given the opportunity to return "onto the right track"; the offender (individual deterrence) or others (general deterrence)[4] should be deterred from

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[1] F. Hegel in: Philosophie des Rechts (1854), translated by T.M.Knox as "Philosophy of Right (1942), Oxford, Oxford University Press.

[2] In modern societies the proof of criminal wrongdoing is a matter of empirical evidence. There is, however, an important split concerning the best method to be used. Some countries, for instance the United States of America, whose laws are based on the Anglo-Saxon legal tradition, place faith in a system of adversaries, which assigns the task of discovering the truth to two opposing lawyers who elicit the facts in the case favourable to their side and present them to an imparial judge or jury. The judge or jury consequently play a relatively passive role in the fact-finding process. Other societies, which derive their legal system from the Roman law are based on the inqisitorial system. Here the judge takes a far more active part and does most of the questioning. (See: Gresham M. Sykes: Criminology, New York, 1978, p.406 - 407.).

[3] See: B. Wootton: Crime and Penal Policy, London, 1978, p.35.

[4] Deterrence is one possible way that punishment may prevent crimes. Although deterrence theories differ, all of them include assertions about crime rates. Deterrence is usually defined as the preventetive effect which actual or threatened punishment of offenders, has upon potential offenders. (Ball as cited in: "Deterrence, Types of Deterrence, and Crime Rates", in: Crime, Punishment and Deterrence by Jack P. Gibbs.)

committing similar crimes in the future; and, finally, the offender should be incapacitated, i.e. be prevented from repeating crimes.

Now that the four leading aims of sentencing have been exposed, it is time to translate these aims into a practical sentencing policy: The basic problem hereto is the determination of the appropriate form and extent of punishment: How should sentencing be organised, and who should determine sentencing policy?

Even if one may find the "correct" approach[5] towards sentencing, unfortunately none of them reveals what kind and length of punishment is appropriate and thereby permissible in a specific case: this decision apparently belongs to the realms of mystery. Much has been said to justify the institution of sentences, little attention has been paid to these questions. They are, however, -most notably in cases where a convicted person shall be sent to prison- of immense importance since they concern the most basic right of citizen, namely the right to liberty.

In several jurisdictions[6] these decisions fell into the scope of the judiciary. For most of the twentieth century the English and American System have been characterised by wide judicial discretion. In general, sentencing was regarded as the responsibility of the judge. Indeed, nowhere else in legal proceedings was the power of a judge more evident.[7] In opposition to most of the Western countries where grossly excessive sentences were subject to routine review and correction, the great majority of jurisdictions of the United States vested sentencing power solely within the discretion of the trial judge. Appellate review was here only available to correct sentences which did not conform to the statutory

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[5] The correct approach is -in my view- the theory of retribution. The theory of retribution has a long history, including the writings of Kant andHegel. According to this theory the punishment must "fit" the crime. The seriousness of crimes should be chief determinant of the quantum of punishment. Retributivists envisage two ladder-like scales whose rungs correspond. The one ladder differentiates offences according to their seriousness; on the other ladder each rung differentiates the severity of penalties from its neighbours. Still, even those scales cannot determine the appropriate sentence for a specific offence, as N. Walker puts it: "One awkwardness is that the degree of difference between rung X and Rung Y cannot be assumed to be exactly the same as that between rung Y and rung Z . The same is true for the other ladder: A sentence of nine-month imprisonment is certainly more severe than a three-month one, but are the differences equal? There are certainly cases in which a short sentence does not lose a man his job when a longer sentence would." (See: N.Walker in: Why punish?, Oxford University Press 1991, p. 101.

[6] See for instance the English and the United States´ s jurisdiction in the beginning of the twentieth century as descibed by A.v.Hirsch and A.Ashworth in: Sentencing Principles, Boston 1992.

[7] See: Gresham M. Sykes: Criminology, p. 438.

limits which attempt to reduce the judge's discretion.[8] Many of these statutory provisions, however, were flouted in practice. Judges refused to displace their own judgement with what they considered to be pointless rigidity or to be unduly harsh. In fact, there was evidence of nonenforcement of mandatory sentencing provisions. Convictions for crimes carrying severe mandatory sentences were rare and "where prosecutors have sought the imposition of long mandatory sentences, the courts often have refused to enforce the statutes or have narrowed their application."[9] In this way judges frequently managed to retain their desired discretion and to ignore the efforts of the legislature to prescribe appropriate punishment by law. Also in other countries world-wide it was common for the legislature to provide for maximum sentences and then to leave the courts freedom of sentencing within the wide ranges. Sentencing was consequently regarded as being "the province of the judiciary"[10].

Since about two decades ago, sentencing policy seems to have changed: Much concern has been expressed about "Lawlessness in Sentencing" and "Disparity of Sentences". Several studies were brought up indicating that sentences imposed by different judges were inconsistent.[11] And consistency is certainly one of the main criteria by which the public assesses the fairness of sentences. Inconsistencies are associated with injustice and easily to be attacked by the media and the public in general.[12] The principle of legal certainty, i.e. that the individual offender should know where he stands, was feared to be endangered. It became evident that a judge's use of discretion in sentencing was shaped by his personal philosophy of punishment and his individual conception of particular kinds of crimes and

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[8] Statutory provisions compel a certain type of sentence in four majour ways: First, the law may state that a person convicted of a specific crime must be imprisoned for a certain time. Second, the law may call for a minimum or maximum period spent in prison for the commission of particular crimes. Third, the law may require that a person who has been convicted repeatedly of crimes must be punished more severely than for the present crime, (i.e. statutes may double the penalty for the second conviction and tripple it for the third. Some states even require life imprisonment for offenders convicted of two or more felonies.) And fourth, the law may call for consecutive rather than concurrent sentences in cases where a person is convicted of several offences at one trial.

[9] The President´s Commission on Law Enforcement and Administration of Justice: "The Task Force Report: The Courts", p. 16, as cited in: Gresham M. Sykes: Criminology, p. 440.

[10] That is was Lord Halsbury stated in : Radzinowicz and Hood, 1986, at 754. (Cited in : A. Ashworth, p. 39).

[11] See: Peter W. Louw: "Inconsistencies Within the Sentencing Strucure", in: Leon Radzinowicz and Marvin E. Wolfgang: The Criminal in the Arms of the Law, New York, 1971, pp. 525 - 29.

[12] N. Walker: Why punish?, Oxford University Press 1991, p. 104.

criminals.[13] Even if disparities in sentencing do not necessarily mean that judges are guided by irrelevant considerations, the call for a limitation of judicial discretion became stronger and stronger.

On the basis of this development, the English Criminal Justice Act of 1991 focuses on the structuring of judicial discretion. Severe guidelines (including mandatory and minimum sentences) were introduced in the United States. In notable opposition to this development, however, is the recent approach of Canadian Law Reform Commission which held that "Sentencing is the judicial determination of a legal sanction to be imposed on a person found guilty of an offence"[14]. It thereby highlighted what is regarded as the most important element of sentencing: judicial determination, the decision by a judge as to what the criminal justice system should do to a person found guilty of an offence.

Should not the judges choose the appropriate penalty? Isn't discretion given to the judge because two cases are never alike and because sentencing cannot be reduced to a formula that obviates the need for individualised evaluations?[15] Isn't consistently placing *x* type of criminal in prison for five years and *y* type for ten years even less consistent with the essentials of justice than an individual evaluation of the responsible judge?[16]

Or should the appropriate punishment be fixed by law and should the judge simply apply the law? Should there merely an option, within legal restrictions, be left for a judge? Is a limited discretion within the legal framework sufficient to impose appropriate sentences for criminals? Does the judiciary assume a power which the principle of the independence of the judiciary does not provide for? Or is Parliament, i.e. the legislature, infringing the principle of judicial independence when it passes detailed legislation such as minimum sentences on specifically defined crimes?

In other words: Is the imposition of sentences part of a judge's "province" or is the judicial function limited by finding the facts and applying the relevant law?

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[13] In the United States of America is was found that among ten judges sitting in the same court over a twenty- month period , one judge handed out imprisonment in 35 percent of the cases, while another judge imposed imprisonment twicw that rate. (See: Task Force Report: The Courts, p.16).

[14] See: " , p. 115.

[15] See: Gresham M. Sykes: Criminology, p. 441.

[16] See: " , p. 441.

In South Africa there has been talk about the introduction of a minimum mandatory sentence for the commission of murder. If one looks at the international situation concerning this issue it is not surprising that shortly after the official abolition of the death penalty by the first decision of the new South African Constitutional Court in May 1995 such a discussion came up. Different countries world-wide have been confronted with a general debate on this issue after they had abolished the death penalty. Life imprisonment is, in fact, the most common alternative punishment to capital punishment obviously the next most severe form of punishment and considered as being a "lenient alternative" to the harsher death sentence for serious crimes. In England and Germany the mandatory sentence of life imprisonment has been the successor for the death penalty and also Eastern European Countries turned into this direction. When the death penalty was abolished in the former Czechoslovakia on 1 July 1990, it was replaced by life imprisonment.[17] Wherever life imprisonment has replaced the sentence of the death penalty, legislation often provides for a mandatory sentence of life imprisonment.

A mandatory sentence of life imprisonment, however, raises similar constitutional issues as the imposition of the capital punishment does. In fact, the mandatory life sentence often violates both of the main criteria of capital punishment: It is mandatory at the trial stage, and then, in the posttrial stage, its duration is often totally arbitrary.[18]A Constitutional Court that declares the death penalty unconstitutional may logically not declare the sentence of life imprisonment constitutional.

The advantages of mandatory minimum sentences are not clear. A common backdrop of their imposition by the legislature is the belief that the legislative pronouncement of a minimum sentence for certain crimes will result in a deterrent effect.

But: Does a mandatory minimum sentence not deprive judges of the opportunity to hear evidence which may lead to mitigation at the sentencing stage? Does not every accused have the right that his matter is tried by an independent court to be in accordance with an essential of justice? And does not every "individualised criminal" need the "safeguard of the Courts" as much as in the assessment of punishment for crimes which carry a minimum sentence as for any other defined crime?

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[17] See: United Nations office at Vienna, Crime Prevention and Criminal Justice Branch: Life Imprisonment, Vienna, 1994, p.1

[18] See: L. S. Sheleff: p.118.

The limitation of judicial discretion -be it through mandatory minimum sentences in general and specifically the imposition of the mandatory sentence of life imprisonment or through the enactment of sentencing guidelines- raises numerous constitutional questions with regard to the principle of judicial independence and the doctrine of the separation of powers. Prescribed sentences further conflict with the principle of proportionality (whether deduced from the prohibition of cruel and unusual punishment[19] or seen as an immediate expression of a Rechtsstaat[20]),

The following paper gives an overview on previous and recent discussion on these issues in different countries.

2) Do mandatory minimum sentences violate the doctrine of the separation of powers between the legislative and judicial branch and the principle of an independent judiciary?

a) About the doctrine of the separation of power

"Freedom cannot exist when the people who make the laws also have the right to apply or enforce laws."[21]

Citizens´ lives together must be regulated, public security and peace within the society as well as a peaceful relationship to other states must be guaranteed. This is what Hobbes claimed in his work "Leviathan".[22] Even if his point of view on human society may be far to negative, one has to agree on his basic thought: Human beings need legal leadership in order to live freely and peacefully.

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[19] According to the American jurisdiction punishment is "cruel and unusual" whenever one of the following five faults is in question: One may argue that punishment is "cruel and usual" because of
- the circumstances surrounding its administration
- the mode of its infliction
- the crime for which it is imposed
- the criminal upon whom it is inflicted or because of
- its inherent nature (See: Hugo Adam Bedau: The Courts, The Constitution and Capital Punishment, Toronto, 1977, p.33.)

[20] To which South Africa commited itself in the Preamble of the interim Constitution of 1993.

[21] See: John Locke in : D. Basson, South African Constitutional Law, 1988, p.23.

[22] In another work he claims that "To understand political power right, and derive it from its original, we must consider what state all men are naturally in, and that is a state of perfect freedom to order their actions and dispose of their possesssion, as they think fit, within the bounds of law...that all men may be restrained from invading others´rights, and from doing hurt to one another..." (John Locke: "Of Civil Government", Chapter II, § 4, 1689, in: Thomas Vormbaum: Texte zur Strafrechtstheorie der Neuzeit, Band I, Baden Baden 1993, p. 81.).

The doctrine of the separation of power is not a dogma of natural right but rather a historic achievement. The theories of the separation of power as established by John Locke and Montesquieu (who believed in an everlasting validity of this principle as an immediate expression of the law of nature) have little in common with today's perception of this very principle. They were rather historic consequences of a certain political situation when political powers tried to reassure and to retain political stability and freedom.

For a proper understanding of the doctrine of the separation of power one needs to abstract from these historic theories. The separation of power is no longer regarded as a later democratic process. The doctrine of the separation of power is a basic organisatorial principle as well as an essential element of a free democratic society. The objective of this doctrine -as perceived at present- is rather positive a human order which results in the constitution of these different branches and which determines and restricts their competencies.

At present the doctrine of the separation of powers is taken for granted as being one of the leading principles of a constitutional order. According to the principle of democracy the reigning power must be carried out by the people. This power, however, shall be divided into three different branches: the legislative, the executive and the judiciary. Different functions within this order must generally be performed by different organs. The structure of Parliament is certainly unsuitable to perform administrative functions; administrative authorities, which are subject to directives, are certainly unable to decide legal conflicts properly; Courts are certainly unable to realise democratic legislation.

The backdrop to this principle is the desire to divide power within a democratic state and thereby to mediate the power of Government which is a necessary requirement to guarantee the freedom of citizen.[23]

The meaning and implications of this principle are seen in the distinction between the competencies of the legislature, the executive and the judiciary, in the allocation of these functions and in the prohibition to perform "jobs" that are allocated to a different branch: the so-called vertical separation of the three governing powers.

The principle of the separation of power, however, also implies the mutual control and restraint amongst the three branches: the so-called balance of the three governing powers.

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[23] A regularily statement of the German Constitutional Court in: BVerfGE 5,85 (199); 9, 268 (279); 22,106 (111); 30, 1 (27f.); 34, 52 (59).

Separation of power has therefore not an exclusive character; it does not imply a final allocation of specific functions: a proper fulfilment of functions does not allow the drawing of strict borderlines. Still, the function of an organ is closely connected to its structure. As a result it must generally be prohibited to perform not corresponding functions of a different branch. The principle of the balance and control of the three branches is consequently very limited. The judiciary, for instance, has apparently a certain power over the legislature and the executive. An effective restriction of the other branches, however, is limited tightly since the judiciary does not perform realistic political power.

Is Sentencing located within the judicial or legislative function?

"There is no liberty, if the power of judging be not separated from the legislative and executive powers", warned Montsquieu[24]. This conception of the judicial function, however, was drawn with regard to the finding of facts and the application of the law. He obviously did not consider a judge's decision concerning the proper sentence for an offence as being a part of the judicial function. In another part in "de L´esprit des lois" he says that "...juries decide whether the accused is guilty or not ... and, if he is declared guilty the judge pronounces the punishment that the law inflicts for that act...". He does not deny the binding nature of laws -which determine the sentence to be imposed for a particular crime- to the judiciary. The power of the judiciary, in his view, ceases with the announcement of law as legislated by the Parliament.

When it comes to the decision on the proper sentence, the classic formulation of the separation of powers does not assist.

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[24] See: Montesquieu in: "De L´esprit des Lois", (translated by Nugent in 1949), Book 11, Chapter 6.

b) About Judicial independence

Lawsuits are necessarily carried out by a third party. To find a just solution, this party must obviously be objective, i.e. independent and impartial. The principle of judicial independence has often been invoked; it has been emphasised proudly in England and also in Germany.[25] To satisfy the criteria of a free democratic constitutional state judgements must be free of partiality and undue political influence. There is, however, no settled definition of this principle and no general agreement on its ambit.[26] It is usually considered to express discretion in the hands of a decision making judge.

Discussions on judicial independence have risen in the belief that in some countries judges are controlled too tightly by the Government and political pressure. In Eastern European countries, for instance, the establishment of an independent judiciary is considered to be a step forward towards progress, since judges in these countries have been political appointees who were expected to follow approved paths.[27] The decisions of the former courts in the German Democratic Republic, for example, were completely dependent on governmental guidelines.

Talk about judicial independence is usually associated with a judge's independence from pressures of various kinds: a judge should be without influence to decide in one way or another on a case, he should impose a sentence without fear or favour, affection or will. What we do not have in mind immediately is the judge's independence from the legislative and the executive branches. To what extent are judges allowed to perform their function independently from the legislative and the executive, which functions belong exclusively to the judiciary, i.e. what kind of activities are to be characterised as "judicial"?

An independent judiciary is a compelling requirement for effective legal security. If the judiciary was completely dependent on instructions of the executive the danger that an accused or suing organ of the executive branch couls follow its ideas through a judge almost being a front man. But even if the principle of the separation of powers provides for an independent judiciary, this cannot include a complete independence from the legislature. A judge - just as any other member of a society- must obey the law.

Judges may, however, still decide independently within the legislative framework. Unfortunately, a Criminal judge's work

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[25] See for instance BVerfGE 2, 307 (320).

[26] See: A.Ashworth: Sentencing and Criminal Justice, London, 1992, p. 38. (In the following cited as A.Ashworth).

[27] See: A.Ashworth, p. 39.

is not done by finding facts and applying rules. With the completion of the trial and the announcement of the verdict his "job" is still far from being done. What remains is the second half of a criminal procedure: the imposition of a sentence. It is here where a tension between legislative and judicial power arises: Is the judge merely authorised to impose the sentence or is he further allowed to determine the sentence he reckons to be appropriate? Is his duty and right merely to judge on the question of guilt or innocence or further to judge on the question of how a convicted person should be punished? Is the legislative not only allowed to define a specific conduct as a criminal act but also responsible to determine the form and extent of punishment for a specific offence?

aa) The South African Experience

The most notable form of a minimum sentence in South Africa was the death penalty. According to Section 227 of the Criminal procedure Act 51 of 1977 this sentence was compulsory for the commission of a murder in a case where no extenuating circumstances could be found. Fortunately, this mandatory minimum sentence was abolished in May 1995.[28][29]

In the 1970s, a mandatory minimum sentence was prescribed for possession of marijuana (the Abuse of Dependence-Producing Substances and Rehabilitation Centre's Act 41 of 1971). The result of that provision was that magistrates and judges resorted to legal contortions to avoid the imposition of this compulsory sentence in cases where the circumstances did not seem to warrant it[30] until the minimum sentence relating to marijuana was finally abolished in 1978. In 1984 the Act was further amended to remove the obligation on the Court to impose imprisonment in respect of certain offences. In this way the court was given back the possibility to choose an appropriate penalty freely, whether imprisonment, a fine or both.

In 1976 the Viljoen Commission of Inquiry into the Penal System of South Africa stated that "the creation of minimum sentences is an unwarranted and futile interference with the discretion of judicial officers", and "a practice which is inconsistent with the penal policy".[31]

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[28] See: S v MAKWANYANE AND ANOTHER, 1995 (3) SA 391 (CC) (death penalty).

[29] Unfortunately to the disagreement of the majority of South Africa´s citizens!

[30] See: D. Hubbard, p. 231.

[31] See: Commission report 5.1.4.26, as quoted in D.P.van der Merve in: Sentencing, 1991, at 4-48 and 5-8.

However, even if they were perceived as being an unjustified interference with the independence of the judiciary, there are still minimum sentences in force at the present time. According to Section 22, Criminal Law Second Amendment Act 126 of 1992, a convicted offender of illegal possession of a firearm which was used in the commission of another offence shall be punished with imprisonment from five to twenty-five years, i.e. with at least five years. Sections 27(1)(c), 27(1a) and 28(1) of the Explosives Act 26 of 1956 provides for a mandatory sentence of three to fifteen years for different offences in relation to the possession and use of explosives and for offences in connection with bomb threats.

In addition, Section 283[32] (Discretion of court as to punishment) and Section 297[33] provide for the possibility of the legislature to enact mandatory minimum sentences for other crimes.

bb) The Namibian Experience

Article 78(2) of the Namibian Constitution guarantees the independence of the judiciary, which shall only be subjected to the Constitution and the law.[34] The principle of the separation of powers under the Namibian Constitution is similar to that in the United States[35], where -as will be shown- minimum sentences have been found neither to be an illegitimate violation of the doctrine of the separation of powers nor to constitute an unacceptable interference with the independence of the judiciary.

In Namibia there are several minimum sentences in force: Section 14(1)(b) of the Stock Theft Act 12 of 1990, for instance, provides for a mandatory minimum sentence of three years in any cases of second or subsequent conviction for any offence in relation to the crime of stock theft, (such as attempted stock theft, receipt of stolen stock, disposing of stolen stock e.t.c.). Section 14 (2) of the Sock Theft Act

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[32] Section 283 of the Criminal Procedure Act 51 of 1977 says: " (1) A person liable to a sentence of imprisonment for life or for any period, may be sentenced to imprisonment for any shorter period, and a person liable to a sentence of a fine of any amount may be sentenced to a fine of any lesser amount. (2) The provision of subsection 1 shall not apply with reference to **any offence for which a minimum penalty is prescribed in the law creating the offence or prescribing a penalty therefore."**

[33] Section 297(4) provides for the right of courts to suspend portions of minimum sentences prescribed by law for a period of up to five years on any of a number of prescribed conditions.

[34] Very similar to this provision is Art.97 I of the German Basic Law, which states that:"Die Richter sind unabhängig und nur dem Gesetze unterworfen"

[35] See: D. Hubbard, p.250.

12 of 1990 explicitly states that this minimum sentence may not be suspended in terms of Section 297(4) of the Criminal Procedure Act 1977[36], which is valid in Namibia as well as in South Africa. The above mentioned sections 27(1)(c), 27(1A) and 28(1) of the Explosives Act of 1956 is also in force in Namibia.

There is now talk about the introduction of a minimum sentence for the commission of the crime of rape, as there is a public sentiment that the number of reported rapes has been steadily increasing[37] as a result of too lenient punishment.

The Legal Assistance Centre recommended to the Law Reform and Development Commission the enactment of a minimum sentence for rape. It was suggested to be set in the range of five to seven years, a period which was considered to retain a large degree of judicial discretion.[38] It was further recommended to empower the courts to define a different period of imprisonment in case of any mitigating factors, which a court may define freely. In this way, it is said[39], courts were free and independent enough to exercise wide discretion to impose sentences and furthermore a strong message about the seriousness of rape would be stressed. It is easy to agree on this point of view. However, such a provision is, in my view, no longer a mandatory minimum sentence but simply serves as a not compulsory guideline to judges.

The Law Society of Namibia[40], however, opposed the imposition of a mandatory minimum sentence on the ground that it would restrict the discretion of the judiciary to an extent that is contrary to the Namibian Constitution. It will be interesting to see how the Namibian Parliament will confront these questions.

cc) The Zimbabwean Experience

The Supreme Court in Zimbabwe held that legislature does not act impermissible if it removes some of the elements of the court's discretion: "It must be accepted that Parliament has power to fetter in some cases the discretion of the

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[36] except for juvenile offenders under the age of 18.

[37] In 1988 there were 352 reported rapes in Namibia, in 1989 already 384 and in 1991 more than 445, it is assumed that only about one out of every 20 rapes commited is reported to the police . (Information from the Namibian Police, in: D.Hubbard, p.238).

[38] See: D. Hubbard, p.254.

[39] See: D.Hubbard, p. 254.

[40] All information comes from W.H. Dicks, President, The law Society of Namibia in: D.Hubbard, p.255.

sentencing court. For instance it fixes the maximum sentence beyond which a sentencing court cannot exceed. The presiding magistrate or judge may wish to impose a lengthier term of imprisonment than that prescribed by the legislature but cannot do so because his sentencing jurisdiction is limited."[41]

dd) The German Experience

There are various minimum sentences in force in the present Criminal Code. According to § 46 StGB (the so-called "extenuating circumstances-provision"), however, those are not mandatory. The court may depart from these standards in cases, where circumstances do not warrant their imposition.

Even the sentence of life imprisonment is provided for several offences.[42] However, also here the judge is not obliged to its imposition9. The judges is rather given the opportunity to impose it in cases wherever they consider a crime to warrant this extreme form of punishment. Whenever there is talk about "besonders schwere Fälle"[43] a judge is given discretion to assume a "nur schweren"[44] or even a "durchschnittlichen"[45] or "minderschweren"[46] case and consequently to inflict a less severe penalty. These provisions are not object of the present discussion.

A different situation offer § 211 I[47] und § 220a I Nr.1[48] of the present German Criminal Code. Here, the reaction of a criminal judge is determined in detail. He is forced to impose the sentence of life imprisonment whenever the accused fulfils the prerequisites of these provisions. There is no discretion left for the judge to decide in a different way. There is no possibility to assume a "minderschweren Fall" and thereby to come to a determined period of imprisonment.

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[41] See: Arab v. the State LCR (Crim) 40, 1990, at 44.

[42] See for instance §§ 94,100, 229 II, 251, 307, 312, 316c, 311 a, 310 b, 212II, 316 a of the present Geramn Criminal Code.

[43] "exceptionally serious crimes" (my translation).

[44] "merely" severe crime (my translation).

[45] "average" (my translation).

[46] "minor" (my translation).

[47] § 211 of the German Criminal Code provides the mandatory minimum sentence of life imprisonment for a convicted murderer: "Der Mörder wird mit lebenslanger Freiheitsstrafe bestraft."

[48] § 220 I of the German Criminal Code ("genocide") states that "Wer in der Absicht eine nationale, rassische, religiöse oder durch ihr Volkstum bestimmte Gruppe tötet.....wird mit lebenslanger Freiheitsstrafe bestraft".

In the early 1970s there was a strong discussion on the abolition of the mandatory sentence for murder, which unfortunately did not continue into present times. The reason for the present calmness of this discussion may be seen in the difference that has resulted in the meantime within this punishment. One could also put it this way: The sentence of life imprisonment has been doubly split; one split can be seen between its penalty and its imposition by the judiciary. The other lies between its imposition and its execution. Both splits lead to the fact that, in practical terms, a situation arises that has very little in common with the wording of this provision.

The law states that the murderer shall be punished with life imprisonment. Those who, however, plead against such an extreme sentence on the basis of this very wording are in danger to be criticised as being naive. In fact, the letters of this provision are not reality by a long way. Who, therefore, claims that it was barbaric to "lock somebody up" until his last breath will have to hear that this may be true but would not help with this discussion. The same -or at least something very similar- has been ruled by the Federal Constitutional Court in 1977. But, still, the court declared the provision as constitutional.

The situation is obviously more complex: One first has to pay attention to the theory and practice of the sentence of life imprisonment in Germany.

"Der Mörder wird mit lebenslanger Freiheitsstrafe bestraft." Such a mandatory penalty is generally alien to the German Penal Code. As the legislator, in this way, interferes grossly with the independence of the judiciary, it is not surprising that judges tried and still try everything to re-gain their discretion. The jurisdiction on § 211 StGB is evident: In practical terms, judges try to avoid a conviction of murder whenever possible.

"In der Praxis werden folglich heutzutage regelmäßig alle Möglichkeiten der Rechtsprechung ausgeschöpft, um ein Verurteilung wegen Mordes zu vermeiden. Angesichts der historischen Hypotheken, die der Mordparagraph unübersehbar mit sich "herumschleppt"[49], gibt es reichlich Möglichkeiten zur "positiven" und "negativen" Korrektur und zur "restriktiven Auslegung" verschiedener Mordmerkmale ... In einer insgesamt sehr "wechselhaften Rechtsprechung"[50] läßt sich oft zwar widersprüchliche Argumentation finden, jedoch auch durchgängig die gute Absicht, die vom Gesetz zwingende Strafe zugunsten einer milderen Freiheitsstrafe zu umgehen."[51] An impressive example of this trend was a

[49] § 211 of the German Criminal Code was enacted in 1941

[50] "sehr wechselhaften", see: Müller-Dietz 1983, p. 570.

decision on 19.5.1981[52], which is known under the keyword "Rechtsfolgenlösung".

The wording of § 211 StGB is apparently degraded to merely "assist" in the decision-making process. This may be interpreted as a rebellion of the judiciary against the inactivity of the legislative.

One wonders why changes of such ineffective legislation have not yet been done. The abolition of a mandatory sentence of life imprisonment would eradicate the problems risen above.

ee) The Experience of the United States of America

The Constitution of the United States does not allocate the issue of sentencing exclusively to one branch of Government.

In the beginning of this century the Supreme Court of the United States held that "the holder of judicial power investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist."[53] The discretion of judicial power was evaluated as limited by the laws as enacted by the legislative.

Recently federal sentencing policy has been changed drastically: Guidelines which set narrow sentencing ranges for different crimes as well as different categories of defendants have been introduced by the United States Sentencing Commission[54] increasingly. These guidelines include several mandatory minimum sentences.

In Mistretta v. US in 1989[55] federal sentencing guidelines were challenged on the grounds that they were an unconstitutional violation of the principle of separation of power. However, not only the basis that the legislature was interfering with judicial discretion, but -since three of the seven members of the commission were judges- also on the basis that it had delegated its legislative power to set sentences to a commission which is composed in part of judicial officers.[56]

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[51] especially heimtückisch und Verdeckungsabsicht, see: BVerfGE 45, p. 187, in: Neue Juristische Wochenschrift 1977, S.1525.

[52] See: BGHSt 30, p.105, in: NJW 1981, p. 1956.

[53] See: Prentis v. Atlantic Coast Line Co. (1908) 211 U.S.210, 226.

[54] Which has been created by the Sentencing Reform Act of 1984 . The Commission is composed of seven members , three of whom must be federal judges.

[55] Mistretta v. US 488 US 361 (1989).

With regard to the first challenge (that sentencing guidelines were an illegitimate restriction of judicial discretion) the Supreme Court held that, although "Congress delegated almost unfettered discretion to the sentencing judge to determine what the sentence should be within the customarily wide range", still "the scope of judicial discretion with respect to a sentence is subject to congressional control".[57] The Supreme Court of the United States further stressed that "it is beyond question that the legislature has the power to define criminal punishments without giving the courts any sentencing discretion".[58]

It was therefore seen as constitutional that the legislature took back the wide discretion it had left to the courts previously and delegated it then within statutory defined limits.

The court also rejected the second argument, i.e. that presidential control of commissioners through appointment and removal significantly threatened judicial independence.[59] With respect to excessive delegation, the Court held that the Sentencing Reform contained "intelligible principles" and policy directions to guide the Commission in rule making.[60] and appropriately delegated authority for detailed rule-making to the Commission.

Consequently, the Supreme Court eventually denied an illegitimate violation of the principle of the separation of power by a clear majority of eight to one and instead emphasised the fact that the United States system was a "three way sharing" of sentencing responsibility between the legislative, judiciary and executive branches. Even if those three branches were generally independent, it was argued[61], they have a degree of overlapping responsibility which enables an effective government. It shall be the responsibility of the legislative to define the minimum or/and maximum of a specific penalty. The judiciary shall be responsible to choose and impose a sentence within the available frame that it considers as appropriate in a specific case and, finally, the executive shall be responsible for the execution of a sentence, including the prior release of prisoners.

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[56] See: D. Hubbard, p. 235.

[57] Blackmun J. delivering the opinion of the court, p. 109. (as cited in A.Ashworth, p. 41.)

[58] See: I.L. Nagel in:"Structuring Setencing Discretion; the New Federal Sentencing Guidelines", in: Journal of Criminal Law and Criminology 1990, p.883.

[59] See: Mistretta v. United States, at 675.

[60] See: Mistretta v. United States, at 654-655.

[61] See: Mistretta v. United States, at 364-365; 380-384, 391.

The court concluded that there was no constitutional barrier to placement of the commission in the Judicial Branch to be found but that the Commission's function were clearly related to the historical work of the Courts.[62]

Opponents of the Federal Guidelines were furthermore concerned about the composition of the Commission- that the statutory requirement that the three federal judges serve on the Commission impermissibly interfered with the functioning of the judiciary. The Court also rejected this argument, observing that the nature of the Commission's work "is devoted exclusively to the development of rules to rationalise a process that has been and will continue to be performed exclusively by the Judicial Branch".[63]

This trend continued. In 1991[64] in Harmelin v. Michigan, three judges stressed the fact that substantial deference must be given to legislative power to set the types and limits of punishment and thereby to assign different weight to the varying penological principles of retribution, deterrence, incapacitation and rehabilitation.[65]

It appears that all that remains for the preserve of the American judiciary in determining sentencing policy is the elastic proposition that wherever the legislature leaves the courts with a discretion in sentencing it is for the courts to regulate the exercise of this discretion. To put it in other words: in American constitutional terms, the ambit of the judicial preserve depends on the amount of discretion Parliament chooses to leave to the judiciary. That is all that remains from the principle of the independence of the judiciary.[66] From an American point of view, sentencing is certainly not regarded as the "province" of the judiciary.

ff) The English Experience

The principle of the separation of powers has a high relevance in British constitutional theory, however, it has never been clear where sentencing fits into any ideal division of responsibilities.[67]

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[62] See: Mistretta v. United States, at 661-667.

[63] See: Mistretta v. United States, at 673.

[64] In: Harmelin V. Michigan, 111 S Ct 2680 (1991).

[65] See: D. Hubbard, p. 234.

[66] See: A.Ashworth, p. 41.

[67] See: A. Ashworth, p.40.

In a leading English constitutional work the scope of punishing convicted offenders is seen as a "arguable not essential judicial function, although they are traditionally the work of judges"[68], as for sentencing policy there is nothing in constitutional theory to suggest that this does not fall within the responsibility of the legislature.
In opposition to this view was the opinion of Lord Hailsham, the former Lord chancellor, who argued that it was unconstitutional to create a Sentencing Council in 1989.[69] He said that it was undoubtedly a matter of the judiciary to determine sentencing policy. According to this approach any legislation, which tends to interfere with the sentencing discretion of the judiciary would be unconstitutional.

Other voices criticised such an approach as being too extreme. "Parliament has not only the power to down maximum sentences", it was argued[70], "but also to introduce mandatory minimum penalties." This view appears to have survived into present times. There have been no serious doubts about the constitutionality of legislation providing for a sentencing framework. Several mandatory sentences are presently in existence in England. The commission of a murder is being punished with the mandatory minimum sentence of life imprisonment, drunk driving is followed by a sentence of a minimum of twelve months of imprisonment.

The historical development of the English Sentencing Policy is very interesting. In opposition to earlier times, when there was scarcely any judicial discretion to be exercised[71], English Courts have enjoyed considerable discretion in deciding what sentence to impose on convicted offenders in the last century. The availability of judicial discretion must therefore be evaluated as a rather modern phenomenon; judicial discretion can be seen as a characteristic feature of the English Sentencing System since about a hundred years ago. At that time Parliament was less and less concerned with a detailed sentencing policy: Whereas in the nineteenth century the judicial freedom was still restricted by several minimum and maximum sentences, these minimum sentences were abolished in the beginning of the twentieth century and were since than unknown; offences were defined more and more broadly and courts were free to fill the growing vacuums with substance.

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[68] See: E.C.S. Wade and G.Phillips: Constitutional Law, 1977,p.44.

[69] Speaking on Radio 4 on the 19 June 1989.

[70] See: A. Ashworth, p. 40.

[71] See: Sir Leon Radzinowicz, A history of English Criminal Law and its Administration, in 1750, (5 vols, 1948-86); as cited in : Sentencing, Judical Discretion and Training, p.27.

In these days judges became accustomed to the fact that the determination of sentences was their "province": "...(A judge) can do as he pleases...if he chooses, he can focus on the crime alone, without considering the criminal...he can be guided by a theory of retribution , by a theory of deterrence, or by a theory of rehabilitation-or by no theory. He can give a wholly emotional response, ... without findings, without reasons, without relating what he does with what he had done before, and without relating his decisions to the relevant decisions to the relevant decisions of other judges...".[72]

The result of that situation, however, was that injustice had no legal barriers to convince to come into being; disparity of sentences was not to hold back but rather the logical consequence.

It was soon realised that the full discretion of a judge with regard to the imposition of a sentence was neither worthwhile nor inside the scope of constitutional principles. The required degree of legal certainty which a Rechtsstaat must provide for a was no longer ensured.

Thus, in 1961, restrictions on imposing custodial sentences and, in 1967, further measures to limit sentencing discretion were introduced. A criminal law reform in the twentieth century replaced narrowly defined offences[73] and mandatory minimum sentences by a small number of "broad band" offences with fairly high statutory maxima: a transfer of power had taken place, courts were given a considerable sentencing discretion.[74]

The enactment of the Criminal Justice Act in 1991 carried this process a lot further: it restricted judges´ discretion even more and changed present sentencing practice by laying down a prescriptive statutory framework for judges. Part I of the Act contains a list of guiding cases and sentences for specific crimes. The reason for these drastic changes was the continuous concern over inconsistency and disparities in sentencing.[75]

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[72] See: K.C.Davis: Discretionary Justice, 1969, p. 137.

[73] Leading examples for this new approach are the Theft Act 1968 and the Criminal Damage Act 1971. Both Acts replaced al large number of different offences.

[74] See. A. Ashworth , p. 38 ff for a general overview on sentencing policy in England in the ninenteenth and twentieth century.

[75] Revealed by studies which demonstrate that, for some offences, a defendant is twice likely to be imprisoned in Manchester as in Liverpool, or ten times as likely to be jailed in Dorset as in Bedfordshire. (See: C. Munro in: "Judical Independence and Judical Functions", in: Sentencing, Judical Discretion and Training, edited by C.Munro and M. Wasik, London 1992, p.13.

Considering the historical background, it is not surprising that English judges resent the curtailment of their discretion and sprang up in defence for their "province" even if the dangers of an unlimited discretion certainly justified a limitation of judicial discretion by a democratic Parliament. Still, the development in England with regard to sentencing policy can hardly be evaluated as being unconstitutional.

In 1976, minimum sentences have been challenged against the principle of the separation of powers in Hinds v. The Queen. The argumentation of the Privy Council in this case is very similar to the American argument. "The power conferred on Parliament to make laws for the peace, order and good government", it was argued, "is not only to define what conduct shall constitute a criminal offence but also to prescribe the punishment to be inflicted on those persons who have been found guilty of that conduct by an independent and impartial court established by the law."[76] The executive was regarded as being responsible to regulate the conditions under which punishment is carried out; its major function is to carry out the punishment in cases where it involves the deprivation of a person's liberty. Still, its power to do so is subject to any limitations by a law of Parliament.

The court stressed the fact that -in the exercise of its legislative power- "Parliament may, if it thinks fit, prescribe a fixed punishment to be inflicted on all offenders found guilty of the defined offence", it may further "prescribe a range of punishment up to a maximum in severity, either with or, as is more common, without a minimum..."[77].

The Advisory Council on the Penal System stated that: "While, within the bounds laid down by Parliament, the courts have an absolute discretion to decide the most appropriate sentence in every individual case, sentencing policy is determined largely, if not exclusively, by the decisions of the Court of appeal."[78] Why should Parliament legislate on sentencing policy less freely than on other major areas of social policy such as taxation and unemployment benefit? To claim the support of the principle of judicial independence does not, if the principle is properly understood, strengthen the case for judicial control of sentencing policy.[79]

In other words, the court declares not only the determination of the kind of punishment as an legitimate exercise of

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[76] See: Hinds v. The Queen (1976) 1 All ER 353, at 370. (Lord Diplock for the council).

[77] See: ", at 370.

[78] See: The Advisory Council on the Penal System (1978), paragraph 317.

[79] See: A.Ashworth, p.43.

Parliament's power within the scope of the doctrine of the separation of powers but also the determination of a minimum length of imprisonment.

"Thus Parliament, in the exercise of its legislative power , may make a law imposing limits on the discretion of judges who preside over the courts by whom offences against that law are tried to inflict on an individual offender a custodial sentence the length of which reflects the judge's own assessment of the gravity of the offender's conduct in the particular case."[80]

In the 1980s it was argued that Parliament may introduce a new form of sentence but that it would be inconsistent with the principle of judicial independence if the legislature specified in detail the circumstances in which the penalty may be used.[81] Such a statement, however does not differ from the argument raised above (that sentencing is the province of the judiciary) that has been refuted in England.

The aforesaid has received recognition in the Criminal Justice Act of 1991, which went further than any other modern English sentencing legislation. The Criminal Justice Act of 1991 tries to impose a structure on decisions with regard to the appropriate sentence for a convicted criminal. The background to this Act is the idea, that sentencing should be developed by a partnership between legislature and judiciary, with Parliament laying down the framework and the Court of Appeal developing the more detailed principles.[82]

Another example for the power of Parliament in connection with the determination of the length of sentences is Section 1(4) of the Criminal Justice Act 1982, which states that a court may not pass a custodial sentence upon person of the age from seventeen to twenty years.

The English answer to the questions raised above in short: "No Government should try to influence the decisions of the courts in individual cases. The independence of the judiciary is rightly regarded as a cornerstone of our liberties. But sentencing principles and sentencing practice are matters of legitimate concern to Government...".[83] Sentencing policy should be determined in a way that Parliament deems it appropriate.[84] Sentencing policy -and thereby also the ability of determing the length of sentences- is seen as the

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[80] See: Hinds v. The Queen (1976) 1 All ER 353, at 370.

[81] See: A.Ashworth, p.42.

[82] See: A.Ashworth, p.43.

[83] See: White paper 1992, paragraph 2.1.,(cited in A.Ashworth, p. 43).

[84] See: A. Ashworth, p.43.

responsibility of the legislature. As a result it is not considered as an illegitimate infringement of the independence of the judiciary.

gg) The Australian Experience

The High Court of Australia defined judicial power as "the power which every sovereign must of necessity have to decide controversies between its subjects, or between itself and its subjects,.., an institution which has the power to give a binding and authoritative decision..."[85]

The question of the constitutionality of a limitation on sentencing discretion of the judiciary has been answered as follows: In the beginning of this century the High Court of Australia held that even if "it is both unusual and in general,..., undesirable that the court should not have the discretion in the imposition of sentences, for circumstances alter cases" and even if it was "a traditional function of a court of justice to endeavour to make the punishment appropriate to the circumstances as well as to the nature of the crime" the question "of whether or not such a discretion shall be given to the court in relation to a statutory offence is for the decision of the Parliament. It cannot be denied that there are circumstances which may warrant the imposition on the court of a duty to impose a specific punishment."[86]

It was further said that a denial to the discretion of the court by Parliament must be respected by the judiciary assuming its validity in other respects; it would not be a breach of the Constitution to confide any discretion to the court as to the penalty to be imposed.

hh) An Evaluation:

It appears that in countries with Constitutions built on the doctrine of the separation of powers and on the independence of the judiciary, the imposition of a minimum sentence is not evaluated as a violating them. It further appears that legislatures may provide mandatory minimum sentences for any offence without a suggestion that they involve an unconstitutional exercise of power by the legislative branch.

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[85] See: Huddart Parker v. Moorehead (1908) 8 C.L.R. 330, 357.

[86] See: Palling v. Corfield (1970) 123 C.L.R. 52, per Barwick C.J., at p.65.

It is submitted that constitutional provisions which ensure a judge's independence cannot be read as guaranteeing the courts absolute discretion in the administration of justice. This is also valid for the sentencing decision which is part thereof. The independence of judges is surely designed to protect the impartiality of judges and their freedom from influence. However, it cannot be used to deny the property of authorised restrictions on sentencing by the legislative. A judge's function ceases with the determination of the nature and extent of punishment whenever the general rule laid down by Parliament gives a range of choice.

Thus, while it would be an illegitimate violation of the doctrine of the separation of powers if the legislative would be allowed to interfere with a court's decision in an individual case it does not offend the province of the judiciary if it prescribes the sentence for a class of offence.

Consequently, a breach of the independence of the judiciary can even not be seen in the case of mandatory sentences, (such as the mandatory minimum and maximum sentence of life imprisonment for the commission of murder in Germany and England), where the legislative deprives the courts completely of their discretion. Even here, the legislative does not prescribe the penalty to be imposed in an individual case. All it states is a general rule: the application of this fixed penalty on those offenders who have been found guilty of this specific offence.

There is no constitutional provision or principle which prevents the legislative from restricting and removing judicial discretion in sentencing. In pleading for the unconstitutionality of mandatory minimum sentences there may no support to be found in the doctrine of the separation of powers.

The issue that remains open to discussion is, whether it is preferable that the legislative leaves the formulation of sentencing policy to the courts or whether it is preferable that the legislative provides the courts with sentencing policy.

On the one hand, one may argue that courts are in a better position to formulate sentencing policy because they deal with it every day. On the other hand it is the democratic Parliament that should decide on issues in connection with sentencing policy similar to policies governing other areas of a society. However, these are political questions which are not constitutionally relevant and therefore not the topic of this but of another discussion.

The deprivation of a court's discretion with regard to sentencing, however, may violate the principle of proportionality as one of the most essential legal principles within a constitutional state.

3) Do mandatory minimum sentences violate the principle of proportionality in the scope of punishment?

Whatever purpose one is trying to achieve by punishing offenders, when it comes to the question of how severe a convicted offender deserves to be punished a basic truism comes to mind: The severity of the penalty depends on the gravity of the offence. "Il est essentiel que les peines aient de l´harmonie entre elles; parce qu´il est essentiell que l´on évite plutot un grande crime qu´un moindre; ce qui attaque plus la société, que ce qui la choque moins", noted Montesquieu in his work "De l´esprit des lois".[87] He criticised present legislation at his time by saying that "C´est un grand male, parmi nous, de faire dubir la meme peine à celui qui vole sur un grand chemin, et à celui qui vole et assassine. Il est visible, que, pour la sureté publique, il fauldrait mettre quelque différence dans la peine."[88]

Only grave offences merit severe penalties; minor misdeeds deserve lenient punishments.[89] Consequently disproportionate punishments are undeserved. To put it in ...... words: "If the punishment is just, and in proportion to the seriousness of the offence, then the victim, the victim's family and friends, and the public will be satisfied that the law has been upheld and there will be no desire for further retaliation or private revenge."

One does not need to be a retributivist to agree on this principle. Noone will deny that the thief must be punished less severe than the murderer. Still, in what way this principle should be applied within the scope of punishment has been answered in various ways.

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[87] See: Montesquieu: "De l´esprit des lois", Chapter XVI: "De la juste proportion des peines avec le crime", in: Thomas Vorbaum: Texte zur Strafrechtstheorie der Neuzeit, Band I, p. 97.

[88] See: " , p. 97.

[89] See: A.v.Hirsch: "Proportionate Punishments", in: A.v. Hirsch and A.Ashworth: Principled Sentencing, p. 195.

a) The German Experience

When the Federal Constitutional Court of Germany had to decide on the constitutionality of § 211 StGB[90] it realised that "es an eine am Verhälnismäßigkeitsgrundsatz[91] orientierte restriktive Auslegung der Tatmodalitäten ankomme...", in cases where a court assumes the commission of a murder and consequently would be forced to impose the mandatory life sentence.

This statement was based on the following consideration: Penalties -even if fixed by law- must stand in a just relationship to the seriousness of the offence and to the blameworthiness of the offender. "Wo die tatbestandsmäßige Handlung und ihr Erfolg verschiedene Grade der Schwere des Unrechts und des Verschuldens aufweisen können, müsse dem Richter grundsätzlich die Möglichkeit flexibler Reaktion eingeräumt werden." In other words, punishment must be proportionate to the crime commited and the judge must have the possibility to decide according to this principle.

Another decision on 3 June 1992 -according to which the proceeding of early release of prisoners and thereby, once more, the mandatory minimum sentence of life imprisonment for the commission of a murder was declared as being constitutional- was criticised by Judge Mahrenholz as follows: "Der Vefassungsrechtliche Grundsatz der Verhältnismäßigkeit verpflichtet den Gesetzgeber, sich von der lebenslangen Freiheitsstrafe zu trennen......sofern sie als absolute Strafe angedroht ist, das heißt als eine Strafe, die Zumessungserwägungen gemäß § 46 StGB ausschließt".[92] In his view, the mandatory penalty of life imprisonment is an illegitimate violation of the principle of proportionality. And, in fact, if one looks at previous and present jurisdiction with regard to the handling of § 211 StGB, it is evident that German judges resorted to legal contortions to avoid the imposition of this mandatory sentence.

Another impressive example for the diffilculties of handling § 211 StGB is a Bundesgerichtshofs-decision from 1981[93]. In this case the court did not manage to circumvent a conviction of murder. The judges, however, felt that the circumstances

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[90] See: BVerfGE 45, 187, in Neue Juristische Wochenschrift, 1977, 1525.

[91] The so-called "Verhältnismäßigkeitsgrundsatz" is a basic principle which is valid in any district of the German legal system, considered as being a direct outflow of the principle of a Rechtsstaat. It is equivalent to the principle of proportionality in other countries as drawn from the prohibition of "cruel and unusual punishment".

[92] See: Abweichende Meinung des Richters Mahrenholz zum Beschluß des Zweiten Senats vom 3. Juni 1992, p. 340.

[93] BGH, Beschl. v. 19.5. 1981 -GSSt 1/81 (LG Münster), in: "Neue juristische Wochenschrift 1981, p. 1965.

of this particular murder would not warrant the sentence of life imprisonment and decided to assume extenuating circumstances according to § 49 StGB. Even though the mandatory sentence of life imprisonment is -according to present legislation-, not to be mitigated under any circumstances. Still, the court concluded that "... wenn außergewöhnliche Umstände vorliegen, aufgrund welcher die Verhängung lebenslanger Freiheitsstrafe unverhältnismäßig erscheint, ist wegen Mordes zu verurteilen. Es ist jedoch der Strafrahmen des § 49 I Nr.1 StGB anzuwenden." In this way the court did not only "break" present legislation. It further exposed the unacceptable legal situation and pleaded indirectly against this mandatory sentence.

b) The experience of the United States of America

Also in the United States of America, where determinate sentences have become commonplace[94], mandatory minimum sentences have been called into question on the grounds of their proportionality to the crime committed.[95]

An "individualised capital-punishment doctrine" was established in terms of which each potential particular case for its imposition had to be examined of the appropriateness. This approach, however, has apparently not become valid for other mandatory penalties.

In Weems v. US[96] a provision prohibiting falsifying official documents -with a mandatory sentence of twelve years and a day- was applied in the Philippine Islands.[97] It was argued that this penalty contravened the provisions of the Philippines Bill of Rights which forbade the infliction of cruel and unusual punishment.[98] The court agreed on this view and concluded that this punishment was impermissible cruel and unusual as it was "by its excessive length and severity greatly disproportionate to the offence charged."

In the following years this decision has been understood as a standing for the principle of proportionality as a constitutional requirement[99], being deduced from the eighth amendment which prohibits" cruel and unusual punishment".

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[94] See: D. Hubbard, p.237.

[95] See: D. Hubbard, p. 233.

[96] Weems v. US, 217 US 349 (1909).

[97] The Phlippine Islands were under United States jurisdiction at that time.

[98] See: D. Hubbard, p. 233.

[99] See: D. Hubbard, p. 234.

In 1977[100] a sentence of death, of life imprisonment or imprisonment from one to twenty years for the commission of rape was declared as being grossly disproportionate. It was argued that rape was a very reprehensible crime and therefore would not warrant a death penalty.

In 1983[101] the imposition of the maximum sentence of life imprisonment for recidivists was declared as being unconstitutional with regard to the constitutional principle of proportionality. In Rumel v. Estelle[102], however, the Supreme Court had the opportunity to examine the disproportionality of the recidivist statute and took a different approach. In this case, the accused had been convicted of forging or obtaining money by false documents on three different occasions within a period of less than ten years. According to the recidivist statute he was given a mandatory life sentence on his third conviction: "Three strikes and you are out!" The court held that the recidivist statute was not unconstitutional. The key factor for this assumption was that the appellant would probably not serve out his full term. The court further rejected a violation of the defenfant´s right of the eighth amendment by denying "grossly and excessive punishment". It referred to the decision on Furman where it was held that "even if the eighth amendment prohibits grossly excessive punishment ... the duty to review the disproportionality of sentences extends (only) to non-capital cases.[103]

A radical change in sentencing policy took place in 1987. The role and authority of an American judge was finally diminished by the severe elimination of discretion by Sentencing Guidelines which took effect on November 1st in 1987.

The Federal Guidelines as enacted in 1987 cover all federal crimes, including the so-called "white collar crimes" as well as Common Law crimes. In the process of finding the appropriate sentence for a convicted offender, American judges were now firstly obliged to consult a schedule of the particular crime in question, which specifies a "base offence level". Then, depending on the way the crime has been committed (in case of a robbery, for instance, with or

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[100] See: Coker v. Georgia, 433 US 584 (1977).

[101] In: Solem v. Helm, 463 US 277 (1983).

[102] See: Rummel v. Estelle, Texas Department of Corrections, 445 U.S. 263 (1980). The statute in question was art. 63 of the Texas Penal Code which provides that "Whoever shall have been three times convicted of a felony less than capital, shall on such third conviction be imprisoned for life in the penitentiary".

[103] See: Rummel v. Estelle, p. 307.

without weapon, the value of the property taken etc.), this level shall be adjusted upwards or downwards. In addition the judge must take into account the defendant's criminal record (was it his first crime or had he been convicted previously) to finally determine the sentence as prescribed being proportionate by the Guidelines.

Since their enactment these Guidelines had been very controversial. The judiciary sprang up in defence on their discretion concerning the setting of sentences. More than 200 district judges invalidated the guidelines and the Sentencing Reform Act.[104] and it took more than two years for the Sentencing Reform Act to finally become declared as being constitutional in Mistretta v. United States[105].

Even if the main criticism -as exposed previously- was that sentencing guidelines were an unduly limitation of judicial discretion, they were also criticised on other grounds. It was argued that they foreseeable cause judges and prosecutors to circumvent them and that they are too complex and hard to apply. A further criticism was based on fairness grounds: by taking only offence elements, they require that very different defendants receive the same sentence. And finally normative arguments were brought up: Federal Guidelines greatly increase the proportion of offenders receiving prison sentences which are generally too harsh.

One Federal district court declared the Sentencing Reform as unconstitutional on the grounds that Congress's delegation of rule-making authority to the Sentencing Commission was excessively broad. Guidelines were further considered to be an illegitimate violation of defendants Fifth Amendment due process rights to individualised consideration of offence and offender characteristics at sentencing.

The due process issues were not resolved in Mistreta v. U.S., and it actually appears that (since all 10 Circuit Courts of Appeals that considered the due process arguments in 1979 rejected them[106]) they were already at that time, for all practical reasons, dead.

A further criticism on the guidelines was that -even if they were "presumptive" (i.e. that judges may depart from them)- the grounds for such "departures" were very limited. Judges may only depart from the guidelines if "there exists an aggravating or mitigating circumstance of a kind ... not adequately taken into account by the Sentencing commission". But, what kind of circumstances remain if "age, education, mental and emotional condition, physical condition (i.e. drug

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104 See: U.S. Sentencing Commission, Annual Report 1989 (1990), p.11.

105 488 U.S. 361 (1989), 109 S.Ct.647 (1989).

106 See: U.S. Sentencing Commission , Annual Report 1989 (1990), p.12.

dependence and alcohol abuse), family responsibilities etc. are not to be taken into account and "not ordinarily relevant in determing whether a sentence should be outside to the applicable range"[107] according to the Federal Guidelines? Furthermore, it is up to the trial judge to prove that the Sentencing Commission did not consider a specific circumstance as "adequate".

A proposal was made to make the Guidelines less rigid by eliminating their mandatory character.[108] The proposal demanded that "Congress should amend the Sentencing Reform Act to state clearly that the guidelines ... are general standards regarding the appropriate sentence in the typical case" however not "compulsory rules". A Guideline should only identify the presumptive sentence, the general authority to select a sentence (even outside the range prescribed by the guidelines), however, should be attributed to the trial judge. The individual decision of the trial judges should be appellate review for abuse of discretion. In this way, it was argued, it would be ensured that the defendant's history and personal characteristics do not remain completely unconsidered.

Judge William W. Schwartzer[109] stated that "We are paying a high price for the present sentencing system."[110] He obviously did not merely refer to the amount of dollars that were spent on introducing the Sentencing Reform but also to the integrity of the criminal justice process. "The elimination of unwarranted disparities is a worthy objective", he said, "... but it has not yet been achieved. Instead a system conductive to producing arbitrary results has been created."

Judge Gerald W. Heaney [111] claimed that "The roles of the prosecutor and the probation Officer in the sentencing process have been enhanced and that of the district judge diminished ... there is very little evidence that to suggest that the congressional objective of reducing unwarranted sentencing disparity has been achieved" but, instead that " ... Voluminous anecdotal evidence and case law show the unfairness of the guidelines and the disparities created through their application...".[112]

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[107] See: U.S. Sentencing Commission, Federal Sentencing Guidelines Manual (1992), Part H, para. 5H1.1-5H1.6.

[108] See: Federal Courts Study Committee, Report (1990), p. 135.

[109] The director of the Federal Judical Centre(which is the research and training agency of the federal courts).

[110] W.W. Schwartzer in: "Judical Discretion in Sentencing" (1991) 4 Federal Sentencing Reporter, 339, at 341.

[111] A senior judge of the Eighth Circuit Court of Appeals.

Also foreign voices criticised those guidelines: In their present form they could not achieve a proportionate sentence for an offence. "For an example, because the Buglary guideline does not specifically aggravate the guideline sentence where the offender causes physical injury, the burglar who beats a homeowner will be treated the same as the burglar who does not. That is, the beating of the homeowner is "free" in Buglary, as it is in a host of other offences."[113]

Furthermore, the guidelines ignore culpability of an offender,- whether he was intentional, reckless or negligent. "The statutory definition of an offence, however, generally requires a minimum level of culpability (recklessness (or negligence), for example) and the guidelines generally assume this level of culpability. Because the guidelines do not adjust for a higher level of culpability, the court must depart from the guidelines to account for an offender who intentionally commits the offence. Thus, the offender who intentionally burns a lumber-producing forest is treated the same as the camper who negligently fails to extinguish his campfire."[114]

The establishment of the Federal Guidelines confronted mandatory sentences that had been enacted by the U.S. Congress since the 1980s. The Commission had to deal with the question of how to reconcile the Guidelines with existing laws setting minimum sentences of two to twenty years. It was considered to evaluate the Guidelines as an alternative approach without regard to the mandatory sentences but, however, still to give priority to established minimum sentences in cases where a mandatory sentence went beyond to a sentence set by the Guidelines. If the mandatory minimum sentence was incompatible to a minimum sentence the set minimum sentence would override the Guideline. Such an approach was justified as:

- limiting departures to matters "not adequately considered by the guidelines"
- precluding departures for matters relating to significant offender characteristics

The Federal Guidelines may be criticised on grounds of their severity, but, however, what is on interest in this

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[112] See: G.W. Heaney in:"The Reality of Guidelines Sentencing: No End to Disparity", in : American Criminal Law Review , Volume 28, 1991, at 161-167.

[113] Robison Dissent as cited in: Sentencing, The law Reform Commission of Ireland, Consultation Paper on Sentencing, Dublin, 1993, p. 250.

[114] See: ", p. 251.

discussion is the character of these provisions forbidding judges to take into account in sentencing of meaningful differences between offenders.

In 1991[115] a new discussion came up: it was now highly disputed whether a principle of proportionality could anyhow be deduced from the Eighth Amendment. In this case the Court had to decide on the question whether a mandatory sentence of life imprisonment for a person being convicted of illegal possession of cocaine was violating a the defenant´s right provided by the eighth Amendment. Four of the judges[116] were prepared to apply an assertive test of constitutional proportionality by arguing that a mandatory penalty is appropriate only if the offence is one that will always warrant the prescribed punishment. (This approach is -in my view- not realistic. One cannot foresee all forms of conduct being prescribed as a certain kind of offence. As a result one cannot prescribe one kind of punishment that is warranted by all offences of one kind.[117]) The narrow majority of the judges in this case finally concluded that mandatory sentences were not generally cruel on unusual in respect to their mandatory character and declared the provision as constitutional.

It is not consistent, that a specific examination of each particular case has been upheld for the imposition of capital punishment but not for any other penalty. Apparently, capital punishment is the single form of punishment that is not revisable and must -sadly enough when still in force- therefore be handled very carefully. However, this cannot justify the imposition of other mandatory sentences without this carefulness. Each individual defendant has the same right to be punished in an appropriate way. To find the most appropriate way of punishment the court has to consider all relevant circumstances of the case. This must be valid for any form of punishment. The sentence of imprisonment cannot be handled with less carefulness simply because imprisonment is not definite but revisable.

It is further not surprising that the American Sentencing policy resulted in a common practice of plea-bargaining and that it is -in fact- advisable for an accused to plead guilty to a lesser charge. Similar to this is the common practice of prosecutors who -when feeling that the recommended penalty for a certain offence would be inappropriate- are motivated to enter into a plea bargain.[118] Another criticism is the

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[115] In: Harmelin v. Michigan, 111 S Ct 2680 (1991).

[116] White, J; Blackmun J, Stevens, J; and Marshall J.

[117] Except if the mandatory minimum sentence was being not punished.

fact that determinate sentences result in overcrowded prisons which equal ("Human warehouses").[119]

c) The Canadian Experience

Many minimum sentences can be found in the Canadian Law and also here they have been tested with regard to the principle of proportionality in order to be constitutional. In this country the principle of proportionality is an immediate expression of Section 12 of the Canadian Charter[120]-

In 1987, the narcotic Control Act which provided for a minimum sentence of seven years of imprisonment for the import or export of any narcotic was challenged on the grounds of its constitutionality.[121] The evaluation of this provision was highly disputed.

The starting point of this decision was the question "whether the punishment is necessary to achieve a valid penal purpose, whether it is founded on recognised sentencing principles, and whether there exist valid alternatives to the punishment imposed."[122] The main objection was that the statute in question applied equally to a different range of offenders: serious commercial dealers were treated equally to undangerous tourists having a single "joint" of marijuana. "It is inevitable that in some cases a conviction will lead to the imposition of a term of imprisonment which will be grossly disproportionate. The certainty of this result is what offends Section 12 ... In particular the provision fails the requirement that the means chosen impair as little as possible the right protected by Section 12 ... It is not necessary to sentence the small offenders to seven years of imprisonment in order to deter the serious offenders."[123]

The court eventually concluded that the provision was too wide to warrant a minimum sentence of seven years for any crime committed under this provision. In some cases -such as personal consumption- it was argued, it would lead to a cruel and unusual punishment and thereby be grossly disproportionate to the offence: "It is the arbitrary nature

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[118] See: D. Hubbard, p. 237.

[119] See: D.J. Rothmann: "The Crime of Punishment", in: The New York Review of Books, on 17 February 1994, p. 34-38.

[120] Section 12 of the Canadian Charter reads as follows: "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.".

[121] In: Smith v. The Queen (Const), on June 25 1987 at pp97.

[122] See: Smith v. The Queen, p. 98.

[123] See: Smith v. The Queen, p. 98.

of the legislatively prescribed minimum sentence which inevitably in some cases results in a imposition of a cruel and unusual punishment... Thus arbitrariness is a fundamental factor in finding that the provision violates Section 12 ..."[124]

However, the Court also emphasised that it was not deciding on the validity of any minimum sentence but only on the specific provision in question. It rather stated that the minimum sentence in question would be constitutional if it was limited to serious cases.[125]

The leading opinion suggested to abolish mandatory minimum sentences for all offences except murder on the grounds that they **"serve no purpose that can compensate for the disadvantages resulting from their continued existence."**[126]

In Regina v. Goltz in 1991 similar issues very discussed, again. In this case the accused was convicted of driving a motor vehicle knowing that he had been prohibited from driving. In question was the constitutionality of a minimum sentence (section 88(1) (c) of the Motor Vehicle Act of 1979) which provides that a person who drives a motor vehicle knowing that he is prohibited from driving is liable on a first conviction to a fine of not less than $ 300 and to imprisonment of not less than seven days.

The accused argued that this provision would constitute a cruel and unusual treatment or punishment and thereby violate Section 12 of the Canadian Charter. The trial judge, however, disagreed on this view and imposed the prescribed sentence. Also the Supreme Court found that in this particular case the imposition of the minimum sentence did not infringe Section 12. The court argued that "While the test of gross proportionality is not dependent on procedural safeguards built into an offence, none of the less review of these procedures markedly reveals that the offence is neither trivial nor arbitrary. On the contrary, the mandatory minimum sentence is based squarely on legislative concern to isolate bad drivers for the better protection of the public" and that "it could not be said to outrage standards of decency or be seen as grossly disproportionate to the wrongdoing.[127]

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[124] See: Smith v. The Queen, p.99.

[125] Such as the importation of large quantities of drugs, the importation of specfic narcotics, repeat offenders, or some combination of such factors.

[126] As recomended by the Canadian Sentencing Commission in 1987. Citing: Sentencing reform: A Canadian Approach 1987.

[127] See: Regina v. Goltz, 67 CCC (3d) (1992), at481, p.482.

Still it became necessary to consider reasonable hypothetical circumstances to determine if it was likely that the general application of this provision would result in the imposition of a grossly disproportionate sentence amounting to cruel and unusual punishment. Justice McLachelin, Lamer and Stevenson concluded that "the mandatory minimum sentence of seven days of imprisonment plus a fine would be grossly disproportionate and shocking to the Canadian conscience and hence, violate the guarantee against cruel and unusual punishment in Section 12 of the Charter ... Accordingly the mandatory minimum sentence should be struck out."[128] It was referred to previous -and very convincing- legislation. The British Columbia Court of Appeal had stated that "... If a sentence of seven days is wholly disproportionate in any given case ... its constitutionality cannot be salvaged on the grounds that it is in some way justified as a form of supplementary punishment for offences of which the offender has already been convicted and for which he has already been punished."[129] It was emphasised that there was an unlimited number of different hypothetical circumstances under which this particular offence could be committed and that Section 12 was violated under the grounds that there will inevitably be cases where a mandatory minimum sentence will be so grossly disproportionate to what would otherwise have been appropriate.

More than a decade before these decisions the Canadian Law Reform[130] had already concluded that there was no objective measurements on the effectiveness of minimum sentences and that experience has not shown that they have any special deterrent or educative effect. The reported research has not shown any more effective than less severe sanctions in preventing crimes. In contrary, the Commission realised other problems arising in denying judges discretion to select the appropriate sentence or the length of a prison term in individual cases: "For one thing the circumstances vary so greatly from case to case that an arbitrary minimum may be seen as excessive denunciation or an excessively long period of separation in the light of the risk and all the circumstances. Indeed not every single case falling within a given offence will require imprisonment for the purposes of isolation. Similar criticisms could be made of a sentencing provision that denies judges the power to choose between a custodial and a non custodial sentence."[131]

In 1987, the Canadian Sentencing Commission stated that " ... in a free and democratic society peace and security can only be enjoyed through the due application of the principles of

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[128] See: Regina v. Goltz, p. 484.

[129] See: Regina v. Goltz, p. 489.

[130] See: Law Reform Commission of Canada, Criminal Procedure: cOntrol of the Process, 1975, p.24.

[131] See: " , p. 24.

fundamental justice ... the fundamental purpose of sentencing is to preserve the authority of and promote respect for the law through the imposition of just sanctions".[132] The Commission felt the need for just deserts: Cardinal proportionality should be the paramount consideration governing the determination of sentence. On the other hand the Commission feared sentencing inconsistency. It therefore suggested firstly a legislative statement of sentencing principles and secondly a rigid guideline system with ranking of offence and penalty severity. In this way, it was assumed, that a sentence is "proportionate to the gravity of the offence and the degree of responsibility and that -on the other hand- it is clear from the guideline ranking that ordinal proportionality has an equally important role.

In the last 35 years, every Canadian Commission which addressed the role of mandatory minimum penalties recommended the abolition of minimum sentences.[133]

d) The Zimbabwean Experience

The proportionality of minimum sentences has also been an issue in Zimbabwe. The principle of proportionate punishment had generally been accepted in Neube v. S[134].

In 1989[135] it was held that -a provision introduced in 1982 which prescribes a sentence of a minimum of three to five years imprisonment plus a fine of up to $ 10 000 for the commission of the crime of illegal possession of precious stones- was in conflict with Section 15 (1) of the Zimbabwean Constitution[136]. In contrary to the Canadian Court, however, the Zimbabwean Court stressed that the provision in question was constitutional.

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[132] See: Canadian Sentencing Commission, Sentencing Reform: A Canadian Approach, 1987, pp. 151, 155.

[133] See: " , p. 178.

[134] In: Neube v. S, LRC (Const) 442, 1988. In this case the Supreme Court of Zimbabwe concluded that Section 15 (1) does not only apply to inhuman or degrading punishment but also to punishment which is "grossly disappropriate. Such punishments were considered as being inhuman and degrading in their disproportionality to the seriousness of the offence.

[135] In: Arab v. The State, LRC (Crim) 40, 1990.

[136] Section 15 (1) of the Constitution of Zimbabwe reads as follows: "No person shall be subjected to torture or to inhuman or degrading punishment or other such treatment."

e) The Indian Experience

Similar to the aforesaid is the Indian approach: The Law Commission of India found that the principal reason for the introduction of minimum sentences in recent Indian legislation appeared "to be a feeling that courts seldom award sentences which would have a deterrent effect, particularly in certain types of offences, which are necessary to be dealt with sternly in the interests of society".[137]

f) The English Experience

According to Rupert Cross Hegel´s conclusion (the abandonment of "conmensurability" for "proportionality") should be the approach of the English sentencing system. Proportionality, he wrote, "is achievable if the object is recognised to be a rough attempt to equate the size of the fine or the length of imprisonment to the gravity of the particular offence as contrasted with offences of other categories (theft contrasted with murder, for instance) and the gravity of the circumstances in which the offence was committed as contrasted with those in which other offences of the same category are committed"[138]. In other words, different thefts have always been committed under different circumstances and may therefore have a different degree of gravity. As a result one can not punish different thefts alike.

The intention of the Criminal Act of 1991 was to introduce a "new legislative framework for sentencing, based on the seriousness of the offence or just deserts".[139]

Sections 2(2)(a) and 6(2)(b) of the Criminal Act 1991[140] state that the length of sentence imposed on a convicted offender shall[141] "consummate with the seriousness of the offence"[142]

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[137] See: Law Commission of India, 14th Report, Vol II, pp 838, at 840, 841,

[138] See: A.R.N. Cross: The English Sentencing System, 1971; 2nd edition, 1975, London. (Cited in: N. Walker: Why punish?, Oxford University Press 1991, p.101 ff.)

[139] See: The White Paper, Crime Jusice and Protecting the public, 1990, paragraph 2.3. (as cited in

[140] See: Thomas: Current Sentencing Practice, Release 29 (Up-to-date to Feb. 1995), published in May 1995, London.

[141] The word "shall" is in this context is mandatory. Consequently a sentence which is imposed to state a deterrent effect, but is disproportionately to the crime commited, does not comply with the Criminal Act of 1991. On the other hand a court may not impose a sentence less severe than the proprtionate sentence.

and thereby exclude other justifications -such as a deterring effect- of choosing the appropriate punishment. As a result a mandatory sentence of five years of imprisonment for attempted robbery, which was challenged in 1989[143], however at that time upheld by the court, would be evaluated differently under the Criminal Act of 1991. In 1989 it was still argued that a deterrent sentence was called for and fully justified in the hope that others will be deterred from the defendant's example. According to the Criminal Act of 1991, however such a justification would no longer be valid as exceeding the proportional sentence for the individual offender.

In contrary to the fundamental backdrop to the English Criminal System, namely -as expressed in the Criminal Act of 1991- desert, stands the mandatory minimum sentence of life imprisonment for the commission of a murder.[144] This compulsory sentence was introduced as a compromise when capital punishment was abolished. Life imprisonment, in general, is the maximum sentence within the English Criminal System[145] and reserved for offenders who have committed "serious offences".

Even if there was much debate about the mandatory sentence of life imprisonment, the Criminal Act of 1991 leaves the criteria of imposing life sentences untouched. Although the dissatisfaction of the mandatory sentence of life imprisonment for the commission of murder was discussed extensively in 1989[146] no changes were progressed.

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[142] Section 2(2)(a) of the Crimnal Jusice Act 1991:"The custodial sentence shall be for such term (not exceeding the permitted maximum) as in the opinion of the court is consumensurate with the seriousness of the offence,... or the combination of the offence and one or more offences assiciated with it,...".

[143] In : Freeman v. The Queen, 11 Cr.App.R., at 398. In this case the offender was accused for picking a tourist´s pocket on the London underground. The offender was said to be a member of a gang that attacked tourist regularily in this manner.

[144] Some exceptions to this principle, however, are made: Section 1(2)(b) permits a court to paass a custodial sentence if it thinks that "only such a sentence would be adequate to protect the public from serious harm from him". Section 2(2)(b) says that if a court imposes a sentence of imprisonment on a offender of more than 21 years for a violent sexual offence , the leghth of that sentence shall be as long as "necessary to protect the public from serious harm from the offender".

[145] Except for the commission of a murder, life imprisonment may be imposed for the commission of many other major crimes, such as manslaughter, rape, robbery, wounding with intent and arson. The focus of this discussions, however, is mandatory sentencing. A mandatory sentence of life imprisonment is only set on convicted murderers. In other cases life imprisonment may only be imposed if "the offence or offences are in themselves grave enough to require a very long sentence", "where it appears from the nature of the offences or from the defenant´s history that he is a person of unstable character likely to commit such offences in future" and where "such offences are commited the consequences to others may be specially injurious, as in the case of sexual offences or crimes of violence." (Criteria found in Hodgson v The Queen, Cr.App.R. 1967, at 113.)

During April 1991 there was an overwhelming majority vote of 177 to 79 in the British House of Lords in favour of the abolition of the mandatory life sentence.
Five principals arguments were put for the abolition:

- The life sentence involves an anomalous transfer of the separation of power from the judiciary to the executive, since (under existing arrangements)it is the latter who determinates the time served in prison.

- The executive exercises its power in secret, with no appeal and on no published criteria, which is wrong because it contradicts the offender's right to judicial process in open court.

- the mandatory sentence prevents justice from being seen to be done, because courts are required to pass the same sentence on murderers of different culpability. Instead murder is a crime that varies just like any other crime. Courts are prevented from reflecting this.

- The sentence of life imprisonment cannot be justified by its presumed deterrent effect. There is, indeed, no evidence for that. A recent example of the Australian State of Victoria (which abolished the mandatory sentence in 1986) shows no increase in murders.

- There is no greater difficulty in determing the appropriate sentence for various murders than for offenders of other crimes.

A second vote, also carried by the majority, was in favour of requiring the judge to state the term of sentence, i.e. the term proportionate to the seriousness of the offence.

The House of Common, however, eradicated these proposals with a clear majority (236 votes to 158 votes).It was argued that "The best an fairest system is the one we have now where the life sentence is fixed by law and the responsibility then passes to the Home Secretary to decide how the sentence should be spent". The turning point of the debate seems to have been the issue of who should decide when to release a life-prisoner rather than the question of whether mandatory sentences serve any useful purpose.

It was further argued that the criminal law must reflect public attitudes and that the public in general feel that the mandatory sentence is appropriate to mark the heinous crime of murder out from all other crimes. This statement, however is

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[146] By the Report of the Select Committee on Murder and Life Imprisonment,(House of Lords, Report of the Select Committee on Murder and Life Imprisonment, (H.L. 78-1), HMSO, 1989.

very weak since it is neither true that the public should determine sentencing policy (if this was so, capital punishment would be still in force in most of the world's countries) nor is there any public opinion poll to see if this statement was true.

In 1993, the Committee on the Penalty for Homicide[147] brought this discussion up, again. The scope of inquiry was -inter alia- to reconsider the propriety and justice of the mandatory sentence of life imprisonment.[148] The starting point was a statement of the Chairman Lord Lane that "the mandatory life sentence is an anachronism and results in potential injustice" and that proposals must be drawn up which address these "injustices".

It was assumed that the crime of murder is a widely misunderstood crime and that misconceptions about its nature and in its legal definition consequently lead to misconceptions about the level of punishment since it applies to a vast range of human conduct resulting in a victim's violent and unnatural death and especially the inflexibility of judges to impose the penalty of life imprisonment for this kind of crime. In short: The "iron equation between the crime of murder and the punishment of the murderer."[149]

The main concern of this Committee was that the prescription of a uniform sentence for an individual crime implies a crime uniform culpability, -even in the least reprehensible and mitigating circumstances[150]- which does not fit to the crime of murder as defined by English Law.

It was submitted[151] to be a "truism" that the taking of human life has a quality that distinguishes it in the popular mind from all other offences. This, however, does not warrant the belief that every murderer is more reprehensible than any other crime. In other words this committee criticised the lack of proportionality between crime and penalty in the case of a convicted murderer.

It will be interesting to see how these issues will be confronted in the future.

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[147] This Report was published by an idependent inquiry into the mandatory life sentence for murder, commissioned by the Prison Reform Trust (Chairman: Lord Lane of St Ippollitts), in London, set up in 1993 to consider, inter alia, the mandatory life sentence for the commission of murder.

[148] In 1965 the so-called Murder Act replaced the previous sentence for murder -the death penalty- by the mandatory sentence of life imprisonment.

[149] See: "Report", Committee on the Penalty for Homicide, p.7.

[150] See: "Report", Committee on the Penalty for Homicide, p.21.

[151] See: "Report", Committee on the Penalty for Homicide, p. 21.

g) The Finnish Experience

Since 1976, Finland's sentencing ideology changed drastically. The background to the Committee Report of 1976 was the observation that any piece of legislation drafted at the end of the last century was out of date. At this stage, the most important sections of Criminal Code of 1889 had -in fact- been re-drafted at least once. Even if it had been possible to extend the life of that law by another hundred years by continuing the practice of partial reforms, it was the desire to reconsider the structure of the Criminal Code and to find an appropriate alternative.[152] This development was favoured by the increasing strength of the socialist parties in opposition to conservative lawyers. Social sciences had become enormously popular in the 1960s. There was a growing feeling that criminal legislation would benefit from social science insights.[153] A new generation was established in the academic world and in the law drafting department of the Ministry of Justice, which finally led to the revision and a total reform of the previous Criminal Code.

The previous rehabilitative approach to sentencing was replaced by a new Chapter added to the Criminal Code which restructured judges´ sentencing discretion by demanding "proportionate sanctions", i.e. the sanction is to be proportionate to the crime.[154] The most important factor in determing the adequate sanction shall be the seriousness of the offence: "The punishment shall be measured so that it is in just proportion to damage and danger caused by the offence and to the guilt of the offender manifested in the offence"[155] , says Art. 1, which is followed by Art.2 to 4 providing detailed lists of more specific criteria as to how the seriousness of an offence may be measured.[156]

In contradiction to this new approach, however, is the fact that judges must impose sanctions as being prescribed by statutory minima and maxima. A judge may not go below the prescribed minimum on the grounds of the seriousness of the crime but only on the grounds of his age, on the grounds of self-defence and similar objective facts.

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[152] See: Lathi, Raimo and Nuotio, Kimmo: Criminal Law Theory in Transition, Finnish and Comparative Perspectives, Helsinki 1992, p. 11.

[153] See: Lathi, Raimo and Nuoti, Kimmo: Criminal Law Theory in Transition, p. 11.

[154] See: Chapter 6 of the Penal Code of Finland.

[155] See Art. 1 of Chapter 6 of the Penal Code of Finland.

[156] Art.2 provides criteria which may increase the seriousness, whereas Art.3 lists factors which generally reduce the harm or culpability of the offending behaviour. Art. 4 provides the right for a court to consider other mitigating consequences caused by the crime.

h) The Swedish Experience:

In 1986, the Swedish Committee on Imprisonment recommended a reduction of statutory minimum and maximum sentences which lead to a revision of the Penal Code in 1988 which identifies proportionality (desert) as the primary basis of sentencing, and which requires the judge to assess the "penal value", i.e. the seriousness of the offence.[157]

Chapter 29, Section 1 of the Swedish Penal Code of 1990 now states that "Penalties shall be decided with regard to the desirability of uniform and consistent adjudication and set within the scale of punishment applicable to the culpability of the offence or offences taken as a whole. In assessing culpability, "special consideration shall be given to the damage, injury or danger occasioned by the criminal act ... and to the intentions or motives he may have had in committing such act."

The following sections 2 and 3 contain lists of factors which may be regarded as aggravating the seriousness of the offence and factors which may mitigate offence severity. Sections 4 and 5 provide further factors which might be considered in determing the length of sentence (such as the previous criminal record, whether the accused announced himself, and similar personal circumstances).

These changes were quite drastic since previous Swedish legislation did not provide for what features of the offender or the offence ought to be given priority in sentencing .

The Finnish and Swedish approaches are notable in the sense that the judges have a great degree of discretion (since they are subject to few legislative restrictions). On the other hand they do not provoke sentencing disparity since their discretion is given guidance by the principles of sentencing as declared by the legislation. As a result judges are free to evaluate the factors in the individual case but not free to impose disproportionate deterrent sentences, even if they desire to do so.

In this way "the structuring of their discretion is thus achieved through an approach which ties their patterns of reasoning to particular aims and principles, rather than through an approach which sets out numerical guidelines."[158] This is certainly a very sophisticated way to achieve individually just sentences and to prevent the feared disparity of sentences in comparison to the approach of other countries as examined above.

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[157] See: A.v.Hirsch and A.Ashworth: Principled Sentencing, Boston, 1992, p. 285.

[158] See: A.v.Hirsch aand A.Ashworth, p.285.

4) Conclusion

Mandatory sentencing laws are claimed to reduce crime rates through a general deterrent effect. The evidence, however, that the enactment of mandatory penalty laws have either no deterrent effect or a modest deterrent effect that soon wastes away is clear and weighty. It is further apparent that mandatory minimum laws provoke judicial and prosecutotial stratagems, usually by accepting guilty pleas to other non-mandatory minimum-penalty offences or to avoid from prosecution altogether, that avoid their application.[159]

The U.S. Sentencing Commission documented that mandatory sentencing laws result in massive circumvention of mandatory penalties. Interviews and surveys of judges prosecutors, defence counsel showed that mandatory penalty laws are disliked by most of the criminal justice system personnel.[160]

"There can be no rule of general application laying down a specific quantum of punishment that should be inflicted in the case of particular offence."

The major disadvantages of minimum sentences, however, are that they may, on occasion, preclude the sentencing judge from imposing the proportionate sentence with regard to the seriousness of the offence. It is impossible for the legislature to foresee in adequate detail the variety of circumstances under which crimes are committed as well as to provide for the sometimes considerable differences of personality between the people who commit crimes.

As a result the defendant's constitutional right of "proportionate sentencing", whether deduced from the Bill of Rights (as , for instance, in the United States of America, Canada and Namibia) or deduced from the principle of a Rechtsstaat (as, for instance, in Germany and England) is endangered to be violated.

It is submitted that any minimum sentences which are still in existence must be considered as a relic of the past. It is therefore recommended that those still in force may be abolished and furthermore that the legislature refrains from the introduction of such in the future.

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[159] See: c. Munro and M. Wasik: Sentencing, Judical Discreton and Training, London 1992, p.152.

[160] See: U.S. Sentencing Commission, Mandatory Minimum Penalties in the Federal Criminal Justice System (1991), See also: M.Tonry:"Mandatory Penalties" in: Crime and Justice: A Review of research, edited by M.Tonry, Vol. 12, 1992.

It is further suggested to replace the mandatory life sentence (which was introduced in England and Germany as a compromise when capital punishment was abolished) by a discretionary sentence. It is definitely time to change the present attitude in these countries since already the European Court of Human Rights decided in 1990[161] to hand back the decision as to the extent of life sentences for prisoners to the judiciary. With regard to Art. 5(4)[162] of the European Convention of Human Rights, it was argued that a prisoner has the right to regular and open judicial review. This right, however, is not practised properly in recent German and English jurisdiction: Once the court has pronounced its sentence, the sentence becomes final and the courts lose their control over the case. Thereafter it is the executive, which is responsible for the administration of sentence.

It is further recommended to return to the principle of "just desert" as demanded by the constitutional principle of proportionality, in terms of which the severity of the sentence be measured individually in proportion to the seriousness of the crime.

A consistent approach to sentencing is certainly worthwhile and is undoubtedly necessary to provide for legal certainty and fairness. Still, to achieve individual justice it is also necessary to retain judicial discretion which allows flexibility in unusual cases and which prevents inconsistency through treating different cases alike.

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161 See: Wilson and Gunnel, Case 399 of 1990.

162 Art. 5(4) of the European Convention on Human Rights reads as follows: "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfullness of his detention shall be decided speedily by a Court and his release ordered if the detention is not lawful."

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