

JUDICIAL DISCRETION IN SENTENCING

**Contrasting Reform in Foreign Jurisdictions
with the South African system**

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1. INTRODUCTION

“Questions have been asked whether we have got the balance right between the rights of criminals and those of ordinary citizens. This government is not about to join the chorus baying for the death sentence or to reverse our human rights gains. Yet, in addition to the measures we introduced regarding bail and mandatory sentences we need to examine spaces that need tightening.”¹

President Nelson Mandela, in his opening address to Parliament, highlighted the fact that there are certain areas in the criminal justice system, which warrant considerable attention. It is the submission of this dissertation that the one such area is the unfettered discretion exhibited by judges in sentencing practice. This problem is not inherent to South Africa. It plagues the criminal justice systems of numerous other countries.

A crucial point that comes to the fore in many of the commentaries and discussions on sentencing is that one is dealing with a concept, which has extensive political, social and economic implications. This topic is not restricted to academic debate alone. It cannot be dealt with in a vacuum and the effects of reform on society as a whole need to be investigated thoroughly prior to any changes being formally implemented.

“Sentencing has long been the backwater of the criminal justice system – an ugly little secret veiled from public scrutiny by the myth of rehabilitation and avoided by overworked appellate courts with the same distasteful aversion the Victorians gave to public discussion of sex. A decade of serious criticism has changed that....”²

In foreign jurisdictions sentencing reform has received a lot of attention over the past years. Changes in many countries have been recent and objective evaluations of the various systems implemented have in numerous cases not been completed. One is dealing with a practice that is tested by observing the patterns that develop once the system is in use, and this takes time. Academics may be able to criticise the theories that the systems are based on, but one has to observe judicial behaviour in order to ascertain whether the desired effects are being achieved. It is for this reason that there is a large amount of literature on the American systems. The reform that took place in America occurred earlier than in other countries and it was radical in nature.

¹ President Nelson Mandela’s Opening Address to Parliament, 5 February 1999

² Doob, A.N. (1995) “The United States Sentencing Commission Guidelines : If you don’t know where you are going you might not get there”, 199

Theories of punishment are still being debated and there is no single accepted purpose of punishment. The notions of rehabilitation, retribution, deterrence, denunciation and public protection are all still used when attempting to formulate a rationale for punishment. A number of Western countries have adopted the notion of just deserts in one form or another. It is not sufficient to embrace a rationale of punishment and then expect the judiciary to solve the problems that exist in the sentencing sector of the criminal justice system. Different judges have different perceptions of what a just desert is.³ A mechanism, which controls and guides judicial discretion, is a necessary aid for those who work in the system on a daily basis.

Criticism of the manner in which the judiciary sentences the offender has come from varied quarters. Generally a feeling that “nothing works” prompted a call for reform of sentencing methods used in various countries. Some of the major concerns related to issues such as lack of truth in sentencing, disparities in sentences handed down to offenders with similar offences, an increase in crime and prison populations and court backlogs in hearing trials.⁴

The recognition that there are widespread disparities in sentencing leading to a lack of certainty was one of the most important concerns and many countries viewed it as a stumbling block to unfettered judicial discretion.⁵ Judges felt that the ability to pronounce a sentence in a specific matter fell within their domain alone. It was not open to scrutiny or restriction by any other public body and the circumstances of the individual involved were paramount to ensuring that the sentence fitted the crime in the specific case. Not only does this result in like cases being treated differently, but it also produces a system, which is not honest. The sentence handed down in court is often not a true reflection of the actual time that will be spent in prison.⁶

A tension in sentencing practice thus developed. On the one hand there was a call for uniformity and consistency so that like cases could be treated in a similar manner.

³ Morgan, R. and Clarkson, C. (1995) “The Politics of Sentencing Reform”, 8

⁴ Ibid. 4-6

⁵ Ibid. 4

Yet on the other hand a certain degree of flexibility is required, so that different cases can be treated differently. Individualisation of the sentence is a core aspect in this area of criminal justice, yet practical issues such as increasing prison populations, financial constraints, a rise in crime and disparities in sentencing mean that the theories must consider reality. The debate is not whether guidance is needed, that begs the question. Rather the issues revolve around the type of guidance required, the form it should take and the body that should impose it. The guidance cannot be so rigid that it does not allow one to distinguish the cases that need distinction.

Public, media and political attention are focused on the criminal justice system in South Africa at the moment. This is due to an increase in crime and the release of prisoners from custody as a result of overcrowding. The country is preparing for an election and politicians are searching for turbulent issues to focus on. The lack of faith in the criminal justice system is an issue, which will arouse public support, or condemnation, depending on the stance taken.

Observations of other systems indicate that a proactive rather than a reactive approach will increase the success and acceptance of reform. The situation that the criminal justice system finds itself in at the moment, in South Africa, means that many of the short-term solutions will be reactive. When long term decisions are made regarding sentencing, specifically and criminal justice, generally then a proactive approach is advocated. Expectations that South Africans have about the impact that reform in the criminal justice system will have are unrealistic. Sentencing practice is a small part of the criminal justice system. Change in sentencing practice is necessary. Reform in sentencing alone is not enough. It will not miraculously lead to a reduced crime rate. There is no single “quick fix” solution to the problems being experienced in the South African criminal justice system and the sooner this is realised, the sooner those involved in change can begin to take an holistic approach to the problem. This is a social, political and economic problem as well as a legal one. All these aspects need to be brought into the equation when searching for a solution to the problems facing the South African criminal justice system.

⁶ Ibid. 5

This paper will examine systems adopted in England and Wales, Australia and the United States of America. The successes and failures of these systems will be discussed and suggestions will be made as to how South Africa can benefit therefrom. These countries will be focussed on as they come from a similar background of wide judicial discretion as in the situation of South Africa.

It is important to keep in mind that this is a developing area. In respect of some systems there is a large amount of research and evaluation. Other areas are undeveloped and the passing of time will be their judge. The writer does not wish to enter a discourse on the various theories of punishment. Where necessary they will be explained or referred to, but an assumption will be made that the reader is aware of the various theories and their limitations.

The focus of this paper is:

- a study of the methods that other countries have used in the promotion of uniformity and truth in sentencing;
- an analysis of their strengths and weaknesses; and
- a discussion on whether any of the systems used in foreign jurisdictions may be applicable in the South African context.

2. FACTORS TO CONSIDER WHEN IMPLEMENTING REFORM

The issues that surround sentencing are complex and confusing. They have been debated worldwide and although reform has occurred in many countries, the issues are far from being solved. The problem is further complicated by the fact that the concept of sentencing is vague, in that it involves a number of factors. It is not only limited to legal theories of accountability, transparency, natural justice and proportionality to name a few. It also involves political, social and economic problems. The history and circumstances of the specific jurisdiction implementing the change cannot be emphasized enough and have an important role to play in the framework that is chosen.

One can learn from the success and failure of others, but one cannot automatically import an idea from one country into another without taking into account the circumstances specific to that area. The individuals involved in the reform must be considered as well. Their attitudes, personalities, involvement and abilities can ensure the success or failure of the chosen framework.

With all these notions complicating the subject and making it almost impossible to formulate a satisfactory, workable solution, one may be inclined just to leave the situation as it is. In doing this one is making a choice by omission. Doing nothing in the South African context means one is bowing to the unfettered discretion that the judiciary wields. One need not advocate revolutionary change. The State of Victoria in Australia is an example of a legislature, which merely codified existing practice in order to create a more defined framework for judges to operate in.⁷

A continuum exists. At the one extreme one finds unfettered discretion and at the other rigid numerical guidelines disallowing deviation.⁸ There is a middle ground. It is from the jurisdictions that have adopted the extremes that one can learn and adapt a methodology to suit the climate in which one operates. It is not an either or situation.⁹ There are so many variables to consider that one is able to take an innovative approach in order to solve the inadequacies of the existing structure. This is a positive point that can be drawn from the minefields of legislation that have been created by countries in the name of reform. There is no single, correct answer. It is the challenging task of the jurisdiction undertaking reform to structure a system that that works for them.

Andrew Ashworth states that an effective, fair method of crime control and punishment is what is required.¹⁰ Due to the public nature of the issue, opinions will never all be the same.¹¹

⁷ Ibid. 15

⁸ Von Hirsch, A. (1986) "Guidance by numbers or words? Numerical versus narrative guidelines for sentencing", 46

⁹ Ibid.

¹⁰ Ashworth, A. (1994) "Altering the sentencing framework", 254-255

The perception that the system is a success is just as important as the reality that it is a success. It is from this standpoint that one can develop a solution.¹² Anthony Doob emphasizes that there is a tension that pervades throughout the literature on this issue.¹³ Who should control sentencing and how it should be controlled are the two issues creating conflict.¹⁴ Academic comment on the subject sometimes confuses these issues or does not specifically identify what the general tensions are. This complicates an already complex area of legal debate. A logical approach to problem will provide greater clarity.

Ashworth advocates a stepped approach to reform in sentencing in his article, "Reflections on the Role of the Sentencing Scholar".¹⁵ He points out the problems succinctly and emphasizes the importance of taking a stance on the theoretical questions, as they have an impact on the reality of sentencing problems.¹⁶ Dividing up the matters to be dealt with on a step by step basis will provide a systematic manner of aiding reform. The theories and practical problems within each step still exist, but the procedure is evident and it may provide the reformer with a sense of direction that would be lacking without it. The following stepped approach is based on Ashworth's concept, however it has been adapted.

- **Step One**

Decide on the body that will formulate and structure the framework. Firstly, those undertaking the task of reform have to have the necessary experience and expertise in the field. The English experience indicates that the individuals involved should have advanced drafting skills to ensure that the guidelines imposed are not going to complicate the matter further.¹⁷ Secondly, they should not be susceptible to direct political manipulation. This can lead to an abuse of the structures or to amendments motivated by political gain alone.

¹¹ Ibid. 254

¹² Ibid

¹³ Doob, A.N. (1995) "The United States Sentencing Commission Guidelines : If you don't know where you are going you might not get there", 199

¹⁴ Ibid

¹⁵ Ashworth, A. (1995) "Reflections on the Role of the Sentencing Scholar", 251-264

¹⁶ Ibid. 256

¹⁷ Ibid. 262

Thirdly, since the judiciary will be the body applying the system, they should be involved in the process. Their support is critical, as indicated by the Federal experience in America.¹⁸ Involving them in the process can aid in altering their perceptions of their role in sentencing.¹⁹ If they know that they have had the opportunity to make a meaningful contribution to the guidelines, then they will be more willing to implement the final system. They are the one's on whom a large part of the ultimate success or failure of the framework lies, as they apply it on a daily basis.

Fourthly, individuals working in the criminal justice system should also be involved in the process for similar reasons to those under the third point. Finally, a degree of public participation is essential.²⁰ Public outreach programmes, media backing and public relations will help to ensure that the final policy is at least understood by a large part of the community, if not accepted by all.

From the above points one obtains the impression that a commission-like structure should be set up and that complete reliance on the legislature is not advocated. This type of structure will avoid the above-mentioned pitfalls and aid in the creation of a workable system. Obviously a commission is subject to limitations as well, but as long as they are recognized, a commission working in conjunction with the legislature is a viable option.

- **Step Two**

Choose a main theory or rationale of punishment. This is essential as in sentencing the rationale that one adopts has practical implications.²¹ This does not mean that if one accepts a set theory then one has to choose a specific framework. For example in choosing a desert-based aim for punishment, one is not necessarily constraining oneself to the use of numerical guidelines.

¹⁸ Tonry, M.H. (1992) "Judges and Sentencing Policy – The American Experience", 137

¹⁹ Ibid.

²⁰ Ashworth, A. (1995) "Reflections of the Role of the Sentencing Scholar", 276

²¹ Ibid. 256

The opposite also rings true. In that a rigid system does not mean that a retributive theory of punishment is being advocated.²² It is interesting to note that a desert-based theory of punishment seems to provide a common backdrop for sentencing in numerous jurisdictions at present.²³

What this step means is that a primary theory is required to ensure that the eventual framework adopted is placed in the correct context when applied.

One need not adopt a single theory and ignore all other rationales of punishment. In Sweden they state that there is an overriding principle that governs punishment, however there are ancillary rationales, which are to be considered as well.²⁴ In that way you are providing the designers and the end users with guidance in developing and using the system respectively. They know what the theoretical basis of punishment in the system is and they then attempt to achieve this in the approach that they adopt.

- **Step Three**

This step relates to a framework choice. A method of sentencing needs to be designed that fits in with the overall theory adopted. This is not a simple exercise. The literature and practice indicate that there are numerous considerations in this step. They include political, social and economic factors, balanced against public and media attention. Essentially the method that one adopts will be dependent on the political climate and the attitudes prevailing at the time of reform. A set methodology must be installed to promote the principles of natural justice and the rule of law. In South Africa these concepts are found in our Constitution. One has to ensure that the system adopted does not conflict with accepted constitutional norms. The sentencing methodology adopted will assist in improving the credibility of the criminal justice system as a whole.

²² Ibid.251

²³ Tonry, M.H. (1995) "Sentencing Reform Across National Boundaries", 268

²⁴ Ibid. 268

- **Step Four**

This involves the establishment of a support system for the framework. The support here relates to: research, planning of how the process will be implemented, training of all involved in the system prior to inception, backup once the framework is in operation, evaluations of the working model, updates on amendments and technical support. It includes training of new recruits, providing materials, statistical analysis and academic review.²⁵

This step emphasizes the fact that careful planning and communication are imperative to the success of the method adopted. A well-planned and executed guideline can alter the behaviour of the judiciary rapidly and effectively.²⁶ It seems trite to say this, but many jurisdictions have failed to adhere to this step. This has reduced the effectiveness of their approach. Regardless of how well developed a theory and framework are if the implementation thereof and the support provided are defective then the framework will fail.²⁷

These four stages group the issues for consideration into separate categories so as to simplify the procedure and ensure a workable end result.

Before embarking on a discussion of specific countries and the approaches that they have adopted a few preliminary observations have to be made.

The concepts of judicial discretion and judicial independence are two ideas often referred to in this debate. It is incorrectly argued, by some, that by restricting the discretion of the judiciary one is impinging on the administrative law concept of the Doctrine of a Separation of Powers. There is a fundamental distinction between executive intervention in sentencing, which is dangerous and legislative articulation of sentencing policy, which provides a framework.²⁸

²⁵ Ashworth, A. (1995) "Reflections on the Role of the Sentencing Scholar", 258

²⁶ Tonry, M.H. (1995) "Sentencing Reform Across National Boundaries", 267

²⁷ Ibid. 275

²⁸ Morgan, R. and Clarkson, C. (1995) "The Politics of Sentencing Reform", 8

The doctrine enshrines the concept of a separate and independent judiciary. It means that a judge should be able to administer law without fear or favour and not be pressurized into passing a sentence.²⁹ The judicial branch of the government should be completely separate to the executive and legislative branches.

The limitation of a judge's discretion means that the judges have to sentence the individual within a framework that the legislature has adopted. A large amount of the work that the judiciary performs is guided by legislation. For example the manner in which judges are appointed, the way crimes are defined and the procedures that are to be followed after a plea has been entered are all aspects of the criminal justice system that are based on legislation. It is not an unusual phenomenon for the judiciary to be regulated by the legislative branch of government. The invasion of the doctrine is not an issue here as the judiciary is free to administer justice in manner that they deem fit.

The notion that "justice is local" is an important consideration when contemplating reformation.³⁰ It has two implications when applying it to sentencing practice. Firstly, it is the community, which must accept and adhere to the principles of punishment and the manner in which a sentence is passed. The concept of a community sanction cannot exist unless the society within which it has to operate agrees that it is an acceptable form of punishment.³¹ The community is, at times; the most vocal critic of the system and without their support and their perception that the procedure works, most reform will fail.

Secondly, one can examine guidelines adopted in other countries and learn from their mistakes, however one cannot import frameworks from other jurisdictions without adapting them to the specific circumstances of the society that they are to be implemented in. Even if a system of sentencing guidelines is successful in another country, this does not mean that it will be a success in South Africa. There are historical, political, social and economic factors particular to this country, which have to be considered. Different jurisdictions experience different problems and these have to be accounted for them in the type of sentencing practice which they adopt.³²

²⁹ Ashworth, A. (1995) "Reflections of the Role of the Sentencing Scholar", 253

³⁰ Tonry, M.H. (1995) "Sentencing Reform Across National Boundaries", 277

³¹ Ibid.

³² Ibid. 267

The above point is an important one, but one must not take it to the extreme and negate the experience that can be gained from other countries, which have already begun the reform process.

“Those jurisdictions that refuse to learn from the experiences of others are condemned to repeat their mistakes”³³

Vital lessons can be drawn from the experiences of other countries. The point is when learning from other countries, remain aware of the specific circumstances existing in your country.

The practice of sentencing must be kept in context. It is part of a broader process. It is only one step in a long series of decisions that are made when an individual is first charged with an offence.³⁴ It is part of the entire criminal justice system and the task of crime prevention cannot be the sole responsibility of the courts and the sentencing judge. One must not overstate, nor for that matter understate the importance of sentencing in the criminal justice system.³⁵

“Sentencing structures are built upon unstable foundations. They are the result of, and vulnerable to, shifting social, political and economic pressures. They will survive as long as they fulfill the needs of the dominant political elements of the society of which they are a product.”³⁶

The concerns relating to a lack of consistency, honesty, proportionality, increasing prison populations and parsimony are factors which emerged repeatedly when different countries began to realize the need for reform in sentencing practice.

Consistency and uniformity relate to the disparities that existed in sentencing practice. Different judges were imposing different sentences for different reasons without providing explanations in open court.³⁷ Sentences were excessive and like cases were not being treated in a like manner, as the emphasis was on the individual and not on fairness.

³³ Tonry, M.H. (1995) “Sentencing Reform Across National Boundaries”, 282

³⁴ Ashworth, A. (1995) “Reflections of the Role of the Sentencing Scholar”, 264

³⁵ Ibid.

³⁶ Ibid. 265

³⁷ Morgan, R. and Clarkson, C. (1995) “The Politics of Sentencing Reform”, 4

There was a lack of truth and honesty in sentencing. Prisoners often received remissions in the duration of their sentence.³⁸ Parole boards were effectively acting as courts of law when making decisions regarding the remission of a sentence.³⁹ There was no transparency in the process.

Punishment should be proportionate to the crime and its severity should be limited. Imprisonment was to be used in only the most serious of cases.⁴⁰ A violent offence against the person was seen as more serious than a simple property offence.

Prison populations were increasing. The concepts of rehabilitation and deterrence were losing impact in the wake of high recidivism of offenders.⁴¹ Crime rates were increasing and the phrase “nothing works” was reducing the credibility of criminal justice systems worldwide.

It was in the light of all these, general and specific concerns that reform in sentencing practice occurred.

3. ENGLAND AND WALES

A culture of discretion and review shaped the development of the English system. The Lord Chief Justice involved himself in the evolution of the system and the courts took their role of formulating guideline sentences seriously. This placed the English system in a position between the two extremes on the continuum. That of a numerical, grid system at the one pole, and unfettered discretion at the other.

³⁸ Ibid. 5

³⁹ Ibid.

⁴⁰ Von Hirsch, A. (1995) “Proportionality and Parsimony in American Sentencing Guidelines : The Minnesota and Oregon Guidelines”, 149

⁴¹ Ibid.

Numerous acts were passed over the years relating to sentencing. There was a history of legislative intervention prior to the passing of the Sentencing Act of 1991. (“1991 Act”)⁴² Regardless of this fact, Parliament had never formally developed a systematic approach to limiting the discretion of the judiciary, as there was a strong belief in the concept of judicial ownership of sentencing.⁴³ This was encouraged by the idea that the practice of sentencing is not an exact science.⁴⁴ The discretion of the court was never severely restricted by legislation and the English system was inclined to rely on the guidance of the Court of Appeal.⁴⁵

In the 1970’s there was a general conception that the criminal justice system was failing. The prison population was increasing. Social and political changes were putting pressure on the system to adapt.⁴⁶ Numerous non-statutory developments were implemented, as the judiciary realized that greater clarity and guidance in sentencing practice was essential.⁴⁷ The Lord Chief Justice advocated change in the system. He became actively involved in calling for the Court of Appeal to develop guidelines for the lower courts to follow.⁴⁸ There were seminars held for judges and this resulted in better communication between them.

Judicial studies became more acceptable and the reporting of judgements, training of judges and criminal justice officials allowed a more cohesive system of sentencing to develop.⁴⁹

Many of these non-statutory changes dealt with the pressures that the sentencing system was experiencing. There was legislation passed during this period as well.⁵⁰ With the enactment of the 1991 Act all these advances were rendered meaningless and the system was plunged into confusion.⁵¹

⁴² Thomas, D. (1995) *Sentencing Reform : England and Wales*”, 271

⁴³ Tonry, M.H. (1995) “Sentencing Reform Across National Boundaries”, 271

⁴⁴ Halliday, J (1992) “Providing a Legislative Framework for Sentencing”, 74

⁴⁵ *Ibid.* 68

⁴⁶ Thomas, D. (1995) *Sentencing Reform : England and Wales*”, 127-128

⁴⁷ *Ibid.* 128

⁴⁸ *Ibid.*

⁴⁹ *Ibid.* 128-130

⁵⁰ *Ibid.*

⁵¹ *Ibid.* 130

The eighties heralded the introduction of the partially suspended sentence and the extension of the parole system.⁵² The partially suspended sentence was rarely used in practice and the increase in numbers of offenders who were released on parole led to a lack of truth in sentencing.⁵³ The extension of parole was a direct reaction to overcrowding in prisons and it essentially meant that the time one spent in prison had little relation to the actual sentence passed. It had more to do with the decision of the Parole Board.⁵⁴ Once the judiciary became aware of the anomalies created by legislation, their reasons for developing more complex guidelines vanished and they lost interest in the process.⁵⁵ In essence all that the parole initiatives accomplished was to create a negative attitude in the judiciary. They brought no relief to the increasing prison population.⁵⁶

During this period advances were made with regard to juvenile offenders. The success achieved in this aspect of criminal justice made the legislature want to extend these techniques into the rest of the criminal justice system.⁵⁷ It was into this climate that the 1991 Act emerged. The reaction to the 1991 Act can be summed up in the words of the then Lord Chief Justice. He stated that the Act forced the judiciary into an “ill-fitting straitjacket” and that it had created a sentencing framework that was “incomprehensible to right-thinking people generally.”⁵⁸

3.1 The Framework created by the 1991 Act

The 1991 Act contained broad legislative guidelines which were supplemented by guideline judgements handed down by the Court of Appeal. The relationship between the government and the judiciary was thus set to continue as it had in the past.⁵⁹ No commission or committee was formed to aid in furthering the development of sentencing practices.⁶⁰ There were numerous other statutes that were in operation during the time that the new Act came into operation.

⁵² Ibid.

⁵³ Ibid. 130-131

⁵⁴ Ibid. 132

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Ibid. 134

⁵⁸ Morgan, R. and Clarkson, C. (1995) “The Politics of Sentencing Reform”, 2

⁵⁹ Ashworth, A. (1992) “The Criminal Justice Act 1991”, 82

⁶⁰ Ibid.

The 1991 Act did not repeal any of these. Instead of creating a more cohesive framework for the judiciary to operate within, the situation was further complicated. In the words of David Thomas,

“Anyone coming to the study of English sentencing law for the first time would be struck by the quantity and complexity of the legislation involved. The maximum penalties for criminal offences are scattered among a large number of criminal statutes dating back in some cases to 1861; even in 1861 the lack of any logical structure or coherence in their arrangement was obvious, and matters have become worse rather than better.”⁶¹

The 1991 Act was based on the “just deserts” theory of punishment. This was not a radical departure from the existing practice in England. The judiciary had in any way recognized the need for the development of a single rationale for punishment and had been promoting this theory.⁶² The 1991 Act, although based on proportionality, never mentioned the word itself. It rather referred to the seriousness of the crime.⁶³ Nor did the 1991 Act advise the judiciary on how to deal with the other aims of punishment. The courts inferred that the other aims of punishment not related to the seriousness of the crime were to be ignored.⁶⁴ Issues of deterrence and rehabilitation were no longer important factors to be considered.⁶⁵ The main aim of punishment was punishment of the offender in accordance with the crime that was committed.⁶⁶

The 1991 Act linked the penalty to a restriction of one’s liberty via a hierarchy.⁶⁷ The gravest form of punishment was custody followed by the community order, a fine and a discharge, in descending order of severity.⁶⁸ It placed emphasis on violent crimes. Showing that they were more serious than property crimes.⁶⁹ It negated the importance of previous offences.

⁶¹ Thomas, D. (1995) *Sentencing Reform : England and Wales*”, 138

⁶² Halliday, J (1992) “Providing a Legislative Framework for Sentencing”, 75

⁶³ Ashworth, A. (1992) “The Criminal Justice Act 1991”, 83

⁶⁴ *Ibid.* 83-84

⁶⁵ *Ibid.* 84

⁶⁶ Halliday, J (1992) “Providing a Legislative Framework for Sentencing”, 71

⁶⁷ *Ibid.* 72

⁶⁸ Ashworth, A. (1992) “The Criminal Justice Act 1991”, 85

⁶⁹ Thomas, D. (1995) *Sentencing Reform : England and Wales*”, 139

When working out an appropriate sentence for an offender the fact that the individual had previous convictions was not a factor to be taken into consideration⁷⁰ This was in direct conflict with the Road Traffic Act, which was also promulgated during this time period. This Act specifically stated that the judge was to consider the previous convictions of the offender.⁷¹ Conflicts between the 1991 Act and other statutes created confusing situations and results.⁷²

The 1993 Act, which was hastily drafted, was a direct result of the criticisms launched against the 1991 Act. It amended the 1991 Act by repealing the sections regarding unit fines and previous convictions. This caused as many problems. It was argued that modification and not wholesale abandonment was required.⁷³ Once again the legislature enacted the statute without proper consultation, resulting in further confusion.

Central to the 1991 Act was the idea that the broad guidelines promulgated in legislation would be supplemented by more detailed principles developed in guideline judgements handed down by the Court of Appeal. It was the role of the courts to fill the gaps that the 1991 Act was unable to legislate in detail about.⁷⁴ The lower court was to be guided by the Court of Appeal. It would carry the burden of establishing a more cohesive framework for sentencing practice.

The court was able to deal with the controversial provisions of the 1991 Act relatively quickly, so that some clarity was obtained at an early stage.⁷⁵ This approach is limited. In the English system, as in many other systems, the Court of Appeal is remote from the lower courts. It deals with serious crimes, its practices are different and it can only consider issues that are brought to it on appeal.⁷⁶ Its ability to make statements and provide guidelines on sentencing is limited to the matters that appear before it. Cases take a long time to reach the Court of Appeal. Clarity on an issue may be a long time in coming.

⁷⁰ Ibid. 137-138

⁷¹ Ibid.

⁷² Ibid. 139

⁷³ Morgan, R. and Clarkson, C. (1995) "The Politics of Sentencing Reform", 2

⁷⁴ Ashworth, A. (1992) "The Criminal Justice Act 1991", 82

⁷⁵ Thomas, D. (1995) *Sentencing Reform: England and Wales*, 144

⁷⁶ Ashworth, A. (1992) "The Criminal Justice Act 1991", 82

Providing the judiciary with the power to hand down guideline judgements is an important tool for limiting discretion. It cannot be the only one made available in a system, which is founded on broad, descriptive guidelines situated in a maze of different statutes. This does not provide the clarity that is needed to reduce disparity in sentencing and ensure that like cases are treated in a like manner and different cases are treated differently. The reason for allowing a wider discretion than in a numerical grid is precisely to provide for this, yet the English system is so complex and creates so many anomalies that in the end the reason for keeping the wide discretion is not obtained.

3.2 Lessons to be learnt from the English experience

The drafting failures of the 1991 Act are legendary. This Act is a prime example of the danger of allowing Parliament to legislate on matters that they are not experts in. Members of Parliament are given too much prominence in the process, while those who work in the system on a daily basis were not included.⁷⁷ This opens the process to political hijacking and public pressure.⁷⁸

The 1991 Act was preceded by a White Paper, which clearly set out the aims of proportionality and the reduction of the prison population as goals to strive for in a new Act.⁷⁹ When the principles contained in the White Paper were enacted into legislation very limited outside consultation occurred, with the result that the 1991 Act was plagued with deficiencies.⁸⁰

If one learns anything from the English experience, it should be that when developing guidelines in such a complex and technical area, experts should be consulted. Members of parliament are always politically motivated. They do not necessarily consider all the ramifications of the Acts that they pass.⁸¹

⁷⁷ Thomas, D. (1995) Sentencing Reform : England and Wales", 144

⁷⁸ Ibid.

⁷⁹ Von Hirsch, A. (1995) "Proportionality and Parsimony in American Sentencing Guidelines : The Minnesota and Oregon Guidelines", 166

⁸⁰ Ibid.

⁸¹ Thomas, D. (1995) Sentencing Reform : England and Wales", 144

Bills are frequently passed as a reaction to public or political pressure.⁸² Numerous ministers are involved in the process. They each have their own input. In the end one has an Act which has to be amended almost as soon as it takes effect and which is filled with conflicting principles.⁸³ This aspect provides clear support for the basis that the legislature should empower a delegated body to draft such guidelines.⁸⁴

A lack of judicial participation in the process not only resulted in the above-mentioned drafting failures, but by excluding the judiciary their support for the reform was not obtained. Judicial hostility towards the 1991 Act was another reason for the rapid enactment of the 1993 measures.⁸⁵ Not including those who will implement the system in the formation thereof reduces their acceptance of the reform. The judges are the individuals who have to make it work and without their support and involvement the system will fail. This is especially true when the judiciary is approaching the matter from the belief that there should be a wide discretion afforded to them and the legislature wishes to limit that discretion.

The Act was passed in 1991 but only came into force in October 1992. A positive outcome of this was that it provided a sufficient amount of time for the judiciary and court officials to receive training in how to effectively, and efficiently use the new system.⁸⁶ Regardless of this positive aspect of training, the exclusion of the judges from the process, was a stronger factor. Good training did not compensate for their lack of participation.

The criminal justice system is not adequately equipped to deal with the policy issues that the 1991 Act demands them to grapple with. The legislature was unable to successfully draft a statute, which provided sufficient clarity for those operating it. A defined set of guidelines drafted by a sentencing commission may have been able to provide the English system with the flexibility that it required, while still maintaining a clear stance on policy issues.

⁸² Ibid. 140

⁸³ Ibid.

⁸⁴ Ashworth, A. (1995) "Reflections on the Role of the Sentencing Scholar", 260

⁸⁵ Tonry, M.H. (1995) "Sentencing Reform Across National Boundaries", 269

⁸⁶ Thomas, D. (1995) *Sentencing Reform : England and Wales*, 144

A redeeming feature of the 1991 Act was that it showed that the legislature is able to respond to shifts in public and academic attitudes in a reasonably rapid manner. The fact that the drafting of the 1991 Act was a disaster does not mean that the legislature's initial intentions were incorrect or misplaced.⁸⁷ It simply means that the manner in which their intentions were implemented was deficient. The 1991 Act reflects the general movement towards a desert-based theory of punishment that was appearing in other jurisdictions.

According to Thomas the Act was a complete failure. An entire overhaul of the system is unlikely, as the legislature has adopted a piecemeal manner for reforming sentencing practice and this method seems to be entrenched in their ideology.⁸⁸ Regular amendments lead to confusion in the implementation and application of sentencing guidelines. They also mean that a judge is expected to have the ability to use two different systems in respect of a single offender if the crimes were committed at different times when different amendments were in operation. In an already complex system one is placing a heavy load on court officials when adopting this method of reform.

4. THE VICTORIAN EXPERIENCE – AUSTRALIA

In Australia the criminal justice system is a matter of State concern and not a Federal issue.⁸⁹ Each State has developed its own sentencing techniques. A general trend within the country is that judges use an intuitive approach to sentencing and their discretion is not limited by rigid guidelines.⁹⁰ That was the method available prior to the Sentencing Act of 1991 ("1991 Act"). It is basically still the approach used today. Some States have adopted a system, which limits the discretion of the judiciary to a greater degree than others have.

⁸⁷ Ashworth, A. (1995) "Reflections on the Role of the Sentencing Scholar", 260

⁸⁸ Thomas, D. (1995) *Sentencing Reform : England and Wales*, 147

⁸⁹ Freiberg, A. (1995) "Sentencing Reform in Victoria : A Case Study", 51

⁹⁰ Morgan, R. and Clarkson, C. (1995) "The Politics of Sentencing Reform", 4

The descriptive guidelines that the 1991 Act promulgates are closer on the continuum to unfettered discretion than they are to the numerical guidelines used in North America.

“An intelligent observer who was told about the sentence passed and the period of incarceration actually served would be likely to conclude either that the Court had no authority because little notice was taken of the sentence passed or that the Court was engaged in an elaborate charade designed to conceal from the public the real punishment being inflicted on the offender.....The authority of the Court is eroded whenever the Executive is authorized to interfere with its orders.”⁹¹

This statement, made by the court in the *Yates* case, sparked a fierce debate about the nature of the sentencing process and the relationship between subordinate sentencing authorities, such as the Parole Board and Correctional Service Agencies, and the Courts.⁹² It highlights the prevailing criticism of a lack of truth in sentencing, as there was a gap between the sentence imposed and the actual time that the offender spent in prison.

Reform in Victoria during the 1970's and 1980' focused primarily on intermediate sentences in their various forms.⁹³ Programmes such as the attendance-centre order, periodic imprisonment, weekend imprisonment and the community-service order where all implemented with varying degrees of success.⁹⁴

Problems experienced in sentencing practice were dealt with in a piecemeal manner. There was no single Act, encompassing a system of guidance, for the judiciary in Victoria. The prevailing theory of “intuitive synthesis” used by judges in sentencing still existed. These problems highlighted the point that a single body ought to be established in order to make recommendations regarding sentencing practice in Victoria. Hence the appointment of the Sentencing Committee and a discussion of their conclusions.

⁹¹ Freiberg, A. (1995) “Sentencing Reform in Victoria : A Case Study”, 55

⁹² Ibid.

⁹³ Ibid. 53

4.1 The Framework for Sentencing that the 1991 Act created

A preliminary point, which in the case of Victoria, cannot be emphasized enough is the importance placed on the idea of “intuitive synthesis”.⁹⁵ The judge forms an opinion of what the sentence should be at the outset of the case. This is then aggravated or mitigated during the trial, as the judge learns about the specifics of the offence involved. Sentencing is not a purely logical exercise.⁹⁶ Purposes of punishment overlap and they do not always have a united effect. Hence the intuitive nature of the task is revealed.⁹⁷ This idea coupled with a fervently individual based approach to sentencing, ensuring that judicial discretion is not limited, is the hallmark of the Victorian sentencing process. The 1991 Act has done virtually nothing to alter this practice. Any discussion on Victorian reform must consider these primary motivators of the system.

The Sentencing Act of 1991 was not symbolic of revolutionary reform in Victorian sentencing law. It was a codification of many established practices, although it did implement some change.⁹⁸ Those involved in the practice of sentencing in the State of Victoria were aware of the subjectivity and unstructured approach that was prevalent in the years prior to the 1991 Act.⁹⁹ The concept of individualized justice was a central tenant to the sentencing ideology that existed.¹⁰⁰

The initial step was to create a Sentencing Committee. They would research the various methods available and then make recommendations to Parliament. The Committee created a package of measures to guide judicial discretion without necessitating the need for a rigid, numerical, grid structure.¹⁰¹

⁹⁴ Ibid. 53-54

⁹⁵ ⁹⁵ Morgan, R. and Clarkson, C. (1995) “The Politics of Sentencing Reform”, 4

⁹⁶ Freiberg, A. (1995) “Sentencing Reform in Victoria : A Case Study”, 58

⁹⁷ Ibid.

⁹⁸ Ibid. 56

⁹⁹ Ibid. 59

¹⁰⁰ Lovegrove, A. (1992) “Sentencing Guidance and Judicial Training in Australia”, 209

¹⁰¹ Freiberg, A. (1995) “Sentencing Reform in Victoria : A Case Study”, 59

These measures defined; the objectives to be pursued by the sentencing process, identified mitigating and aggravating circumstances, guided the courts in the determination of the seriousness of the offence, empowered the courts to hand down guideline sentences and implemented a hierarchy of sanctions.¹⁰²

The Committee identified three important parties in the process and assigned specific roles to each of them. This would ultimately limit the unfettered discretion of the judiciary and reduce disparity, while still allowing for individual treatment. The three players were Parliament, the Judiciary and the Judicial Studies Board.¹⁰³

Parliament had the task of articulating in legislation the policies to be applied by the courts.¹⁰⁴ This included general policy considerations, aggravating and mitigating circumstances, the use of various sentencing options and a hierarchy of sanctions.¹⁰⁵

General policy considerations included the following types of statements:

“The court must have regard to the nature and gravity of the offence and the offender’s culpability.”

“The sentence must be the least severe sentence giving effect to the aim/s of the sentence.”¹⁰⁶

The guidelines provided for the consideration of mitigating and aggravating circumstances. The following are some examples thereof:

“A non-exhaustive list of 11 factors deemed to increase offender culpability and, accordingly, sentence (e.g. the offence involved a threat to kill or inflict serious injury on a person, the offence was planned or pre-meditated....)”

“A list of three factors determining good character (e.g. any significant contributions made by the offender to the community.)”¹⁰⁷

¹⁰² Ibid.

¹⁰³ Lovegrove, A. (1992) “Sentencing Guidance and Judicial Training in Australia”, 210

¹⁰⁴ Ibid.

¹⁰⁵ Ibid. 210-211

¹⁰⁶ Ibid. 211

¹⁰⁷ Ibid.

Parliament was entrusted with the task of explaining when the various sentencing options were to be used. An example of the provision relating to the use of the suspended sentence follows:

“Suspended sentence. Where a court passes a sentence of imprisonment of not more than two years (1) it must suspend the sentence if in view of the personal circumstances of the offender or the circumstances of the commission of the offence it is unlikely that the offender will commit a further serious offence; (2) it may suspend the sentence if in the circumstances it is desirable to do so.”¹⁰⁸

The Committee further recommended that a hierarchy of sanctions be created. What follows are the first three sanctions listed in their suggested hierarchy.

“The proposed sanction hierarchy in descending order of severity:

- (a) A term of imprisonment.
- (b) A term of detention in a youth training centre.
- (c) A term of imprisonment (whether suspended or not) combined with a community based order.....”¹⁰⁹

The Courts had the role of formulating guideline judgements.¹¹⁰ The Full Court would hand down guideline judgements for the lower courts to follow. These judgements were considered binding, unless there were circumstances in the case, which were so materially different to the ones spoken of in the guideline judgement, that departure was necessitated.¹¹¹ The judgements encompassed those aspects, which Parliament had legislated on, but they would provide greater detail and clarity on the broad issues referred to in the legislation.¹¹²

The Judicial Studies Board was to assist in the implementation of the system.¹¹³ The Board was to consist of experts in this field. It was their duty to provide those involved in the criminal justice system with information on all the latest policies and developments in sentencing practice.¹¹⁴

¹⁰⁸ Ibid. 212

¹⁰⁹ Ibid.

¹¹⁰ Ibid. 213

¹¹¹ Ibid.

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ Ibid.

Unfortunately many of the above suggestions espoused by the Committee were not implemented in the final Act.

Section 5(1) of the 1991 Act lists the purposes for which a sentence may be imposed, while section 5(2) states the factors a court is to regard when sentencing an offender.¹¹⁵ This section does not deal with proportionate sentences. It merely restates the purposes of sentencing. It failed to provide any further clarity to the existing situation.¹¹⁶ It maintains the wide discretion that the Victorian judges had always laid claim to, furthering their stance that such unfettered discretion is a hallmark of a fair criminal justice system.¹¹⁷

One of the reasons for the above is that the Victorian Court of Criminal Appeal rejected the adoption of a rigid approach in the *Young* case as they felt that it would result in injustice for the individual.¹¹⁸ Sentences would either be too harsh or too lenient. The court restated the requirement of a range of proportionate sentences from which a judge could choose in order to ensure fairness.¹¹⁹ The court was emphatic in its denial that a single proportionate sentence for a specific offence and offender existed.¹²⁰ It is from this standpoint that one has to read the final draft of section 5 of the 1991 Act. Fairness and the intuitive approach are emphasized above everything else therein.

The Victorian courts were ambivalent about the comparative role of statistics in sentencing.¹²¹ They recognized that in order to deal with the common ground of appeal, that a sentence was manifestly unjust, one had to have an awareness of sentences that had been imposed in similar cases.¹²² The idea of a tariff or a rigid norm of comparison was not accepted by the courts in this state, as there was an overriding concern that they did not want to be subjected to a tyranny of statistics.¹²³

¹¹⁵ Freiberg, A. (1995) "Sentencing Reform in Victoria : A Case Study", 62

¹¹⁶ Ibid.

¹¹⁷ Ibid. 65

¹¹⁸ Ibid. 61

¹¹⁹ Ibid.

¹²⁰ Ibid.

¹²¹ Ibid. 63

¹²² Ibid.

¹²³ Ibid. 64

Statistics produced norms and a reliance on norms would reduce the ability of the court to treat the individual fairly. The courts are emphasizing fairness, at the expense of consistency in sentencing, rather than in addition to it.

Not all states were as opposed to the establishment of a general level or standard of practice as Victoria was.¹²⁴ In the Northern Territory they make use of a comparative idea as long as the information used is accurate, reliable and in fact comparable.¹²⁵ This means that cases, which in reality are similar, are compared. One cannot rely on the theoretical assumption that they are similar. An in depth study is to be done to that like is in reality being compared to like.

The importance that the Victorian courts placed on treating individuals fairly disallowed the advancement of the notion that sentencing practice should promote consistency.¹²⁶ This provides some explanation for the structure of the 1991 Act and the rejection of the suggestions made by the Sentencing Committee.

Section 7 of the 1991 Act did make use of the suggestion of a sentencing hierarchy, which the Committee proposed. This hierarchy contains a list of all the different sentences that are available to the court. Section 7 must be read in conjunction with section 5 of the 1991 Act. Section 5 relates to general principles. For example the court may not impose a sentence which is more severe than is necessary to achieve the purpose for which the sentence is imposed.¹²⁷ In relation to the problematic community-based order the 1991 Act reinforces the hierarchy concept with the principle of proportionality in three ways.¹²⁸

Firstly, the court must only impose those conditions, which are necessary to achieve the purpose or purposes of the order.¹²⁹

¹²⁴ Ibid.

¹²⁵ Ibid.

¹²⁶ Ibid. 65

¹²⁷ Ibid. 69

¹²⁸ Ibid.

The intention was to limit the wide choice that was available to the judge when deciding on an applicable community sentence in a specific instance.¹³⁰ The problem is that section 5 does not do enough to define exactly what the main principle in this consideration should be. One is able to justify almost any choice as a result of the broad manner in which the 1991 Act defines the purpose of punishment and the factors that the court is to consider when implementing them.

Secondly, it separates the different types of community-based sanctions that exist. This provides the court with a clear indication of the methods available to them.¹³¹ In this way it allows greater clarity and accessibility for the overworked magistrate who has not got the time to wade through complex policy issues prior to making a determination on the type and duration of the sentence to be imposed. Thirdly, it allows the principle of proportionality to operate in respect of summary offences.¹³²

A limitation of the intuitive synthesis concept is noted in the hierarchy structure. The courts have held that the principles espoused by the structure have to be applied regardless of the individual opinion of the judge in the matter.¹³³ They are slowly developing “sentencing packages” with a view to ensuring that the overall effect of the penalty concurs with the overall severity of the offence.¹³⁴ The impact that the hierarchy has had on sentencing disparity is yet to be evaluated. There is no clear evidence of their influence, in respect of the decision-making process that a judge undergoes, when sentencing an individual.¹³⁵

Austin Lovegrove states that the 1991 Act does not expressly indicate that the order in which the sentences are presented represent an order of severity.¹³⁶

¹²⁹ Ibid. 71

¹³⁰ Ibid.

¹³¹ Ibid.

¹³² Ibid.

¹³³ Ibid.

¹³⁴ Ibid.

¹³⁵ Ibid.

¹³⁶ Lovegrove, A. (1992) “Sentencing Guidance and Judicial Training in Australia”, 225

The listing of the sentences that can be imposed does not clarify the situation. The judge has to decide, whether the manner in which they are listed, represents their severity. Once this decision is made the judge then decides which sentence is appropriate in the circumstances. The 1991 Act does not simplify the process for the judge. It provides them with a plethora of factors to consider, making their task infinitely more difficult.

The 1991 Act abolished the remission procedure in order to promote truth in sentencing. Along with this abolition came the realization that in order to prevent an increase in the prison population the courts would have to alter the initial sentence passed. Cognizance would have to be taken of the fact that no remissions would be granted.¹³⁷ The effect of this is that the duration of the sentence would be shortened to ensure that future sentences would be consistent with past practices. Why the 1991 Act could not completely break away from past practice and impose a longer sentence if it was justifiable in the situation is on the face of it unclear. However, if one considers the economic implications of such a decision then it becomes more obvious.

The experience in New South Wales is a perfect example of this. The judiciary never altered its practices when their Sentencing Act was passed. Their Act abolished remissions. The judges never took account of this when passing sentences. As a result there was an increase in the prison population, which caused massive overcrowding.¹³⁸ When a policy change is made by Parliament the court must adapt their behaviour. If they do not, the practical implications thereof could be disastrous.

The 1991 Act does not provide for guideline judgements, as suggested by the Sentencing Committee.¹³⁹ The legislature felt that the use of such judgements would be an unjust limitation on the discretion of the judges in the lower courts. This discretion represented the core upon which sentencing practice in Victoria was based, and accordingly guideline judgements were not provided for in the 1991 Act.¹⁴⁰

¹³⁷ Freiberg, A. (1995) "Sentencing Reform in Victoria : A Case Study", 84

¹³⁸ Ibid. 82

¹³⁹ Lovegrove, A. (1992) "Sentencing Guidance and Judicial Training in Australia", 225

¹⁴⁰ Freiberg, A. (1995) "Sentencing Reform in Victoria : A Case Study", 59-60

Not all states in Australia adopt such a restrictive approach to the use of guideline judgements.¹⁴¹

The 1991 Act reviewed the submissions made by the Sentencing Committee with regard to maximum penalties. They did not implement them.¹⁴² They adopted a fourteen-level scale. This penalty scale is expressed in terms of levels, rather than in the traditional manner of a specific maximum penalty for each individual offence.¹⁴³ The scale is able to distinguish between indictable and summary offences and the sanction unit is expressed in terms of months rather than years.¹⁴⁴ The general level of fines was also increased by the 1991 Act. This accords with the policy of enhancement of the credibility of the fine, as an alternative sanction, and it reinforces the principle that imprisonment is a sanction of last resort.¹⁴⁵

These changes are a reflection of current judicial thinking in Victoria and as such are not a radical departure from past practice.¹⁴⁶ They are based on the offences defined in the Crimes Act of 1958. The application of the scale to crimes outside this Act still needs to be done. This has begun in relation to some sexual offences, but there is no comprehensive set of guidelines, which will aid in the creation of future offences and their penalty levels.¹⁴⁷

The suggestion, made by the Sentencing Committee regarding the establishment of a Judicial Studies Board was accepted. The Board officially came into being with the promulgation of the 1992 Judicial Services Board Act.¹⁴⁸ This Board ensured that there was a smooth transition between the old and new systems. One of its main functions was to provide training for all those working within the criminal justice system. It ensured the availability of reading materials and provided technical backup to all those in need thereof.

¹⁴¹ Ibid. 62-63

¹⁴² Ibid. 66

¹⁴³ Ibid. 66

¹⁴⁴ Ibid.

¹⁴⁵ Ibid. 67

¹⁴⁶ Ibid.

¹⁴⁷ Ibid.

¹⁴⁸ Lovegrove, A. (1992) "Sentencing Guidance and Judicial Training in Australia", 225

The fact that the implementation of the 1991 Act was viewed as a relative success by many is proof that matters like planning, training, research, technical support and communication are as important as the framework and policy decisions.

4.2 Lessons to be learnt from the Australian experience

The form and structure of a statute are important. The 1991 Act makes for a user-friendly system. In a single piece of legislation most of the fundamental ideas on sentencing practice are encapsulated.¹⁴⁹ They are set out in a clear, usable and intelligible manner. The 1991 Act is a pleasure to read, especially if one compares it to its English counterpart. This is an important lesson for the South African system to note. Although there are still problems and complexities in the 1991 Act, it is one of the more accessible statutes on sentencing practice.

The success that Victoria had in relation to the abolition of remissions is also notable. The abolition was well advertised and implemented.¹⁵⁰ Judges were made aware of the implications of the abolition on the criminal justice system as a whole, especially in relation to prison populations.¹⁵¹ In comparison the experience of New South Wales was a disaster.

The importance of publicity and training are emphasized by this success and by the fact that the prison population in Victoria has remained relatively stable in the face of rising crime.¹⁵² The smooth transition between the old and the new systems recognizes the fact that a structure such as the Judicial Studies Board is an indispensable part of the reform process. Especially when one is talking about large-scale reform.

¹⁴⁹ Freiberg, A. (1995) "Sentencing Reform in Victoria : A Case Study", 57

¹⁵⁰ Tonry, M.H. (1995) "Sentencing Reform Across National Boundaries", 275

¹⁵¹ Ibid.

¹⁵² Freiberg, A. (1995) "Sentencing Reform in Victoria : A Case Study", 89

The fact that the 1991 Act did not represent a major departure from the old methods should not lessen the importance that is to be placed on the support structures that need to be in place in a criminal justice system.

The 1991 Act was developed over a period of ten years and is considered a relative success. It is not immune to the public pressure and political interference. The rapid enactment of the 1993 Act is testimony to this.¹⁵³ This Act was passed with minimal consultation. In the light of this fact it is submitted that although the Judicial Studies Board exists, its scope needs to be widened and its importance needs to be emphasized. The manner in which the 1993 Act was passed suggests that the future of sentencing in Victoria is uncertain. There is little indication that Parliament has learnt from the past. The definitions in the 1993 Act remain wide and the lack of consultation indicates that the Board has not gotten the recognition that it deserves.

The 1991 Act provides little guidance on policy issues and Victoria is still subjected to the debates regarding which rationales are the leading ones to consider when sentencing an individual.¹⁵⁴ Discretion remains an important aspect of the sentencing process along with the specific circumstances of the individual being sentenced. The 1991 Act did not advance the cause of consistency in sentencing. In this aspect the Victorian experience lags behind developments in other jurisdictions. Uniformity in sentencing plays a major role in many other countries, however in Victoria it is the individual who prevails.

5. UNITED STATES OF AMERICA

The American experience of reform in sentencing procedures is a varied one. There is a distinction between the federal and state systems and the successes that they have had. Both systems use the numerical grid structure to guide judicial discretion. Their approaches to reform have differed and the results obtained vary. The distinction goes further than that, as not all the states have used a grid system to confine judicial discretion. Those that have adopted a numerical grid have not necessarily adopted the same grids.

¹⁵³ Ibid. 94

It is important to note that when one examines American reform one is viewing a country, which comes from a different perspective to the English or Australian one. There was not a strong history of judicial review in America. Reliance on the court structure to interpret legislative reform was not seen as the solution to the problem. The system of rigid guidelines was, and still is, the answer to limiting judicial discretion for many states. The grid is viewed as a method of increasing accountability in sentencing, while at the same time insulating the process from emotion and political pressure.¹⁵⁵ One will never be able to completely remove the political influence experienced in a sentencing system, this approach does limit it to a degree.

5.1 The State Systems

There are fifty states in America. Some have adopted numerical guidelines in sentencing others have not. In Colorado they make use of mandatory sentences to limit judicial discretion.¹⁵⁶ In California and Arizona they rely on determinate sentences.¹⁵⁷ Some of the states use voluntary guidelines, while others have mandatory ones and separate grids for drug offences.¹⁵⁸ The sentences covered by the grids vary as well. Some grids cover custodial and non-custodial sentences, while others do not.¹⁵⁹

The American experience is varied. This discussion will focus on the numerical grid systems used in Minnesota and Oregon. These systems have received the most attention, as they represent radical departures from past practice and they have been in existence for a comparatively long time.

Reform in the state systems grew from an unease with results that wide judicial discretion in sentencing was having.

¹⁵⁴ Ashworth, A. (1995) "Reflections on the Role of the Sentencing Scholar", 256

¹⁵⁵ Doob, A.N. (1995) "The United States Sentencing Commission Guidelines : If you don't know where you are going you might not get there", 202

¹⁵⁶ Van Der Merwe, D.P. (1991) *Sentencing*, 5.5

¹⁵⁷ Ibid.

¹⁵⁸ Frase, R. S. (1995) "Sentencing Guidelines in Minnesota and other American States: A Progress Report". 171-172

¹⁵⁹ Ibid.

Prior to the implementation of the guidelines the state judiciary had an unfettered discretion when it came to sentencing practice. The limited influence that the Appeal Court had over this discretion meant that in practice, when it came to sentencing, judges were a law unto themselves.

This meant that:

- there was no truth in sentencing practice,
- there was overcrowding in state prisons,
- the sentences handed down were not consistent,
- proportionality and parsimony as theories in punishment came to the fore,
- the ideals of rehabilitation and incapacitation were questioned and
- a “get tough” approach to the problems in the criminal justice system was being advocated by many.

It is from this climate that the numerical grid structure emerged.

5.1.1 The Existing Framework of Guidance in Minnesota and Oregon

The guidelines are numerical in nature consisting of a two dimensional grid. Annexures A and B set out the systems adopted in Minnesota in 1980 and 1989 respectively, while Annexure C is a depiction of the Oregon grid.¹⁶⁰

The horizontal axis on both grids represents the criminal history score.¹⁶¹ This score relates to the number of prior convictions that the offender has and to their gravity.¹⁶² On the vertical axis is the offence score, which relates to the gravity of the current conviction that the offender is being sentenced for.¹⁶³ The grid is premised on two factors; severity and criminal history.

¹⁶⁰ Von Hirsch, A. (1995) “Proportionality and Parsimony in American Sentencing Guidelines : The Minnesota and Oregon Guidelines” , 151-153

¹⁶¹ Ibid. 151

¹⁶² Ibid.

¹⁶³ Ibid.

One of its main aims is to imprison offenders who commit serious crimes against the person and reduce the chances of the property offender from ending up in court.¹⁶⁴ The manner in which a crime is classified and the position of the dispositional line directly effect the policy issues on which the grid is premised.

The numbers within the cells represent the duration of imprisonment in months. These numbers indicate the range within which the sentence is to fall.¹⁶⁵ Some grids have a single number above the range. This number represents the “best sentence” in the circumstances.¹⁶⁶ The dark line dividing the grid in two is known as the dispositional line.¹⁶⁷ In the Annexures, everything above this line relates to custodial sentences, while everything below it relates to the non-custodial sentence.

Immediately one notices that there is no suggested framework for the duration of the non-custodial sentence. This is a limitation of the system. The aim was to regulate all sentences passed so that uniformity in sentencing increased. Non-custodial sentences are part of the structure and they are in need of regulation as well. Especially if in using the grid system one wishes to predict and reduce the size of the prison population.¹⁶⁸

One method of achieving this is to increase the use of the non-custodial sentence. If one increases the use thereof, but does not provide set ranges on the grid, as is done for imprisonment, then the efficacy of the system is diminished. The grid only regulates a portion of the available sanctions, which in the writer’s view reduces the validity of the procedure. For only half the task has been completed!

The grids do however produce predictable outcomes. In that they Act as early warnings in connection with an increase or decrease in the size of the prison population.¹⁶⁹

¹⁶⁴ Frase, R. S. (1995) “Sentencing Guidelines in Minnesota and other American States : A Progress Report”, 173

¹⁶⁵ Ibid. 186

¹⁶⁶ Ibid.

¹⁶⁷ Ibid.

¹⁶⁸ Ibid. 175

¹⁶⁹ Ibid. 175-176

This is useful for systems operating under severe economic restraints, as they can amend their practices to ensure that the size of the prison population does not escalate to unmanageable proportions.

Grids allow for predictability of outcome. This is important, as it increases the credibility of the system when two offenders, who have committed the same offence and who have similar criminal histories receive the same sanction.¹⁷⁰ The same system can however result in an inconsistency. For example two offenders commit the same offence, yet they have different criminal histories and thus they are sentenced to different terms of imprisonment. This is not advocating the principle of proportionality, as for the specific crime at hand, one of the offenders is receiving harsher treatment than the other. The system thus can favour uniformity over fairness. If one compares the Minnesota and Oregon grids one notices that on Minnesota's grid the dispositional line is situated at level seven and on Oregon's grid at eight.¹⁷¹ Oregon's line does not drop as sharply as Minnesota's. The relevance of this in practice is that Minnesota's grid has the effect of allowing a property offender to be sentenced to a prison term if he has a high criminal history score.¹⁷² While in Oregon one has to commit a more serious crime before one is eligible for prison.¹⁷³ These seemingly minor differences in the layout of the grids, make a big difference in practice to. This emphasizes the point made by Von Hirsch that the details of the grid do matter.¹⁷⁴

Two further negative effects of such a grid system are the following:

- Plea bargaining increases and the discretion in the system shifts from the judge to the prosecutor. This will be discussed in detail under the federal system.

¹⁷⁰ Ibid.

¹⁷¹ Von Hirsch, A. (1995) "Proportionality and Parsimony in American Sentencing Guidelines : The Minnesota and Oregon Guidelines" , 152

¹⁷² Ibid. 154

¹⁷³ Ibid.

¹⁷⁴ Ibid. 150

- Placing so much importance on prior criminal convictions allows for the offender's criminal history rating to increase at a rapid rate. This in turn leads to a more severe sentence being handed down, when the specific crime being punished may not necessitate such a severe sanction. The punishment is not proportionate to the crime and this violates the principle of proportionality.

5.1.2 Lessons to be learnt from the State experience

There are lessons to be learnt from the state experiences. It is difficult to reliably assess these systems, as there are so many factors to be taken into consideration. One cannot always be sure whether it is the grid system that is impacting on the situation, or whether it is another variable that has not been accounted for.

Adopting an open political process when reforming the sentencing system is an essential ingredient for success.¹⁷⁵ Ensuring that all the relevant actors involved in the system have an opportunity to partake in the change increases the acceptability of the final framework. This also encourages adherence to the system and prevents any unnecessary therefrom.

Setting up a permanent structure to aid in the development and maintenance of the framework is vital. The experience in Minnesota supports this. The Commission learnt from the failures of the first grid and in 1989 they were able to amend the grid thereby reducing some of the inequitable results that it was creating.¹⁷⁶

A permanent body has the ability to correct any loopholes that are found in the grid once it has been put into operation.¹⁷⁷ This prevents judicial nullification of the effectiveness of the grid. The American experience in this regard is limited. Loopholes were found and in many instances the Commission never made the necessary amendments in order to prevent departures from the guidelines.¹⁷⁸

¹⁷⁵ Tonry, M.H. (1986) "Sentencing Guidelines and Sentencing Commissions – The Second Generation", 30

¹⁷⁶ Frase, R. S. (1995) "Sentencing Guidelines in Minnesota and other American States : A Progress Report", 180

¹⁷⁷ Von Hirsch, A. (1995) "Proportionality and Parsimony in American Sentencing Guidelines : The Minnesota and Oregon Guidelines" 163

¹⁷⁸ Ibid.

Although amendments were made in the 1989 grid, there are still numerous ways for the judge, working in conjunction with the prosecutor, to bypass the grid system and render the framework ineffective.

The nature of a numerical guideline makes it resistant to nullification. There is no need for judicial interpretation in the process. Aggravating and mitigating circumstances do represent a possible point for the judge to depart from the guideline. In Minnesota there is a non-exclusive list of these factors. The Commission can overrule the interpretation that the courts give to these factors. This does not however occur frequently.¹⁷⁹

When developing a framework for limiting judicial discretion one needs to choose a system that is consistent with the resources available in the jurisdiction undergoing change. There is no point in choosing a system that will drastically increase the prison population when there are not enough prisons and there is no money to build more.

A further factor to consider is that one should not favour credibility over fairness. The notion of treating like cases in a like manner should not be at the expense of allowing for differentiation where necessary. This is a problem with the grid system

It negates the ability of the court to consider all the personal characteristics of the offender when determining an applicable sentence in the circumstances. It is inequitable to sanction an individual for conduct and then not take all the circumstances of the crime and the individual into account. At least the state structures, in America, make use of the convicted crime when sentencing the individual. In the federal system they rely on the actual crime and not the convicted one. The implications of this will be discussed further on in the dissertation.

5.2 The Federal System

The mandate that the Commission was given in the federal system was to “get tough on crime.”¹⁸⁰ “Getting tough on crime” was viewed as a means of reformation in the federal system. Individual fairness was not as important a consideration of the reform process. It is from this standpoint that the guidelines were constructed and it is from this position that they receive most of their criticism.

The legislature passed the Sentencing Reform Act of 1984 thereby establishing a permanent Sentencing Commission.¹⁸¹ The aims of the Commission were to promote honesty, proportionality and uniformity in sentencing.¹⁸² It is from this mindset that the Commission operated. If one considers the above ideas as their point of departure and takes cognizance of the political climate that they were operating within, then one cannot judge them as harshly as many do.¹⁸³

The fact that the Commission was a permanent body created a feeling amongst many of the commissioners that if the legislation that they drafted proved to be unworkable then they would have the opportunity of amending it at a later stage.¹⁸⁴ The federal system is thus in a position to rectify many of its existing problems.¹⁸⁵ An unfortunate by product of this is that the federal system never took heed of the lessons learnt by the state systems, which had already implemented numerical grids.¹⁸⁶ They had very little support from the outset and made a lot of errors, which could have been avoided if more attention had been paid to the state experiences.

¹⁷⁹ Frase, R.S. (1995) "Sentencing Guidelines in Minnesota and other American States : A Progress Report " 167

¹⁸⁰ Von Hirsch, A. (1995) "Proportionality and Parsimony in American Sentencing Guidelines : The Minnesota and Oregon Guidelines", 149

¹⁸¹ Doob, A.N. (1995) "The United States Sentencing Commission Guidelines : If you don't know where you are going you might not get there", 204

¹⁸² Ibid.

¹⁸³ Ibid. 211

¹⁸⁴ Breyer, S. (1992) "The Key Compromises of the Federal Sentencing Guidelines", 127

¹⁸⁵ Ibid.

¹⁸⁶ Von Hirsch, A. (1995) "Proportionality and Parsimony in American Sentencing Guidelines : The Minnesota and Oregon Guidelines", 246

5.2.1 The Existing Framework of Guidance

The framework imposed for the federal system in guiding sentencing discretion is a two-dimensional numerical grid. The federal grid differs structurally from the state grids in numerous ways. For example:

- The federal grid has more levels than the state grid, as it needs to deal with far more crimes.¹⁸⁷ There are forty-three rows in the federal grid corresponding to various offence levels on the vertical axis.¹⁸⁸ There are two hundred and fifty-eight cells in the grid. Many more than in the various state grids and they are far more detailed.¹⁸⁹
- The grid has six columns, which correspond to six categories of criminal records on the horizontal axis.¹⁹⁰
- The offence levels are determined by the relevant or actual offence as opposed to the convicted offence, which is used in the state grid.¹⁹¹

One is dealing with a very detailed grid structure. As a result of this detail the grid is complex and difficult to use. This has led to numerous problems and resulted in senseless, ludicrous situations arising in practice.¹⁹² The grid allows for different types of offences to have the same effect when sentencing and there is little correlation between offences grouped in the same level.¹⁹³ There is no convincing evidence that the disparities in sentencing that existed prior to the adoption of a grid system have been reduced.¹⁹⁴ Even if the judiciary is complying with the framework that the grid set up, this is not an indication that there has been a reduction in disparity.¹⁹⁵

¹⁸⁷ Breyer, S. (1992) "The Key Compromises of the Federal Sentencing Guidelines", 106

¹⁸⁸ Doob, A.N. (1995) "The United States Sentencing Commission Guidelines : If you don't know where you are going you might not get there", 216

¹⁸⁹ Ibid.

¹⁹⁰ Ibid.

¹⁹¹ Ibid.

¹⁹² Doob, A.N. (1995) "The United States Sentencing Commission Guidelines : If you don't know where you are going you might not get there", 220

¹⁹³ Ibid. 218

¹⁹⁴ Ibid. 233

¹⁹⁵ Ibid.

The Federal System never accepted a primary principle of punishment as a basis for their guidelines.¹⁹⁶ Some members of the Commission wanted to base the grid on deterrence, while others wished for a retributive approach to sentencing.¹⁹⁷

The result of this conflict is that no single rationale was decided on and an adherence to past practice was relied upon.¹⁹⁸ This is a downfall of the Federal System. There is no general guiding principle on which the framework can justify its outcomes. This is problematic for a judiciary, for when a judicial decision is made the reasoning behind it is important.¹⁹⁹ In this instance there is no single justification for the decision reached, allowing for a multitude of justifications to prevail.

“Most lawyers as well as ordinary citizens unfamiliar with the [courts] are astonished to learn that a person in this society may be sentenced to prison on the basis of conduct of which a jury has acquitted him, or on the basis of charges that did not result in a conviction...[This] allows the prosecutor to increase an offender’s sentence more easily by dropping charges than by [proving those charges.]”²⁰⁰

The reliance by the grid on the actual offence rather than the convicted offence means that the individual can be sentenced on conduct, which never formed part of the charge or for which they were acquitted.²⁰¹ The reliance of the courts on the actual offence creates an absurd anomaly. In that it is easier for the prosecutor to obtain a greater offence if certain charges are dropped, than if they are proven.²⁰² Clearly this does not accord with the aim of increasing justice in sentencing.

The previous sentences that an offender has received determine their criminal history score.²⁰³ The result of this reliance is that generally all the other personal characteristics of the offender are ignored when handing down the sentence. This means that the guidelines will not reduce re-offending.²⁰⁴

¹⁹⁶ Breyer, S. (1992) "The Key Compromises of the Federal Sentencing Guidelines", 113

¹⁹⁷ Ibid.

¹⁹⁸ Ibid. 116

¹⁹⁹ Doob, A.N. (1995) "The United States Sentencing Commission Guidelines : If you don't know where you are going you might not get there", 213-215

²⁰⁰ Ibid. 218

²⁰¹ Ibid.

²⁰² Ibid.

²⁰³ Ibid. 225

²⁰⁴ Ibid.

Offenders will rather accumulate points quickly, move up the scale faster and end up with more severe sentences.²⁰⁵ The guidelines thus equate punishment with imprisonment, as more offenders are being sentenced to prison and in general they are staying in prison for a longer time.²⁰⁶ This has had the effect of increasing the prison populations in many of the federal prisons.²⁰⁷

The workload of the probation officer is increased dramatically by this grid. It is the duty of the probation officer to collate all the information and make proposals to the judge with regard to the nature and duration of the sentence.²⁰⁸ They have to do the pre-sentence inquiry and report. This is, in most instances, is accepted by the court, which then hands down a sentence based thereon.²⁰⁹

When the grid system was introduced it was stated that departures from it would be allowed in certain circumstances. The description for when a departure is allowed is so narrow that in reality they hardly ever occur.²¹⁰ Departures are only allowed for extraordinary and compelling reasons.²¹¹ Only aggravating and mitigating circumstances that have not been taken into account by the Commission can allow for departures.²¹² The Appeal Courts are willing to infer that most grounds have been considered by the Commission, unless they are provided with compelling evidence to the contrary.²¹³ The effect of this is that the grids are no longer voluntary, but they are mandatory.²¹⁴ Cases that need distinction cannot be treated differently. More individuals are receiving harsher sentences under this system than they were under the previous one.²¹⁵

²⁰⁵ Ibid.

²⁰⁶ Ibid. 239

²⁰⁷ Ibid. 238

²⁰⁸ Ibid. 225

²⁰⁹ Ibid. 243

²¹⁰ Ibid. 226

²¹¹ Ibid.

²¹² Tonry, M.H. (1992) "Judges and Sentencing Policy - The American Experience ", 144

²¹³ Ibid.

²¹⁴ Doob, A.N. (1995) "The United States Sentencing Commission Guidelines : If you don't know where you are going you might not get there", 226

²¹⁵ Tonry, M.H. (1992) "Judges and Sentencing Policy - The American Experience ", 139

Plea-bargaining has had a big impact on the handing down of fair sentences under the grid system. Under this system the prosecutor has the power. In the past it was the judge who had the discretion. However, since the judge is now obliged to make use of the grid, when handing down a sentence, there has been a shift of power to the prosecutor.

The offender is encouraged to plead guilty to a lesser charge in order to avoid the severe sentences imposed under the grid system.²¹⁶ The unfettered discretion that the system was trying to reduce has been shifted from the judge to the prosecutor. The main reason for the grids inception has not been removed, it has shifted to another player in the system.

The decision to accept a plea is the prerogative of the prosecutor. In accepting a plea the prosecutor is determining the eventual sentence that the judge will hand down. Once the charged is formulated, one is able to determine the range within which the sentence will fall, by looking at the criminal history of the offender. This shift would be less problematic if the guidelines took account of this and put in guidelines, which limited the discretion of the prosecutor as well.²¹⁷

5.2.2 Lessons to be learnt from the Federal Experience

When a system is chosen for limiting the discretion of the judiciary one must ensure that it allows for the distinguishable cases to be distinguished.²¹⁸ Yet it must not become so complex that it renders the system unworkable.

The Sentencing Commission demonstrated that sentencing practice is able to change in a short period of time if the circumstances are correct.²¹⁹ It further demonstrated that if a rigid enough system is constructed it will force the judiciary to limit their discretion even if they do not support the system on the whole.

²¹⁶ Doob, A.N. (1995) "The United States Sentencing Commission Guidelines : If you don't know where you are going you might not get there", 241

²¹⁷ Frase, R.S. (1995) "Sentencing Guidelines in Minnesota and other American States : A Progress Report ", 174

²¹⁸ Breyer, S. (1992) "The Key Compromises of the Federal Sentencing Guidelines", 110

The rider to this is that if they do not support the system then they will find methods of getting around it and ultimately this will limit the efficacy of the system. The political conditions in a country undergoing reform must support the suggested changes otherwise the underlying policy issues upon which the system is based will not be sound and the system will be plagued with inconsistencies.

The formation of a Sentencing Commission will limit political pressure on the choice of a framework. However the appointment of such a commission and the members chosen to be on it is a political act in itself.²²⁰ The Commission structure presents a buffer to direct political interference, but one should not be so naive to assume that it removes this interference totally. Many of the amendments made to the initial grid were politically motivated and done without the provision of any reasons.²²¹ The fact that, no single rationale for punishment was adopted by the Commission, is a direct result of a lack of political homogeneity in the federal system. Political, social and economic influence plays a vital role in the ultimate success of the system adopted and they should not be passed over lightly.

Above all else one should take note of the experiences of other jurisdictions that have undergone reform. This can prevent similar mistakes being made. The federal system clearly did not do this and it has suffered the consequences thereof.

6. SOUTH AFRICA

The imposition of punishment is "pre-eminently a matter for the discretion of the trial court."²²²

This sums up the situation in South Africa in one sentence. The judiciary has an unfettered discretion and there are no developed, readily available guidelines, which are consistently applied, in existence at present. There is a limited amount of jurisprudence on this matter, but there is no single legislative framework, providing guidance for the judiciary.²²³

²¹⁹ Doob, A.N. (1995) "The United States Sentencing Commission Guidelines : If you don't know where you are going you might not get there", 250

²²⁰ Ibid. 201

²²¹ Ibid.

²²² Joubert, W.A. and Scott, T.J. (eds.) (1991) *The Law of South Africa*, 4

²²³ Van Zyl Smit, D. (1995) "Sentencing and Punishment", 1

The central theme that runs through South African sentencing practice is that in order for the criminal justice system to ensure fairness in sentencing the judge must be allowed to sentence the offender based on an intuitive approach not limited by rigid guidelines.²²⁴

The courts are not prepared to limit their discretion in favour of the legislature or other government departments.²²⁵ The case of *S v R* emphasizes this point.²²⁶ In the judiciary's opinion the court loses authority and respect when the government can override decisions that they have made regarding sentencing. The concept that the judiciary does not want their authority eroded takes precedence over matters such as proportionality, consistency, overcrowding and equality.

This attitude is understandable when one considers the history of South Africa. The executive and legislative branches of government were relentless in the pursuit of their apartheid goals. They used all the power and authority that they had to implement the draconian system of oppression in which they believed. The judiciary's fierce protection of their discretion is thus not without reason. The skepticism with which they view any limitation is based on past experience of executive and legislative intervention in any manner possible. During the apartheid years the doctrine of a separation of powers was severely tested by the government and it can be argued in a number of instances completely ignored.

However, a limitation of judicial discretion in sentencing cannot be confused with judicial independence. This was discussed at the outset of this dissertation. The South African judiciary must realize this and not confuse the two ideas.

Furthermore, South Africa is a democracy with one of the most liberal constitutions in the world and this fear is no longer a justifiable one. The need for transparency, accountability and certainty in the criminal justice system has a stronger pull than respect for judicial authority.

²²⁴ Van der Merwe, D.P. (1994) "A criterion for sentencing - the quest for justice", 207

²²⁵ Ibid. 208

²²⁶ Ibid.

By placing the emphasis on these factors, one will indirectly increase the credibility of the criminal justice system and judicial authority and respect will be restored. For the irony of the situation is that, the very authority that they are so vigorously protecting is being eroded, as the government is forced into taking action which negates the efficacy of the criminal justice system. The entire system is in disarray. This is due to a number of factors, one of them being that the judiciary does not take the social, political and economic implications of their sentencing decisions into account. In effect the reason for enshrining their discretion, is the same concept that is eroded by not allowing a system of guidelines to be developed.

The release of prisoners on President Mandela's birthday and the imminent release of petty criminals mentioned recently in the press, is a reaction to overcrowding in the prisons. If the judiciary were prepared to take account of this very real problem when sentencing offenders then such actions by the correctional services department would not be necessary.

A prime example of the how the judiciary fails to take into account the broad practical implications that sentencing practice has is found in the matter of *S v Holder*. In this case the court stated that the fact that there is an increase in the prison population and that this is causing overcrowding has nothing to do with the decision that a judge has when handing down a sentence.²²⁷ Need one say anything further, for if the judiciary is operating from the assumption that their actions have no effect of the practical realities of the South African situation then it is not a surprise that our criminal justice system finds itself in the situation that it is in today.

The rationales of punishment have no clear definition in South Africa. There is no single accepted theory forming the basis of punishment and debate still surrounds the content of the theories and their relevance in the South African context. This further complicates the matter as a choice of rationale has practical implications. If there is no accepted theory and different judges are imposing sentences based on different theories then an already complex situation is worsened.

²²⁷ Joubert, W.A. and Scott, T.J. (eds.) (1991) *The Law of South Africa*, 4

The court in *R v Swanepoel* referred to the various aims of punishment as those of deterrence, prevention, reform and retribution. It stated that deterrence was the most important of these while the other aims were accessory in nature.²²⁸ These aims have been confirmed in later cases.²²⁹ The statement in this case that deterrence is the all important aim is not a generally accepted proposition in law and the case still does not provide clarity on what to do when there is a conflict.

The case of *Di Blasi* comes to mind here. In the lower court the accused was sentenced to four years imprisonment for murder. On appeal it was increased to fifteen.²³⁰ The appeal court emphasized the notions of deterrence and retribution saying that society demanded that such a callous act be severely punished.²³¹ It placed the objective interests of society above the subjective interests of the individual. In this specific instance the conflict was to be dealt with in this manner.²³² If set guidelines existed stating when the different interests prevail then the matter would not have necessarily gone on appeal as the lower court may have reached a similar conclusion. Instead time and money were wasted and the court's authority was brought into disrepute by what was clearly an inadequate sentence passed by the court of first instance.

6.1 The Existing Framework in South Africa

The case of *S v Zinn* formulated the triad approach as a basis for determining a sentence in South Africa.²³³ The court stated that the judiciary was to consider three factors when deciding on the appropriate sentence to impose. They are the crime, the offender and the interests of society.²³⁴

²²⁸ Van der Merwe, D.P. (1991) Sentencing, 5.4

²²⁹ Ibid.

²³⁰ Van der Merwe, D.P. (1991) Sentencing, 5.4B

²³¹ Ibid.

²³² Ibid.

²³³ Van der Merwe, D.P. (1994) "A criterion for sentencing - the quest for justice", 201

²³⁴ Joubert, W.A. and Scott, T.J. (eds.) (1991) The Law of South Africa, 4

The triad does not assist the court in dealing with the problem of contradictory principles of punishment.²³⁵ It is a vague, unsophisticated and elementary method on which to base a sentencing framework.²³⁶ Neither does it provide any guidance on whose interests are to prevail in the situation where one has a conflict between the interests of society and those of the offender.²³⁷

Another criticism of the entire structure is the overlap, which occurs between the three categories.²³⁸ Many of the facts, which can be referred to when considering the crime, may also be considered under the heads of the community and the offender.²³⁹ Once again there is no guidance provided for this type of situation. The effectiveness of this structure is thus questionable. For apart from pointing out the obvious that the criminal justice system is dealing with issues involving both the interests of society and those of the individual, the triad is of little assistance.

The *Zinn* case suggests that the Appellate Division can provide guidelines for the lower courts to follow.²⁴⁰ It does not do this on a regular basis. In the matter of *S v Rabie* the court emphasized the discretion of the judiciary when handing down a sentence.²⁴¹ It stated that it would only alter a sentence if the judge had not exercised his discretion judicially or properly.²⁴² The sentence had to be vitiated by irregularity, misdirection or inappropriateness.²⁴³

Even if the courts did take this aspect of providing guidelines seriously it is certainly not the most effective or efficient method of limiting discretion. Most matters take a long time to reach the appeal stage, judges can limit the reach of the guideline by distinguishing the specific case that they are dealing with. The issues that the superior courts are grappling with are not necessarily relevant in the lower courts.

²³⁵ Van der Merwe, D.P. (1991) Sentencing, 5.2

²³⁶ Ibid.

²³⁷ Ibid.

²³⁸ Ibid.

²³⁹ Ibid.

²⁴⁰ Van der Merwe, D.P. (1991) Sentencing, 5.16

²⁴¹ Joubert, W.A. and Scott, T.J. (eds.) (1991) The Law of South Africa, 4

²⁴² Ibid.

²⁴³ Ibid.

The restrictions that do exist are imposed via legislation regarding statutory maximum and minimum sentences or they are jurisdictional in nature.²⁴⁴ When a statutory maximum or minimum sentence exists, then the judge has no discretion to impose any other sanction, regardless of the circumstances of the case.²⁴⁵ This may solve the problem of an unfettered discretion increasing uncertainty in some cases, but it is not the solution for the entire system and it is certainly not the basis upon which a democratic society can found its entire sentencing practice.

The jurisdictional limitations on discretion relate to the limitations of the application of certain punishments in the lower courts. The High Court of South Africa has inherent jurisdiction and can therefore impose any sentence that it deems appropriate in the circumstances.

The lower courts are limited by factors such as; the type of punishment or the amount of a fine that they can impose and the duration of the sentence that they can hand down. There is a jurisdictional limitation of discretion based on whichever court one is tried in. Once it is established what the jurisdictional limitations are then there are no other set guidelines to direct the judge more specifically. The courts do attempt to strive for a just sentence in the specific circumstances.²⁴⁶ What one judge views as a just punishment, may not be the same as another's view of justice. In a system where there are no further defining mechanisms disparities are thus bound to occur.

The situation as it stands at the moment is unsatisfactory. Crime is on the increase and offenders are committing more violent and daring crimes on a daily basis. The crime prevention structures are understaffed, underpaid and their staff is overworked. The state prosecutors have resorted to go-slows and strikes in order to improve their lot. There is massive overcrowding in prisons and back door releases are on the increase. There are no funds to build more prisons, yet the prison population, especially that of awaiting trial prisoners, is increasing. There is a massive backlog of cases in the courts and this is further hindering their effectiveness. The public, media and politicians are demanding a "get tough" approach to the problem.

²⁴⁴ Van Zyl Smit, D. (1995) "Sentencing and Punishment", 1

²⁴⁵ Joubert, W.A. and Scott, T.J. (eds.) (1991) *The Law of South Africa*, 4

²⁴⁶ Van der Merwe, D.P. (1994) "A criterion for sentencing - the quest for justice", 211

Many sectors of the community are demanding the return of the death penalty and vigilante groups are taking the law into their own hands. The entire system is in crisis and an effective solution is quickly.

Changing the sentencing practices of the judiciary is not going to solve all these problems, but if it is done as part of a holistic approach to the problem then it can have a notable impact on many of the above-mentioned problems.

6.2 Where to from here?

In respect of the approach that the judiciary has to sentencing discretion the South African past is in many instances similar to that of England and Australia. We come from an era of unfettered judicial discretion, appellate review, an emphasis on the individual and fairness in sentencing, the use of mandatory sentences and the development of a multitude of non-custodial sentences.

Obviously our political experiences differ. In this respect there are not any jurisdictions, with similar political experiences as South Africa's, that are at the same juncture in the development of their criminal justice system. The reality of life in South Africa demands change. In order to prevent the reactive manner in which the criminal justice system is responding to problems at the moment, fundamental reform needs to occur.

In all likelihood it is submitted that an approach similar to that of England or Australia will be implemented by our legislature, as the emphasis by our courts on fairness and discretion is great.

Along with our different political background, a further point of differentiation from the English and Australian experience is the existence of a written Constitution and Bill of Rights, especially in relation to the English system. All legislation that is promulgated in this country is measured against the principles enshrined in the constitution. The concepts of legality, proportionality and equality are central to the Constitution and they will hopefully temper the wide discretion of the judiciary in this country.

Legality means that the law has to be reasonably clear and it should be consistently applied.²⁴⁷ The penalties themselves, and their imposition, are to be reasonably clear and consistent in order to meet the principle of legality.²⁴⁸ Van Zyl Smit states that the definition of many of the specific forms of punishment is not a problem in South Africa. The penal content of fines, imprisonment, corporal punishment and the death penalty were at the very least conceptually clear, regardless of their constitutional shortcomings.²⁴⁹ The area of correctional supervision is defined indirectly in South African Law and it is most likely to fall short of the legality principle.²⁵⁰

Section 1 of the Criminal Procedure Act refers to community-based punishment. It defines the concept vaguely.²⁵¹ The implication of the section is that when an individual is sentenced to such supervision any of the many forms of community-based punishments may be imposed.²⁵²

This does not provide the offender with a reasonably clear description of the type of punishment that could be handed down in a specific instance. The content of the punishment is not clearly defined either.²⁵³ One method of reducing this problem is to allow for legislation to restrict the types of community-based sanctions that may be applicable in a given instance and to define their content narrowly.²⁵⁴

Legality issues also arise in connection with the duration of the punishment imposed. This is the area where the wide discretion of the South African judiciary will be directly challenged. The wider the scope of the courts discretion, the less certainty the offender has regarding the type and length of the sentence to be handed down.²⁵⁵ The narrower the scope, the greater the risk of a disproportionate sentence.²⁵⁶

The legality issue will direct and influence legislation relating to sentencing frameworks implemented in South Africa.

²⁴⁷ Van Zyl Smit, D. (1995) "Sentencing and Punishment", 2

²⁴⁸ Ibid.

²⁴⁹ Ibid.

²⁵⁰ Ibid.

²⁵¹ Van Zyl Smit, D. (1995) "Sentencing and Punishment", 3

²⁵² Ibid.

²⁵³ Ibid.

²⁵⁴ Ibid.

²⁵⁵ Ibid. 4

²⁵⁶ Ibid.

The tension will remain between the choice of a narrow discretion, where it may not be as easy to treat different cases differently or a wider discretion, where certainty is lacking. The concept of legality that the Constitution espouses may not force the framework into a rigid grid formula, but it will certainly move South Africa closer to that end of the continuum.

The wide discretion that the judiciary has in South Africa will be influenced by the constitutional concept of proportionality. “The punishment must fit the crime” is the catch phrase to remember in this instance.²⁵⁷ Proportionality is not explicitly referred to in the Constitution, but it clearly is a pervasive notion that directs many concepts specifically legislated on in the Bill of Rights.

In the death penalty case of *S v Makwanyane* the court referred to proportionality as a factor to be considered when deciding whether a punishment was cruel, inhumane or degrading.²⁵⁸ It is a concept with international support. As can be noted from the earlier discussions on reform in other jurisdictions, it is a notion, which has received much attention when various frameworks for guidance in sentencing have been debated. The recommendation by the Council of Europe on Consistency in Sentencing stipulated the following;

“Whatever rationales for sentencing are declared, disproportionality between the seriousness of the offence and the sentence should be avoided.”²⁵⁹

Recognizing that proportionality has an important role in constitutional practice raises problems with certain sentencing practices, which exist in South Africa.²⁶⁰

Mandatory minimum sentences, preventative sentences, exemplary sentences and punishment for specific crimes could all conflict with this doctrine.²⁶¹

²⁵⁷ Ibid. 5

²⁵⁸ Ibid. 5-6

²⁵⁹ Ibid. 6

²⁶⁰ Ibid.

The above four sentencing practices all represent conflicts with this doctrine. In some instances they have been tested in international jurisdictions and the courts have been hesitant to expressly declare them unconstitutional.²⁶² They do all represent direct challenges to the doctrine and legislation, which entrenching them will have to present valid justifications in order to prevent the Constitutional nullification.

In section 9 of the Bill of Rights the equality clause is found. Section 9(1) states that,

“Everyone is equal before the law and has the right to equal protection and benefit of the law.”²⁶³

The American use of the equality clause in deciding what legislative framework to adopt in order to ensure equal protection of the law is directly applicable in the South African context as the wording in section 9(1) is similar to that of the American constitutional provision.²⁶⁴ The famous decision of *Furman v Georgia* set aside the death penalty based on the fact that it was imposed via a process, which allowed the judiciary too wide a discretion in sentencing and this did not therefore ensure equal protection of the law.²⁶⁵ The opposite extreme of the continuum could not ensure the protection of this principle either.²⁶⁶ In the case of *Lockett v Ohio* it was stated that a mandatory death sentence would be unconstitutional if it prevented the consideration of all mitigating circumstances in the matter as this would not ensure equal protection of the law.²⁶⁷

Arguments that a criminal justice system is racially biased and more likely to produce a certain type of punishment for a certain race group have also been dealt with in the American system.²⁶⁸ This argument is directly applicable in South Africa. The entire criminal justice system was directed, if not intentionally then at least indirectly, towards discrimination against individuals of a certain race and class.

²⁶¹ Ibid. 6-11

²⁶² Ibid. 6

²⁶³ The Constitution of the Republic of South Africa Act 108 of 1996, Section 9 (1)

²⁶⁴ Van Zyl Smit, D. (1995) "Sentencing and Punishment", 4

²⁶⁵ Ibid. 6-7

²⁶⁶ Ibid. 7

²⁶⁷ Ibid.

²⁶⁸ Ibid.

Changes have been made to remove these inequalities, but a constitutional challenge based on this idea may well still be raised at a later stage.

In section 35(3)(n) of the Constitution of the Republic of South Africa Act 108 of 1996 it states the following,

“Every accused person has the right to a fair trial, which includes the right to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence changed between the time that the offence was committed and the time of sentencing.”²⁶⁹

This section is an express limitation on the discretion of a judge when sentencing an offender. The general principles of legality, proportionality and equality discussed above are concepts that will have a role in limiting judicial discretion in South Africa. Section 35(3)(n) is an express limitation on discretion in the Bill of Rights itself. The fact that it is a codification of an idea, which existed in common law, is noted. The important conclusion to be drawn from this express limitation is that the legislature is aware of the wide discretion employed by the judiciary and they are prepared to place limitations on it. This may be stretching the ambit of the section. Nevertheless it is a restriction on discretion and it is found in the single most important piece of legislation in South Africa.

The constitution will definitely have a role to play in choosing the final framework of guidance for sentencing in the criminal justice system. It remains to be seen how great its role will be. If, as it is submitted, a similar method of limitation is chosen as in the English or Australian systems then the legislature will have to ensure that it creates a fine balance between the above-mentioned principles, otherwise there will be numerous challenges based on these doctrines.

In saying that South Africa will adopt a similar approach to reform as Australia and England one is not negating the use of structured guidelines in the American system. These guidelines do have numerous positive spin-offs. The theoretical and practical distance between the situation now and the one a numerical grid proposes is in all probability too great a leap to gain widespread acceptance.

²⁶⁹ The Constitution of the Republic of South Africa Act 108 of 1996, Section 35 (3)(n)

Since acceptance is central to the framework's success, a middle of the road approach, restricting discretion, yet allowing for departures may be the answer at this point in time. Whatever route is taken the importance of research, training, consultation and evaluation cannot be over-emphasized.

In West Germany the legislature, after much research became actively involved in the sentencing process. With the effect that the short-term sentence, is almost never used by the courts.²⁷⁰ Reform was not radical, but implementation and research ensured that a process, applicable to the specific circumstances of the jurisdiction involved, was successfully promulgated.

In Sweden the criminal law has been codified.²⁷¹ The provisions relating to guidance are elaborate. Punishment must be proportional to the gravity of the conduct.²⁷² The statute spells out the aim of punishment so that there is no need for the judge to make a selection. The guidelines are descriptive in nature, yet they are still comparatively rigid, in relation for example to the English ones.²⁷³ For such a system to be effective the drafting skills of the body formulating the code need to be well developed. This type of a system also places a greater demand on the court.²⁷⁴ A numerical guide simply allows one to read the sentence from a two dimensional grid, while the descriptive one points the court towards the "answer", but allows them to make the final decision.²⁷⁵ They allow the judiciary to retain a greater amount of discretion within the confines of the descriptive principles that they formulate.

The guidelines provide the clarity, ensuring that like cases are treated in a like manner, while the departures allow for fairness, ensuring that different cases are treated differently.

²⁷⁰ Van der Merwe, D.P. (1991) *Sentencing*, 5.6

²⁷¹ Von Hirsch, A. (1986) "Guidance by Numbers or Words? Numerical versus Narrative Guidelines for Sentencing", 60-61

²⁷² *Ibid.*

²⁷³ *Ibid.* 62-63

²⁷⁴ *Ibid.* 63

²⁷⁵ *Ibid.*

In South Africa today our criminal justice system needs to meet the standards of a liberal democracy as well as reduce the crime rate.²⁷⁶ Parliament has begun the procedure. The promulgation of legislation is a slow process, if left to the legislature alone.²⁷⁷ The use of a select committee to aid the legislature in developing the policy and practical guidelines is necessary. This will aid in keeping political pressure at the lowest possible level. The use of experts will increase the chances of accurate and unbiased research, promote consultation, allow for training and avoid the drafting failures experienced in the English system.

7. CONCLUSION

The concluding sentence in Anthony Doob's chapter in the book *The Politics of Sentencing Reform* is the following;

"You have to be very careful if you don't know where you are going, because you might not get there."²⁷⁸

This reinforces the idea that when undertaking the task of sentencing reform one must have a clear direction from the outset, in order to reduce the problems and inconsistencies that the various jurisdictions examined have experienced. The theoretical decisions that exist in this area have far reaching, practical implications that are not necessarily evident prior to their application in reality. Sentencing practice must be considered in the context of the entire criminal justice system. This system in turn forms part of the political, social and economic history of a country. Sentencing is a part of an intricate structure, its role is important, but it must be viewed within the broader context wherein it is situated.

Unfettered judicial discretion is no longer an acceptable principle in sentencing practice. The advantages and disadvantages of the various frameworks on the continuum of wide discretion on the one hand and rigid, numerical grids on the other, have been referred to in this dissertation and debated by many distinguished legal minds worldwide.

²⁷⁶ Van Zyl Smit, D. et al (1995) "South African Criminal Justice and Criminology in Transition"

²⁷⁷ Ibid.

²⁷⁸ Doob, A.N. (1995) "The United States Sentencing Commission Guidelines : If you don't know where you are going you might not get there", 250

There are no set answers for a country embarking on the path of reform. There are lessons to be learnt from jurisdictions that are involved in the process. Ultimately the success or failure of the chosen system depends on the ability of those undertaking the reform to learn from others and then apply those lessons to their own specific circumstances. Each country has its own history, which must be considered, when making decisions regarding future sentencing practices.

Ill considered and inconsistent sentencing in the South African context, amongst other concerns has bred a lack of public confidence in the ability of the current criminal justice system to effectively sentence criminals.

This has played into the hands of politicians. Developed guidelines, within a framework that allows for flexibility when necessary, are required. This will restore the credibility of sentences handed down by the South African judiciary and in so doing will aid the criminal justice system in repairing its tarnished image.

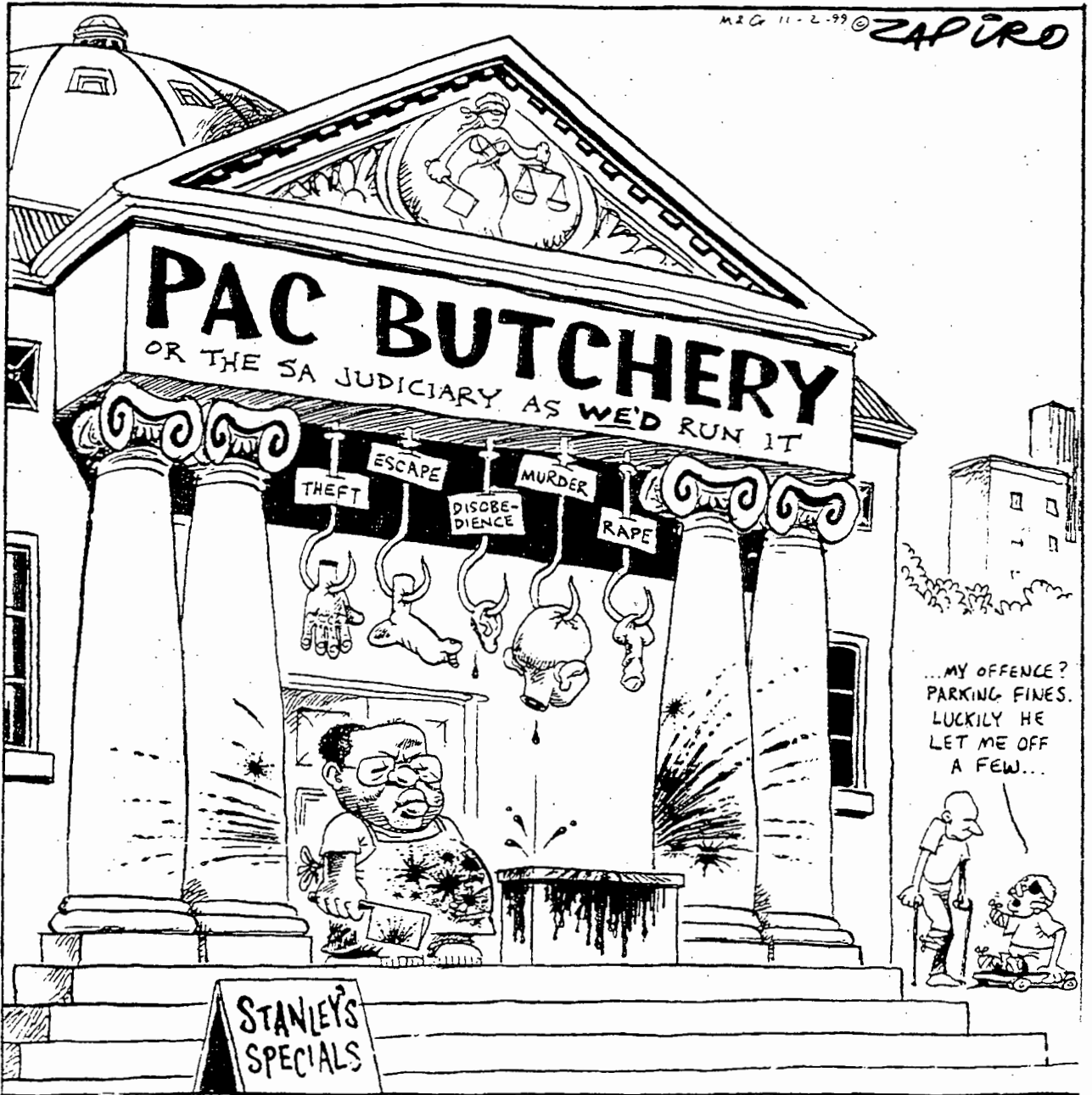
As lucidly illustrated in a political cartoon, found in Annexure D hereto, sentencing is being employed as a political tool, culminating in the espousing of extremist positions on sentencing. While electioneering and the excessive level of crime in the country are undoubtedly factors promoting such advocacy, this cartoon reasserts the dire urgency for a sober examination of sentencing policy and practice in South Africa.

ANNEXURE A**MINNESOTA SENTENCING GUIDELINES
EFFECTIVE 1 MAY 1980**

Offence score	Criminal-history score							
	0	1	2	3	4	5	6 or more	
Intentional unpremeditated murder	10	111-121	133-147	153-171	192-214	231-255	270-298	309-339
Reckless homicide	9	94-100	116-122	124-130	143-155	168-184	195-215	218-242
Assault with a weapon and great bodily harm	8	41-45	50-58	60-70	71-81	89-101	106-120	124-140
Residential burglary with weapon; armed robbery	7	23-25	30-34	38-44	45-53	60-70	75-87	90-104
Residential burglary of an occupied dwelling	6	NP	NP	NP	33-35	42-46	50-58	60-70
Residential burglary of an unoccupied dwelling	5	NP	NP	NP	29-31	36-40	43-49	50-58
Non-residential burglary \$5,000-\$10,000	4	NP	NP	NP	NP	24-26	30-34	37-45
Theft crimes \$150-\$2,500	3	NP	NP	NP	NP	21-23	25-29	30-34
Theft-related crimes \$150-\$2,500	2	NP	NP	NP	NP	NP	NP	25-29
Unauthorized use of motor vehicle	1	NP	NP	NP	NP	NP	NP	NP

ANNEXURE D

MAIL & GUARDIAN
February 12 to 18 1999



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