An evaluation of the effect of mandatory minimum sentencing legislation on judicial discretion in South Africa

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DECLARATION

I, Vijay Maharaj, student number 219044275, hereby declare that "*An evaluation of the effect of mandatory minimum sentencing legislation on judicial discretion in South Africa*" a dissertation submitted in part fulfilment of the requirements for the LLM Advanced Criminal Justice, is my own work and that it has not previously been submitted for assessment or completion of any postgraduate qualification to another University.

It may be made available for photocopying and inter-library loan.

Vijay Maharaj

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ABSTRACT

This research project deals with the effect of mandatory minimum sentencing legislation on judicial discretion in South Africa, where courts have historically had carte blanche to exercise their considerably broad judicial discretion when sentencing offenders. This judicial discretion was significantly curtailed by the advent of the Criminal Law Amendment Act 51 of 1997, and subsequent amendments thereto. The legislation commenced on 1 May 1998 and is still currently in effect. The legislation was enacted in response to an increase in violent crime at that time, and prescribes mandatory sentences for murder, aggravated robbery, rape, as well as for serious financial crimes and others. The courts are thought to be contemptuous and repugnant towards this legislation as it significantly curtails their judicial discretion. Whilst the general public were initially appeased by the impact of this legislation, many detractors felt this amounted to a harsh sentencing regime, calling for these laws to be abolished during the 23 years of its operation. This is a qualitative study and is based largely on a critical analysis of information gathered from the source material in order to identify gaps and trends in the field of interest. The questions, arguments and debates arising from the chosen focus area are located in both the literature and case law. The research design utilised is desktop research, which relies on secondary data, which are already in existence, including government publications, published or unpublished information available from either within or outside an organization, data available from previous research, online data, case studies, library research, and the Internet in general. The research will clearly enunciate the current legislative and judicial positions and advance convincing arguments and viewpoints from an array of distinguished writers and commentators. Various writers agree that South Africa is in dire need of reforming its sentencing system and believe that mandatory minimum sentencing has failed to adequately address sentencing problems in South Africa, deter violent crime or reduce sentencing disparities. They opine that many individuals within the judicial and criminal justice systems are disgruntled with the current regime, resulting in attempts to circumvent and thus undermine the entire mandatory minimum sentencing scheme.

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CHAPTER 1

BRIEF INTRODUCTION, CHAPTER BREAKDOWN AND PROBLEM STATEMENT

1.1 BRIEF INTRODUCTION

Legislation regulating minimum sentences in South Africa was re-introduced by sections 51 to 53 of the Criminal Law Amendment Act 105 of 1997, as amended ("the Act") which came into effect on 1 May 1998. These provisions were initially supposed to be a short-term solution to address an escalation of crime and were to be operative for two years. These provisions were subsequently extended on numerous occasions.[1] The operation of the legislation was consecutively increased for one year effective from 1 May 2000 and then for two years effective from 1 May 2001. This was then again extended for another two years effective from 1 May 2003, for two years effective from 1 May 2005 and thereafter for a further two years effective from 1 May 2007.[2] The Act encompasses a variety of serious offences, including murder, rape and robbery. It also provides for circumstances where the imposition of the mandatory minimum sentences attached to the above-mentioned offences are triggered.[3]

This legislation was adopted due to government being inundated with calls from South African society for the courts to mete out tougher punishment and for the perpetrators of crime to endure more credible periods of incarceration. Public opinion was that the courts were imposing too lenient sentences for serious crimes.[4]

From the research conducted, I the writer contend that some commentators lament that the mandatory minimum sentencing regime has resulted in unnecessarily severe sentences in South Africa over the past two decades. Cameron, for instance, argues that the then new statute strictly curtailed the power of judges to determine the length of prison terms for offences or offenders and rather provided minimum sentences for certain serious offences.[5] These included mandatory life sentences for an assortment of specific crimes. Judges are allowed to deviate from the prescribed punishments only if they are "satisfied that substantial and compelling

[1] ES Nzimande *Minimum Sentence Legislation in South Africa* (2012) 1. "Legislation regulating minimum sentences in South Africa was re-introduced by sections 51 to 53 of the Criminal Law Amendment Act 105 of 1997 which came into operation on 1 May 1998. These provisions were regarded as a temporary measure to be effective for two years, where after they were extended from time to time. After they had been extended for several times, section 51 was rendered permanent on 31 December 2007 by the Criminal Law (Sentencing) Amendment Act 38 of 2007. At the same time sections 52 and 53 were repealed by the same Act."

[2] ES Nzimande *Minimum Sentence Legislation in South Africa* (2012) 3.

[3] s 51 of the Act with reference to Part I to Part IV of Schedule 2.

[4] ES Nzimande *Minimum Sentence Legislation in South Africa* (2012) 1.

[5] E Cameron *Imprisoning the Nation: Minimum Sentences in South Africa* (2017) 3.

circumstances exist which justify the imposition of a lesser sentence".[6] Cameron's further contention is that this principle gives sentencing judges only minimal leeway, as these sentences may not be suspended, nor can time in prison whilst awaiting trial be counted as part of the sentence to be served.[7] The general view is that when enacting the mandatory minimum sentence legislation, government drew on international experiences with mandatory minimums and it hastily and unashamedly assimilated them but achieved very little in reducing crime. [8]

Other writers however are of the view that whilst mandatory minimum sentence legislation does restrict a judge's ability to set a sentence lower than that prescribed by the applicable legislation it does so without completely removing the judiciary's sentencing powers. This is due the presence of an "escape clause" which gives courts a certain amount of leeway during the application of the legislation.[9]

The writer concedes that it is only natural for the Courts to bear contempt and repugnance towards this legislation as it radically curtails their judicial discretion. Whilst the general public were somewhat initially appeased by the impact of this legislation, many detractors, such as former Constitutional Judge Edwin Cameron, felt this amounted to a harsh sentencing regime.[10] Many commentators have called for this legislation to be abolished during the 23 years of its operation. Even when the prescribed sentence is not applied, the legislation continues to have an impact on sentencing in other cases in terms of the doctrine of stare decisis.

1.2 CHAPTER BREAKDOWN

Chapter 1 briefly introduces the reader to the mandatory minimum sentences legislation in South Africa and how it has affected judicial discretion to the disadvantage of the lawbreakers, the criminal justice system and the public at large. The problem of whether judicial discretion is being significantly curtailed by the advent of the Act, is ushered in, the key research questions established, culminating with a discussion of the research methodology, feasibility and limitations of the research.

Chapter 2 delves deeper into the mandatory minimum sentences legislation in South Africa, buffered by the structure and interpretation of the Act. Recent amendments to the Act, as well as pending amendments, notably the Criminal and Related Matters Amendment Bill (B17-2020) are discussed. A discussion of various criticisms leveled against the Act round off this Chapter.

[6] s 51(3) of the Act.
[7] E Cameron *Imprisoning the Nation: Minimum Sentences in South Africa* (2017) 4.
[8] Ibid 33.
[9] TB Njoko *What constitutes "Substantial and Compelling Circumstances" in the Mandatory and Minimum Sentencing Context?* (2016) 24.
[10] E Cameron *Imprisoning the Nation: Minimum Sentences in South Africa* (2017) 3.

Chapter 3 introduces the concept of judicial discretion generally, in the context of sentencing, and then specifically, in terms of minimum sentences legislation. The Chapter is concluded with an overview of a multitude of issues affecting the constitutionality of the Act, culminating in the leading case of *Dodo*[11] where it was held that the Act is not in violation of any relevant constitutional principle.

Chapter 4 briefly discusses how the incarceration of juvenile offenders has been affected by mandatory minimum sentencing legislation, followed by an overview of how the principles and objectives of the Child Justice Act 75 of 2008 relate to minimum sentences legislation. This Chapter concludes with a brief discussion of the leading case of the *Centre for Child Law v Minister of Justice and Constitutional Development and Others*[12] wherein the Constitutional Court ruled that the Constitution of South Africa proscribes minimum sentencing legislation being applied to 16 and 17 year old children.

Chapter 5 critically examines the consequences of mandatory minimum sentence legislation affecting judicial discretion in South Africa. This includes an evaluation of sentencing inconsistencies, prison overcrowding, deterrence of violent crime and public satisfaction with sentencing. The Chapter outlays how researchers commissioned to investigate the impact of the mandatory minimum sentencing legislation postulate that judicial discretion affected by mandatory minimum sentence legislation, has had various consequences such as the impact on crime, on court processes, on the proportionality of sentencing, on judicial independence a well as issues such as the constitutionality of the laws.

Chapter 6 rounds off this dissertation with the conclusion and recommendations as deems viable by the researcher. It seeks to briefly encapsulate the answers to the key research questions identified at the outset of the research, namely:

What is mandatory minimum sentence legislation?

What is judicial discretion?

Can judicial officers freely exercise their discretion in South Africa?

Has mandatory minimum sentence legislation affected judicial discretion in South Africa?

What are the consequences of mandatory minimum sentence legislation affecting judicial discretion in South Africa?

How does mandatory minimum sentence legislation affect children in South Africa?

[11] *S v Dodo* 2001 (3) SA 382 (CC) at Para 8.

[12] *Centre for Child Law v Minister for Justice and Constitutional Development and Others* 2009 (2) SACR 477 (CC).

1.3 PROBLEM STATEMENT

The objective of the dissertation is to evaluate the effect that the mandatory minimum sentencing legislation has had on judicial discretion in South Africa. The research will clearly enunciate the current legislative and judicial positions and advance convincing arguments and viewpoints from an array of writers and commentators.

In South Africa, courts have historically had carte blanche to exercise their considerably broad judicial discretion when sentencing offenders. Whilst this cannot be construed to be unfettered discretion, several commentators have indicated that in many cases, judges actually do exercise their discretion to circumvent the mandatory minimum sentences, due to their opposition thereto.[13] Ultimately, mandatory minimum sentencing legislation is assumed to be inflexible and to be encroaching upon the courts' latitude to determine a fair and balanced sentence comprising individualised sanctions in sentencing.

The primary issue at hand is that judicial discretion is believed to have been significantly curtailed by the advent of the Act, and the subsequent amendments thereto, to which the courts are assumed to be acrimonious. Despite its initial appeasement and pandering to the sentiments of society at large, many critics considered the Act to be tantamount to an overly punitive sentencing regime with constant demands for its abolishment. Ultimately, mandatory minimum sentencing legislation is assumed to be inflexible and to be encroaching upon the courts' latitude to determine a fair and balanced sentence comprising individualised sanctions in sentencing.

1.4 KEY RESEARCH QUESTIONS

As indicated above, the objective of the dissertation is to evaluate the effect that the mandatory minimum sentencing legislation has had on judicial discretion in South Africa through a critical analysis and discussion of the current legislative and judicial positions and to develop persuasive arguments and perspectives from various writers and commentators.

The research will thus hone in on the principles relevant to the subject, in addition to departures from the prescribed sentences under the Act and recent developments in the law.

The dissertation seeks to answer the following questions:

a) What is mandatory minimum sentence legislation?
b) What is judicial discretion?

[13] SM Roth *South African Mandatory Minimum Sentencing: Reform Required* (2008) 169.

c) Can judicial officers freely exercise their discretion in South Africa?
d) Has mandatory minimum sentence legislation affected judicial discretion in South Africa?
e) What are the consequences of mandatory minimum sentence legislation affecting judicial discretion in South Africa?
f) How does mandatory minimum sentence legislation affect children in South Africa?

1.5 RESEARCH METHODOLOGY AND FEASIBILITY

The research for this dissertation is theoretical. Information will be gathered from a host of academic journals, statutes, research papers and theses, textbooks on the subject, internet sources and relevant court cases. This is a qualitative study and is based largely on a critical analysis of information gathered from the source material in order to identify gaps and trends in the field of interest and to debunk any misinterpretations in this regard. The analysed information gathered is then applied to attain the desired objectives of the research. The aims and outcomes of the research are indeed achievable since the questions, arguments and debates arising from the chosen focus are located in both literature and case law. The relevant literature is readily available from the university library situated at the University of KwaZulu-Natal as well as through off-site campus access. The research design utilised is desktop research, which relies on secondary data as elucidated above. A moderate amount of sources dealing with mandatory minimum sentencing and judicial discretion do exist but there is a dearth of material dealing with the combination of the two. The researcher has explored sources which research the topic in countries as diverse as the United States of America (particularly Minnesota), the United Kingdom (England), Canada, Finland, Sweden, Australia and Malawi. The research occasionally draws parallels with similar apartheid era laws. The parameters of the research specifically relate to South Africa, its judiciary and mandatory minimum legislation. The aims and objectives of the research are achievable, given that the questions, arguments and debates arising from the chosen focus are located in both the literature and case law. The research design utilised is desktop research, which relies on secondary data, which are already in existence and need not be collected by the researcher, including government publications, published or unpublished information available from either within or outside an organization, data available from previous research, online sources, case studies, library research, and the Internet in general. The research will clearly enunciate the current legislative and judicial positions and advance convincing arguments and viewpoints from an array of distinguished writers and commentators.

The problem of judicial discretion being curtailed by the operation of mandatory minimum sentencing is important as this belies the true effect on related issues and a myriad of problems such as alternative sentencing, burgeoning prison population, inmates' and victims' rights, constitutional challenges, judicial independence, substituted legislation in the event of abolition of the relevant legislation, etc. This specific research

is therefore also relevant and topical in South Africa's current quandary of dealing with its crime situation. The proposed research is worthwhile as it contributes to the body of knowledge in this arena, particularly from a scholarly perspective. It will certainly enrich knowledge, and may even improve practice and inform policy in this regard.

The value of the research is significant as provides the reader with an all-encompassing view of the current situation. Readers will gain intellectually and thus derive palpable value from it. The implications of the research is that it has the potential to be used as a reference by legislators and law reform commissions to pursue amendments to the legislation. Other researchers can also derive benefit from it from compiling their own research or as a reference work. This research will therefore not be a futile exercise and is undoubtedly feasible.

1.6 LIMITATIONS OF THE RESEARCH

As indicated above, the issue of judicial discretion being restrained by the operation of mandatory minimum sentencing is beset by other related problems including proportionally rising prison populations, constitutional challenges, judicial independence, etc. This specific research, whilst pertinent and contemporary in South Africa's current predicament in addressing its crime situation, focuses modestly on the manner in which judicial discretion may have been affected by the Act. Whilst this dissertation may impress upon on certain sentencing principles as per case law, the intricacies thereof are only explored as they are relevant.

1.7 CONCLUSION

Several researchers affirm that the introduction of mandatory minimum sentencing legislation was due to government being inundated with cries from South African society for harsher punishment and for the perpetrators to serve more convincing periods of incarceration. Public sentiment was that the courts were imposing lenient sentences for serious crimes.[14] Other researchers contend that such mandatory penalties have been in place since time immemorial, and it has only been since the nineteenth century that sentencers were given a wide discretion.[15] Several commentators opine that the application of prescribed mandatory minimum sentences should not be departed from.[16] Some writers are of the view that laws that culminated in sentences that were hugely inconsistent with the crime would be unconstitutional as they would be vindictive, inhuman and unjust. They contend that any mandatory sentence regimes, irrespective of sentences being prescribed by legislation or indirectly by a sentencing council, may be unconstitutional if, in its application it renders the imposition of inconsistent and disproportionate sentences. [17]

[14] ES Nzimande *Minimum Sentence Legislation in South Africa* (2012) 10.
[15] SS Terblanche, G Mackenzie *Mandatory Sentences in South Africa: Lessons for Australia?* (2008) 402.
[16] V Padayachee *Alternative sentencing for perpetrators of intimate partner violence* (2006) 4.
[17] D Van Zyl Smit *Human Rights and Sentencing Guidelines* (2001) 47.

Former judges contend that the mandatory minimum sentencing legislation has resulted in unnecessarily severe sentences in South Africa over the past two decades. They argue that it strictly curtailed the power of judges to determine the length of prison terms for offences or offenders and rather provided minimum sentences for certain serious offenses, with deviations from the prescribed punishments only if they are "satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence".[18] These writers opine that the legislation has had a minimal impact on the reduction of crime generally or in the curbing of the specific targeted offences. [19] They also assert that whilst many judges and magistrates claim that they are compelled by the prescribed sentences to ensure equitable treatment of all those guilty of a particular crimes, regardless of their individual situations, media has often reported that contrariwise, the judiciary has found loopholes to deviate from the prescribed sentences.[20]

Various writers are in agreement that South Africa is in dire need of reforming its sentencing system and believe that mandatory minimum sentencing has failed to adequately address sentencing problems in South Africa, deterred violent crime or reduced sentencing disparities. They opine that many individuals within the judicial and criminal justice systems are disgruntled with the current regime, which has resulted in attempts to circumvent and thus undermine the entire mandatory minimum sentencing scheme.[21] Other researchers posit that sentencing discretion is essential and without it, it is impossible to individualise an ideal sentence for juvenile delinquents in particular. This has routinely led to sentence inconsistency and impossibility in determining a basis for sentences and submit that consistency in sentencing is only achievable when sentence discretion is curbed.[22]

[18] E Cameron *Imprisoning the Nation: Minimum Sentences in South Africa* (2017) 33.
[19] E Cameron *Imprisoning the Nation: Minimum Sentences in South Africa* (2017) 33.
[20] J Sloth-Nielsen, L Ehlers *A Pyrrhic victory? Mandatory and minimum sentences in South Africa* (2005) 12.
[21] SM Roth *South African Mandatory Minimum Sentencing: Reform Required* (2008) 163.
[22] J Gurahoo *Sentencing juveniles according to the Child Justice Act: A critical evaluation of application of the principle that ' "detention must be a measure of last resort and for the shortest possible period of time" in the case law* (2016) 69.

CHAPTER 2

MINIMUM SENTENCING LEGISLATION

2.1 INTRODUCTION AND BACKGROUND

Courts are guided in their imposition of sentences through legislation, mainly due to the inclusion of the objectives and principles of sentencing which are enunciated therein. This includes *inter alia* the deterrent effect on criminal conduct, the civic responsibility to safeguard society from offenders through justifiable and appropriate sentences, with due regard for both perpetrators and victims, and uppermost, the punishment befitting the gravity of the offence.[23]

Gumboh adds credence to this view when comparing sentencing in Malawi prior to and post its 1994 Constitution in terms of the aims of punishment which were not purely retributive but were ultimately for the purposes of crime prevention, hence the Malawian courts' stance. [24] Deterrence was also the main argument touted by politicians to justify the introduction of a Bill containing prescribed minimum sentences in Canada. It seems evident that like in other countries, political agendas are influential when determining sentencing regimes in Canada.[25] Deziel postulates that the legislative history of mandatory minimum sentencing in Canada lays bare their law-makers' affinity to such penalties, contrary to the recommendations of various commissions through the years.[26]

Mandatory sentencing, strictly speaking, is defined by sentencing experts Stephan Terblanche and Geraldine Mackenzie, as the establishment by the legislature of a set penalty for a specific criminal offence.[27] Broadly defined, they postulate that it refers to circumstances where the legislature prescribes a minimum and maximum sentence for an offence, thereby commonly referred to as "mandatory minimum sentencing".[28] A minimum sentence is also considered to be a sentence with a lower limit, thus allowing for some leeway for a court to impose a higher sentence. [29] Historically in South Africa, there were various attempts at mandatory minimum sentences which met their demise due to disapproval thereof from various quarters.[30]

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[23] JJ Neser *Reformation of Sentencing in South Africa* (2001) 86.
[24] E Gumboh *Examining the Application of Deterrence in Sentencing in Malawi* PER / PELJ 2017(20) 12.
[25] J Deziel *The Effectiveness of Mandatory Minimum Sentences: A Comparative Study of Canada and South Africa* (2013) 8.
[26] Ibid 7.
[27] SS Terblanche, G Mackenzie *Mandatory Sentences in South Africa: Lessons for Australia?* (2008) 402.
[28] Ibid 402.
[29] ES Nzimande *Minimum Sentence Legislation in South Africa* (2012) 3.
[30] Ibid.

Mandatory sentencing guidelines for sentencing in the United States courts have been in operation for over two decades. According to Tonry, the US Sentencing Commission had an official policy compelling judges to impose particular sentences, however the judiciary ostensibly resisted these principles whilst they were effective, until 2004 when they were confirmed to be unconstitutional.[31]

This assertion is validated by Sloth-Nielsen and Ehlers who posit that judges' discretion were restored by the US Supreme Court recently after Congress removed these over two decades ago when sentencing guidelines were initially established and postulate that these guidelines should now be regarded as purely advisory, in order to "cure constitutional deficiency".[32]

Mandatory penalties have been in place since time immemorial, and it has only been since the nineteenth century that sentencers were given a wide discretion.[33] This assertion is corroborated by Neser who states that statutory provisions limiting the courts sentencing discretion are well known in the annals of South African criminal justice but he maintains that legislative attempts impinging sentencing discretion with mandatory minimum sentences has previously elicited protestations in legal circles.[34] Sloth-Nielsen and Ehlers affirm that resistance to this legislation, and the lack of guidance and development of rules by the courts and legislature, caused indecisiveness and irregularities in sentencing practice in South Africa.[35]

Perceptions by society that judges' broad sentencing discretion in South Africa prior to 1998 leading to unjust and inappropriate sentences, was the catalyst that led to the then Minister of Justice and Constitutional Development asking the Van den Heever Committee within the South African Law Reform Commission to investigate South African sentencing practices and the desirability of enacting mandatory minimum sentencing legislation.[36] Various solutions were proposed of which the South African Parliament chose the mandatory minimum sentences legislation option, enunciating the reforms in Section 51 to 53 of the Act which came into operation on 1 May 1998.[37]

Sloth-Nielsen and Ehlers contend that whilst the Law Commission process was effectively circumvented to hastily enact minimum sentencing legislation, this should be seen in the context of various other legislative and policy modifications that were prevalent then displaying governments' commitment to eradicating the scourge of crime.[38]

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[31] M Tonry *Crime Does Not Cause Punishment the Impact of Sentencing Policy on Levels of Crime* (2007) 19.
[32] J Sloth-Nielsen, L Ehlers *A Pyrrhic Victory? Mandatory and minimum sentences in South Africa* (2005) 6.
[33] SS Terblanche, G Mackenzie *Mandatory Sentences in South Africa: Lessons for Australia?* (2008) 402.
[34] JJ Neser *Mandatory minimum sentences in the South African context* (2001) 1.
[35] J Sloth-Nielsen, L Ehlers *A Pyrrhic Victory? Mandatory and minimum sentences in South Africa* (2005) 3.
[36] SM Roth *South African Mandatory Minimum Sentencing: Reform Required* (2008) 158.
[37] Ibid 160.
[38] J Sloth-Nielsen & L Ehlers *A Pyrrhic Victory? Mandatory and minimum sentences in South Africa* (2005) 4.

As the writer has indicated above, the Act was created due to government being inundated with cries from South African society for harsher punishment and for the perpetrators to serve more convincing periods of incarceration. Public sentiment was that the courts were imposing lenient sentences for serious crimes.[39] These provisions were initially supposed to be a short-term solution to address crime and was to be effective for two years but which were extended on various occasions. Section 51 of the Act was rendered permanent on 31 December 2007 by the Criminal Law (Sentencing) Amendment Act 38 of 2007. At the same time sections 52 and 53 were repealed by the same Act.[40] Nzimande points out that of importance is the fact that prior to this amendment, the title of section 51 referred to Mandatory Minimum Sentences. However, after this amendment the word "mandatory" was replaced with "discretionary".[41]

The first framework provided by the South African legislature in the sentencing process is decided at the trial court level. The majority of sentences are still stipulated in the Criminal Procedure Act 51 of 1977, therefore courts may not impose any penalties other than that explicitly provided for in legislation.[42] Similarly, whilst several of the more serious crimes in South Africa are not created by statute, they are still common law offences.[43] Deziel compares how the South African jurisdiction's acknowledgment that its sentencing principles are derived from the common law differs from its Canadian counterpart where some general principles and purposes were explicitly assimilated into legislation in 1996.[44] The Zinn case of 1969 delivered the first fundamental triad of sentencing considerations. This triad is based on 'the nature of the offence, the personal circumstances of the appellant and the interests of the community'. At the time, the Court did not provide more specific guidance on which of the appellant's personal circumstances should be taken into account or what constitutes the interests of the community. The only guidance put forward by Rumpff JA was that, in the sentencing process, each of these three factors must "[be] properly balanced with one another".[45] These principles will be discussed further in Chapter Three as they are significant and are still applied by the Courts today.

[39] ES Nzimande *Minimum Sentence Legislation in South Africa* (2012) 10.
[40] Ibid 3.
[41] Ibid 4.
[42] S Terblanche, JV Roberts *Lacking in principle but delivering on justice?* (2005) 189.
[43] Ibid 191
[44] J Deziel *The Effectiveness of Mandatory Minimum Sentences: A Comparative Study of Canada and South Africa* (2013) 37.
[45] *S v Zinn* 1969 2 SA 537 (A) at 540 G.

2.2 THE STRUCTURE AND INTERPRETATION OF THE ACT AND AMENDMENTS THERETO

2.2.1 THE STRUCTURE AND INTERPRETATION OF THE ACT

The Act encompasses a variety of serious offences, including murder, rape and robbery, committed after the date on which it came into effect, namely 1 May 1998. It also provides for circumstances where the imposition of the mandatory minimum sentences attached to the above-mentioned offences are triggered.[46]
The Act lists offences for which the mandatory minimum sentences qualify when committed in circumstances considered as rendering the offender particularly culpable, eliciting public consternation.[47]

These include planned or premeditated murders; murders of "on-duty" law enforcement officers; murders of witnesses or potential witnesses in specific cases; murders of rape or robbery victims when the predicate offences were committed under aggravating circumstances; or murders committed by people acting with common purpose or conspiracy.[48]

The other predominant serious offences include rapes where the victim is violated multiple times; rapes committed by people acting with common purpose or conspiracy; rapes committed by offenders convicted but not sentenced for multiple rapes; rapes committed by HIV/AIDS afflicted perpetrators aware of their affliction; rapes of victims under 16 years old and of mentally ill and physically disabled victims; and rapes where the offender is convicted of a sexual assault inflicting grievous bodily harm on the victim.[49]

There are several other offences deemed serious enough to warrant sanctions of prescribed minimum sentences *inter alia* corruption-related offences, extortion, fraud, dealing in drugs or arms or ammunition (committed under specific circumstances) and "hijacking" of motor vehicles.[50]

S 51 (1) to (8) deals with the minimum sentences to be imposed for certain serious offences.[51] Of importance is the "escape clause" appearing under s 51(3) (a) of the Act which provides that: "If any court referred

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[46] s 51 of the Act with reference to Part I to Part IV of Schedule 2.
[47] J Sloth-Nielsen, L Ehlers *A Pyrrhic Victory? Mandatory and minimum sentences in South Africa* (2005) 5.
[48] Schedule 2 (Part I to IV) of the Act.
[49] Ibid.
[50] Schedule 2 (Part I to IV) of the Act.
[51] (1) A High Court shall, if it has convicted a person of an offence referred to in Part I of Schedule 2, sentence the person to imprisonment for life.
(2) A regional court or a High Court shall
a) if it has convicted a person of an offence referred to in Part II of Schedule 2, sentence the person in the case of
(i) a first offender, to imprisonment for a period not less than 15 years;
(ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and
(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years.
s 51(1) to (8) of the Act.

to in subsections (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceeding and must thereupon impose such lesser sentence".[52]

Njoko postulates that the phrase "substantial and compelling circumstances" has prompted substantial discourse to warrant divergent interpretations. She mentions that three approaches have developed from conflicting interpretations of the phrase, being the narrow and wide interpretations, as well as a third middle-ground approach.

The narrow interpretation emanated from the case of *S v Mofokeng*[53] which severely constrained the courts discretion, as Stegmann J held that: "The absence of previous convictions, the comparative youthfulness of the offenders, the unfortunate factors in their backgrounds, the probable effect upon them of the liquor which they had taken, the absence of dangerous weapons, and the fact that the complainant had not suffered serious injury are all factors that a court sentencing a convicted rapist in the ordinary course, would weigh up as substantial factors relevant to the assessment of a just sentence, and as tending to mitigate the severity of the punishment to be imposed. However, in my judgment, these factors, 'substantial' though they are, are matters that Parliament must have had in mind as everyday circumstances that would be found present in many or most of the crimes referred to in Part I of Schedule 2 of Act 105 of 1997. Without emasculating the legislation, they cannot be thought of as 'compelling' the conclusion that a sentence lesser than that prescribed by Parliament should be substituted for the prescribed sentence. This is owing to the absence of any exceptional factor to explain the prisoners' conduct (which evidently sprang from nothing other than their own wicked desire to slake their lust regardless of the cost to the victim), and the absence of any mitigating factors other than the everyday factors already enumerated. As the present author understands this legislation, substantial and compelling circumstances must be factors of an unusual and exceptional kind that Parliament cannot be supposed to have had in contemplation when prescribing standard penalties for certain crimes committed in circumstances described in Schedule 2." [54]

From Stegmann J's interpretation, Njoko contends that it is evident that various dynamics that would usually be considered to be aggravating or mitigating circumstances for sentencing purposes cannot be merely deliberated upon to establish if they amount to substantial and compelling reasons for a departure, unless they are of an "unusual and exceptional kind that Parliament cannot be said to have contemplated when it prescribed standard penalties for certain scheduled crimes". [55] Stegmann stated that it would mean that the court favoured its own judgment as opposed to that of Parliament if it regarded such circumstances as falling outside the ambit of "unusual and exceptional" thereby compromising the integrity of the court. [56]

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[52] s 51(3) (a) of the Act.
[53] *S v Mofokeng* (n 7) 523i-524d.
[54] Ibid 523i-524d.
[55] TB Njoko *What constitutes "Substantial and Compelling Circumstances" In the Mandatory and Minimum Sentencing Context?* (2016) 25.
[56] *S v Mofokeng* (n 7) 523i-524d.

This approach was embraced in subsequent cases that followed in other decisions in the same Division.[57]

The wider approach was laid down by Leveson J in *S v Majalefa and Another*[58] in this unreported judgment, by emphasising that irrespective of the Act's provisions, at the inception of the enquiry dealing with the issue of whether a departure from the prescribed sentence is warranted, all aggravating and mitigating factors in the usual sense be considered.[59] Leveson J was of the view that the words "substantial and compelling" could be construed as a validation for the consideration of customary factors, while differentiating from pertinent factors and all the other potential issues which still had to be considered during the sentencing process. Hence in terms of this view, the Act should not be regarded as presenting a significant shift in the approach to sentencing. [60]

Njoko further states that a third middle-ground approach emanated from *S v Blaauw*[61]. In this case Borchers J held that the prior sentencing discretion of the courts had been narrowed by the introduction of the Act, especially due to the elevated benchmark established as suitability for circumstances that need to be considered for a departure from the Act's provisions. Borchers J stated that to establish whether a departure was permitted, the court did not have to seek exceptional circumstances but needed to take into consideration the cumulative effect of all the aggravating and mitigating circumstances in the matter. It could depart from the prescribed sentence should this be "startlingly inappropriate" but was otherwise bound to impose them.[62]

The *Malgas*[63] case is however the definitive landmark case dealing with how the phrase "substantial and compelling circumstances" should be interpreted by South African courts by prescribing a systematic methodology. Njoko contends that this case is of significance since it was the first time the SCA expressed itself on the interpretation of the said circumstances and this judgement has been widely recognized by subsequent judgements, including the Constitutional Court in the *Dodo*[64] case thereby negating previous interpretations thereof.[65] Importantly, in *S v Malgas*[66] the Supreme Court of Appeal concluded that an injustice emanating from a prescribed sentence would be tantamount to a "substantial and compelling circumstance", and an appropriate sentence should be imposed by the sentencing court.[67]

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[57] TB Njoko *What constitutes "Substantial and Compelling Circumstances" In the Mandatory and Minimum Sentencing Context?* (2016) 25.
[58] *S v Majalefa and Another* (n 64)
[59] Ibid
[60] TB Njoko *What constitutes "Substantial and Compelling Circumstances" In the Mandatory and Minimum Sentencing Context?* (2016) 25.
[61] *S v Blaauw* 1999 2 SACR 295 (W) (n 65).
[62] *S v Blaauw* 1999 2 SACR 295 (W) (n 65).
[63] *S v Malgas* 2001 1 SACR 469 SCA.
[64] *S v Dodo* 2001 3 SA 382 (CC)
[65] TB Njoko *What constitutes "Substantial and Compelling Circumstances" In the Mandatory and Minimum Sentencing Context?* (2016) 25-26.
[66] *S v Malgas* 2001 (1) SACR 469 (SCA).
[67] Ibid at Para 25 (I).

2.2.2 RECENT AMENDMENTS TO THE ACT

The Act has been rendered permanent by the repeal of sections 53(1) and (2) of the Act, thereby eliminating the then requirement that the legislation be reconsidered bi-annually.[68]

Other recent notable amendments to the Act include those emanating from:

- The Judicial Matters Amendment Act 8 of 2017 which has amended the Act, so as to include rape and compelled rape of an older person in Part I of Schedule 2;[69]
- The Criminal Matters Amendment Act 18 of 2015 which has amended the Act, so as to regulate the imposition of discretionary minimum sentences for essential infrastructure-related offences; and to create a new offence relating to essential infrastructure;[70]
- The Judicial Matters Amendment Act 42 of 2013 which has amended the Act so as to include persons under the age of 18 years from the operation of that Act; [71]
- The Judicial Matters Amendment Act 66 of 2008 which has amended the Act so as to as insert certain serious offences in Part I of Schedule 2.[72]

It is also noteworthy that the Criminal and Related Matters Amendment Bill (B17-2020) seeks to amend the Criminal Law Amendment Act, 1997, so as to further regulate sentences in respect of offences that have been committed against vulnerable persons. These can be found in Clause 15, Clause 16 and Clause 17.This Bill has, inter alia, the aim of changing the sentencing regime of rape similar to that of murder.[73]

2.3 CRITICISM OF THE ACT

The writer is of the view that the Act has been the bane of critics from the outset. It has been the subject of criticism by judicial officers and likewise by sentencing experts. This criticism is primarily based on the Act's poor drafting, language and the perception that the legislator's intention has been unclear. [74] There has been

[68] ES Nzimande *Minimum Sentence Legislation in South Africa* (2012)18.
[69] Government Gazette Vol. 626 Cape Town 02 August 2017 No. 41018.
[70] Government Gazette Vol. 606 Cape Town 15 December 2015 No. 39522.
[71] Government Gazette Vol. 583 Cape Town 22 January 2014 No.37254.
[72] Government Gazette Vol. 524 Cape Town 17 February 2009 No. 31908.
[73] Criminal and Related Matters Amendment Bill (B17-2020).
[74] V Chikoko *The Interpretation of "Substantial and Compelling" By South African Courts and A Comparison with Minnesota Sentencing Guidelines* (2016) 3.

recalcitrance towards the legislation particularly based on the notion that the Act limits the discretion of judicial officers.[75]

The legislature's intention was for the Act to deter offenders from committing crime, to limit inconsistencies in sentencing and to stringently punish the perpetrators of serious offences.[76] The interpretation of the Act in various South African court cases occasioned teething issues in terms of judicial discretion and the departure from prescribed minimum sentences, until a clear interpretation of the meaning of the phrase "substantial and compelling circumstances" contained in Section 51(3) of the Act, emerged through these courts.[77]

The application of the Act is not retroactive and is only applicable to crimes committed after the 1st of May 1998, nor is it applicable to child offenders at all as of 2013.[78] Chikoko contends that the Act has been criticised for limiting the constitutional rights of children without justification, with other constitutional challenges related to the Act infringing on the principle of separation of powers and other rights enshrined in the South African Constitution.[79]

Sloth-Nielsen and Ehlers reiterate that it was foreseeable that the minimum sentencing legislation would eventually be challenged to establish if it passed constitutional muster. The leading case in this regard was *S v Dodo*[80] wherein the legislation was challenged, *inter alia*, on the grounds that the legislature's interference with the Court's sentencing discretion violated the separation of powers doctrine.[81] Sloth-Nielsen and Ehlers opine that the legislature implemented the "substantial and compelling circumstances" criterion intentionally in an attempt to warrant the eventual constitutional validity of the Act, as rigid mandatory sentences jeopardised sentencing outcomes in difficult cases, in terms of inconsistencies.[82]

Several views abound, such as those of Van Zyl Smit, that laws that culminated in sentences that were hugely inconsistent with the crime would be unconstitutional by virtue of the fact that they would be vindictive, inhuman and unjust. [83] He contends that any mandatory sentence regimes, irrespective of sentences being prescribed by legislation or indirectly by a sentencing council, may be unconstitutional if in its application it renders the imposition of inconsistent sentences. He further opines that a too narrow interpretation of the departure clause could give rise to such disproportionate sentences, making it vulnerable to constitutional

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[75] Ibid.
[76] ES Nzimande *Minimum Sentence Legislation in South Africa* (2012) iii.
[77] Ibid.
[78] V Chikoko *The Interpretation of "Substantial and Compelling" By South African Courts and A Comparison with Minnesota Sentencing Guidelines* (2016) 1.
[79] Ibid.
[80] *S v Dodo* 2001 3 SA 382 (CC).
[81] J Sloth-Nielsen, L Ehlers *A Pyrrhic Victory? Mandatory and minimum sentences in South Africa* (2005) 5.
[82] Ibid 6.
[83] D Van Zyl Smit *Human Rights and Sentencing Guidelines* (2001) 47.

challenges.[84] Isaacs submits that mandatory minimum sentences do not violate the Constitution as such but that the Court must consider whether or not the prescribed sentences are unacceptably disproportionate in each case.[85]

The South African Parliament, with the adoption of the Act, did not adequately consider the proposals recommended in Issue Paper 11, thus establishing a sentencing regime that neither furthers the expressed punishment objectives nor addresses the sentencing inconsistencies that prompted the Act at the outset.[86] Sloth-Nielsen and Ehlers aver that prior to Parliament's extension of the mandatory minimum sentencing legislation in April 2005 there was fervent lobbying, activism, and public debate about the effectiveness and prudence of minimum sentences for serious offences with the clamoring voices emanating more from the non-governmental sector, the Office of the Inspecting Judge on Prisons, and as they expected, the judiciary.[87]

Courts had a narrow interpretation of the provisions of the Act with its own varying approaches as to what would qualify as "substantial and compelling" circumstances, according to Isaacs. He contends that the Act can accomplish its goals since this type of sentencing will satisfy the public's lust for perceived justice, will generate an ethos of "just deserts", and criminals will not take liberties with the mistaken belief that there is a likelihood that they can circumvent the sentencing process through raising technical points, having a lenient judge, or the possibility of early parole. [88]

Circumstances regarding the manner in which courts reacted to the Act can be narrowed down to their sentencing jurisdiction, "substantial and compelling circumstances" as a grounds for deviation, the constitutionality of this legislation and the nexus between life imprisonment and other lengthy sentences.[89] Neser contends that South Africa has reached the juncture where democracy has been fundamentally besieged by crime and punishment is undoubtedly required to eradicate violent crime, albeit in a responsible and affordable fashion. He opines that mandatory minimum sentences are short-term solutions to this serious problem and the certainty of punishment can rather lead to crime reduction. [90]

Chikoko explores how "substantial and compelling" circumstances are interpreted by South African courts and its similarities with Minnesota sentencing guidelines. She asserts that subsequent to the

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[84] D Van Zyl Smit *Human Rights and Sentencing Guidelines* (2001) 47.

[85] AE Isaacs *The Challenges Posed By Mandatory Minimum Sentence Legislation in South Africa and Recommendations for Improved Implementation* (2004) 46.

[86] SM Roth *South African Mandatory Minimum Sentencing: Reform Required* (2008) 158.

[87] J Sloth-Nielsen, L Ehlers *A Pyrrhic Victory? Mandatory and minimum sentences in South Africa* (2005) 1.

[88] AE Isaacs *The Challenges Posed By Mandatory Minimum Sentence Legislation in South Africa and Recommendations for Improved Implementation* (2004) 46.

[89] (South African Law Commission *Sentencing (A new sentencing framework)* (2000) 10-19, as cited in JJ Neser *Mandatory Minimum Sentences in the South African context* (2001) 1.

[90] JJ Neser *Mandatory Minimum Sentences in the South African context* (2001) 6.

decisions in the *Dodo*[91] case and the *Malgas*[92] case, courts have created a hybrid system of sentencing that uses techniques from pre-minimum sentencing practices to deviate from the legislatively prescribed sentences, with the aim of complying with these court decisions.[93] Chikoko argues that this has resulted immediately in lesser sentences for the offender as emphasis is placed on matters related to the crime as opposed to that of a perpetrator or a victim. She further opines that this has culminated in a sentencing regime that exploits issues in order to depart from the mandatory minimum sentences.[94]

Mandatory minimum sentencing legislation has resulted in unnecessarily severe sentences in South Africa over the past two decades, according to Edwin Cameron, former Judge of the Constitutional Court of South Africa. He argues that the Act, a then new statute, strictly curtailed the power of judges to determine the length of prison terms for offences or offenders and rather provided minimum sentences for certain serious offences.[95] He opines that when enacting the mandatory minimum sentence legislation, government drew on international experiences with mandatory minimums and it hastily and unashamedly assimilated them into the Act but achieved almost nothing in reducing crime. [96]

During sentencing, equilibrium should be maintained between the crime (also taking cognisance of the perpetrator's rights) and the interests of society (its safety). Any jurisdiction reneging on this obligation will be neglecting the protection of its citizens. Cilliers and Smit believe that a balance must be drawn between the inherent convolutions of the offender and the hopes of a community baying for blood.[97]

Metz, contrariwise, promotes an African approach to sentencing based on the concept of Ubuntu and reconciliation. He argues that even though mandatory minimum sentences appeal to sensibilities of retribution or deterrence, they are not compatible with reconciliation, whereby judges would customarily have to address the perpetrator and victim's circumstances and the wider societal environment. [98]

The protection of individual victims and society at large should always take precedence over other priorities of the courts. The application of prescribed mandatory minimum sentences should not be departed from nor should they be deferred in matters involving the commission of grave acts of domestic violence where the victim's life is jeopardised. [99] Mandatory minimum sentences are efforts seeking to levy the same sentence upon

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[91] *S v Dodo* 2001 3 SA 382 (CC).
[92] *S v Malgas* 2001 (1) SACR 469 (SCA).
[93] V Chikoko *The Interpretation of "Substantial and Compelling" By South African Courts and A Comparison with Minnesota Sentencing Guidelines* (2016) 127.
[94] Ibid 26.
[95] E Cameron *Imprisoning the Nation: Minimum Sentences in South Africa* (2017) 33.
[96] Ibid.
[97] C Cilliers, J Smit *Offender Rehabilitation in the South African Correctional System: Myth or Reality?* (2007) 84.
[98] T Metz *Reconciliation as the Aim of a Criminal Trial: Ubuntu's Implications for Sentencing* 2019 (9) 114.
[99] V Padayachee *Alternative sentencing for perpetrators of intimate partner violence* (2006) 4.

"similarly situated" people.[100] Kubista avers that the South African Law Commission concluded that there was a predominant belief that offenders were being sentenced differently due to dynamics that should not be contemplated, including race and gender. Therefore it was believed that the mandatory minimums would relieve this setback since a sentencing court is compelled to adhere to the guidelines. [101]

A restorative justice approach to sentencing can improve the efficacy and functioning of the criminal justice system in terms of mandatory minimum sentences and new release procedures. Delomoney contends that the vision of the creators of mandatory minimum sentences were to contribute towards the development of uniform sentencing procedures but its application clearly did not achieve its envisioned goals and has rather caused additional difficulties by exacerbating the problem of overcrowded penitentiaries and thus also possibly encroaching on individuals' constitutional rights. [102]

Mandatory minimums have elicited substantial criticism for turning judges into "sentencing machines", particularly with regard to the milieu of crimes associated with the provision and transportation of drugs, narcotics and contraband; as well as conspiracy, incitement or attempts to perpetrate specific crimes such as housebreaking and theft.[103] The Brennan Centre for Justice states that the mandatory minimum sentencing legislation has regrettably not translated into a more just system and has actually had a converse effect.[104] By shackling judges, mandatory minimums effectively disempowered them and handed over their power to prosecutors, who had the advantage of intimidating defendants with charges for offences that would "trigger" a mandatory minimum sentence. [105]

The Act is advantageous in that it expressly specifies that certain serious offences must be severely punished under particular circumstances ensuring minimal sentencing disparities and equality before the law.[106]

Sloth-Nielsen and Ehlers assert that several commentators pointed out at the outset, that Parliament did not originally contemplate the situation of child offenders when the minimum sentences legislation was being created. [107] Various non-governmental organizations joined forces with written and oral submissions contending

[100] NJ Kubista "*Substantial and compelling circumstances": Sentencing of rapists under the mandatory minimum sentencing scheme* (2005) 79.
[101] Ibid.
[102] D Delomoney *Will A Restorative Justice Approach To Sentencing Improve the Efficacy and Functioning of the Criminal Justice System?* (2015) 53.
[103] A Moyo *Youth, competence and punishment: Reflections on South Africa's minimum sentencing regime for juvenile offenders* (2011) 241.
[104] Brennan Centre for Justice *Sentencing Laws and How They Contribute to Mass Incarceration*.
[105] Ibid
[106] JJ Neser *Reformation of Sentencing in South Africa* (2001) 85.
[107] J Sloth-Nielsen, L Ehlers *A Pyrrhic Victory? Mandatory and minimum sentences in South Africa* (2005) 7.

that the concept of minimum sentences for children would be in breach of the UN Convention on the Rights of the Child, including section 28(1)(g) of the South African Constitution, both which stipulate that incarceration of children should be used only as a "measure of last resort, and then only for the shortest appropriate period of time".[108]

2.4 CONCLUSION

As discussed above, Section 51 of the Act was rendered permanent on 31 December 2007 by the Criminal Law (Sentencing) Amendment Act 38 of 2007. There have been various notable amendments to the Act recently. The Act has been the bane of critics from the outset, being the target of criticism by judicial officers, sentencing experts, commentators and the general public. There has been recalcitrance towards the legislation particularly based on the notion that the Act limits the discretion of judicial officers.

[108] Ibid.

CHAPTER 3

JUDICIAL DISCRETION

3.1 INTRODUCTION AND BACKGROUND

The concept of discretion is ubiquitous and multi-faceted in the context of judicial decision-making, and has varying connotations under different circumstances. It is often viewed as an indicator of a legal rule which has components of ambiguity; when the character of a decision begs the question as to whether a review court would come to the same conclusion as the original decision maker; or where this individual is deemed to be in an advantageous position in this regard. Nonetheless, this concept can inevitably be obfuscatory. [109]

It is however widely accepted that all legal rules have varying degrees of unpredictability as there are no definitive predictable situations to which they can be applied nor are they one-size-fits-all solutions despite however intricately crafted they may be. Hence the majority of key basic legal rules are generally "open-textured" in nature, or make provision for open-ended exceptions, hence referred to as "discretionary".[110]

When judges exercise their discretionary powers, they are thereby not authorised to act on "caprice" or in a manner that is "arbitrary or unregulated".[111] Waddams asserts that judges are compelled to apply the letter of the law without any departure therefrom and that the discretionary power of judges does not imply that one decision is as good as another.[112]

Judicial discretion falls within the realm of judicial accountability along with the need for judges to be impartial in cases; refraining from improper conduct in court and abiding by constitutionally enshrined values, standards which are not easily regulated.[113] Womack has conducted research comprising of interviews with South African judges who also confirm her view that individualism is the foundation on which judicial independence is dependent. She has observed that a strong culture of individual discretion exists within the judiciary in the South African context.[114]

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[109] SM Waddams *Judicial discretion* (2001) 6 ed. 59.
[110] Ibid 59.
[111] Ibid 60.
[112] Ibid 61.
[113] S Seedat *Debating the Transformation of the Judiciary: Rhetoric and the Substance* (2005) 1-18 as cited in AJC Womack *The Impact and the Effect, Of the Management and Control Of Judges by the Executive on the Independence of the Judiciary* (2009) 24.
[114] K Malleson *Judicial Training and Performance Appraisal: The Problem of Judicial Independence* 1997(60) 5 P655-667 as cited in AJC Womack *The Impact and the Effect, Of the Management and Control Of Judges by the Executive on the Independence of the Judiciary* (2009) 57.

Womack further submits that legislative amendments are an unnecessary encroachment by the executive and legislature into the independence of the judiciary.[115] The respondents and the interviewees in her research defined judicial independence, *inter alia*, as being able to have unfettered judicial discretion, interpreting the law according to their learning and their conscience, without any interference from the executive and the legislature. The freedom to decide any dispute placed before them and being uninfluenced by any aspect other than the demands of justice, and the ability to approach any judgement without fear or favour thereby arriving at a decision on the merits of the case were also prominently featured.[116]

3.2 JUDICIAL DISCRETION IN SENTENCING

Trial courts in South Africa have broad discretion in terms of the imposition of the nature and severity of sentences, as this is their main prerogative since sentencing is done on a case-by-case basis. Courts follow the "triad of Zinn" which are judge-made, broad sentencing principles which require that, when making sentencing determinations, judges consider three essential aspects, being the gravity of the offence, the circumstances of the offender, and the public interest.[117]

The Law Library of Congress mentions that there are two forms of control that limit the discretion of trial courts firstly, the supervisory power of appellate courts, which can overturn sentences imposed by trial courts. The second form is the statutory mandatory minimum sentencing regime applicable to certain serious offences as indicated previously, only departing from the prescribed sentences whenever they find a "substantial or compelling circumstance" necessitating such departure.[118] In the absence of any guidance from Parliament regarding the meaning and application of the phrase "substantial and compelling", this has led courts to develop different standards as to when it is appropriate to depart from the prescribed sentences."[119]

In addition to the mandatory minimum sentences, this sentencing regime also restricts the ability of judges to suspend parts of custodial sentences they impose. The Criminal Procedure Act provides that a court, after it convicts a person for a crime for which a prescribed minimum sentence is applicable, may suspend up to five years of the prescribed sentence on the basis of various conditions, including compensation, community service, submission to correctional supervision, good behaviour, or any other condition that it deems fit. [120]

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[115] AJC Womack *The Impact and the Effect, Of the Management and Control of Judges by the Executive on the Independence of the Judiciary* (2009) 77.
[116] Ibid 156-157.
[117] P Lenta *Judicial Restraint and Overreach* (2004) 554-555.
[118] Law Library of Congress *Sentencing Guidelines: South Africa* P1.
[119] Ibid 3.
[120] s297 of the Criminal Procedure Act, 51 of 1977.

As noted above, the mandatory minimum sentencing regime is developed around two pivotal aspects necessary to dispense penalties: the severity of the crime and the criminal past of the perpetrator. In order to decide the sanction befitting the offence or depart from the prescribed minimum sentences, courts depend on a variety of the pertinent general mitigating and aggravating circumstances.[121]

Exum contends that mandatory minimum sentencing legislation has a "handcuffing role" for judges. He postulates that in the United States of America, the Supreme Court stipulates that sentencing judges are at liberty to differ with the policies articulated in the Sentencing Guidelines and to impose sentences in accordance with their own assessments of what construes a reasonable sentence under the factors found in 18 U.S.C. 3553(a).[122] He contends that the US Congress has however curbed that discretion by mandating minimum sentences for various offences. There has been increasing criticism of these mandatory minimums from a host of interested parties such as judges, policymakers, legislators, and defense lawyers.[123]

3.3 JUDICIAL DISCRETION IN THE CONTEXT OF MINIMUM SENTENCING LEGISLATION

The presiding officer in *S v Toms*; *S v Bruce*[124] held that the imposition of mandatory sentences by the legislature had always been deemed to be an objectionable intrusion upon the courts sentencing function.[125] Legislative amendments is said to be an unnecessary intrusion by the executive and legislature into the independence of the judiciary. Womack suggests that the measures in place for the judiciary are sufficient to ensure that they can be held accountable for their decisions. This is achieved through, for example, the requirement that hearings are held in open court, that logically concluded judgments are handed down to ensure that judicial discretion is appropriately dispensed as well as appellate reviews which offer a medium for rectifying wrong decisions. This is rounded off with the rule that a judge can recuse him or herself from hearing a matter in which he or she held a specific interest.[126] Womack states that the majority of judges surveyed and interviewed in her research concur with this view.[127]

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[121] Law Library of Congress *Sentencing Guidelines: South Africa* P9.
[122] JJ Exum *A Commentary on Judicial Discretion, Mandatory Minimums, and Sentencing Reform* (2016) 209.
[123] Ibid.
[124] *S v Toms; S v Bruce* 1990 (2) SA 802 (A).
[125] *S v Toms; S v Bruce* 1990 (2) SA 802 (A) 817 C-D as cited in ES Nzimande *Minimum Sentence Legislation in South Africa* (2012) 4.
[126] S Seedat *Debating the Transformation of the Judiciary: Rhetoric and the Substance* (2005) 1-18 as cited in AJC Womack *The Impact and the Effect, Of the Management and Control Of Judges by the Executive on the Independence of the Judiciary* (2009) 24.
[127] AJC Womack *The Impact and the Effect, Of the Management and Control of Judges by the Executive on the Independence of the Judiciary* (2009) 74.

Mandatory minimum sentence legislation may lead to inconsistent sentences because they limit a court's sentencing discretion and therefore disregard the personal situation of an offender.[128] Proportionality requires that a sentence be custom-made to suit the circumstances of the offence and the perpetrator and that this is not realizable if a court does not have the freedom to modify a sentence accordingly.[129] Inconsistent sentences and a lack of uniformity in the sentencing practice in South Africa are derivatives of wide discretion. Neser maintains that it is the legal framework that controls the sentencing discretion which offers this wide latitude which culminates in unequal penalties in these courts.[130] He is of the view that the courts have fostered principles which seek to limit sentencing discretion yet are fruitless and wide-ranging guidelines are required to be the bedrock for sentencing principles. He asserts that the legislation has been subject to harsh criticism since the majority of presiding officers approach the issue of sentencing based on their intuition which is devoid of any logical methodology. [131]

Mandatory penalties are designed to eliminate judicial discretion in choosing among various punishment options, under the assumption that judges are too lenient and that offenders are therefore neither generally deterred from crime nor specifically deterred because some are not incarcerated long enough to prevent persistent criminality. McCoy affirms that discretion removed from one component of the justice system, such as with judges, prosecutors and parole boards, will resurface elsewhere with mandatory sentencing legislation being the prime example.[132]

Another downside of mandatory minimums is that "they shift discretion from the sentencing judge to the prosecutor"[133]. Once the offender has been found guilty, the judge is constrained and the prosecutor is compelled to merely refer the judge to the applicable section in the sentencing legislation. Moyo is of the view that with discretionary minimum sentences, all these difficulties are dealt with unless the legislature comprehensively lists conditions that do not represent exceptional circumstances.[134] He opines that courts can expand the bases under which they are empowered to exercise sentencing discretion thus reducing the "fettering" capacity of discretionary minimum sentences.[135] Mandatory minimum sentences in the United States afford unfettered decision-making authority to prosecutors of the executive branch, yet imposing severe limitations on the discretion of the judiciary. Riley is of the view that this sentencing legislation curtails a judge's power to

[128] E Gumboh *Examining the Application of Deterrence in Sentencing in Malawi* PER / PELJ 2017(20) 6.
[129] Ibid
[130] JJ Neser *Reformation of Sentencing in South Africa* (2001) 84.
[131] Ibid.
[132] C McCoy *Sentencing: Mandatory and Mandatory Minimum Sentences Types of Mandatory Penalties, History and Legality of Mandatory Minima, Impact of Mandatory Minima on Prosecution and Sentencing Severity.* Law.jrank.org 2077 accessed 18 may 2020
[133] Von Hirsch et al *Principled sentencing: Readings on theory and policy* (2009) 3 ed) at 272-273 as cited in A Moyo *Youth, competence and punishment: Reflections on South Africa's minimum sentencing regime for juvenile offenders* (2011) 252.
[134] A Moyo *Youth, competence and punishment: Reflections on South Africa's minimum sentencing regime for juvenile offenders* (year of publication?)242.
[135] Ibid 252.

impose a sentence lower than that prescribed in the relevant provisions.[136] He contends that this shows that statutory mandatory minimum sentences are in conflict with the Constitution because all the sentencing power is accrued to the legislative and executive branches thereby denying judges sentencing discretion and violating the separation of powers doctrine. [137]

South African mandatory minimum sentence legislation, according to Van Zyl Smit, has only recently been a major concern, as legislation historically did not usually prescribe sentences, except for drug-related crimes and political crimes such as terrorism and the refusal to do military service. He reiterates that the courts took unprecedented measures to decipher these provisions in order to vest discretion and thereby circumvent unacceptably inconsistent sentences.[138] He opines that guidelines created taking cognisance of such principles ought to be adequately defined to warrant that like cases are treated alike, yet also be adequately malleable to permit courts their freedom to deal with minor differences and enable more significant departure.[139]

Mandatory life imprisonment is vastly different from discretionary life sentences which are levied at a court's discretion for offences that do not routinely convey life imprisonment.[140] The latest criticisms of life imprisonment in South Africa are provocative as they have concentrated on unencumbered executive discretion. [141] The executive discretion involved in the decision to release a life-sentence prisoner exists because courts do not specify maximum periods required to be served.[142]

Isaacs maintains that the legislature responded to the society's demands for harsher sentences and for offenders to serve more realistic periods of incarceration through the implementation of the mandatory minimum sentences legislation.[143] In *S v Toms; S v Bruce* where it was held that mandatory minimum sentences reduce the Court's discretion to a rubber stamp and that the imposition of mandatory sentences by the legislature has constantly been regarded as an unwelcome incursion upon their territorial discretion.[144] Although the relevant legislation curtails the courts discretion, according to Isaacs, it is not a complete limitation because the Courts can impose lesser sentences in the event that substantial and compelling circumstances are identified.[145]

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[136] K Riley *Trial by Legislature: Why Statutory Mandatory Minimum Sentences Violate the Separation of Powers Doctrine* (2010) 286.
[137] Ibid.
[138] D Van Zyl Smit *Human Rights and Sentencing Guidelines* (2001) 46.
[139] Ibid.
[140] JJ Neser, D Takoulas *The Imposition and Implementation of Life Imprisonment* (1996) 95.
[141] Ibid 99.
[142] Ibid 99.
[143] AE Isaacs *The Challenges Posed By Mandatory Minimum Sentence Legislation in South Africa and Recommendations for Improved Implementation* (2004) 2.
[144] *S v Toms; S v Bruce* 1990 (2) SA 802 (A) at 806(h)-807(b).
[145] AE Isaacs *The Challenges Posed By Mandatory Minimum Sentence Legislation in South Africa and Recommendations for Improved Implementation* (2004) 2.

There appears to be a general perception that the imposition of a penalty is regarded as being the result of the instinct of the sentencer. [146] These include being influenced by socioeconomic conditions and the imposition of lenient sentences to avoid overcrowding the prisons. Jameson believes that the legislature must intervene and that various other measures are definitely needed to monitor the manner in which courts exercise their sentencing discretion. [147] Neser states that the deprivation of courts sentencing discretion through statutory provisions have historically been endemic in South Africa, and prescribed various mandatory sentences for a host of offenses. [148] He further informs that legislative attempts to restrict sentencing power through the introduction of mandatory minimum sentences has previously evoked vociferous objections from legal circles.[149]

The practical operation of sentencing guidelines with variations of rape scenarios and a discussion of likely four different jurisdictions Minnesota (US), England and Wales, and South African law by Terblanche and Mackenzie illustrate the uncertainty associated with the eventual sentence under the South African system with its wide discretion. They assert that current South African law uses a combination of legislation and loose guidance from appellate courts in determining sentence.[150]

The Supreme Court of Appeal in *S v Malgas*[151] held that the mandatory minimum sentences legislation did not hamper the ability of judges to use their discretion since the Act still allowed judges the discretion to depart from mandatory minimums when "substantial and compelling circumstances" were present.[152] Kubista avers that this appellate guidance allowed judges to invoke factors that had been pertinent prior to the Act to establish if any deviations from the Act's mandatory minimum were warranted. She states that this routine has caused the seriousness of an offence from a subjective perspective, to be exploited as a mitigating factor and contends that by substituting the objective of the legislature with judicial discretion, the severity of each type of crime, objectively viewed, has been undermined. [153]

Similarly, Njoko opines that whilst mandatory minimum sentence legislation does restrict a judge's ability to set a sentence lower than that prescribed by the applicable legislation it does so without completely removing the judiciary's sentencing powers. This is due the presence of an "escape clause" which gives courts a certain amount of leeway during the application of the legislation.[154]

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[146] VI Jameson *Structuring the exercising of sentencing discretion in South African criminal courts* (2018) 105.
[147] Ibid.
[148] JJ Neser *Mandatory minimum sentences in the South African context* (2001)1.
[149] Ibid.
[150] SS Terblanche, G Mackenzie *Mandatory Sentences in South Africa: Lessons for Australia* (2008) 1.
[151] *S v Malgas* 2001 (1) SACR 469 (SCA).
[152] *S v Malgas* 2001 (2) SA 1222 (SCA) (para 22) as cited in NJ Kubista "*Substantial and compelling circumstances": Sentencing of rapists under the mandatory minimum sentencing scheme* (2005) 77.
[153] Ibid.
[154] TB Njoko *What constitutes "Substantial and Compelling Circumstances" In the Mandatory and Minimum Sentencing Context?* (2016) 24.

The word “discretion”, when used with regard to judicial decision-making, is subject to various interpretations depending on the context within which it is seen. It may sometimes be used to show that a legal rule contains ambiguous elements or deals with a requirement that restrictions be placed upon appeal rights for the purposes of expedition and finality. It can also refer to situations wherein the nature of the decision is such that the initial decision-maker is as likely as a court of review court to come to a similar conclusion or when the former is considered to have had some favorable position in this regard. [155]

The Canadian Department of Justice Website reports that there is agreement between the majority of commentators, with the concurrence of the judiciary, that South African courts frequently use their discretion to bypass the prescribed sentence and that interviews conducted with judges and counsel show that these professionals "generally preferred the situation before the Act came into effect" and that Judges have continually criticised the Act for limiting their discretion.[156]

There is appears to be no dearth of literature discussing judicial activism and restraint. Judicial restraint is usually used to explanation for judges’ curtailment of the discretion that they are vested with, by restricting their activity to the implementation of prescribed rules. [157] Judges utilise a host of diverse methods to suspend and limit the exercise of discretion including: “ripeness (refusing to hear a matter until the applicant has exhausted all other remedies); standing (refusal to proceed unless the applicant has a close personal interest in the outcome); strict adherence to precedent; the presumption of the constitutional validity of statutes and restricted interpretation of constitutional rights among others”.[158]

The Law Library of Congress is also of the view that in South Africa, sentencing is considered the primary prerogative of trial courts and that they enjoy wide discretion to determine the type and severity of a sentence on a case-by-case basis. They opine that South Africa’s sentencing regime rests on a “fundamental premise that the trial judge is vested with the discretion to decide on a suitable sentence.” Their averment is that the ambiguity of the phrase “substantial and compelling has resulted in judges exercising their discretion to bypass the mandatory sentence in a considerable amount of cases.[159]

It is of concern when courts renege on their obligation to furnish reasons for a downward departure as this would amount to a misdirection but not furnishing reasons for an upward departure is equally confounding.

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[155] SM Waddams *Judicial discretion* (2001) 6 ed. 60.
[156] Canada Dept. of Justice *Mandatory Sentences of Imprisonment in Common Law Jurisdictions: Some Representative Models*..
[157] P Lenta *Judicial Restraint and Overreach* (2004) 548.
[158] Ibid.
[159] Law Library of Congress *Sentencing Guidelines: South Africa* 3.

Phelps quotes from *S v Dail*[160] "However, where a judge in the exercise of his discretion deems it appropriate to deviate from the prescribed minimum sentence by imposing a sentence in excess of that statutory margin he or she is not obliged to give reasons. It is perhaps desirable but certainly not peremptory to do so. The present author would, therefore, refrain from concluding that an omission to give reasons in that context, constituted a material and appealable misdirection".[161]

When exploring the principles of sentencing in relation to the Child Justice Act, the sentencer's duty is to individualise a sentence in accordance with his or her concerted effort at appraising and duly applying the pertinent details, sentencing principles, and suitability of sentences. Gurahoo opines that the fundamental aspect of sentencing discretion is the presupposition that there is no one precise sentence.[162] She avers that the most valued trait of sentencing discretion is to be able to individualise a sentence in accordance with the distinctive facts of the case, with due regard for the perpetrator, the offence, and the presence or absence of mitigating and aggravating factors.[163]

3.4 JUDICIAL DISCRETION AND THE CONSTITUTION

When interpreting the Constitution and in applying rights to particular cases, judges also exercise discretion in deciding contentious issues in the public domain. As they do not empowered with the same free discretion as the legislature; they are limited to deciding issues emanating from specific disputes and are constrained by precedent, and by factors within their environment, contrary to the legislature. [164] Judges, nonetheless, have substantial political power and are allowed to override measures enacted by the legislature that the legislature regards, and is prepared to defend in court, as enshrined in the Constitution. Judicial discretion therefore competes with legislative discretion.[165]

The judiciary appears to have as steadfastly criticised the mandatory minimum legislation on the basis that it restricts their discretion. [166] This legislation nevertheless remains in force and was declared constitutional in the case of *Dodo* where it was held that the Act did not breach any pertinent constitutional principle.[167]It was argued in the *Dodo* case that the prescribed mandatory minimum sentences in the Act violated an accused's constitutional right to public trial in an ordinary court because it deprived courts of the right to

[160] *S v Dail* 2014 JDR 1218 (FB).
[161] *S v Dail* 2014 JDR 1218 (FB) at Para 19 as cited in K Phelps *Sentencing* (2013) 243.
[162] J Gurahoo *Sentencing juveniles according to the Child Justice Act: A critical evaluation of application of the principle that "detention must be a measure of last resort and for the shortest possible period of time" in the case law* (2016) 24.
[163] Ibid.
[164] P Lenta *Judicial Restraint and Overreach* (2004) 545.
[165] Ibid.
[166] V Chikoko *The Interpretation of "Substantial and Compelling" By South African Courts and A Comparison with Minnesota Sentencing Guidelines* (2016) 111.
[167] *S v Dodo* 2001 (3) SA 382 (CC) at Para 8.

impose sentences they considered appropriate and violated the principle of separation of powers. In addressing the matter, the Constitutional Court tied the separation of powers issue to an accused's constitutional right "not to be . . . punished in a cruel, inhumane or degrading way." The Court held that the legislation is indeed constitutional because courts are free to depart from the mandatory minimum sentences, as the law prescribes, whenever there are "substantial and compelling circumstances."[168]

Roth also maintains that the mandatory minimum sentencing regime has culminated in a multitude of potential constitutional issues. She asserts that an independent judiciary is imperative as per the Constitution to ascertain and deliberate on the evidence against an accused and subsequently render a sentence. She contends that the mandatory minimum sentence legislation is an attempt by Parliament to curb judicial discretion thereby threatening the judiciary's independence and an offender's constitutional rights.[169] The unfettered decision-making power to prosecutors of the executive branch and restriction of the judicial discretion provided by minimum sentencing legislation show that these laws are in conflict with the Constitution because all the sentencing power is accrued to the legislative and executive branches thereby denying judges sentencing discretion and violating the separation of powers doctrine. [170]

3.5 CONCLUSION

As discussed above, trial courts in South Africa have broad judicial discretion in terms of the imposition of the nature and severity of sentences, as this is their main prerogative since sentencing is done on a case-by-case basis. Courts follow the "triad of Zinn" which are judge-made, broad sentencing principles which require that, when making sentencing determinations, judges consider three essential aspects, being the gravity of the offence, the circumstances of the offender, and the public interest. Commentators generally contend that when judges exercise their discretionary powers, they are thereby not authorised to act on impulsively or in an arbitrary or unregulated manner. They maintain that the mandatory minimum sentencing regime has culminated in a multitude of potential constitutional issues. They contend that the mandatory minimum sentence legislation is an attempt by Parliament to curb judicial discretion thereby threatening the judiciary's independence and an offender's constitutional rights. Despite the criticisms this legislation was declared constitutional in the case of *Dodo*[171] where it was held that the Act is not in violation of any relevant constitutional principle.

[168] *S v Dodo* 2001 (3) SA 382 (CC) at Para 42.

[169] SM Roth *South African Mandatory Minimum Sentencing: Reform Required* (2008) 172.

[170] K Riley *Trial by Legislature: Why Statutory Mandatory Minimum Sentences Violate the Separation of Powers Doctrine* (2010) 286.

[171] *S v Dodo* 2001 (3) SA 382 (CC) at Para 8.

CHAPTER 4

INCARCERATION OF JUVENILE OFFENDERS UNDER MANDATORY MINIMUM SENTENCING LEGISLATION

4.1 INTRODUCTION AND BACKGROUND

The advent of mandatory minimum sentencing legislation in South Africa, also had a profound effect on the sentencing of juvenile offenders and this came to a head after a few landmark Constitutional court cases as will be discussed hereunder. The Child Justice Act 75 of 2008 ('the CJA') altered the type of sentences that may be imposed on a child offender and the principles through which the appropriate sentence should be determined, but has also amended or clarified several procedural issues closely associated with sentencing. In the *Centre for Child Law v Minister of Justice and Constitutional Development and Others* the Constitutional Court ruled that the Constitution of South Africa proscribes minimum sentencing legislation being applied to 16 and 17 year old children. The court confirmed the order of constitutional invalidity handed down previously by the High Court, declaring the applicable sections of the Amendment Act invalid. …amended in terms of Judicial Matters Amendment Act 42/2013.

Article 37(b) of the United Nations Convention on the Rights of the Child states: "No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time."[172]

Terblanche validates this rule when he recounts the facts of *S v N* [173] where in the majority judgment, Cameron JA endorsed the constitutional principle that a child offender should not be incarcerated except as a last resort. This principle is not only applicable to whether imprisonment should be levied or not. Par [39]): "So if there is a legitimate option other than prison, we must choose it; but if prison is unavoidable its form and duration should also be tempered. Every day he spends in prison should be because there is no alternative". Terblanche contends that because child offender sentencing becomes individualised so too do the responses of judicial officers thereby compounding this into a controversial issue. [174]

[172] United Nations *Convention on the Rights of the Child* of 20 November 1989.
[173] *S v N* 2008 (2) SACR 135 (SCA) (para 39) as cited in SS Terblanche *Sentencing* (2009) 128.
[174] SS Terblanche *Sentencing* (2009) 128.

Prior to the Criminal Law (Sentencing) Amendment Act 38 of 2007 ("the Amendment Act"), adults and children could be subjected to minimum sentencing under parts of section 51(3) of the Criminal Law Amendment Act 105 of 1997 ('the Act'). The Amendment Act removed part (b) of section 51(3) of the Act necessitating the sentencing court to be persuaded that "compelling and substantial circumstances" were present for the justification of the imposition on 16 and 17 year olds of sentences lesser than the prescribed minimum.[175]

In order to amplify its concern about the distinct requirements and rights of juvenile offenders, the legislature had even amended the nature of its language by stipulating that minimum sentences were no longer mandatory but discretionary. Moyo contends that Parliament did not permit the courts, explicitly or implicitly, to ignore children's specific needs or to make unsuitable or inconsistent dispositions which are in conflict with the provisions of section 28(1) (g) of the Constitution.[176]

South Africa considered mirroring international trends dealing with sentencing policies in the nineties when mandatory minimum sentencing legislation was first introduced here in 1997 and which evolved into the current indigenous format.[177] Skelton contends that mandatory minimum sentencing laws are in breach of various internationally accepted principles, including inter alia, the principles of proportionality, imprisonment as a matter of last resort, and those embodied in article 40 (2)(b)(v) of the UNCRC that provide that sentences of juvenile offenders ought to be reviewable by higher competent authorities.[178]

Sentencing discretion is indispensable and in its absence it is virtually unfeasible to individualise an ideal sentence for child offenders. This has routinely led to sentencing discrepancies and impracticalities in formulating a foundation for sentences. Gurahoo submits therefore that sentencing uniformity is only achievable when sentence discretion is restricted. She states that further research could lead to the development of a juvenile sentencing guideline founded on Dutch guidelines that will limit, but not fully eliminate judicial discretion, thereby ensuring that child offenders' rights are sustained together with sentence consistency.[179]

Ultimately, on 15 July 2009, the Constitutional Court handed down a judgment declaring minimum sentences invalid for 16- and 17-year-olds.[180]

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[175] A Moyo *Youth, competence and punishment: Reflections on South Africa's minimum sentencing regime for juvenile offenders* (2011) 229.
[176] Ibid 242.
[177] A Skelton. *The Dynamics of Youth Justice & the Convention on the Rights of the Child in South Africa* (2001) 1.
[178] Ibid 1.
[179] J Gurahoo *Sentencing juveniles according to the Child Justice Act: A critical evaluation of application of the principle that "detention must be a measure of last resort and for the shortest possible period of time" in the case law* (2016) 69.
[180] A Skelton *Minimum sentences declared invalid for 16- and 17-year-olds A Summary of Centre for Child Law v Minister of Justice and Constitutional Development and Others* (2009) 3.

4.2 THE CHILD JUSTICE ACT 75 OF 2008

The Child Justice Act 75 of 2008 ("the CJA") has altered the type of sentences that may be imposed on a child offender and the principles through which the appropriate sentence should be determined, but has also amended or clarified several procedural issues closely associated with sentencing. This includes pre-sentence reports, victim impact statements and the review of and appeals against decisions by child justice courts.[181]

The State is encumbered with the burden of proof of the age of the child offender beyond reasonable doubt, should the age be in contention. In order to establish his or her age, relatives of the child could be called to give *viva voce* evidence in this regard, or the State must refer the child either to a district surgeon to determine his or her age or acquire a certified copy of the child's birth certificate if it is accessible.[182]

There are a minimum of six types of imprisonment under South African law, according to Terblanche. The CJA specifically allows two of these categories of imprisonment to be imposed on a child offender, being "ordinary" (or determinate) imprisonment and imprisonment in terms of section 276(1)(i) of the Criminal Procedure Act.[183] Such an interpretation is supported by the general principles created by the CJA, such as that incarceration should always be the last resort, and that one of the objectives of the CJA is to stipulate processes purposefully catering for child offenders.[184]

The primary aims of the CJA are to protect the right to freedom, the child's best interests, and the child's right to family or parental care. Jameson states that the CJA introduced new goals and aspects which a court must deliberate on prior to the imposition of a sentence on child offenders. Due consideration must be given to reformatory measures with incarceration frugally used as a means of sanction. The CJA encapsulates non-custodial sentences in various provisions which include community-based sentences, restorative justice terms, fines, correctional supervision, and sentences of obligatory housing in a child and youth care facility. The CJA primarily focuses on non-custodial sentences as sanctions with the re-integration of the child offender back into the community being the preferred consequence.[185] Jameson contends that this methodology is a reasonable and unbiased approach to protect children from being exposed to wrongful conviction and sentences.[186]

Gar also advocates community service as the advantages comprise the empowering of an offender to have his self-esteem reinstated through assisting others, the potential for resultant job prospects and the overall

[181] Child Justice Act 75 of 2008. Chapter 1 of Part 3 and Chapter 12 of Part 2.
[182] AE Isaacs *The Challenges Posed By Mandatory Minimum Sentence Legislation in South Africa and Recommendations for Improved Implementation* (2004)10.
[183] SS Terblanche *The Child Justice Act: Procedural Sentencing Issues* (2013) 327.
[184] Ibid 328.
[185] VI Jameson *Structuring the exercising of sentencing discretion in South African criminal courts* (2018) 20.
[186] Ibid 111.

benefit that the community itself gains. He maintains that a penitentiary is a "university of crime" and that it is essential to provide child or first offenders with a practical solutions to terminate his or her illegal conduct.[187]

4.3 RELEVANT CASE LAW

In the *Centre for Child Law v Minister of Justice and Constitutional Development and Others*[188] the Constitutional Court ruled that the Constitution of South Africa proscribes minimum sentencing legislation being applied to 16 and 17 year old children. The court confirmed the order of constitutional invalidity handed down previously by the High Court, declaring the applicable sections of the Amendment Act invalid. The majority of the Constitutional Court found that the minimum sentencing regime confines the discretion of sentencing officers away from non-custodial alternatives by impeding the individualization of sentences and by developing longer prison sentences. Hence sections 51(1) and (2) of the Amendment Act were declared invalid in as far as they refer to 16- and 17-year-olds. To remedy the defect, the court declared that section 51(6) of the Amendment Act is to read as though it provides as follows: "This section does not apply in respect of an accused person who was under the age of 18 years at the time of the commission of an offence contemplated in subsection (1) or (2)".[189]

The Court held that the Amendment Act violated Section 28 of the Constitution and that in the absence of statistical evidence of an increase in crime or concrete policy grounds upon which the extension of minimum sentencing to juveniles could be justified, it was compelled to declare the applicable provisions unconstitutional.[190] Moyo castigates the Court's perceived reluctance to examine the significance of adolescents' mental capability by merely deciding their sanction purely on the grounds of indiscriminate generalizations about "developmental immaturity".[191]

Sentencing of child offenders in serious cases also came under consideration by the Constitutional Court in the recent *Mpofu* case.[192] Mpofu had been sentenced for murder committed during a house robbery to a term of life imprisonment, coupled with a concurrent 28 years' incarceration. After sentence was handed down in 2001 he appealed on the grounds that he was below the age of 18 years when the offence was committed, centering on a violation of his rights under section 28 of the Constitution. Mpofu's appeal against his

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[187] J Gar *Experiences and views on alternative sentencing from Pinetown* (2007) 11.

[188] *Centre for Child Law v Minister for Justice and Constitutional Development and Others* 2009 (2) SACR 477 (CC).

[189] *Centre for Child Law v Minister for Justice and Constitutional Development and Others* 2009 (2) SACR 477 (CC) para 126 as cited in A Skelton *Minimum sentences declared invalid for 16- and 17-year-olds A Summary of Centre for Child Law v Minister of Justice and Constitutional Development and Others* (2009) 3.

[190] Ibid.

[191] A Moyo *Youth, competence and punishment: Reflections on South Africa's minimum sentencing regime for juvenile offenders* (2011) 229.

[192] *Mandla Trust Mpofu v the Minister of Justice and Constitutional Development and Others (Centre for Child Law as amicus curiae)* CCT 124/11 [2013] ZACC 15 at Para 58 and Para 66.

sentence of life imprisonment was dismissed by the majority of the Constitutional Court. [193] These cases depict how statutory developments, legislation and regulation together with principles and norms of international law can be used to shape legal developments in municipal law. Where judges are amenable to looking beyond the boundaries of domestic law, international law is an invaluable source of authority to further children's rights in South Africa.[194]

4.4 CONCLUSION

The Child Justice Act 75 of 2008 ('the CJA') altered the type of sentences that may be imposed on a child offender and the principles through which the appropriate sentence should be determined, but has also amended or clarified several procedural issues closely associated with sentencing. In the *Centre for Child Law v Minister of Justice and Constitutional Development and Others* the Constitutional Court ruled that the Constitution of South Africa proscribes minimum sentencing legislation being applied to 16 and 17 year old children. The court confirmed the order of constitutional invalidity handed down previously by the High Court, declaring the applicable sections of the Amendment Act invalid. …amended in terms of Judicial Matters Amendment Act 42/2013.

[193] A Skelton *The Mpofu case Sentencing of child offenders in serious cases* (2013) 1.
[194] A Skelton. *The Dynamics of Youth Justice & the Convention on the Rights of the Child in South Africa* (2001) 1.

CHAPTER 5

THE CONSEQUENCES OF MANDATORY MINIMUM SENTENCE LEGISLATION AFFECTING JUDICIAL DISCRETION IN SOUTH AFRICA

5.1 INTRODUCTION AND BACKGROUND

It is a foregone conclusion that a judge's experience, background, insight, and interpretation of the law invariably plays in the role when determining an appropriate sentence. Jameson contends, however, that in certain quarters the imposition of a penalty can be attributed to the predisposition of the judicial officer, such as when judges may be inclined to impose relatively light sentences when influenced by socioeconomic conditions to circumvent congestion of the prisons. [195] In the same vein, the premature release of violent criminals may frequently prompt demands for mandatory minimum sentences or sentencing guidelines which will restrict the judicial officer's discretion to impose lesser sentences on offenders considered to be remorseful, or it is improbable that they will commit another offence. Hence, the imposition of non-custodial sentences would not automatically be deemed an exploitation of sentencing discretion.[196] Such errors could have the unintended consequences of prejudicing similarly positioned offenders obtaining disproportionate treatment at the sentencing stage. [197] This is an indicator of sentencing inconsistencies attributable to the use of discretionary sentencing, as such disparities can be overwhelming where one of two similarly positioned offenders receive a non-custodial sentence and the other a period of incarceration.[198]

Hlakanaphila Analytics was commissioned in 2006 by the Open Society Foundation South Africa to research the impact of the mandatory minimum sentencing legislation. Redpath and O'Donovan dealt with the concept of "impact" from a broad perspective and encompassed inter alia the impact on crime, on court processes, on the proportionality of sentencing, on judicial independence including issues such as the constitutionality of the laws. They analyzed various data sets including crime data, court data held by the prosecuting authority, and prison records, supplemented by a survey of a finalised court cases. They conducted interviews with various relevant role players including judges, magistrates and prosecutors whilst also reviewing applicable case law and international literature.[199]

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[195] VI Jameson *Structuring the exercising of sentencing discretion in South African criminal courts* (2018) 35.

[196] VI Jameson *Structuring the exercising of sentencing discretion in South African criminal courts* (2018) 37-38. Von Hirsch, Knapp and Tonry *The Sentencing Commission and its Guidelines* 13-14, see S v Maluleke 2008 1 SACR 49 (T) at 26, where the court proposed a sentence of restorative instead of imprisonment to alleviate prison overcrowding.

[197] Ibid.

[198] Ibid.

[199] M O' Donovan, J Redpath *The Impact of Minimum Sentencing in South Africa* (2006) 7.

Presiding officers, especially magistrates, according to Redpath and O'Donovan, generally believe the *Malgas*[200] judgement gives them sufficient discretion for departures when necessary. Interviewees in their research, were of the view that the sentences for serious violent crime is high and that judges and magistrates would still hand down heavier sentences, despite the legislation. They opine that because government is required to appear to be proactive in respect of crime control, it is unlikely that the legislation will change, despite the fact that it is causing damage.[201]

Due to sentencing in South Africa historically being the preserve of the judiciary, judges have habitually defied any meddling with their discretion to hand down sentence, which they construe as an elementary feature of judicial autonomy.[202] Sloth-Nielsen and Ehlers maintain that the impact of mandatory minimum sentences on deterrence and prevention of crime is negligible and that the country is in need of a more comprehensive sentencing reform strategy.[203] They opine that the mandatory minimum sentences legislation has had a minimal impact on the reduction of crime generally or in the curbing of the specific targeted offences. They also assert that whilst many judges and magistrates claim that they are compelled by the prescribed sentences to ensure equitable treatment of all those guilty of a particular type of crime, regardless of their individual situations, the media has often reported to the contrary that the judiciary has found loopholes to deviate from the prescribed sentences.[204]

An apparent availability of ample evidence does not support the claim by various supporters of mandatory minimum sentencing that such sentences have a deterrent effect or that they promote consistency in sentencing, according to Tonry. He further mentions that various studies have been conducted which indicate that sentencers often shun the imposition of such sentences and that these decisions have caused injustice.[205] Tonry delves into historical mandatory minimum sentencing regimes in 18th and 19th century England and elaborates on how such penalties eventually became commonplace in the US for drug crimes, partly supported by the faith that this would have a deterrent effect. He states that from the US experience these measures do not have the desired effect, and that sentencers there have avoided imposing such penalties on a large scale. [206]

South Africa is in dire need of reforming its sentencing system, according to Roth. She opines that mandatory minimum sentencing has not fulfilled its mandate to effectively address sentencing issues in South Africa as the minimum sentencing legislation has not had any meaningful impact on the prevention of crime or in diminishing

[200] *S v Malgas* 2001 (1) SACR 469 (SCA)
[201] M O' Donovan, J Redpath *The Impact of Minimum Sentencing in South Africa* (2006) 7.
[202] J Sloth-Nielsen, L Ehlers *A Pyrrhic victory? Mandatory and minimum sentences in South Africa* (2005) 1.
[203] Ibid 17.
[204] Ibid 12.
[205] M Tonry *Crime Does Not Cause Punishment the Impact of Sentencing Policy on Levels of Crime* (2007) 18.
[206] Ibid.

sentencing disparities.[207] Roth states that various role-players in the judicial and criminal justice systems are disgruntled with the status quo, which culminated in endeavors to thwart the whole mandatory minimum sentencing regime. She maintains that sentencing inconsistencies are still pervasive in the judicial system in South Africa and the public at large continues to be dissatisfied with the criminal justice system in its entirety.[208]

5.2 SENTENCING INCONSISTENCIES

A study conducted by Mistry, Struwig and Schönteich which evaluated the impact of the Act revealed that, prior to the adoption of the Act, 70% of judicial respondents were of the view that the minimum sentences would cater for more uniformity in sentencing. The study had found that subsequent to the legislation being adopted, there were still substantial variations in sentencing, although the study did not reveal the reasons for these variances.[209] Low prosecution levels; the upsurge in cases dismissed and low conviction rates are some of the unofficial ways manipulated by prosecutors and courts to restrict the effect of mandatory minimums on criminal defendants.[210]

Whilst Parliament had expectations of mandatory minimum legislation reducing sentencing disparities, the concept of "substantial and compelling circumstances" may have contributed to aggravating the discrepancies and irregularities that are pervasive in relation to the offences identified by the Act. Roth opines that the failure of Parliament to define that term “substantial and compelling circumstances” has undermined the Act's venture to foster homogeneity.[211]

Minimum sentences legislation is not founded on any specific sentencing practice, but is ostensibly directed towards the imposition of lengthy periods of incarceration. [212] It is an expensive tool which creates false sense of security. This emphasis is unrelated to ideal sentencing practices and the legislation has contrariwise entrenched poor sentencing practices that will be difficult to improve in the near future and will severely constrain any successive sentencing system.[213]

Redpath and O’Donovan also aver that the legislation has not improved uniformity in sentencing. The prescribed minimums have definitely increased the average sentence length per offence category. Their analysis of data from the Department of Correctional Services indicate that the average term served by current

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[207] SM Roth *South African Mandatory Minimum Sentencing: Reform Required* (2008) 163.
[208] Ibid 163.
[209] D Mistry et al *Qualitative research report on the sentencing practices of the South African criminal courts with particular emphasis on the Criminal Law Amendment Act No 105 of 1997* (2000) as cited in NJ Kubista *“Substantial and compelling circumstances”: Sentencing of rapists under the mandatory minimum sentencing scheme* (2005) 79.
[210] A Moyo *Youth, competence and punishment: Reflections on South Africa’s minimum sentencing regime for juvenile offenders* (2011) 242.
[211] SM Roth *South African Mandatory Minimum Sentencing: Reform Required* (2008) 167.
[212] SS Terblanche *Mandatory and minimum sentences: Considering s 51 of the Criminal Law Amendment Act 1997* (2003) 220.
[213] SS Terblanche *Mandatory and minimum sentences: Considering s 51 of the Criminal Law Amendment Act 1997* (2003) 220.

inmates for sexual offences grew from roughly seven months to just over ten years (126 months) between 1995 and 2005. They assert that minimum sentencing legislation simultaneously seems to have grown the span of sentences imposed per offence category, thus decreasing general consistency.[214]

5.3 PRISON OVERCROWDING

The Canadian Department of Justice Website contends that sentencing and prison admission statistics in South Africa do not allow for reliable conclusions to be drawn regarding the impact of the mandatory sentences on crime rates or prison populations despite several criminal justice role-players contentions that these sentences have contributed to the country's high prison population.[215]

Even though prison overcrowding could initially be attributed to a substantial increase in the amount of prisoners awaiting trial since 1995, mandatory minimum sentencing legislation has exacerbated overcrowding from 1997. Judge Fagan argues that the provisions of this legislation has a vengeful attitude to deter would-be offenders and despite being initially a temporary measure to tackle increasing crime it has actually made prisons grossly overcrowded.[216] Judge Cameron asserts that the mandatory minimum sentence legislation is a poorly researched, misdirected, extremely costly and ultimately ineffective means of meting out punishment to criminals.[217] He reports that as a result, South Africa has thousands of individuals serving life sentences which is the third highest number in the world after only the U.S. and India.[218]

One of the foremost shortcoming of the mandatory minimum sentence legislation is its influence on the main issue of overcrowding in South African prisons.[219] The prison population was 163,049 on 31 October 2007, down from 187,394 in March 2005, attributable to the general amnesty granted in 2005. The prison capacity was calculated at 114,559, translating to an occupancy of 142%.[220] Terblanche and Mackenzie assert that variations in criminal justice figures can usually be attributed to a host of factors including the abolition of the death penalty, the amplification of the primary jurisdictions of both the regional and district magistrates' courts, sentencers reactivity to higher crime rates and, naturally, the minimum sentences legislation. They contend that the real effect is only evident when these inmates' release is postponed due to the lengthier prescribed sentences and non-parole term, and hence such impact on the prison population is largely yet to be realised.[221]

[214] M O' Donovan, J Redpath *The Impact of Minimum Sentencing in South Africa* (2006) 10.
[215] Canada Department of Justice *Mandatory Sentences of Imprisonment in Common Law Jurisdictions: Some Representative Models*.
[216] H Fagan *Curb the vengeance: Laws on minimum sentencing and parole spell worsening prison conditions* (2004) 1.
[217] E Cameron *Imprisoning the Nation: Minimum Sentences in South Africa* (2017) 5.
[218] E Cameron *Imprisoning the Nation: Minimum Sentences in South Africa* (2017) 29.
[219] SS Terblanche, G Mackenzie *Mandatory Sentences in South Africa: Lessons for Australia?* (2008) 415.
[220] Ibid 410.
[221] Ibid.

South Africa has experienced many problems associated with prison overcrowding since 1994. Mandatory life terms emanating from mandatory minimum sentencing, and new parole requirements that inmates serve a minimum of eighty percent of their sentence, has intensified this problem.[222] Roth maintains that while the extent of the effect mandatory minimum sentences will have on the prison population is largely yet to come, this legislation will have a considerably detrimental effect on the prison population soon if South Africa does not amend its current sentencing regime.[223] She postulates that prisoners in South Africa are generally serving longer prison terms as the Act's mandatory minimum sentencing provisions also had the chance effect of growing the prison population such that whilst prisoners serving longer sentences, more offenders are incarcerated. Roth affirms that the percentage of prisoners serving longer sentences (10 years or more) has grown in comparison to the percentage of prisoners serving sentences between five and ten years which has subsided.[224]

The Act's significant contribution to altering the face of South Africa's sentenced prison population were not immediate as there was a delay from its implementation and eventual sentencing.[225] Sloth-Nielsen and Ehlers quote Steinberg who contends that Parliament passed the minimum sentencing provisions apparently without thought to the effect on prison volumes as there is abundant international evidence that a sudden and sustained increase in sentences for serious crimes will inevitably lead to an increase in prison numbers.[226] They postulate that detractors contend that there is no irrefutable evidence that the rise in long-term incarceration and life imprisonment is attributable to the adoption of the minimum sentences legislation. It could, they assert, simply be due to a universal rise in the incidence of serious crime, or to a largely more castigatory and parochial disposition of judges, improved police detection rates for violent crimes, and as a result of augmented jurisdiction of the lower courts.[227]

A case-by-case investigation is required to establish convincingly ascertain the existence of any connection between the adoption of the legislation and the statistics mentioned above, according to Sloth-Nielsen and Ehlers. Such study was conducted about twenty years ago during the South African Law Commission's investigation into sentencing, but these results are now obsolete. They contend that a thorough analysis of police dockets is necessary in order to determine if the growth in the number of prisoners serving long-term or life sentences can be attributed to improved quality of investigations.[228]

[222] SM Roth *South African Mandatory Minimum Sentencing: Reform Required* (2008) 174.
[223] Ibid 175.
[224] Ibid.
[225] ES Nzimande *Minimum Sentence Legislation in South Africa* (2012) 45.
[226] J Steinberg, *Prison overcrowding and the constitutional right to adequate accommodation in South Africa* (2005) as cited in J Sloth-Nielsen and L Ehlers *A Pyrrhic victory? Mandatory and minimum sentences in South Africa* (2005) 10.
[227] J Sloth-Nielsen, L Ehlers *A Pyrrhic victory? Mandatory and minimum sentences in South Africa* (2005) 10.
[228] J Sloth-Nielsen, L Ehlers *Assessing the impact: Mandatory and minimum sentences in South Africa* (2005) 20.

Cameron recounts from his personal experience that prisons were overflowing with women and men arrested for possession of small amounts of dagga in 1971 due to the minimum sentences precursor apartheid legislation for drug-related offences. He contends that Minister Mulder's cruel laws compelled the courts to impose severe minimum sentences for the pettiest cases of dagga possession and dealing.[229]

Whilst it was not part of their mandate to investigate overcrowding in prisons, Redpath and O'Donovan concede that the researchers in their study had to take correctional services data into account, in order to analyze variations in the length of sentences. It shortly became evident that the prevalent levels of overcrowding were negligibly attributable to minimum sentencing. They assert that because the majority of offenders sentenced for offences covered by minimum sentencing would nonetheless have had some type of custodial sentence imposed on them, the impact of minimum sentencing only becomes apparent at the point when these inmates remain incarcerated past the sentence and parole date they would ordinarily have received, and in most cases this milestone has not been reached. Redpath and O'Donovan further aver that the impending crisis in prisons will be more severe in future than experienced thus far, as a direct result of minimum sentencing and this will only be resolved by mass early releases.[230]

5.4 DETERRENCE OF VIOLENT CRIME

The primary motive for Parliament implementing a mandatory minimum sentencing scheme was due to its perception or hope that this would dissuade perpetrators committing serious offences. Roth asserts that increasing the severity of a sentence does not automatically grow its deterrent effect, nor has the mandatory minimum scheme had the desired deterrent effect in South Africa. [231] She reports that the overall crime rate in South Africa has increased since 1998 after seeing a nominal decrease from 1994. The violent crime rate also increased after the Act came into effect in 1998. From 1998 to 2003, the rate of violent crime per 100,000 of the population increased from 1546 to 1743 whilst the rate of violent crime per 100,000 of the population decreased slightly from 1,720 in 2001 to 1,703 in 2002, the violent crime rate increased to 1,753 per 100,000 in 2003 and has not seen any meaningful decrease since 1998.[232]

The impact of the Act on crime levels is negligible According to Nzimande who believes that the literature supports the view that high rates of crime detection rather than severity of sentences act as a crime deterrent.[233]

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[229] E Cameron *Imprisoning the Nation: Minimum Sentences in South Africa* (2017) 8.
[230] M O' Donovan, J Redpath *The Impact of Minimum Sentencing in South Africa* (2006) 12.
[231] SM Roth *South African Mandatory Minimum Sentencing: Reform Required* (2008) 164.
[232] Ibid.
[233] ES Nzimande *Minimum Sentence Legislation in South Africa* (2012) 46.

Sloth-Nielsen and Ehlers also opine that the impact of harsher sentencing regimes on general deterrence of crime is challenging to isolate and measure or quantify. There has been little or no significant impact in respect of this objective due to the introduction of minimum sentencing legislation nor has any substantive claims been made that crime has been reduced.[234]

Several aspects of the legislative process in South Africa limited any prospective deterrent effect the legislation could have, since the ways in which the relevant provisions were made known to potential offenders were lacking and hence most stakeholders were oblivious to the implications it would have. Terblanche and Mackenzie claim that the legislation was passed with minimal fanfare, adequate social learning opportunities and several months elapsed before the legislation was ultimately put into operation. [235]

Redpath and O'Donovan state that crime has officially decreased since the legislation was adopted. They affirm that murder which is the most consistent marker of crime levels and one of the crimes for which a minimum is advised in all eventualities, has indeed dropped since the adoption of the legislation. They contend that this trend cannot automatically be ascribed to minimum sentencing since the descending pattern emerged way before the legislation became effective, perhaps was exaggerated, and may actually be retreating.[236]

5.5 PUBLIC SATISFACTION WITH SENTENCING

Satisfaction with the criminal justice system in South Africa apparently continues to elude the public. Roth maintains that whilst public anxiety regarding lenient sentencing practices was a primary factor that convinced Parliament to adopt the mandatory minimum sentencing scheme, neither the judiciary nor the community has unreservedly accepted the Act's mandatory minimum provisions. [237] She asserts that despite multi-national research showing overall public support of the general concept of mandatory sentencing, the majority of the populace remain ignorant of the ramifications of the application of the provisions. She further contends that public support for mandatory minimum sentencing practices actually wanes when they are provided with particular illustrations of actual sentences imposed. [238]

Perceptions persist that the South African public does not hold its criminal justice system in high esteem especially when mainstream media portray reports of serious violent crime on a regular basis. Terblanche and Mackenzie aver that the public also seems to have overly unrealistic expectations of the criminal justice

[234] J Sloth-Nielsen, L Ehlers *A Pyrrhic victory? Mandatory and minimum sentences in South Africa* (2005) 17.
[235] SS Terblanche, G Mackenzie *Mandatory Sentences in South Africa: Lessons for Australia?* (2008) 407.
[236] M O' Donovan and J Redpath *The Impact of Minimum Sentencing in South Africa* (2006) 10.
[237] SM Roth *South African Mandatory Minimum Sentencing: Reform Required* (2008) 171.
[238] Ibid.

system's capabilities and capacities, and that of incarceration to remedy society's ills.[239] They believe that when considering the environment of public displeasure with a constrained criminal justice system mandatory minimum sentencing schemes might actually be a boon to society to feel less concerned about the inadequacies of the system.[240] Complaints from the public about crime not being dealt with adequately or too light sentences being levied by the judiciary, are believed to have diminished somewhat, subsequent to the coming into effect of the Act,[241]

Whether public confidence has been lifted by the expansion of sentences is debatable. Redpath and O'Donovan contend that magistrates and prosecutors are in overall agreement that victims of serious crime are amenable to harsh sentences, provided they are present at court for sentencing or are made aware of these sentences.[242] They contend however that public trust is generally linked to aspects beyond sentencing issues, therefore anything slowing down the courts operational effectiveness and results in more remands and referrals can have a harmful effect on this trust.[243]

5.6 CONCLUSION

As discussed above, researchers commissioned to investigate the impact of the mandatory minimum sentencing legislation postulate that judicial discretion affected by mandatory minimum sentence legislation, has had various consequences such as the impact on crime, on court processes, on the proportionality of sentencing, on judicial independence a well as issues such as the constitutionality of the laws. Several commentators agree that mandatory minimum sentencing has failed to adequately address sentencing problems in South Africa as mandatory minimums have not substantially reduced sentencing disparities. They contend that sentencing inconsistencies is still pervasive in the judicial system in South Africa and the public at large continues to be dissatisfied with the criminal justice system as a whole.

[239] S Terblanche, G Mackenzie *Mandatory Sentences in South Africa: Lessons for Australia?* (2008) 413.
[240] Ibid.
[241] AE Isaacs *The Challenges Posed By Mandatory Minimum Sentence Legislation in South Africa and Recommendations for Improved Implementation* (2004) 44.
[242] M O' Donovan, J Redpath *The Impact of Minimum Sentencing in South Africa* (2006) 11.
[243] Ibid.

CHAPTER 6

CONCLUSION AND RECOMMENDATIONS

6.1 OVERVIEW

As previously stated, the purpose of this dissertation is to evaluate the effect that the mandatory minimum sentencing legislation has had on judicial discretion in South Africa, through critically analysing and discussing the current legislative and judicial positions and advance convincing arguments and viewpoints from an array of writers and commentators. The researcher has also delved into the principles relevant to the subject in addition, to departures from the prescribed sentences under the Act and recent developments in the law.

The dissertation has sought to answer the following questions:

a) What is mandatory minimum sentence legislation?
b) What is judicial discretion?
c) Can judicial officers freely exercise their discretion in South Africa?
d) Has mandatory minimum sentence legislation affected judicial discretion in South Africa?
e) What are the consequences of mandatory minimum sentence legislation affecting judicial discretion in South Africa?
f) How does mandatory minimum sentence legislation affect children in South Africa?

What is mandatory minimum sentence legislation?

As discussed at length in Chapter Two above, the mandatory minimum sentence legislation regulating minimum sentences in South Africa is primarily embodied in sections 51 to 53 of the Criminal Law Amendment Act 105 of 1997, as amended ("the Act") which came into operation on 1 May 1998. Act Section 51 of the Act was rendered permanent on 31 December 2007 by the Criminal Law (Sentencing) Amendment Act 38 of 2007.The legislation encompasses a variety of serious offences, including murder, rape and robbery, committed after the date on which it came into effect, namely 1 May 1998. It also provides for circumstances where the imposition of the mandatory minimum sentences attached to the above-mentioned offences are triggered. There have been various notable amendments to the Act recently. The Act has been the bane of critics from the outset criticism by judicial officers, sentencing experts, commentators and the general public. This criticism is primarily based on

the Act's poor drafting, language and the perception that the legislator's intention has been indeterminate. There has been recalcitrance towards the legislation particularly based on the notion that the Act limits the discretion of judicial officers. The legislatures' intention was for the Act to deter offenders from committing crime, to limit inconsistencies in sentencing and to stringently punish the perpetrators of serious offences. The interpretation of the Act in various South African court cases occasioned teething issues in terms of judicial discretion and the departure from prescribed minimum sentences, until a clear interpretation of the meaning of the phrase "substantial and compelling circumstances" contained in Section 51(3) of the Act, emerged through these courts.

What is judicial discretion?

Trial courts in South Africa have broad judicial discretion in terms of the imposition of the nature and severity of sentences, as this is their main prerogative since sentencing is done on a case-by-case basis. Courts follow the "triad of Zinn" which are judge-made, broad sentencing principles which require that, when making sentencing determinations, judges consider three essential aspects, being the gravity of the offence, the circumstances of the offender, and the public interest. Several commentators contend that when judges exercise their discretionary powers, they are thereby not authorised to act on impulsively or in an arbitrary or unregulated manner. They are of the view that judges are compelled to apply the letter of the law without any departure therefrom and that the discretionary power of judges does not imply that one decision is as good as another. Other writers opine that judicial discretion falls within the realm of judicial accountability along with the need for judges to be impartial in cases; refraining from improper conduct in court and abiding by constitutionally enshrined values, standards which are not easily regulated. From their research they have observed that a strong culture of individual discretion exists within the judiciary in the South African context.

Can judicial officers freely exercise their discretion in South Africa?

Some commentators maintains that the mandatory minimum sentencing regime has culminated in a multitude of potential constitutional issues. They contend that the mandatory minimum sentence legislation is an attempt by Parliament to curb judicial discretion thereby threatening the judiciary's independence and an offender's constitutional rights. Similarly, other writers opine that the unfettered decision-making power to prosecutors of the executive branch and restriction of the judicial discretion provided by minimum sentencing legislation show that this legislation is in conflict with the Constitution because all the sentencing power is accrued to the legislative and executive branches thereby denying judges sentencing discretion and violating the separation of powers doctrine. Despite the criticisms this legislation was declared constitutional in the case of *Dodo* where it was held that the Act is not in violation of any relevant constitutional principle. In addressing the matter, the Constitutional Court tied the separation of powers issue to an accused's constitutional right not to be punished in a cruel, inhumane or degrading way. The Court held that the legislation is indeed constitutional because courts are free to

depart from the mandatory minimum sentences, as the law prescribes, whenever there are “substantial and compelling circumstances.” Some writers believe that the imposition of mandatory sentences by the legislature is an objectionable intrusion upon the courts sentencing function and the independence of the judiciary by both the legislature and the executive. Other writers opine that whilst mandatory minimum sentence legislation does restrict a judge’s ability to set a sentence lower than that prescribed by the applicable legislation it does so without completely removing the judiciary’s sentencing powers. This is due the presence of an “escape clause” which gives courts a certain amount of leeway during the application of the legislation.

Has mandatory minimum sentence legislation affected judicial discretion in South Africa?

It is evident from the research conducted that mandatory minimum sentence legislation has indeed affected judicial discretion in South Africa. However the effect on judicial discretion being exercised is negligible from the researcher’s perspective. Mandatory minimum sentences legislation does not hamper the ability of judges to use their discretion since the Act still allows judges the discretion to depart from mandatory minimums when substantial and compelling circumstances were present. Appellate guidance allows judges to employ factors that had been pertinent prior to the Act to establish if any deviations from the Act’s mandatory minimum were justified. Some writers contend that this routine has caused the seriousness of crime from a subjective perspective, to be misused as a mitigating factor and contend that by substituting the intent of the legislature with judicial discretion, the severity of each type of crime, objectively viewed, has been undermined. The majority of commentators agree, with which the judiciary concurs, that courts frequently use their discretion to bypass the prescribed sentence and that from interviews conducted with judges and counsel show that these professionals "generally preferred the situation before the Act came into effect" and that Judges have continually criticised the Act for limiting their discretion. Sentencing in South Africa is considered the primary prerogative of trial courts and they enjoy wide discretion to determine the type and severity of a sentence on a case-by-case basis. Various commentators opine that South Africa’s sentencing regime rests on the fundamental premise that the trial judge is vested with the discretion to decide on a suitable sentence. Their averment is that the ambiguity of the phrase ‘substantial and compelling’ has resulted in judges exercising their discretion to bypass the mandatory sentence in a considerable amount of cases.

What are the consequences of mandatory minimum sentence legislation affecting judicial discretion in South Africa?

Researchers commissioned to investigate the impact of the mandatory minimum sentencing legislation postulate that judicial discretion affected by mandatory minimum sentence legislation, has had various consequences such as the impact on crime, on court processes, on the proportionality of sentencing, on judicial independence a well

as issues such as the constitutionality of the laws. Presiding officers, especially magistrates, generally believe the *Malgas*[244] judgement gives them sufficient discretion to deviate when necessary. Commentators opine that sentences for serious violent crime is sufficiently high and that judges and magistrates would still have handed down heavier sentences, despite the legislation. Some writers contend that the impact of mandatory minimum sentences on deterrence and prevention of crime is negligible and that the country is in need of a more comprehensive sentencing reform strategy. Several commentators agree that mandatory minimum sentencing has failed to adequately address sentencing problems in South Africa as mandatory minimums have not substantially reduced sentencing disparities. They contend that sentencing inconsistencies is still pervasive in the judicial system in South Africa and the public at large continues to be dissatisfied with the criminal justice system as a whole. Many writers are unanimous that the foremost shortcoming of the mandatory minimum sentence legislation is its influence on the main issue of overcrowding in South African prisons. They believe that parliament passed the minimum sentencing provisions without thought to the effect on prison volumes despite abundant international evidence that a sudden and sustained increase in sentences for serious crimes will inevitably lead to an increase in prison numbers.

How does mandatory minimum sentence legislation affect children in South Africa?

The Child Justice Act 75 of 2008 ("the CJA") altered the type of sentences that may be imposed on a child offender and the principles through which the appropriate sentence should be determined, but has also amended or clarified several procedural issues closely associated with sentencing. In the *Centre for Child Law v Minister of Justice and Constitutional Development and Others*[245] the Constitutional Court ruled that the Constitution of South Africa proscribes minimum sentencing legislation being applied to 16 and 17 year old children. The court confirmed the order of constitutional invalidity handed down previously by the High Court, declaring the applicable sections of the Amendment Act invalid. The majority of the Constitutional Court found that the minimum sentencing regime confines the discretion of sentencing officers away from non-custodial alternatives by impeding the individualization of sentences and by developing longer prison sentences. Hence Sections 51(1) and (2) of the Amendment Act were declared invalid in as far as they refer to 16- and 17-year-olds. To remedy the defect, the court declared that section 51(6) of the Amendment Act is to read as though the section does not apply in respect of an accused person who was under the age of 18 years at the time of the commission of an offence contemplated in subsection (1) or (2).

[244] *S v Malgas* 2001 (1) SACR 469 (SCA).
[245] *Centre for Child Law v Minister for Justice and Constitutional Development and Others* 2009 (2) SACR 477 (CC).

6.2 RECOMMENDATIONS

From the researcher's perspective, the intention of the legislature has been achieved by the Act to a certain extent. There does not appear to be sufficient evidence for the unwarranted criticism that emanated from the adoption of the Act. Various amendments to the Act aimed to remedying defects in the Act were successful to a degree. Various court decisions have enabled the judiciary to have a clear understanding of the methodology to be followed when interpreting section 51 of the Act, including the phrase "substantial and compelling circumstances". It is important to note that the Criminal Matters Amendment Bill dated 28 February 2020, is draft legislation, which seeks, once it comes into operation, to inter alia, change the sentencing regime of rape similar to that of murder and this will certainly contribute to further overcrowding of prisons, which is already a negative consequence of the Act. This proposed legislation will however enhance sentence severity in the minimum sentencing regime in the identified categories.

The researcher is of the view that whilst the research does reflect some sentencing inconsistencies, this does not warrant further legislation to regulate the sentencing framework in South Africa.

Sentencing will evolve as opposed to being pushed in a particular direction. There appears to be significant impact with regard to the legislature's goals.

Tinkering with the legislation may result in paradoxical and unintended consequences, much as the legislation itself has done.[246]

[246] M O' Donovan, J Redpath *The Impact of Minimum Sentencing in South Africa* (2006) 12.

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