# MINI DISSERTATION

*In South Africa, to what extend is the judge to deviate from the minimum sentence and where does it leave us with the legislature or the respect for the Constitution? Why should we have the Legislation if we are not going to respect and adhere to it? The South African Legal system concerning the sentencing discretion should be codified. Presiding judges have analytical minds trained in logical reasoning and some gained high levels of practical experience in sentencing, they have different school of thoughts as presiding judges.*

**MAMODISE MARGARET THULARE** - *17279853*

*For the degree of MASTER IN LAWS (LLM) in the subject of CRIMINAL LAW at the University of Pretoria*

*Supervisor: Dr Curlewis*

Sentencing Discretion and Minimum Sentences

# Table of Contents

# 1. Chapter 1: Introduction

According to SS Terreblanche[1] , sentencing can be described as the order of the court that finalises the criminal case against the offender.[2]

Sentencing is the most important, yet difficult part of the criminal proceedings. It is in this stage, that the presiding officer is required by law to mete out an appropriate sentence to the convicted offender.

In South Africa, sentencing is considered to be heavily depended on the exercise of a judicial discretion.

The presiding officer is required to assess all the conflicting interests that are placed before the court for assessment, in order to allow the court to make a value judgement before passing sentence. Such interests are to be conflicting as they represent different aspects to be considered for purposes of sentence.

The sentencing process is at the very core of the criminal justice system. Every community needs to devote a good deal of time and energy to producing a justice system that is as logical, rational, sensible and effective as possible.

Sentencing must always at the end depends on the view taken by the individual trial judge/magistrate, which is why it is such an anxious process. In my view, the more we can leave it to the Judge/magistrate subject to clear guidance as to the substantial and compelling circumstance with regard to minimum sentence the better. We can make a start by amending the minimum act and codify the guidance with regard to substantial and compelling circumstance.

There is a need to limit judicial discretion and the most common proposal it to introduce mandatory sentencing.

Judicial officers are independent, not only from the government, but also from each other. This means that individual judges and magistrates are able to

[1] Guide to sentencing in South Africa, 2nd Edition

[2] Criminal and deserved sentence, Ashworth,1989 Criminal Law Review p 340

hear and decide cases entirely on their merits and free from any inappropriate interference even from their own court.

## 1.2 Background of the problem

Minimum sentence used to be quite common during 1970s, but felt out of favour for about two decades, and then in 1997 the legislature enacted a range of new minimum sentence in section 51 of the Criminal Law Amended Act of 1997. This legislation has dominated our sentencing jurisprudence since then.

Act 105 of 1997 came into operation 1st of May 1998.[3] The Act categorised the offence in which minimum sentences should apply. The legislature has however deliberately left it to the court to decide whether the circumstances of a particular case call for a departure from the prescribed minimum sentence.[4] In doing so, the court are required to regard the prescribed sentences as being generally appropriate to crimes of the kind specified and enjoined not to depart from them unless they are satisfied that there is weighty justification for doing so.[5]

## 1.3 Research Problem

How does South African Criminal Justice system deal with sentencing discretion and minimum sentence since there are no guidelines as to the substantial and compelling circumstances?

South African Legislation did not have consistency during the apartheid era as well as the current legislation under democracy era. The impact of the right to equality given the inconsistence in sentencing needs attention. The most obvious inequality is that which results directly from the terms of imprisonment imposed. Mention has already been made[6] of the wide disparity in sentences imposed by the different judges in S v Thebus. The Act raised the celling to

[3] Proc R43 GG 6175 of 1 May 1998
[4] S v Malgas 2001(1) SACR 469 SCA
[5] S v Malgas 2001(1) SACR 468 at para 18
[6] S v Thebus 2002 2 SACR 566 (SCA)

which a sentence could reasonably be imposed, has contributed to this growing inequality between black and white offenders.

The present legislation Act 105 of 1997 is not adequate to effectively deal with the balance and or equality regarding minimum sentence. Because of the discretion given to the presiding judges and without

South Africa needs sentencing guidelines concerning minimum sentence with regard to substantial and compelling circumstances and learn relevant lessons from the UK. Sentencing guidelines council in England and Wales recommended the reduction in sentencing for a guilty plea.[7] This state has effective ways in dealing with sentencing in its jurisdiction. Enacting legislation adequately to deal effectively with sentence discretion and minimum sentence is of importance in South Africa.

The Act was enacted as an emergency measure and has all the inconsistencies of one. There is a need for the amendment of the Act to promote consistency in sentencing, which setting out clearly the meaning of the substantial and compelling circumstances. Politicians believe that the prescription of severe, mandatory sentences will deter potential offenders from committing crimes.[8]

## 1.4 Challenges

1. The is still no universal definition of compelling and substantial circumstances.
2. Different school of thoughts by the presiding officers.
3. Racial discrimination, inequality, favouritism and fear by the courts.

## 1.5. Purpose of Sentence

Section 276(1) of the Criminal Procedure Act 51 of 1977 as amended, is the general empowering provision authorising courts to impose sentences in all cases, whether under common law or statute, where no other provision governing imposition of sentence[9]

[7] Sentencing Guidelines Council (England and Wales) 2007 *Reduction for a plea of guilty.*
[8] CF Michael Tonry Sentencing matters (1996 )159-161
[9] Director of Public Prosecutions, Western Cape v Prins & Others 2012(2) SACR 183

Sentencing is not a purely logical exercise, and the troublesome in nature of sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what an appropriate sentence is in a particular case.[10]

1.5.1 Seven Purposes for which a court may impose a sentence on an offender.[11]

(a) To ensure that the offender is adequately punished for the offence.
(b) To prevent crime by deterring the offender and other persons from committing similar offences.
(c) To protect the community from the offender.
(d) To make the offender accountable for his or her action.
(e) To promote the rehabilitation of the offender.
(f) To denounce the conduct of the offender.
(g) To recognise the harm done to the victim of the crime and to the community.

There is a fundamental and immutable principle of sentencing that the sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed and the circumstances of the crime committed.[12] The principles of proportionality operate to guard against the imposition of unduly lenient or unduly harsh sentence. The principle requires that a sentence should neither exceed nor be less that the gravity of the crime having regard to the objective circumstances.[13]

Sentencing is about achieving the right balance (or, in more high-flown terms proportionality). The elements at play are the crime, the offender and the interest of the community or with different nuance, prevention, retribution, reformation and deterrence.[14]

[10] Veen v The Queen(no 2) 1988 164 CLR
[11] Section 3A of the Sentencing Procedure Act 1999
[12] R v Geddes 1936 SR (NSW) and R V Dodd 1991 57 A Crim R 349
[13] R v McNaughton 2006 66 NSWLR 566
[14] S v RO & another 2010 (2) SACR 248

Deterrence theory is predicted on the assumption that the harsher the punishment the greater the deterrence effect. One of the main purposes of punishment is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that if they yield to them, they will meet with severe punishment.[15]

It is trite that the purpose of punishment is the protection of the community, that purpose can be achieved in an appropriate case by a sentence designed to assist in rehabilitation of the offender at the expense of deterrence, retribution and denunciation.[16]

Rehabilitation has as its purpose the modelling of a person‘s thinking and behaviour so that they will, notwithstanding their past offences, re-establish themselves in the community with a conscious determination to renounce their wrongdoing and establish or re-establish themselves as honourable law abiding citizens.[17] Rehabilitation has been described as one of the cornerstones of sentencing discretion.[18]

Making the offender accountable is an important purpose of sentencing.[19]A fundamental purpose of the criminal law, and of the sentencing of the convicted offenders, is to denounce publicly the unlawful conduct of an offender. This objective requires that a sentence should also communicate society s condemnation of a particular offender s conduct. The sentence represents a symbolic, collective statement that the offender’ s conduct should be punished for encroaching on our society ‘s basic code of values as enshrined within our substantive criminal law.[20]

At common law, courts are always required to take into account the impact of criminal behaviour on a victim for the purpose of determining the culpability of the offender.[21]

[15] R v  AEM 2002 NSWCCA 58 at (92)
[16] R v Zamagias 2002 NSWCCA 17 Howie J said at 32
[17] Vartzokas v Zanker at 279
[18] R v Cimore 2001 121 A Crim R 433
[19] R v Dawes 2004 NSWCCA 363 at (40)
[20] Ryan v Queen 2001 206 CLR 267 at 118
[21] Siganto v The Queen 1998 194 CLR 656

There is a statutory duty placed on the Sentencing Council which must have regard to "the impact of sentencing decision on victims of offences".[22]

## 1.6 Phases of Sentencing

In every criminal trial, there are different phases that are to be followed until the matter is finalised. Firstly, there is a pre-trial phase, where the investigations and taking of witness statements, including search and seizure are made. Upon finalisation or advance stage of investigations, an arrest may be made for the suspect, who will be known as the accused, to appear before court.[23]

Secondly, there is an arraignment stage, where upon arrest of the suspect, known as the accused in court, is appearing in court, and formally informed about the nature of the charges he/she is facing. It is at this stage of the proceedings, where the accused is given the contents of the docket, and further given an opportunity to inform the court what the intention is, whether to object to the charges, to request the matter to be set down for a guilty plea, to negotiate a plea and sentence agreement or to arrange a trial date.[24]

Thirdly, there is a trial stage, where the prosecution is allowed to put charges to the accused, and the accused to plead to such charges, the prosecution to lead evidence in support of its allegations, the defence to be given an opportunity to cross examine the state witnesses. It is in this stage after the state case is closed, that the defence may request a discharge, or presents the defence case. At the conclusion of the state and defence case(s), the presiding officer may be addressed about the merits of the case(s) before a verdict can be considered.[25]

Fourthly, the sentencing stage. This stage only occurs if the court has convicted the accused of any offence(s) that they were charged with. The state will be required to produce any record of previous convictions, if any. Thereafter, the defence and the state will be required to submit evidence in the form of mitigation by the defence and aggravation by the state. It is at this stage that the court will be weighing the conflicting interests for sentencing purposes in order to consider an appropriate

[22] Coroners and Justice Act 2009,section 120 11 (C)
[23] Section 20 – 26 of the Criminal Procedure Act 51 of 1977
[24] Section 80 – 109 of the Criminal Procedure Act 51 of 1977
[25] Section 150 – 151; Section 174; Section 186; Section 256 of the Criminal Procedure Act 51 of 1977

sentence.[26] This thesis is focusing on this stage of the proceedings, specifically with regard to the discretion by the court and the minimum sentencing more so with regard to substantial and compelling circumstances.

## 1.7 Court Discretion

Discretion is the power or right to make an official decision using reasons and judgement to choose from among acceptable alternatives.[27] An abuse of discretion occurs when a decision is unacceptable alternative. The decision may be unacceptable because it is logically unsound or because it is arbitrary and clearly not supported by the facts at hand, or because it is explicitly by a statute or rule of law.

Generally, trial court(s) in South Africa have judicial discretion when sentencing the offender.[28] If the accused is aggrieved with the sentence of the trial court, they may ask for leave to appeal from the trial court to approach the high court.

An appellate court may not interfere with this discretion merely because it would have imposed a different sentence. In other words, it is not enough to conclude that its own choice of penalty would have been an appropriate penalty.

Something more is required; it must conclude that its own choice of penalty is an appropriate one and that the penalty chosen by the trial court was not.[29]Thus the appellate court must be satisfied that the trial court committed a misdirection of such a nature, degree and seriousness that shows that it did not exercise its sentencing discretion at all or exercise its sentencing discretion improperly or unreasonably when imposing it.[30]

Interference is justified only where there exists a ‘striking or startling’ or disturbing disparity between the trial court’s sentence and that which the appellate court would have imposed. In such instances, the trial court’s discretion was regarded as having been unreasonably exercised.[31]

[26] Section 271 – 2714 of the Criminal Procedure Act 51 of 1977
[27] Longman Dictionary of Contemporary English
[28] S v Pieters 1987 (3) SA 717 (A) at 727 F- H
[29] S v Sadler 2000 (1) SACR 331 SCA para 10
[30] S v Pillay 1977 (4) SA 531 (A) at 535 E - F
[31] S v Snyders 1982 (2) SA 694 (A) at 697 D

## 1.8 Aims of Sentencing

Sentencing as the most important phase of the trial, has its own principles and guidelines to be followed for the trial court to arrive at an appropriate sentence. As discussed above, the trial court has discretion to mete out an appropriate sentence. The appellate court has set out such principles as follows:[32]

*"Punishment should fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to circumstances'.*[33]

It was generally accepted that the main aims of sentencing are retribution, prevention and rehabilitation.[34]

The process to be adopted in ensuring that every sentence should fit the offender as well as the offence and be fair to the society is known as individualisation of sentence. Such is the main objective of giving judicial discretion to the trial court when sentence is considered.

## 1.9 Hypothesis

1. Codification of minimum sentence with regard to substantial and compelling circumstance is needed in the South African legal system
2. There should be a standard sentence imposed by all courts on similar offences and offenders
3. The protection of the fundamental human rights.

## 1.10 Assumptions

1. Violation of the fundamental human right in court
2. Act 105 of 1997 is inadequate to strike the balance in passing of the minimum sentence in court
3. No definition of the substantial and compelling circumstances.

## 1.11 Research Methodology

The research methodology used in this thesis is non – empirical qualitative approach. The research on this thesis is heavily library based. The library material used includes, but not limited to textbooks, law reports, legislations, journals,

[32] S v Rabie 1975 (4) SA 855 (A)
[33] S v Rabie 1975 (4) SA 855 (A) at 862G
[34] Criminal Procedure Handbook, Geldenhuys et al; Juta, Eleventh Edition at p 327

academic journals and the Constitution as well as the international instruments. The comparative method is to compare the South African and UK legal system response to legislation for sentencing. In addition the comparative legal method is used for the South African courts can learn lessons from other countries in dealing with sentences.

# 2. Chapter 2: Legal Frame Work

## 2.1 Introduction

The South Africa is a democratic state, therefore is obliged by its Constitution to respect human right and uphold the rule of law.[35]

South Africa is a signatory member of the African Charter on Human and People's Rights,[36] which in its preamble recognises that fundamental rights stem from the attributes of human beings, which justify their international protection.

It is very important for the charge sheet to include a reference to the provisions relevant to the sentence for a particular offence.[37] As part of the right to a fair trial: every accused person has the right to be informed of the charge in sufficient details to answer it.[38]The offender has the right to dignity, not to be punished in a cruel, unusual or degrading manner.[39]

The preamble to the Constitution provides that the people of South Africa recognise the injustice of the past, honour those who suffered for justice and freedom, respect those who worked to build and develop the country, and believe that South Africa belongs to all who lived in it, united in their diversity.[40] The Constitution is the supreme law of the land. The preamble was complemented by the supremacy clause, which provides that the Constitution is the supreme law of the Republic that law or conduct inconsistent with it is invalid, and the obligation by it must be fulfilled.[41]

The Constitution goes further to provide that the Bill of Rights is the cornerstone of democracy in South Africa.[42]It enshrines the rights of all people in South Africa and affirms the democratic values of human dignity and freedom. Therefore, the state must respect, protect and fulfil the rights in the democratic government of South

[35] S 7of the Constitution 108 of 1996
[36] *African Charter on Human and Peoples Rights 1981*
[37] S v Ndlovu 2003(1) SACR 331 SCA
[38] Section 35 (3)(a) of the Constitution, Act 108 of 1996
[39] S v Dodo 2001(1)SACR 594 (CC)
[40] Bekink *Principles* 155
[41] S 2 of the Constitution also see Bikink *Principles* 63
[42] S 7(1) of the Contitution, Act 106 of 1996

Africa. In order for the Government to fulfil its obligations, it requires a balanced legislation that is clear and precisely to the point when the substantial and compelling circumstances for minimum sentence is mentioned and not for the court to find its own meaning. South Africa therefore needs to enact straight forward legislation in order to prevent and combat crime in its area of jurisdiction. It is important that there must be a balance and/or equality in court when passing of sentences to all offenders irrespective of colour and/or money. It is also important that the Legislature defines substantial and compelling circumstances. The inability of the Legislature to define that creates a loophole, which may leave the courts because of their desecration.

## 2.2 The Constitution of the Republic of South Africa Act 108 of 1996

The Constitution is the supreme law of the Republic. Law and conduct inconsistent with it is invalid, the obligations imposed by it must be fulfilled.[43] Sentencing, which in most instances results in imprisonment, infringes on the provisions of the Constitution. Section 35(2)[44] provides that:

Everyone, who is detained, including every sentenced prisoner, has the right.

(a) To be informed of the reason for detention.

(e) To conditions of detention that are consistent with human dignity.

The wording of the Constitution, clearly allows convicted offenders to be incarcerated on good cause shown. Such will not be an infringement of the provisions of the Constitution, if such an infringement is proved; the offender may be released from such detention.[45]

It is however, of paramount importance to note that such rights are not absolute. Legal practitioners regard section 36 of the Constitution as the limitation clause. It implies that the clause consists of provisions and circumstances under which the rights may be limited.[46] An important aspect further in that regard, is the view that a law of general application may limit the rights. What has to be discussed and be understood before limiting such rights is to ascertain what can be regarded as a law of general application.

[43] Section 2 of the Constitution, Act 108 of 1996
[44] The Constitution, Act 108 of 1996
[45] Section 35 (2) (d) of the Constitution 108 of 1996
[46] Section 36 (1) (a) – (e) of the Constitution 108 of 1996

Section 35 of the Constitution specifies particular sets of rights in respect of three categories of people. The section applies to an arrested person, detained person and to accused person.[47] Section 35(4) applies to arrested, detained and accused persons. Section 35(5) does not confined to these three groups.

The right to a fair trial does not begin in court but at the inception of the Criminal Process.[48]The Section 35(3) right to a fair trial does not extend to civil trials, nor does it apply to interrogation procedures outside of the criminal process.

2.2.1 The right to a fair trial

The right to a fair trial is one of the important rights outlined in the Constitution.[49] Therefore, in terms of the Constitution, the right to a fair trial is a basic right in criminal proceedings.[50] Before 1994, the right to a fair trial was protected by the ICCR.[51] *In Key v Attorney General, Cape Provincial Division and Another,*[52] the court held as follows with regard to a fair trial:

"*What the Constitution demands, is that the accused be given a fair trial? Ultimately, fairness is an issue, which has to be decided upon the fact of each case, and the trail judge is the person best placed to take that decision. At times fairness might require that evidence unconstitutionally obtained be excluded. But there will be time when fairness will require that evidence albeit obtained, unconstitutionally, nevertheless be admitted."*

In terms of section 35(3) of the Constitution, every accused person is entitled to a fair trial. This includes the right to be informed of the charge with sufficient detail to answer to it (if the charges reads with the provisions of act 105 of 1997), to prepare a defence, to a public trial before an ordinary court, to have the trial begin and conclude without unreasonable delay, to be present when being tried, to choose to be represented by

[47] Section 35(1-3) of the Constitution of 108 of 1996
[48] S v Lwane 1966(2) SA 433,R v Khuzwayo 1949 (3) SA 761
[49] Section 35 of the Constitution 108 of 1996
[50] Terblanche, *Guide to sentencing page 11*
[51] Art 14(1) of the ICCPR 1966 provides that: all persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or his rights and obligations in a suit at law, everyone shall be entitled to a fair trial and public hearing by a competent, independent and impartial tribunal established by law. The UDHR 1948 provides for the same right in terms of art 10
[52] 1996(4) SA 187 (CC) at 196

a lawyer and to be informed of this right promptly, to be presumed innocent and to remain silent and not to testify during the proceedings, to mentioned but a few.[53]

*In Freedom of Expression Institute v President, Ordinary Court Marshall* [54] *the* provisions of the Defence Act[55] was challenged because the Act allowed members of the army to be tried by a court martial. The officers of the court were not legally qualified or trained and the court had the power to impose sentences of imprisonment of up to two years. The High Court arrived at the decision that the imprisonment sentence imposed by the court martial was a violation of the right not to be detained without a trial as enshrined in the Constitution. The court martial was not an ordinary court and thus, lacked independence.

In *S v Mthwana*[56] the court held that:

"*What an accused person is entitled to is a trial initiated and conducted in accordance with those formalities, rules and principles of procedure which the law requires. He is not entitled to a trial which is fair when tested against abstract notions of fairness and justice."*

The right to a fair trial implies that justice should be done and should be seen to be done, as emphasised in *S v Dzukuda*.[57] The Constitutional courts stressed that, at the heart of a fair trial in the field of criminal justice, one has to bear in mind that dignity, freedom and equality are foundational values of the Constitution. The importance of the right to a fair criminal trial is to ensure that innocent people are not wrongly convicted. Because of the adverse effects, which wrong conviction has on the liberty and dignity and the other interests of the accused, the accused end up taking the state to court for damages suffered.

2.2.2 Equality

In terms of section 9 of the Constitution[58]" Everyone is equal before the law and has the right to equal protection and benefit of the law. Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories

[53] Section 35(3)(a)-(h) of the Constitution 108 of 1996
[54] 1999 (2) SA 471(c)
[55] Act 44 of 1957
[56] 1992 (1) SA 343 (A)
[57] S v Dzukuda 2000 (2) SACR 443 (CC)
[58] Section 9 from 1-5 of the Constitution 109 of 1996

of persons, disadvantaged by unfair discrimination may be taken. The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethic or social origin, colour, sexual orientation, age, disability, religion conscience, belief, culture language and birth".

The Constitution commits the state to the goal of achieving equality.[59] It tells us that the type of society that it wishes to create is one based on equality, dignity and freedom. Therefore it is important that the offenders are treated the same in court during the sentencing stage.

The apartheid political and legal system was squarely based on inequality and discrimination. Apartheid dealt with the problem of scarce resources by systematically promoting the socio-economic development of the white population at the expense of the rest of the society.[60] Therefore, it is also important for the amendment of the Legislature, Act 105 of 1997 to stipulate the meaning of substantial and compelling circumstances for the offenders to be treated equally in court not for the court to give its own meaning and deviate from the Act for flimsy reasons.

The promotion of Equality and Prevention of Unfair Discrimination Act 4 2000 is the National Legislation contemplated in Section 9(4).[61] The Equality Act is an extremely ambitious piece of legislation of social and economic inequalities, especially those that are systemic in nature, which brought pain and suffering to the great majority of our people.[62] It hopes to achieve this aim by prohibiting unfair discrimination by the state and by other persons, providing remedies for the victims of unfair discrimination and promoting the achievement of substantive equality.

It is therefore very important that the legislature regarding minimum sentence be developed as soon as possible regarding the substantial and compelling circumstances for minimum sentence to apply and for all offences as listed on the schedule to receive the same sentence.

Discrimination is differentiation on illegitimate grounds; a law that differentiate between black and white people and place a burden on one group and not on the other is

[59] Section 1(a) of the Constitution 108 of 1996
[60] Terreblanch *History of Inequality*
[61] 2013(3) BCLR 320 (LAC)
[62] Proclamation R49 of 13 June 2003

differentiation on the illegitimate ground of race and is therefore discrimination. The equality clause does not prohibit discrimination; it prohibits unfair discrimination. Fairness is therefore a moral concept that distinguishes legitimate from illegitimate discrimination.[63]

Unfair discrimination means treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity. Unfair discrimination is deferential treatment that is hurtful or demeaning. Discrimination also occurs when the law or conduct perpetuated or does nothing to remedy existing disadvantage and marginalisation.[64]

The Constitutional Court has held that there are factors that should be taken into account in determining whether discrimination has an unfair impact. The position of the complainants in the society and whether they have been victims of the past patterns of discrimination, the nature of the discriminating law or action and the purpose sought to be achieved by it. The extent to which the right s of the complainant have been impaired and whether there has been impairment of his or her fundamental dignity.

The Equality clause does not prohibit discrimination. It prohibits unfair discrimination. Fairness is therefore a moral concept that distinguishes legitimate from illegitimate discrimination.[65] Unfair discrimination means treating people differently in a way, which impairs their fundamental dignity as human beings, who are inherently equal in dignity.

### 2.2.3 Fair Discrimination

Not all discrimination is unfair.[66] President Mandela granted a remission of sentence to all mothers who were in prison at the time and who had children under the age of 12 years. The respondent who was the father of the same age argued that the President's order unfairly discriminated against him based on gender." It was held that the decision of the President benefited children and gave women prisoners with minor children and advantage. The effect of the Act was to do no more than deprive fathers of minor children of an early release to which they had no legal entitlement.

[63] *South African Constitutional Law: the Bill of Rights (2000)*
[64] *2011 (128) SALJ 479*
[65] Prinsloo v Van Linde 1997 (3) (SA) 1012 (CC)
[66] President of the Republic of South Africa v Hugo1997 (4) SA 1 (CC)

Therefore it could not be argued that the decision not to afford male prisoners the same opportunity impaired their sense of dignity as human beings or their sense of equal worth."

### 2.2.4 Unfair Discrimination

Unfair discrimination is discrimination with an unfair impact. Where the discrimination action is designed to achieve a worthy and important societal goal it may make fair what would otherwise be unfair discrimination.[67] A case that illustrates the distinction between unfair discrimination and discrimination that is not unfair is *City Council of Pretoria v Walker*.[68] Walker, a resident of old Pretoria, complained that the flat rate in Mamelodi and Atteridgeville was lower than the metered rate and this therefore meant that the residents of old Pretoria subsidised those of two townships. He also complained that only residents of old Pretoria were singled out by the council for legal action to recover arrears owed for service, while a policy of non-enforcement was followed in respect of Mamelodi and Atteridgeville. The majority of the Constitutional Court held that the first set of actions that Walker complained of was not unfair discrimination while the second set was unfair discrimination.

Unfair discrimination is differentiation that has unfair impact on its victims. In this regard, the court first took into account that Walker was white and therefore belongs to a group that had not been disadvantaged by the racial policies of the past. The council's decision to confine the flat rate to Atteridgeville and Mamelodi and to continue charging the metered rate in old Pretoria was dictated by circumstances.

### 2.2.5 Human Dignity

"*Everyone has inherent dignity and the right to have their dignity respected and protected".*[69]

Human dignity is a central value of the objective, normative value system, established by the Constitution, perhaps the pre-eminent value.[70] According to section 1, the Republic of South Africa is founded on the value of Human Dignity, the achievement of equality and the advancement of human rights and freedom.

[67] Harksen v Lane NO 1998 (1) SA 300 (CC)
[68] City Of Pretoria v Walker 1998 (2) SA 363 (CC)
[69] Section 10 of the Contitution 106 1996
[70] S v Makwanyane 1995 (3) SA 391(cc)

Human dignity also provides the basis for the right to equality, inasmuch as every person possesses human dignity in equal measure, everyone must be treated as equally worthy of respect.[71] The value of human dignity is safeguarded and promoted, inter alia, by the recognition of a right to dignity in the Bill of Rights.

2.2.6 Cruel, inhuman and degrading treatment or punishment

*In S v Williams*[72] the Constitutional Courts, referring to punishment in general held that the Constitution required that

*"Measures that the dignity and self-esteem of an individual will have to be justified; there is no place for brutal and dehumanising treatment and punishment. The Constitution has allocated to the State and its organs a role as the protectors and guarantors of those rights to ensure that they are available to all. In the process, it sets the State up as a model for society as it endeavours to move away from a violent past. It is therefore reasonable to expect that the State must be foremost in upholding those values, which are the guiding light of civilised societies. Respect for human dignity is one such value; acknowledging it includes an acceptance by society"*

The right to dignity is at the heart of the right not to be tortured or to be treated or punished in a cruel, inhuman or degrading way.[73] In S v Makwanyane, Chakalson P held that the right to dignity is one of the relevant factors that must be taken into account to determine whether a punishment is cruel, inhuman or degrading.[74]

In S v Williams, Langa J held that the basic concept underlying the prohibition of cruel, inhuman or degrading punishment is the dignity of a man and the common thread running through the assessment of each phrase is the identification and acknowledgement of society's concept of decency and human dignity.[75]

In S V Dodo[76], the principle objection was to the duration rather that the effect of the sentence. The case concerned the validity of section 52(1) of the Criminal Law Amendment Act 105 of 1997 which in effect makes it obligatory for a High Court to sentence an accused, convicted of and offence specified in the Act, to imprisonment

[71] *National Coalition for Gay and Lesbian Equality v Minister of Justice 1999(1) SA 6(CC*)
[72] S v williams 1995 (3)SA 632(CC)
[73] S v Dodo 2001 (3) SA 382(CC)
[74] S v Makwanyane *Supra*
[75] S v Williams *Supra*
[76] S v Dodo (60)

for life, under section 51(3)(a). The court is satisfied that “Substantial and compelling circumstances” exist which justify the imposition of a lesser sentence.

## 2.3 Criminal Procedure Act 51 of 1977 (CPA)

The court should not sentence until all the facts and circumstances, which are necessary for the fair exercise of the judicial discretion, have been placed before it. If there is insufficient evidence for the court to exercise a proper discretion, the court itself should obtain additional evidence.[77]Even in cases where the accused enjoys legal representation, it remains the task of the court to investigate possible relevant factors.

Sentencing takes place in an open court[78] and in the presence of the accused.[79]

An accused’s sentence should not depend on the competent or incompetent of the legal representative. The court should ensure that both the state and the accused know what is relevant to sentencing.[80] In the mentioned case the accused was found guilty of the contravention of the Road Traffic Act. The court *a quo* made an order *declaring* him unfit to obtain a driver’s licence for three months. The case was taken on automatic review to the Supreme Court.

*“The Court held that the proceedings of the trial court were in order except for the decision regarding the driver’s licence. Although the right of the accused presented relevant facts to the court a quo had been explained to him, the court was not satisfied that he knew what evidence would be important in the circumstances. The court held that it was in the interests of the accused and the community for the trial court to play an investigative role when the accused was called upon to place relevant facts before it. The court found that the trial court, instead of merely asking the accused if there was anything he wanted to say, could have asked him whether he foresaw any need to drive a vehicle within the next three to six months. The court held that there was nothing to be gained by disqualifying the accused from obtaining a licence and that it would be better to encourage him to become a qualified driver. In the circumstances, the order declaring the accused unfit to obtain a licence was set aside.”*

[77] S v Siebert 1998(1) SACR 554 (A)
[78] Section 152 of CPA 51 of 1977
[79] Section 158 of the CPA 51 OF 1977
[80] S v Strydom 1996 (2) SA 636(W)

Justified and affordable sentencing is now more important than ever. Experience has shown that harsh sentences in themselves do not reduce crime. It is not the severity of punishment, which acts as a deterrent but the certainty thereof.[81]

The sentencing officers should be aware of developments in the domain of penal theories. South African Courts have historically enjoyed great freedom regarding sentencing. The appeal court will only interfere if there was misdirection or the sentence is shockingly inappropriate. However, the legislature has over the past few years introduced minimum sentences, which limit the courts' discretion. Minimum sentences were introduced by section 51 of the Criminal Law Amendment Act 105 of 1997 which came into operation on 1 May 1998.

In terms of Section 274 of the CPA, this deals with evidence of sentence:

*(1) A court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.*

*(2) The accused may address the court on any evidence received under subsection (1), as well as on the matter of the sentence, and thereafter the prosecution may likewise address the court.[82]*

The CPA is known as the Bible of the Criminal Justice System. All aspects pertaining to court procedure and practices to be followed are regulated by the CPA. It is on that score that the CPA may be regarded as a law of general application.

The provisions of the CPA as mentioned above, implies that the defence will lead evidence in mitigation of sentence, and conversely, the prosecution will lead evidence in aggravation of sentence. Such evidence of the two opposing parties is required, in order to assist the court to arrive at a just sentence. In S v Mokela,[83] Bosielo JA, had the following to say:

*'The hallowed principle that, in order to arrive at a fair and balanced sentence, it is essential that all facts relevant to the sentence be put before the sentencing court. The duty extends to a point where a sentencing court may be obliged, in the interest of justice, to enquire into the circumstances, whether aggravation or mitigation… This is in line with the principle of fair trial.'*

[81] S v De Kock 1997 (2) SACR 171(T)
[82] Section 274 1-2 of the CPA 51 OF 1977
[83] S v Mokela 2012 (1) SACR 431 (SCA), para 14

The judicial officer, as a sentencing court, must remain impartial throughout the proceedings. He/she must only be guided by the law and the procedure to arrive at a just sentence.[84]

The South African Courts has a discretion in imposing other sentences such as Fines, imprisonment with the option of a fine, a postponed sentence under section 197 (1)(a), a caution and discharged under section 197(1)(c).

## 2.4 Criminal law Amendment Act 105 of 1997

Criminal Law Amendment Act 105 of 1997 came into operation on 1 May 1998. The Act applied only to offences committed on or after 1st May 1998. This was confirmed in Willemse 1999 (1) SACR 450 (C), where there court, after reference to various decisions found that the Act cannot be applied retrospectively.[85]Although the Act was also originally only valid for a period of 2 years, its validity has been extended by the President in terms of section 53.

Section 73(2A)[86] requires a presiding officer not only to inform an accused of his or her right to legal assistance, but also to inform an accused of the consequences should he or she be convicted. Failure on the part of the presiding officer to advise an unrepresented accused of the provisions of section 51(3), *in case*, resulted in an unfair trial.[87]

Courts are required to approach the imposition of sentence conscious that the legislature has ordained the particular prescribed period of imprisonment as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.

Section 51 of Act 105 of 1997 provides as follows

(1) Notwithstanding any other law, but subject to subsections (3) and (6), a High Court shall, if it has convicted a person of an offence referred to in Part I of Schedule 2, sentence the person to imprisonment for life.

(2) Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall

[84] S v Siebert 1998 (1) SACR 554 (SCA) at 558 – 559a.
[85]S v Willemse 1999 (1) SACR 450 (c)
[86] Section 73 (2a) Act 51 of 1977
[87] S v Rapoo 1999(2) SACR 217 (T)

(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;

(b) If it has convicted a person of an offence referred to in Part III of Schedule 2, sentence the person, in the case of

(i) A first offender, to imprisonment for a period not less than 10 years;

(ii) A second offender of any such offence, to imprisonment for a period not less than 15 years; and

(iii) A third or subsequent offender of any such offence, to imprisonment for a period not less than 20 years; and

(c) If it has convicted a person of an offence referred to in Part IV of Schedule 2, sentence the person, in the case of

(i) A first offender, to imprisonment for a period not less than 5 years;

(ii) A second offender of any such offence, to imprisonment for a period not less than 7 years; and

(iii) A third or subsequent offender of any such offence, to imprisonment for a period not less than 10 years.

(3)(a). If any court referred to in subsection (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 proceedings and may thereupon impose such lesser sentence.

(3) (b) If any court referred to in subsection (1) or (2) decides to impose a sentence prescribed in those subsections upon a child who was 16 years of age or older; but under the age of 18 years, at the time of the commission of the act which constituted the offence in question, it shall enter the reasons for its decision on the record of the proceedings.

Such sentences were enacted after the legislature was of the view that some serious and violent offences were not properly penalised. The courts interpreted such provisions in different cases that were adjudicated through the years. The leading case being the Malgas decision.[88] It was held in this case that the era of the use of Act 105 of 1997, does not necessarily take away the sentencing discretion from the presiding officers.[89] The issue of substantial and compelling circumstances, are a question of fact, and must be decided by the facts of each case to be accommodated. However, court was warned not to depart from imposing minimum sentences for flimsy reasons[90]. The legislature has however deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence.

Although the phrase "*substantial and compelling circumstances*" has been referred to by numerous courts, they have, without attempting to define it, and this led to the various interpretation of the phrase. There was no precedent set by any court.

The approach in Malgas [91] clearly indicated as follows:

"*The Legislature aimed at ensuring a severe standardised consistent response from the courts to the commission of such crimes, unless there were and could be seen to be, truly convincing reasons for a different response."*

In my opinion, there is no standardised consistent interpretation of the phrase substantial and compelling circumstances as indicated by the Supreme Court of Appeal.

The decision by the High Court in the matter of the State and Oscar Leonard Carl Pistorius, Judge Masipa departed from the minimum sentence of 15 years as stipulated by section 51(2)(a) of Act 105 of 1997, which provides that:

"*When an accused that is a first offender is convicted of murder that is not planned or premeditated, the court shall sentence him or her to imprisonment for a period of 15 years.*[92]

[88] S v Malgas 2001 (1) SACR 469 SCA
[89] S v Malgas 2001 (1) SACR 469 SCA para 8
[90] S v Malgas 2001 (1) SACR 469 SCA para 9
[91] 2001(1) SACR 469 SCA
[92] Section 51(2)(a) Act 105 of 1997

In the matter mentioned above, the court indicated that: "*To answer the question whether there exist substantial and compelling circumstances justifying a lesser sentence, court consider also aggravating factors as well as mitigating factors in a particular matter."*

*The court indicated that mitigating circumstances outweigh the aggravating factors and found that there are substantial and compelling circumstances, which justify a deviation from the imposition of the prescribed minimum sentence of 15 years.*

Then the court sentenced the accused to 6 years imprisonment as the appropriate sentence for murder based on *dolus eventualis.*

The state filed a notice of application to appeal against the sentence imposed on the murder conviction in terms of section 316B (1) of the CPA.[93] The responded filed a written opposition to the state's application and the court *a quo* dismiss the application for leave to appeal.

I submit that the court put much emphasis only on the personal circumstances of the accused by the defence council than the aggravating factor by the state council, more particularly attempts by the accused to show remorse by apologising to the deceased's family as the most crucial fact, which drove the court to deviate from the prescribed sentence.

The court elevated the personal circumstances of the accused above that of society in general. The appeal Court indicated that the court *a quo* misdirected itself in its assessment of an appropriate sentence.[94]

In conclusion, SERITI JA held that: "*I am of the view that there are no substantial and compelling circumstances which can justify the departure from the prescribed minimum sentences. In the light of the serious offence committed by the respondent and the absence of substantial and compelling circumstances, the court a quo erred in deviating from the prescribed minimum sentence of 15 years imprisonment."*

It is my respectful submission that the decision taken by the High Court in the above-mentioned matter and the decision in the Supreme Court of appeal is a clear indication

[93] Section 316 B (1) Act 51 of 1977. Provides for appeals to the Supreme Court of Appeal against sentences imposed by the superior sitting as a court of first instance and not as court of appeal

[94] Director of Public Prosecution, Gauteng v Pistorius (950/2016) 2017 ZASCR,158

that there is a need for the enactment in the South African legislation, like other countries.

The minimum sentence act must stipulate clearly as to the meaning of the substantial and compelling circumstances not leave that to the courts in interpreting the meaning of the phrase and to give guidance to the court as well.

# 3. Chapter 3: The Comparative Study

## 3.1 Introduction

When interpreting the Bill of Rights, a Court, Tribunal of Forum must promote the values that underlie an open democratic society based on human dignity, equality and freedom, the court must consider international Law, and may consider foreign Law.[95]

It is therefore argued that the South African can learn important lessons from the application of the provisions of the different pieces of Legislation that could also apply in South Africa with regard to sentencing.

## 3.2 South Africa

In line with the principle of constitutionalism, South Africa is described as a constitutional state. The Constitution is the supreme law of the country, and contains bill of rights that enshrines the human rights of the people in the country and affirms the democratic values of human dignity, equality and freedom.

The Minimum Sentencing Act was enacted in order to give the courts the guidance as the sentence to be imposed to the specific offences as indicated by the act, however deliberately left the meaning of the substantial and compelling circumstances to the courts to give its own meaning.

As a democratic and a constitutional State, the Legislature must be clearly stipulate the meaning of the substantial and compelling circumstance to comply with the equality clause as enshrined by the constitution. It is therefore my submission that the courts will impose similar sentences to similar offences as clearly indicated by the legislation.

## 3.3 Sentencing and minimum sentence

The sentencing officers must take the sentencing stage very serious, not as business as usual. A huge responsibility rests on the shoulders of the sentencing officers.[96]

[95] Section 39(1) a-c of the Constitution of South Africa
[96] S v Dzukudu 2000(2)SARC 443 (CC)

The extremely highly expectations placed on sentencing officers are clear from the following dictum by Corbett JA in S v Rabie,[97]

*"A judicial officer should not approach punishment in a spirit of anger, because being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interest of the society which his task and object of punishment demand of him/she. Nor should he/she strive after severity, nor, on the other hand surrender himself to misplace pity, while flinching from firmness, where firmness is called for, he should approach his/her task with a humane and compassionate understanding of human frailties and the pressure of society which contribute to criminality."*

Every sentencing officer has different school of though. Guidelines are necessary for the courts to ensure that everyone is on the same page. Therefore, substantial and compelling circumstances should be codified

Serious crimes are escalating in South Africa because of the discretion of the courts, with regards to minimum sentencing, more particularly substantial and compelling circumstances. There is no evidence of a consistent and therefore no indication that it has any useful deterrent effect. It is important to remind ourselves again that the true deterrent as expressed by Chaskalson in S v Makwanyane[98] is "the likelihood that offenders will be apprehended, convicted and punished."

Therefore, the provision which is unclear, and which changes the common law, should also be restrictively interpreted, Zulman JA closed:

"*More particularly status which prescribes minimum sentences, such as the statute here under consideration, thus eliminating the usual discretions of a court to impose a sentence which befits the peculiar circumstances of each individual case, will usually is construed in such a way that the penal discretion remains intact as far as possible."*[99]

Until now, the Act has been held to be constitutional, mainly because the sentencing court is permitted to depart from the prescribed sentences in the case of substantial and compelling circumstances.

[97] 1975(4)SA 855 (A) at 866 A-C
[98] 1995 (2) SACR 1 (CC)
[99] S v Kimberley 2005 (2) SACR 663 (SCA) at para 13

## 3.4 The United Kingdom

The Lisbon Treaty introduced significant changes to human rights protection in the European Union, the most significant of which lie in the amendments to Article 6 of the Treaty on European Union. These provide that the EU Charter of Fundamental Rights is now legally binding, having the same status as primary EU Law, and that the EU shall accede to the European Convention of Human Rights (ECHR) .In two years since the Lisbon Treaty came into force, the Charter has been referred to on many occasions by the European Courts of Justice, and now operates as the primary source of human rights **i**n the EU**.**[100]

The UK does not have a written constitution and follows the Parliamentary sovereignty form of government. As a measure to protecting Human rights, the UK enacted the Human Rights Act 1998.[101]The Human Rights Act sets out the fundamental rights and freedom that everyone in the UK is entitled. It incorporate the rights set out in the European Convention on Human Rights ECHR into domestic British Law. The Human Rights Act of 1998 came into force in the UK in October 2000.

The European System Council was formed in 1949 and the European Convention on Human Rights was signed in 1950. The convention came into operation in 1953.The Convention originated on the basis of the World War 2. The mission of the European Council was due to horrible experience. The European Continent achieves great unity and the foundation of unity should be democratic based of Human Rights, based on human rights and common ground.

The European Courts of Human Right was established as a body under the European Human Rights Convention, in order to ensure the observance of the engagements undertaken by members of the Council of European to protect human rights and fundamental freedom. It is a successful tribunal where people have rights of individual to sue the state for contravention of Human Rights.

The position before was different because were not to given power to deal with violation of Human Right. The courts will only deal with the member's state. The position slowly developed and allowed the courts to handle many cases-principles of

[100] The European Union and Human Rights after the Treaty of Lisbon, Human Rights Law Review, Volume 11 December 2011, by Sionadh Douglas-Scott

[101] Human Right Act of 1998

solidarity human rights by each of the state and to guarantee everyone Human Rights.

The enjoyment of the Rights and Freedoms sets forth in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.[102]

The Criminal Justice Act is applicable when imposing the sentence in court.[103] A person convicted of murder who is aged 21 on the date of conviction must be sentenced to imprisonment for life unless he was under 18 on the date when the offence was committed.[104]

The maximum reduction of one-sixth or five years (whichever is less) should only be given when a guilty plea has been indicated at the first stage of the proceedings.

The Sentencing Guidelines were introduced in England and Wales. Prior to February 2016, courts in England and Wales had an inconsistent approach on sentence. The introduction of the sentencing guidelines has removed inconsistency by adopting a more prescriptive and transparent approach to sentencing. The sentencing guidelines help judges and magistrates to decide what an appropriate sentence should be for a person who either has been convicted or has pleaded guilty. The sentencing guidelines provides a step-by-step approach to sentencing by looking at an accused's culpability, the seriousness of any harm risked and the likelihood of the harm occurring. The court should deduct from the minimum term a number of days equal to the number of days spent in custody on remand, unless the days would not have counted as remand days if the sentence had been a determinate sentence.

It is therefore on these grounds, that South Africa can learn important lessons from the application of the provisions of the different pieces of legislation that could also apply in South Africa.

## 3.5 Differences and similarities between UK and South Africa

The following is a schematic comparative presentation of similarities and differences between the sentencing legislation in the UK and South Africa.

[102] Article 14 of the European Convention for Protection of Human Rights and Fundamental Freedom
[103] Criminal Justice Act of 2003
[104] Section 269 Criminal Justice Act 2003

| UK | RSA |
|---|---|
| The European Convention for Protection of Human Rights and Fundamental Freedom | The Constitution of RSA |
| Section 269 of Criminal Justice Act of 2003 provides the clear guidelines as to the Sentence. | Section 51 of the Minimum Act 105 of 1997 does not give the meaning of the substantial and compelling circumstances |
| Article 14 of the European Convention on Human Rights provides for the enjoyment of the Rights and Freedoms sets forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.[105] | Section 7 of the Constitution of South Africa of the Bill of rights is a corner stone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom. |
| Section 14 of the Human Rights Act provides for the limitation of Rights | Section 36 of the Constitution provides for the limitation of rights. The rights in the Bill of rights may be limited only in terms of law of general application, to the extent that the limitation is reasonable and justifiable in an open and democratic society, based on human dignity, equality and freedom taking into account all relevant factors, including (a) the nature of the right,(b)the importance of the purpose of the limitation, (c) the nature and the extent of the limitation, (d) the |

[105] Article 14 of the European Convention for Protection of Human Rights and Fundamental Freedom

| | |
|---|---|
| | relationship between the limitation and its purpose and less restrictive means to achieve the purpose. |
| | |

From the above discussion, it is very clear that the South Africa and United Kingdom can learn valuable lessons from each country's legislation for sentencing.

## 3.6 Principal Findings

In South Africa, the pre-democratic era regarding sentence had been accompanied by systematic violation of human rights, which are nowadays guaranteed under the Constitution. The enactment of the minimum sentence legislation also does not protect the human rights, because the legislature has however, deliberately left it to the court to decide whether the circumstances of a particular case call for a departure from the prescribed minimum sentence. The offenders of similar offences are sentenced differently with the similar offences based on the colour of their skin, because of the discretion given to the courts by the legislature.

It is submitted that the research addresses the question asked in chapter one. However, a balance regarding sentence and the protection of human right must be maintained. South Africa must adopt the following in order to be consistent in sentencing the offenders of murder:

- Development of national minimum legislation to the adequately define Substantial and compelling circumstance.
- Standardisation of penalty for serious offences

## *3.7* Chapter Summary

The aim of the chapter is to evaluate the effectiveness of the South African legislation with regard to sentencing and compliance with the human rights as enshrined by the Constitution. The republic of South Africa implemented the minimum sentence legislation with a *lacuna.* The Legislature however deliberately left it to the court to decide whether the circumstances of a particular case call for a departure from the prescribed minimum sentence.[106]

[106] S v Malgas 2001(1) SACR 469 SCA

The position is still the same as before the Constitution of South Africa, where people were oppressed because of their colour and race, which violate the constitutional rights.

South African legislation did not have consistency during apartheid era as well as the current legislation under democracy era. The impact of the right to equality given the inconsistence in sentencing needs the attention. The most obvious inequality is that which result directly from the terms of imprisonment imposed. If our legislation was very clear on the definition of the substantial and compelling circumstance, there will be no violation of the constitutional rights of individuals.

The present legislation Act 105 of 1997 is not adequate to effectively deal with the balance and equality regarding minimum sentence.

South Africa needs sentencing guidelines concerning minimum sentence with regard to substantial and compelling circumstances and learn relevant lessons from UK. Sentencing Guidelines Council in England and Wales recommended the reduction in sentencing for a Guilty Plea.[107]

[107] Sentencing Guidelines Council (England and Wales) 2007 *Reduction for a plea of guilty.*

# 4. CHAPTER 4: Conclusion and Recommendations

## 4.1 Introduction

Although the South African minimum Legislation does not define the substantial and "compelling circumstance" and deliberately left it to the courts, there is still an obligation to protect the rights of all offenders in accordance with the Constitution.[108]

However, for South Africa to achieve the objective of adopting human rights, it needs to draw on the experience of other states, such as United Kingdom, which is at the forefront of consistency concerning sentencing for murder.

The South African Legal System must be developed by codifying the Law of sentencing concerning the substantial and compelling circumstances, in compliance with such recommendation it would be easier for the court to impose equal sentence to all offenders. The South African Legal System has codification of Criminal Law. Same can be adopted in codifying the Law of Sentencing. South Africa needs sentencing Guidelines concerning minimum sentencing more particularly with substantial and compelling circumstances and learns relevant lessons from UK.

## 4.2 Background to the research and the Research Question

The research question was phrased as follows in chapter 1:

How does South African Criminal Justice system deal with sentencing discretion and minimum sentence, since there are no guidelines as to the substantial and compelling circumstances?

South African Legislation did not have consistency during apartheid era as well as the current legislation under democracy era. The right to equality given the inconsistence in sentencing needs the attention. The most obvious inequality is that which result directly from the terms of imprisonment imposed. Mentioned has already been made of the wide disparity in sentences imposed by the different judges in S v Thebus. [109] The present legislation Act 105 of 1997 is not adequate to effectively deal with the balance and or equality regarding minimum sentence.

[108] Section 35 of the Constitution 108 of 1996
[109] S v Thebus 2002 2 SACR 566 (SCA)

The study also compared the legislative regime for sentence in the UK and the Republic of South Africa. The objective of the comparative study was to identify lessons which the Republic of South Africa can learn in her effort to sentencing within her territory. This study also examined the international legal framework regarding the sentence.

It is however, a fact that in order to strike a balance with regard to sentence, the state requires a universal acceptance definition of the substantial and compelling circumstances of the minimum sentence.

It was established that the UK has proper guidelines of sentence, whereby there is a reduction of sentence for guilty plea. The offender who pleads not guilty and convicted on trial receives a minimum sentence as prescribed by the Act.

It therefore for these reasons for the Republic of South Africa to learn this kind of lessons, to be consistent with the sentence.

## 4.3 Standardisation of Sentence.

There is a standardised penalty for murder in the UK in terms of section 269 of the Criminal Justice Act. The Criminal Justice Act is applicable when imposing the sentence in court.[110] A person convicted of murder who is aged 21 on the date of conviction must be sentenced to imprisonment for life unless he was under 18 on the date when the offence was committed.[111]

The maximum reduction of one-sixth or five years (whichever is less) should only be given when a guilty plea has been indicated at the first stage of the proceedings. In South African criminal courts, discretion is given to the courts to apply the minimum sentence. Standardised penalty for Murder will reduce the crime rate of the offence and ensures that equality to all offenders in court without any discrimination. The standardisation of penalties will be in line with the Constitution of the South African Republic.

## 4.4 Judicial oversight

The independence of the Judiciary is crucial to the upholding of the Rule of Law. The Judiciary is tasked to decide cases impartially. However, impartiality must be

[110] Criminal Justice Act of 2003,UK
[111] Section 269 Criminal Justice Act 2003,UK

practised without restriction; interference with the judicial process must be avoided at all costs with the aim of protecting human rights.

Before 1994, the courts in the Republic of South did not have the power of judicial review of the Legislation. Judicial review promotes democratic constitutional values and the Rule of Law.[112] Notwithstanding the fact that the South African courts did not have the power of Judicial Review, the judiciary was independent.[113]

The Republic of  South African and UK are Constitutional Democratic states, although the UK does not have a written constitution, therefore, judicial oversight will ensure the protection of the Constitution by upholding the Rule of Law and respect for human rights.

The South African Judges did uphold rules against the state. The case of Harries v Minister of Interior[114] is one of the cases in which the Judges showed the independence of the Judiciary by invalidating the Bill, which the State attempted to pass without the required special majority. Unfortunately, while the Judges were independent and observed the Rule of Law, this was different with regard to the magistrate. Magistrates implemented and administered policies of the government and this could not rule against the state during the apartheid era.[115]

However, the judiciary is responsible for upholding the law adopted, comply with the Constitution while not losing sight of the fact that the Constitution provides for the separation of powers between the executive and the Legislature and the Judiciary. Therefore judiciary review provides for checks and balances with the aim of preventing the abuse of power by the state.

It is therefore that the courts must also give inputs in drafting and amending of legislation, laws should be enacted and be in conformity with the Rule of Law and not violate fundamental human rights.

## 4.5 Conclusion

It is clear that South Africa still lacks adequate legislation for sentencing.

[112] Delahunty and Yoo 2002 Hrv.J.L & Pub.Pol"Y 304
[113] Swart and Fowkes SALJ 786
[114] Harries v Minister of Interior 1952 2 SA 428 A
[115] Greedy and Kgalema 2003 SATHR 156-158

It is therefore my submission that South Africa needs standard guidelines with regards to minimum sentence and a definition of substantial and compelling circumstances.

# 5. BIBLIOGRAPHY

## 5.1 BOOKS


- Criminal Law, CR Snyman, sixth Edition.
- Criminal Procedure Hand Book.
- Geldenhuys et al: Eleven Edition Page 327.
- Juta Guide to Sentencing in South Africa, 2nd Edition, Lexis Nexis.
- South African Law and Procedudure, Volume 11 Third Edution, JRL Milton, Juta**.**
- Criminal and Deserved Sentence, Ashworth, 1989 criminal Law Review, page 340.
- Legal Dictionary on Legislatives.
- Terblanche, Guide to Sentencing.
- The South African Constitutional Law, the Bill of Rights 2000.


## 5.2 ARTICLES


- Van der Merwe A 2008 “in search of sentencing guidelines for child rape: An analysis of case law and minimum sentence legislation”71:4 THRHR 589-602
- Terblanche ,SS Guide to sentencing murder and the ideal of equality 2011 XLIV CILSA 97
- Sentencing Guidelines Council (England and Wales) 2007 Reduction of Sentence for a plea of Guilty.
- African Charter on Human and People Rights 1981
- Greedy and Kgalema 2003 SATHR 156-158
- Swart and Fowkens SALJ 786
- Delhuty and Yoo 2002 MRUJL & PUB.POL 304


## 5.3 CASES


- S v Pieters 1987 (3) SA 717(A)
- S v Sadler 2000 (1) SACR 331 SCA
- S v Pillay 1977 (4) SA 531 (A)
- S v Snyders 1982 (2) SA 694 (A)
- S v Rabie 1975 (4) SA 855 (A)
- S v Mokela 2012 (1) SACR 431 (SCA)

- S v Siebert 1998 (1) SACR 554 (SCA)
- S v Malgas 2001 (1) SACR 469 SCA
- R v Roux  1954 (4) SA 110 (T)
- S v Prinsloo 1998 (2) SACR 669 (W)
- S v Lister 1992 (3) SACR 228 A
- S v Mbokazi 1998 (2) All SA 78 N
- S v Boesak 2001 SACR 1 CC
- S v Dzuduku 2000(2) SACR 443 CC
- S v Kimberly 2005 (2) SACR 663 SCA
- S v Prinsloo & Van Linde 1997 (3) SA
- 2013 BCLR 320 LAC
- 1992 (1) SA 433 (A)
- 1999 (2) SA 471 ©
- 1996 (4) SA 187 CC
- S v Khuzwayo 1949 (3) SA 761
- S v Lwane 1966 (2) SA 433
- S v Dodo 2001(1) SACR 594 CC
- S v Ndlovu 2003 (1) SACR 331 SCA
- Siganto v The Queen 1998 194 CLR 656
- Ryan v the Queen 2001 121 A Crim R 433
- R v Dawes 2004 NSWCCA 363
- R v Cimore 2001 121 A Crim R 433
- Varstzokas v Zonker 279
- R v Zamaglas 2002 NSWCCA 32
- R v AEM 2002 NSWCCA 58
- R v McNaughton 2006 66 NSWLR 566
- R v Geddes 1936 SR NSW
- R v Dodd 1991 57 A Crim R349
- Veen v The Queen no 2 (1988) 164 CLR
- Director of Public Prosecution, Western Cape v Prins and Others 2012 (2) SACR 183
- S v Thebus 2002 (2) 469 SCA

- President of the Republic of South Africa v Hugo 1997 (4) SA CC
- Harksens v Lame no 1998 (1) SA 300 CC
- City of Pretoria v Walker 1998 (2) SA 363 CC
- S v Makwanyane 1993(3) SA 391 CC
- National Coalition for Gay and Lesbian Equality v Minister 1999 (1) SA 6 CC
- S v Williams 1995 (3) SA 632 CC
- S v Siebert 1998 (1) SACR 554 A
- S v Strydom 1996 (2) SA 636 W
- S v De Kock 1997 (2) SACR 171 T
- S v Mokela 2012 (1) SACR 431 SCA
- S v Willemse 1998 (1) SACR 450 SCA
- S v Rapoo 1999 (2) SACR 217 T
- Director of Public Prosecution, Gauteng v Pistorius 2017 ZASCR 158
- S v Kimberly 2005 (2) SACR 663 SACR 13 CC
- Harries v Minister of Interior 1952 (2) SA 428 A

## 5.4 Legislation

- Constitution of the Republic of South Africa Act 108 of 1996
- Criminal Law Amendment Act 105 of 1997
- Criminal Procedure Act 51 of 1997
- Sentencing Act of 1999
- Coroners and Justice Act 2009
- ICCPR 1966
- ACT 44 OF 1957
- UDHR 1948
- Criminal Justice Act of 2003,UK
- Human Rights Act of 1998,UK