

Mandatory minimum sentences in the South African context

Prof. J.J. Nesor

Department of Criminology

University of South Africa

1 Introduction

Statutory provisions that deprive the courts of their discretion in imposing sentence have been known to exist in the history of South African criminal justice. By way of illustration you may refer to the following examples:

- The mandatory imposition of corporal punishment under particular circumstances (1952).
- Imprisonment for corrective training (minimum of 2 and maximum of 4 years' imprisonment) and the prevention of crime (minimum of 5 years and maximum of 8 years' imprisonment), which were mandatory penalties where the accused's criminal record met certain requirements (1959).
- Act 41 of 1971 prescribed various mandatory sentences for drug related offenses.

Attempts by the legislator to limit sentencing discretion by introducing mandatory minimum sentences has evoked strong protest from legal circles in the past. The Viljoen Commission (Commission of Inquiry into the Penal System of the Republic of South Africa 1971) was of the opinion that prescribed minimum sentences were undesirable and that such erosion of the courts' sentencing discretion could lead to grave injustice. On the recommendation of the Commission, the mandatory minimum sentences for corrective training and prevention of crime have been scrapped from the law books. Chief Justice Corbett commented as follows in *S v Toms; S v Bruce* (1990 2 SA 802 [A] 817 C-D): "... the imposition of a mandatory minimum prison sentence has always been regarded as an undesirable intrusion by the Legislature upon the jurisdiction of the courts to determine the punishment to be meted out to persons convicted of statutory offenses and as a kind of enactment that is calculated in certain instances to produce grave injustice."

The Criminal Law Amendment Act 105 of 1997 (hereafter referred to as the 1997 amendment act) makes provision for the imposition of mandatory minimum sentences. (Proclamation R43 [GG18879] of 1 May 1998). The provisions of the amendment act were initially to be in effect for two years, but this period was extended later. The amendment act lists certain serious crimes such as murder, robbery and rape and describes actual situations in which mandatory sentences, including life imprisonment for murder and rape, must be imposed, except where courts find "compelling and substantial" circumstances which justify a lesser sentence. An important advantage of this amendment act is that it expressly specifies that certain serious offenses must be severely punished in particular circumstances - a fact that can promote consistent sentences and equality before the law. On the other hand, the provisions have also created new problems, for instance diverging interpretations of "compelling and substantial circumstances" by the courts. It must be emphasized that the

bill was compiled as a temporary measure, in anticipation of further reforms in the field of sentencing.

The purpose of this article is to explore the rationale for prescribed mandatory minimum sentences and to describe the initial reaction.

2 Rationale

The Van Den Heever Committee (South African Law Commission 1997:1) found that the rationale for mandatory minimum sentences can be traced back to a call from the community for heavier penalties and for offenders to serve a more realistic term of imprisonment: "The public renewed claims for sentences which give expression to the desire for retribution and that concern for the offenders must give way to concern for the protection of the public. There is also general dissatisfaction with the leniency of sentences imposed by the courts for serious crimes." Public dissatisfaction with the crime situation and sentencing is reflected in various newspaper reports such as the following:

- "People are being murdered, raped, abused and hacked, either through political, recreational or gangster violence. Chaos reigns without control." (*The Citizen* 26 October 1995).
- "Tough jail sentences should be imposed on child abusers and this could be the only deterrent against child abuse. ... We have told Mr. Omar that the sentences meted out for offenders were too lenient and that new laws with stiffer sentences had to be introduced." (*Sowetan* 10 November 1995).
- "We will never be in a position to bring the epidemic of serious economic crime and corruption in South Africa to an end if we do not bring in new structures to deal with it." (*Pretoria News* 26 October 1995).
- "'n Minimum vonnis en strawwer vonnisse kan vir kindermolesteerders ingestel word omdat huidige vonnisse nie 'n voldoende afskrikmiddel vir die gemeenskap blyk te wees nie. [A minimum sentence and tougher sentences could be introduced for child molesters, since existing sentences do not appear to be sufficient deterrent for the community.]" (*Beeld* 22 November 1995).

The Committee (South African Law Commission 1997: 21-22) concludes that:

- A simple message must be conveyed to potential offenders, such as: "People who are found guilty of rape are sentenced to a minimum of 15 years' imprisonment."
- One way of circumventing leniency in courts, is to prescribe mandatory minimum sentences for crimes of violence.
- Appropriate mandatory minimum sentences give the community a feeling that justice is being done.
- Mandatory minimum sentences for crimes of violence communicates a clear message regarding the implications of people's involvement in any form of violence.

3 Reaction to the 1997 amendment act

The response to the 1997 amendment act has been researched and analyzed in various ways. The South African Law Commission (Research Paper 17 June 2000) conducted two empirical studies during the period June 1999 to January 2000 on the following:

- sentencing patterns before and after the introduction of the 1997 amendment act
- attitudes of key role players

The *investigation into sentencing patterns* revealed significant disparities in sentences for serious offenses. The differences in sentences were clearly regional in nature, and prevailed even after the introduction of the 1997 amendment act. Offenders who were accused of rape received longer sentences after the 1997 amendment act. It was found that new sentencing patterns with longer terms of imprisonment could have a significant effect on the problem of overpopulation in prisons.

The *attitude survey* revealed a wide range of opinions on sentencing practices, such as, for example, the lack of uniformity of sentences in cases where the offenders were accused of comparable offenses; the limited use of sentences that involve restitution and the compensation of victims; and strong reaction, particularly from judges, against the limitation of judicial discretion through the introduction of mandatory minimum sentences.

The *reaction of courts* to the 1997 amendment act can be analyzed by way of four criteria, namely, the sentencing jurisdiction of courts; "substantial and compelling circumstances" as grounds for deviating from mandatory minimum sentences; the constitutionality of mandatory minimum sentences; and the relation between life imprisonment and other long term sentences (South African Law Commission December 2000:10-19).

Sentencing jurisdiction of courts

There is concern about offenders in regional courts who are accused of crimes for which the 1997 amendment act prescribes mandatory life imprisonment. On a finding of guilt, such cases must be referred to the supreme court, since the regional court does not have the jurisdiction to deliver a sentence of life imprisonment. Various objections are raised against the so-called split in procedure or "fragmentation" of a hearing (the accused's case is heard in a regional court where he or she is found guilty, but is then referred to the supreme court for sentencing), for example:

- Should such cases be tried in the supreme court from the start (*Beeld* 28 September 2000)?
- The supreme court has to impose a severe sentence such as life imprisonment on the basis of cold

court records from another (regional) court (*Beeld* 17 August 2000). The crux of this objection is that the magistrate (in the regional court) who heard the evidence, does not decide on the sentence. A judge (supreme court) who has not had the advantage of hearing the evidence and seeing the witnesses give evidence, must now decide on the sentence. Judge Davis touched on this matter in *S v Jansen* (1999 [2] SACR 368 [C] in 372g): "It is difficult to obtain a sufficient understanding of the matter in its entirety when only matters of sentencing are referred to this [High] Court."

- The accused is disadvantaged in that a long period usually elapses from when the case is tried by the regional office to when it is referred to the supreme court for sentencing. The time between referral from the regional court and sentencing in the supreme court is on average 207 calendar days (*Beeld* 17 August 2000).

Interpretation of "substantial and compelling circumstances"

The provision in the 1997 amendment act that the mandatory minimum sentence should be imposed, except where the trial court finds "substantial and compelling" circumstances that justify a lesser sentence, has resulted in differing interpretations of the words "substantial and compelling" by the courts. The one extreme interpretation is the view of Judge Stegmann in *S v Mofokeng* (1999 [1] SACR 502 [W]) that these words leave the trial court with almost no discretion and in fact compelled to impose the minimum sentence. Another extreme interpretation is the view of Judge Leveson in *S v Majalefa and Another* (unreported decision in the Rand supreme court of 22 October 1998) that the words "substantial and compelling" are actually just a confirmation of the traditional principles of sentencing; and that the consideration of aggravating and mitigating circumstances should still remain the point of departure. According to this view, the 1997 amendment act is only a measure for establishing greater uniformity in sentencing. A middle road is followed in *S v Blaauw* (1999[2] SACR 295 (W) in 305t and 306i). Judge Borchers favors the opinion that the 1997 amendment act does limit the traditional discretion of courts, in the sense that courts cannot deviate from the prescribed sentence on the grounds of "circumstances" alone. On the other hand, the legislator does not describe what is meant by the qualifying "substantial and compelling" circumstances. The legislator also fails to mention any "extraordinary" circumstances. To determine whether a deviation from the mandatory minimum sentences is permissible, "extraordinary" circumstances must be found, but the cumulative effect of all the aggravating and mitigating circumstances in a case should still be taken into account. If, in the light of this, the mandatory minimum sentence appears to be "startlingly inappropriate", a deviation is then justified. Another interpretation is found in *S v Schwartz* (1999 [2] SACR 380 [C]) where Judge Davis uses the severity of the crime and the principle of just deserts as a point of departure for applying the principle of "substantial and compelling". Generally, courts experience difficulty with the interpretation and application of the "substantial and compelling circumstances" test, since it is not clearly defined in the 1997 amendment act.

Constitutional and mandatory minimum sentences

The constitutionality of the provisions of the 1997 amendment act is disputed on two grounds.

- It is accepted that any legislation that can cause a court to be compelled to impose sentences that are not in proportion to the gravity of the offense (proportionality principle) may be unconstitutional on the ground that such punishments are of a cruel, inhumane and degrading nature. If the deviation clause of the 1997 amendment act were to be interpreted as an absolute limitation on the court's sentencing discretion, compelling the court to impose the minimum prescribed sentence, the danger would exist that such sentences could be in conflict with the proportionality principle, and its constitutionality could be disputed. Since the 1997 amendment act allows for a deviation from the mandatory minimum sentence that is imposed (on grounds of "substantial and compelling circumstances"), it does not appear that its constitutionality can be questioned.
- It is argued that the statutory provisions on mandatory sentences infringe the accused's constitutional right to a fair trial. In *S v Dzukuda and others* (unreported decision in the Rand supreme court of 17 May 2000), Judge Lewis stated that the statutory procedure that prescribes mandatory minimum sentences in the 1997 amendment act is unconstitutional because it infringes the accused's constitutionally secured right to a fair trial. She based her finding on the fragmentation of the trial (a regional court magistrate finds the accused guilty and a judge from the supreme court must impose sentence) and the fact that the accused is administratively disadvantaged in that a long period usually transpires after the finding of guilty in the regional court until sentence is imposed by the supreme court. The decision was overturned by the constitutional court in September 2000.

Relation between life imprisonment and long term imprisonment

The question of mandatory minimum sentences also touches on the problematic relation between a life sentence and long term imprisonment (a stipulated or fixed sentence). There was some obscurity concerning the longest sentence (e.g. life imprisonment or a very long fixed sentence of 30 years imprisonment) and also the serving of such sentences. The appeal court (*S v Siluale en ander* 1999 [2] SACR 102 [SCA] in 106i) recently confirmed that a life sentence is the longest term of imprisonment that a court can impose. It further emphasized that the imposition of a sentence with the purpose of defeating any hope for the offender's release from confinement, has no place in a civilized system of law. What is more, article 73(6) of the Act on Correctional Services (111 of 1998) determines that after completion of 25 years of a sentence, all prisoners should be considered for parole - those serving life sentences as well as those who are serving lengthy sentences, such as 30 years.

4 Conclusion

It remains to be seen whether the mandatory sentencing approach in article 51 of the Criminal Law Amendment Act 105 of 1997 will have any effect on the severe crime wave that South Africa experiences at present. In the past, experimentation with mandatory minimum sentences did not provide the solution. History has shown, for instance, that in the case of drug related crime, the mandatory sentence approach has not been successful in all respects.

Du Toit(1999:28-16D and 16E) supports Judge Stegmann's criticism of mandatory minimum sentences and sums up his standpoint as follows:

"[O]ver a long history our courts have worked out the principles according to which fair and balanced sentences are arrived at in each individual case. He found that in imposing arbitrary and severe minimum sentences from which the court may not depart unless 'substantial and compelling circumstances' have been shown to exist, the legislature has driven a coach and four through these civilised principles. He found that the legislature has seen fit to use the courts as rubber stamps that must apply the legislature's arbitrary sentences without regard to all the factors relevant to just punishment. This was an unfortunate breach of the separation of powers that tended to undermine the independence of the court and to make them mere cat's-paws for the implementation by the Legislature of its own inflexible penal policy".

The stage has indeed been reached where crime threatens the very foundations of democracy and, therefore, there is no doubt that responsible and affordable allocation of punishment is needed to wipe out violent crime. Short-term solutions such as mandatory minimum sentences will not provide the ideal solution to this grave problem, and it is generally accepted that, instead, it is the certainty of punishment that can reduce crime.

Bibliography

Commission of Enquiry into the Penal System of the Republic of South Africa, 1971. Pretoria: Government Printer.

Correctional Services Act 111 of 1998.

Criminal Law Amendment Act 105 of 1997.

Du Toit, E (ed). 1999 (Service 23). *Commentary on the Criminal Procedure Act*. Cape Town: Juta.

South African Law Commission, June 1997. *Sentencing - Mandatory minimum sentences*. L. van den Heever (project leader). Issue Paper 11, August 1997. Pretoria: SA Law Commission.

South African Law Commission, June 2000. *An empirical quantitative and qualitative study of the sentencing practices of the South African criminal courts, with particular emphasis on the Criminal Law Amendment Act, 105 of 1997*. Research Paper 17, June 2000. Pretoria: SA Law Commission.

South African Law Commission, December 2000. *Sentencing (A new sentencing framework)*. D. Van Zyl Smit (project leader), Project 82, December 2000. Pretoria: SA Law Commission.