Balancing Crime and Punishment in a Constitutional System of Government: Some perspectives from Seychelles[1]

Godknows Mudimu

1 Introduction

Since time immemorial, sentencing a convicted person has occupied a central role in the justice system, often creating tensions not only within various arms of government but also within society at large. Societal perceptions of crime have evolved from the primitive age when crime was considered a private wrong, to be avenged by the victim or the family of the victim to a societal collective.[2] Within this collective approach to crime, there are also strong public voices that demand that certain crimes must attract retributive punishments, underpinned purely by revenge. Yet, an ancient view in Plato's Protagoras on punishment depicts an understanding that punishment is a means to an end, when he states the following:

> *No one punishes wrongdoers putting his mind on what they did and for the sake of this – that they did wrong not unless he is taking mindless vengeance, like a savage brute. One who undertakes to punish rationally does not do so for the sake of the wrongdoing, which is now in the past – but for the sake of the future, that the wrongdoing shall not be repeated, either by him or by others who see him or by others who see him punished.*[3]

It has long been accepted that punishment and vengeance are complete opposites, and that vengeance has no place in modern approaches to sentencing. Sentencing is a multifaceted and complex endeavour that involves the balancing of various factors, application of sentencing principles, navigating sentencing guidelines and weighing mitigation and aggravating factors to arrive at a just, proportionate sentence. It involves some 'instinctive synthesis' and is largely a human process which involves 'a wise blending' of various aims.[4] Given the factors applicable during sentencing, it comes as no surprise that sentences imposed are likely to differ, even in similar cases. Traditionally, judges had a wide discretion to impose sentences which took into account the above factors and circumstances. This discretion and the individualization of sentences has increasingly created a tension between various arms of government. Perturbed by this wide discretion, legislative bodies across many jurisdictions have increasingly prescribed sentences for certain crimes, particularly for the most heinous crimes.[5] In addition, law reform commissions have also developed sentencing guidelines meant to ensure some level of consistency in the sentences imposed.[6]

Part of the challenge and debates on sentencing, however, depict the tension between the appropriate punishment that fits the crime and the discretion of judges during sentencing – a position that often places the conflicting perspectives and policy positions of the legislature and the executive on the one end, and the judiciary on the other. This paper seeks to discuss this tension through demonstrating the challenges of minimum mandatory sentences in a constitutional dispensation. The paper begins by discussing briefly some leading theoretical approaches and principles of sentencing. It then discusses the problematic aspects of mandatory minimum sentences, focusing on separation of powers, the right of the accused and the right to hope of the convicted person which is often trumped when mandatory sentences are applied without the discretion of the presiding judge.

2 Theoretical approaches to punishment and sentencing

Any criminal justice system endeavours to justify the rationale or the basis for punishment, since punishment involves a direct state intrusion on the rights and liberties of the convicted person. Several philosophers thus dedicated much of their work on the rationale or justifications for punishment. Through his theory of social contract, Thomas Hobbes argued that when one agrees to the social contract, he or she authorizes the sovereign to use force for the purposes of upholding the social contract.[7] For Hobbes, any punishment for crimes must be greater than the benefit that comes from committing such crime. Similarly, Cesare Beccaria built on the social contract theory and argued that since people are rationally self-interested, they will not commit crimes if the costs of committing such crimes prevail over the benefits of engaging in such undesirable acts.[8] In addition, punishment becomes unjust if its severity exceeds what is necessary to achieve deterrence.[9] This position underpins the proportionality perspective which provides that, for punishment to have a deterrent value, it must be proportionate to the crimes committed. Lastly, Jeremy Bentham proposed that the duty of the state is to promote the happiness of society through 'punishing and rewarding'.[10] The state must not punish if such punishment cannot prevent the mischief.[11] Thus, a person's rights should not be unduly interfered with, where such interference can be secured through other less intrusive means.[12] Both Bentham and Beccaria maintained that punishment in excess of what is essential to deter people from violating the law is unjustified.[13] The severity of punishment and the certainty of its imposition are key pillars of deterrence.[14] A punishment must be imposed immediately after the commission of a crime for it to be seen as a direct consequent of the crime.

Utilitarian models of punishment place emphasis on both special and general deterrence, arguing that the goal of punishment is to extract maximum safety, security and happiness of society through the treatment of individual criminals.[15] Under utilitarian approaches, an offender is punished because it is good for the overall society whereas under retributive

approaches, an offender is punished because he or she deserves such a punishment.[16] To retributivists, punishment is designed to bring the parties to a balance that existed before the wrongful act.

While judges do not expressly refer to some of these theoretical approaches during sentencing, these approaches are nonetheless underscored in the final sentence. Notably, there is no singular approach that adequately explains the justifications of sentencing. As pointed out by scholars of sentencing, no singular approach is capable of satisfying all the theoretical approaches of sentencing.[17]

3 Principles of sentencing

Of the many duties of a judge, sentencing is one of the most difficult exercises, partly due to various considerations and factors involved.[18] The factors considered when sentencing were stated in *Francis Crispin v R* where the court held that:

> *[T]he guiding principles in sentencing are summed up in four words: retribution, deterrence, prevention and rehabilitation…[The appellant] ignores the mental and physical pain and damage he causes his victims. The society abhors such actions. The court must add an element of retribution in punishment of this crime to express the pain and disgust of the society when it convicts an accused with such crime.*[19]

In *Njue v R* it was pointed out that when sentencing, a court must be guided by several principles including: public interest, the nature of the offence and the circumstances in which it was committed, whether there is a possibility for the offender to be reformed, the gravity of the offence, the prevalence of the offence, the damage caused, any mitigation factors, the age and previous records of the accused, the period spent in custody, and the accused cooperation with law enforcement agencies.[20] These factors can be grouped into three categories, namely: looking at the crime committed, the offender, and the interests of society. Thus, in the South African case of *S v Zinn*,[21] the court pointed out the following, on what must be considered when sentencing:

> *It then becomes the task of this Court to impose the sentence which it thinks suitable in the circumstances. What has to be considered is the triad consisting of the crime, the offender and the interests of society…*[22]

Firstly, the above places the court as the only institution tasked with imposing sentences and no one else. Secondly, reference to 'what it thinks fit' refers to discretion, which undoubtedly must be exercised judiciously. The triad was recently applied in *R v ML & Ors*, a case where the three convicted persons were sentenced to 25 years, 12 years and 8 years imprisonment upon conviction on 26 sexual offences committed against children.

During sentencing, the court considered at length the principles of sentencing that guide a court, even in such a disturbing case.[23]

4 Judicial independence, discretion and mandatory minimum sentences

Finding the right sentence therefore calls upon the court to bear in mind principles of proportionality, deterrence, and rehabilitation; in addition to a consideration of both mitigation and aggravating circumstances. It therefore comes as no surprise that any attempt to take away the discretion may result in undermining the balancing act of these factors. O'Malley sharply sums up the role of discretion in sentencing when he states that:

> *[T]he proper exercise of discretion required attention to established guiding principles. In a sentencing context, the objective must be to achieve a viable mix of consistency and individualisation*.[24]

It is this art of finding the balance that is often violated in cases of minimum mandatory sentences. Finding the balance that takes into account the 'triad' stated in the *Zinn case* above is best achieved when an independent judiciary exercises discretion without rubber stamping a sentence imposed by the legislature. Minimum mandatory sentences are often seen as an intrusion on the separation of powers and as striking through the independence of the judiciary in executing its constitutional mandate.[25]

The legislature and proponents of mandatory minimum sentences justify these sentences as necessary to deter violent crimes and other forms of offence.[26] In addition, mandatory minimum sentences have also been advocated on the basis that they reduce sentencing disparities.[27] These arguments and approaches are also reflected in the Seychelles context. In *Simeon v Attorney-General* (2010) SLR 280, for example, it was submitted that when enacting minimum mandatory sentences, the legislature was doing it for a public good and for instilling law and order.[28]

However, studies in South Africa and in the United States have noted that mandatory minimum sentences are not effective in achieving the above goals.[29] The argument has been that the interaction between sentencing guidelines and mandatory sentences has the effect of producing unwarranted sentencing disparities that characterize the indeterminate sentencing laws.[30] These sentences often produce unintended results. Regarding the use of mandatory sentences and the effect on deterrence, Tonry, for example, argues that:

> *The evidence is clear and weighty that enactment of mandatory penalty laws has either no deterrent effect or a modest deterrent effect that soon wastes away. Equally clear and consistent are findings that mandatory minimum laws provoke judicial and prosecutorial stratagems,*

> *usually by accepting guilty pleas to other non-mandatory penalty offences or by diverting offenders from prosecution altogether, that avoid their application.*[31]

Tonry's assertions question the effectiveness of mandatory minimum sentences in achieving a public good in instilling law and order as submitted in the *Simeon* case.

Courts have traditionally been the sole custodians of sentencing, taking into account the various aspects discussed above.[32] Mandatory minimum sentences therefore depart from this position, and in certain instances may be seen as a rubber-stamping exercise by the judiciary.[33] Mandatory minimum sentences without discretion reduce judges to mere spectators – a position that may undermine the proper administration of justice and is in conflict with the mandate of the judiciary as derived from the Constitution.[34] The undesirability of mandatory sentences is further shown by the fact that such sentences encroach on the balancing exercise that judges undertake when imposing a sentence. There is therefore an over-emphasis on the punitive and deterrent factors of a sentence which undermines the subjective, individual aspects of a convicted person.[35]

Of significance is the idea that, in 1993, Seychelles chose a constitutional democratic system of government guided by principles of separation of powers.

4.1 Supremacy of the Constitution

In many jurisdictions, with a Constitution as the supreme law, there is a clear separation of the three arms of government; with the legislature drafting the laws, the judiciary interpreting the law, and the executive enforcing the law.[36] In Seychelles, judicial power is vested in the judiciary and the judiciary is an independent arm of government, only subject to the Constitution and other applicable laws of Seychelles.[37] The Supreme Court has original jurisdiction in matters involving the application, contravention, enforcement or interpretation of the Constitution.[38] Some of its powers listed under Article 125 include a supervisory role of lower courts and the tribunals.[39] Since the Constitution is the supreme law, it follows that the judiciary is subject only to the Constitution that created it and any laws inconsistent with the Constitution are invalid to the extent of the inconsistency.[40] This includes laws that may encroach on the vested powers of the judiciary.

This position safeguards the liberties of individuals, including those undergoing the criminal justice system. Various courts in different jurisdictions have often expressed concern about the use of mandatory sentences. In the South African context, the case of *S v Mofokeng*,[41] was more expressive in showing disapproval of minimum sentences and stated that:

> *[F]or the legislature to have imposed minimum sentences…, severely curtailing the discretion of the courts, offends against the fundamental constitutional principles of separation of the powers of the powers of the Legislature and the Judiciary.*

The court went further to state that:

> *[t]he Legislature has seen fit to use the courts as rubber stamps that must apply the legislature's arbitrary sentences …is an unfortunate breach of separation of powers. It tends to undermine the independence of the courts, and to make them mere cat's paws for the implementation by the Legislature of its own inflexible penal policy that is capable of operating with serious injustice in particular cases.*[42]

Corbett CJ in *S v Toms* had earlier held that:

> *[t]he infliction of punishment is a matter for the discretion of the trial court. Mandatory sentences reduce the Court's normal sentencing function to the level of a rubberstamp. The imposition of mandatory sentences by the legislature has always been considered an undesirable intrusion upon the sentencing function of the Court. A provision which reduces the Court to a mere rubberstamp is wholly repugnant*.[43]

The rejection of mandatory sentences by Corbett CJ is more emphatic, since South Africa had parliamentary sovereignty at the time.[44]

It can be seen from the above that the court was not frowning upon the legislature imposing minimum mandatory sentences but was frowning at stripping courts of their discretion in passing sentences. At the core of discretion is a balancing act to individualize the offender and to ensure that the final sentence takes into account the offender, the crime and the interests of society.

4.2 The judiciary in a constitutional democracy

There are other perspectives that differ from the above position arguing that the judiciary has no monopoly on sentencing and that when the legislature enacts mandatory minimum sentences, they are valid.[45] Several decisions from different legal systems posit that parliament can make a valid law and provide for a minimum sentence, that a court has no or limited discretionary powers, and that such a sentence is valid.[46] These perspectives go on to say that while sentencing is primarily at the discretion of the trial court, this does not mean that other arms of government are prohibited from performing judicial functions. This understanding is premised on the idea that in a constitutional democracy, there is no rigid separation of powers between the legislature, executive, and the judiciary. As pointed out by the American Supreme Court in *Youngstown Sheet & Tube Co v Sawyer*, '…the content of the three authorities of government is not to be derived from an analysis. The areas are partly interacting, not wholly disjointed'.[47] Even when sentencing is taken into account, courts largely interpret the law made by the legislature and find the right sentence and the executive ensures that the convicted person serves the sentence. This shows the co-existence of the branches of government. Indeed, in *Simeon v Attorney General,*[48] the court emphasized that both the legislature and the executive share interest in the punishment to

be imposed by the court and the balance of power between the spheres of government entails a mutual deference.[49]

Proponents of the non-monopoly in sentencing, therefore, argue that there is no absolute system of separation of powers in a democratic state, but one guided by co-existence. However, to the extent that the legislature imposes a mandatory minimum sentence that takes away any discretion from the judge, it appears that such a sentence would fall foul of Article 16 of the Seychelles Constitution.[50] It is the duty of a judge to individualize a sentence to ensure that it is proportionate to the crime.

5 Preventing inhuman, cruel, and degrading punishment

There is yet another reason why minimum mandatory sentences can be problematic. It relates to the rights of the accused or the convicted person which are guaranteed in the Constitution. While several jurisdictions allow for the use of mandatory minimum sentences, such sentences must not result in a sentence that is inhuman, cruel, or a degrading punishment.[51] Since mandatory sentences are blind to the particular circumstances of a crime and the accused, the possibility that the sentence may not fit the crime is huge.

The Nelson Mandela Rules contain a similar provision to Article 16 of the Constitution, which provide that '[a]ll prisoners shall be treated with respect due to their inherent dignity and value as human beings. No prisoners shall be subject to, and all prisoners shall be protected from torture and other cruel, inhuman or degrading treatment or punishment for which no circumstances whatsoever may be invoked as justification'.[52] This rule must also be read together with rule 3 which asserts that:

> *[i]mprisonment and other measures that result in cutting off persons from the outside world are afflictive by the very fact of taking from these persons the right of self-determination by depriving them of their liberty. Therefore, the prison system shall not, except as incidental to justifiable separation or the maintenance of discipline, aggravate the suffering inherent in such a situation*.[53]

This entails that convicted persons are not imprisoned for punishment but that the very act of imprisonment is the punishment. In a constitutional democracy, the sentence imposed must therefore not be disproportionate to the crime committed.

The supremacy of the Constitution, demands that such functions, including the imposition of mandatory sentences is done with due consideration to prescriptions of the Constitution. In particular, Article 16 of the Constitution provides that 'every person has a right to be treated with dignity worthy of a human being and not to be subjected to

torture, cruel, inhuman, or degrading treatment or punishment'.[54] The right to dignity entails that a court must refrain from imposing a sentence which is cruel, inhuman, and degrading. The three adjectives cruel, inhuman, and degrading are independent and the presence of one aspect violates the right to dignity of the sentenced person.[55] While it is difficult to distinguish the three concepts of cruel, inhuman, and degrading punishment, all concepts involve, in one way or another, the undermining or impairment of human dignity.[56] In *Poonoo v Attorney-General* (2011) SLR 424, the court noted that these three adjectives can be found in many aspects of the sentence, including the length of the sentence and the nature of the conditions through which such a sentence is served.

In sentencing, proportionality is a central tenet and has been described in other jurisdictions as the '*sine qua non* of a just sanction'.[57] The principle ensures that the imposed sentence reflects the gravity of the offence, instils confidence in the administration of justice, and promotes justice for the accused. This explains why imposing mandatory sentences can undermine the effective administration of justice since it takes away this balancing exercise from the courts. Proportionality in essence takes into account the triad – thereby making it a hybrid approach through balancing various factors and principles to sentencing. An attack on a sentence on the basis that it is cruel, inhuman, and grossly disproportionate is thus directed at excessive sentences. In Canada for example, a sentencing judge is guided by the Criminal Code which lists some of the objectives underpinning sentencing.[58] In the absence of discretion by a sentencing judge, the mandatory minimum sentences may result in sentences that do not the fit the crime, the offender or the interests of society.

Lastly, mandatory minimum sentences may take away 'the right to hope' of the sentenced person.

6 The inalienable right to life and the right to hope

The component of mercy and the idea of hope as a basic human right demands that, when sentencing, courts are independent and not performing lip service to sentences already passed by the other arms of government. This is so because courts are better equipped to navigate the intricacies involved when giving the appropriate sentence.[59] The concept of proportionality in sentencing requires a court to impose a sentence which is 'reasonably necessary to curb the offence and punish the offender'.[60] Any sentence that fails to balance between the crime and the period of imprisonment undermines the inherent dignity of the convicted person. A sentence that focuses on deterring other persons from committing the crime or the reformative effect of punishment (utilitarian approaches) through imposing lengthy imprisonment, which are not related to the crime, undermines the human dignity of the offender.

Increasingly, courts are acknowledging that any sentence passed must not rob the convicted person of his or her right to hope. This right entails that all prisoners, including those sentenced to life imprisonment, must be given a prospect (the hope) of release at some point. A number of judgments from various jurisdictions have interpreted similar provisions to Article 16 of the Seychelles Constitution as entailing that any imprisonment without a prospect of release amounts to cruel, inhuman and degrading punishment.

The case of *Hutchinson v The United Kingdom* is seminal. Mr Hutchison was convicted of breaking into a family home and stabbing to death a family of three and repeatedly raping an 18-year-old. He was sentenced to life imprisonment and the trial judge recommended a minimum of 18 years to the Secretary of State for the Home Office. After the coming into force of the Criminal Justice Act, 2003, Mr Hutchison applied to the High Court for a review of his minimum term of imprisonment and in 2008, the judge ruled that there were no reasons to deviate from the life sentence, arguing that the seriousness of the crimes and the aggravating factors warranted a life imprisonment. Hutchison appealed this decision to the European Court of Human Rights (ECHR) on the grounds that the sentence violated Article 3 of the Convention which provides that: 'No one shall be subjected to torture or inhuman or degrading treatment or punishment.'

The ECHR first pointed out that contracting states were at liberty to impose life sentences on adults, particularly in serious cases like murder and such an imposition was not incompatible with Article 3 of the European Convention on Human Rights and Fundamental Freedoms.[61] In the court's view, this was more important in cases where the sentence is not a mandatory sentence but one imposed by an independent judiciary after a consideration of both mitigation and aggravating factors.[62] Referring to the earlier decision of *Vinter and Others v The United Kingdom*,[63] the ECHR pointed out that:

> *If a prisoner was incarcerated without any prospect of release and without the possibility of having his life sentence reviewed, there was the risk that he could never atone for his offence and that whatever he did in prison, however exceptional his progress towards rehabilitation, his punishment would remain fixed.*[64]

The court further emphasized that there was a developing trend to have life sentences reviewable after 25 years with further periodic reviews thereafter and where domestic legislation failed to provide for a possibility of review on a life sentence, such a position was incompatible with Article 3.[65]

In addition, a convicted person has the right to know under what circumstances his sentence may be considered for review, with a prospect for release. The court further held that it would be capricious to expect the prisoner to work towards rehabilitation without knowing whether at some future date, he might be considered for release if he demonstrates rehabilitation.[66] However, the ECHR found that the UK courts had already

interpreted that life sentences without a possibility of review violated Article 3 and therefore, there was no violation of Article 3.[67]

To conclude this part, it is also worth noting that the above approaches to sentencing have been grounded in philosophical approaches to sentencing. In giving judgment in the *R (Ralston Wellington) v Secretary for State Home Department* [2007] EWHC 1109, Lord Justice Laws found that there were 'powerful arguments of penal philosophy' which suggested that the risk of a whole-life sentence without parole intrinsically violated Article 3 of the Convention. He observed the following:

> *The abolition of the death penalty has been lauded, and justified, in many ways; but it must have been founded at least on the premise that the life of every person, however depraved, has an inalienable value. The destruction of a life may be accepted in some special circumstances, such as self-defence or just war; but retributive punishment is never enough to justify it. Yet a prisoner's incarceration without hope of release is in many respects in like case to a sentence of death. He can never atone for his offence. However, he may use his incarceration as time for amendment of life, his punishment is only exhausted by his last breath. Like the death sentence the whole-life tariff is lex talionis. But its notional or actual symmetry with the crime for which it is visited on the prisoner (the only virtue of the lex talionis) is a poor guarantee of proportionate punishment, for the whole-life tariff is arbitrary: it may be measured in days or decades according to how long the prisoner has to live. It is therefore liable to be disproportionate – the very vice which is condemned on Article 3 grounds – unless, of course, the death penalty's logic applies: the crime is so heinous it can never be atoned for. But in that case the supposed inalienable value of the prisoner's life is reduced, merely, to his survival: to nothing more than his drawing breath and being kept, no doubt, confined in decent circumstances. That is to pay lip service to the value of life; not to vouchsafe it.*[68]

7 Conclusion

Judges are seen as equalizers, the bearers of proportionality, and the restorers of equilibrium.[69] Mandatory minimum sentences that take away the discretion of the judge have the potential to violate the rights of the convicted person. O'Malley deals with discretion as follows: '[t]he proper exercise of discretion required attention to established guiding principles. In a sentencing context, the objective must be to achieve a viable mix of consistency and individualisation'.[70] Achieving a balance in sentencing involves acknowledging the critical role that various arms of government play in the effective administration of justice. While it is constitutional in a democratic state for parliament to impose mandatory sentences, a sentencing judge must retain discretion in passing the final sentence. If the prescribed sentence fits the crime, the circumstances of the offender and the interests of society, there is no reason why the sentencing judge would depart from the prescribed sentence.

If, on the other hand, as demonstrated in *Poonoo v Attorney-General*, the prescribed sentence would be disproportionate to the crime committed (like sentencing a man to 5 years imprisonment for the theft of a pair of sandals), such a sentence must be departed from and the judge must not feel bound by such a sentence.

Godknows Mudimu PhD LLM (University of Cape Town) LLB B.Soc.Sc (Rhodes University) is Legal Researcher in the Office of the Chief Justice, Seychelles.

Notes

[1] *This paper is based on a presentation by the former Chief Justice of Seychelles Dr. Mathilda Twomey at the Nelson Mandela Symposium day held at the University of Seychelles.*
[2] RA Bauman *Crime and punishment in ancient Rome* (2004) 31.
[3] Plato, Protagoras, cited by L Zaibert 'Punishment and revenge' (2006) 25 *Law and Philosophy* 81.
[4] G Brown *Criminal sentencing as practical wisdom* (2017) Hart Publications 1.
[5] The critique on disparate sentences is often attributed to the judges own personal circumstances, his or her own theoretical understanding of sentencing (see CKY Lee 'The sentencing court's discretion to depart downward in recognition of a defendant's substantial assistance: A proposal to eliminate the government motion requirement' (1990) 23 *Indiana Law Review* 681, 683.
[6] The main justifications for developing sentencing guidelines include providing certainty, fairness, preventing unwarranted sentencing differences for similar offenders (see for example the earlier USA Sentencing Reform Act of 1984; SH Kadish 'Legal norm and discretion in the police and sentencing processes' (1962) 75 *Harvard Law Review* 904. See also IH Nagel 'Structuring sentencing discretion: The new Federal sentencing guidelines' (1990) 80 *The Journal of Criminal Law & Criminology* 883 where the author states that the purpose of the Sentencing Reform Act was to attack the tripartite problems of disparity, dishonesty and excessive leniency.
[7] DI Onwudiwe, J Odo & EC Onyeozili 'Deterrence Theory' (2010) 233.
[8] DI Onwudiwe, J Odo & EC Onyeozili 'Deterrence Theory' (2010) 234.
[9] DI Onwudiwe, J Odo & EC Onyeozili 'Deterrence Theory' (2010) 234.
[10] DI Onwudiwe, J Odo & EC Onyeozili 'Deterrence Theory' (2010) 234.
[11] A Ashworth & J Horder *Principles of criminal law* (2013) OUP 10.
[12] A Ashworth & J Horder *Principles of criminal law* (2013) OUP 10.
[13] DI Onwudiwe, J Odo & EC Onyeozili 'Deterrence Theory' (2010) 234.
[14] J Bentham *An Introduction to the principles of morals and legislation* 1781, republished in 2000. Batoche Books 166.
[15] Seton Hall Law Review 293; T O'Malley *Sentencing law and practice* (2006) Thomson Round Hall, ix.
[16] Seton Hall Law Review 294.
[17] RS Frase Just sentencing and procedures for a workable system – Oxford University 2012.
[18] A Hooper 'Sentencing: Art or science' (2015) 27 *SAcLJ* 15, 17.
[19] *Crispin v R* (SCA CR 16/2013 [2015] SCCA 29, para 9.
[20] *Njue v R* (2016) SCCA 12, para 14.
[21] 1969 (2) SA 537 (A); see also in the *UK R v Bieber* [2009] 1 WLR 223, para 40 where the court pointed out that 'the legitimate objects of imprisonment are punishment, deterrence, rehabilitation and protection of the public'.
[22] *S v Zinn 1969* (2) SA 537 (A) 540G; see also A van der Merwe 'Sentencing procedures and general principles' (2019) 32 *SACJ* 136.

[23] See *R v ML & Ors* paras 18 – 28; see also similar views by the Indian courts in *Alister Anthony Pareivavs State of Maharashstra* [2012] 2 S.C.C 648 para 69 where the court noted that an important part of criminal law is '*... the imposition of an adequate, just, and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done ...'*

[24] *Poonoo v Attorney-General* (2011) SLR 424, citing O'Malley *Sentencing law and practice* (2006) Thomson Round Hall.

[25] S Terblanche 'Aspects of minimum sentence legislation: Judicial comment and the court's jurisdiction' (2001) *SACJ* 1, 3.

[26] SM Roth 'South African mandatory minimum sentences: Reform required' (2008) *Minnesota Journal of International Law* 111, 164.

[27] SM Roth 'South African mandatory minimum sentences: Reform required' (2008) *Minnesota Journal of International Law* 111, 164.

[28] (1 of 2010) [2010] SCCC 3 (28 September 2010)

[29] M Tonry 'Judges and Sentencing Policy – American Experience' in C Munro and M Wasik (eds) *Sentencing, judicial discretion and training* (1992) 137; GT Lowenthal 'Mandatory sentencing laws: Undermining the effectiveness of determinate sentencing reform' (1993) 81 *California Law Review* 61, 106.

[30] GT Lowenthal 'Mandatory sentencing laws: Undermining the effectiveness of determinate sentencing reform' (1993) 81 *California Law Review* 61, 65.

[31] M Tonry 'Judges and Sentencing Policy – American Experience' *in* C Munro & M Wasik (eds) *Sentencing, judicial discretion and training* (1992) 137.

[32] *Deaton v Attorney-General and the Revenue Commissioners* (1963) IR 170, 182-183; S Terblanche 'Aspects of minimum sentence legislation: Judicial comment and the court's jurisdiction' (2001) *SACJ* 1, 3.

[33] See the South African case of *S v Toms* 1990 (2) SA 802 (A) 806(h) – 807(b) where Corbett CJ held that 'the infliction of punishment is a matter for the discretion of the trial court. Mandatory sentences reduce the Court's normal sentencing function to the level of a rubberstamp. The imposition of mandatory sentences by the legislature has always been considered an undesirable intrusion upon the sentencing function of the court. A provision which reduces the Court to a mere rubberstamp is wholly repugnant'. Several decisions went on to emphasis this principle (see *S v Mafokeng* 1999 (1) SACR 502 (W); *S v Jansen* 1999 (2) SACR 368 (C) 373 (g)-(h).

[34] See *Poonoo v Attorney-General* where the Appeal Court in explaining the challenge faced by the magistrate during sentencing stated the following: '…the Court when sentencing the appellant felt that Parliament by a mere legislation had removed from this Magistrate sitting as a court of law, the discretion vested upon her by a democratic Constitution…'

[35] *S v Gibson* 1974 (4) SA 478 (A)

[36] Constitution of Seychelles, 1993 Chapter V vests executive authority in the president together with vice-president and the cabinet; Chapter VI establishes the legislature with legislative power and Chapter VIII vest judicial power in the judiciary; SM Roth 'South African mandatory minimum sentences: Reform required' (2008) *Minnesota Journal of International Law* 111, 164.

[37] Chapter VIII of the Constitution establishes the judiciary and vests judicial authority in the judiciary which comprises of the Court of Appeal, the Supreme Court of Seychelles and any other courts or tribunals established pursuant to article 137; see also the powers of the Supreme Court under Article 125.

[38] The Constitution of Seychelles, Art 125.

[39] The Constitution of Seychelles, Art 125 (c).

[40] The Constitution of Seychelles, Art 119(2), read with Art 5; see the interpretation in *Poonoo v Attorney-General* (SCA 38 of 2010) [2011] SCCA 30 (09 December 2011).

[41] 1999 (1) SACR 502.

[42] *S v Mafokeng* 1999 (1) SACR 502 (W); see also *De Lange v Smuts NO and Others* (1998) (3) SA 785 (CC) para 61.

[43] *S v Toms* 1990 (2) SA 802 (A) 806(h) – 807(b).

[44] H Van Themaat 'Legislative supremacy in the Union of South Africa' (1954) 3 *University of Western Australia Annual Law Review* 59; *Ndlwana v Hofmeyr No and Others* 1937 AD 229. Parliamentary sovereignty as opposed to constitutional supremacy entails that parliament has the right to make or unmake any law and no

other branch of government can override or set such laws aside. See also AV Dicey *Introduction to the study of the law of the Constitution* (1979) Palgrave Macmillan.

[45] M Tonry 'Judges and Sentencing Policy – American Experience' *in* C Munro & M Wasik (eds) *Sentencing, judicial discretion and training* (1992) 137.

[46] See the New South Wales court of criminal Appeal, in *Karim and Others v The Queen* (2015) 274 FLR 387, para 92; South African Constitution Court in *S v Dodo* 2001 (5) BCLR 423 (CC); the Canadian case of Robert Latimer v R [2001] 1 SCR 1.

[47] 1952 USSC 74.

[48] *Simeon v Attorney General*, para 23.

[49] See *Poonoo v Attorney-General* (SCA 38 of 2010) [2011] SCCA 30 (09 December 2011); *Herminie & Anor v Pillay* (CP02/2017; CP06/2017 [2018] SCCC 6 (13 March 2018) for a discussion on some principles underlying separation of powers.

[50] *Poonoo v Attorney-General* (SCA 38 of 2010) [2011] SCCA 30 (09 December 2011). There are other jurisdictions that have held that the lack of discretion in sentencing does not violate the separation of powers. See in Australia *Palling v Corfield* [1970] HCA 53; *Leask v Commonwealth of Australia* [1996] HCA 29.

[51] See the Constitution of Seychelles, Art 16; UN Basic Principles on the Independence of the Judiciary, UN General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

[52] UN General Assembly 'United Nations Standards Minimum Rules for the Treatment of Prisoners (the Nelson Mandela rules) A/RES/70/175, Rule 1. The Nelson Mandela rules prescribe certain minimum standards for the treatment of prisoners.

[53] Rule 3.

[54] The Constitution of Seychelles, Art 19; see also The Universal Declaration of Human Rights, Art 5; Declaration on the Protection of all Persons from being Subjected to Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1979, Art 2; UN International Covenant on Civil and Political Rights, 1966, Preamble and Art 10 directs that all persons deprived of their liberty shall be treated humanity and with respect for the inherent dignity of the human person; P Kaufmann, H Kuch, C Neuhäuser and E Webster (eds) *Humiliation, degradation, dehumanization: Human dignity violated* (2011) Springer.

[55] *S v Dodo*, para 35.

[56] *S v Dodo*, para 35.

[57] See *R v Granados-Arana* (2017) Ontario Supreme Court of Justice ONSC 18057, para 35.

[58] Criminal Code, R.S.C, s 718 provides that:

'718 The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

> (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
> (b) to deter the offender and other persons from committing offences;
> (c) to separate offenders from society, where necessary;
> (d) to assist in rehabilitating offenders;
> (e) to provide reparations for harm done to victims or to the community; and
> (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.'

[59] A recent development feature of sentencing, even under international criminal law is the idea that any sentencing must be accompanied by the idea of hope.

[60] *S v Dodo*, paras 37-38.

[61] *Case of Hutchinson v The United Kingdom*, 57592/08 para 18.

[62] *Case of Hutchinson v The United Kingdom*, 57592/08 para 18; *Vinter and Others* paras 104-106.

[63] European Court of Human Rights, Application Nos 66069/09, 130/10 and 3896/10. The case originated in three applications in which the applicants argued that the imposition of life sentences amounted to a violation of Art 3 of the European Convention on Human Rights and Fundamental Freedoms. All three accused were convicted of multiple murder cases, with aggravating circumstances.

[64] *Vinter and Others* paras 111-112.
[65] *Case of Hutchinson v The United Kingdom*, 57592/08 para 20 (b) and (c).
[66] *Case of Hutchinson v The United Kingdom*, 57592/08 para 20 (d). the court however explained that the fact that a life sentence is served in full does not make it incompatible with Art 3.
[67] *Hutchinson v The United Kingdom*, paras 71 – 73.
[68] Cited with approval in other decisions, see *De Boucherville v State of Mauritius* [2008] UKPC 37; In the United States of America, thirty-one States and the Federal government provide for death penalty and nineteen States provide for life without parole (see M Lippman *Contemporary criminal law: Cases, and controversies* (2009) Sage 44).
[69] CP Nemeth 'Judges and judicial process in the jurisprudence of St. Thomas Aquinas' (2001) 40 *The Catholic Lawyer* 401, 403.
[70] Cited in *Poonoo v Attorney-General* (2011) SLR 424.