INTRODUCTION

The purpose of this article is to scrutinise sentencing in South African, and to highlight certain facets of this process that are of importance to criminology. The imposition of sentences in South African courts is plagued by certain problems, and during 1996, the Minister of Justice instructed the South African Law Commission to investigate this matter. Initially the Law Commission concentrated on mandatory minimum sentences as prescribed in the Criminal Law Amendment Act 105 of 1997 (South African Law Commission June 1997) and later the emphasis shifted to the development of a new sentencing framework for South African courts (South African Law Commission December 2000). Recommendations were also made for a victims' compensation scheme (South African Law Commission February 2001) and a discussion document was released on court reforms (South African Law Commission May 2001). Contained in these proposals was a plea for an inquisitorial approach as point of departure for the process of adjudication.

The following aspects of the Law Commission's recommendations for a new sentencing framework are explored in this article:

- problems concerning sentencing
- purpose of sentencing
- principles of sentencing
- sentencing council
- new options for sentencing
- the position of the victim of the crime in the sentencing process

The recommendations of the Law Commission for a new sentencing framework were summarised in December 2000 in the form of draft legislation.

PROBLEMS CONCERNING SENTENCING

Sentencing in South Africa is confronted by several problems. The Van den Heever Committee (South African Law Commission June 1997:21-22) summarised the most prominent criticism levelled against the system of sentencing as follows:

- Wide discretion in sentencing is the source of inconsistent sentences and a lack of uniformity in the South African sentencing practice.
- The legal framework that regulates sentencing discretion gives wide latitude and does not promote consistent and uniform penalties in South African courts.
- The principles that have been developed by the courts to restrict sentencing discretion are ineffective.
- There is an urgent need for an extensive set of principles that can serve as basic guidelines for sentencing.
- The lack of a systematic approach to sentencing; a structured sentencing policy and sentencing guidelines.
- Attempts by the legislator to control sentencing discretion by introducing mandatory minimum sentences have drawn sharp criticism.
- Most presiding officers approach the question of sentencing in an intuitive and unscientific manner.
- Sentencing does not succeed in protecting the community from serious crime.

The Van Zyl Smit Committee (South African Law Commission December 2000:xvii-xviii & 3) refers to
shortcomings that have been identified since 1994 regarding the way in which sentences are imposed in South Africa:

- Similar cases are not dealt with on the same footing by the courts, as a result of unreasonable discrimination against some offenders on the basis of race and social status. It is difficult to respond to such allegations within a sentencing framework where no clear guidelines exist and those applying the sentences have free discretion.
- Courts do not give due attention to specific offences and apply inappropriately light sentences in many such cases. This complaint is currently most pertinent to certain categories of sexual offences, but the focus may shift when other crimes become the object of public concern.
- Imprisonment is imposed for less serious offences while other more imaginative restorative justice alternatives could give greater satisfaction to all parties concerned.
- Insufficient attention is paid to the victim of the crime.
- Largely as a result of uncontrollable overpopulation, convicted prisoners are too readily discharged from prison.


- Sharp criticism from judges regarding a system of fixed sentences or restrictive guidelines that are enforced by legislature.
- Notwithstanding this opposition, the 1997 amendment act offered a kind of solution for the problem of sentence uniformity and ensured that serious crimes would be severely punished.
- The idea of a system similar to the Minnesota Sentencing Guidelines, which were compiled by an independent sentencing commission, found favour with the majority of judges in the Natal division of the supreme court.
- General support for the principle of allocating a larger, but not dominant, role in the imposition of sentences to the victims of crime.
- Favourable sentiment regarding the use of restorative justice measures in the case of less serious offences.
- The existing measures for victim compensation must be improved.

THE FORMATION OF A PARTNERSHIP

The Van Zyl Smit Committee (South African Law Commission December 2000:xix) adopted the following approach in developing a new sentencing framework, which was proposed in the form of draft legislation in December 2000 by the South African Law Commission:

- It is accepted as fact that criticism of the South African sentencing system holds substance.
- An ideal sentencing framework should promote consistency in sentence imposition; reassure the community that courts will approach specific categories of crime with an appropriate degree of gravity; open the way for victim participation in the procedure of imposing sentence; allow for the development of restorative justice measures in imposing sentence; and deliver sentence outcomes that fall within the State's ability to apply in the long term.
- Decisions regarding sentence imposition will remain in the hands of the courts. Input from legislative and executive state authorities will assist courts in making informed decisions on sentences.
- Underlying the sentence framework is a new
partnership between the legislative, judicial and executive branches of state that will require the participation and cooperation of all three state authorities in sentencing. The legislator represents the will of the community and is familiar with public sentiment that wants certain kinds of crimes punished in a specific way. An inflexible and prescriptive sentencing framework that is enforced by legislation holds certain disadvantages.

Compulsory minimum sentences could result in the imposition of disproportionate sentences (where the severity of the sentence is not proportionate to the gravity of the crime). Legislative intervention that focuses on a specific category of crime only, and does not keep the entirety of the sentence practice in mind, could lead to sentences that the correctional system does not have the capacity to apply. Thus, for example, a drastic increase in prisoners sentenced to life imprisonment could result in the uncontrollable overpopulation of prisons in the long term. The courts (judicial authority) try individual cases and can base sentence decisions on the specific circumstances of a case. This privilege does not give courts unlimited discretion in imposing sentence.

Unstructured sentence discretion means absolute power for whoever is imposing sentence, which cannot be tolerated in a democratic system. One outcome of allowing courts untempered sentence discretion is that sentences of imprisonment tend to become increasingly long and, unavoidably, contribute to exceeding penitentiary capacity. In theory, the executive state authority has the privilege of determining, within a sentencing framework, the level of imprisonment that can be accommodated within the correctional budget. An example of this is the influx control strategy to control prison overpopulation. With such a purely administrative approach (in the executive state authority) decisions are not really responsible to the judicial and legislative state authorities. Another problem is that the decision makers in the executive state authority are not always familiar with community sentiment regarding crime and sentencing.

• The interests of other important role players in the sentencing process, such as the independent Sentencing Council (described below), the community, parliament, cabinet and victims of crime, are fully taken into account in the proposed sentencing framework.

PURPOSE OF SENTENCING

Courts will get more guidance in sentence imposition in that the purpose of punishment and principles of sentencing will be clearly contained in the legislation. The aim to develop a comprehensive sentencing framework serves as point of departure for the definition of the purpose of punishment, namely

• to deter criminal behaviour
• to protect the community from offenders consistently, and consequently to punish according to just deserts with sentences that give due recognition to the human dignity of both the criminals and the victims of crime

The purpose of sentencing is to punish convicted offenders for crimes of which they were found guilty by limiting their rights and imposing certain obligations on them according to legal prescription. Sentences encroach upon offenders' fundamental rights and such constraints can only be justified when the persons charged are judged in accordance with the principles of fair trial. Neither should sentences be of such a nature that they
violate offenders' human dignity. The severity of the crime sets a limit on the magnitude of the penalty that is imposed on the offender.

**PRINCIPLES OF SENTENCING**

The bill provides for the following sentencing principles:

- Sentences must be proportionate to the severity of the crime that has been committed. The principle of proportionality does not exclude the "traditional" objectives of punishment, namely, deterrence, restoration, incapacitation, retribution and just deserts, and rehabilitation.
- The severity of the crime is determined by the damage or injury caused by the crime and the moral guilt (blameworthiness or culpability) of the offender.
- Subject to the principle of proportionality, ideally the following considerations should be optimised in imposing sentence:
  - the restoration of the victim of crime
  - the protection of the community from the offender
  - the creation of an opportunity for the offender to lead a crime-free life in future
- The existence or absence of relevant previous convictions can serve as justification for a moderate departure from the principle of proportionality in the final sentence.
- A reasonable departure from the principle of proportionality in imposing sentence can be justified in a case where "compelling and substantial" circumstances exist, which are unrelated to the moral guilt of the offender and the damage resulting from the crime.

**SENTENCING GUIDELINES**

These sentencing principles are supplemented by sentencing guidelines, developed by an independent Sentencing Council for a specific category or subcategory of crimes.

In developing sentencing guidelines for courts, the capacity of the criminal justice system and, more specifically, the correctional system should be fully taken into account. The supporting arguments are:

- The South African Constitution specifies minimum rights for the detained, including adequate accommodation for those sentenced to imprisonment. Therefore the State may not design a sentencing system that encroaches on this right when prisons become overcrowded.
- Penitentiary space in prisons is a scarce commodity in South Africa and this situation will not change in the foreseeable future. Therefore it would be unrealistic for courts to impose imprisonment when penitentiary space is not available. Against this background, guidelines for sentencing should be developed that comply with the principles of selective incapacitation.

The sentencing guidelines will make provision for cases where the damage caused by the crime may vary from region to region, for example in the case of stock theft. The sentence guidelines will also be of a flexible nature and, for example, allow:

- a deviation of 30 percent above or below the sentence that is recommended in the guidelines (e.g. in a case where a fine of R1000-00 is recommended, depending on the circumstances, the sentence could differ by R300-00 less or R300-00 more in the amount fixed for the fine)
- suspended sentences
- courts to select a suitable sentence in accordance with the sentencing principles where
a guideline provides more than one sentencing option for the crime with which the accused is charged.

SENTENCING COUNCIL

The Sentencing Council responsible for developing sentencing guidelines will be made up of judges, magistrates, members of the national prosecution authority, a member of Correctional Services, an expert in the area of sentencing and a director. The primary functions of the Sentencing Council will be to create sentencing guidelines for use in courts during sentencing. It will be assigned specific functions regarding

- fines and community service
- consultation with the National Commissioner of Police, the National Director of Public Prosecution, the organised legal profession, representatives of the various courts, the departments of Justice, Correctional Services and Welfare and Population Development, and experts in the area of sentencing and sentencing guidelines
- research into sentencing and sentencing guidelines and the creation of a databank
- the provision of information on sentencing guidelines and other aspects of sentencing
- training those who impose sentence in the use of the new sentencing framework

SENTENCING OPTIONS

The following sentencing options are envisaged in future:

- imprisonment
- a fine
- community service
- reparation
- a warning and discharge

Prescriptions for the sentence of life imprisonment and the detention of dangerous criminals are set out in detail. In cases where a dangerous criminal is detained for a crime that resulted in serious physical injury and the offender remains a threat to society, the person may be detained for an indefinite period. Community sentences are amplified with additional provisions for correctional supervision and community service. Conditions that may be linked with these sentences are clearly spelled out and the procedures for their implementation are simplified. More emphasis is placed on restitution and the compensation of the victims of crime. A new sentence of reparation is created that can be imposed as an independent sentence or together with other sentences. Imprisonment or a fine may be suspended on condition that the offender makes reparation to the victim of the crime. The suggestion is that, where possible, those imposing sentence link it with some form of reparation.

The method of calculating fines has been revised completely to accommodate the offender's ability to pay. The sentence declaring an accused a habitual criminal, and periodic imprisonment will be abolished.

VICTIM OF CRIME

The sentence framework will make provision for the procedures in aid of the victims of crime, which include the following:

- The requirement that prosecutors take into account the interests of the victim of crime in the arguments prior to sentencing.
- Victim impact statements can be presented to inform courts of practical implications that the crime has had for victims.
- Courts must ensure that victims are fully informed of their rights in the criminal justice process, including their role in the decision to release any of the accused who are sentenced to imprisonment.
- Procedures to reveal the offenders' income so
that the court can apply suitable sentences for reparation to victims.

CONCLUSION

The bill does not regulate the following:

- Frameworks for appeal and the reviewing of sentences.
- A compensation scheme for all victims of crime.
- Parole placement for sentenced prisoners.
- The adjudication of children.
- The question of diversion from within the criminal justice system. Diversion is applicable to alleged offenders whose guilt has not been determined by a court. The sentencing of convicted offenders should not be confused with diversion of alleged offenders.

On acceptance, the bill on a penal framework could herald a new era in sentencing for South Africa. This would make a substantial contribution to legal certainty in the sense that all prescriptions on sentencing will be incorporated in easily accessible legislation. The general principles of sentencing are clearly spelled out and the establishment of normative sentence guidelines will simplify the courts task of imposing sentence and contribute

- to the speedy and effective completion of cases
- in that offenders who are found guilty will know what to expect in terms of sentences.

Simplified rules of procedure would ensure that the public takes note of what happens in the sentencing process, which would encourage the community to participate in the administration of justice.

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Acta Criminologica Vol 14(2) 2001


