Human rights and sentencing guidelines

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It is widely accepted that the human rights principles of constitutional and international law set outer limits within which any sentencing system must operate. This paper seeks to identify the fundamental human rights principles of relevance to sentencing generally.

It then asks whether these principles are of particular relevance to the development of a system of sentencing guidelines. This question is not only considered with the objective of setting restrictive limits beyond which such guidelines may not stray. An attempt is also made to give an indication from a human rights perspective of what a sentencing framework should seek to achieve both for the offender and for the public at large, including the victims of crime. The answers are illustrated with examples from the debate about the development of sentencing guidelines in South Africa.

The relationship between human rights and sentencing is highly complex. Although human rights are often invoked when sentencing is discussed, little systematic thought has been given to the impact that human rights should have on the sentencing framework as a whole. Part of the reason is that insufficient attention is paid to the reality that sentencing takes place within the overall criminal justice environment. A sentencing guideline system in which an independent sentencing council or commission sets guidelines, which courts are to a greater or lesser extent compelled to follow, is an attempt to make more visible aspects of the sentencing framework. What are the desiderata for such a framework that can be derived from human rights norms?

In answering that question, I propose to consider the standards set for sentencing by three human rights norms – the norms of legality, equality and human dignity. What all three standards have in common is that they are designed to protect offenders against unfair or unjust restrictions of their rights by the state. This is of course important as punishment involves a massive restriction of rights of offenders which needs to be justified and delimited carefully in order to be acceptable at all.

* At the time of writing this paper the author was the project leader of the sentencing committee of the South African Law Commission. The views expressed in the paper are his own and not those of the South African Law Commission or the South African government.

Most of my emphasis will be on human dignity. Nevertheless, I have a few, hopefully provocative, thoughts about the other two rights as well. The principle of *legality* requires that punishments be clearly specified. Historically South African law has not done so. Even if our common law offences are reasonably clearly defined, our penalties are not. A system of guidelines is designed to give potential offenders a sense of what punishment they may expect for particular offences. It is not enough merely to state what the prescribed punishments are. The punishments themselves must be clearly delineated. Also the evidentiary rules for deciding on punishment must meet the standards of legality. In this regard I would remark that, as victims of crime are being given an increased voice in making evidence relevant to sentence available by means of victim impact statements, for example, attention should be paid to ensuring that the offenders rights are not jeopardised by an absence of procedural safeguards to test potentially prejudicial allegations.

Similarly, *equality* concerns should place high on our agenda the requirement that like cases be treated alike. A lack of guidelines and the absence of clear sentencing principles both allow sentencing discretion to be exercised in an opaque way, which makes it impossible to consider whether like cases are in fact being treated alike. Much of the move away from wide sentencing discretion and indeterminate sentences since the 1970s in the USA and elsewhere has been driven by a concern to ensure equality even at the cost of some flexibility, for there must be a measure of trade off.[1]

Concerns about *human dignity* in the sphere of sentencing are usually mediated through the prohibition of cruel, inhuman and degrading punishment.[2] This prohibition is found in key international and regional human rights instruments and in most written national constitutions (Bassiouni 1993). In practice the prohibition takes two forms. There is an absolute prohibition of certain forms of punishments as inherently contrary to human dignity and there is a prohibition of punishments that, while acceptable in principle, may be so disproportionately harsh when imposed for a particular offence that they are cruel inhuman or degrading.[3] The former need not detain us for the moment. The Constitutional Court has effectively ruled out both the death penalty[4] and corporal punishment.[5] As human rights lawyers we can be proud that they play no part in the current debate about a new South African sentencing framework.

The second poses a more serious challenge: It can best be summarised as follows.[6] Foreign jurisprudence, both Canadian[7] and Namibian,[8] quoted

1 See in general Allen 1981 and Tonry 1996.
2 For a useful comparative discussion of this relationship, see Schabas 1996.
3 For a general application of these principles to sentencing, see Van Zyl Smit 1995.
4 *S v Makwanyane* 1995 2 SACR 1 (CC).
5 *S v Williams and others* 1995 3 SACR 332 (C).
6 For a fuller constitutional analysis, see Van Zyl Smit 1999:28-6–28-10a.
7 *Smith v The Queen* (1987) 34 CCC (3d) 97; *R v Goltz* (1992) 67 CCC 481.
8 *S v Vries* 1996 2 SACR 638 (Nm); *S v Likuwa* 1999 2 SACR 44 (Nm).

with approval by South African courts,[9] indicates that any legislation that resulted in sentences that were grossly disproportionate to the crime would be unconstitutional on the grounds that they would be cruel, inhuman and degrading. A mandatory sentence regime of any kind, whether the mandatory sentences are set directly by legislation or indirectly by a sentencing council, runs the risk of being unconstitutional if in its application it results in grossly disproportionate sentences being imposed.

In South Africa this problem has historically not been a major concern, as legislation did not generally set sentences. There were notable exceptions in relation to drugs and in particular in respect of political crimes such as terrorism and the failure to do military service. However, the courts went to considerable lengths to interpret these provisions in a way which would give them discretion and thus avoid grossly disproportionate sentences.[10]

Since 1998 the position has changed. The 1997 Criminal Law Amendment Act[11] that came into effect on 1 May 1998 provides for harsh mandatory minimum sentences for selected offences. However it also provides that these minima need not be imposed if there are "substantial and peculiar circumstances" which justify a departure. There are a number of difficulties with the 1997 Act,[12] but the departure provision ensures that it does not, on the face of it, create a mandatory sentence regime of the constitutionally dubious kind. If, however, the interpretation of the departure clause were so narrow that it could result in such disproportionate sentences, it would be open to constitutional challenge. In *S v Homareda*[13] Cloete J suggested that courts should be alert to this danger and, if the result of applying the new legislation was disproportionality, they should refer the matter to the Constitutional Court. It is clear that any new sentencing legislation or a system of guidelines would have to bear these strictures in mind in determining whether it would pass constitutional muster. It will also have to consider the underlying principle that the constitutionally recognised dignity of all members of society requires that no sentence should restrict the autonomy of an offender more than is justified by legitimate functions of penal law.[14]

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9 *S v Jansen* 1999 2 SACR 368 (C) at 373G–374G; *S v Schwartz* 1999 2 SACR 380 (C) at 383F–J.

10 See, for example, *S v Thoms; S v Bruce* 1990 2 SA 802 (A). For a discussion of the wider judicial policy involved see Abel 1995.

11 Act 105 of 1997.

12 These include a procedure that results in cases that are tried in the regional court, which has a maximum punishment jurisdiction of 15 years imprisonment, being sent to the High Court for sentence where the prescribed sentence is one of life imprisonment. This procedure was held to be unconstitutionally unfair in *S v Dzudka: S v Tilly S v Tshilo* 2000 3 229 (W). The Constitutional Court overturned this ruling in a September 2000 (*S v Dzudka: S v Tilly S v Tshilo* unreported CCT 23/00 delivered on 27 September 2000). However, this does not mean that a split procedure of this kind is the optimal way of making sentencing decisions.

13 1999 2 SACR 319 (W) at 326A.

14 See *S v Schwartz* 1999 2 SACR 380 (C) at 386H–387B.

So much for the moment for human rights desiderata: But what are the main problems that the sentencing system in South Africa currently faces? In a discussion paper published in April this year a committee of the South African Law Commission identified the following public perceptions as problematic for the system as a whole:

> "that like cases are not being treated alike; that sentencers do not give enough weight to certain serious offences; that imaginative South African restorative alternatives are not being provided for offenders that are being sent to prison for less serious offences; that sufficient attention is not being paid to concerns of victims of crime and that, largely because of unmanageable overcrowding, prisoners are being released too readily" (South African Law Commission 2000a).

Public concerns in the sphere of sentencing are not necessarily directly related to human rights but each of these problems raises interesting human rights issues.

(1) The question of treating like cases alike obviously relates to the right to *equality* that I have already considered. I would add only that that concern is linked with notions of justice in the public mind and demands our serious attention.

(2) The alleged lack of weight being given to serious cases could be dismissed as anti-human rights, in that it may be a symptom of vengeance-driven nastiness. However, we do so at our peril. What is required is a re-examination of our sentencing system to ensure that serious offenders are getting their just deserts. The human rights concern with *human dignity* functions as a safeguard to ensure that these sentences do not flout that standard, either in the sense that punishments themselves are inhumane (for example, the return of the death penalty) or grossly disproportionate to the crime in the way I have described.

(3) Alternative, community-based sentences raise questions of *legality* in the first instance. While the meaning of a fine or even of imprisonment is formally clear (so many rands or so many days' loss of liberty), the conditions that may be set for a community sentence can vary enormously. South African courts have recognised this and in the leading case of *S v R*[15] Judge Kriegler emphasised that the courts have a duty to set the conditions attached to a sentence of correctional supervision in the community with some precision. However, the current South African statute law is clearly inadequate in this respect. It does not specify in advance what an offender who is to be dealt with restoratively has to face. A further point worth emphasising is that open-ended non-custodial sentences may allow forms of punishment that are unconstitutional. Restorative justice propagates for what it calls the "reintegrative shaming" of the offender (Braithwaite 1989). However, this can easily be twisted into a form of public mocking of the offender. There is already an anti-human rights literature that suggests that one should think in the community context of "disintegrative shaming," that is the public humiliation of an offender as

15 1993 1 SA 476 (A).

an appropriate form of punishment.[16] A final comment on legality and community-based "restorative" alternatives: this principle also requires that the procedures for the imposition, alteration and suspension of the conditions attached to such alternative sentences meet due process standards.

(4) As far as victims are concerned, I have already said that safeguards are required to ensure that a victim-driven system does not result in the human rights of the accused being prejudiced. This is a rather negative formulation that would put human rights activists in the position that the great South African poet Roy Campbell ascribed to his critics:

> "They use the snaffle and the curb all right. But where's the bloody horse?" (Campbell 1992:19).

I would emphasise therefore that a sentencing system concerned also for the human rights of victims would look at types of sentence that could serve a restitutive function, by compensating the victim directly or providing restitution indirectly by community service, for example. It would also ensure that the victim's voice is heard where he or she has valuable information on sentencing and has a legitimate concern with how the treatment is implemented – the justified fear that the early release of an offender might cause the victim physical harm would be an example.

(5) Finally, the overcrowded prisons and early releases: Grossly overcrowded prisons cannot possibly meet minimum human rights standards. The Constitution specifically guarantees that every sentenced prisoner has a right to "conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense of adequate accommodation, nutrition, reading material and medical treatment".[17] It would take a brave person to claim that South African prisons meet these minimum standards. The cause is simply that too many people are being held in prisons. Somewhat surprisingly, this is not directly a product of the increase in crime. Roughly the same number of cases are reaching the courts, but they are taking longer to be processed and the offenders who are being sentenced are being sentenced to much longer terms. The figures are spectacular. From July 1995 to July 2000 the number of prisoners serving sentences of 20 years or longer increased from 2 814 to 7 123.[18] There is no way that South Africa could ever afford to construct new prisons on a scale that would be able to accommodate prisoners increasing at this rate. The public and the judiciary have a point in being concerned about early release: It undermines the rule of law in that judgments of the courts are in fact not carried out. The government has responded to the concern by enacting legislation that will set higher minimum periods before parole can be considered. This is justifiable, but when it comes into effect, it will of course further exacerbate the problem of overcrowding. The fault clearly lies with the sentencing system (or lack

16 See a discussion of this literature in Tonry 1999.
17 S 35(2)(e) of the Constitution of the Republic of South Africa, Act 108 of 1996.
18 Information provided by the Department of Correctional Services.

of system), for individual sentencing decisions are being taken without concern for the capacity of the whole. This is producing more prisoners than can ever be incarcerated, for anything approaching the full terms to which they have been sentenced, under conditions that meet minimum human rights standards.

In my view, comprehensive sentencing framework legislation, which incorporates provision for normative sentencing guidelines, is the only way the diverse concerns of the public can be met in a manner that also meets human rights standards. What are the requirements for such guidelines? First, they should be based on clear principles. South African sentencing law at the moment contains a confusion of objectives with no ranking order, thus making it very hard to develop a rational sentencing policy. The guidelines drawn up in the light of such principles should be sufficiently clear to ensure that like cases are treated alike. However, they should also be sufficiently flexible to allow courts some discretion to deal with smaller differences and provide mechanisms for more drastic departure to cater for the truly unusual cases where this is justified. The need for such departures should be reduced by identifying, for sentencing purposes, sub-categories of offences that go beyond the very wide definitions of common law crimes that inevitably require a very wide range of sentences. Guidelines should be based on such sub-categories.

The guidelines should also be drawn up with the capacity of the system in mind. Punishment is a scarce resource. While the public is correct in demanding that the most serious offences be firmly punished, such punishment should be reserved for the most appropriate cases. To make the system work, the relative seriousness of offences must be determined and hard choices made that reflect this ranking. The alternative is either an unconscionable degree of prison overcrowding or the early release of prisoners. One cannot continue with a system that as a whole imposes sentences that cannot realistically ever be enforced.

Normative sentencing guidelines need to be embedded in a wider framework of sentencing law to achieve their human rights potential. They need provision for various types of sentences, not only for imprisonment, but also for community sentences, fines related to the capacity of the accused to pay and for restitutive sentences as well. They need a procedural framework that ensures that the requirements of legality are met in the actual decision-making process. There must also be provision for the interests of victims to be appropriately recognised.

Finally, for a sentencing guideline system to produce acceptable results, a great deal of co-operation and restraint is required from all branches of government.

The *judiciary* must recognise that decisions taken with a focus solely on individual cases may mean that like cases are not treated alike and that the sum of the individual decisions may produce sentences that, because of the limited capacity of the penal system, cannot be implemented fully without major human rights abuses being committed.

Parliament must recognise that targeting a few offences for particularly harsh treatment without considering the impact of this on the capacity of those responsible for implementing the sentences as a whole can produce gross disproportionalities and also make the whole system unworkable. It should lay down the principles in legislation but leave it to a sentencing council, on which judges should have the largest representation, to set the actual guidelines.

The *administrative executive* must accept that releasing offenders from the obligations of their sentences can undermine confidence in the whole criminal justice system. It should work to overcome overcrowding by supporting the development of guidelines in practical ways.

A guideline system requires partnership and co-operation between the different branches of government in order for it to function properly. The balance between sufficient rigidity to ensure that the system works and sufficient flexibility to deal with hard cases is the greatest challenge of all.

Postscript: On 7 December 2000, the South African Law Commission publicly presented the Minister of Justice and Constitutional Development with its recommendations on sentencing.[19] The Report of the Commission on a New Sentencing Framework conforms to the suggestions contained in this paper in as far as the proposed creation of sentencing guidelines by a sentencing council is concerned. Underlying the proposals is the idea that the just deserts of the offender for the offence are central to sentencing. Sentences should in the first instance be proportionate to the relative seriousness of the offence. Seriousness is to be determined in terms of harm caused by the offence and the culpability of the offender. Subject to this requirement, a choice may be made amongst various options of equal penal value to ensure that as far as possible sentences restore the rights of the victim, protect society and give the offender the opportunity to lead a crime-free life. Departures from desert-based seriousness, that is, the consideration of factors other than harm and culpability, are, however, only allowed to a limited extent and then only where there are highly unusual factors that justify them. The guidelines are to be constructed in the light of these principles and the capacity of the correctional system to implement sentences.

In the course of putting forward a comprehensive framework, the Commission also makes detailed proposals in respect of other aspects of sentencing law. These include reforms to the way fines are calculated, the mandatory consideration of restitution in each case, and the introduction of victim impact statements as part of package of changes designed to improve the position of victims of crime in the sentencing process. The reaction of the government to the proposals is keenly awaited.

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19 South African Law Commission 2000b.

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