

**PUNISHMENT AND THE SOUTH AFRICAN
CONSTITUTION - A PENOLOGICAL PERSPECTIVE**

by

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SUMMARY

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Since 25 January 1994, when the interim Constitution came into operation, South Africa's criminal justice system became subject to constitutional provisions, especially the Bill of Rights. All forms of punishment and treatment are subject to the provisions of the Constitution. The first casualties were the death penalty and corporal punishment, which were found to be unconstitutional by the Constitutional Court. Since our criminal justice jurisprudence is still in the developing stage, a comparative analysis with the Canadian and American penal systems forms part of this thesis.

Provisions of the Constitution, which will have an indirect influence on punishment include, access to information, just administrative action and state institutions supporting democracy. The following provisions of the Bill of Rights are expected to have a significant impact on punishment in all its facets, equality; human dignity; life; freedom and security of the person; freedom from slavery, servitude and forced labour; and the rights of children.

Judgments of the Constitutional Court, which abolished the death penalty and corporal punishment are examined since they were the first indication the Court gave on aspects of punishment. The Constitution also deals specifically with the rights of arrested, detained and accused persons. It is within this provision that

the rights of prisoners are spelt out. Imprisonment as a form of punishment, has to conform to the provisions of the Constitution, and the Correctional Services Act is an attempt to render imprisonment compliant.

With the abolition of the death penalty and corporal punishment, the effect of constitutional provisions on conventional forms of punishment and the overpopulation of prisons, the establishment of alternative forms of punishment, which would pass constitutional muster, is imperative. The Child Justice Bill is an attempt to establish a unique system for juveniles who commit offences.

DECLARATION

Student number: 297-034-1

I, Eshaam Palmer, declare that "Punishment and the South African Constitution - A Penological Perspective", is my own work, and that all the sources that I have used, or quoted, have been indicated and acknowledged by means of complete references.

ESHAAM PALMER

DATE

DEDICATION

This thesis is dedicated to the three women in my life, my mother Nafiesa, my wife Dee and my daughter Tasmia.

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I wish to express my sincere appreciation to both my promoters, Prof C H Cilliers and Prof D P van der Merwe, whose help and guidance allowed this thesis to reach fruition. The help afforded by the Library of Unisa, especially Ms Talana Burger, and the Library of Parliament, was invaluable. A special thanks to my parents, wife and children, who stood by me during this long and trying period. And last, but not least, the Almighty, whose will and guidance made this research project possible.

NOTE

The interim Constitution, namely, Constitution of the Republic of South Africa Act, No. 200 of 1993, was assented to on 25 January 1994, and came into operation on 27 April 1994. This interim Constitution was to function until a final Constitution was promulgated and certified by the Constitutional Court as having complied with the Constitutional Principles contained in Schedule 4 to the interim Constitution. It also contained a Chapter dealing with fundamental human rights, namely, Fundamental Rights (Chapter 3). Many important Constitutional Court decisions were taken in terms of this Chapter, for example, cases relating to the death penalty and corporal punishment.

During 1994, the Constitutional Assembly embarked on a process to write the final Constitution, and after the final version was passed by Parliament on 8 May 1996, it was submitted to the Constitutional Court for certification. As a result of the certification process, the Constitutional Assembly amended the Constitution on 11 October 1996. After the Constitutional Court certified the new Constitution as complying with the Constitutional Principles, the Constitution came into operation on 4 February 1997, as Act No. 108 of 1996.

Certain provisions of the interim Constitution remain in force and are found in Schedule 6 to the new Constitution. In this thesis the new Constitution (Act No. 108 of 1996) is referred to as the Constitution, whilst the previous Constitution (Act 200 of 1993) is referred to as the interim Constitution.

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CHAPTER 1

THE RESEARCH PROJECT

1.1 INTRODUCTION

On 8 May 1996, the new Constitution was passed by Parliament at a joint sitting of the National Assembly and the Senate, thus heralding an era of supremacy of the Constitution over Parliament within a constitutional democracy. Under the previous constitutional dispensation, Parliament was sovereign and had an unfettered discretion to pass laws on any subject. Most political parties supported its passage, thus ensuring the required two-thirds majority. It was left to the Constitutional Court to certify its validity in terms of the principles enunciated in the Constitution of the Republic of South Africa Act, No 200 of 1993 (the interim Constitution).

Shortly after the interim Constitution was passed into law, the Constitutional Assembly, consisting of representatives of all political parties represented in Parliament (except the Inkatha Freedom Party, which boycotted the proceedings), commenced negotiating a final Constitution. Within a period of just over two years, the Constitutional Assembly was ready to present an appropriate Bill to Parliament. The final Constitution had to comply with the Constitutional Principles set out in Schedule 4 to the interim Constitution. After the Constitutional Court certified the final Constitution, it came into operation on 4 February 1997.

Thus ended a period of intensive negotiations between the various political parties represented in Parliament, and extensive consultation with a wide spectrum of civil society, ranging from churches and religious groups to

academic institutions, and ultimately the general public. In all, there were over 250 000 individual submissions and petitions (Constitutional Talk, 22/4/96:1). In this way Parliament was relegated to second place in the sovereign hierarchy and when exercising its legislative authority, had to act within the limits set by Constitution. South Africa moved from a parliamentary to a constitutional system of government, where all laws emanating from the former have to comply with the provisions of the latter.

The Constitution was drafted in terms of Chapter Five of the interim Constitution, and according to section 74 of the Constitution can only be amended in the following manner:

- Section 1 (founding provision) may only be amended by a Bill passed by the National Assembly, with a supporting vote of at least 75% of its members and the National Council of Provinces, with a supporting vote of at least six provinces;
- Chapter 2 (Bill of Rights) may be amended by a Bill passed by the National Assembly, with a supporting vote of at least two thirds of its members and the National Council of Provinces with a supporting vote of at least six provinces;

Any other provision of the Constitution may be amended by a Bill passed-

(a) by the National Assembly, with a supporting vote of at least two thirds of its members; and

(b) also by the National Council of Provinces, with a supporting vote of at least six provinces, if the amendment relates to a matter that affects the National Council of Provinces; alters provincial boundaries, powers, functions or institutions; or amends a provision that deals specifically with a provincial matter.

Section 1 of the Constitution emphasises its supremacy and the rule of law, whilst section 2 states that it is the supreme law of the country, rendering any

conduct or law inconsistent with it, invalid. The provisions of the Bill of Rights, contained in Chapter 2 of the Constitution will have a significant effect on punishment in South Africa, not only as far as the types of penalties are concerned, but also the manner of its implementation. For example, the following rights are protected in the Bill of Rights, namely, life; human dignity; and cruel, inhuman or degrading punishment. The Bill of Rights is clear and specific on the rights of arrested, detained and accused persons. There are also other provisions in the Constitution, which have an indirect effect on punishment, for example, those provisions regarding constitutional institutions supporting democracy.

It is significant that international law affects the interpretation of local law. Section 233 of the Constitution states that when interpreting any legislation, any court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law. Furthermore, section 232 provides that customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

One of the most notable consequences of the Constitution for purposes of this thesis is that any form of punishment can be declared unconstitutional if the Constitutional Court finds to that effect. Such finding would effectively abolish that form of punishment as a valid penalty within the penal system. The Constitutional Court has already found that the death penalty and corporal punishment are unconstitutional.

The Canadian Constitution, passed as the Constitution Act, 1982, came into operation on 17 April 1982. A Charter of Rights and Freedoms (the Charter) is contained in the Constitution as Schedule B. This law ushered in an era of constitutionality, and for the first time courts had to grapple with issues of

fundamental rights entrenched in the Charter. Prior to this enactment, rights and freedoms were protected by convention and the Bill of Rights. As is the case with the South African Constitution, the rights and freedoms protected in the Charter are not absolute. In terms of section 1 of the Charter, "(t)he Canadian Charter of Rights and Freedoms set out is subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". In essence the contents of this provision is similar to section 36 of the Constitution of South Africa.

The Constitution of America consists of seven Articles (21 sections) and 27 Amendments. The first Amendment was passed in 1791 and the last one in 1992. A Bill of Rights is contained in the Constitution and deals with aspects like due process of law and freedom from cruel and unusual punishment.

1.2 CONTENTS AND DIRECTION OF RESEARCH

The main object of this thesis is to examine the effect of the new Constitution on punishment in South Africa, within a penological perspective and to explore suitable alternative penalties. The Constitution affects every sphere of human life, and will have a major impact on punishment in all its aspects. It is a comparative study, which examines the relative positions in the United States of America (America) and Canada, as well as appropriate references to other constitutional democracies. This topic constitutes the major part of the research project.

This study is fundamentally a theoretical research project, which requires delimitation in order for it to reach fruition. In practice this enabled the presentation of the research project in 9 chapters, which are presented in such a way that the research unfolds in a logical sequence.

Chapter one deals with the research project and the parameters of its ambit. It details the topics and areas to be discussed, the desirability of such research and the manner in which the research will be undertaken. It further reveals the fundamental basis of the research.

In chapter two, the relevant sections of the Constitution, including those sections contained in the Bill of Rights, which indirectly affect punishment, are examined. These sections of the Constitution have both a direct and an indirect effect on punishment, but its effect is not as far-reaching as those provisions contained in the Bill of Rights. This chapter examines the judicial system and the democratic institutions established in terms of the Constitution. These provisions generally affect the penal system of South Africa in a more general manner.

Chapter three deals with the rights of arrested, detained and accused persons, in terms of the Bill of Rights. It also compares the positions regarding these principles in America and Canada.

The effect of the Bill of Rights on punishment is examined in chapter four. It includes a comparative study of the above two countries. The rights, which are examined, are those rights in relation to life; equality; human dignity; freedom and security of the person; slavery, servitude and forced labour; and privacy. In essence, this chapter deals with the central theme of this thesis.

Chapter five deals with the death penalty and corporal punishment, and how these forms of punishment have been affected by judgments of the Constitutional Court and legislation. A brief comparative study is also included in this chapter. In addition to Canada and America, other constitutional democracies like Namibia and Zimbabwe are referred to.

The constitutionality of imprisonment as a form of punishment is examined in chapter six. The position regarding this form of punishment in the above countries is also examined.

Chapter seven examines alternative forms of punishment, like fines, probation, parole, community supervision, etc. A comparative study is included in this chapter.

Appropriate form of punishment for juvenile offenders is the topic of discussion in chapter eight. Juvenile offenders present a specific problem, as many of the conventional forms of punishment are not suitable for such offenders, and further they are more susceptible to rehabilitation. A comparative study is included in this chapter.

Chapter nine consists of a summary and recommendations.

The research project also contains a Bibliography and Case Reference sections, which cite all the sources referred to in this project.

1.3 CHOICE OF SUBJECT MATTER

There are, of course, a number of considerations, which influence the choice of subject matter in any research project. Hereunder, two important determinants, namely, necessity and desirability of choice of the topic, and the involvement of the researcher, are discussed.

1.3.1 NECESSITY AND DESIRABILITY

Following a pilot study undertaken by the researcher, and preliminary investigations into the subject, the following information was obtained.

1.3.1.1 NEED FOR RESEARCH OF THIS NATURE

With the promulgation of the Constitution as the supreme law of South Africa (section 2 of the Constitution), the ethos and system of punishment and the various penalties that may be imposed in South Africa, stands to be affected. Certain forms of punishment will naturally be affected more than others, for example, the death penalty, which the Constitutional Court declared unconstitutional in terms of the interim Constitution. Corporal punishment as a form of punishment for both children and adults was also found to be unconstitutional. Subsequently corporal punishment was abolished as a form of punishment in terms of the Abolition of Corporal Punishment Act, No. 33 of 1997.

All forms of punishment, irrespective of its origin, be it statutory or in terms of the common law, need to be interpreted according to the principles contained in the Constitution, and more especially, the Bill of Rights. These forms of punishment include, but are not limited to, imprisonment, fines, correctional supervision, periodical imprisonment and probation.

As this is a new system of government where the Constitution, and not Parliament is sovereign, it is imperative to examine the manner in which other constitutional democracies where this type of system has applied for some time, have dealt with the effects on punishment. These countries include America and Canada. Thus a comparative study is relevant in the broader context of the prevailing criminal justice system in South Africa. Legislators, judicial officers, law enforcement officers and correctional officials, to name but a few, would need guidance in transforming the criminal justice system to meet the demands of the Constitution, and more especially the Bill of Rights.

To the extent that could be ascertained, this comprehensive form of research has not yet been undertaken in South Africa. As such, the researcher is of the

view that research conducted into the effect the Constitution will have on punishment in South Africa, would satisfy a need for scientific knowledge in an area not effectively served thus far. Research in this field is not only necessary and desirable, but also imperative. It would provide a better understanding of the operation of the criminal justice system within a constitutional dispensation. Going hand in hand with this aspect of the research, is the search for viable alternative forms of punishment. This area of research forms an integral part of the research project.

For the above reasons, the researcher is of the view that the research would not entail a sterile exercise, but that it would contribute to the mainstream search for a better understanding and utilisation of punishment, as well as viable alternatives to the conventional forms of punishment. This would bode well for a better understanding and operation of the criminal justice system in the new South Africa.

1.3.1.2 PENOLOGICAL RESEARCH

As its title indicates, the thrust of the research is rationale seeking, conducted within a penological framework. It is very important to understand the extent to which punishment will be affected by the provisions of the Constitution. This position will have an influence on every aspect of the criminal justice system. With the abolition of certain types of penalties, overcrowding of prisons and the ever-increasing degree of recidivism, it is imperative that viable alternative forms of punishment are developed and implemented.

The comparative nature of the study, which is supported by the promoters, presents a broad framework within which to understand the implications of the new constitutional system. Such system has largely been based on the models currently operating in Germany, Namibia, Canada and America.

Questions posed above, and others related to it can best be answered by a study of the effect of the Constitution on punishment in its totality. According to Nesor, penology concerns itself with such study (1980:29). Within this framework the study seeks out the theoretical basis and objectives of punishment, and hence addresses relevant and fundamental issues (Nesor, 1980:39). The study concerns itself with all the spheres of penology, namely, penitentiary, judicial and community penology.

1.3.2 INVOLVEMENT OF THE RESEARCHER

In the first instance, the researcher is interested in the effect of the Constitution on punishment, and secondly, viable alternative penalties. Research into foreign penal systems is manifest of this interest (researcher completed a dissertation, the topic being "The handling of the offender within the Islamic penal system", for an M.A. degree), and as such, this research is a continuation of the researcher's interest. The researcher's various fields of employment lends itself to this project, for example, public prosecutor, magistrate, attorney, lecturer in law subjects, assessor in the Regional and High Courts, and legal adviser to Parliament.

1.4 OBJECTIVES OF THE RESEARCH

The main objectives underlying penological research generally are, inter alia, knowledge of and insight into the punishment phenomenon, with the ultimate aim of practically applying the knowledge so acquired. As such, the researcher intends to acquire knowledge and insight into the matter under research.

In the conduct of this research on the effect of the Constitution on punishment, and viable alternative forms of punishment, the focus is directed within a penological perspective, in order to attain the set objectives. Thus the

Constitution is the focal point of the research. Furthermore, the researcher wishes to establish the following, although not limited thereto, within this framework:

- How does the new Constitution promote or deviate from the general principles of punishment?
- Does it affect any specific types of punishment?
- What is its penological value and importance?
- Have other countries been similarly affected in the past?
- How essential is it that viable alternatives to the conventional forms of punishment be sought?
- What has the experience been in other selected countries?
- How have other countries dealt with the search for alternative forms of punishment?
- What is the penological importance of developing a model for dealing with such phenomenon?

It is the wish of the researcher that the acquired scientific knowledge, which has been transformed from fragmentary data by means of systemisation to form a workable and meaningful unit, thus facilitating its application. This is the pervading objective when all scientific research is undertaken. It is intended that the research should contribute to the understanding of the affect of the Constitution on punishment and the development of viable alternative forms of punishment. In turn this will promote more effective functioning of the criminal justice system, which will eventually reduce the levels of the prison population, facilitate rehabilitation and build confidence and legitimacy in the criminal justice system in dealing with the overall crime problem.

The research could also serve as a reference for penologists, criminologists, correctional officials, judicial presiding officers, other practitioners within the criminal justice system, and interested parties and institutions who are involved

in the combating of crime on a broad spectrum. It is essential that research encourages further necessary research and investigation.

1.5 METHOD OF RESEARCH

1.5.1 CHOICE OF METHOD

Since the nature of the research is an investigation into the effects of the Constitution on punishment, and viable alternative penalties, it is the main determinant of the method of research utilised by the researcher. The above prescribes that the main source of information for the major part of the research was legislation, namely, the Constitution and other relevant legislation, the American Constitution and the Canadian Charter.

Another important factor is that one of the major focuses of the research is a comparative one. This means that the primary source of information is statutes and other documentary texts - thus rendering the sources of a documentary nature. The objective of this method is to enable knowledge and insight to be obtained from existing literary sources. It is stated by Van der Walt that a documentary study may involve a wide range of documentation, including articles in periodicals, official and non-official reports, books, diaries, and both published and unpublished sources (1977:212-4).

Johnson stated the following regarding a definition of documentary studies: "The literature is searched for content pertaining to the subject. Reference is made in the Bibliography at the end of the thesis to various documentary sources, for example, textbooks, dissertations, theses, statutes, conference proceedings, reports of commissions of enquiries, reports emanating from government departments, articles in periodicals, Hansard and law reports." (1981:18)

1.5.2 DETERMINATION OF RATIONALE

Over and above the research method referred to in 1.5.1 above, other methods and techniques are employed in determining the effects of the Constitution on punishment, and alternative viable forms of punishment. As one of the major sources of information are statutes, it is important to examine the branch of law, which deals with the interpretation of statutes, being mindful not to take a purely legalistic view.

According to Steyn, the ratio and intention of legislation are completely interwoven in that if it were not covered by the ratio, then the legislature would not have intended it (1981:2). Steyn also states that the intention of the legislature is the sovereign rule of interpretation, to which all other rules of interpretation are subservient (1981:2). Davis et al are of the view that a purposive interpretation of the Constitution should be followed by South African courts (1997:14).

A further guide in determining the intention of the legislature are the rules laid down in the case of Hleka v. Johannesburg City Council 1949(1) SA 842 (A) at 852:

- What was the law before the measure was passed?
- What was the mischief or defect for which the law had not provided?
- What remedy had the legislature appointed?
- What was the reason for the remedy?

1.6 GATHERING OF DATA

1.6.1 USE OF ACTA PUBLICA

The main thrust of the research revolves around the Constitution and its effect on punishment, and as such, it forms the basis of the rationale of the project. However, as the study is a comparative one, textbooks and other sources of literature take on a more important role as a source of data gathering. As will be clear from the Case References, the researcher also placed great reliance on court judgments, especially those of the Constitutional Court, both in South Africa and the other countries forming the sample for the comparative research.

In this way the aspect of statutory interpretation becomes an important consideration. In his important work on interpretation of statutes, Steyn states that it is not allowed, in an endeavour to ascertain the ratio underlying an enactment, to utilise parliamentary debates (found in the various editions of Hansard), reports of commissions of enquiries, and investigations by the South African Law Commission (1981:136). However, bearing in mind that the study of penology is concerned with the study of the phenomenon of punishment in both its broader and narrower perspectives, the researcher does not feel inhibited by the strict rules of legislative interpretation, for instance, the one alluded to above.

Debates in Parliament and reports of commissions of enquiry are helpful in determining the problems that must be addressed. The same could be said for reports of the South African Law Commission. These sources could aid the fundamental and philosophical examination of legislation relating to punishment in general, and specifically. Such process facilitates a study within a penological perspective.

1.6.2 MOST IMPORTANT DOCUMENTARY SOURCES

1.6.2.1 NATURE OF THE SOURCES

As dictated by the nature of the research project, the main documentary sources utilised by the researcher are statutory enactments, commission of enquiry reports, reports of the South African Law Commission, judgments of various courts, text-books, law reports, official government reports, research findings, periodicals, reports of working groups and debates in Parliament. The ancillary sources, like articles in newspapers and journals, were utilised solely to either comment upon or clarify aspects and issues raised in the major sources, or to provide background information relevant thereto.

1.6.2.2 STATUTORY PROVISIONS

Prior to the enactment of the Constitution, the legislature virtually had an unfettered right to promulgate legislation to combat crime, and determine the forms of punishment it wishes in place to deal with criminals. There are numerous laws, which establish different forms of punishment, but the nature and implementation of these forms of punishment are influenced by the Constitution. In certain instances, provisions for types of punishment may be found to be unconstitutional, for example, legislative provisions providing for the death penalty as a form of punishment. In this way the legislator is the most fundamental role-player in determining legal punishment.

Legislation is also the main source of alternative forms of punishment. It not only describes the type of punishment it has in mind, but usually also the circumstances under which the penalty can be imposed. In certain instances legislation goes even further by determining the maximum and minimum periods of imprisonment. Acts of Parliament and regulations framed thereunder could

also determine the manner in which punishment is to be carried out, for example, the Correctional Services Act, No. 111 of 1998.

1.6.2.3 DEBATES IN PARLIAMENT

The researcher was able to get insight into the rationale for the relevant provisions of the Constitution by studying debates in Parliament. In this way the background and motivation for the legislation could be ascertained. It also shed light on the events leading to the enactment. This is especially true in respect of rights contained in the Bill of Rights, like the right to human dignity.

1.6.2.4 JUDICIAL DECISIONS

Judicial decisions are important from a penological perspective, since legislation generally only prescribes the types of sentences that may be imposed, and it is left to the judiciary to establish and develop the principles to be applied in the sentencing process. The judicial decisions referred to here are those of the High Courts, Supreme Court of Appeal and Constitutional Court of South Africa and courts of the other countries forming the subject of the comparative study.

There are numerous cases where important and fundamental principles regarding sentencing have formed part of the judgment of the court, these include, R v. Karg 1961 (1) SA 231 (A), S v Zinn 1969(2) SA 537 (A), S v. Holder 1979 (2) SA 70 (A), S v Fredericks 1986(4) SA 1048 (C), and S v Ndaba and others 1987(1) SA 237 (T). It is expected that the Constitutional Court will also establish principles relating to sentencing in the future.

Citing of judicial decisions in the thesis is aimed at supporting fundamental issues like the finding of the death penalty to be unconstitutional, and to indicate and clarify the reasons for such finding. A further motivation was highlighting the need to overcome shortcomings in legislation relating to sentencing, and to

provide comment as to the interpretation of, or legal implementation of statutory measures. The contents of judgments of the Constitutional Court are important as they lay down fundamental principles that must be followed by all other courts and statutory bodies. The Constitutional Court can also finally determine whether or not a form of punishment is unconstitutional.

1.6.3 RELIABILITY OF INFORMATION

Throughout the thesis the researcher has been aware of the shortcomings and pitfalls of the documentary method, in that as a secondary source it is an indirect form of information of which there is no guarantee of its reliability (Van der Walt, 1977:215). As such, secondary sources have been restricted to a minimum, and the danger of subjective interpretation by the researcher is thus minimised. It is, however, important to utilise such sources, as they are relevant and informative.

1.7 DELIMITATION

The researcher acknowledges that it is impossible to include all data on a universal basis. As indicated earlier, the essence of the research was the effect of the Constitution on punishment in South Africa and examining alternative forms of punishment. Within this *universum*, boundaries must be fixed for the research.

1.7.1 PERIOD IN QUESTION

Chapters in the research project are designed to present a chronological and logical sequence, including factors relating to time. In this context chapter three deals with the rights of persons who are arrested, detained and accused, whilst chapters five, six, seven and eight deal with specific types of penalties. Regarding the affect of the Constitution on punishment in South Africa, the

researcher dealt only with the period subsequent to the passing of the interim Constitution.

1.7.2 GEOGRAPHICAL LIMITATION

It was necessary to limit the geographical scope of the comparative study relative to the thesis. The following countries are included in the study, America and Canada. These countries were chosen as they have been through a long historical period in which their respective constitutions influenced the forms of punishment in their countries. There is thus a wealth of judicial decisions and literature regarding the effect of their Constitutions on punishment in their respective countries.

1.8 DEFINITION OF KEY CONCEPTS

In the context of this study, the following concepts need to be defined: forms of punishment that are not unconstitutional, and alternative forms of punishment for both adults and juveniles.

1.9 PROBLEMS AND DEFICIENCIES

An area of possible weakness was that the researcher has not been strictly objective in the presentation and interpretation of the data as is required in scientific research. However, the primary sources utilised by the researcher are factual in content, and as such, do not lend themselves to serious misinterpretation. The researcher strove throughout the research to divest him of a subjective approach to the subject matter.

There has been scant research in this field of study in South Africa, and the danger exists in breaking new ground that a researcher may easily become side-

tracked, or digress, or accord undue emphasis to peripheral issues. The researcher endeavoured to remain within the predetermined parameters throughout the research, despite the existence of so many avenues that presented themselves for exploration.

1.10 SUMMARY

The interim Constitution remained in force until the final Constitution came into operation on 4 February 1997. The main effect of the Constitution is that it changed the system of government to a constitutional democracy, and introduced an entrenched Bill of Rights. The death penalty and corporal punishment was declared unconstitutional in terms of the interim Constitution, and it is expected that all forms of punishment, and/or its manner of implementation, to a lesser or greater degree, will be affected by the provisions of the Constitution. The Constitutional Court has the power to declare any form of punishment, or treatment meted out to prisoners or other sentenced persons, unconstitutional.

It is expected that the Bill of Rights, in particular, will have a significant effect on the system of punishment in South Africa. The main objectives of the thesis are an analysis of the effect of the Constitution on punishment, and an examination of suitable alternative penalties. The nine chapters are aimed at achieving this objective. To the best of the researcher's knowledge, no comprehensive study has yet been undertaken on this topic. The choice of method of research, namely a documentary study, is dictated by the nature of the subject matter.

In addition to examining the position relating to the constitutionality of punishment and alternative penalties in South Africa, the thesis also draws a comparative analysis with the penal systems of America and Canada. The major sources of information for the research are legislation, court judgments,

government reports, reports from the South African Law Commission, periodicals, scientific journals, text books, Hansard, research findings, newspaper articles, and other journals.

CHAPTER 2

PROVISIONS OF THE CONSTITUTION, WHICH HAVE AN INDIRECT EFFECT ON PUNISHMENT

2.1 INTRODUCTION

This chapter examines relevant provisions of the Constitution, which although not having a direct bearing on the element of punishment, nevertheless provides a framework within which the criminal justice system operates. The system of government profoundly influences the manner of imposition and types of sentences imposed by courts. Separation of powers ensures the independence of the judiciary in developing its criminal jurisprudence; this is especially important in a developing constitutional democracy.

The Constitution expresses its underlying values as: "Human dignity, the achievement of equality and the advancement of human rights and freedoms. Non-racialism and non-sexism. Supremacy of the Constitution and the rule of law. Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness" (section 1). Provisions in the Bill of Rights that will have an indirect effect on punishment, and which are discussed in this chapter, include, freedom of religion, belief and opinion; freedom of expression; assembly, demonstration, picket and petition; freedom of association; political rights; citizenship; access to information; and just administrative action.

Other aspects dealt with in this chapter include, historical background to the Constitution; operational provisions of the Bill of Rights; the President and the National Executive; Courts and the Administration of Justice; State Institutions

Supporting Constitutional Democracy; Public Administration; Security Services; and General Provisions.

2.2 HISTORICAL BACKGROUND TO THE CONSTITUTION

2.2.1 INITIATIVES FOR A CONSTITUTIONAL SYSTEM OF GOVERNMENT

One of the first initiatives toward negotiations for a constitutional system of government was the publication of Constitutional Guidelines for a Democratic South Africa by the African National Congress (ANC), during 1988 (ANC Constitutional Guidelines for a Democratic SA, 1988). This was the first public expression of the views on constitutional government from this political party (or a liberation movement as it was at that stage). Shortly after this initiative, in August 1989, the ANC adopted the Harare Declaration of the Organisation of African Unity (Steytler ed., 1991:78). This document was later also adopted by the United Nations General Assembly. In 1992 the ANC proposed its own version of a Bill of Rights for a new South Africa. (Chaskalson et al, 1996:2-11).

There were also other initiatives in this regard, and one of the important initiatives occurred when the South African Government in 1986 requested the South African Law Commission to investigate and make recommendations regarding the definition and protection of group rights, and the possible extension of the existing protection of individual rights. The Commission published a Working Paper during March 1989 and an Interim Report on Group and Human Rights was published in August 1991 (SA Law Commission, Interim Report, 1991). The main ideological difference between the initiatives of the ANC and the then South African government, was that the former placed emphasis on individual rights, whilst the latter emphasised group rights.

2.2.2 ADOPTION OF THE INTERIM CONSTITUTION

Negotiations between various political bodies commenced at a forum called the Conference for a Democratic South Africa (CODESA) (Devenish, THRHR 1997:615). However, this process was not successful and it was followed by a series of bilateral negotiations between the Government and the ANC. The final product of this process was a multi-party negotiating forum at the Trade Centre in Kempton Park. It was ultimately left to this body to thrash out an interim constitution. The process at the Trade Centre was more sophisticated and provided for a negotiating council to discuss reports compiled by working groups and technical committees, whose role it was to clarify issues and present alternatives and issues to be negotiated. Lawyers and academics were co-opted to formulate clear proposals and alternatives. The interim Constitution (Act No. 200 of 1993) came into effect on the day of polling for the first democratically elected government, namely, 27 April 1994. (Chaskalson et al, 1996:2-12). Chapter 3 of the interim Constitution contains a Bill of Fundamental Rights.

2.2.3 CONSTITUTIONAL ASSEMBLY AND THE FINAL CONSTITUTION

Political parties were represented at the Constitutional Assembly according to their numerical strength after the 1994 elections, and the process of drafting the final constitution was undertaken in full view of the public. There was input from both the general public and non-governmental organisations - this added a new democratic and transparent dimension. The process was dynamic and purposeful, and even the boycotting of the proceedings by the Inkatha Freedom Party (IFP) did not undermine the process. On 8 May 1996 the final product of constitution making was put to the full Constitutional Assembly. 87% of the members voted in favour of the final Constitution, with only the Freedom Front and the African Christian Democratic Party voting against it (the balance of the

13% was made up by the absence of the IFP) (Chaskalson et al, 1996:2-16). In terms of section 73(6) of the interim Constitution, the final Constitution had to be passed by a two-thirds majority.

2.2.4 FIRST CERTIFICATION JUDGMENT OF THE CONSTITUTIONAL COURT

In terms of section 71 of the interim Constitution, the Constitutional Assembly was required to submit the final Constitution to the Constitutional Court for certification (that it complies with the constitutional principles contained in Schedule 4 to the interim Constitution). The Constitutional Court consists of 11 judges serving a non-renewable term of 12 years (Klaaren, SAJHR:11). The first certification judgment was Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996 (4) SA 744 (CC). Judgment was handed down on 6 September 1996 in terms of which the Constitutional Court refused to certify the Constitution. The Court found that the following provisions did not meet the requirements of the constitutional principles: sections 23, 74, 194, 196, 229(1), 241(1), clause 22(1)(b) of Schedule 6 and Chapter 7 (Chaskalson & Davis, SAJHR (1997):430).

2.2.5 SECOND CERTIFICATION JUDGMENT OF THE CONSTITUTIONAL COURT

After rejection of the first text by the Constitutional Court, the Constitutional Assembly proceeded to amend it accordingly. The whole process of constitution making was not re-opened and the parties concerned themselves only with the comments of the Court. On 11 October 1997 the Constitutional Assembly passed an amended text and submitted it to the Constitutional Court for certification. The Constitutional Court certified the Constitution on 4 December 1996, and it came into operation on 4 February 1997 (Ex parte Chairperson of

the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1997(2) SA 97 (CC).

2.3 FOUNDING PROVISIONS OF THE CONSTITUTION

2.3.1 SUPREMACY OF THE CONSTITUTION (SECTION 2)

Section 2 of the Constitution unequivocally states that the Constitution is the supreme law of the land to which all laws are subservient. Any law, rule or conduct, which is in conflict with any of the provisions of the Constitution, is invalid to the extent that it is inconsistent or conflictual. This section goes further and states that effect must be given to any of the provisions, which give rise to an obligation. In this way the Constitution ensures that its provisions are alive and not mere empty words.

In terms of this provision, any legislation, common law rule, regulation, proclamation, provincial legislation or by-law, dealing with punishment, and which is not consistent with the provisions of the Constitution, are invalid and unenforceable to the extent of the inconsistency. The provision goes further in that it also invalidates conduct, which is in conflict with the Constitution. In this way conduct by officials of government departments functioning within the criminal justice system may be declared unconstitutional if it conflicts with provisions in the Constitution, especially provisions in the Bill of Rights.

2.3.2 CITIZENSHIP (SECTION 3)

Provisions relating to citizenship, further entrench democracy by ensuring that all citizens are equal before the law, be it the President or a street sweeper. All citizens are equally entitled to the rights, privileges and benefits of citizenship (section 3(2)(a)). This provision is balanced by the fact that duties and

responsibilities are also equally binding on all citizens: "All citizens are ... equally subject to the duties and responsibilities of citizenship" (section 3(2)(b)).

The Constitution provides further that future legislation should regulate "the acquisition, loss and restoration of citizenship" (section 3(3)). The South African Citizenship Act, No. 88 of 1995, provides for the acquisition, loss and resumption of citizenship. Chapter 3 of this Act determines the situations in which a South African citizen may lose his or her citizenship, for example, renunciation of citizenship, acquiring citizenship of another country, etc. This provision would prohibit any form of punishment, which would result in the loss of citizenship of a South African citizen, for example, the ancient punishment of banishment.

In terms of section 1 of the Fourteenth Amendment to the American Constitution, "(n)o one shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;". The Canadian Charter provides for specific rights for citizens, for example, democratic rights (section 3) and mobility rights (section 6).

2.3.3 LANGUAGES (SECTION 6)

Section 6 of the Constitution provides that there are eleven official languages, namely, Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu. All languages have equal status and none may be discriminated against. The Government is obliged to utilise at least two of these languages in its official business communication, whilst local government authorities may consider local language usage when deciding which official language to use. National and provincial governments may use any particular official language for the purposes of government, taking into account usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population as a whole, or the province concerned.

However, the national and provincial governments must use at least two official languages (section 6(3)).

Thus prisoners and other detained persons have the right to be addressed, and dealt with in any of the official languages. In its communication with prisoners, prison authorities must make use of at least two of the official languages. Government officials involved in these institutions have to make adequate provisions to cover this contingency.

Section 16 of the Canadian Charter states that English and French are the official languages of Canada and have equality of status, equal rights, and privileges as to their use in all institutions of Parliament and the Government of Canada. Section 23 provides for language rights in respect of language of instruction. The American Constitution is silent on the issue of official languages.

2.4 PROVISIONS OF THE BILL OF RIGHTS, WHICH HAVE AN INDIRECT EFFECT ON PUNISHMENT

The Bill of Rights is contained in Chapter 2 of the Constitution, and the contents of this Chapter are similar to its predecessor in the interim Constitution, namely, Chapter 3 (Fundamental Rights). The rights protected in the Bill of Rights will have both a direct and an indirect effect on punishment in South Africa. Aspects of the Bill of Rights, which will have an indirect effect on punishment, are the following:

- (a) Freedom of religion, belief and opinion (section 15);
- (b) Freedom of expression (section 16);
- (c) Assembly, demonstration, picket and petition (section 17);
- (d) Freedom of association (section 18);
- (e) Political rights (section 19);

- (f) Citizenship (section 20);
- (g) Access to information (section 32); and
- (h) Just administrative action (section 33).

Aspects of the Bill of Rights that have a direct effect on punishment will be discussed in greater detail in the rest of the chapters.

2.4.1 FREEDOM OF RELIGION, BELIEF AND OPINION (SECTION 15)

Section 15 of the Constitution reads as follows:

- "(1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.
- (2) Religious observances may be conducted at state or state-aided institutions, provided that-
- (a) those observances follow rules made by the appropriate public authorities;
 - (b) they are conducted on an equitable basis; and
 - (c) attendance at them is free and voluntary.
- (3) (a) This section does not prevent legislation recognising -
- (i) marriages concluded under any tradition, or a system of religious, personal or family law; or
 - (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.
- (b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution."

This provision would allow prisoners to partake in religious observances subject to the provisions stated above in subsection (2). However, problems may arise when a religion has practices that others may find abhorrent, for example, devil worshipping, or where the religious practice entails an unlawful act, like smoking

marijuana. In such instances it would be for the Department of Correctional Services to lay down rules for religious practices. The limitations provision in the Constitution (section 36) could also act to limit this right in the prison environment.

The element of voluntariness would weigh against requiring prisoners to pray or attend a religious observance of any nature. In the past there was a strong religious element in the rehabilitation process in South African prisons, and in terms of this provision it would not be possible for prison authorities to put in place an "official" religion (Chaskalson et al, 1996:19-10)

Section 2(a) of the Canadian Charter guarantees freedom of religion, and in the case of R v. Big M Drug Mart (1985) S.C.R. 295, freedom of religion was defined as "... the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal...". The First Amendment to the American Constitution prohibits the Government, both at national and state level, from establishing an official religion (Everson v. Board of Education 330 U.S. 15 (1947)). It was held in O'lonc v. Estate of Shabazz 482 US 342 (1987) that freedom of religion was not an absolute right afforded to prisoners when a denial of religious participation is reasonably related to legitimate penological interests in institutional order, security and rehabilitation. Branham and Krantz state that it is not incumbent on prison authorities to meet all religious requirements, provided that they meet the requirements that were within their means (1991:157).

In terms of section 14 of the Correctional Services Act, No. 111 of 1998, prisoners are allowed freedom of religion, belief, thought, conscience and opinion, and may attend religious services and meetings should they wish to do so. Places of worship must be provided where practicable, but no prisoner may

be compelled to attend any religious service or meeting. This provision appears to satisfy the constitutional provisions within the prison context.

2.4.2 FREEDOM OF EXPRESSION (SECTION 16)

Section 16 of the Constitution defines this right as follows:

- "(1) (a) freedom of the press and other media;
(b) freedom to receive or impart information or ideas;
(c) freedom of artistic creativity; and
(d) academic freedom and freedom of scientific research.
- (2) The right in subsection (1) does not extend to -
(a) propaganda for war;
(b) incitement of imminent violence; or
(c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."

Although protecting freedom of expression, this section prohibits hate speech, incitement of violence and advocacy of hatred based on race, ethnicity, gender or religion. Prison authorities should formulate rules to prohibit freedom of expression provided it complies with the limitations provision. Hate speech can be described as expressive conduct, which insults a racial or ethnic group, whether by suggesting inferiority or by effecting exclusion (Chaskalson et al, 1996:20-47). According to Johannessen, freedom of expression is generally considered to be a cornerstone in a democratic society, and its restriction must be proportionate to the legitimate aim pursued, whilst the basis for justifying the restriction must be relevant and substantial (1994:231 & 239).

Hate speech is also outlawed in the Canadian Constitution - R v. Keegstra 1990 3 SCR 697, 3 CRR (2d) 193. It was decided in the American case of R.A.V. v.

City of St Paul 505 US 377, 112 S Ct 2538 (1992) that hate speech violated freedom of speech by violating the requirement of content-neutrality. The prison environment with its element of confinement, and the frustration that it causes, is fertile ground for hate speech, and prison authorities must make regulations to prohibit such communication.

In terms of section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act, No. 4 of 2000, no person may publish, propagate, advocate or communicate hate speech (defined as speech intended to be hurtful, harmful or which incites harm or promotes or propagates hatred). In addition to civil remedies, a court may refer cases dealing with hate speech to the Director of Public Prosecutions for the institution of criminal charges.

Section 2(b) of the Canadian Charter protects freedom of expression in a very broad sense, and even communication for the purposes of prostitution is protected (Prostitution Reference Case (1990) S.C.R. 1123). However, hate propaganda is expressly prohibited in terms of the Criminal Code. The First Amendment to the American Constitution protects freedom of speech and freedom of the press. The American Supreme Court was at pains in refusing to curtail this right where it found a statute prohibiting persons from burning crosses on property belonging to black persons, unconstitutional. The Court stated that the action could be prosecuted in other ways (R.A.V. Petitioner v. St. Paul, Minnesota 1992 U.S.).

It was reported in the Mail and Guardian that a group of prisoners in the Boksburg Prison started a publication called the Boksburg Progressive Press. The publication was introduced as part of a rehabilitation programme, the aim of which is to allow prisoners the opportunity to learn basic reporting skills. It is envisaged that such skills would render them employable once released from prison. As freedom of expression is limited in prison, warders were concerned

about the contents of the publication. The newspaper is only published once warders have scrutinised the issue and granted permission for its publication, whilst final permission for publication resorts with the Head of the Prison. (9 - 14 June:36).

2.4.3 ASSEMBLY, DEMONSTRATION, PICKET AND PETITION (SECTION 17)

Section 17 states that "(e)veryone has the right, peacefully and unarmed, to assembly, to demonstrate, to picket and to present petitions." It may be necessary in the prison context to limit the right to assemble and demonstrate as it may lead to violence, which could endanger the safety of other prisoners and prison officials. By its nature, life in prison infringes on a prisoner's right to assemble, demonstrate and picket. However, such infringement would be justified in terms of the limitations provision.

The First Amendment to the American Constitution protects the right of people to assemble peacefully. Section 2(c) of the Canadian Charter states that everyone has the right of peaceful assembly.

2.4.4 FREEDOM OF ASSOCIATION (SECTION 18)

This section simply reads that everyone has the right to freedom of association. Prisoners would thus be able to form and join organisations of their choice, provided it does not infringe prison regulations, which regulations could prohibit certain organisations / associations by virtue of the environment. There currently exists a prisoners' organisation called the South African Prisoners' Organisation for Human Rights (SAPOHR) to which many prisoners belong (Prodder, 2001:169). However, membership of prison gangs is usually prohibited by prison rules and regulations.

Section 2(d) of the Canadian Charter guarantees everyone the right to freedom of association, and any limits on this freedom is only permissible within such reasonable limits as prescribed by laws justified in a free and democratic society (Hogg, 1992:991)).

2.4.5 POLITICAL RIGHTS (SECTION 19)

Section 19 of the Constitution reads as follows:

- “(1) Every citizen is free to make political choices, which includes the right -
- (a) to form a political party;
 - (b) to participate in the activities of, or recruit members for, a political party; and
 - (c) to campaign for a political party or cause.
- (2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.
- (3) Every adult citizen has the right -
- (a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
 - (b) to stand for public office and, if elected, to hold office.”

According to this provision it appears that prisoners have voting rights and the right to hold office if elected, in that they have not been expressly excluded as a group. Prisoners have not been deprived of their citizenship, and as such, should be able to vote. However, this is a contentious issue and during the 1994 elections only certain categories of prisoners were allowed to vote in terms of a proclamation issued under the Electoral Act, No. 202 of 1993. Whether or not all prisoners or a specific category of prisoners are allowed to vote in an election must be determined with reference to the limitations clause (Chaskalson et al, 1996:23-15).

In terms of section 47(1)(e) of the Constitution, a citizen who was convicted of an offence and sentenced to more than 12 months imprisonment without the option of a fine, may not be elected as a member of the National Assembly. This disqualification expires five years after completion of the sentence.

It is generally accepted that the main reason for denying prisoners the right to vote is that they violated the rights of others. Certain writers disagree with this view in that retribution is not the sole justification for imprisonment. In the following case, it is clear that retribution is becoming a less important criterion for punishment: S v. R 1993 (1) SA 476 (A). Refusal to allow prisoners to vote could amount to additional punishment, which was not originally imposed when the prisoner was sentenced. It may furthermore be discriminatory, as those persons who are at the financial means may escape imprisonment because of competent and adequate defence, whilst those who are indigent may not have the same advantage (Chaskalson et al, 1996:23-15).

However, it was reported in the Sunday Times of 21 May 2000, that Parliament has decided to fast track legislation aimed at preventing prisoners from voting in the local government elections. The report stated that in certain wards prisoners could potentially cast more votes than other persons who are law-abiding. In this way prisoners may become elected representatives in municipalities. In terms of clause 7(1) of the Local Government: Municipal Electoral Bill [B35 - 2000], a person may only vote in a municipal election if he or she is not lawfully imprisoned or detained on voting day. However, after deliberations the relevant portfolio committee removed this provision [B35B-2000].

Although section 3 of the Canadian Charter grants every citizen the right to vote in elections, this right may be limited by laws justified in a free and democratic society (Hogg, 1992:998). Sections 50 and 51 of the Canadian Elections Act of 1985, prohibit inmates in a penal institution from exercising this right. However,

in the case of Belczowski v. Canada (1992) 90 D.L.R. (4th) 330 (F.C.A.), the provision allowing for the exclusion of inmates in a penal institution from exercising the right to vote was declared unconstitutional. The American Constitution does not specifically grant inmates in a penal institution the right to vote, although the Fifteenth Amendment states that the right to vote may not be denied on account of race, colour or previous condition of servitude.

2.4.6 CITIZENSHIP (SECTION 20)

This section provides simply that no citizen may be deprived of citizenship. As stated above, the South African Citizenship Act, No. 88 of 1995, makes provision for the acquisition, loss and resumption of citizenship. The discussion above in 2.3.2 is applicable here as well.

2.4.7 ACCESS TO INFORMATION (SECTION 32)

Section 32(1) broadly states that everyone has the right of access to any information held by the State and any information held by another person and that is required for the exercise or protection of any rights. The Promotion of Access to Information Act, No. 2 of 2000, was enacted to give effect to this right. The long title of this Act states that it gives effect to the constitutional right of access to any information held by the State and any information that is held by another person and that is required for the exercise or protection of any rights. The Act creates an elaborate system of requesting and granting of information.

As the records of the Department of Correctional Services are not exempted by section 12, prisoners may, under certain circumstances, request access to information held by the Department. Section 38 of the Act provides that a public body must refuse to disclose information that could reasonably be expected to endanger the life or physical safety of an individual, whilst section 39 provides

for the protection of certain information held by public bodies. A public body may refuse access to information that concerns the disclosure of methods, techniques, procedures or guidelines used for the prosecution of offenders; that reveals the identity of a confidential source of information (an informant); and that could facilitate the commission of an offence, (for example, escaping from lawful detention). In this way prisoners cannot access sensitive or confidential information held by government departments.

2.4.8 JUST ADMINISTRATIVE ACTION (SECTION 33)

Section 33 of the Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair, and everyone who has been adversely affected by such action is entitled to written reasons.

The Promotion of Administrative Justice Act, No. 3 of 2000, was enacted to give effect to section 33 of the Constitution. The aim of the Act is to give effect to the right to administrative action that is lawful, reasonable and procedurally fair, and to the right to written reasons for administrative actions (long title of the Act). Section 1 of the Act defines administrative action as any decision taken, or a failure to take a decision by an organ of state, when exercising a power in terms of the Constitution or a provincial constitution, or exercising a public power or performing a public function in terms of any legislation, which adversely affects the rights of any person which has a direct, external legal effect. This definition includes action by officials of the Department of Correctional Services, for example, the decision to grant or refuse to grant a prisoner parole, or disciplinary action against a prisoner.

However, section 2 of the Act provides that the Minister of Justice may exempt certain organs of state from the provisions of sections 3, 4 or 5 of the Act. Such

exemption must first be approved by Parliament, and thereafter it must be published in the Government Gazette.

Section 3 of the Act deals with procedurally fair administrative action affecting a person. This section provides that administrative action, which affects the rights of people, must be procedurally fair, in that:

- (a) there must be adequate notice of the intended administrative action and the purpose thereof;
- (b) the person affected must have a reasonable opportunity to make representations;
- (c) there must be a clear statement of the administrative action;
- (d) the person must be informed of the right to review of or appeal against the finding; and
- (e) the person must be informed of the right to request reasons for the action.

Subsection (4) allows for a departure from the above requirements if it is reasonable and justifiable in the circumstances.

In terms of section 5 of the Act, any person whose rights have been materially and adversely affected by administrative action, and who has not been given reasons for such action may, within a period of 90 days request the administrator concerned to furnish written reasons for the action. Once a request is made the administrator must give adequate reasons in writing for the administrative action, within 90 days. Should no reasons be forthcoming, it is assumed that the administrative action was taken without good reason. However, should there be reasonable and justifiable circumstances, an administrator may depart from this requirement (the Act does not define "reasonable and justifiable circumstances" therefore each situation will have to be dealt with on its merits).

Administrative decisions may be subject to judicial review under certain circumstances. Amongst the grounds which may lead to judicial review, are:

procedurally unfair action; bad faith or arbitrary action; presence of an ulterior motive; or the consideration of irrelevant factors (section 6 of the Act). Section 7 provides that any procedure for judicial review must be instituted without unreasonable delay, but within 180 days. The court or tribunal which reviews the proceedings has wide powers to remedy the situation, for example, granting a temporary interdict; prohibiting the administrator from acting in a certain manner; or setting aside the administrative action (section 8 of the Act). Actions by correctional officials in respect of prisoners are subject to the provisions of this Act (Corder and Smit, SACJ(1998)11:478)).

2.5 OPERATIONAL PROVISIONS OF THE BILL OF RIGHTS

2.5.1 RIGHTS GENERALLY (SECTION 7)

This section contextualises the Bill of Rights as the cornerstone of democracy in South Africa in that it enshrines the rights of all people and affirms the democratic values of human dignity, equality and freedom. The State is obliged to respect, protect, promote and fulfill the rights contained in the Bill of Rights. However, it emphasises the principle that none of the rights are unlimited in its application and that the rights may be subject to the limitation contained in section 36 and in other sections of the Bill of Rights. In this regard section 234 states that in order to deepen the culture of democracy established by the Constitution, Parliament may adopt Charters of Rights consistent with the provisions of the Constitution. Thus further rights may be protected, provided this protection is consistent with the provisions of the Constitution. Rights are not absolute, and have to be balanced against other applicable rights in determining whether or not a right has been infringed.

2.5.2 APPLICATION OF RIGHTS (SECTION 8)

Section 8 of the Constitution provides that the Bill of Rights applies to all law (common law, legislation, regulations, proclamations and by-laws), and binds the legislature, the executive, the judiciary and all organs of state. An organ of state is defined in section 239 of the Constitution as:

- “(a) any department of state or administration in the national, provincial or local sphere of government; or
- (b) any other functionary or institution
- (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.”

All prisons and correctional institutions, whether they owned or managed by the State or a private institution, would fall within the definition of an organ of state, as the institution need not be an intrinsic part of government (Chaskalson et al, 1996:10-62). Chaskalson et al is of the view that section 8(1) applies also in disputes between private parties and in this way the legislature has unequivocally confirmed the direct horizontal application of the Constitution (1996:10-57). He draws support for his view from the decision in Protea Technology Ltd v. Wainer 1997 (9) BCLR 1225 (W). The Constitution thus applies between the State and individuals and between individuals *inter se*; it also applies between juristic persons and individuals (Chaskalson et al, 1996:10-65).

Depending on the nature of the right and the nature of the duty imposed, the Bill of Rights may also apply to juristic persons (subsection (2)). In this regard, in order to give effect to a right in the Bill of Rights, a court must, if necessary,

develop the common law in order to give effect to the right or may develop rules of the common law to limit the right, provided such limitation is in accordance with section 36(1) of the Constitution. Furthermore, a juristic person is entitled to rights in the Bill of Rights to the extent required by the nature of the right and the nature of that juristic person (subsections (3) and (4)).

2.5.3 ENFORCEMENT OF RIGHTS (SECTION 38)

According to section 38, certain persons and bodies have competence to approach a competent court if they allege that a right in the Bill of Rights has been infringed or threatened. If a court is convinced that there is such infringement or threat of infringement, it may grant appropriate relief, which may include a declaration of rights. These persons are:

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members.

In the case of Ferreira v. Levin 1996 (1) BCLR 1 (CC), the Constitutional Court examines in depth the provisions of this section.

2.5.4 INTERPRETATION OF THE BILL OF RIGHTS (SECTION 39)

Section 39 reads as follows:

- “(1) When interpreting the Bill of Rights, a court, tribunal or forum -
- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 - (b) must consider international law; and

- (c) may consider foreign law.
- (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
- (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.”

An important aspect, which dates from the interim Constitution, relates to the manner in which a court determines whether or not a right has been infringed. The Constitutional Court in S v. Zuma & others 1995 (2) SA 642 (CC) adopted a two-stage approach. In the first stage the court defines the ambit of the right by articulating the values, which the right seeks to uphold and identifying the interests, which it seeks to protect. If necessary, the court must balance competing rights in the context of a specific law or act in a specific factual context. The final question to be answered is whether the law or act of which complaint is made, in fact encroaches upon that right. Once this is established the enquiry proceeds to the second stage. The onus of proving the infringement of a right rests with the party who alleges such infringement.

If the law or act is found in the first stage to infringe a protected right, the question at this stage is whether the limitation of the right is reasonable and justifiable in an open and democratic society based on freedom and equality (section 36 of the Constitution). At this stage the value of the right as defined is balanced against the social and political objects, which may require its limitation. If there are competing rights, they must be balanced at this stage. The onus of proving that the limit on the right is permissible in terms of the limitations provision rests upon the party seeking to uphold the limitation (Chaskalson et al, 1996:11-34).

The Canadian Supreme Court has also adopted the two-stage approach, although in practice it is not always easy to implement (Davis et al, 1997:15). In the case of R v. Oakes (1986) 26 DLR (4th) 200E, the Supreme Court of Canada laid down a two-stage procedure in order to determine the constitutionality of an alleged infringement of a fundamental right.

The ambit of the influence of the Bill of Rights is wider than usual as in addition to courts, administrative tribunals and bodies are also affected. This aspect broadens the influence of the Bill of Rights. When interpreting the Bill of Rights, courts must consider international law. International law, especially law relating to punishment, plays an important role as section 232 of the Constitution provides that when interpreting legislation, courts must always prefer any reasonable interpretation which is consistent with international law over an interpretation which is inconsistent with international law. There are numerous international charters and declarations on punishment, which would be affected by this provision.

2.5.5 LIMITATION OF RIGHTS (SECTION 36)

It may be prudent to first examine the limitation of rights section contained in the Bill of Rights before proceeding on a discussion of the extent and effect of these rights. In terms of section 7(3) of the Constitution, the rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill of Rights. It can be said that section 7(3) emphasises the principle that the rights protected in the Bill of Rights may be limited in certain circumstances. General requirements for the limitation of these rights are contained in section 36 of the Constitution.

Section 36 states as follows: "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is

reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”

In the above context the word law includes legislation, common law and customary law - see Shabalala v. Attorney-General of the Transvaal 1995 (12) BCLR 1593 (CC). In this way a legislative body may limit rights when they are regulating matters within their ambit of authority. Legislation which limits such rights may confer a discretion to limit rights to an administrative body, for example, a parole board, provided it does not completely transfer this power (Rautenbach et al, 1998:1A-48). However, for these administrative acts to qualify as law of general application they must be accessible, comprehensible and predictable (Rautenbach et al, 1998:1A-50).

Essentially the purpose of the limitation must be in relation to what is acceptable in an open and democratic society. It should be noted that the word “including” in section 36(1) indicates that the factors to be considered are not restricted to the ones mentioned in the provision. According to Rautenbach et al, the institution or person limiting the right may only do so in order to promote or protect a lawful public interest (1998:1A-53). However, section 36 does not indicate or identify these lawful public interests. With regard to the nature and extent of the limitation, the Constitutional Court stated as follows in S v. Bhulwana 1995 (12) BCLR 1579: “The more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be.”

In applying this provision the courts must test whether the limitation is actually capable of promoting the purpose, otherwise there would be no relation between the limitation and the purpose. Thus in reviewing the constitutionality of a limitation, the courts would have to examine and have due regard to alternatives which would limit the right less severely. Courts will have to test whether the less restrictive alternative is as effective as the limitation being proposed. Once the above provisions have adequately been complied with, a legislature or administrative tribunal may limit any of the rights protected in the Bill of Rights.

Section 1 of the Canadian Charter contain a similar provision and states that the rights and freedoms set out in the Charter are subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. It is left to the courts to determine whether such limitation is valid and justifiable.

2.6 PRESIDENT AND NATIONAL EXECUTIVE (CHAPTER 5)

The President is head of both the State and the Executive, and it is the function of the President to uphold the provisions of the Constitution as the supreme law of South Africa. The powers of the President include, appointing a commission of inquiry, pardoning or relieving offenders, and remitting fines, penalties or forfeitures (section 84). In exercising these powers the President almost always acts on the advice of the Cabinet, and more particularly one of the relevant ministers (section 101).

Presidential pardon entails releasing prisoners before the expiry of their term. The President has the power to grant amnesty to a prisoner or a number of prisoners in terms of this provision. On auspicious events or dates, prisoners convicted of committing minor offences, or those prisoners who are close to completing their term may be released by presidential decree. The President

also has the power to reduce the term of either individual prisoners or categories of prisoners. When this method is employed, certain categories of prisoners are usually excluded, for example, those prisoners who were convicted of violent crimes or dishonesty involving large sums of money.

In terms of section 82 of the Correctional Services Act, the President may at any time authorise the placement on correctional supervision or parole of any sentenced prisoner, subject to such conditions as may be recommended by the Correctional Supervision and Parole Board, and remit any part of a prisoner's sentence.

According to Canadian law, pardons are considered an element of the general power of a sovereign to determine appropriate punishment (Cole & Manson, 1990:399). However, as the criminal law developed and began to accept and implement the concepts of excuse, justification and incapacity, so did the traditional role of pardon diminish (Cole & Manson, 1990:400). In the case of Re Royal Prerogative of Mercy Upon Deportation Proceedings (1933) 2 D.L.R. (S.C.C.), it was held that in capital cases the Governor-General had to act on the advice of the Privy Council when pardoning offenders.

There are, in essence, two forms of pardon in the Canadian legal system, namely, free and conditional pardon. In Hay v. Justices of the Tower of London (1890) 24 Q.B.D. 561, it was held that free pardon placed the pardoned individual in the position of someone who had never been convicted of the offence in question. On the other hand, a conditional pardon is in effect the substitution of one sentence with another, and the prisoner is free of the consequences of the original punishment, provided the conditions imposed are not contravened (Cole & Manson, 1990:404).

Granting of amnesty is also a form of pardon in terms of Canadian Law. Amnesties are usually granted to all prisoners in recognition of some significant or important event (Cole & Manson, 1990:404). Pardon is seen as a safety valve in cases where persons are wrongly convicted, as the criminal justice system is fallible (Cole & Manson, 1990:407). Pardon can be granted in exchange for evidence against accomplices (Re Royal Prerogative case). In terms of section 690 of the Canadian Criminal Code, the Minister of Justice may, on application, order a new trial, refer the matter back to the Court, or request the opinion of the Court of Appeal on criminal matters. It was held in the case of Canada v. Schmidt (1987) 1 S.C.R. 500 that an application in terms of section 690 is reviewable by a court of law, as are all executive discretionary acts of pardon by the Head of State. In terms of section 2 of Article 2 of the American Constitution, the President has the power to grant reprieves and pardons for criminal offences.

It was reported in The Argus of 27 May 2000, that the President has commenced the process of commuting the death sentences of former death row prisoners. A panel of judges was in the process of making recommendations to the President in this regard. Many of the prisoners will be released soon as they had already served a substantial part of their prison term. The Criminal Law Amendment Act of 1997 provides for the setting aside of death sentences imposed on offenders and their substitution with other forms of punishment.

In summary it can be said that it is the function of the courts to determine guilt or innocence, and the power of pardon of the President is residual and extraordinary in that the criminal justice system is not infallible.

2.7 COURTS AND ADMINISTRATION OF JUSTICE (CHAPTER 8)

Chapter 8 of the Constitution regulates the establishment and functioning of the judicial system. Courts are independent and only subject to the provisions of the Constitution (section 165). This Chapter makes provision for the following courts: Constitutional Court, Supreme Court of Appeal, High Court and Magistrates Courts (Regional and District). The Constitutional Court is the highest court, but may only decide constitutional matters. Its power includes the authority to declare an Act of Parliament, or parts of it invalid if it is unconstitutional. High courts also have the power to decide on constitutional matters except insofar as the Constitutional Court has sole jurisdiction on the matter in question.

A High Court and the Supreme Court of Appeal may make an order concerning the constitutional validity of an Act of Parliament, a Provincial Act or conduct of the President, but an order of constitutional validity has no force, unless it is confirmed by the Constitutional Court (section 172(2)(a)). It was reported in the Sunday Times of 30 April 2000, that traditional and community courts are to be made part of the criminal justice system. The South African Law Commission is in the process of formulating legislation aimed at empowering these courts to adjudicate on a broad range of crimes. Currently traditional courts operate extensively in the rural areas and are presided over by chiefs and tribal councillors. One of the controversial issues that the legislation will have to address is corporal punishment, which although outlawed by legislation, is widely used as a form of punishment by these courts (Sunday Times, 30.4.2000:2).

The report states further that the jurisdiction of traditional courts will go beyond petty offences. At present these courts use moral clout rather than the power of the law. Community courts are expected to deal mainly with disputes or crimes

committed within the community. One of aims of the community courts is to prevent, and possibly eliminate “kangaroo courts”, and to render criminal justice more accessible to the community (Sunday Times, 30.4.2000:2).

2.8 STATE INSTITUTIONS SUPPORTING CONSTITUTIONAL DEMOCRACY (CHAPTER 9)

Although there are a number of state institutions, which are established in terms of Chapter 9 of the Constitution, only three have a direct bearing on our penal system, these are the Public Protector, the South African Human Rights Commission and the Commission for Gender Equality.

2.8.1 PUBLIC PROTECTOR (SECTION 182)

The Public Protector is established in terms of section 182 of the Constitution, and has the power to investigate the conduct of any state institution, including a prison or place for correctional treatment, and take appropriate remedial action. The Public Protector has jurisdiction over all organs of state, all institutions in which the state is the majority or controlling shareholder, and any public entity as defined in section 1 of the Reporting by Public Entities Act, No. 30 of 1997. Although it may not investigate court decisions, all state officials must be accessible to it. An independent body, the Public Protector has wide powers to investigate instances of abuse and malpractices in prisons and other correctional institutions. Reports may be made directly by inmates or their families or friends, and the Public Protector's office can investigate independently from the authorities in control of the institution in question.

In terms of section 6 of the Public Protector Act, No. 23 of 1994, the Public Protector is competent to investigate, on his or her own initiative or on receipt of a complaint, any alleged -

- maladministration in connection with the affairs of government at any level;
- abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a public function;
- improper or dishonest act, or omission or corruption, with respect to public money;
- improper or unlawful enrichment or receipt of any improper advantage, or promise of such enrichment or advantage, by a person as a result of an act or omission in the public administration or in connection with the affairs of government at any level or of a person performing a public function; or
- an act or omission by a person in the employ of government at any level, or a person performing a public function, which results in unlawful or improper prejudice to any other person.

It is clear from the above that the Public Protector enjoys wide powers in investigating maladministration or corruption, either as a result of a report or on its own initiative. The Act further gives the Public Protector powers of investigation, which include the power to enter any premises or summon any person to appear in person or to submit documents for examination (section 7 and 7A of the Public Protector Act).

According to section 7 and 7A of the Public Protector Act, the Public Protector may exercise the following powers during an investigation:

- (a) direct any person to appear to give evidence or to produce any document in their possession or under their control;
- (b) request any person at any level of government, or performing a public function, to assist a particular investigation; and
- (c) make recommendations and take appropriate remedial action.

Section 181 of the Constitution ensures that the Public Protector is independent and subject only to the Constitution and the law. The Public Protector must be impartial in the exercise of its functions, which are to be carried out without fear, favour or prejudice, and no person or organ of state may interfere with the functioning of the Public Protector. The job of the Public Protector is to ascertain the facts of a case being investigated and to reach an impartial and independent decision on the merits of the case. In this respect, the nature of the office is similar to that of an ombudsman (Public Protector, Report No. 10:4).

The Public Protector must report at least once a year on its activities to the National Assembly, but may submit a report of an investigation at any time to this body. The Public Protector may either on its own initiative or in response to a report of a prisoner or an interested party, investigate conditions in a prison. In such investigation the Public Protector will have all the powers mentioned above, and a report on the investigation may also be made to the National Assembly.

2.8.2 SOUTH AFRICAN HUMAN RIGHTS COMMISSION (SECTION 184)

In terms of section 184 of the Constitution, the South African Human Rights Commission (SAHRC) must:

- (a) promote respect for human rights and develop a culture of human rights;
- (b) promote the protection, development and attainment of human rights; and
- (c) monitor and assess the observance of human rights in South Africa.

This section provides further that legislation may be enacted to give the SAHRC the power to investigate and report on the observance of human rights and the steps to secure appropriate redress where human rights have been violated. The Human Rights Commission Act, No. 54 of 1994, which was enacted to give effect to these powers, provides for, inter alia, the following matters: its independence and impartiality; access to the President and Parliament; its

powers, duties and functions; modus operandi of investigations; entering and searching premises; etc.

Members of the SAHRC have the power to monitor and assess abuses of human rights in the country, as its main function is to promote a culture of respect for human rights countrywide. Like the office of the Public Protector, it has the power to investigate and report on human rights violations. Its other functions entail research and education on human rights matters.

In a report on the conditions at Pollsmoor Prison in Cape Town, the SAHRC stated that conditions at the prison were "appalling", and certain of the sections within the prison were overcrowded by over 200%. There are insufficient mattresses and many prisoners have to sleep on the floor. Awaiting trial prisoners, who make up more than half the total prison population, often have to wait up to three years for their cases to be heard in court (some are charged with petty crimes, but cannot afford the bail amount). In addition there is a significantly high number of juvenile prisoners amounting to over 1600. Because of the overcrowding and the shortage of staff, the process of rehabilitation is severely hampered. Staff are demoralised and barely cope with their daily functions. (Cape Times, 13.4.2000:4).

Its mission statement states that "(i)t is committed to promote respect for, observance of and the protection of human rights for everyone without fear or favour" (SAHRC, Fourth Annual Report:viii). The SAHRC is of the view that crime and its consequences must be dealt with firmly, but fairly and within the parameters of the Constitution (SAHRC, Fourth Annual Report:14).

The SAHRC has powers similar to the Public Protector, which are stipulated in the Constitution and the Human Rights Commission Act. In terms of section 184(2) of the Constitution, the "Human Rights Commission has the powers, as

regulated by national legislation, necessary to perform its functions, including the power -

- (a) to investigate and to report on the observance of human rights;
- (b) to take steps to secure appropriate redress where human rights have been violated;
- (c) to carry out research; and
- (d) to educate."

2.8.2.1 INVESTIGATIONS AT SCHOOLS

During the period 1997–1998, the SAHRC established that corporal punishment was administered to students at schools in contravention of the South African Schools Act, No. 84 of 1996.

2.8.2.2 INVESTIGATIONS AT PRISONS

The SAHRC is of the view that human rights applies to all persons, simply because they were born human, and these rights can never be revoked, not even if the subject is a prisoner who has violated someone else's human rights. According to the Third Annual Report of the SAHRC (page 23), it received 327 complaints from prisoners for the period 1997 - 1998. These complaints were received in terms of its National Prisons Project, which is an on-going process of monitoring prison conditions nationally. The main categories of complaints were as follows:

- (a) assault - 95
- (b) health care - 49
- (c) transfers - 46
- (d) parole/bail - 45
- (e) dignity - 14
- (f) equality - 10

(g) education - 6.

In 1997 the SAHRC produced a comprehensive report in which it dealt with the following aspects: observations from prisons visited; complaints from prisoners; and summary and recommendations.

The SAHRC also visited the Closed Maximum Security Unit at Pretoria Prison (C-Max) and were of the view that it could cause more harm than good. One of the main problems identified by the SAHRC was the arbitrary manner in which prisoners were chosen for transfer to C-Max. The aim of this type of prison is to house only the most dangerous prisoners and those with a history of prison escapes. The SAHRC was of the view that despite the need to incarcerate dangerous prisoners in institutions like C-Max, the human rights of these prisoners should still be protected. This aspect was essential as the Department of Correctional Services expressed its intention to build a number of C-Max prisons around the country (a C-Max prison has recently been built in the Western Cape) (SAHRC, Third Annual Report:46-47).

According to Luyt, the Pretoria C-Max detains inmates in two phases. Under phase one, inmates viewed as more problematic than those under phase two are escorted with an electric shield, whilst being cuffed at the wrists and ankles. Inmates under phase two are only subjected to restraint measures like a belly chain and kidney belt in cases of emergency.

In its Fourth Annual Report, the SAHRC states that it remains convinced that C-Max prisons "go way beyond the legitimate demands of the criminal justice system and of the broader society" (p.14). The SAHRC monitors prisons on an on-going basis and makes both announced and unannounced visits to prisons. Hereunder are examples of findings on unannounced visits to certain prisons.

(a) Pretoria Local Prison

This prison houses more than twice the amount of prisoners it was intended for. More than three-quarters of the prisoners are awaiting trial (many prisoners complained of waiting for very long periods before their cases went to trial). The facilities were inadequate and there were numerous complaints by prisoners of warders assaulting them. The SAHRC recommended that the Department of Justice review the cases of accused persons who had been granted bail, but were still in prison, and that more blankets and facilities be supplied. On a later visit it was established that the recommendations were in the process of being implemented. (SAHRC, Third Annual Report:48).

(b) Mdantsane Prison

A visit to this prison revealed a number of problems, for example, weak personnel management, poor physical condition of the structure of the prison building, inadequate facilities and overcrowding. A later visit to the prison revealed that conditions had in fact worsened. (SAHRC, Third Annual Report:48).

(c) Lopserfontein Prison

Although the prison was not overcrowded, it experienced problems of escapes from prison and a high absentee rate of warders. A follow-up visit to the prison indicated vast improvements in staff morale and a lowering of the absentee rate, although prison escapes were still a problem (SAHRC, Third Annual Report:48).

(d) Nelspruit Prison

The problems experienced at this prison included overcrowding, limited training programmes for prisoners and the fact that trial awaiting prisoners were in the majority. The SAHRC made recommendations that the Department of Justice review the bail conditions of trial awaiting prisoners, and also pursue the matter

with the Provincial Commissioner of Correctional Services (SAHRC, Third Annual Report:48).

Police holding facilities are also visited by the SAHRC. During September 1998 the following police holding facilities were visited: Johannesburg, Pretoria, East Rand, Guguletu, Milnerton and the CR Swart Police Station in KwaZulu-Natal. A number of observations were made, these included:

- (a) many inmates were frightened and intimidated;
- (b) injuries were visible on a number of inmates;
- (c) inmates were not properly informed about their rights;
- (d) many inmates were denied the right to communicate with their families or legal representatives;
- (e) conditions were not conducive to good health; cells were often dirty, overcrowded and poorly lit; and
- (f) women, men and children were often not placed in separate cells.

(SAHRC, Fourth Annual Report:38).

2.8.2.3 INSPECTING JUDGE OF PRISONS

In terms of section 86 of the Correctional Services Act, the Minister of Correctional Services appointed Judge J J Trengove as the Inspecting Judge of Prisons. Although the Inspecting Judge will be based in Cape Town, he will have jurisdiction to act throughout the Republic. The functions of this position will be carried out by inspectors appointed on a national basis. The main function of the Inspecting Judge is to receive complaints on the treatment and conduct of prisoners, the conduct of prison staff and conditions in prisons. However, there could be overlapping in the functions of the SAHRC and the Inspecting Judge, and in order to avoid conflict and duplication between these two institutions, they developed a mechanism for co-operation. The memorandum of understanding agreed to by the parties determined that the SAHRC would refer most

complaints from prisoners to the Inspecting Judge of Prisons for investigation, whilst the SAHRC would deal more specifically with human rights related prison complaints (SAHRC, Third Annual Report:48-49).

2.8.2.4 COMPLAINTS EMANATING FROM PRISON STAFF

The SAHRC also investigates complaints raised by prison warders. An example of such an investigation was a complaint from a prison warder who was refused permission to visit a prisoner who was transferred to another prison. The prison warder, who was also female, had befriended the prisoner whilst they were at the same prison. On appeal the Provincial Commissioner turned her request down. The SAHRC approached the Commissioner and requested a review of the decision based on section 33 of the Constitution (just administrative action). The outcome of the representations was that the Commissioner agreed that the warder could visit her friend provided she adhered to the rules in this regard.

2.8.2.5 OTHER ACTIVITIES OF THE SAHRC

The SAHRC is represented on the Penal Advocacy Network, an organisation, which allows various organisations, academics, practitioners within the penal system and interested parties, an opportunity to plan active advocacy and public attention on contentious penal issues. It also has representation on the Sentencing Committee of the S A Law Commission. The SAHRC actively participates in the National Crime Prevention Strategy when it formulated a policy on the rights of victims. The Victim Empowerment Project administered by the Department of Welfare and resorting within the National Crime Prevention Strategy is a product of this strategy. The investigation of complaints by victims of crime also falls within the purview of the SAHRC. (SAHRC, Third Annual Report:51-52). Partaking in workshops and conferences on topics relating to the

penal system form part of the activities of the SAHRC (SAHRC, Fourth Annual Report:14).

2.8.3 COMMISSION ON GENDER EQUALITY (SECTION 187)

Established in terms of section 187 of the Constitution, the Gender Equality Commission will have a lesser impact on the topic in question than the Public Protector and the SAHRC. The function of this Commission is to promote the protection, development and attainment of gender equality in all spheres of South African society. It can monitor and report on, amongst others, state institutions like prisons and other places of correctional supervision, where gender equality is not practised. It may also conduct research into issues relating to gender equality.

The Commission on Gender Equality Act, No. 39 of 1996, provides in section 1 that the Commission must monitor and evaluate policies and practices of organs of state; statutory bodies or functionaries; public bodies and authorities; and private businesses, enterprises and institutions, in order to promote gender equality and make recommendations in this regard.

In its Annual Report for the period April 1998 to March 1999 the vision of the Commission on Gender Equality is stated as follows: "(t)he Commission on Gender Equality is committed to creating a society free from gender discrimination, and all other forms of oppression in which all people will have the opportunity and means to realise their full potential, regardless of race, gender, class, religion, sexual orientation, disability, or geographic location." The Commission on Gender Equality audits and examines legislation for discriminatory clauses.

2.9 PUBLIC ADMINISTRATION (CHAPTER 10)

According to Chapter 10 of the Constitution, the public administration must adhere to the values and principles contained in the Constitution. Section 195 (1) goes on to describe these principles:

- * high standard of professional ethics;
- * effective and economic use of resources;
- * development orientated;
- * unbiased, impartial, fair and equitable;
- * participative policy-making;
- * accountable and transparent;
- * good human resource management; and
- * broadly representative of the public.

The Departments of Justice, Safety and Security, and Correctional Services, form part of the Public Service (in terms of Schedule 1 to the Public Service Act 103(P) of 1994), and as such, are obliged to comply with these principles. A Public Service Commission has been established to monitor the implementation of the above principles (section 196 (4)(a) of the Constitution). The Public Service Commission put in place a Code of Conduct for Public Servants on 25 August 1997. The purpose of the Code is to give practical effect to the relevant constitutional provisions relating to the public service. All employees in the public service are subject to the provisions of the Code, which act as a guideline regarding expected behaviour from an ethical point of view, both in their individual conduct and in their relationship with others. Employees who contravene provisions of the Code may be disciplined.

The following are examples of provisions in the Code:

- (a) An employee must not use his or her official position to obtain private gifts or benefits for himself or herself during the performance of his or her

official duties nor may he or she accept any gifts or benefits when offered as these may be construed as bribes.

(b) An employee must act responsibly as far as the use of alcoholic beverages or any other substance with an intoxicating effect are concerned. (Code of Conduct for Public Servants, dated 25 August 1997).

Employees of the Department of Correctional Services are public servants and are thus subject to the provisions of the Code.

2.10 SECURITY SERVICES (CHAPTER 11)

It is significant that prison authorities have not been designated as being part of the security services, as was the case in the previous system of government. The security services consist of the Defence Force, Police Services and the Intelligence Services (Chapter 11 of the Constitution). This is a conscious shift by the Government to render the prison services more conducive to rehabilitation and community orientation instead of merely being a security force to impose rules and serve as custodians. Military ranks previously assigned to members of the prison services have been altered to a non-militaristic designatory system.

One of the effects of this classification is that the provisions of the Labour Relations Act, No. 66 of 1995, apply to staff of the Department of Correctional Services. Thus prison staff may join and form trade unions, and in certain circumstances embark on strike action (unless they are declared an essential service in terms of section 71 of the Labour Relations Act).

2.11 GENERAL PROVISIONS (CHAPTER 14)

Chapter 14 of the Constitution makes provision for the ratification of international treaties and agreements, and states that all such agreements that were in force prior to the promulgation of the Constitution remain in force. This provision renders international treaties and agreements relating to punishment applicable to the practice and forms of punishment allowed within the criminal justice system.

On 4 and 6 November 1998, the National Assembly and the National Council of Provinces respectively adopted the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Minutes of the National Assembly dated 4 November 1998 and Minutes of the National Council of Provinces dated 6 November 1998). In terms of section 231(2) of the Constitution, an international agreement binds the Republic after it has been approved by resolution in both the National Assembly and the National Council of Provinces. This Convention, which was adopted by the General Assembly of the United Nations on 10 December 1984, is thus binding on the Republic. Twenty-three countries signed the original document, amongst them were, Argentina, Belgium, Denmark and Finland (Encyclopaedia Britannica, Vol. 2:907).

Torture is defined in the Convention as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with consent or acquiescence of a public official or other person acting in an official capacity. Article 1(2) states

that not even the declaration of a state of war or any other exceptional circumstances may be invoked as a justification for acts of torture.

Article 3(1) provides that no party to the Convention may expel, return or extradite a person to another state where there are substantial grounds for believing that he would be subject to torture in that state, whilst Article 4(1) states that each party state must criminalise acts of torture in its legal system. Party states are obliged to ensure that education and information regarding the prohibition against torture are included in the syllabus of legal training for law enforcement personnel within the public service and civil society. Such training must include training relating to arrest, custody, interrogation, detention and imprisonment (Article 10).

In terms of Article 12, party states must ensure that impartial investigations occur promptly where there are reasonable grounds to believe that an act of torture has been committed within its area of jurisdiction. Should it be proven that an individual indeed suffered torture, he or she would be entitled to compensation, including the means for rehabilitation of that individual. In the event of the death of an individual by means of torture, the family of such individual should receive compensation (Article 14). Statements extracted by means of torture may not be used as evidence (Article 15). In terms of Article 16 party states must undertake to prevent the imposition of punishment or treatment that is inhuman, degrading or cruel.

The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which contains very much the same provisions as the above Convention, was signed at Strasbourg on 26 November 1987, but has not been adopted by Parliament. Other important international human rights treaties are the Universal Declaration of Human Rights and the American Convention of Human Rights (Botha, SA Public Law:248).

2.12 SUMMARY

2.12.1 BACKGROUND TO THE CONSTITUTION

Prior to the completion of the final Constitution, the interim Constitution was in operation from 27 April 1994 until 3 February 1997. The final Constitution was the product of both negotiations and litigation, since it had to be certified by the Constitutional Court. After the second certification judgment, the Constitution took effect on 4 February 1997. A new system of government was ushered in by the Constitution, which is the supreme law of South Africa. The Constitution, and not Parliament, is now sovereign. Law or conduct in conflict with the Constitution is invalid to the extent that it is inconsistent or conflictual.

2.12.2 FOUNDING PROVISIONS OF THE CONSTITUTION

The founding provisions of the Constitution are contained in Chapter 1, and deal with issues like constitutional structure of South Africa's government; supremacy of the Constitution; citizenship; national anthem; national flag; and languages. A 75% majority of the members of the National Assembly must vote in favour of an amendment to section 1.

2.12.3 PROVISIONS OF THE BILL OF RIGHTS, WHICH HAVE AN INDIRECT EFFECT ON PUNISHMENT

There are a number of provisions in the Bill of Rights that have an indirect effect on punishment. These provisions are: citizenship; access to information; just administrative action; freedom of religion, belief and opinion; freedom of expression; assembly, demonstration, picket and petition; freedom of association; and political rights. An example of a possible effect is that the provisions relating to just administrative action would apply to a number of

activities in prison, like failure to release a prisoner on parole and disciplinary action.

The Constitution prohibits any enforcement of religion in a state institution, including a prison, and requires that religious practices occur on a free and voluntary basis. Both the American Constitution and the Canadian Charter guarantees freedom of religion and prohibits enforcement of religious practices. Although freedom of expression is a cornerstone of any democratic society, and the Constitution embodies this principle, hate speech is outlawed in legislation. Likewise, hate speech is outlawed in America and Canada. Hate speech and incitement to violence is an ever-present danger in the prison environment, and thus its prohibition is essential to avert dangerous and life-threatening situations.

Right to assemble, demonstrate, picket and petition is enshrined in the Constitution, but in the prison environment such rights can be limited in terms of section 36 of the Constitution. Such limitation is essential for the safe functioning of correctional institutions, as is the practice in other western democracies. The Constitution grants political rights, in the form of the right to vote, for all citizens, including those in detention and in prison. The Canadian Supreme Court has found unconstitutional, legislative provisions, which prohibit prisoners from exercising their right to vote. The American Constitution does not prohibit prisoners from voting.

Access to information in the public and private domain is governed by the Promotion of Access to Information Act. In terms of the provisions of this Act, a public body may refuse access to information, which may facilitate the commission of an offence, including escaping from lawful custody. The Promotion of Administrative Justice Act, which gives effect to section 33 of the Constitution, will have an effect on punishment generally. This Act ensures fair

administrative procedures and entitles those affected by such action, to reasons for administrative decisions.

2.12.4 OPERATIONAL PROVISIONS OF THE BILL OF RIGHTS

The Bill of Rights applies in its entirety to the criminal justice system, but certain rights may be limited in terms of section 36 of the Constitution, as required by specific circumstances. The Constitutional Court has adopted the two-stage approach in operation in the Canadian legal system, namely, that in the first stage the court determines whether there was an infringement of a right. The onus is on the person complaining of the infringement, to prove such infringement. The question that is to be determined in the second stage, is whether the infringement can be justified in an open and democratic society based on freedom and equality.

Operational provisions of the Bill of Rights generally affect the way in which provisions of the Bill of Rights are identified, enforced and interpreted. The provisions that are dealt with under this heading are: rights generally; application of rights; enforcement of rights; interpretation of the Bill of Rights; and limitation of rights. In terms of section 36 of the Constitution, rights in the Bill of Rights may be limited under certain circumstances. The purpose of the limitation is to limit a right in relation to what is acceptable in an open and democratic society. This provision enforces the view that rights contained in the Bill of Rights are not absolute.

2.12.5 POWERS OF PARDON OF THE PRESIDENT

The Constitution empowers the President to pardon and relieve offenders and remit fines, penalties and forfeitures. Amnesty can be granted to individual offenders or groups of offenders by the President, and has been used as a

means of reducing the prison population. In terms of the Constitution, executive acts of the President are subject to judicial review. This is also the position in Canada and America.

2.12.6 COURTS AND ADMINISTRATION OF JUSTICE

In terms of the hierarchy of courts, the Constitutional Court is the highest court and has the power to declare laws or conduct unconstitutional. High Courts also have the power to decide on constitutional matters, except insofar as the Constitutional Court has exclusive jurisdiction on the matter. Investigations by the S A Law Commission are currently underway in respect of the establishment of traditional courts, which will have limited civil and criminal jurisdiction.

2.12.7 STATE INSTITUTIONS SUPPORTING DEMOCRACY

The Public Protector, which is established by section 182 the Constitution, has powers of independent investigation into any organ of state, including correctional institutions. This constitutional institution, which is answerable to the National Assembly, has wide powers and can investigate any area of government. The South African Human Rights Commission (SAHRC), which is established in terms of section 184 of the Constitution, has as its main function, the promotion and protection of a culture of human rights in South Africa. Members of the SAHRC have the power to monitor and assess abuses of human rights wherever they occur, including prisons.

The SAHRC has embarked on a project called the National Prisons Project, in terms which prisons are monitored on an on-going basis. In 1997 it produced a comprehensive report on the state of prisons in South Africa. It views the C-Max prison as going beyond the legitimate demands of the criminal justice system and of the broader society. It also expressed a problem with the manner in

which prisoners are selected for transfer to the C-Max prison. The SAHRC has made numerous unannounced visits to prisons and other places of detention, for example, Pollsmoor Prison, Lopserfontein Prison and Nelspruit Prison. Investigations are conducted as a result of complaints from both prisoners and prison staff. The Commission on Gender Equality, which is established in terms of section 187 of the Constitution, will have a lesser impact on punishment than the previous two constitutional institutions. Its main function is to promote and protect gender equality.

2.12.8 PUBLIC ADMINISTRATION AND SECURITY SERVICES

Since government departments that deal with punishment are part of the public service, they will have to comply with the provisions of section 195 of the Constitution. This provision contains principles and values, which include, a high standard of professional ethics and accountability and transparency. Employees in these departments are also subject to the Code of Conduct for Public Servants. In terms of the Constitution, the Department of Correctional Services is not part of the security services, and thus their service provisions are subject to the Labour Relations Act and other labour laws.

2.12.9 GENERAL PROVISIONS

The United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, was adopted by Parliament during 1998. In terms of section 231(2) of the Constitution, an international agreement binds the Republic after Parliament has approved it by resolution. In terms of this convention, punishment or treatment that is cruel, inhuman or degrading is prohibited. The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which contains similar provisions to the above Convention, has not yet been adopted by Parliament.

CHAPTER 3

RIGHTS OF PERSONS WHO ARE ARRESTED, DETAINED AND ACCUSED

3.1 INTRODUCTION

This chapter deals with the rights, in terms of section 35 of the Constitution, of persons who are arrested, detained and accused. It was held in the case of De Lange v. Smuts NO and others 1998 (3) SA 785 (CC) that these rights are also applicable in cases where the detainee is not arrested for criminal prosecution. These rights would thus also apply in cases where a person's arrest is necessary for the maintenance of law and order. According to Davis et al, these rights apply in both the pre-conviction and post-conviction periods (1997:167).

In the period before the interim Constitution came into operation, the provisions of the Criminal Procedure Act, No. 51 of 1977 regulated this sphere of the criminal procedure. The aspects that are now left to interpretation of the Constitutional Court, are whether the Constitution recognises established rights that were not recognised before, or whether it imbued existing common law principles or statutory safeguards with a new or different content, or as having merely accorded entrenched status to familiar principles and safeguards (Chaskalson et al, 1996:27-1). Section 4(c) of the Correctional Services Act, No. 111 of 1998, provides that "(t)he minimum rights of prisoners entrenched in this Act may not be violated or restricted for disciplinary or any other purpose."

According to Goredema, one of the consequences of the inclusion of the provisions of section 35 into the Constitution, was that the police would have to be more careful in carrying out their duties, and they would have to keep

meticulous records (SACJ, 1997:249). The element of good faith will in the future be an important aspect in the application of section 35 (van der Merwe, 1998:473).

3.2 RIGHTS OF ARRESTED PERSONS

In relation to arrested persons, section 35(1) of the Constitution provides as follows: "Everyone who is arrested for allegedly committing an offence has the right -

- (a) to remain silent;
- (b) to be informed promptly -
 - (i) of the right to remain silent; and
 - (ii) of the consequences of not remaining silent;
- (c) not to be compelled to make any confession or admission that could be used in evidence against that person;
- (d) to be brought before a court as soon as reasonably possible, but not later than -
 - (i) 48 hours after the arrest; or
 - (ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day;
- (e) at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and
- (f) to be released from detention if the interests of justice permit, subject to reasonable conditions."

According to Chaskalson et al, a person who is arrested enjoys the same rights as a detained person, as well as those rights specified for an arrested person as such person is detained for allegedly committing an offence (1996:27 - 40). It

was reported in the case of Zuma 1995 (4) BCLR 401 (SA) that in addition to the above rights, criminal trials must be conducted in accordance with the principles of fairness and justice, and the onus is on the criminal courts to give effect to these principles.

The Fourteenth Amendment to the American Constitution provides that a state may not deprive any person of life, liberty, or property without due process of law. All persons within the jurisdiction of the state are subject to equal protection of the law. The Constitution of America, which consists of 7 Articles (21 sections) and 27 Amendments, provides in the Fourth Amendment, that people are protected against unreasonable searches and seizures of their property. This Amendment provides further that a warrant of arrest may not be issued unless there is probable cause, supported by a sworn or affirmed affidavit describing the person to be arrested.

Section 9 of the Canadian Charter, states that everyone has the right not to be arbitrarily detained or imprisoned. Although this provision is more concise than its counterpart in the South African Constitution, namely section 35, the other rights are contained in legislation, like the Canadian Criminal Code. Section 10 of the Charter, which deals with arrest and detention states as follows: "Everyone has the right on arrest or detention -

- (a) to be informed promptly of the reasons therefore;
- (b) to retain and instruct counsel without delay and to be informed of that right; and
- (c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful."

This provision is similar to section 35(2) of the Constitution, which deals with the rights of detained and sentenced prisoners.

3.3 RIGHTS OF DETAINED PERSONS

The rights of detained persons are contained in section 35(2) of the Constitution, which reads as follows: "Everyone who is detained, including every sentenced prisoner, has the right -

- (a) to be informed promptly of the reason for being detained;
- (b) to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;
- (c) to have a legal practitioner assigned to the detained person by the state at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
- (d) to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful to be released;
- (e) 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; and
- (f) to communicate with, and be visited by, that person's -
 - (i) spouse or partner;
 - (ii) next of kin;
 - (iii) chosen religious counsellor; and
 - (iv) chosen medical practitioner" (my underlining).

Prior to the era of the Bill of Rights, prisoners had very few rights and were entitled only to those privileges granted by the Commissioner of Correctional Services at his or her discretion (Swart, *Acta Criminologica* Vol. 11(2) 1998:48). The contrast in the positions taken in the Goldberg and others and Hofmeyr cases illustrates this point. In the former case the position was that prisoners' rights were limited to those basic rights relating to their physical survival, whilst in the latter case the position was that prisoners retain all their basic rights, except those removed by law.

According to Corder and Smit, the rights contained in section 35(2) are applicable to all prisoners (1998:479). The rights granted in terms of this subsection are specifically rendered applicable to every sentenced prisoner (subsection (2)). Subsection (2)(e), which provides that the conditions of detention must be consistent with human dignity, appears to overlap with section 10 of the Constitution, which deals with human dignity generally, as well as with section 12(1)(e) of the Constitution, which deals with the right not to be treated in a degrading way.

A further point of interpretation of this provision is that the word "adequate" applies to accommodation, nutrition, reading material and medical treatment, which may result in different standards being applied by different institutions. (See case of Van Biljon & others v. Minister of Correctional Services and others 1997 (2) SACR 50 (C). An investigation by the South African Human Rights Commission revealed that there was no prison policy for dietary requirements and visitation rights vary from prison to prison (SA Human Rights Commission, 1997:15). The rights of prisoners contained in this provision are discussed in more detail hereunder.

3.3.1 RIGHT TO BE INFORMED PROMPTLY OF REASON FOR BEING DETAINED

According to this provision, a person who is being detained must be informed of the reason for the detention. Section 39(2) of the Criminal Procedure Act, provides as follows in this regard: "The person effecting an arrest shall, at the time of effecting the arrest or immediately after effecting the arrest, inform the arrested person of the cause of the arrest." It was held in Kader v. Minister of Law and Order and another 1989 (4) SA 11 (C) that the verbal notification need not contain the precise words of the charge, it is sufficient if the broad reasons for the arrest are given. What is important is that such explanation is given

simultaneously with, or shortly after the arrest. Although section 35(2)(a) of the Constitution gives a detained person the right to reasons for being arrested, section 39(2) of the Criminal Procedure Act makes it peremptory for the person carrying out the arrest to give such reasons. Thus read together, the right to be informed of the reasons for the detention are mandatory.

In South Africa, with its multi-lingual society, the question of language may be an issue. The question arises whether a detained person is entitled to be informed of the reasons in his or her mother tongue. The European Commission, in the case of Delcourt v. Belgium (268/65) CD 22/48, decided that the information given must be in a language understood by the detained person, but not necessarily in his or her mother tongue.

According to section 6(1)(a) of the Correctional Services Act, no person may be committed to prison without a valid warrant for his or her detention. By implication, this provision would apply to both sentenced and unsentenced prisoners. The Commissioner of Correctional Services has the power to detain a person at a place of detention other than the place mentioned in the warrant (section 6(1)(b) of the Correctional Services Act).

Section 10(a) of the Canadian Charter provides that everyone has the right, on arrest or detention, to be informed promptly of the reasons for the arrest or detention. In the case of R v. Smith (1991) 1 SCR, 714, it was held that an accused who had not been fully informed of the reasons for his arrest amounted to a breach of section 10(a) of the Charter. In this case the accused was informed that he was being arrested as a result of a shooting incident, whereas he was actually being arrested on a charge of killing someone. The Sixth Amendment to the American Constitution provides that an accused has the right to be informed of the nature and cause of the accusations.

Although the American Constitution does not contain a provision that prohibits arbitrary detention or imprisonment, the Fourth Amendment prohibits unreasonable seizures of persons, which includes arrests and detention (Hogg, 1992:1069-1070). The Fifth Amendment ensures accused persons of a speedy and public trial (trial by jury). The accused must be informed of the charges against him or her and also have the assistance of legal counsel. It was held in the case of Escobedo v. Illinois 378 U.S. 478 (1964) that a suspect had the right to be assisted by counsel during custodial interrogation. In terms of the Eighth Amendment to the American Constitution, bail must not be set at an excessive level, whilst excessive fines and cruel and unusual punishment are prohibited.

The Supreme Court of Canada held that the provision in the Criminal Code which authorised the arrest, without a warrant, of a person “who has committed an indictable offence or who, on reasonable and probable grounds” is believed to have committed, or was about to commit an indictable offence, was not unconstitutional since it used the standard of “reasonable and probable grounds” – R v. Storrey (1990) S.C.R. 241. The length of the period of detention does not affect its legality (Hogg, 1992:1074).

3.3.2 RIGHT TO THE SERVICES OF A LEGAL PRACTITIONER

This right rests on two legs, firstly, the right to choose and consult with a legal practitioner of the prisoner’s choice, and the right to be informed of this right; and secondly, the right to have a legal practitioner assigned to him or her at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly. The right to consultation with a legal practitioner of the prisoner’s choice was recognised by our courts in the case of Mandela v. Minister of Prisons 1983 (1) SA 938 (A). According to Davids et al, although this right is internationally recognised, (recognised by the International Covenant on Civil and Political Rights) it is not clear who exercises this discretion, who carries

the responsibility for informing the accused and what the consequences are of non-compliance (1997:168).

Section 17(1) of the Correctional Services Act, provides that every prisoner is entitled to consult with a legal practitioner of his or her choice on any legal matter. The cost of such legal services is to be borne by the prisoner. In terms of section 6(3) of the Correctional Services Act, a prisoner must, immediately on admission, be informed of his or her right to choose and consult with a legal practitioner, or if substantial injustice would otherwise result, a legal practitioner must be assigned and paid for by the State. Regulation 12 provides that the consultation between a prisoner and a legal practitioner must take place in sight, but out of earshot of a correctional official (Draft Correctional Services Regulations, 2001)

In S v. Mfene 1998 (9) BCLR 1157 (N), the Court stated as follows: "It is necessary to inform a detainee of his right to be provided with the services of a legal practitioner by the State at least in every case in which the detainee is indigent, in the sense that he is unable to afford the services of his own legal practitioner, and he has been detained in connection with a charge which, in the event of a conviction, might lead to imprisonment." According to Goredema, there is also a downside to this right in that offenders can directly or indirectly alert accomplices (SACJ (1997) 10:247). Furthermore, unwitting or unethical lawyers may knowingly or unknowingly pass on information, which may defeat or obstruct the course of justice.

The Canadian Charter provides that a person has the right, on arrest or detention, to retain and instruct counsel without delay, and to be informed of this right (section 10(b)). In terms of this provision, the warning must be given without delay, and such warning must be understood by the person being arrested or detained (Hogg, 1992:1082). However, this provision does not

compel an arrested person to retain counsel, and thus such person may waive this right, provided such waiver is clear and unequivocal (Clarkson v. The Queen (1986) 1 SCR, 383). In the case of Re Ewing (1974) 49 DLR (3d) 619 (BCCA), the Court held that the provision of a right to counsel does not require that the counsel be provided at state expense. It should be noted that the Canadian criminal justice system does make provision for legal aid for indigent accused (Hogg, 1992:1086).

A person's right to legal representation on arrest has been part of the common law of Canada, and this right has been entrenched in the Criminal Code (Conway, 1985:28). The Charter adds a further requirement in that the accused must be informed of the right to representation. According to Watson, section 7 of the Charter affords accused persons the right to remain silent after arrest (1991:106). The rights protected in terms of the Charter are not absolute, and may be limited by law under circumstances, which are justified in a free and democratic society (Griffiths & Verdun-Jones, 1994:104).

The Sixth Amendment to the American Constitution provides that an accused has a right to the assistance of counsel for his defence. In the American case of Miranda v. Arizona (1966) 384 US 436, the Supreme Court held that the Fifth Amendment privilege against self-incrimination, required a suspect to be informed of the right to counsel prior to police questioning.

3.3.3 RIGHT TO CHALLENGE THE LAWFULNESS OF DETENTION

Section 35(2)(d) of the Constitution provides that everyone who is detained has the right to challenge the lawfulness of the detention in person before a court of law, and to be released if the detention is unlawful. According to Davis et al, an accused always had the right to challenge his or her detention under the common law, provided that an interested party had to approach the court on

behalf of the accused (1997:169). Thus the right to appear in person before the court certainly strengthens this common law right. A detained person may under this provision challenge the conditions of detention (Davis et al, 1997:170).

A prisoner's unfettered right to access to the courts is the most fundamental right, since all other rights are illusory without it (Mushlin, 1993:3). It forms the foundation of every other right the prisoner enjoys, since without access to the courts prisoners have no way of defending those rights. Rudolph is of the view that section 185 of the Criminal Procedure Act, No. 51 of 1977 (detention of a witness) is unconstitutional as it provides for detention without trial (SAJL Vol. 111, 1994:504).

According to section 10(c) of the Canadian Charter, a person arrested or detained has the right to challenge the validity of the detention by way of habeas corpus, and to be released if the detention is unlawful. Section 24(1) of the Charter provides remedial action for a person detained unlawfully. The difference between the two provisions is that only the detained person may invoke the provisions of section 24(1), whereas an interested third party may apply in court for an order of habeas corpus (Hogg, 1992:1088).

Section 9 of the Canadian Charter, which reads as follows: "Everyone has the right not to be arbitrarily detained or imprisoned", should be read in conjunction with section 2(a) of the Canadian Bill of Rights, providing that no law shall be applied so as to "authorize or affect the arbitrary detention, imprisonment or exile of any person." According to Hogg, the operative word is "detained", as it has a broader meaning than "imprisoned" (1992:1070). It was held in R v. Hufsky (1998) 1 S.C.R. 621 that detention is arbitrary if there are no criteria, express or implied, which governs the exercise of detention.

The Fifth Amendment to the American Constitution provides that an accused may not be deprived of life, liberty or property, without due process of law. In the Supreme Court case of Patsy v. Board of Regents (1982) 457 US 496, it was held that a prisoner could challenge both the constitutionality of his or her confinement and the conditions of confinement.

The American Supreme Court has held that the right to access to courts is to be found in the Fourteenth Amendment's guarantee of due process, which access must be for all and not just those who can afford to hire lawyers (Bounds v. Smith 430 US 817 (1977)). This right of access to courts can be attained in different ways, for example, "jailhouse lawyers" (inmates who offer legal assistance to fellow inmates), law libraries in prisons, and assistance from legal practitioners (Bounds v. Smith case).

3.3.4 RIGHT TO CONDITIONS OF DETENTION THAT ARE CONSISTENT WITH HUMAN DIGNITY

Section 35(2)(e) of the Constitution states that a detained person or a 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;". The words "including at least" are indicative that the list is not exhaustive, but that any other services must be interpreted in the context of those mentioned. Section 10 of the Constitution provides that everyone has inherent dignity and the right to have their dignity respected and protected. According to Davis et al, the word "adequate" in the above provision means that the obligation on the State to supply these services depends on the resources and financial constraints of the State (1997:168). Thus a detainee who is an artist may be entitled to special paints and brushes, but not necessarily at State expense. It was held in the case of Minister of Justice v. Hofmeyr 1993 (3) SA 131 (A) that prisoners retain

all the rights and privileges enjoyed by free citizens, except those, which they of necessity lose, on incarceration.

In the case of S v. Mpofana 1998 (1) SACR 40 (Tk), a prisoner appealed against a refusal to grant him bail on the grounds that the conditions in the prison he was being detained violated his dignity. His argument was based on the fact that he was being held with 14 other prisoners in a cell designed to accommodate 10 prisoners. The judge in the matter did not rule on the question of whether it infringed his dignity, but informed the appellant that he should first have requested the prison authorities to remedy the problem causing his complaint. Failure to do so by the prison authorities would have been grounds for such an application.

Section 11 of the Correctional Services Act provides that "(e)very prisoner must be given the opportunity to exercise sufficiently in order to remain healthy and is entitled to at least one hour of exercise daily." It provides further that, weather permitting, the exercise must take place in the open air. Courts in America have stated that it may amount to a cruel and unusual form of punishment if prisoners are not granted adequate time and facilities for recreation and exercise (Flanagan, 1998:62). In Canada the courts have stated that oppressive conditions in prison amount to cruel and unusual punishment (McCann v. The Queen) (1976) 1 FC 570 (TD).

Accommodation of prisoners is dealt with in terms of section 7 of the Correctional Services Act. This section provides that prisoners must be held in cells with specific requirements in relation to floor space, cubic capacity, lighting, ventilation, sanitary installations and general health conditions. These requirements must be such that it does not infringe their human dignity. Subsection (2) of section 7 states that sentenced prisoners must be kept apart from unsentenced prisoners; males must be kept apart from females; and

children must be kept apart from adults. Prisoners in specific health, age or risk categories must also be kept apart, whilst children must be kept in accommodation that is suitable for their age. This section states further that under no circumstances may the above provisions be departed from when it relates to sleeping accommodation.

American author Flanagan is of the view that overcrowding in prisons severely affects the reasonable accommodation of prisoners and may be an infringement of the Eighth Amendment (1998:59). Seriously overcrowded cells may result in conditions that are unhealthy and unsafe, and may constitute cruel and unusual punishment. Plumbing and sanitary conditions are important aspects that affect accommodation. According to Hogg, it is not only punishment that can be cruel and unusual, but also the treatment of prisoners, including overcrowded prisons (1992:1136). It was held in the Canadian case of McCann v. The Queen (1976) 1 FC 570 (TD) that oppressive prison conditions amount to cruel and unusual punishment.

Section 8 of the Correctional Services Act, provides that each prisoner must be provided with a nutritious diet to promote good health. Children, pregnant women and other prisoners requiring a special diet must be specifically catered for when devising the diet. Where reasonably practical, the diet must take into account religious and cultural preferences, for example, Jews and Muslims are not supposed to eat pork in terms of their religious doctrines. Clean drinking water must at all times be available to prisoners. The food that is served to prisoners must be well prepared and served at intervals of not less than four and a half hours and not more than fourteen hours between the evening meal and breakfast during each twenty-four hour period.

According to Flanagan, the supply of nutritious food is an integral part of the conditions under which prisoners live (1998:61). Although prisoners are not

entitled to meals that are appetising or to meals of a specific type, food must be adequately nutritious and must be prepared under hygienic conditions. American courts have required that food for prisoners must be nutritious and prepared in a clean and hygienic environment (Flanagan, 1998:61). In terms of the McCann v. The Queen judgment above, the same position regarding nutritious food is applicable to Canadian prisons.

In terms of section 18 of the Correctional Services Act, every prisoner must have access to available reading material of his or her choice, provided that such reading material does not constitute a security risk or is not conducive to his or her rehabilitation. This provision applies to both reading material from the prison library and material that is sent to the prisoner from outside. Court decisions in America have allowed prison authorities a limited right to inspect books and other literature and correspondence for contraband, and even to censor correspondence under certain circumstances (Flanagan, 1998:66). Certain books can be censored on the basis of their content if they are sexually explicit.

Section 9 of the Correctional Services Act obliges the Department of Correctional Services to provide the means for all prisoners to keep their clothing, bedding, cell and person clean. Sentenced prisoners must be provided with clean and necessary bedding and clothing, whilst unsentenced prisoners may retain or acquire appropriate clothing and bedding (section 10).

Depending on available resources, the Department of Correctional Services must provide prisoners with adequate health care services based on the principles of primary health care (section 12 of the Correctional Services Act). Every prisoner is entitled to adequate medical treatment (excluding cosmetic medical treatment) at State expense. It could be argued that in these circumstances prisoners receive better and more adequate medical treatment than indigent law abiding persons, and at no cost. This provision could also

place a financial burden on the Department as medical treatment for certain conditions are expensive, for example, treatment for HIV/AIDS and serious operations.

If a prisoner makes use of his or her own medical practitioner, as opposed to a medical practitioner supplied by the State, the medical costs must be borne by the prisoner - section 12(2) and (3) of the Correctional Services Act. Although prisoners are encouraged to undergo medical treatment when it is required, they may not be compelled to undergo such treatment.

The handling of HIV/AIDS cases in prison needs special attention. In December 1999, there were 2600 prisoners who were HIV positive and 136 had AIDS in South African prisons (Annual Report, 1999:19). According to the 1999 Annual Report, the main method of combating HIV/AIDS in prison was through dissemination of information (p. 18). In conjunction with the Department of Health, a five-year action plan was embarked upon to combat the spread of HIV/AIDS in prison. Between December 1998 and December 1999, the rate of HIV/AIDS cases increased by 30% (Annual Report, 1999:19). The Inspecting Judge states in his Annual Report for 2000 that the 1087 natural deaths in prison were mainly due to HIV/AIDS (p. 20).

In 1993 about 7-8% of all prisoners in Canada and America were either HIV positive or had AIDS (Larsen, 1995:335). According to Larsen prison is a high-risk area for spreading HIV/AIDS for a number of reasons, for example, needle sharing, tattooing, and anal intercourse (1995:335). The following measures have been put in place in American prisons to reduce the rate of the infection:

- (a) Mandatory testing – this may have constitutional implications as it infringes the prisoner's right to privacy and right to human dignity.
- (b) Segregation of infected prisoners – this restricts fundamental human rights and should be undertaken only after careful consideration is

given to the rights of the individual inmate and the potential risks to others.

- (c) Providing condoms to prisoners – may have moral and legal implications.
- (d) Provision of sterile injection equipment – may have moral implications in that it may appear to condone intravenous drug usage. (Larsen, 1995:337-339).

The position generally in Canadian prisons in respect of HIV positive prisoners is to protect inmates and staff, educate prisoners and staff, promote their health, and prevent the transmission of HIV (Achmat & Cameron, SALJ Vol. 112, 1995:5).

In the case of Van Biljon and others (above), it was held that as prisoners who were HIV positive did not have access to the necessary treatment, they were entitled to medical treatment of a standard higher than what was available at provincial hospitals. However, the Court held that budgetary constraints were part of the definition of “adequate” and that the onus to disprove the availability of funds rested with prison authorities. In this way prison authorities could refuse to provide better treatment than that which is available at state hospitals, if funding is not available.

American courts have found that it amounts to a violation of the Eighth Amendment if prisoners are not given adequate medical treatment, since they are entirely dependent on the institution for their medical needs (Flanagan, 1998:62). The courts have also recognised that women have special health needs (Flanagan, 1998:63).

A Zimbabwean High Court decision (S v. Mahachi 1993 (2) SACR 36 (Z)) in which it was suggested that prisoners who are HIV positive or who have AIDS

should be subjected to compulsory testing, segregated from other prisoners, and generally subjected to human rights curtailment, was severely criticised in the media (Achmat & Cameron, SALJ Vol. 112, 1995:1-2 & 8). In the case of R v. Smith (1987) 44 SASR 587, the court stated that the health of an offender is a factor to be considered in imposing sentence, but that it should not become a licence to commit crime (in this case the accused had AIDS).

The right to be visited by a detainee's spouse or partner, next of kin, religious counsellor and medical practitioner will serve to lessen the opportunity for physical or psychological abuse in respect of the prisoner, going undetected. The term partner would probably also include a same-sex partner, given the wording of section 9 of the Constitution (dealing with the prevention of discrimination). However, access of the above persons in a prison environment would be subject to the restrictions required by a unique environment, for example, the safety of other prisoners. In terms of section 36 of the Constitution, such rights could be limited, provided the requirements of this section are complied with.

In terms of section 13 of the Correctional Services Act, the Department of Correctional Services must encourage prisoners to maintain contact with the community and to stay abreast of current affairs. Prisoners must be given the opportunity, under the necessary supervision, of communicating with and being visited by at least their spouses or partners, next of kin, chosen religious counsellors and chosen medical practitioners. Each month, prisoners must be allowed visits of at least one-hour duration. This Act makes no provision for conjugal visits by either the spouse or partner of the prisoner; however, it also does not expressly or impliedly prohibit such visits.

Although American courts have ordered conjugal visits for pretrial detainees, there has been no order for such visits for sentenced prisoners. According to

Klein, in the not too distant future, courts may find that such deprivation constitutes cruel and unusual punishment (1992:497).

It was held in the case of Goldberg and others v. Minister of Prisons and others 1979 (1) SA 14 (A) that the rights of communication of prisoners with close friends and relatives, together with other rights such as proper clothing, adequate food and medical care, accommodation and the right to legal representation, all related to the prisoner's physical and mental well-being. However, it was held that these rights are subject to the limitation that a detainee or prisoner must submit to the discipline of prison life and the rules and regulations as to how prisoners must conduct themselves whilst in prison. The court stated that if a prisoner was moved to another prison and the next of kin of the prisoner was not able to visit the prisoner because of the location of the prison, such transfer of the prisoner would be unconstitutional.

3.4 RIGHTS OF ACCUSED PERSONS

The rights of accused persons are set out in section 35(3) of the Constitution as follows: "Every accused person has a right to a fair trial, which includes the right-

- (a) to be informed of the charge with sufficient detail to answer it;
- (b) to have adequate time and facilities to prepare a defence;
- (c) to a public trial before an ordinary court;
- (d) to have their trial begin and conclude without unreasonable delay;
- (e) to be present when being tried;
- (f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;
- (g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

- (h) to be presumed innocent, to remain silent, and not to testify during the proceedings;
- (i) to adduce and challenge evidence;
- (j) not to be compelled to give self-incriminating evidence;
- (k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;
- (l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;
- (m) not to be tried for an offence in respect of an act or omission for which that person has previously been acquitted or convicted;
- (n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
- (o) of appeal to, or review by, a higher court.”

Prisoners who are accused of further offences will enjoy the rights mentioned above in respect of accused, but subject to any limitation in terms of section 36 of the Constitution, for example, certain provisions of the Correctional Services Act.

Section 11 of the Canadian Charter, grants the following rights to detainees and prisoners, the right -

- “(a) to be informed without unreasonable delay of the specific offence;
- (b) to be tried within a reasonable time;
- (c) not to be compelled to be a witness in proceedings against that person in respect of the offence;
- (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
- (e) not to be denied reasonable bail without just cause;

- (f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;
- (g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognised by the community of nations;
- (h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and
- (i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.”

The Sixth Amendment to the American Constitution provides that “(i)n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.”

3.5 SUMMARY

3.5.1 RIGHTS OF ARRESTED PERSONS

Section 35 of the Constitution deals with the rights of persons who are arrested, detained and accused. Prior to the promulgation of the interim Constitution, these rights were dealt with in the Criminal Procedure Act. Arrested persons have the right to remain silent and to be informed of this right. At their first court

appearance such persons must be charged or informed of the reason for their detention, whilst arrested persons have the same rights as that of detained persons.

Section 35(1) introduces a number of rights in respect of arrested persons, for example, the right to remain silent and to be promptly informed of such right; not to be compelled to make a confession or admission that could be used in evidence against that person; to be brought before a court as soon as is reasonably possible; to be charged or released at the first court appearance; and to be released from detention if the interests of justice permit it. In addition to these rights, trials must be conducted fairly and justly.

The Fourteenth Amendment to the American Constitution provides that persons may not be deprived of their liberty without due process of law. The American Supreme Court has laid down numerous rules in this regard, for example, the Miranda rules. Section 9 of the Canadian Charter contains similar provisions to section 35(1) of the Constitution, and in addition grants the right of habeas corpus.

3.5.2 RIGHTS OF DETAINED PERSONS

Section 35(2) of the Constitution grants all detained and sentenced prisoners the following rights:

- To be informed promptly of the reason for being detained;
- To choose and consult with a legal practitioner, and to be informed of this right;
- To have a legal practitioner assigned at state expense under certain circumstances and to be informed of this right;
- To challenge the lawfulness of the detention in person;
- To be detained in conditions consistent with human dignity; and

- To be able to communicate with relatives, friends, religious counselor and a medical practitioner.

In addition to the requirement that an arrested person must be informed promptly of the reasons for being detained, section 39(2) of the Criminal Procedure Act obliges the person carrying out the arrest to inform the arrested person of the cause of the arrest. The Canadian Charter provides that everyone has the right on arrest or detention, to be informed promptly of the reasons for the arrest or detention. The Fourth Amendment to the American Constitution prohibits the unreasonable seizure of persons, including arrests.

An arrested person has the right to the services of a legal practitioner and the right to be informed of this right. There is also a right to a legal practitioner at state expense if substantial injustice would otherwise result. The right to consultation of an arrested person with a legal practitioner of his or her choice is part of our common law. The Correctional Services Act grants all prisoners the right to consult with a legal practitioner (at the prisoner's expense).

The Canadian Charter provides that everyone has the right, on arrest or detention, to retain and instruct counsel without delay, and to be informed of this right. This right has also been part of the Canadian common law. According to the Sixth Amendment to the American Constitution, an accused person has the right to the assistance of counsel for his or her defence.

Accused persons in South Africa always had the right to challenge the lawfulness of their detention in terms of our common law. However, section 35(2)(d) of the Constitution extends this right by allowing the detained person to challenge the detention in person. The Canadian Charter empowers detained persons, by way of habeas corpus, to challenge the lawfulness of their

detention. The Fifth Amendment to the American Constitution provides that an accused may not be deprived of his or her liberty, without due process of law.

Section 35(2) gives some indication of what is required for detention to be humane and dignified, for example, exercise, adequate accommodation, nutrition, reading material and medical treatment. Prisoners retain all the rights they had as free persons, except those rights, which they of necessity lose on incarceration. Section 11 of the Correctional Services Act provides that a prisoner must be allowed adequate opportunity to exercise, whilst section 7 states that accommodation for prisoners must meet certain standards, like the separation of men and women, and children and adults. American and Canadian courts have found that oppressive conditions in prison and severe overcrowding amount to cruel and unusual punishment.

Prisoners must be provided with a nutritious diet to promote good health, and where reasonably practical, the dietary requirements in respect of religious and cultural groups should be considered. Clean drinking water must be available at all times, and meals must be served within certain periods. Section 18 of the Correctional Services Act provides that prisoners must have access to available reading material of their choice. Depending on available resources, the Department of Correctional Services must provide prisoners with adequate health care services based on the principles of primary health care. American courts have found that it amounts to a contravention of the Eighth Amendment if prisoners are not given adequate medical treatment, since they are entirely dependent on the institution for their medical care.

The right to be visited by a detainee's spouse or partner, next of kin, religious counselor and medical practitioner, serves to lessen the opportunity for physical or mental abuse going undetected. Partners in this context would include same-

sex partners as section 9 of the Constitution prohibits discrimination on the basis of sexual preference.

3.5.3 RIGHTS OF ACCUSED PERSONS

Section 35(3) of the Constitution and section 11 of the Canadian Charter contain similar rights in this regard. The rights which are protected include, a public trial before an ordinary court, to adduce and challenge evidence, to be present when being tried, not to be compelled to give self-incriminating evidence, to challenge evidence, to have adequate time and facilities to prepare a defence, appeal or review by a higher court, and to be represented by a legal practitioner. The Sixth Amendment to the American Constitution provides that in all criminal prosecutions, accused have the right to a speedy and public trial; an impartial jury; opportunity to challenge evidence and to call witnesses; and to be assisted by counsel.

CHAPTER 4

THE BILL OF RIGHTS AND PUNISHMENT

4.1 INTRODUCTION

This chapter examines the effect of the Bill of Rights (Chapter 2 of the Constitution) on punishment. The following rights are dealt with: equality (section 9); human dignity (section 10); life (section 11); freedom and security of the person (section 12); slavery, servitude and forced labour (section 13); privacy (section 14); and children (section 28). These fundamental rights will have an effect on numerous penalties, for example, imprisonment and fines, and have had an effect on the death penalty and corporal punishment.

Provisions in the Bill of Rights are expected to have a more profound effect on punishment than other provisions in the Constitution. The right of equality will have far reaching effects on all aspects of punishment, as well as the implementation thereof. In essence, this right provides that all people are equal before the law, and all forms of unfair discrimination are prohibited. The Promotion of Equality and Prevention of Unfair Discrimination Act, No. 4 of 2000, was promulgated to give effect to the equality provision. Human dignity played a major role in the Constitutional Court case which dealt with the death penalty (S v. Makwanyane and another 1995 (6) BCLR 665 (CC)), in which the death penalty was found to be unconstitutional. This right will also have a significant impact on other forms of punishment, like fines and correctional supervision.

The right to life is protected by one of the shortest provisions in the Constitution, and merely states that "(e)veryone has the right to life". It was this provision and the right to human dignity that formed the basis for the decision in the death

penalty case mentioned above. Freedom and security of the person protects individuals from arbitrary arrest, detention without trial, freedom from violence and torture, and punishment that is cruel, inhuman or degrading. The right of freedom from slavery, servitude or forced labour means just that, that no one may be subjected to slavery, servitude or forced labour. Section 14 of the Constitution provides that everyone enjoys the right of not being searched or their possessions seized, or the privacy of their communication infringed. These rights would impact on the manner prisoners are dealt with in penal institutions.

Rights of children are dealt with in a fair amount of detail in section 28 of the Constitution. Children are protected from maltreatment, neglect, abuse, exploitative labour practices and may only be detained as a measure of last resort. The Correctional Services Act, No. 111 of 1998, was passed by Parliament on 6 November 1998 in order to give effect to the rights contained in the Bill of Rights, in respect of those persons serving sentences. This chapter includes a comparative analysis of the operation of similar rights in the American Constitution and the Canadian Charter.

In terms of section 36 of the Constitution, the rights contained in the Bill of Rights may be limited by law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. In imposing the limitation all relevant factors must be taken into account, including, the value of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve this purpose.

The Canadian Bill of Rights was assented to on 10 August 1960 and is described in the text as "(a)n Act for the Recognition and Protection of Human Rights and Fundamental Freedoms". The Bill of Rights served to confirm

enumerated fundamental rights without regard to race, national origin, colour, religion or sex, but was not entrenched and could thus be repealed or amended by an ordinary Act of Parliament. It was also only applicable to federal legislation. As the Bill of Rights was not seen to be effective, the Charter of Rights and Freedoms (contained in the Canadian Constitution as Schedule B Part 1) was enacted. The Canadian Charter applies to both federal and provincial authorities. However, the rights contained in the Charter are not absolute and are subject to reasonable limits prescribed by law, which are justified in a free and democratic society (section 1 of the Canadian Charter). According to Stuart, the Canadian Charter had a significant effect on the criminal justice system in Canada, and more especially, the system of punishment. Stuart is further of the view that South Africa has one of the strongest Bills of Rights in the world (SACJ 1998: 329).

Consisting of seven Articles (21 sections) and 27 Amendments, the American Constitution contains within its text, a bill of rights. It is mainly the Amendments, which date from 1791 that are of relevance for the purposes of this thesis. The First Amendment was passed in 1791, whilst the Twenty Seventh Amendment was passed in 1992 (this was the last Amendment passed to date). The Amendments protect, amongst others, the following rights: no arrest or imprisonment without due process of law; no excessive bail; no excessive fines; freedom from cruel and unusual punishments; no slavery or involuntary servitude; and equal protection before the law.

4.2 RIGHT TO EQUALITY (SECTION 9)

4.2.1 SOUTH AFRICAN BILL OF RIGHTS

Section 9 of the Constitution reads as follows:

“(1) Everyone is equal before the law and has the right to equal protection

and benefit of the law.

- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”

If one has regard to past political policies and practices, this right occupies a central place in the new South African constitutional order. The Constitutional Court held in the case of Fraser v. Children’s Court, Pretoria North 1997 (2) SA 261 (CC) that the guarantee of equality is at the very heart of the Constitution.

A purposive interpretation of subsection (1) would mean that all persons, including offenders, must be treated equally in terms of the law, including offenders. Thus the status of an incarcerated person is not diminished by the mere fact of such impediment. Such persons retain all their legal rights whilst imprisoned or deprived of their liberty. However, as all rights may be subject to limitation (section 36), the law may under certain circumstances provide for a limited application of a right, and in this way sentenced persons may have a restricted protection of these rights. By its nature, punishment would require certain rights to be infringed, especially the right to human dignity.

Subsection (2) makes provision for the implementation of affirmative action policies and procedures designed to rectify unfair discrimination of the past. This provision would have application concerning the appointment of people of colour and females to positions in the criminal justice system, if they were deprived of such positions in the past on the basis of unfair discrimination.

The provisions of subsection (3) are far-reaching and provide that the State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. Such provision would prohibit any form of unfair discrimination within the penal system, and would include deracialising prisons, unfair discrimination in the imposition of punishment, but would permit fair discrimination, for example, separate prison facilities for men and women. Provided there is a rational and fair basis to discriminate, all forms of discrimination are not per se unfair (subsection (5)).

However, the State can enact legislation to prohibit specific forms of unfair discrimination, even between private individuals. An example of such legislation is the Promotion of Equality and Prevention of Unfair Discrimination Act. Jagwanth is of the view that equality challenges in criminal matters will mainly be brought before the equality courts in terms of this Act (SALJ Vol. 117, 2000:689).

4.2.2 CANADIAN CHARTER OF RIGHTS

The concept of equality before the law as contained in the South African Constitution was adapted from the Canadian Charter (Davis et al, 1997:61). The Canadian Supreme Court placed human dignity at the heart of a court's equality enquiry (de Vos, THRHR 2000: 65). It was held in the case of A-G Canada v. Lavell (1974) SCR 1349 that judicial review on equality grounds did not concern

the substance of the law, but only the manner in which it was administered. This right was designed to protect those groups who suffer social, political and legal disadvantage in Canadian society - Andrews v. Law Society of British Columbia (1989) 56 DLR AC 319.

Section 15 of the Canadian Charter, headed Equality Rights, is divided into two subsections, each dealing with a different aspect of this right. The first part, under the heading "Equality before and under the law and equal protection and benefit of law", reads as follows: "(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability". The second part, under the heading "Affirmative action programmes", reads as follows: "(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

According to Cole and Manson, court rulings indicate that differential treatment under the law is only actionable if the discrimination is by reason of a personal characteristic of the individual or a group (1990:136). They argue further that even being a prisoner can be a distinguishing feature that results in different treatment. Issues of equality may also arise if prisoners are treated differently amongst themselves, especially if the distinction results from discrimination. Thus a prisoner cannot be denied a visit by a same-sex partner (Veysey v. Canada (Commissioner of Correctional Services) (1989) 29 F.T.R. 74.)

4.2.3 AMERICAN CONSTITUTION

The Fourteenth Amendment provides that all persons shall enjoy the equal protection of the laws. In order to promote the equality clause, the Civil Rights Act was passed in 1964. Affirmative action became the policy to repair the harm caused by past discrimination (Bodenhamer & Ely, 1993: 155). Affirmative action has been the subject of numerous court cases in America, where its legitimacy was challenged (McCrudden, 1991:xv). In 1984 Congress passed the Sentencing Reform Act, which is aimed at reducing the disparity in sentencing, increasing certainty and uniformity, and to correct past patterns of undue leniency in sentencing. To this end, the United States Sentencing Commission was established to determine the appropriate type and length of sentences for each of the federal offences.

In addition, parole was abolished in order that sentences imposed were sentences served (SA Law Report, 1997:31). Thus sentencing discretion was severely curtailed as mandatory guidelines were promulgated by the Commission. However, the Commission found in a study in 1991 that despite minimum sentences, sentencing disparity was still prevalent due to prosecutorial discretion that empowers a prosecutor to accept a guilty plea on a lesser charge (SA Law Commission, 1997:34).

4.2.4 PARDONING OF FEMALE PRISONERS ONLY

In the case of Hugo v. State President of the RSA 1996 (6) BCLR 876 (D) the Presidential Act of remitting the sentences only of mothers with minor children under the age of twelve years was declared invalid as it discriminated against men on the basis of their gender. The President exercised his powers in terms of section 82(1)(k) of the interim Constitution, in terms of which the President

has the power to pardon or relieve offenders, either unconditionally or on certain conditions, and to remit any fines, penalties or forfeitures.

However, this decision was overturned by the Constitutional Court in President of the RSA v. Hugo 1997 (6) 708 (CC), where it was held that although the President did discriminate against men in this case, the discrimination was not unfair under the circumstances. The Court found that the Act was primarily intended to serve the interests of children and that it was generally true that mothers bear an unequal share of the burden of child rearing in our society. As such, the release of male prisoners would not have contributed as significantly to the achievement of the President's purpose, which was to benefit children. The Court found that there was also no legal entitlement to an early release.

4.2.5 SEXUAL ACTS BETWEEN CONSENTING ADULT MALES

It was held in the case of National Coalition for Gay and Lesbian Equality & others v. Minister of Justice and others 1998 (6) BCLR 726 (W) that the criminal prohibition of sexual activity, including sodomy, between consenting adult men is unconstitutional as it unfairly discriminated on the grounds of sexual orientation. In this case the common law crime of unnatural sexual acts discriminated unfairly on the basis of gender as it criminalised acts committed between men, which would not be prohibited if it were committed by women or between a man and a woman. The inclusion of sodomy in Schedules to the Criminal Procedure Act, No. 51 of 1977 and the Security Officers Act, No. 92 of 1987 was held to infringe section 9(3) of the Constitution, and was consequently found to be unconstitutional.

In the case of S v. Kampher 1997 (2) SACR 418 (C) it was held that prosecution of the accused (a prisoner) on the grounds of consensual adult sodomy was

unconstitutional. Louw, in his article states that non-consensual adult sodomy amounts to an offence of indecent assault (SACJ (1998) 11:116).

There is no legal prohibition on consensual sexual acts between adult males in Canada (Wood-Bodley, SALJ Vol. 115, 1998:426). The same position prevails in America (Romer et al v. Evans et al 116 S Ct 1620, 1346 Ed 2d 855 (1996)). It can be mentioned that the "cautionary rule", which stereotyped women in particular as unreliable, and which applies in sexual assault cases, was found to infringe the right to equality – S v. J 1998 (2) SA 984 (SCA).

It has been claimed by prisoners claiming conjugal rights in respect of their spouses that condoms are provided to male prisoners for sexual purposes, whilst they are denied heterosexual relations (Pete, SACJ (2000) 13:53-54). They claim that they are being treated unfairly on the basis of their sexual orientation, i.e. heterosexuality. Prison officials state that condoms are not issued to encourage sexual relations, but to prevent the transmission of HIV/AIDS.

4.2.6 UNREPRESENTED PRISONERS

The Constitutional Court in S v. Ntuli 1996 (1) BCLR 141 (CC), held that section 309(4)(a) of the Criminal Procedure Act was unconstitutional as it afforded unequal treatment between legally represented prisoners and convicted persons who were not serving sentences of imprisonment, as against unrepresented prisoners. Section 305 of the Criminal Procedure Act provides that a person who is imprisoned after being convicted of an offence in a lower court may not prosecute in person any proceedings for the review of the proceedings relating to his or her conviction, unless a judge of the High Court has certified that there are reasonable grounds for review.

4.2.7 EXCESSIVE SENTENCING DISPARITY

According to Chaskalson et al, the power of the State to create forms of punishment is limited by the constitutional principle of proportionality, and although the principle that punishment must suit the crime is entrenched in our law, the Constitution makes no specific reference to it (1996:28-5). In the case of S v. Makwanyane above, the Constitutional Court examined the principle of proportionality when determining whether the death penalty was cruel, inhuman or degrading. There is also international support for this principle in the sense that the following was recommended by the Council of Europe on Consistency in Sentencing: "Whatever rationales for sentencing are declared, disproportionality between the seriousness of the offence and the sentence should be avoided." (Recommendation no. R(92) 17 of the Committee of Ministers of the Council of Europe). This recommendation was adopted on 19 October 1992.

There are four specific areas where proportionality has a significant impact, namely, mandatory minimum sentences, indeterminate sentences, exemplary sentences and punishment for specific offences. In the Namibian case of S v. Vries 1996 (12) BCLR 1666 (Nm), the court set out the following general approach in relation to minimum sentences: mandatory minimum sentences are not *per se* unconstitutional. However, it will be unconstitutional if the sentence results in a shocking sentence under the circumstances before the court. A court that examines such sentence must enquire whether it will be shocking with respect to hypothetical cases which can be foreseen as likely to arise commonly. If a court finds that such sentence is unconstitutional it may declare the provision of no force or effect generally or in a particular class of cases or in the case before the court, or to allow the legislature to cure the defect.

In the case of S v. Bhulwana 1996 (1) SA 388 (CC), the Court expressed its disfavour with constitutional exemption, and emphasised that "the litigants

before the court should not be singled out for grant of relief, but relief should be afforded to all people who are in the same position as the litigants". It is clear from the judgment in this case that South African courts will not declare a provision unconstitutional for specific litigants only. Chaskalson et al are of the view that although compulsory confiscation orders and suspension of drivers' licences are not strictly punishments, they may have the same disproportionate effect on the offender (1996:28-9).

The legislative framework for indeterminate sentences may encourage courts to impose sentences, which are disproportionate to the offence committed and the blameworthiness of the offender (Chaskalson et al, 1996:28-9). The question that arises is whether the need for society to be protected from "dangerous" criminal overrides the requirements of proportionality in sentencing. It may also not be constitutional, on the basis of disproportionality, to sentence an offender convicted of a minor offence, to an indefinite period of detention if the offender is found to be a "dangerous" criminal (Chaskalson et al, 1996:28-10).

In the case of S v. Potgieter 1994 (1) SACR 61 (A), the court held that exemplary sentences are justified only in a limited range of circumstances and only to the extent that the injustice to the individual does not outweigh the broad interests of society. Legislation which provides for specific punishments for an offence in cases where such punishment is disproportionate in relation to the offence and the circumstances under which it was committed, may be unconstitutional (Chaskalson et al, 1996:28-12). Thus excessive disparity and disproportionate sentences may amount to an infringement of section 9 of the Constitution.

According to Jobson and Ferguson, section 15 of the Canadian Charter can be interpreted to mean that excessive sentencing disparity is unconstitutional (1987:18). Canada's Criminal Code generally leaves the act of sentencing in the hands of judges (although maximum penalties are stated, they are usually very

high), and hence there is a considerable degree of disparity in sentencing across the country (Griffiths & Verdun-Jones, 1994:422). In 1978 the Canadian Sentencing Commission stated as follows: "In the present system, where there are no formal 'standards' against which to judge a sentence, the lack of systematic sentencing information accessible to judges in their determination of sentences almost ensures that there will be unwarranted variation in sentences." (1987:60).

A study by Murray and Erickson in 1983 found that there were significant sentencing variations in sentences imposed on persons convicted of possession of cannabis in five locations in the Province of Ontario. It was held in the case of Regina v. McLean et al. (1980), 26 Nfld. P.E.I.R 158 that uniformity in sentencing is essential for fair and just administration and enforcement of the criminal justice system in a democratic society. It was this need to eliminate disparity in sentencing that the Canadian Sentencing Commission embarked on a process of establishing guidelines for sentencing in Canadian courts (Griffiths & Verdun-Jones, 1994:424). In researching reasons for disparity in sentencing, Hogarth stated that aspects like penal philosophies, judicial attitudes and sociological constraints of presiding officers in criminal cases, affect the type and degree of the penalty (1971:356).

Sentencing disparity may also occur as a result of economic discrimination, for example, income, social status, the fact that an offender is unemployed, etc., may affect the severity of the sentence (Debicki, 1985:234). In Canada during 1994-95, 71% of adults sentenced to imprisonment were of aboriginal ancestry (Quigley, 1999: 159). However, studies by LaPrairie found no evidence to suggest that there was disparity in the sentences of Aborigines in relation to other Canadian citizens (1992:135), whilst studies by Wickler were inconclusive regarding gender bias in sentencing. According to Hofer et al, treating offenders differently on the basis of race would be discriminatory if it resulted in sentencing

disparity (1999:242). Mohr is of the view that non-custodial penalties such as fines, probation and community service orders, which are viewed as lenient penalties, may have a harsher effect on women than men because of their often impecuniary position (1990:483).

According to Smit, the American Supreme Court held in an early case that a disproportionate sentence could amount to a cruel form of punishment (Weems v. United States 217 US 349, 54 L Ed. 793 (1910)) (1954:370). Although not per se cruel and unusual, the death penalty could also amount to being cruel and unusual if it is disproportionate to the offence (Gregg v. Georgia 428 US 153, 49 L Ed. 859 (1976)).

There are numerous other judgments in America indicating that the constitutional prohibition of cruel and unusual punishment applies to both the forms of punishment, which are inherently cruel and unusual, and to sentences which are grossly out of proportion to the seriousness of the offence for which it was imposed (Smit, 1995:371). Examples of the latter include, a mandatory life term for a third conviction of a non-violent crime, namely, fraud (Rummel v. Estelle 455 US 263, 63 L Ed. 2d 382 (1980)), life imprisonment without parole for a first offender for possession of a large quantity of cocaine (Harmelin v. Michigan 501 US 957, 115 L Ed. 2d 386 (1991)), and 20 years imprisonment for possession of 12 ounces of marijuana (Hutto v. Davis 454 US 370, 70 L Ed. 2d 556 (1982)).

4.2.8 PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT

The Promotion of Equality and Prevention of Unfair Discrimination Act was promulgated in order to give effect to section 9 of the Constitution. According to the long title, the Act intends to prevent and prohibit unfair discrimination and harassment; promote equality and eliminate unfair discrimination; and prevent

and prohibit hate speech. The objects of the Act include the prevention of unfair discrimination and protection of human dignity as contemplated in sections 9 and 10 of the Constitution, to provide remedies for victims of unfair discrimination, hate speech and harassment, and persons whose rights to equality have been infringed (section 2 of the Act).

This Act binds both the private and public domain in that it binds the State and all persons. In terms of section 5, the provisions of this Act prevail over the provisions of any other Act, except the Constitution, in instances where there is any conflict relating to a matter dealt with in this Act. In this way the provisions of this Act will prevail where there is a conflict with Acts dealing with punishment, for example, the Correctional Services Act and the Criminal Procedure Act. Section 6 states that neither the State nor any person may unfairly discriminate against any person. Chapter 2 of the Act deals with the prevention, prohibition and elimination of unfair discrimination, hate speech and harassment, whilst Chapter 4 deals with equality courts (presided over by magistrates or judges, as the case may be, so designated by the Minister of Justice).

4.2.9 SPIRIT OF CORRECTIONAL SERVICES ACT

Although the Correctional Services Act does not have as one of its objects, the elimination of unfair discrimination, the spirit of the Act is to ensure that prisoners are kept under conditions that do not discriminate against them unfairly, and do not infringe their dignity. More specifically, section 41(7) of the Correctional Services Act provides that educational and other programmes offered by the Department must be responsive to the needs women and they must ensure that women are not disadvantaged.

4.3 RIGHT TO HUMAN DIGNITY (SECTION 10)

4.3.1 SOUTH AFRICAN BILL OF RIGHTS

Section 10 of the Constitution provides that everyone has the right to have their dignity respected and protected in the following terms: "Everyone has inherent dignity and the right to have their dignity respected and protected". Such provision would have an influence on virtually every form of punishment, as all forms of punishment impinge on human dignity to a lesser or greater degree. Intimate bodily searches in prisons may also be affected by this provision. Punishment must be implemented in such a way that respects the dignity of the offender.

The long title of the Correctional Services Act states that the Act provides for the custody of all prisoners under conditions of human dignity. Neither the Canadian Charter nor the American Constitution make any specific mention of the right to human dignity, and this right is protected under the rubric of other specified rights. Courts in America have often relied on the Fourteenth Amendment (equal protection of the law) and the Eighth Amendment (which prohibits cruel and unusual punishment) to protect the right to dignity. (Chaskalson et al, 1996:17-1).

4.3.2 PURPOSE OF CORRECTIONAL SYSTEM

Section 2 of the Correctional Services Act states that the purpose of the correctional system is to contribute to maintaining and protecting a just, peaceful and safe society by, amongst others, detaining prisoners in safe custody whilst ensuring their human dignity. Although section 27 of this Act provides for wide powers for correctional officials, for example, "(a) search by visual inspection of the naked body", such searches must be conducted in a manner, which invades

the privacy and undermines the dignity of the prisoner as little as possible. It provides further that all searches must be conducted in private. The right to human dignity is, of course, also subject to the limitations provision, under appropriate circumstances.

4.3.3 DEATH PENALTY

It was held in S v. Makwanyane & another 1995 6 BCLR 665 (CC) that the protection of the right to human dignity constitutes the source of the protection of all other rights. Thus the factual unlawful limitation of any right could amount to an infringement of human dignity. In this case it was held that the death penalty infringed the right to human dignity. In S v. Makwanyane above, the Constitutional Court unanimously held that the death penalty as a form of punishment violated the prohibition of cruel, inhuman or degrading punishment and that it also violated the right to human dignity.

As stated earlier in this chapter, the Canadian Charter does not refer specifically to the right to have human dignity respected and protected. Section 7 of the Charter states that "(e)veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." As early as 1835, the Canadian government indicated that it was not in favour of the death penalty as a form of punishment, but it was only in 1976 that the Criminal Code abolished it. The last execution occurred in Canada during 1962 and all the death sentences that were imposed between 1967 and 1976 were commuted. During 1987 a motion in Parliament to reinstate the death penalty was defeated (Griffiths & Verdun-Jones, 1994:581).

4.3.4 CORPORAL PUNISHMENT

Section 294 of the Criminal Procedure Act, which permitted corporal punishment as a form of punishment for juvenile males under certain circumstances, was found to violate the right to human dignity in the case of S v. Williams and others 1995 (3) SA 632 (CC). The Constitutional Court accordingly declared section 294 unconstitutional. In this case the Court only dealt with corporal punishment as a statutory form of punishment and not as a form of instilling discipline either in schools or in the family home.

4.3.5 LIFE IMPRISONMENT

In the Namibian case of S v. Tcoeib 1996 (1) SACR 390 (NmS), it was held that a sentence of life imprisonment infringes the right to human dignity. The Court stated that in order for a life sentence to be constitutionally justifiable there had to be a realisable expectation of release, adequate to protect the prisoner's right to dignity, which must include belief in, and hope for, an acceptable future for himself. Permanent confinement of a prisoner, irrespective of future circumstances, would therefore not be constitutionally sustainable in terms of the rationale of this judgment. However, the Court concluded that life imprisonment is not per se unconstitutional as the system of granting parole to all prisoners and executive pardon were held to constitute a realisable expectation of release.

4.3.6 DETENTION OF ILLEGAL IMMIGRANT

The detention of an illegal immigrant without being charged, for a period in excess of a year, was held to be an infringement of the right to dignity in the case of Johnson v. Minister of Home Affairs and another 1997 (2) SA 432 (C). According to Davis et al, it can be said that a person's dignity is impaired when

such person is subjected to treatment, which is degrading or humiliating or which treats a person as subhuman (1997:73).

4.3.7 PROVISIONS IN THE CORRECTIONAL SERVICES ACT, WHICH DEAL WITH HUMAN DIGNITY

4.3.7.1 DIGNIFIED CUSTODY OF PRISONERS

Part A of Chapter 3 of the Correctional Services Act deals in detail with the custody of prisoners under conditions of human dignity. Although section 4 places an obligation on prisoners to be obedient to the lawful instructions of prison authorities, the Department of Correctional Services must take steps to ensure that all prisoners are kept in conditions that ensure their safety. Prison rules aimed at maintaining security and good order must be applied in such a manner that they meet the requirements for which they were established, and do not adversely affect the prisoner more than is necessary, and not for a longer period than is required. This provision also ensures that the minimum rights established by the Act may not be violated or restricted for any purpose, including disciplinary purposes.

4.3.7.2 ESTABLISHMENT OF PRISONS

According to section 5, the Minister of Correctional Services may establish prisons for the purposes of detention and treatment. However, if there is no prison in a specific district, a prisoner may be detained in a police cell for a period not exceeding one month, unless the Commissioner of Correctional Services grants an extension of this period. On admission, prisoners must be informed of their right to choose and consult a legal practitioner or have a legal practitioner assigned to them by the State, at State expense, if substantial injustice may otherwise result (section 6(3)). Furthermore, on admission,

prisoners must be provided with written information regarding the rules and regulations of the prison. In the case of an illiterate prisoner, the written information must be explained verbally, and if necessary, through an interpreter (section 6(4)). Prisoners must also undergo a health status examination, which includes being tested for contagious and communicable diseases (section 6(5)).

Regulation 2 provides that as soon as possible after admission, a prisoner must bathe or shower, and before mixing with other prisoners, the prisoner must undergo a medical examination. All prisoners must be examined for obscure, communicable or contagious diseases (for example, HIV/AIDS) (Draft Correctional Services Regulations, 2001). However, this Regulation may infringe the prisoner's right to privacy. In a TPD High Court case in 1995, a judge awarded damages in favour of a prisoner whose blood was drawn for HIV testing without his consent, as it infringed his right to privacy (Pete, SACJ (1998)11:82).

4.3.7.3 ACCOMMODATION OF PRISONERS

Accommodation for prisoners must, in respect of floor space, cubic capacity, lighting, ventilation, sanitary installations and general health conditions, meet the requirements of human dignity (section 7(1)). In further ensuring the dignity of prisoners, sentenced and unsentenced prisoners, and male and female prisoners must be kept separately. Adult prisoners must also be kept apart from prisoners who are below the age of 18 years (section 7(2)). However, the Head of a Prison may depart from the provision regarding separation of certain prisoners as stated above, but only for the purposes of development, support services or medical treatment (section 7(3)). Integration of prisoners may be required in certain circumstances, for example, when attending educational classes, or being kept in the sickbay, or prison hospital.

Regulation 3 provides that cell accommodation must be such that a prisoner can move freely and sleep comfortably therein. Prisons must have adequate ablution facilities with running hot and cold water. Each prisoner must be supplied with a bed and clean bedding. Male and female prisoners must have separate accommodation and prisoners between 18 and 21 years must be separated from prisoners over the age of 21 years. Prisoners whose health status poses a threat to other prisoners must on request of the medical officer be detained separately from other prisoners. (Draft Correctional Services Regulations, 2001).

4.3.7.4 NUTRITIONAL REQUIREMENTS OF PRISONERS

Prisoners must be provided with adequate nutrition, and the diet must make provision for the nutritional requirements of children, pregnant women and prisoners requiring a special diet for health reasons. Where reasonably possible, a special diet may be presented for the religious and cultural requirements of certain prisoners. To ensure the good health of prisoners, a wide variety of foods must be served. Clean drinking water must be available to all prisoners at all times. Meals must be served at intervals not exceeding 14 hours in a 24-hour period (section 8). It was reported in the Saturday Cape Argus of 2 September 2000, that a judge of the Pretoria High Court stated that the Correctional Services Department should consider the physical needs of prisoners when supplying them with food. In the case in question a prisoner complained of constipation as his prison diet did not contain sufficient roughage. The judge also stated that the State had an obligation to supply prisoners with sufficient food and that prisoners must be "treated with human dignity".

According to Regulation 4, a prisoner's diet must be balanced and should be rich in calcium, protein, fats and oils, and must include fruit, vegetables and cereals (Draft Correctional Services Regulations, 2001).

4.3.7.5 CLEANLINESS OF PRISONERS

Prison authorities are required to provide the means for prisoners to keep their clothing, bedding and cell, clean and tidy (section 9). The obligation is not on the prison authorities to ensure cleanliness, but for the prisoner to be enabled to achieve and maintain this state. The aspect of cleanliness is intended to instill a sense of pride and dignity in the prisoner. Prison authorities must also provide prisoners with sufficient bedding and clothing in order to meet the above requirements (section 10). However, unsentenced prisoners may wear their own clothing and make use of their own bedding (section 10(2)).

Sentenced prisoners must be provided with a clean outfit of clothing. If unsentenced prisoners are issued with clothing, such clothing must be different to that of sentenced prisoners. Prisoners may also wear religious or cultural attire. (Draft Correctional Services Regulations, 2001).

4.3.7.6 HEALTH CARE OF PRISONERS

Section 12 requires prison authorities, within their budgetary constraints, to provide adequate health care in order that prisoners may lead a healthy life. However, prisoners are not entitled to cosmetic medical treatment at state expense. Suitably qualified medical personnel must administer the medical treatment and, subject to permission from the Head of the Prison, prisoners may be examined and treated by a medical practitioner of their choice (in such cases the prisoner is personally liable for cost of the treatment). Prison authorities must encourage prisoners to maintain good health and to seek medical help when the need arises. However, prisoners may not be compelled to undergo medical treatment, unless failure to do so would endanger the health of others. Medical operations may only be performed on prisoners after they have given consent, and in the case of children, the consent of their guardian is required. If

a prisoner is unable to give consent, in circumstances where a medical operation is required in the interests of the prisoner's health (including children who are prisoners), prison authorities may give consent.

According to Regulation 7, primary health care must be available to all prisoners at the same level as that rendered by the State to the community. The services of a medical practitioner and a dentist must be available at each prison. (Draft Correctional Services Regulations, 2001).

The question of HIV/AIDS presents a problem within the prison context, firstly because the treatment is expensive, and secondly, the isolation of such prisoners suffering from this disease presents constitutional problems. In numerous Supreme Court cases in America it was found that segregation of prisoners with AIDS did not violate the Eighth and Fourteenth Amendments and was not unconstitutional (Durham III, 1994:77). As regards testing for HIV/AIDS, the Court has held that the American Constitution neither prohibits nor requires it. However, mandatory testing of prisoners may amount to an infringement of their right to privacy or confidentiality (Durham III, 1994:81).

In the American case of Estelle v. Gamble 429 US 97 (1976), the Court held that prison officials who were deliberately indifferent to the serious medical needs of prisoners, violated that prisoner's Eighth Amendment right to be free from cruel and unusual punishment.

4.3.7.7 MAINTAINING COMMUNITY LINKS

The Act recognises the necessity of a prisoner maintaining community links, both for the purposes of rehabilitation and their human dignity. According to section 13, the Department of Correctional Services must encourage prisoners to maintain contact with the community, and must give them the opportunity of

communicating with at least their spouses, partners, next of kin, religious counsellors and medical practitioners (under suitable supervision). Visits by such persons must last for at least one hour. Should the prisoner's spouse or partner not be in a position to visit, the prisoner is entitled to a visit from any other person on a monthly basis. This practice is to ensure that the prisoner maintains links with the community.

Prisoners who are foreign nationals are entitled to communicate with their diplomatic or consular representative, or in the absence of such representatives, a representative of the state or international organisation whose tasks include protecting the interests of such prisoners, for example, Amnesty International - section 13(5). On admission, and when being transferred to another prison, prisoners must inform their next of kin (or any other relative if the next of kin is unknown) of their admission or transfer, unless the prisoner informs the Head of the Prison that he or she does not wish to do so (section 13(6)).

Children may not refuse such notification (in the case of children the notification is aimed at the appropriate state authorities and the parents of the child). The Commissioner of Correctional Services is obliged to assist a prisoner in all reasonable ways in order to facilitate this communication. The Commissioner must, on the request of a spouse, partner or next of kin of a prisoner, inform them of the place of detention of a prisoner, if the prisoner consents in writing thereto (section 13(6)).

Under certain circumstances, for example, where the safety of any person is endangered, correspondence of prisoners may be intercepted. However, the interception must be the least restrictive measure available in the circumstances and the prisoner must be given reasons for the interception (Regulation 8 of the Draft Correctional Services Regulations, 2001).

4.3.7.8 DEATH OF A PRISONER

When a prisoner dies in prison, the Head of the Prison must forthwith inform the prisoner's next of kin or any other relative if the next of kin is unknown. If the death of a prisoner is not due to natural causes the death must be reported by the Head of the Prison in terms of section 2 of the Inquests Act, No. 58 of 1959. All prison deaths must also be reported to the Inspecting Judge who may conduct any inquiry or instruct the Commissioner of Correctional Services to conduct any inquiry (section 15). Regulation 9 provides that a prison must keep a record of all deaths in the prison and must assist with the burial of a deceased prisoner (Draft Correctional Services Regulations, 2001).

According to the 1999 Annual Report of the Department of Correctional Services, 61 prisoners died of unnatural causes (shooting, suicide, accidents, assault and drowning) for the year 1999. This amounted to seven deaths less than the total for 1998 (Annual Report, 1999:11). The rate of unnatural deaths has almost doubled over the last seven years, for the period July 1989 – June 1990 there were 42 unnatural deaths, whilst between January – December 1997 there were 75 unnatural deaths (Louw, SACJ (2000)13:88).

4.3.7.9 DEVELOPMENT AND SUPPORT OF PRISONERS

Section 16 is a type of catch all provision in that the Department of Correctional Services may provide development and support for prisoners even where such development and support is not specifically provided for in the Act. When such development and support is provided, the Commissioner of Correctional Services must inform prisoners accordingly. According to Regulation 10, social work and education and training services must be made available to sentenced prisoners who have a need for such services (Draft Correctional Services Regulations, 2001).

Should prisoners so require, they may consult a legal practitioner of their choice at their own expense, and the legal confidentiality thereof must be respected. Regulations may impose restrictions on such consultations as are necessary for the safe custody of prisoners. Prisoners who are accused in criminal matters must be given the opportunity to prepare their defence (section 17).

4.3.7.10 ACCESS TO READING MATTER

In terms of section 18, all prisoners must be allowed access to reading material of their choice, except reading material that constitutes a security risk or which would negatively affect a prisoner's rehabilitation. The source of such reading material may be either the prison library or an outside source, provided the material meets the above requirements. Regulation 13 provides that a properly organised library with literature of a constructive and educational value must, if reasonably practical, be established at each prison. Reading material may be received from outside the prison, unless the head of the Prison believes on reasonable grounds that such literature would jeopardise the security of the prison or the safety of any person. (Draft Correctional Services Regulations, 2001).

4.3.7.11 COMPLAINTS OF PRISONERS

If prisoners have complaints about anything relating to their imprisonment, they may at any time after their admission to the prison lay a complaint with the Head of the Prison, or an official authorised to represent the Head. The complaint must be dealt with promptly and both the complaint and the outcome must be recorded in writing. The prisoner must undergo a medical examination if the complaint is one of assault on the prisoner. Should the prisoner not be happy with the manner in which the complaint was dealt with, he or she may refer the matter, with reasons for the dissatisfaction, to the Head of the Prison, who must

refer the matter to the Area Manager. If a prisoner is not satisfied with the response of the Area Manager, he or she may refer the matter to the Independent Prison Visitor, who must then deal with it in terms of section 93.

4.3.6.12 AMENITIES TO FACILITATE REHABILITATION OF PRISONERS

As regards sentenced prisoners, section 37(1)(b) provides that the Department of Correctional Services must seek to establish amenities that will create an environment that allows a prisoner to live with dignity, and in this way facilitate rehabilitation of the prisoner. On admission, sentenced prisoners must be assessed to determine their needs in, amongst others, the following areas, health needs, educational needs, social and psychological needs, specific development programme needs and work allocation (section 38(1)). In terms of section 41, the Department of Correctional Services must provide as full a range as is practicable, of programmes and activities to meet the training needs of sentenced prisoners.

4.3.7.13 LEAVE OF TEMPORARY ABSENCE FOR PRISONERS

In terms of section 44, the Commissioner of Correctional Services may grant permission for leave of temporary absence in respect of sentenced prisoners for the following purposes:

- (a) compassionate leave (for example, death of a close relative);
- (b) treatment, development or support programmes (for purposes of rehabilitation);
- (c) preparation for release (for example, halfway-houses); and
- (d) reintegration programmes (usually facilitated and presented by the National Institute of Crime Prevention and Rehabilitation of Offenders [NICRO]).

This is an innovative provision, which allows a prisoner to temporarily leave the prison confines for a specified period and under specific conditions.

4.3.7.14 SPECIAL PROVISIONS FOR UNSENTENCED PRISONERS

In order for unsentenced prisoners to maintain their dignity, special provisions are set out in section 46 - 49. In terms of these provisions, unsentenced prisoners are not required to wear prison clothes and may obtain clothing from a private source. They may also have food and drink sent to them from outside the prison. Where practicable, unsentenced prisoners may be allowed all the amenities they would normally have access to outside the prison. These amenities may be restricted as a disciplinary measure by the prison authorities. Subject to prison restrictions, they may receive visitors, use a telephone and receive and send letters.

4.4 RIGHT TO LIFE (SECTION 11)

4.4.1 SOUTH AFRICAN BILL OF RIGHTS

The briefest provision is found in section 11 of the Constitution, which states as follows: "Everyone has the right to life". Although brief, this provision has had far reaching implications for the death penalty as a form of punishment. It may also affect the decriminalisation / depenalisation of the offence of forced abortion and euthanasia. Chaskalson et al, is of the view that a law authorising euthanasia or mercy killing may be a reasonable and justifiable limitation on the right to life (1996:15-8). The implications of this provision are discussed in greater detail in Chapter 5 and other parts of this thesis.

According to Chaskalson et al, the right to life, with the possible exception of human dignity, is the most basic value constitutionally protected right, which

gives meaning to all other rights (1996:15-1). Swart is of the view that the Department of Correctional Services has to protect the lives of all prisoners in its custody (Acta Criminologica Vol. 11(2) 1998:52).

4.4.2 CANADIAN CHARTER OF RIGHTS

Section 7 of the Charter states that "everyone has the right to life, liberty and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice". According to Hogg, the right to life has been given effect to with the abolishment of the death penalty, whilst the Supreme Court has determined that abortion does not infringe the right to life, as a foetus is not a person (1992:1026).

4.4.3 AMERICAN CONSTITUTION

The American Constitution states that no person shall be deprived of life, liberty or property, without due process of law. The Supreme Court has found that the death penalty is not per se unconstitutional (Gregg v. Georgia (1976) 428 US 153), and abortion does not amount to an infringement of the right to life (Roe v. Wade 410 US 113, 93 SCt 705, 35 L Ed. 2d 147 (1973)).

4.4.4 DEATH PENALTY AND THE RIGHT TO LIFE

This provision does not explain the extent of this right and the courts will have to decide these issues with reference to the limitation provision. For example, it was held in the case of S v. Makwanyane above, that the death penalty constitutes a cruel, inhuman and degrading punishment on the basis that the penalty violates the right to life and to human dignity. Section 7 of the Canadian Charter protects "life, liberty and security of the person". The courts have interpreted the term "person" to exclude a foetus - R v. Wholesale Travel Group

(1991) 3 S.C.R. 154. As the death penalty does not exist in Canada, this provision has not been the subject of judicial scrutiny. The American Constitution does not contain a similar provision, and the death penalty has been dealt with in terms of the principle of the prohibition of cruel and unusual punishment.

4.4.5 ABORTION AND THE RIGHT TO LIFE

A question that arises regarding abortion is whether a law allowing abortion infringes the right to life? In terms of section 2 of the Choice on Termination of Pregnancy Act, No. 92 of 1996, a pregnancy may be terminated and a foetus aborted under the following circumstances:

- “(a) upon request of a woman during the first twelve weeks of the gestation period of her pregnancy;
- (b) from the thirteenth up to and including the twentieth week of the gestation period if a medical practitioner, after consultation with the pregnant woman, is of the opinion that -
 - (i) the continued pregnancy would cause the woman physical or mental harm;
 - (ii) there is substantial risk that the foetus would suffer from physical or mental abnormality;
 - (iii) the pregnancy resulted from rape or incest; or
 - (iv) the continued pregnancy would significantly affect the social or economic circumstances of the woman; or
- (c) after the twentieth week of the gestation period if a medical practitioner, after consultation with another medical practitioner or a registered midwife is of the opinion that the continued pregnancy would-
 - (i) endanger the woman’s life;
 - (ii) result in severe malformation of the foetus; or
 - (iii) pose a risk of injury to the foetus.”

The Choice on Termination of Pregnancy Act gives limited rights to terminate pregnancy by choice of the pregnant woman. In terms of the common law a foetus is not recognised for legal purposes until a birth occurs. In the case of Van Heerden and another v. Joubert NO & others 1994 (4) 793 (A), it was held that a stillborn child is not treated as a dead person. It is also not a protectable right to be born alive - Christian League of Southern Africa v. Rall 1981 (2) SA 821 (O). However, a foetus is not devoid of protection, in that if it develops into a live person it is recognised as having financial interests worthy of legal protection - Ex parte Boedel Steenkamp 1962 (3) SA 954 (O).

In the Constitutional Court case of Christian Lawyers Association of SA v. Minister of Health 1998 (4) SA 1113, it was held that age commenced at birth and a foetus is not a child. It held further that there was no express provision in the Constitution, which stated that a foetus also had the right to life, and such position could not be read into the relevant provision. The Court decided that to include a foetus in the meaning of "everyone" in section 11 of the Constitution would ascribe to it a meaning different from that which it bore everywhere else in the Bill of Rights. Such a position would be clearly untenable. It is clear from this judgment that a foetus does not enjoy the right to life and that the above provisions of the Choice on Termination of Pregnancy Act do not infringe the right to life.

In the case of Morgentaler (1988) S.C.R. 30, 129, the Supreme Court of Canada declared unconstitutional a law prohibiting abortion, as the law infringed section 7 of the Canadian Charter (life, liberty and security of person). The Canadian Criminal Code no longer prohibits abortion. The US Supreme Court decided in Roe v. Wade 410 US 113, 93 S. Ct. 705, 35 L Ed. 2d 147 (1973) that a law prohibiting abortion in situations other than to save the mother's life, was unconstitutional as it infringed the mother's right to privacy. The Court also found that a foetus was not a person.

4.5 RIGHT TO FREEDOM AND SECURITY OF THE PERSON (SECTION 12)

4.5.1 SOUTH AFRICAN BILL OF RIGHTS

Section 12(1) of the Constitution provides protection for freedom and security of the individual. All persons are granted the right not to be deprived of freedom arbitrarily or without just cause. According to section 12(1) "Everyone has the right to freedom and security of the person, which includes the right -

- (a) not to be deprived of freedom arbitrarily or without just cause;
- (b) not to be detained without trial;
- (c) to be free from all forms of violence from either public or private sources;
- (d) not to be tortured in any way; and
- (e) not to be treated or punished in a cruel, inhuman or degrading way."

4.5.2 CANADIAN CHARTER OF RIGHTS

Section 12 of the Charter reads as follows: "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment." According to Hogg, the term "cruel and unusual" has never been satisfactorily defined, and whether it must be both cruel and unusual or whether it must be cruel or unusual.

4.5.3 AMERICAN CONSTITUTION

The Eighth Amendment to the American Constitution states that no one may be subjected to cruel and unusual punishment. In contrast to the South African and Canadian equivalent provisions, the provision does not prohibit treatment that is cruel and unusual.

4.5.4 CRUEL, INHUMAN OR DEGRADING PUNISHMENT

According to du Plessis and Corder, the difference between cruel, inhuman or degrading treatment and torture, is one of degree, determined by reference to the difference in intensity of the suffering inflicted (1994:153). Davis et al, in regard to cruel punishment, states that punishment for crimes should be graduated and proportioned to the offence (1997:81). In other words there must be a relationship between the seriousness of the offence and the punishment meted out. Punishment which violates inherent human dignity, is also a cruel form of punishment. It is also cruel if it makes no contribution toward the goals of punishment and amounts to a purposeless and needless imposition of pain and suffering (Davis et al, 1997:81). This provision applies equally to prisoners, especially the provision regarding torture (Corder and Smit, SACJ (1998):479).

It was held in the case of Rudolph v. Alabama (1963) 375 US 889 that it should be determined whether the permissible aims of punishment can be achieved as effectively by a less severe form of punishment. In Tyrer v. United Kingdom (1978) Y.B. Europe. Ct. of Human Rights, it was held that the test to determine whether or not punishment was degrading, the element of humiliation and debasement must be at a particularly high level in relation to the usual level found in judicial punishment. Corporal punishment inflicted on adults by a judicial or quasi-judicial authority was held to be a degrading form of punishment in the Namibian case of Ex parte Attorney-General, Namibia: In re Corporal Punishment by Organs of State. In this case the Court stated that it exercised a value judgment in deciding whether the punishment was degrading or not. After such exercise, the Court found that corporal punishment on adults was in conflict with Article 8(2)(b) of the Namibian Constitution.

The death penalty was held in the case of S v. Makwanyane (above) to be a cruel, inhuman and degrading form of punishment. It held further that the

imposition of capital punishment was inherently arbitrary, failed to treat the guilty party as a human being worthy of respect and was irreversible. In the Canadian case of R v. Miller & Cockriell (1977) 2 S.C.R 80, the Supreme Court upheld the death penalty; however, it had already been abolished a year earlier in 1976. Prior to its abolition the death penalty was widely criticised as being cruel and unusual and a violation of section 2(b) of the Canadian Bill of Rights, and that in itself it was barbaric (Hogg, 1992:1137). In this case the Court defines cruel and unusual punishment, as "whether the punishment prescribed is so excessive as to outrage standards of decency".

In the case of Kindler v. Canada (1991) 2 S.C.R. 779, the Supreme Court of Canada held that it was not a contravention of section 12 of the Charter to extradite a fugitive to a country where the death sentence was a valid penalty.

There are numerous cases in which the American Supreme Court found that the death penalty is cruel and unusual where the trial court has an unfettered discretion to impose such penalty, for example, Furman v. Georgia (1972) 408 U.S. 238. The death sentence was also held to be a cruel and unusual form of punishment when there was no discretion in its imposition - Woodson v. North Carolina (1976) 428 U.S. 280; or where it has been imposed on a juvenile aged below 16 years - Thompson v. Oklahoma (1988) 487 U.S. 815. However, the Supreme Court of America in the case of Gregg v. Georgia (1976) 428 U.S. 153, found that the death penalty was not cruel and unusual if the sentencing court has a discretion as to its imposition and that statutory guidelines are in place to control the exercise of the discretion.

In almost all court cases in America regarding the death penalty, courts have held that it is not *per se* a cruel and unusual punishment, although other factors surrounding it may render it cruel and unusual, for example, the delay in carrying

out the death sentence, treatment on death row, or the manner of execution (Keightley, SAJHR (1995): 389).

The Canadian Charter prohibits both treatment and punishment that is cruel and unusual, and thus it will only be applicable when the sanction amounts to treatment or punishment. It was held in the case of R v. Miller (1988) 65 O.R. (2nd) 746 (CA) that an automatic suspension of a driver's license was a civil sanction, which did not amount to either treatment or punishment. Likewise the deportation of a non-citizen who was found guilty of committing a serious offence was also not held to be punishment - Chiarelli v. Canada (1992) 1 S.C.R. 711. The Court did consider that the deportation could amount to treatment, but in any event that did not take the matter any further as the Court was of the view that deportation was not in itself cruel and unusual. In the case of R v. McC. (T) (1991) 4 O.R. 3d 203 (Ont. Ct. Prov. Div.), it was held that dirty, overcrowded holding cells for young offenders was cruel and unusual treatment.

Considerable debate has occurred around whether treatment or punishment should be both cruel and unusual, or if it is sufficient to be either of the two (Hogg, 1992:1130). The debate was finally settled in R v. Miller & Cockriell (1977) 2 S.C.R. 680, in which case the Supreme Court of Canada found that the two concepts had to be considered together as a compendious description of a norm. In this case the Court accepted the test to be whether the punishment prescribed is so excessive as to outrage standards of decency. In R v. Smith (1987) 1 S.C.R. 1045, the Court stated that this test indicated two categories of treatment or punishment, namely, those that are in their nature barbaric, and those that are grossly disproportionate to the gravity of the offence. The Court gave as examples of the first category of treatment or punishment, corporal punishment, castration of sexual offenders and the lobotomisation of dangerous offenders. These forms of treatment or punishment would be cruel and unusual irrespective of the type of offence for which it is imposed.

Treatment or punishment found in the second category is grossly disproportionate to the offence - in the case of R v. Smith above, the Court found that a minimum penalty of seven years imprisonment for importation of narcotics for a first offender fell within this category. In this case it was held that the statutory minimum sentence of seven years imprisonment was grossly disproportionate to the offence, as it could be a very young first offender with a small quantity of the prohibited substance.

In this case of R v. Smith above, the Court took the opportunity to deal with the aspect of minimum sentences. The Court took a hypothetical case of the most innocent offender in which case a sentence of seven years imprisonment would be grossly disproportionate. It found that Parliament was not empowered to significantly remove the discretion of a court to impose a sentence when establishing a sentencing rule. However, the Court found that not all minimum sentences are cruel and unusual, and that the concept of minimum sentences is not in itself cruel and unusual. The Court stated that it favoured the concept of individualised sentences. The Canadian Supreme Court found in R v. Goltz (1991) 3 S.C.R. 485 that a minimum seven-day sentence of imprisonment was cruel and unusual after applying the most innocent offender test. This decision made it clear that no sentence, irrespective of its magnitude would escape this test. The Court stated that the test of the most innocent offender must apply to imaginable circumstances that may arise in every day life, which rendered the test in a stricter standard.

In the case of R v. Luxton (1990) 2 S.C.R. 711, the Court held that a sentence of life imprisonment in terms of which the offender was only eligible for parole after a period of twenty five years had expired, was not cruel and unusual as the punishment was not excessive and did not instill a sense of outrage. This decision has been criticised in that there were many hypothetical cases where such a sentence would be cruel and unusual, for example, the offender could

have been found guilty of murder, but was only the look-out and did not commit the actual act (Hogg, 1992:1135).

4.5.5 IMPRISONMENT OF HABITUAL AND DANGEROUS CRIMINALS AS CRUEL AND INHUMAN PUNISHMENT

It was decided in the case of Bernstein & others v. Bester & others NNO 1996 (2) 751 (CC) that imprisonment does not in itself violate the right of not being detained without trial and does not require justification in terms of section 33(1) (limitation provision) of the interim Constitution, if it was the result of a conviction and sentence of an ordinary court. This view is held internationally as well (Chaskalson et al, 1996:39-20). In Coetzee 1995 (4) SA 631 (CC), it was held that imprisonment of civil debtors constituted a violation of this right because it did not follow the normal criminal procedure.

Section 286 of the Criminal Procedure Act provides for the declaration of certain persons as habitual criminals after a court finds that the person habitually commits offences. Persons under the age of 18 years may not be declared a habitual criminal (subsection (2)). Before a court can declare a person a habitual criminal, it must be of the opinion that the punishment warranted in the circumstances will be at least 15 years. The potential thus exists that a person sentenced in terms of this provision could spend the rest of his or her life in prison. Terblanche is of the view that imprisoning a habitual criminal for a period in excess of 15 years would amount to punishment that is cruel, inhuman or degrading and thus unconstitutional (1999:275). It may also be unconstitutional on the basis of inequality and disproportionality.

According to section 286A of the Criminal Procedure Act, a person may be declared a dangerous criminal if such person represents a danger to the physical or mental well being of other persons and the community should be

protected against such person. Before making a declaration in this regard the court must undertake an enquiry, which must be conducted by two psychiatrists (one appointed by the State and the other by the person concerned) (subsection (3)(a)). Once a court has declared a person a dangerous criminal, it must sentence the person to undergo imprisonment for an indefinite period and direct that the person must be brought before the court at the expiry of a period not exceeding the court's jurisdiction.

Now since repealed in Canada, the imposition of an indeterminate prison sentence after an offender has been declared an habitual criminal has been found to be cruel and unusual treatment or punishment in the case of Re Mitchell and the Queen (1983) 42 O.R. (2 nd) 481 (H.C.). The offender in this case was sentenced prior to 1977 when the term habitual criminal was replaced with dangerous criminal and an indeterminate sentence of imprisonment could only be imposed when serious personal injury was inflicted, and after it was established that the offender was a danger to society. The National Parole Board (Canada) must review offenders who are classified as dangerous criminals three years after the classification, and every two years thereafter. The National Parole Board has the power to change the prisoner's classification should it be of the view that the prisoner was no longer a danger to society (Hogg, 1992:1136).

In a later decision the Supreme Court of Canada held that the dangerous offender provision was not cruel and unusual treatment or punishment and thus did not contravene section 12 of the Canadian Charter - R v. Lyons (1987) 2 S.C.R. 309. The Court stated that the preventative purpose was not disproportionate because prisoners classified as dangerous possessed characteristics that made such detention necessary. Thus although the indeterminate prison sentence was severe, it was not disproportionate because of its preventative purpose and the fact that the National Parole Board could

alter the classification if it was warranted. Judge La Forest stated in R v. Milne (1987) 2 S.C.R. 512 that there was no exact way to determine gross disproportionality and it did not require penalties to be perfectly suited to "accommodate the moral nuances of every crime and every offender".

4.6 TREATMENT OF PRISONERS IN TERMS OF THE CORRECTIONAL SERVICES ACT

As regards the safe custody and security of prisoners, Part C of Chapter 3 of the Correctional Services Act provides for the safe custody and security of prisoners. Section 26 deals with the safe custody of prisoners, on the underlying rationale that every prisoner has the right to personal integrity and privacy, subject to such limitations, which are necessary to ensure the security of the community, the safety of correctional officials and the safe custody of other prisoners. In order to achieve these objectives, a correctional officer may:

- “(a) search the person or property of a prisoner and seize any object or substance which poses a threat to the security of the prison or the safety of any person;
- (b) take steps to identify the prisoner;
- (c) classify prisoners and allocate segregated accommodation, even single cells;
- (d) apply any mechanical means of restraint; and
- (e) use reasonable force where necessary.” (section 26).

4.6.1 SEARCHING OF PRISONERS

According to section 27 of the Correctional Services Act, a prisoner may be searched in ways that are intimate and personal, but it also places certain restrictions on the manner in which the search must take place. Manual or

mechanical means may be used to search a prisoner's clothed body, and upon reasonable grounds a prisoner may be searched in the following ways:

- (i) visual inspection of the naked body;
- (ii) physically probing any bodily orifice;
- (iii) x-ray of the body of the prisoner or search by other technical means if there are reasonable grounds to believe that the prisoner swallowed or excreted a substance or object needed as an exhibit in a hearing, or that poses a danger to the prisoner or any other person;
- (iv) detaining a prisoner in order to recover by normal excretory process, any object which may pose a danger to the prisoner or any other person.

However, section 27 of the Correctional Services Act places certain restrictions on the power of prison authorities to search prisoners. The dignity and privacy of a prisoner must be infringed as little as possible during the search and only an official of the same gender as the prisoner may conduct the search. All searches must be authorised by the Head of the Prison, must be conducted in private and must not be in an area where they are visible to others. Other than the inspection of the naked body of the prisoner, a registered nurse, medical officer or medical practitioner, depending on the procedure required during the search, must supervise all other bodily searches. The official conducting the search is empowered to seize anything found during the search.

4.6.2 IDENTIFICATION OF PRISONERS

In order to further ensure the safe custody of prisoners, prison officials may take the following steps to identify a prisoner:

- (a) taking finger and palm prints;
- (b) taking photographs of the prisoner;
- (c) ascertaining external physical characteristics;
- (d) taking measurements; and

(e) referral to a medical officer to ascertain the age of the prisoner.

A prisoner may, at own cost, request that his or her private medical practitioner be present when his or her age is determined. If the Head of the Prison is of the view that the prisoner's age is incorrectly estimated, the Head of the Prison may remit the case to the Court concerned for a reappraisal of the prisoner's age (section 28 of the Correctional Services Act).

4.6.3 SEGREGATION AND ISOLATION OF PRISONERS

According to section 30 of the Correctional Services Act, a prisoner may be segregated from other prisoners for a period of up to one day, which segregation may include detention in a single cell, in the following circumstances:

- (a) when a prisoner requests such segregation in writing;
- (b) imposed as a penalty after a disciplinary hearing;
- (c) on medical grounds if prescribed by a medical officer;
- (d) if a prisoner either displays violent tendencies, or as a means of protection when threatened with violence;
- (e) in order to prevent a prisoner from escaping again after being recaptured;
and
- (f) at the request of the police, and if the Head of the Prison is of the view that such segregation is in the interests of the administration of justice.

A correctional official must visit a prisoner who is segregated in terms of this provision at least once every four hours, whilst the Head of the Prison must visit the prisoner at least once a day. In addition, a registered nurse, psychologist or medical officer must assess the prisoner's health at least once a day. If any of these medical personnel are of the view that such segregation is detrimental to the health of the prisoner the segregation must end. Where segregation occurs as a result of the request of a prisoner, such request may be withdrawn at any time (by the prisoner). If the Head of the Prison is satisfied that the segregation

is not detrimental to the health of the prisoner, and the medical officer or psychologist confirms such belief, the period of segregation may be extended to 30 days if the Commissioner of Correctional Services agrees.

The Head of the Prison must report all cases of segregation or the extension thereof to the Area Manager and the Inspecting Judge. Any prisoner who is subject to segregation may refer the matter to the Inspecting Judge. Any decision on the matter by the Inspecting Judge must be given to the prisoner concerned within 72 hours of the referral. Segregation must generally be for a minimum period and the minimum restrictions must be imposed on the prisoner.

4.6.4 MECHANICAL AND OTHER RESTRAINTS

Section 31 of the Correctional Services Act deals with mechanical restraints used to restrain prisoners under certain circumstances. Should it be necessary for the safety of a prisoner or any other person with whom a prisoner may come into contact, or if there is a reasonable suspicion that a prisoner may escape, prison authorities may restrain a prisoner by mechanical means. Unless a court so authorises, a prisoner may not appear before a court in mechanical restraints other than handcuffs or leg-irons. Mechanical restraints may only be used on prisoners who are in solitary confinement when approved by the Head of the Prison, and then only for a period of 7 days.

Generally mechanical restraints may not be used on a prisoner for a period exceeding 7 days, unless the Commissioner of Correctional Services grants permission for it to continue until a maximum of 30 days. The Commissioner may only extend the period beyond 7 days after consultation with a medical officer or psychologist. The use of any mechanical restraints, except leg-irons and handcuffs, must be reported to the Area Manager and Inspecting Judge. Prisoners who are subject to mechanical restraint (other than leg-irons and

handcuffs) may appeal against such restraint to the Inspecting Judge, who must make a decision within 72 hours. In terms of this provision, mechanical restraints may never be used as a form of punishment or disciplinary measure.

Regulation 18 provides that only the following mechanical restraints may be used: handcuffs, leg-irons and -cuffs, belly chains, plastic cable ties, electronically activated high-security transport stun belts, and patient restraints (Draft Correctional Services Regulations).

4.6.5 USE OF FORCE AGAINST PRISONERS

The use of force against a prisoner is regulated by section 32 of the Correctional Services Act. Correctional officials may use force to detain prisoners in safe custody when no other means are available. However, minimum force must be used and the force must be proportionate to the objective. A correctional official may only use force if so authorised by the Head of the Prison, or if the official believes that the Prison Head would authorise the use of such force and the delay in obtaining such authorisation would defeat the objective. In such cases the official must report the use of force to the Head of the Prison as soon as is reasonably possible. The Prison Head may authorise the official to use non-lethal incapacitating devices, like stun rods. In all cases where force is used, the prisoner must undergo a medical examination, and if necessary, receive appropriate medical treatment.

4.6.6 NON-LETHAL INCAPACITATING DEVICES

According to section 33 of the Correctional Services Act, a correctional official may use non-lethal incapacitating devices on the authority of the Head of the Prison or the Head of Community Corrections. Only officials who have been

trained in the use thereof may use such devices. These devices may only be used in the following circumstances:

- (a) if a prisoner fails to lay down any weapon or dangerous instrument, after being ordered to do so;
- (b) if the security of the prison or the safety of prisoners is threatened by one or more prisoners; and
- (c) in order to prevent a prisoner from escaping.

Regulation 18 provides that only the following non-lethal incapacitating devices may be used: chemical agents, electronically activated devices, and rubber missiles. According to Regulation 20, batons and pyrotechnical equipment may be used in appropriate circumstances by correctional officials (Draft Correctional Services Regulations, 2001).

4.6.7 USE OF FIREARMS AGAINST PRISONERS

A correctional official may only use a firearm on the authority of the Head of the Prison or the Head of Community Corrections. Only correctional officials who have been trained in the use of firearms may use such weapons, and only in circumstances where the security of the prison or the safety of prisoners or others is threatened. According to Regulation 20, whenever a firearm is fired, the correctional officer must report it to the Head of the Prison (Draft Correctional Services Regulations, 2001). The use of any other weapon must be authorised by the Head of the Prison as prescribed by regulation (section 35 of the Correctional Services Act).

4.6.8 DISCIPLINING OF PRISONERS

In order to meet the requirements of section 12(1) of the Constitution, insofar as it relates to prisoners, Parts B and C of Chapter 3 of the Correctional Services

Act were enacted. Section 22 to 25 deals with disciplining prisoners and the penalties that may be imposed. Section 22 states that although discipline must be firmly imposed, it should not exceed the standard, which is adequate to achieve and maintain good order in the prison. This principle constitutes the underlying philosophy in prison discipline. Subsection (2) and (3) deals with the relationship between discipline and criminal proceedings emanating from the same conduct. If a prisoner is convicted of a criminal offence, prison officials may use such conviction as a basis for disciplinary action against the prisoner. Furthermore, pending or current criminal proceeding does not affect the right of prison authorities to take disciplinary action against a prisoner. Prisoners may not be involved in the implementation of discipline - this provision is to prevent legitimising informal disciplinary steps amongst prisoners.

Section 23 lists forms of conduct which could give rise to disciplinary action, for example, dishonest replies to legitimate questions posed by prison authorities; disobeying a lawful command; failing to comply with any regulation or order; being abusive to any person; refusing or failing to perform any labour or any other duty imposed or authorised by this Act; carelessness or negligence in carrying out any labour or other duty imposed or authorised by this Act; and using insulting, obscene or threatening language.

The provisions of section 24 deal with the procedures to be followed at a disciplinary hearing and the penalties that may be imposed if a prisoner is found guilty. Disciplinary hearings must take place in a fair manner and must be presided over by the Head of the Prison or a disciplinary official. Hearings before a Prison Head is informal and the prisoner may acknowledge or deny the allegations presented to him or her. A prisoner is not entitled to representation at such hearings. The Prison Head may impose one or more of the following penalties if satisfied that the prisoner is guilty: reprimand, loss of gratuity for a

period not exceeding one month; and restriction of amenities for a period not exceeding seven days.

However, in terms of subsections (4) and (5), when a hearing is presided over by a disciplinary official, the prisoner must be informed of the allegations in writing and has the right to be present throughout the hearing. The prisoner may also present his or her version of the facts at the hearing, cross examine and call witnesses and is entitled to reasons for the disciplinary official's decision. The disciplinary official may impose one or more of the following penalties: reprimand, loss of gratuity for a period not exceeding two months, restricted amenities for a period not exceeding 42 days, and solitary confinement for a period not exceeding 30 days in cases of repeated infringements.

Regulation 14 provides that a disciplinary hearing must be conducted as soon as possible, and if possible, within 14 days of notification of the charge. A prisoner may be represented by a legal practitioner, and the presiding chairperson may adopt an inquisitorial approach. Guilt or innocence is determined on a balance of probabilities. (Draft Correctional Services Regulations, 2001).

The American Supreme Court has laid down five procedural safeguards to which prisoners are constitutionally entitled during disciplinary hearings:

- written notification of the charges against them;
- right to call witnesses;
- right to assistance in their defence;
- written reasons for the decision; and
- an impartial adjudicator (Branham and Krantz, 1991:172-177).

4.6.9 SOLITARY CONFINEMENT AS A PENALTY FOR PRISONERS

Section 25 of the Correctional Services Act deals specifically with the implementation of solitary confinement as a penalty for prisoners. Such penalties must be referred to the Inspecting Judge for review, who must within three days after considering a report of the proceedings and a report from a registered nurse, psychologist or medical officer on the status of health of the prisoner, confirm or set aside the decision. Where the decision is to set aside the penalty, the Inspecting Judge may substitute the penalty with an appropriate order. The punishment may only be carried out after the Inspecting Judge has confirmed the penalty.

A correctional official must visit a prisoner who is in solitary confinement (at least once every four hours) and the Head of the Prison must visit the prisoner at least once a day. A registered nurse, psychologist or a medical officer must also assess the health of the prisoner. If in the view of the medical personnel mentioned above, the solitary confinement poses a threat to the prisoner's physical or mental health, the solitary confinement must be discontinued immediately.

In an American case it was held that prisons were not meant to be places of comfort - Rhodes v. Chapman (1981) 452 U.S. 337. However, it was decided in the case of Trop v. Dulles 356 US 86 that mental cruelty has been included as constitutionally prohibited as well as physical cruelty, and thus harsh treatment of a prisoner, which is not necessary for safe confinement is an unconstitutional deprivation of rights. In this case the Court decided that solitary confinement was held to be unconstitutional as it amounted to cruel and unusual punishment.

Prison conditions which are oppressive and prison discipline which is severe may amount to cruel and unusual punishment (Canadian case of McCann v. The

Queen (1976) 1 F.C. 570 (TD)). In the last-mentioned case solitary confinement was held to be cruel and unusual punishment and a contravention of section 2(b) of the Canadian Bill of Rights, whereas double-celling was not held to be cruel and unusual punishment under section 12 of the Canadian Charter (Collin v. Kaplan (1983) 1 F.C. 496 (T.D.)).

4.7 RIGHT TO FREEDOM FROM SLAVERY, SERVITUDE AND FORCED LABOUR (SECTION 13)

4.7.1 SOUTH AFRICAN BILL OF RIGHTS

Section 13 of the Constitution provides that “(n)o one may be subjected to slavery, servitude or forced labour.” This provision would appear to prohibit any form of forced labour as a form of punishment. Previously terms of imprisonment were often accompanied by hard labour. The nature of prison labour and other prison activities may also be affected by this provision. Forced labour amounts to work performed by someone against his or her will, and the work to be performed must be unjust, oppressive or involve unavoidable hardness (Davis et al, 1997:89). From this definition it is clear that not all types of prison labour would amount to “forced labour”.

4.7.2 CANADIAN CHARTER OF RIGHTS

The Canadian Charter does not contain an equivalent provision of section 13 of the Constitution.

4.7.3 AMERICAN CONSTITUTION

The Thirteenth Amendment to the American Constitution prohibits slavery and involuntary servitude, except as a form of punishment after conviction by a court of law.

4.7.4 LABOUR PERFORMED IN PRISON

Section 37 of the Correctional Services Act provides that in addition to obligations which apply to all prisoners, they must perform any labour related to any developmental programme, or which is designed to foster habits of industry, unless a medical officer or psychologist certifies in writing that the prisoner is physically or mentally unfit to perform such labour. According to section 40, as far as is practicable, sufficient work must be provided for prisoners in order to keep them active during a normal working day. For this purpose, a prisoner may be forced to carry out work.

However, sentenced prisoners may not work or carry on a private business for their own account. If a choice exists as to the type of work a prisoner must carry out, the prisoner may make a choice in accordance with an appropriate vocational programme. Any gratuity received by a prisoner for work performed must be regulated by prison regulations. According to section 41, sentenced prisoners who are illiterate or who are children, may be compelled to take part in educational programmes, whilst certain prisoners may be forced to take part in programmes which are necessary (in the opinion of the Commissioner), as a result of their past criminal conduct.

Regulation 23 provides that the Commissioner of Correctional Services may contract with any institution or person for the utilisation of the labour or service of prisoners upon conditions agreed to between the parties. Products of the

labour or service in a prison may be sold to any person on conditions determined by the Commissioner. This Regulation provides further that prisoners trained in a specific field must at all times perform labour, tasks and other duties assigned for the purposes of training or utilisation of the skills learnt. Prisoners may not work more than eight hours a day, and must either receive compensation for work done or be exempted from one day's compulsory work for each day worked voluntarily (Draft Correctional Services Regulations, 2001).

Smit in his article about prison labour in Germany agrees with the view that compulsory prison labour is an effective means of re-socialising prisoners when such work is appropriately recognised. The recognition need not be in the form of monetary reward, as the system could allow for time-off or improved benefits for the prisoner (SALJ, 1998:618).

According to the 1999 Annual Report of the Department of Correctional Services, the income derived from prison labour amounted to R3,8 million for the year ending 31 December 1999. During 1999, 14 599 prisoners were involved in prison labour in the following areas, building and maintenance, agricultural services, production workshops and maintenance workshops (Annual Report, 1999:24).

4.7.5 LABOUR AS A FORM OF PUNISHMENT

Prisoners may not be forced to perform work as a form of punishment or disciplinary measure (section 40(5) of the Correctional Services Act), and work performed by a prisoner does not constitute an employment relationship with the Department of Correctional Services (section 40(6)). Although a prisoner can be forced to perform labour in terms of the above provisions, I am of the view that it will not amount to an infringement of section 13 of the Constitution as it can be

justified in terms of section 36 of the Constitution. Labour under such circumstances would qualify as justifiable in terms of the limitations provision in that the work is part of the rehabilitation process, and not a form of punishment.

Work forms part of the prison rehabilitation process in many western democracies, and although the labour may be of a forced nature, it is for a prescribed purpose, which is intended for the benefit of the prisoner. The labour is intended to keep at bay the dangers of idleness and boredom and to develop the prisoner in a vocational area, thus rendering the prisoner employable on release.

In the European case of Droogenbroek v. Belgium (7906/77) Report 9-7-1980, it was held that recidivists who were placed at the Government's disposal did not amount to being held in servitude. The European Commission stated that it did not amount to forced labour for a pupil advocate to be obliged to represent indigent clients as part of the contract of pupilage (Davis et al, 1997:90).

4.8 RIGHT TO PRIVACY (SECTION 14)

4.8.1 SOUTH AFRICAN BILL OF RIGHTS

Section 14 of the Constitution states that: "Everyone has the right to privacy, which includes the right not to have -

- (a) their person or home searched;
- (b) their property searched;
- (c) their possessions seized; or
- (d) the privacy of their communications infringed."

The provisions of section 14 encompass the right not to have the person or their home searched; their property searched; possessions seized; or the privacy of

their communication infringed. This provision would have application on the privacy of prisoners, especially regarding their means of communication and protection of their personal possessions. However, such rights can be limited in terms of the provisions of section 36 of the Constitution, as it may be necessary to invade the privacy of prisoners in order to ensure their safety and the safety of other people with whom the prisoner may come into contact. According to Louw, this right would effectively also decriminalise homosexual conduct in private, although non-consensual homosexual conduct would amount to indecent assault (SACJ 1998: 382). In the case of S v. Chapman 1997 (3) SA 341 (SCA), the court went a step further and stated that it was an aggravating factor that the accused violated the victim's right to privacy by raping her.

4.8.2 CANADIAN CHARTER OF RIGHTS

Although there is no specific provision dealing with the right to privacy in the Charter, section 8 states that everyone has the right to be secure against unreasonable search or seizure. The rights of prisoners in this regard may be limited in terms of section 1 of the Canadian Charter.

4.8.3 AMERICAN CONSTITUTION

The Fourth Amendment to the American Constitution provides that "(t)he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, ...". It was held in the case of Hudson v. Palmer 468 US 517 that a prison inmate has no reasonable expectation of privacy in his prison cell entitling him to protection of the Fourth Amendment against unreasonable searches.

4.8.4 POWERS OF SEARCH AND SEIZURE

Chapter 2 of the Criminal Procedure Act, which grants wide powers of search and seizure, entry of premises and forfeiture and disposal of property, may be challengeable in terms of section 33(1) of the Constitution (dealing with just administrative action). Davis et al are of the view that this provision would probably not pass constitutional muster as it is unlikely that a court will find the provision reasonable or justifiable in an open and democratic society based on freedom and equality (1997:97). The provisions of Chapter 2 are applicable to prisoners.

4.9 RIGHTS OF CHILDREN (SECTION 28)

4.9.1 SOUTH AFRICAN BILL OF RIGHTS

The Constitution places great emphasis on the rights of children, and has devoted section 28 to expounding these rights. Section 28 reads as follows:

- “(1) Every child has the right -
- (a) to a name and a nationality from birth;
 - (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
 - (c) to basic nutrition, shelter, basic health care services and social services;
 - (d) to be protected from maltreatment, neglect, abuse or degradation;
 - (e) to be protected from exploitative labour practices;
 - (f) not to be required or permitted to perform work or provide services that -
 - (i) are inappropriate for a person of that child’s age; or
 - (ii) place at risk the child’s well-being, education, physical or mental health or spiritual, moral or social development;

- (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under section 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be -
- (i) kept separately from detained persons over the age of 18 years;
and
 - (ii) treated in a manner, and kept in conditions, that takes account of the child's age;
- (h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
- (i) not to be used directly in armed conflict, and to be protected in times of armed conflict.
- (2) A child's interests are of paramount importance in every matter concerning the child.
- (3) In this section child means a person under the age of 18 years."

Subsection (3) defines a child as a person not older than 17 years. This age limit is the same as the age at which an accused is treated as a juvenile for purposes of sentencing in terms of section 290 of the Criminal Procedure Act. For purposes of this research project, the relevant rights enjoyed by children are:

- family or parental care, or appropriate alternative care when removed from the family environment (subsection (1)(b));
- basic nutrition, basic health care services, shelter and social services (subsection (1)(c));
- not to be maltreated, neglected, abused or degraded (subsection (1)(d));
- not to be required to work or provide services inappropriate for a person of that age or where the child's well-being, education, physical

or mental health, or spiritual, moral or social development is detrimentally affected (subsection (1)(f));

- only to be detained as a last resort and only for the shortest appropriate period of time, in addition to the rights enjoyed under sections 12 and 35 (subsection (1)(g));
- children must be kept separately from other detained persons who are 18 years and older (subsection (1)(g)(i)); and
- the conditions under which a child is detained must be appropriate in relation to the child's age (subsection (1)(g)(ii)).

Neither the Canadian Charter nor the American Constitution specifically refers to the protection of rights of children as these rights are protected in terms of the other specific rights, which apply generally to all persons.

Du Plessis and de Ville in their article state that the Bill of Rights reflects the peculiarities of the political context in which it exists, hence the comprehensive provision relating to protection of the rights of children (1994:238). These measures to protect children stem from an era where children were regularly jailed for political activities and violence against state institutions (Devenish, 1998:74).

4.9.2 INTERNATIONAL CONVENTIONS I.R.O. CHILDREN

According to Olivier, South Africa became a signatory to the Convention on the Rights of the Child (adopted by the General Assembly of the United Nations on 20 November 1989), on 29 January 1993, and ratified the Convention on 16 June 1995 (SAJHR 1995:641). A children's summit was held in Cape Town between 27 May and 1 June 1992, and shortly thereafter, Cape Town hosted the International Conference on the Rights of the Child from 10 - 13 June 1992.

With childrens' rights firmly on the political and social agenda, section 28 of the Constitution was born (Rautenbach, 1998:3E-12).

Rautenbach is of the view that section 28(1)(b) infers that a child's rights to care extends to state sponsored institutions that act *in loco parentis* when the child is removed from the care of the parents or family (1998:3E-13). In this way the right to care would extend to correctional institutions, including prisons, where children are in custody.

4.9.3 BASIC REQUIREMENTS OF CHILDREN

Subsection (1)(c) provides that a child is entitled to certain basic rights, which are probably designed to prevent cases of extreme deprivation or impoverishment. From the wording of this provision it appears that an obligation is placed on the State to provide these basic necessities (basic signifying a minimum level necessary to prevent malnourishment or disease). However, the enforceability of these rights, which entail expenditure on the part of the State, would also depend on the financial resources available (De Vos, SAJHR 1997: 87-88). A further qualification is that the onus is on the State to supply only such services when they are either inadequate or non-existent (Davis et al, 1997:269).

Correctional institutions housing children are obliged to ensure that children who are inmates are protected from maltreatment. According to Davis et al, the Convention on the Rights of the Child, which sets out rights protecting children from sexual exploitation and drugs, may be used as a point of reference to give substance to subsection (1)(d) (1997:269). In this context the State would be obliged to protect incarcerated children from the dangers of physical, sexual and drug abuse.

4.9.4 CORPORAL PUNISHMENT

The issue of judicial imposition of corporal punishment on juveniles has been settled in the Constitutional Court case of S v. Williams and Others 1995 (7) BCLR 861 (CC), where it found such punishment to be unconstitutional on the grounds that it infringed the right to dignity and protection against cruel and inhuman or degrading punishment. The question whether the imposition of corporal punishment on children in the home, school or institution infringed section 28(1)(d) has not yet been finally decided. However, I am of the view that the Constitutional Court would arrive at a similar decision as in S v. Williams above, in respect of non-judicial corporal punishment.

It was held in the case of Hiltonian Society v. Crofton 1952 (3) SA 130 (A) that the relationship between a teacher and a pupil justified the infliction of moderate and reasonable corporal punishment in certain situations. In the European case of Christella Roberts v. United Kingdom (Independent Law Report 26 March 1993), the court was of the view that the corporal punishment must be severe enough in order to constitute a violation of article 3 of the First Protocol (European Commission). However, in the light of the S v. Williams judgment, corporal punishment administered on juveniles in penal institutions would in all probability be unconstitutional. Furthermore, the Correctional Services Act does not provide for such punishment.

4.9.5 REPORTING ABUSE OF CHILDREN

Section 4 of the Prevention of Family Violence Act, No. 133 of 1993, provides that any person, who cares for, treats or examines any child, must report any ill treatment of such child to the police or a social worker. In addition, section 42(1) of the Child Care Act, No. 74 of 1983, states that medical personnel and social workers are obliged to report incidents of child abuse to the relevant authorities.

4.9.6 PERFORMANCE OF INAPPROPRIATE WORK BY CHILDREN

Subsection (1)(f), which mitigates against a child being required to perform work that is inappropriate for the age of the child, would mainly be applicable to work which an incarcerated child would have to perform as part of serving a sentence in prison or a juvenile correctional institution. According to Davis et al, this restriction would cover work, which has the effect of exposing a child to sex, alcohol or drugs, and if children are required to do work whilst in prison it should be of a light nature (1997:273).

4.9.7 DETENTION OF CHILDREN AS A LAST RESORT

According to subsection (1)(g), a child may only be detained as a last resort, and then only for the shortest period of time. When children are detained they must be kept separately from other detained persons who are over the age of 17 years, and the condition in which they are kept and the treatment they receive must be appropriate for their age. In addition to the protection afforded in terms of this provision, the rights enjoyed in terms of sections 12 and 35 (dealt with above) are also applicable. It is clear from the wording of this provision that it was intended to place a heavy onus on the State to ensure that as a general practice, children are not imprisoned. In cases where children have to be detained, it should be for the briefest period only.

4.9.8 ADDITIONAL RIGHTS FOR INCARCERATED CHILDREN

In addition to the rights generally enjoyed by prisoners in terms of the Correctional Services Act, children also enjoy the special rights and privileges contained in section 19. This section reads as follows:

“(1)(a) Every prisoner who is a child and is subject to compulsory education must attend and have access to such educational programmes.

- (b) Where practicable, all children who are prisoners not subject to compulsory education must be allowed access to educational programmes.
- (2) The Commissioner must provide every prisoner who is a child with social work services, religious care, recreational programmes and psychological services.
- (3) The Commissioner must, if practicable, ensure that children who are prisoners remain in contact with their families through additional visits and by other means.”

In this way children who are prisoners may not be deprived of the opportunity to continue their education. Prison authorities are obliged to arrange that these children have access to educational programmes within the prison environment. Both the spiritual and psychological needs of children have to be catered for, and they also enjoy additional visits from family members. Other means may also be employed to ensure that they remain in contact with their families.

Section 20 of the Correctional Services Act, which deals with female prisoners who have young children, reads as follows:

- “(1) A female prisoner may be permitted, subject to such conditions as may be prescribed, to have her child with her until such child is five years of age.
- (2) The Department is responsible for food, clothing health care and facilities for the sound development of the child for the period that such child remains in prison.
- (3) Where practicable, the Commissioner must ensure that a mother and child unit is available for the accommodation of female prisoners and the children whom they may be permitted to have with them.”

On 16 February 1999, the Department of Correctional Services adopted a policy in respect of female prisoners who have young children, containing the following main principles:

- the admittance of a baby or a young child with a mother is only permitted when no other suitable accommodation and care is available at that particular point in time; and
- mothers and infants or young children are kept in a separate unit in a prison (Annual Report, 1999:9).

The rights in this section apply to children below the age of six and who are with their mothers in prison. The Department of Correctional Services is required to ensure that the child is supplied with adequate food, accommodation, clothing and health care. The European Commission ruled in the case of Aummeruddy-Cziffra v. Mauritius (R) 9/35 HRC 36 that it is a reasonable limitation of this right to separate a child from its parents when the parents are incarcerated.

It was reported in the Cape Argus of 12 June 2000, that 396 juveniles between the ages of 14 and 17 are imprisoned in the already overcrowded Pollsmoor Prison in the Western Cape. In a recent case in which member of Parliament, Ms P de Lille applied to the High Court for the release of juveniles from Pollsmoor Prison in order that they may be moved to a place of safety, the Court declared that children detained at Pollsmoor Prison were, amongst others, entitled to basic health care. The matter was settled out of court and the parties agreed that the children would be transferred to places of safety as soon as possible.

4.10 SENTENCING GUIDELINES IN TERMS OF THE CANADIAN CRIMINAL CODE

Bill C-41, which was assented to on 13 July 1995 and became Part 23 of the Canadian Criminal Code, introduced sentencing guidelines for courts. Section 718.2 contains the following guideline principles:

- (a) A sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, for example, motivation based on prejudice, abuse of the offender's spouse or child, abusing a position of trust or authority, or offender working in co-operation with a crime syndicate.
- (b) A sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.
- (c) Where consecutive sentences are imposed, the effect of the combined sentences should not be unduly harsh or long.
- (d) An offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances.
- (e) All available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

It is intended that over time, the Canadian Supreme Court will give further guidance to ensure proportionality in sentencing and that due regard is given to relevant factors (Roberts and Cole, 1999:34). It is clear from the above principles that the Canadian Parliament was mindful of the disproportionate involvement of aboriginal people in crime and that hate-motivated crimes and spousal abuse require special attention. In South Africa there are no legislative guidelines for imposition of sentences at present (Chaskalson et al, 1996:28-1). Smit disagrees with the view that legislatively imposed sentencing guidelines

necessarily result in disproportionate sentences (European Journal of Crime (1995):3).

4.11 SUMMARY

4.11.1 RIGHT TO EQUALITY

The Bill of Rights contained in the Constitution as Chapter 2, will have a profound impact on the types of punishment that may be imposed and the manner in which it is carried out. Section 9 of the Constitution which deals with the aspect of equality, will have the effect of prohibiting all forms of unfair discrimination within the penal system, whilst also preventing significant sentence disparity. The spirit of the Correctional Services Act is such that it seeks to avoid unfair discrimination against prisoners. The Canadian Charter and the American Constitution contain similar provisions. By its nature, punishment would infringe on certain rights of offenders. However, such infringement would only be acceptable if it complies with the provisions of section 36 of the Constitution.

It is clear from the case of The President v. Hugo (above), that not all discriminatory acts are unlawful, only those acts, which discriminate unfairly. The offence of consensual sexual acts between adult males was found to be unconstitutional by the Constitutional Court as its prohibition infringed on the right to equality. Excessive sentencing disparity and disproportionality in sentencing is unconstitutional as it infringes on the right to equality, in terms of decisions of courts in South Africa, Canada and America. Such sentences are also unconstitutional on the grounds that it constitutes cruel, inhuman or degrading punishment. The Promotion of Equality and Prevention of Unfair Discrimination Act was passed in 2000 in order to give effect to section 9 of the

Constitution. One of the objects of the Correctional Services Act is to eliminate unfair discrimination within the prison environment.

4.11.2 RIGHT TO HUMAN DIGNITY

The aspect of human dignity is an issue in virtually all forms of punishment, and this right has been one of the underlying factors that led to the decision in finding the death penalty and corporal punishment, unconstitutional. The Correctional Services Act, which has as one of its objectives, the detention of prisoners in safe custody whilst ensuring their human dignity, prescribes rules and provisions, which are intended to render the treatment of prisoners by correctional officials humane and dignified. To this extent, the Act makes provision for adequate nutrition, clean clothing and cells, health care and the maintenance of family links, to name but a few. Complaints of prisoners are also dealt with in an effective and comprehensive way.

Life imprisonment could be unconstitutional on the basis of human dignity if it is of such a nature that there is no prospect of an early release, either on parole or as a result of an act of amnesty or presidential pardon. It was held in a high court case that a person's dignity is impaired when such person is subjected to treatment which is degrading or humiliating or which treats a person as subhuman.

4.11.3 RIGHT TO LIFE

The right to life has already received attention by the Constitutional Court and was one of the principles on which the Court found the death penalty to be unconstitutional. Canada has also abolished the death penalty. The death penalty is not unconstitutional in terms of the American legal system, provided that the court can exercise its discretion when imposing the penalty. Other

aspects, like the long wait on death row and prison conditions prior to execution can render this penalty unconstitutional on the basis of it being a form of cruel and unusual punishment. Abortion is not an infringement on the right to life in terms of the legal systems of South Africa, Canada and America.

4.11.4 RIGHT TO FREEDOM AND SECURITY OF THE PERSON

Section 12, which deals with the right to freedom and security of the person makes specific mention of cruel, inhuman or degrading punishment. Although there are few South African cases dealing with this aspect, Canadian and American courts have dealt extensively with it. The main aspect that is of concern for the purposes of this thesis is the prohibition of cruel, inhuman or degrading treatment or punishment. The Constitutional Court dealt in detail with the prohibition of cruel, inhuman or degrading punishment in the cases of S v. Makwanyane and S v. Williams (above). In numerous American court cases it was held that the death penalty constituted a form of cruel and unusual punishment, but in the case of Gregg v. Georgia (above), the Supreme Court found that the death penalty was not per se cruel and unusual punishment.

The South African and Canadian provision goes further than the American provision in that they include treatment that is cruel and unusual. In the Canadian case of R v. Miller & Cockriell (above), it was held that to qualify as an infringement of this provision, the treatment or punishment must be both cruel and unusual. Punishment that is cruel and unusual is punishment that is so excessive that it outrages standards of decency. Punishment that is grossly excessive or disproportionate to the offence is also unconstitutional on the basis that it amounts to cruel and unusual punishment. In this way certain minimum sentences could be disproportionate, and thus unconstitutional. It was held in the Canadian case of R v. Luxton (above) that a sentence of life imprisonment in terms of which the offender was only eligible for parole after a period of 25

years, was not cruel and unusual in that it was not excessive and did not induce a sense of outrage.

Dangerous criminals may, in theory at least, remain in prison for the rest of their lives as they are imprisoned for an indefinite period. However, if habitual criminals serve a term longer than 15 years, it may amount to punishment that is cruel and unusual and thus unconstitutional.

4.11.5 TREATMENT OF PRISONERS IN TERMS OF THE CORRECTIONAL SERVICES ACT

Section 27 of the Correctional Services Act provides extensive powers of search to correctional officials over prisoners. However, the privacy and dignity of the prisoner must be infringed as little as possible in this process. Prison officials may take a number of steps to identify prisoners, including, taking photographs of the prisoner and ascertaining the external physical characteristics of the prisoner. A prisoner may request to be placed in a single cell, whilst such isolation may also result from a disciplinary penalty. The Commissioner of Correctional Services is empowered to extend this period to 30 days if the Head of the Prison is satisfied that it will not detrimentally affect the prisoner's physical or mental health.

Prison authorities are empowered, in terms of section 31, to use mechanical and other restraints if there is a reasonable suspicion that the prisoner will escape, or in situations where the prisoner could cause harm to other persons in the institution. The period for which such restraint can be used may not exceed seven days, unless the Commissioner extends such period. In certain circumstances prison officials may also use force against prisoners, provided that minimum force is used and the force must be proportionate to the objects to be achieved. Non-lethal incapacitating devices may be used in situations where

a prisoner constitutes a danger to others, whilst firearms may only be used on the authority of the Head of the Prison or the Head of Community Corrections.

Discipline may be firmly imposed against prisoners, but should not exceed the standard that is adequate to achieve and maintain good order in prison. Penalties, which could be imposed against prisoners include, a reprimand, loss of gratuity for a month, restriction of amenities for a period not exceeding seven days, and solitary confinement for a period not exceeding 30 days for repeated infringements. A prisoner may only be placed in solitary confinement if it does not detrimentally affect the prisoner's mental or physical health. It was held in a Canadian case that solitary confinement of a prisoner amounted to a form of cruel and unusual punishment.

4.11.6 RIGHT TO FREEDOM FROM SLAVERY, SERVITUDE AND FORCED LABOUR

The right to freedom from slavery, servitude and forced labour will effectively prohibit forced labour for prisoners, unless it can be justified in an open and democratic society (limitations provision). In terms of section 37 of the Correctional Services Act, prisoners must perform any labour related to any developmental programme, which is designed to foster habits of industry. Although forced labour is prohibited by the Constitution, such labour can be justified in terms of the limitation provision. However, prisoners may not be forced to perform work as a form of punishment or disciplinary measure.

4.11.7 RIGHT TO PRIVACY

Although a prisoner is entitled to this right, the nature of imprisonment is such that the right would have limited application. However, the searching of

prisoners will have to be conducted with due regard to the provisions of section 14 of the Constitution (the right to privacy).

4.11.8 RIGHTS OF CHILDREN

Rights of children are dealt with comprehensively in section 28 of the Constitution. These rights require that children must only be incarcerated as a last resort; that they are not abused or degraded in any way; and that their physical and mental well being, must be considered. Other rights which are specifically granted to children include, appropriate alternative care when removed from the family environment; to be kept separately from detained persons who are 18 years and older; protection from maltreatment, neglect, abuse and degradation; to be kept under conditions that are appropriate for the age of the child; and they are entitled to basic nutrition, health care services, shelter and social services.

Ultimately, the child's interests are of paramount importance in every matter concerning the child. Neither the American Constitution nor the Canadian Charter contains provisions, which relate specifically to children. South Africa is a signatory to the Convention of the Rights of the Child. In the case of S.v. Williams (above), the Constitutional Court declared corporal punishment on juveniles to be unconstitutional.

CHAPTER 5

ABOLITION OF THE DEATH PENALTY AND CORPORAL PUNISHMENT

5.1 INTRODUCTION

This chapter examines the legal and constitutional basis on which the Constitutional Court dealt with the death penalty and corporal punishment. The death penalty and corporal punishment have both been abolished as forms of punishment within our penal system. In the case of S v. Makwanyane and another 1995 (2) SACR 1 (CC), the Constitutional Court found that the provisions of the Criminal Procedure Act, No. 51 of 1977, providing for imposition of the death penalty, were unconstitutional. This was one of the first cases dealing with punishment to come before the Constitutional Court. Thereafter Parliament passed the Criminal Law Amendment Act, No. 105 of 1997, which repealed section 277 of the Criminal Procedure Act, thereby abolishing the death penalty.

In S v. Williams and others 1995 (2) SACR 251 (CC), the constitutionality of corporal punishment was examined. The Constitutional Court distinguished between five forms of whipping, namely, adult, juvenile, prison, school and home whippings. The Court found that adult and juvenile whipping were unconstitutional, but did not pronounce itself on the remaining three instances of whipping. During 1997, Parliament passed the Abolition of Corporal Punishment Act, No. 33 of 1997. This Act abolishes corporal punishment for both juveniles and adults and also prohibits a court of traditional leaders from imposing such punishment (section 1 of this Act). In terms of section 2 of the Act, which came

into operation on 5 September 1997, all laws providing for corporal punishment are repealed.

Abolishment of the above forms of punishment increased the urgency for finding alternative forms of punishment, especially in relation to juvenile offenders. Although the death penalty was not widely used in relation to other penalties (1023 people were executed in South Africa between 1980 and 1992 – Ladikos, SACJ (1994) 1:288), it was significant in that it was the most severe penalty that could be imposed. Corporal punishment for juvenile offenders was a popular form of punishment, probably as a result of the dearth of suitable alternative forms of punishment. Historically in South Africa, judicial corporal punishment was infused with racist ideology, and it was seen as an indispensable tool for disciplining black people (Pete, SACJ (1994) 1:301).

As the cases of S v. Makwanyane and S v. Williams above, were amongst the first Constitutional Court cases to deal with judicial punishment, it is important that the reasoning underlying the judgments be examined closely.

5.2 DEATH PENALTY

5.2.1 PRE - 1990 AMENDMENT

In terms of the common law the death penalty was a mandatory form of punishment in cases of murder, if a court did not find mitigating circumstances. The death penalty became discretionary only once mitigating circumstances are found by the Court (assessors did not partake in the process of determining whether mitigating factors were present) (Terblanche, 1999: 528). Section 277 of the Criminal Procedure Act provided for a list of offences which a court could impose the death penalty. The list included rape, armed robbery and child stealing (section 277).

5.2.2 1990 AMENDMENT

During 1990, the Criminal Law Amendment Act, No. 107 of 1990 was passed, which removed amongst others, the mandatory element of imposition of the death penalty. It provided further that a court may only impose the death penalty once it had satisfied itself that such penalty was the only proper sentence for the specific crime, after having determined whether or not mitigating factors were present (section 276(2)(a) of the Criminal Procedure Act). In terms of the Amendment, the death penalty could only be imposed if the offender was at least 18 years old at the time the offence was committed.

5.2.3 S v. MAKWANYANE AND ANOTHER

In this case the accused were convicted of armed robbery in which two policemen and two bank officials were killed. The Rand Supreme Court (as it was then known) imposed the death sentence on each of the accused. The matter was taken on appeal, but as the interim Constitution had since come into force, the matter was set down for hearing in the Constitutional Court. A number of litigants took part in the hearing, namely, the appellants, the State, Department of Justice, Black Advocates Forum, Lawyers for Human Rights and a private individual.

The main arguments for the retention of the death penalty were:

- it was recognised as a legitimate penalty in many parts of the world;
- it acted as a deterrent against violent crime;
- it responded to society's need for retribution against heinous offences;
- and
- South African society regarded the death penalty as an acceptable form of punishment.

Arguments against retention of the death penalty were mainly that:

- it was an affront to human dignity;
- it was not consistent with the unqualified right to life contained in the Constitution;
- it was irreversible; and
- it negated the rights which flowed from the right to life. (Terblanche, 1999:514).

Following the process in the case of S v. Zuma 1995 (1) SACR 568 (CC), the Court adopted a two-stage approach in determining whether or not the death penalty contravened any provisions of the Bill of Rights. In this process the Court first determined whether the accused person's rights in respect of the Bill of Rights were infringed, and if the Court so determined, embarked on a process to determine whether such rights are liable to limitation in terms of section 33 of the interim Constitution. The Court also found that the accused bore the onus of proving that the death penalty prima facie infringed on their fundamental rights. It was then left to the State to prove that the circumstances necessitated an infringement of these fundamental rights (as allowed by section 33).

The main legal argument put forward by the appellants was that the imposition of the death penalty for murder was a cruel, inhuman or degrading punishment as the death penalty was an affront to human dignity. Furthermore, the death penalty was inconsistent with the unqualified right to life. The State argued that the death penalty was recognised as a legitimate form of punishment in many parts of the world and that it was a deterrent to crime. It also met society's need for adequate retribution for heinous offences and was regarded by the population of South Africa as an acceptable form of punishment (Para. [27]).

In determining whether any of the fundamental rights of the accused were infringed, the following aspects were examined:

5.2.3.1 CRUEL, INHUMAN OR DEGRADING PUNISHMENT

In order to assist in interpreting this section, the Court examined the meaning of section 35, which stated that the Court must promote the values which underlie an open and democratic society based on freedom and equality, and must where applicable, have regard to public international law applicable to the protection of the rights entrenched in the Chapter on Fundamental Rights. In this way the Court examined a number of foreign judgments, for example, the Canadian case of Kindler v. Canada (Minister of Justice) (1992) 6 CRR (2nd) 193 (SCC) (Para. [26]).

Chaskalson P stated as follows: "In the ordinary meaning of the words, the death sentence is undoubtedly a cruel punishment. Once sentenced, the prisoner awaits on death row in the company of other prisoners under sentence of death, for the process of their appeals and the procedures for clemency to be carried out. Throughout this period, those who remain on death row are uncertain of their fate, not knowing whether they will ultimately be reprieved or taken to the gallows. Death is a cruel penalty and the legal processes, which necessarily involve waiting in uncertainty for the sentence to be set aside or carried out, add to the cruelty. It is also an inhuman punishment for it involves, by its very nature, a denial of the executed person's humanity, and it is degrading because it strips the convicted person of all dignity and treats him or her as an object to be eliminated by the state." (Para [26]).

The Court found that the arbitrariness of the death penalty rendered it cruel and inhuman. Chaskalson P stated: "It cannot be gainsaid that poverty, race and chance play roles in the outcome of capital cases and in the final decision as to who should live and who should die." (Para [51]). The Court was also of the view that errors in imposing the death penalty could never be totally excluded (Para [51]).

5.2.3.2 HUMAN DIGNITY

In this regard the Court examined public international law, and more specifically judgments from courts in Germany, Canada, India and America, all constitutional democracies. The Court quoted with approval from the minority judgment in the American case of Gregg v. Georgia 428 US 153 (1976): “fatal constitutional infirmity in the punishment of death is that it treats members of the human race as non-humans, as objects to be toyed with and discarded”. The Court found that the values expressed in that judgment were similar to those protected by the South African Constitution. The Court also placed emphasis on the death row phenomenon where prisoners often spent years waiting before being executed (Para [196]).

The Court agreed with the minority view in the Canadian case of Kindler v. Canada (1992) 6 CRR (2nd) 193 (SC) that the death penalty was the ultimate desecration of human dignity. The Court approved of the judgment in the German Federal Constitutional Court wherein it stated as follows: “Respect for human dignity especially requires the prohibition of cruel, inhuman and degrading punishments. The State cannot turn the offender into an object of crime prevention to the detriment of his constitutionally protected right to social worth and respect.” (BverfGE 187 at 228 (1977) 45). The Court accordingly found that the death penalty infringed on the right to human dignity.

5.2.3.3 RIGHT TO LIFE

Mohammed J had this to say about the death penalty and the right to life: “The death penalty sanctions the deliberate annihilation of life. As I have previously said it is the ultimate and the most incomparably extreme form of punishment. It is the last, the most devastating and the most irreversible recourse of the criminal law, involving as it necessarily does, the planned and calculated

termination of life itself; the destruction of the greatest and most precious gift which is bestowed on all humankind" (Para [236]). Didcott J stated that the right to life must at least protect people from being put to death by the State deliberately, systematically and as an act of policy that denies in principle the value of the victim's life (Para [176]).

The Court quoted with approval the following in the Hungarian case of Soering v. United Kingdom (1989) 11 EHRR 439: "The value of life is immeasurable for any human being, and the right to life enshrined in article 6 of the Covenant is the supreme human right." The Court found that the death penalty infringed on the right to life principle in the interim Constitution.

5.2.3.4 SECOND STAGE OF HEARING

After completion of the first stage, the Court, as per Chaskalson P, came to the following conclusion: "The carrying out of the death penalty destroys life, which is protected without reservation under section 9 of our Constitution, it annihilates human dignity, which is protected under section 10, elements of arbitrariness are present in its enforcement and it is irremediable. Taking these factors into account, as well as the assumption I have made with regard to public opinion in South Africa, and giving the words of section 11(2) the broader meaning to which they are entitled at this stage of the enquiry, rather than a narrow meaning, I am satisfied that in the context of our Constitution the death penalty is indeed a cruel, inhuman and degrading punishment" (at Para [95]).

The Court then proceeded to determine whether the death penalty was justifiable in terms of section 33 of the interim Constitution. Here the Court applied the triple test of the Canadian case of R v. Oakes (1989) 19 CRR 308 and found that it was doubtful whether the death penalty would satisfy the third component of this test (Para [106]). In rejecting the State's argument for the

retention of the death penalty, the Court stated that killing by the State takes place long after the crime was committed, at a time when there is no emergency and under circumstances which permit the careful consideration of alternative punishments (Para [138]). The Court also found that an offender does not lose all his dignity when being imprisoned, as his dignity is only being encroached upon, whereas the death penalty destroys his dignity.

In finding against the State on the second stage the Court stated as follows: "Retribution cannot be accorded the same weight under the Constitution as the right to life and dignity, which are the most important of all the rights in Chapter 3. It has not been shown that the death sentence would be materially effective to deter persons or prevent murder than the alternative sentence of life imprisonment would be. Taking these factors into account, as well as the elements of arbitrariness and the possibility of error in enforcing the death penalty, the clear and convincing case that is required to justify the death sentence as a penalty for murder has not been made out" (Para [146]).

On whether or not section 33 rescued the argument for the retention of the death penalty, Chaskalson P said: "In the balancing process, deterrence, prevention and retribution must be weighed against the alternative punishments available to the state, and the factors which taken together make capital punishment cruel, inhuman and degrading: the destruction of life, the annihilation of dignity, the elements of arbitrariness, inequality and the possibility of error in the enforcement of the penalty" (Para [135]). It is clearly stated in the judgment that the Court saw life imprisonment as an alternative to fulfill the task of the death penalty. Imprisonment would be a bulwark against errors in the decision to impose the death penalty and will do away with the finality that is a consequence of the death penalty.

The main emphasis of the judgment is that the death penalty is a cruel, inhuman or degrading punishment. Thereafter the judgment emphasises that it contravenes the principle of the right to life and human dignity. The Court appears to have placed the right not to be punished in a cruel, inhuman or degrading way above even the right to life.

It was found by the Court that the death penalty was arbitrary and irreversible in its implementation (Para [47]). In respect of the deterrent effect of this penalty, the Court stated as follows: "We would be deluding ourselves if we were to believe that execution of the few persons sentenced to death during this period and a comparatively few other people each year from now onwards, will provide the solution to the unacceptably high rate of crime." (Para [121]). With respect to retribution, the court stated that there was a need for reparation and not vengeance (Para [130]).

In this unanimous judgment the Court was of the view that the approach to be followed in interpreting the Constitution should be that it represents a break from the past and that full effect should be given to the new legal order. It stated that it was against South Africa's historical background of racism, authoritarian, insular and repressive policies, that the constitutionality of the death penalty must be determined (Para [264]). In quoting from the American case of The People v. Anderson 439 p 2nd 880 (Cal 1972) 896, Didcott J stated: "The abolition of the death penalty is not grounded in sympathy from those who commit crimes of violence, but in concern for the society that diminishes itself whenever it takes the life of one of its members." (Para [272]).

5.2.3.5 OTHER ASPECTS CONSIDERED BY THE COURT

Chaskalson P had this to say about the relevance of public opinion: "Public opinion may have some relevance to the enquiry, but in itself, it is no substitute

for the duty vested in the courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order established by the 1993 Constitution” (Para [88]).

In the Tanzanian case of Mbushuu and Another v. The Republic Criminal Appeal 142 of 1994, the Court found that although the death penalty was cruel and degrading punishment, it was of the view that it was justifiable in that society favoured the retention of the death penalty (Para [115]). The Court disagreed with this judgment in the sense that South Africa was a constitutional democracy and not a parliamentary democracy where the people (Parliament) could decide to retain the death penalty.

Certain of the judges also examined the principle of ubuntu from within African culture, which translates into humaneness (Para [308]). They found that the death penalty went against this principle and that traditional African legal systems did not make provision for the death penalty (Para [381]). Ubuntu was said to emphasise communality, interdependence of members of the community and it places a high value on human dignity and life (Para [224]). Although the concept of ubuntu was not one of the principles protected in the Constitution, it is clear that the Court paid significant attention to it.

This important judgment raises a number of issues that require further discussion. Although the Court stated that the penalty of death was horrific and inhuman, many victims and family members of victims may view it to be the just deserts of the offender. In fact, certain states in America have introduced humane methods of carrying out this penalty, for example, the lethal injection.

Public opinion in South Africa indicates that many people still support this penalty (Pitfield, 1980:throughout). The Court made an issue of the long period that prisoners wait on death row. This may be an issue in America, but in South Africa such long periods were not generally experienced as there was only one appeal, namely to the Appellate Division of the Supreme Court (only the Supreme Court could impose the death penalty).

The right to life is couched in clear and unambiguous terms in the Constitution, but it should be remembered that section 36 of the Constitution allows the court to limit any right contained in the Bill of Rights, including the right to life. It is thus possible that at some point in the future the court may come to a different decision. The argument of the arbitrariness of the death penalty must surely be applicable to other forms of punishment as well, for example, the length of a term of imprisonment or the quantity of a fine.

5.2.3.6 CONSTITUTIONALITY OF THE DEATH PENALTY IN OTHER COUNTRIES

Cases dealing with the death penalty in America revolved around the aspect of the prohibition of cruel and unusual punishment in the Eighth Amendment. The American Supreme Court in the case of Furman v. Georgia 408 US 238 (1972), found the death penalty to be unconstitutional as it amounted to cruel and unusual punishment. However, in the later case of Gregg v. Georgia 428 US 153 (1976), the Court found that the death penalty was not per se cruel and unusual punishment and therefore not unconstitutional. The former decision was a split one and the Chief Justice was of the view that cruel and unusual punishment cannot be construed to bar the imposition of the penalty of death. The five judges who found the penalty to be unconstitutional were of the view that the penalty was obviously cruel in the discretionary sense. Although the

second judgment was also split, Justice Stewart was of the view that the death penalty had a deterrent effect (Schabas, 1996:60-61).

Although one of the main arguments for the abolition of the death penalty is its arbitrariness, Baird and Rosenbaum are of the view that this argument is not universally accepted as a constitutional argument (1995:162).

In 1996 the American Congress passed the Federal Death Penalty Act, which created a new range of federal offences for which the death penalty could be imposed, for example, espionage, trafficking in large quantities of drugs and treason (Hodgkinson et al, 1996:1-3). Research undertaken in respect of crime statistics in Texas, America, indicates that executions do not tend to have a deterrent effect (Sorensen et al, Crime and Delinquency (1999):489). According to Latzer, one of the main arguments against the death penalty in America is that an innocent person may be executed (1998:15).

The death penalty was abolished by the Canadian Parliament in 1976, although it was retained for certain offences in terms of the National Defence Act, for example, mutiny and espionage (Nthai, SACJ (1998) 11:253). However, before the death penalty was abolished, the Canadian Supreme Court found that it was not unconstitutional as it was not per se cruel and unusual (Miller v. Cockriell (1977) 2 SCR 680).

Smit states that the Hungarian and South African constitutions are similar in respect to the protection of life and dignity, and thus the fact that the Hungarian Supreme Court ruled without qualification that the death penalty was unconstitutional is very relevant for our constitutional development. In its judgment, the Court stated that "(h)uman life and human dignity form an inseparable unity and have a greater value than anything else.". The cases decided in American courts, which deal with the constitutionality of the death

penalty have hinged on the prohibition of cruel and unusual punishment (SACJ (1994) 3:350). The German constitution abolished the death penalty and a noted German jurist, Kurt Hendl refers to the right to life as follows: "Of all the norms of international law, the right to life must surely rank as the most basic and fundamental, a primordial right which inspires and informs all other rights, ..." (Du Plessis, SACJ (1994) 1:148).

5.2.3.7 LEGISLATIVE AMENDMENT TO ABOLISH THE DEATH PENALTY

Shortly after the S v. Makwanyane judgment, Parliament passed the Criminal Law Amendment Act, No 105 of 1997, which repealed sections 277 - 279 of the Criminal Procedure Act. Section 1 of this Act places prisoners on death row in three categories:

- (a) Prisoners who have exhausted all their legal remedies subsequent to being sentenced to death, will have their cases referred to the trial court. The trial court, in terms of the procedure laid down in subsections (2) and (3), must firstly advise the President that the death sentence needs to be set aside, secondly impose a substitute punishment, and thirdly determine whether the substitute punishment should be back-dated.
- (b) Prisoners who have appealed against the death sentence only, must have their cases remitted to the full court of the relevant division. The full court must set aside the death sentence, and may then dispose of the matter within its appeal powers. The Supreme Court of Appeal will not consider the appeal further.
- (c) Prisoners whose appeals are pending or part heard by the Supreme Court of Appeal, will have their cases disposed of by that court.

Viljoen in his article on the Constitutional Court's decision on the death penalty, lists the following in his argument against the death penalty:

- arbitrary nature of its imposition;
- impacts predominantly on the lives of marginalised people;
- open to abuse and may be used as an ideological tool;
- a referendum is unsuitable for settling the matter conclusively; and
- life imprisonment is an adequate alternative penalty.

5.3 CORPORAL PUNISHMENT

5.3.1 PRE - ABOLITION OF CORPORAL PUNISHMENT ACT, 1997

Section 294 of the Criminal Procedure Act authorised corporal punishment as a form of punishment for juveniles. The Prisons Act also made provision for corporal punishment for prisoners. The Zimbabwean High Court dealt with the issue of corporal punishment in the case of S v. Ndhlovu 1988 (2) 702 (ZSC), where it found that adult whipping was an inhuman and degrading punishment in that it contravened the Declaration of Rights contained in the Constitution of Zimbabwe. In a local case Goldstone J found that whipping coupled with imprisonment amounted to unnecessary brutality - S v. Ndaba 1987 (1) SA 237 (T). In another case of adult whipping, the Court found it inappropriate - S v. Motsoesoeana 1986 (3) SA 350 (N). Didcott J in S v. Machwili 1986 (1) SA 156 (N) stated that by imposing flogging on an adult, the State stoops to the level of the criminal it wishes to punish.

In a Namibian case Mohammed J found that adult corporal punishment was inhuman and degrading and consequently unconstitutional - Ex parte Attorney-General, Namibia: In re Corporal Punishment 1991 (3) SA 76 (N). The Criminal Justice Act of 1948 abolished corporal punishment for juveniles in the United Kingdom. The Criminal Law Amendment Act of 1972 likewise abolished it in

Canada. However, according to Van der Merwe, corporal punishment is still a valid penalty in Zambia, Malawi, Botswana, Lesotho and Swaziland (1991:4-26).

5.3.2 S v. WILLIAMS AND OTHERS

In the case of S v. Williams and others 1995 (2) SACR 251 (CC), the Constitutional Court had to decide on the constitutionality of section 294 of the Criminal Procedure Act, which authorised corporal punishment for juveniles. There were essentially four arguments for the abolition of this form of punishment.

Firstly, that it contravened section 8(1) of the Constitution, which obliges the State to treat everyone equally before the law and should receive equal protection from the law. It was argued that this provision was contravened in that corporal punishment was only imposed on males and that the recipients of this punishment were mainly black and coloured persons. Secondly, corporal punishment contravened section 10, which guarantees every person the right to respect for, and protection of his or her dignity. Thirdly, that it contravened the protection afforded by the interim Constitution to children, by virtue of their vulnerability. Lastly, that it contravened section 11(2) of the Constitution, which prohibits subjecting people to cruel, inhuman or degrading treatment or punishment.

The Court examined judgments from Namibia, Zimbabwe, Canada and America, where corporal punishment was generally found to be a cruel and inhuman form of punishment. The Court agreed with the decisions in the Namibian and Zimbabwean cases: Ex parte Attorney-General Namibia: In re Corporal Punishment 1991 (3) SA 76 (Nm) and S v. A Juvenile 1990 (4) SA 151 (ZHC), respectively.

In rejecting the State's argument that although adult whipping was unconstitutional, juvenile whipping still had merit, Langa J stated: "I do not agree. One would have thought that it is precisely because a juvenile is of a more impressionable and sensitive nature that he should be protected from experiences, which may cause him to be coarsened and hardened. If the state, as role model par excellence, treats the weakest and the most vulnerable among us in a manner that diminishes rather than enhances their self-esteem and human dignity, the danger increases that their regard for a culture of decency and respect for the rights of others will be diminished."

The Court again followed the two-stage approach that was adopted in S v. Makwanyane (Para [60]). The State argued further that there were no practical alternative penalties to whipping for juveniles, and also that corporal punishment acted as a deterrent. The Court's response was that the abolition of corporal punishment was in keeping with international trends, which expressed a move away from retribution to rehabilitation. Langa J stated that the juvenile justice system should be developed in order to make provision for suitable alternatives to whipping.

When disposing of the matter, the court dealt mainly with section 11(2) of the Constitution, and did not to any significant extent deal with the other three issues. The Court did not express itself on whipping that took place in the home and those that were administered in a school, as that matter was not before the Court. The Court found ultimately that all judicial whipping were unconstitutional as it was a cruel, inhuman and degrading form of punishment that infringed the human dignity of the individual. The Abolition of Corporal Punishment Act, No. 33 of 1997 was assented to by the President on 28 August 1997 and came into operation on 5 September 1997. Section 1 of this Act provides as follows: "Any law which authorises corporal punishment by a court of law, including a court of

traditional leaders, is hereby repealed to the extent that it authorises such punishment.”

After the S v. Williams case above, and the consequent legislation prohibiting corporal punishment as a form of judicial punishment, it was generally believed that the dust had settled on this matter. However, it was reported in the Cape Argus of 26 April 2000 that the leader of the New National Party, Mr M van Schalkwyk stated that he intended to request the Government to review the South African Schools Act, so as to allow the re-imposition of corporal punishment in schools in order to combat drug and gang problems. He was of the view that school governing bodies should have the power to decide whether to administer corporal punishment, although there should be strict regulations in order to prevent abuse. Research findings indicate that about 20% of schools countrywide administer corporal punishment (Maree, *Acta Criminologica* Vol. 12(2) (1999):58).

It was reported in the Sunday Times of 30 April 2000 that the South African Law Commission was drawing up legislation that would render traditional and community courts part of the criminal justice system. Traditional courts are presided over by chiefs and tribal councilors and are found mainly in rural areas. It is expected that the new statute will regulate its rules of procedure and its composition. At present, traditional courts still regularly impose corporal punishment as a form of punishment for both juveniles and adults. Informal street committees regularly "impose sentences" of corporal punishment. It will remain to be seen how the new legislation deals with this aspect.

Community courts would deal mainly with disputes or crimes committed within a community. Such courts would have the power to order offenders to make reparations as well as to mediate between families that experience conflict. The aim of the legislation is twofold, firstly, to eliminate kangaroo courts, and

secondly, to unclog the criminal justice system by dealing with trivial and minor criminal and civil matters (Sunday Times, 30.4.2000).

5.3.3 CORPORAL PUNISHMENT IN OTHER COUNTRIES

Adams is of the view that although corporal punishment in the household, schools and institutions for children occurred in Great Britain, it remains an abusive form of punishment (1998:133-135). However, van der Merwe is of the view that moderate chastisement of children by their parents is probably not unconstitutional (1991:4-31). In the Zimbabwean case of S v. Tshuma 1988 (2) SA 702 (ZSC), the full bench held that whipping of adult offenders was unconstitutional as it is by its very nature inhuman and degrading. A similar decision was arrived at by the Namibian Supreme Court in the case of Ex parte Attorney-General, Namibia: In Re Corporal Punishment by Organs of State. Hatchard states that the supreme courts of Namibia and Zimbabwe have played a major role in developing human rights jurisprudence by deciding as they did in the above cases (J.A.L. (1992):85).

5.4 SUMMARY

5.4.1 DEATH PENALTY

The Constitutional Court case examining the constitutionality of the death penalty was one of the first cases dealing with punishment to come before this Court. For this reason, it is important to discuss the reasoning of the Court in arriving at its unanimous decision. In terms of the common law, the death penalty was mandatory after an accused was found guilty of murder, unless the court found mitigating circumstances. A legislative amendment in 1990 removed the mandatory element of this penalty and granted the court discretion in its imposition, whether or not mitigating factors were present.

Arguments in favour of the retention of the death penalty in the case of S v. Mkwanyane above, were that it was recognised as a legitimate penalty in other parts of the world; it acted as a deterrent against violent crime; it responded to society's need for retribution against heinous offences; and South African society regarded it as an acceptable form of punishment. Arguments against the retention of this penalty were that it was an affront to human dignity; it was inconsistent with the unqualified right to life in the Constitution; it was irreversible; and it negated the rights, which flowed from the right to life.

The Court found that the death penalty amounted to a cruel, inhuman and degrading form of punishment. Even the period on death row before the offender is executed was an affront to the human dignity of the person concerned, as the person waited in uncertainty until the time of the execution. Furthermore, the arbitrariness of its imposition was also cruel, inhuman and degrading.

In arriving at the view that the death penalty constituted an infringement of the dignity of the offender, the Court examined numerous foreign judgments on the issue, for example, judgments from India, Germany, Canada and America. The Court accepted the view that this penalty was the ultimate desecration of human dignity. Lastly, the Court found that the death penalty infringed the right to life principle in the Constitution. Didcott J stated that the right to life must at least protect people from being put to death by the State, deliberately, systematically and as an act of policy that denies in principle the value of the victim's life.

The Court adopted the two stage approach, which had its origin in the Canadian legal system, by first determining whether there in fact was an infringement of a right in the Constitution, and if so, whether such infringement was justified in an open and democratic society based on dignity, equality and freedom. On passing the first stage, the Court examined issues like, the principles of

punishment, public opinion, ubuntu and other issues in order to determine the outcome of the second stage. Speaking on behalf of the Court, the President of the Court stated that on examining all the factors, there was no justification for the infringement of the right to life, the right to human dignity, and that the death penalty constituted a cruel, inhuman and degrading form of punishment. Consequently the Court declared the death penalty as a form of judicial punishment, unconstitutional. Thereafter Parliament passed the Criminal Law Amendment Act, abolishing the death penalty.

Although the Constitutional Court has pronounced the death penalty to be unconstitutional, a recent survey indicated that about 75% of people questioned supported the death penalty (Schonteich, ISS Papers 1999:8). Whilst lauding the Constitutional Court for abolishing the death penalty, Krautkramer is of the view that there is no guarantee that the death penalty will not in the future be used as a tool of political oppression (1994:25).

The death penalty has been abolished in Canada by legislation, although the Canadian Supreme Court found that it was not a form of cruel and unusual punishment. Numerous states in America apply the death penalty, in various forms, as punishment for serious offences. The American Supreme Court found that the death penalty is not per se a cruel and unusual form of punishment. The Federal Penalty Act of 1996, created a new range of federal offences for which the death penalty could be imposed, for example, espionage, drug trafficking, and treason.

5.4.2 CORPORAL PUNISHMENT

Section 294 of the Criminal Procedure Act authorised corporal punishment as a form of punishment for juveniles. In a 1986 court case, Didcott J stated that by imposing whipping on an adult, the State stoops to the level of the criminal it

wishes to punish. In a Namibian case, Mohammed J found that adult corporal punishment was inhuman and degrading and consequently unconstitutional. In 1948 corporal punishment was abolished in the United Kingdom, whilst it was abolished in Canada in 1972. However, corporal punishment is still a valid form of punishment in Botswana, Zambia, Malawi and Swaziland.

The main arguments in favour of the abolition of corporal punishment were that it contravened the equality clause in that it could only be imposed on males and that the recipients were mainly coloured and black children; it infringed the human dignity of children; it contravened the special protection afforded children in terms of the Constitution; and it was a cruel, inhuman and degrading form of punishment. The Court found that it did in fact infringe the four principles mentioned above, and found that judicial corporal punishment was unconstitutional. Thereafter Parliament passed the Abolition of Corporal Punishment Act.

CHAPTER 6

CONSTITUTIONAL ISSUES REGARDING IMPRISONMENT

6.1 INTRODUCTION

This chapter examines the constitutionality of life imprisonment, imprisonment of habitual offenders and dangerous criminals, mandatory minimum sentences of imprisonment, summary imprisonment, private prisons and other issues regarding imprisonment, which have constitutional implications.

Chapter 28 of the Criminal Procedure Act, No. 51 of 1977, deals with the aspect of judicial sentencing. Section 276 of the Criminal Procedure Act states that subject to any other law and the common law, the following sentences may be passed on a convicted accused: imprisonment (including life imprisonment), periodical imprisonment, declaration as an habitual criminal, committal to any institution established by law, a fine, and correctional supervision and imprisonment from which such a person may be placed under correctional supervision in the discretion of the Commissioner of Correctional Services.

Imprisonment is usually reserved for serious offences, with its most extreme form, namely life imprisonment, reserved for the most serious offences like murder and rape. The concept of imprisonment has undergone radical changes over the past years with changes like mandatory minimum prison sentences and prisons managed and owned by the private sector. Since 1 April 1996, the correctional system was demilitarised in a move toward moving to a rehabilitative model from a mere custodial one (Annual Report, 1999:xii).

The Correctional Services Act, No. 111 of 1998, establishes a new correctional system based on the values contained in the Bill of Rights. According to the long title of the Act, its objectives are:

- to provide for the custody of all prisoners under conditions of human dignity;
- to give effect to the rights and obligations of sentenced and unsentenced prisoners;
- to establish a system of community corrections;
- to establish rules for release from prison and placement under correctional supervision; and
- to put in place provisions for the release of prisoners on parole and day parole.

6.2 IMPRISONMENT GENERALLY

As at 31 December 1999, the prison population of South Africa stood at 162 638, which was an increase of about 11% on the total inmates in prison at 31 December 1998. This figure can be broken down as follows:

	ADULTS	YOUTHS	TOTAL
SENTENCED	91 742	12 665	104 407
UNSENTENCED	44 101	14 130	58 231
TOTAL	135 843	26 795	162 638
PERCENTAGE	83,5%	16,5%	100%

For the year 1994, cell accommodation was established at 95 695 for prisoners, resulting in overpopulation of 19%, whereas there was cell accommodation for 99 834 prisoners for 1999, resulting in an overpopulation figure of 63%. As at 31 December 1999 there were 236 prisons functioning for male inmates, 8 prisons for females and 12 youth development centres. Juvenile prisoners are normally accommodated in separate sections in male and female prisons (Annual Report, 1999:1-2). Section 81 of the Correctional Services Act, provides for special measures to reduce the prison population. If the Minister of Correctional Services is of the view that the prison population is reaching such proportions that the safety, human dignity and physical care of prisoners are being materially affected, the matter must be referred to the National Council. The National Council may recommend the early release of certain prisoners or categories of prisoners.

Courts in both Canada and America have indicated that it is unconstitutional for prisoners to be kept in oppressive conditions, for example, excessive overcrowding of prisons.

As at December 1999, about 50% of all sentenced prisoners were sentenced to terms of six months and less, whilst 30% were serving between one and three years. Only 5% percent of all prisoners were serving terms in excess of 10 years (Annual Report, 1999:13). Thus the overwhelming majority of prisoners are serving short terms. For the same period in question, 17 218 prisoners were on probation and 40 144 were on parole. The parole success rate was 79% (Annual Report, 1999:15).

Overpopulation of prisons places a heavy burden on ablution facilities, kitchens, hospital services, hot water systems and laundries in the prison complex. It also has a negative effect on supervision and control. The present prison infrastructure in South Africa cannot accommodate the increasing number of

prisoners. The Department of Correctional Services is of the view that its prisons are seriously overpopulated and that this overpopulation has a negative impact on the humane detention and treatment of prisoners (Annual Report, 1999:6).

Pete suggests the following to reduce the prison population: building new prisons, privatisation of prisons, electronic tagging, and amnesties (SACJ (1998) 11:60-62). In addressing the parliamentary Portfolio Committee on Correctional Services, the Judge responsible for inspecting prisons, Justice Fagan, called on Parliament to amend the Correctional Services Act in order to release tens of thousands of trial awaiting prisoners because of the horrendous conditions resulting from overcrowding (Cape Times, 4 April 2001:2). The Judge went on to say that prisons were overcrowded by 72 000 prisoners and that some prisons were overpopulated by over 400%. The overcrowding has led to inhuman conditions and a strain on facilities like toilets and ablution facilities. Many trial awaiting prisoners who did not pose a danger to society and who were granted bail of R1000 and under were too poor to pay the bail. Justice Fagan stated that he was of the view that detention of these trial awaiting prisoners was unconstitutional as it amounted to detention without trial. Furthermore, the release of such prisoners would save the State about R1m a day.

In the Annual Report of the Inspecting Judge for 2000, the following recommendations are made in respect of reducing the prison population:

- (a) Trial awaiting prisoners
- pre-trial diversion for juveniles;
 - greater use by police of their powers to release arrested persons on bail;
 - wider use of admission of guilt fines;
 - investigating officers must give more information to prosecutors in order to enable them to determine whether or not the accused should be released on bail;

- greater use by courts of alternatives to incarceration, for example, electronic monitoring, release on warning, and placement under supervision;
- on further appearances in court, presiding officers should consider alternatives to further incarceration;
- cases of awaiting trial prisoners to be given preference over those accused awaiting trial outside prison;
- additional courts to expedite trials; and
- withdrawal of charges in trivial cases, weak cases and where an accused has been waiting trial for an inordinate period.

(b) Sentenced prisoners

- greater use of diversion, especially for juveniles;
- greater use of non-custodial sentences, for example, affordable fines, correctional supervision, suspended sentences, discharge with reprimand, postponed sentences, and probation;
- in cases where the prisoner is serving time for non-payment of a fine, the prisoner should be released under correctional supervision;
- greater use by the Commissioner of conversion of prison terms to correctional supervision; and
- increased use of parole.

By its very nature, imprisonment violates the dignity of the individual. However, it can be assumed that the Constitution is aware of this fact, in that in terms of section 12(1)(e) people may not be treated or punished in a cruel, inhuman or degrading way. Thus people may be punished, and by implication imprisoned, provided that this does not amount to being cruel, inhuman or degrading. Although, section 36 allows this right to be limited, such limitation must be reasonable and justifiable in an open and democratic society based on human

dignity, equality and freedom. There is also currently no legislation, which prescribes the approach courts should adopt in sentencing.

The main purpose of imprisonment is to punish the offender (Goldberg v. Minister of Prisons 1979 (1) SA 14 (A)); to prevent the offender from committing further crimes; and to rehabilitate the offender (Du Toit, 1981:253-254). Prisoners are punished in the sense that they are deprived of their freedom of movement and the lifestyle they have become accustomed to. They are also deprived of the physical contact of their loved ones. Although one of the purposes of punishment is to prevent the offender from committing further crimes, this is only true in relation to society in general, since prisoners are still in a position to commit crimes against other prisoners and prison officials. The general view is that prison is not the best means to rehabilitate an offender, but courts are of the view that prisons are equipped to act as vehicles for the rehabilitation of prisoners (S v. Ngcongo 1996 (1) SACR 557(N)). On the other hand, the court found in S v. Khumalo 1984 (3) SA 327 (A) that unduly prolonged imprisonment may result in the complete mental and physical deterioration of the prisoner.

Terblanche is of the view that there is no evidence to prove that imprisonment can rehabilitate an offender, whilst few prison systems expound the potential of a prison to rehabilitate an offender (1991:243). One of the main reasons for this phenomenon is that insufficient funds are available to provide the means to rehabilitate offenders. During 1999 the Correctional Services Department had 483 social workers and 44 psychologists to service the needs of over 160 000 prisoners as well as probationers and staff of the Department (Annual Report 1999:26-27). It is clear that such limited resources cannot be expected to make a significant impact on the rehabilitation process of prisoners. According to Terblanche, the focus of the behavioural sciences in this regard has been on training and treatment rather than rehabilitation (1999:243). The very nature of

a prison goes against the grain of rehabilitation, as its main object is to punish and not cure (S v. Lister 1993 (2) SACR 228 (A)).

Prison serves mainly to free society, at least for a period, of the unlawful activities of the offender, whilst serving as a severe sanction for the offender. Amongst the negative effects it has on the public coffers are, that it is a very expensive form of punishment and puts a huge financial burden on the fiscus (R4,6 billion for 1999/2000 – Annual Report 1999:1); the potential income that the prisoner could have earned is lost; prisoners partake in very little valuable activity whilst in prison; prisons are often a learning ground for criminality; prison society and culture is abnormal; and prisoners are not subject to the good influence of a loving family (Terblanche, 1999:244-246).

According to Luyt, prison authorities do very little to improve the skills of prisoners so that they could lead useful lives on release (SACJ (1999) 12:223). Both prisoners and prison staff suffer from the lack of human rights, a situation the Correctional Services Act, No. 111 of 1998 wishes to eradicate (Luyt, SACJ (1999) 12:224).

6.3 PROVISIONS OF THE BILL OF RIGHTS WHICH AFFECT IMPRISONMENT

There are a number of provisions in the Bill of Rights, which directly affect imprisonment. These provisions are mentioned hereunder, but are discussed elsewhere in this thesis. Rights in the Bill of Rights directly affecting imprisonment are the following:

- Equality (section 9);
- Human dignity (section 10);
- Life (section 11);
- Freedom and security of the person (section 12);
- Slavery, servitude and forced labour (section 13);

- Privacy (section 14);
- Freedom of religion, belief and opinion (section 15);
- Freedom of expression (section 16);
- Assembly, demonstration, picket and petition (section 17);
- Freedom of association (section 18);
- Political rights (section 19);
- Health care, food, water and social security (section 27);
- Children (section 28);
- Education (section 29);
- Language and culture (section 30);
- Access to information (section 32);
- Just administrative action (section 33);
- Access to courts (section 34);
- Arrested, detained and accused persons (section 35); and
- Limitation of rights (section 36).

Provisions in the Canadian Charter, which directly affect imprisonment are:

- Fundamental freedoms (section 2);
- Democratic rights (section 3);
- Life, liberty and security of the person (section 7);
- Search or seizure (section 8);
- Detention or imprisonment (section 9);
- Arrest or detention (section 10);
- Proceedings in criminal and penal matters (section 11);
- Treatment or punishment (section 12); and
- Equality before and under the law and equal protection and benefit of law (section 15).

The following provisions in the American Constitution directly affect imprisonment:

- First Amendment (freedom of religion, freedom to assemble and submit petitions);
- Fourth Amendment (unreasonable seizures and searches);
- Fifth Amendment (deprivation of life, liberty or property without due process of law);
- Sixth Amendment (assistance of legal counsel);
- Eighth Amendment (prohibition of cruel and unusual punishment);
- Thirteenth Amendment (prohibition of involuntary servitude);
- Fourteenth Amendment (equal protection of the law); and
- Twenty-sixth Amendment (voting rights).

Two institutions have been established in terms of the Correctional Services Act, whose function it is to ensure that the provisions of the Act, especially those relating to protection of the rights of prisoners, are not infringed. Firstly, the Judicial Inspectorate functions under the control of the Inspecting Judge. Its main objective is to facilitate the inspection of prisons in order that the Inspecting Judge may report on the treatment of prisoners in prison (section 85). According to the Inspecting Judge's Annual Report for 2000, 74 362 complaints of prisoners were dealt with (p. 3). Secondly, the Independent Prison Visitors deal with complaints of prisoners when making regular visits to prisons, interviewing prisoners in private, recording complaints and monitoring how they have been dealt with, and discussing the complaints with the Head of the Prison (section 93). In terms of section 99 of the Correctional Services Act, a judge of the Constitutional Court, Supreme Court of Appeal or High Court and a magistrate within his or her area of jurisdiction, may visit a prison at any time.

Ultimately, correctional policy will have to be modeled on constitutional principles and relevant legislation (Kalinich & Clack, *Acta Criminologica* Vol. 11(2) 1998:66). Human resource management will have to re-orientate itself to meet the new set of challenges. New skills will be needed to manage a system,

which now emphasises rehabilitation and respect for human rights. The crucial challenge will be to create and build a correctional system that can easily change to meet changing environmental constraints and demands (Kalinich & Clack, *Acta Criminologica* Vol. 11(2) 1998:70).

6.4 CONSTITUTIONALITY OF SPECIFIC FORMS OF IMPRISONMENT

6.4.1 LIFE IMPRISONMENT

6.4.1.1 LIFE IMPRISONMENT GENERALLY

A penalty of life imprisonment may be imposed in terms of section 276(b) of the Criminal Procedure Act by a High Court. Life imprisonment is generally seen as the most severe form of punishment now that the death penalty has been declared unconstitutional (*S v. Qamata* 1997 (1) SACR 479 (E)). Whilst the death penalty was still a competent penalty, life imprisonment was seen as an alternative to the death sentence. Although the Criminal Law Amendment Act, No. 107 of 1990 has specifically inserted life imprisonment into the Criminal Procedure Act, it was imposed as a penalty as early as 1957 - see *S v. Mzwakala* 1957 (4) SA 273 (A).

Life imprisonment can only be imposed by a High Court and, in theory at least, it can be imposed for any common law crime (Terblanche, 1999:264). In the case of *S v. T* 1997 (1) SACR 496 (SCA), the Court stated as follows regarding the decision to impose life imprisonment: "A sentence of life imprisonment authorises the State to keep the person sentenced in prison for the rest of his life. Unless this result is considered to be appropriate, life imprisonment is not appropriate and should not be imposed."

A penalty of life imprisonment should only be imposed when the offence is of a very serious nature, and it is of the utmost importance that society be protected from the offender (S v. Smith 1996 (1) SACR 250 (E)). Although courts impose life imprisonment on offenders for whom the prognosis for rehabilitation is not good, it may also be imposed on offenders for whom the prognosis is good (S v. de Kock 1997 (2) SACR 171 (T)). Life imprisonment is a competent sentence in both Canada and America (in respect of both state and federal legal systems).

6.4.1.2 LENGTH OF TERM OF LIFE IMPRISONMENT

Early court decisions indicate that there was no certainty as to the period of life imprisonment, as in practice prisoners served different periods (S v. Masala 1968 (3) SA 212 (A) and S v. Sibiya 1973 (2) SA 51 (A)). In the earlier case the judge said that there was no legislative directives in this regard. In order to compensate for this lacuna, judges ordered copies of the transcript of the case be sent to the Department of Correctional Services in cases where the judges were of the view that a long term of imprisonment was necessary because of the circumstances – S v. Bosman 1992 (1) SACR 115 (A).

A court imposing a sentence of life imprisonment may not order that an offender may not be released on parole, but may order that parole must not be granted before a certain period of the sentence has expired - section 276B(1)(a) of the Criminal Procedure Act. This section reads as follows: "If a court sentences a person convicted of an offence to imprisonment for a period of two years or longer, the court may as part of the sentence, fix a period during which the person shall not be placed on parole."

In the case of S v. van Wyk 1997 (1) SACR 345 (T), the court found that life imprisonment may not be extended by additional periods of imprisonment. In effect this would mean that any period of imprisonment imposed in addition to

life imprisonment falls away once the period of life imprisonment has expired or the prisoner is released on parole. According to Wasik, a life sentence may run concurrently, but not consecutively with a fixed-term sentence (1998:134-135). In order to avoid early release of prisoners serving life sentences, courts have turned to sentencing offenders who are found guilty of committing serious offences, to long terms of imprisonment, for example, more than 100 years. It is not uncommon to sentence offenders to 30 years or more (Dissel & Mnyani, 1995:5).

The Criminal Procedure Act is silent on the actual length of life imprisonment, which has led to courts imposing sentences of imprisonment of extraordinary long periods. It was stated in S v. Mohlongo 1994 (1) SACR 584 (A) that "if, on careful consideration of all the circumstances of a case, a sentence of life imprisonment can properly be imposed, it should not be avoided simply because the administrative machinery available to the executive allows for the possibility that the offender concerned may be released earlier." Nesor and Takoulas are of the view that a life sentence that could only be ended by an executive or presidential pardon would be unconstitutional (Acta Criminologica Vol. 9, 1996:96).

It has often been asked whether a prisoner serves a sentence of life imprisonment until the end of the offender's natural life. However, it is not as its name indicates that a prisoner spends the rest of his or her life in prison, as the Department of Correctional Services may release an offender earlier on parole in terms section 73 of the Correctional Services Act. Section 73(6)(b)(iv) of the Correctional Services Act provides that an offender who has been sentenced to life imprisonment may not be placed on parole until the offender has served at least 25 years of the sentence. However, prisoners who have reached the age of 65 years may be placed on parole if they have served at least 15 years of their sentence. According to the 1999 Annual Report of the Department of

Correctional Services, about 1,700 prisoners are serving periods of 20 years and longer (p. 13).

The Correctional Supervision and Parole Board may under appropriate circumstances recommend to the court, which imposed the sentence, that a prisoner serving a life sentence may be placed on parole or day parole (subject to the 25 and 15 year provision above). The court may then grant such parole as recommended, or the court may refuse to grant parole, in which case it may make recommendations in respect of treatment, and the prisoner's chances of being placed on parole at a later stage (section 78 of the Correctional Services Act). There is no requirement in this provision that the same judge who passed the sentence must consider the request for parole. This is probably a matter of practicality since the sentencing judge may have passed away or may not be a judicial officer anymore. In terms of section 39(2) of the Correctional Services Act, any other term of imprisonment served by a prisoner runs concurrently with a life sentence to be served by such person.

According to Roberts and Cole, a person serving life imprisonment in Canada for first-degree murder, must serve at least 25 years imprisonment, whilst someone serving a prison term for secondary degree murder must serve at least 10 years in prison (1999:16). Prisoners serving prison terms for offences other than murder, for example, robbery, manslaughter or aggravated sexual assault, must serve at least seven years in prison (Roberts and Cole, 1999:16).

6.4.1.3 CONSTITUTIONALITY OF LIFE IMPRISONMENT

The question of the constitutionality of life imprisonment was posed in the case of S v. Makwanyana and another 1995 (2) SACR 1 (CC). However, most of the judges were of the view that life imprisonment was the de facto alternative to the death penalty and was in all probability not unconstitutional, although this view

was said obiter. Chaskalson P stated as follows: "The choice to be made is between putting the criminal to death and subjecting the criminal to the severe punishment of a long term imprisonment which, in an appropriate case, could be a sentence of life imprisonment" (Para [123]). Thus the question is whether the sentence of life imprisonment is proportionate to the offence committed and the mitigating and aggravating factors concerned. Ackerman J went a step further and stated that in cases of a violent criminal, society needs to be assured that such a recidivist will remain in prison permanently (Para [170]). Rautenbach is of the view that by necessary implication, the Constitutional Court, in the case of S v. Makwanyane above accepted that life imprisonment was indeed an alternative to the death sentence, and thus it was not unconstitutional per se (1998:5B-97).

Smit opines that mandatory life imprisonment sentences would in all probability not pass constitutional muster in South Africa, as it could lead to the imposition of sentences that are disproportionate to the seriousness of the offence, and thus could amount to a form of cruel, inhuman or degrading punishment (Article, 1994:5). In the Australian case of Sillery v. The Queen (1981) 55 ALJR 509, the Court found a mandatory sentence of life imprisonment for hijacking to be unconstitutional as it would be disproportionate in less serious cases. The German Federal Constitutional Court has already in 1992 found mandatory life sentences to be unconstitutional as life imprisonment was in itself disproportionate (Smit, Article 1994:8).

In an early case in the American Supreme Court, it was held that a grossly disproportionate sentence was inherently cruel and unusual (Weems v. United States 217 US 349 (1910)). In a later case in the same court, it was found that a discretionary sentence of life imprisonment without parole was disproportionate and therefore unconstitutional (Solem v. Helm 463 US 277 (1983)). However, the American Supreme Court in the case of Harmelin v. Michigan 111 S Ct 2680

115; L Ed 2d 836 (1991) upheld a mandatory life term of imprisonment without the possibility of parole, for possession of a large quantity of drugs, as not being unconstitutional. The Court held that life imprisonment was not unusual in the constitutional sense as they had been used for many years, and the mandatoriness of the sentence also does not render it unconstitutional. The German Federal Constitutional Court held in the case of BverfGE 45 187 (1977) that life imprisonment, which could only be ended by an executive pardon, is unconstitutional.

In the Namibian case of S v. Tcoeb 1996 (1) SACR 390 (NmS), the Court was asked to decide whether life imprisonment was in effect a death sentence and as such a cruel, inhuman or degrading form of punishment. Section 8(2)(b) of the Namibian Constitution prohibits punishment that is cruel, inhuman or degrading. Although the Court found that life imprisonment was an extremely severe form of punishment, it could not be equated with the death penalty. The Court also found that life imprisonment should only be imposed in the most extreme cases. Mohammed CJ stated that if life imprisonment meant that an offender would spend the rest of his or her natural life in prison without any prospect of parole, it would be inconsistent with the humane values contained in the Constitution.

The Namibian Supreme Court found in the above case that although life imprisonment was not per se unconstitutional, there were two situations where it would be unconstitutional. Firstly, as stated above, if the prisoner has no option to be released on parole, and secondly, where it is imposed in circumstances where it would amount to punishment that was grossly disproportionate in relation to the crime committed. In these situations the punishment would constitute cruel, inhuman or degrading punishment, in contravention of section 8(2)(b) of the Namibian Constitution. Although the question of whether life imprisonment was unconstitutional was never before our courts, it is safe to

assume that as it is discretionary and as there are possibilities for a prisoner serving life imprisonment to be released on parole, it is not unconstitutional.

Without deciding on the constitutionality of life imprisonment, the Canadian Supreme Court, in the case of Latimer (1997) found that the minimum term for life imprisonment was inappropriate in this case (one of mercy killing) and a sentence of two years imprisonment was upheld. In this case the court made an exception where a mandatory sentence of life imprisonment should have been imposed.

Certain aspects of life imprisonment have been labeled as containing an element of cruelty (S v. Martin 1996 (2) SACR 378 (W)). Life imprisonment may have a varying degree of severity for different people, for example, it would amount to a longer actual period of imprisonment for a young person of about 20 years of age in relation to an older person of about 55 years of age. Section 76 of the Correctional Services Act states that a prisoner who is older than 65 years may be released on parole after serving only 15 years of the sentence. However, there is a rational basis for this distinction and it is doubtful whether a court would find by that reason that life imprisonment is unconstitutional. At the other end of the argument, life imprisonment as a form of punishment is important to protect society from those offenders who are not capable of being rehabilitated (S v. Qamata 1997 (1) SACR 479 (E)).

As a harsh sentence is not in itself unconstitutional, life imprisonment per se is not unconstitutional. However, certain procedural issues related to it could render the sentence in certain circumstances unconstitutional, for example, where it is mandatory, in cases where parole is not an option or where it is a disproportionate penalty. The safest route is to render the sentence discretionary and to allow the prison authorities to determine release on parole.

In a recent case in the Eastern Cape High Court it was found that a mandatory life sentence (in a case where the accused was found guilty of murder and where in the ordinary course of events the judge would not have imposed a life term of imprisonment) was unconstitutional (Daily Dispatch, 6 April 2001:2).

However, this decision was overturned by the Constitutional Court (S v. Dodo – 5 April 2001), which found that whilst the court recognised the separation of powers, it did not confer on the courts the sole authority to determine the nature of sentences imposed on convicted persons. The court went on to state that “(b)oth the legislature and the executive have a legitimate interest, role and duty, in regard to the imposition and subsequent administration of penal sentences”. The legislature’s power to prescribe sentences was not unlimited and had to be balanced with the power of the judiciary. As a matter of principle the legislature ought not to oblige the judiciary to impose punishments that unjustifiably violated an accused person’s rights. If a court considered a sentence to be “cruel, inhuman or degrading”, it had a discretion to impose a lesser sentence. The Constitutional Court referred the matter back to the High Court for sentencing.

6.4.1.4 LIFE IMPRISONMENT IN GREAT BRITAIN

In reality life imprisonment in Great Britain does not mean the offender spends the rest of his or her life in prison, as the Home Secretary has the power to authorise an early release under supervision with possible recall to prison to serve a further period (Wasik, 1998:129). Thus the term indeterminate instead of life imprisonment would be a more appropriate term. However, courts do have a measure of influence over the period to be served by the offender, as the sentencing judge can recommend a period, which the offender must serve before being released. The sentencing judge is also empowered to indicate a “tariff”, being a period of imprisonment, which the offender must serve in order to meet the requirements of retribution and deterrence in the case. The Home

Secretary is not bound by the tariff, and can set a lower or higher tariff after examining the views of the Parole Board.

In terms of the Murder (Abolition of Death Penalty) Act 1965 (Great Britain), life imprisonment is a mandatory sentence for offenders over the age of 21 years who commit murder, whilst offenders under the age of 21 years are sentenced to life imprisonment in terms of the Criminal Justice Act 1982. However, if the offender was 18 years or younger when the offence was committed, the offender must be sentenced to imprisonment during Her Majesty's pleasure.

A life sentence is imposed automatically when an offender is convicted of a serious offence for a second time (section 2 of the Crime (Sentences) Act 1997). However, if there are exceptional circumstances present in the case, a court may impose a different sentence. Examples of serious offences for the purposes of this provision are: attempted murder, rape, robbery where a fire arm is used, sexual intercourse with a girl under 13 years of age, etc. A court has a discretion to sentence a first offender convicted of a serious offence (of a violent or sexual nature) to life imprisonment. The purpose of discretionary life imprisonment must be to protect the public from further harm from the offender.

6.4.2 INDETERMINATE SENTENCES OF IMPRISONMENT

In terms of section 276(1)(d) of the Criminal Procedure Act, a High Court or Regional Court may, after convicting a person of one or more offences, declare the offender to be a habitual criminal (if the court is satisfied that the person habitually commits offences). The person must be 18 years or older and the offence(s) for which the accused was found guilty, must merit imprisonment of at least 15 years. The period of imprisonment is indeterminate in the sense that the prison authorities may decide when to release the prisoner. A person who is declared a habitual criminal is dealt with in terms of the Correctional Services

Act. It is unconstitutional (on the grounds of disproportionality) if a habitual criminal serves a prison term in excess of 15 years (see also S v. Masisi 1996 (1) SACR 147 (O)). Persons declared habitual criminals, and who serve longer than 15 years, would render such action, unconstitutional on the grounds of proportionality and equality (Terblanche, 1999:275).

Section 286A of the Criminal Procedure Act makes provision for a person to be declared a dangerous criminal if the person presents a danger to the physical or mental well-being of other persons, and if the community should be protected against him. The court must direct that an enquiry be held and a report submitted. Once a court (High Court or Regional Court) declares a person to be a dangerous criminal, the court must sentence the person to undergo imprisonment for an indefinite period, and direct that he or she be brought before the court on expiration of a period determined by it, which period may not exceed the jurisdiction of the court (section 286B). After re-examining the person at the expiry date, the court may confirm the indefinite imprisonment, or release the prisoner conditionally or unconditionally. The comments above about the constitutionality of a person declared a habitual criminal are equally relevant to this type of sentence.

The S A Law Commission in its report on the Bill of Rights and sentencing, refers to Steytler with approval in stating that indeterminate sentencing for dangerous criminals in terms of the Criminal Procedure Act, is constitutionally suspect on the grounds of its severity. Furthermore, it could also be grossly disproportionate to the offence for which the accused has been convicted. The definition of a "dangerous" person may also not pass constitutional muster (2000:59).

Indeterminate sentences may be imposed for a number of offences in Canada, for example, murder (first and second degree), aggravated sexual assault,

robbery and manslaughter (Roberts and Cole, 1999:16). However, the Criminal Code establishes minimum periods of imprisonment in each of these instances, for example, 25 years for first-degree murder. When an offender is sentenced for a crime, which involves violence, or if the offender is a danger to society, and if the offence for which the offender has been convicted carries a maximum penalty of 10 years or more, the Crown may apply to the court to declare the offender a dangerous offender. Once the Court declares the offender a dangerous offender, the court can impose an indeterminate sentence (section 753 of the Canadian Criminal Code).

In the case of R v. Lyons (1987), 37 CCC (3d) 1, the Supreme Court of Canada upheld the constitutionality of indeterminate detention under the dangerous offender provisions. However, in the case of Steele v. Mountain Institute (1990), 60 CCC (3d) 1, the court held that the continued detention of an offender after 37 years imprisonment under the dangerous offender provision was unconstitutional as it constituted cruel and unusual punishment.

6.4.3 MANDATORY MINIMUM SENTENCES OF IMPRISONMENT

Generally, mandatory minimum sentences are the exception to rule in South African penal law, as punishment is usually within the judge's discretion (S v. Toms 1990 (2) SA 802 (A)). In this judgment, the Court was very critical of mandatory sentences, and the Chief Justice had this to say: "... 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 offences and as a kind of enactment that is calculated in certain instances to produce grave injustice". However, on the other hand magistrates have been accused of sentencing on an unscientific basis, and this aspect justified mandatory minimum sentences (SA Law Commission, 1997:20). Mandatory

minimum sentences are based on the seriousness of the crime rather than on individual factors (Oliver, *Acta Criminologica* Vol. 11(2) 1998:87).

According to Oliver, there are two categories of mandatory minimum sentences. In the first category a predetermined minimum sentence must be imposed if no "substantial and compelling circumstances" can be found that would necessitate a different sentence. In the case of a first conviction on a charge of murder, rape or robbery the minimum sentence is 15 years imprisonment. The second category consists of offences like indecent assault on children and housebreaking with intent to murder, rape or rob, where a minimum sentence of 10 years imprisonment must be imposed for a first offence.

The SA Law Commission in its report of 1997 stated as follows in support of this form of sentence: "However, failure by the legislature to provide a clear and unambiguous legislative framework for the exercise of the sentencing discretion, and failure by the courts to develop firm rules for the exercise of the sentencing discretion and failure by the courts and the legislature to give firm guidance as to which sentencing theories or aims carry the most weight, brought much uncertainty into the sentencing process in South Africa".

Principles under which sentencing discretion is exercised are that the offender is treated as an individual; consideration is given to the crime, criminal and the community's interest; and the further aims of punishment are considered in a balanced way. However, mandatory sentences disregard all these principles (Rautenbch, 1998:5B-103). Rautenbach is of the view that mandatory sentences may infringe section 9 (equality) and section 10 (human dignity) of the Constitution as the offender's dignity is impaired since he or she is not treated as an individual, resulting in the law being applied equally to unequal situations (1998:5B-104). Rautenbach is further of the view that this infringement may be permissible in terms of section 36 of the Constitution as a result of societal

considerations, like the current wave of criminality and ensuring uniformity in sentencing (1998:5B-104).

Disregard for these principles has led the Supreme Court in Namibia to find that mandatory sentences are unconstitutional – S v. Vries 1996 (12) BCLR 1666 (Nm). In this case the Court found that a mandatory penalty left no room for considering factors relating to the specific case, for example, the kind of animals involved in the stock theft. According to Wasik, the courts have often criticised mandatory sentences as it removes the element of judicial discretion (1998:129). Oliver is of the view that mandatory minimum sentences violate the principle of equal justice to all because certain categories of crime are accentuated (*Acta Criminologica* Vol. 11(2) 1998:89).

The question the Constitutional Court will have to grapple with is whether there are no other less invasive means of dealing with offenders, for example, utilising the provisions of section 310A and 316B of the Criminal Procedure Act in terms of which the prosecuting authority may appeal against what it perceives to be a lenient sentence. Rautenbach advises that courts will have to treat each mandatory provision on its merits, and if it amounts to an unjustifiable violation, it should be declared unconstitutional (1998:5B-104).

Mandatory sentences have proliferated in all states in America since the early 1970's, and are also prominent in the federal judicial system (Tonry, 1998:551). According to Wicharaya, mandatory sentences are widely accepted in America, both at the state and the federal levels of government (1995:82). In America, mandatory prison sentences are also imposed for offences relating to drug possession and drug dealing (Smit, 1994:3). The American Supreme Court found in Coker v. Georgia 433 US 548 (1977) that a mandatory sentence, which was disproportionate to the magnitude of the offence was unconstitutional as it was cruel and unusual.

The U.S. Sentencing Commission in 1991 criticised mandatory sentence as follows:

- they fail to make sentencing more uniform;
- they are invoked more often with black persons than white persons;
- they do not facilitate a smooth rehabilitation process; and
- prior convictions dating back many years are also considered (Long, 1995:44).

It was held in the Canadian case of Smith v. The Queen (1987) 34 CCC (3d) 97 that mandatory sentences are cruel and unusual and thus unconstitutional. The court found that it was inhibited from giving consideration to the facts of the case and could thus not give effect to the amount of drugs that was imported. However, in a later case, namely, R v. Goltz (1992) 67 CCC (3d) 481, the Court found that mandatory sentences were not per se unconstitutional, but that the offender's dignity is severely impaired as all the unique human characteristics and circumstances are ignored, and they are not treated as individuals. Roberts and Cole are of the view that sentencing disparity is a very real problem in Canadian courts, which must be addressed as a matter of urgency since it infringes on the right to equality in the Charter (1999:11-12).

The Canadian Sentencing Commission recommended, amongst others in 1987, that mandatory minimum penalties, except those for murder, should be abolished. The Sentencing Reform Act, which abolished mandatory minimum sentences, was assented to on 13 July 1995 and now forms part of Canada's Criminal Code. However, certain minimum penalties have been retained, for example, unauthorised possession of a firearm. This Act also introduced a number of alternative penalties, one being a conditional sentence of imprisonment.

In the case of United States v. Madkour US 930 F. zd 234 (2d Cir. 1991), the Supreme Court criticised mandatory penalties as denying courts the right to “bring their conscience, experience, discretion and sense to what is right into sentencing procedure, ... It violates the rights of the judiciary and of the defendants, and jeopardizes the judicial system”.

It appears that one of the underlying reasons for the introduction of minimum mandatory sentences is ensure consistency and uniformity in sentencing. However, in practice it could have the opposite effect. Although uniformity and consistency are important principles in sentencing, it should not be achieved at the expense of imposing appropriate and suitable sentences in the light of both the crime and the offender. At the end of the day the punishment must meet the requirements of justice and must not infringe on the rights contained in the Constitution.

One of the negative effects of mandatory minimum sentences is that it can be seen to reduce courts to mere rubber stamps by diminishing their discretion. The discretion exercised by a court constitutes the human element, which is so important in imposing a suitable sentence. To a great extent mandatory minimum sentences removes this discretion from presiding officers. If presiding officers have strong convictions about mandatory sentences or if in specific cases they are of the view that the sentence would be inappropriate, they may tend to lean excessively toward finding the accused not guilty.

Crimes of the same nature differ from situation to situation and if the crime is the overriding element, an injustice may result. For example, if there is a mandatory penalty for the crime of murder, then the perpetrator who viciously murders a family member in order to inherit an amount of money, should be sentenced to the same punishment as the loving child who in an act of mercy killing increases the parent's dosage of medication. The degrees of abhorrence are vastly

different, but the sentences to be imposed should be the same. Surely this could not have been the intention of the Legislature. Furthermore, such action may infringe the dignity of the offender or the principle of equality (i.e. by treating unlike alike).

I am of the view that courts should be allowed greater discretion when imposing sentences, but this can be achieved within the regime of mandatory minimum sentences. The substantial and compelling circumstances should be wide enough to allow courts to exercise a discretion. Further assistance could be in the form of sentencing guidelines, which should preferably be contained in legislation. Courts could then develop a policy to give effect to these guidelines.

In summary, although mandatory minimum sentences are not per se unconstitutional, in its implementation it may infringe on the right to dignity or equality.

6.4.4 CONSTITUTIONALITY OF SUMMARY IMPRISONMENT

In Nel v. Le Roux 1996 (3) SA 562 (CC), the Court had to determine whether section 205 of the Criminal Procedure Act, which allowed for summary imprisonment of recalcitrant witnesses was unconstitutional as it violated section 12(1)(b) of the Constitution. The Court held that it did not violate this right, as the provision did not require a fair trial in the sense envisaged in section 35(3) of the Constitution. It would be sufficient if the trial complied with the requirements of fairness, due process and natural justice.

6.5 PRIVATE PRISONS

According to Corder and Smit, private involvement in prisons in South Africa is not a new phenomenon, as owners of diamond and gold mines in the late 1800's

built and managed prisons (SACJ (1998)11:481). The State also used cheap prison labour on farms, whilst farmers built prisons and handed them over to the Prisons Department, a system which continued in the Western Cape until 1988 (Corder & Smit, SACJ (1998)11:481).

It costs the State about R200 000 per prisoner when building a new prison, and thus it would not be economically viable to build enough prisons to house all prisoners under humane conditions (Inspecting Judge's Annual Report, 2000:12). Thus the answer to house the increasing number of prisoners may be with the establishment of private prisons.

Provision is not made in the Constitution for the establishment of private prisons, but it also does not prohibit such activity. However, one will have to examine the rationale underlying such a system to determine its constitutionality. The Correctional Services Act makes provision for joint venture prisons in Chapter 14. The Minister of Correctional Services is empowered to contract with any party to design, construct, finance and operate (for a period not exceeding 25 years) a prison or part of a prison (section 103). The Contractor is required to promote and maintain a just, peaceful and safe society by enforcing the sentences of the courts, detaining all prisoners in safe custody whilst ensuring their human dignity, and promoting the social responsibility and the human development of all prisoners (section 104).

A Contractor is specifically prohibited from doing the following:

- Taking disciplinary action and imposing penalties;
- Be involved in the determination or computation of sentences;
- Determine the prison in which a prisoner will be held;
- Determine the placement or release of a prisoner;
- Be involved in the implementation of community corrections;
- Grant temporary leave to a prisoner; and

- Subcontract, cede, assign or delegate, without authorisation, any of the functions in terms of the contract (section 104(4)).

The Department of Correctional Services must appoint a Controller, whose responsibility it is to monitor the operations of joint ventures. Functions of such person include, conducting searches, detaining prisoners separately, applying approved mechanical means of restraint, using non-lethal incapacitating devices and fire-arms, and using reasonable force as and when required (section 106). The Controller reports directly to the Commissioner of Correctional Services. With the prior approval of the Commissioner, the Contractor must appoint a director to head the joint venture prison (sections 107 & 108). The Contractor must also appoint custody officials to perform custodial duties, but such officials may only commence duty once they are certified by the Commissioner. Custody officials have the same powers and functions as correctional officials (section 109 & 110).

It is incumbent on every employee of the Contractor to preserve confidentiality in respect of any information acquired in the course of employment, unless legally required to disclose such information, or if the Commissioner authorises such disclosure (section 111). In situations where the Director of a joint venture prison has lost or is likely to lose effective control of the joint venture prison or any part of it, and if it is in the interests of safety and security to take control of it, the Commissioner may appoint a Temporary Manager to take control and perform the functions of the Director (section 112).

Negotiations are currently underway between the Department of Correctional Services and two private consortiums, for the building of two private prisons. This process is known as the Asset Procurement and Operating Partnership System (APOPS). Two maximum-security prisons, one each at Bloemfontein

and Louis Trichardt, are expected to have bed capacities of 2928 and 3024, respectively (Annual Report, 1999:8).

The provisions of the Bill of Rights, as well as section 195 of the Constitution (dealing with basic values and principles governing public administration) will be applicable to private venture prisons. In terms of this provision, it is required that a high standard of professional ethics must be maintained. In the view of Corder and Smit there are sufficient safeguards contained in the relevant provisions of the Correctional Services Act to render such prison ventures safe to constitutional scrutiny (SACJ (1998)11:488). The safeguards are, for example, the power of the Controller and the Commissioner to intervene; Inspecting Judge, Independent Prison Visitors and Visiting Committees have access to those institutions; and disciplining of prisoners is expressly excluded from the functions of custody officials.

Private prisons were built and managed by the private sector in America since the mid-1980's, and by 1996 there were over 100 private prisons, accommodating about 75 000 prisoners (Mc Donald, British Journal of Criminology (1994) 34:29). However, this concept has not got off the ground in Europe, as there was concern as to the constitutionality of such prisons in that imposition of punishment was a core function of government (Corder & Smit, SACJ (1994) 11:483). Tunick is of the view that if managing prisons is a core function of government, it may be unconstitutional if the whole system of prisons is privatised (1992:vii). The American Civil Liberties Union is of the view that the right to punish is reserved for the State, and private prisons infringe this right. However, in the absence of any constitutional provision prohibiting private prisons, its existence is not unconstitutional (Durham 111, 1994:273-274).

6.6 OTHER ISSUES REGARDING IMPRISONMENT, WHICH MAY HAVE CONSTITUTIONAL IMPLICATIONS

Neser and Takoulas are of the view that overcrowding of prisons may infringe the right to human dignity of prisoners and may thus be unconstitutional. They state as follows in their article: "It is a fact that this country has among the highest per capita prison populations in the world. Consequently many South African prisons are encroaching on the fundamental rights of prisoners through overcrowding. This is the most obvious problem of our penal system and one which could have significant consequences if left unchecked." (The Magistrate, 1995:135).

The American Supreme Court found in Ingraham v. Wright 430 US 651 (1977) that certain sentences by courts which do not strictly amount to criminal punishment, like involuntary confinement in a juvenile or mental institution, may be unconstitutional if it infringes the First or Eighth Amendment. Thus in this way, judicial placement in a juvenile institution or a mental institution, in situations where it does not technically amount to criminal punishment, may come under constitutional scrutiny (Winick, 1996:217-218, 239).

6.7 CUMULATIVE AND CONCURRENT SENTENCES

Sentences, which are cumulative or concurrent, are dealt with in terms of section 280 of the Criminal Procedure Act. This section states as follows:

- "(1) When a person is at any trial convicted of two or more offences or when a person under sentence or undergoing sentence is convicted of another offence, the court may sentence him to such several punishments for such offences or, as the case may be, to the punishment for such other offences, as the court is competent to impose.

- (2) Such punishments, when consisting of imprisonment, shall commence the one after expiration, setting aside or remission of the other, in such order as the court may direct, unless the court dictates that such sentences of imprisonment shall run concurrently.
- (3) Such punishments, when consisting of correctional supervision referred to in section 276(1)(h), shall commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct, unless the court directs that such sentences of correctional supervision shall run concurrently. However, if such punishments in the aggregate exceed a period of three years, a period of not more than three years from the date on which the first of the said punishments has commenced shall be served, unless the court, when imposing sentence, otherwise directs.”

Essentially subsections (2) and (3) contain the same provisions in respect of imprisonment and correctional supervision respectively. In terms of this section, sentences may be imposed separately for separate convictions and when a serving prisoner is convicted of further offences, a further sentence may be imposed. When such sentence is imprisonment, such imprisonment commences immediately after expiration of the first sentence, unless the court directs that the sentences must run concurrently.

The practical effect of this provision with regard to an accused convicted of multiple offences, is that the court has its full penal jurisdiction with respect to each offence. In this way the total sentence imposed on an accused may collectively exceed the penal jurisdiction of the court. This is especially so if an accused is convicted of numerous serious offences like murder, rape, robbery and housebreaking. It was held in the case of S v. Mpofu 1985 (4) SA 322 (ZHC) that the cumulative effect of such a sentence may be too severe under the circumstances and courts must take this cumulative effect into account when

imposing the sentence. In other words, the sentence must in its totality reflect the blameworthiness of the accused, a factor, which in itself may render the penalty unconstitutional.

There are three ways in which courts can give effect to the S v. Mpofo judgment, namely, ordering some or part of the sentences to run concurrently, reducing the individual sentences, or by taking all or some of the crimes of which the accused was convicted as one for the purposes of sentencing (Terblanche, 1999:205). It was held in S v. Hoffman 1992 (2) SACR 56 (C) that only sentences consisting of imprisonment or correctional supervision may be ordered to run concurrently. It was further held in this case that it is not necessary for the whole of a sentence to run concurrently even a part of a sentence may run concurrently. There need not be a relationship between the offences for which the sentences run concurrently - S v. Pase 1986 SA 303 (E).

Terblanche argues that the intention of the legislature in section 280(3) is that the total duration of correctional supervision, which is to be served at one time, is limited to three years, unless most of the first sentence has expired and the court considers a further period of correctional supervision to be appropriate (1999:207). In addition, a court is empowered to impose a combination of sentences as a single sentence for a single offence (Terblanche, 1999:204).

6.8 CORRECTIONAL SERVICES AMENDMENT BILL (B8-2001)

The minister of Correctional Services has introduced the above Bill in Parliament in order to effect the following amendments:

- (a) Empowering the Commissioner of Correctional Services to restrict, suspend or revise amenities for prisoners of different categories.

- (b) Prisons may be established for specific categories of prisoners, for example, maximum security.
- (c) As soon as possible after admission, all prisoners must undergo a health status examination, which must include testing for contagious and communicable diseases, like HIV/AIDS.
- (d) Prisoners of a specific age, health or risk categories may be detained separately.
- (e) Prisoners may be compelled to undergo medical examinations under certain circumstances.
- (f) The Department of Correctional Services must take measures to render prisons gender sensitive.
- (g) If at a disciplinary hearing a prisoner behaves in such a manner that his or her presence at the hearing makes it impractical to proceed, the prisoner may be removed and the hearing continued in his or her absence.
- (h) Right of prisoners to be legally represented at disciplinary hearings.
- (i) A correctional officer may only use force or use a fire-arm under the following circumstances: self-defence, preventing a prisoner from escaping, or protection of property. A verbal warning must first be given, followed by a warning shot.
- (j) A prisoner sentenced to life imprisonment before Chapters 4, 6 and 7 came into operation, is entitled to be placed on parole after 20 years of the sentence has been served.

For purpose of this thesis, the most far-reaching provisions contained in this Bill are the ones dealing with mandatory medical examination and possible segregation of prisoners with communicable diseases like HIV/AIDS. Although these provisions infringe the right to privacy and human dignity, they may be justifiable in terms of section 36 of the Constitution.

6.9 SUMMARY

6.9.1 IMPRISONMENT GENERALLY

Imprisonment is one of the most common forms of punishment imposed for serious offences by courts, with life imprisonment being the most severe form of punishment. The constitutionality of the various forms of imprisonment, like indeterminate sentences, life imprisonment, mandatory and minimum sentences are discussed in this chapter. There are presently 162 638 prisoners, made up of 104 407 sentenced and 58 231 unsentenced prisoners, resulting in an overpopulation of 63%. The Department of Correctional Services have admitted that its prisons are hopelessly overcrowded, and that this condition has a negative impact on the humane detention and treatment of prisoners. The prison infrastructure cannot accommodate the increasing number of prisoners.

Although the main purpose of imprisonment is to punish the offender, the conditions under which the prisoner is kept may render the punishment cruel, inhuman or degrading, and infringe on the prisoner's human dignity. Imprisonment already amounts to deprivation of the amenities and luxuries of life that the prisoner has become accustomed. Prolonged imprisonment may also result in the complete mental and physical deterioration of a prisoner. Many criminologists are of the view that imprisonment is not the best vehicle to rehabilitate an offender, and may in fact cause a hardening of negative attitudes.

6.9.2 LIFE IMPRISONMENT

Life imprisonment is seen as the natural successor to the death penalty, now that the latter form of punishment has been abolished. Thus life imprisonment should only be imposed where accused have been found guilty of serious offences, like murder or rape. In theory at least, a person sentenced to life

imprisonment could remain in prison for the rest of his or her natural life. Neither legislation nor early court decisions quantify the term of life imprisonment, and in practice prisoners have served varying periods. Life imprisonment cannot be extended by additional periods of imprisonment.

In terms of section 73 of the Correctional Services Act, an offender who has been sentenced to life imprisonment may not be placed on parole until the offender has served at least 25 years of the sentence, except that prisoners who have reached the age of 65 years may be placed on parole if they have served at least 15 years of their sentence. Furthermore, in terms of section 276(B)(1)(a) of the Criminal Procedure Act, a court sentencing a person convicted of an offence to imprisonment for a period of two years or more, may fix a period during which the prisoner may not be placed on parole.

In terms of the Canadian criminal justice system, a prisoner serving a life term for first-degree murder must serve at least 25 years in prison, whilst someone serving a life term for secondary degree murder must serve at least 10 years in prison.

6.9.3 CONSTITUTIONALITY OF LIFE IMPRISONMENT

In the case of S v. Makwanyane above, a full bench of the Constitutional Court was of the view that life imprisonment was not per se unconstitutional, although this was said obiter. Issues which could render life imprisonment unconstitutional, are if the sentence is disproportionate to the seriousness of the offence or if it is inconsistently applied. In such situations the sentence would be cruel, inhuman and degrading. Mandatory life sentences would in all probability be unconstitutional as it would infringe the equality clause and it may be cruel, inhuman and degrading under the circumstances.

Although in an earlier case the American Supreme Court held that a discretionary sentence of life imprisonment without parole was cruel and unusual and thus unconstitutional, it held in a later case that mandatory life imprisonment without parole was not unconstitutional for a conviction on possession of a large quantity of drugs. In a Namibian case the Supreme Court found that although life imprisonment was an extremely severe form of punishment, it was not cruel, inhuman or degrading and consequently not unconstitutional. The Court held further that life imprisonment could be unconstitutional if there was no option of release on parole, or if it was grossly disproportionate to the offence for which it was imposed.

6.9.4 INDETERMINATE SENTENCES

In terms of section 276(1)(d) of the Criminal Procedure Act, a High Court or Regional Court may, after convicting a person of one or more offences, and if the court is satisfied that the person habitually commits offences, declare the offender a habitual criminal. Such person may then be sentenced to an indeterminate period of imprisonment. However, the minimum period served must be seven years and the prisoner should not be detained for longer than 15 years. Detaining a prisoner under these circumstances for longer than 15 years may be unconstitutional on the grounds of disproportionality.

Section 286A of the Criminal Procedure Act makes provision for a person to be declared a dangerous criminal if such person presents a danger to the physical or mental well-being of other persons, and if the community should be protected from him or her. Once a court declares a person a dangerous criminal, the court must sentence the person to undergo imprisonment for an indefinite period. The court must also direct that the person be brought before the court on expiration of a period determined by it, in order to determine whether or not the prisoner

should be released conditionally or unconditionally, or if the prisoner should remain in prison indefinitely.

Indeterminate sentences imposed in terms of this provision may also be unconstitutional if it is disproportionate to the offence committed or if the prisoner remains in prison for a very long period, for example, 30–40 years. Although the Canadian Supreme Court upheld the constitutionality of an indefinite period of imprisonment for dangerous offenders, it found that detention of an offender for 37 years under the dangerous offender provision was unconstitutional as it constituted a cruel and unusual form of punishment.

6.9.5 MANDATORY MINIMUM SENTENCES

In South Africa, mandatory minimum sentences for offences are more the exception than the rule, as the imposition of punishment is usually within the presiding officer's discretion. The Supreme Court has held that mandatory sentences were an intrusion by the Legislature into the judicial domain of sentencing. However, in a recent report of the S A Law Commission, it supported minimum sentences as in its view the Legislature has failed to provide a clear and unambiguous legislative framework for the exercise of sentencing discretion by presiding officers. The Namibian Supreme Court found that mandatory sentences are unconstitutional as it left no room for considering factors relating to the specific case. Rautenbach is of the view that "minimum sentences disregard all unique human characteristics, treats individuals as members of an amorphous category and leave no room for personal rehabilitation," and as such infringe the right to human dignity (1998:5B-104). However, it could be justified by the high crime rate and to ensure uniformity in sentencing.

The United States Sentencing Commission criticised mandatory sentences in that they failed to make sentencing more uniform; were invoked more for black people than white people; did not facilitate a smooth rehabilitation process; and forced courts to consider previous convictions dating back many years. The Canadian Supreme Court held that mandatory sentences were cruel and unusual and thus unconstitutional. The Sentencing Reform Act of 1995 abolished all forms of mandatory sentences, except in certain specific instances, like unlawful possession of a firearm.

6.9.6 SUMMARY IMPRISONMENT

It was held in a Constitutional Court case that summary imprisonment in terms of section 205 of the Criminal Procedure Act was not unconstitutional, as the provision did not require a fair trial in the sense envisaged by section 35(3) of the Constitution. However, the trial must comply with the requirements of fairness, due process and natural justice.

6.9.7 PRIVATE PRISONS

The concept of private prisons is not new to South Africa, as mining houses built private prisons in the late 1800's. In terms of Chapter 14 of the Correctional Services Act, the Department may enter into joint ventures with the private sector to build prisons, finance or operate such institutions for a period not exceeding 25 years. The provisions of the Constitution apply to a private prison, as it falls within the definition of an organ of state. The Contractor is prohibited from undertaking certain tasks, for example, taking disciplinary action, deciding on the placement or release of a prisoner or granting temporary release to a prisoner.

With the approval of the Commissioner of Correctional Services, the Contractor must appoint a Director to head the joint venture and must also appoint custody officials, who would have the same powers as correctional officials, to perform custodial duties. The Contractor must preserve the confidentiality in respect of any information acquired in the course of employment. The Commissioner is empowered to intervene and take control of a joint venture prison if the Director loses effective control. Joint venture prisons are subject to the intervention of the Inspecting Judge, Independent Prison Visitors and Visiting Committees. Private prisons are also in existence in America since the mid 1980's.

6.9.8 OTHER CONSTITUTIONAL ISSUES REGARDING IMPRISONMENT

Overcrowding of prisons infringe the human dignity of prisoners and may be unconstitutional. Certain sentences by courts, which do not amount to punishment, for example, confinement in a juvenile or mental institution, may be unconstitutional if it infringes provisions of the Bill of Rights.

6.9.9 CUMULATIVE AND CONCURENT SENTENCES

The cumulative effect of sentences may be too severe and disproportionate in relation to the offence for which the offender was convicted, and may thus be unconstitutional. Courts could prevent such a situation by ordering sentences to run concurrently, reducing individual sentences, or taking all or some of the offences as one for the purpose of sentencing.

CHAPTER 7

ALTERNATIVE PENALTIES

7.1 INTRODUCTION

This chapter examines penalties, which could serve as alternatives to imprisonment in relation to adult offenders (chapter 8 deals with alternative penalties for juvenile offenders). As a result of the overcrowding of prisons, the high cost of imprisonment, and the abolition of the death penalty and corporal punishment, it has become imperative that alternative penalties that meet the requirements of the Constitution, be implemented more often and that new penalties become part of our penal system. As is the case with the previous chapters, the study will be of a comparative nature, in respect of Canada and America.

A limited number of alternative penalties are established by the Criminal Procedure Act, No. 51 of 1977, and in the absence of legislation stipulating a sentencing policy or an approach which the courts may adopt in respect of sentencing, it is imperative that other non-statutory forms of penalties also be examined. Statistics for the period 1992/3 indicate the following comparative rate of incarceration:

South Africa: 368 per 100 000 [114 047 inmates];

Canada: 116 per 100 000 [30 659 inmates]; and

America: 519 per 100 000 [1 339 695 inmates] (Mauer et al, 1994:3).

7.2 CRIMINAL PROCEDURE ACT, NO 51 OF 1977

Section 276(1) of the Criminal Procedure Act provides for the following alternative penalties:

- (a) fines;
- (b) correctional supervision; and
- (c) committal to a treatment center.

According to section 297 of the Criminal Procedure Act, a court may also impose a caution or a reprimand and may suspend or postpone, conditionally or unconditionally, any sentence, whilst section 300 makes provision for compensation and restitution. It is manifest that the opportunities for alternative penalties in terms of the Criminal Procedure Act are very limited.

7.2.1 FINES

Du Toit defines a fine as a sentence by a court in terms of which an offender has to pay a specific amount of money to the State (1981:297). It is generally accepted that fines are the most common penalties imposed by courts and are usually imposed for less serious offences (Terblanche, 1999:303). The limits within which a fine may be imposed for statutory offences is regulated by statute, whereas a court has a discretion in respect of common law offences. Limits of the amounts of fines are set by the relevant court's jurisdiction, for example, R60 000 in respect of a district magistrates court; R300 000 in respect of a Regional Court; whilst the High Court has no limit in this regard (section 92(1)(b) of the Magistrates' Courts Act, No. 32 of 1944, read with Government Notice R1411 dated 30/10/1998).

Fines, which are disproportionate to the offence, or disproportionate to the financial means of the offender, and fines which are imposed in an inconsistent manner, run the risk of being unconstitutional by infringing section 9 and 12 of

the Constitution, which prohibits the State from unfairly discriminating against people. The Constitutional Court held in the case of S v. Makwanyane (above), that the right to equality also applies to sentencing. In this case Chaskalson P found as follows: "The differences that exist between rich and poor, between good and bad prosecutions, between good and bad defence, between severe and lenient judges, and the subjective attitudes that might be brought to play by factors such as race and class, may in similar ways affect any case that comes before the courts, and is almost certainly present to some degree in all court systems".

Although the Court accepted that it is virtually impossible to completely remove the arbitrariness in sentencing, the element of arbitrariness nevertheless infringes the right to equality, especially equality before the law. Courts should thus guard against disproportionate and inconsistent imposition of fines. In the later case of President of the RSA v. Hugo 1997 (1) SACR 567 (CC), Goldstone J stated: "It is the logical corollary of the principle that like should be treated like, that treating unlike alike may be as unequal as treating like unlike." These Constitutional Court judgments make it clear that the principle of equality, and more specifically proportionality and consistency, are applicable in the area of sentencing, and more specifically, the imposition of fines.

Fines are usually linked to periods of imprisonment, which come into effect in cases of non-payment of the fine. In this regard the principles of consistency and proportionality must be maintained in order to ensure its constitutionality. It was stated in the case of S v. Juta 1988 (4) SA 926 (Tkh) that "(i)deally, the sentence, both the primary fine, and the secondary, alternative prison sentence, must satisfy the requirements of justice, in all that that term connotes". This statement is equally applicable in today's constitutional environment.

7.2.2 CORRECTIONAL SUPERVISION

Section 276(1)(h) of the Criminal Procedure Act, provides for correctional supervision as a form of punishment, whilst section 276A determines under which circumstances such penalty may be imposed. Neither section however defines what correctional supervision entails, and it is left to the Correctional Services Act, No. 111 of 1998, to deal with the details of this penalty. In terms of section 276A(1), correctional supervision may only be imposed after a report of a probation officer or a correctional official has been placed before the court. Correctional supervision may only be imposed for a maximum period of three years.

An offender serving a period of imprisonment may be placed under correctional supervision under certain circumstances (section 276A). Such person must appear before the court that imposed the original sentence, although it does not have to be before the same presiding officer. In the case of S v. D 1995 (1) SACR 259(A), it was stated that "(i)n particular it should be realised that appreciable punishment can now be inflicted without imprisonment, with all its well-known advantages for both the prisoner and the broader community". Terblanche defines correctional supervision as follows: "Correctional supervision is a form of punishment which an offender serves in the community, and during which the offender is not incarcerated in a prison at any time, subject to conditions such as the court may prescribe, which will invariably include house arrest and community service, as well as submission to various programmes aimed at the offender's training, rehabilitation and improvement." (1999:331).

Section 50 of the Correctional Services Act, provides two main objectives of this form of punishment, firstly, to enable persons subject to community corrections to lead a socially responsible and crime-free life during the period of their sentence, and in the future. Secondly, to ensure that persons subject to

community corrections abide by the conditions imposed upon them in order to protect the community from offences, which such persons may commit. Chapter 6 of the Act, headed "Community Corrections", deals with amongst others, community corrections.

In terms of section 52 of the Correctional Services Act, a court, Correctional Supervision and Parole Board, Commissioner of Correctional Services or other body, which has statutory authority to do so, may impose conditions under which correctional supervision is to be served. The aspect of supervision underlies this type of penalty, and section 57(1) provides that all persons subject to community service must be supervised in the community by correctional officials. Hereunder is an indication of some of the conditions, which could apply.

(a) Placing under house detention

The hours to which a person is restricted daily to his or her dwelling and the overall duration of the limitation must be stipulated in the order (section 59).

(b) Doing community service

Community service may not be less than 16 hours per month, unless the court directs otherwise. The place where the community service is to be served and the time limit must be stipulated in the order (section 60).

(c) Seeking employment

Such person must make a reasonable effort to find employment and must furnish evidence to the Commissioner of Correctional Services of attempts made in this regard. The Commissioner must also assist in trying to find employment for the person under correctional supervision (section 61).

(d) Take up and remain in employment

A person who is required to take up and remain in employment may not change employment without the permission of the Commissioner. They must perform the work to the best of their ability and comply with the conditions of the employment contract, and may also not leave their place of work for reasons unrelated to their work (section 62).

(e) Pay compensation to victims

The person undergoing correctional supervision must provide the Commissioner with a statement of income and expenditure, and present proof that the compensation was in fact paid to the victim (section 63).

(f) Take part in specific programmes

The person may be ordered to take part in specific programmes, which may include treatment. If such programmes are not stipulated, the Supervision Committee must specify the programmes (section 64).

(g) Contribute towards the costs of community corrections

Such person must provide the Commissioner with a statement of income and expenditure, after which the Commissioner must determine the contribution to costs which that person must make, and may adjust the contribution during the period of supervision (section 65).

(h) Live at a fixed address

After consultation with the Commissioner, a fixed address must be determined. The Commissioner may determine an address to be unsuitable and refer the matter back to court (section 66).

(i) Refrain from using or abusing alcohol and/or drugs

If a correctional officer suspects that such condition has been breached, it may be ordered that a designated medical officer take a blood or urine sample in order to establish the presence and concentration of alcohol or drugs in the blood or urine (section 67).

(j) Subject to monitoring

The order must specify the form of monitoring, and if the monitoring involves the use of an electronic device, such device must be prescribed by regulation. The use of the device may infringe the human dignity and privacy of the person only in so far as it is proportionate to the objective to be achieved (section 68).

(k) Additional conditions in respect of children

A child who is under correctional supervision may be required to attend educational programmes whether or not they are subject to compulsory education. The Commissioner must also ensure that the child has access to adequate social services, religious care, recreational programmes and psychological services (section 69).

If a person does not comply with any applicable conditions, the Commissioner may reprimand the person; instruct the person to appear before a court, Correctional Supervision and Parole Board or other body, which imposed the correctional supervision; or issue a warrant of arrest for such person (section 70). If circumstances so require, the Commissioner is empowered to change the conditions. Persons under correctional supervision may, if they have complaints, direct such complaints to the relevant community corrections officer who must deal with the complaint. However, if such person is dissatisfied with the response, the matter may be referred to the Area Manager (section 72).

The main advantages of this type of penalty are that it has punitive value and the potential to facilitate the offender's rehabilitation, whilst a further advantage is that all the disadvantages of imprisonment are avoided (Terblanche, 1999:333). It was held in S v. R 1993 (1) SACR 209 (A) that this form of penalty has significant rehabilitative value as it entails a shift from incarceration to rehabilitation. However, there are limitations in that it may only be imposed subsequent to a report of a correctional officer and may only be imposed for a period of up to three years. It is an appropriate penalty for a wide range of offences, ranging from drunken driving (S v. Majodina 1996 (2) SACR 369 (A)), to fraud (S v. Kotze 1994 (2) SACR 214 (O)).

7.2.3 COMMITTAL TO A TREATMENT CENTRE

Section 296(1) of the Criminal Procedure Act, provides that a court may sentence an offender, in place of any penalty, to be detained in a treatment centre established under the Prevention and Treatment of Drug Dependency Act, No. 20 of 1992. This type of sentence is thus limited to persons who are dependent on drugs. A further limiting requirement is that before such sentence can be imposed, a probation report must be submitted to the court. It was held in the case of S v. Pretorius 1980 (4) SA 568 (T) that committal to a treatment centre does in fact constitute a form of punishment. Persons undergoing such punishment are detained at a treatment centre for the purposes of undergoing treatment and training, and may be required to perform certain duties (section 8 of the Prevention and Treatment of Drug Dependency Act). It should be remembered that the provisions of the Bill of Rights are applicable to treatment in a treatment centre.

7.2.4 CAUTION AND REPRIMAND

In terms of section 297 of the Criminal Procedure Act, a court may in instances where no minimum sentence is prescribed, discharge an offender with a caution or a reprimand. Discharge has the effect of an acquittal, except that the conviction is recorded on the offender's record. Although it may appear to be a very lenient penalty, the conviction record may serve as the basis for a more severe penalty if the offender is again found guilty of the same or similar offence in the future. However, it is clear that such penalty is only appropriate for minor offences, or moderately serious offences where there is a high degree of mitigating factors.

7.2.5 SUSPENDED AND POSTPONED SENTENCES

In terms of section 297(1)(a) of the Criminal Procedure Act, where a court finds an offender guilty of an offence for which a minimum sentence is not prescribed, it may postpone the imposition of the sentence for a period not exceeding five years, and release the offender either conditionally or unconditionally. However, the unconditional postponement of a sentence has been viewed as being no sentence at all or equivalent to a caution and discharge (Terblanche, 1999:458-459).

Conditional suspension of the operation of a sentence is provided for in section 297 of the Criminal Procedure Act. Although a sentence can only be suspended conditionally, there are an infinite number of conditions under which a sentence can be suspended (S v. Stanley 1996 (2) SACR 570 (A)). Conditions commonly imposed include, compensation, community service, reparation, and non-committal of a similar offence. As this provision does not indicate which type of sentences may be suspended, it is safe to assume that any sentence may be suspended, even a mandatory sentence (Terblanche, 1999:414).

Certain limitations apply to community service as a condition of suspension, for instance, it can only be imposed on an offender who is older than 15 years, and the service must be to the benefit of the community as a whole, and not to the benefit of an individual - S v. Ferreira 1975 (1) SA 447 (O). Community service itself can take many forms, ranging from jobs aimed at cleaning premises to sophisticated jobs like caring for people in homes for the aged. A driver's licence may also be suspended in terms of various municipal ordinances.

7.2.6 FORFEITURE AND COMPENSATION

Forfeiture amounts to taking the property of the offender and giving it to the State without any compensation (section 35 of the Criminal Procedure Act). Thus, in reality it has the same effect as a fine. Although in the true sense of the word it is not a form of punishment, but it does have a punitive effect. This section does not exclude certain types of property from forfeiture, and in practice, the subject has often been money, weapons and goods that are presumed stolen. However, it was held in the Namibian case of Freiremar SA v. Prosecutor-General of Namibia 1994 (6) BCLR 73 (NmH) that in cases where forfeiture becomes absolute and where the onus is on the accused to prove "reasonable steps", it amounted to a violation of the right of the accused to be presumed innocent, and thus unconstitutional. A similar provision is found in the Drugs and Drug Trafficking Act, No. 140 of 1992.

Section 300 of the Criminal Procedure Act, provides that under certain circumstances a court may award a victim compensation for the damage or loss suffered. The maximum amount that may be awarded is determined by the Minister of Justice and Constitutional Development from time to time and published in the Government Gazette. This award has the same effect as a civil judgment within the court's jurisdiction. However, Kriegler is of the view that

before such an award is made, the offender must be given an opportunity to address the court, or to lead evidence on the matter (1993:757).

According to a report of the SA Law Commission dated 30 June 1997, the Commission is of the view that in situations where the offender was not in a position to pay compensation to the victim, the State should endeavour to provide such financial compensation (p.33). Further in the Report the Commission moots the establishment of a compensation scheme that draws its funding from fines imposed by courts and money confiscated in terms of the Proceeds of Crime Act, No. 76 of 1996, amongst others, which will pay compensation to victims in situations where the offender is not in a position to pay (p. 42-43).

Van der Walt is of the view that unreasonable or disproportionate forfeiture would be unconstitutional (SAJHR (2000) 16:43). The South African Prevention of Organised Crime Act, No. 121 of 1998, provides for the forfeiture of property of innocent persons if it was used in the commission of a crime. However, such forfeiture would only be justifiable if it is reasonable and in the public interest (as in effective crime fighting) (Van der Walt, SAJHR (2000) 16:45).

7.2.7 PROBATION ORDER

A probation order, which is often utilised for offenders below the age of 21 years, is usually linked to other forms of individualised sentences, for example, a fine or community order (Pitfield, 1997:102). Pitfield states that probation is primarily about supervision, which involves a period of time during which the offender is aided to re-adjust to the social demands of society (1997:102).

7.2.8 COMMUNITY SERVICE ORDER

When a person is sentenced to community service, he or she serves time outside prison by giving free service to the community. The aim of this type of sentence is to ensure that offenders pay their debt to society whilst maintaining a stable lifestyle. Community correction sentences are usually linked to an established sentence like a suspended sentence of imprisonment or a suspended fine. The nature of the sentence can vary in accordance with the needs of each situation, and taking into account the rehabilitation of the offender. Some of the advantages of this type of sentence are, that-

- a sense of responsibility is instilled in the offender;
- the offender can improve his or her inter-personal relationships with the community;
- it is more cost effective than imprisonment;
- it prevents a breakdown of family ties; and
- it promotes a better work habit (Naude, 1991:15).

In an article in the Nexus journal, it is reported that electronic monitoring is an effective way of implementing community sentences (Eksteen, 1997:26-27). Although not an established penalty, diversion is another way of dealing with offenders. An offender is diverted from the criminal justice system in that the criminal charges are withdrawn on condition that the offender performs community service. Should the offender either refuse to perform such service or performs it in an unsatisfactory manner, the charges could be re-instated. (Dissel and Mnyani, 1995:25).

7.3 ALTERNATIVE PENALTIES AVAILABLE IN THE CANADIAN PENAL SYSTEM

Unlike the American criminal justice system, but similar to the South African system, the Canadian system is based on a national model, in that provisions of the Criminal Code apply throughout the country on a nation-wide basis. Thus the provisions discussed below are applicable throughout Canada, in all its provinces.

7.3.1 ABSOLUTE AND CONDITIONAL DISCHARGE

In terms of section 730 of the Canadian Criminal Code, a court can grant an absolute or conditional discharge. However, such penalty can only be imposed in situations where a minimum penalty is not obligatory or where the offence does not warrant a sentence in excess of 14 years imprisonment or life imprisonment. Furthermore, the court must be of the opinion that the imposition of such penalty is not contrary to the public interest (section 730 of the Code). The effect is that the offender walks away a free person and is deemed not to have been convicted, but that the person will have a criminal record (Stuart, 1993:885). The Criminal Records Act makes specific provision for absolute and conditional releases to be recorded as previous convictions. This type of penalty is eminently suitable for minor offences.

7.3.2 FINES

Section 718 of the Canadian Criminal Code makes provision for the imposition of a monetary penalty. A fine may be imposed in addition to other punishment, or in lieu of another penalty, but not in lieu of any other punishment if the offence is subject to a minimum sentence of imprisonment. Before a court decides to impose a fine as an alternative to imprisonment in default of payment, a court

must first ascertain the accused's ability to pay (R v. Natrall [1973] 1 WWR 608, 20 CRNS 265, 9 CCC (2d) 390). The offender can be given an extended period to pay the fine and may also be granted ad hoc extensions of time (section 718(9) of the Code). Where a period of imprisonment is imposed as an alternative to paying a fine, and the offender pays only part of the fine, the period of imprisonment is reduced relative to amount paid (section 727.8 of the Code).

7.3.3 PROBATION

A court may suspend the passing of a sentence and place the offender on probation in situations where there is no minimum sentence provided (section 737 of the Canadian Criminal Code). In addition, a court may impose a fine or imprisonment and place the offender on probation, provided the period of imprisonment is not longer than two years. A court may also impose conditions, which the offender must comply with during the period of probation, which conditions could include community service. However, a court cannot fine, imprison and place an offender on probation (Smith [1972], 7 CCC (2d) 468 NWT). Section 737 of the Code states further that beside the listed statutory conditions, a court may impose such reasonable conditions in order to ensure the good conduct of the offender and to prevent a repetition of the offence or the commission of other offences.

7.3.4 RESTITUTION

Restorative justice is based on the following three beliefs:

- Crime causes harm to victims, offenders and communities.
- Victims should actively be involved in the criminal justice process.
- The community should accept responsibility for the establishment of peace in the community. (Luyt, *Acta Criminologica* Vol. 12(3) 1999:67).

Section 737(2) of the Code authorises a court to order an accused to make restitution or reparation for the actual loss or damage sustained. Restitution can also be granted for bodily injury (section 725 of the Code). The amount of restitution to be paid to the victim must be determined by the sentencing judge after conducting an enquiry (section 727 of the Code). The money found in possession of the offender on arrest may be seized and used to defray the expenses in respect of restitution (section 727.2 of the Code).

7.3.5 COMMUNITY SERVICE

Although not directly sanctioned by the Code, courts have imposed conditions of community service to be carried out during a period of probation – R v. Shaw [1977], 36 CRNS 358 (Ont. CA).

7.3.6 INTERMITTENT SENTENCE

This sentence entails a sentence of imprisonment, which is served at intermittent periods. It is a condition of such sentence that the sentencing court must order probation for the period the offender is not in prison (section 737(1)(c) of the Code). Intermittent sentences are similar to periodical imprisonment as practised in South Africa.

7.3.7 SUSPENDED SENTENCE

According to section 731 of the Criminal Code, a judge who convicts an offender can suspend the sentence and instead impose only a period of probation. If the offender is convicted of another offence before the period of probation expires, the suspension can be revoked and replaced with any sentence that was available in the first place.

7.4 ALTERNATIVE PENALTIES AVAILABLE IN THE AMERICAN PENAL SYSTEM

The American criminal justice system consists of two distinct components, the one that applies on a federal level, throughout the country, and the other on a state level, and which is only applicable within the state boundaries. The discussion below deals mainly with the federal system, but where relevant, reference is made to individual state systems. According to Klein, the following aspects must be considered when establishing an alternative penalty, the offender, the offence, the victim, the community and the environment (1997:140–146).

7.4.1 PROBATION

Probation is available on the federal level as well as in all states and in Washington DC, although only a few states have actually enacted legislation to manage such a system (Durham 111, 1994:180). In essence, as it is practiced on the federal and state level, probation consists of the suspension of a formal sentence, pending the results of a probationary period. The underlying principle of probation is one of rehabilitation of offenders, whilst others include re-integration of offenders; protection of the community; and justice. In most states probation is managed by state departments (Durham 111, 1994:180).

7.4.2 INTENSIVE SUPERVISION PROGRAMMES

Intensive probation differs from ordinary probation, not in content but in frequency of contact (Klein, 1988:240). There are a number of intensive supervision programmes that exist in about 40 states; hereunder is a discussion of three such programmes.

(a) California's Intensive Supervision Programme

There are two systems in place; the first one is intensive supervision within the community in lieu of imprisonment, whilst the second one is community-based monitorship of offenders only after they have served part of their prison term. This programme has not proved to be very successful and studies indicate that about 40% of offenders on the programme were convicted of further offences. A research report stated that offenders that were granted probation under the scheme constituted a danger to society (Durham 111, 1994:181).

(b) New Jersey's Intensive Supervision Programme

This programme has four objectives:

- To shorten the period of imprisonment to between three and four months;
- To provide intermediate-level punishment within the community;
- To control deviant behaviour by a high level of monitoring; and
- To operate on a cost saving basis.

Participants are carefully screened, and offenders found guilty of sex crimes, murder or robbery, are not eligible. During the programme offenders are subjected to intensive supervision, which includes night visits. They must also provide at least 16 hours of community service per month. Each participant has a sponsor who monitors the progress, and they also have to attend group therapy sessions. This programme has proved very successful and has been emulated in other states. (Durham 111, 1994:183).

(c) Georgia's Intensive Supervision Programme

This programme was established in the state of Georgia with the main aim of reducing the growing prison population, and was designed for prisoners who would otherwise have had to spend time in prison. The design of the programme includes distinctive stages, the first being face-to-face contact on a weekly basis with probation officials. The second stage and further stages

include, being in employment, performing community service and paying towards the cost of the programme. According an evaluation report, the programme proved very successful in that there were fewer re-arrests and re-convictions than other offenders on parole who were not participants in the programme (Durham 111, 1994:183-184).

7.4.3 HOME CONFINEMENT

Home confinement is usually imposed in conjunction with a probationary sentence. It is a popular form of penalty in many states, and is imposed in order to reduce the number of prison inmates. Klein is of the view that this form of punishment has its origin in the military (1988:238). Florida was the first state to introduce this type of penalty in 1980, called the Florida Community Control Program. The aim of the programme is to divert non-violent offenders from the penal system by providing around-the-clock surveillance. Participants are contacted by probation officials a minimum of 28 times a month. The offender is only permitted to leave his or her home to go to work or for other essential reasons, like visiting a doctor. Since the offender can maintain vital community and family relations, the rehabilitation process is significantly facilitated. The programme, which is cost-effective, has proved relatively successful in that the failure rate amounted to 16% in 1990.

7.4.4 ELECTRONIC MONITORING

This amounts to an electronic means to monitor the movements of offenders serving sentences within the community. Two major kinds of technology are utilised in this system, namely, telephone based and non-telephone based. The telephone-based system includes a computer receiver-dialer that accepts transmissions from a wrist or ankle transmitter worn by the offender. Information is relayed over the telephone line to a central monitoring location. The other

system also involves wrist or ankle transmitters, but the signal is sent via radio waves. The state of Florida was the first to introduce the system in 1984, and by 1988 over 30 states had introduced similar systems.

Although the programme encountered implementation difficulties, like the discomfort of wearing a transmitter and embarrassment by being seen in public with the transmitter, the programme was reasonably successful in that thousands of potential inmates served their sentences in the community. Advantages of the system include, public safety, rehabilitation orientated, low cost, retention of employment, maintaining family relationships, etc. The penalty is eminently suitable for most types of offenders. (Durham 111, 1994:193-195). Electronic monitoring can be combined with other sentences like home confinements and probation, and can also be used for trial awaiting offenders (Abadinsky, 1997:431).

7.4.5 FINES

Financial penalties are amongst the most commonly imposed penalties and are utilised at both state and federal levels of government. All fines are paid in favour of either the state or the federal authority, as the case may be (Klein, 1988:195). The rationale underlying this type of penalty is that essentially it is punitive in nature. In most states the practice is that heavy fines are imposed for traffic violations, whilst the offender's ability to pay the fine is an important consideration before the penalty is imposed. Empowering statutes usually establish upper and lower limits for fines, and generally fines are not imposed for serious offences like rape or murder. Credit cards and other electronic methods of payment may be used to pay fines, as this eases the administrative burden on the State. Courts also use the services of debt collecting agencies to collect outstanding fines.

7.4.6 RESTITUTION

In essence, this type of penalty consists of compensation to the victim for loss or damage to property or for physical harm sustained. Most states have restitution programmes, distinguished from state-victim compensation programmes, in operation. In addition to the compensation principle, this penalty also gives effect to retribution. The advantages of restitution is that it is less costly than other penalties, and often pays for itself in the long run; it has a strong rehabilitative element; and it contributes to the psychological well-being of the victim. Already in 1982 Congress passed the Victim and Witness Protection Act to lay the groundwork for the establishment of such programmes (Klein, 1988:143). The Federal Penal Code also makes provision for such programmes at a national level. In terms of the federal programmes, offenders may pay compensation in a number of ways, for example, labour or services in place of direct financial compensation.

The state of Texas has established a restitution center where inmates spend between six and 12 months. The centre houses about 50 inmates who have free movement within the centre. Inmates are either employed on a regular basis or they do community service. Their income goes towards the cost of restitution, support for their family, running costs of the centre, etc. This centre has proved to be successful, and most failures are due to technical violations and not new crimes (Durham 111, 1994:214-215). Klein states that restitution allows the offender an opportunity to pay the victim back and become better integrated into society (1988:161). Seen from the perspective of the victim, the consideration of the needs and opinion of the victim can help the victim to regain a sense of control over his or her life and a sense that justice has been done (McLeod, 1995:504). The American Supreme Court held in the case of Morris v. Slappy 103 S. Ct. 1610 (1983) that the administration of justice cannot ignore the concerns of victims of crime.

7.4.7 COMMUNITY SERVICE

Community service can, by its nature, assume a number of forms, and can be tailor-made to the peculiarities of the offender. Although California was the first state to introduce this type of penalty, all other states have their own unique systems of community service. New York has an extensive community service programme run by the Vera Institute, whilst the programmes in California are run by the California Community Service Order. (Durham 111, 1994:218-219). The Vera Programme has over the years served as a model for the establishment of similar programmes in other states (Klein, 1988:177).

7.4.8 DAY-REPORTING CENTRES

This programme can be used in conjunction with many forms of punishment, especially probation. Day-reporting centres were first built in Minneapolis in 1976 and New Jersey in 1977. In practice, inmates spend day-time at the centre under intensive surveillance, and return at night to their family environment. It serves as a means of ensuring a smooth transition from incarceration to freedom within the community. The facilities are usually non-residential and offer services of a monitoring nature. (Durham 111, 1994:220 – 221).

7.4.9 BOOT CAMPS

In terms of this system, inmates spend time in an institution under austere conditions where they are made to work hard at tasks that are physically demanding. The intention is that the stay in the boot camp must be difficult and harsh, without being cruel, and in this way ensuring that offenders will not in the future easily return to a life of crime. These camps are designed for first offenders and those who are still reasonably young, where an attempt is made to end an early career in crime. The highly disciplined environment is intended to

develop self-control in the inmates, who spend between 90 and 180 days in the camp, thus keeping costs to a minimum. Boot camps are seen as an alternative to prisons without the negative connotations that go along with incarceration.

The advantages of boot camps are that they punish without being destructive; it helps prevent recidivism; it helps to reduce overcrowding in prisons; and reduces the overall costs of punishment (Durham 111, 1994:232–233). Lutze and Brody sound a word of caution in stating that the treatment in boot camps may be such that they violate the Eighth Amendment (prohibition of cruel and unusual punishment) (1999:246).

7.4.10 MANDATORY TREATMENT

There are numerous treatment centres at the state and federal level for the mandatory treatment of alcoholism and drug addiction. Federal and state laws make provision for courts to require offenders to attend such centres under various circumstances. Treatment is also used as a condition of probation. Treatments vary from centre to centre, but treatment that amounts to cruel and unusual punishment may be declared unconstitutional, for example, mandatory surgical castration of convicted rapists. (Klein, 1988:218-220).

7.4.11 SHOCK PROBATION

Shock probation amounts to the imposition of a lengthy term of imprisonment, and later reducing it within a specific period of time. Shock probation combines the concept of probation with that of incarceration (Enos, 1992:18). The other term for this method of punishment is “shock sentencing”. In order for this method to be a real shock, the offender must firmly believe that he or she has been sentenced to a lengthy period of imprisonment, then brought back within a specific period and released after having had a taste of prison. In terms of the

empowering statute in Ohio, judges are allowed to re-sentence offenders within a period of between 30 and 60 days. Presently more than 12 states make use of this form of penalty. (Klein, 1988:244 – 245).

7.5 SUMMARY

7.5.1 ALTERNATIVE PENALTIES IN THE SOUTH AFRICAN PENAL SYSTEM

The Criminal Procedure Act provides for a number of penalties, which could serve as alternatives to imprisonment. Fines in terms of which the offender pays an amount of money to the State, is the most common penalty imposed by our courts. The limits of fines for statutory offences are usually determined in the empowering statute, whilst courts exercise their discretion in respect of common law offences, subject to their penal jurisdiction. Fines which are disproportionate to the offence, or disproportionate to the financial means of the offender, may infringe section 9 of the Constitution and accordingly may be unconstitutional. The imposition of inconsistent fines for the same offence may also be unconstitutional.

Correctional supervision is an effective form of punishment for a number of offences ranging from drunken driving to theft, in appropriate cases, but is underutilised by the courts. In terms of the Correctional Services Act, terms of imprisonment may be converted into correctional supervision under certain circumstances. The main advantage of this form of penalty is that the person undergoing it serves the punishment within the community and within his or her family environment, factors which greatly enhance the rehabilitation of the offender. A number of conditions can apply to those serving correctional supervision, for example, house detention, doing community service, monitoring, and paying compensation.

Persons who are addicted to drugs or alcohol may be sentenced to serve an in-house period at a rehabilitation centre. Prior to making such determination, a court must be presented with a probation report. The treatment which the person undergoes at the centre is subject to the provisions of the Bill of Rights. A caution and reprimand is reserved for minor offences and has the same effect as a finding of not guilty, except that the conviction is noted on the record of the accused. Any sentence can be suspended or postponed conditionally, which conditions commonly include, community service, compensation and reparation. A driver's licence may also be suspended, although if the offender earns a living by such means, and the offence is not a very serious one, the suspension of the driver's licence may be unconstitutional on the grounds of disproportionality.

Section 300 of the Criminal Procedure Act, provides that under certain circumstances a court may award a victim, compensation for the damage or loss suffered. However, in practice this does not occur very often as victims are not usually aware of this provision and prosecutors do not always request the court to invoke it. The S A Law Commission has recommended in a report that in situations where the offender is not in a position to pay compensation, the State should endeavour to provide such compensation.

Probation orders are most often imposed on juvenile offenders, unless the conditions are appropriate for it to be imposed on an adult. Courts are free to impose any suitable condition to be carried out by the probationer. Community service orders are often imposed as conditions of probation. The advantage of this type of penalty is that it is served outside the confines of a prison. Electronic monitoring may also be used to render the element of supervision in this penalty more effective.

Electronic monitoring may prove to be a viable alternative since according to Haverkamp & Luyt, during 1999 there were 52 416 persons subject to either

correctional supervision or parole supervision (Acta Criminologica Vol. 12(1) 1999:15).

7.5.2 ALTERNATIVE PENALTIES IN THE CANADIAN PENAL SYSTEM

Absolute and conditional discharge is widely used for minor offences or serious offences when there are substantial mitigating factors. This penalty can only be imposed in situations where a minimum penalty is not applicable or where the offence does not warrant a term of imprisonment in excess of 14 years. Although the person walks free after the penalty is imposed, the conviction is noted on the record of the accused. Monetary penalties in the form of fines are also commonly imposed by courts for a number of offences. Courts must first determine whether the accused has the means to pay the fine before it may be imposed.

A court may impose a period of probation in addition to a fine or imprisonment, provided the period of imprisonment does not exceed two years, but all three penalties cannot be imposed simultaneously. Orders of community service commonly accompany probation orders. Courts can also order that an accused compensate the victim for any loss suffered by the victim as a result of the offence. A court must conduct an enquiry prior to determining the extent of the compensation. Although the Criminal Code does not make provision for community service, such condition often forms part of a sentence of probation. A court can also impose a sentence of intermittent imprisonment, in terms of which an offender serves time in prison at intermittent periods.

7.5.3 ALTERNATIVE PENALTIES IN THE AMERICAN PENAL SYSTEM

Alternative penalties occur at both the federal and state level. Probation is available at the state and federal level and most states have enacted legislation

to manage such system. Rehabilitation is the underlying principle of probation. States, like California and New Jersey have implemented programmes of intensive supervision in terms of which certain selected offenders are subjected to intensive supervision and monitoring. Intensive supervision programmes in New Jersey and Georgia have proved successful in reducing the rate of recidivism. Home confinement is a penalty, which is normally reserved for non-violent offenders who have committed medium to serious offences. Violent and sex offenders are excluded from the programme. Inmates may only leave their home to go to work and for essential reasons.

Electronic monitoring has become a popular form of strengthening the system of supervision, and offenders have the benefit of serving the sentences within their family and community environment. This penalty is not suitable for violent offenders. Fines and restitution orders are commonly imposed by courts, and offenders may pay in installments or with credit cards. Debt collecting agencies deal with those offenders who do not pay. Community service is often imposed as a condition of probation in suitable cases. New York has an extensive community service programme run by the Vera Institute.

Young and first time offenders can be sentenced to day reporting centers where they spend day-time and return home at night. It allows for a smooth transition back into the community. Boot camps have been established on a military basis where non-violent offenders may be sent for periods of between three and six months. Strict discipline is the cornerstone of this type of penalty. The advantages of boot camps are that they punish without being destructive and it reduces overcrowding in prisons. Concern has been raised that if the discipline is too severe, it may contravene the Eighth Amendment in that it amounts to cruel and unusual punishment.

Offenders who are addicted to drugs or alcohol may be sent for mandatory treatment to a treatment centre in terms of state or federal laws. Such treatment can also be imposed as a condition of probation. Shock probation or shock sentencing as it is known, consists of imposing a long term of imprisonment on the offender and then reducing the term to between one and two months and placing the offender on probation. The aim is to induce a sense of shock into the offender by imposing the long term of imprisonment.

CHAPTER 8

ALTERNATIVE APPROPRIATE PENALTIES FOR JUVENILES

8.1 INTRODUCTION

This chapter deals with alternative penalties appropriate for juvenile offenders. The position of punishment in respect of juveniles merits special attention, especially with the abolition of corporal punishment and provisions in the Constitution and other legislation, which deal with rights of children. Corporal punishment was often resorted to as a form of punishment for juveniles and with the abolition of corporal punishment, it has become essential that existing alternative forms of punishment for juvenile offenders, which will pass constitutional muster be used more regularly, and new ones established.

A juvenile is not defined in the Constitution, but section 1 of the Correctional Services Act, No.111 of 1998, defines a child as a person under the age of 18 years. For purposes of this thesis, a juvenile is equated with a child, i.e., a person under the age of 18 years. Both the Correctional Services Act and the Criminal Procedure Act, No. 51 of 1977, contain specific provisions, which deal with penalties for juveniles.

It has been emphasised in early judgments that the sentencing of young offenders require a different approach to the sentencing of adults. For example, it was stated in R v. Smith 1922 TPD 199, that "(t)he State should not punish a child of tender years as a criminal and stamp him as such throughout his after life, but it should endeavour ... to educate and uplift him ...". Two principles emanate from this judgment, namely, that courts view children as being less blameworthy than adults, and secondly that rehabilitation is the underlying basis for punishment of young offenders. It is thus important to approach the

sentencing of children with a different philosophy, since children are in a more favourable position to be reformed than adults.

Currently the criminal justice system serves both adults and children as there is no separate system for children. However, the S A Law Commission is in the process of investigating the position of child offenders within the criminal justice system (Sloth-Nielsen, 1998:97), and recently submitted a comprehensive report (Report on Juvenile Justice, S A Law Commission: July 2000). As a result of the shortage of juvenile facilities, they often end up in prisons or police cells (Sloth-Nielsen, SACJ (1995) 8:48).

8.2 CONSTITUTIONAL PROVISIONS I.R.O. CHILDREN

Section 28 grants rights specifically to children, and for the purposes of punishment, the following rights are of importance:

- (a) to be protected from maltreatment, neglect, abuse or degradation;
- (b) not to be required or permitted to perform work or provide services that are inappropriate for the child's age, or place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
- (c) to family care or parental care, or to appropriate alternative care when removed from the family environment;
- (d) not to be detained except as a measure of last resort, in which case and in addition to the rights bestowed by sections 12 and 35 (dealing with freedom and security of the person and arrested, detained and accused persons, respectively), the child may be detained only for the shortest appropriate period of time. When children are detained under these circumstances, they must be kept apart from prisoners of 18 years and older, and treated in a manner, and kept in conditions that take account of their age; and

- (f) a child's best interests are of paramount importance in every matter concerning the child.

According to the Report of the National Prisons Project of the SA Human Rights Commission, there were few prisons that assisted juvenile prisoners with their integration into society. As a result of the problem of overcrowding, juvenile prisoners were not always kept separate from adult prisoners. The problem of overcrowding also affects concentration on their studies, as education facilities are available at most institutions. There were virtually no rehabilitation programmes and juveniles were involved in criminality within prisons, for example, smuggling illegal substances, gang activities, drug dealing and manufacturing weapons (1997:27). The Report recommended that:

- specially recruited and trained staff be allocated to juvenile prisons;
- specially designed rehabilitation programmes;
- imposition of alternative penalties that are geared toward rehabilitation, like community service; and
- all juveniles must be removed from prisons to places of safety (1997:29).

There are no provisions in either the American or Canadian Constitutions, which deal with punishment for juvenile offenders, although both countries have numerous pieces of legislation, which deal with this aspect.

8.3 CORRECTIONAL SERVICES ACT, NO. 111 OF 1998

Section 19 provides that every child prisoner who is subject to compulsory education must attend and have access to such educational programmes. Furthermore, where practicable, all children who are prisoners not subject to compulsory education must be allowed access to educational programmes. The Commissioner of Correctional Services is obliged to provide every prisoner who is a child with social work services, religious care, recreational programmes and

psychological services. Where practicable, the Commissioner must ensure that prisoners who are children remain in contact with their families through additional visits and other means. It should be noted that certain of these provisions are only applicable if it is practicable, and thus they are not absolute rights, but are made available at the "discretion" of the Department of Correctional Services. The inclusion of the words "by other means" allows the Department to be innovative in establishing means for child prisoners to remain in contact with their families - this is an essential element of their rehabilitation.

8.4 CRIMINAL PROCEDURE ACT, NO 51 OF 1977

Section 254 of the Criminal Procedure Act provides that if at any time during the trial of a child, it appears to the court that the child is a child in need of care in terms of section 14(4) of the Child Care Act, No. 74 of 1983, the trial may be stopped and the accused may be brought before a children's court. Such order can even be made after the court has given a verdict in the matter. Louw and Van Oosten refer to this type of order as diversion from the criminal justice system (1998:123). In this way a child is dealt with outside the criminal justice system and with it the increased chances of rehabilitation. Unfortunately, in practice this provision is not used very often (Singh, 1995:297). Singh confirms this view in an article in the THRHR (1995 (58):297).

In terms of section 290, a court may upon conviction, instead of imposing punishment, order that:

- (a) the child be placed under the supervision of a probation officer or a correctional official;
- (b) the child be placed in the custody of any suitable person designated in the order;
- (c) both such supervision and custody; or
- (d) the child be sent to a reform school

Although the term "instead of imposing punishment" is used in the provision, Terblanche is of the view that the above orders nevertheless constitute punishment in the penological sense (1999:386). It was held in S v. Williams 1988 (3) SA 386 (C) that placement in a reform school prevents a child from the influences of adult offenders. The purpose of reform schools is that it would have a less detrimental effect than prison on a young offender, in other words, an alternative to imprisonment. Although prison is clearly not a suitable place of detention for child offenders, large numbers of children commit serious offences, and there is no suitable alternative sentence to impose in such cases. According to Sloth-Nielsen, during the period 1993/4, 4 465 children committed serious offences which merited imprisonment (1995:339). The provisions of section 290 are examined more closely hereunder.

8.4.1 SUPERVISION OF PROBATION OFFICER OR CORRECTIONAL OFFICER

A juvenile offender is supervised by a probation officer in co-operation with the juvenile's parents and teachers. The function of the probation officer is to improve the living conditions of the juvenile and to instill in him or her a sense of responsibility. This can be achieved by regular visits by the probation officer to the home and school of the juvenile. It is advisable to obtain a probation officer's report before placing a juvenile under probation (Terblanche, 1999:388). Probation is not suitable for serious offences. If the correctional officer is a social worker, the role will be the same as that of a probation officer.

8.4.2 CUSTODY OF ANY SUITABLE DESIGNATED PERSON

According to Terblanche, this type of sentence is very rarely imposed (1999:391). Since anyone could qualify as a suitable person, the order should

specify the identity of the person. This order can be issued in conjunction with other appropriate orders.

8.4.3 SUPERVISION AND CUSTODY

This sentence amounts to a combination of 8.4.1 and 8.4.2 above.

8.4.4 REFORM SCHOOL

A reform school resembles a prison rather than a school, and is a severe form of punishment as it removes the offender from the community (S v. L 1978 (2) SA 75 (C)). The purpose of a reform school is to reform and remove criminal tendencies from the offender (S v. L 1993 (1) SACR 386 (C)). The offender suffers less of the disadvantages of imprisonment, as he or she does not come into contact with hardened criminals (S v. Willemse 1988 (3) SA 836 (A)). It is essential that a probation report should precede referral to a reform school (S v. Zungu 1962 (1) SA 377 (N)), and should only be imposed after careful consideration. Referral to a reform school should be limited to serious offences or repeat offenders.

There are currently 12 youth correctional centers under the control of the Department of Correctional Services, catering for the custody, treatment and development of juvenile offenders (Annual Report, 1999:8).

8.5 CHILD JUSTICE BILL

The S A Law Commission is presently drafting a Bill, to be called the Child Justice Bill, as one of its projects (Project 106). The Bill is still in the drafting stage and has not been presented to the Cabinet for approval to be introduced in Parliament. The main thrust of the Bill is to ensure that children who are

accused of less serious offences will be diverted from the criminal justice system into programmes in which they could repay their debt to society in a more constructive way. In order to achieve this objective, a separate system of justice for juvenile offenders must be established. Louw & van Oosten are of the view that diversion is based on the principle that it is in the best interests of children that they do not become contaminated by the criminal justice system (THRHR 1998 (61):123).

The purpose of the programmes mentioned above is that they encompass restorative justice principles, which focus on restitution and reconciliation rather than retribution and punishment. The emphasis will be on compensating the victim and thereby reintegrating both the offender and the victim back into the mainstream of society. However, the Bill does make provision for the criminal prosecution of children who commit serious offences, like rape and murder, as well as those who repeatedly commit offences. Provision is made for the removal of such children from society for reasonable periods. In line with the constitutional provisions that children should be detained in prison only as a last resort, the Bill defines specific circumstances under which children may be detained. The Bill aims to render the system a specialised field in order that it may develop into a unique system.

Provision is made for specialised child justice courts at the district level, which will ensure that the system of probation develops into a more sophisticated and effective system. A pre-trial system is to be introduced and this preliminary enquiry will provide a formal step prior to the charge and plea. This will allow maximum use of diversion at this stage and will act as a window period for deserving cases. The new system will be in an ideal position to address the problems the existing criminal justice system is manifesting. The Bill also increases the sentencing options currently available and creates mechanisms to

ensure the effective monitoring of legislation. (Project 106 – Report on Juvenile Justice, SA Law Commission 2000).

The main recommendations in the Report regarding sentencing of children are as follows:

- Children under the age of 14 years may not be imprisoned. No child may be sentenced to life imprisonment.
- Children may only be referred to a reform school for a maximum of two years, and may only remain there until the age of 18 years.
- Monetary fines should not be paid to the State, but must become part of the restorative process.
- More use should be made of alternative penalties like community service, which should be for at least 50 hours. Programmes offered by NICRO should be implemented as part of the sentence.
- Use should be made of postponed and suspended sentences coupled to community service.
- Children over the age of 15 years should not be sentenced to correctional supervision.
- Diversion should be possible also after conviction. (SA Law Commission, 2000:166–176).

8.6 ALTERNATIVE PENALTIES FOR JUVENILE OFFENDERS IN THE CANADIAN PENAL SYSTEM

Section 3 of the Young Offenders' Act of 1982, provides a sentencing policy for young offenders. The main principles contained in this policy are as follows:

- (a) Although young persons are not in all instances held accountable in the same manner as adults, young persons who commit offences should nonetheless bear responsibility for their contraventions.

- (b) Young offenders require supervision, discipline and control, but because of the level of their development and maturity, they require guidance and assistance.
- (c) Where possible, young offenders should be diverted from the judicial system.
- (d) Young persons enjoy all the rights contained in the Charter of Rights and Freedoms, and the Bill of Rights, and should have special guarantees of these rights and freedoms.
- (e) The rights and freedoms of young persons should be interfered with as little as possible.
- (f) Parents have a responsibility for the care and supervision of their children, and children should only be removed from the care of their parents in circumstances where parental supervision is inappropriate.

In terms of section 20 of the Young Offenders' Act, the following penalties can be imposed on young offenders:

- An order for restitution or compensation;
- An order for up to 240 hours of community service;
- An absolute discharge;
- A fine of up to 1000 dollars;
- An order for up to two years probation;
- An order for treatment for up to three years; and
- An order for custody for up to three years.

Section 4 of the Act provides a legislative framework for the establishment of alternative measures, which include, diversion from the court process for first time offenders charged with relatively minor offences; programmes involving parents, victims and the community; probation with supervision by volunteers or government social workers; restitution; volunteer work; or a charitable donation. The referral to a programme is dependant on the needs of the offender and the

community. If the offender denies responsibility for the offence, the matter must go to court for a determination of guilt or innocence. If the offender co-operates fully with the programme, the criminal charges will be dropped. A youth court system deals with issues like child protection and adoption (Larsen, 1995:376).

A young offender may be transferred to an adult court in terms of section 16 of the Act if the court is of the view that the offender is charged with an offence that would warrant, on conviction, either life imprisonment or a long term of imprisonment. Once a young offender is transferred to an adult court, penalties applicable to adults may be imposed. A transfer may only take place if the court is of the opinion that it is in the interests of society and having regard to the needs of the person, that the transfer takes place.

8.7 ALTERNATIVE PENALTIES FOR JUVENILE OFFENDERS IN THE AMERICAN PENAL SYSTEM

In the case of In re Gault 387 US 1 (1967), the Supreme Court of America granted additional due process rights to juvenile offenders and declared that the criminal justice system must treat juveniles separately from adults. One of the main consequences of this judgment was the establishment of the juvenile court system. Juvenile courts adopted a dual approach of rehabilitation and punishment (Cassim, 1997:32).

8.7.1 RESTITUTION

This type of sentence is reserved mainly for non-violent juvenile offenders. The offender is required to make payment to the victim, either in the form of monetary compensation or services rendered. It is envisaged that such restitution will make the offender more responsible, whilst at the same time giving recognition to the claims of the victim (Cassim, 1997:34). It is the function of the State to set

up the mechanism to facilitate the rendering of payment or services to the victim. Reconciliation, more than punishment, is the hallmark of this type of sentence. According to Bartollas, financial restitution and community service orders have become widely used as conditions of probation (1997:463). The aims of restitution are:

- To hold juveniles accountable;
- To provide reparation for victims;
- To treat and rehabilitate juvenile offenders; and
- To punish juvenile offenders.

There are generally three restitution models operative in the states, namely, the financial and community service model; the victim-offender mediation and service model; and the victim financial restitution model (Bartollas, 1997:465).

8.7.2 COMMUNITY SERVICE

Community service requires the offender to repay his or her debt to society by undertaking unpaid community service. However, such sentence is only suitable for offenders who do not constitute a danger to others (Cassim, 1997:35). The aim of the sentence is to instill a sense of responsibility and pride in the offender. It is possible to be innovative and structure the community service in the most appropriate manner. According to Bartollas, community service as a condition of probation, is one of the most common conditions utilised by state juvenile institutions (1997:463)

8.7.3 MEDIATION

The process of mediation is used in conflict situations, and where there is a likelihood of future conflict. It entails the involvement of a third party, usually someone who is skilled in conflict management, to try and resolve the dispute

between the offender and the victim. It is eminently suitable in situations where the offender and victim are either related to each other, for example, parent and child or siblings or where they are, or have been friends. The aim of mediation in this instance is to correct behaviour and to eradicate present and future conflict. Numerous states, like Texas and New York have empowering legislation in this regard (Cassim, 1997:35). Mediation as a form of punishment will enable the offender and the victim to interact in a positive manner, whilst at the same time give the victim a sense of satisfaction that justice is being done.

8.7.4 ELECTRONIC MONITORING

This form of punishment entails attaching to the ankle or wrist of the offender an electronic mechanism, which emits radio waves from which the location of the offender can be monitored. According to Charles, an electronic monitoring programme with the following characteristics was established in the state of Indiana (1989:151). Electronic devices are attached to the wrists of the participants in the programme, whilst an encoder device is inserted into a verifier box attached to the telephone. In this way the supervisor can maintain regular tracking as part of the intensive supervision programme. The programme had a positive effect on the participants in that they did not experience societal rejection and the wrist monitor acted as a constant reminder. Overall evaluation indicated that it was a suitable alternative to incarceration as the offender was rehabilitated within his or her community and family. In 1988, officials in 33 states were using this system of monitoring the behaviour of juvenile offenders (Bartollas, 1997:467).

8.7.5 DIVERSION

Diversion consists of diverting an offender from the criminal justice system and in turn dealing with the offender outside of the system. The various state

authorities have established numerous programmes and schemes, which may be used during instances of diversion. According to De Angelo, the following community-based programmes have been used during instances of diversion:

- Probation involving the police;
- Treatment involving suitably trained staff;
- Education and work involving in-house programmes;
- Job counseling and remedial teaching;
- Volunteer work in the community; and
- Recreational programmes involving recreation and sport (1988:24).

8.7.6 CURFEW ENFORCEMENT

In order for a comprehensive curfew programme to be effective, the co-operation of all the role-players is essential. The role-players include, law enforcement officers, juvenile court officials, representatives from welfare and education services, and religious and medical communities. Curfew enforcement entails investigation, processing, counseling and follow-up services (Cassim, 1997:38). Bilchik is of the view that carefully designed and implemented curfew programmes carried out in conjunction with programmes and services that assist young people and families to solve individual and family problems, present an ideal opportunity to enhance positive youth development, prevent juvenile delinquency and reduce victimisation of children (1996:1).

8.7.7 BOOT CAMPS

Boot camps have been established in numerous states as an alternative penalty for juvenile offenders. These camps are based on a military structure where the emphasis is on discipline and obedience. Boot camps provide juvenile offenders with an opportunity to pursue rehabilitative goals in a challenging and robust environment (Cassim, 1997:39). Certain types of offenders are not suitable

candidates for boot camps, for example, juvenile offenders with violent tendencies or those with histories of mental illness. The period for which participants stay at the boot camp is usually about three months, during which period they undergo intensive training, supervision and aftercare. According to Bourque, boot camps take in participants who have been through the court process, are under 18 years and who are non-violent (1996:17).

Features of programmes at boot camps in Ohio and Colorado include, military-like daily routing, drills and discipline, rigorous physical conditioning, and rehabilitative components like education, counseling, work and life-coping skills (Cassim, 1997:39).

8.7.8 PROBATION

According to Bartollas, 35 states have operative probation systems for juveniles where it functions mainly under the auspices of a juvenile court (1997:459). Probation officers usually administer the intake of juveniles at institutions that render probation services. After interviewing both the parents and the juvenile offender, a probation officer undertakes an investigation as to the type of treatment that would be effective in the particular case. Once a court imposes a sentence of probation, the probationer comes under the direct supervision of a probation officer. The period under which a juvenile can be placed under probation differs from six months in California to five years in Illinois (Bartollas, 1997:461). An important aspect of probation is that the probationer remains under constant surveillance by the probation officer in order to ensure that the probationer complies with the conditions of the probation order and does not commit further offences (Bartollas, 1997:462).

8.7.9 COMMUNITY VOLUNTEER PROGRAMME

This is not a new system, as probation actually started with the help of volunteers. During 1997, there were over 2000 court sponsored volunteer programmes in operation (Bartollas, 1997:469). Practice has shown that the use of volunteers is one of the most effective ways of assisting offenders to re-integrate into community life. The volunteer generally provides one-on-one support for the juvenile, whilst also functioning as a go-between with teachers, employers, police and other persons the juvenile has to interact with. The volunteer can assist the juvenile with the learning of skills and can act as a role model. From a practical perspective, they reduce the workload of full-time probation officers.

8.7.10 RESIDENTIAL DAY TREATMENT PROGRAMMES

Residential day treatment programmes are earmarked for probationers who experience difficulty with the looseness of probation supervision. As a participant in this programme, the probationer attends the programme in the morning and afternoon and returns home in the evening. Probationers may also be placed in a residential programme, where he or she is grouped in a foster-care placement under 24-hour supervision (Bartollas, 1997:470). The main types of residential day treatment programmes functioning are the group homes programme and the wilderness programme. The survival programme, which is a well-known form of the wilderness programme, allows juveniles to overcome problems on their own in the outdoors in order to make them more self-reliant and to increase their sense of self-worth.

8.8 SUMMARY

8.8.1 SOUTH AFRICAN LEGISLATION REGARDING PENALTIES FOR JUVENILE OFFENDERS

Section 28 of the Constitution grants additional rights to children and provides specifically that children must be detained only as a last resort. The Correctional Services Act gives effect to the rights contained in this provision, by providing that whilst in detention children must have access to educational programmes, social work services, religious care, recreational programmes and psychological services. The Criminal Procedure Act makes provision for four types of sentences for juveniles:

- Placement under supervision of probation/correctional officer;
- Placement in custody of a suitable person;
- Both such supervision and custody; and
- Referral to a reform school.

8.8.2 CHILD JUSTICE BILL

The S A Law Commission has produced a comprehensive report on Juvenile Justice (July 2000), which contains, inter alia, a draft Child Justice Bill. Pertinent issues raised in the Report include:

- (a) Children accused of less serious offences should be diverted from the criminal justice system, and should repay their debt to society in a more constructive way. This should occur in a system separate from the criminal justice system.
- (b) Punishment for juveniles should be based on restorative justice principles and should focus on restitution and reconciliation.
- (c) However, children who are convicted of serious offences like murder, may be detained.

- (d) A child justice court system should be established at district level and such court should develop a more sophisticated and effective form of probation.
- (e) Children under 14 years may not be imprisoned and juveniles may not be sentenced to life imprisonment.
- (f) Children may only be referred to a reform school for a period of two years, and may only remain there until the age of 18 years.
- (g) More use should be made of postponed and suspended sentences, diversion and community service.

8.8.3 ALTERNATIVE PENALTIES FOR JUVENILE OFFENDERS IN THE CANADIAN PENAL SYSTEM

The Canadian criminal justice system has a separate system for dealing with young offenders, and the Young Offender's Act provides a legal framework for this system. It provides for a system of formal court procedures where penalties like imprisonment, fines, probation and orders for restitution or compensation may be ordered. However, it also provides a framework for the imposition of alternative penalties like diversion, community service, charitable donations, volunteer service, restitution, etc. It is essential that offenders admit their guilt before being allowed to take part in one of the alternative measures.

Offenders who are charged with serious offences, may if the court is of the view that it is in the interests of society and having regard to the needs of the offenders, be transferred to an adult court where they may be sentenced to penalties applicable to adults. Transfers usually take place where a court is of the view that the charge merits a sentence in excess of the court's jurisdiction, for example, life imprisonment or a long term of imprisonment.

8.8.4 ALTERNATIVE PENALTIES FOR JUVENILE OFFENDERS IN THE AMERICAN PENAL SYSTEM

In America the juvenile criminal justice system functions at the state and federal level. Restitution programmes are reserved for minor non-violent offences. It is envisaged that restitution will render the offender more responsible and give the victim a sense that justice has been done. Community service is another popular penalty for juveniles, but is reserved for offenders who do not constitute a danger to society. It is most commonly used as a condition of probation. Mediation is a suitable penalty in conflict situations or where there is a likelihood of future conflict. The aim of mediation is to correct behaviour and to eradicate present and future conflict.

Electronic monitoring is also a suitable penalty for juvenile offenders. Electronic devices are attached to the wrist or ankle of the offender in order to monitor his or her movements. The offender remains within the family and community environment throughout the period of the sentence. Diversion consists in diverting the offender from the criminal justice system into more appropriate programmes, like community-based programmes. Curfew enforcement entails investigation, processing, counseling and follow-up services by probation officers in order to effectively supervise the offender.

Boot camps and probation remain suitable alternative penalties for juvenile offenders. Community volunteer programmes entail volunteers mentoring and assisting juveniles with learning skills and also act as role models. Residential day treatment programmes are aimed at probationers who experience difficulty with the looseness of probation supervision. Examples of this type of programme include the survival programme and the wilderness programme.

CHAPTER 9

SUMMARY AND RECOMMENDATIONS

CHAPTER: 2

2.1 FREEDOM OF RELIGION, BELIEF AND OPINION

In terms of section 15 of the Constitution, the Department of Correctional Services may not establish an "official" religion for institutions under its control. There are numerous religions being practiced in South Africa and the Department will have to cater for these religions, provided that it is within the means of the Department and that such religious services do not unduly disrupt prison routine. The main responsibility in this regard is that religious groups must be accommodated within the structural programme of the relevant institution. Prisoners may also not be forced to attend religious services, even if they are adherents to that particular religion. In this regard freedom of religion is not an absolute right for prisoners and the most they can expect is reasonable accommodation of their beliefs and practices.

Recommendation

Prison authorities must accommodate the various religious practices to the extent that they do not seriously affect the daily programme of the relevant institution. Where practically possible, all the main religious persuasions must be accommodated (Christianity, Islam, Hinduism, Judaism and Buddhism).

2.2 FREEDOM OF EXPRESSION

Although section 16 of the Constitution provides for freedom of expression, such freedom does not extend to hate speech. Section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act prohibits hate speech. In terms of this provision it is a criminal offence to propagate or advocate hate speech (that is speech, which is hateful, harmful or incites harm or promotes hatred). This provision is important for people in a prison environment, where the danger of racial violence is ever present.

Recommendation

The Department of Correctional Services must compile and publish regulations governing the use and consequences of hate speech in the prison environment. Such notification should be brought to the attention of all prisoners on admission to the institution.

2.3 FREEDOM OF ASSOCIATION

Prisoners enjoy a measure of freedom of association, which does not extend to membership of unlawful organisations like criminal gangs. However, prisoners will be able to join and form organisations, which promote their interests, for example, the South African Prisoners' Organisation for Human Rights.

Recommendation

The Department of Correctional Services must clearly indicate the types of organisations that prisoners can form and join, and that all prisoners be informed accordingly.

2.4 POLITICAL RIGHTS

An important issue in respect of political rights of prisoners is the right to vote. Prisoners' right to vote in national, provincial and local government elections is by now an internationally established right. As prisoners enjoy such rights in South African prisons, they should be allowed contact with politicians and political views in order for them to make an informed decision when voting.

Recommendation

Prisoners must be allowed access to politicians and political information at election time in order for them to make informed decisions when exercising their right to vote.

2.5 ACCESS TO INFORMATION

The provisions of the Promotion of Access to Information Act came into operation on 9 March 2001. These provisions establish a system whereby persons can request information from official bodies, and also indicates the circumstances under which the State may, may not, or must give information.

Recommendation

Officials of all government departments dealing with punishment must acquaint themselves with the relevant provisions of this Act.

2.6 JUST ADMINISTRATIVE ACTION

The Promotion of Administrative Justice Act was enacted to give effect to section 33 of the Constitution. In terms of this Act, administrative action which affects

the rights of people (including prisoners and other sentenced people), must be procedurally fair. Fairness can be attained by adequate notice, reasonable opportunity to make representations, clear statement of the administrative action, the right to review or appeal, and reasons for the action. These provisions, amongst others contained in the Act, are applicable to sentenced people.

Recommendation

Officials involved in the criminal justice system must apply the relevant provisions of this Act, and sentenced people must be informed of their rights in this regard.

2.7 LIMITATION OF RIGHTS

In terms of section 36 of the Constitution, rights contained in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking relevant factors into account (the section goes on to list a number of these factors). It can be mentioned that section 37, which deals with a state of emergency, declares the right to life and human dignity as rights that cannot be derogated. In order to determine whether any of these rights are limited, the Constitutional Court has adopted a two-stage approach. That is, first ascertaining whether a right has in fact been infringed, and then whether the infringement is justified in terms of section 36.

Recommendation

Officials involved in the criminal justice system, must have a good understanding of the rights in the Bill of Rights and the circumstances under which the limitation

thereof will be justifiable. Prisoners should be made aware of their rights in terms of the Bill of Rights, and what they in fact mean to them in practical terms.

2.8 PRESIDENTIAL POWERS I.R.O PUNISHMENT

Although the President has the power, in terms of the Constitution and other legislation, to pardon or reprieve offenders, and remit fines, penalties or forfeitures, the exercise of such executive discretion is subject to scrutiny by the courts in respect of its constitutionality. Such scrutiny has already occurred in the case of President of the RSA v. Hugo.

Recommendation

In exercising the powers mentioned above, the President is bound by the provisions of the Constitution, and more especially the Bill of Rights. The executive must therefore be mindful of the provisions in this regard, as the decision could be overturned by the courts if they infringe constitutional provisions.

2.9 PUBLIC PROTECTOR

The Public Protector is one of the constitutional institutions that are required to promote democracy and the rights contained in the Constitution. The Public Protector has the power to investigate any abuse of power, improper conduct, corruption or unlawful enrichment in any organ of state, including prisons and other correctional institutions, and private prisons. Investigations can be initiated either at the instance of the Public Protector or as a result of a complaint from someone (including a prisoner or sentenced person).

Recommendation

Officials in the criminal justice system must be mindful of the ambit of power of the Public Protector and persons serving sentences must be made aware that they are entitled to lay legitimate complaints with that body if other avenues to address their complaints have proved unsuccessful.

2.10 SOUTH AFRICAN HUMAN RIGHTS COMMISSION

The South African Human Rights Commission (SAHRC) is a constitutional institution and enjoys similar powers to the Public Protector. The main functions of this body are to promote and protect respect for human rights and monitor the observance of human rights in South Africa. In terms of its National Prisons Project, the SAHRC has undertaken numerous unannounced visits to prisons. It has made a number of recommendations in order to improve respect for human rights in prisons. Its power also lies in publicising abuses of human rights in prisons. The SAHRC and the Investigating Judge of Prisons have developed a modus operandi in terms of which the Inspecting Judge deals mainly with complaints from prisoners, whilst the SAHRC deals more specifically with human rights related prison complaints.

Recommendation

The SAHRC must undertake training programmes in prisons and other correctional institutions for both prison officials and prisoners in respect of the provisions of the Bill of Rights. Furthermore, that the SAHRC continue to undertake unannounced visits to prisons and present reports on such visits, which should contain an identification of the problems encountered, as well as proposals to remedy such problems.

2.11 COMMISSION ON GENDER EQUALITY

The Commission on Gender Equality has the power to evaluate and monitor practices and policies of organs of state in relation to gender equality. Although this body will have less impact than the afore-mentioned two bodies, this Commission will play an important role in respect of gender equality in the criminal justice system.

Recommendation

This Commission must take a more active role in examining the position of females within the criminal justice system, so that the special requirements of females are catered for; also that training sessions on gender equality be undertaken in prisons for both prison officials and prisoners.

CHAPTER 3

3.1 RIGHTS OF ARRESTED PERSONS

Arrested persons enjoy the following rights in terms of section 35(1) of the Constitution:

- Remain silent, and to be informed of this right and the consequences thereof;
- Not to be compelled to make a confession or an admission;
- To be brought before a court within at least 48 hours;
- To be charged or released; and
- To be released from detention subject to reasonable conditions.

Recommendation

Officials within the criminal justice system must understand and implement these provisions consistently.

3.2 RIGHTS OF DETAINED PERSONS

3.2.1 REASONS FOR BEING DETAINED

On being detained, a detainee must be informed promptly of the reason for the detention. This is the position in terms of section 35(2) of the Constitution and section 39(2) of the Criminal Procedure Act.

Recommendation

All officials with the power of arrest must put into effect the above provisions when effecting arrests.

3.2.2 RIGHT TO ASSISTANCE OF LEGAL PRACTITIONERS

Once detained, any person has the right to the assistance of a legal practitioner and to be promptly informed of such right, and if substantial injustice would otherwise result, a legal practitioner must be appointed at state expense.

Recommendation

Detained persons must be informed of this right on arrest, and if required, they must be assisted in this regard by officials.

3.2.3 CHALLENGE LAWFULNESS OF DETENTION

A detainee is empowered to challenge the lawfulness of his or her detention in terms of section 35(2)(d) of the Constitution.

Recommendation

All detainees must be informed, after being detained, of the right to challenge in a court of law the lawfulness of their detention.

3.2.4 CONDITIONS OF DETENTION

In terms of section 35(2)(e) of the Constitution, conditions of detention must be consistent with human dignity. This right entails the following:

- (a) adequate exercise, and if possible, in the open air;
- (b) adequate accommodation;
- (c) nutritious meals;
- (d) reading material;
- (e) medical treatment; and
- (f) communication with spouse or partner, next of kin, chosen religious counselor and chosen medical practitioner.

Recommendation

Prisoners must be granted the above rights as provided in terms of the Correctional Services Act, and prisoners must be informed of these rights. The SAHRC must monitor these activities on an on-going basis.

3.3 RIGHTS OF ACCUSED PERSONS

Accused persons have numerous rights in terms of section 35(3) of the Constitution, for example, public trial before an ordinary court, adduce and challenge evidence, etc.

Recommendation

Officials within the criminal justice system must give effect to these rights.

CHAPTER 4

4.1 RIGHT TO EQUALITY

Section 9 of the Constitution outlaws unfair discrimination on the grounds of race, ethnicity, gender, etc. These rights are applicable to judicial sentencing as well. In applying this right, the High Court found that the criminal prohibition of sexual activity, including sodomy, between consenting adult men is unconstitutional as it unfairly discriminates on the grounds of sexual orientation. Excessive sentencing disparity was also unconstitutional as it contravenes the equality principle. The Promotion of Equality and Prevention of Unfair Discrimination Act was promulgated to give effect to this constitutional provision.

Recommendation

Legislation laying down sentencing guidelines similar to the Canadian guidelines must be formulated as a matter of urgency in order to eliminate disproportionality and inconsistency in sentencing. These guidelines must give effect to the principles contained in the Bill of Rights and other parts of the Constitution. Thereafter courts must develop the guidelines further. All mandatory and

minimum sentences must be re-examined in the light of this constitutional provision.

4.2 RIGHT TO HUMAN DIGNITY

This right will affect most forms of punishment, as well as the way in which they are carried out. In respect of prisoners, aspects that will be affected include, health care (especially the problem of HIV/AIDS), cleanliness, accommodation, nutrition, maintaining community links, access to reading matter, complaints of prisoners, etc. The Correctional Services Act goes a long way in addressing these issues.

Recommendation

Prison officials must be trained and monitored in the implementation of the relevant provisions of the Correctional Services Act, and prisoners must be educated in this regard. A comprehensive policy for dealing with HIV/AIDS must be formulated and implemented. An effective strategy is required since the disease has the potential to spread rapidly in a prison environment.

4.3 RIGHT TO LIFE

This right affects mainly aspects of the death penalty and abortion. The Constitutional Court has already dealt with both matters.

Recommendation

Female prisoners must be informed of their rights in terms of the Choice on Termination of Pregnancy Act.

4.4 RIGHT TO FREEDOM AND SECURITY OF THE PERSON

Section 12 of the Constitution prohibits torture, treatment and punishment that are cruel, inhuman or degrading. The Constitutional Court has found both the death penalty and corporal punishment to be cruel, inhuman and degrading punishment. Life imprisonment without any prospect of early release is a cruel, inhuman and degrading form of punishment. Under certain circumstances, minimum sentences and imprisonment of habitual and dangerous criminals may amount to an infringement of this provision.

The Correctional Services Act has laid down provisions regarding the treatment of prisoners, for example, disciplinary procedures that are consistent with respect for human dignity.

Recommendation

Sentencing guidelines mentioned earlier must also address the manner in which sentences are to be carried out, and prison officials must implement the relevant provisions of the Correctional Services Act. Furthermore, bodies like the SAHRC must educate prisoners and prison officials on their rights in this regard.

4.5 RIGHT TO FREEDOM FROM SLAVERY, SERVITUDE AND FORCED LABOUR

Although forced labour is prohibited by section 13 of the Constitution, prison labour as part of a vocational programme would in all probability qualify as a valid limitation of this right, as its rationale is justifiable in terms of section 36 of the Constitution.

Recommendation

Age and physical condition of prisoners must be considered when they are required to perform work in prison.

4.6 RIGHT TO PRIVACY

Imprisonment by its nature will require that the privacy of prisoners is invaded from time to time, for a number of reasons.

Recommendation

Prisoners' right to human dignity must be respected when their right to privacy is infringed.

4.7 CHILDREN

Children have received special attention in the Bill of Rights (section 28). Children must not be required to perform work that is inappropriate for their age; they must be protected from maltreatment, neglect, abuse or degradation; they must only be detained as a measure of last resort, and when they are detained, they must be kept separate from adult prisoners and kept in conditions, which take account of their age.

Recommendation

The Child Justice Bill must be presented to the Cabinet for approval and introduced in Parliament in order that a separate and unique juvenile criminal justice system is introduced in terms of which special attention, in matters of sentencing and punishment is given to juveniles.

CHAPTER 5

5.1 DEATH PENALTY

The Constitutional Court has found this penalty to be unconstitutional because it infringed on a number of rights contained in the Constitution.

5.2 CORPORAL PUNISHMENT

Although judicial corporal punishment was found to be unconstitutional by the Constitutional Court, "traditional courts" still make use of this penalty.

Recommendation

Steps must be taken to end corporal punishment still being implemented in "traditional courts".

CHAPTER 6

6.1 OVER-POPULATION OF PRISONS

Overpopulation of prisons results in a strain on the facilities at prisons and may result in unsanitary conditions. This could ultimately result in inhuman and degrading prison conditions.

Recommendation

Greater use must be made of alternative penalties like correctional supervision, periodical imprisonment, fines and compensation, and community service. Imprisonment should only be imposed for serious offences like murder, rape,

robbery, etc. If bail is granted, it must be within the means of the accused. Juveniles should be kept in juvenile correctional centers and not in prison. Trial awaiting prisoners should be transferred to private prisons so that prison officials can give more attention to sentenced prisoners, and in order to decrease the prison population. The ideal situation is where all trial awaiting detainees are housed in private prisons.

6.2 LIFE IMPRISONMENT

This is the most severe form of punishment now that the death penalty has been abolished. Life imprisonment with no prospect of early release is in all probability unconstitutional.

Recommendation

Conditions of the implementation of this sentence must be monitored in order to avoid constitutional problems.

6.3 INDETERMINATE SENTENCES

Although not per se unconstitutional, these sentences could under certain circumstances amount to cruel, inhuman or degrading punishment.

Recommendation

The statutory sentencing guidelines mentioned earlier must also address the position regarding indeterminate sentences.

6.4 MANDATORY MINIMUM SENTENCES

Mandatory minimum sentences may in certain circumstances be disproportionate and thus unconstitutional.

Recommendation

The statutory sentencing guidelines mentioned above must also deal with the implementation of mandatory minimum prison sentences.

6.5 PRIVATE PRISONS

There are adequate safeguards in the Correctional Services Act to render joint venture prisons constitutional. The prison population can be reduced significantly if trial awaiting prisoners are transferred to these institutions. Joint venture prisons are subject to the provisions of the Bill of Rights.

Recommendation

More resources must be utilised for joint venture projects. The aim should be that all trial awaiting prisoners are kept in such institutions so that more attention could be given to the rehabilitation of sentenced prisoners. It will also greatly alleviate the burden on prison facilities. If this exercise proves successful, prisoners serving short terms of imprisonment may also be transferred to private prisons. In this way a human rights culture in prisons can be facilitated as overcrowding would not be an obstacle.

CHAPTER 7

ALTERNATIVE PENALTIES

As a result of the abolishment of the death penalty and corporal punishment, provisions of the Bill of Rights in respect of punishment, and prison overcrowding, it is essential that more use be made of alternative penalties. In this regard more research is required, especially in countries, which are constitutional democracies like Canada and America.

Recommendation

Government must commission research on alternative penalties that will comply with constitutional principles. Other constitutional democracies should be examined in this regard, for example, Canada, America, Germany and countries in Europe. Greater use should be made of alternative non-incarcerative penalties. The sentencing guidelines proposed above should provide guidance in this regard.

CHAPTER 8

ALTERNATIVE APPROPRIATE PENALTIES FOR JUVENILES

With the abolition of corporal punishment and the special provisions in respect of children contained in the Bill of Rights, alternative penalties, which are appropriate for juvenile offenders should be examined and implemented. Children are generally more susceptible to rehabilitation than adults

Recommendation

Serious attention should be given to the Child Justice Bill by the Government in order that a new system for juvenile justice can be implemented as soon as possible. More use must be made of alternative penalties by courts and research must be conducted into alternative penalties that are in operation in other constitutional democracies. Electronic monitoring may go a long way in improving the system of supervision of juvenile offenders.

BIBLIOGRAPHY

ABADINSKY, H: Probation and Parole – Theory and Practice. 1997. Prentice Hall, New Jersey.

ABOLITION OF CORPORAL PUNISHMENT ACT, NO. 33 OF 1997. Government Printer.

ACHMAT, Z & CAMERON, E: "Judges and policy on AIDS: Prisons and medical ethics." SALJ Vol. 112, 1995.

ADAMS, R: The Abuses of Punishment. 1998. St. Martins Press Inc., New York.

AFRICAN NATIONAL CONGRESS: Constitutional Guidelines for a Democratic South Africa. 1988.

BAIRD, R M & ROSENBAUM, S E: Punishment and the Death Penalty – The Current Debate. 1995. Prometheus Books, New York.

BARTOLLAS, C: Juvenile Delinquency. 1997. Allyn and Bacon, Boston, United States of America.

BASIC LAW OF THE FEDERAL REPUBLIC OF GERMANY, 1994.

BEKKER, P M & GELDENHUYS, T (ET AL): Criminal Procedure Handbook. 1998. Third Edition. Juta & Co., Cape Town.

BILCHIK, S: "Curfew: An answer to juvenile delinquency and victimization?"
OJJDP Juvenile Justice Bulletin 1, 1996.

BLAUSTEIN, A P & FLANZ, G H (EDS.): Constitutions of the Countries of the
World. 1991. Oceana Publications, Incorporated, Dobbs Ferry, New York.

BODENHAMER, D J & ELY JR., J W (EDS.): The Bill of Rights in Modern
America (After 200 years). 1993. Indiana University Press, Bloomington &
Indianapolis.

BOURQUE, B B (ET AL): "Boot camps for juvenile offenders: An implementation
evaluation of three demonstration programmes". NIJ Research Report 17, 1996.

BOTHA, N: "International law and the South African interim Constitution." SA
Public Law. 1994.

BRANHAM, L S & KRANTZ, S: Sentencing, Corrections, and Prisoners' Rights
(In a nutshell). 1991. West Publishing Company, St. Paul, Minnesota, USA.

CACHALIA, A (ET AL): Fundamental Rights in the New Constitution. 1996.

CANADIAN CHARTER OF RIGHTS AND FREEDOMS (Constitution Act, 1982,
Schedule B Part 1).

CANADIAN ELECTIONS ACT, 1985. (Canada).

CANADIAN SENTENCING COMMISSION, DEPARTMENT OF JUSTICE:
Sentencing Reform: A Canadian Approach. 1987. Ottawa: Minister of Supplies
and Services Canada.

CAPE ARGUS, 26 April 2000.

CAPE ARGUS, 27 May 2000.

CAPE ARGUS, 12 June 2000.

CAPE ARGUS, September 2000.

CAPE TIMES, 13 April 2000.

CHARLES, M T: "Electronic Monitoring for Juveniles". *Journal of Crime and Justice*, 1989.

CHASKALSON, M (ET AL): *Constitutional Law of South Africa*. 1998. Juta.

CHASKALSON, M & DAVIS, D: "Constitutionalism, the Rule of Law and the First Certification Judgment: Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996 (4) SA 744 (CC)". 13 SAJHR (1997) 430.

CHILD CARE ACT, NO. 74 OF 1983. Government Printer.

CHOICE ON TERMINATION OF PREGNANCY ACT, NO. 92 OF 1996. Government Printer.

CODE OF CONDUCT FOR PUBLIC SERVANTS: Public Service Commission of South Africa, dated 25 August 1997.

COLE, D P & MANSON, A: *Release from imprisonment - The law of sentencing, parole and judicial review*. 1990. Carswell, Toronto, Canada.

COMMISSION ON GENDER EQUALITY ACT, NO. 39 OF 1996. Government Printer.

COMMISSION ON GENDER EQUALITY ANNUAL REPORT: April 1998 to March 1999.

CONSTITUTION ACT, 1982 (Canada).

CONSTITUTION OF THE REPUBLIC OF NAMIBIA, 1990.

CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA ACT, NO. 200 OF 1993. Government Printer.

CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA ACT, NO. 108 OF 1996. Government Printer.

CONSTITUTION OF THE UNITED STATES OF AMERICA

CONSTITUTIONAL TALK, 22 April 1996.

CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT: Adopted by the General Assembly of the United Nations on 10 December 1984.

CONWAY, R: "The Right to Counsel and the Admissibility of Evidence". Criminal Law Quarterly. 1985. Pages 28 - 63.

CORDER, H & SMIT, D VAN ZYL: "Private Prisons and the Constitution". SACJ (1998) 11. Butterworth.

CORRECTIONAL SERVICES ACT, NO. 111 OF 1998. Government Printer.

CRIME (SENTENCES) ACT, 1997 (Great Britain).

CORRECTIONAL SERVICES REGULATIONS (DRAFT): 2001. Promulgated in terms of the Correctional Services Act, No. 111 of 1998.

CRIMINAL CODE OF CANADA, 1996.

CRIMINAL JUSTICE ACT, 1982 (Great Britain).

CRIMINAL LAW AMENDMENT ACT, NO. 107 OF 1990. Government Printer.

CRIMINAL LAW AMENDMENT ACT, NO. 105 OF 1997. Government Printer.

CRIMINAL PROCEDURE ACT, NO. 51 OF 1977. Government Printer.

DAILY DISPATCH, 6 April 2001.

DAVIS D, (ET AL): Fundamental Rights in the Constitution: Commentary and cases. 1997. Juta & Co., Kenwyn.

DE ANGELO, A J: "Diversion programmes in the juvenile justice system: An alternative method of treatment for juvenile offenders". Juvenile and Family Court Journal, 1988.

DEBICKI, M: "Sentencing and Socio-Economic Status." D Gibson & J K Baldwin, (eds.). Law in a Cynical Society: Opinion and Law in the 1980's. 1985. Calgary: Carswell Legal Publications (Western Division).

DEPARTMENT OF CORRECTIONAL SERVICES ANNUAL REPORT: 1998.
CTP Printers.

DEPARTMENT OF CORRECTIONAL SERVICES ANNUAL REPORT: 1999.
CTP Printers.

DEVENISH, G E: "The interim Constitution in the making." THRHR 1997 (60).

DEVENISH, G E: A Commentary on the South African Constitution. 1998.
Butterworths, Durban.

DE VOS, P: "Pious wishes or directly enforceable human rights? Social and economic rights in South Africa's 1996 Constitution", SAJHR 1997.

DE VOS, P: "Equality for all? A critical analysis of the equality jurisprudence of the Constitutional Court". THRHR 2000 (63).

DISSEL, A & MNYANI, M: Sentencing Options in South Africa. 1995. Institute of Criminology, UCT.

DRUGS AND DRUG TRAFFICKING ACT, NO. 140 OF 1992. Government Printer.

DU PLESSIS, L M: "Whither capital punishment and abortion under South Africa's transitional Constitution?" SACJ (1994) 1. Butterworth.

DU PLESSIS, L & CORDER, H: Understanding South Africa's transitional Bill of Rights. 1994. Butterworth.

DURHAM III, A M: Crises and Reform – Current issues in American Punishment. 1994. Little, Brown and Company, Boston, USA.

DU TOIT, E: Straf in Suid-Afrika. 1981. Juta.

EKSTEEN, K: "Electronic monitoring is a logical next step for community corrections to increase confidence in community sentencing". Nexus, September 1997.

ELECTORAL ACT, NO. 202 OF 1993. Government Printer.

ENCYCLOPAEDIA BRITANNICA: 15th edition 2000. Encyclopaedia Britannica Inc., Chicago.

ENOS, R (ED.): Alternative sentencing (electronically monitored correctional supervision). 1992. Wyndham Hall Press.

EUROPEAN CONVENTION FOR THE PREVENTION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT: Adopted in Strasbourg on 26 November 1987.

FRIEDLAND, M L & ROACH, K: Criminal Law and Procedure: Cases and Materials. Sixth edition. 1991. Edmond Montgomery Publications Limited, Toronto, Canada.

GOREDEMA, C: "Implications of suspects' and other detainees' rights to legal assistance before the first appearance in court in South Africa", SACJ 1997 (10).

GRIFFITHS, C T & VERDUN-JONES, S N: Canadian Criminal Justice. 1994. Harcourt Brace, Canada.

HATCHARD, J: Case notes. *Journal of African Law* (1992).

HAVERKAMP, R & LUYT, W: "Community corrections in Sweden, the Netherlands and South Africa with emphasis on electronic monitoring". *Acta Criminologica* Vol. 12(1) 1999.

HODGKINSON, P (ET AL): "Capital Punishment in the United States of America – A review of the issues." Parliamentary Human Rights Group. 1996.

HOFER, P J (ET AL): "The effect of the federal Sentencing Guidelines on inter-judge sentencing disparity". *The Journal of Criminal Law and Criminology* (Northwestern University). Volume 90. 1999.

HOGARTH, J: *Sentencing as a Human Process*. 1971. Toronto: University of Toronto Press.

HOGG, P W: *Constitutional Law of Canada*. 3rd. Edition. 1992. Carswell, Ontario, Canada.

HUMAN RIGHTS COMMISSION ACT, NO. 54 OF 1994. Government Printer.

INTERNET: Numerous court decisions, statistics and facts downloaded from various websites.

JAGWANTH, S: "Equality in criminal law." *SACJ* Vol. 117, 2000.

JOBSON, K & FERGUSON, G: "Towards a revised sentencing structure for Canada." 1987. *Canada Bar Review*, Volume 66. Pages 1 - 48.

JOHANNESSEN, L: "Freedom of expression and information in the new South African Constitution and its compatibility with international standards". SAJHR 1994.

JOHNSON, E S: Research methods in criminology and criminal justice. 1981. Englewood Cliffs: Prentice Hall.

JUDICIAL INSPECTORATE ANNUAL REPORT: (Prisons and Prisoners) 2000.

KALINICH, D & CLACK, W: "Transformation: From Apartheid to Democracy – South African Corrections." Acta Criminologica Vol. 11(2) 1998.

KEIGHTLEY, R: "Torture and cruel, inhuman and degrading treatment or punishment in the UN Convention against torture and other instruments of international law: Recent developments in South Africa". SAJHR 1995.

KLAAREN, J: "Structures of government in the 1996 South African Constitution: Putting democracy back into human rights." SAJHR 1996.

KLEIN, A R: Alternative sentencing – A practitioner's guide. 1988. Anderson Publishing Company, Cincinnati.

KLEIN, A R: Alternative sentencing, intermediate sanctions and probation. 1997. Anderson Publishing Company, Cincinnati, Ohio.

KLEIN, I J: Constitutional Law for Criminal Justice Professionals. Third Edition. 1992. Coral Gables Publishing Company Inc., Miami, Florida.

KRAUTKRAMER, R P R: "The South African Death Sentence under a New Constitution". MA Dissertation. 1994. UNISA.

KRIEGLER, J: Hiemstra: Suid-Afrikaanse Strafproses. 1993. Butterworths, Durban.

LABOUR RELATIONS ACT, NO. 66 OF 1995. Government Printer.

LADIKOS, A: "Perspectives on capital punishment, death row prisoners and sentencing." SACJ (1994) 1.

LAPRAIRIE, C: "The Role of Sentencing in the Over-representation of Aboriginal People in Correctional Institutions." R A Silverman and M O Nielsen, (eds.). Aboriginal Peoples and Canadian Criminal Justice. 1992. Butterworths, Toronto.

LARSEN, N (ED.): The Canadian Criminal Justice System – An issue approach to the administration of justice. 1995. Canadian Scholars' Press Incorporated, Toronto.

LATZER, B: Death Penalty Cases – Leading U.S. Supreme Court cases on Capital Punishment. 1998. Butterworth – Heinemann, New York.

LOCAL GOVERNMENT MUNICIPAL ELECTORAL BILL [B35 - 2000]. Government Printer.

LOCAL GOVERNMENT MUNICIPAL ELECTORAL BILL [B35B - 2000]. Government Printer.

LONG, R E (ED.): Criminal Sentencing. The Reference Shelf Vol. 67 No. 1. 1995. H W Wilson & Co., New York.

LOUW, A & VAN OOSTEN, F: "Diverting children from the criminal courts: Some proposals". THRHR 1998.

LOUW, R: "Sexual orientation, the right to equality and the common-law offence of sodomy: S v. Kampher 1997 (2) SACR 418 (C)". SACJ (1998) 11. Butterworth.

LOUW, R: "Sexual orientation, criminal law and the Constitution: Privacy versus equality". SACJ (1998) 11. Butterworth.

LOUW, R: "The legacy of Barend van Niekerk: A challenge to the on-going abuse of prisoners' rights." SACJ (2000) 13.

LUTZE, F E & BRODY, D C: "Mental abuse as cruel and unusual punishment: Do boot camp prisons violate the Eighth Amendment?". Crime and Delinquency, Vol. 45, No. 2. April 1999.

LUYT, W: "Secure prisons in South Africa: The Super Maximum Concept." Acta Criminologica Vol. 13(3) 2000.

LUYT, W: "A perspective on the future of prisons in the new South Africa." SACJ (1999) 12.

LUYT, W: "Restorative justice in perspective." Acta Criminologica Vol. 12(3) 1999.

MAIL AND GUARDIAN, 9 - 14 June 2000.

MAREE, K: "Spoil the rod, spare the child: Some views on corporal punishment in South Africa." Acta Criminologica Vol. 12(2) 1999.

MAUER, M: "American behind bars: The international use of incarceration, 1992-1993". The Sentencing Project. September 1994. University of Iowa, USA.

McCORMICK, K R E & VISANO, L A (EDS.): Canadian Penology: Advanced Perspectives and Research. 1992. Canadian Scholars Press, Toronto, Canada.

McCRUDDEN, C (ED.): Anti-Discrimination Law. C McCrudden. 1991. Dartmouth.

McDONALD, D: "Public imprisonment by private means; the re-emergence of private prisons and jails in the United States, the United Kingdom, and Australia". British Journal of Criminology (1994) 34.

McLEOD, M: "Victim participation at sentencing". Criminal Law Bulletin, 1995.

MEYERSON, D: Rights Limited, Freedom of Expression, Religion and the South African Constitution. 1997. Juta & Co., Cape Town.

MINUTES OF THE NATIONAL ASSEMBLY, 6 November 1998.

MINUTES OF THE NATIONAL COUNCIL OF PROVINCES, 4 November 1998.

MOHR, R M: "Sentencing as a General Process: Results of a Consultation." Canadian Journal of Criminology, Volume 32. Pages 479 - 485.

MURDER (ABOLITION OF DEATH PENALTY) ACT, 1965 (Great Britain).

MURRAY, G F & ERICKSON, P G: "Regional Variation in Criminal Justice System Practices: Cannabis Possession in Ontario." Criminal Law Quarterly, Volume 26. Pages 74 - 96.

- MUSHLIN, M B: *Rights of Prisoners*. Vol. 2. 1993. McGraw-Hill Inc., New York.
- NAUDE, C M B: "Correctional supervision: Alternative community-based sentencing options for South Africa". *Acta Criminologica* Volume 4, No. 2, 1991.
- NESER, J J : Teoretiese prinsipiële studie oor sekere aspekte van die straf en behandeling van die oortreder uit 'n penologiese perspektief. 1980 Unisa, Pretoria.
- NESER, J J & TAKOULAS, D: "Bursting at the seams: Prison overcrowding – a brief overview". *The Magistrate* (1995) 30.
- NESER, J J & TAKOULAS, D: "The imposition and implementation of life imprisonment." *Acta Criminologica* Vol. 9, 1996.
- NTHAI, S A: "Death row controversy continues: *Johnson v. Jamaica* 1996 (1) BHCR 37 (communication 599/1994)". *SACJ* (1998) 11. Butterworth.
- OLIVIER, C: "Evaluating mandatory minimum sentences: What will be practical, fair and effective?" *Acta Criminologica* Vol. 11(2) 1998.
- OLIVIER, P: South Africa's participation in international human rights instruments. *SAJHR*, 1995.
- PALMER, E: "The handling of the offender within the Islamic penal system". Unpublished M.A. Thesis. 1993. Unisa, Pretoria.
- PETE, S A: "Spare the rod and spoil the nation?: Trends in corporal punishment abroad and its place in the new South Africa." *SACJ* (1994) 1. Butterworth.

PETE, S: "The politics of imprisonment in the aftermath of South Africa's first democratic elections." SACJ (1998) 11.

PETE, S: "The good, the bad and the warehoused: The politics of imprisonment during the run-up to South Africa's second democratic election." SACJ (2000) 13.

PITFIELD, D: "Public Opinion on Sentencing in Pretoria". 1980. Unpublished LLD thesis, Unisa.

PREVENTION AND TREATMENT OF DRUG DEPENDANCY ACT, NO. 20 OF 1992. Government Printer.

PREVENTION OF FAMILY VIOLENCE ACT, NO. 133 OF 1993. Government Printer.

PROCEEDS OF CRIME ACT, NO. 76 OF 1996. Government Printer.

PRODDER: The South African Development Directory 2001.

PROMOTION OF ACCESS TO INFORMATION ACT, NO. 2 OF 2000. Government Printer.

PROMOTION OF ADMINISTRATIVE JUSTICE ACT, NO. 3 OF 2000. Government Printer.

PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT, NO. 4 OF 2000. Government Printer.

PUBLIC PROTECTOR: Report No. 10 (for the period 1.7.96 - 31.12.96). RP 80 / 1999. Government Printer.

PUBLIC PROTECTOR ACT, NO. 23 OF 1994. Government Printer.

PUBLIC SERVICE ACT, NO. 103 OF 1994. Government Printer.

QUIGLEY, T: "Are we doing anything about the disproportionate jailing of aboriginal people". Criminal Law Quarterly. Volume 42, 1999.

RAUTENBACH, I M (ET AL): Bill of Rights Compendium. 1998. Butterworth.

RAUTENBACH, I M & MALHERBE, E F J: Constitutional Law. 1997. Butterworth, Johannesburg.

REPORTING BY PUBLIC ENTITIES ACT, NO. 30 OF 1997. Government Printer.

ROBBINS, I P: "Managed Health Care in Prison as Cruel and Unusual Punishment". The Journal of Criminal Law and Criminology (USA). 1999. Northwestern University School of Law.

ROBERTS, J V & COLE, D P (EDS.): Making Sense of Sentencing. 1999. University of Toronto Press, Toronto, Canada.

ROBINSON, J A: The Law of Children and Young Persons in South Africa. 1997. Butterworths, Durban.

RODRIGUES, G P: Pocket Criminal Code (incorporating R.S.C. 1985 and subsequent amendments). 1996. Carswell, Canada.

RUDOLPH, H: "The 1993 Constitution – Some thoughts on its effect on certain aspects of our system of criminal procedure." SACJ 111, 1994.

SCHABAS, W A: The Death Penalty as Cruel Treatment and Torture. 1996. Northeastern University Press, Boston.

SCHONTEICH, M: "Sentencing in South Africa – Public Perception and the Judicial Process". Institute for Security Studies. 1999.

SENTENCING REFORM ACT, 1995 (Canada).

SINGH, P: "Juvenile justice and constitutionalism". THRHR 1995 (58).

SLOTH-NIELSEN, J: "No child should be caged – closing doors on the detention of children." SACJ (1995) 8.

SLOTH-NIELSEN, J: "Juvenile justice review 1997". SALJ 1997. Butterworths, Durban.

SMIT, D VAN ZYL: "Imposing and implementing sentence in the light of the fundamental rights declared by the Constitution of the Republic of South Africa 1993". Notes for a seminar on the Bill of Rights at the University of Cape Town. 1994. UCT, Cape Town.

SMIT, D VAN ZYL: "Taking life imprisonment seriously." Article. 1994.

SMIT, D VAN ZYL: "Is capital punishment constitutional? The answer from Hungary." SACJ (1994) 3. Butterworth.

SMIT, D VAN ZYL: "Constitutional jurisprudence and proportionality in sentencing". *European Journal of Crime, Criminal Law and Criminal Justice*. 1995 – 3.

SMIT, D VAN ZYL: *South African Prison Law and Practice*. 1992. Butterworth.

SMIT, D VAN ZYL: "Anchoring the treatment of sentenced prisoners in a rights discourse: The example of rewards for prison labour in German law". *SALJ* 1998. Juta, Cape Town.

SMIT, D VAN ZYL: "Mandatory minimum sentences and departures from them in substantial and compelling circumstances". *SAJHR* (1999) 15.

SORENSEN, J (ET AL): "Capital Punishment and Deterrence: Examining the Effect of Executions on Murder in Texas". *Crime and Delinquency*, Vol. 45 No. 4, 1999. Sage Publication, Texas.

SOUTH AFRICAN CITIZENSHIP ACT, NO. 88 OF 1995. Government Printer.

SOUTH AFRICAN HUMAN RIGHTS COMMISSION: *Report of the National Prisons Project*. 1997. Cape Town.

SOUTH AFRICAN HUMAN RIGHTS COMMISSION: *Third Annual Report*. 1997 - 1998. December 1998.

SOUTH AFRICAN HUMAN RIGHTS COMMISSION: *Fourth Annual Report*. 1998 - 1999. December 1999.

SOUTH AFRICAN LAW COMMISSION: *Interim Report on Group and Human Rights*. 1991. Government Printer.

SOUTH AFRICAN LAW COMMISSION: Mandatory Minimum Sentences. 1997. Government Printer.

SOUTH AFRICAN LAW COMMISSION: Sentencing: Restorative justice (compensation for victims of crime and victim empowerment). Project 82. 1997. Government Printer.

SOUTH AFRICAN LAW COMMISSION: Report on Juvenile Justice. July 2000. Government Printer.

SOUTH AFRICAN PREVENTION OF ORGANISED CRIME ACT, NO. 121 OF 1998. Government Printer.

SOUTH AFRICAN SCHOOLS ACT, NO. 84 OF 1996. Government Printer.

STEYN, L C: Die Uitleg van Wette. 1981. Juta, Kenwyn.

STEYTLER, N (ED.): The Freedom Charter and Beyond: Founding Principles for a Democratic South African Legal Order. 1991.

STUART, D & DELISLE, R J: Learning Canadian Criminal Law. 1993. Fourth Edition. Carswell, Canada.

STUART, D: "An entrenched Bill of Rights best protects against law and order expediency". SACJ (1998) 11. Butterworth.

SUNDAY TIMES, 30 April 2000.

SUNDAY TIMES, 21 May 2000.

SWART, D N: "The constitutional rights of prisoners with reference to access to courts." *Acta Criminologica* Vol. 11(2) 1998.

TERBLANCHE, S S: *The Guide to Sentencing in South Africa*. 1999. Butterworth.

TUNICK, M: *Punishment – Theory and Practice*. 1992. University of California Press, Berkeley, USA.

VAN DER MERWE, D P: *Sentencing*. 1991. Butterworth.

VAN DER MERWE, S E: "The 'good faith' of the police and the exclusion of unconstitutionally obtained evidence". *SACJ* (1998) 11. Butterworth.

VAN DER WALT (ET AL): *Kriminologie. 'n Inleiding / Criminology. An Introduction*. 1977. Unisa, Pretoria.

VAN DER WALT, A J: "Civil forfeiture of instrumentalities and proceeds of crime and the constitutional property clause." *SAJHR* (2000) 16.

VAN WYK, DUGARD, DE VILLIERS AND DAVIS (EDS.): *Rights Constitutionalism*. 1994. Butterworth.

VICTIM AND WITNESS PROTECTION ACT, 1982 (America).

WASIK, M: *Emmins on Sentencing*. 1998. Blackstone Press Limited, London.

WATSON, J: "Talking about the Right to Remain Silent". *Criminal Law Quarterly*. 1991. 106 - 123.

WICHARA, T: Simple theory, hard reality (the impact of sentencing reforms on courts, prisons, and crime). 1995. State University of New York Press.

WIKLER, N J: "Researching Gender Bias in the Courts: Problems and Prospects". J Brockman and D E Chunn, (eds.). Investigating Gender Bias: Law, Courts and the Legal Profession. 1993. Thompson Educational Publishing, Inc., Toronto. Pages 46 - 61.

WINICK, B J: "When treatment is punishment: Eighth Amendment limits on mental health and correctional therapy". Criminal Law Bulletin (USA) 1996. School of Criminal Justice, New York.

WOOD-BODLEY, M C: "One small step for 'gay liberation'." SACJ Vol. 115 1998.

YOUNG OFFENDERS ACT, 1982 (Canada)

CASE REFERENCES

A-G Canada v. Lavell (1974) SCR 1349

Ameruddy-Cziffra v. Mauritius (R) 9/35 HRC 36

Andrews v. Law Society of British Columbia (1989) 56 DLR

Belczowski v. Canada (1992) 90 D.L.R. (4th) 330 (F.C.A.)

Bernstein and others v. Bester and others NNO 1996 (2) 751 (CC)

Bounds v. Smith 430 US 817 (1977)

BverfGE 45 187 (1977)

Canada v. Schmidt (1987) 1 S.C.R. 500

Chiarelli v. Canada (1992) 1 S.C.R. 711

Christella Roberts v. United Kingdom (Independent Law Report 26 March 1993)

Christian Lawyers Association of SA v. Minister of Health 1998 (4) SA 1113

Christian League of Southern Africa v. Rall 1981 (2) SA 821 (O)

Clarkson v. The Queen (1986) 1 SCR, 383

Coker v. Georgia 433 US 548 (1977)

Collin v. Kaplan (1983) 1 F.C. 496 (T.D.)

De Lange v. Smuts NO and others 1998 (3) SA 785 (CC)

Droogenbroek v. Belgium (7906/77) Report 9-7-1980

Ex parte Attorney-General, Namibia: In re Corporal Punishment 1991 (3) SA 76 (Nm)

Ex parte Boedel Steenkamp 1962 (3) SA 954 (O)

Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996 (4) SA 744 (CC)

Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended text of the Constitution of the Republic of South Africa, 1997(2) SA 97 (CC)

Delcourt v. Belgium (268/65) CD 22/48

Droogenbroek v. Belgium (7906/77) Report 9-7-1980

Escobedo v. Illinois 378 U.S. 478 (1964)

Estelle v. Gamble 429 US 97 (1976)

Everson v. Board of Education 330 U.S. 15 (1947)

Ferreira v. Levin 1996 (1) BCLR 1 (CC)

Fraser v. Children's Court, Pretoria North 1997 (2) SA 261 (CC)

Freiremar v. Prosecutor-General of Namibia 1994 (6) BCLR 73 (NmH)

Furman v. Georgia (1972) 408 US 238

Goldberg and others v. Minister of Prisons and others 1979 (1) SA 14 (A)

Gregg v. Georgia 428 US 153, 49 L Ed 859 (1976)

Harmelin v. Michigan 111 S Ct 2680 (1991)

Hay v. Justices of the Tower Division of London (1890) 24 Q.B.D. 561

Hiltonian Society v. Crofton 1952 (3) SA 130 (A)

Hleka v. Johannesburg City Council 1949 (1) SA 842 (A)

Hudson v. Palmer 468 US 517 (1984)

Hugo v. State President of the RSA 1996 (6) BCLR 876 (D)

Hutto v. Davis 454 US 370, 70 L Ed 2d 556 (1982)

In re Gault 387 US 1 (1967)

Ingraham v. Wright 430 US 651 (1977)

Johnson v. Minister of Home Affairs and another 1997 (2) SA 432 (C)

Kader v. Minister of Law and Order and another 1989 (4) SA 11 (C)

Kindler v. Canada (1991) 2 S.C.R. 779

Mandela v. Minister of Prisons 1983 (1) SA 938 (A)

Mbushuu and another v. The Republic Criminal Appeal 142 of 1994 (Tanzania)

McCann v. The Queen (1976) 1 F.C. 570 (T.D.)

Minister of Justice v. Hofmeyr 1993 (3) SA 131 (A)

Miranda v. Arizona (1966) 384 US 436

Morgentaler (1988) S.C.R. 30 129

Morris v. Slappy 103 S. Ct. 1610 (1983)

National Coalition for Gay and Lesbian Equality & others v. Minister of Justice and others 1998 (6) BCLR 726 (W)

Nel v. Le Roux 1996 (3) SA 562 (CC)

O'loner v. Estate of Shabazz 482 US 342 (1987)

Patsy v. Board of Regents (1982) 457 US 496

President of the Republic of South Africa and another v. Hugo 1997 (6) BCLR 708 (CC)

Prostitution Reference Case (1990) S.C.R.1123 (Canada)

Protea Technology Ltd v. Wainer 1997 (9) BCLR 1225 (W)

R v. Big M Drug Mart (1985) S.C.R. 295

R v. Goltz (1991) 3 S.C.R. 485

R v. Goltz (1992) 67 CCC (3d) 481

R v. Hufsky (1998) 1 S.C.R. 621

R v. Karg 1961 (1) SA 231 (A)

R v. Keegstra 1990 3 SCR 697, 3 CRR (2d) 193

R v. Luxton (1990) 2 S.C.R. 711

R v. Lyons (1987) 2 S.C.R. 309

R v. M(c) [1995] 30 CRR (2d) 112

R v. McC. (T) (1991) 4 O.R. 3d 203 (Ont. Ct. Prov. Div.)

R v. Miller (1988) 65 O.R. (2nd) 746 (CA)

R v. Miller & Cockeriel (1977) 2 S.C.R. 80

R v. Milne (1987) 2 S.C.R. 512

R v. Natrall (1973) 1 WWR 608, 20 CRNS 265, CCC (2d) 390

R v. Oakes (1986) DLR (4th) 200

R v. Oakes (1989) 19 CRR 308

R v. Shaw (1977), 36 CRNS 358 (Ont. CA)

R v. Smith 1922 TPD 199

R v. Smith (1972), 7 CCC (2d) 468 NWT

R v. Smith (1987) 1 S.C.R. 1045

R v. Smith (1991) 1 SCR, 714

R v. Storrey (1990) S.C.R. 241

R v. Wholesale Travel Group (1991) 3 SCR 154

R.A.V. v. City of St. Paul 505 US 377, 112 Sct 2538 (1992)

Regina v. McLean et al (1980) 26 Nfld. P.E.I.R. 158

Re Ewing (1974) 49 DLR (3d) 619 (BCCA)

Re Mitchell and the Queen (1983) 42 O.R. (2nd) 481 (H.C.)

Re Royal Prerogative of Mercy Upon Deportation Proceedings (1933) 2 D.L.R.
348 (S.C.C.) 361

Rhodes v. Chapman (1981) 452 US 337

Roe v. Wade 410 US 113, 93 S. Ct. 705, 35 L Ed. 2d 147 (1973)

Romer et al v. Evans et al 116 S Ct 1620, 134 L Ed 2d 855 (1996)

Rudolph v. Alabama (1963) 375 US 889

Rummel v. Estelle 455 US 263, L Ed. 2d 382 (1980)

S v. A Juvenile 1990 (4) SA 151 (ZHC)

S v. Bhulwana 1995 (12) BCLR 1579 (CC)

S v. Bosman 1992 (1) SACR 115 (A)

S v. Chapman 1997 (3) SA 341 (SCA)

S v. Coetzee 1995 (4) SA 631 (CC)

S v. D 1995 (1) SACR 259 (A)

S v. de Kock 1997 (2) SACR 171 (T)

S v. Ferreira 1975 (1) SA 447 (O)

S v. Fredericks 1986 (4) SA 1048 (C)

S v. Hoffman 1992 (2) SACR 56 (C)

S v. Holder 1979 (2) SA 70 (A)

S v. J 1998 (2) SA 984 (SCA)

S v. Juta 1998 (4) SA (Tkh) 928

S v. Kampher 1997 (2) SACR 418 (C)

S v. Kellerman 1996 (1) SACR 89 (T)

S v. Khumalo 1984 (3) SA 327 (A)

S v. Kotze 1994 (2) SACR 214 (O)

S v. L 1978 (2) SA 75 (C)

S v. L 1993 (1) SACR 386 (C)

S v. Lister 1993 (2) SACR 228 (A)

S v. Machwili 1986 (1) SA 156 (N)

S v. Mahachi 1993 (2) SACR 36 (Z)

S v. Majodina 1996 (2) SACR 369 (A)

S v. Makwanyane and another 1995 (6) BCLR 665 (CC)

S v. Martin 1996 (2) SACR 378 (W)

S v. Masala 1968 (3) SA 212 (A)

S v. Masisi 1996 (1) SACR 147 (O)

S v. Matsoesoeana 1986 (3) SA 350 (N)

S v. Mfene 1998 (9) BCLR 1157 (N)

S v. Mohlongo 1994 (1) SACR 584 (A)

S v. Mpofana 1998 (1) SACR 40 (Tk)

S v. Mpofu 1985 (4) SA 322 (ZHC)

S v. Mzwakala 1957 (4) SA 273 (A)

S v. Nehemia Tjijo (Namibia - unreported judgment delivered on 4 September 1991)

S v. Ndaba and others 1987 (1) SA 237 (T)

S v. Ndhlovu 1988 (2) SA 702 (ZSC)

S v. Ngcongco 1996 (1) SACR 557 (N)

S v. Ntuli 1996 (1) BCLR 141 (CC)

S v. Pase 1986 SA 303 (E)

S v. Pretorius 1980 (4) SA 568 (T)

S v. Qamata 1997 (1) SACR 479 (E)

S v. R 1993 (1) SA 476 (A)

S v. Sibiya 1973 (2) SA 51 (A)

S v. Smith 1996 (1) SACR 250 (E)

S v. Stanley 1996 (2) SACR 570 (A)

S v. T 1997 (1) SACR 496 (SCA)

S v. Tcoeib 1996 (1) SACR 390 (NmS)

S v. Tshuma 1988 SA 702 (ZSC)

S v. Toms 1990 (2) SA 802 (A)

S v. van Wyk 1997 (1) SACR 345 (T)

S v. Vries 1996 (12) BCLR 1666 (Nm)

S v. Willemse 1988 (3) SA 836 (A)

S v. Williams 1988 (3) 386 (C)

S v. Williams and others 1995 (3) SA 632 (CC)

S v. Zinn 1969 (2) SA 537 (A)

S v. Zuma and others 1995 (2) SA 642 (CC)

S v. Zungu 1962 (1) SA 377 (N)

Shabalala v. Attorney-General of the Transvaal 1995 (12) BCLR 1593 (CC)

Sillery v. The Queen (1981) 55 ALJR 509

Smith v. The Queen (1987) 34 CCC (3d) 97

Soering v. United Kingdom (1989) 11 EHRR 439

Solem v. Helm 463 US 277 (1983)

Steele v. Mountain Institute (1990) 60 CCC (3d) 1

The People v. Anderson 439 p 2nd 880 (Cal 1972)

Thompson v. Oklahoma (1988) 487 US 815

Trop v. Dulles 356 US 86 (1958)

Tyrer v. United Kingdom (1978) Y.B. Europe. Ct. of Human Rights

United States v. Madkour US 930 F. zd 234 (2d Cir. 1991)

Van Biljon & others v. Minister of Correctional Services and others 1997 (2)
SACR 50 (C)

Van Heerden and another v. Joubert NO and others 1994 (4) 793 (A)

Veysey v. Canada (Commissioner of Correctional Services) (1989) 29 F.T.R. 74

Weems v. United States 217 US 349, 54 L Ed 793 (1910)

Woodson v. North Carolina (1976) 428 US 280