AN ANALYSIS OF JUDICIAL SENTENCING APPROACHES TO PERSONS CONVICTED OF SERIOUS CRIMES

by

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SUMMARY

This study analyses judicial approaches to sentencing offenders under the age of 18 convicted of serious crimes and their adult counterparts. It traces sentencing patterns, trends and shifts from 1950 to 2009 with reference to key moments. The study seeks to identify factors that determine the choice of sentence. Indeed, competing penal theories appear to be behind judicial decisions. In this regard it is claimed that although it is difficult to identify the extent of factors considered in sentencing decisions, seriousness of crime seems to carry more weight than the prior record and age factor in the selection of a sentence.

The study applied both quantitative and qualitative methodologies, using primary or historical and secondary sources of data collection. This involved studying real court cases, the observation of trials and interviews with Wynberg regional court magistrates, Mitchells Plain regional court magistrates and Cape High Court Judges as part of primary-historical data collected. Penal statistics and data gathered included law reports, penological literature was analysed and computerised, and philosophical interpretation of findings was used. The study concludes that sentencing approaches are still marked by inconsistency and vagueness, which require to be improved by ongoing assessment within the courts in pursuit of balanced sentencing that meets various goals. It is pointed out that there are variations between the courts, and among different regional magistrates and judges, which require to be justified in the light of the divergences in crime seriousness and offenders alike. The study claims that sentencing is a complex and multifaceted phenomenon, involving history, law and sociology. It further recommends that persons under the age of 18 convicted of serious crime should be accorded less culpability compared to adults with regard to sentence severity.

Title of thesis:

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Key terms:

An analysis; Judicial approaches; Sentencing; Patterns; Trends and Shifts; Severity; Convicted persons; Serious crimes

CONTENTS

LIST OF TABLES

LIST OF FIGURES

CHAPTER 1

INTRODUCTION

1.1 Introduction

The judicial sentencing of convicted persons remains a complex process characterised by inconsistencies in approach.[1] Sentencing approaches become even more complex when they are applied to different offenders convicted of similar serious crimes. It is important to understand the factors that underlie differences in the sentences imposed in South Africa over the years and currently. Central to the different sentencing approaches is the idea of the promotion of an appropriate punishment that meets multiple objectives.[2]

An analysis of recent developments in judicial sentencing approaches ought to focus on key moments. This implies tracing the history of sentencing patterns, trends and shifts from 1950 to 2009. This involves focuses only on serious crimes. The 1950s are a point of departure as then the South African courts had to grapple with the interpretation of apartheid laws.[3] A historical account is important in order to understand the conditions under which judicial sentencing approaches have been judicial rendered and factors prevalent at different times. As Ruby[4] explains approaches do not develop in a vacuum. They are compatible with circumstances and the context of serious crimes before the sentencing court. In this regard there seems to be an immense responsibility on sentencers, particularly regarding the need to justify inconsistencies in their sentencing decisions. Such judicial responsibilities become even more intricate in the context of various approaches to offenders under the age of 18 years compared to adults regarding the severity of punishment[5] and the seriousness of the crime. This study attempts to elucidate the claim that judicial sentencing approaches tend to be shaped among other things by the historical and sociological context and not only by the law.[6]

1.2 Motivation and rationale: the problem of disparities in judicial sentencing approaches

In 2000 the researcher conducted a preliminary study based on unstructured interviews with senior magistrates of the Wynberg Magistrates' court and the principal drafters of South Africa's juvenile justice legislation in order to establish the challenges facing sentencers with regard to sentencing young offenders convicted of serious offences compared to adults. This current study has to elucidate the problem of sentencing disparities in South Africa. Table 1.1 below illustrates sentencing

[1] See Green, E. (1961:1) Judicial attitudes in sentencing. A study of the factors underlying the sentencing practice of the criminal court of Philadelphia. London: Macmillan.
[2] See Naude, C. (1989:1) The handling of the offender in the pre-sentence and post-sentence phase. Symposium held at the University of South Africa, Pretoria, 28-29 September 1989: 1 – 17.
[3] See Corder, H. (1984:3) Judges at work. The role and attitudes of the South African appellate judiciary, 1910–1950. Cape Town: Juta.
[4] (1980:3) Sentencing. 2nd edition. Toronto: Butterworths.
[5] Severity of punishment refers to sentencing regime. Also see section 1.9 on conceptual clarification.
[6] See Hogarth, J. (1974:166) Sentencing as a human process. University of Toronto: University of Toronto Press.

disparities in terms of the prison population with regard to persons under the age of 18.

Table 1.1 Sentenced offenders under the age of 18 – annual average number

Statistical years	Below 14 year old	14 years	15 years	16 years	17 years	Grand total
2003	8	36	145	520	1101	1810
2004	12	33	159	451	1054	1710
2005	5	22	100	346	764	1237
2006	4	14	89	283	710	1099
2007	2	10	74	246	563	895

Source: Department of Correctional Services, 10 June 2008, Republic of South Africa

Table 1.1 represents the annual average number of sentenced children in prison for the last 5 years. Disparities among young age groups suggest fewer convictions compared to older offenders. This is a pattern from 2003 to 2007. Between 2003 and 2007 there is a slight decrease among different age group of young offenders. It should be determined in chapter 4 whether convictions in respect of offenders under the age of 18 reflect a smaller number compared to their adult counterparts. The notions of rights and the degree of culpability for those under the age of 18 might clash with the penal approaches of magistrates and judges. This possibility might be informed by the fact that accused under the age of 18 compared with adults appear to have more rights provided by constitutional and sentencing law yet seem to commit serious crimes similarly to their adult counterparts. With regard to adult offenders judicial officers might have wider discretion to impose various sentences. This seems to be a sentencing pattern over the past five years.

The preceding chapters have to assess how the age factor has been understood in South African sentencing. It must be emphasised that the study spans both juvenile justice and sentencing and punishment. Therefore to say under 18 and adults recognises these two systems, namely that juveniles and adults are ideally treated differently in terms of the South African law.[7] Indeed an analysis of sentencing approaches on persons under the age of 18 is related to their adult counterparts in order to promote greater insight. Certain sections in Chapter 3 discuss evolution of the juvenile justice with reference to sentencing of young persons and adults convicted of serious crimes. In South African sentencing system serious cases of persons under the age of 18 and adults are tried and sentenced in regional and High Court.[8] This approach is old in South African sentencing as confirmed by the earlier studies.[9] It must be noted that the minimum sentences prescribed by the Criminal Law Amendment Act, 105 of 1997 do not apply to young offenders under the age of 16.[10] The Act affords the courts discretion with regard to sentences to be imposed on those at the age of 16, 17 and adults based on the existence of 'substantial and compelling

[7] See Criminal Procedure Act 51 of 1977. Also see Criminal Law Amendment Act 105 of 1997.
[8] See section 1.6,
[9] See Midgley, J. (1974:460)
[10] See section 51 of the Criminal Law Amendment Act, 105 of 1997.

circumstances', which justify the imposition of a lesser sentence than the prescribed sentence.[11] This law seeks to oblige courts in general to account for its sentencing decisions. Sentencing prescriptions are not unique to South Africa. For instance in the presiding Chapters it is shown that in other sentencing jurisdictions, courts have limited discretion to reinforce a sense of accountability to the community.

Subsequent to the above, a study on the role of the criminal justice system in the prevention of crime was undertaken by the researcher.[12] The area of jurisdiction in which the research was conducted comprised Wynberg Magistrates' Court, Drakenstein Prison (formerly known as Victor Verster Prison) and the policing area of Stellenbosch. The research showed that young persons are deeply affected by violence, both as victims and offenders, and are involved in serious violent crimes such as rape, robbery with aggravating circumstances and murder.[13] Some offender respondents were young persons serving long sentences such as life imprisonment, which had been converted from death sentences imposed before the death penalty was abolished.[14] This earlier study, inter alia, provided the researcher with the background to undertake further study focusing on analysing judicial approaches to sentencing persons under the age of 18 and adults convicted of serious crimes.

In this current study the main focus is to get an understanding of the factors behind sentencing decisions. The study is intended to respond to the problem of inequalities in sentencing. It attempts to search for a balanced approach to this challenge. This implies that sentencing should ideally take into account a range of factors such as the age factor, severity of punishment, prior record, gravity of the crime, equal application of different sentencing theories and specific circumstances, as opposed to rigid, one-sided sentencing approaches which are likely to lead to unjustifiable inconsistencies.

There are various approaches to how sentencing decisions are taken. Hogarth sums up this point as follows: 'the most obvious fact which emerges is that there are enormous differences among magistrates in nearly every aspect of the sentencing process. Magistrates differ in their penal philosophies, in their attitudes, in the ways in which they define what the law and the social system expect of them, in how they use information and in the sentences that they impose. In a variety of ways it was demonstrated that magistrates interpret the world selectively in ways consistent with their personal motivations and subjective ends. Regardless of what position one takes with regard to the social purposes that sentencing should serve, it is likely to be repugnant to the average man's sense of justice if such differences are allowed to persist.'[15] As evident in the preceding studies and in this study, it is apparent that sentencing approaches are not as simplistic as one would have thought. There are serious intricacies which require some explanation in judicial approaches to

[11] See Van Zyl Smit, D. (2004) Sentencing and punishment.
[12] Magobotiti, C. D. (2001) The contribution of social work in the prevention of crime by the criminal justice system. MA thesis.
[13] See Magobotiti, C. D. (2001:178) The contribution of social work to the prevention of crime by the criminal justice system. MA thesis.
[14] See S v Makwanyane and Another 1995 (3) SA 391 (CC).
[15] As quoted in the Report of the Proceedings – National Conference on the Disposition of Offenders in Canada. (1974:11-12) Toronto: University of Toronto. Also see Hogarth, J. (1974:382) Sentencing as a human process. University of Toronto: University of Toronto Press.

sentencing, particularly regarding those under the age of 18 compared to adults convicted of serious crimes.

Inconsistencies are evident not just among individual sentencers of the same court but also between areas of the same jurisdiction and between the different sentencing jurisdictions.[16] In the context of the study the latter chapters will determine whether such inconsistency might be observed in, for example, differences in approaches regarding judicial sentencing decisions between cases decided in Court F and those decided in Court D of Wynberg regional court. Similarly, variations might be investigated and determined in the response of individual regional magistrates in those courts. Another possibility could be differences between Court 1 and Court 4 of the Cape High Court's sentencing decisions that should be evaluated in the preceding chapters.

Indeed, it should be established whether there are variations in responses from Judges of the Cape High Court and differences between regional magistrates and Cape High Court Judges. In the same vein, there might be inconsistencies between Wynberg regional court and Mitchells Plain regional court. Variations could relate to sentencing jurisdiction, individual sentencers, the area in which the court is located, and the nature and circumstances of the cases.[17] For example courts geographical location, cases and sentences imposed could deepen an insight on sentencing complexity. It is asserted that: 'the worst type of inconsistency is inconsistency in the way in which sentencers decide on which approach to adopt when making the sentencing decision – as where one sentencer decides that a particular offender should receive a short sentence on the grounds of rehabilitation and another sentencer decides that the same offender should receive a lengthy sentence on the grounds of deterrence – because it leads to unequal treatment of offenders by the criminal justice system.'[18]

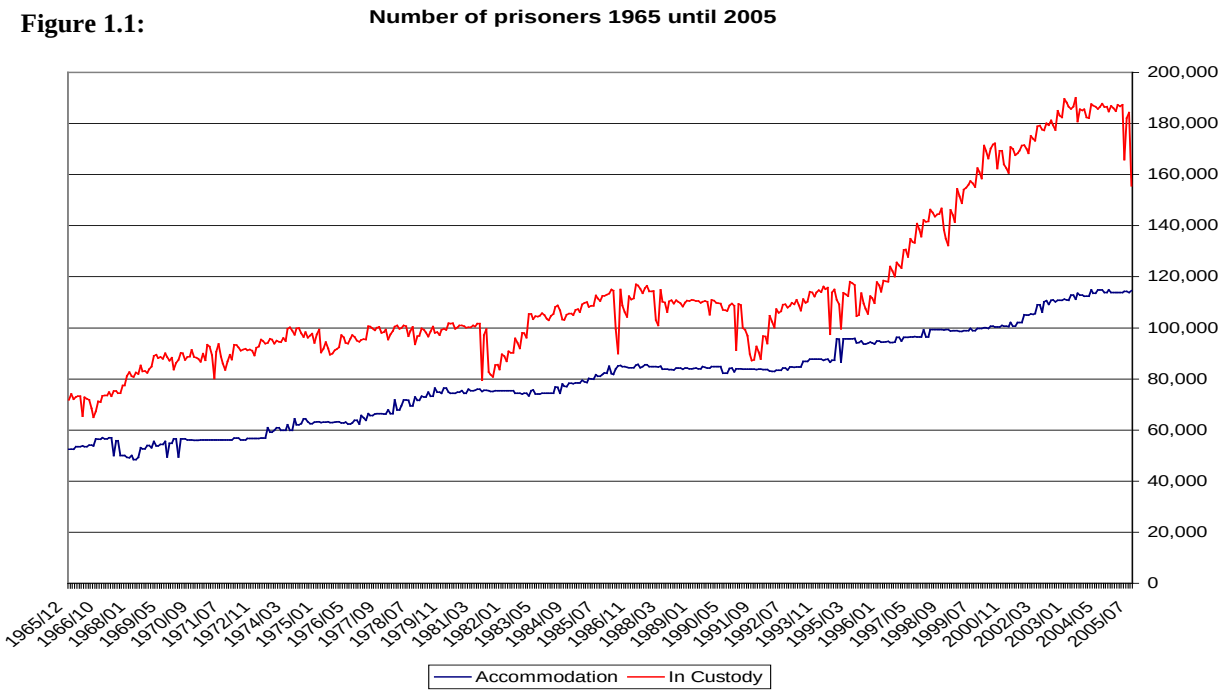
1.2.1 Sentencing patterns, trends and shifts in respect of persons under the age of 18 and adults convicted of serious crimes

Analysing judicial approaches requires the tracing of previous sentencing decisions, both statistically and qualitatively, including assessing law reports. It is important to note that over the years statistical information about sentencing patterns in South African courts has been limited mostly to information about the prison population, which provides some indication of the sentences imposed by the criminal courts.[19] In recent years there have been conflicting claims that, on the one hand, the South African judiciary tends to impose too lenient sentences, while on the other hand, it imposes too severe sentences.[20] The severity of sentences is linked to overpopulation in South African prisons, while the opposing view contends that lenient sentencing approaches mean that appropriate sentences are not imposed on offenders convicted of serious crimes.

[16] Radzinowicz and Hood (1993:68) As quoted in a law reform commission on sentencing. Ireland: The Law Reform Commission.
[17] See Chapter 2, section 2.8.1 on sentencing disparities in this thesis.
[18] See A Law Reform Commission on Sentencing. (1993:68) Ireland: The Law Reform Commission.
[19] Newman, J. and Midgley, J. (1975:16) Crime and penal statistics in South Africa. In Midgley, J., Steyn, J. and Graser, R. Crime and punishment in South Africa. Johannesburg: McGraw - Hill.
[20] Muntingh, L. (1996:21) A review of sentencing trends in South Africa, 1977/8-1993/4. Cape Town: NICRO.

This issue has long been of concern in South Africa. In 1976 the Viljoen Commission of Inquiry was set up to look at the extremely high prison population in order to come up with a strategy to reduce the numbers of offenders sentenced by the courts.[21] Figure 1.1 below show the pattern of the length of sentences served by prisoners during the period 1965 to 2005.

Figure 1.1:



Source: Extracted from the Judicial Inspectorate of Prisons Annual Report (2006/07) Republic of South Africa

As shown in Figure 1.1 there has been shifts and fluctuations in prison figures over the years until present period. Trends of prison figures started to increase steadily in the 1960s and 1970s. Between 1982 and 1983 numbers dropped and again during period 1992. This trend could be associated with government specific measures to reduce prison overcrowding. In Figure 1.1 the period 1996 to 2005 represent a sharp upward curve showing an increase in prison population compared to previous years. This can be attributed to the impact of mandatory and minimum sentences compared to the earlier years when the death penalty was an option available to the courts in serious cases. For example, during the period 1968 to 1969, 84 persons were executed.[22] During the period 1969 to 1970, 80 persons were executed. During the period 1970 to 1971, another 80 were sent to the gallows by the courts. Of this number, 56 persons were executed. Of the executed persons, 49 were convicted for murder, three for robbery and murder, one for rape, and three for robbery with aggravating circumstances.

During the period 1977 to 1978 the number of sentenced persons was 337,635, while for 1993 to 1994 the number of sentenced persons was 318,064. Figures for the period 1993 to 1994 represent a decrease in sentencing trends compared to previous years.[23]

[21] Viljoen Commission of Inquiry into the penal system of the Republic of South Africa. (1976:48) Pretoria: Government Publications.
[22] See Newman, J. and Midgley, J. (1975:16) Crime and penal statistics in South Africa. In Midgley, J., Steyn, J. and Graser, R. Crime and punishment in South Africa. Johannesburg: McGraw – Hill.
[23] See Muntingh, L. (1996:22) A review of sentencing trends in South Africa, 1977/8-1993/4.

This shift could be associated with democratic transitional period. Subsequently, as shown by the table below, various child offenders were detained for crimes of different degrees of seriousness during the period 2003 to 2007.[24] This is a complete different picture than the years of political transition.

Table 1.2

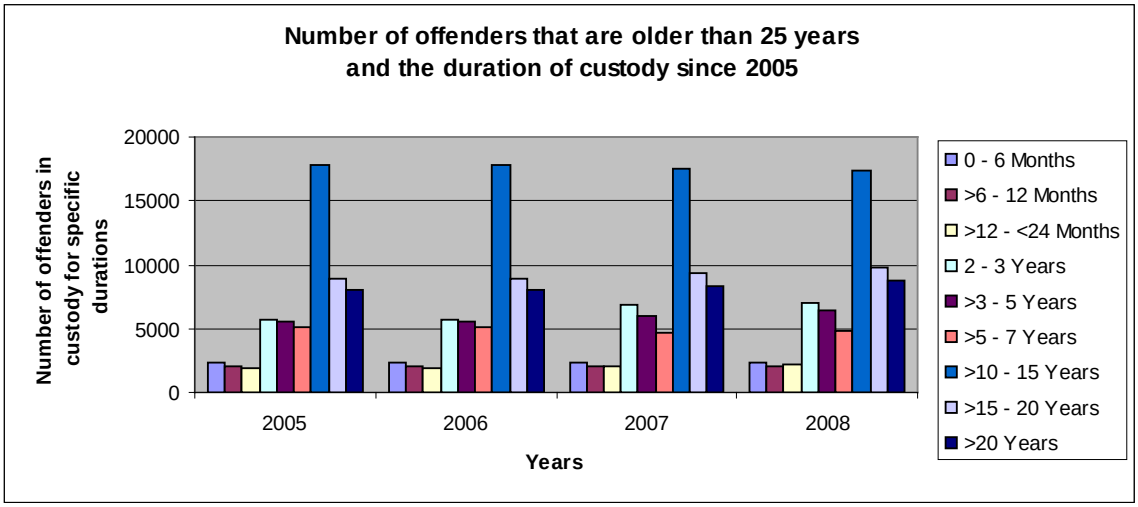
Nature of crimes, sentences and gender of the offenders under the age of 18

Females	Males	Both genders	Sentence
House breaking x 10	House breaking x 477	House braking x 487	0 to 6 years imprisonment
Theft x 9	Robbery x 268	Robbery x 271	0 to 10 years imprisonment
Assault x 7	Theft x 212	Theft x 221	0 to 7 years imprisonment
Murder x 5	Rape x 115	Rape x 115	Plus minus 16 years imprisonment
Robbery x 3	Assault x 104	Assault x 114	0 to 10 years imprisonment
Culpable homicide x 2	Murder x 75	Murder x 80	Plus minus 16 years imprisonment

Source: Department of Correctional Services, 10 June 2008

As shown in Table 1.2, different length of imprisonment sentences imposed for the crime of varying degree of seriousness. There are few female offenders in each nature of crime seriousness compared to their male counterparts. Table 1.2 above also reveal disparities in sentencing approaches. This can be attributed to the circumstances of each case. Moreover, it is likely to be a pattern of sentencing over the years. Past and present sentencing patterns are unlikely to show significant variation in both young and adult offenders, as indicated by the Tables and Figure 1.1 above. The following figure shows the pattern of the length of sentences served by adult's offenders during the period 2005-2008.[25]

Figure 1.2 Year and length of sentences served by adult offenders



Source: Judicial Inspectorate of Prisons (2008) Republic of South Africa

[24] See Department of Correctional Services, 10 June 2008
[25] (2008).

As depicted in Figure 1.2, there are large numbers of prisoners who are serving sentences of between 10 years and 15 years. These numbers seem to suggest a similar pattern during the period 2005 to 2008. Prison population could be attributed to the fact that during this period minimum sentence are most applicable for serious crimes.[26] Disparities are shown by one or two numbers. Indeed, these numbers appear to confirm the claim of overcrowding. Regarding sentences of two years and longer, there is a substantial increase in numbers compared to short-term sentences.

With regard to sentenced offenders under the age of 18 there is hardly any difference between 2002 and 2003. In August 2003 the total recorded number for persons under 18 was 230, while in 2002 the corresponding number was 238. This pattern can be attributed to local preventive initiatives, including police and community safety forums against crime.[27] Such local initiatives include programmes on partnership against crime as articulated in the National Crime Prevention Strategy.[28] In this regard the DPP report points out that Cape High Court criminal divisions secured convictions in more than 90% of cases,[29] while the Wynberg regional court had a conviction rate of 66% in that year. Statistics show that sentences for various serious crimes have become more violent between 1995 and 1997.[30] For example, in 1995 sentences ranging between five and ten years' imprisonment comprised 47.6%, while in 1997 they comprised 52.9%.

The levels of crime differ for each locality at a particular moment and public opinion, judges and magistrates could interpret these patterns differently.[31] In other words, sentencers could adjust their sentences to be commensurate with a perceived increase in crime and when there is a decrease in crime penalties might be more lenient. This argument appears to be widely shared, as evidenced by the evolution of the South African Child Justice Bill, and represents changing attitudes to youth crime from 1995 to the present.[32] In the same vein, Justice Vision 2000[33] appears to favour a balanced sentencing approach that is consistent with the degree of seriousness of the crime while recognising that some cases require less rigidity in approach. As suggested by the sentencing patterns, this picture is more likely to reveal shifts in South African sentencing approaches than the route that was envisaged during early stages of South Africa's democratisation. Another dimension is that the sentencing statistics has suggested the prevalence of crime in South Africa since 1995, the trend towards meeting the interests of victims and accused, and the impact of judicial philosophy.[34] Indeed past and current sentencing figures suggest inconsistencies in judicial approaches in varying degrees that follow a similar pattern. It is possible for

[26] See Ehlers L. and Sloth-Nielsen (2005:18) Assessing the impact: Mandatory and minimum sentences in South Africa. South African Crime Quartely No. 14
[27] See Annual Report by the Director of Public Prosecutions (DPP). (1999:100) Cape of Good Hope.
[28] See Department of Safety and Security (1996:61).
[29] (1999:41), quoted above.
[30] NEDCOR. (1998:2) Institute for Security Studies. Crime Index No. 4.
[31] Hogarth, J. (1974:75).
[32] See Skelton, A. (1999:97) Juvenile justice reform: children's rights and responsibilities versus crime control. In Davel, CJ. Children's rights in a transitional society. Pretoria: Protea book house.
[33] Department of Justice. (1997:44) Pretoria: Ministry of Justice.
[34] See Magobotiti, C. D. (2001:178).

sentencers to differ widely with regard to the effectiveness of penal measures and the criteria used in deciding between various forms of sentences.[35]

Similarly, it is more likely that sentencing decisions are mainly based on the seriousness of the crime and the criminal record before other factors are considered.[36] This suggests that all relevant factors should be considered equally. Judicial approaches must be in accordance with the proportionality principle.[37] The notion of proportional punishment requires punishers to strike a balance between the gravity of the crime, the age factor, a prior record, and the severity of punishment and the individual circumstances of the offender. As shown by the figures or statistics and analysis above, a pattern of divergences over the years and currently in judicial approaches between sentencing courts and among sentencers, among other things, has motivated the undertaking of the study.

1.3 Hypothesis

The study's hypothesis was that South Africa's judicial approaches to sentencing persons convicted of serious crimes are still marked by unjustifiable inconsistencies and unequal application of sentencing theories that lead to sentencing rigidity.

1.4 Aim of the study

The aim of the research study is to identify the extent of the consideration of the age factor, the seriousness of the crime, a prior record and the severity of punishment in judicial sentencing approaches to persons under the age of 18 and adults convicted of serious crimes.[38]

1.5 Objectives of the study

In order to achieve the aim of the study the following objectives have been formulated:

(i) To identify sentencing variations between sentencers and differences between court approaches to young and adult offenders convicted of serious crimes.

(ii) To assess and explain the sentencing philosophy behind judicial approaches to persons under the age of 18 and adults convicted of serious crimes.

(iii) To look at sentencing patterns, trends and shifts over the last 50 years with regard to young and adult offenders convicted of serious crimes.

(iv) To analyse empirically past and present judicial approaches to sentencing persons under the age of 18 and adults convicted of serious crimes.

[35] See Hogarth, J. (1974:91) Sentencing as a human process. University of Toronto: University of Toronto Press.
[36] Gross, H. and Von Hirsch, A. (1981:304) Sentencing. Oxford: Oxford University Press.
[37] Primoratz, I. (1990:149) Justifying legal punishment. New Jersey: Humanities Press.
[38] See Chapter 4 and 5 on the detailed meaning of the age, seriousness, prior record and severity.

(v) To obtain an accurate picture and understanding both theoretically and empirically of how sentencing decisions are taken regarding those under the age of 18 and adults convicted of serious crimes.

(vi) To generate knowledge of and insight into judicial approaches to sentencing persons convicted of serious crimes in South Africa

1.6 Demarcation of the research field

The empirical part of the research study was limited to the jurisdiction of the Wynberg regional courts, the Mitchells Plain regional courts and the Cape High Court in the Western Cape, since regional and High Courts are where cases involving serious crimes allegedly committed by young and adult offenders are usually tried. Regional courts impose sentences from non-imprisonment to 15 years' imprisonment.[39] As described by the Criminal Procedure Act 51 of 1977, High Courts impose sentences from non-custodial measures to life imprisonment sentences. The researcher asked for permission from the Chief Magistrate of the Wynberg Magistrates' Court to access sentencing decisions and other court records involving persons under the age of 18 and adults convicted of serious crimes.[40] In the Cape High Court a letter requesting permission was submitted to the court Registrar in order to assess court cases.

Part 1 comprised of the collection and analysis of published penal statistics. Part 2 comprised of a systematic random sample of cases decided previously and currently in the Wynberg courts and the Cape High Court. A systematic random sample has a target number but it involves selection of the sample at random in order to avoid possible bias of the researcher.[41] Part 3 comprised of interviews with all regional magistrates of the Wynberg and Mitchells Plain regional courts and three judges of the Cape High Court.[42] Like in the case of Wynberg magistrate court in part 3 the researcher asked for permission from the Chief Magistrate of Mitchells Plain and Judge President of the Cape High Court.[43] Assessing judicial sentencing decisions provided the researcher with penological insight. This part of the research was guided by the methodology and the aim of the study. Assessing court cases was undertaken in order to study actual decisions. This was done to analyse how sentencing decisions are based and determined the extent of factors underlined those decisions, such as the seriousness of the crime, age, a criminal record and the severity of sentence.

A sample of cases involving accused under the age of 18 and adults convicted of serious crimes in the Wynberg regional court was analysed.[44] Another systematic random sample of cases was assessed for both offenders under 18 and adults. A significant number of judgments and imposed sentences in the Cape High Court and the Wynberg regional court were extracted for analysis.[45]

[39] See section 92 of the Magistrates' Court Act. Also see Criminal Procedure Act 51 of 1977.
[40] See Appendix A in this thesis.
[41] See Babbie, E. and Rubin, A. (1997:254) Research methods for social work. 3rd edition, Pacific Grove: Cole Publishing Company.
[42] See Appendix B in this thesis.
[43] See Appendix A and B in this thesis.
[44] See Chapter 4, Part 2, 4.3 for details.
[45] See Chapter 4 in this thesis.

Another systematic random sample was analysed of cases decided in the Cape High Court involving persons under the age of 18 and adults convicted of serious crimes.[46] As described above, and applied in Chapter 4, this part of the research is premised on a systematic random sample. According to Grinnell,[47] and Babbie and Rubin[48] systematic random sampling is based on the selection of a total number of the chosen elements of a sample that gives an opportunity for greater selection or generalisation for a wider population.

The study concentrated on a narrow area in order for the research process to remain focused.[49] This will promote feasibility in order the study to meet its aim. The demarcation of the study was mainly and specifically focused on judicial sentencing decisions that take place in courts. Comparison of the age factor seeks to provide concrete insight and analysis of sentencing approaches. The nature and forms of judicial decisions might, inter alia, be suggested statistically by prison figures regarding overcrowding and could reflect on courts decisions. For example overpopulation in prisons could give an indication on sentencing approaches and trends. This relates to Parts 1 and 2 and sentencing trends and patterns, which involve sentencing statistics published by Statistics South Africa, the Department of Correctional Services and others.

1.7 Research design and methodology

The empirical part of the study is explanatory and descriptive in nature. Garbers,[50] Grinnell,[51] and Babbie and Rubin[52] believe that the main aim of an explanatory study is to test the existing knowledge with the phenomenon. This involves explaining relationships and differences of different variables and providing clarification of certain phenomena where accurate information is lacking. Researchers are likely to use this method of design when they want to assess pre-existing knowledge into a particular field.[53] In this study, explanatory and descriptive design is used to examine sentencing approaches to persons under the age of 18 and adults convicted of serious crimes. This is to determine factors underlying judicial approaches to those under the age of 18 and adults. Indeed, the study was undertaken to analyse and explain sentencing approaches in terms of variations in sentences imposed on different offenders for similar crimes.

In this regard, Meares,[54] Garbers,[55] Grinnell,[56] and Babbie and Rubin[57] maintain that the particular research question, problem or phenomenon being studied should dictate

[46] See Chapter 4 in this thesis.
[47] (1997:158) Social work research and evaluation. 4th edition, USA: Peacock Publishers.
[48] (1997:254) Research methods for social work. 3rd edition, Pacific Grove: Cole Publishing Company.
[49] Grinnell, R. (1997:19).
[50] (1996:287) Effective research in the human sciences: Research management for researchers, supervisors and masters and doctoral candidates. Pretoria: JL van Schaik Academic.
[51] (1997:153), quoted above.
[52] (1997:110), quoted above.
[53] See Grinnell, R. (1997:153) and Babbie, E. and Rubin, A. (1997:110).
[54] (1995:6) Application for qualitative research: Let the work begin. Journal of Social Work Research, 19(1):5-7.
[55] (1996:284), quoted above.
[56] (1997:162), quoted above.
[57] (1997:372), quoted above.

the selection of research methodologies. The nature of this research requires the generation and collection of both quantitative and qualitative data. In the study the quantitative method was applied through the collection of published penal statistics. A quantitative approach was also applied in assessing judicial decisions, by reading significant numbers of cases from the court files decided in the Wynberg regional court and the Cape High Court, in order to extract relevant penal data.[58] But assessing these cases also had a qualitative methodological aspect, as evident in the observed and distilled data. This is in line with tracing past and present sentencing patterns, trends and shifts in judicial approaches to sentencing persons under the age of 18 and adults convicted of serious crimes. Penal statistics suggests variations in sentences imposed by the sentencing courts. Historical sentencing data was generated by the use of statistics and real assessed judicial sentencing decisions, as described above.

Babbie and Rubin,[59] and Garbers[60] consider both qualitative and quantitative approaches to be valuable. The qualitative method tends to provide the researcher with an opportunity to observe and participate in the process, while the quantitative method tends to allow indirect involvement and comprehensive representation. With respect to qualitative methodology, a questionnaire was developed which consists of closed and open type questions. Section 1 of the closed questions will later be coded for data analysis and section 2 will entail open questions.[61] There was a preliminary interview process, in accordance with the idea of piloting, with former sentencers in order to test the validity and reliability of the instrument before conducting actual interviews with the respondents. In this context validity refers to the possible results to be yielded, while reliability may refer to the degree of accuracy or precision regarding the consistency of answers to the questions.[62] This was achieved by testing the results and relevant data. A self-administered questionnaire required the respondent to fill in the questionnaire in a face-to-face encounter with the researcher, or without the researcher but going over it with the researcher at a later stage in order to enhance completion and accuracy.[63] In the study this relates to the closed questions of the questionnaire.[64]

The questionnaires were designed for and distributed to eight magistrates of the Wynberg regional court, two magistrates of the Mitchells Plain regional court and three judges of the Cape High Court, and had to be completed as requested in the introductory letter from the researcher. This sample has a probability of all selected respondents to have a wider representation based on similar characteristic procedures and approaches within the framework of South African sentencing laws and the 1996 Constitution.[65] This is because all respondents are sentencers guided by the law. On this basis it seems as if it is possible to generalise the findings from this sample to wider judicial approaches. This broader picture considers the fact that each area might have its specific factors that shape sentencing approaches. Indeed, recent study

[58] See Figure 1.1 and tables above.
[59] (1997:373), quoted above.
[60] (1996:284), quoted above.
[61] See Appendix B for questionnaire.
[62] Grinnell, R. (1997:181).
[63] Babbie, E. and Rubin, A. (1997:348).
[64] See Appendix B in this thesis.
[65] See Grinnell, R. (1997:156) and Babbie E. and Rubin, A. (1997:235).

confirms that there are big differences in sentencing approaches for the same crime in different South African regions.[66]

Open questions in the questionnaire were tape recorded to ensure verbatim recording and probing, and notes were taken while the interviewee listened in order to probe.[67] The interviews provided the researcher with the opportunity to observe and the observation technique was also used in Part 2 during the reading of court files. The same questionnaire instrument was administered to the Cape High Court judges. Unlike with the use of the probability systematic random sample that was applied in respect of the Wynberg regional court, the researcher used a purposive sample to target three judges as key respondents for both closed and open questions, as described above, for data collection. A purposive sample is likely to have few key respondents and is based on a selection of the researcher that might provide useful information in order to be generalised to a sentencing population in respect of the same applied laws in a particular sentencing jurisdiction.[68] This data could help to compare judicial approaches by magistrates in the Wynberg and Mitchells Plain regional courts and judges of the Cape High Court, and between regional magistrates and judges of the respective courts on sentencing offenders under the age of 18 and adults convicted of serious crimes. [69]

The researcher observed specific trials in the Wynberg regional court, the Mitchells Plain regional court and the Cape High Court. The use of the observational technique encouraged the researcher to come to grips with and gain an understanding of complex penal philosophical underpinnings, and constitutional and legal procedures that inform judicial approaches to sentencing persons under the age of 18 and adults convicted of serious crimes. This was further to explain penal intricacies. In this study the observational technique was applied in respect of actually sitting in court proceedings and empirically assessing court cases decided previously and currently that have become part of the historical or primary data collection. Respondents' responses to the interview and penal statistics represent secondary data collection.

1.8 Analysis of data

This study was carried out by means of historical or primary and secondary data collection. The empirical data was captured and analysed. This includes an analysis of penal statistics or figures, data extracted from court sentencing records, observed trials and comparisons of different responses from interviewees in order to gauge inferences. The data were presented, analysed and interpreted in univariate, bivariate and multivariate analysis. Babbie and Rubin[70] state that this form of analysis enables the data to be categorised or classified on the basis of commonalities and inferences in order to enhance analysis and interpretation. This approach is useful in order to identify emerging data during analysis. Structured tables and figures were used for the interpretation of statistical data. The researcher was assisted by statisticians with regard to excel computerised data analysis. Based on the data and findings, conclusions are drawn and recommendations made.

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[66] Paschke, R. and Sherwin, H. (2000:10 of 11).
[67] See Babbie, E. and Rubin, A. (1997:392).
[68] Babbie, E. and Rubin, E. (1997:266) and Grinnell, R. (1997:162).
[69] See Chapter 4.
[70] (1997:473), quoted above.

1.9 Conceptual clarification[71]

In order to present a sound academic research study, it is important to define some key concepts as a basis for the theoretical framework. This is necessary to premise concisely and locate the study on judicial approaches to sentencing persons under the age of 18 and adults convicted of serious crimes.

(i) Conviction – the process when an accused person has been found guilty of the crime or offence by a court of law for which she or he has been charged and for which sentencing should follow.

(ii) Sentence – involves any measure applied by a court to the person convicted of a crime.

(iii) Sentencing – involves the practical imposition of a sentence by the court of law on a specific convicted person or accused, in a specific case.

(iv) Punishment – involves the deliberate, rational and justified infliction of something assumed to be unwelcome to the recipient by those generally regarded as having the right to do so in response to the voluntary infringement, either by act or omission, of a law, rule or custom.

(v) Severity of punishment – refers to penal regime's extent of the durability of the served sentence.

(vi) Theories/philosophy of punishment – refers to moral justifications of punishment which are useful in explaining the nature of punishment and its application in judicial approaches.

(vii) Proportionality – in desert theory the principle that a specific punishment should be in proportion or equal to the seriousness of a crime.

(viii) Serious crimes or offences – refers to crimes such as murder, rape, robbery with aggravating circumstances, high treason, housebreaking with intent to steal and theft, fraud and assault with grievous bodily harm (GBH).

(ix) Under the age of 18 years – refers to children/juveniles/youth or young persons.

(x) Adults – refers to those who are 18 years and above.

[71] See Criminal Procedure Act, 51 of 1977, Criminal Law Amendment Act, 105 of 1997, Joubert, J. (1999:42) Criminal procedure handbook. 4th edition, Juta: Juta CO. LTD. , Rabie, A. (1977:1) Theories of punishment. Johannesburg: Perskor Publishers. , Schwikkard, P. J. and Van der Merwe (2002) Principles of evidence. 2nd edition. Cape Town: Juta. Van der Merwe, D. (1991) Sentencing. Johannesburg: Juta , Walker, N. (1991) Why punish? Oxford: Oxford University Press.

1.10 Limitations of the study

In any study there are challenges the researcher has to overcome, and in this study these include the following:

(i) Lack of adequate financial support in order to execute a profound research, both theoretical and empirical, in accordance with the aim and method of the study.

(ii) Lack of penal statistics, particularly directly from the respective courts with regard to both young offenders and adults convicted of serious crimes.

(iii) Lack of specific explanations or reasons underlying sentencing decisions empirically.

(iv) Matters of confidentiality regarding sentencing courts' records.

(v) Lack of regional comparisons of South African sentencing patterns as revealed by Paschke and Sherwin's study above.

Nevertheless, the above limitations had little impact on the actual research process. They were limitations in as far as the academic conventional procedures were concerned with regard to greater scope or stylistic ways of carrying out the study in a more scientific manner than was undertaken. Another dimension is that because limitations were envisaged, they might have constituted a self-limiting factor to the researcher.

1.11 Overview of the study

The study of judicial approaches to sentencing persons convicted of serious crimes is presented in five chapters.

Chapter 1 presents a conceptual basis with regard to judicial variations in approaches to sentencing persons convicted of serious crimes in South Africa. It provides an overview and the background of the sentencing problem. The background also highlights recent and current theoretical and empirical sentencing approaches in order to promote a broader penological insight and discuss both applied qualitative and quantitative methodology and give an insight on sentencing disparities.

Chapter 2 presents penal philosophy as a framework in which to premise an analysis of judicial approaches to sentencing young offenders and adults convicted of serious crimes. A review of theoretical work of South Africa and international literature was undertaken. It examines how different sentencing theories work in shaping individual sentencers actual decision making and their justifications.

Chapter 3 traces sentencing patterns, trends and shifts over 50 years to the present in South Africa in respect of persons under the age of 18 and adults convicted of serious crimes. This chapter analyses South African sentencing approaches, legislations and subsequent trials since 1950 to the present period with a focus at key moments. The

analysis deepens both historical and theoretical understanding. It shows how penal theories applied in the actual judicial sentencing decisions. This includes gauging their penal value and justifications.

In Chapter 4 empirical judicial sentencing decisions in respect of persons under the age of 18 and adults convicted of serious crimes is analysed and relate the debate to the preceding chapters. It examines both theoretical and empirical account on sentencing decisions to serious crimes.

Chapter 5 presents conclusions and recommendations for judicial approaches to sentencing persons under the age of 18 and adults convicted of serious crimes. This chapter revisited the theoretical and empirical approaches to sentencing persons convicted of serious crimes. It accounts for how an understanding of sentencing philosophy can help to explain sentencing complexities regarding crime seriousness, severity of sentence, prior record and subsequent inconsistencies in sentencing.

CHAPTER 2

SENTENCING THEORIES ON PERSONS UNDER THE AGE OF 18 AND ADULTS CONVICTED OF SERIOUS CRIMES

2.1 Introduction

This chapter discusses sentencing theories with regard to persons under the age of 18 convicted of serious crimes with reference to their adult counterpart. It presents different sentencing theories in order to promote an understanding of and insight into how theories of punishment work. This is in accordance with the empirical part of the study, focusing on adjudicative practices.[72] Walker[73] broadly describes punishment in terms of its purpose of the justified infliction of something assumed to be unwelcome on the recipient by those having the right and power to do so in reaction to the voluntary infringement of a law. In terms of this definition punishment must have as its purpose something that is ordered rather than something that happens by error.

The presentation attempts to examine different sentencing theories in relation to sentencing practices. However, this is not to suggest that judicial sentencing approaches are simply determined by penal theories. There seems to be a range of factors that are likely to shape sentencing approaches. To a certain extent those factors are likely to feature within the ambit of penal philosophy. Indeed, it is not accurate to present these as separate entities. There is an element of co-existence of competing sentencing theories in judicial sentencing approaches. Judicial officers' penal philosophies should not be seen as some kind of static blocs in penal practices. In judicial sentencing judgments and decided cases it is possible to extract elements of desert, rehabilitation, restoration and deterrence as combined sentencing theories.

The discussion seeks to portray judicial sentencing decisions as being guided by sentencing theories, although it seems rather difficult to identify specific theories adopted by punishers in a particular rendered sentencing decision. It seems as if the interpretation of the judicial officers matters in this regard, and can be informed by the sentencing theories, the circumstances of each case, the law and the wider context. This relates to the notion that not all accused and cases are the same but call for different treatment. The analysis has to locate sentencing theories in their philosophical context. The importance of theories of punishment is of value in terms of understanding various justifications of different sentences imposed in each individual case.[74] This implies that sentencing principles function with the ambit of criminal law. This will promote an understanding of sentencing theories in line with the aim of the study, rather than presenting them in abstract.[75]

2.2 Contextual philosophy of punishment

Hogarth[76] states that sentencing does not take place in a sociological and politico-historical vacuum; rather the changing context tends to shape and influence

[72] See Chapter 1 in this thesis.
[73] Walker, N. (1991:1-3) Why Punish? Oxford: Oxford University Press
[74] See Snyman, C.R. (2008:10) Criminal Law. 4the edition, Durban: Lexis Nexis
[75] See Chapter 1 in this thesis.
[76] (1974:19) Sentencing as a human process. Canada: University Press. Also see De Keijser, J. (2000).

sentencing approaches. It is going to be evaluated in the latter chapters whether historically approaches of South African judges and magistrates were not immune from the internal and external contradictions that might influence their thinking about their sentencing patterns. For example the use of corporal and capital punishment in the 1970s and 1980s and the passing of laws in order to respond to the crime levels of the time could suggest the social and political impact on sentencing. In this regard, sentencing theories need to be situated in judicial sentencing decisions with regard to persons under the age of 18 convicted of serious crimes. Garland and Young[77] maintain that penal discourse should not be viewed from one angle only, such as the legal, economic or ideological perspective. Rather other social relational aspects of the phenomenon should be considered for a broader understanding. This proposition warns against a narrow technicist tendency which tends to view penal practices away from the social context within which they take place.

This view recognises that the application of theories of punishment and the understanding of judicial officers will be informed by the nature, circumstances and gravity of the crimes committed by persons under the age of 18 in comparison with adults in a specific jurisdiction and context. This relates to the judicial interpretation of sentencing laws and penal philosophy. Sentencing and punishment as an institution is as old as society.[78] This suggests that the use of punishment in society is inevitable, hence it requires to be balanced appropriately in order to guard against excessive sentences. The historical development suggests that criminal law originates in the sense of retribution at a personal level when one party has been violated and desires to retaliate, but as society develops these feelings are replaced by state-led punishment against those who commit wrongs.[79] The philosophical basis of punishment has undergone some reforms over the years, so that punishment can be perceived as less harsh or punitive due to the historical penological developments at specific times.[80]

Cavadino and Dignan[81] endorse the idea that punishment as a social institution takes different forms in different societies, jurisdictions and stages in history and that it is informed by social forces, with the aim to enhance social order and rules. Snyman[82] similarly argues that choices infavour for specific theories of punishment might depend on specific circumstances of each country. Societies have choices with regard to competing models of criminal justice at particular moments.[83] While the crime control model has to do with the suppression of criminal conduct and securing more convictions in order to maintain public order, the due process model appears to be concerned with the restriction of state power over individual accused persons, hence its emphasis on proper procedures and notions of rights. The assumption is that entrenching rights and procedures could lead to appropriate sentences and community confidence in state penal organs. Griffiths' emphasis on choices available to states in choosing the criminal justice model best suited to the country sounds as if power is

[77] (1983:14) The power to punish. Contemporary penality and social analysis. New Jersey: Humanities Press.
[78] (1991:1) Why Punish? quoted above.
[79] Burchell and Milton, As quoted by Terblanche, (1999:531) In 'The guide to sentencing in South Africa'. Durban: Butterworth Publishers.
[80] Killinger, and Cromwell, M. (1974:25) Penology, The evolution of corrections in America.
[81] (1997:59) The penal system - an introduction. 2nd edition. New Dehli: Sage.
[82] (2008:20)
[83] Griffiths, J. (1970:360) Ideology in criminal procedure or a third 'model' of the criminal process. The Yale Law Journal. Vol. 79, (3):359-417.

not contested by internal and external interests. In class societies there are different levels of power that appear to place constraints on the models chosen. However, it is on these levels of power that Griffiths has concentrated as presenting alternatives or shifts for countries' criminal procedures or models relevant at a particular time.

Bonger[84] suggests that penal law must be premised on the historical context and specific types of crimes that require appropriate punishment. The appropriateness of punishment in this context may refer to broader terms that involve crime prevention programmes at community level.[85] This relates to the claim that social circumstances tend to induce people into criminality.[86] Hogarth[87] argues that sentencing should be understood in terms of various contextual levels of influence, namely legal, sociological, historical and psychological. These factors tend to influence sentencing decision-makers when applying sentencing theories. For example, Rusche and Kirchheimer[88] appear to suggest that some sanctions, such as imprisonment, community service and fines, have been reinforced by the labour market. This assertion is evident in the South African penal sphere where approaches over the years seem to have been historically shaped by the need for labour.[89] This is not to suggest that each court decision have been purely influenced by labour demands.

Similarly, Althusser and Poulantzas[90] emphasise the view that the economic aspect should not be seen as the dominant factor; instead the political and state ideological stance should take precedence. In sentencing approaches, the above factors should not be regarded as contradictory, but should rather be viewed as complementary, since they are interdependent, particularly in matters of interpretation.[91] This point is crucial, particularly with regard to sentencing approaches involving persons under the age of 18 convicted of serious crimes. Sentencing involves moral judgments pertaining to the gravity of crimes and the appropriate levels of punishment that are of vital importance both to criminal accused and to society.[92] In penal discourse the punisher has the right and power to make a judgment; however, it is important not to view sentencing and punishment purely as a matter of personality or individual attitude. Rather, this should be understood as a broader matter of range of factors, philosophical theories of punishment and interpretations behind sentencing decisions. It is possible for the state to use its power to subject its political opponents to penal measures that involve detention without trial.[93]

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[84] In Gross, H. and Von Hirsch, A. (1981:293) Sentencing. Oxford: Oxford University Press.
[85] Griffiths, J. (1970:373) Ideology in criminal procedure or a third 'model' of the criminal process. The Yale Law Journal. Vol. 79(3):359-417). His perspective of the family model of justice sees the criminal behaviour not away from the social process, in order to be preventative rather than reacting through punishment.
[86] Hudson, B. (1993:10) Penal policy and social justice. London: Macmillan Press.
[87] (1974:16-17) Sentencing as a human process.
[88] As quoted by Garland, D. and Young, P. (1983:25).
[89] Van Zyl Smit, (1999:215-16) In Van Zyl Smit, D. and Dunkel, F. Prison labour: salvation or slavery? International perspectives. Aldershot: Ashgate/ Dartmouth.
[90] As quoted by Garland and Young (1983:26).
[91] Hogarth, (1974:17).
[92] Gross, H. and Von Hirsch, A. (1981:338) Sentencing. Oxford: Oxford University Press.
[93] Van Zyl Smit, (2001:589) In Van Zyl Smit, D. and Dunkel, F. 2nd edition. Imprisonment today and tomorrow – International perspectives on prisoners' rights and prison conditions. The Hague: Kluwer.

Poulantzas and Althusser[94] suggest that in class societies the state becomes a site of class forces competing for their interests. This position seems to be illustrated by Pashukanis[95] with regard to the idea that notions of private property, rights and contracts are not naturally premised, but rather are historical and legal constructions. This view further postulates that the legal framework is underpinned by class ideology. Garland and Young claim that the notion of private property is a legal dimension other than economic conception. In this context the right notions become monetary commodity and penalty of fine measures. Each penal historical policy and each piece of legislation tends to reflect the class interests of the dominant group.[96] Contrary to this view, Mabbott[97] locates punishment in a purely legal context, while Hegel, Kant and Bradley, for instance, appear to view punishment as a purely moral question.

Garland[98] points out that at some historical conjuncture minimalist and maximalist state penal approaches had to reach common ground. This refers to the conflicting interests represented by the state whereby others would want the state to be involved in judicial sentencing not just to regulate the criminal justice system. In this regard state interference with individual liberty should be limited based on court discretion and merits of crime's seriousness. This line of thought appears to be compatible with Foucault's call that punishment must be proportionate to the gravity of the crime while the power to punish remains vested in the state authorities.[99]

Durkheim[100] similarly sees the state as charged with a penal duty to protect its people. In this view the state seems to entrench itself or inculcate collective beliefs in a manner that regards offences against state power as offences against the collective. The above author describes this reaction as a violation of collective sentiments that are spontaneously widely felt. On this basis punishment has to maintain social cohesion.[101] This implies that punishment has to bring harmony in society. Another historical dimension is that punishment tends to have a wider scope than is perceived in recent years, reflecting a shift from viewing punishment as a public duty to a narrow notion of the right of the state to punish.[102] Durkheim appears to stress that the penal institution is a moral process shaped by moral sentiments. However, criticism has been levelled[103] against Durkheim's theory of punishment for presenting penal developments as given. He is criticised for portraying sentencing shifts and reforms as uncontested results rather than as the product of ongoing conflict and contradictions

[94] As quoted by Garland and Young, (1983:27). Also see Griffiths, J. (1970:367) He speaks of the battle model, which involves a conflict of interests between the individual criminal and the state in a criminal process, with sentencers trying to ensure that the battle is fought within the law.
[95] As cited by Garland and Young, (1983:28).
[96] Pashukanis, (1990:113) In Garland, D. Punishment and modern society. A study in social theory. Oxford: Clarendon Press.
[97] In Killinger, G., Cromwell, P. and Wood, J. (1979:29) Penology. The evolution of corrections in America. 2nd edition, San Francisco: West Publishing Company.
[98] (1985:46) Punishment and Welfare. A history of penal strategies. England: Gower Publishing Company Limited.
[99] (1977:53) Discipline and punish. The birth of the prison. New York: Pantheon books.
[100] In Garland, D. (1990:30) Punishment and modern society. A study in social theory. Oxford: Clarendon Press.
[101] (1990:34), quoted above.
[102] Platt, A. and Bittner, E. (1972:24) In Gerber, R. and McAnany, P. Contemporary punishment. Views, explanations and justifications. London: University of Notre Dame Press.
[103] (1990:50), by Garland above.

of different competing social groups or powers. Garland[104] asserts that the relationship between penal law and public sentiment remains contentious. This analogy relates to the serious treatment of crimes and appropriate punishment in accordance with societal sentiments.

Norrie[105] appears to suggest that responsibility for criminal conduct should be located within social relations because individuals behave within a social context. He goes on to say that accused behaviour tends to emanate from social relationships and punishment and context, accused and community or state, reflect a blaming relationship. In terms of this line of reasoning the context appears to have an effect on the culpability of the offender. Lacey[106] takes this position further that an individual offender is likely to view punishment to be connected with a broader context of what is right and wrong at a particular point in time. This idea implies that moral reasoning tends to be shaped by general attitudes. It calls for broader sentencing approaches in terms of psychology, the criminal's social background, criminal law and social science knowledge.[107] Hart suggests that punishment is not a simplistic phenomenon that can be viewed from a one-sided position, particularly in plural societies. Sentencing trends and shifts are likely to be influenced by various movements of thought in different specific societal contexts.[108]

In this context an understanding of penal power as simply state power tends to obscure versions of power which include power as control, power exercised by the judiciary and disciplinary power.[109] Matravers stresses that sentencing approaches are likely to be underpinned by wider versions of penal power, including private power, and voluntary, public and integration approaches.[110] This seems to be in accordance with the demands of penal philosophy posed by contemporary culturally plural societies. Another possibility is that such diversions of penal power and practices can actually reverse modern coherent forms of punishment and reintroduce inhumane past penal approaches.[111] This appears to regulate the notion of right and power to punish in accordance with the modern democratic principles of accountability and responsibility. Indeed, Garland[112] endorses that punishment can be regarded as a coercive relationship between the state and the offender.

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[104] (1990:58), quoted above.

[105] (2003:154) As cited by Wood, P. and Dunaway, G. Consequences of truth – in – sentencing. The Mississippi case. Punishment and Society. Vol. 5(2):139-154.

[106] (1988:12-13) State punishment. Political principles and community values. New York:Routledge.

[107] Hart, H. L. A. (1968:168-69) Punishment and responsibility. Essays in the philosophy of law. Oxford: Clarendon Press.

[108] Bottoms, A. (1995:39) In Clarkson, C. and Morgan, R. The politics of sentencing reform. Oxford: Clarendon Press.

[109] Matravers, M. (1999:155) Punishment and political theory. Oxford and Portland, Oregon: Hart Publishing. Also see Poulantzas, N. (1978:42) State, power and socialism. London: Indiana University Press. In this regard description of power appear not as a monolithic entity that can be seen to be inherently in institutions such as state, prison & judiciary but rather be understood as social relations. This refers to the different levels of power in penal realm such as the power of the judiciary, state, victims, offenders and society.

[110] (1999:160) quoted above.

[111] See Pratt, J. Punishment and civilization. Reviewed by Barry Vaughan (2003:245) In theoretical criminology. An International Journal. Vol. 7 No. 2: 139-255.

[112] (1990:280) Punishment and modern society. A study in social theory. Oxford: Clarendon Press. See Murphy, J. (1995:1) Punishment and rehabilitation. California: Wadsworth Publishing Company. The author sees criminal punishment as representing coercive state power. In this regard punishment as a necessary evil and pain tends to put a burden on the state to prove and justify its punishment. This

From a similar point of view one may argue that punishment must be seen within the cultural context.[113] This seems to suggest that the punitive response and its interpretation are likely to be relevant to a specific period and time. For example, what is viewed to be inhumane, cruel and degrading punishment currently was likely to be regarded as appropriate from the late 1700s until recent years in some societies.[114] Bentham[115] captures this point and illustrates that as far back as 1778 penal approaches involving solitary confinement could be combined with labour, reflecting disproportionate forms of punishment in most societies in Western Europe. These approaches are likely not just to rehabilitate offenders but to reshape social attitudes to the law and to punishment. Penal approaches have historically developed in a manner that reflects power relations,[116] such as state power or royal power, the power of the judiciary and the monarch, over citizens.

During the late 1700s in most western societies the infliction of pain through punishment tended to be physical, leading to excessive public executions which appear to reflect the absolute power of the authorities to punish criminals and a sense of arbitrariness.[117] In France, for instance, penal organs appear to have had different levels of power, although the king seems to have had monarchical or absolute power to punish and even to exile judges and appoint new ones. Patterns of punishment have been characterised by shifts from earlier penal approaches.[118] These penal shifts can be associated with a wider social and political evolved approaches mostly in the 18th and 20th century. In this regard monarchical penal approaches were gradually replaced by judicial torture or modern interrogation as an approach to induce the accused to make a confession. Morris[119] agrees that excessive punishment is likely to be dangerous. Over a period of time in the above highlighted jurisdictions the movement for penal reforms pervaded through taking a slow process of moderation from physical infliction of pain such as execution to investigation and intellectual battle between the criminal and the state.[120] It seems evident that judicial sentencing approaches have changed with the time. This refers to a search for a much more efficient approach.

Similarly, in the penal realm the concept of retribution has been found to have strong emotional connotations in recent years in some societies, hence desert as its variant has associations with wider notions of justifications, deserved punishment and grades.[121] Indeed, competing theories of punishment provide moral justifications and

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assertion appears to derive its strength from the criminal conduct. (Also see Kant, I., In Murphy, J. (1995:14).

[113] Grupp, E. (1971:6) Theories of punishment. London: Indiana University Press.

[114] Chapter 3 in this study is relevant to this point as it traces South African historical penal account.

[115] (2002:207) Zero tolerance, mandatory sentencing and early liberal arguments for penal reform. In Buchan, B. International Journal of the Sociology of Law. (30): 174-264.

[116] Foucault, M. (1977:78-79) Discipline and punish. The birth of the prison. New York: Pantheon books.

[117] Foucault, M. (1977:78). There is a similar pattern in South Africa over the same period, as captured by Professor Sloth Nielsen (1990:9-10). In McKendrick, B. and Hoffman, W.

[118] Foucault, M. (1977:13).

[119] (1979:42) In Killinger, G., Cromwell, P., and Wood, J. Penology.

[120] Foucault, M. (1977:69).

[121] Von Hirsch, A. (1981:46) Doing justice. The choice of punishments. New York: Hill and Wang.

try to explain the nature of punishment.[122] Significantly in recent years, punishment seems to be justifiable when it strikes a balance between the rights of the offender and those of victims in societies with just and viable Bills of Rights. In this perspective crime committed by the criminal represents a negation of the rights of other persons, and punishment is necessary to affirm the rights that have been violated in a balanced way.[123] Sentencing theories should give meaning and interpretation to the culpability of the offender, the gravity of the crime with regard to the harm done to the victim and society, the criminal record and the measure of punishment to be inflicted on the offender. It should be noted that different penal theories have competing goals on the purpose of specific punishments.

2.3 Desert sentencing theory

Von Hirsch and Duff[124] describe retribution and desert sentencing theory as involving looking at the harmfulness of the crime, and the degree of culpability of the conduct of the offender to gauge the measure of punishment, and prescribing a deserved sentence with the aim of prevention and fairness. Retribution and desert are regarded as deontological theories of sentencing, as they are premised on looking backward as their point of departure in censuring the wrongfulness of conduct. Von Hirsch and Duff also claim that the theory look forward, as the sanction seeks to prevent future offending. This last factor suggests an element of consequentialist theory within deontological thought, in other words, punishment must be justified and deserved, but also justified as a means of preventing future crimes. Desert sentencing theory seems to regard the seriousness of the crime as a basis for a certain measure of punishment.

Murphy[125] argues that desert is justified in punishment on the basis that the penalty should be deserved by the offender. The moral culpability of the offender provides the sentencing court with the right and duty to punish. The notion of deserved punishment assumes that persons have wider choices and are capable of foreseeing the results of the criminal conduct. This notion sounds simplistic because evolving circumstances such as violent conditions and the age factor tend to count in matters of individual choice-making. In this regard choice-making is not immune from psychological pressures. However, in the same vein offenders have the right to just and proper procedures.

Moore[126] connects the principle of fairness with the notion of deserved punishment, in other words the criminally liable person should deserve the quantum of punishment. This idea seeks to limit an unwarranted measure of punishment and suggests that punishment for its own sake might not serve the purpose of preventing crime. Mundle[127] concurs that the infliction of pain should fit the crime. This view recognises that it will mean injustice for the guilty to be unpunished, which would send wrong signals to the public and in respect of future conduct. Indeed, it is unjust

[122] Rabie, Strauss and Mare, (2000:19) Punishment: an introduction to principles. South Africa: Alex Patria Publishers.
[123] Hegel, as quoted by Murphy (1990:284) In Primoratz, Justifying legal punishment. London: Humanities Press International, Inc.
[124] See Von Hirsch, A. and Ashworth, A. (1998:161) Principled sentencing. Readings on theory and policy. 2nd edition. Oxford: Hart Publishing.
[125] (1995:3) Punishment and rehabilitation. 3rd edition. California: Wadsworth Publishing Company.
[126] See Von Hirsch and Ashworth, (1998:150).
[127] In Grupp, S. (1971:62) Theories of punishment. London: Indiana University Press.

to punish the innocent or to punish the guilty by disproportionately harsh punishments or disproportionate leniency. In the same breath, to punish atrocious crimes for the sake of deterrence and rehabilitation is unwarranted without judging the justification for the quantum of punishment. In this regard the necessity of punishment is likely to be relevant to enhance a sense of conformity and law abiding.[128] Primoratz[129] endorses the above proposition on the basis that a purely utilitarian understanding of punishment tends to ignore the link between punishment and justice in desert sentencing, and as a result unjust punishment is possible. Desert theory of sentencing provides the right to punish and enhances the duty to punish in a justifiable manner. Moore[130] and Primoratz[131] concur that the principle of deserved punishment can often be characterised by a tendency to narrow justification, while it stresses a certain amount of commensurate punishment.

The notion of commensurate[132] punishment to the culpability of the offender might be problematic in the context of justified desert punishment, since it might be impossible to measure the degree and effect of punishment inflicted on the offender. This view argues that the degree of harmfulness of the crime of murder might be hard to establish in terms of how much harm was intended and how severe punishment should be in order to meet the notion of justification in desert theory. Walker[133] warns against a loose understanding and application of the notion of justification in desert sentencing theory and recognises the importance of the principle of blameworthiness with regard to the conduct of the offender in sentencing decisions.

Although desert theory of punishment seems to oppose the deterrence view that punishment should be imposed to deter the offender and to encourage others to desist in future, there is an area of convergence. In desert theory punishment should be justified and deserved by the offender's past wrongdoing and also be justified as a way of preventing future crimes.[134] The subsequent chapters will investigate whether theories are combined in practice. In the words of Duff:[135] 'desert sentencing looks both back towards the crime which is punished, as a justified response to that crime, and forward towards the offender's repentance and self-reform.' This approach further states that punishment which is justified as a balanced response for past crime, could also by its very nature contain a future-oriented aim. In this regard serious offences by responsible persons should justify severe censure.

Deserved censure should be proportionate to the seriousness of the crime and the degree of guilty.[136] This implies that the notion of deserved punishment might not just relate to the amount of punishment, rather it involves wider legal procedures. It is proper to inflict and carry out punishment in such a way that society can fulfil its

[128] Durkheim as quoted by Toby, J. (1971:106) In Grupp, S. Theories of punishment.
[129] (1990:145) Justifying legal punishment. New Jersey: Humanities Press.
[130] See Von Hirsch and Ashworth, (1998:150).
[131] (1990:145), quoted above.
[132] Walker, (1998:156) In Von Hirsch, A. and Ashworth, A.
[133] (1998:156) In Von Hirsch and Ashworth,
[134] Duff, R. A. (2001:21) Punishment, communication and community. Oxford: University Press.
[135] Duff, R. A. (1998:161) In Von Hirsch, A and Ashworth, A..
[136] Cross, R. and Ashworth, A. (1981:126) The English sentencing system. 3rd edition. London: Butterworth.

responsibility and honour the criminal by rendering deserved sentencing measures.[137] Because of the 'free will' of individual offenders, their repentance will come from their own judgment and understanding, not by coercion or forms of disproportionate penance.[138] Von Hirsch adopts this argument on the basis that penalties that are grossly excessive in relation to the gravity of crimes tend to be seen as unfair. This view calls for a less mechanical conception of the principle of proportionality in sentencing, in other words not equating proportionality with the notion of revenge, mere retribution and biblical notions of an eye for an eye.

Van Zyl Smit seems to recognise this challenge by advancing the proposition that the sentencing court needs to maintain a balance between the sentencing principles of fairness, legality and equality in terms of the desert proportionality framework.[139] Both Van Zyl Smit and Von Hirsch conceptualise sentencing in desert theory as strictly meant to be guided by sentencing principles. They suggest that deciding the quantum of punishment should be based on focusing on the committed offences rather than the consequences or the seriousness of the crime of the convicted offender. This calls for balanced sentencing approaches. In desert theory the degree of blameworthiness has implications for the quantum of punishment to be selected by the criminal courts. Von Hirsch[140] and Morris[141] agree that the principle of proportionality in desert sentencing theory tends to be a limiting factor, because it cannot determine some definite quantum of severity of punishment compared to the seriousness of the crime. They state that the proportionality principle provides broad limits in terms of which punishment should be delivered. It tends to limit the minimum and maximum of the sentence that may be imposed and does not prescribe the appropriate sentence for the case at hand. For example, with regard to rankings in terms of ordinal proportionality, it should be borne in mind that persons convicted of serious crimes could be punished with comparable severity, and those that are convicted of crimes of differing gravity should suffer punishment correspondingly graded in seriousness.[142]

The culpability of the offender tends to present a sufficient and necessary basis of liability for criminal punishment.[143] In this view the degree of culpability tends to differ, which requires cases to be treated on merit.[144] This view acknowledges that gauging the seriousness of crimes in relation to rankings in their gravity poses practical difficulties. However, the gravity of crimes depends on the degree of harmfulness of the conduct of the offender to the victim and society, while culpability can be gauged with the guidance of criminal law in matters of distinguishing intentional criminal conduct from reckless or criminal negligence conduct.[145]

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[137] Stella, P. (2001:63) 'Purpose and effects of punishment'. European Journal of Crime, Criminal Law and Criminal Justice, 1.
[138] Duff, R. A. (2003:299) Penance, punishment and the limits of community. Punishment and Society. Vol. 5 (3): 259-365.
[139] (2004) Sentencing and punishment. In M. Chaskalson et al (eds.) Constitutional Law of South Africa. (Revision Service 5).
[140] See Von Hirsch and Ashworth (1998:172).
[141] See Von Hirsch and Ashworth (1998:173).
[142] Ashworth, A. (1983:189) Sentencing and penal policy. London: Weidenfeld and Nicolson.
[143] Moore (1995:96) In Murphy, J. Punishment and rehabilitation.
[144] McCloskey, H. (1972:132) In Ezorsky, G. Philosophical perspective on punishment. Albany: State University of New York Press.
[145] Von Hirsch, (1998:185) In Von Hirsch, A. and Ashworth, A.

Comparing the harmfulness of criminal conduct should take into account that the acts tend to invade different interests and needs of the victim and society.[146] These interests and needs might include psychological suffering, physical harm (wound), dignity, social deprivation and cultural aspects. This sentencing approach entails assessing the past wrongful conduct and level of blameworthiness in accordance with the justification of the deserved punishment.[147]

Gauging the severity of punishment requires an interest-based analysis, that is, punishment should be ranked according to the degree to which it affects the interests of the punished person's freedom of movement, privacy, earning ability and quality of life.[148] In this case long-term imprisonment qualifies as a severe penalty because it takes away the liberty of the punished person. This implies that severe punishment is not just about torture or mere imprisonment, but about the different interests and needs of the offender; hence a non-custodial sentence (house arrest) can be restrictive, impinge on the interests of the offender and be equally severe or more so than imprisonment, depending on the interests of the offender.[149] Von Hirsch[150] argues that interests impinged on by the sanctions could increase the severity. Therefore penalties should be ranked according to the degree to which they intrude on the sentenced person's freedom of movement and earning ability. This argument goes on to say that the weight of the interests could be gauged by the extent to which they affect the punished person's living standard rather than the defendant's subjective perceptions of painfulness, which tend to vary. As a result, gauging the seriousness of various crimes and the severity of penalties poses practical difficulties when judicial officers have to rank the gravity of crimes and compare this to the severity of the punishment.[151]

In desert sentencing theory the punishers tend to a limited extent to take into account the criminal record of the offender. The extent to which prior record is taken into account depends on its relevance to the current crime. Gross and Von Hirsch[152] postulate that studies suggest that in sentencing practice the judicial officers tend to take into account the seriousness of the crime and criminal record when discharging punishment. Other factors are viewed as secondary. However, there are different views among desert theorists on the relevance of the prior record in sentencing decisions. Some hold that the prior record should not be considered,[153] while others believe that offenders who are convicted for the first time should receive discount, but such mitigation could lapse if there is re-offending.[154] Von Hirsch[155] suggests that the criminal record should be considered not as an approach to determine the measure of punishment with regard to the culpability of the offender and blameworthiness, but

[146] Simester, A. P. and Von Hirsch, A. (2002:281) Rethinking the offence principle. Legal theory. Vol. 8(3): 269-385.
[147] Von Hirsch, A. (1981:49) Doing justice. The choice of punishments. New York: Hill and Wang.
[148] Von Hirsch, A. (1992:197) In Von Hirsch, A. and Ashworth, A. Principled sentencing. Boston: Northeastern.
[149] See Von Hirsch and Wasik, (2001:145-47) Proportionate sanctions and sentence substitutability: a reply to Austin Lovegrove. The Howard Journal, vol. 40:2).
[150] (1993:34) Censure and sanctions. Oxford: Clarendon Press.
[151] Empirical chapters in this study will determine this assertion.
[152] (1981:304) Sentencing. Oxford: Oxford University Press.
[153] See Fletcher, G. and Singer, R. (1992:195) In Von Hirsch, A. and Ashworth, A.
[154] Ashworth, A. (1995:31) Sentencing and criminal justice. 2nd edition. Edinburgh: Butterworths.
[155] (1998:195) In Von Hirsch and Ashworth

rather previous convictions should be considered to gauge and array appropriate punishment to the present crime.

It is important to gauge the extent of the meaning and interpretation of the above factors in judicial sentencing decisions to persons under the age of 18 convicted of serious crimes or multiple counts in contrast to their adult counterparts.[156] Von Hirsch and Jarebong[157] provide a proportionalist description of the seriousness of crime. They state that harm can refer to committed injury or injury risked by crime, while culpability refers to factors of intent, motive and circumstances that determine the extent of blameworthiness of the individual. For instance, murder is more serious than aggravated assault, hence the injury is greater, and more serious than negligent homicide because the offender's culpability is greater.[158]

Broadly, factors of prior record that seem to be considered in sentencing decisions include: number of previous convictions, similarity of previous crime to the present crime, frequency of re-offending, seriousness of previous offences, age of accused when he or she received previous convictions, and previous sentences.[159] In this regard the degree of gravity of harm and extent of prior convictions tend to give weight to the meaning of seriousness of crime in sentencing approaches to a varying degree between different sentencers and courts.[160] It is likely that previous conviction can serve as a discount in the sentence, although in cases of very serious nature such as rape a clean record or by a first offender tend to provide a limited discount.[161] This line of thought might appear to increase the severity of a sentence, or to decrease it, depending on the assessment applied. The number, similarity of previous crimes to the current one and frequency of past offences and punishments appear to be relevant in sentence selection based on desert.[162]

Another dimension is that the extent of age, prior record, crime seriousness and personal predictions of dangerousness are likely to be reflected in whether offenders are treated as juveniles or adults.[163] The prior record factor appears to fit better within the forward-looking justifications in the identification of high-risk offenders who require confinement.[164] However, such power should promote sentencing decisions that do not just consider the seriousness of the crime and a prior record but also factors surrounding each individual crime.[165] In judicial practices it is possible that the role, meaning and interpretation of these factors might be narrow or one-sided,

[156] Lovegrove, A. (1997:20) The framework of judicial sentencing. A study in legal decision-making. Cambridge: University Press. The author calls for high levels of consistency in sentencing.
[157] See Von Hirsch and Ashworth, (1992:221). Principled sentencing.
[158] Also see Snyman, C. (1991:151-53) Criminal law. 2nd edition. Durban: Butterworths.
[159] Walker, N. (1985:44) Sentencing theory, law and practice. London: Butterworths.
[160] Devlin, K. (1970:47) Sentencing offenders in magistrates' courts. London: Sweet and Maxwell.
[161] Dunbar, I. and Langdon, A. (1998:92) Tough justice. Sentencing and penal policies in the 1990s. Great Britain: Blackstone Press.
[162] Wasik, M. (1987:109) In Wasik, M. and Pease, K Sentencing reform. Guidance or guidelines? Great Britain: Manchester University Press.
[163] Feld, B. and Podkopacz, M. (2001:1001) The back-door to prison: waiver reform, 'blended sentencing', and the law of unintended consequences. The Journal of Criminal Law and Criminology. Vol. 91(4): 547-1156.
[164] Durham, A. (1987:618) Justice in sentencing: The role of prior record of criminal involvement. The Journal of Criminal Law and Criminology. Vol. 78(3): 614-803.
[165] Gottfredson, D., Wilkins, L. and Hoffman, P. (1978:79) Guidelines for parole and sentencing. A policy control method. Toronto: Lexington Books.

suggesting sophisticated diversity in sentencing approaches with regard to persons under the age of 18 convicted of serious crimes and adults.[166]

Tonry[167] calls for the principle of parsimony to be considered in sentencing decisions as it tries to promote consistently less severe sentences in accordance with the principle of proportionality. The principle of parsimony in proportional punishment encourages sentencers to take account of particularly young offenders' circumstances, the offence context and punishment dimensions. In terms of this view, the age factor in sentencing decisions to persons under the age of 18 convicted of serious crimes should be closely considered, thus recognising that persons under the age of 18 convicted of serious crimes deserve punishment that considers their level of culpability, which must be less than that of their adult counterparts. Judicial sentencers should understand the age factor in relation to the offenders' culpability and circumstances in an effort to promote justifiably deserved punishment. This point emphasises link between desert theory and lesser sentences for under 18 years offenders.

2.3.1 Justifiable deserved punishment to persons under the age of 18 convicted of serious crimes

Desert sentencing theory seems to be relevant to persons under the age of 18 convicted of serious crimes because it accept their youthfulness while retaining its emphasis on justified deserved punishment. In desert theory the deserved punishment hinges on three central questions: Why punish? Whom to punish? How much to punish?[168] Desert theorists seem to agree in principle on the second and third questions, while the first – why punish? – seems to elicit two different approaches among modern desert theorists. Offenders should not be punished more than is warranted by the seriousness of the crime.[169] Moore[170] advances the approach that persons who commit crimes deserve to be punished for the reason that those who commit civil wrongs deserve to be made to pay damages as their extent of liability requires. It seems as if Moore's approach focuses solely on the act of the crime which deserves punishment to the exclusion of anything else.

To the question of "why punish?", Von Hirsch appears to take the broader view that judicial punishment focuses to some extent on the level of blameworthiness of the criminal conduct and the offender's culpability. The other justification for legal punishment is based on the future prevention of criminal conduct. Duff[171] concurs that the question of "why punish?" requires a backward-looking approach to gauge the wrongfulness of the past conduct and is forward-looking in that punishment attempts to prevent future criminal conduct. In this context justified deserved punishment should consider the criminal conduct and the offender's age in assessing blameworthiness to impose deserved punishment. The age factor should be considered

[166] Blumstein, A., Cohen, J., Martin, S. and Tonry, M. (1983:80) Research on sentencing: The search for reform. Washington, D.C.: National Academy Press.
[167] In Duff, R. A. (1995:157). A reader on punishment . Oxford: Oxford University Press.
[168] See Von Hirsch, A. and Ashworth, A. (1998:141).
[169] Von Hirsch, A. (1981:71) Doing justice. The choice of punishments.
[170] In Von Hirsch and Ashworth, (1998).
[171] In Von Hirsch and Ashworth, (1998).

in the understanding of culpability.[172] The amount of infliction of punishment on those under the age of 18 should fit the degree of their culpability in contrast to their adult counterparts. If the gravity of the crime committed by an accused aged 17 is relatively or equal to a crime committed by an accused aged 15 then the severity of punishment should be less for the young accused.

In relation to the second question – whom to punish? – desert theorists concur that only those who are found guilty beyond reasonable doubt ought to be punished. This limitation distinguishes desert theory from the deterrence notion of exemplary punishments and future predictions.

The third question – how much to punish? – seems to be fundamental to persons under the age of 18 convicted of serious crimes. This question calls for the principle of proportionality in sentencing decisions to be better understood and interpreted broadly. In the context of sentencing persons under the age of 18, punishment should be deserved considering the age factor in relation to culpability. The quantum of punishment should be commensurate with the culpability of the offender, thereby recognising the age factor and other circumstances in a sensitive manner.[173] Walker concurs with the view that ordinal sentencing should consider the different circumstances of each crime. For example, with regard to a 16-year-old who has been convicted of housebreaking and a 29-year-old who is convicted of the same act, culpability should differ, inter alia due to the age factor which requires appropriate punishment. The age factor of the criminal accused is likely to be considered by the sentencing court, including extremely old age and those under the age of 18.[174]

Desert sentencing theory[175] perceives offenders as moral agents, and assumes that they have a sense of right and wrong. In this regard the notion of deserved punishment should be premised on an understanding that the moral judgment of persons under the age of 18, due to their lesser maturity, is not the same as that of their adult counterparts.[176] The degree of reprehensibleness of the conduct of persons under the age of 18 convicted of serious crimes requires the severity of punishment to be proportionate to the level of blameworthiness.[177] When dealing with persons under the age of 18, the severity of punishment should not purely be determined by the seriousness of the crime, rather other factors and rehabilitation-based approaches should be considered. The notions of minimum and maximum punishment in proportional sentencing seem to promote deserved sentencing to persons under the age of 18 convicted of serious crimes. Indeed, the idea of balanced, appropriate sentencing matters particularly when dealing with those under the age of 18 convicted of serious crimes. Offenders under the age of 18 presents complicated emotional, psychological and social needs in contrast with their adult counterpart.

[172] Thomas, D. A. (1980:257) Principles of sentencing. The sentencing policy of the court of Appeal Criminal Division. 2nd edition, London: Heinemann.
[173] Walker, N. (1998:156) In Von Hirsch and Ashworth,
[174] Devlin, K. (1970:43) Sentencing offenders in magistrates' courts. London: Sweet Maxwell.
[175] Von Hirsch, (1998:176) In Von Hirsch and Ashworth,
[176] Boyle, C. and Allen, M. (1985:137) Sentencing law and practice. London: Sweet and Maxwell.
[177] Cross, R. and Ashworth, A. (1981:80) The English sentencing system. 3rd edition, London: Butterworths.

Von Hirsch[178] suggests that in the context of sentencing persons under the age of 18 convicted of serious crimes, their prior record should not be considered to increase the quantum of punishment. This implies that justified and deserved censure requires knowing the social history, including previous convictions of the young offender, in order to gauge the commensurate punishment to be imposed in accordance with the needs and interests of the offender. This is related to the notion of the pre-sentence report necessary for the court to sentence persons under the age of 18 convicted of serious offences. In this regard re-offending may be attributed appropriately to previously imposed sentencing measures which require treatment of cases afresh and on merit, in line with their specific context and the circumstances of the persons under the age of 18 convicted of serious crimes. The age factor of those under 18s should serve as a mitigating factor in judicial sentencing approaches, as should be the case to those older than 60, and should serve as a ground for leniency in sentencing courts.[179]

The penalty to be imposed tends to depend on the seriousness of the crime, while seriousness seems to depend on the gravity of harm caused or risked by the criminal conduct and the degree of the offender's culpability regarding its blameworthiness.[180] In this line of reasoning offenders convicted of crimes of similar seriousness can be treated commensurate with their level of blameworthiness. The 17-year-old offender convicted of robbery with aggravated circumstances should probable be punished less severely than a 22-year-old offender convicted of the same crime. This relates to treating crimes on merit, and the young offender is presumed to have less insight into the consequences of his action than his adult counterpart.

2.3.2 Treating serious cases on merit with regard to persons under the age of 18

Von Hirsch[181] and Feld[182] both argue that it is possible for desert sentencing theory to be applied to child offenders on the basis of proportionate and deserved punishment. They argue that persons under the age of 18 should be regarded as having a lesser degree of culpability. For example, if a 16-year-old person and a 30-year-old person commit similar robberies, the degree of harm of the act is the same, yet the level of blame should be different. Feld and Podkopacz[183] emphasise that the difference should be with regard to culpability, that is, child offenders should be understood as having less blame in committing an offence, which makes the conduct less serious. It is further argued that the punishment should be less for the crime committed by the child offender because culpability is less compared to the same criminal act committed by an adult offender. This view appears to be criticising waiver and blended sentencing in judicial approaches, although recognising that accused under

[178] (1998:196) In Von Hirsch and Ashworth,
[179] Walker, N. (1985:51) Sentencing theory, law and practice. London: Butterworths.
[180] Von Hirsch, A. (1981:79-80) Also see Von Hirsch, (1992:188) In Von Hirsch, A. and Ashworth, A. Principled sentencing. Boston: Northeastern University Press. Von Hirsch endorses the view that ordinal proportionality places emphasis on keeping correspondence between relative seriousness of the crime and relative severity of the sentence, while cardinal proportionality requires the overall levels of the penalty scale to be kept in some reasonable relation to the degree of gravity of the criminal conduct.
[181] (2001:223) Proportionate sentences for juveniles. How different than for adult? Punishment and Society. Vol. 3(2) 221-237.
[182] (1999:197) Punishment and society. a funny thing happened on the way to the centenary. Punishment and Society. Vol. 1(2) 187-209.
[183] (2001:1009) The back-door to prison: waiver reform, 'blended sentencing', and the law of unintended consequences. The Journal of Criminal Law and Criminology. Vol. 91(4):547-1156.

the age of 18 charged for serious crimes can be tried as adults, but with less culpability compared to adults and with additional criminal procedural rights.

In desert sentencing theory[184] the notion of deserved punishment hinges on the understanding of culpability. In this regard the age factor must influence culpability while recognising the harmfulness of the serious crime to the victim and gauging the severity of the punishment. This approach allows for appropriate sentence being handed down to persons under the age of 18 convicted of serious crimes. Similarly, Tonry[185] warns against unwarranted, grossly disproportionate, unjust desert-based sentencing if it simply scales the severity of punishment to the seriousness of the crime on the basis of treating like crimes the same or equally. He argues against mechanical uniformity because each crime has its own specific circumstances. This idea also raises the need to treat only truly like cases alike while proposing that crimes be ranked in order of their seriousness and punishments be proportionate to those rankings.[186]

In this scheme persons convicted of serious crimes would get harsher penalties than those convicted of less serious crimes. This comparative scale should not concentrate mechanically and exclusively on the severity of crimes and criminal records, at the expense of the personal factors and circumstances of convicted persons under the age of 18.[187] Sentencing decisions should reflect a broader grasp of ordinal proportionality with regard to the order of severity in relation to the order of punishment. However, in some sentencing jurisdictions the seriousness of the committed crime by a 16-year-old offender tends to outweigh the age factor, so that the accused might be treated as an adult.[188] This position is relevant, particularly in serious cases of murder where the age factor may be regarded as subordinate to the seriousness of the crime.[189]

Von Hirsch[190] and Zedner[191] acknowledge that young offenders have less capacity to assess and appreciate the harmful consequences of their criminal actions than their adult counterparts. They argue that young offenders have less opportunity to develop impulse control and resist peer pressures to offend. The above authors call for individualised assessment of young offenders' culpability based on the degree of moral development. They state that if expectations regarding comprehension and self-control are greater in respect of a 16-year-old than in respect of a 13-year-old, the penalty reductions will be smaller for the 16-year-old. This analysis avoids a blanket approach on age of culpability, hence its emphasis on categorisation, but it is not clear how the authors can measure the degree of moral development except by assumptions based on age. This analysis further suggests that persons under the age of 18 should never be viewed as a homogenous group; rather, they have different emotional and

[184] Feld, B. (1997:101) Abolish the juvenile court: youthfulness, criminal responsibility and sentencing policy. The Journal of Criminal Law and Criminology. Vol. 88(1) 68-101.
[185] (1996:13-14) Sentencing matters, New York: Oxford University Press.
[186] See Von Hirsch, A. (1981:78) Doing justice. The choice of punishments.
[187] Devlin, K. (1970:48) Sentencing offenders in Magistrates' courts. London: Sweet and Maxwell.
[188] Cole, D. and Roberts, J. (1998:278) Making sense of sentencing. London: University of Toronto.
[189]See Wasik, M. (1993:37) Emmins on sentencing. 2nd edition, London: Blackstone Press Limited.
[190] (2001:223). Proportionate sentences for juveniles. How different than for adult? Punishment and Society. 3(2):221-237.
[191] In Ashworth and Wasik, (1998:170). Fundamentals of sentencing theory. Essays in honour of Andrew Von Hirsch. Oxford: Oxford University Press.

material needs of development which should be taken into account in sentencing decisions.

Ashworth[192] supports the idea that desert sentencing theory is capable of taking into consideration young offenders' social circumstances in mitigation, including age. The principle of equality before the law should be measured by the notion of the legality of punishment and is central in desert sentencing theory.[193] Desert sentencing theory departs from the premise that offenders should be punished equally. It suggests a sense of parsimony which recognises that punishment can be limited by the fact that an act was not intentional, including the age factor and other circumstances. Indeed, the principle of equality in desert theory suggests that punishment should not be grossly unequal and unjust, so that indeed the punishment becomes offensive. Zedner[194] argues further on the principle of equality by emphasising that young offenders be held responsible for offences they have committed and be punished similarly to adult offenders in accordance with their level of culpability. Similarly, the perspective on the treatment of offenders assumes that they have duties and responsibilities to know the consequences of their conduct, hence they can be criminally liable and blameworthy.[195] Von Hirsch[196] agrees that lack of responsibility can lead to a situation where young offenders are treated less severely than adults and are seen as objects of excessive state intervention at the expense of their rights and dignity. There seems to be a clash between penal approaches and notions of rights, particularly when it comes to their application to offenders under the age of 18 as they enjoy more rights than their adult counterparts.[197] In this context the rights discourse appear to limit the quantum of sentence. From another angle it can be argued that rights and procedures might prevent treating the offender as an end in himself rather than as a means to social process.[198] This refers to less disproportionate approaches. Tonry and Hamilton[199] in this regard call for monetary penalties to be proportionate to the financial positions of the respective offenders. They argue that a fine is the most ordered sanction, mostly for serious property crimes and violent crimes. This cannot be possible in young offenders as opposed to their adult counterparts.

Logan[200] adopts the position that the principle of proportionality is central to the sentencing of persons under the age of 18 convicted of serious offences. He argues that approaches to juvenile sentencing tend to exhibit narrow interpretations of the application of the principle of proportionality. This narrow understanding tends to subject persons under the age of 18 to harsh adult punishments or long-term imprisonment that does not give them hope that one day they will be released and

[192] In Ashworth and Wasik (1998:172) Fundamentals of sentencing theory. Oxford: Oxford University Press.
[193] Van Zyl Smit, (2004). Sentencing and punishment.
[194] In Ashworth and Wasik, (1998:173). Fundamentals of sentencing theory.
[195] Hart, H. (1968:40) Punishment and responsibility. Essays in the philosophy of law. Oxford: Clarendon Press. Hart stresses that the basis for conditions of responsibility involves that the accused acted of his own will, without coercion or duress.
[196] In Ashworth and Wasik (1998:174).
[197] Knowles, D. (1999:33) In Matravers, M. Punishment and political theory. Oxford and Portland, Oregon: Hart Publishing.
[198] Lacey, N. (1988:23) State punishment. Political principles and community values. London & New York: Routledge.
[199] (19995:15) Intermediate sanctions in overcrowded times. Boston: North Eastern University Press.
[200] (1998) Proportionality and punishment: Imposing life without parole on juveniles. Wake Forest Law Review 33:681-725.

become law-abiding members of society. What is required is an approach that takes into account the unique characteristics of persons under the age of 18, and that would be meaningful and efficient in sentencing and punishment discourse, especially for those that are convicted of serious crimes.

According to Logan,[201] proportionality should be informed by three objective factors. Firstly, it should be informed by the gravity of the offence and the harshness of the punishment. The courts must also consider the severity of punishment at the level of decision-making and whether it is disproportionate. Secondly, it is useful to compare the sentences imposed on other criminals in the same jurisdiction to assess if more serious crimes are subject to the same penalty or to lesser penalties in order to get some indication whether the punishment is excessive. Thirdly, it may be helpful for judicial officers to compare the sentences imposed in other jurisdictions for commission of the same crime. This broad-based approach to sentencing and punishment tries to prevent gross disproportionality, particularly when dealing with young offenders.

Feld[202] argues that juveniles whose criminal records show persistence in committing serious crimes warrant criminal courts to treat present serious crime seriously in accordance with the age. In this regard the age factor could serve as a mitigating factor in the selection of punishment although crime remain serious. This proposition seeks to prohibit the tendency where the harmfulness of the crime and the record of recidivism are considered to increase the degree of culpability and subsequently outweigh the age factor when the court is deciding a sentence. Comparisons can be made in the light of the harm caused or threatened to the victim or society, and the culpability of the young offenders in contrast to an adult. For example, courts would consider the seriousness of the crime of rape and compare it to other crimes such as murder to determine the nature of the crime by different age groups. In this case the culpability of the child offender may be established by the lack of intent to kill. In this view it is important not to divorce the crime from its surroundings and the youth offender's culpability, especially with regard to a young offender that is convicted of a serious crime. Failure to endorse this approach may suggest that the principle of proportionality is violated.

Logan[203] further postulates that judicial officers should examine the circumstances of the crime, its motive, the extent of the accused's involvement in the offence, the manner in which the crime was committed and the consequences of the accused's actions. Among the considerations are the personal characteristics of the accused, age, prior criminality and mental capabilities. Logan's description of the proportional point of departure could promote justified deserved punishment to reduce the trend by appeal courts in which the imposed penalties are declared 'grossly disproportionate' to the child offender's individual culpability.

The age factor and other circumstances should serve as a basis for an understanding of the proportional sentencing approach. As Logan[204] puts it: 'the age factor per se

[201] (1998), quoted above.
[202] (1987:498) The juvenile court meets the principle of the offence: legislative changes in juvenile waiver statutes. The Journal of Criminal Law and Criminology. Vol. 78(3) 471-533.
[203] (1998), quoted above.
[204] (1998: 696), quoted above.

should not necessarily follow that all 15-year-olds are incapable of moral culpability, rather culpability be balanced appropriately'. This argument support the view that persons under the age of 18 are less blameworthy than adults who commit similar crimes, yet they can be responsible for their crimes although their age could serve as a mitigating factor to promote the notion of a balanced, proportionate punishment. Understanding young offenders' culpability could help the judicial officers to structure the sentence that it is not just proportionate to the degree of seriousness of the crime but also to the needs of offenders under the age of 18, particularly those that are convicted of serious crimes who might face the possibility of sentences that can amount to deprivation of liberty. Different offenders have specific needs that could require for instance approaches that are premised on reintegration of the offender into the community.

2.4 Rehabilitation sentencing theory

Rehabilitation theory involves an attempt to change the offender's personality, opportunities and treatment in order to help the person to be a law-abiding member of society.[205] As an outcome-oriented and -based approach it is forward-looking in focus for future prevention of crime.[206] From its consequentialist standpoint, it emphasises notions of re-socialising the offender and separating from society if there is a possibility of offending again. Unlike desert, rehabilitation theory is likely to permit different sentences for similar crimes.[207] For example, in the case of two offenders aged 17 and 18 convicted of housebreaking with intent to steal and theft the judicial officer is likely to impose community-based treatment on one offender while for the other offender a prison-based programme might be more suitable. The justification for the selection of these two sentences could be based on treatment for specific needs and prevention of re-offending and public protection. In this theory justification is likely to depend on the prediction of the dangerousness.[208] In this view those who are posing a greater threat are likely to receive treatment-related confinement in order for the individual to be available for the treatment programme.

The effectiveness of the application of the theory of rehabilitation tends to be measured by recidivism rates, thereby trying to gauge if offenders have been induced to desist. It is argued however, that the trend to use reconviction as a measure for success of penal treatment seems to be inadequate in showing a connection to types of sentences or treatment to gauge future patterns of behaviour.[209] In the same breath, this view recognises that empirically most studies perceive the theory to be less effective, and that treatment programmes tend to be effective only when they are applied to certain types of offenders or when they target specific behaviours. The counter-argument suggests that conditions under which the programmes are operated matter and in some circumstances this works successfully particularly with young offenders.[210] Another argument in favour of the theory claims that effective

[205] See Neser, J. (1993:61) Penitentiary penology. 2nd edition, Johannesburg: Lexicon Publishers. Also see McWilliams, W. (1987:99) Probation, pragmatism and policy, (27), The Howard Journal, p.97-121.
[206] Moberly, W. (1968:44) The ethics of punishment. London: Faber and Faber.
[207] Von Hirsch, A. (1981:12) Doing justice.
[208] Von Hirsch, A. (1981:167) , In Gross, H. and Von Hirsch, A. Sentencing. Oxford: Oxford University Press.
[209] Bagaric, M. (2001:153) Punishment and sentencing. A rational approach. Sydney: Cavendish Publishing Limited.
[210] Bagaric, M. (2001:154).

rehabilitation is possible with short imprisonment sentences, probably combined with suspended sentences, probation, fines or community corrections rather than long imprisonment sentences.[211]

Similarly, this view associates[212] the decline of the rehabilitative use of treatment programmes with stigmatizing notions based on the rigid treatment of offenders as a means rather than an end. Gilbert, Karen and Cullen[213] take a different view, namely that the state should play a key role in promoting penal treatment in prison, thereby creating humane conditions in order to enhance the therapeutic environment. These authors dismiss the desert, rights-based notion that offenders are responsible persons who are free to engage in criminal activities. They argue that social injustices may lead individuals to breach the law, and that punishment should consider the nature of the crime and the circumstances surrounding the crime to gauge the severity of punishment. From the perspective of a less restrictive understanding of the theory it appears that prisoner rehabilitation can complement the rights-oriented method.

Von Hirsch and Maher[214] present the thesis that the notion of treatment in rehabilitation sentencing theory requires a consideration of the degree of blameworthiness of the conduct of the offender. Therefore, specific treatment programmes should germinate from gauging the social and personal characteristics of the offender. This seems to be helpful and possibly particularly applicable to sentencing persons under the age of 18, in order to know their specific needs and interests with a view to preventing recidivism and developing their personal skills. The above cited authors argue that proportionality as a limiting principle in sentencing can provide broad parameters for the quantum of punishment even in cases in which a rehabilitative sentence can be imposed. In this regard, understanding the harm of the offence to the victim and the culpability of the offender with regard to the age factor can relate penal treatment to the specific circumstances of the offender. The contemporary proponents of rehabilitation focus on persuading rational individual offenders to co-operate in their own long-term interest.[215] This view further stresses that rehabilitative penal programmes should demonstrate respect for the person as a moral agency, as part of enhancing the confidence to rehabilitate.

2.4.1 Rehabilitation approach in sentencing decisions in respect of persons under the age of 18 convicted of serious crimes

In penal discourse it is sometimes argued that it is possible for rehabilitative goals to be premised on the framework of the principle of proportionality, that is, that the punishment should be commensurate with the gravity of the offence.[216] In the context of punishing persons under the age of 18 convicted of serious crimes approaches are likely to be appropriate in terms of this theory due to its focus on the needs of the offender rather than the nature of the crimes.[217] In this regard the degree of culpability

[211] Rotman, E. (1990:148) Beyond punishment. A new view on the rehabilitation of criminal offenders. London: Greenwood Press.
[212] Allen (1998:14) In Von Hirsch, A. and Ashworth, A.
[213] In Von Hirsch and Ashworth, (1998:21).
[214](1998:30) In Von Hirsch and Ashworth,
[215] See Rex, (1998:38) In Von Hirsch and Ashworth.
[216] See Rex, (1998:38) In Von Hirsch and Ashworth. Also see Von Hirsch, A. (1981:127) Doing justice.
[217] Von Hirsch, A. (1981:11) Doing justice.

should take account of the age factor when the criminal court discharges penalties. The lower the age, the greater should be the possibility for a reduction of the degree of culpability compared to adult offenders. It is stated that desert should determine the measure of punishment, while rehabilitation should determine the content.[218] Wasik and Von Hirsch[219] emphasise that it is possible for the punisher to select a sentence which is appropriate to the offender, which might be a probation sentence in line with rehabilitation theory. In the same breath the sentencing court can array restrictions on liberty that are proportionate to the seriousness of the crime.

Serious consideration of the age factor in sentencing decisions can promote rehabilitation programmes, thereby helping young offenders to improve their reasoning skills. Rex[220] believes that cognitive behavioural programmes could help offenders to consider the consequences of their conduct for their own interests and other persons. A similar proposition calls for individualised treatment because offenders present different needs and age-related interests which are constantly changing.[221] Individualisation approach recognises that different offenders have been convicted and punished for crimes of varying degrees of seriousness. In this regard sentencing involves more than simply an understanding of the personality of the offender, rather it includes knowing of treatment measures designed for different reactions of particular offenders.[222] This understanding is likely to be reflected in judicial sentencing decisions, treatment programmes, parole decisions and release of prisoners.[223] Treatment programmes for offenders should not appear as a monopoly of the state, rather other role-players should assist.[224] From a utilitarian position punishment should communicate to the criminal to desist in future, through the use of treatment.[225]

Another dimension is that it is possible for a rehabilitation-oriented sentencer to impose long sentences on those convicted of serious crimes based on predictions of dangerousness and of the treatment that consequently is required.[226] It is stated that predictive communicative censure and treatment could be justified on the basis of prevention.[227] Duff emphasises that punishment in this context proceeds from the idea that offenders must be dealt with as members of a community and be held liable for committing wrongs. Nevertheless, it is important to note that effective rehabilitation cannot take place in isolation, nor can it be the sole responsibility of the correctional system.[228] There is a need to build social networks, which include favourable

[218] See Hudson, B. (1995:22) Beyond proportionate punishment: difficult cases and the 1991 Criminal Justice Act, Crime law and social change, 74).
[219](1998:279) In Von Hirsch and Ashworth,
[220](1998:36) In Von Hirsch and Ashworth,
[221] Glueck, S. (1971:279) In Grupp, S. Theories of punishment. London: Indiana University Press.
[222] Whinery, L., Nagy, T., Sather, G. and Fisher, K. (1976:9) Predictive sentencing. An empirical evaluation. Toronto: Lexington Books.
[223] Glueck, S. (1971:281).
[224] Garland, D. (1985:126) Punishment and welfare. A history of penal strategies. Great Britain: Gower Publishing Company Limited.
[225] Duff, A. R. (1995:176) In Murphy, J. Punishment and rehabilitation. 3rd edition. California: Wadsworth Publishing Company.
[226] Allen, F. (1972:214) In Gerber, R. and McAnany, P. Contemporary punishment. Views, explanations and justifications. London: University of Notre Dame Press.
[227] Duff, A. R. (2001:82) Punishment, communication and community. Oxford: University Press.
[228] Rotman, E. (1990:167) Beyond punishment. A new view on the rehabilitation of criminal offenders. London: Greenwood Press.

conditions, family support and combined approaches to encourage the former prisoner to become a law-abiding member of society.[229] In sentencing decision making and the broader penal context, rehabilitation approaches seem to have the potential for fostering a humane, positive attitude and behaviour due to the age factor. This group of persons is vulnerable to re-offending if the punishment is not appropriate to their interests. In S v Makwanyane and Another[230] the concept of humaneness (ubuntu) and fairness seem to be at the centre of the Constitutional Court decision. This judgment appears to pave the way for sentencing approaches that are premised on fairness and justice.

2.5 Restorative theory

Restorative theory is regarded as a broad approach to criminal justice rather than a theory of punishment.[231] The major focus of this approach is on restitution and compensation, or resolution of the conflict, that is, the crime and its underpinnings are viewed as representing conflict which requires to be mediated.[232] The mediation should seek to involve the victim, the offender and the family in the resolution of the dispute, and building community support networks such as anti-crime programmes in a proactive manner.[233] This theory works differently in judicial decision-making in the context of sentencing. With its notions of forgiveness it is likely to be in conflict with the law of sentencing.[234] It argues that justice is unlikely to be done through single legalistic approaches.[235] It is likely that a restorative-oriented sentencer can use wider sentencing options involving community-based sentencing measures.[236] Indeed some judicial sentencing jurisdictions appear to recognise the theory's response to crime in a different, socially integrative way.[237] In some sentencing court, the victim might express a wish regarding sentencing, particularly those that have suffered as a result of serious crimes, and diversions of minor cases particularly by young persons.[238] An expression of a wish is not a procedural matter; it depends on the court or victim.

It is important to illustrate that restorative approach might be relevant in some cases of varying circumstances. For example sentencing court can convict a 17-year-old offender of theft of a vehicle and possession of an unlicenced firearm and impose a sentence of four years' imprisonment with both counts running concurrently. Hypothetically the sentencer can reason that the offender can effectively serve three

[229] Palmer, T. (1994:71) A profile of correctional effectiveness and new directions for research. Albany: State University of New York Press.
[230] 1995 (3) SA 391 (CC).
[231] See Zedner, (1998:343) In Von Hirsch, A. and Ashworth, A.
[232] Hickey, C. (1999:86) In Consedine, J. and Bowen, H.) Contemporary themes and practice. New Zealand: Ploughshares publications.
[233] White, R. (2003:151) Communities, conferences and restorative social justice. The International Journal of Policy and Practice. Vol. 3 (2): 139 – 221.
[234] Murphy, J. (2003:265) Christianity and criminal punishment. Punishment and Society. Vol. 5 (3): 259 – 365.
[235] Consedine, J. (1999:22) Restorative justice. Healing the effects of crime. New Zealand: Ploughshares publications.
[236] Skelton, A. (1993:81) In Report of the international seminar on children in trouble with the law. 15 – 17 October. South Africa: A Community Law Centre Publication. Also see Devlin, K. (1970:169) Sentencing offenders in magistrates' courts. London: Sweet and Maxwell.
[237] Mackay, R. (2003:11) Restorative justice and the children's hearings – a proposal. European Journal of Crime, Criminal Law and Criminal Justice. Vol. 11 (1): 1 – 150.
[238] See Von Hirsch and Ashworth, (1998:301).

years' imprisonment and the other one year's sentence could count for a community probation sentence. In the case of a 28-year-old offender convicted of the same crime, the sentencing court might reason that the older offender deserves a four-year prison treatment sentence. This judicial reasoning might reflect views that suggest that the inflicted pain of punishment conveys different meanings and perceptions to young and adult offenders. In this regard young offenders tend to be seen as vulnerable to state penal crime control measures.[239] When dealing with young offenders in particular, sentencing approaches should recognise the specific circumstances and the context with a focus on the harm caused by the crime to the victim and the community.[240]

Christie[241] and Petit and Braithwaite[242] argue that sentencing courts should take account of the interests, needs and circumstances of the directly affected parties. They believe that the process of making the wrongs right requires inclusive approaches to different cases. This implies that criminal court decision-making and procedures should be broadened. In the context of judicial sentencing the above quoted authors seem not to offer specific ways on how to deal with different categories of serious crime. Their analysis seems to be based on the assumption that all crimes are less serious or are crimes only in the context of criminal justice. In this regard, Von Hirsch[243] states that a penal theory should give principled and fair guidance on the ordering of criminal punishment. It is likely for restorative theory to contribute to the discourse on sentencing, particularly in respect of the relative seriousness of crimes and the context, similar to desert, rehabilitation, incapacitation and deterrence.

Both restorative theory and desert theory recognise the offender's autonomy as an individual to make moral choices, hence their notion of responsibility. Indeed there is a growing and shared view emerging from empirical studies that restorative justice is less frequently applied on the ground, particularly in relation to serious crimes. A certain degree of evidence suggests that where it has been applied it includes elements of retribution to censure the past offence and rehabilitation elements to encourage future law-abiding conduct.[244] But the harmfulness of crime is viewed from different angles by the two theories. In desert theory punishment should be proportionate to the culpability of the offender with regard to the intent to offend, while restorative theory departs from the view that crime has been inflicted on the victim and justice should repair harm to the victim. This shows that the theory of restorative justice is relationship-centred.

Broadly, both notions might provide guidance to judicial officers, especially with regard to sentencing persons under the age of 18 convicted of serious crimes. Thus, these approaches could be geared towards rights-based sentencing in a consistent and balanced way. Frase[245] endorses the idea that the impact of restorative justice theory in sentencing approaches should be recognised. On the one hand, restorative justice

[239] Brown, S. (1998:82) Understanding youth and crime. Listening to youth? Philadelphia: Open University Press.
[240] Pinnock, D. (1997:65-66) Gangs, rituals and rites of passage. Cape Town: African Sun Press.
[241] (1982:94) Limits to pain. Oxford: Martin Robertson.
[242] (1990:91) Not just deserts. A republican theory of criminal justice. Oxford: Clarendon Press.
[243] (1998:334) In Von Hirsch and Ashworth.
[244] Zedner, (1998:334) In Von Hirsch and Ashworth, Also see Daly, (2002:59) Restorative justice, the real story. Punishment and Society. 4(1) 5-140.
[245] In Tonry and Frase, (2001:272) Sentencing and Sanctions in Western Countries. Oxford: Oxford University Press.

can reduce stigmatization of the accused due to being forward-looking and notions of forgiveness, reparation and community-oriented approaches. On the other hand, this argument goes on to say that with regard to victims' rights, if there is a strong emphasis on vindictive sentiments such as payback, then there is the possibility that severe penalties will be imposed by judicial officers. Cavadino and Dignan[246] call for an integrated restorative model, an approach that takes into account the recognition and protection of human rights involving the victim, the offender and the community. In such approach, for example the National Institute for Crime Prevention and the Rehabilitation of Offenders (NICRO) provides for a Family Group Conference (FGC) to deal with persons under the age of 18 in a manner that brings together the victim, the offender and their families.[247] The FGC focuses on making the wrongs good and promoting community involvement in criminal justice processes. In the judicial sentencing context the rights-based approach should be within the limits of the principle of proportionality to individual offenders. This refers to the fact that rights of the accused could not outweigh seriousness of crime and liability.

2.5.1 Relationship-centred sentencing to persons under the age of 18 convicted of serious crimes

A victim-offender approach, in relation to the proportionality approach, suggests a capability of balancing the rights of the victim and those of the offender in a manner that seeks to repair or punish the harm.[248] It is also possible to recognise the human rights of members of the public within the ambit of this principle. Cavadino and Dignan[249] state that in penal discourse restrictions of these rights should be justified on the basis of violations of another person's rights and the degree of harm the crime causes the victim. Diversion of young offenders away from the criminal justice system is most likely to yield good results, particularly regarding trivial crimes.[250] In the penal context diversions involve wider measures which the offender requires to attend to.[251] They range from skills training programmes, referral to rehabilitation centres, and direct and indirect compensation to the victim, although monetary compensation tends to be difficult to implement due to lack of resources.[252] Such programmes should be viewed within the ambit of penal treatment because they deprive leisure time and liberty of offenders as liable persons.[253] Duff further postulates that an offender can repent, recognising his wrongdoing, and in the sense of penance, as a form of restitution, express this to his victim and the community.

In the criminal sentencing court it is possible in some cases for judicial officers to impose restitution orders on the offender, particularly those convicted of robbery and

[246] (1998:352) In Von Hirsch and Ashworth.
[247] See Muntingh, L. M. and Shapiro, R. J. (1997:14) An introduction to diversion from criminal justice system. Cape Town: NICRO.
[248] Daly, K. (2002:61) Restorative justice. The real story. Punishment and Society. Vol.4 (1):55-79.
[249] See Von Hirsch and Ashworth, (1998:351).
[250] Kratcoski, P. and Kratcoski, L. (1990:245) Juvenile Delinquency. 3rd edition, New Jersey: Prentice Hall.
[251] Rutherford, A. (1977:4) Youth crime policy in the United States. Cambridge: Institute for the Study and Treatment of Deliquency.
[252] Gross, F. (1985:109) Youth in crisis. Johannesburg: Juta and Co., Ltd.
[253] Duff, R. (2001:109) Punishment, communications and community. Oxford: Oxford University Press.

theft, to repay money to the victim.[254] In cases where it is unlikely that the compensation order could be successful, the court can opt for another measure according to its discretion regarding the accused's circumstances.[255] The victim-rights based approach stresses that victims should participate in the criminal court solution-seeking process. Ashworth[256] raises concerns, about the impact of the victims' involvement in sentencing, since it might lead to inconsistency as some victims may be more vindictive than others. This point is relevant particularly to sentencing persons under the age of 18 convicted of serious crimes. Sentence imposed with the seriousness of their crimes and the age factor in mind, might not meet the demands and the different needs of their victims.[257] Dignan[258] acknowledges this point and emphasises that the response to the violation of a person's rights should not be excessively severe. This argument seems to avoid sentencing notions of general deterrence based on wider societal interest.

2.6 Deterrence sentencing theory

Deterrence sentencing theory holds that general prevention of crime should be the chief end of punishment.[259] In this theory sentencing is forward-looking in relation to its preventive aims.[260] It is regarded as part of consequentialist theories of punishment, which include rehabilitation and incapacitation. Its proponents believe that deterrence sentencing theory punishment is justified and measured by the utilitarian idea of preventing future offences. For it the seriousness of the crime should not be the sole basis for punishment in judicial sentencing.[261] The consequentialist notion in the context of deterrence theory is to inflict punishment to deter future offences. It seems to have less capacity for distributing criminal punishment than for justification.[262] In the words of Bentham, punishment is rendered for 'conduct of the party himself who has committed mischief already, and the conduct of other persons who may have similar motives'.[263] This point might be associated with its orientation of prediction of dangerousness or risk in order to deter future crimes.[264]

Deterrence suggests two goals: the first part relates to individual deterrence, that is, punishment has to be inflicted directly on the offender in order to deter him or her from re-offending for the aim of prevention, and the second part suggests that general deterrence attempts to impose punishment in such a manner that it can deter other potential offenders and general members of society.[265] Hypothetically a sentencing

[254] Cross, R. and Ashworth, A. (1981:64) The English sentencing system. 3rd edition. London: Butterworths.
[255]Thomas, D. A. (2003:485) Case and Comment. Sentencing. R v Jannaway. The Criminal Law Review:431-494.
[256] (1998:343) In Von Hirsch and Ashworth,
[257] Murphy, J. (1995:144) Punishment and rehabilitation. 3rd edition. California: Wadsworth Publishing Company.
[258] See Von Hirsch and Ashworth, (1998:353).
[259] Bentham, (1998:45) In Von Hirsch and Ashworth,
[260] See Von Hirsch and Ashworth, (1998:44).
[261] See Rabie, Strauss and Mare, (2000:25) and Von Hirsch and Ashworth, (1998:44).
[262] Von Hirsch, A. (1981:61) Doing justice.
[263] See Von Hirsch and Ashworth, (1998:53).
[264] Gross, H. and Von Hirsch, A. (1981:187) Sentencing. Oxford: Oxford University Press.
[265] Van Den Haag, E. (1983:67) In Van Den Haag, E. and Conrad, J. The death penalty. A debate. New York and London: Plenum Press.

court might impose exemplary imprisonment sentence on an offender under 18 convicted of theft on the basis that such offender is a danger to society and that punishment is likely to deter others who might be tempted to commit similar crimes.[266] According to Bentham,[267] deterrence theory of sentencing perceives individuals as rational beings to be influenced by the punishment imposed by the courts and restrained from crime. The quantum of punishment tends to be determined by the possible future predictions of criminal conduct of other people rather than the present offence.[268] In the same breath, the quantity of punishment should increase with the degree of crime. This implies that the punishment should meet the crime. This also relates to the persistence of certain crimes at a particular time in different sentencing jurisdictions, for instance the persistent cases of child rape. In such situations it is likely that the sentencing courts could hand down exemplary severe sentences to convicted offenders.

Deterrence theory[269] assumes that crimes are committed because the expected benefits tend to outweigh the consequences of such actions. This is particularly the case with regard to certain property-related crimes. When one asks offenders who are serving sentences for property crime about their choices to commit offences, their responses tend to support the fact that interests outweighed the penal outcomes of their conduct.[270] Based on the notion of moral choice of individual persons, deterrence theory calls for severe punishment of apprehended and convicted persons for the purposes of deterrence.[271] Goldman[272] postulates that deterrence punishment should limit its array of penalties to the guilty. Goldman goes on to cite Van den Haag as a proponent of deterrence theory whose recent ideas seem to object to punishment of the innocent for mere deterrence and further points out that deterrence penalties should be proportionate to the gravity of crimes.

Proportionality within deterrence sentencing theory sounds fair, particularly when the court ought to discharge punishment to persons under the age of 18 convicted of serious crimes. Beyleveld[273] endorses the view that in order for deterrence to be effective it requires not to be excessive in the quantum of punishment for the sake of threatening potential offenders. This may lead to offending other sentencing principles and may retard rehabilitation, in other words a long prison sentence, with disregard of the seriousness of the crime, might not be regarded as fair by the offender.[274] The extent of the threat of punishment varies depending on various specific crimes and their motives.[275] The threat of punishment is likely to be effective if it is inflicted in relation to interests.[276] Its effect might probably induce and reform wrong conduct in

[266] Moberly, W. (1968:53) The ethics of punishment. London: Faber and Faber.
[267] (1998:45), quoted above.
[268] Barbara, H. (1993:36) Penal policy and social justice. London: Macmillan Press Ltd.
[269] Schuessler, K. (1971:182) In Grupp, S. Theories of punishment.
[270] See Magobotiti, C. D. (2001:178), MA thesis.
[271] Lacey, N. (1988:28) State punishment. Political principles and community values. London and New York: Routledge.
[272] , (1998:83) In Von Hirsch and Ashworth
[273] (1998:67) In Von Hirsch and Ashworth,
[274] Newman, G. (1983:134) Just and painful. A case for the corporal punishment of criminals. London: Collier Macmillan Publishers.
[275] Andenaes, J. (1974:85) Punishment and deterrence. USA: The University of Michigan Press.
[276] Lacey, N. (1988:27) State punishment.

the interests of society.[277] In this regard the individual offender seems to be a point of departure with a view to prevention or reforming the offender through punishment.[278] Recent studies suggest that the theory has not been able to provide evidence of the deterrent effect of its sentence severity for various crimes.[279] Walker concurs with this assertion and further recognises that offenders may be deterred in some situations depending on a range of factors and circumstances.[280]

2.6.1 Individual deterrence to persons under the age of 18 convicted of serious crimes

For deterrence sentencing theory to work effectively judicial officers should have detailed information relating to the individual's character, the circumstances and the previous record particularly of the young offender.[281] This could assist the sentencing court in gauging the appropriate sentence for the specific young offender to reduce the likelihood that the young offender will commit further crimes.[282] In this context, a criminal record might increase the quantum of punishment although the principle of parsimony may still moderate punishment to be commensurate with the individual young offender.[283] This suggests that in the case of an offender aged 16, for example the recidivism factor might serve to aggravate or mitigate the extent of punishment.

Bentham[284] provides three preventive descriptions of deterrence punishment to the individual offender. Firstly, the individual offender's physical power may be taken away, which relates to physical incapacitation through incarceration and capital punishment. Secondly, punishment may be inflicted to take away the desire to offend, which relates to rehabilitation. Thirdly, the theory believes that punishment may induce the offender not to offend again by intimidation, that is, punishment may seek deliberately to inflict pain. A similar view is that individual experience of punishment is likely to instil fear.[285] Offenders under the age of 18 are likely to endure greater fear from experienced punishment in contrast to adults due to their immature emotional levels.

According to this line of reasoning the punished individual offender is likely to adopt conformist behaviour resulting from personal experience,[286] although an individual could react differently towards threatening consequences and distance himself from former criminal conduct or the group. In this view the judicial officer should assess the personality of the offender when selecting punishment, particularly for those

[277] Saunders, T. (1991:20) Plato's penal code. Tradition, controversy and reform in Greek penology. Oxford: Clarendon Press.
[278] Packer, H. (1972:102) In Gerber, R. and McAnany, P. Contemporary punishment. Views, explanations and justifications. London: University of Notre Dame Press.
[279] See Beyleveld, (1998:67) In Von Hirsch and Ashworth, Also see Von Hirsch, Bottoms, Burney and Wikstrom, (1999:45). Criminal deterrence and sentence severity.
[280] (1980:67) Punishment, danger and stigma. The morality of criminal justice. Oxford: Basil Blackwell.
[281] Devlin, K. (1970:8) Sentencing offenders in magistrates' courts. London: Sweet and Maxwell.
[282] O'Donnell, P., Churgin, M. and Curtis, D. (1977:51) Toward a just and effective sentencing system. Agenda for legislative reform. London: Praeger Publishers.
[283] Von Hirsch, A. (1998:45) In Von Hirsch, A and Ashworth, A.
[284] (1998:53), quoted above.
[285] Andenaes, J. (1974:176) Punishment and deterrence.
[286] Zimring, F. and Hawkins, G. (1974:226) Deterrence. Chicago and London: The University of Chicago Press.

under the age of 18 convicted of serious crime.[287] The basis for this line of reasoning is that the individual offender is liable for his wrongdoing.[288] Some sentence forms appear to have a deterrent effect in relation to the nature of crimes.[289] It is likely that severe punishment might suppress the criminal behaviour of the individual compared to a lenient sanction.[290] This might relate to treating offenders as ends for the good of society.[291] In sentencing decisions and from the above deterrence preventive aims, it is important to note that the theory is not only about the severe punishment of imprisonment, since a suspended sentence can serve as a deterrent for possible future severe penalties given re-offending. A non-custodial sentence can impose severe restrictions depending on what would deter the young offender.

2.6.2 General deterrence to persons under the age of 18 convicted of serious crimes

The notion of general deterrence[292] conceptualises the infliction of punishment on the convicted person as an example, thereby intimidating other potential offenders that might be subjected to the same penalty if they are found guilty. The justification of general deterrence is premised on the idea that punishment is meant to be the chief end.[293] This refers to the degree of severity of punishment for the purposes of prevention of future offending and no more. In the context of persons under the age of 18 exemplary sentences may offend other sentencing principles such as proportionality and fairness, if it is imposed for the sake of the public good or greater deterrence of potential offenders in future. Hypothetically, from a utilitarian viewpoint, a sentencer might base her or his reasoning on the need for public protection.[294] The judicial claim on public protection should be properly balanced with the merit and facts of the specific case to avoid disproportionate punishment.[295] Nevertheless, the reasoning on the interests of the public appears to suggest that punishment is an expression of societal condemnation for greater restraint and ought to uphold public confidence.[296] This suggests that punishment is inflicted on behalf of the public and the courts could become acceptable through its approaches. It is claimed that the public morale generated by punishment tends to promote a sense of awareness against crime.[297] There is however, a need for general deterrence theory to associate its measures closely with the interests and needs of young offenders and with the relative gravity of the crime.[298]

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[287] Andenaes, J. (1974:3).
[288] Farrell, D. (1995:41) In Murphy, G. Punishment and rehabilitation. California: Wadsworth Publishing Company.
[289] Lacey, N. (1988:32) State punishment. Political principles and community values.
[290] Zimring, F. and Hawkins, G. (1974:239).
[291] Newman, G. (1985:203) The punishment response. New York: Harrow and Heston.
[292] Bentham, (1998:54) In Von Hirsch and Ashworth,
[293] Devlin, K. (1970:7) Sentencing offenders in magistrates' courts.
[294] Henham, R. (2003:60) The policy and practice of protective sentencing. The International Journal of Policy and Practice. Vol. 3(1): 57-83.
[295] Lacey, N. (1988:30).
[296] Hawkins, G. (1972:123) In Gerber, and McAnany, Contemporary punishment. Views, explanations and justifications. Also see Farrell, D. (1995:44) In Murphy, J. Punishment and rehabilitation.
[297] Andenaes, J. (1974:8).
[298] O'Donnell, P., Churgin, M. and Curtis, D. (1977:54) Toward a just and effective sentencing system. Agenda for legislative reform. London: Praeger Publishers.

In this theory of punishment the notion of threat as communication to offenders appears to be fundamental, increasing in scale as crime increases, with the purpose of greater deterrence.[299] This suggests that some penalties could vary with a view to increasing the threat of deterrence and general reaction could reveal personality characteristics regarding fear of painful consequences. In order to be more effective, general deterrence theory should attempt to understand serious crime in its context, the nature of the crime and the age factor, to judge the level of blameworthiness of the offender for the appropriate sentence. For example, crimes of passion and common crimes ought not to be dealt with as homogenous types of crimes. It is possible for young offenders to conform better to the socialising influence cultivated by punishment than older offenders.[300] In the deterrent perspective socialising can be viewed outside and within the prison in a manner that suggests perceived invaded personal interests.[301] This is possible because the theory could use the prisoner as an example to a broader community outside prison. In this position it appears that the more restrictions imposed by punishment the greater the degree of reducing offending to the prisoner and to others.

2.7 Incapacitation sentencing theory

Incapacitation is one of the theories of punishment which may be described as consequentialist, in the sense that it looks forward to predictive restraint.[302] It seeks to deal with offenders in a manner that makes them incapable of offending for a substantial period of time in the interests of the public good.[303] This theory tends to be applied to certain groups, such as dangerous offenders, career criminals or other persistent offenders, and is likely to call for the sentencing option of imprisonment.[304] Wilson[305] argues that incapacitation theory makes no assumptions about human beings while deterrence assumes rationality. Unlike rehabilitation theory, which seeks to rehabilitate the offender's attitude to desist from crime, incapacitation theory leads to physical restraint of the person, to prevent them from becoming involved in crime by imposing sentencing options.

These broadly range from capital punishment to long or life imprisonment, probation orders, house arrest, and disqualification from driving.[306] These penal measures vary in sentencing jurisdictions and are decided on the basis of predicting possible re-offending. From a utilitarian perspective punishment appears to be proactive, hence the claim that it treats the individual as a means to an end.[307] A sentencer who strongly adheres to this theory is more likely to predict that in the event of imposing a suspended or community sentence on an offender under the age of 18, he will commit another crime during the period of his non-custodial sentence. This reasoning might persuade the judicial officer to select a much longer imprisonment sentence in

[299] Zimring, F. and Hawkins, G. (1974:19-20) Deterrence.
[300] Hawkins, G. (1971:168) In Grupp, S. Theories of punishment.
[301] Lippke, R. (2003:44) Prisoner access to recreation, entertainment and diversion. Punishment and Society.
[302] Von Hirsch, A. (1981:19) Doing justice.
[303] See Von Hirsch and Ashworth, (1998:54).
[304] Bagaric, M. (2001:128) Punishment and sentencing: A rational approach.
[305] (1998:113), quoted above.
[306] Ashworth, A. (1998:68) In Ashworth, A. and Wasik, M. Fundamentals of sentencing theory. Oxford: Oxford University Press.
[307] Newman, G. (1985:208) The punishment response. New York: Harrow and Heston.

accordance with predictive restraint. This line of thought remains a challenge in the sense that the relationship between future and past criminal conduct is not easy to determine, nor is the offender's reaction to the likely imposed punishment.[308]

Ashworth[309] postulates that incapacitation theory claim that it can identify some offenders as dangerous because they are likely to commit serious crimes in the future. If offenders present great risks to victims, then it is justifiable to incarcerate them for a long period, particularly if they have committed heinous crime.[310] A sentencing criminal court may require to know previous convictions, social history, personality and other circumstances to be able to predict future re-offending.[311] It is possible that potential recidivists or those who have a conviction record may be seen by the judicial officers or parole boards as presenting a possible risk to commit further crimes.[312] Similarly, Walker[313] and Bottoms and Brownsword[314] raise concern about measures imposed based on predictions of the possible danger for serious harm and re-offending. The authors acknowledge the conflicting rights of the offender and the victim, but concede that in the case of competing rights, the rights of the person who has harmed or attempted to harm should be limited in respect of the crucial right of the victim or for public safety.

The claim to protect the community appears to be an underlying idea in the theory of incapacitation.[315] As quoted by Bagaric, Judge Brennan stated in the Channon case that: 'The necessary and ultimate justification for criminal sanctions is the protection of society from conduct which the law proscribes. Criminal sanctions are purposive, and they are not inflicted judicially except for the purpose of protecting society, nor to an extent beyond what is necessary to achieve that purpose.'

Indeterminate sanctions such as a life sentence appear to have a demoralizing effect on the individual lifer to varying degrees, based on their personalities.[316] In the same vein, but from different angles, Wood and Dunaway[317] appear to have identified some practical limitations of the incapacitation theory in its predictions of dangerousness-based measures. They argue that predictions on dangerousness should be informed by accurate information and be less one-sided in order to avoid disproportional punishment. This argument stresses that because incapacitation tends to base its sentencing decisions on previous arrests and conviction, social history, age and unemployment to predict likely subsequent commission of dangerous crime rather than the crime itself, it might be unfair. For example, in the case of two offenders, say F is convicted of assault with intent to do grievous bodily harm yet cannot really present the above predictive factors, while B is convicted of housebreaking and his

[308] Whinery, L., Nagy, T., Sather, G., and Fisher, K. (1976:7) Predictive sentencing. An empirical evaluation. Toronto: Lexington Books.
[309] (1995:68). Sentencing and criminal justice. 2nd edition. Edinburgh:Butterworths.
[310] Zimring, F. and Hawkins, G. (1987:160) Capital punishment and the American agenda. New York: Cambridge University Press.
[311] See Von Hirsch and Ashworth, (1998:88).
[312] Von Hirsch, A. (1981:20) Doing justice.
[313] See Von Hirsch and Ashworth, (1998:104).
[314] See Von Hirsch and Ashworth, (1998:105).
[315] Bagaric, M. (2001:130).
[316] Walker, N. (1980:109) Punishment, danger and stigma. The morality of criminal justice. Oxford: Basil Blackwell.
[317] (2003:152) Consequences of truth – in sentencing. The Mississippi case. Punishment and Society. Vol.5(2): 139-154.

record can be strongly associated with subsequent offending, a sentencing court in relation to this argument might impose a harsh sentence on offender B predicting from the record, while offender F receives less a sentence. This suggests a wide margin, although the harm might be relatively serious in both cases. In this regard individualisation of the penalty is necessary in order for the punishment to be tailored to the specific offender.[318] As suggested by Von Hirsch, in this context for individualisation to be successful it requires decision-makers to have wide discretion. Such discretion is likely to permit the punisher to make use of a pre-sentence report to gather relevant information about the offender's state of mind during the time of the crime and other factors to assess the level of blameworthiness and future dangerousness.[319]

Tonry[320] takes this argument further and suggests intermediate mixed sentences because differences between the interpretation of 'dangerous' and 'non-dangerous' tend to lead to differences between the punishments of offenders who have committed the same crime. This tends to aggravate existing inequalities in punishment and suggests that there might be a sense of rigidity and a risk of passing some mandatory sentences due to prediction orders of dangerousness of different crimes at a certain period or in a certain jurisdiction.

2.7.1 Sentencing predictions in respect of persons under the age of 18 convicted of serious crimes

In relation to sentencing persons under the age of 18 convicted of serious crime, it is possible for the judicial officers to impose short sentences based on predictions of rehabilitation within a short period.[321] The age factor and unemployment should not be seen purely as predictions to increase punishment, because there is a risk of the punishment being declared a gross violation of the Beijing Rules[322] and other sentencing principles. It is possible that a utilitarian-oriented judicial officer may observe these sentencing principles and hypothetically impose 19 months of imprisonment on a 17-year-old offender in contrast to a 23-year-old adult where both have been convicted of robbery. In this case the 23-year-old offender might receive two years' imprisonment on the prediction that he might have better foreseen the consequences of his action than his younger counterpart and hence presents a risk of re-offending. Tonry[323] captures this point in the sense that an increase in punishment on the basis of incapacitation is unfair; hence punishment should be derived from the degree of blameworthiness and the culpability of the offender.

It should be determined in the next chapters whether judicial sentencing officers combine incapacitation with other sentencing theories in an eclectic approach, particularly when distributing punishment to persons under the age of 18 convicted of

[318] Von Hirsch, A. (1981:27) Doing justice.
[319] Angus, G. and Cole, D. (2003:339) Using pre-sentence reports to evaluate and respond to risk. The Criminal Law Quarterly. Vol. 47(3): 233-396.
[320] (1993:68) In Von Hirsch, A. Censure and sanction. Oxford: Clarendon Press.
[321] Cross, R. (1981:135) The English sentencing system.
[322] It is one of the international instruments including Human Rights Committee and other rights instruments.
[323] (1995:157) In Duff, A. R. and Garland, D. A reader on punishment. Oxford: Oxford University Press. Tonry recognises that some cases might dictate incapacitation or deterrence, hence within utilitarian principles sentencing must not be severe.

serious crimes.[324] This includes measures such as suspended sentences of a certain part of imprisonment and probation sentences to be applied.[325] The age factor in sentencing decisions can be considered differently by the punishers in the sense that a utilitarian punisher can regard older age as mitigating while younger age can result in greater predictions for dangerousness in future and therefore warrant severe punishment.[326] The reasoning could be that young offenders present greater future possibilities or risk of re-offending compared to their adult counterparts.

As suggested by the notion of individualisation of sentence, incapacitation is not only about imprisonment emanating from the individual offender's need to be restored to the community if it is proper.[327] In this regard each particular offender must be restrained from recidivism by a punishment adjusted to him.[328] Similarly, Hart endorses the view that prevalent crimes and persistent offenders might be met by severe punishment in accordance with the prevention of more criminality.[329] But the high rate of recidivism tends to relate to petty crimes and correlation is less when it comes to serious crimes.[330] In this context it is difficult to predict whether young offenders are to be regarded as dangerous, because most of them lack a criminal history, compared to their adult counterparts.

2.8 Social theories of sentencing

Various contemporary theorists criticize the traditional theories of punishment for tending to look at sentencing in isolation from its wider social and political setting.[331] They believe that sentencing theories should be more responsive to social conditions and community expectations. Hudson[332] opines that priority should be given to crime prevention and reduction of the use of imprisonment by sentencing regimes. She proposes changes in social policy that relate to job creation, education, health and other basic needs. These are of more significant importance than mere debates about proportionality of sentence. In this regard sentencing should consider the problem of the whole person rather than individual conduct or behaviour.

According to Hudson the state should not divorce social processes and events from people, rather there must be emphasis on the provision of rehabilitative opportunities. In sentencing practice, this perspective should occur within a framework set by proportionality theory. Similarly, Lacey[333] is of the view that the state must demonstrate its duty to foster a sense of community by providing proper facilities and equal opportunities for all citizens. Once this equal environment is created, then

[324] Walker, N. (1985:118) Sentencing theory, law and practice. London: Butterworths.
[325] Roberts, J. (2003:245) Evaluating the pluses and minuses of custody: sentencing reform in England and Wales. The Howard Journal of Criminal Justice. Vol. 42(3): 217-322.
[326] Green, E. (1961:55) Judicial attitudes in sentencing. A study of the factors underlying the sentencing practice of the criminal court of Philadelphia. London: Macmillan.
[327] Duff, R. A. (2001:15) Punishment, communication and community. Oxford: University Press.
[328] Bentham, J. (1972:59) In Ezorsky, G. Philosophical perspective on punishment.
[329] (1968:172) Punishment and responsibility. Also see Gibbs, J. (1982:285) In Bedau, H. The death penalty in America. 3rd edition. Oxford: Oxford University Press.
[330] Bagaric, M. (2001:135).
[331] See Ashworth, A. (2005:87) Sentencing and criminal justice. 4th edition, Cambridge: University Press.
[332] (1995:59) Beyond proportionate punishment: Difficult cases and the 1991 Criminal Justice Act. Crime, law and social change.
[333] (1998:23) State punishment. London: Routledge

punishment is justified as promoting the values it has decided to protect through use of criminal codes.

The principle of proportionality is notable to conflict with the notions of welfare of the community. A possibility is raised by Lacey that community involvement should be monitored due to potential biases. In the same breath, the republican theory of Braithwaite and Petit[334] maintains that the criminal justice system can promote a system of minimum intervention though it could promote preventive policies through sentencing where necessary. In this view proportionality of sentencing is not fundamental. The republican theory is of the view that censure should be separated from sentencing. It is likely to achieve censure effectively through shaming and other forms of social reaction. It appears that certain sentence could be lighter if there are more prospects for shaming.

Braithwaite and Petit seem to accept that substantial sentences based on predictive and preventive justifications might be relevant. Indeed, social theorists appear to place emphasis on reducing penalties and reduction of vast inequalities, other than the relative fairness of individual sentences. By implication it appears that different accused should not be discriminated against rather be treated equally irrespective of class, gender, race, social status and religion. It is noticeable that sentencing becomes more complex in a society ravaged by social and economic inequalities.[335]

2.8.1 Sociological perspectives on punishment

Penal reforms appear to be bound to occur in society developing from a multidimensional angle.[336] Sentencing approaches applied by society at one period are shaped by a number of interests and purposes. For instance, specific responses to crime problem could arise at one moment but ought to be replaced over time. It implies that penal approaches evolve within a wider sociological and political context. Garland[337] warns against deductionist perspectives whereby punishment is seen as an instrument of class rule, exercise of power and mechanical control geared for a single penological goal. Be that as it may, Garland recognizes the multi-dimensional nature of punishment as explained by Durkheim, Foucault and Marx. Distilling from these theorists punishment is not a unitary phenomenon but rather a complex differentiated process. It must be borne in mind that divergences in sociological theorization have been explored in contextual section above.

2.8.2 Community punishments

Research points out that sentencing option were traditionally limited in Western countries and USA.[338] This was the case too in South Africa.[339] However in recent years South African sentencers have not fully explored sentencing options with regard to trivial cases and accused under the age of 18 even when sentencing options are

[334] (1990:23)
[335] (2005:96)
[336] See Ashworth, and Von Hirsch, (1998:386)
[337] (1998:383)
[338] Tonry, (1996:16)
[339] Sloth-Nielson (1990:37)

available. Probably this is due to the fact that the Child Justice Bill is incomplete.[340] However preference of imprisonment by the courts is sometimes due to pressures from the public, media and criminal justice. But sometimes this tendency can be attributed to the lack of community resources to ensure effective implementation of community punishments. It is claimed that a non-custodial sentence can have more punitive bite than incarceration.[341] Such non-custodial sentence involves:

- Monetary penalties/ Fines (particularly unit or day fines measured by income)
- Community service
- Correctional supervision or intensive probation
- Required attendance at day = reporting centres
- Home detention
- Postponed and suspended sentences
- Compensation orders and
- Forfeiture

It is possible for non-custodial penalties to be scaled according to their degree of severity to a commensurate degree of the seriousness of the crime.[342] Von Hirsch argues that community punishments could be effective if they are scaled within desert sentencing model. This implies that accused criminal conduct be punished equally within the community sanctions of different punitive degrees.

2.9 Judicial sentencing discretion and decisions in relation to young and adult offenders

Terblanche[343] asserts that the infliction of punishment is a matter for a trial court and this duty places obligations on punishers to exercise their sentencing discretion reasonably. This assertion recognises the autonomous sentencing powers of the courts and the underlying philosophical bases for punishment in a manner that is justified in practice, in accordance with the sentencing principles in relation to young offenders.[344] This is precisely because there are variations between young and old offenders and within them and their crimes. The extent of judicial sentencing discretion is more likely to vary widely in the recent modern period.[345] Discretionary powers provide sentencers with broader options to consider the nature of crime, the offender and the circumstances in selecting an appropriate sentence.[346] This seems to encourage individual approaches of punishers to reflect diverse penal philosophies in relation to the specific circumstances of young and adult offenders.[347] In modern plural societies judicial sentencing decisions should not be simply a matter of penal

[340] Skelton, (2001:104)
[341] Tonry (1996:41)
[342] Ashworth and Von Hirsch (1998:258)
[343] (1999:132-133) The guide to sentencing in South Africa, Durban: Butterworths.
[344] See Henham, R. (2002:273) The internationalisation of sentencing: reality or myth? International Journal of the Sociology of Law, (30): 265-315.
[345] Wasik, M. and Pease, K. (1987:1) Sentencing reform guidance or guidelines? Great Britain: Manchester University Press.
[346] Alschuler, A. (1978:64) In Determinate sentencing. Reform or regression? Proceedings of the special conference on determinate sentencing. June 2-3, Berkeley: University of California.
[347] Wasik, M. and Pease, K. (1987:2).

philosophy; rather there are other factors, including the punisher's social background, age, moral views or social class and religious beliefs.[348]

In real sentencing practices, unfettered wide discretionary power appears to be ineffective, and lack guidance and consistency.[349] In this perspective sentencing powers are not viewed as an absolute entity. While there is the sentencing power of the trial court, there is also the power of the appellate court to which lower courts' decisions are often subject and overturned subsequent to assessment.[350] In Zinn[351] (1969), the Appellate Division held that in the assessment of a sentence, a triad must be considered which consists of the crime, the offender and the interests of society. In this approach the punishment should fit the young offender, the gravity of the crime, be fair to the community or state, and contain a certain amount of mercy. This case illustrates the link between crime and aggravating factors which require proper punishment. In this case the impact of older age on the sentence and the protection of society, as well as the sentencing theory of deterrence of other potential offenders, seem to inform the sentencing decision of the judicial officer. Judging by his age he will be too old when he finish his term of imprisonment sentence. Yet it is often stated that punishment should not destroy the future of the offender.

Guided or structured discretionary power should be in the context of judicial accountability, selecting an appropriate sentence other than judicial control or regulation by the state.[352] In the penal realm the disposition by judicial officers or by parole officers tends to present challenges regarding guidelines in accordance with appropriate decisions.[353] This relates to possible divergence of considered factors underlying such decisions. It is possible for courts and parole authorities as state agencies to use their wide discretion for the management of challenges such as court case backlogs, prison overcrowding and parole boards, instead of the purpose of punishment.[354] Another view postulates that narrow sentencing discretion is likely to result in the uniform or mechanical application of sentencing laws.[355] This view further recognises the possibility that sentencing discretionary reforms might be a reflection of the extent of the consideration of community sentiments.

In the same vein sentencing has been characterised by difficulties, as pointed out by Ruggles-Brise: 'There is ample power, but it is useless for a code to prescribe effective sentences when the public sentiment, of which the Judges must be to a large

[348] Hart, H. L. A. (1968:171) Punishment and responsibility. Essays in the philosophy of law. Oxford: Clarendon Press.
[349] Wasik, M. and Pease, K. (1981:1).
[350] See Frankel, M. (1973:77) Criminal sentences. Law without order. New York: Hill and Wang. Also see T and V v United Kingdom 30 EHRR 121 (2000), S v Malgas 2001 (1) SACR 469 (SCA) in chapter 3, section 3.6.2.
[351] See Rabie, Strauss and Mare, (2000:287) Punishment. An introduction.
[352] Henham, R. (2003:62) The policy and practice of protective sentencing. The International Journal of Policy and Practice. Vol. 3(1): 57-82. It seems as if sentencing guidelines should not be seen in conflict or threatens judicial independence in principle. Although in practice guidelines may constrain judicial approaches. This calls for proper structuring of guidelines in line with consistency because wide discretion could give rise to certain undesirable judicial attitudes.
[353] Wilkins, L. (1987:7) In Wasik, M. and Pease, K. Sentencing reform. Guidance or guidelines? Great Britain: Manchester University Press.
[354] Von Hirsch, A. (1981:30) Doing justice.
[355] Wood, P. and Dunaway, G. (2003:147) Consequences of truth – in sentencing. The Mississippi case. Punishment and Society. Vol. 5(2): 139-154.

extent the interpreters, is opposed to severity of punishment.'[356] In the next chapters it will be tested whether individual judicial officers' lack of consensus in sentencing practices can be attributed to their psychological personality traits.[357] Some sentencers' assessment of culpability might consider the psyche of the young accused more than the seriousness of the crime and prior record when selecting punishment. Discretionary power tends to allow the courts to use various approaches. Such approaches could impact on sentencing trends and patterns and reflect shifts in discretionary power. This may reinforce public perceptions on sentencing disparities.

2.9.1 Sentencing disparities

Judicial sentencing takes place within a legal and social framework, which imposes certain limitations on the discretion of the court.[358] In this regard judicial decisions are not immune from the broader influence of social factors. It is possible for sentencing approaches to be determined by various factors and dimensions.[359] Previous patterns of sentencing in South Africa in respect of persons under the age of 18 have shown that the seriousness of the crime has played a major role in sentencing decisions involving mostly offenders of 16 and 17 years of age.[360] Midgley points out that in Cape Town juvenile court 65% of cases involving serious crimes were referred to the higher courts. The majority of serious crimes relate to rape, murder, serious assault, housebreaking and theft, and they seem to warrant severe sentences. In this regard the empirical chapter has to determine whether sentencing decisions of Wynberg regional court, Mitchells Plain regional court and the Cape High Court, reflect this pattern. Paschke and Sherwin's recent study confirms that there has been inconsistency in South African sentencing practices before and even after the Criminal Law Amendment Act, 105 of 1997 came into operation.[361]

South African judicial approaches to sentencing both adults and persons under the age of 18 convicted of serious crimes should not only take into account the crime factor in the selection of an appropriate sentence.[362] Over the years South African sentencing has evidenced a pattern of inconsistencies between judges or magistrates, according to court discretion.[363] This is not to suggest that variations are a consequence of discretion. Kahn calls for discretion to be used appropriately and inconsistencies to be permissible. In this regard the late Professor Barend Van Niekerk pointed out the necessity for less rigid judicial approaches many years ago, specifically regarding the interpretation of section 6 of the Terrorism Act, 83 of 1967.[364] It seems proper for judicial sentencing approaches to be analysed in accordance with the demands of

[356] See Garland, D. (1985:63) Punishment and welfare. A history of penal strategies. USA: Gower.
[357] Pease, K. (1987:128) In Wasik, M. and Pease, K. Sentencing reform. Guidance or guidelines?
[358] See Hogarth, J. (1974:366).
[359] See Report of the Proceedings of the National Conference on the Disposition of Offenders in Canada. (1972:11) Toronto: University of Toronto.
[360] Midgley, J. (1975:94) Children on trial. A study of juvenile justice. South African studies in criminology. Cape Town: National Institute for Crime Prevention and the Rehabilitation of Offenders (NICRO).
[361] (2000:61 of 111) Empirical study of the sentencing practices in South Africa. Research paper. University of Cape Town: Institute of Criminology.
[362] Van Zyl Smit, D. (2001:4) Sentencing children convicted of serious crimes. Article 40, Vol. 3, No 4.
[363] Kahn, E. (1976:222) Symposium on capital punishment. In Proceedings of the conference on crime, law and the community. Held on 1-4 April 1975 at the University of Cape Town. Cape Town: Juta and Company.
[364] See S v Van Niekerk 1972 (3) SA 711 (AD).

changing times and contexts.[365] Assessment of or engagement with judicial approaches should not be seen as a matter of obstruction, but should rather be viewed as an attempt to enhance appropriate judicial leadership as expected by society.[366] This implies that judicial approaches might be shaped by the public interest and the mood of the time.

It is possible for judicial officers to use their sentencing discretion in a manner that broadens rather than limits proportionality, particularly when dealing with persons under the age of 18 compared to adults convicted of serious crimes.[367] Different sentencers seem to hold divergent approaches in their sentencing decisions in respect of both young and adult offenders.[368] It appears that as the result of sentencing discretion and different gravity of crimes, these divergences are inevitable even if sentencers have the same penal philosophy.[369]

According to Sloth-Nielsen the period of the 1980s revealed differences among South African judges on the imposition of the death penalty. There was some resistance to seeming state pressure for the execution of its punishment but other judges, as stated, were quite keen. These differences in sentences could be associated with, inter alia, an individual judge's penal philosophy and attitude to the penal legislation of the time.[370] Part of this proposition underlines the extent of the recognition of the age factor of the accused as constituting the existence of extenuating circumstances in a specific capital case.

Justice Leon, former judge in Natal, states that: 'I know from my own experience that some judges find extenuating circumstances more easily than others. I know judges who impose the death sentence not infrequently, and I know one judge who has been on the bench for some years who has never passed the death sentence.'[371] Justice Didcott is known to have spoken out publicly against the death penalty.[372] By contrast, Justice Kriek and Justice Munnik perceived the death sentence as an appropriate penalty. In the same vein, the Durban judge is quoted to have suggested that: 'on occasion, he had even imposed the death sentences merely to frighten local criminals.'[373] These divergences appear to endorse the assertion that sentencing decision-making poses extreme difficulties for both judges and magistrates.[374]

Magistrates and judges might hold different views on which offences constitute serious crimes, based on personal philosophy, and the severity of sentences imposed

[365] Van Niekerk, B. (1978:592-93) Judges on trial. South African Law Journal. Vol. 95.
[366] Dugard, J. (1972:285) Recent cases. The South African Law Journal. Vol. 89.
[367] Skelton, A. (1993:81) Report on the International Seminar on 'children in trouble with the law'. 15-17 October 1993. Cape Town: Community Law Centre Publication.
[368] See Murray, C. , Sloth-Nielsen, J. and Tredoux, C. (1989:167) The death penalty in the Cape Provincial Division: 1986-88. South African Journal on Human Rights. Vol. 5.
[369] See Nicholas, H. C. (1972:31) The courts – disparity in sentencing: consistency and discretion – are they reconcilable? Crime, punishment and corrections. Vol. 1, No. 2. November 1972-73
[370] See Sloth-Nielsen, J. (1990:85) Legal violence: Corporal and capital punishment. In McKendrick, B. and Hoffman, W. People and violence in South Africa. Cape Town: Oxford University Press.
[371] (1989:164), quoted above.
[372] See National Association of Democratic Lawyers (NADEL) (1998:46) The role of lawyers and the legal system in gross human rights violations of apartheid: Cape Town: NADEL.
[373] (1989:167), quoted above.
[374] Hogarth, J. (1974:3).

for such similar crimes could vary.[375] This is likely to be associated with variations regarding the age factor of the offender, the degree of seriousness of the crime and surrounding circumstances. Sloth-Nielson and Van Heerden call for judicial approaches that are less mechanical, particularly in respect of young persons compared to their adult counterparts.[376] Indeed, a number of studies endorse that differences in sentencing philosophy, personality and social background could determine individual sentencing approaches.[377]

Disparities in imposed sentences might reflect on sentencers' approaches to specific crimes and offenders.[378] In this regard sentencing approaches are likely to be shaped by the diversities of the crime, criminals and criminal justice resources.[379] This implies that judges' or magistrates' sentencing approaches should not just fit the crime, but also match a sentence to an offender. It is possible for a judicial officer to emphasise the importance of the length of sentences, genuinely believing that in this approach: 'he will be doing all he can to reduce crime rates, while his colleague might offer an offender the best chance to rehabilitate himself by imposing lenient measures. Even if two magistrates resort to the same measure, they may be doing so for quite different reasons, other judges might impose severe sentences, not as punishment, but in what they saw to be the offenders' own interests.'[380] Sentencing variations offering too much leniency may not be warranted due to the specific crimes and circumstances of offenders.[381] This point suggests that disparate approaches are not necessarily a matter of an injustice, particularly if they are justifiable by the circumstances of each case.

It is proper to understand the reasons for such sentencing variations in light of the possible differences of each case.[382] Variations might not be simply a matter of personality of the sentencer reflected in individual decisions; rather there might be a practical basis for such variations in sentencing.[383] Hood stresses that an evaluation of variations in sentencing approaches recognises that all cases are unique and reflect variations in the nature of the crimes and offenders before the magistrates in different jurisdictions. Similarly, the conditions in one case are different to the conditions in others. In this respect, the term 'equal approaches' appears to refer to 'equality of consideration' regarding the factors to be taken into account in sentencing decisions.[384] This point begs the question whether considerations are selective or

[375] Hogarth, J. (1974:78), quoted above.
[376] (1999:119) The political economy of child law reform: pie in the sky? In Davel, C. J. Children's rights in a transitional society. 1st edition. Pretoria: Pretoria Book House.
[377] See Daly, K. (1994:173). Also see Green, E. (1961:67).
[378] See Model Sentencing Act. (1972:2) Council of Judges of the National Council on Crime and Delinquency.
[379] See Morris, N. (1978:3) In proceedings of the special conference on determinate sentencing. 2-3 June 1977. Washington: National Institute of Law Enforcement and Criminal Justice.
[380] Brody, S. (1976:4) The effectiveness of sentencing. A review of the literature. London: Her Majesty's Stationary Office.
[381] See Wilkins, L., Kress, J., Gottfredson, D., Calpin, J. and Gelman, A. (1978:1) Sentencing guidelines: structuring judicial discretion. Report on the feasibility study. Washington, D.C. National Institute of Law Enforcement and Criminal Justice.
[382] See Proceedings of the National Conference of Judges on Sentencing. (1964:6) University of Toronto: Centre of Criminology.
[383] Hood, R. (1969:14) Sentencing in Magistrates' courts. A study in variations of policy. London: Social Science Paperback.
[384] (1969:14), quoted above.

based on certain factors at the expense of others. Such factors include the seriousness of the crime, the age of the offender, the severity of the punishment, the extent of the application of sentencing theories and a prior record.

It is claimed that judicial approaches require a balance between the interests of society, the circumstances of the individual offender and the gravity of the committed crime.[385] Nevertheless, sentencing approaches could be characterised by disparities at a particular time in history based on the specific nature of the cases before the individual punisher.[386] A similar view is that differing sentences could be attributed to newly enacted laws that appeared as a response to the crime rate at a certain time in South Africa's history, such as the 1971 Drug Act.[387] As described by Albertyn, Hall is of the opinion that legislative processes could reflect a wider changing context against lawlessness and calls for tougher sentences for young offenders by the media and the public, and might represent state hegemony over its citizens.[388]

Balanced judicial approaches require a sentence to be based on comprehensive, reliable information.[389] A probation officer or social worker could present information about an offender's circumstances and background in the search for an appropriate sentence. This is relevant particularly with regard to persons under the age of 18 convicted of serious crimes in order to assess the degree of their culpability, and could establish how the age factor, background circumstances and conditions of the crime could mitigate the degree of culpability for a justifiable sentence, and not necessarily on the grounds of social expediency.[390] Some individual sentencers might use the information differently, while others might ignore it based on the discretionary exercise of power and their frame of mind.[391]

Wide sentencing discretion seems to provide judicial sentencing officers with broader scope in order to exercise their discretion in a manner that allows for flexibility and creativity in sentencing decisions, particularly with regard to young offenders, although in sentencing practice studies point out that wide discretion often leads to inconsistencies and sentencing disparities.[392] They argue that sentencing discretion needs to be limited by means of structured sentencing to reduce unwarranted disparities. A similar view is that sentencers must provide some explanations behind their decisions in line with transparent sentencing approaches.[393]

Disparity should not be understood in isolation because courts ought to treat cases on merit.[394] In wide discretionary context judicial officers have power to decide similar

[385] See Report of the proceedings – National Conference on the Disposition of Offenders in Canada. (1974:21) Toronto: University of Toronto.
[386] Sloth-Nielsen, J. (1990:84).
[387] See Albertyn, C. (1985:107) Drugs and moral panic. In Davis, D. and Slabbert, M. Crime and power in South Africa. Critical studies in criminology. Cape Town: David Phillip.
[388] Albertyn, C. (1985:114).
[389] See Ford, P. (1972:7) Advising sentencers. A study of recommendations made by probation officers to the courts. Oxford University: Basil Blackwell.
[390] Hood, R. (1969:19) Sentencing in Magistrates' Courts. London: Social Science Paperback.
[391] Frankel, M. (1973:17) Criminal sentences. Law without order. New York: Hill and Wang.
[392] See Terblanche, (1999:136), Report of the South African Law Commission (2000), Von Hirsch and Ashworth, (1998:213) and Tonry, (1996:177).
[393] Henham, R. (2001:66) Sentence discounts and the criminal process. Sydney: Ashgate Dartmouth.
[394] Von Hirsch, (1987:48) In Wasik, M. and Pease, K. Sentencing reform. Guidance or guidelines?

cases differently.[395] In this regard it is quite likely that judicial sentencing approaches might converge and diverge in crimes of similar gravity although sentencers are required to attempt to achieve consistency as far as the circumstances of each case are concerned.[396] Judicial officers' differences in sentencing approaches can be associated with the respective penal philosophies rather than bad faith.[397] A similar perspective endorses that the sentencer's background and sentencing philosophy tend to affect his attitude towards various types of crime.[398] Such differences can result in gross discrepancies which are upheld, even if one sentencer might deliberately strive for consistency. As summed up by Gaylin: 'Each Judge has a point of view, a set of standards and values, a bias, which influence and direct the nature of his verdicts independently of the specific condition of the criminal being charged. Five years is a maximum for Judge Garfield; it is seen as a minimum for Judge Stone. Crimes against property are a rectification of the order of things, political actions, to Judge Ravitz; they are profound threats to the fabric of civilization to Judge Stone, and will be dealt with accordingly. These sets of values constitute bias in the non-pejorative equity and fairness in exactly the same way as naked bigotry does.'[399] This quotation illustrates the key challenge for different magistrates and judges as it will be depicted in the next chapters.

It is suggested that some judicial officers are lenient to white-collar criminals yet become harsh to young violent offenders due to wide discretion.[400] Singer criticises utilitarian approaches for imposing different sentences to criminals who have committed crimes of the same gravity. It is possible to limit wide discretion with the idea of proportionate and consistent punishment.[401] This is not to suggest that discretion in sentencing should be eliminated, particularly recognising varying degrees of crime gravity. In this regard disparity in sentencing approaches will tend to feature whether the sentencer is utilitarian, social or desert in orientation due to the extent of the relevant factors considered and the goal of punishment.[402] For example, one sentencer might emphasise the age factor to increase culpability over criminal record yet to the next sentencer age might be a mitigating factor rather than an aggravating one.[403] This could be the reasoning with the social context factor. It is likely that the nature and source of information which the court receives about the crime and the offender, and the inferences drawn from the relevant factors can play a crucial role in decision-making.[404] This point concurs with the idea that decision-makers tend to differ not only in decisions they make but also in the method they

[395] Von Hirsch, A. (1981:28) Doing justice.
[396] Green, E. (1961:67) Judicial attitude in sentencing. A study of the factors underlying the sentencing practice of the criminal court of Philadelphia. London: Macmillan.
[397] Von Hirsch, A. (1981:29).
[398] Green, E. (1961:67).
[399] See Von Hirsch, A. (1981:29-30).
[400] Singer, R. (1979:9) Just desert: sentencing based on equality and desert. Cambridge: Ballinger Publishing Company.
[401] Buchan, B. (2002:205) Zero tolerance, mandatory sentencing and early liberal arguments for penal reform. International Journal of the Sociology of Law. (30): 174-264.
[402] Ashworth, A. (1987:26) In Penington, D. and LLoyd-Bostock, S The psychology of sentencing. Approaches to consistency and disparity. Oxford: Centre for Socio-Legal Studies.
[403] Frankel, M. (1974:79) Criminal sentences. Law without order. New York: Hill and Wang
[404] Ashworth, A. (1987:30) In Penington, D. and LLoyd-Bostock, S.

employ in identifying information regarding the uniqueness of an individual offender.[405]

Consistent sentencing approaches are likely to emerge from the exercise of discretion regarding criteria used in dealing fairly with different cases in contrast to each other rather than striving for rigid uniformity.[406] This view suggests that in this approach imposed sentences will differ, and how they are perceived by the offenders will vary widely depending on the impinged interest of the sentence. For example, a rehabilitative-institutional order can involve longer incarceration than a retributive prison sentence, and probation and community service may be longer and more intense than a short prison sentence.[407] Disparities in sentencing approaches are likely to suggest an influence of wider factors in the criminal trial involving the psychosocial inquiry report, facts, and arguments in mitigation, particularly regarding young offenders in contrast with adult offenders.[408]

Judicial sentencing discretion demands that the sentencer limits his psychological personal assessment of a particular offender, crime and environment.[409] Cooke illustrates his point by quoting Lord Justice James's comment: 'Sentencing is often a difficult, delicate and distasteful business operated on the basis of an informed guess. Every sentence contains an element of the public interest. Balancing the interest of the public, the victim and the offender is a delicate and anxious business.' Some sentencing approaches might put more weight on the internal attitudinal factors of the offender and attribute that to influence the assessment of the seriousness of the crime and the severity of the imposed punishment.[410] In this context it seems proper for each judicial officer to give reasons underlying his or her sentencing decisions in accordance with appropriate sentencing, particularly when dealing with those under the age of 18 punished for serious crimes.

According to Tonry,[411] most studies point out that sentencing disparities have decreased as a result of sentencing guidelines. The notion of guidelines has improved the elements of consistency and uniformity in sentencing practices. This seems to be complicated, particularly with regard to young offenders, hence there is narrow scope for proportional analysis to promote individualised sentencing. Indeed, South African sentencing has been structured by the Criminal Law Amendment Act, Act 105 of 1997, although certain serious violent crime have shown the opposite. Also, empirical findings point out that there have been disparities in sentencing for serious crimes, especially along regional lines.[412] According to this report there has been an increase in sentencing, particularly for rape compared to other offences. Disparities in judicial sentencing decisions seem to suggest a different understanding and interpretations of sentencing laws and theories of punishment with regard to their application.

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[405] Gottfredson, D., Wilkins, L. and Hoffman, P. (1978:101) Guidelines for parole and sentencing. A policy control method. Toronto: Lexington Books.
[406] Samuels, A (1987:66) In Pennington, D. and LLoyd-Bostock, S.
[407] Samuels, A. (1987:67) In Pennington, D. and Lloyd-Bostock, S.
[408] Shapland, J. (1987:84) In Pennington, D. and LLoyd-Bostock, S. The psychology of sentencing. Approaches to consistency and disparity. Oxford: Centre for Socio-Legal Studies.
[409] Cooke, R. (1987:59) In Pennington, D. and LLoyd-Bostock, S.
[410] Pennington, D. and Ewart, B. (1987:182) In Pennington, D. and Lloyd-Bostock, S.
[411] Sentencing matters (1996:41).
[412] See South African Law Commission. 'Report on a new sentencing framework', (November 2000:10).

Another dimension is that the extent of age, prior record, crime seriousness and personal predictions of dangerousness are likely to be reflected in whether offenders are treated as juveniles or adults.[413] The prior record factor appears to fit better within the forward-looking justifications in the identification of high-risk offenders who require confinement.[414] However, such power should promote sentencing decisions that do not just consider the seriousness of the crime and a prior record but also factors surrounding each individual crime.[415] In judicial practices it is possible that the role, meaning and interpretation of these factors might be narrow or one-sided, suggesting sophisticated diversity in sentencing approaches with regard to persons under the age of 18 convicted of serious crimes and adults.[416] In this regard patterns of judicial sentencing decisions are likely to show different interpretive convictions in line with each sentencer's view of the world, beliefs and wider state ideology.[417]

2.10 Independent judicial sentencing, impartiality and accountability in sentencing decisions with regard to persons under the age of 18 and adults convicted of serious crimes

In sentencing decision-making, particularly with weaker groups such as young offenders, the notions of judicial accountability, impartiality and independence are fundamental. Section 165[418] states that: 'the courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.' Subsection (4) states that: 'organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.' In the context of sentencing persons under the age of 18 and adults these provisions recognise that the judicial role in sentencing decision-making deals with legal cases or disputes between an individual and the state, or between individuals, and requires not to be interfered with unless the idea is to promote judicial impartiality.[419] A similar view recognises that state relationship with legal apparatuses may be replete with ideological complexities, particularly in a different political context where the judiciary can be coerced to further state political interests.[420] For example in South Africa during apartheid rule the relationship between the judiciary and the executive was not clearly demarcated and there seems to be a certain degree of judicial loyalty to the political statusquo of the time.[421] This situation appears to have compromised judicial impartiality. In a constitutional democratic state, an independent judiciary is necessary

[413] Feld, B. and Podkopacz, M. (2001:1001) The back-door to prison: waiver reform, 'blended sentencing', and the law of unintended consequences. The Journal of Criminal Law and Criminology. Vol. 91(4): 547-1156.
[414] Durham, A. (1987:618) Justice in sentencing: The role of prior record of criminal involvement. The Journal of Criminal Law and Criminology. Vol. 78(3): 614-803.
[415] Gottfredson, D., Wilkins, L. and Hoffman, P. (1978:79) Guidelines for parole and sentencing. A policy control method. Toronto: Lexington Books.
[416] Blumstein, A., Cohen, J., Martin, S. and Tonry, M. (1983:80) Research on sentencing: The search for reform. Washington, D.C.: National Academy Press.
[417] Davis, D. (1995:108 & 123) Integrity and ideology: towards a critical theory of judicial function. The South African Law Journal. Vol. 112(1):1-210.
[418] The Constitution of the Republic of South Africa, Act 108.
[419] Laue, R. (2002:120) The administration of justice in the context of judicial independence. Journal of the Judicial Officers' Association of South Africa. Vol. 5(3):91-135.
[420] Davis, D. (1995:128).
[421] See Forsyth, C. (1985:229).

to allow for impartial decision-making on the part of sentencers, in accordance with their assessment of the facts and their understanding of the law without any restrictions, inducements, influences, threats or interferences.[422] This relates to interpretation of the law, theories and considerations of previously decided cases in a justificatory way.

The independence of the judiciary will help sentencers to promote respect for individual rights and collective rights and interests, particularly when sentencing persons under the age of 18 convicted of serious crimes. Ashworth[423] argues that the principle of judicial independence requires a proper relationship between the legislature, the judiciary and the executive in matters of sentencing. This is in accordance with the judicial function and discretionary power to be exercised.[424] In sentencing decisions, attempts to restrict judicial independence and activism are likely to emanate from state interests on the basis of claims for public interest and rights.[425] This is not to suggest that groups such as big business interests, the media and criminals cannot threaten judicial independence. In Colombia[426] 122 judicial members were murdered between 1979 and 1995 by powerful criminals. It is possible that the dangers to independence can come from, for instance, the degree of judicial exposure to the media.[427] In S v Mhlakaza and Another[428] the public sentiments were generally running high and it is in this judgment that the dynamics of sentencing were revealed. The court decision was that: 'the object of sentencing is not to satisfy public opinion but to serve the public interest. A sentencing policy that caters predominantly or exclusively for public opinion is inherently flawed. It remains the court's duty to impose fearlessly an appropriate and fair sentence even if the sentence does not satisfy the public.'[429]

Impartial sentencing is about the philosophy of the individual sentencer rather than institutional relationships.[430] The application of the proportionality principle and the interpretation of the factors surrounding offences committed by young offenders could provide assumptions on sentencing theories behind sentencing decisions, in contrast to adults. In addition to theoretical aspects, other biases might emanate from judicial dependence, fear or favour. In penal discourse impartiality requires dealing with persons under the age of 18 equally as unique individuals compared to their adult counterparts. Justice L'Heureux-Dube (1998) asserts that impartiality does not mean judicial neutrality, since punishers must be able to legally relate wider injustices in society to the case at hand. This implies that the punisher must be able to impose

[422] L'Heureux-Dube, L. (1998) Judicial independence & impartiality: the foundation of equality. (Paper read at International Commission of Jurists (ICJ) conference on the rule of law in a changing world, 20-22 July) S.A: Cape Town.
[423] (1983:59) Sentencing and penal policy. London: Weidenfeld and Nicolson.
[424] Munro, C. (1992:27) In Wasik, M. and Munro, C. Sentencing, judicial discretion and training. London: Sweet and Maxwell
[425] Tushner, M. (2003:93) Judicial activism or restraint in a section 33 world. University of Toronto Law Journal. Vol. L111 (1): 1-101.
[426] Dato'Param Cumaraswamy, (1998) The UN basis principles and the work of the UN special rapporteur on the independent of judges and lawyers. (Paper read at ICJ conference on the rule of law in a changing world, 20-22 July) South Africa: Cape Town.
[427] Laue, R. (2002:120).
[428] 1997 (1) SACR 515 (SCA).
[429] Also see S v Makwanyane and Another, 1995 (3) SA 391 (CC). And S v Williams and Others, 1995 (3) SA 632 (CC). for similar decisions on public opinion or pressure.
[430] L'Heureux-Dube (1998).

combined sentences in respect of serious crimes involving deprivation of liberty and rehabilitation-based sentencing, taking into account the level of education, age and circumstances of the young offender as a member of society.

Ashworth,[431] Cumaraswamy[432] and Bhagwati[433] are of the view that judicial sentencing decisions are subject to scrutiny by the appellate courts in line with the democratic principles of accountability and accessibility to people. This line of thought emphasises that judicial independence ought to be viewed in accordance with judicial accountability to society and warn against overstating one above the other.[434] This suggests that the sentencing officers have to be fair in fulfilling their tasks and provide reasons for their sentencing decisions, because it is possible to act in an arbitrary manner in sentencing matters. This might help to build trust and relationships between the judiciary and the people they serve, and promote accessibility through proceduralist notions. The convicted, sentenced young offender must be helped to understand that his behaviour was wrong in order to accept a rehabilitation-based prison sentence.

Section 172[435] provides powers to the courts to deal with criminal cases in accordance with the Constitution. Chief Justice Mahomed[436] and Justice Bhagwati[437] relate judicial sentencing power to responsibility and accountability to the people in the context of democratic constitutionalism when the courts discharge sentences. As suggested by Foucault, independence and accountability seem to be central in modern plural societies, unlike medieval times when judicial officers were like kings in their own palace.[438] This calls for the courts to be accessible and sensitive to the interests of young offenders by providing information to both young and adult offenders about their rights and sentencing procedures. Ashworth[439] endorses this argument and further postulates that discretionary power should not be used on the basis of personal interest, but should rather be based on legal sentencing principles in a manner that enhances the principle of judicial impartiality and independence, especially when the courts have to discharge punishment to persons under the age of 18 convicted of serious crimes.

2.11 Analysis

This chapter presented sentencing theories in a manner which analysed and evaluated penal philosophical dimensions, including the legal, sociological and historical. These dimensions should not be seen as detours, rather as complementary in the realm of penal theory and a wider context. The analysis began by contextualising punishment in an attempt to place it in a wider societal setting. Judges and magistrates operate in

[431] (1983:59) Sentencing and penal policy.
[432] (1998), quoted above.
[433] **(**1998) Accountability: Judicial independence vs. Judicial accountability. (Paper read at ICJ conference on the rule of law in a changing world, 20-22 July) South Africa: Cape Town.
[434] Smith, B. (1999:146) Scottish public prosecution, policy and practice: issues of independence and accountability. The Law Journal of the Scottish Universities. The Juridical Review. Part 3: 141-218.
[435] The Constitution of the Republic of South Africa, Act 108 of 1996, p.92.
[436] (1998) The independence of the judiciary. (Paper read at ICJ conference on the rule of law in a changing world, 20-22 July) SA: Cape Town.
[437] (1998), quoted above.
[438] See section 2.2 above.
[439] (1995:44), quoted above.

criminal courts with accused persons within a particular social context. This line of thought emphasises that punishment is suppose to have a legal and social function. To say sentencing approaches do not take place in a vacuum recognises the fact that punishment might be structured by the changing political context, legislation and sentencers' philosophy.

In this chapter the presentation of a wider picture of the philosophy of punishment sought to lay the foundation for the analysis of specific sentencing theories. This analysis acknowledges that sentencing theories should help to inform judicial approaches. As shown in the chapter, there are various competing theories of punishment that may be applicable to persons under the age of 18 convicted of serious crimes in contrast to adult offenders. It is noticeable that judicial decisions are underpinned by penal philosophy, although judges and magistrates may appear not to be too concerned about the influence of their philosophy when they preside over cases on a daily basis. It might be revealed in the latter empirical chapters that the trend of responses suggests a lack of time to consider whether sentencers base decisions on incapacitation, deterrence, desert or rehabilitation. Rather they are much more aware of the evidence before the court and the law of the country. This trend is confirmed by Hogarth's study.[440] More importantly, it should be determined in the next chapters whether sentencing approaches are influenced by just penal philosophy or not?

Penal philosophy could help to understand and explain complexities surrounding sentencing decisions, even on the basis of a critique of the arbitrariness of judicial approaches. This calls for an understanding of the social conditions of these various sentencing theories. It appears that sentencing decisions could be similarly or differently informed by a crime's gravity, the offender's age and the wider context. These factors could carry different meanings for various sentencing theories discussed in this chapter. For example, proponents of desert could look at the seriousness of the crime. On the other hand, utilitarian sentencers might base their decisions on future predictions. However, this is not to suggest that punishment is immune from power relations in society. This relate to social theories of sentencing.

As suggested by Poulantzas, Althusser, Garland and Griffiths, the criminal courts could appear to be trying to mediate between the conflicting interests of the victim, the offender and the state. This is not to imply that the relationship between these groups is always characterised by a sense of antagonism. Over time the interests and the relationship between the state and its people tend to take different forms, and sometimes there is mutual interests in the penal realm. The latter could be associated with Durkheim's notion of punishment as a collective social response, while the former on inequalities of power could be associated with Foucault.

Desert sentencing theory advocates that punishment should be deserved proportionate to the degree of the culpability of the offender. The theory considers differences among accused persons and crimes committed. On this basis it calls for individualised approaches. Nonetheless, its emphasis tends to be on the degree of seriousness of the crime and the accused's background and prior record are considered as minor. But there is not much emphasis on inequalities of power between adults and young accused, affluent and poor accused in sentencing approaches. As discussed in this

[440] (1974:68), quoted above.

chapter, sometimes these variables might be taken for granted in sentencing approaches. Desert's weaknesses appear to be its focus on the seriousness of the crime and a prior record as the major determining factors, while others are considered as subordinate in sentencing approaches. This emphasis could mean different things to different proponents of desert. For example, the age factor might carry more weight, competing with the seriousness of the crime, to one judicial officer while to another officer the age might have no significance in the choice of sentence.

It could be argued from another angle that the notion of deserved punishment does not differentiate on the impact of the age factor in sentencing. Therefore the degree of culpability of persons under the age of 18 convicted of serious crime could be less than those of adults charged with the same crime and warrant different sentence severity. Desert is old in South African sentencing. South African citizens appear to make desert-oriented calls, such as that the punishment must fit the crime when they respond to court decisions via the media. The theory's premises are based on the degree of crime seriousness, the accused's culpability and the interests of society. Its philosophy appears to have been entrenched and relevant to society, that is characterised by prevalence of crime like South Africa. In the same vein, public sentiments tend to be expressed through vigilantism when those perceived to have committed crimes go unpunished or the court imposes a disproportionately lenient sentence. Similarly, it must be noted that backward-looking theories attempt to prevent disproportionate punishment and inconsistency in sentencing approaches. However, this appears to be difficult at a practical level due to variations in crimes.

Utilitarian theories of sentencing have as their main focus the prevention of future crime. As presented in the discussion, they are rehabilitation, deterrence and incapacitation. The utilitarian theories have been competing with backward-looking theories in South African judicial approaches. It is going to be determined in the next chapters whether retribution, deterrence and incapacitation have been dominant in South African sentencing approaches. This chapter suggests that penal theories might be applied in a combined manner in judicial approaches. Based on the prevention of future criminal behaviour one offender under the age of 18 might receive a treatment prison sentence of 9 months. A 23-year-old offender could receive a two-year prison sentence, of which one year could be suspended, and serve 10 months in rehabilitation programmes in prison and two months under correctional supervision. It seems as if combining sentencing theories could inform a punisher with various sentencing options. The challenge seems to be the fact that accused persons do not necessarily match the violent nature of their crimes as individual persons. Hypothetically a 15-year-old could commit murder and the circumstances and conditions of the crime could be far less compelling to such conduct. An appropriate sentence in this context becomes difficult.

It is suggested in this chapter that deterrence, incapacitation and rehabilitation are rather mechanical, due to a disregard of the circumstances of the crime. Although they focus on the offender's background. This is in accordance with their forward-looking orientation in order to prevent crime. Probably this weakness might be addressed by borrowing elements from theories that look backward including social theories of sentencing. Subsequently there seems to be no single theory that can successfully be useful on its own, as some views want to advocate for one at the expense of the other. What transpires from this chapter is competing theories and criteria used that provide

possibilities for various sentencers to make decisions. This calls for different theories to be applied in a proper context and less mechanically regarding the crime, the offender, the victim and the community. Deterrence, incapacitation and rehabilitation continue to be seen as major judicial sentencing theories at present.

In the recent South African constitutional democracy restorative justice has gained popularity, particularly in resolving trivial cases by young persons outside the criminal justice system. This theory tries to bring victim and offender in the same setting to address wrongdoing. Judicial officers recognise that other crimes should be diverted and victim interest appears to play a small part in criminal courts. As stated earlier, various sentencing theories require relevant social conditions. Currently South Africa has more serious crimes and a population that is concerned with punishment by the courts. The weaknesses of the theory appear to be the fact that it treats crimes as if they are all trivial. It appears to fall short in explaining judicial penal processes and how best to treat serious crimes. Nevertheless, as time goes by society and courts could develop confidence and knowledge about it. Above all, in plural democratic societies various theories could be applied equally, informed by the nature of crimes, society and the interests of the victim and the offender.

It appears in this chapter that for penal philosophy to be effectively applied requires discretionary power. This judicial power is relevant particularly when sentencing persons under the age of 18 and adults convicted of serious crimes. This is in accordance with individual sentencers' interpretation of different cases while striving for greater consistency in sentencing. It is important to note that the philosophy of punishment could be useful in settings when the independence and impartiality of judicial officers is viewed in relation to accountability to the society they serve. This assertion suggests that judicial decisions are likely to be characterised by philosophical divergences in search for appropriate punishment to persons under the age of 18 in comparison with adults. In this regard various studies confirm the challenge of courts approaches and their penal effects. This chapter shared some insights on the application of sentencing theories to different age groups of offenders and circumstances of different crimes. The analysis and evaluation considered the nature of society in respect of various sentencing theories. The next chapter traces South African sentencing patterns, trends and shifts from 1950 to 2009 of young and adult offenders convicted of serious crimes. This is to explicate as to how penal theories are actually applied within sentencing principles. Indeed this is to gauge the value of different theories in practice as shown by the courts decisions over 50 years with reference to key moments. .

CHAPTER 3

AN ANALYSIS OF SENTENCING PATTERNS, TRENDS AND SHIFTS IN SOUTH AFRICA BETWEEN 1950 AND 2009 OF ADULTS AND PERSONS UNDER THE AGE OF 18 CONVICTED OF SERIOUS CRIMES

3.1 Introduction

Chapter 2 presented sentencing philosophy as the basis on which judicial sentencing decisions should be premised and understood. It further claims that there are various dimensions in the sentencing discourse. This chapter seeks to trace over 50 years of sentencing patterns, trends and shifts in the approaches of sentencing courts in punishing persons under the age of 18 convicted of serious crimes. The analysis attempt to contrast sentencing patterns of young and adult offenders, in order to promote an understanding of how judicial sentencing decisions were rendered over the years. This will provide insight into how the age factor has been understood in judicial sentencing decision-making. It has to grapple with the extent to which a prior record, the seriousness of the crime and the severity of punishment have underpinned historical judicial sentencing decisions. In tracing empirical sentencing patterns, trends and shifts, the analysis should reflect on key moments in judicial sentencing approaches over the years and their pertinence in the 2000s.

Reflecting on important recent and historical developments and patterns requires an analysis that takes into consideration the legal and sociopolitical context of South African sentencing. This chapter will reflect on the significant moments in the evolution of juvenile justice in South Africa. The analysis will gauge crime seriousness, legislation and events that have shaped sentencing patterns and trends over the last 50 years.

Furthermore, South African sentencing patterns over the years could be located within international penal discourse and key judgments rendered by the courts in those jurisdictions in order to grapple with the application of international sentencing instruments and appropriate punishments. From the perspective of penology, it is important to evaluate various sentences rendered by judicial officers over the past 50 years, in order to identify and gauge factors most frequently associated with the choice of sentence, particularly with regard to persons under the age of 18 convicted of serious crime compared to their adult counterparts. This constitutes the empirical part of the study, in line with its aim.

Over the years South African sentencing law has been premised on the idea that the principle of proportionality is applicable to both young and adult offenders.[441] In this regard the analysis has to grapple with how proportionality has been understood as a principle of balanced sentencing approaches. At an empirical level, did the judicial officers, in their search for a proportional sentence, equally consider the seriousness of the crime, previous convictions, age and other circumstances to constitute proportionality when passing sentence? Record of judgments and penal statistics can give insight into the approaches applied by judicial officers and their penal value. The

[441] Van Zyl Smit, D. (2004) Sentencing and punishment. Also see Sloth-Nielsen, J. (2001) The role of International Law in Juvenile Justice Reform in South Africa. PhD thesis.

analysis of sentencing patterns, trends and shifts should be situated in the proper context from the perspective of punishment.

3.2 South African sentencing patterns, trends and shifts in a broader context

By 1950, two years after the National Party government had taken power in 1948, a significant number of discriminatory apartheid laws had been entrenched.[442] These laws were perceived as repressive and were met by organised black resistance, particularly from the period 1950 to the early 1960s.[443] Foster, Davis and Sandler agree that the growth of opposition to the discriminatory, suppressive laws resulted from the intensity of state legislation to curb individual liberty. On this basis it is likely that the 1950s present mammoth challenges in judicial sentencing approaches.[444]

In this context, the state passed legislation to outlaw communism in South Africa, the Suppression of Communism Act, Act 44 of 1950.[445] This Act provided the state with the powers to apprehend or arrest, prosecute and punish those associated with, inciting or taking part in strike action and lawlessness. The 1946 mine workers' strike and industrial action elsewhere in the world during this period were noted events and enabled the Minister of Labour to approach Parliament for law enforcement.[446] The result of these discriminatory laws was that sentencing courts were overburdened with carrying out this work and trying to protect the interests of the apartheid system from this time on.

Bundy[447], an eminent historian, captures this dilemma: 'Law is not neutral, it reflects existing interest and the distribution of power in any society. The law of 19th and 20th century South Africa favoured the propertied and employing classes, there was precious little neutral about the Master and Servant Laws, the 1913 Land Act, the Urban Areas Act, the Group Areas Act or the Prohibition of Illegal Settlements Act. These and many others expressed in statute form the asymmetrical property and power relations one might sum up as, I am an owner, you are a tenant, he is a squatter.' This suggests that sentencing does not take place legal vacuum. In this regard law makers enact certain legislation to respond to the perceived crime and criminality at a specific period and locality.

The evolution of the penal system in a society reflects the power relations at a particular period. Conditions under which sentencing courts have operated since the period 1950 to 1969 and sentencing approaches reflect factors prevalent at the time.[448]

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[442] Foster, D., Davis, D. and Sandler, D. (1987:12) Detention and Torture in South Africa. Cape Town: David Phillip. Also see Corder, H. (1984:148) Judges at work. The Role and Attitudes of the South African Appellate Judiciary, 1910-1950. Cape Town: Juta.

[443] Lobban, M. (1996:2) White Man's Justice. South African political trials in the black consciousness era. Oxford: Claredon Press. also see Foster, D., Davis, D. and Sandler, D. (1987:12).

[444] Corder, H. (1984:4).

[445] Corder, H. (1984:5). Also see Coleman, M. (1998:10) A Crime Against Humanity: analysing the repression of the apartheid state. Cape Town: David Phillip. Also see Foster, D., Davis, D. and Sandler, D. (1987:15).

[446] Foster, D., Davis, D. and Sandler, D. (1987:14-15).

[447] (1990:5) Land, Law and Power: Forced removals in historical context. In Murray, C. and O'Regan, C. No Place to Rest – Forced Removals and the Law in South Africa. Cape Town: Oxford University Press.

[448] Corder, H. (1984:4).

State penal systems developed rapidly during medieval times to replace private vengeance in the history of most societies.[449] At this stage penal methods tended to take a physical form – the violent infliction of pain – and were executed publicly, in the form of hangings, torture, burning and being pulled apart by four beasts, particularly in the Cape in the 18th and 19th centuries, where these practices in respect of slaves were common. The colonial situation gave rise to the spread of floggings, and laws were passed to induce slaves to become loyal to their owners before slavery was abolished in the 1830s.[450] Sloth-Nielsen go on to say that the industrial revolution brought about shifts in penal philosophy, mostly in Europe, which led to an embrace of institutional forms of punishment. These penological shifts filtered through to South Africa, where imprisonment gained significant momentum, although backed up by physical violence to maintain coercion.[451]

In the context of juvenile justice with respect to serious crimes committed by persons under the age of 18, Midgley recognises the impact of juvenile philosophy on the approaches of judicial members.[452] Prior to the beginning of the 19th century young persons convicted of criminal offences were tried and punished as adults. This was the case in Europe and its former colonies before the development of the reformist movement.[453] In 1879 the Reformatory Institutions Act was enacted and gradually a juvenile reformatory system developed in Cape Town. After Union in 1910, the Prisons and Reformatories Act, Act 13 of 1911, was passed. According to Midgley this piece of legislation was amended in 1920 by Act 46 of 1920, to allow voluntary groups to provide accommodation to those convicted of criminal offences. Subsequently, in 1937, the government created a social welfare ministry and eventually an interdepartmental committee was formed to look after the needs of children in trouble with the law, as well as neglected or abused children.[454] Act 31 of 1937 provided powers to judicial officers to refer children charged with criminal offences or delinquency to a trial court, and in terms of section 1 of this Act those regarded to be in need of care could be referred to a children's court.

Midgley goes on to say that the Criminal Procedure Act, Act 56 of 1955, introduced numerous amendments pertaining to court procedures in respect of juvenile courts, although similar to procedures in respect of adult criminal courts. While the Children's Act, Act 33 of 1960, introduced few changes in respect of procedural matters, it reduced the maximum age in the context of criminal culpability from 19 to 18 and criminal responsibility from 10 to 7 years of age.[455] This suggests that persons under the age of 18 convicted of serious crime could be considered less culpable compared to their adult counterparts, and could be punished appropriately, although in

[449] Sloth-Nielsen, J. (1990:74) Legal Violence: Corporal and Capital Punishment. In McKendrick, B. and Hoffman, W. (eds) People and Violence in South Africa. Cape Town: Oxford University Press.
[450] Sloth-Nielsen, J. (1990:75).
[451] Van Zyl Smit, D. and Offen, as quoted by Sloth-Nielsen, J. (1990:74).
[452] (1975:143) Children on Trial. a study of juvenile justice. South African studies in criminology. Cape Town: NICRO.
[453] Midgley, J. (1975:51) Children on Trial: study of juvenile justice. South African studies in criminology. Cape Town: NICRO.
[454] Midgley, J. (1975:66) Children on Trial.
[455] Midgley, J. (1975:68).

practice sentencing courts tended to be punitive and impose whipping sentences.[456] Midgley points out that during the early colonial period in South Africa magistrates' courts could mete out whipping sentences of several hundred lashes, while higher courts could impose a maximum of 50 lashes.

Legislation was enacted for juvenile cases in 1869 at the Cape Colony to restrict the courts to imposing no more than 15 lashes to persons under the age of 15. Midgley states that the colony of Natal did not have similar restrictions on the number of lashes imposed until Union in 1910. In 1917 the state reduced the number of strokes that could be imposed to 15, which demonstrates a shift from the earlier patterns. As far back as 1911, higher courts could overturn the sentencing decisions of magistrates regarding the number of lashes to be imposed, based on exceptional circumstances. During the period 1948 to 1950 about 281 offenders were whipped. Subsequently legislation was passed to restrict the number of lashes that could be imposed by magistrates to 10.[457] The sentencing pattern of whipping underwent significant shifts with regard to the number of strokes that could be imposed prior to 1950. The reasoning behind these shifts seems to have been, inter alia, the realisation of the serious injury or death that could result from the infliction of floggings. As stated in Chapter 1, the presentation reflect on key moments with reference to specific events and surrounding circumstances to promote focus as per the period below.

3.2.1 Judicial corporal punishment in South Africa from 1950 to 1969

In 1952 the state enacted a new piece of legislation known as the Criminal Sentences Amendment Act, Act 33 of 1952.[458] This Act provided for mandatory whipping to be imposed by the courts in addition to sentences of imprisonment. The Act exempted women and men over the age of 50 years, those suffering ill health and habitual offenders. Persons under the age of 18 and adult offenders could receive corporal punishment as a sentence. This law was a watershed event in the realm of sentencing and punishment in South Africa. It is important to note the mandatory nature of the Act despite the British Cadogan Report of 1938.[459] This report pointed out that there was no evidence that corporal punishment served as a deterrent to offenders or to others. The report found that 75% of young offenders who had been whipped were reconvicted within a period of two years, and there was recidivism of 45% in respect of those placed on a probation sentence. The report's conclusion was that those subjected to whipping tended to commit violent crimes. Van Zyl Smit and Offen concur on the notion of a cycle of violent behaviour.[460]

Nevertheless, the above authors agree that the 1938 Cadogan Report did not recommend the abolition of corporal punishment, but instead brought about sentencing reforms. In the South African context, in 1947 the Smuts government ordered an inquiry into matters concerning the penal system,[461] including prison overcrowding, crime trends and the deterrent effect of punishment. The 1947

[456] Midgley, J. (1982:11) Corporal Punishment and Penal Policy: notes on the continued use of corporal punishment with reference to South Africa. The Journal of Law and Criminology. Vol. 73(1) 388-403.
[457] Midgley, J. (1982:389).
[458] Midgley, J. (1982:397). Also see S v Williams and Others 1995 (3) SA 632 (CC).
[459] Midgley, J. (1982:396).
[460] See Sloth-Nielsen, J. (1990:88).
[461] Midgley, J. (1982:396). Also see Sloth-Nielsen, J. (1990:201).

Lansdown Commission of Inquiry on Penal and Prison Reform recommended the retention of corporal punishment with certain limitations.[462] The commission acknowledged the fact that most civilized countries in the world had abandoned corporal punishment as a sentence option. The commission held that to a certain extent corporal punishment had a deterrent effect on offenders, particularly those who were accustomed to lawlessness. According to Midgley and Sloth-Nielsen, the 1947 commission of inquiry proposed five strokes for child offenders and eight for adults, and that no person should be whipped more than twice. Before whipping was carried out, a medical practitioner should examine the offender and declare the offender fit for the punishment, physically and mentally. They point out that the 1947 Lansdown Commission of Inquiry's penal reforms were not implemented.

Midgley and Sloth-Nielsen further argue that the Criminal Sentences Amendment Act, Act 33 of 1952, imposed limitations on the sentencing discretion of courts in respect of corporal punishment. The Act provides for whipping to be imposed as a sentence for a variety of crimes, including murder, rape (in cases where the death penalty had not been imposed), arson, robbery, housebreaking, public violence or sedition, and culpable homicide involving assault with intent to rape or rob.[463]

Midgley states that courts were overburdened and between 1952 and 1954 the number of offenders sentenced to corporal punishment increased significantly, from 8,724 to 13,873. The patterns of sentencing over this period reveal an increase in crime rates in respect of serious offences. This Act was more applicable to black offenders and sentencing patterns reflect offences related to the mostly black political protests of the early 1950s.[464] Midgley acknowledges that the prosecution rate for serious crimes increased by 37% between 1950 and 1958.

Another crucial law enacted in the early 1950s with respect to the penal system is the Public Safety Act of 1953. The limitations of judicial sentencing discretion in respect of the mandatory imposition of strokes in terms of Act 33 of 1952 posed some challenges with regard to the interpretation of the provisions that permit departure from the prescribed strokes under 'special circumstances'. In R v Mokganedi[465] the accused was convicted by the magistrate of the crimes of housebreaking with intent to steal and theft. He was sentenced to four months' imprisonment with hard labour and a whipping of 10 strokes. However, the reviewing judicial officer found special circumstances in this case: 'The first special circumstance is the youthfulness of the accused, he is 18 years of age. The second special circumstance is the fact that between three and four months ago he received a whipping of 10 strokes, and that has proved to have been useless deterring him.' On this basis the judge suspended the sentence of whipping and reduced the number of strokes because of the extreme gravity of the offence. The court held that the reduced five strokes would be suspended for a period of two years, provided that the accused was not convicted of any offences during that period. Lastly, the sentence of four months with hard labour was confirmed.

[462] Midgley, J. (1982:396) and Sloth-Nielsen, J. (1990:201).
[463] Midgley, J. (1982:396).
[464] Midgley, J. (1982:395). Also see Sloth-Nielsen, J. (1990:201).
[465] 1952 (3) SA 848 (T).

Another case relevant to the new Act 33 of 1952 was that of R v Modise and Mkasa.[466] Section 4(2) of the Act allows the sentence of strokes to be suspended under special circumstances. The court held that its approach was premised on the fact that corporal punishment should not be imposed frequently or loosely in order to promote an effective deterrent. The court declared that: 'In the present case the element of youth is not evident, but the main consideration is that there has been a comparatively recent imposition of corporal punishment, which amounts to special circumstance within the provision of the new Act.' With regard to both the accused the judge found it sufficient to justify the suspension of corporal punishment for 12 months on condition that during that period the accused were not found guilty of any crime. In both cases the sentence of imprisonment was confirmed.

In both the above cases the decisions of the court seem to recognise that the infliction of strokes and imprisonment constitute severe punishment and that previous whippings had a negative effect rather than to have been a deterrent. In R v Malika[467] the accused was charged with theft on two counts, having had a long conviction record since 1947, when he was sentenced to imprisonment with hard labour for six months, part of which was to be spent in solitary confinement with spare diet. In respect of the latter theft his sentence was imprisonment with hard labour for 12 months and a whipping of eight strokes. Subsequently, this sentence was overturned with regard to the whipping measures. The court held that in view of numerous previous convictions a whipping was justified but not in excess of six strokes. On the basis of this the court found that: 'A whipping of three strokes with the cane on each of the two counts, and a sentence of six months' imprisonment with hard labour on each count is confirmed.'

The pattern of sentencing decisions in these cases reflects divergence in the understanding of provision 4 of the Act regarding the grounds for special circumstances. While there is a trend of housebreaking offences, their circumstances and facts have shown not to require the same number of strokes from the judicial officers.

These patterns of sentencing decision-making reflect a trend by the judges to associate 'special circumstances' mostly with extreme cases, with the gravity of the crime determining the number of strokes or departures. As far back as 1952, some judicial officers, particularly from the high courts, raised concerns regarding the deterrent effect of whipping practices, with reference to special cases before the courts and proportionality in sentencing decisions. It appears that the deterrent value of corporal punishment was little as shown by a pattern of judicial decisions above. In R v Anthony[468] the accused was charged with housebreaking with intent to steal and theft. He pleaded guilty, was found guilty and was sentenced to six months' imprisonment with hard labour and eight strokes. The record reveals that he was a first offender and that no aggravating circumstances attended the commission of the offence. The reviewing court decided that in the light of the circumstances and the fact that the accused was a first-time offender, the number of strokes should be reduced to six. The sentence of imprisonment and hard labour was confirmed.

[466] 1952 (3) SA 850 (T).
[467] 1953 (3) SA 173 (T).
[468] 1954 (1) SA 532 (C).

A similar sentencing decision with regard to number of strokes was imposed in the case of R v Maboko and Others.[469] This case involved three accused, aged 21, 19 and 19 years respectively. They were charged with the crime of robbery alleged to have been committed in Kimberley on 10 February 1956. They pleaded not guilty but were duly found guilty and rightly convicted. Accused numbers 1 and 3, Maboko and Kwetsane, were each sentenced to six months' imprisonment with hard labour and a whipping of ten strokes. Both accused numbers 1 and 3 had previous convictions. Accused number 2, Maboko, was sentenced to three months' imprisonment and five strokes. It is reported that the complainant was walking home along the pavement when one of the accused tripped him. When he fell, all three kicked him and pulled the money out of his pocket. It appears that no weapons were used and there was no violence or undue brutality.

According to the high court, the magistrates' court did not exercise its sentencing discretion appropriately with respect to the number of strokes imposed. It was subsequently confirmed that accused numbers 1 and 3 should each receive six months' imprisonment with compulsory labour and four strokes with a cane. Accused number 2 should get three months' imprisonment with compulsory labour and four strokes with a cane. In the above judgment Judge Fannin recognised that: 'Sentencing is fundamentally a matter in the discretion of the trial court and such powers should be exercised judicially because interference by the superior court is limited when there is misdirection.' Various interpretations and application of criminal law Acts in the rendering of sentencing decisions have shown no obvious approaches in respect of judicial officers.

In R v V[470] the accused was charged with the crime of the rape of a small child aged four years. The parents of the child saw the man on top of the child. A doctor's examination could find no sign of penetration and marks could have been caused by something like a finger. On the basis of this evidence the Crown court abandoned the charge of rape. Both courts concurred on the lack of intent to commit the alleged crime. It was decided that the accused was guilty of contravening section 14(1)(b) of Act 23 of 1957. It was alleged that the accused was capable of understanding his wrongful conduct even if he had been drinking.

Another case relevant to the question of ability to form intent is that of R v Pethla.[471] The Appellate judicial sentencing decisions suggest a trend of careful decision-making by the courts so as not to be regarded as imposing inappropriate or severe punishment, although in some cases appeals on the basis of severe punishment were dismissed. For example, in R v Karg[472] the appellant was a first offender, had been convicted of culpable homicide and sentenced to two years' imprisonment. In his appeal against the severity of the sentence the appellant, among other things, stated that he had fired generally in the direction of the deceased without intending to kill him. The trial court held that his behaviour showed recklessness or a high degree of negligence. In this case the judge ruled that there was no misdirection by the trial court and there was no justification for interference with the decision of the trial court. The judge further stressed that: 'It is no criticism of a sentence that it is severe if

[469] 1956 (1) SA 144 (G).
[470] 1960 (1) SA 117 (T).
[471] 1956 (4) SA 605 (AD).
[472] 1961 (1) SA 231 (AD).

severity is called for.' There seems to be a strong sense of retribution and deterrent sentencing theory in this case, probably due to the impact of the mandatory whipping Act.

With respect to judicial whipping, in 1958 the number of those who were whipped increased to 18,542, although judicial officers were unhappy about their inability to apply discretion on the basis of the merits of each case.[473] Whipping was the sentence most frequently imposed.[474] According to Midgley more than 331 young offenders, or 57% of those convicted, were whipped. Whipping was imposed for all types of offences, and for all ages, irrespective of previous convictions. Section 346(1) of the Criminal Procedure Act, Act 56 of 1955, prohibits female whipping, and section 345(1) prevents the juvenile court from imposing more than 10 strokes of whipping. Midgley points out that about 38% of those sentenced to be whipped received six strokes, 24% received four strokes and 19% received eight strokes. During this period the youngest offenders sentenced to be whipped were nine years, and the oldest were 20 years of age. The above author further postulates that 16- and 17-year-olds were most frequently subjected to this punishment. At the same time 60% of those convicted were sentenced to be whipped, compared to just over half of all who were convicted and 56% of those aged 13 to 15.[475] This picture corresponds with the cases discussed above, particularly with reference to the number of strokes imposed.

In the light of judicial criticism, legislation was enacted which brought some reforms to the use of corporal punishment in 1959, in the form of the Criminal Law Amendment Act, Act 16 of 1959.[476] The Act provided some limitations to the imposition of whipping on a first offender, adults could not be whipped on more than one occasion within a three-year period and offenders who were sentenced to a statutory minimum period of imprisonment were exempted. These shifts in legislation limited the number of whippings imposed by the courts. During the period 1963-64, the number of persons whipped dropped to 16,889.

It seems that these shifts in legislation provided a certain amount of judicial sentencing discretion in decision-making. In S v De Jager[477] the applicant was convicted, inter alia, of theft. The applicant appealed against his sentence on the grounds that he sought to lead other evidence. He was initially sentenced to 15 years' imprisonment. The judge found no irregularity or misdirection by the trial court except for severity of punishment. On these grounds various sentences were ordered to run concurrently, to constitute six years' imprisonment. Both the Karg and De Jager cases carried heavy punishment other than whipping, which suggests the impact of the Criminal Law Amendment Act, Act 16 of 1959, although judicial sentencing discretion was still limited to a certain extent in the context of these cases.

Subsequently in 1965 the legislation on compulsory corporal punishment was repealed by the Criminal Procedure Amendment Act, Act 96 of 1965.[478] This development and shift appear to reveal a decline in the pattern of whipping sentences,

[473] Midgley, J. (1982:397).
[474] Midgley, J. (1974:459).
[475] Midgley, J. (1974:459).
[476] Midgley, J. (1982:397).
[477] 1965 (2) SA 612 (AD).
[478] Midgley, J. (1982:397).

which dropped to 8,888 for the period 1965-1966.[479] By this time obligatory corporal punishment had been in operation for 13 years. Its impact appears to be confirmed by a Supreme Court judge: 'Within comparatively recent times corporal punishments of quite horrifying severity were inflicted and I for one do not believe that the deterrent effect of such punishments justified the suffering and indignity which were inflicted on those so punished.'[480] Sentencing patterns reveal that courts mostly imposed combined sentences of imprisonment and whipping and there were very few cases where offenders were sentenced to only corporal punishment. Consequently, the post-1965 period was marked by a decline in the application of corporal punishment in the approaches of sentencing courts due to the judicial discretion restored by the Act.[481] In this context there was an increasing trend of Supreme Court rulings on the sentences imposed.

One of the first cases decided in the aftermath of the Criminal Amendment Act, Act 96 of 1965, is that of S v Kumalo and Others.[482] Between 1952 until 1965 sentencing courts had less discretion regarding the imposition of whipping with respect to the crime of housebreaking. During this period sentencing patterns suggest more frequent imposition of corporal punishment by judicial officers with regard to persons convicted of housebreaking. Indeed, the trend of housebreaking crimes suggests growing persistence by young and adult persons to commit these offences. In the case of Kumalo and Others the three accused, aged 26, 23 and 22 respectively, had pleaded guilty to and had been convicted of housebreaking with intent to steal and theft, and each had been sentenced to five months' imprisonment and a whipping of six strokes. The accused were first offenders. In imposing the whipping sentence the magistrate was aware that in terms of section 12 of Act 96 of 1965 it was no longer compulsory.

The literature confirms that corporal punishment was not successful as a deterrent and left sentencing discretion to the courts. In reviewing the judgment, Judge Kennedy concurred with the trial court that: 'The sentence imposed was not so severe as to warrant the court substituting its own discretion for that of the trial court.' However, Judge Fannin in his dissenting minority view, reflected: 'I am of the opinion that a whipping is a punishment of a particularly severe kind. It is brutal in its nature and constitutes a severe assault upon not only the person of the recipient but upon his dignity as a human being. The severity of punishment depends to a very large extent upon the personality of the judicial officer charged with the duty of inflicting it, and over that the court ordering the punishment can have little, if any, control.'

The judge went on to cite the case of S v De Jager and Others[483] in which Judge Holmes stated that the Appeal court could interfere on limited grounds with the trial court discretion. According to Judge Fannin in S v Kumalo and Others: 'A great many criminals who are so punished, indeed probably the majority of them, suffer no lasting effects either physical or mental, but the others, who constitute, I am convinced, a lot inconsiderable minority, may well suffer physical and mental after-effects out of all proportion to the gravity of the offence for which they have been punished.' Furthermore the judge stated that: 'I am of the opinion, too, that the prime

[479] Midgley, J. (1982:397).
[480] See Midgley, J. (1982:397).
[481] Midgley, J. (1982:399).
[482] 1965 (4) SA 565 (N).
[483] 1965 (2) SA 616 (AD).

consideration, when a court considers imposing corporal punishment, should be the criminal himself. I do not go to the length of saying that there may not be cases where it may be necessary and desirable to impose a sentence of a whipping in order to put an end to a wave of a particular type of crime. It may be necessary in such cases for a whipping to be imposed in order that others may be shocked into a realisation that a continuation of a particular type of offence may result in the imposition of floggings upon offenders. But apart from cases such as that, the main consideration should be the criminal and the crime committed by him.'

In arriving at his decision the judge stated that a sentence of a whipping of six strokes, together with a long period of imprisonment, was severe and unjust under the circumstances. The judge's position was that the sentence of whipping should be revoked, leaving a sentence of five months' imprisonment to be served by the accused, further leaving a whipping sentence in the hands of a magistrate as a punishment available to be imposed should the accused re-offend. The dissenting view and the majority in S v Kumalo and Others and S v De Jager and Others show a pattern that sentencing was pre-eminently a matter at the discretion of the trial court and that a higher court's power to interfere was limited. During this period the relationship between magistrates' (lower) courts and high courts reveal greater levels of overlap in sentencing approaches. This may have been caused by increasing trends of serious crime, which were likely to result in less uniform approaches in sentencing decisions of judicial officers. This opinion was captured in the De Jager judgment: 'Whether the sentence induces a sense of shock, that is to say, if there is a striking disparity between the sentence passed and that which the court of appeal would have imposed. It should therefore be recognised that the appellate jurisdiction to interfere with punishment is not discretionary, but, on the contrary, is very limited.'

In S v Dematema[484] the accused was 33 years old and convicted of attempted murder. He was sentenced to five years' imprisonment with hard labour and four cuts with a cane. The reasoning of the trial court was that corporal punishment was imposed on account of the extreme brutality of the attack. Judge Young of the reviewing court reasoned that: 'When corporal punishment is coupled with long-term imprisonment a more rigorous justification of corporal punishment is required.'

Similarly, the same judge in R v Tanbiga[485] argues that: 'If the interests of society and of the offenders could best be reconciled by the infliction of corporal punishment in lieu of imprisonment, such conclusion provided a rational basis for such punishment.' The court judgment found the imposition of corporal punishment to be unjustified and the cuts were deleted from the sentence. One can distill from these judgments a trend by judicial officers to show some predicament with the notion of justifiably appropriate punishment with regard to the circumstances of each specific case.[486] These sentencing patterns suggest a sense of disproportionality in the trends of long imprisonment coupled with whipping. In S v Maisa[487] Judge Hiemstra reflects on the elements of severity when corporal punishment ought to be imposed, including the age of the accused, aggravating circumstances connected with the offence and previous convictions.

[484] 1967 (4) SA 371 (R).
[485] 1965 (1) SA 257 (R).
[486] Also see similar judgment in S v Shepard and Others, 1967 (4) SA 170 (W).
[487] 1968 (1) SA 271 (C).

A similar judgment which is widely quoted in judicial sentencing decisions is that of S v Zinn.[488] The appellate was aged 58 years, had been found guilty of several counts of fraud, theft and a count contravening the Insolvency Act, and was sentenced to 15 years' imprisonment. With regard to corporal punishment, the appellant's age and illness persuaded the court to consider a whipping sentence to be inappropriate. It appeared that the Appeal court regarded the sentence as excessively severe with a strong emphasis beyond the permissible limits with regard to the nature and effect of the crime, reducing the personality of the offender and the effect the punishment might have on the offender. The sentence was reduced to 12 years' imprisonment. Judge Rumpff went on to say: 'What has to be considered is the triad consisting of the crime, the offender and the interest of society.'

The judge further cited a quotation with respect to the approaches and duties of a judge in imposing punishment: 'that anger should be especially kept down in punishing, because he who comes to punishment in wrath will never hold that middle course which lies between the too much and the too little. It is also true that it would be desirable that they who hold the office of judge should be like the law, which approaches punishment not in a spirit of anger but in one of equity. In trivial cases indeed judges ought to be more inclined to mildness, but in more serious cases to follow the severity of the laws with a certain consideration of generosity.' Sentencing judgments have had to grapple with this balanced proportional sentencing over the years, and call for judicial officers' sense of responsibility and accountability in sentencing approaches. In the period 1950 to 1965 a pattern emerged which requires sensitive judicial approaches when dealing with serious crimes committed by persons under the age of 18 and adults.

It appears from these judgments that the sentencing theories of retribution, deterrence and rehabilitation tend to be the major factors and guides behind rendered punishments. This is suggested by the idea of gauging the deterrent effect, proportionality and foresight in reforming the personality of the offender in the imposition of a sentence by judicial officers. Judge Kennedy in the review recognises the influence or link between the penal philosophy of the judicial officer and the personality factor in sentencing decisions. The influence of judicial penal philosophy on the individual judge has been raised significantly in cases of capital punishment in South Africa over the years.[489] These views broadly correspond with the descriptions of judicial sentencing philosophy in Chapter 2. Whipping patterns and trends have shown a considerable degree of tough judicial sentencing decisions, and disproportionality in the imposing of corporal punishment on the offenders. Cases and figures discussed seem to correspond with the contextual nature of the seriousness of crimes.

By the early 1950s and towards the mid-1960s a significant number of sentencing decisions by trial courts were appealed and substituted by the court of appeal. Such trends could raise interesting developments with respect to the 1970s.

[488] 1969 (2) SA 537 (AD).
[489] Sloth-Nielsen, J. (1990:85).

3.2.2 Judicial corporal punishment from 1970 to 1979

The 1968 and 1971 whipping patterns reflect a major difference.[490] In 1968 the figure was 57,5%, while there was an increase in 1971 to 69,8%. With reference to the age factor and the repeal of the compulsory corporal punishment Act, from 1968-69 the number of adult offenders aged 18 years and older who had been sentenced to be whipped dropped to 5,237. By 1976 it had been reduced to 2,251.[491] This picture seems to correspond with various court judgments discussed above in the period after 1965. For instance, in S v Maisa[492] the court stressed that corporal punishment should be imposed judiciously and be constrained to violent offences. Another judgment in 1965 ruled that whipping is a severe and degrading punishment for an adult and proper only for serious offences where there are aggravating circumstances.[493]

Penal developments before the 1970s tended to contribute to the decline of the imposition of corporal punishment on adult offenders while juvenile patterns showed the opposite.[494] By 1970 there were about 34,000 young offenders sentenced to whipping.[495] Midgley argues that 57% of all convicted young persons were punished to corporal punishment and that is also revealed by a study of sentencing in the juvenile court in Cape Town. The above author further relates that the study reveals that the youngest person to be whipped was nine years old, this despite the normal trend to impose corporal punishment on those over the age of 12 and most frequently on persons between the ages of 16 and 17 years old. Midgley and Newman point out that sentences of corporal punishment were imposed by the courts in respect of 4 399 mostly male juvenile offenders during the period 1971-1972. Of the above number, 91,6% of whippings were imposed by the lower courts and the rest by the Supreme Court. Significantly, whipping practices tended to reflect a blanket approach with regard to minor crimes, first and second offenders.[496]

Over the years whipping trends and patterns in respect of persons under the age of 18 and adult offenders tend to reflect conflicting approaches by the sentencing courts. In S v Tsoku[497] the accused was convicted of assault with intent to do grievous bodily harm and sentenced to three years' imprisonment and eight lashes. The reviewing judge raised the question whether the magistrate took account of the principles in S v Zimo en Andere[498] when discharging sentence, in light of the fact that the accused was 38 years of age. The magistrate responded: 'Taking into account the accused's previous convictions and the present case the court concluded that lashes might have been the necessary deterrent.' It also appeared from the case that the court was aware of the principles in R v Anthony[499] discussed above. The evidence before the court seemed to suggest that the accused had committed a brutal attack without provocation by the complainant, and kicked him and stabbing him several times with a

[490] Midgley, J. (1975:126) Children on Trial. A Study of Juvenile Justice. South African Studies in Criminology. Cape Town: NICRO.
[491] Midgley, J. (1982:397).
[492] 1968 (1) SA 271 (C).
[493] R v Tanbiga 1965 (1) SA 257 (R).
[494] Midgley, J. (1982:399).
[495] Midgley, J. (1982:400).
[496] Midgley, J. (1982:400). Also see Midgley, J. and Newman, J. (1975:17) Crime and Penal Statistics.
[497] 1976 (4) SA 6 (T).
[498] 1971 (3) SA 337 (T).
[499] 1954 (1) SA 532 (C).

screwdriver. According to the facts of the case, the injuries sustained by the complainant included loss of his eye. The three previous convictions were taken into account. The court reasoning appeared to be based on deterrence theory to prevent him and others from re-offending in future. Nevertheless, the reviewing judge considered three years' imprisonment coupled with eight strokes to constitute a severe sentence for a person of 38 years of age. In this regard the court confirmed three years' imprisonment and revoked the eight strokes.

Following this judgment in the realm of corporal punishment, the Viljoen Commission of Inquiry[500] recommended that the imposition of whipping should be reduced to five strokes, and that offenders should not be whipped on more than two occasions. Corporal punishment should be imposed only in respect of violent crimes or defiance of lawful authority, and adult offenders above 30 years of age should be exempted. The commission went on to state that the age limit should be 40 years for prisoners committing offences while in prison. Juveniles should be whipped over their clothing. Whipping should not be executed unless a medical officer had certified that the offender was fit for such punishment.[501] Subsequently, after the Commission's report was presented in parliament in January 1977, a new Criminal Procedure Act was passed which replaced the 1955 Criminal Procedure Act.[502] The new Act considered some of the recommendations of the commission, although not all the commission's penal reforms were accepted by parliament.[503] For example, the recommendation in respect of a maximum of five lashes was changed to seven. The recommendation that whipping should not be imposed on more than two occasions did not apply to juveniles. The recommendation to confine corporal punishment to serious crimes was not accepted.

As a result, in the context of the 1976-1977 township schools uprising, the majority of children were whipped for participating in politically motivated activities.[504] By 1977-1978 corporal punishment convictions reached a total number of 39 142.[505] These high figures appear to correspond with the implementation of legislation after the recommendations of the Viljoen Commission, as shown above. Indeed, figures can be attributed to the wide use of corporal punishment and suggest a decrease in the use of other sentencing options that do not directly inflict physical pain or punishment. Midgley seems to agree with this idea and postulates that a survey of South African juvenile courts undertaken between 1968 and 1971 revealed that courts tended to adopt approaches that were premised on excessively punitive sentences. They most frequently applied corporal punishment while other types of punishment were not frequently imposed.[506] As shown in this period most courts did not see the retributive value of corporal punishment as evident in various conflicting judgments. The compulsory whipping Act of 1952, shifts and approaches were subjected to sustained judicial criticism, but the practice of capital punishment tended to be taken for granted by the South African judiciary.[507] Both corporal and capital punishment in the South

[500] 1954 (1) SA 532 (C).
[501] (1976:104) Viljoen Commission of Inquiry into the Penal System of the Republic of South Africa.
[502] Midgley, J. (1982:402).
[503] Midgley, J. (1982:401-02).
[504] Midgley, J. (1982:402).
[505] Muntingh, L. (1996:22) A review of sentencing trends in South Africa, 1977/8-1993/4.
[506] Midgley, J. (1975:186) The Treatment of Juvenile Offenders. In Proceedings of the Conference on Crime, Law and the Community. Cape Town: Juta and Company Limited.
[507] Van Niekerk, B. (1969:465).

African apartheid context raised perceptions of racial bias with regard to their pattern of imposition.[508] In this regard statistical patterns of disparities along racial lines were sketchy, although it is claimed that convictions of white accused for murder was seldom when the victim is black particularly during the 1950s.[509] Kahn advances the proposition that the imposition of capital punishment is arbitrary and capricious.[510] NADEL[511] concurs that over the years capital punishment tended to have a political bias, particularly in the early 1960s to the 1980s, and this seems to be evident in political executions.

3.3 The death penalty in South Africa

The history of the death penalty is as old as society, with the corresponding movement for its abolishment or limited application.[512] In South Africa during the early colonial years there were public hangings at the Cape. Since those years the method of execution in South Africa has been hanging by the neck, except for the 1914 execution of Jopie Fourie, found guilty of treason, who was executed by firing squad during war time.[513] Roman Dutch Law spells out several crimes punishable by death other than murder, which required evidence of grave circumstances.[514] The Criminal Procedure and Evidence Act of 1917 specified capital crimes and section 338 provided for mandatory hangings in the case of murder.[515] Capital punishment in respect of rape and treason were at the discretion of the sentencing court.

By 1935 section 61 of the General Law Amendment Act, Act 46 of 1935, introduced some shifts from mandatory capital punishment for murder with the idea of 'extenuating circumstances'.[516] The meaning of the term 'extenuating circumstances' has to a large extent depended on the interpretation and understanding of each individual judicial officer trying capital crimes.[517] The Act broadly considers extenuating circumstances to include the age factor (under 18), lack of use of dangerous weapons, personal circumstances, first offender, state of mind, and aggravating and mitigating factors in the context of death penalty. Currin cites the S v Lembete[518] judgment to illustrate the complex nature of extenuating circumstances, as it places a duty on the accused to prove its presence in respect of a case.[519]

By 1958 a number of amendments had been introduced to the Criminal Procedure Act of 1955. This led to the creation of new capital crimes by Act 9 of 1958 and each of

[508] Van Niekerk, B. (1969:464) Hanged by the Neck until you are Dead. The South African Law Journal. Vol. Lxxxv1 (iv): 457-75. , Sloth-Nielsen, J. (1990:85). Also see Midgley, J. (1982:397).
[509] See Van Blerk, A. (1988:45).
[510] (1975:220) Symposium on Capital Punishment. In Proceedings of the Conference on Crime, Law and the Community. Cape Town: Juta.
[511] (1998:47) The Role of Lawyers and Legal System in Gross Human Rights Violations of Apartheid. Also see Coleman, M. (1998:84).
[512] Van Niekerk, B. (1969:461).
[513] Van Niekerk, B. (1969:459) also see Kahn, E. (1975:223).
[514] Kahn, E. (1975:222) also see Currin, B. (1990:2) Capital Punishment. In Robertson, M. South African Human Rights and Labour Law Year Book. Vol. 1, Cape Town: Oxford University Press.
[515] Kahn, E. (1975:222).
[516] Currin, B. (1990:2), quoted above.
[517] Currin, B. (1990:2), quoted above.
[518] 1947 (2) SA 60
[519] (1990:3), quoted above.

the crimes' punishment depended on the discretion of the court.[520] They ranged from robbery or attempted robbery with aggravating circumstances, to infliction or threat of serious bodily harm, housebreaking or attempted sabotage, in terms of the 1962 General Law Amendment Act. A further crime introduced was that of a resident or former resident undergoing training or obtaining information that could further the objects of communism, unless the absence of such purpose could be proven beyond reasonable doubt. This crime was created in 1963 by an amendment to the Suppression of Communism Act of 1950. The crime of kidnapping was created by an amendment to the Criminal Procedure Act of 1955. Participation in terroristic activities, such as sabotage and treason, was widely defined as a capital crime and was created by the 1967 Terrorism Act.[521] Sentencing trends and patterns reveal that murder was most frequently the crime to result in the imposition of the death penalty in the early 1950s to the late 1960s. Between 1948 and 1968 a significant number of persons were hanged. In 1954 the number of executions was 73,[522] while from 1957 to 1968 the number increased to 93 executions. During mid-1961 to mid-1962 there was a dramatic increase in the number of hanged persons, to 128.[523] This pattern shows an increase in the number of capital crimes or judicial rigidity in interpreting extenuating circumstances and other factors relevant to a case.

During the period 1947 to 1969 execution trends and patterns reveal that capital crimes other than murder were seldom punished by death. For rape, the number of executions is estimated to be about 135. For robbery or housebreaking with aggravating circumstances the number is about 70 and for sabotage about seven.[524] It seems from this picture that not all capital crimes were met with the death sentence. Probably capital punishment was less prevalent and the circumstances often mitigated against capital punishment in sentencing discretion. During this period it appears that most executions, approximately 90%, were for murder.[525] In 1951 there were about 37 executions.[526] By mid-1967 to mid-1968 there was an increase in convictions to around 1 671, while from 1958 to 1960, 291 death sentences were imposed and 140 executions carried out.[527] Of the number of death sentences imposed between 1963 and 1965, 794 executions were carried out. Currin, Kahn and Olmesdahl seem to broadly agree on the increase in capital convictions and executions from the late 1950s to the mid-1960s. They also reflect on the growing number of commutations of death sentences at the time. It is possible that the shift towards the notion of extenuating circumstances permitted wide possibilities by judicial officers in respect of convictions for murder.

Capital or serious trials in the period from 1950 to the 1980s have been executed in accordance with the notion of extenuating circumstances. Others within the period have shown a strong application of the doctrine of 'common purpose', which

[520] Currin, B. (1990:3), quoted above.
[521] Kahn, E. (1975:222).
[522] Van Niekerk, B. (1969:458).
[523] Kahn, E. (1975:223).
[524] Kahn, E. (1975:223).
[525] Kahn, E. (1975:224).
[526] Currin, B. (1990:22).
[527] Olmesdahl, M. C. J. (1983:192) Predicting the Death Sentence. In Olmesdahl, M. C. J. and Steytler, N. C. Criminal Justice in South Africa. Selected aspects of discretion. Cape Town: Juta & Co. Ltd.

developed in English case law.[528] It is stated that in the English case of R v Maclin, Murphy and Others[529] the court defined the doctrine as follows: 'It is a principle of law, that if several persons act together in pursuance of a common intent every act done in furtherance of such intent by each of them is, in terms of the law, done by all.'[530] Subsequently, the common purpose principle was adopted in South Africa as far back as 1886. In accordance with the common purpose law, in R v Mgxwiti[531] the accused, with seven other persons, was charged before a judge and assessors in the East London Circuit Local Division with the murder of a woman. The first and second accused persons were convicted of murder with no extenuating circumstances and were sentenced to death.

The conviction for murder was based on the finding that the Crown court had proved a common purpose of the group of persons who attacked and killed the deceased and that the appellant was part of such purpose. The deceased was in her car that she was driving as the only occupant. According to the evidence of the court the appellant had decided to take part in the attack in pursuance of his decision, came to the driver's side of the car, which was on the right-hand side, and, either through the open window space or the open door space, stabbed at the deceased with a knife. Stones had been thrown at the car and it was set alight while the deceased was still in the car. On appeal, the defence argument was that the appellant could not be held guilty of murder, on the doctrine of common purpose, unless he had associated himself with that purpose at the time when the deceased had not received a fatal injury. The contention was disputed and dismissed and conviction for murder was endorsed.

Prior to 1950, the case of McKenzie v Van der Merwe[532] related to the principle of common purpose. The evidence seemed to reveal that the accused, while in rebellion and acting in concert with other persons in rebellion, was an assistant commandant of the rebel forces in the Orange Free State during the 1914 rebellion. The rebels had come to the plaintiff's farm to cut his wire fences and take away his stock. But the plaintiff did not succeed in his claim on the basis that there was no direct evidence which linked the accused with other rebel groups who were on the scene. In the appeal the contention by the complainant centred on the fact that: 'Every rebel was liable for acts such as those complained of, done by every other rebel in furtherance of the common purpose.' Subsequently, the appeal was rejected on the grounds that it was improper to make a narrow inference to hold the accused liable for the deeds of rebel forces within the limitations of the doctrine of common purpose.

In S v Malinga and Others[533] four appellants were convicted of the serious crime of murder by a judge and two assessors and were sentenced to death in Durban and Coast Local Division. It appears from the case that the appellant had concert to commit the crime of housebreaking with intent to steal and theft. One appellant was armed with a loaded revolver which he consequently shot and killed a policeman. The court pronounced that the other appellants must have foreseen the likelihood of such

[528] Davis, D. (1990:139) Capital Punishment and the Politics of the Doctrine of Common Purpose. In Hansson, D. and Van Zyl Smit, D. (eds) Towards Justice? Crime and State Control in South Africa. Cape Town: Oxford University Press.
[529] 1838
[530] Davis, D. (1990:139).
[531] 1954 (1) SA 370 (AD).
[532] 1917 SA 41 (AD).
[533] 1963 (1) SA 692 (AD).

occurrence and were party to and equally guilty of the murder. The court further pronounced that there were no extenuating circumstances. A major point on appeal was that the trial court was mistaken in not regarding the state witness as a police trap, as he was at the scene. On appeal it was further alleged that there was insufficient proof of any common purpose existing at the time when the deceased was shot. The use of a fire arm by appellant number 4 was not a possibility foreseeable by the other appellants. The appellant further claimed that there were extenuating circumstances in respect of those who did not fire the shot. Eventually the appellate court arrived at a decision that all the appellants should have foreseen the intention to kill, in the light of the use of a loaded fire arm which could result in loss of life, and the appeal was dismissed. In S v Dladla and Others[534] the accused was convicted of the murder of a police informer. The court judgment was that the accused should have foreseen the crowd's murderous intent to kill the victim, and it appeared from the evidence that the appellant had participated in the actions that resulted in the killing.

Gauging the pattern of sentencing in accordance with the doctrine of common purpose, there seems to be a shift from the earlier pattern of rendered judgments. From 1950 onwards the application of the common purpose principle appeared to be understood narrowly or loosely as a mere attempt to secure convictions compared to prior to the 1950s. This pattern of approach in sentencing decisions could be associated with the possibility of an increase in capital crimes. For example, in the case of Malinga and Others the state appeared to be at pains to secure the death sentence, probably in order to set an example to deter other potential offenders. This is suggested by the role of an accomplice who turned informer and state witness, which resulted in the accomplice being discharged from liability for prosecution.

In S v Mkaba and Others[535] the appellants were Zinakile Mkaba, Vuyisile Mini and Wilson Khayingo. They were charged in 1963 with 17 counts of sabotage in terms of section 21 of the General Law Amendment Act, Act 76 of 1962, six counts of contravening section 11(a) of the Suppression of Communism Act, Act 44 of 1950, one count of housebreaking with intent to steal and theft, and the murder of a police informer. The three appellants were found guilty with no extenuating circumstances and the death sentence was passed on each appellant. It appears from the evidence of the court that at the time of the murder the appellants were members of Umkhonto we Sizwe's[536] regional committee in the Eastern Cape. The appellants' contention was that there were extenuating circumstances based on the fact that the murder took place in the context of political aspirations and the motive was to further political objectives. However, the court recognised political motives and concluded that they could not serve to extenuate the culpability of the crime. The court held that the murder could not be treated as if it took place in an open field, or where political emotions were running high. It further held that the murder of the deceased was secret and carefully planned, with a common purpose, and dismissed the appeal.

In cases where groups were accused of the crime of murder in the period between 1950 and 1969, there seems to be a trend to convict the accused without strong evidence that links with the act as an individual. For example, in the case of Malinga and Others the court of appeal stated that association with an illegal common purpose

[534] 1962 (10) SA 307 (AD).
[535] 1965 (1) SA 215 (AD).
[536] A banned organisation.

constituted participation in the unlawful act, and association in the common design made the act of the principal offender the act of all. By contrast, in McKenzie v Van der Merwe the court refused to establish liability without showing direct proof. These are the contradictions in sentencing decision and patterns with respect to the use of the common purpose doctrine.

A judicial approach relevant to murder convictions based on the common purpose doctrine is that of S v Thomo and Others.[537] In this case three adult men and a woman appeared before a judge and assessors on a charge of murder. The three appellants were found guilty of murder with extenuating circumstances. The first appellant was sentenced to eight years' imprisonment, the second and fourth appellants were each sentenced to 15 years' imprisonment. The third accused was found guilty of common assault and sentenced to six months' imprisonment. Apparently in this case the evidence showed that accused number 3 had provoked the deceased to come out and fight accused number 1, in response to which accused number 1 assaulted the deceased with sticks and accused number 3 assaulted the deceased by kicking him. Then accused number 2 appeared on the scene carrying a cane knife and struck the deceased a number of blows on the left side of the deceased's head. While this fight was going on, accused number 4 also arrived at the scene and began assaulting the deceased by stabbing him. On the appeal against conviction of murder, the appeal court appeared not to be satisfied with the evidence discharged by the state on the duty of proving beyond reasonable doubt that accused number 1 had assisted either the accused number 2 or 4 with the intention of murdering the deceased. With respect to accused number 4, the court was satisfied that when he started stabbing the deceased was alive, although it was not satisfied that such stabbing was causally related to the death of the deceased.

Eventually the court set aside the conviction of murder with extenuating circumstances and the sentence of eight years' imprisonment of accused number 1. A verdict of guilty of being accessory after the fact of murder and a sentence of three years' imprisonment was substituted. The sentences of accused numbers 2 and 3 remained. Lastly, the fourth accused's conviction of murder with extenuating circumstances and a sentence of 15 years' imprisonment was replaced by a verdict of guilty of attempted murder and a sentence of 10 years' imprisonment. Nevertheless, often in the context of the doctrine of common purpose, sentencing patterns and trends suggest that the degree of the crime of murder tends to raise the degree of culpability, and the level of blameworthiness tends to override the possibility of identifying extenuating circumstances and other factors surrounding the crime. It appears that the principle of deterrence and incapacitation were applied frequently than other theories, although it is difficult to determine their deterrent effect.

3.3.1 The death penalty from 1970 to 1979

As described earlier, the beginning of the 1950s and the early 1960s were characterised by a significant upsurge in the resistance to the development of apartheid, yet by the end of the 1960s there was a political lull due to the detention of those found challenging the authority of the state.[538] By the 1970s there was a revival in political resistance and the period is mostly marked by the events of 16 June 1976,

[537] 1969 (1) SA 385 (AD).
[538] Sloth-Nielsen, J. (1990:87).

the Soweto student uprising which consequently appeared to have resulted in new repressive laws, and amendments in the penal realm to strengthen state social control measures.[539]

Execution patterns from 1971 to mid-1972 reflect 56 hangings. From mid-1972 to mid-1973 there were 55 hangings.[540] These hangings were mostly for the crime of murder, followed by robbery. The third type of crime to account for these execution patterns was robbery with aggravating circumstances. Rape is counted to have received less attention in respect of capital punishment during this period. From 1974 to 1975 about 59 persons were hanged, from 1976 to 1977 there were about 87 executions carried out by the courts, and from 1978 to 1979 there were about 148 executions.[541]

By 1971-1972, 91 persons sentenced to death by the courts were admitted to prisons. On 30 June 1971 there were 41 persons who had been sentenced to death but who were still awaiting execution in prison. In 1971-1972, 56 persons were executed, while the previous year, 1969-1970, 80 persons were executed, and in 1970-1971 another 80 persons were sent to the gallows. In 1968-1969, 84 persons were executed. Midgley and Newman conclude that the figure of 56 executions for 1971-1972 represents a decrease of one third in the number of executions since 1968-1969, which shows a trend towards a decrease in the use of the death penalty compared to the previous years. Of the 56 executions in the period 1971-1972, 49 were for murder, three for robbery and murder, one for rape and three for robbery with aggravating circumstances. The execution trends and patterns in this period have shown an increase in hangings. This suggests that conviction rates for serious crimes were on the increase and a prevalence of such crimes in the context of uprising. Another dimension is that the doctrine of common purpose permitted judicial officers to arrive at the conviction of a group of persons and find them liable for the unlawful conduct of one individual.

By the mid-1970s there was a resurgence of politically related trials.[542] These cases appeared to have been tried under the ambit of the common purpose doctrine. In the case of S v Mahlangu (unreported) there seems to be strong elements of the application of the common purpose doctrine.[543] The accused appeared to be youthful and had left the country after the Soweto student uprising in 1976. In 1977, he returned with two men, heavily armed as ANC guerrillas. It appeared that on their way they were stopped by the police. Mahlangu ran away, the other man disappeared and Motlaung ran into a warehouse in Goch Street, Johannesburg, where he shot dead two men and threw a hand grenade and injured two other men (all civilians). It appeared that Mahlangu was not on the scene. Later both were charged, in February 1978, and Motlaung was declared unfit to stand trial due to some brain damage and blows to his head in the struggle at the warehouse when he was captured. Then Mahlangu was tried alone for the two crimes of murder. The court argued that the

[539] Scharf, W. (1985:56) Liquor, the State and Urban Blacks. In Davis, D. and Slabbert, M. (eds) Crime and Power in South Africa – Critical Studies in Criminology. Cape Town: David Phillip. Also see Foster, D., Davis, D. and Sandler, D. (1987:28).
[540] Kahn, E. (1975:223).
[541] Olmesdahl, M. C. J. (1983:192), quoted above. Also see Midgley, J. and Newman, J. (1975:16) Crime and Penal Statistics. In Midgley, J., Steyn, J. and Graser, R. above.
[542] Lobban, M. (1996:2).
[543] Lobban, M. (1996:155).

accused realised as well as Motlaung that in the event of certain circumstances the fire arm would be used to kill. The judgment states: 'Solomon Mahlangu was equally liable for all the acts that Motlaung had done; the pulling of the trigger was as much the pulling by Solomon or by Mondy.' Solomon Mahlangu was sentenced to death for his part in the killing of two men on 13 June 1977 and was executed on 6 April 1979.[544] While Mahlangu was associated with these acts, the court approach seems not to have taken into account the nature and the political context of this serious crime in the light of the upheavals of the time. It appears from the case that the accused's youthfulness and political motives did not constitute extenuating circumstances in sentencing decision.

By this time courts had become a site for an ideological battle of ideas between students and youth on the one hand, and the state on the other, for challenging, inter alia, the establishment of the Bantu Education Act, Act 47 of 1953 and other agencies of state power.[545] In this context most trials tended to emanate from the charge of sedition. Students' conduct was labeled as seditions against authority, and was often prosecuted and punished as crimes of public violence.[546] By contrast, the Seditious Acts and Terrorism Act, Act 83 of 1967, tended to be vague and because of its wide scope, the state could pursue charges and convictions against the accused.[547] In this regard judicial sentencing tends to reflect patterns that show the impact of section 6 of Act 83 of 1967 and had received direct criticism from Van Niekerk, which resulted in his trial.[548] Dugard, in reviewing the case of Van Niekerk, described section 6 of Terrorism Act[549] as providing the police with powers to detain any person that it suspected of participation in terrorist activities. Such persons could be detained indefinitely in solitary confinement for the purpose of interrogation. Thus far, the justification for the use of death penalty was based on retribution, but mostly on deterrence and incapacitation. Be that as it may it is difficult to prove the preventive value of such decisions.

In the period subsequent to 1976, the government appointed the Viljoen Commission of Inquiry into the South African penal system. The rationale appeared to be based on the increase of the prison population.[550] The commission recommended that laws that tend to increase arrests, court trials, convictions and criminal sanctions should be reduced as they appear to be the cause of prison overpopulation.[551] Similarly, this is likely to be relevant with regard to death row prisoners, gauging by the rates of death penalties and detention convictions over the years as revealed by trends and patterns. Like the 1947 Lansdown Commission and the England Cadogan Report of 1938, the Viljoen Commission made certain recommendations with respect to corporal punishment. It recommended the limitation of the imposition of corporal punishment

[544] See Lobban, M. (1996:158) and Coleman, M. (1998:84) 'Political Executions' A Crime Against Humanity.
[545] Lobban, M. (1996:227).
[546] See Lobban, M. (1996:228 & 238).
[547] Lobban, M. (1996:123).
[548] Lobban, M. (1996:123).
[549] (1972:271) Recent cases. Judges Academics and Unjust Laws: Van Niekerk Contempt Case. The South African Law Journal. Vol. 89: 271-285.
[550] See Viljoen Commission of Inquiry into the Penal System of the Republic of South Africa. (1976:163).
[551] (1976:163), quoted above.

but not necessarily the abolishment of whippings. This development seems to stress for sentences other than corporal and capital punishment.

3.4 Sentences other than corporal and capital punishment

From 1950 until 1980s, in South Africa sentences other than corporal and capital punishment tended to constitute imprisonment, and did not reflect a balanced use of other sentencing options.[552] This assertion corresponds with empirical sentencing patterns which show that corporal punishment tended to be coupled with imprisonment and was related to prison population rates.[553] In terms of section 329 of the Criminal Procedure Act, Act 56 of 1955, South African sentencing options ranged from the death penalty to imprisonment with or without solitary confinement, periodic imprisonment, declaration as a habitual criminal, whipping, the imposition of a fine, community service, reform school, a suspended or postponed sentence, caution or reprimand and probationary supervision.[554] By 1958-1959 the daily average number of prisoners in detention was 49 886. In 1959-1960 the number rose to 52 956, in 1960-1961 it was 55 762, in 1961-1962 it was 62 769, in 1962-1963 it was 66 575, and by 1963-1964 it was 70 351.[555] These figures reflect the trend of a growing prison population, although the length of sentences may have had an impact on this picture.

The Commissioner of Prisons reported that from July 1971 to June 1972, 440 058 sentenced.[556] Midgley and Newman state that in 1971-1972 approximately 23 persons were sentenced to life imprisonment and 1 085 persons were sentenced to indeterminate periods of imprisonment by the courts. In the light of these figures Midgley and Newman reflect that, in respect of child offenders, during judicial decision-making the notion of criminal responsibility with regard to age was outweighed by the seriousness of the offence. Cases brought before the juvenile court were referred to the higher courts, and 65% of cases included murder, rape and serious assault. Few property crimes of a more serious nature were tried by the higher courts. The reasoning was that the seriousness of a case would often lead to a heavy penalty and this often resulted in a situation where juveniles were tried as adults.[557]

By 1970-1971 it was reported that 474 065 sentenced persons had been admitted, and the corresponding figure for 1968-1969 had been 496 071. In 1965 there was minor drop compared to previous years. For example, the increase between 1965 and 1969, a period of less than five years, amounted to 78%. The 1971-1972 figure reflects a considerable improvement on that of 1968-1969, with a decrease of 55 149 in the sentenced prison population.[558] These figures reflect the empirical sentencing pattern of the imposition of custodial sentence during 1950s to 1970s, and present the picture with regard to sentencing trends for both young and adult offenders.

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[552] Midgley, J. (1974:460), quoted above.
[553] See Viljoen Commission of Inquiry into the Penal System of the Republic of South Africa. (1976:3).
[554] See Viljoen Commission of Inquiry into the penal system of the Republic of South Africa. (1976:2) and see Midgley, J. (1974:457) Sentencing in the Juvenile Court.
[555] Viljoen Commission of Inquiry, (1976:3).
[556] Midgley, J. and Newman, J. (1975:17 & 94) Crime and Penal Statistics. In Midgley, J., Steyn, J. and Graser, R. Crime and Punishment in South Africa. Johannesburg: McGraw-Hill.
[557] Midgley, J. and Newman, J. (1975:17).
[558] Midgley, J. and Newman, J. (1975:17).

With respect to the age factor, about 22 or 4% of young persons who were convicted during this period were sentenced to imprisonment. Offenders in the 18-to-21-year age group were more frequently sentenced to imprisonment than younger offenders. Of the 18-to-21-year-old offenders, 46% were sentenced to imprisonment, while only 5% of 16-to-17-year-old offenders were sentenced to imprisonment. No person under the age of 16 years was imprisoned and only two women offenders were sentenced to imprisonment.[559] Midgley asserts that many of those sentenced to imprisonment were convicted of crimes against the person rather than of property crimes. He goes on to say that the presence of previous convictions and the degree of gravity of the offence were strongly associated with the imposition of a prison sentence. In this regard accused persons over 18 years of age and with a criminal record were likely to be imprisoned for serious offences, while persons under 18 years of age with the same circumstances might be committed to reform school, but in both situations the sentence would have a custodial purpose.[560] It appears from the empirical trends and patterns that the gravity of the offence and criminal record of the accused tended to override the age factor in juvenile cases.

Midgley[561] notes that the serious crimes of murder and rape were not tried in juvenile courts but rather in the higher court for the purpose of imposing a custodial sentence, while committal to reform school was designed for those children convicted of serious crimes. Midgley advances the proposition that young persons without a previous conviction were seldom sentenced to reform school. The previous conviction factor and the gravity of the crime seem to have been the major deciding factors for a sentence of reform school. The majority of convicted persons committed to reform school were 15 years of age, while less than 21% of such persons had two previous convictions and 50% had three previous convictions. The sentence of probationary supervision was seldom imposed with regard to young offenders. During this period approximately five convicted child offenders were placed under the supervision of a probation officer. Most of these child offenders were convicted of property crimes. Those convicted were younger than 15 years of age; two had no previous conviction and three had one previous conviction each.[562]

Midgley states that fines were imposed on 6% of persons convicted in terms of the jurisdiction of the juvenile court. By contrast, fines tended to be more frequently imposed on older offenders than on younger offenders. The gender pattern shows that women were more often fined than their male counterparts. Fines were most frequently meted out to first offenders. The penalty of a fine was seldom imposed on property offenders or those convicted of crimes against the person. The imposition of a fine was most frequently applied for unlawful business or crimes of multiple or public order in nature. The author states that about 2% of crimes against the person received a fine penalty. The penalty of a fine was imposed on about 70% of those charged with illegal street business or public order.[563]

[559] Midgley, J. (1974:460).
[560] Midgley, J. (1974:460).
[561] (1974:460), quoted above.
[562] Midgley, J. (1974:458).
[563] Midgley, J. (1974:458).

The case of S v Whitehead[564] appears to illustrate the nature of crimes that were met with a fine. In this case the appellant was convicted of contravening section 140(1)(a) of a road traffic ordinance, Ordinance 21 of 1966, by driving a motor vehicle while under the influence of intoxicating liquor and drug effects. The accused was sentenced to a fine of R150,00 or 75 days' imprisonment. In addition, he was sentenced to a period of 60 days' imprisonment, which was suspended for two years on condition that he did not drive a motor vehicle on a public road for a period of six months. The contention seems to be that there was no direct proof that the appellant's faculties were impaired by narcotic drugs other than alcohol, which was established by a medical practitioner. On this basis the court of appeal confirmed the conviction of contravening section 140(1)(a) and a verdict of guilty of a contravention of section 140(2)(a) was set aside. The substitute verdict included that a fine of R150,00 or 75 days' imprisonment was suspended and an additional period of 30 days' imprisonment was suspended on condition that the appellant was not convicted of a contravention of the respective section during the period of suspension.

As described by section 352(1)(a) and (b) of Act 56 of 1955, suspended and postponed sentences were meant to reinforce a degree of restraint on the offender's conduct subsequent to conviction, through the prescription of some condition of acceptable behaviour for the period for which the sentence was suspended or postponed.[565] Suspended or postponed sentences were imposed on about 17% of those convicted. The author identifies that postponed sentences were more frequently applied than suspended sentences. For example, postponed sentences were imposed with respect to more than 15% of cases, while suspended sentences were imposed in respect of fewer than 2% of cases. Compared to the sentence of caution or reprimand, suspended or postponed punishment was not associated with the age of the offender. A minority of child offenders received a lesser sentence of this nature compared to their adult counterparts. Only 10% of convicted boys received postponed sentences compared to 60% of convicted girls. On the whole, few suspended sentences were imposed. Midgley observes that the application of a conditional sentence was not strongly associated with factors such as the nature and gravity of the crime or the number of previous convictions of the offender.[566]

Suspended or postponed sentences were not frequently imposed on persons convicted of serious crimes. A significant number of those given postponed sentences tended to have previous convictions; some had three or four previous convictions, while in the case of caution or reprimand very few young offenders with previous convictions received this type of sentence.[567] It seems as if caution or reprimand and discharge were imposed mostly on first offenders. Those charged with offences against public order were more frequently cautioned and discharged than children charged with offences against the person or with property-related offences. The above quoted author further observes that judicial sentencing approaches reflect less frequent use of caution or reprimand as the accused's age increases, in the case of the Cape Town juvenile court at the time. While 8% of those convicted were cautioned, of these 23% were very young offenders.

[564] 1970 (1) SA 25 (T).
[565] Midgley, J. (1974:457).
[566] Midgley, J. (1974:458).
[567] Midgley, J. (1974:458).

Younger offenders, particularly those under the age of 12, were mostly given conditional sentences or transferred to the children's court, although a certain number were dealt with punitively by the courts.[568] It is pointed out that of 35 social inquiry reports presented to the juvenile court, there was only one recommendation to the magistrate that the child be transferred to the children's court. Pre-sentence reports tend to show patterns of rigidity in the majority of cases rather than an individualized approach.

By 1977-1978 the number of young and adult offenders who were cautioned was 12 996.[569] In 1987-1988 this number was 10 576, in 1988-1989 it was 8 975, in 1991-1992 it was 7 679, in 1992-1993 it was 7 331 and in 1993-1994 it was 6 696. The number of suspended sentences for 1977-1978 was 46 848, for 1987-1988 it was 48 578, by 1992-1993 it was 64 799 and in 1993-1994 it was 64 898. The number of fines imposed were 26 134 in 1977-1978, it was 31 192 in 1987-1988 and in 1993-1994 only 24 761 convicted persons received this punishment. As shown by the figures patterns of the use of fines show a consistent decrease over the years, while patterns of the application of suspended sentence have shown a consistent increase. The imposition of caution has shown a consistent drop in numbers over the years. These trends and shifts probably reflect the application of non-custodial sentences at various times and convictions with regard to the nature of crimes.

However, Muntingh states that these non-custodial sentences are related to imprisonment.[570] This probably concurs with the reported sentencing patterns, in terms of which non-custodial sentences tend to be coupled with imprisonment. With respect to life imprisonment, in 1977-1978 the number of convicted persons receiving this sentence were 17, in 1987-1988 the number was 12, in 1988-1989 it was six, in 1989-1990 it was nine, in 1990-1991 there was an increase to 28 and the following year it was also 28. In 1992-1993 there was a decrease while in 1993-1994 the number dropped to 15. The pattern of the sentence of life imprisonment shows some variations in the figures. This trend can be attributed to the use of the death penalty and its subsequent abolishment in recent years. The lowest number seems to correspond with the frequent imposition of the supreme penalty during the late-1980s. Of all sentences reflected in these figures, the sentence of life imprisonment appears to be the least frequently applied compared to other sentences, probably due to the lack of convictions.

Empirical sentencing patterns, trends and shifts from 1950 to the present seem to depict some contentious moments with respect to approaches of judicial officers. Albertyn suggests that judicial approaches tend to reflect the nature and context of changing laws that seem to emanate from the state's coercive strategies of social control.[571] As described by Albertyn, the 1971 Abuse of Dependence Producing Substances and Rehabilitation Centres Act, Act 41 of 1971, was one of the toughest anti-drug laws. This anti-drug Act provided wide powers for arrest, conviction and sentencing that ranged from imprisonment to fines and other non-custodial sentences. For example, those convicted without a criminal record of drug dealing could receive

[568] Midgley, J. (1975:87) The Treatment of Juvenile Offenders.
[569] Muntingh, L. (1996:22). A review of sentencing trends in South Africa.
[570] (1996:23), quoted above.
[571] (1985:121) Drugs and Moral Panic. In Davis, D. and Slabbert, M. (eds) Crime and Power in South Africa – Critical Studies in Criminology. Cape Town: David Phillip.

five years' imprisonment and/or a fine of R1000. A second conviction carried a minimum penalty of one year's imprisonment and a maximum of five years' imprisonment, with or without a fine of about R1000. Albertyn endorses the proposition that the state perceived the drug problem to be directly related to the political context of the 1970s, hence the emphasis on the security of the state through repressive laws.[572]

In S v Van Niekerk[573] the appellant was a professor of law at the University of Natal who had been convicted on two charges of contempt of court and acquitted on a charge of attempting to defeat or obstruct the course of justice. The appellant was sentenced to pay a fine of R100 with an alternative sentence of one month's imprisonment. Both charges emanated from a speech delivered at a public meeting in the Durban City Hall on 9 November 1971. The meeting seems to have been a protest gathering directed at certain aspects of the Terrorism Act, Act 83 of 1967, particularly with respect to the clauses on detention for interrogation without trial and solitary confinement, and to the circumstances under which several people had died while detained in terms of the Act.

The appellant in his address stated: 'The judiciary has practically been eliminated by repressive legislation such as the Terrorism Act to give the individual the protection he so sorely needs in the uneven struggle with the state.' The appellant went on to ask: 'In the face of the grotesqueness of the situation as regards the application of the Terrorism Act, has the time not come for them to stand up more dynamically in the defence of the hallowed principle of the rule of law in the Western sense?' The appellant further reflected: 'So far as to take judicial notice of the public anxiety as regards the recent wave of detention.' The underlying argument of the appellant seems to have hinged on how judicial penal philosophies could influence sentencing approaches and be influenced by the nature of laws, social circumstances and the aspirations of citizens. This matter is related to the penal notion of judicial accountability, responsibility and independence, as pointed out in Chapter 2. Indeed, the appellant called for judicial critical perspectives rather than the mechanical application of sentencing law as if it was immune from the interests of the state.

Dugard,[574] in reviewing the case of Professor Van Niekerk, argues: 'Contempt of court is too wide and too vague for modern conditions, in which matters concerning the administration of justice are perpetually subject to debate.' Dugard goes on to say that an attempt to promote justice and exercise freedom of speech by calling judges to criticize law should not be viewed as obstruction or interference with the course of justice.[575] Although the court contention tended to regard the speech of the appellant as falling within the ambit of the crime of contempt, the court did not manage to link beyond reasonable doubt the appellant's utterances to the pending trial of S v Hassim and Others. Eventually the appeal was dismissed. After this ruling, another law was introduced, known as the Internal Security Amendment Act.[576] Section 10(2)(a) gives more powers for arrest and detention for participating in activities that threaten the

[572] (1985:121-22), quoted above.
[573] 1972 (3) SA 711 (AD).
[574] (1972:280) Recent Cases. Judges, Academics and Unjust Laws: Van Niekerk Contempt Case. South African Law Journal. Vol 89: 271-285.
[575] (1972:282), quoted above.
[576] See Foster, D., Davis, D. and Sandler, D. (1987:28).

security of the state or public order. This law later became known as the Internal Security Act, Act 74 of 1982, and seems to have been introduced after the Rabie Commission's report on matters of detention.[577] The Act entrenched the notion of detention for penal considerations despite criticism. From the 1950s to the 1980s there seems to have been a succession of laws, which, in the light of new patterns or events, were repealed and renamed to suit the conditions for the imposition of sentence.

3.5 South African sentencing trends, patterns and shifts with respect to serious crimes

By the 1980s there was an unprecedented resurgence of political protest, mostly led by the youth, against repressive state measures, with rapid participation in mob or crowd killings in the townships of those associated with state agencies.[578] By this time South African sentencing was characterised by wide judicial sentencing discretion with few rights for child offenders.[579] In another jurisdiction Tonry takes this view further and states that unstructured wide discretion tended to lead to unwarranted sentencing disparities.[580] Skelton suggests that, similarly to the 1970s, during the period 1984 to 1988 judicial officers applied the doctrine of common purpose widely for conviction of crowd-related murder in township violence. In the light of these developments, the number of prisoners on death row increased and the majority of those sentenced to death had been convicted for murder.[581]

During this period section 277 of the Criminal Procedure Act, Act 51 of 1977, provided for eleven capital crimes, more than provided for in Act 9 of 1958. The Criminal Procedure Act of 1977 continued to provide a mandatory death penalty for the crime of murder unless extenuating circumstances are found. Capital punishment was prohibited in respect of persons under the age of 18.[582] This relates to the idea that punishers should come to grips with the age factor of the offender in their assessment of the degree of culpability, in lieu of mere focus on the seriousness of the offence. Sentencing patterns suggest that the obligatory provision for the factor of extenuating circumstances tended to be narrowly defined, based on factors and the degree of moral blameworthiness at the time of the commission of the crime,[583] although section 277(2) of the Criminal Procedure Act, Act 51 of 1977, permited the sentencing court to impose an alternative sentence other than the death sentence where it found extenuating circumstances.

However, between 1985 and 1988, South Africa is reported to have carried out the second highest number of executions in the world, namely 537.[584] Between 1910 and

[577] Foster, D., Davis, D. and Sandler, D. (1987:33).
[578] Scharf, W. (1990:239) The Resurgence of Urban Street Gangs and Community Responses in Cape Town during the late Eighties. In Hansson, D. and Van Zyl Smit, D. (eds) Towards Justice? Crime and State Control in South Africa. Cape Town: Oxford University Press. Also see Sloth-Nielsen, J. (1990:76).
[579] Skelton, A. (1999:105) Juvenile Justice Reform: Children's Rights and Responsibilities versus Crime Control. In Davel, C. Children's Rights in Transitional Society. 1st edition. Pretoria: Pretoria Book House.
[580] Tonry, M. (1996:177) Sentencing Matters. New York: Oxford University Press.
[581] Sloth-Nielsen, J. (1990:76-77 and 82).
[582] Criminal Procedure Act 51 of 1977.
[583] Sloth-Nielsen, J. (1990:82).
[584] Amnesty International, (1989) When the State Kills. The Death Penalty v Human Rights.

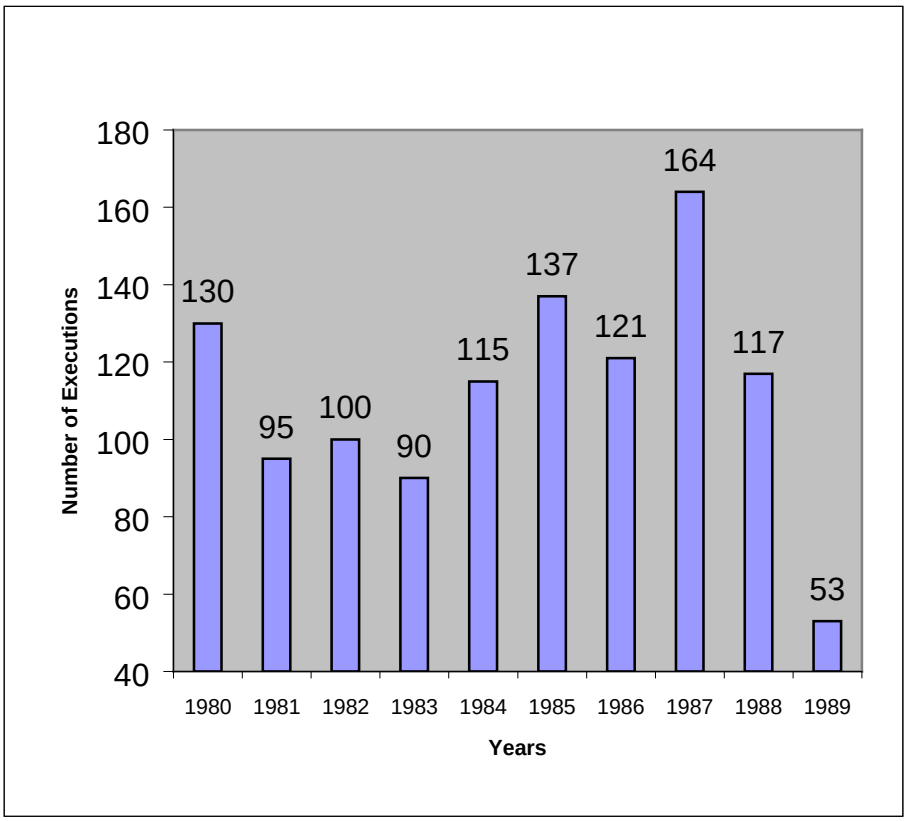
1989 more than 4 200 persons were executed.[585] Corporal punishment was imposed by the courts on 4 399 mostly male juvenile offenders in 1971-1972.[586] These sentencing patterns and trends broadly suggest a sense of disproportionality and rigidity in South African sentencing, particularly with regard to child offenders, before the adoption of the Constitution. For example, certain non-custodial sentences and short-term imprisonment approaches were not equally explored by judicial officers, who instead adopted a one-sided approach other than a balanced one. These sentencing patterns and trends also show that the death penalty and corporal punishment were common features of South African judicial sentencing approaches, although their retributive and deterrent value is not easy to gauge.

3.5.1 Capital and corporal punishment

During the 1980s capital punishment was increasingly imposed by the judicial decision-makers in South Africa as a mandatory sentence for serious violent crimes.[587] In this period the death penalty was viewed as a deterrent sentence for adult offenders convicted of serious crimes. But the manner in which some individual judicial officers have applied their discretion has given rise to the perception that their penal philosophy was influential in determining the death sentence decision.[588] This suggests that sentencing disparities with regard to capital sentences tended to be arbitrarily based on sentencing theories held by individual judicial officers as well as other factors.[589] As shown in the preceding chapter, a pattern of sentencing can be illustrated by the case of Judge Lategan, regarded as a harsh judge, who sentenced 29 individual offenders to death between 1 January 1986 and December 1988, while Judge Didcott is known to have publicly condemned capital punishment.[590] This difference in the stances and approaches of individual judges exhibits the sentencing theories and wider factors behind their respective decisions. Another dimension could be the seriousness of the crime decided by a particular judicial officer and how sentencing laws were interpreted. This dilemma is evident in the empirical sentencing judgment which shows that some judges reflected that the imposition of the death penalty was not their own choice but that they had to apply the law. Statistics released on executed persons from 1980 to 1990 give an insight into and a broader picture of judicial approaches to capital crimes, as shown in Figure 3.1 below.

[585] See NADEL: (1998:45).
[586] Midgley, J. and Newman, J. (1975:17).
[587] Amnesty International, (1989) When the State Kills. The Death Penalty v Human Rights. Also see chapter 1, p.2, paragraph 1.
[588] See NADEL: (1998:45).
[589] 1995 (3) SA 391 (CC). Also see Magobotiti, C.D. MA thesis, (2001:178) an interview with a former death row prisoner who was under the age of 18 at the time of committing the offence, now serving a life imprisonment sentence, since the judgment of S v Makwanyane and Another 1995 (3) SA 391 (CC).
[590] See chapter 1, section 1.2 and Chapter 2 section 2.8.1 for details in this thesis.

Figure 3.1 Total number of executions in South Africa from 1980 to 1989.



Source: Department of Justice. Republic of South Africa. (1995-06-26)

In 1980 there were 130 hangings. In 1981 it was 95, in 1982 it was 100, and in 1983 it was 90. By 1984 it was 115, in 1985 it was 137, in 1986 it was 121, in 1987 it was 164, in 1988 it was 117, in 1989 it was 53 and in 1990 there was a moratorium on executions.[591]

The high number of executions in the 1980s can be attributed to the late 1970s uprisings. While in 1981 there was decrease of 35, in 1982 there was an increase, with a subsequent drop in 1983. These numbers show less consistent trends but quantitative shifts do not seem to be substantial, probably due to reprieves. In 1987 there was a more significant increase in executions than in any other year, as shown in Figure 3.1 and the numbers above. In 1989 there was a substantial decline in executions, as shown by above. Of 53 executions in 1989, two were for rape.[592] Murray, Sloth-Nielsen and Tredoux suggest that the 1989 figures might have been influenced by the political climate with respect to those sentenced to death for unrest-related crimes.[593] Historical sentencing records reveal that most crimes punished by execution tended to be politically motivated, but in 1992 executions were suspended pending the introduction of the Bill of Rights.[594] Hood states that 1991 marked the last date of execution in South Africa.[595]

[591] Department of Justice. (1995-06-26) Republic of South Africa.
[592] Currin, B. (1990:11) Capital Punishment.
[593] (1989:166) The Death Penalty in the Cape Provincial Division: 1986-1988. South African Journal on Human Rights, Vol 5(2):154-182. Johannesburg: Juta and Co., Ltd.
[594] NADEL, (1998:45).
[595] (2001:352) Capital Punishment. A Global Perspective. Punishment and Society. 3(3) 331-354.

Corporal punishment was the most common sentence imposed on persons under the age of 18;[596] however, there were other sentencing options provided by section 297 of the Criminal Procedure Act, Act 51 of 1977, to allow the courts to promote creative sentencing for children and adults. The sentence of whipping allowed the courts an alternative to a custodial sentence in certain cases. Although it was regulated by section 294 of the Criminal Procedure Act, Act 51 of 1977, the courts could impose up to seven strokes for male persons under the age of 18 as a sentence.[597] It is important to note that both capital and corporal punishment were described by some academics, particularly in relation to young offenders, as broadly repressive and inhuman practices.[598]

Looking at the Cape Provincial Division study, Murray, Sloth-Nielsen and Tredoux identify that some judges imposed the death sentence more frequently than others in respect of the same cases of murder. They recognise that not all murders present the same circumstances, hence it is not possible to treat them the same in a mechanical manner. The number of cases assigned to a particular judge also tended to play a role in this matter. In S v Safatsa and Others[599] the sentencing court seems to have applied the law of common purpose in a manner that suggests a strong sense of continuity compared to the pattern of approaches to crowd-related crimes in earlier years. In this case six of the accused were convicted of the murder of the mayor of the town council of Sharpeville on 3 September 1984. In this case a crowd of people numbering about 100 attacked the mayor's house, throwing stones and petrol bombs and setting the house alight. The deceased was caught by the crowd as he was running away from his burning house. Stones were thrown at him, and he was dragged into the street, where petrol was poured over him and he was set alight and died at the scene.

The contention in this case seems to be the argument that there was no proven causal connection between each individual action of the accused and the death of the deceased. But the court was of the opinion that in accordance with the common purpose principle there was no reason for the state to prove the causal connection between the conduct of the accused and the death of the deceased. Justice Botha referred to previous similar judgments on common purpose, such as R v Mgxwiti above, endorsing that sentencing trends suggest similar approaches. The judge stated: 'Consequently the acts of the mob which caused the deceased's death must be imputed to each of these accused.' Regarding this case Professors Burchell and Hunt identified the major challenge for sentencing courts as the notion of 'proof' of the participation of an individual with a common purpose.[600]

In this case the notion of de-individuation arising from crowd behaviour was described in the expert testimony of Tyson (psychologist) as reducing a person's awareness of the consequences of his actions due to the emotional situation and could be seen as extenuating circumstances. But the court could not find extenuating circumstances and the appeal against the accused's conviction for murder and the

[596] Skelton, A. (1999:174).
[597] See S v Williams and Others 1995 (3) SA 632 (CC).
[598] See Van Zyl Smit and Offen as quoted by Sloth-Nielsen (1990:74). Also see Meer, F. (1989:127-134) The Trial of Andrew Zondo, A sociological insight. Johannesburg: Skotaville Publishers.
[599] 1988 (1) SA 868 (AD).
[600] Burchell, E. M., Milton, J. R. L. and Burchell, J. M. (1983:434-435) South African Criminal Law and Procedure Vol 1, 2nd edition Cape Town: Juta and Co, Ltd.

death sentence imposed were dismissed. Du Toit and Mangani, as quoted by Davis,[601] seem to suggest that the notion of de-individuation portrays crowd conduct away from the context in a manner that seems to be ahistorical and apolitical. They believe that the notion of de-individuation tends to decontextualize the mob acts as without political motivation rather than as irrational mob psychosis. The wider political context was that on 3 September 1984 workers throughout the Vaal Triangle were participating in a stay-away in protest against rent increases. But in Sharpeville the situation during the protest march to the local municipal offices had resulted in the deceased's death.[602]

In S v Thabetha and Others[603] the court accepted the notion of de-individuation in the crowd-related crime of murder to constitute extenuating circumstances. The murder charges emanated from the events after the funeral of a civic leader. The accused were youthful: three were 17 years of age at the time of the commission of the crime, one was 19 and the other was about 14. The judge considered, inter alia, the youthfulness of the accused to constitute grounds for extenuating circumstances during the appeal. In this regard Skeen endorses the view that de-individuation should be proved not as a generality but in connection to the individual accused.[604] A similar case in which the court found extenuating circumstances, inter alia on the grounds of de-individuation and the age factor, is that of the Queenstown Six[605] during retrial by Justice Jansen. As captured by Currin,[606] in passing sentence the judge considered the subjective state of mind of the accused that consciously or unconsciously led them to necklace[607] the deceased. The judge recognised the perception of the community with regard to their sense of deprivation, alienation, frustration and experience of police actions. This judgment substituted the death sentence for less than two years' imprisonment.

In S v Khumalo and 25 Others,[608] as described by Currin, unlike in the Queenstown Six judgment, Justice Basson found that all 26 of the Upington accused had intent to kill the deceased as the motive was political resistance against authority.[609] Among those accused sentenced to death on common purpose without extenuating circumstances there seems to have been young accused under the age of 18.[610] It appears from these judgments that serious violent crimes by persons under the age of 18 take different forms at specific historical moments. From the trend of these common purpose judgments, the trial court could not find the age factor and other social factors to constitute extenuating circumstances. Patterns of judicial sentencing approaches appear to place much emphasis on the degree of gravity of the crime, which appears to increase the level of culpability of the accused. It seems that the approaches of judicial officers, particularly with regard to capital crimes, tended to

[601] Davis, D. (1990:147).
[602] Diar, P. (1990:3). The Sharpeville Six. The South African Trial that Shocked the World. Toronto and London: M and S.
[603] 1988 (4) SA 272 (T).
[604] (1989:81) Cases and Comments. South African Journal on Human Rights. Vol. 5:78-81, Johannesburg: Juta.
[605] Unreported
[606] (1990:7), quoted above.
[607] See Chapter 2. As described, this is a method of killing by putting a tyre around a person's neck and setting it alight.
[608] Unreported (1989).
[609] (1990:7), quoted above.
[610] Durbach, A. (1999:81 and 128) Judgment by Justice Basson. Upington. A Story of Trials and Reconciliation. Cape Town: David Phillip.

depend on and reflect the appointed judge's penal philosophy. The Queenstown Six of Judge Jansen and the Upington 26 case of Judge Basson seem to illustrate this perception.

In another common purpose case, S v Mgedezi and Others,[611] the accused were convicted of murder at a mining compound. In responding to his critics, Justice Botha reflected on the judgment in S v Safatsa and Others above. The judge argued that the court never pronounced that a mere presence in crowd violence could lead to being held liable for the crime. Eventually the Appeal Court found that the trial court constituted a misdirection in the sense that there was no direct proof of each accused's role in the death of the deceased, and the death sentence was substituted for a prison sentence. Compared to earlier cases, the pattern of Appeal Court judgments suggests a trend that seems to consider wider factors in the application of the common purpose doctrine. In S v Zwane and Others[612] the eight accused were charged with high treason, sedition and subversion. The charge appeared to subvert the authority of the state in respect of conspiring with the ANC and involvement in a people's court. The appeal court held that the necessary hostile intent required for high treason had not been proven and conviction was confirmed for sedition in respect of all accused. This case reveals that the death penalty was not only applied with regard to crimes of murder. In S v G[613] the accused was charged for the crime of rape which was seen by the court to be complicated. In this case the Appellate Court appears to have raised whether the trial court exercised discretion in a proper and reasonable manner in relation to the imposition of exemplary sentence.

It is important to understand that the empirical judicial sentencing patterns, shifts and trends, particularly with regard to capital cases in the late 1980s, tended to reflect a wider sociopolitical context compared to previous years. In S v McBride[614] the accused was convicted and sentenced to death for bombing a bar in 1987 in which three women were killed and 89 persons injured. The court appeared to recognise that the killing might be politically motivated but refused to view that as amounting to extenuating circumstances. As in 1965 in the case of Mkaba and Others, the court held that there was no ground for interference with the notion of extenuating circumstances and the death sentence was imposed by the trial court. Professor Milton, as an assessor in his minority judgment, reflected on the appellant's mind at the time of the commission of the crime: 'His age, he is a young man of an age still suggestive of lack of maturity and the thoughtless susceptibility to the stress of intense emotions.' The professor went on to ask: 'How am I to assess the morality of this act? In a normally ordered society – where every citizen enjoys the full range of civil liberties and equal access to political protest – this would be a totally senseless act and in my view without the slightest justification, in his moral blameworthiness no different to one who placed a bomb in a normal society.'

Another case in which social and political backgrounds were raised in extenuation to politically motivated offences was that of Andrew Zondo.[615] The accused was a young person at the time of the commission of the offence and was charged with

[611] 1989 (1) SA 687 (AD).
[612] 1989 (3) SA 253 (T).
[613] 1989 (3) SA 695 (AD).
[614] 1988 (4) SA 10 (AD).
[615] Unreported.

planting a limpet mine in an Amanzimtoti shopping centre near Durban in 1985. It appeared that the accused was convicted for killing five people and injuring others and was executed in September 1986. In this case sociological evidence was presented by Professor Meer, who reflected: 'Well, a person like Andrew Zondo, born in 1966, grows up totally within the ambit of Bantu Education and Bantu Authorities, and to my mind these are the pillars of the kind of society which has been devised for him – Apartheid society.'[616]

Van Zyl Smit suggests that it remains a challenge in the South African context for the sentencing court to be only presided over by professional judges in pursuit of justice.[617] He considers the necessity for a wider view in the search for proportional sentencing approaches. This challenge posed by Van Zyl Smit corresponds broadly with sentencing patterns of the rendered judgments over the years which tended to be disproportionate and inconsistent. Both death penalty and corporal punishment statistical trends tended to question the deterrent value of these sentences, although continued to be applied despite criticism within and outside judiciary.

3.6 Sentencing approaches after the adoption of the Constitution, from 1996 to 2009

The transitional developments from 1990 until the adoption of the 1996 Constitution represent a turning point in South African sentencing law, when rights-based sentencing, proportionality, legality, fairness, equality and constitutionality of sentences received wider attention.[618] In this regard article 7 prohibits torture or cruel, inhuman or degrading treatment or punishment.[619] The article states that treatment or punishment must be of minimum severity, informed by the specific circumstances of the case. The South African Constitution and international instruments paved the way for new sentencing approaches to persons under the age of 18 as well as adults. In accordance with these principles, the South African Law Commission's Project Committee on juveniles broadly viewed sentencing approaches to be premised on the wellbeing of the child offender in an individualised manner.[620] Key to this idea is an approach based on the individual circumstances of each case. In another development the Issue Paper of the Law Commission on juveniles emphasises that sentencing decision-makers should be guided by the principle of proportionality and the best interests of the child, so that deprivation of liberty should be considered as a last resort.[621]

Towards the end of 1994, an amendment was made to section 29 of the Correctional Services Act, Act 8 of 1959,[622] which prohibited the detention in police cells or prisons of persons under the age of 18 for more than 24 hours after arrest. Skelton goes on to trace the evolution of the Child Justice Bill and state that there was a clause limitation that persons over 14 and under 18 years charged with serious crimes could

[616] (1989:128), quoted above.
[617] (1990:14), quoted above.
[618] Van Zyl Smit, D. (2004) Sentencing and Punishment. In M Chaskalson et al (eds.) Constitutional Law of South Africa (Revision Service 5).
[619] See English, K. and Stapleton, A. (1997:28-9) The Human Rights Handbook. A Practical Guide to Monitoring Human Rights. United Kingdom: Juta and Co, Ltd.
[620] Skelton, A. (1999:96), quoted above.
[621] Skelton, A (1999:95), above.
[622] See Skelton, A. (1999:98), above.

be held for 48 hours. The intention of the legislation was that child offenders should be sent home to await their trials. However, the new law provided that if this was not possible they should be accommodated in a place of safety. But there were difficulties due to absconding from places of safety and many did not return to stand trial. These developments took place during a period when the country experienced an increase in crime, particularly by persons under the age of 18, and growing public concern about crime being voiced by the media.

These developments and sentencing trends are evident in the juvenile sentencing statistics.[623] Indeed, developments in the Child Justice legislation show major shifts in the evolution of juvenile justice. In 2008 parliament has finally passed Child Justice Bill.[624] It represents progress in child justice regime. In this regard judicial officers will be guided by this legislation when they trial children in conflict with the law. This legislation has strong elements of restorative justice regarding the resolution of trivial cases and still upholds elements of desert when dealing with serious crimes. The success of child justice legislation is likely to depend on the available financial and human resources in order to ensure that courts are able to impose alternative sentences and use diversions as contained in the legislation.

3.6.1 Constitutionality of capital and corporal punishment in South African sentencing

The empirical sentencing patterns and approaches in the 2000s have shown major shifts from the previous trends over the years due to national and international developments in penal discourse. Section 7(2) of the Constitution states that 'the state must respect, protect, promote and fulfil the rights in the Bill[625] of Rights'. This section places obligations on the state and suggests that the South African democratic constitutional state cannot play a neutral or minimalist role; instead its role should be maximalist. The state has to respect and promote the Constitutional Court judgment in S v Makwanyane and Another.[626] This Constitutional Court judgment refers to the 1993 interim Constitution. It based its judgment on the right of individuals not to be subjected to cruel, inhuman and degrading punishment.[627]

These sections do not relate directly to capital punishment but have been interpreted as outlawing the death penalty and made it unconstitutional. This decision is remarkable and historic in the realm of South African sentencing. The judgment demonstrates the courts' commitment to human rights values, constitutionalism and democratic principles despite pressures from public opinion. A similar case is that of Furman v Georgia[628] in which the US Supreme Court was confronted by the claim that the punishment of death is cruel and unusual and in violation of the US Constitution (eighth amendment). In this case the ruling was against capital punishment despite societal opinion to the contrary. Because of S v Makwanyane and Another, in 1995 South Africa joined those countries which have abolished the death

[623] See draft Chapter 1 of this dissertation.
[624] [B 49-2002]
[625] The Constitution of the Republic of South Africa, Act 108 of 1996. (p.6).
[626] 1995 (3) SA 391 (CC).
[627] See section 12(e) of the 1996 Constitution. However, this right was connected to the right to life (see section 11) and inherent dignity (see section 10).
[628] 408 US 238 (1972).

penalty for ordinary crimes, and in 1997 capital punishment was abolished for all crimes.[629]

Corporal punishment[630] was commonly used by the South African judicial system as a deterrent sentencing practice for petty and serious offences, mostly in respect of persons under the age of 18 as opposed to adults. By 1987-1988 more than 40 000 young and adult persons were whipped in South Africa. In 1991, 38 324 persons under the age of 18 were sentenced to whipping, while in 1992, 35 745 were whipped.[631] In this context corporal punishment can be described as cruel or inhuman punishment as it involves the intentional, direct infliction of physical pain on a human being by another on orders of the state (courts) to instigate fear.[632] Many courts regarded the numbers of strokes imposed in whipping sentences as having a deterrent effect with regard to future crimes but others held a different view. However, during the period after 1992 there was a significant decline in the use of whipping by magistrates' courts due to national and international pressure against the inhuman violent nature of whipping.[633] This involves the impact of international human rights law, judgments, campaigns and sustained critiques by academics and NGOs. This shift in judicial approach in declining to use whipping is reported to have taken place nine months before the official Constitutional Court ruling. In S v Williams and Others[634] the Constitutional Court found corporal punishment to be unconstitutional. The argument behind the judgment interpretation was that corporal punishment violates sections 10, 12(d) and (e), and 28, which directly relate to children's rights, of the Constitution. In this case the court further reasoned that, in accordance with the context and meaning of these sections, judicial corporal punishment constitutes cruel, inhuman or degrading punishment. Eventually corporal punishment was outlawed officially as a sentencing option in South Africa by the Abolition of Corporal Punishment Act, Act 33 of 1997.[635] Various courts decisions and statistics of whippings and executions seem unlikely to suggest reduction in crime rates committed by young and adults.

3.6.2 Sentencing trends, patterns, shifts and approaches to serious crimes

The post-apartheid period presented South African sentencing with new challenges premised on notions of rights and constitutionality which constituted a departure from previous years. During this period serious crimes, particularly by young persons, tended to be on the increase, as shown above. In South African penal discourse sentencing shifts, trends and patterns seem to be premised on the Bill of Rights enshrined in Chapter 2 of the 1996 Constitution. But, 15 years after the adoption of the Constitution, the question has to be asked to what extent the drafters of the Constitution have grappled with the implementation aspects of the rights in the Constitution, especially in the light of the social circumstances of vulnerable groups such as child offenders and the illiterate. In this context child offenders might not be able to invoke their rights enshrined in the Constitution because they cannot afford to

[629] Hood, R. (2001:352) Capital punishment, a global perspective. Punishment and Society. 3(3): 331-354.
[630] Midgley, J. (1982:390).
[631] The Citizen, 10 June, (1995) p.6.
[632] Pete, S. (1998:430) SAJHR.
[633] See Sloth-Nielsen, J. (1996:324) International Journal of Children's Rights. (4): 323-331.
[634] 1995 (3) SA 632 (CC).
[635] See Statutes of the Republic of South Africa – Criminal Law and Procedure Issue No 32.

pay for good representation and are not aware of such rights. Lack of capacity for dealing with child offenders convicted of serious crimecould become a serious limiting factor, although section 36 introduces limitations by applicable general law in the rights entrenched in the Constitution. It is not clear whether the courts uphold rights enshrined in the Constitution and other international instruments on child rights. The major challenge is to what extent the courts can impose sentences appropriate to persons under the age of 18 convicted of serious crimes. Nevertheless, convictions must follow justified proof beyond reasonable doubt and a fair trial according to proper procedures in order for the punishment to be appropriate.

The key constitutional problem was highlighted by a decision of the US Supreme Court as far back as the 1960s. In re Gault[636] the lower court sentenced Gault to six years in a secure juvenile facility for making obscene phone calls. The judge had found that Gault was habitually involved in immoral matters. The penalty for an adult accused of a similar offence was a fine of five to fifty dollars or a maximum of two months' imprisonment. The Supreme Court overturned the lower court decision and held that juveniles were entitled to the following rights where sentencing includes incarceration: 'The right to an adequate, timely, written notice of the charges, the right to counsel, the right to confront and cross-examine witnesses, and the privilege to be protected against self-incrimination, the use of unsworn hearsay testimony and the failure to make records of the proceedings.' As captured by Feld,[637] the Gault case shifted the focus from treatment-based delinquency hearings to proof of legal guilt and formal procedures such as those for adult criminal accused in the criminal justice system. This implies that the plight of juveniles in sentencing discourses cannot be taken for granted. There might always be attempts to close the gap between them and their adult counterparts in the promotion of rights-based sentencing approaches.

Similarly, on trial proceedings in juvenile matters of procedure during trial proceedings, Sloth-Nielsen argues that the court review in S v N[638] has found the sentencing decision to be inappropriate. In this case a 15-year-old girl was convicted on a guilty plea to dealing in 7 kg of dagga. The accused was sentenced to a fine, which she could not pay, and the alternative sentence was imprisonment. The accused had not been represented and neither her parents nor guardian had been present. On this basis the review court found that the proceedings were not in accordance with justice in terms of section 74 of the Criminal Procedure Act, requiring parents or guardians of those under the age of 18 to attend criminal proceedings. Sloth-Nielsen states that a gross irregularity was committed by proceeding in the absence of a parent or guardian in accordance with the conduct of a fair trial.

A similar point is made in respect of S v M.[639] The accused was 14 years old, and sentenced to 12 months' imprisonment for a first offence of robbery. The verdict was changed on review to one of theft. Sloth-Nielsen relates that the judge described the sentence to be shockingly inappropriate. The Attorney-General in this case argued that other sentencing options such as suspended sentence and correctional supervision were not really punishments. But this position was rejected by the judge not to be in

[636] 387 U.S. 1 (1967).
[637] (1999:195) A funny thing happened on the way to the centenary. Punishment and Society. 1(2): 187-209.
[638] 1997 (1) SACR 84 (TK) In Juvenile Justice Review 1997 SACJ (1998) 11 SAS.
[639] 1996 (2) SACR 127 (T).

accordance with non-custodial sentence and appropriate approaches to child offenders.

The rights of child offenders are inseparable from penal law and society. It is through prioritising child offenders' interests that society can benefit.[640] This point emphasises the need to promote respect for the child offender's humanity and dignity. It further suggests that offenders' behaviour is not inherently criminal; rather it is produced and shaped by the social circumstances in which the child lives. According to Feld,[641] in court disposition on serious offences, procedures must be in line with the Gault decision, which holds that every juvenile is constitutionally entitled to counsel throughout proceedings. This suggests that whether juveniles are tried or prosecuted as adults or not, the process should not take away their individual and constitutional rights. Proper representation is required in procedures because child offenders are less able to cope with the criminal justice system than adult offenders. This argument by Feld is replete with examples. For instance, in the South African judicial system persons under the age of 18 who are charged with serious crimes are mostly tried and sentenced in adult regional courts and high courts, presumably in terms of the proper procedures.[642]

The international approach to child criminal justice has recently tended to locate criminality on the social and personal level rather than approaches that are based on individual morality and treatment. The United Nations Convention on the Rights of the Child and the Beijing Rules place legal duties on states to ensure that civil, social, economic and cultural rights are protected in child criminal justice, particularly in court sentencing and detention.[643] Van Bueren further emphasises that the notion of rehabilitation in sentencing theory tends to overshadow the element of responsibility to child offenders in the name of individual treatment. The treatment-based approach tends to stigmatise and isolate child offenders from their social environment, in contrast to the reintegration approach.

Both Sloth-Nielsen and Van Bueren concur on the idea that children accused of serious crimes may be tried as adults but should not lose the protection of the United Nations Rules and the Beijing Rules for persons under the age of 18. These rules state that deprivation of liberty should be a measure of last resort to be imposed when a child has committed a serious violent act against persons or persists in committing other serious offences.[644] Sloth-Nielsen further stresses that article 40(3)(a) of the Convention on the Rights of the Child places a duty on state parties to promote the establishment of a minimum age below which children should be presumed not to have the capacity to infringe the penal law.

[640] Van Bueren, G. (1990) International Perspectives on Adolescents' Competence and Culpability: A Curious Case of Isolationism. America and International Child Criminal Justice. Quinniapiac Law Review, 18: 451-465.
[641] (1989:1217) The right to counsel in juvenile court: an empirical study of when lawyers appear and the difference they make. The Journal of Criminal Law and Criminology. Vol. 79(4):1187-1346.
[642] See Chapter 1 and Chapter 4, as evident in judicial empirical sentencing approaches.
[643] Van Bueren, G. (1999) also See Van Bueren, G. (1992:381) Child Oriented Justice – An International Challenge for Europe. International Journal of Law and Family. 6:381-399.
[644]Sloth-Nielsen, J. (2001).

In T and V v United Kingdom[645] the applicants were tried in an adult Crown Court and convicted and sentenced for the abduction and murder of a two-year-old boy. The applicants (T and V) were both 10 years old at the time the offence was committed. In this case the age of criminal responsibility, the judicial process and the relationship between the gravity of the crime and the severity of punishment for the offenders' culpability became the major issues. The judge sentenced the offenders to a period of eight years' detention. Among other things, the reasoning was that punishment should satisfy the requirements of retribution and deterrence. The judge further stated: 'If the defendants had been adult I would have said that the actual length of deterrence necessary to meet their requirements of retribution and general deterrence should have been 18 years.'

However, the European Court of Human Rights held that: 'the circumstances in which the applicants were tried and were held criminally responsible constituted inhuman and degrading treatment or punishment – he was deprived of a fair trial by the procedures adopted and attendant circumstances, he was discriminated against in respect of the trial process applicable to him at his age, the sentence imposed on him constituted inhuman and degrading treatment or punishment, he was deprived of his liberty in an arbitrary manner, his sentence was not fixed by an independent and impartial tribunal in a judicial procedure since his tariff was fixed by the Secretary of State, there has been no judicial review of the lawfulness of his continued detention.'[646] This case shows that the age of criminal responsibility and human rights aspects cannot only and narrowly relate to the sentencing stage but should relate broadly to other judicial procedures.

Similarly, in Ex Parte Attorney-General Namibia, the judgment led by Justice Mahomed found corporal punishment to be in violation of article 8 of the Namibian Constitution.[647] The Namibian Constitution is very direct in outlawing the imposition of corporal punishment by the judiciary. In S v A Juvenile[648] judicial corporal punishment was found to be in contravention of section 15(1) of the Zimbabwean Constitution as it constitutes inhuman or degrading punishment or treatment. In the above judgment the role of the state has been brought to the centre to take society forward in accordance with constitutional democratic values. In the words of Justice Brandeis, as quoted by Pete[649] in a dissenting opinion in Olmstead v United States: 'Our government is the potent, the omni-present teacher and it teaches the whole people by its examples.' The underlying idea is that criminal justice sentencing approaches should be premised within the ambit of the Constitution and other international sentencing principles.

In the South African context the period 1993 to 1996 was marked by some thought on restorative justice whereby trivial crimes by young offenders in particular could be diverted from criminal justice for appropriate sentence.[650] This relates to the individualized sentencing approach regarding youth offenders' sentences to be

[645] (2000) 30 EHRR 121.
[646] (2000) 30 EHRR 121.
[647] 1991 (3) SA 76 (NmSC).
[648] 1990 (4) SA 151 (ZSC).
[649] (1998:430) SAJHR.
[650] See Skelton, A. (2000:5) Article 40. Volume 2, Number 3.

commensurate with the circumstances surrounding the harm caused by the crime.[651] The idea is to promote the reintegration of the young offender into the family and the community and to provide services such as supervision or treatment. Alternative sentences premised on restorative justice require intensive programmes to be developed for offenders under the age of 18. This development requires policies that are capable of distributing resources for the promotion of child rights as entrenched in the Constitution other than government's neo-liberal Growth, Employment and Redistribution Strategy (GEAR).[652] GEAR tends to constrain distribution of resources to few people due to its orientation on a private sector driven economy rather than a public bottom-up approach. This assertion recognises the huge impact of economic policy in shifting the sentencing approaches and vision in the early stages of the transition.

3.7 The relevance of the Criminal Law Amendment Act, Act 105 of 1997, to sentencing persons under the age of 18 and adults convicted of serious crimes

In recent years South African judicial sentencing discretion tends to be characterised by disproportionality with regard to leniency and severity of punishment to persons under the age of 18 convicted of serious crimes.[653] This often results in claims that there are sentencing disparities. This led to parliament passing the Criminal Law Amendment Act, Act 105 of 1997, which introduced mandatory minimum sentences to deal with serious crimes. Originally the Act was going to apply to persons under the age of 18 as compared to adults,[654] but Skelton and Sloth-Nielsen contested the move with a submission to the portfolio committee to change its approach to some extent. Their argument was based on the claim that the application of minimum sentences to persons under the age of 18 violates international and constitutional sentencing principles. These sentencing principles relate to, inter alia, the Beijing Rules, the Convention on the Rights of the Child and section 28(g) of the Constitution, which relate directly to the use of a prison sentence as a last resort since it deprives the young offender of liberty. Subsequently the Criminal Law Amendment Act, Act 105 of 1997, does not apply to child offenders under the age of 16.[655] The Act is applicable to those that are aged 16 and 17 years and the legislation requires the state to show evidence to justify its case. Skelton suggests that mandatory sentencing legislation tends to work better in respect of adult offenders than in respect of young offenders due to the age factor and other circumstances premised on juvenile philosophy and other sentencing principles.

The Criminal Law Amendment Act, Act 105 of 1997, provides sentencing prescriptions, but it does not take away judicial sentencing discretion. Section 51 provides minimum sentences for certain serious offences and subsection (3) provides grounds for departure on the basis of 'substantial and compelling circumstances' which justify the imposition of a lesser sentence than the prescribed sentence.

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[651] Roy, N. (2000:6) Article 40.
[652] See Sloth-Nielsen, J and van Heerden, B. (1999:121) The political economy of child law reform: pie in the sky? In Davel, C.J. Children's rights in a transitional society. Pretoria: Protea Book House.
[653] Skelton, A. (1999:102).
[654] Skelton, A. (1999:104).
[655] Sloth-Nielsen, J. (2001).

In S v Malgas[656] the appellant was convicted in a Local Division of murder and sentenced to imprisonment for life. Leave to appeal to the Supreme Court of Appeal against her sentence was granted by the court. This case centred on the court discretion and the prescribed sentences for certain serious crimes in the Act. Section 51(1)(3) of Act 105 of 1997 provides for departure from the prescribed minimum sentence based on 'substantial and compelling circumstances' that must be such as to justify an alternative sentence. The trial judge viewed the case as having a strong element of premeditation with regard to the killing of the defenceless deceased with a motive of greed on the part of the accused. The court based its judgment on the lack of 'substantial and compelling circumstances' to depart from the prescribed sentence. Further reasoning was that the crime was so heinous in nature as to require to be punished severely by life imprisonment.

The Supreme Court of Appeal overturned the decision of the trial court for failing to consider an appropriate sentence on the basis of substantial and compelling circumstances in the case. Such substantial and compelling circumstances included relative youthfulness, first offender, subjugation of the offender to a domineering personality and the spontaneous confession which led to the arrest. These factors constituted substantial and compelling circumstances for the court to depart from the usual prescribed sentence for such a crime. The court further reasoned that the appellant's youthfulness provided enough opportunity for a rehabilitation-based sentence. Therefore the appeal succeeded and the life imprisonment sentence was set aside and substituted by a sentence of 25 years' imprisonment.

In S v Dodo[657] the applicant was convicted of murder under section 51(1)(3) of the Criminal Law Amendment Act, Act 105 of 1997. The Eastern Cape High Court, the trial court in this case, challenged the Act as constitutionally invalid since it was inconsistent with section 35(3)(c) of the Constitution, which provides for the right of the accused to a public fair trial (see p.17). It further claimed that the Act contravened section 12(1)(e) of the Constitution, which provides for the right of the offender not to be punished in a cruel, inhuman or degrading way (see p.8). The High Court also held that the Act was contrary to the separation of powers required by section 172(2) of the Constitution.[658] The Constitutional Court judgment held that section 51(1), (2) and (3) were in accordance with the Constitution with respect to sections 12(1)(e), 35(3)(c) and 172(2) of the Constitution. The court based its judgment on the fact that substantial and compelling circumstances provide sentencing courts with the basis for departure and for imposing appropriate punishment in line with the Constitution. It further reasoned that judicial sentencing power ought to be balanced with the intention to promote judicial independence.

Another case was decided in the ambit of prescribed minimum sentences of the Criminal Law Amendment Act, Act 105 of 1997.[659] In this case Van Zyl Smit endorses that crime seriousness is not the only factor to be taken into consideration in an attempt to arrive at proportionate sentencing.[660] The author stresses that judicial

[656] 2000 (1) SACR 469 (SCA). Also see Professor Van Zyl Smit above on the meaning or interpretation of these provisions in sentencing practices.
[657] 2001 (1) SACR 594 (CC).
[658] See Constitution of the Republic of South Africa. (p. 92).
[659] S v Nkosi 2002 (1) SA 494 (W).
[660] See Article 40, November 2001 Vol 3 (4): p. 4 & 5.

sentencing decisions should intend and foresee prospects for rehabilitation of the young offender convicted of serious crime compared to their adult counterparts.

On 12 September 2008 the Pretoria High Court heard an application by the Centre for Child Law against the Minister of Justice and Constitutional Development and Others.[661] The dispute emanated from the Criminal Law (sentencing) Amendment Act 38 of 2007 which makes minimum sentences ranging from 5, 10, 15, 20 years and life imprisonment for certain crimes applicable to 16 and 17 year olds. According to the merits of the case the Counsel for the Centre argued that the Amended Act was inconsistent with Section 28 (1) (g) (2) of the Constitution as it made minimum sentences applicable to 16 and 17 year old child offenders convicted of serious crimes. It appears that the effect of the amended Act is that courts may impose minimum sentence as prescribed as a starting point and may depart when there are substantial and compelling circumstances. The Centre argued that the Amendment Act ignored the approach of the court in S v B[662] where the SCA held that when sentencing child offenders aged 16 and 17 years, the court must start with a 'clean slate' which entails court liberty to impose any sentence. In reply the Minister argued that the Amendment Act was not unconstitutional because court retains its discretion when interpreting the Amendment Act and does not purport to treat child offenders as adults. However the court disagreed with the Minister and in her judgment, Potterill AJ stated that 'with the amendment Act the court must start with minimum sentences of long term imprisonment as an instance of first sort and then look for compelling and substantial circumstances and proportionality'. The Judge reasoned that the Amended Act conflict with Act 105 of 1997 where imprisonment and life sentence are option of last resort when sentencing 16 and 17 year old offenders.

Comparing the present and previous evolved context and patterns, there seems to be similarities in the approaches of the sentencers and the evolving Child Justice legislation, although at present sentencing principles tend to be considered but the legislation seems to suggest, inter alia, an emphasis on the seriousness of the crime compared to other factors in the search for a proportionate sentence. In the light of this approach imprisonment could appear as the only alternative while sentencing options include fines, reform school, imprisonment, correctional supervision, suspended and postponed sentences, life imprisonment, community service, and diversion.[663] It is suggested that regional courts seem not to be informed of current developments pertaining to the imposition of sentences on child offenders other than imprisonment.[664] This proposition seems to call for a broader exercise of judicial discretion compared to rigid mandatory approaches.

[661] See Article 40 (2008) Vol. 10, No. 3: 1-3.
[662] 2006 (1) SACR 311 (SCA).
[663] South African Law Commission. 'Sentencing' Juvenile Justice Report, Project 106 (July 2000).
[664] See Article 40, Vol 2 No 3 September 2000 p.2.

3.7.1 Mandatory minimum sentences in respect of persons under the age of 18 convicted of serious crimes

Terblanche[665] is of the view that mandatory minimum sentences tend to be subjected to criminal appeals. Van Zyl Smit[666] similarly stresses that the principles of the proportionality and constitutionality of minimum sentences tend to be the underlying factors in most appeals, although the sentences are not inherently unconstitutional or disproportionate. The above quoted authors draw attention to the Canadian experience, particularly the decision in Smith's case in which the minimum sentence was subjected to constitutional scrutiny. Crutcher[667] argues that the Canadian controversy around minimum penalties centres on the fact that these sentences are designed for persons convicted of a specific crime, while the circumstances surrounding the offence and offender do not receive wider attention. The counter-argument states that minimum sentences seek to promote an effective deterrent, protect society, reduce sentencing disparity and may denounce criminal behaviour.

In relating these arguments to persons under the age of 18 convicted of serious crimes, it is important to note that the effect of minimum sentences might be assessed by the extent to which they take into account sentencing principles and constitutionality. Tonry[668] acknowledges the challenge posed by mandatory minimum sentences and describes these as not adequate enough in promoting sentencing proportionality, since they can lead to mechanical and rigid sentencing practices. This implies that minimum sentences might not be flexible enough in relation to the idea of promoting balanced approaches to diverse offenders and crimes. Indeed, rigidity tends to prohibit or limit mitigating notions, particularly with regard to young offenders, and can result in sentencing disproportionality. In the realm of sentencing decision-making, although the shortcomings of mandatory minimum sentences have been explored, they seem to encourage the courts' independence, accountability and fairness, based on proceduralist notions in accordance with the discretionary power of judicial officers.

Since 1997 there has been an increase in trends towards imprisonment and life sentences for both adult and young offenders. Probably this is because of the increasing number of serious crimes and the international penal context. This trend is shown by Figure 3.2 below.

[665] (1999:71) The Guide to Sentencing in South Africa. Durban: Butterworth Publishers.
[666] (1999) Mandatory minimum sentences and departures from them in substantial and compelling circumstances. 15 SAJHR 270.
[667] (2001:279) Mandatory Sentences. The Criminal Law Quarterly, Vol. 77, No 3. 261-279.
[668] (1996:13) Sentencing Matters. New York: Oxford University Press.

Figure 3.2

Source: Extracted from the Annual Report 2006/2007 of the Judicial Inspectorate of Prisons

As argued above minimum sentencing regime was meant to reduce serious crimes and achieve consistency in sentencing and at least to appeal to the members of the public that courts are being tough on crime. This attitude on sentencing bears arguments of dessert and deterrence sentencing theory. Figure 3.2 has shown that life sentence has constant increasing pattern from 1996 to 2007. In the same sentencing pattern there is claim that minimum sentences have increased the length of sentences and rigidity and disparities.[669] As shown in Chapter 4[670] statistics between 1998 and 2007 both persons under the age 18 and adults appear to serve long sentences ranging from 7 years or more than 10 years. However offenders serving sentences of less than 7 years has over the same period declined.[671] As illustrated by Figure 3.2 the number of offenders sentenced to life imprisonment has increased from 793 in 1998 to 6 998 in 2006.[672] The growing sentencing length could be associated with serious nature of crimes during the period as illustrated by Figure 3.2.

3.8 The principle of doli incapax in judicial sentencing decisions

Doli incapax[673] is a principle of criminal responsibility which assumes that under a certain age children are not capable of knowing right from wrong and therefore cannot be criminally responsible for their actions. Muncie[674] acknowledges the vast differences among countries on the age of criminal responsibility. In Scotland the age is 8, in England and Wales 10, in France 13, in Denmark and Sweden 15, in South Africa and the Netherlands 12, in Ireland 7, and in Belgium 18. It is important to note that serious violent crimes are committed by young persons and this brings the age of criminal responsibility under scrutiny. The case of T and V v United Kingdom

[669] See Sloth-Nielsen, J. and Ehlers, L. (2005:17) Assessing the impact of mandatory and minimum sentences in South Africa. South African Crime Quarterly No 14 .
[670] Tables 4.3 – 4.6 and Chapter 1.
[671] See (2006/07:38) Annual Report of the Judicial Inspectorate of Prisons
[672] See (2006/07:39)
[673] Muncie, J. (1999:305) Youth and Crime. A critical introduction. New Delhi: Sage Publication.
[674] (1999:255), quoted above.

discussed above is a relevant example of the complexity of assessing the age of criminal culpability, the seriousness of the crime and the victim's circumstances in order to impose appropriate punishment. In this case it was highlighted that the Beijing Rules and other international law principles cannot impose what they regard to be the age of criminal responsibility on sovereign countries.

From the proportionality perspective it seems as if the age of criminal responsibility should be informed by the specific crime trends and patterns of that specific society with regard to the age of criminal involvement, and not by an assumption based on a one-sided viewpoint. According to the Child Justice Legislation in South Africa the age of criminal responsibility is 14 and those below this age are presumed to lack criminal capacity unless the State proves that he or she has criminal capacity in accordance with section 11. In this regard there is a need to set parameters in accordance with sentencing principles when punishing those under the age of 18 convicted of serious crimes. Hutchinson points out that while the criminal capacity of those between 7 and 14 years of age is rebuttable, presumed to be doli incapax, empirical evidence from court records seems not to reflect that courts rebutted the presumption in the 1980s.[675] This point seems to converge with Midgley's assertion on the gap between theory and court approaches in the 1970s.

Feld[676] advances the proposition that the age of criminal responsibility should not be viewed in narrow cognitive capacity, but rather that a child's judgment should be seen as a product of cognitive and psychosocial factors. Therefore development in choice-making should be regarded as a gradual and continuous aspect of life, rather than as fixed, full-blown development. This argument suggests that different young offenders' levels of development assume different levels of reasoning in specific matters of life. While this argument recognises non-homogenous behaviour among offenders, it endorses the view that in certain matters child offenders reason better than in other matters of life, and therefore can be held responsible for their crimes but should be punished less severely than adults.

3.9 Analysis

This chapter traced more than 50 years of sentencing patterns, trends and shifts in respect of adults and persons under the age of 18 convicted of serious crimes in South Africa. More than 50 years of historical sentencing patterns have shown some intense moments characterised by the judicial pursuit to discharge proper sentencing approaches in line with the conditions and penal laws of the time. This refers to diversity in sentencing approaches to varying crimes of seriousness and different circumstances of offenders. The chapter reflected briefly on sentencing approaches prior to 1950 in order to promote an understanding and situate the analysis in its proper context. As far back as 1950, sentencing patterns showed the impact of political shifts, international penal discourse and the changing context to influence the nature of crime seriousness and judicial sentencing decisions. This is suggested by the increase in figures for the imposition of corporal, capital and imprisonment punishments. New penal legislations from 1950 to 1967 paved the way for more

[675] (1983:246) Juvenile Justice. In Olmesdahl, M. C. J. and Steytler, N. C. Criminal Justice in South Africa. Selected aspects of discretion. Cape Town: Juta and Co. Ltd.
[676] (1997:107) Abolish the Juvenile Court: Youthfulness, Criminal Responsibility and Sentencing Policy. The Journal of Criminal Law and Criminology. Vol 88, No 1:68-101.

floggings. These enactments tended to reduce judicial discretion by passing mandatory whipping laws such as the Criminal Sentences Amendment Act, Act 33 of 1952. Since 1965 this law has been repealed, although there was substantial difference in whipping trends and patterns, as these were mostly coupled with imprisonment prior to the period 1965 to the 1980s. It was really in the 1950s when a popular movement in protest against repressive laws was gaining momentum, trying to shape penal processes. Subsequently in 1960 a State of Emergency was declared from 30 March to 31 August.[677]

Cases discussed in the chapter depict a picture of judicial arguments and penal philosophies behind sentencing decisions in a manner that seem to be eclectic. In cases of corporal punishment and imprisonment, a substantial number of judgments tended to show diversity of opinion. In this chapter a pattern of trial court decisions was found to constitute misdirection in the passing of a particular sentence. In cases of the imposition of the death penalty judicial sentencing decisions appeared to reflect uniform approaches, particularly from the 1950s to the 1980s, as if all murders are the same rather than treating each case individually. But there were noted inconsistencies within this trend. The empirical sentencing patterns reveal decontextualization of crimes in the approaches of judicial officers. In cases where the doctrine of common purpose featured, sentencing courts tended to find the group liable of the criminal act in wider terms. It is apparent that the history of punishment tends to reflect power relations between the ruling group and its people. Between 1977 and 1988 the state legislation, through the doctrine of common purpose in death penalty cases, appeared to interfere with judicial discretion in a manner that was increasingly significant in South Africa. The same trend is suggested in the use of corporal punishment and the State of Emergency. Partial State of Emergency control measures were declared in 21 July 1985 to 7 March 1986 and subsequently a national State of Emergency was declared on 12 June 1986. This shows a complex political pattern underpinned by the penological discourse. As revealed in this chapter, way back during the 1800s in Cape Town the ruling group of the time meted out whippings and hangings to captured slaves who were resisting against the system or trying to run away from their rulers. If one looks at the history of punishment from a broader scale it appears that penal approaches at various moments remain intertwined with power.

With regard to both adults and persons under the age of 18, patterns of corporal punishment, imprisonment and capital punishment suggest that the age factor and context of crimes were considered less in sentencing decisions. It appeared from the rendered judgments that these factors could not amount to constituting extenuating circumstances. Rather, judicial approaches reflected an emphasis on the degree of gravity of crimes and a criminal record in order to gauge the moral blameworthiness of the offender. The principle of proportionality in sentencing decisions seems to be given a narrow perspective.

By the mid-1980s executions, corporal punishment and imprisonment had all increased. The nature of crimes and trials tended to be politically related. Subsequently, in 1988-1989 there seems to have been a broader approach in judicial sentencing decision-making, as suggested by various judgments and execution figures or statistics. A broader understanding of proportional sentencing is required when

[677] See Coleman, M. (1998:10).

courts discharge punishment, particularly to persons under the age of 18 convicted of serious crimes. In this chapter past sentencing judgments and various authors appeared to suggest that the sentencing theories of deterrence and retribution received much more emphasis than combined sentencing approaches to serious crimes with a strong rehabilitation aspect. Penal statistics suggests prevalence of crime to the degree that is likely to undermine the goals of theories of punishment. This chapter reflected on more than 50 years of historical sentencing in South Africa that has shown a pattern of partiality and court approaches shaped by the political and legal conditions of the times. This calls for the necessity of discretionary power of judicial officers, independence and impartiality in accordance with accountability and responsibility, in order to reduce disparities in sentencing approaches and for sentencers not to appear as state footmen or be subjected to competing interests in society.

From the 1990s to the present, patterns of sentencing decisions suggested an attempt to strike a balance in accordance with the Constitution and international sentencing principles, although some trends and shifts point to judicial approaches that consider the degree of harm caused by the crime more important than prospects of rehabilitation, for instance as in the recent case of Nkosi.[678] It is possible for judicial sentencing decisions to be premised on wider sentencing approaches and this is more evident in some decisions. This analogy implies that penal discourse should depart from proportionality in a manner that grapples with the degree of culpability of the offender, the harm the crime inflicts on the victim and society, the severity of the punishment, particularly to the young offender, and the context of serious crimes. As recently as 1995 penal discourse seemed to favour the politics of the centre. This relate to the idea to apply community-based penalties. In South Africa there was a commitment to rendering sentences in accordance with the Constitution and international law. This attitude even prevailed before the official abolishment of corporal and capital punishment in 1995. For example, as stated in this chapter, in 1992 many courts refrained from imposing whipping due to national and international pressure. The same is true regarding the death penalty, although there was a moratorium in the same period during the transition. By this time the penal realm has shown a pattern of responsiveness to local and international developments. There was a noticeable beginning to charting a way towards a restorative approach for trivial crimes committed by young persons. The process of the Child Justice regime in South Africa is noticeably shaped by wider developments.

Ten years ago, as revealed by sentencing trends and Chapter 4, there has been a shift from the politics of the centre and constitutionalism towards mechanical approaches. This refers to the shift from the earlier thinking on flexible approaches emphasising rights of the victim and offender. This shift takes place in a period of global neo-liberalism and the prevalence of serious crimes committed by both young and adult persons. Subsequently in this context there has been a shift in philosophies that appears to reflect a trend of the diversion of resources to the private sector. These developments to a certain degree impact on possible choices to be taken. As captured by Paschke and Sherwin's study, minimum sentences seem to promote rigid approaches and inconsistencies with regard to the same crime continue to exist in South Africa. This urges that judicial discretion should be used in a manner that could minimise unjustifiable inconsistencies, indeed taking into account the divergency of

[678] 2002 (1) SA 494 (W).

accused persons and the degree of seriousness of the crime. In light of prevalence of serious crime minimum sentences seem to serve the purpose that justice has to be seen done by the community and victim. In this chapter patterns of sentencing decisions appear to endorse a philosophical and socio-historical claim that punishment is a multifaceted phenomenon. The following chapter presents an analysis of empirical judicial sentencing decisions in respect of persons under the age of 18 and adults convicted of serious crimes.

CHAPTER 4

ANALYSIS OF EMPIRICAL JUDICIAL SENTENCING DECISIONS

4.1 Introduction

This chapter presents an empirical analysis of past and present judicial sentencing decisions. In accordance with the aim[679] of the study, the empirical sentencing study was carried out in three[680] phases. In the chapter these three phases are presented as Parts 1, 2 and 3 to show the overlapping nature of the empirical sentencing research study. Part 1 deals with sentencing statistics or figures, Part 2 constitutes systematic random[681] accessing of real judicial sentencing decisions, and Part 3 consists of the results of interviews with judicial officers. This is in line with the application of quantitative and qualitative methodologies.[682] As stated in Chapter 1[683] with respect to the demarcation of the research field, the study is limited to the jurisdiction of the Wynberg regional court, the Mitchells Plain regional court and the High Court in the Western Cape. These courts are where cases involving serious crimes allegedly committed by both young persons and adults are usually tried and sentenced.[684] It is here that the analysis should evaluate and determine sentencing approaches of these three courts, different individual magistrates and judges, and penal statistics in relation to sentencing persons under the age of 18 and adults convicted of serious crimes.

It is important to note that crime seriousness is difficult to gauge without a broader penological insight into each crime. This is suggested by the fact that various crimes represent different degrees of gravity.[685] For example, white-collar crime such as fraud differs widely from murder because it does not inflict direct physical harm, but its long-term economic effects can be equally devastating.[686] In this regard, various sentencing jurisdictions, including South Africa, tend to classify certain crimes legally perceived to be serious to warrant long sentences. These include murder, robbery, rape, housebreaking with intent to steal and theft, fraud, public violence, kidnapping, treason, assault with intent to do grievous bodily harm and culpable homicide.[687] As evident in the preceding chapters,[688] various penological authors suggest that the seriousness of crimes should include wider considerations in the search for proportionate punishment.[689]

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[679] See Chapter 1, 1.4
[680] See Chapter 1, 1.6.
[681] See Chapter 1, 1.6 on the description of the systematic random sample.
[682] See Chapter 1, 1.7.
[683] Section 1.6.
[684] See Chapter 1, section 1.2, Table1.1, 1.2 (motivation of the study) and section 1.6 on the feasibility and focus in accordance with the aim of the study.
[685] See Chapter 2 and Table 4.9 below.
[686] Coleman, J. (1985:7) The criminal elite: the sociology of the white-collar crime. Also see Gottfredson, M. and Hirsch, T. (1990:182) A general theory of crime.
[687] Criminal Procedure Act 51 of 1977, Snyman, C. R. (1991:305) Criminal Law. Also see Terblanche, S. (1999:549) The guide to sentencing in South Africa.
[688] See Chapter 1 to Chapter 3 in this thesis.
[689] See Van Zyl Smit, D. Sentencing children convicted of serious crimes. November 2001, Article 40, vol. 3, Number 4, p.5, Von Hirsch, A. (1998:185) Principled sentencing: reading on theory and policy. In Von Hirsch, A. and Ashworth, A. Also see Burchell, E. M., Milton, J. R. L. & Burchell, J. M. (1983:96) South African Criminal Law and Procedure. General principles of criminal law. Vol. 1.

4.2 Background to the sentencing data

The first part of the empirical research is premised on the quantitative method of data collection. This method involves an analysis of the sentencing statistics of persons under 18 and adults convicted of serious crimes. The methodology is in line with the idea of tracing sentencing patterns, trends and shifts suggested by the primary historical data with respect to judicial sentencing decisions. In this part, penal statistics reflecting sentencing patterns, trends and shifts become the primary data which lay the basis for the purposes of a combined application of both quantitative and qualitative methodologies.[690] To execute this part of quantitative data collection, a letter of permission was faxed to Chief Magistrate Van Renen of Wynberg. He suggested to the researcher to look at court sentencing records and find what he could extract due to lack of accurate statistics. Similarly, in the Cape High Court Ms Rowena Bihl (Registrar) and Mr Hilton Adam (Chief Registrar) permitted the researcher to study judicial sentencing decisions.

Following the quantitatively based first part of the empirical study, the second part had both quantitative and qualitative aspects.[691] Actual judicial sentencing decisions were accessed with the idea of establishing on what judicial officers base their sentencing decisions. Questions to which answers were sought included: What picture is presented by the judicial sentencing decisions? What kind of information can the researcher distil from those judicial sentencing decisions? What are the implications of the justification of various punishments? How do just desert, rehabilitation, deterrence, incapacitation and restorative sentencing theories work or how are they applied? How have persons under 18 been dealt with over the past four years or more, and currently, compared to their adult counterparts convicted of serious crimes by the sentencing courts? The background question was whether sentencing patterns in the sentencing decisions were likely to give an insight into and an understanding of the seriousness of the crime (gravity) and the severity of punishment in rendered judgments and punishment in relation to the principle of proportionate sentencing. An attempt was made to identify factors mostly associated with the choice of sentence in those judicial sentencing decisions involving gravity of crime, age, severity of punishment, prior record and other circumstances.

The accessing of real judicial sentencing decisions could be viewed quantitatively (figures) suggested by the number of cases decided previously and currently. For example, four accused who were under 18 were punished less severely than their adult counterparts convicted of the crime of rape. On the other hand, accessing or reading court cases could enhance the qualitative method (interview schedule) which was to form the third part of the empirical research. For example, looking at the age factor, prior record, gravity of the crime and the severity of punishment in judicial sentencing decisions could provide an insight into gauging the factors likely to inform or determine the choice of sentence. In this regard, primary historical data represented by statistics complement philosophical aspects in recorded cases and interviews in the latter part. The application of the qualitative methodology is further illustrated by the more detailed analysis and interpretation of eight judgments delivered and sentences imposed by both the Wynberg regional court and the High Court. This is in line with

[690] See Chapter 1.
[691] See Chapter 1.

the idea of empirically identifying sentencing theories behind judicial sentencing decisions and previously decided cases and judgments.[692]

From a quantitative viewpoint, random accessing of real sentencing decisions previously rendered enhances greater penological insight and provides more details which might not be evident in penal statistics. For example, current statistics do not reflect on prior convictions of the accused, quantum of punishment, crimes committed and their circumstances. In this regard, systematic random accessing of actual judicial sentencing decisions seems to overlap with both quantitative and qualitative methodologies. This is suggested by the information extracted from those judicial sentencing decisions.

4.2.1 Observational technique

As part of the qualitative method,[693] the researcher observed a fraud case in the Wynberg regional court involving an adult accused and presided over by one regional magistrate at courtroom E. Another serious case observed in regional courtroom C involved robbery. In the Mitchells Plain regional court proceedings involving murder cases were observed in courtrooms A and B, while in the Cape High Court, the researcher applied the observational technique by sitting in on a murder trial of Captain Lategan with two accused from Brandvlei maximum prison, registered on the court roll as State v Jeneker and Another. The deceased is reported to have been investigating serious violent crimes. The trial was presided over by a judge and two assessors at courtroom 2. Another observed trial involving a serious crime was that of the murder of Mrs De Klerk in courtroom 1, registered on the court roll as State v Mboniswa. In this case, the accused was charged with murder, rape, robbery with aggravated circumstances and housebreaking with intent to commit an unknown crime. Yet another observed trial involving the serious crime of murder was that of a youth member of a gang popularly known as the Sexy Boys, in courtroom 3.

One of the contentious matters in the proceedings of the Mboniswa trial appeared to be centred on the admissibility of the statement or confession made by the accused on the evening of his arrest. The defence counsel contested that the accused was not properly informed of his constitutional rights to remain silent, access to legal representation and to be presumed innocent until found guilty beyond reasonable doubt by a court of law. The state was of the view that there was no evidence of coercion or interrogation of the accused. They believed that, gauging from the content of the questions asked, it was improper to declare the confession or statement inadmissible. The state further claimed that the accused had been informed about his rights. In this regard, Judge Hlophe ruled that there seemed to be two mutually contradictory versions which required the court to exercise caution, recognising probabilities while accepting the statement as admissible.

Another case involving three accused was registered on the court roll as State v Nyembezi and 2 Others in the serious crime of robbery and murder and was presided over by Judge Knoll in courtroom 1. In delivering her judgment and sentence, the judge argued that sentencing should not be based on anger and should achieve the

[692] See Chapter 1, 1.4.
[693] See Chapter 1, 1.7 on the use and the relevance of observational technique as data collection in qualitative methodology.

purpose of sentencing in each case. This suggests that like cases should be treated alike. She made reference to the case of S v Mhlakaza and Another[694] with regard to the killing of a police officer on duty as constituting aggravating circumstances and its prevalence which required an effective sentence. The judge reasoned that robbery of the Post Office was a premeditated act and that this amounted to an aggravating factor. On the other hand, the murder of the police officer appeared to suggest a high degree of recklessness or negligence which served as a mitigating factor. Subsequently, its mitigating circumstances were due less to lack of foresight and the unlawful possession of a firearm. The judgment points out that an effective sentence is not necessarily a harsh punishment, and the prevalence of this crime does not justify the imposition of minimum sentences unless it occurred during the operation of the Act. The case's gravity appeared to call for minimum sentences. According to the judge, the sentence should reflect the persistence and seriousness of the crimes in question for the purposes of rehabilitation and deterrence in order to prevent them in future. In this regard the judgment seems to reflect an emphasis on the forward-looking sentencing philosophy, while at the same time it reflects great consideration for the gravity of the crime.

Judge Knoll stated that the accused were relatively young men at the time of the commission of the offence. For example, accused number 1 was 21 years old, yet he already had a previous conviction of 1991, for which he had received a whipping and a suspended sentence. The judge pronounced that neither accused had shown any remorse. For example, accused number 3 continued to insist on his innocence – a factor that might derail the prospects of rehabilitation in prison. The judge postulated that pronouncement of innocence was not unusual in a court of law, but it had nothing to do with sentencing. It is important to note that after the sentence was imposed, some of the people in the court gallery, who appeared to be friends and family members of the accused, cried loudly. This reaction corroborates the penal philosophy in the proposition that punishment is pain and a necessary evil.[695]

The judgment tries to cover broad matters, stated as factors considered in sentencing the accused. Similarly, criticism could be levelled that such factors are mentioned in less specific ways, including the interest of society, the context of the crimes, age, prior record and seriousness of the offence. This is suggested by the fact that factors determining the sentence or taken into account over others were not explicitly pointed out. In the judgment and sentences imposed, the idea of preventing future crimes suggests a sense of the deterrence theory, combined with rehabilitation. On the other hand, the gravity of a crime could be associated with the deterrence and desert theory of punishment. In imposing a sentence, the judge asked the accused to make use of rehabilitation programmes and to reflect on their crimes, the victims of their crime, and society in order to make a meaningful contribution in future. Accused number 1 received an effective 28 years' imprisonment, accused number 3 received an effective 25 years' imprisonment, and accused number 2 received nine years' imprisonment, of which four years were suspended. The imposed punishment concurs with the verdict statement that the sentence is an attempt to treat the accused in a manner that is commensurate with their involvement in the crimes before the court.

[694] 1997 (1) SACR 515 (SCA).
[695] See Chapter 2 in this thesis.

Another observed trial in courtroom 2 involved S v Staggie and Another charged with the crimes of rape, kidnapping and illegal possession of a firearm. It was presided over by Acting Judge Sarkin. In this regard, the application of the observational technique in the sentencing court ought to intermingle with penal statistics or figures. This is in order to gauge a real sentencer's verdict on young and adult accused in relation to trends and patterns suggested by the statistics.

Part 1

4.2.1 Sentencing statistics

As described above, sentencing statistics or figures reflect an application of the quantitative methodology. This is in accordance with the empirical tracing of sentencing patterns, trends and shifts in the approaches of judicial officers. Penal figures are likely to provide a glimpse into the empirical judicial sentencing approaches over the years and currently. This is to compare and contrast trends with respect to the disposition of young and adult accused. As depicted in Table 4.1, there are different significant numbers of persons under the age of 18 and adults convicted of crimes of varying degrees of seriousness. Convictions of specific crimes of varying gravity might elucidate the reasoning behind sentencing approaches in respect of both young and adult offenders. In this regard the reasoning of different judicial officers could reflect and be informed by the nature of committed crimes by the accused under the age of 18 and their adult counterparts. Conviction rates and crimes of varying seriousness committed by both young offenders and adults could give an insight into sentencing statistics for different crimes and offenders alike. It is important to note that tracing patterns, trends and shifts requires one to look back at various key moments, not just at the current conjuncture. This is to identify the level of consistencies and divergences in sentencing approaches.[696] As stated in Chapter 1,[697] Table 4.1 below is consistent with the focus of the study on approaches applied to those under the age of 18 and adults.

Table 4.1 Convictions in South Africa according to age category

Persons under 18 years	Adults between 18 and 20 years	Crime
7	16	Public violence
1	1	Terrorism
5	8	Abduction
0	1	Kidnapping, child stealing
1516	1386	Burglaries (housebreaking) of business premises and public buildings
205	147	Burglaries of premises in which financial institutions are lodged
62	63	Indecent assault
476	733	Rape or attempted rape
568	2216	Drugs and dependence-producing substance
628	2064	Common assault
1578	3835	Assault with the purpose to inflict grievous bodily harm

[696] See Chapter 1 and Chapter 3.
[697] See sections 1.6 and 1.9.

Table 4.1 Convictions in South Africa according to age category

47	88	Murder (with a firearm, pistol, revolver)
2	12	Murder (with high-calibre automatic weapon)
202	410	Murder (with another weapon: knife, panga or any other object or as a consequence of stone throwing, burning, explosives and mine explosion, etc)
78	164	Attempted murder (with any object)
391	690	Robbery under aggravating circumstances (with a firearm, knife, panga or any other object)
360	942	Theft of livestock & related matters
3366	4867	Other theft (shoplifting)
397	571	Theft of motor vehicle including motor cycle
49	250	Frauds or embezzlements

Source: Extracted from CSS Report No. 00-11-01 (1995/96): Reported crimes, prosecutions and convictions. Pretoria (1998).

The numbers of convictions for various serious crimes reflect a consistent difference with respect to the age factor and the seriousness of the crime. A total number of 218 394 (74,9%) were convicted in South Africa during the 1995/96 period.[698] Of the total number, 17 526 (8,0%) were recorded for persons between 7 and 17 years old and 30 565 (14,0%) for adults (persons between 18 and 20) in the 1995/96 period. The highest number of convictions are for property crime, namely 106 986. In 1995/96 the number of convictions for serious crimes shows a decreasing trend of 218 394, compared to the 1991/92 number of 373 590. The Western Cape province recorded a total number of 53 972 (24,7%) convictions, which is high compared to the North West province which recorded a total number of 9 702. With regard to prosecutions, the magisterial district of Wynberg recorded a total number of 10 631, compared to the smaller figure of 6 302 in the Cape Town magisterial district during the period 1995/96.

In Table 4.1, convictions of persons under the age of 18 appear to represent smaller numbers compared to their adult counterparts, although they still represent significant numbers. For example, rape or attempted rape shows a figure of 476 for those under the age of 18 in contrast to 733 for adults. This is also the trend in the case of assault with grievous bodily harm, for which the number is 1 578 for offenders under 18 years compared to 3 835 for adult offenders. This is the pattern of conviction rates for almost all the crimes except two categories – figures representing young offenders are lower than those for adults. It is only with respect to 'burglaries' of business premises and public buildings and 'burglaries' of premises in which financial institutions are lodged where persons under the age of 18 appear to represent larger numbers than those over 18. For example, in respect of the first type of 'burglaries' the number of persons under the age of 18 is 1 516 compared to 1 386 for their adult counterparts.

[698] See Reported crimes, prosecutions and convictions (1998).

This is followed by a figure of 205 for persons under 18 years in comparison with 147 for adults for the second type of 'burglaries'.

As depicted in the table, the difference in numbers has shown varying margins. In some cases such as terrorism there is no difference, whereas in the case of indecent assault the difference is very little. This trend shows crimes committed by different offenders and South African court approaches and what is likely to inform their sentencing decisions. It shows that persons who have committed crimes are dealt with not only in terms of whether they are young or adults. This trend seems to underlie judicial sentencing approaches to young and adult offenders convicted of serious crimes. Court approaches point to shifts at the level of magisterial district, province and nationally over different periods. This is a statistical pattern that provides a diverse picture of approaches in different historical moments and this is in accordance with the tracing of sentencing shifts and trends. As argued in the preceding chapters and here, these shifts might be associated with variations in crime seriousness and their prevalence at different times, and courts' sentencing jurisdiction and their geographical location, as explored in this chapter.

Table 4.2. Nature of crimes and different sentences imposed by the South African courts in 1991

Crime category	Fine only	Imprisonment or fine suspended	Imprisonment or fine partly suspended	Dangerous criminal imprisonment sentence	Life imprisonment sentence	Reformatory school	Corrective supervision	Corporal punishment only
Indecent, sexual & related matters	386	192	115	12	9	49	202	35
Law & order	538	577	471	10	0	9	38	7
Life & body of a person	1112	7145	2899	98	97	77	1231	91
Burglaries & related matters	141	802	421	149	0	356	797	155
Other thefts	12	11537	531	127	1	240	1564	184

Source: Adapted from CSS Report No. 00-11-01 (1995/96): Reported crimes, prosecutions & convictions. (1998) Pretoria .

The figures in Table 4.2 show the frequent use of fines as sentences imposed in South African courts during 1991. This pattern of sentencing is evident in both violent and property-related crimes. Table 4.2 reveals to a certain degree the application of sentencing options by judicial officers. This is suggested by the imposition of fines and imprisonment or suspended sentences. In some cases, a portion of the punishment appears to have been suspended. By and large, imprisonment sentences appear to be frequently imposed, compared to other sentences. Probably this could be attributed to the degree of seriousness of the crimes. This is further counted as dangerous criminal imprisonment sentence as shown in Table 4.2. Life sentences seem to represent a substantial number, which corresponds with crimes related to the life and body of a person (violent). Non-custodial sentencing options such as corrective supervision and suspended sentences are represented by large numbers. Meanwhile, reformatory schools and corporal punishment[699] only show small figures, probably for young offenders. This picture in sentencing patterns has persisted in recent years as well as

[699] Corporal punishment was abolished in 1995 but because of the nature of the study it is part of the penal statistical trends and Chapter 3 on historical account concurs with this analysis.

currently. Table 4.3 below present's statistics with regard to the length of sentences served by persons of different age categories in South African prisons.

Table 4.3 Adapted from the 2008 juvenile offender statistics

	AGE				
SENTENCE length	7 - 13 Years	14	15	16	17 Years
0 - 6 Months	0	1	7	21	50
>6 - 12 Months	0	2	11	32	57
>12 - <24 Months	0	2	7	18	49
2 - 3 Years	0	9	22	51	126
>3 - 5 Years	0	3	15	64	150
>5 - 7 Years	1	1	3	22	52
>7 - 10 Years	1	1	3	11	39
>10 - 15 Years	0	0	2	9	14
>15 - 20 Years	0	0	0	2	6
>20 Years	0	0	0	0	5

Source: Department of Correctional Services. Pretoria (2008).

Judging by the 2008 juvenile sentencing statistics, the majority of offenders are serving short sentences. Sentences ranging between 0 to 12 months are represented by a substantial number of age group from 14 year old to 17 years. As shown in Table 4.3 the majority of offenders are serving sentences from 2 to 5 years. Sentences between 5 and 10 years are served by all age groups as evident in the Table. While 10 to 15 years sentence are only served by offenders aged 15, 16 and 17 years. This trend is followed by both 16 and 17 year old offenders serving sentences ranging from 15 to 20 years. Sentences ranging from 20 years are served by the 17 years. Of the different age groups the majority of offenders are 17 year old and severe sentence compared to other age groups. This sentencing pattern is likely to be attributed to the nature and seriousness of the crimes, including the degree of participation of this age group. It is important to consider the circumstances of the different specific age groups in each case, rather than simply to lump them away from their crimes. A similar pattern of juvenile sentencing is evident in Table 4.4 below.

Table 4.4 Adapted from the 2007 juvenile offender statistics

	AGE group				
SENTENCE length	7 - 13 Years	14	15	16	17 Years
0 - 6 Months	0	1	7	22	59
>6 - 12 Months	1	1	12	31	58
>12 - <24 Months	1	2	9	25	64
2 - 3 Years	1	5	22	61	139
>3 - 5 Years	0	2	15	62	125
>5 - 7 Years	0	1	6	22	49
>7 - 10 Years	1	1	3	15	41
>10 - 15 Years	0	1	2	4	18
>15 - 20 Years	0	0	1	1	4
>20 Years	1	0	0	2	1

Source: Department of Correctional Services. Pretoria (2008).

In Table 4.4, persons from the age of seven and 14 tend to represent small numbers compared to a majority of those aged 15 to 17 serving longer sentences. On the other hand, it is noticeable that a sentence of 20 years is represented by 7 to 13 years age group, 16 and 17 years. This pattern suggests difficulties to gauge age factor and crime seriousness. For the period 2007 to 2008, statistical patterns in respect of the length of sentences have increased substantially, compared to the early 1990s. This is evident in the presented tables. This picture is likely to be associated with an increase in serious crimes and the application of minimum sentences to both adult and young offenders in past and present judicial sentencing approaches.[700] A pattern of adult sentencing resembles a different statistical picture although similarly old age group tends to represent a big figure as shown below.

Table 4.5 Adapted from the 2008 adult offender statistics

	AGE group		
SENTENCE length	< 20 Years	20 - 25 Years	> 25 Years
0 - 6 Months	639	1778	2355
>6 - 12 Months	517	1489	2000
>12 - <24 Months	492	1521	2145
2 - 3 Years	1259	4723	7042
>3 - 5 Years	953	4020	6495
>5 - 7 Years	423	2595	4817
>10 - 15 Years	294	5038	17359
>15 - 20 Years	107	2252	9837
>20 Years	49	1313	8735

Source: Department of Correctional Services. Pretoria (2008).

Picking up from Table 4.5, the total number of short sentences served by 25-year-old offenders appears to represent a big number compared to offenders aged between 20 and 25 years. This trend differs with respect to 20 years age group and their sentences. It is possible to attribute this sentencing shift to the degree of seriousness of the convicted crimes and the age factor. For example, as suggested in Table 4.5, a 20-year-old and a 24-year-old accused appear to have the same status in terms of the Criminal Law Amendment Act, 105 of 1997, with regard to the degree of culpability in relation to proportionate punishment. In this context the Act[701] provides sentencing prescriptions and the youth factor for offenders at the age of 20 could constitute substantial and compelling circumstances which justify the imposition of a lesser sentence depending on the sentencer's discretion.

The length of these sentences could be associated with the application of desert and utilitarian theories[702] in terms of departing from seriousness and future prevention. In desert the length of a sentence could give an indication of the degree of seriousness of the crime, whereas in terms of utilitarian approaches the past crime is not viewed as the starting point; rather this theory is premised on the desire to prevent future serious crimes through long sentences. Sentencing trends of the 2007 adult offender seem to give a similar picture below.

[700] See Paschke, R. and Sherwin, H. (2000:13 of 111) Empirical study of the sentencing practices in South Africa. Research paper. University of Cape Town: Institute of Criminology.
[701] See subsection 3 of the Criminal Law Amendment Act 105 of 1997.
[702] See Chapter 2 for details in this thesis.

Table 4.6 Adapted from the 2007 adult offender statistics

SENTENCE lenght	AGE groups < 20 Years	20 - 25 Years	> 25 Years
0 - 6 Months	634	1652	2283
>6 - 12 Months	551	1474	2001
>12 - <24 Months	522	1509	2058
2 - 3 Years	1368	4793	6857
>3 - 5 Years	989	3826	6001
>5 - 7 Years	447	2630	4626
>10 - 15 Years	339	5388	17565
>15 - 20 Years	118	2294	9328
>20 Years	45	1383	8315

Source: Department of Correctional Services (2008)

Youth offending seems to be a major challenge in this period, although they still below their adult counterpart as shown in Table 4.6 above. Sentencing patterns illustrate that youth between age 20 and 25 years are imprisoned for long sentences than other age group. As shown in Table 4.6 different sentence length are served by various age groups. This suggests varying degrees of crime seriousness and severity of sentence. Of significant importance age groups ranging from age 20 to 25 are represented by different figures in each sentence length. This picture could be associated with court approaches, the nature of crimes and their prevalence at a specific time. As pointed out in 4.2.1, sentencing trends and shifts could reveal to some extent the levels of crime, prosecutions, convictions and sentencing approaches in respect of young and adult offenders. This picture shows divergences in age groups and imposed sentences.

Patterns of sentencing numbers broadly concur with extracted cases from judicial sentencing decisions of the Wynberg regional court. The aspects of convergence are mostly evident with regard to the age factor, interpretations, severity of punishment and seriousness of crimes committed with regard to proportionate sentencing approaches. Prior convictions or criminal records of the offenders and judgments are more evident in judicial court cases than in sentencing statistics. Judicial sentencing decisions studied in the Wynberg regional court concur with primary historical penal figures. They suggest an application of various sentencing options by the sentencing court in the past and present penal approaches. However, this is not to suggest that such empirical penal data concurs with the principle of proportional punishment.

Sentencing figures since the 1991 reflect a sentencing pattern that demonstrates divergences in judicial approaches. This assertion is suggested by different sentences imposed on offenders and justifications of various judgments. Long imprisonment sentences compared with non-custodial sentences, presented in various tables, broadly suggest the application of theories of punishment and use of information. In respect of desert sentencing theory, it is possible that the justification is premised on the notion that punishment should be deserved. Proponents of the rehabilitation theory could be of the view that long sentences of imprisonment provide enough time for the treatment of offenders. Those who support incapacitation and deterrence could reason that punishment should bring some restraint and deter future possible crimes. It must

be noted that empirical judicial sentencing decisions tend to suggest that these sentencing theories are not necessarily separate entities, but combine factors taken into account, including prevalence of certain crimes and statistics. It is possible that the empirical quantitative penal data could complement the systematic random[703] accessing of judicial sentencing decisions of the Wynberg regional court, as will be shown in the next section.

Part 2

4.3 1999 and 2002 Wynberg regional court cases – judicial sentencing decisions

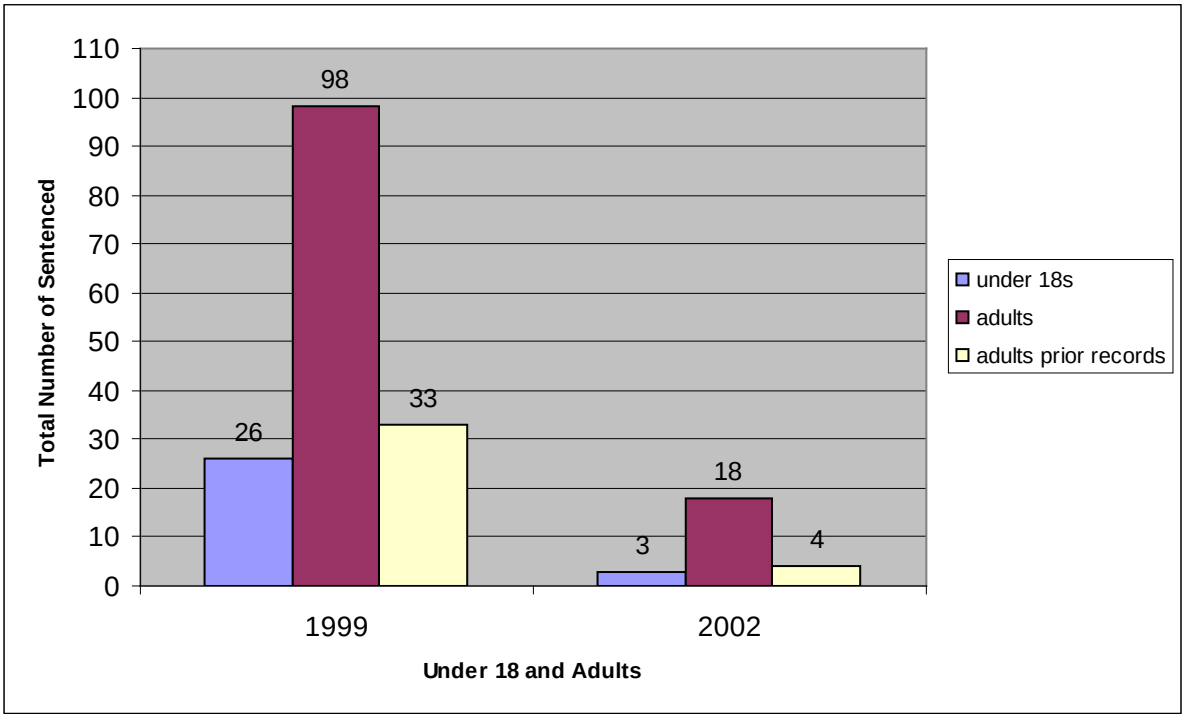
This section deals with the justifications given by judicial officers for the sentences they imposed. They are judicially recorded as cases decided in 1999 and 2002. The records include particulars of the convicted and sentenced person such as thumb prints, address, exhibit, photos, case number, judgment, imposed sentence, age, committed crime, maps, video, statements, transcript and previous convictions or criminal record. In this regard, the researcher looked at real cases decided over a period of four years (and decided in 1999 and 2002) and involving both persons under the age of 18 and adults convicted of serious crimes. Cases studied were selected randomly from those classified as serious matters in the regional court for both young and adult offenders. Some of them were found in the criminal record book.

From the sample of the Wynberg regional court sentencing records of 1999, a significant number of cases reflect that prior convictions of the accused show persistence in the property crimes of housebreaking, theft and robbery, whilst violent crimes such as rape, murder and assault show an increase, as suggested by the rendered judicial sentencing decisions. Accessed judicial sentencing decisions reveal that some adult accused's prior records date back to their crime careers before the age of 18. Of the cases read, the total number of convicted and sentenced adults shows a wider difference from that of convicted and sentenced persons under the age of 18. This pattern is also evident in the 2002 judicial sentencing decisions.

Figure 4.1 below shows numbers of cases accessed in Wynberg regional courts. The total number of decided cases was 157 in 1999. As shown by the figure below, of this total number, 26 persons under the age of 18 were sentenced, which is fewer than the sentenced adults in that year. Sentenced adults represent a large number of 98. Of this total number of adult cases, 33 reveal previous convictions. As depicted in Figure 4.4, 2002 reveals a total number of 25 cases. In 2002 there were three sentenced persons under the age of 18, and 18 were adults convicted of serious crime. Four adult accused had criminal records, as shown in Figure 4.1 below. Decreasing sentencing trends in 2002 reflect the period during the empirical research. The year was incomplete.

[703] See Chapter 1, section 1.6 on the application of the systematic random sample.

Figure 4.1 Numbers of sentenced persons under the age of 18 and adults' prior convictions



Source: Wynberg regional court sentencing records

As shown in Figure 4.1, the Wynberg regional court records reveal that sentences imposed during the period under investigation range from whipping[704] to fines, suspended or postponed sentences and imprisonment in respect of persons under 18 and adults alike. In this regard serious crimes committed and their imposed sentences are relatively different from those imposed on persons under the age of 18 as well as adults.

The 1999 judicial sentencing decisions in respect of persons under the age of 18 appear to constitute a small number, compared to adult cases. This sentencing pattern and shift appears to be much wider than suggested by the low figures in 2002 of rendered sentences in respect of persons under the age of 18, compared to their adult counterparts. However, a certain number of cases tend to be withdrawn or result in acquittal, particularly charges against persons under 18, as compared to adult cases. There are no explanations for this trend. Presumably, the court lacked enough information to convict the accused in question due to their young age. The same might also apply to the alleged victims of the crimes. Information perused from the court records showed that some cases from 2002 were still on appeal in 2003. This picture broadly converges with statistical patterns, as shown in Tables 4.5 and 4.6. Indeed, the primary data seem to correlate with secondary data regarding judicial approaches in respect of young and adult offenders. Numbers of persons under the age of 18 continue to be smaller than those for adults. This pattern is evident in the nature of crime seriousness and severity of sentences imposed.

[704] This refers to criminal history of the respective accused as revealed by the court files before whipping was abolished in 1995.

In characterising the severity of punishment in relation to the nature and degree of the seriousness of the crime committed, the following categories are used in Table 4.7 below: non-custodial sentences are referred to as moderate, 0 to 3 years' imprisonment as medium, 4 to 7 years as short, and 8 to 15 years as long. Characterisation of crimes and sentences imposed does not necessarily imply that sentences are unusual or disproportionate nor lenient in relation to the degree of seriousness of the crimes committed. Rather, they are characterised for the purposes of promoting a certain level of understanding of empirical proportional judicial sentencing decisions and patterns. This is due to the notion that each crime has its own circumstances. This also grapples with various sentencing philosophies underlying rendered judicial sentencing decisions. A sentence described as short in respect of a person under 18 could not be similarly described if it involved an adult accused. The age factor and prior record might impact on the sentencing decision.

Table 4.7. Severity of sentences imposed in the Wynberg regional court

Total number of moderate sentences	Total number of medium sentences	Total number of short sentences	Total number of long sentences
33	61	20	63

Most cases reflect violent and property crimes and this is evident in long sentences as suggested by the total number of 63. Medium sentences are commonly imposed as represented by the total number of 61. Moderate and short sentences show a decrease in numbers although they still represent a significant number, as suggested in Table 4.7. In some cases there are multiple counts with one accused or more. In this regard, patterns of sentences imposed also vary, suggesting the varying nature and degrees of seriousness of committed crimes, as evident in Table 4.7.1 below.

Table 4.7.1. Nature and degree of gravity of crime seriousness and prior records

Year	Total number of property crimes	Total number of violent crimes	Total number and nature of prior records
1999	53	61	16 property crime, 8 violent, 7 drug-related and 2 law and order
2002 (January to October	8	13	2 property crime, 1 violent, 1 drug-related crime

Table 4.7.1 reflects that in 1999 convictions and sentencing of crimes with a violent degree of seriousness were on the increase and represented a total number of 61, compared to the property crime figure of 53. The same pattern is evident in figures for the year 2002. There are small figures for 2002 because the study was undertaken in October of that year. Patterns of previous convictions show a different picture. Prior records of 1999 show a high figure for property crimes, namely 16, compared to a small number of violent crimes, namely 8. There are previous records for drug-related crimes and offences relating to law and order. This is a similar pattern that persists through the 2002 records in Table 4.7.1. In 2002, eight accused sentenced for property crime had a prior record of drug and property crimes. As shown in Table 4.7.1, another 13 accused were sentenced for violent crimes. Of the 13 accused, one had a prior record of violent crime (rape) and property crimes and one accused had a prior record of property crimes. In Table 4.7.1 prior records reveal a degree of recidivism

on the part of certain accused, particularly for crimes such as housebreaking with intent to steal and theft, robbery, possession of illegal fire-arms and ammunition, and theft. For example, there seems to be a chain of reconvictions for housebreaking with the intent to steal and theft, as revealed by the criminal record of an accused in Table 4.7.1.

Prior records show less re-offending with regard to violent crimes, meaning murder, rape, assault with intent to do grievous bodily harm and the serious crime of robbery with aggravating circumstances. Those recorded crimes of the degree of seriousness in nature tend to show the imposition of a lesser punishment. Broadly, prior records reveal an application of sentencing options mostly ranging from suspended and postponed, short-term imprisonment, fine plus imprisonment, partly suspended imprisonment, fine only, whipping, fine or, alternatively, imprisonment and reform school. In this regard, the most common duration of prison sentences is from a few months to four years, as suggested by Table 4.7.

4.4 Cape High Court judicial sentencing decisions

As with the regional court, the High Court's judicial sentencing decisions consist of detailed information. The real judicial sentencing decisions are contained in tied records located in brown boxes. These include the text of previously published cases, judgments, files, testimony, the charge sheet, SAP 69, the social work report in cases of accused under 18, medical reports, exhibits, photographs of the deceased or victims in cases of rape and murder, photographs of the accused in some cases, video, maps, folders, jail warrants and tapes. The researcher's observation is that serious crimes committed by persons under the age of 18 are tried or sentenced by the High Court. This is evidenced by the frequency of young persons involved in the judicial sentencing decisions of the High Court compared to regional court sentencing decisions. These serious crimes committed by young persons appear to take the form of a group of accused, sometimes with one adult or more. The researcher in this regard assesses some of the real cases and judgments rendered by the High Court for the period 2000 to 2002 to persons under the age of 18 and adults convicted of serious crimes. Some cases appear to be referred by the regional courts to the High Court. Probably this trend reflects matters captured in Part 1 of this chapter on the sentencing philosophies behind decisions and notions of transfer to the High Court. Another dimension might be the notion of mandatory minimum sentences for certain crimes, as referred to by most judgments.[705] As explained earlier,[706] Tables 4.8 and 4.8.1 are in accordance with the method used in order to avoid possible biases by random selection of cases with a systematic target of age group and certain number.

[705] See Criminal Law Amendment Act, No 105 of 1997.
[706] See Chapter 1, 1.6 in this thesis.

Table 4.8. Cape High Court systematic random sample of offenders under the age of 18

Year	Age	Crime	Sentence	Total number
2000	15	Murder and robbery	Correctional supervision	1
2000	17- and 17-year-old offenders	Murder, Housebreaking with intent to steal and theft	16 years' imprisonment for each accused on the count of murder. 3 years' imprisonment on the count of housebreaking to run concurrently	2
2001	17	Rape	14 years' imprisonment	1
2001	16-, 17- and 17-year-old	Murder and robbery	15 years' imprisonment	3
2002	15-, 16- and 16-year-old	Rape	12 years' imprisonment	3
2002	16	Rape	10 years' of which 5 are suspended	1
2002	16	Rape	15 years' imprisonment	2

Source: Cape High Court sentencing records.

The random sample of cases as presented in Table 4.8 reveals a significant trend in respect of persons under the age of 18 convicted of serious crimes, with multiple counts similar to their adult counterparts. This pattern is evident in the years 2000 to 2002 in Cape High Court sentencing decisions and depicts similar gravity of crimes. The length of sentences imposed is likely to resemble the gravity of these crimes and multiple counts. They vary from 10 to 16 years' imprisonment. This could be attributed to the age factor, as it seems to mitigate the degree of culpability in the search for an appropriate punishment, of course depending on the individual judge's approach, as shown in Table 4.8. Another dimension could be variations with regard to the seriousness of the crime and the circumstances. It must be noted that the ages of the total number of 13 individual offenders vary from 15 to 17. As depicted in Table 4.8, most offenders under the age of 18 convicted of serious crimes tend to be 16- and 17-year-olds, while 15-year-old offenders are not common in serious crimes. This shows the heterogeneous nature of the age factor and crime seriousness. Some judges might view the age factor and lack of a prior record as grounds constituting 'substantial and compelling circumstances'. This might be done in the context of the Criminal Law Amendment Act, 105 of 1997, which provides grounds for departure to a lesser sentence than the prescribed one.

4.8.1. Cape High Court systematic random sample of adult offenders

Year	Age	Crime	Sentence	Total number	Nature of prior records and sentence imposed
2000	19, 19 and 37	Murder and robbery	16 years' imprisonment	3	No prior record
2000	22 and 33	Attempted murder	12 years' imprisonment of which 6 years were suspended	2	No previous convictions
2000	19 and 37	Rape	Aged 19 accused: 10 years Aged 37 accused: 15 years	2	Aged 37 accused: 1987: housebreaking Sentence: reformatory school 1993: housebreaking sentence: 4 years' imprisonment 1995: theft sentence: fine or 6 months' imprisonment 1998: theft sentence: 1 year's imprisonment
2000	19 and 37	Assault and rape	Aged 19: 10 years Aged 37: 15 years	2	No prior record
2000	18 and 18	Murder and robbery with aggravating circumstances	15 years' imprisonment	2	No prior record
2000	18, 22 and 45	Rape x 2 and attempted murder	Aged 18: 25 years' imprisonment for rape count 15 years for attempted murder count. Aged 22: 50 years' imprisonment for rape count 15 years for attempted murder. Aged 45: double life imprisonment for rape count 15 years for attempted murder 8 years for assault	3	Aged 45 accused: 1983: public violence Sentence: 9 months' imprisonment 1996: Indecent assault Sentence: 18 months' imprisonment
2000	19 and 28	Murder, robbery with aggravating circumstances	15 years' imprisonment	2	No prior record
2001	41	Rape / incest	Life	1	No record
2001	20	Rape	Life	1	No record

4.8.1. Cape High Court systematic random sample of adult offenders

2001	18 and 20	Murder x 2. Rape x 4	Life	2	No prior record
2002	19, 20, 22, 24, 30 and 38	Murder and robbery	Aged: 38 life on murder count. On robbery count – 15 years. Aged 19: imprisonment in juvenile section Remaining accused: 4 years on robbery count 15 years on murder count	6	Aged 38 accused: 1989: possession of dagga Sentence: 6 cuts (light whipping) 1990: assault Sentence: whipping 1991: theft Sentence: fined R120,00 or 80 days' imprisonment 1992: theft sentence: 12 months' imprisonment 1995: housebreaking Sentence: 3 years' imprisonment
2002	19	Rape	12 years' imprisonment	1	No prior record
2002	18 and 24	Rape	Aged 18: 12 years Aged 24: 14 years	2	No prior record
2002	18	Attempted rape and assault	8 years' imprisonment	1	No prior record
2002	18	Rape	16 years' imprisonment	1	No record

Source: Cape High Court sentencing records

In Table 4.8.1, sentences range from non-imprisonment to life sentence for cases in 2000 to 2002. Of these cases, sentences of 10 to 16 years' imprisonment are frequently imposed, compared to other sentence lengths. Probably this could be associated with the fact that most offenders are young adults. Another possibility could be the effect of minimum sentences in those decisions. Rape appears to persist, followed by murder and robbery. This is a pattern common in Table 4.8 as well. Table 4.8.1 depicts six life sentences meted out to different offenders of varying ages and in respect of various crimes. It is followed by a long sentence of 50 years.

Prior records of the accused, as shown in Table 4.8.1, tend to reflect mostly property crimes involving housebreaking and theft, and law and order related crimes. Punishment, as revealed by the sentencing data in Tables 4.8 and 4.8.1, suggests varying applications of sentencing options by the Cape High Court. This could mirror the extent of the application of different theories of punishment by individual judges, as claimed in the preceding chapters. Sentences imposed revealed by the criminal

history of the accused include a duration of months in prison, a fine or imprisonment, whipping, whipping and imprisonment, and a four-year prison sentence. Patterns of prior convictions of each accused suggest that the nature and degree of gravity of such past crimes do not demonstrate the same degree of seriousness as the crimes for which they were being sentenced at this stage. This pattern of prior sentencing is revealed by the cases in Table 4.8.1, which are for 2000 to 2002.

The relevance of prior records in sentencing could depend on the penal philosophy of the individual judge, with regard to whether to increase the quantum of sentence. This relates to criteria used to evaluate the relationship between the prior record and the current crime. Roberts,[707] reflecting on the situation in the UK, captures this prior conviction pattern when he argues that crime seriousness and criminal history are often poorly correlated. Serious crimes tend not to be committed by offenders with serious prior records. Roberts further bases his argument on sentencing data released by the Home Office Report, which demonstrates that persistent offenders often commit less serious crimes compared to other offenders. This point is evident in Table 4.8.1, as shown by the three accused with prior records of trivial crimes and lenient sentences.[708] Of the three accused with prior records, one was currently sentenced for rape and attempted murder and one accused was currently sentenced for murder and robbery.

This quantitative picture might not be accurate enough to provide a deeper understanding on its own. This introduces the need for a qualitative analysis of sentencing judgments, as both approaches complement one another.

4.5 Judgments delivered and imposed sentences

The sample of judgments shed some light on the nature of the case story, details of the main actors in the crime and the time and place where the crime was committed. It further records the sequence of the court proceedings, involving legal arguments, procedures and constitutional matters. As recorded in the court files, the majority of serious cases tend to take a period of three years to be completed. The text of most judgments is a thick, detailed manuscript of about 200 pages, tied with ribbon. Sentencing judgments tend to be a short summary of 6 to 16 pages, with references to previously decided cases as well as imposed sentences. The reference to previously decided cases appears to be in accordance with the search for a proportionate sentence. For example, the famous reference to the Zinn[709] case of 1969 is referred to in most judicial sentencing decisions. Below is a sample of eight judgments[710] selected from the sentencing court records. As explained in Chapter 1, this sample was selected with the intention of avoiding possible biases and there was a systematic target based on age categories. Of these eight samples, some were decided within the ambit of the Criminal Law Amendment Act, 105 of 1997, if offences had been committed after 1 May 1998 when the Act was implemented. In these cases the accused are both youth and adults charged with serious crimes. It is proper to use

[707] (2002:413) Alchemy in sentencing – an analysis of sentencing reform proposals in England and Wales. Punishment and Society. 4(4):425-442.
[708] Also see Part 2, Wynberg regional court cases, section 4.3.
[709] See Chapter 3 discussion on this case in section 3.2.1
[710] Also see accessed cases in this Chapter.

them in order to assess the impact of the age factor on judgments and the treatment of similar serious crimes and imposed sentences.

4.5.1 Case NO: SHD/111/99

This judgment and sentence were extracted from the case of two accused – accused number 1, aged 17, and accused number 2, aged 19.[711] They were charged with two counts. Count 1 was assault to do grievous bodily harm. Count 2 was housebreaking with the intent to steal. It appears from the judgment that accused number 1 assaulted a 79-year-old woman with the intent to commit the crime of theft after breaking down the front door. The court convicted accused number 1 on both counts while accused number 2 was convicted on count 1 on a charge of housebreaking with the intent to steal. In imposing the sentence, the court held that both accused were first offenders, although convicted for a serious crime. The court acknowledged the age factor in respect of both the accused, the seriousness of their crimes and the interests of the community. It further suggested the aims of rehabilitation and deterrence when determining an appropriate sentence. The court reasoned that serious crime by young persons was endemic, particularly in the Western Cape. It further called for a clear message to be conveyed to both the accused and other youngsters in the community who might be intent on committing similar crimes, that the court would not hesitate to impose appropriate punishment on them. This suggests an emphasis on the theory of individual and general deterrence. Equally, rehabilitation prospects were considered. The magistrate reasoned that, taking into account all the accused's relevant aspects, accused number 1 was sentenced on count 1 to five years' imprisonment. On count 2, both the accused were sentenced to two years' imprisonment, two of which were suspended for five years, on condition that the accused were not convicted of the same offences during the period of suspension.

4.5.2 Case NO: SHD 36/38/98

Another judgment delivered in the Wynberg regional court involves a 21-year-old accused found guilty of culpable homicide.[712] It appears from the evidence that the accused had negligently shot and killed the deceased. In sentencing the accused, the presiding officer reasoned that: 'it is important to make sure that the initial period of imprisonment is long enough to reach the goal of deterrence.' In this regard the accused was sentenced to eight years' imprisonment. This sentencing decision concurs with the discussed case above and shows that the deterrence theory of punishment plays a key role in the search for an appropriate sentence, sometimes combined with other sentencing theories.

4.5.3 Case NO: SHG 315/97

A similar decision in the search for an appropriate sentence suggests that the court should grapple with the aim of punishment.[713] It points to personal circumstances, the crime committed and the interests of society in order to find a suitable sentence. This proposition concurs with the broad idea that the imposition of punishment requires

[711] Case NO: SHD/111/99 Wynberg regional court.
[712] Case NO: SHD 36/38/98 Wynberg regional court.
[713] Case NO: SHG 315/97 Wynberg regional court.

proper justification to protect the interests of society.[714] Rabie, Strauss and Mare postulate that justification of punishment requires application of various theories of punishment. The court reasoned that it had to deter the individual offender who stood before it as well as other people from committing a similar crime. This is a direct call for individual deterrence whilst the latter refers to general deterrence. The sentencing court further calls for rehabilitation and retribution when meting out punishment. The judgment seems to suggest that the accused had abused his close relationship with the complainants, having been in a position of trust. It appears from the evidence that his alleged victims were all young girls who were complainants in the charge of rape and indecent assault. It further appears from the judgment that the accused had previous convictions in 1981 and 1989. Eventually the accused was sentenced to 10 years' imprisonment.

4.5.4 Case NO: SHB 285/99

In this judgment the state charged one accused for committing murder.[715] It appears from this judgment that in October 1999 near Old Crossroads the accused stabbed the deceased with a knife. The evidence seems to suggest that the accused entered whilst others were sitting and drinking and he drank the beer of the deceased. Then he threw the rest of the beer into the face of the deceased and after an argument he stabbed him several times. As in other judicial sentencing decisions, in this case the sentencing court points out three factors which should be taken into account and be balanced against each other, rather than one of them being over-emphasised at the expense of the others. In amplifying this judicial approach, the court referred to the case of S v Rabie.[716] In that case the judge stated that: 'punishment should fit the criminal as well as the crime, be fair to society and be blended with the measure of mercy according to the circumstances.' The court reasoned that in terms of the minimum sentence a period of 15 years was prescribed with regard to murder in line with subsections (3) and (6) in Part 2 of Schedule 2.[717] In accordance with the notion of 'substantial and compelling circumstances' the court endorses an approach that takes into account the fact that the accused was a first offender and was aged 19 at the time of the commission of the crime. It further reasoned that the accused would have reflected better if he had been an adult. On that basis, the court imposed a 10-year prison sentence.

4.5.5 Case NO: SHA 136/2000

Another judgment within the ambit of the Criminal Law Amendment Act, 105 of 1997, involves two counts of rape against one accused.[718] It appears from the judgment that the accused was a male person aged 36. According to the judgment he unlawfully and intentionally had sexual intercourse with a female person in 1995. It is alleged that she was at that time under the age of consent, aged nine years. The second charge is that during the period 1997 he committed a similar crime. It appears from the evidence that in both counts the child was under the age of consent. It further appears that the state evidence proved beyond reasonable doubt that he was guilty on

[714] See Rabie, M. A., Strauss, S. A., and Mare, M. C. (2000:55).
[715] Case NO: SHB 285/99 Wynberg regional court.
[716] 1975 (4) 855 (T).
[717] See Criminal Law Amendment Act No 105 of 1997.
[718] Case NO: SHA 136/2000 Wynberg regional court.

both counts. The court held that section 51 of Act 105 of 1997 was applicable. The case was then referred to the High Court for sentence. In this case it seems as if the accused's degree of culpability, and the harm the crime inflicted on the young child, had increased his blameworthiness, hence the High Court appears to be better placed to apply an appropriate sentence. This judicial approach appears to resemble the philosophy of desert theory of punishment.

4.5.6 Case NO: SS 13 /2002

In the judgment of the High Court three accused were charged with sexual assault and murder.[719] It appears from the judgment that the deceased was aged 29 and married to accused number 3. The judgment reveals that evidence presented by an accomplice and other state witnesses suggests that the husband of the deceased (accused number 3) had hired accused numbers 1 and 2 to kill the deceased with ulterior motives. It appears that the accused had concert and conspiracy to execute murder in the deceased's house in Athlone. In trying to assess the evidence and the version of an accomplice, the learned acting judge quoted from a previous decided case of Hlaphezulu.[720] In the Hlaphezulu case Judge Holmes stated: 'the testimony of an accomplice requires particular scrutiny because of the cumulative effect being the self-confessed criminal. Secondly, various considerations may lead him falsely to implicate the accused, for example a desire to shield a culprit or, particularly where he has not been sentenced, the hope of clemency.' It seems in this judgment that the evidence before the court gives grounds for a proper finding. Its emerges that the notion of proof beyond reasonable doubt should be viewed in the context of protecting the community, the degree of truth, and the facts and inferences, rather than minor possibilities to deflect the cause of justice.

Acting Judge Meer reasoned that there was proof beyond reasonable doubt that accused numbers 1, 2 and 3 were guilty of the murder of the deceased as charged. On the second count of indecent assault, the state submitted that: 'there is not a proper factual basis for a conviction of sexual assault in respect of accused number 3.' With respect to accused numbers 1 and 2, the court found them guilty of indecent assault as charged beyond reasonable doubt. In passing sentence, Acting Judge Meer stated that: 'a court, when sentencing, considers the triad consisting of the crime, the offender and the interests of society.'[721] This quotation by the learned acting judge suggests a search for a balanced appropriate sentence. The judge emphasised that: 'the gravity of crime, the endemic nature of violence in our society and the need to convey a clear message to those who might be tempted to indulge in such violence that conduct will not be tolerated.' On this basis: 'there is a need to impose sentences which are seen to be sufficiently retributive and which would have a sufficiently deterrent effect.' In this view, application of the retribution theory implies looking back to the harm caused by the criminal conduct. It is combined with the general deterrence theory, which is based on the idea of deterring offenders from committing similar crimes in future.[722]

[719] Case NO: SS 13/2002 In the High Court of South Africa – Cape of Good Hope Provincial Division. before: Meer, A. J.
[720] 1965 (4) SA 439 (A).
[721] S v Zinn 1969 (2) SA 537.
[722] See Von Hirsch, A. and Ashworth, A. (1998:54 and 141) Principled sentencing readings on theory and policy. 2nd edition, Oxford: Hart publishing.

Acting Judge Meer quoted from the decision of the Supreme Court of Appeal in accordance with the Criminal Law Amendment Act, 105 of 1997.[723] In this decision, the court reasoned that the accused's youthfulness, lack of a prior record and the fact that she was dragooned into the commission of the offence by a domineering personality constituted 'substantial and compelling circumstances' within the meaning of the Act. She further quoted from the decision in S v Fukude and Others[724] which stated that: 'where it is proved beyond reasonable doubt that one of the accused was the instigator or mastermind, there is good reason for imposing a different sentence in respect of that accused.' In this case it appears that accused number 3 had been proved beyond reasonable doubt to be the mastermind and instigator behind the killing. The acting judge reasoned that the lack of a prior record and the relative youth of accused numbers 1 and 2 constituted 'compelling and substantial circumstances' within the meaning of Act 105 of 1997. A sentence of life imprisonment would be unjust with regard to them compared to accused number 3. With regard to count 2, the charge of indecent assault, accused numbers 1 and 2 were sentenced to seven years each. With regard to count 1, the charge of murder, they were sentenced to 20 years' imprisonment. Sentences were to run concurrently on counts 1 and 2. Accused number 3 was sentenced to life imprisonment on count 1, the charge of murder. The long sentence of 20 years seems to resemble prospects for rehabilitation for those young accused. In this regard this case exhibits the individualised sentencing approach and this is shown by the focus on each accused's level of participation in the crime.

4.5.7 Case NO: SS 123/2000

Similarly, in the judgment of Judge Mjoli,[725] two accused were charged with three counts – murder, possession of a firearm, and possession of ammunition. It appears from the judgment that the state could not make a *prima facie* case upon which it could convict accused number 2. He was acquitted on all counts while accused number 1 had a case to meet. In this view, the court amplifies the relevance of section 35, which guarantees the accused's right to remain silent and to be presumed innocent. As with Acting Judge Meer's judgment, the approach of Judge Mjoli is premised on the triad case.[726] Patterns of judicial sentencing decisions suggest that the Zinn case is not just historic but is a guiding authority in proportionate approaches. The judge reasoned that the accused's previous conviction was considered, but not necessarily to increase punishment. The court further held that the accused lacked a sense of remorse, so that hindered the possibility of getting an understanding of the motive behind the murder. This appears to have a bearing in determining the moral blameworthiness for the commission of the crime.

The court acknowledged that the case fell within the ambit of mandatory minimum sentences.[727] It further reasoned that the state had failed to prove that the crime had been premeditated or had been committed with a common purpose. Quoting section 11 of the Constitution, the learned judge said the accused had violated the

[723] S v Malgas 2000 (1) SACR 469 (SCA).
[724] Unreported Case No: 645/98.
[725] Case No: SS 123/00 In the High Court of South Africa – Cape of Good Hope Provincial Division.
[726] S v Zinn 1969 (2) SA 537.
[727] See Criminal Law Amendment Act No 105 of 1997.

deceased's right to life.[728] This suggests an attempt to strike a balance between the rights of the accused and the deceased in sentencing approaches. On imposing a sentence, the judge stated that: 'society needs to be protected against violent people and be compensated by your removal for a considerable period of time.' The accused was sentenced to an effective 16 years' imprisonment. Long sentences of incarceration relate to the incapacitation and deterrence theory, which is based on the idea of bringing practical restraints by removing the offender from society in order to prevent his capacity to offend.[729] This is not to suggest that a long term of imprisonment on its own could lead to future crime prevention without effective rendered programmes inside prison. The notion of compensation to society connotes a sense of retribution in the way of looking at the gravity of the crime. For instance, it appears in the evidence that the young deceased suffered from 61 stab wounds and this act could be horrific in judicial thought. This is in accordance with proportionality between the seriousness of the crime and the quantum of punishment.[730]

4.5.8 Case NO: SS 128/2000

Another judgment[731] reflecting on section 35(3) of the Constitution, namely the right to a fair trial, involves four accused charged with and convicted of public violence. Judge Foxcroft tries to look at this right in relation to the right of citizens in any democratic society to enjoy a peaceful climate. On this basis, he regards public violence as a serious crime. It appears that Pagad had a protest march on 4 August 1996 against alleged gangsters and drug dealers. The evidence suggests there were violent events which led to the killing of Rashaad Staggie in London Road in Salt River. As with the judgment of Judge Meer, the court found the accused had a common purpose. The finding stated that their degree of participation in the crime required careful examination on an individual basis. In dealing with sentencing, the learned judge concurs with the remarks of Du Toit, AJ in S v Thonga.[732] In the Thonga case, the acting judge said: 'in these changing times sentencing has to focus also on the future. One should not only look into the past and punish what was done yesterday, punishment should also reflect the demands of tomorrow, this must especially be so when youth are to be sentenced.'

Du Toit, AJ calls for a combined application of sentencing theories. It relates to the perspective of desert theory in grappling with the degree of the gravity of a crime. Similarly, there is a need for foresight with regard to the prospects for rehabilitation.[733] The judge reasoned that in a crowd situation there must be considerable differentiation between the sentences imposed on the ringleaders in front and other persons at the back. In this regard, the judge called for a greater need for a deterrent, adding that some kinds of crowds would have to be deterred more than others. The judge argued that: 'sentences should not often reflect an over-reaction by the courts to public violence, with general deterrence being over-emphasised in the interest of the state while insufficient or no weight is given to considerations such as

[728] Act 108 of 1996 (p. 7).
[729] See Von Hirsch, A. and Ashworth, A. (1998:88).
[730] See Lovegrove, A. (1997:37) The framework of judicial sentencing: A study in legal decision making. Cambridge: University Press.
[731] Case No: SS 128/00 In the High Court of South Africa – Cape of Good Hope Provincial Division.
[732] 1993 (3) SACR 365.
[733] See Van Zyl Smit, D. (2001:5) Article 40, Vol. 3 No 4.

the degree of the offender's participation and his personal circumstances.' Accused number 3 was sentenced to three years' imprisonment, suspended for five years, on condition that he was not convicted of public violence again, committed within the period of suspension. The judge reasoned that accused number 4 appeared not to be from the rank and file of Pagad due to the finding that he exhorted the crowd by firing three shots outside London Road on the night in question. The court sentenced accused number 4 to three years' imprisonment. The court further ordered that after a period of incarceration, he would be released into correctional supervision on conditions determined by the Department of Correctional Services.

With regard to accused number 1, the judgment revealed that the accused appeared in video footage in a leadership position, in possession of a shotgun which was fired outside London Road. It appears that the film footage shows accused number 1 involved in the incitement of the crowd at the front of a mosque, holding a firearm, facing the crowd on a number of occasions. The court was of the view that his prior conviction for common assault in 1981 had no bearing on the sentencing. The learned judge further reasoned that he intended: 'to suspend part of his sentence in the hope that it will deter him from similar conduct in future.' Eventually, the accused was sentenced to seven years' imprisonment, of which two were suspended for a period of five years, on condition that he was not convicted of public violence again, committed during the period of suspension. In this case, the sentence in each case seems to be tailored to the accused in line with his needs and future prospects in order to desist from crime. This is suggested by fixing of multiple sentences on one count, for instance a period of imprisonment coupled with a suspended sentence or correctional supervision.

From an empirical penological perspective, it is possible to distil significant data for a broader insight from past and present judicial sentencing decisions. Sentencing statistics may provide some insight into sentencing consistency of judicial approaches.[734] Various judgments and sentences imposed by both the Wynberg regional court and the Cape High Court suggest complex patterns of judicial sentencing decisions. This is portrayed by the judicial search for appropriate sentences in various court decisions and further claims to consider various factors relevant to each case. This approach appears less concrete with regard to specific factors determining the choice of sentence. It seems as if judicial officers leave the question open to analysis within the realm of punishment. Indeed, this approach is applied to persons under 18 as well as adults in the search for proportionate punishment. This dilemma is captured by Bagaric[735] when referring to English courts in their judicial sentencing decisions. He opines that they lack a sense of justification for their choice of sentence.

As quoted by Bagaric, Walker describes judicial approaches as eclectic in respect of sentencing. This leads to a situation where a sentencer could select a justification that appears to suit the case. Walker further asserts that judicial approaches take into account certain factors and circumstances in a mechanical and superficial way, making general reference to previous cases and factors, instead of concrete explanation on how the judicial officer weighed these factors in arriving at a given sentence. Referencing to past sentencing decisions appears to help the court not to

[734] Bagaric, (2001:23).
[735] (2001:14), quoted above.

take a top-down approach to sentencing. Instead, the court exercises its discretionary power to deviate on justifiable grounds.[736] Similarly, Gross and Von Hirsch[737] are of the view that the past sentencing patterns of judicial decisions previously rendered suggest few factors strongly associated with the choice of sentence. They believe that research has demonstrated that a few factors, usually the seriousness of a crime and the extent of any prior convictions, are considered, while other factors seem to play a subordinate role.

Part 3 reveals interesting similar views from magistrates of the Wynberg and Mitchells Plain regional courts and Cape High Court judges on divergences in sentencing approaches.

Part 3

4.6. Judicial officers: Regional magistrates and Cape High Court judges

As stated in Chapter 1 of this study, the sample presented in Table 4.8 below consists of Wynberg regional court magistrates, Mitchells Plain regional court magistrates and Cape High Court judges. All sentencers in these respective courts were given a questionnaire in advance in order to answer section 1 by means of ticking boxes, circling and short answers or phrases.[738] The response rate was 100%.

Table. 4.9 Personal profile[739]

Courts	Number of respondents	Female	Male	Age	Judicial experience
Wynberg regional court magistrates	8	4	4	30 to 35 years 36 to 40 years 36 to 40 years 41 to 45 years 41 to 45 years 41 to 45 years 46 to 50 years 61 and above	2 to 5 years 2 to 5 years Above 5 years to 10 years Above 10 years to 15 Above 10 years to 15 Above 10 years to 15 More than 15 years More than 15 years
Mitchells Plain regional court magistrates	2	1	1	41 to 45 years 51 to 60 years	Above 5 years to 10 years Above 5 years to 10 years
Cape High Court judges	3	1	2	41 to 45 years 41 to 45 years 51 to 60 years	Less than 6 months Above 5 years to 10 years Above 10 years to 15 years

[736] (2001:24), quoted above.
[737] (1981:304) Sentencing. Oxford: Oxford University Press.
[738] See Chapter 1, 1.7 for details on how the instrument was constructed.
[739] See a questionnaire and a letter of permission.

It must be noted that Table 4.9 depicts a picture of three diverse sentencing courts. Various sentencing studies have suggested the impact of the personal and social background of magistrates and judges in their sentencing approaches.[740] As depicted in Table 4.9, the majority of Wynberg regional court magistrates are over middle age with small variations. This suggests the degree of personal previous roles and experience. Of eight respondents of the Wynberg regional court, four are males and four are females. As with the Wynberg regional court, the Mitchells Plain regional court respondents appear to demonstrate a gender balance. Both of them appear to be over middle age. Table 4.9 depicts all three judges as being over middle age. Of the three judges one is a woman.

The degree of experience could be a significant factor in influencing sentencing approaches and individual thought.[741] Regional magistrates and judges might be more sensitive to crimes before them due to their perception of society, their roles and the seriousness of their cases. Table 4.10 below depicts respondents' experience in relation to the severity factor in proportionate approaches.

Table 4.10 Judicial experience and severity of sentence

Count of respondent	Sentence severity						
Experience	1	2	3	Depends	Vary	vary	Grand Total
1				1			1
3		1	1				2
4	2	2					4
5	1	2	1				4
6					1	1	2
Grand Total	3	5	2	1	1	1	13

As depicted in Table 4.10, three respondents of varying experience could not be specific as to whether they consider the extent of severity in sentencing they impose. Of the three respondents, one had less than six months' experience and two had more than 15 years' experience. Two respondents had a split, one pointing to more weight and one to greater weight with the experience of two to five years. Similarly, four respondents had a split, two viewing severity to have less weight while another two placing more weight when sentencing offenders. The four respondents' experience ranges between five and 10 years. Another four respondents with experience ranges above 10 to 15 years reveal differences. Of this number, one considered less weight, two placed more weight and one placed greater weight on the severity of his sentence. As shown in Table 4.10, difficulties exist in gauging the impact of experience in sentencing approaches. Variations seem to exist among sentencers of different experience and it is difficult to determine whether such approaches change with the length of time in sentencing courts.

It appears that sentencing does not purely rest on the personalities of individual sentencers. However, this is worth exploring. For example, the degree of seriousness of rape committed by a 17-year-old offender can appear to demonstrate more blameworthiness in the eyes of a female magistrate than of a male magistrate. The female magistrate might consider this case to mirror gender inequalities and violence against women in society but this can be the reasoning of a male magistrate as well. It

[740] See Hogarth, J. (1974:51) and Green, E. (1961:67).
[741] See Green, E. (1961:68) also see Hogarth, J. (1974:64).

is here that judicial approaches could be evaluated within wider social perceptions and relations. Table 4.11 below depicts respondents' approach in terms of gender with regard to case number 4 involving a 17-year-old first offender charged with the rape of a 14-year-old girl.[742]

Table 4.11 Gender and sentencing approaches

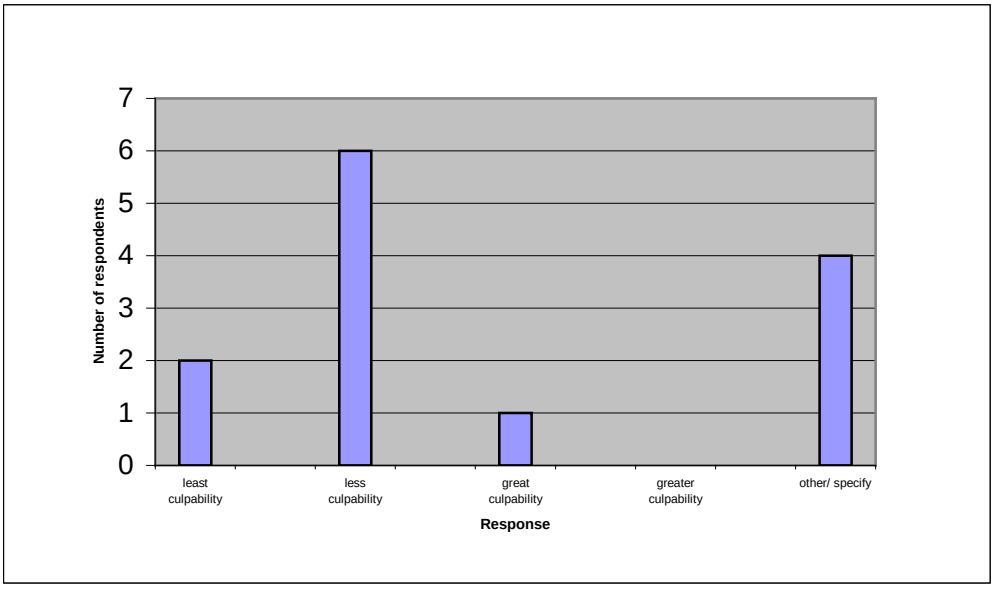
Count of respondent	Case 4				
Gender	1	2	3	4	Grand Total
1	3	2	1		6
2	4	1		2	7
Grand Total	7	3	1	2	13

Table 4.11 reveals that three female sentencers ranked case 4 as most serious, while four male sentencers ranked the same case as most serious. This is followed by two female sentencers who ranked the same case as more serious, compared to one male who ranked the same. Then one female sentencer ranked the above case as serious. As shown in Table 4.11, two male sentencers ranked the same case as less serious. Complexities are noticeable in terms of gender perspective in that the majority of male sentencers ranked a case of the rape of a girl in the highest range compared to their female counterparts. The ranking by female sentencers ranges from most serious to serious, while men exceed to less serious.

4.7 Judicial sentencing and the age factor[743]

In section 1 of the questionnaire[744] the judicial officers were asked to tick in the appropriate box to indicate the degree of culpability on the part of offenders under the age of 18 and adults. Figure 4.2 below illustrates respondents' responses with regard to the degree of culpability.

Figure 4.2. Degree of culpability of persons under the age of 18 in contrast to adults



[742] See section 4.8 and frequency table below and a questionnaire.
[743] See a questionnaire.
[744] See footnote 57 above.

From this figure it is apparent that the majority of respondents regard youthfulness as a mitigating factor, that is, meaning less blameworthiness, compared to adults convicted of serious crimes. As shown in Figure 4.2, six respondents regard persons under the age of 18 to have less culpability. This is followed by four respondents who feel that persons under the age of 18 might have (either/other) different culpability or the same as adults depending on the circumstances of the case. Only one respondent selected great culpability and two chose least culpability. Those who favoured less culpability and below tend to emphasise that young offenders lack experience about the consequences of their actions compared to their adult counterparts. On the other hand, respondents who selected great culpability and other culpability tend to stress the circumstances of the case and the degree of involvement of the young offender in committing the crime. Figure 4.2 exhibits variations of responses on the degree of culpability in respect of persons under the age of 18 convicted of serious crime. From the variations represented by this figure it appears difficult to gauge the impact of the age factor in sentencing.

Respondents' various responses on culpability could mirror different courts and different respondents and similarities within the same courts. Table 4.12 below depicts degrees of culpability as represented by each court. Among judges of the Cape High Court there seem to be similarities, as shown in Table 4.12, with three of them viewing age as a mitigating factor in terms of culpability, depending on the circumstances of each case. The three judges' explanations for this choice have suggested nuanced variations. There are clear differences in the Mitchells Plain regional court between the two courts. Court B has selected a lesser degree of culpability for offenders under the age of 18 convicted of serious crime compared with adults, whereas court A views persons under the age of 18 to have the least culpability. Among the total number of eight courts in Wynberg there seem to be interesting divergences with regard to culpability, as suggested in Table 4.12 below. One court selected least degree of culpability, five courts pointed to a lesser degree of culpability, one court selected great culpability and one court viewed culpability in relation to a range of circumstances.

Table 4.12 Courts' approaches to culpability of the offender

Count of respondent	Culpability				
Court	1	2	3	5	Grand Total
Cape High court				3	3
Mitchells Plain	1	1			2
Wynberg	1	5	1	1	8
Grand Total	2	6	1	4	13

As shown in Table 4.12, of the three courts, two are regional courts and one is the High Court. The responses of respondents from these courts could reflect their different sentencing jurisdictions[745] and their geographical locations. For example, the Mitchells Plain regional court is situated within the township whereas the Cape High Court is located in the main city. Probably this might have a bearing on sentencing approaches and the behaviour of the accused in these environments. Another dimension is that of the eight courts in Wynberg, four are sexual offences courts, namely courts F, G, J and L. These are specialised courts dealing with rape cases and

[745] See Chapter 1, 1.6 on sentencing jurisdiction of the regional and High courts.

other sexually related matters involving children and adults. Other courts in Table 4.12 do not have special courts for these matters and rape cases are tried in any court. Within the Wynberg regional court, courts C, A, D and B try both violent (non-sexual) and property crimes. This difference could support claims made in earlier chapters about divergences in court approaches and might impact on statistical patterns. For example, a sentencer who presides only over rape cases could reason sensitively at a psychological level due to the traumatic and violent nature of these cases. Presiding over sexual offences courts might be more emotionally challenging compared to a court trying a wide variety of cases. Another dimension is that most of these cases could be referred to the Cape High Court, as confirmed by the respective regional magistrates during interviews, and this is in accordance with the Criminal Law Amendment Act, 105 of 1997.

In section 1 of the questionnaire[746] respondents were asked to tick a box to indicate the amount of weight of various factors in order to assess the determination of sentences. Responses point to diverse choices and reasonings probably premised on different penal perspectives. Table 4.13 below depicts the gender of respondents in relation to the weight of harmfulness in sentencing decisions.

Table 4.13 Sentencer's gender and the weight of harmfulness in sentencing

Count of respondent	Harmfulness			
Gender	2	3	Depends	Grand Total
1	2	3	1	6
2	4	2	1	7
Grand Total	6	5	2	13

As shown in Table 4.13, there is a narrow gender difference among the total number of respondents. Of the 13 respondents, seven are male and six are female sentencers. As shown in the table, most responses range from more weight to greater weight. Based on gender differences, choices seem to be narrow, although six male sentencers indicated more and greater weight of harmfulness in sentencing, while five female sentencers similarly view harmfulness to carry more and greater weight in sentencing decisions. As shown by Table 4.13, one female and one male sentencer regard the harmfulness factor to depend on other factors and the circumstances of each case.

Table 4.14 below depicts a different pattern that shows wider variations and vagueness with regard to reasoning based on predictions of future criminal behaviour in sentencing decisions.

Table 4.14 Sentencer's gender and prediction of future behaviour in sentencing

Count of respondent	Prediction				
Gender	1	2	Depends	Not sure	Grand Total
1	3	2	1		6
2	4	1	1	1	7
Grand Total	7	3	2	1	13

Table 4.14 shows that most respondents view predictions of future criminal behaviour as carrying less weight in sentencing approaches. This position was held by three female and four male respondents. As depicted in Table 4.14, two female and one

[746] See a questionnaire.

male respondents believe that future predictions carry more weight in sentencing. There is a gender balance for those two who believe that their approaches depend on various factors. One male respondent could not be sure whether future predictions play a part in his decisions. A similar pattern is shown in Table 4.15 below in respect of the extent to which a prior record influences the courts' approaches.

Table 4.15 Courts' approaches to prior record in sentencing

Count of respondent	Prior record				
Court	1	2	3	Depends	Grand Total
Cape High Court		2		1	3
Mitchells Plain		2			2
Wynberg	1	4	2	1	8
Grand Total	1	8	2	2	13

As depicted in Table 4.15, two judges of the Cape High Court believe that a prior record carries more weight in sentencing. A minority view pointed to the difficulty in specifying the weight of a prior record in decisions, stressing that all factors are weighed against each other depending on the circumstances of the case. Courts A and B in Mitchells Plain regard a prior record as carrying more weight in sentencing approaches. As evident in Table 4.15, the Wynberg courts depict divergences. One court points to less weight compared to four courts that point to a prior record carrying more weight. Then two courts point to greater weight compared to one court which is of the view that a prior conviction could depend on other factors. As revealed in Table 4.15, of the three different courts, eight sentencers place more weight on a prior record, followed by greater weight, and there is one court which argues for less weight. The fact that two courts believe that a prior record could depend on the factors and circumstances seems to reveal the contradictory and complex nature of sentencing approaches.

It appears that there is no clear pattern to associate certain factors with the determination of sentences, but harmfulness seems to carry significant weight, although it is difficult to gauge its extent over others. Indeed, a prior record appears to be an important factor in sentencing, as revealed above. It must be noted, as suggested in the above tables, that factors informing sentencing choices could vary between different sentencers.

4.8 Severity of punishment in respect of offenders under the age of 18 and adults convicted of serious crime[747]

Regional magistrates and judges were asked to rank the order of the relative seriousness of the crime by circling 1 for the most serious, 2 for more serious, 3 for serious, 4 for less serious and 5 for least serious. They were given 14 cases involving offenders of different ages, repeat and first-time offenders convicted of crimes of varying degrees of seriousness, and asked to select sentences proportionate to such cases. Table 4.16 below shows respondents' rank order of the relative seriousness of a crime and their selection of an appropriate sentence. This is shown by use of a frequency table and the calculated ranking percentage of the crime's seriousness.

[747] See a questionnaire.

Frequency Table 4.16 ranking crime seriousness and selection of sentence

Age of the offender	Crime	Rank order	F. C.	F. C. %	Selected sentence
16-year-old and first offender	Robbery– R15 000 threatened with firearm (case 1)	Most serious	6	46%	7-8 years' imprisonment, 10 years, correctional supervision, juvenile school, depending on factors
		More serious	1	8%	10 years' imprisonment
		Serious	5	38%	Reform school, 5 and 6 years' imprisonment
		Less serious	1	8%	Reformatory/ imprisonment
		Least serious	0	0%	None
16-year-old and first offender	Theft of motor vehicle (case 2)	Most serious	2	15%	Correctional supervision, juvenile detention
		More serious	1	8%	Depending on the factors
		Serious	6	46%	10 years, 3 years, imprisonment partly suspended, suspended, postponed
		Less serious	3	23%	4 to 5 years, 2 years, 4 years suspended
		Least serious	1	8%	Suspended or reformatory
17-year-old and first offender	Murder of a police officer on duty (case 3)	Most serious	11	85%	Life, 20 to life, 15 years, 10 years, 10 to 15 years, long-term imprisonment, juvenile detention, depending on factors
		More serious	2	15%	Life, 10 years' imprisonment
		Serious	0	0%	None
		Less serious	0	0%	None
		Least serious	0	0%	None
17-year-old and first offender	Rape of a 14-year-old girl (case 4)	Most serious	8	61%	15 years, 10 to 15 years, 10 years, term of imprisonment
		More serious	4	31%	15 years to life, 10 years, term of imprisonment, depends on factors
		Serious	1	8%	Life imprisonment
		Less serious	0	0%	None
		Least serious	0	0%	None
17-year-old and repeat offender	Bank robbery, worth R20 000 (case 5)	Most serious	9	69%	20 years, 15 years, 10 years, term of imprisonment, depends on factors
		More serious	3	23%	15 to 20 years, 10 years

Frequency Table 4.16 ranking crime seriousness and selection of sentence

		Serious	0	0%	None
		Less serious	1	8%	6 to 8 years' imprisonment
		Least serious	0	0%	None
14-, 17- and 18 – year-old and first-time offenders	Housebreaking with intent to steal and theft. Stolen and damaged property worth R12 000 (case 6 – 8)	Most serious	1	8%	Depending on the circumstances
		More serious	0	0%	None
		Serious	8	61%	Aged 14: reformatory, Aged 17 and 18: 4 years, Aged 14: postponed, Aged 17 and 18: suspended, Aged 14: postponed, Aged 17:suspended, Aged 18: imprisonment, Aged 17: correctional supervision, Aged 18: 2 to 4 years, Aged 14: diversion, Aged 17 and 18: 3 years' imprisonment
		Less serious	3	23%	Aged 14: suspended, Aged 17: reformatory, Aged 18: imprisonment suspended, Aged 14: 2 years suspended, Aged 17: 2 to 3 years' imprisonment, Aged 18: 3 years' imprisonment
		Least serious	1	8%	Postponed
22-year-old and first offender	Murder of a 15-year-old youth caught in crossfire during gang shootings (case 9)	Most serious	10	77%	20 years or life, 20 years, 15 years, 10 to 15 years, 10 years, minimum sentence, term of imprisonment, depends on factors
		More serious	2	15%	18 years, 15 years
		Serious	1	8%	10 years
		Less serious	0	0%	None
		Least serious	0	0%	None
25-year-old and repeat offender	Rape of a 34-year-old woman (case 10)	Most serious	10	77%	Life, 20 years to life, 20 years, 15 to 20 years, 15 years, term of imprisonment
		More serious	3	23%	15 to 25 years, 10 years, depends on merits
		Serious	0	0%	None

Frequency Table 4.16 ranking crime seriousness and selection of sentence

		Less serious	0	0%	None
		Least serious	0	0%	None
15-year-old first offender and 26-year-old repeat offender	Murder of a 30-year-old man thrown out while the train was in motion between Belhar and Lavistown station (case 11 – 12)	Most serious	9	69%	Aged 15: 3 to 5 years, Aged 26: 15 years, Aged 15: probation, Aged 26: 20 years, Aged 15: reformatory, Aged 26: 15 to 20 years, Aged 15: 15 years in reform school, Aged 26: 25 years, Aged 15: 10 years' imprisonment, depending on the circumstances
		More serious	4	31%	Aged 15: reformatory, Aged 26: 10 to 15 years, Aged 15: 8 years, Aged 26: 20 years, Aged 15: 10 to 15 years, Aged 26: 20 to life, depends on the merit of the case
		Serious	0	0%	None
		Less serious	0	0%	None
		Least serious	0	0%	None
28-year-old and repeat offender	Fraud worth R13 000 (case 13)	Most serious	1	8%	Suspended
		More serious	4	30%	7 to 10 years, 5 years, +/- 5 to 6 years, depending on the facts of the case
		Serious	7	54%	5 years, 4 years, 3 to 6 years, 2 years, imprisonment, fine option of imprisonment
		Less serious	1	8%	Plus/minus 3 years
		Least serious	0	0%	None
38-year-old and first-time offender	Rape of a 9-year-old girl by her uncle (case 14)	Most serious	12	92%	Life, 20 years, 15 years
		More serious	1	8%	Depending on a range of factors
		Serious	0	0%	None
		Less serious	0	0%	None
		Least serious	0	0%	None

As depicted in Table 4.16, respondents demonstrated divergences on the degrees of crime seriousness. These divergences appear to suggest nuanced thoughts on the impact of the age factor, prior records and the circumstances of the victim. For example, in Table 4.16 a 16-year-old and first offender convicted of robbery with aggravating circumstances was ranked by 46% as most serious. The same case is

ranked 8% as more serious, yet ranked 38% as serious. In this case most serious and serious rankings show a significant difference although they constitute a big percentage. Its difference is shown by a substantial drop between the high percentage in respect of most serious followed by a decreased percentage in respect of more serious and a sudden increase in respect of the percentage rank as serious. At the same time there is a certain degree of uniformity, probably influenced by the impact of minimum sentences, although this does not correspond with sentences imposed in most cases nor is this consistent enough. This is illustrated by the case of theft of a motor vehicle by a 16-year-old first offender, where two sentencers ranked this crime as most serious and selected correctional supervision and a juvenile detention sentence. Then six sentencers ranked the same case as serious and selected various sentences ranging from a non-custodial sentence to 10 years' imprisonment. It is noted by various studies that ranking the seriousness of crimes could be complicated because views or perceptions of what constitutes seriousness may vary widely.[748]

Table 4.16 suggests that the degree of the gravity of crime seriousness tends to be associated with direct physical violent harm caused by the blameworthy conduct. Respondents appear to select specific sentences proportionate to those rankings and to what they regard to be appropriate. This approach seems to concur with Von Hirsch on the comparative severity of sentences in respect of the seriousness of crime, as discussed in Chapter 2. There is a significant degree of variation in punishment chosen by the respondents for crimes of the same seriousness. Probably this suggests philosophically conflicting goals of the individual sentencers. As shown in Table 4.16, with regard to the case of the murder of a police officer on duty by a 17-year-old first offender, 85% ranked this crime as most serious followed by more serious rank with 15%. Although this crime could fall within the ambit of the mandatory minimum sentence, as shown in the table punishments vary widely, probably mitigated by age factor of the accused.

It is also noted that there are differences in sentences imposed for similar cases. This is suggested by the lack of exactness between selected sentences and ranked seriousness. For example in Table 4.16, a respondent could rank rape of a 14-year-old girl as the most serious crime and subsequently impose 15 or 10 years' imprisonment as sentence. Another sentencer could rank the crime the same but give a sentence of life imprisonment. Others could rank the degree of seriousness but could not choose a sentence on the grounds that each case depends on a range of factors and circumstances. This seems to exhibit a complex pattern of judicial thought. In this regard the nature of punishment selected by the respondents could provide some insight into the philosophical reasoning of the individual sentencer. For example, some respondents have suggested that a repeat offender or a 17-year-old offender could pose a threat in the future due to the reasoning that previous punishment did not work or his younger age presents challenges for future similar conduct. On this basis the degree of seriousness might increase and require long-term imprisonment for greater deterrence. In the same range some responses suggest that a first offender deserves a lesser sentence than a second- or third-time offender, which is the reasoning behind desert theory.[749]

[748] Herzog, S. (2003:116).
[749] See Parts 1 and 2 in this chapter.

As shown in the table, there are convergences in respect of crimes that appear to fall within the ambit of the minimum sentences Act.[750] This is suggested by greater percentages in ranking over others. For instance, the case of the murder of a police officer on duty was ranked 85% as most serious, 15% as serious and other ranks scored 0%. Respondents appear to recognize the minimalist nature of the Act with regard to their discretionary power, particularly when dealing with persons under the age of 18, although most regard 'substantial and compelling circumstances' to provide grounds for departure from the prescribed sentence. This is due to its wider meaning. Emerging patterns have suggested that minimum sentences could promote rigid approaches, although within this context there are wide variations. For example, the case of the rape of a 9-year-old girl by her uncle seem to be viewed within the ambit of minimum sentences and ranked 92% as most serious, 8% as more serious and 0% other rankings. Within this pattern there are divergences particularly in selected sentences. Few respondents are of the view that the regional courts have to be granted greater sentencing power to impose sentences other than referring serious cases to the High Court, which does not always impose recommended minimum sentences. This is revealed when asked about their sentencing discretions and the impact of minimum sentences. Magistrates in sexual offences courts feel the impact of minimum sentences more than other sentencers since most of their cases fall within the ambit of the Act and referral to the High Court and other procedures tend to be common.

As depicted in Table 4.16, differences are evident in selected punishments. There are differences among the judges' responses, for instance one could select 15 years' imprisonment for a crime he ranks as serious. Another judge could rank the same crime as more serious and impose a sentence of 25 years' imprisonment. Similarly, regional magistrates of the same court could agree on the gravity of a crime committed by a 16-year-old first-time offender but impose widely varying sentences. It is also evident in Table 4.16 that different courts reach consensus, for instance, on the rape case of a 9-year-old girl as most serious and appear to agree that it warrants a life imprisonment sentence. In the table this pattern is suggested by 92% rank as most serious compared to 8% rank for more serious. There seems to be a wide difference in the emerging patterns. The reasoning behind this approach could be informed by the age factor of the victim and the fact that the accused as her uncle had breached trust.

Judging by the selected sentences and rankings on relative seriousness it is notable that property-related crimes such as fraud, theft and housebreaking seem to be perceived as less serious than violent crimes. For example in Table 4.16, fraud worth R13 000 was ranked by 8% as most serious yet the murder of a 15-year-old youth caught in crossfire during gang shooting was ranked by 77% as most serious. There is a substantial difference in the seriousness of different crimes between regional magistrates and judges. This picture converges with the accessed decisions and observed cases of the Wynberg regional court and the Cape High Court.[751] Indeed, there are differences in similar cases of gravity and similarities among magistrates and judges and between the courts. Table 4.16 below depicts this claim on sentencing approaches applied in case number 9.[752]

[750] See Criminal Law Amendment Act, Act 105 of 1997.
[751] See Parts 1 and 2 in this chapter.
[752] See Table 4.15 above and a questionnaire.

Table 4.17 Average sentence, gender and courts' approaches to case no 9

Average sentence	Court			
Gender	Cape High Court	Mitchells Plain regional court	Wynberg regional court	Grand Total
1	18	10	14.375	14.25
2	10	15	16.25	15
Grand Total	14	12.5	15.3125	14.625

It is noticeable in Table 4.17 that the average sentence of the Cape High Court female judge is 18 years compared to 10 years for male judges, while Mitchells Plain regional courts depict 10 years for the female magistrate compared to 15 years for her male counterpart. The Wynberg regional court, having a big number of courts, has an average of 14.375 for female magistrates compared to 16.25 for their male counterparts. As depicted in Table 4.17, the total average sentence among the courts vary and between different genders in respect of the same case of rape. For example, within the regional magistrate courts Mitchells Plain has 12.5 compared to 15.3125 total average. This difference should be expected because of the fewer courts in Mitchells Plain and it is also behind the Cape High Court which has a total average of 14. Similarly, divergences and similarities in different courts and individual sentencers' approaches in cases of relative seriousness seem to exist as revealed in Table 4.18 below in respect of case number 10.[753]

Table 4.18 Average sentence, gender and courts' approaches to case no 10

Average sentence	Court			
Gender	Cape High Court	Mitchells Plain regional court	Wynberg regional court	Grand Total
1	25	10	20	19.16666667
2	25	15	16.875	17.91666667
Grand Total	25	12.5	18.4375	18.54166667

In Table 4.18 above the Cape High Court shows convergences across gender differences by the average of 25 years. The Mitchells Plain regional court portrays a different picture with an average 10 for a female sentencer compared to 15 for her male counterpart. A shift is evident in the Wynberg regional court where female sentencers have an average of 20, which is more than the average of 16.875 for their male counterparts. From another angle, the Cape High Court seems to have an increase in sentences in Table 4.18, with an average of 25 compared to 14 in Table 4.16. In the same vein as shown by both tables the Mitchells Plain regional court seems to show some consistency in sentencing different crimes of relative seriousness with the average of 12.5. The Wynberg regional court depicts a narrow increase in Table 4.18, which is 18.4375 compared to the figure for Table 4.17, which has an average of 15.3125. It is noticeable, as confirmed by the total average, that differences and convergences seem to exist among and within different courts in respect of crimes of relative seriousness, for instance with regard to rape by a repeat offender and the case of murder by a first-time offender.

[753] See Table 4.15 above and a questionnaire.

As shown above, different sentencers have imposed different sentences of varying severity in respect of crimes of comparative seriousness alike.[754] Table 4.19 below depicts a range of sentences from minimum to maximum.

Table 4.19 Range of sentences from minimum to maximum

Case Number	Minimum sentence	Maximum sentence
One	Correctional supervision	10 years
Two	Suspended	5 years
Three	10 years	Life
Four	10 years	Life
Five	6 years	20 years
Six	Postponed	4 years
Seven	Suspended	3 years
Eight	Diversion	Suspended
Nine	10 years	Life
Ten	10 years	Life
Eleven	Probation	15 years
Twelve	15 years	Life
Thirteen	Suspended or Fine	10 years
Fourteen	15 years	Life

It must be noted that Table 4.19 shows different sentencers' thought on sentences of comparative severity to different offenders convicted of crimes of varying degrees of seriousness. Subsequently the meaning of seriousness and appropriate punishment might not be decided in a somewhat ahistorical vacuum.[755] In this view judicial conception on what constitutes seriousness and appropriate punishments could be shaped by the legal and societal setting and sometimes reflect it. Such setting is not homogenous because of cultural and political diversities. This point is argued in Chapter 2 and is confirmed by various regional magistrates and judges in section 4.9 below. As explained in the preceding sections, in the questionnaire this part of data was generated through open questions in section 2. This section required some detailed explanation which was tape-recorded during an interview.

4.9 Sentencing serious crimes[756]

4.9.1 Respondents were asked: 'What offences constitute serious crime for persons under the age of 18 and adults?' The majority of respondents perceive serious crime in penal statutory terms. This is suggested by a tendency to list violent crimes such as rape, murder and robbery in line with the Criminal Law Amendment Act, Act 105 of 1997.[757] A significant number of respondents have listed both violent and property crimes such as theft of a motor vehicle, housebreaking with intent to steal and theft, fraud and tax evasion. Both magistrates and judges tend to view property crime with varying degrees of seriousness or equivalent to violent crimes. No respondent could draw a distinction between those under the age of 18 and adults in assessing the seriousness of a crime. Age is seen to reduce the degree of culpability but has no impact on the harmfulness and damage caused or risked. This appears to be the measure of seriousness. Therefore age culpability is viewed separate from crime

[754] See Table 4.16 above.
[755] See Gross, H. and Von Hirsch, A. (1981:250) Sentencing. Oxford: Oxford University Press.
[756] See a questionnaire.
[757] See section 51, Parts 1, 2, 3 and 4 of Schedule 2. Also see Criminal Procedure Act No 51 of 1977, Schedule 1.

seriousness. The criteria seem to reveal intricacies in the search for an appropriate punishment whereby the mitigating factor of age is mentioned in varying forms.

In this regard one respondent put it this way: 'I believe that if accused under the age of 18 years and adults commit crimes like rape and murder they would be committing serious crimes. The blameworthiness might be different depending on the age of the accused but seriousness of crime would be exactly the same.'[758] This seems to be the dominant view among the respondents and is compatible with the content of the files of the Wynberg regional court and the Cape High Court.[759] As depicted by court records in Part 2, there are serious crimes committed by young offenders and adults convicted and sentenced in these respective courts. It is important to note that an individual sentencer's background and education might shape his or her view on what crime seriousness means.[760] For instance, white-collar crime could be seen as equally serious as murder. In this regard it is possible for sentencers whose legal studies reflect a combination of property law and economics and those with criminal law and sociology to reason differently. Another respondent stated similarly that the seriousness of a crime might depend on an individual judge's reasoning or line of thought. For example, 10 years ago rape was less serious than theft of a motor vehicle. This shift reflects the current societal conservative attitude and openness with regard to such crime compared to before. Here conservatism refers to the traditional attitude at a family level to different roles and openness relates to gender awareness, notions of rights and greater community involvement in matters affecting them. The shift also emulates the philosophical perspective of individual sentencers and the multidimensional nature of the concept 'seriousness'. It appears that the concept could be gauged, inter alia, by interest violated or offended. But what is the nature of these interests?

4.9.2 Respondents were asked: 'Under what circumstances do you treat differently those convicted of crimes of the same degree of seriousness?' Interestingly, most respondents thought that an accused under 18 years should be treated differently because their personal circumstances could be different compared to adults. However, this does not make their crime less serious. They are perceived to act more impulsively than their adult counterparts. It was pointed out by the respondents that there are different personal circumstances between a 15-year-old and a 17-year-old accused which require to be treated slightly differently. This assertion suggests that accused persons under 18 years are not a homogenous group. They have different needs at social and emotional level. A significant number of respondents suggest that there is no single decisive factor in sentencing approaches. They consider the circumstances of each case, including whether the crime was premeditated, weapons were used and the role of each individual if there are more than one accused. However, the claim about looking at all factors cumulatively could mean different things to different sentencers.

4.9.3 Most respondents thought that the degree of injury (harm) and damage to property suffered by the victim could be the criterion used to decide on the relative seriousness of a crime. This might relate to the nature and circumstances of committed crimes. Few respondents believe that the prevalence of a crime could

[758] Regional magistrate.
[759] See Part 2 in this chapter.
[760] Cape High Court Judge.

inform their decision. Similarly, one respondent suggests that the social circumstances of crimes could influence criteria in decision-making in respect of relative seriousness. Another similar view is that: 'what judicial officers have to do would be to interpret what society feels at this point in time. Fifteen years ago society had certain thoughts about rape but those thoughts have changed with time. At this stage it is regarded as very serious.'[761] This response supports the claim in the preceding chapters on the historical changing moral attitude of society to certain crimes at certain times and the impact on judicial sentencing approaches.[762] The respondent also links this with the length of sentences currently imposed on young offenders and adults convicted of rape within the ambit of the minimum sentences Act. This is further revealed by the actual accessed cases of the Wynberg regional court and the Cape High Court, and observed trials.[763] For example, Table 4.7 shows a total number of long sentences (8 to 20 years) with a figure of 63. These sentences mostly count for violent crimes such as rape, murder and robbery. Similarly, Tables 4.8 and 4.8.1 of the Cape High Court reveal that most rape cases received sentences ranging from 10 years' to life imprisonment. The criminal history of some accused reveal that in the past 19 years rape was treated as less serious with sentences ranging from 3 to 6 years' imprisonment.

4.10 Sentencing and previous convictions[764]

4.10.1 Respondents were asked how seriously they regarded previous convictions in considering an appropriate sentence for accused under the age of 18 and adults. Almost all respondents regard the relevance of a prior record to depend on how recent it was and its relationship with the current crime. It is ignored if it refers to 10 years ago. They believe that when the accused is convicted of rape and his prior record relates to the current crime or shows a pattern of violent behaviour such as assault and murder, then it is seriously taken into account. Yet if the prior records appear to be unrelated to rape, revealing trivial crimes, such as possession of dagga and shoplifting, then it could be ignored.

With regard to this question the crucial point seems to be the latter one, which relates to the punishment. This refers to the fact that one could gauge the extent of a prior record when it is assessed in relation to the choice of sentence. In this regard responses have suggested a certain degree of diversity. In the former the respondents believe that they consider punishment imposed for previous convictions in order to assess what has worked or not in the past. This relates to the fact that some respondents have suggested that prior records are not considered to increase sentencing. Rather the purpose is to know the character of the offender better for appropriate sentencing options. Other respondents suggested that prior records could help to predict future behaviour to assess the deterring effect of previous punishment. For example, a 17-year-old offender might be convicted of robbery and sentenced to correctional supervision and within a relevant period of time he could be reconvicted of theft and receive a suspended sentence. Eventually considering the previous non-custodial sentences the court might decide on an appropriate sentence of four years' imprisonment. The impact of previous convictions in sentencing severity seems to

[761] Regional magistrate.
[762] See Chapter 1, Chapter 2 and 3 in this thesis.
[763] See Parts 1 and 2 in this chapter.
[764] See a questionnaire.

exhibit nuanced differences. It further suggests philosophically competing goals of the deontological and consequentialist theories. A consequentialist-oriented sentencer might view a prior record as pointing to possible threatening behaviour in future that requires a severe deterrent sentence, while a deontological sentencer might depart from examining the relevance of a prior record and if it is relevant there might be a severe sentence, but if it is not relevant it might not influence the choice of sentence severity.

4.11 Severity of punishment in respect of offenders under the age of 18 and adults convicted of serious crimes[765]

4.11.1 Respondents were asked regarding the basis of selecting an appropriate punishment for offenders convicted of serious crime. All the respondents appear to suggest that the basis of selecting an appropriate punishment could be measured by comparing crime seriousness and severity of punishment. This approach seems to converge with desert theory[766] and is employed for persons under the age of 18 and adults. The underlying aspect in this common response is the idea that punishments should not be disproportionately lenient or severe with regard to the specific crime. Some respondents demonstrated the means of achieving their goals, which relates to the use of information through the pre-sentencing report of a social worker or probation officer. But what does severity of sentence mean? There is a tendency to equate severity simply with a prison sentence. As much as this could be relevant, as it infringes on the freedom of movement of the offender, it could be useful to assess severity in terms of the unpleasantness and the individual interests it has infringed.[767] As suggested in Chapter 2, this point recognises that not all offenders would react the same to punishment, because they are different in age, emotions, and background and interests.

4.11.2 Finally, respondents were asked: 'on what grounds do you base different punishments of offenders convicted of crimes of similar seriousness by persons under the age of 18 and adults?' A significant number of respondents believe that different punishments recognise the different personal circumstances of individual accused, and the nature and degree of crime seriousness which differs in each case. 'You could get cases where on the face of them they look similar. But deeper they are different. One person could get partly imprisonment and postponed sentence, yet another one receives full imprisonment sentence. There could be disparity in sentences imposed because crimes are different and their circumstances. Then the relevance of courts' discretion becomes important to individualise each case when you sentence.'[768]

Most respondents appear to perceive age to have no significant impact on its own in sentencing. The approaches appear to depend on the circumstances of each case. A few respondents were more explicit in their references to this question: 'while the law regards youthfulness as a mitigating factor, age is neither here nor there. It depends on the range of factors including involvement of the accused in committing crime. For example, in the case of a 36-year-old and a 17-year-old accused, the court could be in favour of the young accused assuming that he was influenced by the adult. But when

[765] See a questionnaire.
[766] See Chapter 2 in this thesis.
[767] See Chapter 2.
[768] Regional magistrate.

it looks at the evidence it finds a 17-year-old accused having played a major role such as providing the gun, cheating the woman known to him and rape first. These factors might outweigh the age factor and it is possible for a 17-year-old to receive 20 years' imprisonment or life and adult receive 15 or 20 years' imprisonment sentence.'[769]

Similarly, another respondent, in illustrating her point, believes that two rapes could be punished differently. For instance: 'an adult can go out on a date with a woman, you just have sex against her will, now that is rape. If I have to compare that with a 17-year-old who causes serious bodily harm to the woman and strangles her. That 17-year-old is going to get a bigger sentence than an adult.'[770] Conversely, some respondents believe that punishments could vary due to the fact that: 'circumstances of persons under the age of 18 could differ widely or be relatively similar to adults.'[771] The above quotations from the respondents appear to confirm candidly different and similar trends by individual sentencers of the respective courts in respect of the age factor and a subsequent consideration of the seriousness of a crime to warrant proper punishment.[772]

While several respondents claim not to regard a few factors as determining in sentencing decisions, there seem to be penal intricacies suggested by the responses. Four respondents seem to capture this dilemma. Of the four respondents, two are regional magistrates and two are judges. In the words of one of them: 'sentencing is very difficult, not so easy as some people think. You do not just grab a sentence and impose on the convicted offender.'[773] The respondents concur with various sentencing studies.[774] It is possible that these complexities could account for variations in the severity of sentences in respect of similar degrees of crime seriousness. In comparing the responses of the respondents in this context, it is noticeable that there are divergences between regional magistrates and judges on the seriousness of the same crime. Similarly, there are differences on the notion of the appropriateness of sentences to be imposed. The impact of the age factor and prior records has suggested nuanced variations of opinion. Within this scenario there are agreements, as shown by the data. Differences and convergences do not just relate to the geographic locations of the Cape High Court, the Mitchells Plain regional court and the Wynberg regional court, and their sentencing jurisdictions and the nature of crimes. They seem to exist among judges and regional magistrates of the same court. In the context of sentencing the meaning of these diverse approaches appears to depict variations in serious crime and penal philosophical complexities, as shown by this chapter and preceding sentencing studies.

4.12 Sentencing philosophy

4.12.1 In testing the role of sentencing philosophy[775] in judicial decisions, respondents were asked: 'why do you impose a sentence?' Almost all respondents believe that they impose a sentence in order to prevent crime. Regional Magistrates

[769] Cape High Court judge.
[770] Cape High Court judge.
[771] Regional magistrate.
[772] See Parts 1 and 2 of this chapter.
[773] Regional magistrate.
[774] See Hogarth, J. (1974:3), Green, E. (1961:1), Daly, K. (1994:173) and De Keijser, J. W. (2000) as quoted in the Chapter 1 and Chapter 2.
[775] See a questionnaire

and Judges interviewed in this study reveal less awareness or interests on the relevance of their individual penal philosophy on daily judicial practices. This assertion is revealed by their stated claim that: 'it is my legal duty to impose a sentence to the guilty offenders in order to protect society.' In this regard interviews revealed differences among respondents in achieving their goals. Studies confirm that sentencers differ widely on the purpose of sentencing.[776]

4.12.2 Regional Magistrates and Judges were asked: 'what are the justifications of the various sentencing decisions do you take?' There were divergences among the respondents pointing to different purposes of penal measures they apply. These justifications appear to include factors such as prevalent of crime, crime seriousness, interests of society, deterrence, prevention, rehabilitation and circumstances of each case. Disagreements among the respondents appear to be around penal philosophy and seem to concur with the philosophical evidence as discussed in Chapter 2. Indeed in probing sentencers it appears that there is no single justification of various sentencing decisions taken.

4.13 Analysis

This chapter presented an empirical analysis of South African judicial sentencing decisions with specific reference to the Wynberg regional court, the Mitchells Plain regional court and the Cape High Court. The presentation is divided into Parts 1, 2 and 3. Part 1 presented sentencing statistics regarding trends and patterns for persons under the age of 18 and adults, including convictions to assess court approaches to various crimes. This chapter began by discussing the use of the observational technique in order to get an insight into sentencing practices. This was to observe and evaluate real sentencing pronouncements made by respective sentencers with regard to specific cases. It is noticeable, as portrayed by 4.1 in this chapter, that individual sentencers' approaches could be different to crimes of similar seriousness. This could be interpreted to resemble conflicting goals of sentencing theories applied by individual judicial officers. These conflicting claims of different theories appear to complicate judicial approaches with regard to different crimes and offenders alike.[777] Sentencing philosophy could be useful to inform judicial decisions. The empirical analysis ought to uncover and explain these intricacies and complexities in the sentencing approaches of various courts.

As depicted in Table 4.3, sentencing statistics point to variations in sentences imposed for crimes of varying degrees of seriousness. This is a pattern revealed by the figures in Table 4.3. These figures provide a picture of sentencing trends in the years before the adoption of the Constitution and the period from 1999 to 2008. The preceding chapter has shown that over the years the age factor has tended to be outweighed when the young offender is convicted of a serious crime. In this regard it is important to gauge the extent to which sentencing trends have remained the same or changed in dealing with offenders under 18 compared to adults. Penal statistics continue to show young offenders in smaller numbers than adults in sentencing trends. As shown by the tables in Part 1, sentencing trends from 1999 to 2008 of persons under the age of 18 do not reveal a significant difference in comparison to earlier years. There is a similar trend in the use of imprisonment compared to other sentencing options for young and

[776] See Hogarth (1974) and Green (1961) in this thesis.
[777] See Chapter 2 account.

adult offenders convicted of serious crimes. At present there seems to be a constant increase in the length of sentences imposed by the courts. This is evident as shown by statistical patterns in Tables 4.4 to 4.8.1 and Figures 4.1 and 4.2 and Part 3, particularly as revealed in Tables 4.17 to 4.19 above. This pattern might reflect an increase in crime committed by young and adult offenders and the impact of minimum sentences.[778] The Act came into operation on 1 May 1998 and in the context of the empirical data it is relevant to crimes committed from that date onwards. In this chapter sentencing patterns and judgments from 2000 onwards could definitely indicate its impact.

There seems to be a perception that minimum sentences have increased rigidity and length of sentences, and inconsistencies continue to exist with regard to the same crimes.[779] This picture could reveal individual sentencers' conception of the wider meaning of 'substantial and compelling circumstances' as the grounds for departure from a prescribed minimum sentence.[780] It seems at the beginning of the implementation of the Act there was a concern among judges and magistrates that their discretionary power had been taken away by the Act.[781] As suggested by the discussed judgments and empirical data of the Wynberg regional court, the Mitchells Plain regional court and the Cape High Court, currently there seems to be an understanding of the 'substantial and compelling circumstances' as providing sentencing discretion to judicial officers compared to the early stages of the operation of the Act.

In the context of this study its impact is likely to exhibit rigid uniformity in judicial approaches. For example as depicted in Table 4.8 and 4.8.1, the majority of offenders under the age of 18 and adults convicted for rape and murder were sentenced to 10 years to 20 years and others received life imprisonment sentences. As shown by the data there is a sense of uniformity in some cases and inconsistency on the other hand.[782] Respondents confirm this point and cite complex variations in crimes of relative seriousness. Yet there is discretion for consistent but equally flexible sentencing approaches. Because of its prescriptive nature, 16- and 17-year-old persons convicted of serious crimes seem to be treated as adults, as depicted by sentencing trends. Be that as it may, the underlying idea points to the individual sentencers' reasoning in decision-making. There is discretionary power for discerning judgments informed by the circumstances of each case.

As demonstrated in Part 2, the rationale for extracted judgments and a sample of cases accessed in the Wynberg regional court and the Cape High Court is that young offenders are treated slightly differently than adults. In this regard differences show a small margin as revealed by imposed sentences. Part 2 reveals that past and present sentencing patterns suggest that judicial sentencing approaches reflect an aspect of wide sentencing discretion. This is evident in the presented tables, reflecting sentence options in the imposed sentences. Severity of punishment tends to be based on the

[778] See Criminal Law Amendment Act, Act 105 of 1997.
[779] See Paschke, R. and Sherwin, H. (2000).
[780] See Van Zyl Smit, D. (2004).
[781] See S v Dodo at section 3.8 in Chapter 3. The facts of the case seem to be centred on the claim that the Act is unconstitutional by prescribing sentences for the courts. Also see S v Malgas as discussed in Chapter 3 on the meaning of 'substantial and compelling circumstances'.
[782] See Parts 2 and 3 above.

degree of seriousness of crimes and multiple counts. The majority of sentences imposed appear to be of short and medium duration in respect of both young and adult offenders, as illustrated by the tables. Prior convictions and the age factor of the accused are likely to be factors considered in the search for an appropriate sentence. As illustrated by various judgments and imposed sentences, the determination of punishment is not easy to gauge. This point could be associated with various sentencing theories used by the judicial officers as apparent in penal figures, judgments and imposed sentences by the sentencing courts. Nevertheless, they are broadly likely to give a picture of philosophical underpinnings with regard to factors mostly associated with the choice of sentence in judicial approaches.

Part 3 begins by suggesting the extent and the influence of the personal background of an individual sentencer in sentencing approaches. Various tables presented above have shown diversity in gender levels and judicial experience in relation to sentencing approaches. This is not to attempt to personalise sentencing processes. The analysis recognises the relationship between psychological self-conception and the broader philosophical and legal aspects of the sentencing realm. Individuality could shape a sentencer's interpretation of penal theories, legality, and the nature of cases before the court and the sentencer could be influenced by these factors in turn. Tables 4.10 to 4.19 endorse this assertion based on the assessment of crime seriousness. Various respondents ranked seriousness differently and selected varying sentences in correspondence to those rankings, taking into account the age factor and prior record of the offender. For example, variations exist as shown in the table with regard to the same crime namely housebreaking with intent to steal and theft committed by 14-, 17- and 18-year-old first-time offenders. This case ranked 8% as most serious, 0% as more serious, 61% as serious, 23% as less serious and 8% as least serious. As depicted in Tables 4.10 to 4.19, emerging patterns have shown big and nuanced margins and selected sentences vary widely in accordance with an individual offender's circumstances. There seems to be a similar pattern, characterised by variations in approaches to persons under the age of 18 convicted of serious crime across gender lines of respective sentencers. It must be noted that judicial attitudes on the age factor are somewhat eclectic.[783] Age is not viewed as explicitly as prior records or seriousness of crime in sentencing approaches. Its weight appears to depend on the circumstances of the case. As shown by the use of quotations on age impact in section 4.11.1, 'circumstances' could mean different approaches in the imposition of sentences on young offenders compared to adults.

It is apparent in this chapter that penal philosophy and the sentencer's background could affect the meaning of seriousness in respect of different crimes, the relevance of the age of the offender and the extent of prior records during the choice of sentence. In this regard differences and similarities are evident in the rape of a 34-year-old woman by a 25-year-old repeat offender and ranked 77% as most serious and 23 % as more serious. Section 4.11 exhibits that the degree of severity of sentences can be expected to differ.[784] This is because the gravity of crimes and offenders' circumstances are different. This point underlines inequalities in sentencing approaches. As revealed by the citations, respondents tend to demonstrate that sentencing is fraught with difficulties and inconsistencies. This does not mean that inconsistency should amount to arbitrariness and wide discrepancies with regard to

[783] See Tables 4.10, 4.11 and Figure 4.2 above.
[784] See Tables 4.16 to 4.18.

crimes of equal seriousness, hence variations in approaches should be justified. For instance, it is unjust to punish one murderer with a life sentence and another murderer with a fine of R8000,00 or a suspended sentence. Judging by the information in the media, it appears that South African courts are still replete with these examples, even in the light of minimum sentences.[785]

In this chapter Parts 1, 2 and 3 depict a pattern of sentencing variations in respect of persons under the age of 18 and adults convicted of serious crimes. As depicted in various tables there are variations between the Cape High Court, the Mitchells Plain regional court and the Wynberg regional court, and differences and similarities among individual sentencers.[786] This is possible because crimes and offenders are different. Another important possibility suggested by the analysis is that different competing sentencing theories might not be utilised equally. Various judgments discussed and sentencing trends have shown dominance of a few theories, namely desert and deterrence. Chapter 2 suggests the necessity for the equal application of competing sentencing theories, including contemporary ones, in a flexible, combined way, particularly when sentencing young offenders. For instance, desert advocates that sentences must be deserved and in this context be proportionate to the degree of culpability of the young offender. The culpability of the young offender, compared with adults, appears to be treated mechanically as a separate entity away from the selected sentence in decision-making. Therefore there seems to be inequality in the use of theories of punishment, yet crimes, sentences and the offender's circumstances vary. The next chapter presents conclusions and recommendations for judicial approaches to sentencing persons under the age of 18 and adults convicted of serious crimes.

[785] See Paschke, R. and Sherwin, H. (2000).
[786] See Tables 4.9 to 4.19 above. Also see section 4.12 on differences on penal philosophy of individual Regional Magistrates and Judges.

CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

This chapter presents conclusions and recommendations in line with the aim[787] of the study. Chapters 1, 3 and 4 relate to both statistical and philosophical issues, whereas chapter 2 outlines penal philosophy with regard to an analysis of judicial approaches to sentencing persons under the age of 18 and adults convicted of serious crime, in order to determine empirically and theoretically whether sentencing decisions have been based on narrow or vague justifications during the period under investigation, rather than having been based on concrete, wider penal grounds. The study seeks to identify factors mostly taken into account in judicial sentencing decisions in order to promote balanced sentencing approaches. In the realm of proportionate sentencing approaches such factors include the seriousness of the crime, a prior record, the severity of the punishment and the age factor. The conclusions of major findings are presented in order to lay the bases for the recommendations. The recommendations will identify specific requirements for balanced judicial approaches to sentencing persons under the age of 18 and adults convicted of serious crime, in order further to promote consistency in sentencing approaches.

5.2 Conclusions of major findings and recommendations

There is some tentative consistency between conclusions and data. Data refers not just to the empirical chapter but to the chapters preceding it. It is determined in this study that the sentencing of convicted offenders is a complex process.[788] The study has illustrated that sentencing is underpinned by historical, legal and sociological dimensions.[789] Sentencing does not take place in a political vacuum. Thus context matters in sentencing. The study has shown that over the past 50 years to 2009 sentencing approaches have been and are characterised by variations among different magistrates as well as among judges.[790] The study also reveals eclectic justifications in their approaches and hence it is difficult to identify the determination of sentences. However, the seriousness of the crime seems to be considered first, then the extent of a prior record, age and other circumstances are taken into account as secondary factors, depending on the penal philosophy of the individual sentencer. The study further depicts that competing sentencing theories are not applied equally to various serious crimes committed by different young and adult offenders.

5.2.1 Seriousness of crime

Von Hirsch[791] suggests that the degree of the seriousness of the crime is difficult to gauge. This implies that each serious crime has its own merits, circumstances and a wider context. Judges and regional magistrates confirm, as demonstrated in

[787] See Chapter 1, 1.4
[788] See Chapters 1 and 2, as argued by other scholars and as confirmed empirically in Chapter 4.
[789] See mainly Chapters 2 and 3.
[790] See Chapters 3 and 4.
[791] In Gross, H. and Von Hirsch, A. (1981:248), above.

Chapter 4,[792] that there are difficulties in judging crime seriousness. There is empirical evidence as revealed by the divergences in the approaches of the Wynberg regional court, the Mitchells Plain regional court and the Cape High Court.[793] Empirical sentencing evidence suggests that each murder case carries different degrees of gravity from a judicial perspective. The seriousness of a crime varies widely, even when such crimes appear to have a similar level of seriousness. This is recognised in the reported judgments of the courts too. In S v De Kock,[794] Van der Merwe J considered the complex judicial meaning of the seriousness of a crime. The judge reasoned that all crimes could be regarded as serious, while some are punished more severely than others. In another judgment involving the meaning of the seriousness of a crime, by Holmes JA, it is stated that to simply lump particular crimes together as serious can serve to obscure the wide variety of shades and grades of seriousness of crime.[795]

The seriousness of a crime is multidimensional, and in terms of desert sentencing philosophy consists of two major components,[796] namely harm and culpability.[797] In this view the seriousness of a crime depends on the harmfulness of the conduct with regard to the degree of injury caused or risked. For example, robbery with aggravated circumstances in judicial sentencing decisions of the Wynberg regional court and the Cape High Court appeared to generate more harm than theft.[798] In this context some forms of harm are graver than others.[799] This implies that harmfulness should not be viewed only physically. It varies widely and can involve psychological and material harm.[800] In applying the observational technique in the Wynberg regional court, the fraud trial suggested the varying nature of the harmfulness of crimes.[801] Fraud appears not to carry immediate physical, psychological and material harmfulness compared to other common crimes. However, as described under 4.1 in Chapter 4, as a serious crime it is likely to have long-term economic effects. This involves comparing the harmfulness of crimes which invade different interests.[802] For example, assault with grievous bodily harm might inflict physical and psychological harm, while the theft of a motor vehicle could affect the standard of living of the victim through stealing his property. The understanding of crime harmfulness, as suggested by the data, differs widely among sentencers and within different courts.[803]

Another important component of seriousness is the degree of the offender's culpability.[804] This involves the degree to which the person may be accountable or liable to blame for the consequences or risks of his conduct. In Chapter 4 regional magistrates and judges appear to demonstrate immense differences with regard to the degree of culpability of offenders under the age of 18 convicted of serious crime.

[792] See Part 3.
[793] See Chapter 4, Part 2, systematic random sample and Part 3, Table 4.10 to 4.19 and Figure 4.2.
[794] 1997 2 SACR 171 (T).
[795] See S v Rabie, above.
[796] See Von Hirsch, A. and Jareborg, N. (1992:220) In Von Hirsch, A. and Ashworth, A.
[797] See Gross, H. and Von Hirsch, A. (1981:248).
[798] See Chapter 4, Part 2 and Part 3, Table 4.13.
[799] See Walker, N. (1991:96) Why punish?, above.
[800] Von Hirsch and Jareborg (1992:229), above.
[801] See Chapter 4, 4.2 in Part 1.
[802] Von Hirsch and Jareborg (1992:229), above.
[803] See Chapter 4, Part 2 and 3, mostly Table 4.13.
[804] Gross and Von Hirsch (1981:249) and Sloth-Nielsen (1990:82) in Chapter 3 highlight a similar view on the degree of blameworthiness in approaches of South African courts.

Most of them regard age to have no impact on seriousness. They separate the culpability of the young offender from the seriousness of the crime. This is evident when one compares responses on the degree of culpability, the ranking of seriousness and selected sentences. There seem to be significant variations.

In view of the above it is recommended that the courts could treat those under the age of 18 differently compared to adults, in accordance with the lower level of culpability mitigated by age.

The concepts of harm and culpability present dilemmas.[805] For example, housebreaking might be viewed as more serious than the theft of a motor vehicle, and the respondent's reasoning would be that a person's safety and privacy is more important than his property. Crimes that share common characteristics are likely to facilitate a better process of gauging their comparative gravity.[806] Dissimilar crimes tend to present difficulties in terms of ranking. For example, it is difficult to rank fraud against assault. This is also evident from empirical judicial sentencing approaches of the Wynberg regional court and the Cape High Court when, for instance, comparing the treatment of rape, murder and attempted murder with theft and housebreaking.[807] As shown by the rankings and courts approaches,[808] murder and rape bear grave harmfulness, as they inflict physical and psychological harm. Bagaric[809] postulates that consequentialist theories can also relate the importance of culpability to crime seriousness, but that does not constitute a determining factor to sentencing decision-making. Utilitarian theories regard intent to foresee the consequences of the harm of the act to bear much weight in terms of the ranking of seriousness.[810] The theories of retribution and utilitarianism are complementary with regard to the notion of justification.[811] These divergences on seriousness appear to explain some of the inconsistency in sentencing.

It is recommended that sentencing courts could rank the relative seriousness of crime and compare that to a similar crime based on affected interests by the crime in order to avoid gross disparity in sentencing approaches.

5.2.2 Severity of punishment

Different forms of punishment should be graded in terms of their comparative severity.[812] The grading of punishment tends to be premised on various justifications, depending on whether the emphasis is on looking backward to the harmfulness or looking forward to greater prevention of harm.[813] Severity could further depend on the punishment's degree of unpleasantness, as perceived by the individual offender.[814]

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[805] Gross and Von Hirsch (1981:249).
[806] Gross and Von Hirsch, (1981:250).
[807] See Chapter 4, Parts 2 and 3.
[808] See Chapter 4, Table 4.13, 4.16 to 4.19.
[809] (2001:186).
[810] Bagaric, M. (2001:187) also see Chapters 2 and 4.
[811] Primoratz, I. (1990:119).
[812] Von Hirsch (1998:188) In Von Hirsch, A. and Ashworth, A., above.
[813] Montague, P. (2002:4) Grading punishments. An International Journal for Jurisprudence and Legal Philosophy. Vol. 22(1):1-118.
[814] Gross, H. and Von Hirsch, A. (1981:252).

This is depicted in Chapter 4.[815] The degree of unpleasantness as perceived by punished persons differs widely on the basis of their individual experience.[816]

The study depicts that penalties should not be graded in onerousness away from the case, since individual subjective perceptions of painfulness differ. Important interests impinged by punishment could provide indications regarding the degree of severity of the punishment. On this basis penalties could be ranked in relation to the degree to which they impinge the punished person's right to liberty, employment and privacy.[817] In this regard rating punishment reveals different interests, for instance imprisonment and home detention concern the interest of liberty. Rating the importance of impinged interests could promote an assessment of the severity of the punishment.[818] A prison sentence imposed is a severe punishment, based on the idea that the interests of freedom of movement and privacy are taken away by imprisonment. Non-custodial penalties can carry a significant degree of severity, depending on the intensity of such penalties in impacting on interests and standard of living. In this regard some penal sanctions seem to be a greater burden and more restrictive than probation, and a lesser burden and less restrictive compared to imprisonment.[819] Fines appear likely to be unfair or severe to a poor accused and lenient to the rich when comparing the financial positions of individuals.[820] The few fines that are imposed are mostly for theft. Similarly, a small number of respondents apply fine sentences to economic-related crimes such as fraud.[821] Past sentencing statistics show fines to be widely employed in the past compared to currently.[822]

This challenge requires sentencing approaches that are tailored to an individual's income. Indeed judicial officers should be left with sentencing discretion in order to adjust the sentence to fit the particular individual crime.

Divergences in court approaches are evident in the study, depicting mostly the use of short and long sentences in respect of young and adult offenders convicted of serious crime. These divergences might be associated with the idea that from the perspective of desert, the approach involves gauging the degree of punishment in order to be deserved, while utilitarian judicial sentencing assessment of punishment seems to focus on what will minimize or prevent future crime. In terms of the desert perspective, severe sentences are permissible when the crimes are serious.[823]

It is recommended that accused convicted of comparable crimes should get similar punishment, and those convicted of more serious crimes should receive more severe penalties than those convicted of less serious crimes. It is suggested in the study that sentencing approaches should not be disproportionate to crimes committed by individual offenders. Inconsistencies in sentence severity should be justifiable, based on inequalities of crime seriousness and circumstances.

[815] See Part 3.
[816] Von Hirsch, A. (1993:33), above.
[817] Von Hirsch, A. (1993:34) also see Chapter 4, Table 4.13, Part 3.
[818] (1993:35), above.
[819] See Tonry, M. and Hamilton, K. (1995:1).
[820] Tonry, M. and Hamilton, K.(1995:15) above.
[821] See Chapter 4, Part 3.
[822] See Chapter 4, Part 1, Table 4.2. and 4.2.1.
[823] Gross and Von Hirsch (1981:254).

5.2.3 Prior criminal record

Prior criminal convictions can be considered in different ways, depending on the judicial philosophy of the sentencer.[824] Sentencing courts may take into account any previous convictions of an offender or any failure to respond to previous punishments. This seems to be without specifying means and ways an accused's criminal history can impact on the nature and quantum of punishment.[825] The predictive assessment appears to suggest utilitarian-based judicial sentencing approaches, while culpability-based assessment seems to resemble desert sentencing theory. The perspective of the predictive approach tends to regard repetitive offenders as posing a danger to society, hence they need to be isolated for longer punishment. This divergence is noticeable in the responses of the individual respondents and courts, as revealed in Part 3 of the preceding chapter.[826]

From the point of view of the commensurate desert perspective, the extent of the accused's previous convictions tends to influence the degree of seriousness of the crime.[827] In this regard a first offender could receive a more lenient sentence than a repeat offender. This seems to concur with the judgment delivered and the imposed sentence by a regional court magistrate in accordance with 'substantial and compelling circumstances' that justify departures from the prescribed minimum sentence.[828] The magistrate held that the accused was a first offender, which justifies the choice of a lesser sentence. This decision could be associated more with grounds of departure, although guided by a broader penal philosophy. It is asserted that for prior records to be considered they must show a pattern of similarities with the current crime, in which case the prior imposed punishment could be evaluated.[829] As depicted in the study, the prior criminal convictions might lose weight if the crimes are dissimilar to the present one. For example, housebreaking with intent to steal and theft are similar to theft because they violate similar property interests. With regard to the relevance of the number of previous convictions, there seems to be empirical evidence that some adult offenders have more criminal convictions dating from when they were under 18 years old.[830] Their previous punishment varies from imprisonment to non-imprisonment and whippings.

The observed case at the Cape High Court, courtroom 1, involved two accused convicted of rape, kidnapping and illegal possession of a firearm.[831] The complainant was a young girl. In this case the state prosecutor regarded large numbers of prior convictions for accused number 1 to bring much weight to the seriousness of the present crime. The state reasoned that the previous criminal record of accused number 1 and the factor of the young victim reduced grounds for 'substantial and compelling circumstances'.[832] Furthermore, he referred to the previous decision with regard to dissimilar prior convictions of accused number 1. The judge held that there seemed to be no prior conviction for rape or a similar charge. He reasoned that these

[824] See Roberts, J. (2002:408).
[825] See Roberts, (2002:406).
[826] See Table 4.15 and section 4.10.
[827] See Gross and Von Hirsch (1981:250).
[828] See Chapter 4, Part 2, 4.5.4.
[829] See Chapter 4, Part 3.
[830] See Chapter 4, Figure 4.2.
[831] See Chapter 4, 4.2, In State versus Staggie and Another.
[832] See Criminal Law Amendment Act No 105 of 1997.

factors seemed to justify departures from a life imprisonment sentence to an effective 15 years' imprisonment.

The study has shown that sentencing in South Africa has not shifted from desert to utilitarian approaches, in the sense that criminal history appears not to increase the seriousness of the case more than the committed crime.[833] It is evident in the study that the seriousness of the crime committed and the criminal history tend to be poorly correlated. Most serious crimes are not committed by the accused with the worst prior records.[834] This empirical evidence shows that prior crimes and penalties of persistent offenders tend to be less severe, while the current crime might appear more serious with a severe sentence. It has been shown that persistent offenders often commit less serious crimes than other offenders.[835] Sentencers from the perspective of desert theory could regard repetition to increase the personal culpability of the offender.[836] Another judicial approach would justify sentencing criminal history on incapacitative grounds to impose imprisonment and treatment of the offenders.[837] Then the punisher could reason that emphasis on the prior criminal record might increase penalties for deterrence and a potential recidivist might think twice before re-offending for fear of severe punishment. Considering these conflicting justifications, the age factor in sentencing can increase or reduce the sentence severity depending on the penal theoretical orientation of the punisher.

However, it is possible for judicial officers to consider the accused's prior record in search for appropriate punishment, other than to increase severity of punishment. This is because previous crimes have been punished before.

5.2.4 Age factor in sentencing

This study calls for a lesser degree of culpability in respect of young offenders compared to adults. For example, while a 16-year-old accused convicted of robbery and a 28-year-old adult convicted of robbery appear to carry the same degree of harmfulness, personal culpability could be different due to the age factor. The culpability of the 16-year-old accused should be lesser than that of the 28-year-old accused. Von Hirsch[838] relates this point on the reduction of culpability, inter alia, to the cognitive aspect, namely that the accused under the age of 18 might have less capacity to assess the harmful consequences of his criminal conduct. Another point relates to the idea that those accused under the age of 18 might have less opportunity to develop impulse control and resist peer pressures to offend. This is likely the point made by most respondents in favour of less culpability in respect of young offenders.[839] In the same vein, they could not perceive age to reduce seriousness. Age as a separate factor could at least be considered to reduce the degree of culpability.[840]

[833] See Chapter 3 and 4.
[834] See Chapter 4, Parts 2 and 3.
[835] See Chapter 4, tables and figures presented.
[836] Von Hirsch, (2002:425).
[837] (2002:430), above.
[838] (2001:223).
[839] See Chapter 4, Part 3.
[840] See Chapter 4, Part 3.

However, in S v Kwalase,[841] Van Heerden J placed the age of the accused at the centre in judging individual culpability in order to select punishment that would be relevant to the needs of the accused. Youthfulness appears to be widely regarded as a mitigating factor. To illustrate this assertion, Botha JA in S v Jansen[842] amplified that: 'the interests of society cannot be served by overlooking the interest of the juvenile offender'.

It is noticeable that offenders of different ages respond differently to the degree of their equal punishment. For example, young offenders might respond differently than adults. A sentence of four years' imprisonment could be more severe for offenders under the age of 18 than for adult offenders.[843] Some sentencers can regard the age of the young accused as justification for predicting more serious crimes in future, as shown above. This study shows that different sentencers regard age as a mitigating factor but its extent in relation to the actual sentence and crime seriousness varies widely. Other studies claimed that past empirical sentencing decisions of the sentencers reveal that factors that are primarily considered are crime seriousness and the extent of any prior record, then age and a few variables are considered secondarily in sentencing approaches.[844]

It is further recommended that sentencing courts should take into account the rights of the child as entrenched in the Constitution and the use of the pre-sentence report to get background information, particularly with regard to accused under the age of 18. In this context this relates to the right not to be detained except as a measure of last resort. Judicial sentencing decisions should reflect an approach that considers crime seriousness in relation to the offender's age and his circumstances, and a sentence with a limited degree of severity with prospects for rehabilitation.

5.2.5 Judicial penal philosophy

It appears that penology is underpinned by questions of criminal deterrence, rehabilitation and efficacy of punishment.[845] These theories ought to rationalise the purpose of punishment. Empirical analysis appears to suggest that almost all regional magistrates and judges view their sentencing decisions in accordance with the protection of society.[846] As revealed by respondents and sentencing patterns, there seem to be considerable differences as to what sentencing measures are appropriate for this goal. Past empirical patterns of judicial sentencing decisions of the Wynberg regional court, the Mitchells Plain regional court and the Cape High Court confirm that societal interest, crime seriousness and crime rates appear to be relevant to specific cases, and this seems to be behind choices in sentencing decisions.[847] Predicting future criminal behaviour and the need to protect society are two of the goals of incapacitation theory.[848] In this view rendering offenders incapable of re-offending by imprisonment enhances a sense of community safety. Empirical evidence suggested by the district, provincial and national figures, length of sentences

[841] 2000 (2) SACR 135 (C).
[842] 1975 1 SA 425 (A).
[843] Duff, A. (1998:173).
[844] See Gross and Von Hirsch, (1981:304-305) and Chapter 4.
[845] See Garland and Young, (1983:204).
[846] See Chapter 4, Parts 1, 2 and 3.
[847] See Chapter 4, 4.2, observed criminal trials and discussions.
[848] Bagaric, (2001:130).

and justifications by various sentencers based on community protection confirm the active application of utilitarian theories in judicial sentencing approaches.[849]

In this regard judicial experience and philosophy seem to be central in sentencing approaches.[850] As endorsed by Green,[851] the background and personalities of sentencers tend to be relevant, but penal philosophy appears to play a fundamental role in judicial sentencing decisions. Similarly, in Chapter 4[852] some respondents implicitly view the seriousness of a crime as depending on the penal thought of an individual sentencer. The penal philosophy of sentencers differs widely with respect to kinds of penal measures,[853] for example, with regard to their views on the effectiveness of long sentences compared to partly imprisonment and supervision. For instance, in the Cape High Court one accused was aged 16, convicted of rape and sentenced to 15 years' imprisonment, while another accused also aged 16 was convicted of rape and sentenced to 10 years, of which five years were suspended on condition that he did not commit rape during suspension.[854] Judicial differences on the selection of penal measures could reveal their different penal philosophies and different purposes for such measures.[855] As depicted in the study, differences in penal philosophy could lead to variations in sentences chosen and theories utilised over others. A punisher who believes in the philosophy of incapacitation and deterrence to deal with serious crimes could find it difficult to select a sentence for an old recidivist convicted of stealing bread at the supermarket.

In view of the above it is possible for judicial approaches to combine consequentialist theories and deontological sentencing approaches. Although different cases require to be treated differently, they should not be viewed as separate entities from one another.

Walker[856] holds that judicial sentencing rationale tends to be vague. This vagueness can be associated with various penal codes upheld by each judicial officer. A judicial officer can represent different philosophical traditions based on the merits of each case. For example, with regard to a crime of robbery the sentencer's line of thought might suggest desert orientation but sometimes suggest utilitarianism. Duff and Garland[857] emphasise that judicial sentencing decisions tend to draw eclectically on broad ideas of the philosophy of punishment. They apply different kinds of reasoning for what they perceive as relevant to each case. This might show the contradictory nature of judicial sentencing decisions. This vagueness is evident in the study[858] and further confirmed by the actual accessed court records that require a lot of time to read and show a lack of direct sentencing statistics.

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[849] See Chapter 4.
[850] See Hogarth, (1974:65) and Chapter 4. Also see Murray, Sloth-Nielsen and Tredoux (1989:163) in Chapter 1, section 1.2.2 and Chapter 2, 2.8.1.
[851] (1961:67) also see Chapter 4, Part 3.
[852] Section 4.9 and Tables 4.10, 4.11, 4.13, 4.14, 4.17, 4.18 and 4.19.
[853] (1974:74) also see Chapter 4, Part 2 on the ranking of crimes and sentences imposed and Part 3, 4.12.
[854] See Chapter 4, Table 4.8.
[855] See respondents' responses and a Questionnaire testing judicial penal philosophy such as: 'why do you impose a sentence? Also see respondents' rankings of crime seriousness and selected sentences in Table 4.16 of Chapter 4.
[856] (1991:8).
[857] (1995:17).
[858] See Chapter 4, Part 2, 4.3, 4.4 and 4.12.

It is recommended that sentencing courts should record their decisions and justifications in a specific manner in accordance with the idea to evaluate its approaches consistently. This consequently points to the necessity for a format sheet for continuous statistical analysis.[859]

5.2.6 Variations in sentencing approaches

Sentencing as a complex phenomenon is not immune from wider societal influence.[860] A similar view by one regional magistrate[861] is that sentencing approaches and interpretations have to go with the societal attitude at a specific time. This study depicts differences in the meaning of seriousness and variations in sentencing among regional magistrates and judges. There are heterogeneous conceptions of seriousness. Similarly, a substantial number of regional magistrates and judges view the youthfulness of the offender with some vagueness. It appears to mean different things to different judicial officers.[862] These differences have suggested the complex multidimensional nature of the approaches rather than mere uniformity.[863] They point to variations suggested by statistics and the rank order of crime seriousness by different respondents and sentences of comparative severity.[864] Indeed, such divergences appear to mirror the competing philosophical doctrines of individual regional magistrates of Wynberg and Mitchells Plain and of Cape High Court judges, such as rehabilitation, deterrence, desert, restorative, incapacitation and social theories.[865] Interviews with Regional Magistrates and Judges to elicit the impact of penal philosophy reveal divergences.[866]

Because crimes are different and offenders are not the same, therefore sentencing theories applied should not be the same. In this regard not all murder cases could be tried from the perspective of desert or deterrence; there must be recognition for contemporary ones such as the restorative approach, human rights approaches and combined sentences, particularly when dealing with persons under the age of 18 convicted of serious crime. This point is compatible with the idea of promoting flexible and consistent approaches for diverse crimes of young and older offenders.

As concluded in this chapter, past empirical sentencing decisions seem to resemble present sentencing approaches. In the wider context, as highlighted earlier, the recent study reveals major inconsistencies in different regions, with Gauteng and KwaZulu-Natal generally imposing more severe sentences than the Eastern Cape and the Western Cape.[867] The study points out that the same serious crimes of murder and robbery with aggravating circumstances show a significant difference in sentences. This is despite the implementation of the minimum sentences Act.[868] Accused under the age of 18 received lesser imprisonment sentences compared to adults over 20. Accused over 49 years of age were few and tended to receive less severe sentences.

[859] See Appendix C for proposed Sentencing court record sheet.
[860] See Forsyth, C. (1985:225) and Van Blerk, A. (1988:90) in Chapter 1 and Chapter 2 for details.
[861] See Chapter 4, Part 3 and Chapter 1, 1.2.2.
[862] See Chapter 4, Parts 1, 2 and 3.
[863] Similarly see discussion in Chapter 2, 2.8.1.
[864] See Chapter 4, Parts 1, 2 and 3.
[865] See Chapter 2 account on detail.
[866] See Chapter 4, in section 4.12.
[867] See Paschke and Sherwin (2000).
[868] See Criminal Law Amendment Act 105 of 1997.

These inconsistencies appear to be evident in the Wynberg and Mitchells Plain regional courts and the Cape High Court and sentencing trends over the years.[869]

It is possible to reduce variations in sentencing, taking into account these various circumstances in accordance with consistent and flexible judicial approaches. Inconsistency in sentencing requires to be justifiable, informed by the differences of the circumstances of each case.

[869] See Chapters 3 and 4.

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APPENDIX A

Accessed cases (judgments & sentences) of Wynberg regional court and Cape High Court

Case No: SHA 136/2000 Wynberg regional court.

Case No: SHB 285/99 Wynberg regional court.

Case No: SHD 36/38/98 Wynberg regional court.

Case No: SHD/111/99 Wynberg regional court.

Case No: SHG 315/97 Wynberg regional court.

Case No: SS 123/2000 In the High Court of South Africa – Cape of Good Hope Provincial Division.

Case No: SS 128/2000 In the High Court of South Africa – Cape of Good Hope Provincial Division.

Case No: SS 13/2002 In the High Court of South Africa – Cape of Good Hope Provincial Division. before: Meer, A. J.

3 Gothic Court
Station Road
Rondebosch
7700
21 September 2007

Sentencing statistics

Dear Sir/ Madam

I am a Doctoral student in Penology at the University of South Africa, doing research on judicial sentencing of persons under the age of 18 and adults convicted of serious crimes. I request sentencing statistics on this topic including accessing relevant files and material regarding courts or prison stats. Thank you.

Yours sincerely

Chris Derby Magobotiti

Email: **cmagobotiti@hotmail.com**

APPENDIX B

3 Gothic Court
Station Road
Rondebosch
7700
2 October 2007

Dear Magistrate,

I am a Doctoral student in Penology at the University of South Africa, doing research on judicial sentencing of persons under the age of 18 and adults convicted of serious crimes. With the permission of the Chief Magistrate, I am sending you the attached questionnaire. I would like to ask you please to assist my research by answering it. Your identity will be treated as confidential and the answers used for scientific purposes only.

This questionnaire consists of 4 types of questions. There are questions that require an answer by means of a tick in the box. Secondly, there are questions that require a circle. There are also those that require short answers or phrase. Finally, there are open questions that require some detailed explanation which I will request to be tape recorded during an interview. If some questions are difficult to answer I would discuss with you later during interview.

Thank you in anticipation for your help.

Yours faithfully

Chris Derby Magobotiti

Email: cmagobotiti@hotmail.com

3 Gothic Court
Station Road
Rondebosch
7700
2 October 2007

Honourable Judge President of the Cape High Court,

I am a Doctoral student in Penology at the University of South Africa, doing research on judicial sentencing of persons under the age of 18 and adults convicted of serious crimes. I am requesting your permission to interview 3 Judges. If permission is granted I wish to submit in advance the attached questionnaire and interview schedule.

Yours sincerely

Chris Derby Magobotiti

Email: cmagobotiti@hotmail.com

3 Gothic Court
Station Road
Rondebosch
7700
2 October 2007

Honourable Judge,

I am a Doctoral student in Penology at the University of South Africa, doing research on judicial sentencing of persons under the age of 18 and adults convicted of serious crimes. With the permission of the Judge President of the Cape High Court, I am sending you the attached questionnaire. I would like to ask you please to assist my research by answering it. I would follow it up with the Court Registrar to make appointment with regard to interviews. Your identity will be treated as confidential and the answers used for scientific purposes only.

This questionnaire consists of 4 types of questions. There are questions that require an answer by means of a tick in the box. Secondly, there are questions that require a circle. There are also those that require short answers or phrase. Finally, there are open questions that require some detailed explanation which I will request to be tape recorded during an interview. If some questions are difficult to answer I would discuss with you later during interview.

Thank you in anticipation for your help.

Yours faithfully

Chris Derby Magobotiti

Email: cmagobotiti@hotmail.com

QUESTIONNAIRE

Section 1

Part A: Personal Identifying Profile

Please answer all the questions in this part by means of a **tick** ☐ in the appropriate box.

1. Wynberg Regional Court Magistrate: ☐ W
2. Mitchells Plain Regional Court Magistrate: ☐ M
3. Cape High Court Judge: ☐ C
4. **Gender:**

4.1 Female: ☐ 1
4.2 Male: ☐ 2

5. **Age:**

5.1 Less than 30 years: ☐ 1

5.2 30 to 35 years ☐ 2

5.3 36 to 40 years ☐ 3

5.4 41 to 45 years ☐ 4

5.5 46 to 50 years ☐ 5

5.6 51 to 60 years ☐ 6

5.7 61 and above ☐ 7

6. How long have you been a judicial officer?

6.1 Less than 6 months ☐ 1

6.2 6 months to 2 years ☐ 2

6.3 2 years to 5 years ☐ 3

6.4 Above 5 to 10 years ☐ 4

6.5 Above 10 years to 15 years ☐ 5

6.6 More than 15 years ☐ 6

Part: B. Judicial Sentencing and the Age Factor

1. What degree of culpability do you place on offenders under the age of 18 convicted of serious crimes compared to their adult counterpart? Please **tick** in the appropriate box and **explain.**

1.1 Least culpability: ☐..1
1.2 Less culpability: ☐ 2

1.3 Great culpability: ☐ 3
1.4 Greater culpability: ☐ 4
1.5 Other/specify: ☐ 5…….

Part: C Sentencing and Previous Convictions

1. In your experience do you believe that punishment imposed on offenders have the following deterrent degree? Tick in the appropriate box.
1.1 Under 18s:
1.1.1 Less deterrent effect: ☐ 1
1.1.2 More deterrent effect: ☐ 2
1.1.3 Most deterrent effect: ☐ 3
1.1.4 Other degrees of deterrent /specify: ☐…4…….

1.2 Adults:
1.2.1 Less deterrent effect: ☐ 1

1.2.2 More deterrent effect: ☐ 2

1.2.3 Most deterrent effect: ☐ 3

1.2.4 Other degrees of deterrent /specify: ☐…4……

Part: D. Severity of Punishment on Offenders under the Age of 18 and Adults Convicted of Serious Crime

1. What are the most appropriate sentences you think should be imposed on the following offenders convicted of serious crime? Please **rank order** the relative seriousness of crime by **circling** 1 for the most serious, 2 more serious, 3 serious, 4 less serious and 5 for the least serious. Also **select** what you consider an appropriate sentence for each crime by **writing** in the space provided.

Age and Offender	Crime	**Rankings:** eg. circle 1 for most serious and 2 for the next.	**Appropriate sentence:** eg. 17 years' imprisonment, suspended, life or Fine.
16 years old and first offender (case 1)	Robbery – threatened with firearm-R15, 000	Rank: 1, 2, 3, 4, 5	Sentence:…….
16 years and first offender (case 2)	Theft – of motor vehicle	Rank: 1, 2, 3, 4, 5	Sentence:…….
17 years and first time offender (case 3)	Murder - of the police officer on duty	Rank: 1, 2, 3, 4, 5	Sentence:……
17 years and first offender (Case 4)	Rape – of a 14 years girl	Rank: 1, 2, 3, 4, 5	Sentence:…….
17 years old and repeat offender (case 5)	Robbery - of the bank with R20, 000.	Rank: 1, 2, 3, 4, 5	Sentence:…….
18, 17 and 14 years old and first time offenders	House breaking with intent to steal and theft	Rank: 1, 2, 3, 4, 5	Sentence:…….

(case 6 – 8)	– stolen and damaged property worth R12, 000		
22 years and first offender (case 9)	Murder - of a 15 years youth caught in crossfire during gang shootings	Rank: 1, 2, 3, 4, 5	Sentence:……..
25 years and repeat offender (case 10)	Rape – of a 34 years woman	Rank: 1, 2, 3, 4, 5	Sentence:……
15 years old first offender and 26 years old and repeat offender (case 11 – 12)	Murder - of a 30 years man – thrown out while the train was in motion between Belhar & Lavistown station	Rank: 1, 2, 3, 4, 5	Sentence:……..
28 years old and repeat offender (case 13)	Fraud - worth-R13, 000	Rank: 1, 2, 3, 4, 5	Sentence:…….
38 years and first time offender (case 14)	Rape – of a 9 years old girl by her uncle	Rank: 1, 2, 3, 4, 5	Sentence:…….

2. How much weight do you place on the following factors in imposing a proportionate sentence for serious crimes? **Tick** in the box to indicate amount of weight.

	1	2	3
Harmfulness of crime	Less weight: ☐	More weight ☐	Greater weight ☐
Age of the offender	Less weight: ☐	More weight: ☐	Greater weight: ☐
First offender	Less: ☐	More: ☐	Greater: ☐
Prior record	Less: ☐	More: ☐	Greater: ☐
Prediction of future behaviour	Less: ☐	More: ☐	Greater: ☐
Sentence severity	Less: ☐	More: ☐	Greater: ☐
Context of crime	Less: ☐	More: ☐	Greater: ☐
Other/specify	Less: ☐	More: ☐	Greater: ☐

3.How much does Criminal Law Amendment Act, Act 105 of 1997, on the mandatory minimum sentences affect your sentencing discretionary power? **Tick** in the box and **explain.**

1	2
3.1 For 16 and 17years: very much: ☐	3.1.2 Not much: ☐
3.1.3 Not at all: 3☐	3.1.4 Please briefly explain:

1	
3.2 Adults: very much: ☐	3.2.2 Not much ☐2
3.2.3 Not at all: 3☐	3.2.4 Please explain.

Section 2 **Part: A. Sentencing Serious Crimes** **For Interviews.**
1. What offences constitute serious crime?
1.1 For under 18s and
1.2 Adults
2.Under what circumstances do you treat differently those convicted of crimes of the same degree of seriousness?
2.1 For under 18s and
2.2 Adults
3. What criteria do you use to decide on the relative seriousness of crimes?
3.1 For under 18s and
3.2 Adults
Part: B. Sentencing and Previous Convictions
1. How seriously do you regard previous convictions in considering an appropriate sentence? Comment with regard to:
1.2 Under 18s and
1.3 Adults
2. How much weight do you place on previous convictions compared to other factors?
2.1 Comment on under 18s and
2.3 Adults
Part: C. Severity of Punishment on Offenders under the Age of 18 and Adults Convicted of Serious Crimes
1. On what basis do you select an appropriate punishment for offenders convicted of serious crime?
1.1 Briefly comment with respect to under 18s and
1.2 Adults
2. On what grounds do you base different punishments on offenders convicted of crimes of similar seriousness?
2.1 Comment with regard to under 18s and
2.2 Adults
Part D. Sentencing Philosophy
1.1 Why do you impose a sentence?
1.2 What are the justifications of the various sentencing decisions do you take?

APPENDIX C

Courts sentencing record and analysis sheet

Presiding Officer (Name)	Assessors (Names)	Date of Sentence (YYMMDD)	Offence (See code list)	Date of Offence (YYMMDD)	Accused (Name)	Age (Yrs)	Gender (M/F)	Prior Record (Yes, No, Multiple)	Year of Prior Offence	Prior Offence (Code)	Prior Sentence(s) (Detail)

OFFENCE CODE LIST

It is possible for both regional and High Courts to make additions on the offence code list below where necessary.

Code	**Offence and type**[870]
A	**Crimes against the state and administration of justice**
A1	Public violence
A2	Possession of firearms and ammunition by unauthorised persons
A3	Escaping from custody and assisting in escaping
A4	Terrorism
A5	Negligent/ reckless driving
A6	Sabotage
A7	Contempt of court
A8	Defeating or obstructing the course of justice
A9	Perjury
Code	**Offence and Type**
B	**Crimes against reputation**
B1	Crimen iniuria
B2	Criminal defamation
C	**Crimes against freedom of movement**
C1	Abduction
C2	Kidnapping
C3	Child stealing
D	**Crimes against property and damage**
D1	Housebreaking with intention to steal and theft
D2	Robbery with aggravating circumstances
D3	Robbery
D4	Theft
D5	Theft of livestock and related matters

[870] See Snyman, C. (2008) and Burchell, E. M. , Milton, J. R. L. and Burchell, J. M. (1983).

D6	Theft of motor vehicle including motor cycle
D7	Fraud
D8	Arson
D9	Intentional damage to property
E	**Crimes against bodily integrity (violent)**
E1	Indecent assault
E2	Incest
E3	Rape
E4	Attempted rape
E5	Common assault
E6	Assault with grievous bodily harm
F	**Crimes against the person (violent)**
F1	Culpable homicide
F2	Murder
F3	Attempted murder
G	**Crimes against public administration**
G1	Bribery
G2	Corruption
G3	Road traffic offences
Code	**Offence and Type**
G4	Drugs and dependence-producing substance