

# An assessment of life sentence without parole for people convicted of killing police officers on duty in South Africa

## Abstract

Like many societies, South Africa seeks to respond to the increasing killing of police officers, by exploring possible tough sentences. This article shows that sentencing does not take place in a socio-historical vacuum. It is concerned about sentencing proportionality as a limiting principle against possible excessive penal measures. In this article, life sentence without parole is assessed in terms of its justification and appropriateness. The article views life sentences as measures that require necessary parameters. It demonstrates that judicial decision-making is informed, *inter alia*, by different sentencing theories, and remains complicated.

## 1. Introduction

This article discusses life sentence without parole for people convicted of killing police officers on duty. It considers the current debate on the recent rate of police killings, and the reactions on the part of the public, politicians and academics. This article locates the discussions within sentencing theories, the *Constitution* and international law, by assessing some justifications of sentencing and mandatory life sentences with and without parole, at both national and international level.

Calls for full life imprisonment sentences, or developing new life sentences, for those who are convicted of killing police officers on duty, suggest that sentencing does not develop in a vacuum.<sup>1</sup> A wider context involving crime trends and socio-political circumstances tends to shape the views of the public, executive and judiciary on sentencing approaches.<sup>2</sup> According to the South African Police Service's (SAPS) annual report on crime statistics, South Africa has a 4.6 per cent murder rate.<sup>3</sup> Between 1 April 2014 and 31 March 2015, 86 police officers were murdered in

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1 Hogarth 1974:166. See also Ruby 1980:3.

2 Magobotiti 2009:153.

3 South African Police Service 2015.

South Africa. Murder is defined as “the unlawful and intentional causing of the death of another human being”.<sup>4</sup>

As a result of the murders perpetrated against the police, the parliament of the Republic of South Africa convened an open debate in an attempt to share divergent views, in order to find a solution to the phenomenon.<sup>5</sup> There were debates inside and outside parliament. The majority of politicians noted that the killing of police officers was an act of criminality, which undermines the authority of the State, and hinders the police mandate from preventing, combating and investigating crime. In his speech, the Minister of Police gave a breakdown of the circumstances surrounding these gruesome murders. He opined that over two thirds of the killings (71%) occurred when police were responding to the needs of the public:

- 45.7 per cent of police killed during 2014/2015 were attending to complaints (robbery, hijacking and cash in transit);
- 11.4 per cent while effecting (or during evading of) an arrest;
- 5.7 per cent while conducting searches of persons and motor vehicles;
- 5.7 per cent while pursuing suspects;
- 5.7 per cent while attending to domestic violence complaints;
- 2.9 per cent while escorting suspects to police cells; and
- 2.9 per cent being victims of an attack on a police station.

The so-called random killings account for 14.2 per cent. In this debate, members of the public and politicians alike seemed to urge the courts to impose life sentences of imprisonment. They also urged the police, when under attack, to use minimum force in self-defence – as prescribed by the law.<sup>6</sup>

## 2. Sentencing theory

Various sentencing theories account for specific sentences imposed by the courts.<sup>7</sup> Life sentence without parole is referable, among others, to the sentencing theory of deterrence, incapacitation and desert. The importance of theories of punishment is of value in terms of understanding various justifications for different sentences imposed in each individual case,<sup>8</sup> and the attitude or the thinking of the judiciary and society on the complexities underlying sentencing and punishment.<sup>9</sup> There are different

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4 Snyman 2008:447.

5 Parliamentary Monitoring Group (PMG) 2016.

6 *Criminal Procedure Act* 51/1977:sec. 49.

7 Hogarth 1974:91.

8 Snyman 2008:10. See also Cloete & Stevens 1990:197.

9 Green 1961:1.

competing theories of punishment that provide moral justifications in an attempt to explain the nature of punishment.<sup>10</sup>

## 2.1 Desert sentencing theory

Von Hirsch and Duff describe the retribution and desert sentencing theory as involving an examination of the harmfulness of the crime, and the degree of culpability of the conduct of the offender, in order to gauge the measure of punishment, and prescribe a deserved sentence – with the aim of prevention and fairness.<sup>11</sup> Retribution and desert theories 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 looks forward, as the sanction seeks to prevent future offending.<sup>12</sup> This last factor suggests an element of the consequentialist theory within deontological thought. In other words, punishment must be justified and deserved, but also justified as a means of preventing future crimes. The desert sentencing theory seems to regard the seriousness of the crime as a basis for a certain measure of punishment.

Von Hirsch conceptualises sentencing in the desert theory as strictly meant to be guided by sentencing principles. He suggests that deciding the quantum of punishment should be based on focusing on the committed offences, rather than on the consequences or the seriousness of the crime of the convicted offender. This calls for balanced sentencing approaches. In the desert theory, the degree of blameworthiness has implications for the quantum of punishment to be selected by the criminal courts. Von Hirsch<sup>13</sup> and Morris<sup>14</sup> agree that the principle of proportionality in the 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. These authors further 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 convicted of crimes of differing gravity should suffer punishment correspondingly graded in seriousness.<sup>15</sup>

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10 Rabie *et al.* 2000:19.

11 Von Hirsch & Ashworth 1998:161.

12 Von Hirsch & Ashworth 1998:161.

13 Von Hirsch & Ashworth 1998:172.

14 Von Hirsch & Ashworth 1998:173.

15 Ashworth 1983:189.

The culpability of the offender tends to present a sufficient and necessary basis of liability for criminal punishment.<sup>16</sup> In this view, the degree of culpability tends to differ – which requires cases to be treated on merit.<sup>17</sup> The view acknowledges that gauging the seriousness of crimes in relation to rankings of their gravity poses practical difficulties. However, the gravity of a crime 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 criminally negligent conduct.<sup>18</sup>

Comparison of the harmfulness of criminal conduct should take into account that the acts tend to invade different interests and needs of the victim and society.<sup>19</sup> 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.<sup>20</sup>

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.<sup>21</sup> 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 only about torture or mere imprisonment, but also 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 to, or more so than imprisonment, depending on the interests of the offender.<sup>22</sup>

Von Hirsch argues that interests impinged on by the sanctions could increase the severity.<sup>23</sup> 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, it appears that 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.

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16 Murphy 1995:96.

17 Ezorsky 1972:132.

18 Von Hirsch & Ashworth 1998:185.

19 Simester & Von Hirsch 2002:281.

20 Von Hirsch 1981:49.

21 Von Hirsch & Ashworth 1992:197.

22 Von Hirsch & Wasik 2001:145-147.

23 Von Hirsch 1993:34.

## 2.2 Deterrence sentencing theory

Deterrence sentencing theory holds that general prevention of crime should be the chief end of punishment.<sup>24</sup> In this theory, sentencing is forward looking in relation to its preventative aims.<sup>25</sup> It is regarded as part of the consequentialist theories of punishment, which include rehabilitation and incapacitation. Its proponents believe that the deterrence sentencing theory of 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.<sup>26</sup> 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.<sup>27</sup> 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”.<sup>28</sup> This point might be associated with its orientation of prediction of dangerousness or risk, in order to deter future crimes.<sup>29</sup>

Deterrence suggests two goals: the first relates to individual deterrence – that is, punishment has to be inflicted directly on the offender, in order to deter him/her from re-offending, for the aim of prevention; the second suggests that general deterrence attempts to impose punishment in such a manner that it can deter other potential offenders and general members of society.<sup>30</sup> Hypothetically, a sentencing court might impose an exemplary imprisonment sentence on an offender under 18 years of age, convicted of theft, on the basis that such an offender is a danger to society, and that punishment is likely to deter others who might be tempted to commit similar crimes.<sup>31</sup>

According to Bentham, the deterrence theory of sentencing perceives individuals as rational beings to be influenced by the punishment imposed by the courts, and to be restrained from crime.<sup>32</sup> The quantum of punishment tends to be determined by the possible future predictions of criminal conduct of other people, rather than the present offence.<sup>33</sup> 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.

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24 Von Hirsch & Ashworth 1998:45.

25 Von Hirsch & Ashworth 1998:44.

26 Rabie *et al.* 2000:25. See also Von Hirsch & Ashworth 1998:44.

27 Von Hirsch 1981:61.

28 Von Hirsch & Ashworth 1998:53.

29 Gross & Von Hirsch 1981:187.

30 Van Den Haag & Conrad 1983:67.

31 Moberly 1968:53.

32 Von Hirsch & Ashworth 1998:45.

33 Barbara 1993:36.

In such situations, it is likely that the sentencing courts could hand down exemplary severe sentences to convicted offenders.

Deterrence theory assumes that crimes are committed because the expected benefits tend to outweigh the consequences of such actions.<sup>34</sup> This is particularly the case with regard to certain property-related crimes. When offenders who are serving sentences for property crime are asked about their choices to commit offences, their responses tend to support the fact that interests outweighed the penal outcomes of their conduct.<sup>35</sup> Based on the notion of moral choice of individual persons, the deterrence theory calls for severe punishment of apprehended and convicted persons for the purposes of deterrence.<sup>36</sup>

Goldman opines that deterrence punishment should limit its array of penalties to the guilty.<sup>37</sup> He 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 the deterrence sentencing theory seems to be constrained, due to the harm predicted by any future criminal behaviour on the offender's part. Similarly, incapacitation theory, which inclines to longer sentences rather than commensurate to the harm caused by the committed crime, is likely to go beyond the limitations as set by the proportionality principle.

### 2.3 Incapacitation sentencing theory

Incapacitation is one of the theories of punishment that may be described as consequentialist, in the sense that it looks forward to predictive restraint.<sup>38</sup> 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.<sup>39</sup> 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.<sup>40</sup> Wilson argues that incapacitation theory makes no assumptions about human beings, while deterrence assumes rationality.<sup>41</sup> Unlike the rehabilitation theory, which seeks to rehabilitate the offender's attitude to desist from crime, incapacitation theory leads to physical restraint of the person by imposing sentencing options, to prevent them from becoming involved in crime.

These options broadly range from capital punishment to long or life imprisonment, or without parole, probation orders, house arrest, and

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34 Grupp 1971:182.

35 Magobotiti 2001:178.

36 Lacey 1988:28.

37 Von Hirsch & Ashworth 1998:83.

38 Von Hirsch 1981:19.

39 Von Hirsch & Ashworth 1998:54.

40 Bagaric 2001:128.

41 Von Hirsch & Ashworth 1998:113.

disqualification from driving.<sup>42</sup> 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.<sup>43</sup> 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 accordance with predictive restraint. This line of thought remains a challenge, in the sense that it is not easy to determine the relationship between future and past criminal conduct, nor the offender's reaction to the likely imposed punishment.<sup>44</sup>

Ashworth states that the incapacitation theory claims that it can identify some offenders as dangerous, because they are likely to commit serious crimes in the future, and life imprisonment could be imposed for public protection.<sup>45</sup> If offenders present great risk to victims, then it is justifiable to incarcerate them for a long period, particularly if they have committed heinous crimes.<sup>46</sup> A sentencing criminal court may require to know about previous convictions, social history, personality and other circumstances, to be able to predict future re-offending.<sup>47</sup> It is possible that the judicial officers or parole boards may regard potential recidivists, or those who have a conviction record, as presenting a possible risk to commit further crimes.<sup>48</sup> Similarly, Walker<sup>49</sup> and Bottoms and Brownsword<sup>50</sup> 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.<sup>51</sup>

The claim to protect the community appears to be an underlying idea in the theory of incapacitation.<sup>52</sup> As quoted by Bagaric, Judge Brennan stated the following in the *Channon* case:

The necessary and ultimate justification for criminal sanctions is the protection of society from conduct which the law proscribes.

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42 Ashworth & Wasik 1998:68.

43 Newman 1985:208.

44 Whinery *et al.* 1976:7.

45 Ashworth 2015:237, 248.

46 Zimring & Hawkins 1987:160.

47 Von Hirsch & Ashworth 1998:88.

48 Von Hirsch 1981:20.

49 Von Hirsch & Ashworth 1998:104.

50 Von Hirsch & Ashworth 1998:105.

51 Von Hirsch & Ashworth 1998:104-105.

52 Bagaric 2001:130.

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 demoralising effect on individuals to varying degrees, based on their personalities.<sup>53</sup> In the same vein, but from different angles, Wood and Dunaway appear to have identified some practical limitations of the incapacitation theory in its predictions of dangerousness-based measures.<sup>54</sup> 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 it might be unfair, 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.

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 record can be strongly associated with subsequent offending, a sentencing court might, in relation to this argument, impose a harsh sentence on offender B, predicting from the record, while offender F receives a lesser 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.<sup>55</sup> 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, in order to gather relevant information about the offender's state of mind during the time of the crime, as well as other factors, to assess the level of blameworthiness and future dangerousness.<sup>56</sup>

Tonry takes this argument further, and suggests intermediate mixed sentences, because differences between the interpretation of 'dangerous' and 'non-dangerous' tend to lead to differences in punishment of offenders who have committed the same crime.<sup>57</sup> This tends to aggravate existing inequalities in punishment, and suggests that there might be a sense of rigidity, as well as 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. In most jurisdictions such as Western Europe, America and South Africa, mandatory long-term imprisonment sentences

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53 Walker 1980:109.

54 Wood & Dunaway 2003:152.

55 Von Hirsch 1981:27.

56 Angus & Cole 2003:339.

57 Von Hirsch 1993:68.

have been met by court challenge, and often declared disproportionate when considering the seriousness of the offence and sentence severity.<sup>58</sup>

### 3. Mandatory minimum sentences

Over the years, South African judicial sentencing decisions tended to be characterised by disproportionality, with regard to leniency and severity of punishment of persons convicted of serious crimes, and this is even worse when considering the age factor.<sup>59</sup> This often results in claims that there are sentencing disparities. This led to Parliament passing the *Criminal Law Amendment Act* 105 of 1997, which introduced mandatory minimum sentences to deal with serious crimes.

In *S v Malgas*,<sup>60</sup> the appellant was convicted of murder, in a Local Division, 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's discretion and the prescribed sentences for certain serious crimes mentioned in the *Act*. Sec. 51(1)(3) of the *Act* 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 judgement on the lack of "substantial and compelling circumstances" to depart from the prescribed sentence. Further reasoning was that the crime was of so heinous a 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 circumstances included relative youthfulness, first offender, subjugation of the offender to a domineering personality, and the spontaneous confession that 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*,<sup>61</sup> the applicant was convicted of murder under sec. 51(1)(3) of the *Criminal Law Amendment 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 sec. 35(3)(c) of the *Constitution*,

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58 Tonry & Frase 2001:4. See also Van Zyl Smit 2002:10.

59 Skelton 1999:102.

60 *S v Malgas* 2000 (1) SACR 469 (SCA). See also Van Zyl Smit (2002:10) on the meaning or interpretation of these provisions in sentencing practices.

61 *S v Dodo* 2001 (1) SACR 594 (CC).

which provides for the right of the accused to a public fair trial. It further claimed that the *Act* contravened sec. 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. The High Court also held that the *Act* was contrary to the separation of powers required by sec. 172(2) of the *Constitution*.<sup>62</sup> The Constitutional Court judgement held that sec. 51(1), (2) and (3) were in accordance with the *Constitution*, with respect to secs 12(1)(e), 35(3)(c) and 172(2) of the *Constitution*. The court based its judgement 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.

As shown above, mandatory minimum sentences tend to be subjected to criminal appeals. Similarly, long-term imprisonment, or life without parole, often clashes with the principle of proportionality, and the constitutionality of these sentences tends to be the underlying problem in the majority of appeals, although the sentences are not inherently unconstitutional or disproportionate. For example, Crutcher draws attention to the Canadian experience, particularly the decision in Smith's case, in which the minimum sentence was subjected to constitutional scrutiny. Crutcher 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 the offender do not receive wider attention.<sup>63</sup> The counter-argument states that minimum sentences seek to promote an effective deterrent, protect society, reduce sentencing disparity, and may denounce criminal behaviour. However, a number of cited research studies have found that mandatory minimum sentences have no deterrent effect.<sup>64</sup>

In South Africa, minimum sentence was enacted as the ultimate sentence, since the death penalty was abolished by the Constitutional Court judgement in *S v Makwanyane and Another*.<sup>65</sup> This Constitutional Court judgement refers to the 1993 interim *Constitution*. It based its judgement on the right of individuals not to be subjected to cruel, inhuman and degrading punishment.<sup>66</sup> However, given the current level of violent crime in South Africa, and the killing of police officers, the provisions in the minimum life sentence or prison law, which provide for offenders to be released on parole before completion of their sentences, if they meet specified criteria, is considered lenient by other sections of the community. For example, calls such as "life sentence must mean life sentence" have become a common reaction from the community, with the rise of the killing

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62 *The Constitution of the Republic of South Africa*, Act 108/1996.

63 Crutcher 2001:279.

64 Terblanche & Mackenzie 2008:404.

65 *S v Makwanyane and Another* 1995 (3) SA 391 (CC).

66 *The Constitution of the Republic of South Africa*, Act 108/1996:sec. 12(e). However, this right was connected to the right to life (see sec. 11) and inherent dignity (see sec. 10).

of police officers – and violent crime, in general. This is despite the fact that there has been no comprehensive study to prove whether such killers were parolees with prior convictions of murder.

#### 4. Life without parole

A life sentence without parole can be described as the most severe sentence after the death penalty. Offenders sentenced to life imprisonment without parole have no prospect of ever being released. They are imprisoned until death, for a full or natural life. As captured by Professor Van Zyl Smit, proponents of life without parole make examples of individual cases of some offenders who were released on parole, after having committed murder, and then re-offended.<sup>67</sup> They further critique that the parole decision-making has inherent weaknesses in releasing an offender who presents a danger to society.

As discussed in the above section on desert sentencing theory, life without parole could be viewed as the most severe sentence that goes beyond the limitations of the principle of proportionality. It could be characterised as “death by incarceration”.<sup>68</sup> The severity of life sentence without parole could favour the argument behind deterrence, to prevent potential criminals from committing crime or killing police officers. However, deterrence is challenged on the grounds that there is only very slight evidence that the punishment imposed on convicted offenders has any impact on the behaviour of potential offenders.

An incapacitation-oriented court is more likely to impose a life sentence without parole. As suggested earlier on, both the death penalty and life sentence without parole are perceived to result in permanent physical incapacitation of offenders who pose a danger to society. Life sentence without parole is considered very expensive, compared with the death penalty, and is seldom executed. However, there has been a rise in life without parole decisions in the 1970s in American federal states, including Texas, for example, to apply this law to juveniles, or treat them as adults.<sup>69</sup> By 1996, 34 states had provision for life sentences without parole, of which 26 provided for the death penalty.<sup>70</sup>

##### 4.1 Constitutionality of life without parole

Life sentences without parole rose after the decision of the U.S. Supreme Court in 1972 in the case of *Furman v Georgia*.<sup>71</sup> At the time, this decision appeared to have abolished the death penalty. In this case, the U.S. Supreme Court was confronted by the claim that the punishment of death

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67 Van Zyl Smit 2002:55.

68 Van Zyl Smit 2002:55.

69 Logan, 1998:73.

70 Van Zyl Smit 2002:55.

71 *Furman v Georgia* 408 US 238 (1972).

was cruel, unusual, and in violation of the Eighth Amendment of the U.S. Constitution. The Eighth Amendment provides that “no cruel and unusual punishment shall be inflicted”. The Supreme Court has interpreted this to mean that a punishment cannot be “grossly disproportionate” to the crime. According to Logan, courts have adopted a narrow view of proportionality as contained in the Eighth Amendment.<sup>72</sup>

The case of *Schick v Reed*<sup>73</sup> resulted in the endorsement, by the U.S. Supreme Court, of life without parole as an acceptable sentence. Schick was convicted of murder and sentenced to death, but had his sentence commuted to life imprisonment by President Eisenhower. The commutation included a condition that Schick should never be released on parole. Schick challenged this condition, however, arguing that he should be considered for parole, but the Supreme Court ruled that the President was entitled to set a condition and endorse a sentence of life without parole, thus setting a precedent. It appears that, after the *Furman* decision, the death penalty and life without parole gained momentum, and its application to specific cases has been scrutinised unsuccessfully.

In South Africa, it is not possible to successfully enact a law entitled ‘life without parole’, because of the precedent created in the case of *S v Makwanyane and Another*, as argued earlier. In all probability, the killing of police officers on duty would not provide justification for the sentence of life without parole as an option for the sentencing courts. The *Constitution*<sup>74</sup> entrenches “the right to human dignity<sup>75</sup>, the right to life<sup>76</sup> and the right not to be treated or punished in a cruel, inhuman or degrading way”.<sup>77</sup>

It appears that life without parole is in direct conflict with the cited constitutional provisions. The discussion in this article revealed a pattern of commitment to the principle of proportionality by the various different South African courts. In this regard, life without parole becomes too severe, excessive and disproportionate. International instruments such as the International Bill of Human Rights and the United Nations Convention against Torture, to both of which South Africa is signatory, provide prohibition of cruel, inhuman and degrading punishments, and will not allow life without parole to be legislated.<sup>78</sup>

## 5. Conclusion

An assessment of life sentence without parole has brought the foundation of sentencing philosophy into the light. This article provided evidence that sentencing has a purpose, value, power and context. It highlighted

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72 Logan 1998:75.

73 *Schick v Reed* 419 US 256 (1974).

74 *The Constitution of the Republic of South Africa*, Act 108/1996.

75 *The Constitution of the Republic of South Africa*, Act 108/1996:sec. 10.

76 *The Constitution of the Republic of South Africa*, Act 108/1996:sec. 11.

77 *The Constitution of the Republic of South Africa*, Act 108/1996:sec. 12(1)(e).

78 Mtshaulana *et al.* 1996:232.

numerous examples of how sentencing law is developed, shaped and passed or failed, or prohibited and outlawed. It also revealed the fundamental sentencing questions to the judicial officer, namely “Why do you impose a sentence?”<sup>79</sup> Clearly, the crime rate often shapes the mood of the community, courts and politicians. In the realm of constitutional sentencing, however, there are entrenched checks and balances that have to be considered, despite the fact that sentencing courts, Parliament and the executive should consider the weight of public opinion when formulating the law or imposing a sentence.

Few sentencing models that seem to be close to the law in question have been presented, to assess their justification. The principle of proportionality seems to be in tension with the incapacitation theory of punishment, due to its predictions of dangerousness.<sup>80</sup> This article demonstrates that life without parole could be successfully challenged constitutionally, or might not pass the constitutional challenge, as shown by the pattern of court decisions. Even in jurisdictions such as the United States of America, where it is a sentencing option, it remains under scrutiny.

An alternative view is to suggest that sentencing courts should continue to impose a minimum sentence on those convicted of killing police officers. The state should, however, in the first instance, equip police officers with adequate protective gear for potential life-threatening circumstances. They should also provide sufficient training in the appropriate use of firearms, in order to ensure the arrest of suspects and the ultimate securing of convictions. This, in turn, calls for the number of police officers to be commensurate with the growing local population. Community involvement against crime is also of significant importance.

For this complex initiative to be successful, however, would require inter-departmental cooperation – for example, security of the country’s borders by the South African National Defence Force, provision of social welfare services to communities, and the implementation of by-laws. It is not possible to resolve all these multifaceted problems through policing and sentencing alone.

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79 Magobotiti 2009:187.

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