Assessment of the South African parole system (part 1)*

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1 *Introduction*

In a country such as South Africa, which is marred by high levels of especially violent crime,[1] the possibility of the early release of prisoners on parole is understandably a sensitive matter.[2] Attempts to ameliorate crime levels and the negative perceptions associated therewith by toughening bail legislation[3] and introducing minimum sentencing legislation[4] did not have the desired effect.[5] The release on parole of prisoners convicted in high profile criminal trials therefore often capture the headlines in South African newspapers.[6] In several other instances, however, release on parole is denied and it appears from the law reports that a large

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1 The United Nations Office on Drugs and Crime *2013 Global Study on Homicide* (33) reported that South Africa had a murder rate of 31 per 100 000 of the population in 2012. In 2011 the rate was 32 per 100 000, which translated into 15 940 murders and ranked South Africa twelfth in the world on the list of murder rates (see Terblanche "Sentencing in Namibia: the main changes since independence" 2013 *SACJ* 21 38).

2 According to Stats SA *Victims of Crime Survey 2015/16* (58) 58.2% of South African households indicated that prisoners were released on parole too easily. In the Western Cape 78.1% of households held this view.

3 s 60 of the Criminal Procedure Act 51 of 1977; see Kruger *Hiemstra's Criminal Procedure* (2016) 9-9; Du Toit, De Jager, Paizes, Skeen and Van der Merwe *Commentary on the Criminal Procedure Act* (2016) 9-26.

4 s 51 of the Criminal Law Amendment Act 105 of 1997; see Terblanche *A Guide to Sentencing in South Africa* (2016) 49-89.

5 Terblanche (n 4) 90. The measures had no noticeable effect on the crime rate but caused an increase in the numbers of awaiting trial detainees and prisoners serving long-term imprisonment. For a critique on mandatory minimum penalty laws see Tonry *Thinking about Punishment Penal Policy across Space, Time and Discipline* (2009) 303-333.

6 Recent examples of these include Clive Derby-Lewis – convicted of the murder of former South African Communist Party leader Martin Thembisile Hani and sentenced to death on 15 Oct 1993 – the death sentence was commuted to life imprisonment and Derby-Lewis was released on medical parole by order of the high court after serving nearly 22 years of his sentence (*Derby-Lewis v Minister of Correctional Services* 2009 6 SA 205 (GNP), 2009 3 All SA 55 (GNP); *Derby-Lewis v Minister of Justice and Correctional Services* 2015 2 SACR 412 (GP)); Schabir Schaik – convicted of corruption and fraud committed in alleged close association with South African president Jacob Zuma was sentenced to fifteen years' imprisonment and released on medical parole after having served two years and four months (*Sunday Times* (21-02-2016); *S v Shaik* 2008 2 SA 208 (CC)); Jacob Sello Selebi – former national commissioner of the South African police service who was convicted of corruption and sentenced to fifteen years' imprisonment, which was confirmed on appeal by the supreme court of appeal, was released on medical parole having served 219 days of his sentence (*News24* (20-07-2012)); Molemo Jub-Jub Maarohanye – hip hop artist convicted of *inter alia* culpable homicide for causing the death of four children during a high speed vehicle race through a

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number of these decisions are contested in court.[7] This apparent dichotomy in the granting of parole raises inevitable questions pertaining to the structures entrusted with the competency to decide about release on parole and the applicable criteria for release. Parole is an internationally recognised process used to conditionally release offenders before expiry of their imprisonment with the aim of gradually reintegrating them into society.[8] In *S v Jimmale*[9] the constitutional court confirmed that "[p]arole is an acknowledged part of our correctional system. It has proved to be a vital part of reformative treatment for the paroled person who is treated by moral suasion." The process is also of importance to the prison administration as prisoners may more readily co-operate within the institution in order to qualify for early release. Early release of prisoners will obviously also assist in reducing the challenge of overcrowded prison facilities.[10] A credible parole system with processes which are consistently applied will therefore be in the best interest of the community in general[11] and more specifically assist in addressing the challenges experienced by the victims of crime as well as providing legal certainty to prisoners.[12] The aim with

suburb and sentenced to ten years' imprisonment of which two years were conditionally suspended. Maarohanye and his co-accused Tshabalala were released on parole on 5 January 2017 having served just more than four years of their sentence (*TimesLive* (05-01-2017); *S v Maarohanye* 2015 1 SACR 337 (GJ)). In this regard the matter of Marlene Lehnberg – (the so-called scissor murderess) also comes to mind. Lehnberg and a co-accused were initially sentenced to death for murdering her lover's wife but the sentences were substituted with 20 and fifteen years' imprisonment respectively on appeal. Lehnberg was released on parole after serving eight years of her 20-year sentence (*S v Lehnberg* 1975 4 SA 553 (A); Diemont *Brushes with the Law* (1995) 195).

7 For example in the case of the co-accused of Derby-Lewis, Janusz Walus (*Walus v Minister of Correctional Services* ((41828/2015) 2016 ZAGPPHC 103 (10 March 2016)); Ferdinand Barnard (*Barnard v Minister of Justice, Constitutional Development and Correctional Services* (2016 1 SACR 179 (GP)); Nanima "*Barnard v Minister of Justice*: the minister's verdict" 2017 *SA Crime Quarterly* 19).

8 Moses *Parole in South Africa* (2012) 10.

9 2016 2 SACR 691 (CC) par 1.

10 Hargovan "Violence, victimisation and parole" 2015 *SA Crime Quarterly* 55 indicates that "South Africa has one of the highest per capita inmate populations, ranking ninth in the world and the highest in Africa." Also see Peté "The end of the honeymoon: penal discourse and the human rights of prisoners in the aftermath of South Africa's second democratic election" 2016 *Obiter* 487 490-507 for a general discussion on prison overcrowding in South Africa.

11 In view of the negative outcomes to incarceration as a rehabilitation measure it seems that a more holistic approach to sentencing might be needed: see Fattah "Is punishment the appropriate response to gross human rights violations? Is a non-punitive justice system feasible?" in Van der Spuy *et al Restorative Justice: Politics, Policies and Prospects* (2009) 209; Watney "The role of restorative justice in the sentencing of adult offenders convicted of rape" 2015 *TSAR* 844 853; Skelton and Batley "Restorative justice: a contemporary South African review" 2008 *Acta Criminologica* 46; Spies "Substantive equality, restorative justice and the sentencing of rape offenders" 2016 *SACJ* 273 290-291; Manson, Healy, Trotter, Roberts and Ives *Sentencing and Penal Policy in Canada: Cases, Materials and Commentary* (2016) 445-447 and the sources listed there.

12 Van Zyl Smit "Prison law" in Dubber and Hörnle *The Oxford Handbook of Criminal Law* (2014) 988 1002-1003 states as follows with reference to Kelk *Recht voor Geïnstitutionaliseerden* (1983); *Nederlands Detentierecht* (2000): "For Kelk the legal position of prisoners is constituted by elements that are external to the prison and those that are internal to it. External elements are the rules relating to admission of persons to prison and their release from the prison, which potentially may be early and conditional. Internal elements are the substantive rights that prisoners have, the procedural rights to the enforcement of these substantive rights, and the availability of information that enables them to enforce these rights. The external element is largely governed by substantive criminal law (which includes sentencing law) and the law of criminal procedure. The focus should therefore be primarily on the internal element." See Louw *A Mixed Method Research Study on Parole Violations in South Africa* (2013 thesis Unisa) 35-39 for a discussion on the theoretical and philosophical foundations of parole.

this contribution is to have a closer look at the origin and current place of parole in society and to specifically assess the South African parole system with reference to the position in Belgium, England and Wales and Canada and where necessary make recommendations to improve the system.

2 *Background*

2.1 The origin and development of parole

For purposes of this discussion the focus will be placed on the origin and initial development of parole. A comprehensive discussion on the complete historical development of the concept will not be undertaken.[13] Tracing the origin of the concept of parole is challenging. With reference to Abadinsky, Moses indicates that the word "parole" is derived from the French "parole d'honneur" which means "word of honour" and refers to the French custom of releasing prisoners of war on the guarantee or their word of honour that they would refrain from attacking France upon their release.[14]

Witmer indicates that Plato is at times credited for suggesting the concept of parole but points out that the practical implementation of the idea had its start in the Australian penal colonies.[15] It is interesting to note that before Elizabeth I ascended the English throne imprisonment was not a legal punishment and gaols were used for the exclusive detention of awaiting trial detainees, debtors and felons awaiting execution of the death penalty.[16] Common punishments at the time were hanging, pillory,[17] the stocks,[18] flogging, branding and fining.[19] The Elizabethan period[20] however saw an alarming increase in crime. This was attributed to the seizure of monastic lands during the Reformation, which diminished the means of the church to take care of people as well as changing economic conditions leading to unemployment.[21] New forms of punishment were required to address the surging criminal element and by legislation[22] houses of correction and "transportation" were created. Through transportation convicts were given the option of leaving the country in order to avoid hanging. "Leaving the country" had the unfortunate spin-off that despite protestations the American colony became inundated with

[13] See Graser *Parole in South Africa* (1982 thesis UDW) 19-39 for a comprehensive analysis on the historical development of parole.

[14] Moses (n 8) 6. He relies on Abadinsky *Probation and Parole: Theory and Practice* (2006) 206-207. Graser (n 13) 19-20 indicates with reliance on Burkhart "The great parole experiment" in Miller and Montilla *Corrections in the Community: Success in Correctional Reform* (1977) that Spain, France and Germany were already experimenting with conditional release of convicts prior to the advent of formal conditional release.

[15] Witmer "The history, theory and results of parole" 1927 *Journal of Criminal Law and Criminology* 24 (http://www.scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=2047...jclc (16-06-2017)).

[16] Witmer (n 15) 24. Gardner and Anderson *Criminal Law* (2015) 213 indicate that imprisonment was illegal as punishment during the early Roman law and only used for detention.

[17] A wooden framework with holes for the head and hands in which offenders were locked and exposed for public abuse (*Oxford Dictionary & Thesaurus* (2007)).

[18] A wooden structure with holes for a person's feet and hands in which criminals were locked as a public punishment (*Oxford Dictionary & Thesaurus* (2007)).

[19] Witmer (n 15) 24.

[20] Elizabeth I ruled from 1558 to 1603.

[21] Witmer (n 15) 25.

[22] The Act of 1576.

undesirable criminals from England. The American Revolution[23] put an end to this convenient export market and the subsequent discovery of New South Wales came as a welcome relief to the English, who were by then inundated with an oversupply of convicts in local jails.[24]

Transportation of convicts continued until an 1838 report highlighted the abuses of the system. As a result the transfer of convicts to New South Wales was terminated and Van Diemen's Land (Tasmania) was identified as the new reception point with the aim of developing a new approach, referred to as the probation system, to deal with the convicts. According to Witmer this seems to be the first official recognition that England gave to the concept of parole.[25] The probation system did not have a uniform set of rules and was applied with varying degrees of success in different parts of the penal colony. The most successful approach entailed the application of the mark system. Marks were in principle allocated for good behaviour and deducted for misconduct. Marks could be used to buy food and be saved up for earlier release. This system had three core principles: it involved a labour sentence instead of a time served sentence, convicts had an interest in each other's good conduct and thus developed social responsibility and it prepared the convicts for return to society by gradually relaxing the restraints applicable to them.[26] The system further entailed that the sentence was divided into three stages: during the first stage work was carried out under strict supervision and discipline. During the second stage the convicts grouped themselves into units of six and worked together. Stage three saw the convicts still working for marks but free to have their own huts and gardens and raising their own animals.[27] This stage involved the convict's conditional release on a ticket-of-leave.[28]

The probation system eventually failed mainly due to the number of convicts that poured into the colony and an insufficient supply of employment to the newly created pass-holders, ticket-of-leave men and discharged prisoners.[29] Despite its failure in the colonies it is argued that the practice of mark allocation and the ticket-of-leave principle form the basis of the present-day parole system.[30]

The transportation system came to an end in 1852 with the refusal by the colonies to receive any more convicts. Having now to deal with its own convicts,

[23] 1765-1783; Graser (n 13) 24.

[24] Witmer (n 15) 25-26. Captain James Cook mapped the New South Wales coast of Australia in 1770 and the first fleet of English convicts arrived in 1788 to establish a penal colony at Sydney; Graser (n 13) 25.

[25] Witmer (n 15) 26.

[26] Witmer (n 15) 28; Graser (n 13) 27.

[27] Witmer (n 15) 28-29.

[28] Moses (n 8) 6.

[29] Witmer (n 15) 29 quotes Clay *Our Convict Systems* (1862) 17 describing the desperate situation: "the pass-holders and the ticket-of-leave men became the terror of the community. Yet into this unhappy colony fresh convicts were poured, during the next three years, at the rate of three thousand a year. The Home Government was kept in ignorance of the worst of the evils they were creating. The commercial embarrassments which had befallen the colony almost destroyed the demand for labor; the free emigrants were flocking to the neighboring continent; and the pass and ticket-of-leave men, unable to find employment, were thrown back on the government, which, at one time, with an empty exchequer, had to support more than 12,000 criminals. In fine, the inundation of criminals had well-nigh swamped the colonial administration ... At many of the stations convicts of every grade and character – ticket-holders, pass-holders, and gang-men – were huddled together in promiscuous confusion. Many of the officers in charge were debauched rogues, who aided and abetted the villanies of the prisoners..."

[30] Witmer (n 15) 31.

England promulgated the Penal Servitude Act,[31] which entailed a period of separate confinement and non-intercourse, a period of labour and a conditional discharge on a ticket-of-leave. The crown reserved the right to revoke the licence (as the ticket-of-leave was officially referred to) if the person "associated with notoriously bad characters, led an idle or dissolute life, or had no visible means of livelihood".[32] The absence of any form of supervision however meant that the system was ineffective.[33]

Having traced the origin and development of the system of parole it is apt to now consider its place in the legal system.

2.2 Prison law

Parole forms part of the specialised body of law referred to as prison law. In order to facilitate a better understanding of parole a brief overview of this body of law will be undertaken. Before a definition is ventured it is apt to note that the development and fairly recent emergence of prison law has been described as "somewhat chaotic".[34]

2.2.1 Towards a definition of prison law

Prison law is perhaps best described as that area of the law aimed at both regulating the powers of the state in establishing and governing institutions for sentenced offenders and defining the rights of prisoners vis-à-vis prison authorities.[35] When interpreting the definition a liberal interpretation would be required so as to include matters related to the release of a prisoner on parole or correctional supervision. In terms of German criminal law doctrine, matters pertaining to the implementation of sentences of imprisonment (*Strafvollzugsrecht*) are incorporated as part of the wider criminal law.[36] Prison law may as such be seen as part of the criminal law[37] interfacing with other legal fields that impact on prison law such as constitutional law, administrative law[38] and the law of criminal procedure. The common law jurisdictions have a less formal approach in this regard and although prison law is recognised in some jurisdictions (*eg* in the United States as the law of corrections) the more popular approach seems to apply the different branches of

31 Penal Servitude Act of 1853.

32 Witmer (n 15) 35.

33 It appears that a similar system was applied in Ireland during the same period but with much greater success, mainly due to the fact that the Irish used an effective method of police supervision of the convicts after release. See Witmer (n 15) 35-42; Graser (n 13) 32-33.

34 Van Zyl Smit (n 12) 1008.

35 Van Zyl Smit (n 12) 989.

36 Van Zyl Smit (n 12) 988. He comments as follows on Günther *et al Strafvollzug: ein Lehrbuch* (2002) and the German argument that prison law should be considered as a separate but integral part of the criminal law: "In order to explain this, they have developed theories that describe criminal law as consisting of various stages or steps, each with their own primary purpose. Thus the legislative threat of punishment for prohibited acts serves the function of general prevention; the sentence of the court is primarily based on the principles of retribution; and the purpose of the execution of the (prison) sentence is individual prevention, to be achieved, as the *Sozialstaat* requires, by offering the prisoner the opportunity of resocialisation. These purposes are not exclusive but complimentary; ideally working together to provide a coherent system while allowing the component parts to develop in relative autonomy" (1003-1004).

37 Van Zyl Smit (n 12) 988.

38 Van Zyl Smit (n 12) 1003 comments thus on opinions in the United States and Germany that to a large extent prison law is a form of applied administrative law: "What this means is that doctrines of procedural fairness and reasonableness as developed by the common law, and the key administrative principle in civilian systems that all administrative actions must be proportionate, should govern decision-making by prison authorities as well."

the law (constitutional law, criminal law and administrative law) to the situation as it presents itself.[39] Van Zyl Smit indicates that regardless of the definition attached to prison law, the aim with the development of the concept requires recognition that a body of law is needed to regulate the powers of the state in establishing and governing detention centres for sentenced offenders as well as defining the rights of prisoners in relation to prison authorities.[40]

2.2.2 The impact of international human rights developments on prison law

A brief overview (with specific emphasis on parole) will be provided of some of the seminal international human rights developments which impacted on the current appreciation and application of prison law.[41] The Universal Declaration of Human Rights of 1948, with its recognition of human dignity and prohibition of torture and cruel, inhuman or degrading treatment or punishment, is one of several post-World War II international instruments impacting on imprisonment.[42] This approach was continued on regional level in the 1950 European Convention on Human Rights,[43] the 1969 American Convention on Human Rights[44] and the 1981 African Charter on Human and People's Rights[45] further cascading provisions on treatment and punishment.[46]

The 1955 United Nations Standard Minimum Rules for the Treatment of Prisoners (United Nations Rules)[47] contains the following guiding principles pertaining to the treatment of prisoners under sentence:

> "58 The purpose and justification of a sentence of imprisonment or a similar measure deprivative of liberty is ultimately to protect society against crime. This end can only be achieved if the period of imprisonment is used to ensure, so far as possible, that upon his return to society the offender is not only willing but able to lead a law-abiding and self-supporting life.
>
> 59 To this end, the institution should utilise all the remedial, educational, moral, spiritual and other forces and forms of assistance which are appropriate and available, and should seek to apply them according to the individual treatment needs of the prisoners.
>
> 60(1) The regime of the institution should seek to minimise any differences between prison life and life at liberty which tend to lessen the responsibility of the prisoners or the respect due to their dignity as human beings.
>
> (2) Before the completion of the sentence, it is desirable that the necessary steps be taken to ensure for the prisoner a gradual return to life in society. This aim may be achieved, depending on the case, by a pre-release regime organised in the same institution or in another appropriate institution, or by release on trial under some kind of supervision which must not be entrusted to the police but should be combined with effective social aid.

[39] Van Zyl Smit (n 12) 988.

[40] Van Zyl Smit (n 12) 989.

[41] Van Zyl Smit (n 12) 988-1011 provides a comprehensive account of the historical development of and current challenges faced by prison law.

[42] Van Zyl Smit (n 12) 993; Rautenbach *Rautenbach-Malherbe Staatsreg* (2012) 256; Mubangizi *The Protection of Human Rights in South Africa* (2013) 15-16; Ackermann *Human Dignity: Lodestar for Equality in South Africa* (2012) 8-9; Chirwa *Human Rights under the Malawian Constitution* (2011) 121; Clayton & Tomlinson *Fair Trial Rights* (2010) 2-3.

[43] a 3.

[44] a 5.

[45] a 5.

[46] Van Zyl Smit (n 12) 993.

[47] Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Geneva in 1955 and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

61 The treatment of prisoners should emphasise not their exclusion from the community, but their continuing part in it. Community agencies should, therefore, be enlisted wherever possible to assist the staff of the institution in the task of social rehabilitation of the prisoners. There should be in connection with every institution social workers charged with the duty of maintaining and improving all desirable relations of a prisoner with his family and with valuable social agencies. Steps should be taken to safeguard, to the maximum extent compatible with the law and the sentence, the rights relating to civil interests, social security rights and other social benefits of prisoners."

A significant development followed in the 1966 International Covenant on Civil and Political Rights (International Covenant),[48] which goes further than the standard provision of requiring that "(n)o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"[49] in setting the following clear requirements pertaining to prison conditions:

"10(1) All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
(2)(a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;
(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.
(3) The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status."

Although the United Nations Rules is not a binding treaty, the human rights committee, which is responsible for interpreting the International Covenant, has relied on the United Nations Rules in evaluating reports from individual countries on compliance with the International Covenant.[50]

Pertaining specifically to Europe the Council of Europe adopted the European Prison Rules[51] of which *inter alia* the following are applicable to sentenced prisoners:

"107.1 Sentenced prisoners shall be assisted in good time prior to release by procedures and special programmes enabling them to make the transition from life in prison to a law-abiding life in the community.
107.2 In the case of those prisoners with longer sentences in particular, steps shall be taken to ensure a gradual return to life in free society,
107.3 This aim may be achieved by a pre-release programme in prison or by partial or conditional release under supervision combined with effective social support.
107.4 Prison authorities shall work closely with services and agencies that supervise and assist released prisoners to enable all sentenced prisoners to re-establish themselves in the community, in particular with regard to family life and employment.
107.5 Representatives of such social services or agencies shall be afforded all necessary access to the prison and to prisoners to allow them to assist with preparations for release and the planning of after-care programmes."

[48] Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 Dec 1966, entry into force 23 March 1976. South Africa signed and ratified the International Covenant and it entered into force on 10 March 1999.
[49] a 7.
[50] Van Zyl Smit (n 12) 995.
[51] Adopted by the committee of ministers on 11 Jan 2006 at the 952nd meeting of the ministers' deputies.

Van Zyl Smit[52] indicates that although the European Prison Rules is not a binding treaty the European court of human rights (ECtHR) has referred to it on various occasions in matters of principle and in order to provide specific instructions on the interpretation of the European Convention on Human Rights (ECHR).[53] As a regional instrument the European Prison Rules plays an important role in the reform of national prison law.[54]

Several other international human rights developments applicable to prison law are not referred to in this discussion as they are not strictly speaking relevant to a discussion on parole.[55] As several developments on national level in various countries are also of importance in the development of prison law the focus will now shift to individual countries.

2.2.3 National human rights developments impacting on prison law

On national level legislative intervention as well as case law made a considerable contribution to prison law. The following are noteworthy:

(a) Germany

The German federal constitutional court ruled in 1972 that the rights of sentenced prisoners could be limited only by an act of parliament and not by an administrative law doctrine. In this regard the court indicated that the statutory limitation of these rights would be acceptable only in order to serve an essential purpose and if it was compatible with the values of the German constitution and the good of the community.[56]

Of specific interest for the purposes of parole, the federal constitutional court ruled in the *Lebach* case that prisoners had a right to be afforded the chance of resocialisation:[57]

> "From the point of view of the offender, this interest in resocialization develops out of his constitutional rights in terms of Article 2(1) in conjunction with Article 1 of the Basic Law [i.e. the right to develop one's personality freely in conjunction with the protection of human dignity]. Viewed from the perspective of the community, the constitutional principle of the *Sozialstaat* requires public care and assistance for those groups in the community who, because of personal weakness or fault, incapacity or social disadvantage were retarded in their social development: prisoners and ex-prisoners also belong to this group."[58]

The federal constitutional court indicated that lower courts should consider international human rights standards when considering the question whether disproportionally cumbersome restrictions were imposed on awaiting trial detainees who had to remain in their cells 23 hours a day. The court referred in this regard to the European Prison Rules, the standards established by the Committee for the Prevention of Torture as well as the Council of Europe Recommendation on Remand

[52] (n 12) 995.
[53] The ECHR is binding on all European states with the exception of Belarus.
[54] Van Zyl Smit (n 12) 995-996.
[55] See Van Zyl Smit (n 12) 996-997 for a discussion on those developments.
[56] Van Zyl Smit (n 12) 997; *BVerfG* (14-03-1972).
[57] *BVerfG* (05-06-1973). See Morgenstern "Judicial rehabilitation in Germany – the use of criminal records and the removal of recorded convictions" 2011 *European Journal of Probation* 20 21-23 (http://www.ejprob.ro/index.pl/judicial_rehabilitatopn-in-germany (31-07-2017)) for a discussion on the question of re-socialisation as a right of the offender.
[58] Translation by Van Zyl Smit (n 12) 998.

Detention.[59] The constitutional court also suggested that if an amendment to prison legislation is considered it should be done within the context of the human rights culture as developed by the relevant organs of the United Nations and the Council of Europe.[60]

(b) United States of America

Prisoners' rights litigation in the United States coincided with the civil rights movement of the 1960s and the opportunity provided by the Civil Rights Act of 1964 to challenge state laws inclusive of prison legislation in federal courts.[61] With reliance on the important ruling by the United States supreme court that "[t]here is no iron curtain drawn between the Constitution and the prisons of this country",[62] prisoners litigated on various constitutional issues and thus contributed to a collection of case law on American prison law.[63] This development was however somewhat curtailed with the 1996 Prison Litigation Reform Act, which attempted to make it more difficult for prisoners to request federal courts to protect their constitutional rights. The act *inter alia* provides for courts to grant the least intrusive relief to correct the violation of a federal right.[64]

(c) Canada

The Canadian Charter of Rights, which contains a bill of rights entrenched in the Constitution of Canada,[65] served as catalyst for the adoption of new prison legislation in the form of the Corrections and Conditional Release Act.[66] It brought about important amendments on the previous position, as it replaced the remission-based release on mandatory supervision with statutory release after two thirds of a sentence is served.[67]

(d) United Kingdom

The ECtHR has held that various United Kingdom prison practices were in conflict with the ECHR.[68] In order to comply with these decisions several amendments were effected to rules applicable to United Kingdom prisons. Subsequent to the incorporation of the ECHR into the domestic law of the United Kingdom, ECtHR case law and various European human rights instruments had been used to develop the national prison law.[69]

[59] *BVerfG* (17-11-2012); Van Zyl Smit (n 12) 1001.

[60] *BVerfG* (31-05-2006) translation by Van Zyl Smit (n 12) 1000. See Kleinfeld "Two cultures of punishment" 2016 *Stanford Law Review* 933-1036 for a comprehensive comparative analysis of criminal punishment in the United States of America and Europe with emphasis on the German model.

[61] Van Zyl Smit (n 12) 998.

[62] *Wolff v McDonnell* 418 US 539 (1974).

[63] Van Zyl Smit (n 12) 998-999. For a discussion on the US supreme court decision in *Miller v Alabama* (132 US 2455 (2012)) see Barrie "Mandatory life sentence without parole for juveniles declared unconstitutional by supreme court of United States of America – effect retroactive or prospective?" 2016 *TSAR* 377.

[64] Van Zyl Smit (n 12) 1000.

[65] Constitution Act, 1982.

[66] SC 1992, c 20.

[67] Manson, Healy, Trotter, Roberts and Ives (n 11) 929.

[68] *Inter alia* in respect of access to lawyers and correspondence with lawyers, family and friends. See Van Zyl Smit (n 12) 1001.

[69] Van Zyl Smit (n 12) 1001.

3 *The South African parole system*

The origins of parole referred to as well as the general trends identified in the international development of prison law provide a suitable background to reflect on the South African parole system. In the overview of the South African parole system consideration will be given to the legislative framework, the applicable administrative process when parole is considered and recent case law pertaining to release on parole.

3.1 The legislative framework

The two types of community corrections that form part of the South African penal system, namely parole and correctional supervision are regulated by the previous Correctional Services Act[70] (the 1959 act), the current Correctional Services Act[71] (the 1998 act) and the Criminal Procedure Act.[72] The aim[73] of the 1998 act is clearly directed at giving effect to those provisions of the Constitution of the Republic of South Africa, 1996 that relate to detainees.[74] It is submitted that especially the following constitutional provisions are relevant in respect of parole:[75]

> "12 Freedom and security of the person
>
> (1) Everyone has the right to freedom and security of the person, which includes the right-
>
> (a) Not to be deprived of freedom arbitrarily or without just cause;
>
> (b) Not to be treated or punished in a cruel, inhuman or degrading way.[76]
>
> 33 Just administrative action
>
> (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

[70] Act 8 of 1959. This act was originally known as the Prisons Act 8 of 1959 but the title was amended in s 33 (1) of Act 122 of 1991. The act was preceded by the Prisons and Reformatories Act 13 of 1911.

[71] Act 111 of 1998. S 136 of the act contains a transitional arrangement and provides that any person serving a sentence of incarceration immediately before the commencement of the 1998 act on 1 October 2004 is subject to the provisions of the 1959 act relating to his placement under community correction and such release and placement by the correctional supervision and parole board has to be considered in terms of the policy and guidelines applied by the former parole boards prior to the commencement of the 1998 act.

[72] Act 51 of 1977.

[73] The introduction to the 1998 act reads as follows: "Preamble: With the object of changing the law governing the correctional system and giving effect to the Bill of Rights in the Constitution,1996, and in particular its provisions with regard to inmates; Recognising international principles on correctional matters; Regulating the release of inmates and the system of community corrections; in general, the activities of the Department of Correctional Services; and Providing for independent mechanisms to investigate and scrutinise the activities of the Department of Correctional Services." The international principles referred to are contained in the regional and international instruments applicable to South Africa and include the UN Convention on Civil and Political Rights, UN Convention against Cruel, Inhuman and Degrading Treatment and Punishment and the African Charter on Human and People's Rights (see Hoctor "Execution and extinction of sentence" in Verbruggen, Franssen, Blanpain and Hendrickx *IEL Criminal Law* (2012) 246).

[74] Detainees include persons in custody awaiting trial as well as sentenced prisoners.

[75] The department of correctional services states as follows: "The Interim Constitution of the country, introduced in 1993, embodied the fundamental rights of the country's citizens, including that of offenders. This resulted in the introduction of a human rights culture into the correctional system in South Africa, and the strategic direction of the Department was to ensure that incarceration entailed safe and secure custody under humane conditions" (*History of Transformation of the Correctional System in South Africa* 1 (http://www.dcs.gov.za/AboutUs/history.aspx (22-06-2017)).

[76] In *S v Makwanyane* 1995 3 SA 391 (CC) par 146 the constitutional court found that the death penalty *inter alia* infringes the right not to be subjected to cruel, inhuman or degrading treatment or punishment as protected in s 11(2) of the Constitution of the Republic of South Africa Act 200 of 1993 (the interim constitution) and found s 277(1)*(a), (c)-(f)* of the Criminal Procedure Act inconsistent with the interim constitution and invalid.

35 Arrested, detained and accused persons
(2) Everyone who is detained, including every sentenced prisoner, has the right-
(e) to conditions of detention that are consistent with human dignity, ..."

The South African department of correctional services departs from the premise that the primary purpose of the correctional system is to contribute to a just, peaceful and safe society by enforcing sentences of the courts in the manner described in the 1998 act, detaining prisoners in safe custody whilst ensuring their human dignity and promoting the social responsibility and human development of sentenced offenders.[77] A further two important aspects define the approach of the department, namely that a sentence remains valid until it expires and that a sentence of imprisonment does not necessarily have to be served in full in a correctional centre but that it might be served in the community under supervision of officials of the department. The objectives of community corrections are stated as follows in the 1998 act:

"50 Objectives of community corrections
(1)(*a*) The objectives of community corrections are –
(i) to afford sentenced offenders an opportunity to serve their sentences in a non-custodial manner;
(ii) to enable persons subject to community corrections to lead a socially responsible and crime-free life during the period of their sentence and in future;
(iii) to enable persons subject to community corrections to be rehabilitated in a manner that best keeps them as an integral part of society; and
(iv) to enable persons subject to community corrections to be fully integrated into society when they have completed their sentences."

South African courts have taken the clear position that although tension may arise between the judiciary and the executive branch of government as to the minimum sentence to be served, trial courts are not at liberty to interfere with the executive and prescribe to parole boards as to how and what period of a sentence should be served.[78]

3.1.1 The Criminal Procedure Act

It is necessary to draw a clear distinction at this stage between the two forms of community corrections, namely parole and correctional supervision. Community corrections are defined[79] as "all non-custodial measures and forms of supervision applicable to persons who are subject to such measures and supervision in the community and who are under the control of the department".[80] Whilst placement

[77] s 2 of the 1998 act.
[78] See *S v Mhlakaza* 1997 1 SACR 515 (SCA) par 18; *S v Matlala* 2003 1 SACR 80 (SCA) par 7; *S v Motloung* 2016 2 SACR 243 (SCA) par 14-16. This is obviously not applicable to the power of a court to set a non-parole period in terms of s 276B of the Criminal Procedure Act (see n 99).
[79] In s 1 of the 1998 act.
[80] Referring to the department of correctional services.

on parole[81] during the course of a sentence of imprisonment is done in terms of the Correctional Services Act, correctional supervision[82] on the other hand is a community-based sentencing option which might be imposed by a court in terms of the Criminal Procedure Act.[83] The department of correctional services indicates that there is no real difference between the way in which parole placement and correctional supervision functions and in both instances the placement conditions might be similar.[84]

The Criminal Procedure Act provides for the following sentencing options:

> "Nature of punishments
> 276(1) Subject to the provisions of this Act and any other law and of the common law, the following sentences may be passed upon a person convicted of an offence, namely-
> (a) ...
> (b) imprisonment, including imprisonment for life or imprisonment for an indefinite period as referred to in section 286B(1);
> (c) periodical imprisonment;
> (d) declaration as an habitual criminal;
> (e) committal to any institution established by law;
> (f) a fine;
> (g) ...
> (h) correctional supervision;
> (i) imprisonment from which such a person may be placed under correctional supervision in the discretion of the Commissioner or a parole board."

The following four types of correctional supervision are identifiable:

(a) Section 276(1)*(h)*

In terms of this provision a person is sentenced directly to correctional supervision and does not enter prison at all. A sentence in terms of this section shall only be imposed after submission to the court of a report by a probation officer or a correctional official and for a fixed period not exceeding three years or in the case

[81] Parole is defined in s 1 of the 1998 act as "... a form of community corrections contemplated in Chapter VI" of the act. S 52(1) of the 1998 act stipulates that when community corrections (parole or correctional supervision) are ordered a court, the parole board, the national commissioner or other body which has the statutory authority to do so may subject to the applicable limitations and qualifications stipulate that the person concerned is placed under house detention; does community service; seeks employment; remains employed; pays compensation or damages to the complainant; participates in victim and offender mediation; is restricted to one or more magisterial districts; lives at a fixed address; refrains from using or abusing alcohol or drugs; refrains from committing a criminal offence; refrains from visiting a particular place; refrains from contacting and or threatening a particular person; and is subject to monitoring.

[82] For a discussion on correctional supervision as sentencing option see *S v R* 1993 1 SACR 209 (A); Terblanche (n 4) 317-347; Kruger (n 3) 28-33 – 28-38; Du Toit, De Jager, Paizes, Skeen and Van der Merwe (n 3) 28-10G – 28-10T. See n 81 for the conditions that may be imposed.

[83] S 1 of the Criminal Procedure Act defines correctional supervision as a community-based sentence to which a person is subject in terms of chapters V and VI of the 1998 act and the regulations made under that act and lists the provisions authorising such a sentence.

[84] "Placement on parole and correctional supervision: how the process affects the offender" 3 http://www.dcs.gov.za/docs/landing/Parole%20public%20pamphlet%202012%20Eng.pdf (24-06-2017). In terms of s 52(1) of the 1998 act a court may impose any of the conditions listed in n 81.

of a conviction for any offence referred to in the Criminal Law (Sexual Offences and Related Matters) Amendment Act[85] for a fixed period not exceeding five years.[86]

(b) Section 276(1)*(i)*

A person sentenced to imprisonment in terms of this provision may be placed under correctional supervision in the discretion of the commissioner of correctional services or a parole board. It is required that a person must have served at least one sixth of his sentence before being considered for placement under correctional supervision, unless the court has directed otherwise.[87] A person will be sentenced to imprisonment in terms of this section only if the court is of the opinion that the offence justifies the imposing of imprisonment, with or without the option of a fine, for a period not exceeding five years and for a fixed period not exceeding five years.[88]

(c) Section 276A(3)*(a)*

This provision is applicable to a person who has been sentenced by a court to imprisonment not exceeding five years or where the period of imprisonment exceeds five years but his date of release is not more than five years in the future. In such an instance the commissioner or a parole board may, if he or it is of the opinion that the prisoner is fit to be subjected to correctional supervision, have the prisoner appear before the sentencing court in order to reconsider sentence. It is required that the prisoner must serve at least a quarter of the effective sentence before an application is made for conversion of the sentence to correctional supervision.[89]

(d) Section 287(4)*(a)*

Unless otherwise directed by the sentencing court which has imposed a sentence in terms of section 287(4)*(a)* of imprisonment of five years or less with the option of a fine the commissioner or a parole board may, at his or its discretion at the commencement of the imprisonment or at any stage thereafter, (i) act as if the prisoner was sentenced as referred to in section 276(1)*(i)*; or (ii) where the period of imprisonment as alternative to a fine exceeds five years and the prisoner has

[85] Act 32 of 2007.

[86] S 276A(1)*(a)* and *(b)* of the Criminal Procedure Act; see Du Toit, De Jager, Paizes, Skeen and Van der Merwe (n 3) 28-10D.

[87] s 73(7)*(a)* of the 1998 act.

[88] s 276A(2)*(a)* and *(b)* of the Criminal Procedure Act. The period of imprisonment may therefore be less than five years but it may not exceed five years; see Du Toit, De Jager, Paizes, Skeen and Van der Merwe (n 3) 28-10M; Terblanche (n 4) 285-287.

[89] s 73(7)*(e)* of the 1998 act. Terblanche (n 4) 262-267. When a court reconsiders sentence in terms of this section it has the same powers as a sentencing court after conviction. The court may confirm the sentence of the court *a quo*, convert the sentence as requested or impose any other proper sentence provided that the last-mentioned sentence, if imprisonment, shall not exceed the period of imprisonment that still has to be served by the prisoner (s 276A(3)*(e)*).

completed at least a quarter of the sentence apply in terms of section 276A(3) for the sentence to be converted to correctional supervision.[90]

Section 276A(4)*(a)* provides that a court which has imposed a punishment in terms of section 276(1)*(h)* or *(i)* on a person or has converted his sentence under section 276A(3) may at any stage, if it is found from a motivated recommendation by a probation officer, the commissioner or the parole board that the person is not fit to be subject to correctional supervision or to serve the imposed punishment, reconsider that punishment and impose any other proper punishment.

3.1.2 The Correctional Services Act (1959 and 1998)

The provisions of both the 1959 and 1998 Correctional Services Acts are relevant, as any person who was serving a sentence of imprisonment immediately before the commencement of the 1998 act on 1 October 2004 is subject to the provisions of the 1959 act relating to his placement on parole.[91]

(a) The 1959 act

When the release on parole of an offender serving a determinate sentence and subject to the provisions of the 1959 act is considered the offender has to be allocated the maximum amount of credits in terms of the said act.[92] The practical implication of the credit system, which is no longer applied in terms of the 1998 act, is that a prisoner who is allocated the maximum amount of credits whilst serving a life sentence will be considered for parole after serving thirteen years and four months, a habitual offender after serving seven years and those prisoners serving determinate sentences after serving one third of the sentence.[93]

[90] s 73(7)*(b)* and *(c)* of the 1998 act. Terblanche (n 4) 309 states that this measure provides for the release of prisoners almost immediately on entering prison. It is however submitted that the provision is clear in as far as it requires that at least one sixth of a sentence less than five years or a quarter of the sentence that exceeds five years be served. The question arises whether an offender sentenced to the payment of a fine alternatively to a period of imprisonment and who elects to rather pay the fine, will be refunded part of the fine after expiry of a certain period because of his good behaviour, similar to the offender who elected to serve the imprisonment and who is released on parole. There is no statutory provision that the offender who pays a fine in lieu of undergoing the alternative sentence of imprisonment will be repaid part of the fine. The reason for this apparent discrepancy is probably to be found in the fact that a release on parole is conditional and at times fairly restrictive of the offender's freedom of movement. Any breach of the conditions will result in the cancellation of parole and a return to incarceration for the full period of the original sentence. The offender who elected to pay the fine, on the other hand, is released without condition. For the benefit of unconditional release the fine is payable in full and non-refundable.

[91] s 136 of the 1998 act. Hargovan (n 10) 55 56 describes the South African parole regime as complex and confusing due to several amendments over the years.

[92] s 136(2) of the 1998 act. See Lidovho "A critical look at the past and current release policy of the department of correctional services" 2003 *SACJ* 163-172 for a discussion on the release policy applicable in respect of the 1959 act; *Van Vuren v Minister of Correctional Services* 2012 1 SACR 103 (CC) par 56 and 66; *Van Wyk v Minister of Correctional Services* 2012 1 SACR 159 (GNP) par 26-27.

[93] "Placement on parole and correctional supervision" (n 84) 5. Pertaining to the application of the 1959 act see Rabie and Strauss *Punishment An Introduction to Principles* (1981) 162-163 and Du Toit *Straf in Suid-Afrika* (1981) 276-280. It appears from information provided by the minister of justice and correctional services on 29 June 2017 that there are still 93 offenders serving life sentences who are subject to the 1959 act (http://www.dcs.gov.za/docs/2017%20doc/Minister%20Masutha%20updates%20nation%20on%20key%20developments%20in%20DCS.pdf (17-07-2017)).

(b) The 1998 act

Release from a correctional centre for placement under correctional supervision or parole is regulated by chapter VII of the 1998 act. The act stipulates that a sentenced offender remains in a correctional centre for the full period of sentence and if sentenced to life imprisonment, for the rest of his life.[94] This provision is subject to section 73(4), which provides for the placement of a sentenced offender under correctional supervision, day parole or parole before the expiration of his term of imprisonment. Such placement takes place on a date determined by the correctional supervision and parole board,[95] or in the case of an offender sentenced to life imprisonment, on a date determined by the minister of correctional services and is subject to the provisions of chapter VI of the act and such offender accepting the conditions of placement.[96] Terblanche correctly points out that a prisoner has no right to be released on parole but only a right to have the release considered by the department.[97]

A prisoner who serves a determinate sentence[98] or cumulative sentences of more than 24 months may not be placed on parole unless the prisoner has served the stipulated non-parole period,[99] or if no non-parole period was set, half of the

[94] s 73 of the 1998 act. The inference from this provision is clear that early release on parole is a privilege and not a right. See Mujuzi "Unpacking the law and practice relating to parole in South Africa" 2011 *PELJ* 205 207-208 and the authorities referred to in support of this statement. Moses "Parole: is it a right or a privilege?" 2003 *SAJHR* 263 277 concludes as follows: "A sentenced prisoner whose term of imprisonment has not yet expired, has a right to be assessed and considered for parole in terms of the relevant provisions ... Such a prisoner also has the right and legitimate expectation to be assessed and considered for parole in a fair manner. That assessment and consideration must not only be procedurally fair, but must also be fair and justifiable in terms of the decision whether or not to release such prisoner on parole. In the circumstances, the sentenced prisoner also has the right and legitimate expectation that the decision, in terms of its substance and merits, be fair, lawful and constitutional, since the decision in itself constitutes an administrative action. If, after such assessment and consideration, the prisoner is found to be eligible for parole, in accordance with the 'norm' and 'general practice', he or she has an enforceable right in the form of a legitimate expectation to be released on parole."

[95] The creation of correctional supervision and parole boards is regulated by s 74 of the 1998 act.

[96] s 73(5) of the 1998 act.

[97] Terblanche (n 4) 475. Decisions by the department not to grant release on parole are subject to review by the high court. The court remarked as follows in *Kelly v Minister of Correctional Services* 2016 2 SACR 351 (GJ) par 56: "The applicant is a convicted murderer who is serving a sentence of life imprisonment imposed by the High Court. He is not entitled as of right to be released on parole. The only right which he has is the right to a fair hearing which involves a fair process resulting in decisions based upon considerations which do not offend against the administration of justice and which do not furnish grounds as provided for in PAJA."

[98] A determinate sentence is a sentence of imprisonment in respect of which a court has determined the maximum period of incarceration. See Terblanche (n 4) 478.

[99] S 276B of the Criminal Procedure Act provides that if a court sentences a person to imprisonment for a period of two years or longer the court may fix a period during which a person shall not be placed on parole. This period is referred to as the non-parole period and may not exceed two thirds of the term of imprisonment or 25 years, whichever is the shorter period. See Kruger (n 3) 28-38. In *S v Klassen* 2017 JDR 0934 (SCA) the supreme court of appeal followed the guidance provided by the constitutional court in the *Jimmale* case (n 9) that "[c]ourts should generally allow the parole board and the officials in the Department of Correctional Services, who are guided by the Correctional Services Act, and the attendant regulations, to make parole assessments and decisions" (par 20) and adopted a cautious approach in the application of section 276B. The court in the *Klassen* case reaffirmed that "[t]he grant of parole is something best left to the executive and those officials charged with the duty of considering and deciding upon parole ... Consequently, the power of a trial court to act under s 276B should be sparingly exercised, and then only after holding an inquiry as to the desirability of such an order and hearing argument on the issue" (par 11). Also see the authorities referred to in n 78.

sentence. Parole must however be considered whenever a prisoner has served 25 years of a sentence or cumulative sentences.[100]

A prisoner who is serving a determinate sentence or cumulative sentences of 24 months or less, may not be placed on parole until the prisoner has served either the non-parole period or if no non-parole period was stipulated, a quarter of the sentence.[101]

The above sections 76(6)*(a)* and *(aA)* are subject to section 76(6)*(b)*(iv), which stipulates that a prisoner who was sentenced to life imprisonment may not be placed on parole until he has served at least 25 years of the sentence, and 76(6)*(b)*(vi), which stipulates that a person that was sentenced to any term of imprisonment may be placed on parole on reaching the age of 65 years provided that he has served at least fifteen years of the sentence. This provision is not applicable to a person who has been declared a dangerous criminal in terms of section 286A of the Criminal Procedure Act.[102] A person who has been declared a dangerous criminal must be referred back to the court within seven days after the period determined by the court or 25 years, whichever is the shortest.[103]

A person who has been declared a habitual criminal may be detained in a correctional centre for a period of fifteen years and may not be placed on parole until after a period of seven years.[104] The act previously stipulated that a person sentenced to a minimum sentence as envisaged in sections 51 and 52 of the Criminal Law Amendment Act may not be placed on parole unless he had served a minimum of four fifths of the imprisonment or 25 years, whichever is the shortest period.[105]

3.2 The administrative process

The department of correctional services adopted a process in terms of which a prisoner need not apply for parole. Six months prior to the prisoner completing the

[100] s 73(6)*(a)* of the 1998 act.

[101] s 76(6)*(aA)* of the 1998 act.

[102] S 286A of the Criminal Procedure Act prescribes the applicable procedure for a superior or regional court, who is satisfied that a person convicted of an offence represents a danger to the physical or mental well-being of other persons and that the community should be protected against him, to declare such a person as a dangerous criminal. In terms of s 286B a court which declared a person a dangerous criminal shall sentence such person to undergo imprisonment for an indefinite period and direct that such person be brought before the court on the expiration of a period determined by the court. When the prisoner is again brought before the court as aforesaid the court shall reconsider the sentence. When reconsidering the sentence the court shall consider a report from a parole board. The court that reconsiders the sentence may confirm the sentence of indefinite imprisonment and again set a date for the prisoner to appear before the court or convert the sentence into correctional supervision or release the prisoner unconditionally or on such conditions as it may deem fit. See Kruger (n 3) 28-51.

[103] s 73(6)*(d)* of the 1998 act.

[104] s 76(6)*(c)* of the 1998 act. In *Niemand v S* 2002 3 BCLR 219 (CC) par 34 the constitutional court declared s 65(4)(b)*(iv)* of the 1959 act read with s 286 of the Criminal Procedure Act inconsistent with s 12(1)*(e)* of the constitution in as far as it had the effect of rendering a declaration as a habitual criminal an indeterminate sentence. The court therefore ordered that s 65(4)(b)*(iv)* of the 1959 act had to be read as though the words "provided that no such prisoner shall be detained for a period exceeding 15 years" appear in the section. See Rautenbach (n 42) 356; *Mans v Minister van Korrektiewe Dienste* 2009 1 SACR 321 (W) on the determination of the period of imprisonment in respect of further offences committed by a habitual criminal prior to such declaration.

[105] Kruger (n 3) 28-30. S 73(6)*(b)*(v) of the 1998 act. This provision was however repealed on 1 March 2012. It is submitted that the position iro minimum sentences will therefore also be regulated by s 73(6)*(a)*, which will have the effect that a prisoner may not be placed on parole unless he has served the non-parole period or if no such period was stipulated by the sentencing court, half of the sentence but parole must be considered after 25 years of a sentence was served.

minimum detention period the case management committee activates the process in terms of which it compiles a report as prescribed by section 42 of the 1998 act.[106] The committee will meet with the prisoner and he is informed of what the committee's recommendation to the parole board will entail. The recommendation is then submitted to the board and the prisoner is also afforded an opportunity to submit a presentation or appear before the board in person.[107]

3.2.1 The national council for correctional services, correctional supervision and parole boards and the correctional supervision and parole review board

The minister of correctional services appoints a national council for correctional services and the members hold office for such period as determined by the minister at the time of their appointment.[108]

The correctional supervision and parole review board is selected from the national council and the national council must appoint members for each meeting of the review board. A decision by a majority of the members of the review board is a decision of the board. The presiding member has a deciding vote in case of an equality of votes.[109]

The minister of correctional services must appoint one or more correctional supervision and parole boards consisting of a chairperson, a vice-chairperson, an official of the department nominated by the national commissioner of correctional services and two members of the community.[110] The minister may name each board,

[106] Each prison must have one or more case management committees which consist of correctional officials. The committee is *inter alia* required to interview and assess offenders at regular intervals. The committee conducts the first step in the parole process with the compilation of a report which must contain relevant information pertaining to the offender's offences, the judgment of the sentencing court, remarks made by the sentencing court at the sentencing phase, the criminal record of the offender and the assessment results and progress made with the offender's sentence plan. S 24 of the Correctional Services Regulations regulates the composition and functioning of a committee (published in GN R323 in *GG* 35277 25-04-2012).

[107] "Placement on parole and correctional supervision" (n 84) 4-5.

[108] s 83(1) of the 1998 act. The national council is a high-level body consisting of three judges of the supreme court of appeal or of the high court appointed after consultation with the chief justice, a regional magistrate, a director or deputy director of public prosecutions, two members of the department of or above the rank of director, a member of the South African police service of or above the rank of director, a member of the department of welfare of or above the rank of director, two persons with special knowledge of the correctional system who are not in full-time service of the state and four persons not employed by the state appointed as representatives of the public in consultation with the relevant parliamentary committees (s 83(2)).

[109] s 76 of the 1998 act. The review board consists of a judge as chairperson, a director of public prosecutions or his nominee, a member of the department, a person with special knowledge of the correctional system and two representatives from the public (s 76(1)).

[110] s 74(2) of the 1998 act. Muntingh *An Analytical Study of South African Prison Reform After 1994* (2012 thesis UWC) 326 comments as follows on appointments to the parole boards: "The establishment of civilian parole boards was intended to bring about a greater sense of public participation in the prison system and, perhaps more importantly, to make the community partly responsible for who is released from prison. Fears about public safety and the possibility that dangerous offenders are released without recognising the interests of the public are what partly motivated the establishment of the civilian parole boards. Prior to that (between 1993 and 2004), parole boards did exist but comprised of only DCS officials; the responsibility and accountability for releases thus rested firmly with the DCS". See Louw and Luyt "Parole and parole decisions in South Africa" 2009 *Acta Criminologica* 1 11-12 reflecting rather unsettling results on research undertaken in respect of qualification levels of chairpersons, vacancy rates and workloads of parole boards. The position identified by Louw and Luyt has not improved, as it appears from an advertisement on the website of the department of correctional services that the following is required for appointment as additional community member to the parole board in Pietermaritzburg, KwaZulu-Natal on a

specify the seat for each board and determine and amend the area of jurisdiction of each board.[111] A board may co-opt an official nominated by the national commissioner of the South African police service or an official nominated by the director-general of the department of justice or both such officials for a meeting of the board and any such co-opted official may vote at a meeting of the board.[112] Three members constitute a quorum for a meeting of a board and it must include the chairperson or vice-chairperson.[113] Any decision of the board is taken by resolution of the majority of the members in attendance and in the event of an equality of votes the chairperson shall cast the deciding vote.[114] A member of a board holds office for the period and on such conditions as determined by the minister and may resign in writing to the minister. The minister may remove a member on grounds of misbehaviour, incapacity or incompetence.[115]

3.2.2 Powers, functions and duties of the national council and the respective boards

The primary function of the national council for correctional services as described in the 1998 act is to advise at the request of the minister or on its own accord in developing policy pertaining to the correctional system and the sentencing

twelve-month contract at an hourly tariff of R195 (www.dcs.gov.za/Vacancies.axpx (19-07-2017)): "Must be literate and conversant in English and isiZulu. Preferably in possession of matriculation certificate. Proof that he/she is a respectable and accountable person in the community. Should be a resident of the community that the Board serves. Experience in the activities of the community forums and in meeting procedures and a special interest in the Criminal Justice System will be an added advantage." The same advertisement states that the following is required for appointment as chairperson of the parole board in Durban, KwaZulu-Natal, on a twelve-month contract with an all-inclusive remuneration package of R475 272: "Degree/national diploma and 3-5 years managerial experience in a comparable environment. Proven managerial or community leadership experience as well as active involvement in community-based structures. Valid driver's license. Computer literacy. Experience in the field of Criminal Justice will be an added advantage." The advertisement lists the following under competencies and attributes: "Plan, organise, lead and control, client orientation and good communication skills. Ability to manage documents, assertiveness, service delivery innovation and creativity. Conflict management, financial management, facilitation management, integrity and honesty. Coaching and mentoring, good work ethics, confidentiality, good interpersonal relations, problem solving and analytical skills, openness and transparency, networking, influence and impact, time management, tact and diplomacy, presentation and conceptual skills." The advertisement concludes by listing the responsibilities of the successful candidate: "Determine the order of the agenda and the procedure of the session. Ensure recommendations for correctional supervision are updated with the computerized diary system. Ensure that all recommendations for placement under correctional supervision, placement, day parole or parole are completed correctly and relevant annexure and reports are attached. Management of the proceedings of the Board. Manage and ensure that the decisions of the Board are implemented. Facilitate inputs regarding the correctional placement or release of any sentenced offender as maybe [*sic*] requested by the Minister, National Commissioner, or when questions are raised in the National Assembly to finalize representations. Create a confidential environment for the work of the Board. Ensure that the interest of the community is served during Parole Board meetings. Ensure that the Department and the Parole Boards are marketed within the community and the interest of the Department of Correctional Services is served during community meetings / forums. Management of human resources, finance and assets."

[111] s 74(1) of the 1998 act.

[112] s 74(7A) of the 1998 act.

[113] s 74(5) of the 1998 act. Louw *The Parole Process from a South African Perspective* (2008 dissertation Unisa) 91 describes the South African correctional supervision and parole boards as independent bodies. The accuracy of this statement is questionable.

[114] s 74(6) of the 1998 act.

[115] s 74(7) of the 1998 act.

process. In this regard the minister is required to refer draft legislation and major proposed policy developments regarding the correctional system to the council for its comments and advice.[116] The function of the national council to consider the record of proceedings of a correctional supervision and parole board and its recommendations pertaining to a person sentenced to life imprisonment and to submit its own recommendations in respect thereof to the minister is of significant importance.[117] The national council's function in this regard has been described as an oversight role.[118]

For purposes of this discussion the following functions of a correctional supervision and parole board are of importance:

(a) after considering a report submitted to it by the case management committee[119] on a sentenced offender serving a determinate sentence of more than 24 months and in the light of any other information or argument the board may place a sentenced offender under correctional supervision or day parole or grant parole or medical parole and set the conditions of community corrections;[120]

(b) in respect of an offender who has been declared a dangerous criminal in terms of section 286A of the Criminal Procedure Act the board may make recommendations to the court pertaining to the granting or placement under correctional supervision, day parole, parole or medical parole;[121]

(c) the board may make recommendations pertaining to the granting or placement under correctional supervision, day parole, parole or medical parole to the minister in respect of a sentenced offender serving a life sentence;[122]

(d) if the national commissioner requests a board to cancel correctional supervision or parole or to amend the conditions of community corrections imposed on a person, the board must consider the matter within 14 days and may cancel the correctional supervision or release on parole or amend the conditions thereof;[123]

(e) in respect of a person sentenced to life imprisonment the board must at the request of the national commissioner within 14 days consider the matter and make recommendations to the minister pertaining to the amendment or cancellation of parole;[124]

[116] s 84 of the 1998 act.

[117] s 78 of the 1998 act. It will appear later that the recommendations of the national council are often ignored by the minister.

[118] the *Barnard* case (n 7) par 20.3.

[119] See Muntingh (n 110) 328 on the responsibilities of a case management committee.

[120] s 75(1)*(a)* of the 1998 act. In terms of s 75(7) the national commissioner may place a sentenced offender serving a sentence of 24 months or less under correctional supervision or grant parole or medical parole or cancel such correctional supervision or parole or amend the conditions thereof.

[121] s 75(1)(*b*) of the 1998 act.

[122] s 75(1)(*c*) of the 1998 act. In terms of s 75(3)(*a*) the sentenced offender must be informed of the recommendations and must be allowed to submit written representations or appear before the board in person with or without a representative and in terms of s 75(3)(*c*) the board must allow the offender to submit written representations with regard to the recommendation of the board.

[123] s 75(2)(*a*) and (*b*) of the 1998 act. In terms of s 75(3)(*a*) the sentenced offender must be notified to submit written representations or to appear in front of the board. See *Du Preez v Minister of Justice and Correctional Services* 2015 1 SACR 478 (GP).

[124] s 75(2)(*c*) of the 1998 act. In terms of s 75(3)(*a*) the sentenced offender must be notified to submit written representations or to appear before the board.

(f) when the board or the minister cancels correctional supervision or parole the matter may be reconsidered within such period as the board or minister deems fit but it must be done within two years.[125]

A decision of the board is final, but the minister, the national commissioner or the inspecting judge may refer the matter to the correctional supervision and parole review board for reconsideration. In such a case the decision of the board is suspended pending the decision of the review board.[126]

In cases where the Criminal Procedure Act entitles a complainant or relative to make representations or to attend a meeting of a board, section 75(4) places a duty on the national commissioner to inform the board accordingly and the board must inform the complainant or relative in writing when and to whom he may make representations and when and where a meeting will take place.[127]

When a decision of a board is referred to the correctional supervision and parole review board it may hear any submission from the minister, national commissioner, inspecting judge or the sentenced offender as well as other evidence or argument and it must within four months either confirm the board's decision or substitute its own decision and make any other order which the board was entitled to make. The review board must give reasons for its decision which are to be made available to interested parties and all other boards for their information and guidance.[128]

3.2.3 Powers of the minister of correctional services in respect of life sentences

It should be noted that the minister does not act directly on a recommendation by the board pertaining to the placement on parole of prisoners serving life sentences. The recommendation of a board must first be considered by the national council of correctional services, who may recommend to the minister to grant a release on parole. Should the minister refuse to grant parole he may make such recommendations pertaining to treatment, care, development and support of the offender which may contribute to the possibility of future release on parole. If the minister refuses parole the matter must be reconsidered by the minister within a period of two years.[129]

3.2.4 Medical parole

Section 79 of the 1998 act regulates the procedure in respect of placement on medical parole. An offender may be considered for release on medical parole by the national commissioner, a parole board or the minister if the offender is suffering from a terminal disease or condition or if he is rendered physically incapacitated due to injury, disease or illness to such an extent as to severely limit daily activity or inmate self-care. In addition thereto it is required that the risk of re-offending

[125] s 75(6) of the 1998 act.
[126] s 75(8) of the 1998 act.
[127] s 75(4) of the 1998 act.
[128] s 77 and 75(10) of the 1998 act.
[129] s 78 of the 1998 act. Steytler *Constitutional Criminal Procedure* (1998) 420 comments as follows in respect of a sentence of life imprisonment: "In principle there is no constitutional objection to the purpose of an indeterminate prison sentence; preventing further offending for the protection of the community is a legitimate purpose of sentencing. The emphasis on the protection of society is in accordance with the general purpose of criminal law and sentencing in particular. The indeterminacy of the imprisonment is thus not *per se* objectionable provided that the constitutional principle against gross disproportionality is respected."

is low and that appropriate arrangements exist for the offender's care within the community.[130]

3.3 Recent case law

The application of the parole provisions in the recent cases of *Barnard v Minister of Justice, Constitutional Development and Correctional Services,*[131] *Walus v Minister of Correctional Services*[132] and *Naidu v Minister of Correctional Services*[133] will be briefly considered against this background.

3.3.1 *Barnard v Minister of Justice, Constitutional Development and Correctional Services*

The applicant sought an order reviewing and setting aside the decision by the minister to refuse Barnard's application for his release on parole. The applicant further requested the court to grant an order of substitution in terms of section 8(2) of the Promotion of Administrative Justice Act[134] directing his immediate placement on parole should the application be successful. At the time of his application Barnard was serving two life sentences imposed on 4 June 1995 for two counts of murder[135] as well as concurrent fixed terms of imprisonment imposed in respect of the following offences: two counts of attempted murder, three counts of malicious injury to property, one count of housebreaking with intention to rob and robbery, two counts of unlawful possession of a machine gun and the unlawful possession of ammunition, eight counts of fraud, one count of causing an explosion, one count of defeating the ends of justice, one count of theft, one count of the unlawful possession of a firearm and one count of the unlawful possession of ammunition. The applicant also had previous convictions for two counts of murder, one of attempted murder and three of theft in respect of which imprisonment were imposed on 10 December 1984. He was released on parole pertaining to these offences on 10 December 1987. During May 1989 and whilst on parole he committed the offences in respect of which the current application is applicable.[136] The parties were in agreement that the parole provisions of the 1959 act were applicable to the applicant and as he had served sixteen years and eight months of his sentence he was eligible to be considered for release on parole.[137]

[130] s 79(1) of the 1998 act. The applicable procedure pertaining to such an application is set out in s 79(2), whilst s 79(3) provides for the minister to establish a medical advisory board to provide an independent medical report in an application of this nature to the national commissioner, a board or the minister. For a comprehensive discussion on medical parole see Van Wyk *The Legal Framework Regulating Medical Parole: A Comparative Study* (2014 dissertation Unisa).

[131] (n 7).

[132] (n 7).

[133] *Naidu v Minister of Correctional Services* case (11215/2013) 2017 ZAWCHC 23 (9 March 2017).

[134] Act 3 of 2000.

[135] One of the murder victims was Webster, who was a well-known academic and anti-apartheid activist at the time. The victim in one of the attempted murder convictions was Omar, at the time a lawyer supporting the anti-apartheid struggle and later minister of justice. The relevance of the identity of the victims will appear later.

[136] the *Barnard* case (n 7) par 1-4, 37.

[137] the *Barnard* case (n 7) par 7. This was calculated in terms of s 22A(1) of the 1959 act in terms of which 20 years of a life sentence had to be served before a prisoner became eligible for consideration for parole and in terms of which the date of parole could be advanced in accordance with credits earned. The parole policy applicable to Barnard was adopted on 3 April 1995 and was still in effect on the date of his sentence.

The applicant was first considered for release on parole in 2013 at which time the national council for correctional services recommended to the minister that the applicant should not be placed on parole. The minister followed this recommendation and after a review application was instituted in respect of the decision the parties settled the matter with an agreement which included timelines for a reconsideration of the applicant's placement on parole.[138]

The national council thereupon made a recommendation to the minister on 19 February 2015 that the applicant be released on parole as from 1 June 2015.[139] The minister however refused to approve the recommendation of the national council and concluded that the applicant's placement on parole was not appropriate at that stage.[140] In the reasons for the decision subsequently provided by the minister in his answering affidavit he indicated that he considered both the positive factors[141] counting in favour of the applicant's placement on parole as well as the negative factors[142] which militated against the granting of parole.

The applicant's grounds for applying for a review of the minister's decision were founded on the following grounds: (i) that the minister deviated in his answering affidavit and added reasons to those he initially supplied in refusing to release the applicant on parole and thus acted *mala fide* and (ii) the minister's decision was an unreasonable administrative action.[143]

The discussion of the court's judgment on the allegation of *mala fides* will focus on the allegation of political bias and the relevance of restorative justice. In her judgment pertaining to the allegation of *mala fides* Keightley AJ indicated that section 6(2)(*e*)(v) of Act 2 of 2000 renders a decision taken in bad faith reviewable and relied on the description by Hoexter[144] that bad faith for these purposes refers to "the conscious knowing use of power for ends that are prohibited by law".[145] The court noted in this regard that courts should not easily conclude that administrators acted with deliberate intention to mislead the court in affidavits during a court process. As administrators are bound by the constitution and the rule of law it is required that they should act with honesty and integrity. The court concluded that

[138] the *Barnard* case (n 7) par 9-13.

[139] the *Barnard* case (n 7) par 14. *Inter alia* on condition that the applicant complete a pre-release programme and that the applicant be electronically monitored in terms of the 1998 act.

[140] The minister initially indicated as reasons for his decision *inter alia* the following: there was no indication of restorative justice attempts in respect of Webster's immediate family and no indication of any attempts to trace the second victim's family; the offender should be assisted to strengthen his relationship with his son; the offender has not participated in any self-development programmes; the department and relevant structures should advise on any security threats that might exist should the offender be released on parole (par 17).

[141] These were listed as the applicant's clean disciplinary record during incarceration, multidisciplinary programmes attended aimed at rehabilitation; reports submitted by a social worker and clinical psychologist regarding placement on parole; the availability of a support system; that the applicant was married and had received an offer of employment (par 35).

[142] The following were listed as negative factors: remarks made by the sentencing court (which included the following: Webster was murdered in cold blood; the second victim was beaten to death with a blunt object; in respect of the housebreaking the house of the complainant was entered with machine guns used to effect the robbery; there were few if any mitigating factors and an abundance of aggravating factors; the previous convictions of Barnard which included *inter alia* two counts of murder; the murder of Webster was committed whilst Barnard was on parole; Barnard was regarded as a danger to the community); the applicant's criminal history; his previous non-compliance with parole conditions and the applicant's lack of scholastic, academic and technical achievements whilst in prison (par 36-37).

[143] the *Barnard* case (n 7) par 41.

[144] *Administrative Law in South Africa* (2012) 310.

[145] the *Barnard* case (n 7) par 43.

administrators "must be assumed to intend to act within these prescripts in the absence of cogent evidence to the contrary".[146] The court referred to the fact that some of the applicant's victims were targets of the old apartheid regime and that part of the applicant's case of bad faith on the part of the minister was inferential and based on the minister's alleged political bias against him. The court indicated that such an inference was not justifiable in the absence of actual evidence indicative of such a motive on the part of the minister.[147]

Pertaining to the lack of compliance with restorative justice principles identified by the minister in his initial reasons, the applicant averred that restorative justice was not a statutory requirement for consideration of parole and referred to the following comment of the court in *Gwebu v Minister of Correctional Services*:[148]

> "The Parole Board duly interviewed the applicant on the 22nd February 2013. Then the Parole Board apparently relied on the so-called 'restorative justice' aspect to delay the matter. This so-called 'restorative justice' concept is a fabrication of a process whereby it is required of a prisoner to make peace with the family of the victim, in this case people outside the borders of our country. The whole process is an illegal concoction undermining the rights of prisoners to be released on parole when they legally qualify for it."[149]

Keightley AJ indicated that she disagreed with this remark if it was intended to apply to all cases and relied on the following binding finding of the constitutional court in *Van Vuren v Minister of Correctional Services*:[150]

> "Restorative justice, in our jurisprudence, is linked to the foundational value or norm of ubuntu-botho. It is a value that recognizes – in the context of this case – that to rehabilitate an offender sentenced to life incarceration to a position where he or she is repossessed of the fuller scope of his or her rights, is to recognize the inherent human dignity of the offender. Evidently from the departmental release and placement policy, parole has a restorative-justice aim. It is aimed at the eventual rehabilitation and reconciliation processes of the offender – themes that underpin restorative justice. Importantly, all these interests must be balanced against those of the community, which include the right to be protected against crime."[151]

The court in the *Barnard* case thus accepted that the principles of restorative justice form an inherent and underlying component of any parole process and rejected the contention that the minister acted in bad faith when he recommended restorative justice measures. The court made this finding despite the fact that restorative justice principles are not identified in the parole policy in terms of the 1959 act applicable to Barnard. The court however made it clear that, depending on the facts, the insistence by parole authorities on specific restorative justice measures as a requirement for release on parole may be subject to review.[152]

The court found the minister's recommendation that the applicant strengthen family ties with his son and pursue academic qualifications as consistent with improved prospects of successful integration with the community and thus part of achieving the objective of successful rehabilitation that underlies the parole

[146] the *Barnard* case (n 7) par 49.
[147] the *Barnard* case (n 7) par 62-63.
[148] 2014 1 SACR 191 (GNP).
[149] the *Gwebu* case (n 148) par 5. The frustration of the court in the *Gwebu* case appears from the following comment: "This is a further matter that reached this court, like so many before it, wherein it is contended that a Parole Board failed in its duty" (par 1).
[150] the *Van Vuren* case (n 92).
[151] the *Van Vuren* case (n 92) par 51.
[152] the *Barnard* case (n 7) par 68.

process. The court followed the same approach in respect of the recommendation of trauma therapy and viewed the recommendation on security threats as part of the need to ensure that the community is not endangered by Barnard's release or that he himself is placed in danger upon his release. The court concluded that these recommendations were *bona fide* cautionary measures to require before a future parole decision is made and concluded that the minister did not act in bad faith when he made the recommendations.[153]

The second part of the applicant's attack contended that the minister's decision was an unreasonable administrative action.[154] Section 6(2)(*h*) of the Promotion of Administrative Justice Act provides that administrative action will be reviewable under conditions where the exercise of power is so unreasonable that no reasonable person could have so exercised the power. With reference to the guidelines provided by the constitutional court in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*[155] Keightley AJ emphasised the importance of drawing a clear distinction between the appeal and review processes, that a reasonable decision will depend on the circumstances of each case and that a court should not usurp the functions of administrative agencies when making a decision on reasonableness.[156] In heeding the guidance by the constitutional court that when a decision-maker is given a discretion that is dependent on the consideration of a range of competing factors, the task of the court of review is "merely to determine whether the decision made is one which achieves a reasonable equilibrium in the circumstances"[157] Keightley AJ made the following important comment:

> "These dicta are particularly appropriate in the circumstances of the case before me. As I noted earlier, it is clear from the principles and guidelines set out in the parole policy and parole manual that in making a parole determination in any particular case in which an offender is serving a life sentence, the Minister is required to give consideration to a complex matrix of factors. These factors address competing interests: the individual interests of the offender in securing his or her release from imprisonment on parole at an appropriate time, versus the interests of the community in being protected against offenders who have been given the maximum sentence by virtue of the nature and seriousness of their crimes. The Minister must be astute to ensure that while each individual offender is dealt with in a fair and just manner in the parole process, the individual interests of the offender do not override the importance of the retention of public confidence in, and ultimately the legitimacy of, the criminal-justice and parole systems."[158]

[153] the *Barnard* case (n 7) par 72-77.

[154] The applicant relied on *inter alia* the following grounds for this contention: the minister failed to take into account alternatively gave insufficient weight to the positive factors that support release on parole; the minister ignored alternatively deviated without good reason from the recommendation of the national council; the minister treated the applicant differently to other offenders convicted of similar offences in violation of his constitutional right to equality and non-discrimination; the minister failed to give appropriate consideration to the fact that the offences were committed in a political context on instruction of superiors; the negative factors such as his criminal history and the comments of the sentencing court cannot be changed by the applicant and it was thus unreasonable for the minister to rely on these; and there was overwhelming motivation to release the applicant on parole and the minister's refusal to do so was therefore unreasonable (par 79).

[155] 2004 4 SA 490 (CC). The constitutional court provided the following framework of factors which should be considered: the nature of the decision; identity and expertise of the decision-maker; the factors relevant to the decision; the reasons provided for the decision; the nature of competing interests involved and the impact of the decision on the lives and wellbeing of the affected parties (par 45).

[156] the *Barnard* case (n 7) par 82.

[157] the *Bato Star* case (n 155) par 49; the *Barnard* case (n 7) par 83.

[158] the *Barnard* case (n 7) par 84.

In dealing with the individual grounds submitted in support of the contention that the minister acted unreasonably the court remarked that the political aspects of the applicant's case were not irrelevant but rather added a layer of complexity to the decision-making process. The court also referred to the fact that not al' the applicant's crimes were politically motivated and that it demonstrated a propensity for violent crime also outside of the political ambit. Although the psychologist who assessed the applicant's risk for committing violent crime in the future indicated that the risk for committing politically motivated violent crime was low, his inclination towards violence was difficult to "pin down" and it was uncertain to what extent the greed component in his propensity for criminal conduct had been contained during his imprisonment.[159] The court indicated that no evidence was presented to indicate that the applicant was treated in a discriminatory manner compared to other prisoners serving life imprisonment. Although the applicant would be unable to change negative factors that happened in the past, the court found that it was not unreasonable for the minister to take those factors into account. Pertaining to the averment that the minister's failure to follow the recommendation of the national council was unreasonable the court noted that the council did not provide reasons for its decision whilst the minister provided cogent reasons and struck a reasonable equilibrium between the competing factors. In considering the positive factors counting in favour of the applicant's release the court concluded that these factors were not overwhelming and should be weighed against the applicant being an offender with a seasoned history of the most serious violent crime.[160] In concluding that the court's task in reviewing the minister's decision for reasonableness involved the question whether the minister achieved a reasonable balance between the competing factors, the court held that it was unable to find that the minister acted unreasonably and dismissed the application.[161]

In this comprehensive judgment the court provides important guidelines on the approach to be adopted by the relevant role players when considering the placement on parole of prisoners serving life sentences in particular. The judgment is also of importance in as far as it interprets the approach of a review court pertaining to matters of this nature. That this sound approach is unfortunately not always being adhered to by the relevant role players is illustrated by the next two cases.

3.3.2 *Walus v Minister of Correctional Services*[162]

The applicant in this matter was, together with Clive Derby-Lewis, prosecuted for and convicted of the murder on 10 April 1993 of South African Communist Party leader Martin Thembisile Hani. Both were sentenced to death on 15 October 1993, which sentence was commuted to life imprisonment on 7 November 2000. Derby-Lewis was released on medical parole on 29 May 2015. The applicant applied in terms of section 6(2) of the Promotion of Administrative Justice Act for the review of the decision taken on 10 April 2015 by the minister of correctional services to refuse his application for release on parole as well as an order of substitution in terms of section 8(2) of Act 2 of 2000. The chairperson of the national council for correctional services was cited as second respondent. At the time of the application

[159] the *Barnard* case (n 7) par 86-92.
[160] the *Barnard* case (n 7) par 94-104.
[161] the *Barnard* case (n 7) par 89 and 106.
[162] The minister appealed the decision by the high court to the supreme court of appeal. The judgment of the supreme court of appeal was not available at the time of writing.

the applicant was 60 years of age and had served a term of approximately 23 years' imprisonment. In view of the applicant's date of sentence the parole provisions of the 1959 act were applicable to the parole application. It appears that the applicant's profile was referred to the minister on 12 July 2011, but the minister declined release on parole and indicated that the victim's family had to be afforded the opportunity to submit a victim impact statement or statement of opposition.[163]

In a renewed application for release on parole the parole board in its report to the minister recommended the granting of parole. It appeared from the report that the applicant was a first offender. The parole board referred *inter alia* to the following remarks made by the sentencing court: the accused assassinated the deceased, who was a prominent South African whose killing was likely to have serious and far-reaching consequences and harmful effects for the entire South African society; the murder was politically motivated; the murder was premeditated; and the deceased was defenseless and unprotected when he was killed. The report mentioned that the applicant attended several rehabilitation programs whilst incarcerated. It indicated that the applicant had a positive support system, as he would be staying with his brother, who would also employ him. Positive reports were submitted by the social worker and psychologist. The victim's family submitted a victim impact statement and a statement of opposition to release on parole.[164] The national council also recommended the applicant's release.[165]

The minister however again refused to release the applicant on parole. As part of his decision the minister indicated that the applicant should be afforded the opportunity to participate in the restorative justice process by personally apologising to the deceased's family. The minister indicated that this process would assist the applicant to accept responsibility for the crime and thus contribute to his rehabilitation. The minister also requested to be advised on any security threats that might exist should the applicant be released on parole. No reasons were initially given for the decision, but in his answering affidavit the minister indicated that his decision was informed by the nature of the crime and the remarks by the sentencing court.[166]

Van Nieuwenhuizen J indicated that although the minister mentioned all the factors that had to be considered in his affidavit, no reference was made to the facts applicable to the factors. The court therefore found it difficult to determine whether all the factors were properly considered. The court concluded that the minister considered the period of imprisonment served by the applicant as inadequate punishment for the crime he committed.[167] The court discussed the aims of punishment and concluded that the "focus of punishment shifts with the passing years and ultimately more weight is attached to rehabilitation. It is, *inter alia*, an internationally accepted method and based on compassion".[168] The court reiterated that parole is still a form of punishment, as strict conditions are attached thereto and the prisoner is in effect serving the rest of his sentence outside prison. After giving

[163] the *Walus* case (n 7) par 10.
[164] the *Walus* case (n 7) par 10.
[165] the *Walus* case (n 7) par 23-26. During the application it was argued on behalf of the second respondent that all applications for release on parole in respect of prisoners serving life sentences must be recommended to the minister by the national council. The court rejected this argument and found that the national council was at liberty to either recommend or not to recommend release on parole (par 24).
[166] the *Walus* case (n 7) par 12.
[167] the *Walus* case (n 7) par 14.
[168] the *Walus* case (n 7) par 17-19.

consideration to all the positive factors mentioned in the report of the parole board as well as the fact that the national council also supported the recommendation, the court concluded that the decision taken by the minister was "not reasonable and rational ..." and should be set aside.[169] In addition thereto the court granted a substitution order to the effect that the applicant be placed on parole subject to the parole conditions to be imposed by the minister within 14 days from the date of the order.[170]

When the test as set out in the *Barnard* case is applied, difficulties arise as to whether the minister in the *Walus* case did indeed manage to obtain a reasonable equilibrium between the positive and negative factors pertaining to the applicant. All the available reports provided a clear case for the granting of parole and the applicant's release was supported by both the parole board as well as the national council. No reservations were expressed in any of the positive recommendations. It also appears that the applicant exhausted all possible attempts through various channels from his side to participate in victim offender dialogue and victim offender mediation in order to participate in the restorative justice process.[171] These attempts were understandably rejected by the victim's family on various occasions. The insistence by the minister that the applicant should be afforded a further opportunity to participate in the restorative justice process involving the victim's family therefore appears unreasonable. This in fact appears exactly to be the scenario referred to by Keightley AJ in the *Barnard* case when she indicated that the insistence by parole authorities on specific restorative justice measures as a prerequisite to release on parole might be subject to review.[172] The finding of the court that the minister acted unreasonably and that the decision had to be reviewed and set aside and replaced with an order of substitution is therefore supported.

3.3.3 *Naidu v Minister of Correctional Services*

The facts in the *Naidu* case bear witness not only to the poor success rate with rehabilitation in correctional centres, but also point to the challenges of inadequate resources both inside correctional facilities in order to facilitate rehabilitation as well as post-release to ensure effective monitoring of offenders released on parole. The plaintiff, a school teacher, was attacked in her home in Somerset West by Michaels on 19 July 2010. During the ordeal he threatened her with a knife, bit her and threatened to rape and murder her.[173] The plaintiff issued summons against the minister of correctional services claiming damages, as she claimed the attack was a direct result of the negligent release of Michaels on parole.[174]

At the commencement of the hearing two important concessions were made on behalf of the minister, namely (i) if it was found that the defendant was negligent in releasing Michaels such negligence was causally connected to the harm suffered by

[169] the *Walus* case (n 7) par 26-27.

[170] the *Walus* case (n 7) par 28-47. The court discussed the requirements for the granting of a substitution order at length and confirmed that it would be granted only in exceptional circumstances. The court however concluded that should the matter be referred back to the minister he would "in all probability not be able to apply his mind in an unbiased manner" and that further undue delay would be caused by referring the matter back (par 43-45).

[171] the *Walus* case (n 7) par 12, 32, 36-41.

[172] the *Barnard* case (n 7) par 68.

[173] As a result of this attack Michaels was charged with robbery, housebreaking and escaping from custody and sentenced to an effective 17 years' imprisonment (the *Naidu* case (n 133) par 6).

[174] the *Naidu* case (n 133) par 1-3.

the plaintiff and, (ii) there existed a legal duty on the part of the defendant to ensure the safety of members of the public such as the plaintiff.[175] The single issue that remained for the court to decide was whether the defendant acting through the correctional supervision and parole board was negligent in releasing Michaels on parole.

Michaels has the following impressive criminal record, which commenced in 1980 and spanned 26 years: theft (six counts); assault with the intent to cause grievous bodily harm (two counts); escaping from custody (two counts); one count of assault and one count of murder. He was sentenced to twelve years' imprisonment in 1987 for the murder charge and released on parole in December 1996. Whilst on parole he violated the parole conditions by being convicted of theft during November 1997 for which he was sentenced to four-and-a-half years' imprisonment. In June 2004 he was convicted of theft, assault with the intent to do grievous bodily harm and contravening the Dangerous Weapons Act[176] and sentenced to seven-and-a-half years' imprisonment. The sentencing magistrate made an annotation to the record that Michaels was not to be released on parole again without the court being notified. He was thereafter sentenced to an additional two years' imprisonment for theft and was thus serving an effective sentence of nine-and-a-half years' imprisonment at the Brandvlei correctional centre when he was released on parole in March 2010.[177] It was after this release on parole that he attacked the plaintiff.[178]

During 2007 Michaels was considered but not recommended for parole. Whilst serving sentence he was convicted in three different disciplinary hearings for contravening the 1998 act. During his incarceration he attended an aggression program and a life skills program of three days each. In April 2009 the case management committee recommended to the parole board that Michaels be released on parole after completing two thirds of his sentence. The sentencing court was informed and the magistrate raised no objection thereto. The parole board approved his placement on parole.[179]

The following evidence was presented on trial: Pansegrouw, a social worker with 20 years of experience and formerly employed at Brandvlei maximum correctional services, testified as expert witness in support of the plaintiff's claim. He described the short group programs presented at the prison as insufficient to promote the rehabilitation of offenders. He testified that the parole boards had the necessary tools to assess the rehabilitation and chances of recidivism of prisoners as the boards receive reports from professionals and may call experts to assist at board hearings. He however indicated that parole decisions had become a logistical consideration instead of an enquiry into whether the prisoner had been rehabilitated and was ready to be released into society. Pansegrouw testified that on the information available to the board Michaels should not have been released on parole. Adonis, a clerk with 20 years of service at Brandvlei prison and a member of the three member board that decided to release Michaels on parole, testified in the defendant's case. He was the acting secretary to the board whilst the other members were the chairperson and a community member. Pertaining to this specific hearing, which lasted approximately

[175] the *Naidu* case (n 133) par 4. This is a legal duty similar to that enunciated in *Minister of Safety and Security v Carmichele* 2004 3 SA 305 (SCA) par 43. Further to this s 131 of the 1998 act provides as follows: "In the event of a person serving community corrections being liable in delict for an act or omission in the course of such service, the damages sustained may be recovered from the State."

[176] Act 15 of 2013.

[177] The judgment refers to two different dates as the date of Michaels's release on parole: May 2009 (par 5) and 17 March 2010 (par 16). The last-mentioned date appears to be correct.

[178] the *Naidu* case (n 133) par 7-9.

[179] the *Naidu* case (n 133) par 13-16.

34 minutes, the parole board considered reports from a social worker, an educational officer, the unit manager, a religious worker and a medical report. He confirmed that the obligatory report[180] by the case management committee pertaining to *inter alia* the likelihood of relapse into crime after release had not been available at this specific hearing. He indicated that nothing negative was reported on Michaels in the available reports and that these positive reports outweighed the negative information relating to his criminal and disciplinary record in and out of prison. His testimony was that a person who committed a crime whilst on parole was not precluded from release on parole again. He conceded that the negative factors in this case were indicative of a person who had not been rehabilitated. The testimony of the social worker who compiled the important social work progress report on Michaels was at best vague and non-committal.[181]

It is hardly surprising that Meer J found on the strength of this evidence that the case management committee as well as the parole board failed to comply with their obligations in terms of the 1998 act. The court referred to similar previous decisions of parole boards which had been described as arbitrary and capricious and set aside[182] and concluded that:

> "[50] In my view the reasonable person in the position of the Board appraised with:
> 50.1 Michaels' history prior to incarceration which showed him to be a habitual violent criminal who was historically not rehabilitated by time spent in prison, nor by early release on parole;
> 50.2 The fact that Michaels had previously violated the parole conditions imposed on him while serving his sentence for murder and had committed a further crime while on parole;
> 50.3 The knowledge that after his 2004 incarceration Michaels continued to commit offences in prison and his aggression was flagged on more than one occasion by officials...
> would have foreseen, in the absence of any clear evidence of rehabilitation, the reasonable possibility of his conduct, if released on parole, injuring another."[183]

The court found that the case management committee and the parole board had a direct legal duty to protect members of the public from persons on parole, had failed to meet that duty by negligent commission and that the defendant was liable for that act. The court upheld the plaintiff's claim.[184]

The apparent superficial manner in which the relevant responsible officials dealt with this specific parole hearing is a matter of concern. In view of the facts of the matter it could be argued that all the available resources of the department should have been used to ensure that an informed and responsible decision was taken in what must surely have been one of the more serious cases for consideration. It would perhaps not be an exaggeration to state that the credibility of the parole system as a whole is tarnished with this type of negligent conduct.

Having touched on some of the strengths and shortcomings of the South Africa parole system it is opportune to consider the systems applicable in other jurisdictions.

[to be concluded]

[180] s 42(2)*(d)* of the 1998 act provides that such a report must be provided to the parole board.

[181] the *Naidu* case (n 133) par 17-45.

[182] *Lebotsa v Minister of Correctional Services* (6478/2009) 2009 ZAGPPHC 126 (29 October 2009); *CV v Minister of Correctional Services* (48967/2012) 2012 ZAGPPHC 324 (30 November 2012). To this list can *inter alia* also be added *Motsemme v Minister of Correctional Services* 2006 2 SACR 277 (W); *Lombaard v Minister of Correctional Services* 2009 1 SACR 157 (T) and *Sebokoe v Minister of Correctional Services* 2010 JDR 0833 (GNP).

[183] the *Naidu* case (n 133) par 50.

[184] the *Naidu* case (n 133) par 53.