Parole for Lifers: The Constitutional Court Errs in *Walus v Minister of Justice and Constitutional Development*

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Abstract

Janusz Walus was sentenced to death for the murder of Chris Hani in 1993. With the advent of the *Constitution* and the *S v Makwanyane* Constitutional Court judgment, his sentence was converted to life imprisonment in 2000. Walus became eligible for parole in 2005 in terms of the *Correctional Services Act* 8 of 1959. However, his release was denied on several occasions by the Minister of Justice. Following a series of court challenges, Walus challenged his continued imprisonment before the Constitutional Court in 2022. The central issue before the Court was whether there is a point at which denial of parole for a prisoner serving life imprisonment is no longer justifiable by the crime's seriousness and the court's sentencing remarks. More broadly, the *Walus* case speaks to whether eligible prisoners can justifiably be denied parole on the sole basis of factors beyond their control. The decision is also significant in interpreting the phrase "sentencing remarks" in the parole board policy. While the Constitutional Court made the correct decision in releasing Walus on parole, its reasoning is questionable. The Court erred in interpreting the Parole Board Manual and the law.

Keywords

Parole; life imprisonment; parole board; non-parole period; Walus.

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1 Introduction

Walus v Minister of Justice and Correctional Services[1] concerns procedural law in the context of prisoners' right to early release. When considering whether to release the applicant on parole, the Constitutional Court had to decide on an issue relating to the exercise of executive powers. Two overlapping systems governed the applicant's circumstances concerning his release on parole. Since he had been sentenced in 1993, both the 1959 *Correctional Services Act*[2] and that of 1998[3] determined the conditions of his release on parole. Walus qualified for placement on parole in 2005, 17 years before the matter was decided. The court grappled with whether the refusal by the Minister of Correctional Services (the Minister) to release the applicant on parole was justifiable. This note first summarises the facts, the applicable law and the court's conclusion. It then argues that while the court reached a plausible conclusion, its reasoning is problematic.

2 Existing legal framework

According to section 73(1) of the 1998 *Correctional Services Act*, a prisoner convicted of an offence must remain imprisoned for the full sentence. Thus, for prisoners sentenced to life, the expectation is that they will spend the rest of their lives in prison.[4] An essential objective of imprisonment is the rehabilitation and eventual release of prisoners into society to lead crime-free lives.[5] Parole is a form of punishment,[6] "a non-custodial measure of supervision in the community".[7] It is a form of punishment distinct from imprisonment.[8] The parole system has an element of punishment in that it allows prisoners to serve the remainder of their sentences under correctional supervision. Parole is a privilege, not a right.[9] A prisoner is not

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1 *Walus v Minister of Justice and Correctional Services* 2023 2 BCLR 224 (CC).

2 *Correctional Services Act* 8 of 1959.

3 *Correctional Services Act* 111 of 1998.

4 Section 73(4) of the *Correctional Services Act* 111 of 1998.

5 Section 36 of the *Correctional Services Act* 111 of 1998.

6 *Phaahla v Minister of Justice and Correctional Services* 2019 7 BCLR 795 (CC) para 29.

7 *Phaahla v Minister of Justice and Correctional Services* 2019 7 BCLR 795 (CC) para 31.

8 *Phaahla v Minister of Justice and Correctional Services* 2019 7 BCLR 795 (CC) para 39.

9 *Combrink v Minister of Correctional Services* 2001 3 SA 338 (D) 342.

automatically entitled to be released after serving a certain period of detention, but a determination is made by the parole board on whether a prisoner is eligible for parole. However, a prisoner has a right to be considered for parole through a fair procedure as prescribed by law.[10] Prisoners have a legitimate expectation of being considered for and placed on parole should they satisfy all the requirements.[11] The Minister's failure to meet this legitimate expectation triggers the power of a court to review the decision and make an appropriate decision.[12]

Parole is an essential aspect of the penal system.[13] Life imprisonment without the possibility of parole is a cruel, inhumane and degrading punishment.[14] Life imprisonment does not entail physical imprisonment for life. Thus, prisoners sentenced to life imprisonment who benefit from the privilege of parole must ordinarily remain on parole for life.[15] "A parolee remains at all times a sentenced prisoner and has no right to parole."[16] Currently, offenders serving life imprisonment may be considered for parole only after serving 25 years.[17] An earlier release is possible when they have reached 65 years of age and having served 15 years of their sentence.[18] The mandate to consider parole for prisoners sentenced to life lies with the Minister of Justice and Correctional Services on the recommendation of the Correctional Supervision and Parole Board (Parole Board).[19] Section 78 of the *Correctional Services Act* also grants courts the power to give parole to prisoners sentenced to life. The Minister must consider parole within the provisions of the *Correctional Services Act* and the Department's policy document, which outlines the factors that must be considered.

The exercise of these powers by the Board and the Minister amounts to an administrative action.[20] This brings parole decisions within the ambit of the *Promotion of Administrative Justice Act* (PAJA).[21] They must, therefore, be rational.[22] At a minimum, PAJA requires that there be a rational connection between the Minister's exercise of power and the purpose for which the

10 *Van Gund v Minister of Correctional Services* 2011 1 SACR 16 (GNP) para 11.
11 *Mohammed v Minister of Correctional Services* 2003 6 SA 169 (SE).
12 See Moses 2003 *SAJHR* 263.
13 *Motsemme v Minister of Correctional Services* 2006 2 SACR 277 (W) 285.
14 *S v Chavulla* 2002 1 SA 535 (SCA) para 23; *Motsemme v Minister of Correctional Services* 2006 2 SACR 277 (W) para 9.
15 *Baloyi* v *Minister of Justice and Correctional Services* 2019 2 SACR 501 (GJ); *S v Smith* 1996 1 SACR 250 (E) 255d; Terblanche *Guide to Sentencing* 481.
16 *Du Preez v Minister of Justice and Correctional Services* 2015 1 SACR 478 (GP) para 12.
17 Section 73(6)(b)(iv) of the *Correctional Services Act* 111 of 1998.
18 Section 73(6)(b)(iv) of the *Correctional Services Act* 111 of 1998.
19 Section 75(1)(c) of the *Correctional Services Act* 111 of 1998.
20 *Combrink v Minister of Correctional Services* 2001 3 SA 338 (D).
21 *Promotion of Administrative Justice Act* 3 of 2000 (PAJA).
22 Section 33 of the *Constitution of the Republic of South Africa*, 1996.

legislation conferred the power.[23] Parole decisions can be set aside by a court if found to be irrational. A court then has the discretion either to make a substitution order by itself deciding on the parole application or to order the Minister to reconsider the application afresh. Given that courts are slow to usurp the powers of a functionary,[24] the latter is the preferred route. However, in exceptional cases a court may consider whether or not to place the prisoner on parole.[25] Several factors can persuade a court to do this. Specifically, a court may hold that it is in as good a position as the functionary to make the decision and that the decision of the functionary is a foregone conclusion. The overriding consideration is "whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties". A substitution order would be justifiable if referral to the administrator would result in further unwarranted rights infringement and unfairness.[26] Generally, a court will be as equipped as an administrator if there is no need for the administrator's expertise or the matter is judicial and the court has all the relevant information before it.[27] An administrator's decision will be considered a foregone conclusion if, given all the circumstances of the case, there is only one proper decision that an administrator could make. In other words, ordering the administrator to reconsider their decision would be a waste of time.

For prisoners sentenced to life before 1 October 2004, the 1959 *Correctional Services Act* is applicable.[28] Section 136(3)(a) requires that such prisoners must be considered for release by the Minister on the recommendation of the National Council after serving 20 years. In *Van Wyk v Minister of Correctional Services*[29] it was held that prisoners doing life imprisonment immediately before 1 October 2004 were entitled to have their parole advanced by credits earned under the 1959 Act. This resulted in the eligibility of these prisoners for parole after serving 13 years and four months.[30] Parole applications for these prisoners are governed by section 136(1) of the *Correctional Services Act,* which requires that they be considered in terms of the policy and guidelines the former Parole Boards applied. The timing of parole is also subject to section 276B(1) of the

23 *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC) para 84.
24 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC) paras 45, 46.
25 *Derby-Lewis v Minister of Justice and Correctional Services* 2015 2 SACR 412 (GP).
26 *Groenewald v Minister of Correctional Services* 2011 1 SACR 231 (GNP) para 37.
27 *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Limited* 2015 5 SA 245 (CC) para 48.
28 Section 136 of the *Correctional Services Act* 111 of 1998.
29 *Van Wyk v Minister of Correctional Services* 2012 1 SACR 159 (GNP).
30 *Walus v Minister of Justice and Correctional Services* 2023 2 BCLR 224 (CC) para 42.

Criminal Procedure Act,[31] which allows a court to order a non-parole period in cases where an offender is sentenced to more than two years. This period may be at most two-thirds of the sentence or 25 years, whichever is shorter. The stipulation of a non-parole period should be made only in exceptional circumstances. Section 73(6)(a) of the *Correctional Services Act* prohibits the parole of a prisoner before the expiry of the non-parole period. Regarding policy regulating the placing of prisoners on parole, prisoners must be placed on parole "as soon as possible after reaching their consideration dates". The Minister retains the discretion to grant parole if the recommendation of the Council is favourable to the prisoner.[32] The factors relevant to consideration for parole are clearly stated in the Parole Board Manual. Indeed, the Minister must consider the following in determining the release of a prisoner on parole: the nature of the crime; the background history; the criminal's behaviour and reaction to treatment; medical, psychological and psychiatric considerations; domestic circumstances and employment opportunities after placement.[33]

The policy of the Department on parole requires the Minister to consider the following factors:

a. the remarks made by the court in imposing sentence;

b. the nature and seriousness of the crime and the consequence thereof;

c. the behaviour and adjustment of the offender during his or her incarceration;

d. the programmes attended by the offender within the correctional centre aimed at his or her rehabilitation;

e. the availability of support systems to the offender in the event of his or her being placed on parole;

f. whether the offender has a fixed address which can be monitored on his or her being placed on parole;

g. the offender's scholastic or technical achievements during his or her incarceration; and

h. the risk of recidivism in the event of the offender being placed on parole.[34]

Furthermore, where the 1959 Act is applicable the Minister must consider "the nature of the offence and any remarks made by the court at the time of the imposition of the sentence".[35] The weighing of these factors is a delicate

31 *Criminal Procedure Act* 51 of 1997.

32 Section 136(3)(c) of the *Correctional Services Act* 111 of 1998.

33 Department of Correctional Services 2019 http://www.dcs.gov.za/wp-content/uploads/2019/01/Procedure-Manual.pdf 194.

34 *Walus v Minister of Justice and Correctional Services* 2023 2 BCLR 224 (CC) para 7.

35 Section 63(1) of the *Correctional Services Act* 8 of 1959.

exercise which must serve the interests of the community and the prisoner through a fair and just evaluation.[36] Once all the requirements are met, the legitimate expectation of consideration for and placement on parole demands that the relevant factors be weighed appropriately. In practice, the nature of the crime and the likelihood of re-offending are significant factors in considering parole.[37] Ultimately, the policy recognises that the offender's interests, the community and the public interest must be balanced in parole determinations. Protecting the public from released offenders is paramount.[38] However, so is the public's responsibility and involvement in reintegrating an offender into the community.[39] A rehabilitated offender with a low risk of reoffending should ideally be released on parole.[40]

Courts have generally not differed in the sentencing remarks applicable to the parole decision. There has been consensus that the remarks relate to the nature and seriousness of the crime. In *Barnard v Minister of Justice, Constitutional Development and Correctional Services,*[41] the sentencing remarks relating to the circumstances in which the offence was committed (namely the violent and cold-blooded nature of the murders) were accepted as "quite clearly closely aligned" with the applicable parole criteria and principles.[42] The court reiterated these circumstances in holding that the refusal of parole was reasonable, stressing that considering factors that a prisoner cannot change does not render a parole decision unreasonable.[43]

In *Walus* the central issue was whether there is a point at which the denial of parole for a prisoner serving life imprisonment is no longer justifiable by the crime's seriousness and the court's sentencing remarks.[44] More broadly, the *Walus* case speaks to whether eligible prisoners can justifiably be denied parole on the sole basis of factors beyond their control. The decision is also significant on the proper interpretation of the phrase "sentencing remarks" in the parole board policy.

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36 See the introduction in Chapter VI(1A)(19) of Department of Correctional Services 2019 http://www.dcs.gov.za/wp-content/uploads/2019/01/Procedure-Manual.pdf.

37 Lidovho 2003 *CILSA* 365, 379 and 380.

38 *Naidu v Minister of Correctional Services* 2017 2 SACR 14 (WCC).

39 *Barnard v Minister of Justice, Constitutional Development and Correctional Services* 2016 1 SACR 179 (GP) para 24.

40 See, for instance, *Motsemme v Minister of Correctional Services* 2006 2 SACR 277 (W) 285.

41 *Barnard v Minister of Justice, Constitutional Development and Correctional Services* 2016 1 SACR 179 (GP).

42 *Barnard v Minister of Justice, Constitutional Development and Correctional Services* 2016 1 SACR 179 (GP) para 56.

43 *Barnard v Minister of Justice, Constitutional Development and Correctional* 2016 1 SACR 179 (GP) para 96.

44 *Walus v Minister of Justice and Correctional Services* 2023 2 BCLR 224 (CC) para 36.

3 Facts

Mr Walus and his co-accused, the late Clive Derby-Lewis, were convicted of murder and sentenced to death in terms of the then-section 277(1)(a) of the *Criminal Procedure Act*. He was convicted of assassinating a struggle icon, the South African Communist Party Secretary General, Mr Chris Hani.[45] The trial court held that Hani was killed in a planned, cold-blooded assassination.[46] The murder occurred during the Convention for a Democratic South Africa (CODESA) negotiations to transition South Africa into a democratic state. Mr Walus was further sentenced to five years for possessing an unlicensed firearm.[47] He had planned to kill several anti-apartheid activists, including Mr Nelson Mandela. At the time, Mr Mandela was the African National Congress (ANC) president and would become the first president of a democratic South Africa in 1994. On 6 June 1995 the Constitutional Court declared the death penalty unconstitutional.[48] As a result the Supreme Court of Appeal modified Mr Walus' death sentence to life in prison, reasoning that "the atrocious crime demands the severest punishment that the law permits".[49] Mr Walus requested to be released on parole many times since 2011, but the different Ministers in charge of the correctional system denied his requests. When a recommendation was sent to the Minister, who refused the application on 22 June 2011, Mrs Hani was not engaged with the initial application.[50] In denying the initial application, the then-Minister held:

> The offender' on parole is not approved at this stage. The victim's family and any other interested party must be given opportunity to provide either a victim impact statement or a statement of opposition.[51]

Mr Walus filed a case in the Gauteng Division of the High Court in Pretoria to have the Minister's March 2020 decision rejecting his parole application reconsidered and overturned. In dismissing the matter, the court ruled that the Minister had properly considered all the factors required before deciding whether to place Mr Walus on parole. It emphasised that the Minister had noted that his decision and the grounds for it did not entail that Mr Walus would never be rereleased on parole. Relying on reports such as the social

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45 *Walus v Minister of Justice and Correctional Services* 2023 2 BCLR 224 (CC) para 6.

46 *Walus v Minister of Justice and Correctional Services* 2023 2 BCLR 224 (CC) para 18.

47 *Walus v Minister of Justice and Correctional Services* 2023 2 BCLR 224 (CC) para 18.

48 *S v Makwanyane* 1995 6 BCLR 665 (CC).

49 *Walus v S* [2001] JOL 7629 (A).

50 *Walus v Minister of Justice and Correctional Services* [2018] JOL 40332 (GP) para 5.

51 *Walus v Minister of Justice and Correctional Services* [2018] JOL 40332 (GP) para 5.

worker's assessment, the Minister acknowledged that there was little chance that Mr Walus would commit another crime after being released. Mr Walus' application was dismissed with costs by the High Court.[52] Mr Walus' petition to the Supreme Court of Appeal was denied because there were no realistic chances for success and no other compelling reason to hear his appeal.[53]

4 The Constitutional Court judgment

The court held that it had jurisdiction to hear the matter. The court based this reasoning on Mr Walus' High Court application to review a decision using the PAJA, which gives effect to section 33 of the *Constitution*. After settling the issue of jurisdiction, the court noted that its decision to allow Mr Walus' leave to appeal depended on several factors. The factors the court had to consider included the gravity of the case, whether granting permission would significantly impact on society at large or just the parties, and whether Mr Walus had a reasonable chance of succeeding. The court then granted Mr Walus leave to appeal in the interests of justice. The court first discussed section 36 of the *Correctional Services Act*, which deals with the objectives of imprisonment. It found that section 36 provides a legal foundation for the idea that one of the main goals of incarceration in our correctional facilities is to rehabilitate the prisoners so that, upon release from prison and reintegration into society, the prisoner can lead a crime-free life.[54] The court then considered Mr Walus' behaviour while in custody. The court acknowledged that Mr Walus had been an exemplary inmate. After analysing section 36 and considering the accused's behaviour while in prison, the court had to decide whether the Minister's decision to refuse to release Mr Walus on parole was rational. In determining whether the decision was rational, the court considered several aspects of the application. The elements considered included the factors considered by the Minister in refusing parole.

The court highlighted three significant reasons for the Minister's parole refusal: the nature and seriousness of the offence committed by Mr Walus, and the trial court's sentencing remarks. The court started by considering the rejection based on the trial court's comments. The trial court's statements considered by the Minister, as reflected in the Minister's paper to the Court, relate to how Mr Walus committed the offence in cold blood and almost led the country to a civil war. The court found that the minister had misconstrued the interpretation of the law and policy guidance on the

52 *Walus v Minister of Justice and Correctional Services* 2023 2 BCLR 224 (CC) para 27.

53 *Minister of Justice and Correctional Services v Walus* 2017 2 SACR 473 (SCA).

54 *Walus v Minister of Justice and Correctional Services* 2023 2 BCLR 224 (CC) para 37.

factors to be considered. The court explained that the remarks to be reviewed should not be those in relation to the seriousness of the offence but rather those, if any, relating to the release of the prisoner on parole. Thus, when the Department's policy paper refers to the trial court's sentencing remarks, this relates to the sentencing court's statements that reflect the minimum amount of time the offender was required to serve in prison before being eligible for parole. The court acknowledged that section 276B(1)(a) of the *Criminal Procedure Act* conferred such powers upon courts. Section 276B(1)(a) entails that a court may specify a period during which a person convicted of an offence will not be eligible for parole as part of the punishment if the prison term is two years or more. The court may invoke section 276B(1)(a) on condition that this period, known as the non-parole period, may not be more extended than two-thirds of the sentenced time in jail or 25 years, whichever is shorter.[55] The court then held that the sentencing remarks allowed by the Department's policy were not stated in the current instance by either the trial court or the Supreme Court of Appeal when it replaced Walus' death sentence with life imprisonment.

In considering whether the decision to refuse Mr Walus' parole was rational, the court turned to the Minister's remarks in his submissions. The Minister had hinted that his refusal of parole in 2020 did not mean he would not grant Mr Walus parole on the same factors in the future. Regarding this aspect, the court rhetorically asked,

> If the Minister were to release Mr Walus on parole on the same facts in the future, how would he justify his two conflicting conclusions on the same facts?.[56]

According to the court, the Minister's papers had not answered this question. After analysing the Minister's reasons for refusing the parole application, the court concluded that there was no relationship between the Minister's use of his authority and the reason the law gave it to him. Having found that the Minister's decision was irrational, the court had to consider whether to remit the matter to the Minister. The court decided to release Mr Walus on parole.[57] In articulating the reason for its decision the court held that it had noted the history of Mr Walus' request to be released on parole, the doctrine of the separation of powers and that it was in the same position as the Minister in deciding whether Mr Walus should be released on parole.

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55 Section 276B[1][b] of the *Criminal Procedure Act* 51 of 1977.

56 *Walus v Minister of Justice and Correctional Services* 2023 2 BCLR 224 (CC) para 81.

57 *Walus v Minister of Justice and Correctional Services* 2023 2 BCLR 224 (CC) para 98.

The court set aside the Minister's decision and ordered that Mr Walus be released on parole within ten business days of the order.[58]

5 Discussion

5.1 Interpretation of "sentencing remarks"

There are several reasons why it may be said that the court erred in interpreting what constitutes "sentencing remarks" in the parole board manual. Firstly, section 276B is irrelevant to offenders sentenced to life imprisonment. The non-parole provisions in section 276B apply only to determinable sentence periods. Several factors support the claim that section 276B does not apply to a sentence of life imprisonment. As previously indicated, section 276B(1)(b) allows courts to fix a non-parole period to a maximum of 25 years. In terms of section 73(6)(b)(iv) of the *Correctional Services Act*, a person sentenced to life in prison may not be granted parole until he or she has served at least 25 years.[59] The essence of section 73, read with section 276B(1)(b), is that "sentencing remarks", as interpreted by the court, would be an irrelevant factor to consider for a prisoner who has been sentenced to life imprisonment. Thus, it is incorrect to limit sentencing remarks to section 276B non-parole order provisions.

Secondly, a prisoner subject to section 276B[60] is not eligible for parole before the expiry of the non-parole period. Section 276B(1)(b) additionally states that the "non-parole period" may not exceed two-thirds of the sentence imposed or 25 years, whichever is shorter. This argument is further supported by case law on the purpose of section 276B. In *Phaahla v Minister of Justice and Correctional Services*, for example, the court acknowledged that this provision gives the courts the power to defer a prisoner's eligibility for parole.[61] Another reason to conclude that the court misconstrued the meaning of "sentencing remarks" is evident in that the policy predates section 276B. Indeed, section 276B became operative on 1 October 2004, whereas the policy which gives effect to the parole board manual was gazetted on 30 June 2004. Before the enactment of section 276B parole was governed by the 1998 *Correctional Services Act* and the courts had no control over the implementation of sentences.[62] Thus, at the time of the parole board manual's drafting, the policymakers could not have contemplated the interpretation adopted by the Court. Unfortunately, the

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58 *Walus v Minister of Justice and Correctional Services* 2023 2 BCLR 224 (CC) para 98.

59 *Correctional Services Act* 111 of 1998.

60 *Criminal Procedure Act* 51 of 1977.

61 *Phaahla v Minister of Justice and Correctional Services* [2018] JOL 39671 (GP) para 22.

62 *Ndlovu v S* (925/2016) [2017] ZASCA 26 (27 March 2017) para 8.

court's reasoning for this conclusion is not apparent from the judgment that "sentencing remarks" apply only to remarks relating to section 276B.

5.2 Consideration of "unchanging" factors

The second issue with the *Walus* case is that the court erred in grounding irrationality on the "unchanging" factor of the seriousness of the offence. This is the context of the court's analysis of the proper weighting of unchanging factors beyond a prisoner's control. The court rightly cautions against refusing parole because of unchangeable factors. The judgment reads in paragraphs 81 and 82:

> [I]f, in the future, the Minister can or will release the applicant on parole on the same facts as those which prevailed in 2020 when he denied him parole, does that mean that he will have reached two different and mutually exclusive conclusions on the same facts? If he could reach the conclusion to release the applicant on parole on these facts in the future, why is it that he did not release him in 2020 on the same facts. If the Minister were to release the applicant on parole on the same facts in the future, how will he justify his two conflicting conclusions on the same facts? The Minister did not explain any of this in his answering affidavit. His failure to explain this renders his decision to deny the applicant parole inexplicable. If it is inexplicable, it follows like night follows day that it is irrational.
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> [I]f more than 26 years after the applicant was sentenced for the crime he committed, it was appropriate for the Minister not to release the applicant on parole in 2020 because of the nature of the crime, the seriousness thereof and the Court's sentencing remarks, why would it be appropriate for the Minister to release him one or two or three or five years thereafter? These three factors are immutable. They will not change one or two or three or five years later. This the Minister has not explained … Therefore, this Court must vitiate the Minister's decision. If it were not to do so, it would in effect be giving its approval to the proposition that in future it would be appropriate for the Minister to deny the applicant parole even when he may have served 30 or 35 or even 40 years of imprisonment. That, simply on the basis of the nature of the crime, the seriousness thereof and the trial court's and Supreme Court of Appeal's sentencing remarks despite the fact that the applicant has complied with all other requirements for him to be placed on parole which the Minister concedes.[63]

Does the court suggest that denying parole solely based on immutable factors renders the refusal of parole irrational? The answer must be in the affirmative. To contextualise the court's remarks, Walus' circumstances must be recalled. He qualified for parole 17 years before the decision and had served a total of served 28 years. He was "an exemplary prisoner" with a low risk of offending upon release, had no record of ill-discipline,[64] and, as admitted by the Minister, all factors but the seriousness and nature of the offence were in favour of parole. This made it difficult for the Minister to

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63 *Walus v Minister of Justice and Correctional Services* 2023 2 BCLR 224 (CC) paras 81-82.

64 *Walus v Minister of Justice and Correctional Services* 2023 2 BCLR 224 (CC) para 47.

argue that a different decision could be made in the future. The court found that the Minister's failure to explain how he would justify another decision in the future rendered the decision irrational and unconnected to the purpose for which the power to consider parole was conferred on him. On this reasoning it is difficult to fathom a scenario where a court would reach a different conclusion if a prisoner had fulfilled all the parole requirements and was yet denied release based on the seriousness and nature of the crime. A denial of parole due to the nature and severity of the offence where all other factors are met would likely run into similar problems.

Was the court right to characterise the nature and seriousness of the offence as an unchanging factor? The issue is not that the factors in themselves are unchanging. Instead they cannot pass as the sole justification for continued detention post eligibility for parole. Considering the nature and seriousness of an offence speaks to the retributive purposes of punishment. As noted in *S v Makwanyane*, retribution entails that "[p]unishment must to some extent be commensurate with the offence".[65] It reflects the moral outrage of the victims of crimes and the public abhorrence of vile crimes.[66] A lengthy prison sentence is one way of expressing the desire for retribution.[67] At a minimum, the parole tariff of 25 years for life sentences exacts adequate retribution for the serious offences punishable with life. An opinion that the seriousness and nature of the crime militate against parole means that the administrator believes that the sentence served thus far is inadequate for retributive purposes. It is, therefore, possible for this view to change. Such a change will not mean that the offence is no longer serious or that its nature has changed. Instead, the view would be that the prisoner has spent enough time in prison to satisfy the goal of retribution and not make a mockery of justice. This call is within the mandate of the Minister. Holding that "unchanging" factors cannot rationally be the basis for withholding parole would render the factors irrelevant.[68] This would be contrary to the policy, which, as noted by the Court itself,[69] requires the Minister to consider the seriousness of the crime. This allows the Minister to deny parole based on the seriousness or nature of the crime.

What weight should be given to retribution when an offender has satisfied all other requirements in the parole process? The discretion ultimately lies with the Minister. Therefore, resorting to retribution as a justification for the continued detention of a prisoner who otherwise qualifies for parole cannot,

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65 *S v Makwanyane* 1995 6 BCLR 665 (CC) para 129.
66 *S v Makwanyane* 1995 6 BCLR 665 (CC) para 129.
67 *S v Makwanyane* 1995 6 BCLR 665 (CC) para 129.
68 See *Walus v Minister of Justice and Correctional Services* 2023 2 BCLR 224 (CC) para 82.
69 *Walus v Minister of Justice and Correctional Services* 2023 2 BCLR 224 (CC) para 7.

without more, be deemed irrational. Such a determination will have to be made on a factual basis. A general principle is that a penal system based on human rights must not give undue weight to retribution.[70] Other purposes of punishment, like rehabilitation, and the circumstances of the offender, must be considered carefully. Irrationality will arise if the Minister has reached a foregone conclusion that his decision will never change; that is, that the seriousness of the offence bars an offender's release at any point.

6 Conclusion

The *Walus* case demonstrates that the parole framework for offenders sentenced to life is complex. The Minister must weigh up several factors to reach a decision. This requires a consideration of all the factors laid out in the policy and the law. None of the factors must be rendered redundant. The policy requires the Minister to consider the nature and seriousness of the crime and the sentencing remarks. The finding in *Walus* that sentencing remarks refer to the section 276B non-parole period is problematic. For one thing, it overlooks the inapplicability of these non-parole periods to life prisoners. It also undermines the nature of section 276B non-parole periods as court orders, which cannot be characterised as sentencing remarks or factors. *Walus* can also be criticised for its conclusion that denying parole to life prisoners on the sole basis of the nature and seriousness of the offence is irrational. This decision is inimical to the discretion vested in the Minister, including considering retribution as a sentencing purpose. While life prisoners must not be locked away for the rest of their lives, the Minister must fully apply the policy and the law to achieve a legally sustainable approach to their early release.

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LIST OF ABBREVIATIONS

CILSA	Comparative and International Law Journal of Southern Africa
PAJA	Promotion of Administrative Justice Act
SAJHR	South African Journal on Human Rights