

**GENERAL DETERRENCE AS A SATISFACTORY
JUSTIFICATION FOR PUNISHMENT**

BY

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ABSTRACT

It is a universal phenomenon that peace, law and order only exist where justice prevails. Justice is an ingredient of the rule of law. In Namibia crime has become a topical issue. The nation focuses its attention and its fears on the threat of crime. Rights which are guaranteed by the law particularly in the Constitution of the Republic of Namibia such as a right to liberty; to own property and right to dignity are violated by offenders with impunity.

For many, the criminal justice system has become soft on crime. It seems deterrent punishments are no longer imposed by the courts. Courts have apparently lost sight of the fact that the law does not only protect the rights of accused and convicted persons, but also those victims of crime.

Restorative justice has not found emphasis in the punishment meted out by the courts. The legislature has done little in enacting legislations for the more effective combating of crimes in the country. When hearing the views canvassed by the public, not even the re-introduction of capital punishment is spurred from the list of proposed solutions to the crime. It is however not possible to re-introduce capital punishment given our current Constitution which outrightly outlaws capital punishment in Article 6. Also canvassed by the public is the re-introduction of corporal punishment which has also been declared unconstitutional by the Supreme Court.

The acclaimed African leader, the late and former Tanzanian President Julius Nyerere in his book – Freedom and Socialism 1968 pp 110 – 112 says:

“Justice demands many things. It demands that the innocent be assured of personal security and also that the guilty should be punished. It demands impartiality between citizens – that the law should be the same for all. And it demands an understanding by the judiciary of the people and by the

people of the judiciary, for without this mutual understanding the people's basic sense of justice in their relations with each other may be outraged by the very instrument which they have created to implement justice"

Motives for punishment have been changing from century to century. During our current century, punishment should be influenced by not only the protection of the fundamental rights of those who have wronged against the law but also those whose rights have been violated by the offenders.

Certainly the law-abiding citizens country-wide demand drastic and effective action by the State and Judiciary to protect the rights of law-abiding citizens, the victims of crimes and potential victims. This is what the Constitution which is the supreme law provides. Strong measures are necessary to protect the Namibian society.

It is recommended in this thesis that the current Criminal Procedure Act be overhauled if not repealed so that a new Namibian Criminal Procedure Act which will underline the need for the courts to serve justice is enacted. The new Act should make provision for life imprisonment with the possibility of remission, parole or probation as well as life imprisonment without the possibility of remission, parole or probation depending upon the gravity of the crime committed. Mandatory minimum sentences should be provided for, for serious crimes such as murder, kidnapping, child stealing and robbery with aggravating circumstances. For those found guilty of fraud or misappropriation of public funds, the Act must make room for the Court to order compensation which shall have the effect of civil judgment.

It is also recommended for the reintroduction of whipping on male offenders under the age of 21 years, provided the whipping is inflicted in a moderate manner and proper safeguards are put in place.

Legislation should therefore be enacted that makes provisions that victims or their families be accorded the right to bring to court's attention the harm they have suffered as a result of crimes of violence against the person. The court should be empowered by the law in serious crimes to mero motu ask for victim's impact statement if the court so desires. It is recommended that the judicial officers should play more active role in their efforts to do justice. Our criminal system should become more inquisitorial rather than adversarial in approach if the criminal system has to live by the letter and spirit of the Namibian Constitution.

By the time this research was concluded a new Criminal Procedure Act has been enacted though it has not yet come into operation. It provides for quite a number of issues recommended in this research. Though the new Act is not all encompassing, it has addressed substantial shortcomings in the present Criminal Procedure Act.

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DEDICATION

To my wife, Nellago, two sons, Mandume and Iipumbu and two daughters, Martha and Tuyeimo.

DECLARATIONS

I, Paulus Noa, declare hereby that this study is a true reflection of my own research, and this work, or part thereof has not been submitted for a degree in any other institution of higher education.

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HAPTER 1

1. INTRODUCTION

1.1 Introductory remarks

Crime has become a topical issue in Namibia. The nation focuses its attention and its fears on the threat of crime. Concerns for rehabilitation and even deterrence appear to have yielded for many people in favour of retributive justice. For many, the criminal justice system has become soft on crime. Even parliamentarians seem to be boggled by the crime rate. Not even the introduction of capital punishment was spared from the list of proposed solutions to the crime. There is a flurry of activity at the national level to pass legislation that get tough on crime. Good examples are the Combating of Rape Act¹, Arms and Ammunition Act², and the Stock Theft Act³. More bills that get tough on crimes are looming in parliament. What underlies all these legislations is the theory of general deterrence. The question we ask ourselves is, what purpose society intends punishment to serve, and why it is thought that a criminal should undergo a particular form of punishment?

Attempts at justifying society's reaction to criminal behaviour are known as theories of punishment. There are various theories of punishment. The first classification distinguishes the relative theory, the absolute theory and the unitary theory. The relative theories are further classified into the preventive, deterrent and reformative theories. The deterrent theory is then subdivided into the individual deterrence and general deterrence⁴. This thesis focuses on general deterrence as a purpose of criminal punishment.

1. Act 8 of 2000.

2. Act 7 of 1996.

3. Act 12 of 1990.

4. Fitzgerald, P.J. 1962. **Criminal law and punishment**. Oxford: Clarendon Press, 57.

1.2 Definition of punishment

The punishment the court imposes entail certain purposes. Punishment entails the infliction of suffering upon an offender and the expression of the community's condemnation and disapproval of the offender and his conduct. Punishment must be a lesson to offenders and must deter them from further crime. As Mays⁵ puts it: "Once bitten, twice shy". The underlying principle is that anyone who has once experienced the suffering and unpleasantness of punishment is conditioned to refrain from criminal behaviour in future.

Punishment for the sake of punishment is wrong. Punishment is acceptable only if it aims at something positive. Punishment is therefore regarded as an investment in pain.

Admittedly punishment causes the offender pain, but if others are deterred by this punishment, pain resulting from further crimes is avoided.

The pain prevented in this way is the interest earned by the initial investment. People commit crimes to gain certain advantages for themselves, but if crimes are subject to punishment, and the pain caused by this punishment is sufficient, they will avoid crime. The criminal punished is therefore sacrificed in the interests of general welfare. Advocates of this approach believe that punishment should take place in public so that members of the community can see this sacrifice and become aware of the dangers associated with criminal behaviour⁶.

5. Mays, J. B. 1975. **Crime and its treatment**. London: Longman, 82.

6. Ball, J.C. 1955. **The deterrence concept of criminology and law**. Journal of Criminal Law, Criminology and Police Science. Volume 29, 42.

Traditionally we speak of three needs in reaction to crime. These needs which form the rationale for state intervention in citizens' lives are:

- (i) the need to sanction a crime,
- (ii) the need to assist in the rehabilitation of the offender,
- (iii) the need to improve the safety of the community.

Recently people have also expected the criminal justice system to meet the fourth need, namely to compensate victims where possible for losses suffered as a result of the crime.

Our criminal justice system has been severely criticized by members of the community through demonstrations and petitions of being more criminal friendly at the expense of the law abiding citizens whose rights to life, liberty and dignity should in fact be protected.

1.3 A brief history of punishment.

To deter people from crime through the existence, imposition and operation of punishment is a very old penal objective. It is based on the belief that the criminal will duly consider the unpleasant consequences of committing the crime (retribution in the form of punishment) and will therefore refrain from criminal behaviour. The purpose of deterrence in punishment is to keep the sentenced offender away from further crime, and to obviate criminal behaviour in the potential offender⁷. Accordingly deterrence has two elements: first, the effect of punishment on the convicted offender, and secondly, the example to others who may thereby be deterred from committing intended crime.

7. Eysenck, H.F. 1977. **Crime and personality**. St Albans: Paladin, 161.

During the middle ages and subsequent periods the state gained control of the administration of punishment but, under the influence of religious dogmatism and feudal tyranny, judges tended to impose extremely cruel punishments.

During this initial developmental phase the principle that punishment should be commensurate with the crime was not acknowledged at all. The only objective was deterrence. Hence the inhuman punishments that were so common at the time. Caldwell⁸ believes that deterrence has both a restraining influence on the intending or potential offender and a positive, moral influence on the education of the community as a whole: It may also operate to strengthen the public's moral code, bringing about deterrence through inhibition of wayward impulses and formation of habits.

Meyer⁹ refers to the Greek philosopher Plato as the first person to advocate crime prevention through a deterrent force. In the eighteenth century Blackstone and Bentham¹⁰ saw the suffering of an offender as an important penal objective, but regarded its deterrent value as the cornerstone of the community's moral law. Beginning with the premise that the eventual purpose of punishment is to control human behaviour, Bentham went on to show that this aim was reached not only by the offender's compensation but also, and even more important, by the example made of the offender.

Bentham¹¹ also made the interesting distinction between the "real" and the "apparent" effect or value of punishment, the real effect being its effect on the person undergoing it, and the apparent effect referring to its effect on people's philosophy in general.

8. Caldwell, R.G. 1965. **Criminology**. New York: Ronald, 425.

9. Meyer, J. 1968. **Reflection on some theories of punishment**. Journal of Criminal Law, Criminology and Police Science, Volume 59. 599.

10. Fitzgerald, P.J. 1962. **Criminal Law and punishment**. Oxford: Clarendon Press, 207.

11. Redmount, R. 1959. **Some basic considerations regarding penal policy**. Journal of Criminal Law, Criminology and Police Science. Volume 49. 427.

In the nineteenth century, deterrence was generally accepted as the main objective of punishment. In his well-known work “An essay on crime and punishment”, Beccaria¹² argues that the objective of punishment should not be to exact retribution from the offender but to prevent others from committing a similar offence. His premise was that any justifiable punishment should have only the necessary intensity or severity to make it an effective deterrent. Rousseau and the French nationalists were foremost among those who protested against excessive sentences. This was the origin of the Classical School which advocated a fixed, objective and humane punishment for every crime¹³.

The classical principle of punishment was based on the belief that every human being has a free will which he exercises to maintain a balance between pleasure and pain, the object being to achieve as much pleasure as possible. It was therefore necessary to link particular punishments with particular acts, so that people would have the opportunity of weighing up the advantages and disadvantages attached to the commission of a crime, and thus of deciding whether or not it would be to their advantage to do the particular deed concerned.

By nicely calculating the length of imprisonment to be assessed against each offence (a longer period for graver offences, a shorter period for lesser), and by making sure that punishment was swift and certain, the eighteenth century reformers felt they would achieve a maximum of deterrence and a minimum of injustice¹⁴.

12. Reckless, W. 1967. **The Crimes problem**. New York: Appleton – Century – Crofts, 89.

13. Caldwell, R.G. 1956. **Criminology**. New York: Ronald Press, 55.

14. Korn, R.R. & McCorkle, L.W. 1959. **Criminology and Penology**. New York: Holt, 580.

Rusche and Kirchheimer have attempted to show that socio economic factors were the main reason for the change in penal policy. On the substitution of prison sentences for the cruel, inhuman punishments of earlier times, they observe that these changes were not the result of humanitarian considerations, but of certain economic developments which revealed the potential value of a mass of human material completely at the disposal of the administration¹⁵.

Although the new ideological concepts introduced by the Classical School were an improvement on the old system, attention remained focused on the deed rather than on the doer. According to Korn & McCorkle¹⁶ the Classical “School” of Criminology is a broad label for a group of thinkers of crime and punishment in the 18th and early 19th centuries. Its most prominent members, Cesare Beccaria and Jeremy Bentham, shared the idea that criminal behavior could be understood and controlled as an outcome of a “human nature” shared by all of us. Human beings were believed to be hedonistic, acting in terms of their own self-interest, but rational, capable of considering which course of action was really in their self-interest. A well-ordered state, therefore, would construct laws and punishments in such a way that people would understand peaceful and non-criminal actions to be in their self-interest-through strategies of punishment based on deterrence.

Punishment was regarded as a kind of expiation, designed to repair the injury done to the communal sense of justice or to make good the criminal’s breach of the social contract. Thus the distinguishing feature of this second phase in the development of the motives for punishment was the principle that the severity of the punishment should be commensurate with the seriousness of the offence¹⁷.

15. Korn & McCorkle *supra*, 581.

16. Korn & McCorkle *supra*, 583.

17. Korn & McCorkle *supra*, 583.

The Classical School also drew attention to the dangers of the earlier policy of deterrence, namely the excessively wide discretion given to judges and the undesirable degree of freedom permitted to the persons who administered punishments. To combat this danger, the classicists urged that the individual should be protected by legal rules defining the precise nature and degree of the punishment for every crime.

James Mill¹⁸ stated the case as follows:

This we may assume as an indisputable principle; that whatever punishment is to be inflicted, should be determined by the Judge, and by him alone, that it should be determined by its adoption to the crime, and that it should not be competent to those to whom the execution of the sentence of the Judge is entrusted; either to go beyond the line, which he has drawn, or to fall short of it.

The beginning of the third developmental phase was characterized by the assumption that the main purpose of penal policy is to assist security by reducing the volume of crime, and therefore that the value of any punishment is to be appraised by its effectiveness in promoting this purpose¹⁹. Nowadays increasing attention is paid to the circumstances of the offender, the nature of the crime and the interests of society when an appropriate punishment is being assessed²⁰.

1.4 General deterrence theory

Whereas individual deterrence and the effect of punishment focus on the offender undergoing punishment, general deterrence has the community as a whole as its focal point.

18. Encyclopaedia Britannica of 1824. Radzinowicz, L. & Turner, J.W.C. 1945. **The modern approach to criminal law**. London: Macmillan, 45.

19. James Mill, *supra*, 51.

20. Straus, S.A. 1961. **Nuwe weë in die Suid-Afrikaanse Strafprosesreg**. Professoral inaugural lecture: University of Pretoria. S v Zinn 1969(2) SA 537(A).

The principle is to punish the offender severely enough to deter would-be offenders from a similar crime for fear of a similar punishment²¹. An English judge sums up the principle as follows: “Men are not hanged for stealing horses, but that horses may not be stolen”²².

Marris²³ mentions that general deterrence functions in two ways: first fear of punishment may be the deciding factor in keeping the would-be criminal from criminal behaviour, and secondly the existence of punishment may have an educational and formative influence on the moral conditioning of society in general.

1.4.1 The justification for deterrence as a penal objective

The main justification for deterrence as a penal objective is that the deterrent effect of punishment may contribute to crime prevention, but only in so far as punishment succeeds in deterring the offender and the would be offender, from crime. Therefore the success of punishment as a deterrent contributes directly to public protection. Another justification for deterrence as a penal objective is its contribution to the rehabilitation of offender, making them fear their previous wrong behaviour may help break their behavioural patterns. This may contribute to their own rehabilitation and so to public protection²⁴. Some people have bondless faith in the deterrent value of punishment, whereas others doubt or even deny its effectiveness.

21. Viljoen Commission, 1976. **Report of the Commission of inquiry into the penal system of the Republic of South Africa**, 56.

22. Van den Haag, E. 1975. **Punishing criminals: Concerning a very old and painful question**. New York: Basic Books, 61.

23. Carter, R. M., Glaser, D. & Wilkins, L.T. 1972. **Correctional institutions**. New York: Lippincott, 27.

24. Nesor, J. 1980. **ń Toereties – prinsipiële studie oor sekere aspekte van die straf en behandeling van die oortrede vanuit in penologiese perspektief**. D. Phil-proefskrif, Universiteit van Suid Afrika, Pretoria.

The fact that normal people generally avoid or try to avoid the unpleasant is such a commonplace that its validity is unquestionable, but experience has shown that punishment has no absolute deterrent value. Though deterrence does not have an absolute deterrent value, it remains a penal objective to reckon with. Those who reject it are not entirely correct. They argue that the mere presence of criminals in spite of the existing threat of punishment is sufficient proof that punishment is no deterrent and that the deterrence ought not to be a penal objective²⁵. This argument does not hold water. The undeniable fact that some would-be offenders are not deterred cannot be used to generalize that punishment is not a deterrent to anyone.

1.4.2 The effectiveness of deterrence

Penal codes of many countries in the world proscribe punishment for specific crimes with the object of deterring potential criminals. The most obvious result of punishment is its effect on the rest of the community.

The mere fact that a particular act has been declared punishable serves as a threat and induces people to refrain from that particular offence. The infliction of the prescribed punishment proves to the community that the threat was not an empty one. The unpleasant experience which the offender is made to undergo then restrains other people from imitating him²⁶.

After his release from prison, the offender is once again a potential criminal, but the unpleasant experience of punishment is a factor that may restrain him from committing further criminal acts in the future. My experience as a judicial officer is that many of the offenders who were sentenced to prison do not relapse into crimes. Though there are some, the number is limited. That itself is an indication of the effectiveness of deterrence to the community.

25. Reid, S.T. 1976. **Crime and Criminology**, Hinsdale, IL: Dryden Press, 501.

26. Hospers, J. 1963. **Human conduct: an introduction to the problems of ethics**. London: Hart – Davis, 455.

The example offered by the sufferings of criminals was an important element in Bentham's theory of punishment. Bentham draws a distinction between the "real" and the "ostensive" value of punishment²⁷. The real value of punishment is the effect it has upon the person undergoing it. The ostensive value of punishment is its effect on the mental processes of the people in the community at large.

The idea of punishment as a deterrent rests on the following assumptions:

- (1) Intending criminals think before they act. As Reckless²⁸ says:
"The conception of deterrence presumes that the person thinks before he acts and that all he has to do is to think of the consequences and then he will be deterred." The individual's free will offers some control over behaviour, thus making it possible to act with insight and in accordance with the hedonist principle²⁹. Thus people judge themselves in particular situations and in emergency can direct their behaviour reasonably in spite of all other considerations³⁰. It can be reasonably assumed that normal, rational people think before they act and that using their intelligence they weigh up the undesirability of punishment against the benefits of crime.
- (2) The adversity of punishment is always greater than the benefits of crime. This means that punishment that is imposed should be heavier than the benefit obtained from the crime. This is important for the offender to know that crime is not worth a candle. He needs to be made to know that crime does not pay. How severe the punishment to be imposed will depend on various prevailing factors. The primary objective is that punishment must have a deterrent value.

27. Fitzgerald, *supra*, 207.

28. Reckless, *supra*, 504 – 505.

29. Redmount, *supra*, 428.

30. Caldwell, *supra*, 426.

- (3) Punishment arouses fear but not always the necessary fear. Experience has shown that punishment may arouse rage, and then it does not deter but acts as an incentive to the offender to seek relation and commit further crime. If offenders and their crimes have been motivated by strong convictions such as religious convictions, the effect of punishment may be inspiring and not frightening or deterrent. Various writers point out that frightening effect of punishment is relative. In making his general calculations, the potential criminal is aware of police and courts and prisons, but the individual is concerned with his present temptation, his urges, his drives, his frustrations. According to the theory of general deterrence, the individual offender is punished for the purpose of deterring him and not only him but other potential offenders from committing such a crime in future³¹.
- (4) There is no doubt that punishment will follow crime. Duffee and Fitch³² point out indications that punishment does act as a deterrent in cases where it is relatively inevitable, and where the interval between a crime and its punishment is short. Closer investigation shows that this does not always hold true. Not all crimes are known, nor are offenders of reported cases always traced, nor are all arrested offenders convicted and punished. Many offenders rely or take a chance on the possibility of escaping punishment³³.

Pontell³⁴ examines the most recent and methodologically most responsible studies in this area, and classifies them into three groups: those with political motives, those within the framework of the economic sciences and those by social scientists (such as sociologists).

31. Higgens, L. & Fitzpatrick, E. 1958. **Criminology and crime prevention**. Milwaukee: Bruce, 263.

32. Duffee, D. & Fitch, R. 1976. **Introduction to corrections: a policy and system approach**. Santa Monica, CA: Goodyear, 75.

33. Elkin, A.W. 1957. **The English penal system**. Edinburgh: Clark, 31.

34. Ibid, 32.

Ball³⁵

believes that the effectiveness of punishment as a deterrent depends on the following factors:

- (1) the social structure and values in a community;
- (2) the particular population group;
- (3) moral support of the law on which punishment is based;
- (4) the type and severity of the punishment;
- (5) the certainty of arrest and punishment, and
- (6) the individual's knowledge of an attitude to legal prescriptions and the existence of punishment.

Kant³⁶ explains punishment as an ethical necessity by saying that practical reason demands unconditionally that crime should be followed by punishment, retribution in the form of suffering inflicted as a punishment for crime is categorically imperative. He goes on to say that if civilization were to come to an end tomorrow, it would still be necessary to execute the last murderer today. Deterrence is based on the belief that the purpose and function of punishment is to cause the offender to suffer and by so doing to restrain him and other potential criminals from committing crimes in the future.

35. *Supra*, 349.

36. Kant quoted in, Hazewinkel–Zuringa. D. 1956. **Inleiding tot studie van het Nederlandse strafrecht**. Haarlem: Willink, 540. Vos, H.B. 1960. **Leerboek van Nederlandse strafrecht**. Haarlem: Willink, 13.

CHAPTER 2

2. PAST AND PRESENT CRIMINAL JUSTICE SYSTEM IN NAMIBIA

2.1 Criminal Justice system prior to independence

Namibia had been under South African administration prior to independence. The laws applied in South Africa have also been applied in the then South West Africa. For clarity this happened as follows:

With the termination of the First World War of 1914 – 1918 and in terms of Article 119 of the Peace Treaty of Versailles signed on the 28 June 1919, a defeated Germany ceded to the principal Allied and Associated powers, all its rights and titles to its former colonies, including German South West Africa. South Africa became the mandatory on behalf of the League of Nations of the mandated territory of South West Africa in 1920. After the demise of the League of Nations, South Africa asked for consent from the United Nations Organisation to incorporate South West Africa as a fifth province of the Republic of South Africa in 1946. When this was refused and a new aggressive National Party Government came to power in 1948 in South Africa and in 1950 in South West Africa, the said government proceeded to denounce the mandate proclaimed and dealt with South West Africa as a colony or fifth province¹.

1. O'Linn B. 1978. **UN Resolution 435(1978) and the future of Namibia**, Published in Töttemeyer G., Kandetu V. and Werner W. (eds), **Namibia in Perspective**, Windhoek: Angelus Printing, 22.

In terms of the Criminal Procedure Act² the nature of punishments that may be passed upon a person convicted of an offence are:

- (i) the sentence of death;
- (ii) imprisonment, including imprisonment for life;
- (iii) periodical imprisonment;
- (iv) declaration as a habitual criminal;
- (v) committal to any institution established by law;
- (vi) a fine;
- (vii) a whipping, and
- (viii) correctional supervision.

Superior Courts were mandated to pass the death sentence upon a person convicted of murder if aggravating circumstances were found to be present³.

As a result of that provision which does not leave any room for discretion, many convicted persons became the victims of the gallows. Judges who are abolitionists at heart found themselves constrained to impose the death sentence where aggravating circumstances were present.

In the period 1980 – 1988, there were 1070 executions and 290 reprieves, an annual average of over 27 per cent of executions. In 1988 the percentage declined. In the two years 1986 – 1987 there were 310 executions and only 42 reprieves, an annual average of 14 per cent of executions. But then in 1988 the number of executions dropped from all time high in 1987 of 164 to 117, and the number of reprieves rose from 20 to 49; some 42 per cent⁴.

2. Section 276 of the Criminal Procedure Act 51 of 1977.

3. Section 277(1)(a) of Act 51 of 1977 supra.

4. Murray, C. 1985. **Hangings in Southern Africa**: The last ten years 1 SAJHR 180.

In the case of *S v Diedericks*⁵, the accused was charged with murder. Van der Heever, J in this case said the following:

The compulsory imposition of the death penalty for murder in the absence of a finding of extenuating circumstances had not kept pace with the development of our legal system, where the court had a discretion in determining an appropriate sentence with every other crime.

The passing of the death sentence is the duty never taken lightly by most of the judges and the position could be different if there were discretion. Van Den Heever, J indicates how difficult it was to determine the existence or non-existence of extenuating circumstances⁶. He says the Legislature should entrust the Bench with a discretion in relation to sentence in murder cases to the same extent as the Court has a discretion in respect of other capital crimes.

In the case of South Africa, the criminal procedure made a turning point with the introduction of the Criminal Law Amendment Act⁷. The most dramatic turn was the abolition of the mandatory imposition of the death sentence for murder. The clause “sentence of death shall, subject to the provision of subsec (2) be passed upon person convicted of murder” was replaced with the clause “sentence of death may be passed by a superior court only and only in the case of conviction for (a) murder..., after the presiding officer sitting with or without assessors subject to the provisions of S145(4)(a), the court has made a finding on the presence or absence of any mitigating or aggravating factors, and the judge or court is satisfied that the sentence of death is the proper sentence”⁸.

5. 1981 (3) SA 940 (C) at 941 – 943.

6. *S v Diedericks* supra at 942.

7. Act 107 of 1990, Section 277 substituted by Section 4 of Act 107 of 1990.

8. Section 4 of Criminal Law Amendment Act supra.

Prior to the new dispensation the death penalty could even be imposed on juveniles⁹. With the introduction of the amendment the death penalty cannot be imposed upon a juvenile under the age of 18 years at the time of the commission of the crime¹⁰.

The juvenile death penalty is prohibited by Customary International Law and **Jus Cogens**. The United Nations' Sub-Commission on the Promotion and Protection of Human Rights affirmed that the prohibition of the juvenile death penalty is customary international law¹¹.

The Republic of South Africa Constitution¹², does not specifically abolish the death penalty. It deals with the prohibition of 'cruel, inhuman or degrading treatment or punishment'¹³. The issue was left to the Constitutional Court to determine whether it was unconstitutional or not. In August 1991 the South African Law Commission in its **Interim Report on Group and Human Rights** described the imposition of the death penalty as 'highly controversial'¹⁴.

Eventually the imposition of death was declared unconstitutional in the case of *S v Makwanyane and Another*¹⁵. Chaskalson P who wrote the judgment said the following:

The greatest deterrent to crime is the likelihood that offenders will be apprehended, convicted and punished. It is that which is presently lacking in our criminal justice system, and it is at this level and through addressing the causes of crime that the State must seek to combat lawlessness.

9. *S v Marmela* 1976 (2) SA 587 (A) (16-year-old).

10. Section 4(3)(a) of Criminal Law Amendment Act supra.

11. The death penalty in relation to juvenile offenders, Resolution 2000/17; adopted August 17, 2000.

12. Act 200 of 1993.

13. Section 11(2) of the Constitution of the Republic of South Africa supra.

14. South African Law Commission. 1991. **Interim report on Group and Human Rights Project 58** (August) paragraph 7:31.

15. 1995(2) SACR 1(cc).

In the debate as to the deterrent effect of the death sentence, the issue is sometimes dealt with as if the choice to be made is between the death sentence and the murder going unpunished. That is of course not so. The choice to be made is between putting the criminal to death and subjecting the criminal to the severe punishment of a long term of imprisonment which in appropriate case, could be a sentence of life imprisonment. Both are deterrents, and the question is whether the possibility of being sentenced to death, rather than being sentenced to life imprisonment, has marginally greater deterrent effect, and whether the Constitution sanctions the limitation of rights affected thereby¹⁶.

Mahomed, J. in his concurring judgment explained the multifaceted approach as follows:

We were not furnished with any reliable research dealing with the relationship between the rate of serious offences and the proportion of successful apprehensions and convictions following on the commission of serious offences. This would have been a significant enquiry. It appears to me to be an inherent probability that the more successful the police are in solving serious crimes and the more successful they are in apprehending the criminals concerned and securing their convictions, the greater will be the perception of risk for those contemplating such offences.

That increase in the perception of risk, contemplated by the offender, would bear a relationship to the rate at which serious offences are committed. Successful arrest and conviction must operate as a deterrent and the State should, within the limits of its undoubtedly constrained resources, seek to deter serious crime by adequate remuneration for the police force, by incentives to improve their training and skill, by augmenting their numbers in key areas, and by facilitating their legitimacy in the protection of the communities in which they work¹⁷.

16. *S v Makwanyane and Another* supra at 50 e-g.

17. *Makwanyane and Another* supra at 100 f-j.

Mahomed, J. further said that there was a need for substantial redress in the social-economic conditions of those ravaged by poverty, debilitated by disease and malnutrition and disempowered by illiteracy¹⁸. I agree that there is such need. What is also needed is a closer co-operation between the law enforcement agencies and members of the community. There must be a multi-dimensional approach against crime. Whereas the principle formulated by Mahomed, J. is correct, socio-economic conditions should not serve as an excuse for crimes of violence. It is not because of socio-economic conditions that an adult person should sexually abuse a child of less than thirteen years. Socio-economic conditions should not serve as an excuse for an adult person to rape another adult person. Socio-economic conditions should not serve as a scapegoat for somebody to unlawfully and intentionally cause the death of another human being. Criminals should not be allowed to hide behind socio-economic conditions to rob others their hard-earned properties. The need for a strong deterrent to violent crime is a matter of validity which is not open to question.

The legislature, judiciary and the executive, being the three pillars of the State, have responsibilities towards the community. The courts of law are obliged to protect human life, dignity and property through the instrument of punishment. In every society there must be laws which regulate the behaviour of people. For every law to be effective it must authorize criminal sanctions on those who go against it. There would be chaos if laws exist without deterrent criminal sanctions.

2.2 Criminal justice system after independence

The advent of the Namibian independence brought about the realization of so many rights of those living within the boundary of the Republic of Namibia.

18. Makwanyane and Another *supra* at 100j.

These fundamental rights and freedoms are entrenched in the Constitution of the Republic of Namibia. Among such rights is the right to life. The Constitution provides

that the right to life shall be respected and protected, and no law may prescribe death as a competent sentence. No Court or Tribunal shall have the power to impose a sentence of death upon any person and no execution shall take place in Namibia¹⁹.

Though death penalty has been abolished, it remains appropriate for academic convenience to discuss the feelings of some of the people in Namibia regarding their views on deterrent value of death penalty.

After several conferences and workshops in the country on the alarming upsurge of crimes, His Excellency the President of the Republic of Namibia, Dr Sam Nuyoma, in response appointed by means of proclamation²⁰, *The Commission of Enquiry into Legislation for the more effective Combating of Crime in Namibia*. The Commission was tasked with due consideration to the need not only to ensure that an innocent person should not be punished, but that a guilty person does not escape punishment. The Commission was further tasked with the need not only to protect the fundamental rights of accused and/or convicted persons, but also those of the victims of crime.

The Commission conducted public hearings at many places in the country. Those who testified before the commission considerably supported the reintroduction of the death sentence for exceptionally cruel, inhuman or degrading crimes of violence particularly if that could be done legally and / or in accordance with the constitution.

19. Article 6 of the Namibian Constitution.

20. Proclamation 2 of 1995 that was contained in Government Notice 75 of 1996, published in Government Gazette 1285 of 1996 in April 1996. The Commission was chaired by Mr Justice Bryan O'Linn and for the purpose of paragraph 6 of the Commission's terms of reference, one other person designated by the Minister of Prisons and Correctional Services.

The participants were generally in agreement that crime is prevalent and has escalated in recent years after independence²¹. Juveniles committing serious crimes, have become a grave problem in itself requiring special measures and that criminals banding together in dangerous gangs have become a serious threat to society.

They were also of the view that the rights of accused and convicted persons are overemphasized at the cost of victims, their witnesses and generally at the cost of the law-abiding members of society²². The message these views send home is one, that the criminal justice system needs an overhaul. Drastic and deterrent measures are required by the Legislature, the Executive and the Judiciary.

2.2.1 Deterrent value of the death penalty

Though the Constitution of Namibia²³ outlaws the imposition of death penalty, it remains appropriate to discuss the deterrent value of the death penalty. This is because members of our society still discuss the imposition of death penalty in relation to general deterrence.

To what extent does the death penalty as a punishment achieve the objective of deterrence?

One of the main arguments raised by supporters and opponents alike is the deterrent value or otherwise of the death penalty. Supporters allege that it has unique deterrent value and is an effective deterrent to potential offenders.

21. Final report of The Commission of Enquiry into Legislation for the more effective Combating of Crime in Namibia *supra*, 26-28.

22. Final report of The Commission of Enquiry into Legislation for the more effective Combating of Crime in Namibia, *supra*, 26.

23. Article 6.

Opponents question this unique deterrent value and claim that the death penalty is no more effective in this regard than any other punishment ²⁴.

Following a survey of research findings the United Nations concluded that the research has failed to provide scientific proof that executions have a greater deterrent effect than life imprisonment²⁵. Following are some of the views expressed by the interviewees in the above referred research;

“For many years I favoured death penalty for the most heinous of crimes but the last few years I have changed my views. Firstly, it is difficult for all to agree what constitutes the most heinous crimes worthy of taking human life. For some killing of policemen is heinous and others rape and murder are heinous. Where do we start and where do we end? Secondly, there is enough evidence to support the idea that determination of guilt even by the most sophisticated methods is still error prone. Does it matter that the error rate is very small. Can one justify even one out of 100,000 incorrect state mandated killings? How would one feel if that one mistake affected someone close: father, mother, child? Even DNA identification is not fool proof (I am a molecular biologist). Finally, assuming the evidence is overwhelming, and the crime is despicable, does one human under any circumstances have the moral right to take another one’s life?

I am not a religious person but I do not feel that this should be the case. The State’s reaction to murder should not be to murder in return”.

Another comment reads:

In Germany, the sentence is based on “prevention of crime” not punishment. Remember when Monica Seles was stabbed by a crazed German fan and he did not even go to jail because they ruled he was unlikely to commit another crime.

24. United Nations, 1988. **The Question of the Death Penalty and the new Contributions of Criminal Science to the Matter**. Oxford: Clarendon Press, 110. Hood, R. 1996. **The Death Penalty: A world-wide Perspective**. Oxford: Clarendon Press, 238.

25. Hood, The Death Penalty supra, 238.

She was mad at that ruling but on the other hand the guy has not committed another crime as far as I know. Most criminals who commit heinous crimes themselves have terrible histories of abuse. Is it fair to give them the death penalty. Many proponents of the death penalty in US just do not want to pay taxes for upkeep of prisoners²⁶”

Proponents of capital punishment point out that the argument about punishment (including death) being a deterrent is supported by both determinist and indeterminist views of human behaviour²⁷. Determinists see all human behaviour as the product of an interaction between a person’s inherited attributes and his circumstances. They consider the death penalty to be a favourable factor in a potential offender’s circumstances, reinforcing the total of favourable factors within the person and his environment to a point where he will not commit a capital offence²⁸.

Indeterminism is based on the rationalist view that man is a free and moral being whose behaviour is governed by his reason. In choosing lines of action he is influenced by considerations of what is agreeable and what is not, since man pursues what is agreeable and avoids what is disagreeable. Where the disagreeable result of a wrong action is the death penalty, the potential capital offender will be deterred by this and by the fear of death²⁹.

Those whom I interviewed gave substantial different opinions regarding the death penalty as a general deterrence. There are those who feel that the death penalty is a cruel and inhuman form of punishment.

26. United Nations. The Question of the Death Penalty and the new Contributions of Criminal Science to the Matter supra at 111.

27. Van Rensburg, W. J. J. 1970. **Enkele gedagtes oor die straf van die oortreder**. Unpublished inaugural address. Bloemfontein: University of Orange Free State, 4.

28. Van Rensburg supra, 4.

29. Van Rensburg supra, 5.

There are also those who are of the opinion that it is in some extreme cases the community's only effective safeguard against violent crime.

One member of the community, Mrs Hileni Paulus said the following:

“ Crimes such as murder, rape and robbery are horrible and death penalty is a powerful deterrent”

Mr Emirich Netope said the following:

“ Death is the most extreme form of punishment to which a convicted criminal can be subjected. Its execution is final and irrevocable. Those who sit on the bench are human beings. Humanity is fraught with errors. If an error in judgment is made and the convict is executed, there is no room for another remedy. It is degrading because it strips the convicted person of all dignity and treats him or her as an object to be eliminated by the State”

One community leader (a traditional leader), Mr Hilundwa Paulus Shaamena says that it is a Biblically sanctioned form of punishment. The Bible calls for the death sentence when it says “an eye for an eye, a tooth for a tooth” He feels that it would deter others from committing horrendous crimes as soon as they learn that the criminal convict has been executed.

Pastor Arvid Shalongo yaShalongo of Evangelical Lutheran Church says that whether death penalty has a deterrent value or not, it is a sinful act. Life is a God given gift. Only the redemptive God should take away the life and not a human being take the life of another human being.

According to him serious crimes are man-made products because of the imbalances in the society. He believes that other forms of punishment such as long term imprisonment have enough deterrent value. Death penalty is not a solution.

The O'Linn Commission³⁰ also reports that there are those who support the death sentence as being the most effective and appropriate sentence in the case of particularly cruel, inhuman and degrading crimes of violence and / or where the convicted criminal or the type and method of crime, constitutes a grave and continuing danger to society.

They believe that it is the final and decisive deterrent to the particular convicted criminal and is the strongest general deterrent and serves the need of society for retribution the best. It is also fair in the circumstances considering the victim's rights and society's need for effective protection. It further reports that those against the death sentence do so either because they believe the constitution has prohibited it unequivocally and that tampering with the constitution to reintroduce such punishment would put at risk other fundamental human rights; because they are against it on moral or ethical grounds such as that it is excessively cruel, inhuman or degrading and because of the finality and the possibility of error of judgment and of the availability of the alternative of life imprisonment. However if life imprisonment without parole is also held to be unconstitutional, their view may change³¹.

2.2.2. International and foreign comparative law

The death sentence is a form of punishment which has been used throughout history by different societies. It has long been the subject of controversy³².

30. The Commission of Enquiry into Legislation for the more effective Combating of Crime in Namibia that was chaired by Mr Justice Bryan O'Linn *supra*, 28.

31. Final report of the O'Linn Commission, *supra*, 29.

32. Khan E. 1970. **The Death Penalty in South Africa** 33 THRHR 108. Amnesty International, 1989. **When the State Kills The Death Penalty v Human Rights**. Oxford: Clarendon Press.

The movement away from the death penalty gained momentum during the second half of the present century with the growth of the abolitionist movement. In some countries it is now prohibited in all circumstances, in some it is prohibited save in times of war, and in most countries that have retained it as a penalty for crime its use has been restricted to extreme cases. According to Amnesty International, 1871 executions were carried out throughout the world in 1993 as a result of sentences of death, of which 1419 were in China, which means that only 412 executions were carried out in the rest of the world in that year³³. Almost half of the countries of the world have abolished capital punishment. In most of those countries where it is retained, it is seldom used. But in China, the executions apparently increased from 1419 in 1993 to 2468 in 2001³⁴.

2.2.2.1 International Agreements to Abolish the Death Penalty

One of the most important developments in recent years has been the adoption of international covenants and regional treaties whereby states commit themselves to not having the death penalty. These are:

- (1) The Second Optional Protocol to the International Covenant on Civil and Political Rights. This is a United Nations' instrument.
- (2) The Protocol to the American Convention on Human Rights to Abolish the Death Penalty.

33. Amnesty International **Update to Death Sentences and Executions in 1993 AI Index Act 51/02/94**. In 2001, 90 per cent of all known executions took place in China, Iran, Saudi Arabia and the USA. In China the limited and incomplete records available to Amnesty International at the end of the year indicated that at least 2,468 people were executed.

34. Amnesty International 1993. **The Death Penalty: List of Abolitionist and Retentionist Countries (1 December 1993) AI Index act 50/02/94**.

- (3) Protocol No 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights).
- (4) Protocol No 13 to the European Convention for the Protection of Human Rights and Fundamental Freedoms³⁵.
- (5) African Charter on Human and peoples' Rights³⁶.

Though the African Charter on Human and Peoples' Rights does not expressly call for the abolishment of the death penalty, it prohibits the arbitrary deprivation of human rights³⁷. It sets out a wide range of human rights. Its implementation is supervised by the African Commission on Human and Peoples' Rights³⁸ Following the adoption of the African Charter on Human and Peoples' Rights various protocols have been adopted.

These are:

- 1. Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and People's Rights³⁹
- 2. African Charter on the Rights and Welfare of the Child⁴⁰
- 3. Protocol to the African Charter on Human and Peoples' Rights of Women in Africa⁴¹.

35. Amnesty International supra 4.

36. Adopted on 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5,21 I.L.M. 58(1982), entered into force 21 October 1986.

37. Article 4.

38. Article 30.

39. Adopted on 9 June 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III).

40. 1990 OAU Doc. CAB/LEG/24. 9/49, entered into force Nov. 29, 1999.

41. Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, July 11 – August 13, 2003.

2.2.2.2 Germany

The Federal Constitutional Court has stressed the aspect of punishment.

Respect for human dignity especially requires the prohibition of cruel, inhuman, and degrading punishments. The State cannot turn the offender into an object of crime prevention to the detriment of his constitutionally protected right to social worth and respect⁴².

This is a decision on the constitutionality of life imprisonment where the German Federal Constitutional Court took into account that life imprisonment was seen by the framers of the Constitution as the alternative to the death sentence when they decided to abolish capital punishment⁴³.

2.2.2.3 Canada

That capital punishment constitutes a serious impairment of human dignity has also been recognized by judgments of the Canadian Supreme Court. *Kindler v Canada*⁴⁴ was concerned with the extradition from Canada to the United States of two fugitives, Kindler, who had been convicted of murder and sentenced to death in the United States and Ng who was facing a murder charge there and a possible death sentence.

42. (1977) 45 BverfGE 187 at 228 (Life imprisonment case).

43. Kommers, 1989. *The Constitutional Jurisprudence of the Federal Republic of Germany*, 315.

44. (1992) 6 CRR (201) 193 (SC).

Three of the seven Judges who heard the case expressed the opinion that death penalty was cruel and unusual:

It is the supreme indignity to the individual, the ultimate corporal punishment, the final and complete lobotomy and the absolute and irrevocable castration. It is the ultimate desecration of human dignity⁴⁵.

2.2.2.4 India

The Indian Penal Code authorizes the imposition of the death sentence as a penalty for murder. The constitutionality of the Penal Code provision was put to test in *Bachan Singh v State of Punjab*⁴⁶. The Supreme Court had recognized in a number of cases that the death sentence served as a deterrent, and the Law Commission of India which had conducted an investigation into capital punishment in 1967 had recommended that capital punishment be retained⁴⁷.

2.2.2.5 United States of America

From the beginning, the United States Constitution recognized capital punishment as lawful. The main argument against death penalty in the United States of America does not stem from the concept of deterrence.

45. *Kindler v Canada*, supra, 241.

46. (1980) 2 SCC 684.

47. *Bachan Singh v State of Punjab* supra, 709-712.

The argument is that it constitutes cruel and unusual punishment. They argue that the whole system of state – sanctioned executions is tainted with unfairness, injustice, and racism⁴⁸.

2.2.2.6 Tanzania

The judgment of the Tanzanian Court of Appeal in **Mbushuu and Another v The Republic**⁴⁹, held that the death sentence amounted to cruel and degrading punishment, which is prohibited under the Tanzanian Constitution, but that, despite this finding, it was not unconstitutional. The Constitution authorised derogations to be made from basic rights for legitimate purposes, and a derogation was lawful if it was not arbitrary and was reasonably necessary for such purpose. There was no proof one way or the other that the death sentence was necessarily a more effective punishment than a long period of imprisonment. Death sentence was not declared unconstitutional.

2.2.3. Deterrent value of corporal punishment

Prior to the advent of independence, corporal punishment had been one of the various forms of punishments the courts could impose in terms of section 276 of the Criminal Procedure Act.

48. *Furman v Georgia* 408 US 238(1972), 257-290.

49. Criminal Appeal 142 of 1994 (30 January 1995).

There is no doubt that corporal punishment has deterrent value, especially among the juveniles. It had been imposed by courts as the best option for young male offenders rather than sending them to custody.

Since corporal punishment is the outcome of a wrongful action, the potential offender will be deterred by the unpleasantness and fear of the infliction of lashes⁵⁰.

The Lansdown Commission which was appointed to inquire into the Penal and Prison system in South Africa⁵¹ expressed itself as follows on the question of the deterrent value of corporal punishment:

The retention of corporal punishment as a punishment for crime is justified by its protagonists on the grounds that it is an exceptionally effective deterrent, especially in a country that is largely inhabited by a people, the bulk of whom have not yet emerged from the uncivilized state, and that no other form of punishment would be as effective in respect of crimes of violence or of those crimes which owing, to their fiendish and inhuman nature, cause cold shivers in a law-abiding nation.

My personal view of supporting corporal punishment is not based on the grounds of uncivilization as expressed in the Lansdown Commission. My reason for supporting corporal punishment is because it has a deterrent value. A person thinks before he acts. A reasonable man will think before acting, consequently, he will weigh the disadvantages of his crime against the apparent benefits that may ensue.

50. Barber, R. W. and Wilson, P.R. 1968. **Deterrence aspect of capital punishment and its effect on condition of rates: the Queensland experience.** Australian and New Zealand Journal of Criminology, vol. 2: Australia.

51. Lansdown Commission, 1947. **Report of the Commission on Penal and Prison Reform UG47.** Pretoria: Government Printer, 73.

Certainly, there would be those who are not deterred by corporal punishment, but that does not mean it does not have a deterrent effect. There will be those who do not want to suffer the pain suffered by the offender who is subjected to corporal punishment. In that instance corporal punishment has a deterrent value.

The O'Linn Commission printed and distributed one hundred and nine thousand (109 000) copies of a questionnaire dealing with the theme and terms of reference of the Commission. Though not all the copies were returned, quite a reasonable number of them were returned. One of the questions that are contained in the questionnaire is:

Are you in favour of corporal punishment as one of the options in a court of law for dealing with juvenile offenders guilty of crimes, with the aim of keeping such juveniles out of prison?

Eighty-three (83) percent of the participants were in favour of corporal punishment as against seventeen (17) percent of the participants who were against. The majority of people who gave oral testimonies before the O'Linn Commission were in favour of the reintroduction of corporal punishment, particularly for crimes committed by juveniles. The reason mostly advanced is that it would keep juveniles who are first offenders out of prison.

Prison is not a suitable place for juvenile offenders. While in prison juvenile offenders meet with hardened criminals. They get influenced and learn more about criminal conducts. Once they come out of prison they relapse into crime. Whipping was an appropriate punishment for juvenile offenders rather than sending them to prison.

2.2.3.1 The approach of the Namibian Supreme Court to corporal punishment: Attorney-General, Ex parte: In re Corporal Punishment by Organs of State⁵²

During November 1990, the Attorney-General submitted a petition to the Chief Justice in terms of section 15(2) of the Supreme Court Act 15 of 1990, in which he sought the consent of the Chief Justice or such other Judge designated for that purpose by the Chief Justice, for the Supreme Court to exercise its jurisdiction to act as a court of first instance, in hearing and determining a constitutional question which the Attorney-General sought to refer to the Supreme Court under the powers vested in him by article 87(c) read with article 79(2) of the Constitution of the Republic of Namibia Act 1 of 1990. The Supreme Court held that corporal punishment was unconstitutional because it was in conflict with article 8(2)(b) of the Namibian Constitution.

Mahomed, AJA, refers to certain general objection to the imposition of corporal punishment on adults by organs of the State. These are:

- (1) Every human being has an inviolable dignity.
- (2) The manner in which the corporal punishment is administered is attended by, and intended to be attended by, acute pain and physical suffering which strips the recipient of all dignity and self-respect.
- (3) The fact that these assaults on human being are systematically planned, prescribed and executed by an organized society makes it inherently objectionable.
- (4) It is in part at least premised on irrationality, retribution and insensitivity.

52. 1991 NR 178 (SC).

- (5) It is inherently arbitrary and capable of abuse leaving as it does the intensity and the quality of the punishment substantially subject to the temperament,

the personality and the idiosyncrasies of the particular executioner of that punishment.

- (6) It is alien and humiliating when it is inflicted as it usually is by a person who is a relative stranger to the person punished and who has no emotional bonds with him⁵³.

The court held that if corporal punishment administered on adults authorised by judicial or quasi-judicial authorities constitutes inhuman or degrading punishment in conflict with article 8(2)(b) of the Constitution, then it is also in conflict with the same article 8(2)(b) of Constitution when it (corporal punishment) is administered upon a juvenile. The general objections against corporal punishment are of equal application to both adults and juveniles⁵⁴.

Although the Namibian Constitution expressly directs itself to permissible derogations from the fundamental rights and freedoms entrenched in chapter 3 of the Constitution, no derogations from the rights entrenched by article 8 is permitted⁵⁵.

The issue as per the Supreme Court's decision that outlaws the imposition of corporal punishment by organs of the state is not whether or not corporal punishment has deterrent value. The issue is that it subjects the person on whom corporal punishment is being administered to an inhuman and degrading treatment.

53. Ex parte Attorney-General supra, 188-189.

54. Ibid 192D.

55. Article 24(3) of the Namibian Constitution.

Corporal punishment was a traditional form of punishment imposed by many traditional and indigenous authorities in Namibia. The question as to whether a particular form of punishment authorised by the law can properly be said to be inhuman or degrading involves the exercise of a value judgment by the court⁵⁶.

Berker, CJ. in his concurring judgment said the following:

“In other words, the decision which this court will have to make in the present case is based on a value judgment which cannot primarily be determined by legal rules and precedents, as helpful as they may be, but must take full cognizance of the social conditions, experiences and perceptions of the people of this country. This is all the more so as with the advent and emergence of an independent sovereign Namibia, freed from political and general beliefs held by the former colonial power, which imposed them on the Namibian people, the Namibian people are now in the position to determine their own values free from such imposed foreign values by its former colonial ruler⁵⁷”

Similar views were expressed by Mahomed AJA who wrote the main judgment. Despite goods views articulated, the binding validity of the decision of the Supreme Court on those affected or likely to be affected remains questionable. Interested parties were not invited to air their views on the question of corporal punishment.

The traditional authorities, where corporal punishment was mostly administered were not cited as parties to the proceedings. This is probably why even after the Supreme Court decision, some traditional authorities unknowingly the decision of the Supreme Court continued to impose corporal punishment⁵⁸.

56. Ex parte Attorney-General, supra, 188D.

57. At 197 I-J see also the judgment of O'Linn AJA in the case of the Chairperson of the Immigration Selection Board v Frank and Another 2001 NR 107 (SC), 135-136.

58. S v Sipula 1994 NR 41.

As O'Linn says that prima facie it seems that when a court is required to 'enquire into' a dispute of fact and law, such enquiry contemplates at least the application of certain fundamental principles and requirements⁵⁹. The principle of *Audi Alteram Partem* rule requires all interested parties to be heard. In this matter no interested parties were given an opportunity to air their views on the question of corporal punishment. This is so despite the provisions of Supreme Court Act⁶⁰. The requirement of *Audi alteram Partem* is made mandatory by section 15(5) of the Supreme Court Act. The heading of section 15 of the Supreme Court Act reads:

'Jurisdiction of Supreme Court as court of first instance'

Section 15(1) provides:

" Whenever any matter may be referred for a decision to the Supreme Court by the Attorney-General under the Namibian Constitution, the Attorney-General shall be entitled to approach the Supreme Court directly (without first instituting any proceedings in any other court), on application to it, to hear and determine the matter in question.

Then section 15(5) provides:

If the Chief Justice or such other judge, as the case may be, is of the opinion that the application is of a nature which justifies the exercise of the court's jurisdiction in terms of this section, any party affected or likely to be affected by the decision of the Chief Justice or such other judge shall be informed of that decision by the registrar, and the matter shall, subject to the provisions of section 20, be further dealt with by the Supreme Court in accordance with the procedures prescribed by the rules of court.

Subsection (6) provides that a party affected or likely to be affected can institute proceedings for the setting aside of the said decision of the Chief Justice in any other competent court.

59. S v Tcoeib 1992 NR 198 at 208 C-J-209 A-J.

60. Section 15 of the Supreme Court Act 15 of 1990.

It is also apposite to refer to the provisions of section 20 which provides that whenever the Supreme Court is properly seized with a matter as a court of first instance, it shall have the power to receive evidence orally or on affidavit or by deposition before a person appointed by the court, or to direct that the matter be heard by the High Court, with such instructions relating to the taking of evidence or any other matter as the court may deem necessary.

Non-compliance with the mandatory provision of section 15(5) of the Supreme Court Act in regard to notice and the other applicable procedures prescribed by the Rules of Court, may lead to the resultant judgment or order being either a nullity or at best to be not binding on 'parties affected or likely to be affected'⁶¹. Since the Supreme Court gave its judgment as a court of first instance and not as a court of appeal, it has to follow and comply with the provisions of the law, otherwise its judgment would be a nullity and not binding on those affected or likely to be affected by the decision. This is more so where the provisions of the law are mandatory.

When dealing with a dispute of fact, there must be evidence, either *viva voce* or on affidavit or both, unless the facts are notorious facts, of which the court can take judicial notice or facts which are common cause or not in dispute, such as a stated case provided for in the Rules of the High Court. The court's value judgment must be objectively articulated and identified⁶².

The issue of value judgment was not only reiterated by Mahomed AJA in his judgment, the late Berker CJ when concurred in the judgment of Mahomed AJA noted the following reservations:

“Whilst it is extremely instructive and useful to refer to, and analyse decisions by other courts such as the International Court of Human Rights, or the Supreme Court of Zimbabwe or the United State of America on the question whether

61. S V Tcoeib supra, 209B.

62. S v Tcoeib supra, 209 F-G.

corporal punishment is impairing the dignity of a person subjected to such punishment, or whether such punishment amounts to cruel, inhuman or degrading treatment, the one major and basic consideration in arriving at a decision involves an enquiry into the generally held norms, approaches, moral standards, aspirations and a host of other established beliefs of the people of Namibia. In other words, the decision which the court will have to make in the present case is based on a value judgment which cannot primarily be determined by legal rules and precedents as helpful as they may be, but must take full cognizance of the social conditions experience and perceptions of the people of this country”⁶³.

Though Mahomed AJA also mentioned that value judgment requires objectively to be articulated and identified, regard being had to the contemporary norms, aspirations, expectations and sensitivities of the Namibian people, he said nothing of the ‘enquiry’⁶⁴.

Judgment can only be objectively articulated if the laws and Rules of Court are comphed with and those who are affected or likely to be affected by the decision are given an opportunity to present evidence either *viva voce* or on affidavit or both. This is not what happened in this matter. The South African Appellate Division reiterated the principle that even decisions of the Appellate Division would be a nullity if given without the necessary jurisdiction, that is if given in conflict with statutory provisions which are binding upon it⁶⁵. The South African Appellate Division is equivalent to the Namibian Supreme Court, thus the principle applies with equal force.

O’Linn J, in his report said that the Supreme Court judgment in *S v Tcoeib* may also be not biding because a completely new approach and method was followed in regard to the interpretation and application of Article 8 of the Namibian Constitution, which was in conflict with the approach and method

63. Ex Parte Attorney-General supra at 197G – J.

64. Ex Parte Attorne-General supra at 188 D – E.

65. *S v Cassidy* 1978(1) SA 687 (AD) at 691.

laid down in the Supreme Court's own decision in *Ex parte Attorney-General, Namibia: In re Corporal Punishment by Organ of the State*⁶⁶.

O'Linn J said further:

The value of the *ratio decidendi* as persuasive precedent may also be destroyed by the fact that the *ratio decidendi*, after being pronounced, was not applied. For if the value judgment which the court had to make 'requires objectively to be articulated and identified regard being had to the contemporary norms, aspirations, expectations and sensitivities of the Namibian people as expressed in its national institutions and its constitution' or if the major and basic considerations at arriving at a decision involves an enquiry into the generally held norms, approaches, normal standards, aspirations and a host of other established beliefs of the people of Namibia "as was said by Mahomed AJA as he then was and Berker CJ respectively, then overlooking or ignoring the aforesaid statutory provisions, makes the decision not only a decision per incuriam but one without even persuasive effect"⁶⁷.

Those who testified before the Commission said they never had any opportunity to put their views before the Supreme Court or any other court and were shocked and dismayed when they were told after the event that the Supreme Court had decided that corporal punishment in any government institution whether school, court or traditional authority was unconstitutional⁶⁸.

They claim on the basis of their experience that discipline in many schools deteriorated and that many juveniles were sent to prison, contributing to the overcrowding of prisons, who could have been spared the humiliation and deprivation of freedom and the bad influences of prisons, if a moderate whipping was an available option in Courts of law⁶⁹.

66. O'Linn Commission supra, 628, see also *S v Sipula* supra 49 - 40.

67. O'Linn Commission supra, 634 – 635.

68. O'Linn Commission supra 637.

69. O'Linn Commission supra, 637.

There might be those who think that children and juveniles who have experienced corporal punishment are most likely among those who when grown up themselves behave violently towards their children and next of kin.

The answer to that notion is that the type of corporal punishment envisaged here is a moderate spanking of a convicted juvenile in execution of an order by a Court of law or by a teacher. Corporal punishment does not entail abuse such as repeated and excessive hidings by parents, teachers or police officers when executing the order of the court. An abuse of such power is a criminal offence. Since corporal punishment was declared unconstitutional the culture of freedom brought about indiscipline irresponsibility, lack of recognition of the rights of others. Many juveniles indulge in criminal conducts. Prisons are overcrowded⁷⁰.

If corporal punishment is an appropriate punishment that should be inflicted on the juvenile for the crime he has committed, I fail to understand how that can be interpreted to be cruel and inhuman. In any case if that is so, what punishment is not cruel and inhuman. Even incarcerating a juvenile in cruel and inhuman then. Prisons are so overcrowded that juveniles are subjected to severe ill treatment as they mix up with adult hardened criminals. Some may be subjected to immoral practices such as sexual intercourse while in prison. Is that not cruel and inhuman treatment worse than corporal punishment. Prison is not a suitable place for juveniles. At the same time juveniles cannot be let seat free when they are committing crimes.

The better option would rather to subject them to moderate spanking rather than sending them to prison. Sometimes they engage themselves in serious criminal offences. Should they not be taught a lesson that crime does not pay in a most moderate method that befits them?

70. O'Linn Commission *supra*, 637 – 638.

Should they just invade the rights of others such as dignity and freedom without any consequence? The law-abiding citizens deserve protection from whoever is invading their rights. Surely if a juvenile invade the freedom and dignity of others he deserves punishment which is appropriate to him and that may be in the form of corporal punishment.

Corporal punishment may be a best option for juvenile when executed under proper restrictions and safeguards in consequence of a regularly pronounced judicial sentence. How come those teachers who are *in loco parentis* are prohibited from exercising moderate corporal chastisement on children who misbehave at schools, but their counterparts (parents) are not prohibited from doing same. Both, a teacher and a parent, have a responsibility to bring up the child in a moral standard. I am again talking about the corporal chastisement which is moderate and reasonable.

Democratic and civilized society is not about lawlessness, undisciplined behaviour, invading of freedom and dignity of others with impunity. Every society is governed by the laws that stipulate what should be done, what not and the consequence thereof. The US Supreme Court held that the prohibition of moderate corporal punishment does not apply in schools or the family⁷¹. Whether or not corporal punishment is degrading is a relative concept. It depends on the manner and method of its execution. I am aware of the trend of acclaimed jurists and academics towards corporal punishment⁷².

As demonstrated in the O'Linn Commission, the majority of the people are in favour of the reintroduction of moderate corporal punishment.

71. *Ingram v Wright* 430 US 651 (1977) at 667.

72. See *S v Ncube*; *S v Tshuma*; *S v Ndlovu* 1988(2) SA 702.

S v Kumalo and Others 1965 (4) SA 565 (N) at 574 F – H (ZSC)

A. M. Kirkpatrick, **Corporal Punishment** (1967 – 68) 10

Criminal Law Quarterly 320 at 327 – 328.

As Namibian society we should determine our own destiny. The Namibian Courts, legislature and society at large are free not to follow decisions in foreign jurisprudence when such decisions do not suit our own situation.

Article 1(2) provides:

“All power shall vest in the people of Namibia who shall exercise their sovereignty through the democratic institutions of the State”.

Judiciary is one of the three main organs of government in the Namibian democracy based on the Namibian Constitution which is the Supreme Law. Article 5 of the Namibian Constitution provides that the fundamental rights and freedoms enshrined in Chapter 3 shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of the Government and its agencies, where applicable to them, by all natural and legal persons in Namibia and shall be enforceable by the Courts in the manner hereinafter prescribed.

Therefore all three organs of the government are bound by the provisions of the Constitution in the exercise of their duties. Be that as it may, the Namibian Constitution expressly provides in Article 81 that the decision of the Supreme Court shall be binding on all courts of Namibia and all persons in Namibia unless it is reversed by the Supreme Court itself, or is contradicted by an Act of Parliament lawfully enacted. It means the Parliament is empowered to pass a law that contradicts the decision of the Supreme Court as long as that law does not contradict the provisions of the Constitution which is the supreme law. To date the Parliament has not made use of such article 81.

Judge O'Linn in Sipula's case says that the Namibian Constitution does not appear to regard traditional authorities as being main organs of the state⁷³. In support of his views he refers to article 1(3) read with article 78-83 of the Namibian Constitution.

He further referred to section 3(2) and 4(2) of Proclamation 348 of 1967, as well as section 1(1) and 1(2) of Proclamation R320 of 1970. In the above-mentioned Proclamations, the legislature of that time recognized the native law and custom observed by the tribes pertaining to the imposition of corporal punishment of people convicted by the tribal authority of a crime or offence.

The two Proclamations remain laws until repealed or amended by Act of Parliament. Judge O'Linn went on further to say the following:

Corporal punishment, imposed in accordance with native law and custom, notwithstanding that it is given recognition by statutes such as Proclamation R348 of 1967 and R320 of 1970, is not "a formal system of punishment which originates from and is formulated by a government authority." It is more correct to say that such corporal punishment "originates" from native law and custom and is "formulated" by native law and custom. On this ground it must be distinguished from corporal punishment in government schools which was described in *Ex Parte Attorney-General, Namibia, In re Corporal Punishment* by organs of the state, as "a formal system of punishment" which originates from and is formulated by a government authority⁷⁴.

Though I have high regard for the decision of the Supreme Court on this question of corporal punishment, particularly the interpretation of article 8 of the Namibian Constitution on which the decision is based, it remains my conviction that corporal punishment has deterrent value especially to juveniles, but for the interpretation of article 8 and article 24(3) of the Namibian Constitution.

73. *The State v Albius Sipula* supra, 10.

74. *Supra*, 12.

2.2.4 Deterrence and imprisonment

The underlying philosophy in the case of deterrence is to make the effects of the wrongful deed so unpleasant that the offender and potential offender will be deterred from committing a crime. There have been a shift of emphasis on imprisonment in regard to the kind of treatment given to the offender. The feeling among many Namibians is that the courts do not impose deterrent imprisonment punishments on offenders convicted of serious crimes. They argue that the rights of accused and convicted persons are overemphasised at the cost of victims and the law-abiding members of society.

The O'Linn Commission⁷⁵ reports that there is a general agreement that drastic and urgent action is required by the Legislature, the Executive and the Judiciary, the prosecution and the police to combat crime more effectively.

They propose that life imprisonment without parole, i.e. for the natural life of the convict be at least available as a sentencing option in case of extreme cruel, inhuman and degrading crimes of violence such as Murder, Rape and Robbery with aggravating factors or circumstance. The sentences imposed by the Court must be substantially served by the prisoners and not substantially reduced by prison authorities.

The Namibian High Court has illustrated the importance of imposition of deterrent punishment in the case *The State versus Wilbart Mbanze Nankema*⁷⁶,

Now, Namibian Courts are well aware that Namibians are reeling under the onslaught of criminals. Namibian society is increasingly demoralized by the escalation of crime.

75. O'Linn Commission *supra*, 27;28.

76. Unreported High Court Case No. CC 127/93 dated 29/10/93.

Namibians are repeatedly brutally murdered by criminals who have no respect for the fundamental rights or for the right to dignity and life of others. They also show no respect for the law or for the government or for the police or the courts of law. They also do not fear these institutions.

The courts cannot alone prevent this, because although the Courts play a very important role, there are many other institutions including the government, its police forces and society itself. These institutions should take an honest and in depth look at the problem, sweep aside the holy cows, identify the causes and then act in a determined and robust way to eliminate or at least minimize some of the root causes of crime and its escalation.

It can also be helpful if Courts are as consistent as possible in their sentences, notwithstanding the approach that Courts must consider every case individually and give due weight to its particular circumstances. The general approach of the Court in sentencing is that the Courts consider the individual criminal, the crime and the interest of society. Inherent in this consideration is also the deterrent retributive and rehabilitative aspects of punishment. There is continuous debate about the role of the retributive consideration. I can do no better than to quote from a decision by me in this Court in the case of *S v Tcoeib* reported in the 1993(1) SACR, p. 274. I wish to repeat for the purpose of this case what I said at p.278 – 279, beginning at paragraph I: Although the Namibian Constitution has abolished the death sentence, at the same time provided as the first fundamental human right the protection of the life of all citizens. (see article 6). In article 5 it is provided that all fundamental rights and freedoms, including the right to life shall be respected and upheld by the Executive, the Legislature and the Judiciary.

It seems the prison authority has also acknowledged the feelings of the public regarding sentences given to offenders. When addressing the Zonal Release Boards and Prison Management Committees during the visit in October, November, December 2001 and January 2002 the Commissioner of Prisons said the following:

We know the public's feelings and sentiments that sentences given to offenders should be tougher and longer and that they should be locked up until they finish their imprisonment.

We also know and accept the fact that a significant proportion of crime causes anger, hurt, fear and tragically, in many cases physical and mental disability and at times death. It is also true that many of the prisoners we are dealing with, have a value system that is more compatible with criminal behaviours than law abiding behaviours. And they simply do not know how to behave in an acceptable manner when they are on their own. On the other hand we know that something can be done about their thinking deficiencies and that criminal thinking and behaviour can be changed. We know too well that it is sometimes because of the wave of vicious crime that flooded society that the public tend to believe that the offenders will be deterred from offending if the punishment is sufficiently severe.

The O'Linn Commission⁷⁷ proposed minimum and maximum sentences on 23 crimes. Among those crimes are:

- (i) Treason with aggravating factors:
Minimum: Life imprisonment with the possibility of parole, probation or remission.
Maximum: Life imprisonment without the possibility of parole, probation or remission.
- (ii) Murder with aggravating factors:
Minimum: Life imprisonment with the possibility of parole, probation and remission.
Maximum: Life imprisonment without the possibility of parole, probation or remission.
- (iii) Rape with aggravating factors:
Minimum: Seventeen (17) years imprisonment
Maximum: Life imprisonment without the possibility of parole, probation or remission.

77. Supra, 460 – 461.

- (iv) Sodomy committed by one person on another, forcibly or without the consent of that other person or a contravention of section 14 and 15 of the Combating of Immoral Practices Act (Act 21 of 1980), committed by a person who knows or has reason to believe at the time of such act that he/she is HIV positive.
Minimum: Five (5) years imprisonment.
Maximum: Fifteen (15) years imprisonment.
- (v) Robbery with aggravating factors:
Minimum: Fifteen (15) years imprisonment.
Maximum: Life imprisonment without the possibility of parole, probation or remission.

The objective of punishment should not be to merely exact retribution from the offender but to prevent others as well from committing a similar offence. Imprisonment as a justifiable punishment should have the necessary intensity or severity to make it an effective deterrent.

2.2.5 Restorative justice as a general deterrent

Traditionally, we speak of three needs in the reaction to crime. These needs, which also form the rationale for state intervention in citizens' lives are:

- (i) the need to sanction a crime
- (ii) the need to assist in the rehabilitation of the offender
- (iii) the need to improve the community's safety

Recently people have also expected the criminal justice system to meet the fourth need, namely to compensate victims where possible for losses suffered as a result of the crime. Our criminal justice system has been severely criticized of being more criminal friendly at the expense of the law-abiding citizens whose rights to life, liberty and dignity should in fact be protected.

The General Assembly of the United Nations⁷⁸ declared the Basic Principles of Justice for Victims of Crime and the Abuse of Power. The resolution declares among others that:

1. Victims should be treated with compassion and respect for their dignity and are entitled to prompt redress for harm caused.
2. Judicial and administrative mechanisms should be established and strengthened to enable victims to obtain redress.
3. Victims should be informed of their role and the timing and progress of their cases.
4. The views and concerns of victims should be presented and considered at appropriate stages of the process.
5. Offenders should, where appropriate make restitution to victims or their families or dependants.

The system of compensation and restitution may have a deterrent impact on crime rate if compensation and restitution are made an independent sanction option. There is also the need to draft legislation that gives right to victims or their families to bring to the Court's attention the harm they suffered as a result of crimes of violence against the person (physical, emotional and psychological injury and financial losses suffered). The court shall then take into account such submission for sentencing purpose after it has convicted the offender.

78. United Nations General Assembly Resolution 40/39 of the 29th November 1985.

Restitution is in fact a system that had been applied as a form of punishment in pre-colonial African societies. It was proved to be a workable restorative justice system.

Professor Charl Cilliers⁷⁹ said the following on the important role played by victims of crime in the criminal justice system:

Victims play an important part in the whole process of apprehending and prosecuting offenders. They provide evidence, make statements, attend identification parades, check photographs of known criminals and give up their valuable time by attending as court witnesses. Some victims will have been informed by the police or a victim support scheme of their rights in relation to compensation or restitution, but for the most, too little is provided by way of services.

79. Cilliers, C. 1996. **Victims Rights**. A paper delivered at a symposium in Namibia in May 1996 by Prof. Charl Cilliers: Head of the Department of Criminology at The University of South Africa.

CHAPTER 3

3. ATTITUDES TOWARDS THE THEORY OF GENERAL DETERRENCE

3.1 The moral acceptance of deterrence as a penal objective

Deterrence is alleged to be a negative penal objective because of its attempt to use fear to enforce certain behaviour instead of ensuring that behaviour is a matter of individual conviction. The question is however whether law-abiding behaviour brought about through fear is worthwhile. However the use of fear for a positive goal is not unknown. In children's education, and even in religion, fear is freely used as a means of reaching the desired goal. The element of fear in punishment is therefore justified.

To sum up, the unpleasantness of punishment will be a lesson to keep the offender away from criminal behaviour. This is known as individual deterrence. In the framework of general deterrence the idea is to punish the offender that this punishment serves as a warning to potential offenders and deters them from committing a crime. This when potential offenders are considering whether or not to commit a crime, fear of punishment may be the deciding factor in deterring them from doing so. The chief justification for deterrence as a penal objective is that it may help to prevent crime.

The principle of making the penal consequences of crime so unpleasant that the offender and the potential offender will in future refrain from crime is built directly on the principle of retribution. Deterrence is therefore a logical outcome of the retributive objective of punishment, and it also helps to make the principle of retribution positive and more meaningful.

People will be deterred from crime through fear and not through their own convictions. This would create fear morality. In so far as deterrence is effective and helps prevent

crime, it does protect the community. Deterrence in punishment does not exclude rehabilitation, but it can contribute considerably to it. For example teaching offenders to fear their evil ways may help to change these ways. Thus deterrence as a penal objective can play a part in rehabilitation, and so in the long run can contribute to the protection of the community.

It is true punishment does not have absolute deterrent value. But the idea of rejecting the deterrent value cannot be accepted unless the threat of punishment can be isolated as a factor in crime causation and can then be empirically proved to have no effect on it. Though general deterrence is a sound object of criminal punishment, it is not meant to crucify an offender on the alter of general deterrence.

3.2 Legislation aimed at general deterrence

Some laws have been enacted modelled on the arguments of proponents of general deterrent theory. The proponents of general deterrent theory argue:

The punishment should fit the crime. The public demands a prison sentence. The sentence will be a warning to others. Lock them up and throw away the key and nobody can get them out¹.

On sentencing in general there are three types of mandatory forms. There are mandatory prison term, mandatory minimum sentence and mandatory supervision after incarceration².

1. Wicharaya, T. 1995. **Simple Theory. The impact of Sentencing. Reforms on Courts, Prisons and Crime.** New York: State University of New York Press, 43.

2. Ibid, 43.

When a prison term is mandatory, the use of incarceration is automatic on conviction of target offences.

The Legislature passed certain laws that are aimed at general deterrence. Among these are,

Combating of Rape Act³,
Arms and Ammunition Act⁴ and
Stock Theft Act⁵

When introducing the Combating of Rape Bill, the Honourable Minister of Justice in his second reading speech emphasized the totally unacceptable crime rate in the country. He also emphasized the need to enact a law on rape that provides for prescribed minimum sentences⁶.

The Combating of Rape Act provides for the minimum mandatory sentences ranging from 5, 10, 15, 20 and 45 years imprisonment⁷. It however leaves room for the court to impose a lesser sentence if there are substantial and compelling circumstances justifying the imposition of a lesser sentence⁸. The minimum sentences prescribed do not apply in respect of a convicted person who was under the age of eighteen years at the time of the commission of the rape⁹.

Also when the Arms and Ammunition Bill was introduced and read for the second time in Parliament, the emphasis was on deterrence¹⁰.

3. Act 8 of 2000.

4. Act 7 of 1996.

5. Act 12 of 1990.

6. The Second Reading Speech B8/99 on 3 June 1999.

7. Section 3(1).

8. Section 3(2).

9. Section 3(3).

10. Arms and Ammunition Bill (B. 33/95).

The Arms and Ammunition Act provides for the minimum sentence of ten years imprisonment for the contravention of section 29(1)(a).

This section reads:

Subject to subsection (4), no person shall except on behalf of the State or under the authority of and in accordance with a permit issued by the Minister in his or her discretion, import into Namibia, supply to any other person or have in his or her possession any armament, or any part including – (a) any cannon, recoilless gun or mortar, rocket launcher, machine gun, or machine rifle or any similar armament, or any part including a magazine, frame, or body, thereof.

The Court imposing the sentence is not empowered to suspend any part of the sentence if the offender was eighteen years or older at the time of the commission of the offence. This demonstrates how deterrent the sentence is.

Also when the Stock Theft Bill¹¹ which has since been passed into law, was introduced in Parliament, the motive was to pass a law that provides for a deterrent punishment.

3.3 Statutory limitations of the discretionary power

Though the infliction of punishment is pre-eminently a matter for the discretion of trial court, this is not so without an exception. The Legislature is empowered subject to the Constitution, to make and repeal laws for the peace, order and good government of the country in the best interest of the people of Namibia¹². Legislation with such penalty clauses are not *per se* unconstitutional so long as such legislation do not fall foul of Article 8(2)(b) of the Constitution.

11. Stock Theft Bill (B 11/90) now Act 12 of 1990.

12. Article 63 of the Namibian Constitution.

This is also the position in other countries such as South Africa, Zimbabwe, US, Canada, England to mention but a few¹³. Parliament has broad discretion in proscribing conduct as criminal and in determining proper punishment. While the final judgment as to whether a punishment exceeds constitutional limits set by the constitution is properly a judicial function¹⁴.

Minimum sentences must adhere to the principle of proportionality in order to survive constitutional challenge. This is the requirement in almost all the countries I have mentioned with minimum sentence legislation. In Zimbabwe, the Supreme Court of Zimbabwe approved minimum sentences in principle, so long as they satisfy the principle of proportionality¹⁵.

The United States Supreme Court has stated that, it is beyond question that the legislature has the power to define criminal punishment without giving the courts any sentencing discretion¹⁶. In Namibia the first ever challenged statutory legislation which makes provision for a minimum sentence is section 14(1) of the Stock Theft Act¹⁷. Section 14(2) expressly excludes a court from suspending any portion of the minimum mandatory sentence for second or subsequent offenders where such offenders were eighteen years or older when the second or subsequent offence was committed.

The criticism levelled against this minimum mandatory sentence is that it does not make any limit on the number of years which may elapse between the date of the last previous conviction and the offence in respect of which the minimum penalty is to be applied¹⁸.

13. Hubbard D. 1994 **Should a minimum sentence for rape be imposed in Namibia?** Acta Juridica 228 – 255.

14. Smith v The Queen 1987 (34) CCC(301)97.

15. Hubbard, supra 255.

16. Chapman v US 111 s ct 1919(1991) at 1928.

17. Stock Theft Act 12 of 1990.

18. S v Vries 1996(2) SACR 638(Nm) at 647G.

It is a recognized rule in the sentencing process that the significance of a previous conviction reduced with the passage of time. There comes a point at which, in the case of all but the most serious of offences, a sole conviction registered many years ago no longer has any significance at all¹⁹. The second criticism is that it does not distinguish between the different kinds of stock at all. Whether cattle or sheep are involved makes no difference, and it is common knowledge that the value of cattle are five to six times that of sheep²⁰.

In Vries' case the Court decided that it was not the imprisonment clause *per se* which was unconstitutional but only the minimum prescribed period of imprisonment. The Court then decided to read down the section in such a way that upon a second or subsequent conviction an offender will have to undergo a period of imprisonment which will be in the discretion of the Court but which the Court will not be able to suspend because of section 14(2) unless such second or subsequent offender was under the age of eighteen when he / she committed such second or subsequent offences. The words *of not less than three years, but* were struck out from section 14(1)(b) of the Act as being in conflict with Article 8(2)(b) of the Constitution.

Equally the Arms and Ammunition Act²¹ provides for a minimum sentence of ten years imprisonment for the contravention of section 29(1)(a).

19. R v Kumar (1994) 20CRR (2d) at131.

20. S v Vries supra 648B.

21. Arms and Ammunition Act 7 of 1996.

This section reads:

Subject to sub-section (4), no person shall except on behalf of the state or under the authority of and in accordance with a permit issued by the Minister in his or her discretion, import into Namibia supply to any other person or have in his or her possession any armament, including (a) any canon, recoilless, gun or mortar rocket launcher, machine gun or machine rifle or any similar armament, or any part including a magazine, frame or body thereof.

Section 38(2)(a) reads:-

Subject to the provisions of this section, any person convicted of an offence under this Act shall be liable (a) in the case of a contravention of section 29(1)(a);(b); or (c); to imprisonment for a period of not less than 10 years, but not exceeding 25 years.

In terms of subsection (4) of the section the court imposing sentence is not empowered to suspend any part of the sentence if the offender was at the time of the commission of the offence 18 years of age or older.

The court in the case of *Likuwa*²² considered whether section 38(2)(a) of the Arms and Ammunition Act was in conflict with Article 8(2)(b) of the Constitution. If it is not in conflict with Article 8(2)(b), whether it is in conflict with Article 10(1) of the Constitution. Article 8(2)(b) of the Constitution provides:

No person shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.

Article 10(1) provides that:

All persons shall be equal before the law.

The court in determining this question applied the same test as that applied by *Mahomed AJA*²³.

22. *S v Likuwa* 1999(2) SACR 444(NmHc).

23. *Ex parte, Attorney-General, Namibia: In re Corporal Punishment by Organs of The State*, supra, 188D.

The Honourable Judge said:-

The question as to whether a particular form of punishment authorised by law can properly be said to be inhuman or degrading involves the exercise of a value judgment by the Court (*S v Naibe and Others supra* at 7171). It is however a value judgment which requires objectively to be articulated and identified, regard being had to the contemporary norms, aspirations, expectations and sensitivities of the Namibian people as expressed in its national institutions and its Constitution, and further having regard to the emerging consensus of values in the civilized international community (of which Namibia is a part) which Namibians share. This is not a static exercise. It is a continually evolving dynamic. What may have been acceptable as a just form of punishment some decades ago, may appear to be manifestly inhuman or degrading today. Yesterday's orthodoxy might appear to be today's heresy.

In this case the Court concluded that the imposition by the Legislature of a minimum is not **per se** unconstitutional. The concern is therefore whether this particular mandatory minimum sentence infringes Article 8(2)(b) of the Constitution.

Like in the *Vries* case, **supra**²⁴, the Court considered the disproportionality test adopted by the courts in the United States of America and Canada and concluded that it was the same test laid down in *R v Taaljaard*²⁵ 1924 PPD 581 with regard to appeals against sentence, namely that a court cannot interfere with a sentence unless it is so clearly excessive that no reasonable man would have imposed it. The Court recognizes that Parliament has a wide discretion in proscribing conduct as Criminal and determining proper punishment.

24. *S v Vries supra*, 648-650.

25. 1924 PPD 581.

The Court's view was that, whereas the sentence of 10 years imprisonment for certain contraventions of section 29(1)(a) would not be an inhuman or cruel punishment, such a lengthy sentence for a contravention where a machine is obtained and possessed simply for the protection of livestock is²⁶. As it is not the imprisonment per se which is unconstitutional but only the minimum prescribed term of imprisonment, the Court read down the section by striking out the words *of not less than 10 years but*.

In the case of *S v Ndikwetepo and others*²⁷, it was re-iterated that it is indeed a settled rule or practice that punishment falls within the discretion of the trial court. As long as that discretion is judicially, properly or reasonably exercised, an Appellate Court ought not to interfere with the sentence imposed. This rule of practice has been invariably applied by appellate courts and has acquired the mantle of the rule of law, that punishment is pre-eminently a matter for the discretion of the trial court.

The legislature in apparent realization of the courts' challenge of the mandatory minimum sentences on the grounds of their proportionality to the crime committed, made provision in the Combating of Rape Act whereby the court may depart from the prescribed mandatory minimum sentence. Section 3(2) of the Combating of Rape act reads:

“If a court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the applicable sentence prescribed in subsection (1); it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence.”

To date I am not aware of any case in Namibia challenging the proportionality of prescribed mandatory minimum sentence under the Combating of Rape Act.

26. *S v Likuwa*, supra 49G.

27. *S v Ndikwetepo and Others* 1993 NR 319 (SC), 322G.

There is likely not to be any in the light of section 3(2) of the Act. Minimum sentences are accepted in many countries with Bills of Rights entrenched in their constitutions such as South Africa, Canada, Tanzania and Zimbabwe. The power conferred on Legislature to make laws for the peace, order and good government enables it also to prescribe the punishment to be inflicted on those persons who have been found guilty of that conduct by an independent, competent and impartial court established by law. That is within the legislative power of Parliament.

3.4 Courts and general deterrence as an object of punishment

Courts in various cases imposed punishments that have deterrent effect. The interests of society; the crime committed and the personal circumstances of a convict play an important role in determining what punishment should be imposed²⁸.

The end of punishment, is therefore, no other than to prevent the criminal from doing further injury to society, and to prevent others from committing the like offences. Such punishment, therefore and such a mode of inflicting them ought to be chosen as will make the strongest and most lasting impressions on the minds of others with the least torment to the body of the criminal²⁹.

One of the leading cases on the issue of deterrence is the case of *S v Chapman*³⁰. In this case the court put emphasis on sending the message to the accused, the other potential offenders and the community.

28. *S v Zinn* 1969 (2) SA 537(A), 541D.

29. *R v Swanepoel* 1945 AD 444, 454.

30. 1997(3) SA 341 (SCA).

Also in the case of the State versus Joseph Tieties³¹, Teek JP said:

When the circumstances require it, the court should not shirk its duty to impose a sentence where the deterrent and preventive aims of punishment is justified not only to deter the convict from committing a similar crime in future but also to serve an example to would be criminal who might entertain the same or similar inclinations.

In *S v Botha en 'n ander* and *S v Marais*³², appellants had been sentenced to death for the murder of seven people. The appellants (who were members of an organization which was opposed to a possible black government in the country in the future and was prepared to do everything possible to preserve the interests of whites in general and the Afrikaner people in particular) had attacked a bus carrying black passengers with automatic rifles in revenge for an attack earlier on the same day by black youths (belonging to a black political organization) on whites in which eight people were injured.

Seven blacks were killed in the attack on the bus and a number of others were injured. In an appeal against death sentences the Court found that the appellants' attack on the bus had been perpetrated in the full knowledge that they were committing murder and that the appellant's political beliefs and philosophies of life which corresponded with that of the organization of which they were members and which contributed to the crime, could carry little mitigating weight. The court found further that the murders had not been committed with a political motive but that the motive was revenge and nothing else. The court found that the mitigating factors which had been found were totally overshadowed by the aggravating factors and that in the case such as this retribution and deterrence were the decisive objects of the sentences.

31. Unreported High Court Case No. A24/99, delivered on 2000/08/07.

32. 1993(2) SA 76(A).

The court accordingly held that the appellants be dealt with in the strictest possible manner as the only appropriate expiation for their deeds and for the sake of preventing similar occurrences in the future. The court found that in the cases of all the appellants, the death sentences was the only proper sentence and their appeals were accordingly dismissed.

The Constitutional Court, subsequently declared the death sentence to be unconstitutional as it infringes right to life in section 9 of Constitution (SA), right to dignity in section 10 of Constitution and right not to be subjected to cruel, inhuman or degrading treatment or punishment in section 11(2) of Constitution.

In the Namibian case of *S v Van Wyk*³³, the court places emphasis on retribution and deterrence. The brief facts in this case are that five white young men met one black man (deceased) in a street in Windhoek. Deceased who was also relatively young was merely peacefully walking in the street. The deceased was then brutally and viciously assaulted. He died as a result. The culprits were subsequently convicted by the High Court. Van Wyk who was sentenced to 12 years imprisonment appealed to the Supreme Court against sentence.

The Court dismissing the appeal, *per Ackerman AJA*³⁴, said the following:

Article 23(1) in fact authorizes Parliament when enacting legislation to render punishable practices of racial discrimination and apartheid, to prescribe such punishment 'as Parliament deems necessary for the purposes of expressing the revulsion of the Namibian people at such practices. It seems to me therefore that a court of law, when considering an appropriate punishment for a crime which has been motivated by racism, will in fact be acting in accordance with the constitutional commitment

33. 1993 NR 426 (SC).

34. *Supra*, 452J-453A-B.

and public policy above referred to if it considers such racist motive to be an aggravating circumstance and therefore places additional emphasis on the retributive and deterrent objects of punishment in order, *inter alia*, to contribute to the eradication of racism.

Also Berker CJ in his concurring judgment said *inter alia*;

this Court will act in the letter and the spirit of the Constitution, as set out above. In doing so it will deal extremely severely with persons in the country who act contrary to the Constitution and public policy. Any person who will offend against this will be extremely severely punished. And it is this approach by this Court which I believe should be brought to the attention of all citizens of our country, so that hopefully racially motivated crimes and offences will be stopped³⁵.

Deterrence as a theory of punishment aims at infliction of something assumed to be unwelcome to the recipient e.g. the offender. The hardship of incarceration serves as deterrence.

35. at 455J – 456 A-B.

CHAPTER 4

4 CONCLUSION

4.1 Findings

There is a general agreement that deterrence as a penal objective contributes to crime prevention. The general views are also that Courts do not impose sentences that have deterrent effect. Some crimes are so heinous that long terms of imprisonment are called for. The general agreement is that imprisonment has a general deterrent effect, provided lengthy sentences are imposed on serious crimes where aggravating factors are found to be present.

With regard to the death penalty, though there are some members of the community who call for the reintroduction of the death penalty and argue that it is the most deterrent form of punishment, we should accept the reality of the current Constitutional dispensation that the death penalty is expressly abolished by Article 6 of the Constitution. The United Nations concluded that research had failed to provide scientific proof that executions have a greater deterrent effect than life imprisonment. Many countries have abolished the death penalty and in those countries which still retain death penalty, executions are seldom carried out, with the exception of China where the rate is still higher.

On imprisonment, the vast majority of those I interviewed complain that sometimes the Courts impose proportionate sentences but these sentences are frustrated by the Prison and Correctional Services authorities which release the prisoners much earlier than the expiry term of imprisonment imposed. They regard this as an abuse of power vested in these authorities by the Prisons Act.

Many people have lost confidence in the administration of justice because of this practice. The majority of them are of the view that sentences imposed by the Courts

should be given effect to. For serious crimes such as murder, rape, robbery with aggravating factors and kidnapping, they suggest that a full sentence should be served or at least in substance. That in their view will have a general deterrent effect.

Though members of the community are in principle not against remission or release on parole, their general view is that only those who have been convicted of less serious offences should be entitled to remission or release on parole. A long term of imprisonment or life imprisonment in the absence of death penalty, serves a just deterrent purpose. There are hosts of sentences by the Courts, where the Courts have put emphasis on general deterrence.

Though the decision of the Supreme Court that life imprisonment *per se* was not unconstitutional was welcomed, the public disagree with the Court's approach that life imprisonment is unconstitutional if it amounts to an irreversible imprisonment without any lawful escape from that condition for the rest of his / her natural life and regardless of any circumstances which might subsequently arise¹. There are instances where imprisonment for natural life could be the only appropriate sentence in the absence of death penalty. This is especially so when the crime is so gruesome. The arguments advanced are that if the Court today holds that imprisonment for natural life is in violation of Article 8(2)(b) of the Constitution, there is no guarantee that it would not hold tomorrow that imprisonment for any lengthy term other than life imprisonment for natural life is unconstitutional. One other aspect that receives criticism is the interpretation of the laws and application of the Constitution by the Courts.

1. S v Tcoeb 1996(1) SACR 390 (NmS).

The general feeling is that whenever Courts are passing sentences, often than not courts are more concerned about the rights of convicted persons and disregard or put little consideration to the rights of victims in particular and that of law-abiding citizens in general. Where there are rights there must be obligations or responsibilities.

Juveniles commit host of serious crimes. This is particularly so since corporal punishment was declared unconstitutional. Juveniles do no longer receive deterrent punishments from the courts. Imprisonment is often not an appropriate punishment for them. They relapse into crimes because they know that the courts will hardly send them to jail. Some members of the community call for the reintroduction of corporal punishment. There are those who are however opposed to corporal punishment not because it does not have a deterrent value but because it is inhuman, cruel and degrading the dignity of the offender sentenced to corporal punishment. They further argue that the punishment may be abused by those who would be assigned with a duty to execute corporal punishment imposed by the court, no matter proper mechanisms put in place. Many serious crimes are committed especially by juveniles and youthful offenders after they have consumed intoxicating liquor and other habit forming substances. Committing a crime while under intoxication should serve as an aggravating factor rather than a mitigating factor.

Though victims are a force to reckon with, in the process of apprehending and prosecuting offenders, though they spend their valuable time attending court as witnesses, they are disregarded during sentencing stage. More often than not they are not aware of their rights in relation to compensation and those who are aware do not know how to go about it. There is a general feeling that victims are not fairly treated by the courts.

Victims of crime supposed to enjoy the rights as set out in the Bill of Rights. The victim has the right to be treated with fairness, respect and dignity. A victim further has the right to offer and receive information, the right to legal advice, right to reparation or restitution. It is also the view of the community that much as the accused are entitled to legal representation in criminal trials, victims should also be allowed to engage their lawyers who would work hand in hand with the lawyer for the state (public prosecutor). The victim would then be better advised by his/her lawyer especially on the question of restitution.

The criminal justice system needs to undergo a radical reassessment and overhaul. It should make provision for the victim's impact statement. This could serve an important role by placing the Court in a proper perspective in determining the appropriate sentence in the circumstances.

Though not everyone is deterred by sentences imposed by the Courts, it does not mean punishment does not have a deterrent effect. There are those who learn from others' examples.

4.2 Recommendation

Criminal law cannot exist without certain forms of punishment. Any form of a crime deserves to be punished with the compatible penalty. The interests of the community should serve as the first priority in determining the status of the appropriate deterrent sentence. The end of punishment is to prevent the criminal from doing further injury to society and to prevent others from committing the like offence.

There is no doubt that crimes such as treason, kidnapping, child stealing, rape, murder and robbery with aggravating circumstances are serious crimes. The interests of community will be served if in extreme crimes, life imprisonment without the

prospect of parole as the maximum punishment can be imposed. The writer agrees that to a certain extent the socio-economic frustration in the country has induced people to commit crimes. Socio-economic conditions can however not serve as a justification for the commission of heinous crimes such as treason, rape, murder, kidnapping and robbery with aggravating circumstances.

Certainly the law-abiding citizens country-wide demand drastic and effective action by the State and Judiciary to protect the rights of law-abiding citizens, the victims of crimes and potential victims. This is what the constitution which is the supreme law provides. Strong measures are necessary to protect the Namibian society.

It is thus recommended that the Criminal Procedure Act should be overhauled if not repealed so that a consolidated new Namibian Criminal Procedure and Evidence Act which will *inter alia* underline the need for the courts to serve justice by having as its main aim the discovery of the truth is enacted.

The new Act should make provisions for life imprisonment with the possibility of remission, parole or probation as well as life imprisonment without the possibility of remission, parole or probation, depending upon the gravity of the crime committed. This recommendation is notwithstanding the Supreme Court decision against life imprisonment without the prospect of release. Article 81 of the Namibian Constitution provides that the Supreme Court decision can be reversed by the Supreme Court itself or by an Act of Parliament lawfully enacted.

In respect of serious crimes such as murder, kidnapping, child stealing and robbery with aggravating circumstances, these should be codified so that mandatory minimum sentences are provided for. The new Act should make provision for periodical imprisonment including weekend imprisonment and night imprisonment, combined with day parole.

For those found guilty, the Act must make room for the Courts to order compensation which shall have the effect of civil judgments. Because of the alarming rate of crimes committed by juveniles, especially male juveniles, the writer recommends for the reintroduction of whipping on male offenders under the age of 21 years for crimes where violence is an element, provided the whipping is inflicted in a moderate manner and proper safeguards are put in place. Before a whipping is inflicted a district surgeon or assistant surgeon has examined the person concerned and has certified that he is in a fit state of health to undergo the whipping.

There are instances where offenders charged with extreme crimes raise intoxication as a defence. It is recommended that whenever a person is charged with the commission of any crime or offence and it is found by the trial court that the accused is not criminally liable for the crime or offence charged only on account of the fact that there existed a reasonable possibility that the accused did not have the ability at the time of the commission of the said crime or offence to perform a voluntary act or to appreciate to perform a voluntary act or to appreciate the wrongfulness of the said act or to act in accordance with that appreciation due to the consumption of intoxicating liquor, or prohibited habit-forming drugs or medicines or other substances, such accused shall be acquitted on the aforesaid charges.

He may however be convicted of a contravention of this section and shall be liable to the same penalty which could have been imposed if found guilty of the crime or offence with which the accused is charged, provided that:

- (1) The State has proved beyond reasonable doubt in the course of the trial
 - (a) That the accused voluntarily consumed one or more of the substances aforesaid, and

- (b) When so consuming the said substances the accused knew or could reasonably have foreseen that the said consumption could have the said effect on his/her aforesaid ability.
- (2) The accused had been warned of the possibility of such conviction and penalty in accordance with this section as soon as the defence of incapacity and/or lack of intention emerged in the course of the trial.

The present Criminal Procedure Act does not underline the rights of victims of crimes. This is so despite the fact that the rights of citizens and those who live in the Republic of Namibia are entrenched in the Namibian Constitution.

The protection of the law-abiding citizens should be at the centre-stage of our criminal justice system. Legislation should therefore be enacted that makes provisions that victims or their families be accorded the right to bring to court's attention the harm they have suffered as a result of crimes of violence against the person.

Be it physical, emotional, and psychological injury and financial losses suffered and that such submission may be taken into account by the courts for sentencing purposes after the conviction of the offender. Details of the victim should also be submitted to the court for the court to determine whether the victim was a vulnerable member of the society.

The victims should be provided a choice whether or not they wish to make such a submission. The court should also be empowered by the law in serious crimes to *mero motu* ask for the victim's impact statement if the court so desires. The impact statement shall be submitted in writing prepared by a probation officer or a trained victimologist/criminologist. Necessary documentary evidence such as medical or psychological reports, statements of expenses incurred may also be attached.

The probation officers, prosecutors, magistrates and judges have to receive training as to the rights of the victim and the use of victim impact statements. Police officers should be trained as well on how to compile a report on the harm suffered by the victims of crimes. The public should be educated as well and informed as to their rights in the criminal justice process.

Even where the crime has not been proved beyond reasonable doubt and the accused has consequently been acquitted on the criminal charge but the court is of the opinion that a wrongful and unlawful act or omission causing damage to the victim has nevertheless been proved on a balance of probability such court shall if such victim has no legal representative inform the victim of his/her right to apply for compensation.

It is recommended that the judicial officers should play more active role in their efforts to do justice. Our criminal system should become more inquisitorial rather than adversarial in approach if the criminal system has to live by the letter and spirit of the Namibian Constitution as far as the protection of the rights of law-abiding citizens and those living in Namibia is concerned.

Justice should not be frustrated and defeated because presiding officers fear that they would step in the arena of prosecution as soon as they ask certain incisive questions or caused certain witnesses to be subpoenaed to testify as court witnesses.

Appropriate punishments imposed by the courts have general deterrent effect. There are those who learn from others' examples.

4.3 Recent developments

The Minister of Justice recently introduced a bill in Parliament, which has now been passed as an Act². The purpose of this bill is to make provisions for procedure and related matters in criminal proceedings.

The Act revamps the existing Criminal Procedure Act and create new provisions that address many of the issues that are raised in this research project. The Act recognizes the right of accused to be represented by the legal practitioner of his or her choice before the commencement of and during his or her trial in any criminal proceedings³. The Act further makes provision for the victim of the offence to appoint his or her legal practitioner of his or her choice to represent in general his or her interests at the trial of accused for the offence that caused injury, damages or loss to him or her. The function of this legal representative is to consult with and advise where necessary, the prosecutor and the victim. The legal representative of the victim also applies, immediately after the conviction of the accused, to the court for the award for compensation to the victim⁴.

2. Criminal Procedure Bill [B25-2004] now Criminal Procedure Act, No 25 of 2004. The Act has not come into operation yet.

3. Section 17.

4. Section 18.

The Act also provides for the victim impact statement. The police officer investigating the case or any other member of the police charged with such a duty, must obtain a victim impact statement in respect of every victim of an offence against the person or against property and file the statement so obtained with the prosecution authority in such manner and within such period but not later than the date of commencement of the trial of the accused. Such victim impact statement may as well be prepared on behalf of the victim by the victim's legal practitioner or the spouse or any dependant or other relative of the victim if the victim is incapable of preparing such a victim impact statement. Even the Prosecutor-General or the prosecutor charged with the prosecution of the accused may prepare the victim impact statement on behalf of the victim⁵.

The other development worth mentioning in the Act concerns acts committed under the influence of certain substances. A person who voluntarily consumes or uses any substance that impairs his or her faculties to appreciate the wrongfulness of his or her acts or to act in accordance with that appreciation, while he or she knew or reasonably ought to have foreseen, that such substance has that effect, and who while such faculties are thus such impaired commits an act prohibited by law under any penalty, but is not criminally liable because his or her faculties were impaired as aforesaid, commits an offence and is liable on conviction to the penalty that may be imposed in respect of the commission of that act.

If in any prosecution for an offence it is found that the accused is not criminally liable for the offence charged on account of the fact that accused's faculties were impaired by the consumption or use of any substances,

5. Section 39.

the accused may be found guilty of voluntary consumption or uses of substances that impairs his or her faculties to appreciate the wrongfulness of his or her acts or to act in accordance with that appreciation, while he or she knew or reasonably ought to have foreseen that such substance has that effect⁶.

The Act introduces minimum sentences for certain serious offences. These offences are such as treason, murder, rape and robbery. Where such offence is committed in any of the circumstances as contemplated in the Act the competent court shall sentence the convict to life imprisonment without the prospect of parole or probation or remission of sentence. In some circumstances as contemplated in the Act, the competent court shall sentence the convict to life imprisonment with the prospect of parole or probation or remission of sentence after having served a period of imprisonment of not less than 25 years⁷. The only convict exempted from the application of the prescribed minimum sentence is when at the commission of such offence he or she was under the age of 16 years⁸.

Now that the Act has been passed into law by the Parliament, it has marked a turning point in our criminal justice system. Though the Act is not all encompassing, it has addressed substantial shortcomings in the present Criminal Procedure Act.

6. Section 301.

7. Section 309.

8. Section 309(7).

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