THEORY AND PRACTICE OF SENTENCING IN NAMIBA: A CRITICAL ANALYSIS

By Flavia Pombili Reinholdt

200612581

Submitted in accordance with the requirements for the degree of

BACHELOR OF LAWS

In the subject

CRIMINOLOGY/ CRIMINAL PROCEDURE LAW

At the

UNIVERSITY OF NAMIBIA

SUPERVISOR: MR F. MUNDIA

THE DISSERTATION SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE AWARD OF THE BACHELOR OF LAWS (LLB) DEGREE

DECLARATION

This study is an original piece of work which is made available for photocopying and inter- library loan

Signed at Windhoek, on _____ of _____ 2011

_____

Signature

SUPERVISOR'S CERTIFICATE

I, Ferdie Mundia, hereby cerity that the researching and writing of this dissertation was carried out under my supervision.

Signature: _____

Date: _____

ACKNOWLEDGEMENTS

First and foremost: to my Heavenly Father, with heartfelt gratitude and unfailing love, I say thank you for who you are to me.

I acknowledge the constant guidance and support of my supervisor, Mr Mundia without whose knowledge, constructive suggestions and immeasurable help I would not have completed this paper. Thank you for helping me develop my research and writing skills. To my friends (-*you know who you are*) and family who always imparted words of support and encouragement throughout my studies. Thank you for making the journey full of pleasure. To all those who believed in me and who contributed to the completion of this dissertation directly or indirectly, I offer my sincere gratitude.

Lastly, I dedicate this paper to my mother, Wilhelmina, without whom I would not be who I am today. I admire and respect the resilient strength you carry. Your unconditional love and support has been the foundation for all the accomplishments I have achieved. Thank you for all the considerable sacrifices you have made throughout the years so that I could further my studies. Secondly, I dedicate it to the entire Namibian criminal justice, may it provide a premise for further research.

ABSTRACT

James Mill[1] stated: “This we may assume as an indisputable principle; that whatever punishment is to be inflicted, should be determined by the judge, and 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”. This paper will discuss the disparities and weaknesses of our sentencing system against the theory and justification of punishment and sentence.

The significance of this paper is the positive contribution it will make to the evaluation and review of our Criminal Justice System. This paper seeks to evaluate and discuss the weaknesses of our sentencing systems or practices, disparities and controversial sentences passed under legal system. Taking into consideration the aims of punishment under any jurisdiction, being: Rehabilitation, Retribution and Deterrent, the paper or research seeks to test out whether Namibia gives practice to theory as postulated under literature through case law.

[1] Radzinowicz, L. & Turner, J.W.C. (1945). *Encyclopedia Britannica of 1824: The modern approach to criminal law.* London: Macmillan, p 45.

TABLE OF CASES

CONTENTS

Table of Content

Total word count: 16 426

Chapter 1

Introduction to Study

1.1 Introduction and Background

Following the high increase of gender based violence, cases of stock theft and reported cases of corruption, the Namibian legal system has often and most recently found itself under scrutiny and criticisms by the public, more especially on the credibility of the criminal justice in Namibia. Most members of society and the public at large feel that crime has been on the increase and the institutions responsible for addressing such have failed to deter and manage crime as entrusted. A denial or confirmation of the correctness of these perceptions may not be as easy as there is a high deficiency of scientific and objective inquiries into criminal matters.[1] The recent case of Magdalena Stoffels,[2] where the accused was released following a medical inquiry, more specifically DNA test proved that the critics of the society and perceptions may necessary be unfounded and in most cases the public cries are based on misinformation.

One perception raised from the lack of confidence in our criminal justice system is the proposition that institutions responsible for dealing with the issue of crime and criminality in Namibia have not adequately and successfully managed to deal with the issues of crime and deliver justice as that is what the criminal justice system is supposed to be all about. This poses a question on the credibility of these institutions. For sake of argument, among other reasons for such inefficient in the said institutions, are the provisions of the supreme document,[3] the Constitution of Namibia especially chapter 3, the Bill of Rights and the common principle in our criminal matters that the state has the duty to prove beyond reasonable doubt so any degree or percentage of unanswered or proven question may result in an acquittal of

[1] Hinz, M.V. (2000). *The Constitution at Work: 10 years of Namibian Nationhood.* Pretoria: UNISA, p. 298.

[2] A depth in discussion of this case will follow in due course. However, in brief, this case involved a charge of rape and murder of Magdalena Stoffels and the only suspect in the matter was Junias Fillipus who as the public have seen was released from prison following a withdraw of the charges against him in April 2011.

[3] Article 1(6) of the Namibian Constitution reads: “This Constitution shall be the supreme law of Namibia”.

the accused though there may be strong evidence on other aspects of the case. In this regard, one may argue that the rights as contained in the Bill of Rights sometimes act as a partial hindrance to and prevention against effective suppression of crime in the country.[4] From this perspective, one argue that our criminal justice institution should be conferred with more power than it has now to effectively approach crime and this power may- if necessary require such institution(s) to curb crime at the expense and to the exclusion of the existing constitutional safeguards.[5] It is merely a situation of having to make a choice between two evils which involves weighing up an individual's rights and those of the general public and this usually involve a sacrifice of an individual's right to protect those of the public at large. An insight discussion of this argument is given in due course of the study.

As it has been said above, the primary aim of the study is to critically analyse the sentencing theory underlying the criminal justice process in Namibia and the practice in courts. An argument is advanced, recommendations are given and a conclusion is drawn. Despite the recommendations, one must note that we are not only dealing with a system here- a system is capable of being transformed but we are also dealing with a mentality of people and this is not something that is simply changed by a sample or certain guidelines on papers, it is deep rooted hence criminal justice institutions may be reluctant to adopt new guidelines. The recommendations made at the end of the study requires a change from the "we-do-it-this way" attitude[6] and from rigid working practices to democratic- based and rule – governed mechanisms. Looking at the rate at which crime is increasing, it is obvious there is a need for rigorous coherence within our criminal justice system.

Looking at the sentences given in some cases, for example, in cases of murder/rape and stock theft, one would formulate certain assumptions. I have come down to the following understandings or assumptions:

- During sentencing, our courts do not seem to give the theoretical purposes of sentence practical effect. Looking at the crime rate and the circumstances of

[4] Hinz, M.V, p. 298.
[5] Ibid.
[6] Ibid.

different cases, i have often failed to understand the rationality or relationship between the sentence imposed and the purpose thereof.

- There is no rationality between the theory of sentencing and the practice of sentencing in Namibia.

Overall, the hypothesis centralizing this paper is that; there is no coherence between what theory is teaching us and the practice in our courts.

1.2 Research question and hypothesis

Namibia has recently seen its crime rate intensifying, especially gender based violence and stock theft and this is despite the soaring, irrational unprincipled sentences especially those passed under the *Stock Theft Amendment Act 19 of 2004.* The sentences in murder cases and those under stock theft have led to questions on the credibility and consistency of our justice system or the whole criminal justice system all together resulting in some members of society calling for death penalty as a punishment especially for cases related to rape and murder. However, Namibia being a democratic state and this is enshrined in the Namibian Constitution under Article1 and the preamble, cannot accommodate such outcries of the public. But it is often said that democracy in layman's terms simply means government for the people by the people. So by reading this, one is often left with the following question: just how involved is the public involved in the legislation process or law reforms? In other words, if the public is not happy with a certain punishment or sentence, is it enough for the legislation to revisit, review and amend the particular section according to cries of the society? How does one explain the difference in sentences given to two different accused for the same crime? Do our judicial or presiding officers take cognisance of mitigating and aggravating factors? What is the justification or reason behind most of the sentences given in our system? What do we hope to achieve? These are some of the questions that need to be addressed.

Formally stated, the research question in this study is:

1. With regard to the theory purposes of sentence, do sentences (the practice) in Namibia reflect the theory?

1.3 Research methodology

The objective of the study was to critically analyse the Namibian criminal justice, main focus being on the sentencing or punishment particularly, this research was compiled on documentary data basis or rather a desktop research. I have mainly consulted the available literature on the theory purposes of punishment and analysis of judgments delivered in our courts for practical purposes. This was done to assess whether theory is being given practical application. Where I saw the need to consult persons for clarity, I've conducted interviews accordingly.

1.4 The Criminal Justice System

The Namibian legal system is a hybrid of borrowed colonial legal systems. It is a combination of the Westminster-style Constitutional law, Roman Dutch Law, customary law and international law.[7] This is not an end cut of the ingredients to our legal system as some components are unwritten therefore requires due distillation from the body of jurisprudence as Namibia has gone under colonisation twice- German and South Africa.

The administration of South Africa was often tainted with grievous violation of human rights but we cannot ignore the positive contribution that South African legal administration has made to our legal system as it even stands today. One important attribute of the South African administration was the establishment of a stable legislative framework that was in inexistence at the time before their occupation.[8]

After the liberation struggle, the main functions of the assembly were to draw up a constitution and organise elections to select and establish a Namibian's own administration body. The drawing up of this constitution was done by guidelines from the internal community, more especially on the principles to be included in the constitution and most of these principles are found under Chapter 3 of the Namibian Constitution and this forms the main core of the foundation on which the constitution is built. On the 9th February 1990, the Namibian Constitution was adopted.

The adoption of the constitution saw the rise of the concept of constitutional supremacy and this meant that the validity of all laws was tested against the

[7] Skeffers, I & Mwanza, G. G. (2001). *Researching Namibian Law and the Namibian Legal System.* Global Law School Programme: Globalex

[8] See footnote 15.

constitution as opposed to parliamentary supremacy that was in existence in the pre-colonial era. This marked to be one of the great achievement and positive step toward a democratic state and the applicability of the concept of rule of law.[9] The provisions of Chapter 3 are considered to be an embodiment of the human rights culture and the importance of these rights to Namibian legal system is of great value that it has earned it the "untouchable" status.[10]

Namibia now being a democratic country, a criminal justice was also established to enforce and protect these democratic rights. The criminal justice system (hereinafter referred to as CJS) is traditionally more concerned with the violation of the law. It deals with the enforcement of procedures of criminal law and management of crime. Therefore, the two outstanding aims of the CJS are to control crime and to ensure due process in criminal dealings.[11]

On the face of it, it may appear that the components that makes up the CJS includes the 3 organs of state as provided under Article 1(3) of the constitution more specifically, the executive, legislative and the judiciary.[12] This impression is narrowly derived from the nature of the functions the 3 organs perform therefore such impression is misleading. Strictly speaking, the executive and legislative, though they interact with the CJS, they do not form part of the system. The 3 components that make up the CJS are; the police, the courts and the corrections. These can be summed up under the judicial arm of the state.

The study is divided into five chapters: chapter 1 being the introduction as seen above, chapter 2 is the literature review which deals with a more detailed discussion of the CJS and this where i will also look at the recent developments and its discrepancy factors. Case study will be disseminated under chapter 3. Chapter 4 deals with the discussion of the case law and this where i will have a comparison study with regard to two other jurisdictions. Recommendations and conclusion are given under chapter 5.

---

[9] Amoo, S.K. (2008) *An introduction to Namibian Law: Material & Cases.* MacMillan Education: Namibia.

[10] See footnote 15.

[11] William, D & Friedman, k. *EDDJJ Professional Development Series Module 1: History of the Criminal Justice System.* University of Maryland.

[12] Article 1(3) of the Namibian Constitution reads: "The main organs of state shall be the Executive, the Legislature and the Judiciary".

CHAPTER 2

Overview of Study

2.1 What is punishment?

An ordinary interpretation of punishment is usually associated with suffering or penalty for a fault or crime committed. Under criminal law, punishment serves as a penalty for a crime committed. It involves the infliction of pain, forfeiture, discipline or castigation by the judicial arm of the state.[13] Punishment must entail a certain purpose. In addition to the infliction of the pain, it must also express the condemnation of the community and disapproval of the offender and his conduct. The principle underlying punishment is that anyone who has experienced the pain that may come with infliction of punishment would be discouraged from criminal behaviour in future.

2.2 Theories/ Aims of sentence

Punishment, retribution, deterrence and prevention as the aims of sentencing have been around since time immemorial, they are ancient ideas.[14] The aims of sentence are categorised into either absolute or relative theories.

Absolute theories are retrospective in nature and they are mainly focused on the past and sometimes the present. It concentrates on the crime that has been committed, the perpetrator and not the after results. According to the relative theories, punishment is merely just a transport to a secondary or end purpose of sentencing. This secondary purpose materially differs from the aims of relative theories in that; according to the preventive theory, the secondary purpose is prevention of crime through deterrence; and according to the rehabilitation theory, the secondary aim is to reform or rehabilitate the criminal.[15] Therefore, the relative theory is more concerned with the future and the emphasis is on the object (the perpetrator) and in most cases, punishment is aimed at preventing further crimes and the rehabilitation of the criminal.

---

[13] Nyoka, p. 6.

[14] Terblanche, S. S. (2007). *A Guide to Sentencing in South Africa.* 2nd Ed. LexisNexis: Durban, p 154.

[15] Snyman, C. R. (1989). *Criminal Law.* 2nd ed. Butterworths: Durban, p. 7.

2.3 Relative theories

2.3.1 Deterrence

According to Rabie[16], "The idea is that a man, being a rational creature, would refrain from the commission of crimes if he should know that the unpleasant consequences of punishment will follow the commission of certain acts. It is thus the inhibiting effect of the threat of punishment or the imposition of punishment on others, which would cause a person to think twice before he would commit a crime".[17]

In terms of this theory, a criminal considers the risks and the benefits of the crime, weigh it up against the possible punishment before he acts. This argument might be correct but not all acts are deliberate.[18] Furthermore, this theory alleges that crimes are a result of conflict of interests; between the interest of the offender and those of the society. Therefore, the aim of punishment is to rid-off this conflict of interests.

From the premise on which the deterrence theory is based, one is able to deduce that there are two forms of deterrence; general deterrence and individual deterrence.

According to the general deterrence, punishment is given as an example to the society, more particularly, potential offenders. The underlying notion is that the infliction of a certain punishment usually an unpleasant one will cause potential offenders to refrain from committing similar crimes.[19] In essence, the theory claims that people are rational beings with free will and they will avoid crime if the unpleasant consequences of criminal behaviours are known and this is the potential punishment faced. This argument is known as "hedonistic calcus" and presupposes that weighing up enjoyment (from the crime) and the potential pain or unpleasantness (from punishment) against each other directs human behaviour.[20]

---

[16] Rabie, M.A and Strauss, S.A. (1981). *Punishment, An Introduction to Principles.* Cape Town: Lex Patria Publishers, p. 6.

[17] Terblanche, S. S. (2007). *A Guide to Sentencing in South Africa.* 2nd Ed. LexisNexis: Durban, p. 156. The same concept was reflected in the case of *S v Makwanyane* 1995 (2) SACR 1 (CC) at par 169.

[18] Conklin, J.E. (1998). *Criminology*, 6th ed. Boston: Ally & Bacon, p524.

[19] Terblanche, S. S. (2007). *A Guide to Sentencing in South Africa.* 2nd Ed. LexisNexis: Durban, p. 157.

[20] Ibid.

In contrast, Individual deterrence is concerned with the offender himself and how he experiences the punishment. The theory is based on the notion that punishment deters an individual by conditioning their behaviour to avoid crime in future.[21]

The vital ideology behind the deterrence theory is often achievable through further theories of incapacitation and the preventative theory. These will now be discussed in details.

Incapacitation

This theory requires physical separation of the offender from the society to reduce opportunities for him to commit further crimes. The basic belief under this notion is that offenders will be susceptible to commit further more crimes if they remain in society.[22]

Incapacitation comes in different forms, either: total incapacitation, medical intervention or incapacitation or incapacitation by imprisonment. Total incapacitation is a permanent removal of an offender from the society, for example life imprisonment. Medical incapacitation involve a medical procedure that permanently remove the offender from society though it is not an absolute incapacitation of the offender, it is merely a procedure of restoring an offender into the society but his opportunity to commit further crimes are permanently removed, for example castration of sexual offenders. The last form of incapacitation which is by imprisonment, the offender is temporarily removed from society. This is done for example through detention in prison.[23]

2.3.3 The preventative theory

In terms of this theory, punishment is viewed as being preventative and disabling. Therefore, criminal behaviour is deterred by infliction of fear and this is the primary and general purpose of the preventative theory. The secondary or long-run purpose is to prevent repetition of an offence by the offender and this is achieved through disabling the offender.[24] Taking a wider perspective on the theory, it may include deterrence and rehabilitation as disabling factors. The secondary purpose is in most

[21] Ibid.
[22] See footnote 7.
[23] Ibid.
[24] Terblanche, p.162.

cases illustrated and indicated by the judges when they for instance make remarks such as; “the punishment is to prevent others from committing similar crime”.[25]

Taking a narrow approach on the theory, the object(s) of preventative theory is achieved through physical incapacitation of the offender from committing crime in society. After the death penalty was abolished, the only sentence to the same effect is life imprisonment. The importance of physical incapacitation is relevant in cases where the offender is deemed to be a danger to society so such incapacitation is done for the protection of the society.[26]

2.3.5 Rehabilitation theory/ Reformative theory

In terms of this theory, punishment should be imposed to reform the offender as an individual so that he becomes or is restored to being a normal law-abiding member of the community. The objective of the reformative theory is aimed at the behavioural modification of the offender for the better. This includes reformation of personality and ego. The advantage of a restored once negative ego is that; it deals away with external dependency factors such as negative influences for example the use of drugs and alcohol. Therefore, if a person’s criminal behaviour can be attributed to these external negative and they are successfully addressed, chances of repetition of the same offences are unlikely.[27]

Taking a wider view on the theory, it is asserted that through reformation, an offender is exposed to new options and to insight consequence of his action therefore, he is made to realise that his conducts were wrongful and that his punishment has been fair in proportion to the act he has committed therefore developing a conscience.[28]

---

[25] Ibid.

[26] *S v Tcoeib* 1996 1 SACR (NmS) 400i- 410a.

[27] Snyman, C.R. (1989). *Criminal Law.* 2nd ed. Butterworths: Durban, p. 22.

[28] Nyoka, p.10.

The Absolute theory

2.4.1 The Retributive theory

The term retributive cannot be defined under as single meaning or concept as it is subject to different interpretations depending on the context the term is being used in. The ordinary dictionary meaning refers to requital for evil, sometimes the term is equated to vengeance. The basic maxim is that; the punishment must fit the crime.

Commission of a crime in society is believed to be a disturbing factor in society. Crime disturbs the legal balance and order of society and this can only be restored through the punishment of the offender. Therefore, it's only natural that punishment follows automatically upon the commission of the crime.[29] However, although the guilt cannot go unpunished, such punishment or penalty must be proportional to the harm caused and to the extent of their blameworthiness.[30]

The utility of retribution is that it explains why the courts in executing their judicial functions are justified in handing sentences or punishment which may be regarded as intentional.

The criticisms levelled against this theory are that; looking at the basic ideology or belief behind the theory, one is able to deduce that this is merely just a manifestation of an old traditional urge to seek revenge, simply embodied in an old principle: "*An eye for an eye and tooth for a tooth"*. Furthermore, it is often difficult to ascertain the punishment that fits a certain deed which then often results in disparities.

2.2.4 The Unitary Theory

This theory basically sums up all the above discussed theories; their basic arguments and beliefs. Summing up and comprising of the theories under one theory seems to serve best as the remedy required by the inefficiency of the above theories as a single justification for punishment. In general, every theory has its own flaws and by combining the theories such flaws may be remedied by another "borrowed"

[29] Ibid.

[30] In *S v Mafu 1992 (2) SACR 494 (A)* it was stated that: "certain proportionality should exist between crime and punishment". In the case of *S v Makwanyane 1995 SACR 1 (cc) par 129,* it was said that: "the punishment must to some extent be commensurate with the offence."

principle from the next theory. Furthermore, the unitary theory has as its core principle three main considerations which the courts should take into account when imposing a punishment, namely; the crime committed, the criminal and the interest of society.[31]

Synman comprehensively illustrated the essence of the unitary theory in to say:

> By 'crime' is meant especially regard must be heard to the degree of harm or the seriousness of violation (retributive theory), by 'criminal' is meant especially that regard must be heard to the personal circumstances of the offender, for example the personal reasons which drove him to commit crime as well as his prospects of one day becoming a law-abiding member of the society again (reformative theory); by the 'interest of the society' is meant either that society must be protected from dangerous criminals (preventative theory); or that the community must be deterred from crime (general deterrence) or that the righteous indignation of society at the contravention of the law must fit some expression (retributive theory). There ought to be a healthy balance between these three factors. A court should not emphasise any of them at the expenses of others.[32]

2.3 What is unprincipled punishment?

At the outset, an unprincipled punishment is one that does not take into consideration the purpose for which the punishment was passed or given. It is important that the presiding officers in passing judgement must consider the following:

a) Punishment must reflect the seriousness of the offence and this is to promote respect of the law and to provide just punishment for the offence.
b) To offer and provide adequate deterrence to criminal conduct.
c) Such deterrence must be in protection of the public from further conducts or crimes of the defendant.
d) To afford the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

In essence, these four purposes bears resemblance to the conventional purposes of punishment as discussed in the previous topics. Therefore, it is important that presiding officers must give or at least have a purpose statement as to what s/he is

[31] Snyman, p. 23; Nyoka, p. 12.
[32] Snyman, 23.

exactly hoping to achieve or what message is s/he sending out there for the public. Punishment imposed in vain, without a purpose and unprincipled may be a waste of public resources and funds or they may not serve justice to the victims or public.

However, giving the term an in-depth discussion, one also has to look at the concept of justice.

The concept of justice was discussed by *John Rawls,*[33] according to the jurist, justice as fairness consists of two parts, namely:

a) An interpretation of the initial situation and of the problem of choice posed there, and;
b) A set of principles which, it is argued would be agreed to.

The principle of justice is not a foreign concept to Namibia. It is reflected, *inter alia,* in the Namibian constitution under Article 1(1) where it is acclaimed that the Republic of Namibia is established, *inter alia,* on the principle of justice for all. Therefore, legal interpretation needs to address the question of offering meaning which is consistent with the values of the Namibian legal system and society at large.

2.4 Sentencing in Namibia

Based on what and where Namibia has come from, particularly in terms of independence which saw the birth of the constitution which is now the supreme law of the land as opposed to parliament supremacy. The constitution has accordingly abolished the death penalty, our government, through its institutions, e.g. The Ministry of Prisons and Correctional Services has embraced the concept of rehabilitation of prisoners. It is sufficient and safe to say that gone are the days when punishment was imposed on convicted criminals and justified on the ground of revenge for their depraved conducts. Although imprisonment remains an important form of punishment to date, the main reason or justification of sending people to prison has gone under reformation. In the past, offenders were sent to prison as a way of separating them from society and in a way, they were deterred from committing further crimes, however, it was seen that making a prison as a place

[33] Freeman, M.D.A (1994). *Introduction to Jurisprudence;* In Kloppers, p. 11.

merely for keeping away criminals and hard labour did not in any way reduce crime rates as ex inmates finds themselves back into the prison cells as fast as their release. This was mainly because there was no reformation or rehabilitation of inmates in prison to prepare them for the outside world and making them law abiding members of society.

Today, prisoners sent to prison are expected to use their prison terms for rehabilitation purposes so that they could be useful citizens upon return to their communities.[34] The underlying principle is to limit the use of prisons to only selected categories of violent offenders and not to incarcerate each and every convicted person. *The Prison Act*[35] and especially the mission statement of the Ministry of Prisons and Correctional Services provides for a departure from the colonial era of prisons for incarceration only. The Namibian prisons and correctional services were established under an Act of Parliament[36] and this finds further support in the Namibian constitution under Article 121-123 respectively.[37] These developments have been considered to be an achievement by the government as the aims for punishment were reconsidered in hope of reducing the population in prisons by reformation of inmates or ex-offenders.

The post independent or rather objective of the ministry was and is approached from a humanitarian perspective because the operations of prisons were conducted in accordance with the relevant legislations, being the Bill of Rights as found under Chapter 3 of the Namibian Constitution, provisions of international law (e.g. The African Charter on People's Rights) and code of conducts under national law, where inmates are to be cared for in a compassionate manner by affording them the opportunity to regain self-respect and the logical way of achieving this is through rehabilitation.[38] The Ministry of Prisons and Correctional Service has also played a remarkable role as an instrument of the country's criminal justice system by protecting law- abiding citizens from criminal elements. This has been accomplished

[34] Hinz, p309.
[35] Police Act 19 of 1990.
[36] Act 17 of 1998.
[37] http://www.op.gov.na/Decade_peace/prison.htm. Last accessed on the 2011-07-25.
[38] Ibid.

through incarceration of offenders and their rehabilitation for their due integration into society while exercising reasonable safe and secure control.

Notwithstanding this mission statement and policies, often public outcries are heard calling for a return of the colonial era where every convicted person was not only to be sent to prison but expected to suffer for their conducts-while in prison which was achieved through hard labour. Extreme voices have even suggested the need for a return to the death penalty. Justification for these public callings and demands may be emotional responses arising from the increase in criminality in the country and "lack of effective ways" of dealing with it as the public perceives.[39]

In her dissertation,[40] Nyoka have discussed the criminal justice system in light of the alternatives to the tradition of imprisonment as punishment. More specifically, an imposition of community service orders as alternative to imprisonment and its impact on the existing system as it stands under the Criminal Procedure Act.[41]

Our criminal justice system was also scrutinised in Kloppers's 2005 dissertation.[42] His area of focus was however on the issue of justice and how one of the most fundamental rights as provided under Article 12 of the Namibian constitution[43] may be violated by a delay in a trial, at whatever stage. Another publication related to the topic in discussion is a thesis paper by Paulus Noa, titled; "General Deterrence as a Satisfactory Justification for Punishment".[44] In this thesis, the author mainly looked at and discussed one aspect or aim of punishment, namely deterrence as a sole justification or reason for punishment.

I therefore conclude that my area of focus and angle of concentration is a new and fresh area of concentration that has not been addressed or written on.

---

[39] See footnote 48.

[40] See footnote 9.

[41] Act 51 of 1977.

[42] Kloppers, V. I. (2005). *Does Delay of Justice in our Criminal Law System Constitute a Violation of the Namibian Constitution.* University of Namibia.

[43] Article 12 is basically on the right of fair trial of an accused.

[44] Noa, P. (2005). *General Deterrence as a Satisficatory Justification for Punishment.* University of Namibia.

2.5 The equation of sentencing

Sentencing is a complicated process because every case has its own circumstances that can either result in a higher or lighter sentence. In deciding an appropriate sentence, it is important that the presiding officers consider the following factors:

- ***The crime, criminal and the community***

The nature and gravity of the crime plays a very important role in sentencing, the nature of the crime inflame public distaste and rage. Public opinion often demands heavy sentences; the court ought to be a mirror image of the feelings of the law abiding community. This feeling is important and courts ought to punish in such a way that society's feeling of indignation over crime is satisfied. The personal circumstances of the accused which can either be aggravating or mitigating and the interest of the community also play an important role. This is about the offender's age, cultural background, physical and mental and emotional condition, the absence and existence of previous offences and the effect the period of imprisonment would have on the accused.

The accused's status in the community, remorse and willingness to make restitution also play a vital role. The motive behind the crime is also important.

- ***Aggravating and mitigating factors***

The fact that the accused had been found guilty of a similar crime before or that it is a very serious crime for example would be an aggravating factor. Mitigating factors that could be brought to the attention that the offender is a first time offender and shows deep remorse for the crime, for instances. These factors have the potential of either resulting in a heavy sentence or either a lighter one.

- ***The goal of punishment***

This is the desired aim to be achieved with a sentence. Sentencing is not a purposeless or aimless procedure and in every sentence there are recognised aims that the presiding officer will keep in mind and pursue in a balanced way without placing undue emphasis on one of the aims.

- ***Humaneness or compassion***

To arrive at an appropriate sentence, the decision must be approached with humaneness or compassion. The court must therefore not sentence to take revenge or to destroy the person under sentence. This measure is called mercy.

It is most important that during the sentencing process, our judicial officers must keep in mind the purpose of sentence and not just aim to punish the offender. Moreover, the process of sentencing must be approached with caution and with a measure of mercy.

CHAPTER 3

Critique of study

This chapter forms the first part of the basis of this dissertation and discussion of the results or findings will follow in the following chapter. In chapter 1, it was made clear that the objective or aim of this dissertation is to discuss and draw conclusion as to whether the theory pertaining to sentencing finds or is being employed in practice. Therefore, it is necessary that there must be a discussion of the discrepancies and unprincipled as one may deduct to be from the recent and finalised cases. Particular concern bears on the cases hailing the same or at least similar facts or circumstances only to come to different judgements or outcomes or disparate sentences. Studies in the United State of America have showed that under the imprecise sentencing model disparities was a prevalent problem and that identical defendants often received different penalties simply because they appeared before different judges.[45]

This then leaves one with the question; do different outcomes of cases depend on who the presiding officer is? Or does it depend on the aim or purpose of punishment considered by the presiding officer as the reason for the sentence passed?

3.1 Equation of sentence in Namibia

The theoretical equation of sentencing in chapter 2 is an important equation in imposing a just and proportionate sentence. It has the ability to reduce disparities and improve consistency in our courts as well.

In the case of *S v Orina*[46], it was stated that sentencing must take into consideration the personal circumstances of the offender, the crime committed and the interest of the society, whilst at the same time, the court must decide the objectives of punishment to be meted out. These factors were again stated in the case of *S v*

[45] Aaron, J.R. (2004) *Unprincipled Punishment: The U.S. Sentencing Commission's Troubling Silence and the Purposes of Punishment, p 1050.*

[46] CC 12/2010.

Basson[47], the accused was found guilty of murder and of assault with intent to cause grievous bodily harm. The court stated that the law requires that in imposing sentence, the court must have regard to the personal circumstances of the prisoner, the seriousness of the crimes and the interests of society.

The Court is required to strike a balance between the sometimes divergent interests and to blend the punishment with a measure of mercy, according to the circumstances. It may seem that consideration of these factors require equal consideration but it often happen in practice that such balance isn't always easy. Therefore, as much as each factor deserves due consideration, equal weight need not be given to the different factors, as situations may arise where it becomes necessary to emphasise one factor at the expense of the others.

This was reflected or illustrated in the case of *S v Shipanga & Others*[48], where Usiku, AJ expressed that the mitigating factors presented to court which were the personal circumstances of the accused persons were nothing compared to the need for a sentence that would deter the community (general deterrence) consequently sentencing the accused persons to an effective 46 years of imprisonment (each).

As much as the there is a need for protection of society and it's a natural expectation of the community that the court will punish perpetrators of serious crimes severely, at the same time the community also expects that mitigating circumstances, including the accused person's personal circumstances to be given due consideration. That to my mind is fairness in sentencing as opposed to an overemphasis of the interest of the community. Therefore, it's necessary that courts try and strike a balance between the three.

Another factor that is of importance in the process of sentencing is the remorseful of the offender and this importance was illustrated in the case *Orina*, the accused in this case expressed no remorse for his conducts and it was note that the absence of remorse is a factor that is taken into consideration when the Court has to consider

[47] CC 23/2010.
[48] CC 02/2009.

deterrence as an objective of punishment; and where same is lacking; there is an increased risk that the accused would re-offend therefore incapacitation would be the appropriate aim of sentencing to be considered. However, it is not just a situation of being expressing remorse in hope for a reduction of a sentence or just because one knows the impact of the absence such, it must be genuine as it was said in the case of *S v Seeger*[49] ...it has often been said in our courts that remorse, to have meaning and effect, should be genuine and sincere.

Another factor of the equation of sentencing in Namibia is the length of the period the accused spent in custody awaiting finalization of his trial. In the case of *Orina*, the accused has been in custody awaiting the finalization of his trial for a period of four years and seven months and the court stated that as a matter of principle; where the period an accused spends in custody, awaiting trial, is lengthy, this would lead to a reduction in sentence. The accused in this case was also given the same benefit. Orina was sentenced to 40 years imprisonment.

3.2 Purpose of sentencing in Namibia

The hypothesis underlying the study is that there is no coherence between the theory of sentencing and the practice. In other words, there are often disparities between what theory is teaching us (and sometimes quoted in judgements) and the practice in courts as reflected in their sentences.

In the case of *S v Brandt*[50] and various other cases, the court enunciated the following principles at *357 A and 358 C:*

> The reason for punishing convicted persons is to deter them and others from committing similar crimes, and if they are capable of being reformed, of reforming them. Society also expects that people who have done wrong will be punished, that is the retributive purpose in punishment is important. This is particularly so in cases which involve violence for housebreaking where the indignation of the community has been aroused. Sentences which are too low do not achieve any of those purposes. The accused and the community laugh and scoff at such sentences and sentences lead eventually to the community taking the law into their own hands and meeting out the punishment they consider the accused deserves." And "violence is becoming more and more prevalent, and depending on the circumstances, where the accused

[49] 1970 (2) SA 506 (A).
[50] 1991 NR 356.

> used any type of weapon, it is one of those crimes where a first offender could and even should be sent to prison.

In the case of *S v Soroseb,* [51] the accused was convicted of culpable homicide. The court stated that in sentencing the accused, it has to be kept in mind the purpose of punishment and must try to affect a balance in respect of the interest of the accused and the interest of society in relation to those purposes.[52]

However, the despite the common employment of general deterrence as the preferred aim of sentence, in the case of in *S v Sparks and Another*[53], at 410, stated as follows:

> … and, in addition to the matter of punishment, the deterrent aspect calls for a measure of emphasis, lest others think the game is worth the candle. Nevertheless, the appellants must not be visited with punishment to the point of being broken. Punishment should fit the criminal as well as the crimes be fair to the State and to the accused, and be blended with a measure of mercy.

Therefore, an accused person must not be crucified in teaching a lesson to the community in general. To deter the public from commission of the same or similar cases and rehabilitation as set out in the *Prison Act* and the Ministry of Justice actually comes secondary to the imposition of a sentence and this is in contradiction with the provisions of the Namibian Correctional services. Although such deterrence is to be imposed with mercy, the background of the judicial officer may have either a positive or a negative influence on the level of mercy added to the punishment. Thus it is imperative that judges do not approach the sentencing process in an angry manner, however all this might not be easy because judges are human as well.

As Parker J, put it in the case of *Naftali Kondja*[54]:

> Consequently, in my opinion, the court must not behave as if it is perched on an ivory tower, far removed from the general populace and its genuine fears and concerns about horrendous and depraved crimes and from the people's desires to live in peace.

---

[51] CC 08/2010.

[52] See State v Brand 1991 NR 356 at p 365 B – C.

[53] 1972 (3) SA 396.

[54] CC 04 of 2006.

In the case of *Orina* still, the court said: "As regards the objectives of punishment the Court, when balancing the interests of the accused against the crime and the interests of society, is convinced that the aggravating factors by far outweigh the mitigating factors placed before the Court and that the imposition of a lengthy custodial sentence is inevitable." In addition, the Court must ensure that the accused does not repeat these crimes and through the sentence to be imposed, to deter others from committing similar or other serious crimes.

In *S v Mhlakaza and Another, (supra)* it was stated that given the current levels of violence and serious crimes, it seems proper that, in sentencing especially such crimes, the emphasis should be on retribution and deterrence and that rehabilitation plays a minor role. I fully endorse these sentiments and further am of the view that the case (for instance that of *Orina*) is one of those cases where the accused – despite being a first offender – should be punished for the crimes he committed and that the sentence to be imposed must reflect the Court and society's indignation.

In deciding what an appropriate sentence should be, it has been held in *S v Bohitile*[55] that the proper approach with regard to sentence is that as set out by CORBETT, JA (as he then was) in *S v Nxumalo*[56] in the following way:

> If they have been serious and particularly if the accuser's negligence has resulted in serious injury to others or loss of life, such consequences will almost inevitably constitute an aggravating factor, warranting a more severe sentence than might otherwise have been imposed. It is here that the deterrent purpose in sentencing comes to the fore. Nevertheless, this factor, though relevant and important, should not be over-emphasised or be allowed to obscure the true nature and extent of the accuser's culpability. As always in cases of sentencing, where different and sometimes warring factors come into play, it is necessary to strike a balance which will do justice to both the accused himself and the interests of society.

In the case of Basson, the court stated that as it is a judge's duty to show mercy to a convicted prisoner, it is an equally important duty of judges to protect society from the scourge of violence. The fact that the sentences imposed do not seem to deter would - be criminals should not make us shirk from that responsibility. In my view, in order to maintain a balance between the high incidences of violence against the vulnerable, especially women and children, and society's demand for justice, very long terms of imprisonment for such crimes must be the norm – only to be deviated

[55] 2007 (1) NR 137 (HC).

[56] 1982 (3) SA 856 (A) at 861H - 862B.

from in exceptional circumstances. This is the backdrop against which the judge decided on the sentence to impose on Basson. Fully mindful of the accused personal circumstances, although not presented under oath, Damseb, JP stated that he is obliged by the considerations he had set out before, to impose a sentence that will send a clear message that violence against the vulnerable in our society has reached a crisis-point and will be visited by the Courts with very severe sentences. Therefore the accused was sentenced to 45 years imprisonment.

The case of *S v Shaduka*[57] is one case where the court deviated from imposing a lengthy period of imprisonment as the only way through which deterrence can be achieved. In this case, the accused was convicted of culpable homicide after he was initially charged with murder, read with the provisions of the Combating of Domestic Violence Act. The deceased was his wife, Selma Mirjam Shaimemanya. The Court also convicted the accused of a second count of attempting to defeat or obstruct the course of justice. In my view culpable homicide caused by assault should generally also be treated with a heavier hand than culpable homicide caused by the negligent handling of a firearm where no assault is involved. I also think that a distinction should be made between cases where a shot is deliberately fired causing the death of a person in circumstances of negligence (as in e.g. the *Rademeyer* case), and cases where the shot itself is negligently or inadvertently triggered. In this case there is no evidence of an assault or a deliberate firing of the shot. While the grossly negligent handling of the firearm in this case calls for a deterrent sentence, the question arises whether this aim of punishment can only be achieved by the imposition of effective imprisonment in the circumstances of this case.

Niekerk, J. stated that the accused is a person who seems to be able to make a useful contribution to society and especially as a business man, in the economic affairs of the country. Bearing in mind that he is a first offender who has already been in custody for two years and that it is not unlikely that he has indeed learned a lesson as he has stated, I (the judge) am not persuaded that he must be ordered to serve a further period of imprisonment so in my view a stiff fine should serve the purposes of sentence in this matter, which is mainly deterrence, but also to afford the

[57] Case No. CC11/2009.

accused a chance to mend his ways. He was sentenced to a fine of N$27 000.00 or 14 months imprisonment.

Although not common, it sometimes happens that courts also consider rehabilitation as the purpose of imposing a sentence. For instances, in the case *S v Soroseb* where the accused was a first time offender and there was also no evidence of previous violence perpetrated against the deceased in the four years that the parties were living in a domestic relationship. The evidence supports the impression that the accused was not normally given to reacting violently and has been able to restrain himself in previous situations when provoked therefore the court stated that it can deduce that this render the accused capable of being rehabilitated.

3.3 Analysis of study

In the case of *Orina,* Liebenberg J was of the opinion that "it seems likely that the deceased's death came as a result of domestic violence". The court remarked that despite several judgments in which it was said that the Court views crime committed in a domestic relationship in a serious light and would increasingly impose heavier sentences in order to try to bring an end thereto, this unfortunate trend in society seems to continue unabated.[58] In addition to this, in was stated in the case of *Soroseb* that, the sentences imposed in this context, whilst taking into account the personal circumstances of the accused and the crime, should also take into account the important need of society to root out the evil of domestic violence and violence against women. In doing so, these sentences should reflect the determination of courts in Namibia to give effect to and protect the constitutional values of the inviolability of human dignity and equality between men and women. The court further held that the clear and unequivocal message which should resonate from the courts in Namibia was that crimes involving domestic violence would not be tolerated and that sentences would be appropriately severe.

In my opinion, I find that in line with most judgements of the courts, the fact that the accused had eight people that depended on him financially including his 14 year old daughter is a serious mitigating factor. This is because; the daughter has a lost a

[58] *S v Bohitile,* 2007 (1) NR 137 (HC)

mother already so she ought to rely on the father for support so sentencing Orina to a lengthy custodial sentence will be of economic loss to the dependants. I understand that the interest of the victim's family of the public at large is that he be removed from society and this a cry because they are not the ones that will suffer the economic loss. The sentence to be imposed must take into consideration of this fact but at the same time the accused must also pay for his acts but not to punish the dependants. I mean, they are society as well although they might be the minority. Moreover, this case read in light of the judgment of *S v Shaduka*, the accused was sentenced or ordered to pay a fine as his incarceration was understood to have negative impact on his business and a loss to those that depended on him. So i do not understand why Orina cannot be afforded the same empathy or consideration.
One cannot help but ask where is the consistence in all these?

Certain conducts such as the barbaric behaviour in the case of *Orina* fills one with abhorrence which has sent shock-waves through society and it seems appropriate to remind oneself of what was said in *R v Karg*:

> It is not wrong that the natural indignation of interested persons of the community at large should receive some recognition in the sentences that Courts impose, and it is not irrelevant to bear in mind that if the sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands.

Liebenberg, J. remarked "I am aware that public expectation is not synonymous with public interest and that the courts are under a duty to serve only the latter; however, given the grave escalation of crimes of violence committed lately against the most vulnerable in society like the elder, women and young children, there is a general outcry from the public for protection against criminals which cannot be ignored by our courts. The Court fulfils an important function in the community by applying the law and has a duty to uphold the rule of law through its decisions and the imposition of sentence, thereby promoting respect for the law. This Court will certainly fail in its duty to society if it omits to view the crimes committed in this instance as very serious and to protect the sanctity of life expressed by the Constitution by meting out appropriate and suitable punishment."

The judgment in the case of *Shaduka* caused rage in the community, especially the Sheimemeanya's family. They felt cheated that the life of their daughter was worth N$25 000 only. Besides emotional feelings, the outcome of this case was a clear indication of the flaws of our sentencing system.

In the case of Orina, Liebenberg, J. said "the evidence has been shown in court that the marital relationship between the deceased and the accused was unstable and there has been a history of domestic violence and it's against this background that i believe that it seems likely that the deceased's death came as a result thereof and the court views crimes committed in a domestic relationship in a serious light and would increasingly impose heavier sentences in order to try to bring an end thereto." Domestic violence was considered to be an aggravating factor in sentencing Orina. Although Niekerk, J. expressed reservations with regard to the evidence shown in court with regard to the nature of relationship that was between the deceased and the accused, the outcome of the case indicates a total inconsideration or ignorance of this fact. The rate of this type of crimes is escalating at an alarming rate so one is left wondering what is the message that this sentence is sending out?

Niekerk, J. enunciated the use of drugs by the accused in *Shaduka*. Culpability is usually measured along two dimensions; the blameworthiness of the accused's mental state and the harm caused by the conduct. It sort of seems like Niekerk, J. took a retributive position in this case. In that insinuating that the accused had a mental disturbance caused by the use of drugs and regarded it as a mitigating factor and therefore deciding that a fine or short sentence is appropriate in the matter. Whereas, had Liebenberg, J. been the judge in the matter (judging from the case of Orina and the Soroseb) he would have viewed such disturbance as an aggravating factor under a utilitarian rationale because the accused appears to be a higher risk of threat that the society requires protection from him and therefore deciding that a longer sentence is appropriate.

On the question of remorse, there is a question mark hanging over the remorse expressed in the case of *Shaduka*. It's the question of sincerity and how much he really regretted his act and how sorry he was. In the case of Orina, Liebenberg, J expressed "the absence of remorse is a factor to be taken into consideration when

the court has to consider deterrence as an objective of punishment and where the same is lacking; there is an increased risk that the accused would reoffend. The accused can be considered to be dangerous". In this case (of Shaduka) the accused waited until the trial and only when he was asked if he had something to say that he apologized to the deceased's family, i mean a person who was truly sorry would have apologized after the incident, it's not just about tradition it's also about moral obligations.

What is evident from the cases above is that there seem to be a difference in degree of consideration of the mitigating factors and what is considered to be aggravating. Some factors which are common in for example cases of *Shaduka*, *Orina, Shipanga, Basso* and*, Soroseb* , the mitigating factors considered were such that all accused's have dependants but judging from the sentences imposed, one is left to wonder how was this factor considered, if at all? This decision also poses a question of reason or is it simply the different factors mattering on a different level to different judges. In the case of Orina, the daughter between the deceased and the accused is 14 years old and Liebenberg, J. emphasised on how she will have to grow up without the support of the mother because of the acts of the accused. In the case of Shaduka, the child of the deceased and the accused is only a few months old, isn't this the stage where the child needs the support and love of her mother more? Niekerk, J. has failed to articulate sound reasons for his choice of considerations. Considering the sentence in *Shaduka*, how does a fine address or effectively serve deterrence as the purpose of punishment enunciated by Niekerk, J.?

In my opinion, the case of *Shaduka* is just another illustration of the flaws of our sentencing system and proof that there is lack of coherence between theory and practice when it comes to sentencing. I will continue to look at a few cases to illustrate the need for sentencing laws reform.

In consideration of all that has been said, one cannot help but wonder if Tommasi, J. had been the judge in the Shaduka case. I mean, in this case, the accused is a young man, with dependents, he is a first time offender and he had approached the deceased family to apologize and there was no history of domestic violence, why couldn't he be given a fine as well? I mean it's a case of culpable homicide as well.

Whatever the case is, it is evident that there is a misapplication of the law or in one case or both.

Reading and scrutinising the few cases above, although bearing different circumstances and facts, one cannot help but notice how some or certain cases that bears similar facts have reached different sentences. It is obvious that within the current system, the judiciary possesses nearly unfettered discretion so the trial judge is at liberty to impose a sentence within the broad statutory range that is not defined. Another aspect or feature that stands out from the cases above is that following the imposition of a sentence, is a brief explanation or rationale behind the imposed sentence often given by the presiding officer however, the actual sentence does not in any way reflect what the judge had enunciated. The sentence imposed does not only depend on the circumstances of the case but also on who the presiding officer is. Circumstances of cases may never be accurately the same hence distinctive nature of cases, however, same principles are relied, same authorities are quoted and used, however, different results are reached. One thing that is certain though; most presiding officers, if not all have expressed great condemnation for criminal activities.

Upon close scrutinizing, one is able to point out that great disparities are common in murder cases. This may be explained by the fact that this one area that provides for a wide discretion of judges and it is within the same system that harbours discrepancies. As with regard to rehabilitation as the purpose of punishment as provided under the mission statement of the Ministry of Prisons and Correctional Sentences and The Police Act, it's clear that practically, rehabilitation as the primary purpose of punishment is ignored completely when imposing sentences.

The murder of Irene Matlatla is but a chapter in the narrative of domestic violence and violence against, especially, women and children in Namibia. It is a sad commentary that as judges we come to court, meet out heavy sentences for violent crimes and move on to hear other cases involving violence against women and children. Yet, inspite of the heavy sentences we impose, those who perpetrate these heinous crimes seem to devise ways of raising the bar of brutality. There seems to be no end in sight. These crimes truly evoke a sense of collective helplessness in

the national psyche: On the one hand it seems the severe sentences the Courts impose have no deterrent effect, while on the other hand a relaxation in the severe-penalty regime raises the real risk of loss of the public's confidence in the Court's resolve to protect society from violent criminals.

The shameful disparity in criminal sentences is a major flaw in the existing criminal justice system. The sentences for some violent offenders are too low and that the sentences for some property offenders are too high to serve the purpose of punishment.

One needs to ask; what is the relationship between the purposes of punishment? Are the purposes consistent with each other or must choices be made among them. Could this choice be the reason for the disparities? Conflict among purposes is especially true where consideration of the offender's personal circumstances yield different perspectives as to the appropriate penalty to be assessed.

A common misconception about the purposes of punishment concerns their role in justifying sentencing decisions. To say that a purpose of punishment helps to justify a punishment is correct but misleading. They are not justifying standards. For instance, consider incapacitation? Incapacitation is simply separating the accused from the rest of the society and eventually they will be reason, if there were no reformative programmes in prison, what kind of person do you expect to come out? Moral theories and principles are the justifying standards; they offer a reason or rationale why certain ends should be pursued. Purposes of punishment constitute considerations relevant to those moral theories.

CHAPTER 4

Comparative study

Having looked at the practical cases in Chapter 3, this chapter will provide a more indepth discussion on the sentencing aspect of the criminal justice system. It is important that courts more specifically judges observe the purposes of punishment when making specific sentencing decisions. Sentences should not be passed in vain but they must address or aim for a constructive objective. Presiding officers must also hold themselves in a consistent manner so to avoid discrepancies. Some consistence in the sentencing system will provide certainty and fairness in meeting and fulfilling the purposes of sentencing. The much needed consistence will be of assistance in avoiding unwarranted sentencing disproportions among defendants with similar conducts and have been found guilty of the same while maintaining adequate flexibility to permit individualised sentencing when justified.

Moreover, having discussed the weaknesses present in our current sentencing system, it would be beneficial to look at what and how other jurisdictions are handling the sentencing process. A comparative study is therefore important in improving or rather appreciating one's system. Hence, we will look at the United States of America and our neighbouring jurisdiction, South Africa.

USA

In October 12, 1984, the US sentencing system signed into their law "The *Sentencing Reform Act of 1984*" (the "SRA"). The Act is considered to have marked a revolutionary change in the federal sentencing process. The enactment of the Act saw the creation of the U.S. Sentencing Commission and it directed the Commission to promulgate binding rules, referred to as guidelines.[59] These guidelines are set to reduce sentencing disparities and ensure that sentences for federal offenders were

[59] Aaron, J. (2004), p. 1044.

appropriately strict. The Act called upon to the USA sentencing commission for the rationalisation of the sentencing system, specifically by ensuring that the guided decisions reflect the traditional purpose of punishment; deterrence, incapacitation, rehabilitation and just deserts.[60]

The *Sentencing Reform Act* brought with it some appreciable changes. It abolishes parole and sentences are measured in "in real time". Judicial discretion has also been drastically limited. Firstly, by the fact that the U.S. Sentencing Commission still has the authority to enact guidelines to restrict such for example, the commission is required to make the guidelines relatively narrow. Secondly, the commission's rules are presumptively binding. However, in exceptional cases, judges can depart from the guideline range. It is important to note that these guidelines are not static. The Senate Judiciary Committee noted that where the rate of a certain crime rises dramatically, an increase in the guideline sentences for the offense might be justified in order to deter others from committing the offense. Thirdly, sentences are subject to appellate review. Judges are under the duty to articulate reasons for their choice of a guideline range and for any decision to depart form that range.[61] Such articulation of reason is necessary otherwise, the Congress cannot assess whether the Commission has satisfied its statutory obligation. In addition to this, participants in the system will know what purpose is to be achieved by the sentence in each particular case. Noting that one purpose of the Sentencing Commission is to provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities while maintaining sufficient flexibility to permit individualised sentencing when warranted. The guidelines provide that substance dependence or abuse is not a reason for imposing a sentence below the guidelines.

The U.S. Sentencing Commission demands that punishment must be imposed to:[62]

a) Reflect the seriousness of the, to promote the respect of the law and to provide just punishment of the offense;

b) Afford adequate deterrence to criminal conduct;

---

[60] Ibid.

[61] Aaron, J. (2004), p. 1050.

[62] Aaron, J. (2004), p. 1058.

c) Protect the public from further crimes of the defendant;

d) Provide the defendant with needed educational or vocational training, medical care or other correctional treatment in the most effective manner.

The commission is afforded the right to independently develop a sentencing range that is consistent with these purposes of sentencing. However, the Congress recognises that the Commission would need to favour one purpose over another in some cases. Moreover, if the Commission finds that the primary purposes of sentencing in a particular case should be deterrence or incapacitation and that a secondary purpose should be rehabilitation, the recommended guidelines sentence should be imprisonment if that is determined to be the best means of assuring deterrence and incapacitation, notwithstanding the fact that such a sentence would not be the best means of providing rehabilitation. Therefore, a balancing of competing interests is necessary. However, the commission has come under some criticisms on the ground that it has succeeded in institutional obligation of setting up guidelines but it has failed or neglected the philosophical mandate entirely as it has refused to address or identify the purposes of punishment that ground the guideline system.[63]

It has been suggested that the Commission must make an assessment of the guidelines' effectiveness. It can do so by making a determination of which purpose of punishment is primary or at the very least explain how the different purposes are to be weighed against each other. Narrowed down, the commission must adopt an integrated and internally consistent sentencing philosophy and thus reduce sentencing disparities. It was further forwarded that although a public statement of purposes may help to discipline the Commission's activities, this alone may not be sufficient to ensure independent action by the agency. This criticism is brewed by political influences.

To sum up, the *Sentencing Reform Act* places sentencing purposes at the heart of the reform movement. The legislature is in accord that any coherent attempt to rationalise the sentencing system, to put it on a principled footing requires consideration of the purposes of punishment. Therefore, fulfilling the policy goals of

[63] Aaron, J. (2004) p, 1065.

reducing disparities and reassessing severity calls for some view on sentencing purpose and these efforts inevitably called upon the commission to make some choices about which purpose would predominate in specific sentencing situations.

Complications of set guidelines or mandatory sentences under the Namibian Jurisdiction

The sentencing officer's discretion may be unfettered but it is not so restrained. This is because the legislator can prescribe the possible forms of punishment or type of sentence for a specific crime. This can be done by means of prescribing maximum fines or terms of imprisonment and even compulsory minimum sentences examples of this would be the sentences as prescribed by the *Combating of Rape Act*, the *Motor Vehicle Theft Act*, and the *Stock Amendment Act Theft Act 2004*. This way, the presiding officer's discretion is limited to the extent that the exercise of discretion has to be consistent and with your uniformity and according to the principles of reasonableness and justice.[64] However, the existence of sentencing discretion is a cornerstone of fair sentencing. A big advantage of broad punishment discretion is that sentencing officers can adapt sentences to make provision for differences in the personal circumstances of offenders. The disadvantages as illustrated in the case of Shaduka, is that it is sometimes not conducive to equality of punishments and that different sentences can be imposed on two people who appear before two different presiding officers for the same crime.

One concern that has risen over this legislator prescription of sentences is that such prescription may be a violation of the concept of separation of power as it will result in one organ of the state interfering in another's functions and duties. Such prescription may also result in the infringement of the independence of the judiciary as provided for under Article 78(2) of the Namibian Constitution which states that the independence of the judiciary is inviolable. As this may be, one must also remember that it is important that there must be control mechanisms over every organ of state in a democratic state. Therefore, such prescription may not necessarily be illegal. Sentencing in itself is a *sui generic* function in that; the legislature lays down the law and the judge's function is to apply the facts to it.

64

South Africa

In principle, South African courts employ a discretionary sentencing system. Within the boundaries set by the legislature, the courts have to exercise a judicial discretion in order to determine an appropriate sentence, based on a balancing of all the different factors present in the particular case. This discretion is coupled with a well-established system of appeal against sentences imposed in all the trial courts, as well as judicial review of sentences impose in the lowest courts.[65]

No trial court is likely to impose a sentence in the full knowledge that that sentence is likely to be quashed on appeal, with the result that the appellate system influences the outcomes of criminal cases substantially. The state is also permitted, in terms of the Criminal Procedure Act, to appeal against a patently lenient sentence.[66] The trite view of the Supreme Court of Appeal regarding the sentence discretion and appeals has recently been reiterated in *S v Barnard* as quoted in the Namibian cases above.

The framework provided by the Legislature

Before a court can exercise any sentence discretion, it has to determine the boundaries within which that discretion is to be exercised. The first limitation on sentencing powers is effected by the level of the trial court. In the case of *S v Ferreira*[67] where the High Court was involved, these courts are the highest trial courts in South Africa and they may impose any sentence provided for by the Legislature[68] including any fine and imprisonment of up to life imprisonment.

Many of the more serious South African offences are not contained in any statute, but are still common law offences e.g. murder is a major example. As a result no additional statutory limits are generally specifically applicable to the sentencing of murder as every case yields its own special circumstances.

---

[65] www.isrcl.org/Terblanche.pdf [last accessed on 08 October 2011]

[66] Section 310 (A).

[67] Unreported judgement 245/03 decided on 22 March 2004.

[68] Most of the sentences are set out in the Criminal Procedure Act, in particular in s 276. No court may impose a form of punishment other than that specifically provided for in legislation.

Prescribed minimum sentences

The Criminal Procedure Act specifically provides for an escape clause and if "substantial and compelling circumstances" are present, justifying a lesser sentence, the court is permitted to deviate from the prescription.[69] This phrase was probably borrowed from the Minnesota Sentencing Guidelines[70] but our courts have expressly declined the opportunity to interpret it as in Minnesota.[71] Instead, in the case of *S v Malgas,*[72] the Supreme Court of Appeal decided that, if the prescribed sentence would result in an injustice, this would amount to a substantial and compelling circumstance, and the sentencing court would then retain their discretion to impose an appropriate sentence. However, an "injustice" is not lightly inferred and the courts need truly convincing reasons or weighty justification to depart from the prescribed sentences.

The judgment in *S v Malgas* brought to an end an era of uncertainty as to how the phrase "substantial and compelling circumstances" should be interpreted. At the time when Ms Ferreira was sentenced, the phrase was interpreted in certain divisions of the High Court as "exceptional circumstances". The trial court found nothing exceptional in the appellant's circumstances, and imposed the sentence prescribed by the Act.

The role of the sentence discretion

In the case of *R v Mapumulo,*[73] the Chief Justice explained why the trial judge or magistrate should have the sentence discretion in to say:

> The infliction of punishment is pre-eminently a matter for the discretion of the trial Court. It can better appreciate the atmosphere of the case and can better estimate the circumstances of the locality and the need for a heavy or light sentence than the appellate tribunal.

---

[69] Section 51 (3) (a) of the Criminal Procedure Act, 51 of 1977.

[70] CD Van Zyl Smit (1999) *"Current developments: Mandatory minimum sentences and departures from them in substantial and compelling circumstances*" *South African Journal of Human Rights* 270-276.

[71] *S v Malgas* 2001 (1) SACR 469 (SCA) par 18 (because the legislature did not prescribe the contents of the phrase, as happened in Minnesota, it means that this function has specifically been left for the courts to interpret); *S v Jansen* 1999 (2) SACR 368 (C).

[72] 2001 (1) SACR 469 (SCA).

[73] 1920 AD at 56 and 57.

Because the trial court is (ideally) involved in the trial from start to finish, it is the best placed to impose sentence. But another reason for discretion is that without it, it is almost impossible to convert the relevant factors and considerations into the currency of sentences, namely a number of years or months' imprisonment, or whatever other measure a sentence might consist of.

The South African courts have really struggled to get to grips with the role of discretion in the sentencing process. The sentencing process is distinctly two-phased in nature. First all the facts relevant to sentence have to be established, and in this process discretion should play hardly any role. It is only when all the facts have to be balanced and considered in conjunction with other relevant considerations and circumstances that the discretion comes into play. The South African tendency has been to regard the discretion as in play immediately following the judgment. It is for this reason that the incidence of the onus of proof of facts relevant to sentencing has never been sorted out fundamentally. In the case of *Ferreira,* the minority stated that the accused has the burden of proving "mitigatory circumstances". This view is fairly widely practiced in our courts, but has never been judicially or fundamentally considered and decided. Courts will also haphazardly take judicial notice of facts during the sentencing phase when it will only do so according to fairly strict legal principles during the trial itself. This element is closely related to the other, namely the role of the adversarial system. Like other Anglo- American systems this is also the basis of South African procedure.[74]

The traditional principles of sentencing in South Africa

It is trite law that the court has to balance three important considerations in determining the sentence that will, in its view, be appropriate under all the circumstances: these considerations are the seriousness of the crime, the personal factors surrounding the criminal, and the interests of society.[75] Within this balancing process the courts are expected to impose sentences that will serve the purposes of deterrence, prevention, rehabilitation and retribution.[76] Exactly how these purposes should be achieved and whether all should be required in every instance is a matter

[74] Terblanche, S. p,

[75] *S v Zinn* 1969 (2) SA 537 (A).

[76] *R v Swanepoel* 1945 AD 444.

of speculation and much difference of opinion and variance of application. There is much to be said for these principles. It allows the court to make a true assessment of the seriousness of the offence, to bring the personal circumstances of the offender into consideration, and to have regard for the interests of society.

The crime is the factor that set the whole criminal process in motion there is no way in which it could ever be disregarded. The offender and society are the true parties involved in the crime, and the victim(s) are not forgotten either, because society's interests are only served when the interests of the victims are paramount. Unfortunately, the courts have not made the most of these principles.[77]

Aspects for increased consistency from the basic principles

From the basic principles South African courts have always simply passed directly into a discussion of the facts of the particular case. No intermediate set of principles have been developed. Especially with respect to the seriousness of the offence, it is possible to develop much more objective measures than is currently in place. It is true that our courts often refer to the blameworthiness or moral blameworthiness of the offender when it comes to the seriousness of the offence.[78] This happened again in the *Ferreira*-judgment, in connection with the fact that the appellant committed a contract killing; majority found that the moral blameworthiness of the appellant has to be determined based on her "motive and subjective state of mind" in engaging the killers. Her only motive was "to end the relationship so as to preserve her bodily integrity." However, these discussions of the blameworthiness of the offender never become more than a purely subjective assessment of this blameworthiness. As such it is simply another way of saying that the sentence has to be appropriate. South African courts have not considered the seriousness of the crime in senses: the magnitude of the harm caused (or risked) by the offender and the offender's culpability with respect to that harm.[79]

The same, more objective approach is possible with respect to the offender. The courts often give the impression that even factors such as the number of children

[77] See footnote 85.

[78] *S v Somyalo* 1996 1 SACR 566 (Ck) 569*b.*

[79] www.law.wits/salc/report/report.html.

that an offender has, or whether they are married or not, or are employed or not, can substantially affect the sentence. But examples where such factors really affected the sentence are almost impossible to find. It is important to reduce these factors to those that really affect the sentence. It is also highly commendable to work our specific reductions of sentence that can be achieved through certain mitigating factors. It is a practice that is widely practised in certain jurisdictions, notably certain Australian states (South Australia and New South Wales), Scotland and England. In South Australia a two-stage approach is widely followed, where a starting point is expressed based on the seriousness of the offence, with a specific reduction or discount for certain mitigating factors.[80]

Conclusion and recommendations

There is little argument that the current sentencing scheme used in South African law is lacking in important principle. There is enough in the form of rhetoric, but it does not various sentencing courts to consistent outcomes. One merely needs to consider the sentences imposed in the present cases. Even if the life imprisonment is discounted due to the different interpretation attached to "substantial and compelling circumstances", there remains a non-custodial sentence, and one of eight years' imprisonments. However, there is quite a lot to recommend. Therefore, the following recommendations are put forward, that may also be of use to other systems that are still employing discretionary sentencing schemes:[81]

1. It is essential to separate the fact-finding phase of the post-conviction trial process from the decisions-making stage of the process.

2. During the fact-finding phase the court should also be involved in the process of collecting evidence, so that its decisions will as far as possible be based on facts and as little as possible on conjecture.

3. When facts are presented as facts to the court, by experts in the various fields related to sentencing, those facts have to be accepted if there is nothing to gainsay

[80] *R v LLK* [2003] SASC 431 par 45.

[81] Terblanche, S. p, 13.

it. The court should not be permitted to reject factual information simply because of doubt regarding the reliability of the evidence.

4. There is a need for objective criteria to determine the seriousness of the offence, because the seriousness of the offence will always be the starting point for an objective determination of the severity of the sentence. Two of the better criteria that have been put forward are the harm caused or risked by the offence, and the offender's culpability with respect to that harm.

5. The role that mitigating factors surrounding the offender should play needs to be streamlined It makes little sense to claim that every offender is different and that this is the reason for having a sentence discretion, when most of these differences do not affect the sentence at all. A revaluation of these subjective features is necessary, and much can be learnt from systems where specific reductions of sentence is offered for specific mitigating factors, such as a plea of guilty, remorse, and other subjective factors that really reduce the blameworthiness of the offender.

6. All the purposes of punishment need to be directly related to the interests of society. If there is no evidence that a particular sentence would deter others, or would individually deter the offender, then that factor should not be mentioned as a sentencing feature. The same goes for reform and incapacitation.

7. In South Africa the resources for the execution of sentences are severely limited. The courts can no longer close their eyes to this fact. Imprisonment is not a sentence imposed in a vacuum. South African prisons are getting so overcrowded, with conditions in many prisons so bad, that incarceration is very close to contravening a number of rights in the Bill of Rights, if not beyond that already. Courts of law dare not wilfully send offenders to such conditions.[82]

[82] See footnote 85.

CHAPTER 5

Findings and Conclusion

Having read the situation in Namibia and how the U.S. is proposing and doing, we cannot ignore the cry for a need to rationalise the sentence system specifically for sentences to reflect the customary purposes of punishment as discussed in the previous chapters.

National decisions should not be guided by frustration, however, pronounced it might be. Where and when such calls are made they may not only arise from ignorance of penal policies and practice worldwide, they may also be misguided and based on outdated perceptions of what the purposes of punishment are. Public frustration, however, pronounced as it may be, should not lead the country into extremely irrational and unwarranted policy. Policy makers should be advised to refrain from responding to extreme views. Instead, the causes of each crime should be carefully studied and appropriate measures to deal with it instituted. As much as the provisions of the constitution were enacted in line with progressive opinions of the time, it is also in the interest of the country that those responsible should think and act responsibly and in line with international penal trends. In the case of *S v Makwanyane and Others*[83] it was said “public opinion may have some relevance to the inquiry, but in itself, it is no substitute for the duty vested in the courts to interpret the constitution and to uphold its provisions without fear and favour. If public opinion were to be decisive there would be no need for constitutional adjudication.

In addition to the recommendations made by Terblanche above- with regard to the South African legal system, i make the following recommendations:

[83] 1995 (3) SA 391

Recommendations

There is obviously a need for the review of Namibian criminal law review. Among others, these are some of the issues that need to be looked at and considered and these are some of the elements we can borrow from the U.S. jurisdiction:[84]

- Courts must make a determination of which, purpose of punishment is primary or at the very least explain how the different purposes are to be weighed against each other. The system must adopt an integrated and internally consistent sentencing philosophy.

- Establishment of a range of acceptable punishments for each crime, the judiciary chose a specific sentence within that range for each offender and the executive branch determines the precise date an offender would be released from prison.

- The legislature can limit the sentencing officer's broad discretion by legislation as in the case of restrictions for declaring an offender a habitual criminal. They can also impose restrictions such as sentences that only a higher court may impose or that offenders under the age of 18 may not be subjected to a certain kind of punishment.

- Short term imprisonment should be avoided at the very least and juveniles should not be subjected to imprisonment.

- Judges must give clear reasons or justifications explaining their reasons for considering what they felt were a mitigating factor and which are aggravating factors.

Where offenders receive punishment in accordance with sentencing purposes, similarly situated offenders will be treated alike and individual offenders will receive proportionate penalties.

One must also keep in mind the purpose of the criminal justice system which is to restore justice. Restorative justice is an approach to justice that focuses on repairing the harm caused by crime while holding the offender responsible for his or her

[84] See footnote 48, p. 1288.

actions, by providing an opportunity for the parties directly affected by the crime – victim(s), offender and community – to identify and address their needs in the aftermath of the crime, and seek a resolution that affords healing, reparation and reintegration, and prevents further harm.[85]In essence, the concept calls and seeks to address issues of reparation, healing and rehabilitation rather than sever sentences, longer terms of imprisonment which in reality just adds to the already crammed prisons.

In the case of *S v Shilubane*[86] Bosielo J, Shongwe J. expressed that:

> It is obvious that restorative justice cannot provide a single and definitive answer to all of the ills of crime and its consequences. Restorative justice cannot ensure that society is protected against offenders who have no wish to reform, and who continue to endanger our communities. But on the other hand restorative justice, properly considered and applied, may make a significant contribution in combating recidivism by encouraging offenders to take responsibility for their actions and assist the process of their ultimate reintegration into society thereby.

Conclusion

My findings are that there is absolute no coherence between theories of punishment and the practice. Our judges say one thing and do another. Absolute consistency or complete equality of sentences may be unachievable. Sentencing officers must strive for the greatest degree of consistency by keeping abreast of colleague's sentencing standards. Uniform punishments contribute to legal security and community trust in the courts. Effective and affordable fixing of punishment can promote legal security and contribute to the important educational function of illustrating effective justice to the community. Judges need to keep in mind that it's a fundamental principle that every person has the right to equality before the law and to equal protection by the law, they are also entitled to respect and protection of their dignity and they are also entitled to freedom and the security of their person. All this rights and freedoms are a result of the adaptation of the constitution.

---

[85] Robert Cormier in Restorative Justice in Sentencing: South Africa available on http://www.restorativejustice.org/editions/2006/oct06/southafrica last accessed 08/10/11. The author underlines that restorative justice shifts the focus of the criminal process from retribution to healing and re-establishing societal bonds. It concentrates on the development of the offender into a responsible member of society, through the process of acknowledging the hurt suffered by the victim and society, and taking steps to eliminate the effects of the crime upon these individuals and the community at large.

[86] 2005 JOL 15671 (T).

In cases where there are no guidelines with regard to the sentences or punishment to be imposed, the judicial officer exercises his discretion. However, this discretion is can be predictable if one gets to know presiding officers. It's a trait that presiding officers tend to be more lenient with offenders with whom they could identify than with offenders thought to be somehow "different". It is accepted that factors like the presiding officer's socio-political orientation, personal nature, background and general outlook on life play an important role in exercising discretion in sentencing in respect of the type and quantum of punishment that is ultimately imposed. It's important that the presiding officer maintains a judicial balance required for a fair system. In the case of *S v Rabbie*[87], Ex-Chief Justice Corbett remarked:

> A judicial officer should not approach punishment in a spirit of anger, because being a human, that will make it difficult for him to achieve that delicate balance between crime, the criminal and the interests of society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor; on the other hand, surrender himself to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a human and compassionate understanding of human frailties and the pressure of society which contribute to criminality.

The sentencing officer's view of man, the offender may also influence the decision of the choice and aim of punishment. Some judicial officers have a traditional belief that criminals are wild animals that deserve to be put or caged away. View of a man is also influenced by his intelligence or educational background. Practice has also showed that certain judgements or sentences are passed after consideration of the accused's intellectual capabilities.

Exercising the sentencing discretion also involves making a choice between different forms of punishment (except where a specific sentence is laid down) and normally also a weight or measurement of punishment of the sentence option decided by the court. It's crucial to note that there are two elements in justice in sentencing; namely, revenge and consistency. The premise in revenge is that the sentencing officer should avoid the impression of personal involvement, temper or anger in fixing punishment. The sentence should be reasonable and therefore related to offender's moral guilt and the gravity of the offence. Consistency refers to equal rights in

[87] 1975 (4) SA 855 at 866A-C.

sentencing and implies that offenders with similar crimes and personal circumstances should be treated the same.

And thus reduce sentencing disparities and strengthen the foundation to enable the system ability to resist public pressure in the volatile criminal justice arena.

I find that there seem to be a relationship between the different purposes of punishment; in that a person who is not remorseful cannot be rehabilitated therefore a sentence in hope of deterrence would seem to be suitable, to punish the offender and make an example of him to society. However, the accused who takes notice of his wrongfulness may be capable of being rehabilitated therefore; the time for incapacitation for purposes of deterrence may also be used to rehabilitate a convicted person. Furthermore, during the sentencing process, our judges set out the purposes of punishment however the outcome of the case does not reflect the purpose. Some judgements are often tainted by bias and arbitrary considerations or is it simply an eminent situation under the adversarial system: who has the best lawyer laughs last or are there those who are more equal than others?

Bibliography

Books

1. Amoo, S.K. (2008) *An introduction to Namibian Law: Material & Cases.* MacMillan Education: Namibia
2. Anderson, E. (1999). *Code of the street: Decency, violence and the moral life of the inner city.* New York: Norton
3. Anthony, L. E. (2007). *Criminology: An interdisciplinary approach.* Sage Publications
4. Anthony, W. E. (2007). *Criminology: An interdisciplinary approach.* Sage Publications Inc: London- UK
5. Conklin, J.E. (1998). *Criminology*, 6th ed. Boston: Ally & Bacon
6. Freeman, M.D.A (1994). *Introduction to Jurisprudence*
7. Hagan F (2011) *Introduction to Criminology: Theories, Methods and Criminal Behaviour.* Sage Publications
8. Hagan, F (2008) *Introduction to Criminology: Theories, methods and Criminal Behaviour. 6th edition.* Sage Publications
9. Hinz, M.V. (2000). *The Constitution at Work: 10 years of Namibian Nationhood.* University of South Africa
10. John, D. H. (2000). *Deliquency in society. 4th ed.* McGraw Hill
11. Rabie, M.A and Strauss, S.A. (1981). *Punishment, An Introduction to Principles.* Cape Town: Lex Patria Publishers
12. Radzinowicz, L. & Turner, J.W.C. (1945). *Encyclopedia Britannica of 1824: The modern approach to criminal law.* London: Macmillan
13. Sharp, B. (2000). *Changing criminal thinking: A treatment program*. Lanham: American Correctional Association
14. Siegel, L (2010). *Criminology Theories, Patterns and Typologies. 10th edition.* Wadsworth Publishers
15. Siegel, L. (2010). *Criminology Theories, Patterns and Typologies*. 10th ed. Wadsworth Publishers
16. Snyman, C. R. (1989). *Criminal Law.* 2nd ed. Butterworths: Durban
17. Terblanche, S. S. (2007). *A Guide to Sentencing in South Africa.* 2nd Ed. LexisNexis: Durban

18. William, D & Friedman, k. *EDDJJ Professional Development Series Module 1: History of the Criminal Justice System.* University of Maryland

Dissertations[88]

1. Kloppers, V. I. (2005). *Does Delay of Justice in our Criminal Law System Constitute a Violation of the Namibian Constitution.* University of Namibia
2. Noa, P. (2005). *General Deterrence as a Satisfactory Justification for Punishment.* University of Namibia
3. Nyoka, L. *A Critical Look on the Law on Community Service Orders as an Alternative to Imprisonment and its Impact on the Criminal Justice System in Namibia.* University of Namibia

Journals

1. Aaron, J.R. *Unprincipled Punishment: The U.S. Sentencing Commission's Troubling Silence and the Purposes of Punishment*

Statutes

1. *The Combating of Domestic Violence Act, 8 of 2003*
2. *The Combating of Rape Act, 4 of 2004*
3. *The Motor Vehicle Theft Act, of 1999*
4. *The Namibian Constitution Act, 1 of 1990*
5. *The Stock Theft Amendment Act, 19 of 2004*

Websites

1. http://www.op.gov.na/Decade_peace/prison.htm.
2. Skeffers, I & Mwanza, G. G. (2001). *Researching Namibian Law and the Namibian Legal System.* Global Law School Programme: Globalex
3. www.isrcl.org/Terblanche.pdf
4. www.osf.org.za/File_Uploads/docs.SE

[88] Available at the University of Namibia's special collections.