

**Proportionality of Sentences to Crimes and the Concept of Justice
in the Namibian Criminal Justice System**

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DECLARATION

I, *Hileni Ashipala* hereby declare that this dissertation entitled '*The existence of unjust laws and practices in our Criminal Justice System*' is my own original work and has not been submitted to any other institution of higher learning.

Signed by _____ on this _____ of _____ 2011

SUPERVISOR'S CERTIFICATE

I, Mr S.K. Amoo hereby certify that the research and writing of this dissertation was carried out under my supervision.

Signature: _____

Date: _____

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CHAPTER ONE



INTRODUCTION

Crime is generally defined as a violation of the law and the response to such violation is usually punishment. It is logical to expect that such punishment must be proportional to the crime and it must be fixed or determinate. The sentences given to convicted criminals seem to indicate that our Courts, in sentencing, are more concerned with the rights of the perpetrator than those of the victim. Iivula-Ithana, P.¹ stated that the concern to protect the rights of the defendants (accused persons) in the face of the State machinery is seen by many as having swung the pendulum of justice too far on the side of the offender, leaving the actual victim thereof completely unprotected. Titus-Reid, S.² said the following about the crime victim's role in criminal prosecutions: "victims have traditionally been either ignored by the system or simply used as tools to identify and punish offender."

Perhaps the discretion of judicial officers, in the process of sentencing, is too wide and certain regulations need to be developed in order to ensure that justice is and appears to be done in the sentencing process.

The main objective of this research paper is to investigate whether sentences given to criminal offenders serve their purpose to the accused and to society or whether they create a sense of injustice in our Criminal Justice System. This paper will also look into the aspect of public participation in the Criminal Justice System as a possible method, amongst others, of ensuring justice in the Republic of Namibia and the role the public could play in the sentencing process.

It is a norm in Namibia that societies hold peaceful public demonstrations when a very serious crime has been committed anywhere in the country³. These

¹ Iivula-Ithana, P. (1998). *Victims' Rights in Namibia*. Windhoek: University of Namibia, p 8.

² Titus-Reid, S. (year?). *Crime and Criminology*, 6th Edition, p 465. In Iivula-Ithana, P. (1998). *Victims' Rights in Namibia*. Windhoek: University of Namibia, p 8.

³ This is confirmed and illustrated by the newspaper headlines such as those in annexure A of this paper; e.g. Figure 1, 2, 5 and 6.

demonstrations usually call for stakeholders to provide society with the necessary protection, calls for stiff sentences and most call for the re-instatement of the death penalty. These peaceful public demonstrations call for justice to be done immediately. However, it appears now that soon after the Namibian nation has been shocked by these violent crimes such as rape and murder, a very similar act usually occurs else where in the country. A good example is that of the rape and murder of Magdalena Stoffels in Windhoek in 2010; she was a young teenage girl who was raped and violently killed with a broken bottle in a riverbed on her way to school. Just a few weeks after this crime that had shocked the whole nation, a similar crime took place in Okahandja. A young man raped and attempted to murder a school girl in a riverbed on her way from school.

It appears that criminal behaviour seems to be motivated or encouraged by other such criminal behaviour instead of being deterred to do it, deterrence being one of the rationales for punishment of crime. Essentially, deterrence is the simple idea that the incidence of crime is reduced because of people's fear or apprehension of the punishment they may receive if they offend.⁴ The deterrence mechanism can be divided into two categories, individual deterrence and general deterrence.⁵ Individual deterrence occurs when someone commits crime, is punished for it, and finds the punishment so unpleasant or frightening that the offence is never repeated for fear of more of the same or worse.⁶

Staff shortages, tardy police investigations and insufficient funds to employ more staff are all still cited as the main reasons for the wheels of justice turning ever so slowly in Namibia.⁷

Is the Namibian Criminal Justice System failing the Namibian nation? What are the main objectives for the punishment of crime in Namibia? Are the Namibian Courts concerned with justice? What is the role of the public in ensuring that justice

⁴ Cavadino, M. & Digman, J. (1992). *The Penal System, An Introduction*. London: SAGE Publications, p 33.

⁵ *ibid.*

⁶ Cavadino, M. & Digman, J. (1992). *The Penal System, An Introduction*. London: SAGE Publications, p 33.

⁷ Nakuta, J. & Cloete, V. (year). *The Justice Sector and the Rule of Law in Namibia*. Windhoek: Namibia Institute for Democracy, p 2.

prevails? These are some of the questions that this paper will be looking at, in order to under the concept of justice in the Namibian context.

BACKGROUND AND OUTLINE

In a country such as Namibia, which is founded upon the principles of democracy, the rule of law and justice for all⁸, it is only fair to expect that law bring justice to all through the Constitution which is the supreme law of the nation and legislation that is in standard conformity with the Constitution of Namibia which is highly praised for its vast protection of human rights in all spheres possible. There seems to be little indicating that enough is being done to ensure that justice prevails in Namibia, Nakuta, J. & Cloete, V.⁹ quoting Odendaal, A. state that it is safe to state that the Namibian criminal justice system has not yet produced resources of authority that are respected at large. They further state that the generally held view amongst the public is that the criminal justice system has failed to suppress crime and that crime has been constantly increasing since 1990.¹⁰

However, it appears that justice is not always served in criminal cases in terms of sentences given for the different types of crimes. With the question of justice in this regard, the question of human rights is often asked: whose human rights? The victim's or the perpetrator's human rights in criminal proceedings? It appears from newspaper reports¹¹ that most of the society believes now that law/human rights are there to protect perpetrators and not victims, especially in rape and murder cases.

However, the sentences given to those convicted of stock theft, were so outrageous that it shocked the community and was recently declared unconstitutional by our courts, for example in the case of *S v Johannes Babieb*¹² the keetmanshoop

⁸ Article 1 (1) of the Namibian Constitution.

⁹ Nakuta, J. & Cloete, V. (year). *The Justice Sector and the Rule of Law in Namibia*. Windhoek: Namibia Institute for Democracy, p 1.

¹⁰ *ibid.*

¹¹ Kolbe, S. (2005). "As Good As Dead". *The Namibian Newspaper*. Available at www.namibian.com/index.php; last accessed on 04 October 2011.

¹² Case No, CR 180/07, review judgement delivered on the 21st December 2007.

Regional Court Magistrate imposed a sentence of 20 years imprisonment 18 years of which were suspended for 5 years for the theft of one goat. The goat was valued at N\$700. Fortunately however, the sentence was substituted by the High Court with a sentence of 1 year imprisonment wholly suspended for 3 years on condition that the accused in not convicted of theft stock within the period of suspension.

The section under which the accused was charged is Section 14(1) (a) (ii) of the Stock Theft Amendment Act 12 of 1990 as amended by Act 19 of 2004, which reads as follows:

- “14 (i) any person who is convicted of an offence referred to in Section 11(1) (a) to (d) that relates to stock other than poultry –
- a) Of which value – (i) (ii) is N\$500 or more, shall be liable in the case of a first conviction, to imprisonment for a period not less than twenty years without the option of a fine.”

Despite this, there are still crimes for which perpetrators do not seem to get proportional sentences for, such as murder and rape for example.¹³ The Namibian courts have adopted a very inconsistent approach when sentencing offenders who claim to have been intoxicated at the time of committing rape offences.¹⁴ Some courts have simply accepted that the offender may have been induced to commit the crime because of alcohol consumption, while others have required evidence that the intoxication had an effect upon the offender’s decision to commit the offence. One judge has even called for legislation that would expressly permit judges to consider intoxication as an aggravating factor.¹⁵ This level of inconsistency in courts’ treatment of the effects of intoxication is both alarming and also an undesirable practice which contributes to the miscarriage of justice in our legal system.

¹³ See e.g. *S v Lopez* 2003 NR 162 (HC), *S v Libongani* NAHC 73 (2 June 2009) and *S v Hoaseb* 2006 (1) NR 317 (HC); Hassan L (below) states that since the Combating of Rape Act, 8 of 2000 came into force, the judicial attention has focused on the implementation of minimum sentences introduced under the Act, and in what circumstances judges may find “substantial and compelling” circumstances permitting deviation from those prescribed minimums.

¹⁴ Hassan, L. (2011). “Sentences under the Combating of Rape Act, 2000: The Misapplication of Judicial discretion.” *Namibia Law Journal*, Volume 03 (Issue 01): p 43.

¹⁵ *ibid.*

This therefore requires that the paper also looks into the role of judges and magistrates in ensuring justice and elements of proportionality in the process of sentencing.

The Namibian Criminal Justice system utilises mainly the methods of fact finding and dispute resolution of the adversarial model. The adversarial model is said to be a contributor to some of society's evils such as a decline in civility and an increasing contentious politics.¹⁶ Furthermore, the model is said to be similar to that of a battlefield because the different parties, the plaintiff and the defendant see each other as adversaries. It is therefore worthwhile to wonder if certain aspects of the other model, the inquisitorial model, could improve the Criminal Justice System. The sole concern of the inquisitorial system is said to be the search for truth and that the lawyers in the inquisitorial system are more concerned with justice whereas their counter parts are more concerned with winning the case.¹⁷ This paper therefore also discusses the adversarial (accusatorial) and the inquisitorial models so as to determine is certain aspects can be borrowed from the inquisitorial model and incorporated into the Namibian model with the aim of improving the Criminal Justice System, in respect of judicial discretion in sentencing.

STATEMENT OF THE PROBLEM

As a result of what appears to be light/minimum sentences often but not always given to perpetrators of serious crimes such as rape and murder,¹⁸ the Namibian public seems to have lost faith in the Namibian criminal justice system.¹⁹ Over the last couple of years, there has been a significant number of public outcries through

¹⁶ Garry, P. M. (1997). *A Nation of Adversaries, How the Litigation explosion is reshaping America*. New York: Plenum Press, pp 66 – 70.

¹⁷ Garry, P. M. (1997: p 68).

¹⁸ For example in the *S v Nango* case, the trial magistrate imposed the minimum sentence under the Combating of Rape Act, despite the fact that the complainant was threatened with a weapon, force had been used against her and the fact that she was only 10 years old at the time the crimes was committed, those facts were not viewed by the adjudicator as aggravating circumstances (Hassan L. 2011: p 31).

¹⁹ Kloppers, I. (2010). The System has Failed us. *The Namibian Newspaper*. Available at www.nambian.com/index.php last accessed on 04 October 2011.

peaceful demonstrations for the reinstatement of the death penalty, thus indicating the public's displeasure of sentences to serious crimes.²⁰

This paper does not advocate for death penalty; it just uses the demand for death penalty as an illustration that, even to the general public, there seems to be little or no proportionality between the crime committed and the sentence given to the crime. Measuring the proportionality of sentences to the crime committed is not an easy task but a thorough consideration of all relevant factors (as will be discussed in this paper) in the process of sentencing would be a starting point as measurement for proportionality.

An example of this can be case of *S v Victor Mbishi Mishe*²¹ in which the accused pleaded guilty to the theft of a goat valued at N\$250 and was facing the prescribed minimum sentence under the Stock Theft Act without an option of a fine. Had the value of the stock been more than N\$500, the prescribed sentence is a minimum of 20 years unless the judge finds substantial and compelling reasons for a lesser sentence. Compared to a case where a 20 year sentence was also imposed on an accused for the murder of his girlfriend, namely the case of *S v Gert Hermanus Hansie Losper*.²² This seems to indicate that the value of a human life is equal to that of life stock valued at more than N\$500.

The case of *S v Johannes Alex Roos and Immanuel Claasen*²³ further illustrates the above point. In this case the two accused were charged with and convicted of rape and attempted rape under the provisions of the Combating of Rape Act 8 of 2000, namely section 2(1)(a). Both accused were sentenced to sixteen (16) years each, whereas someone could be sentenced to a minimum of 20 years without an option of a fine for the theft of live stock valued at N\$500 or more under the Stock Theft Act. Fortunately, as stated before, sentencing under that Act was recently declared unconstitutional.

²⁰ Odendaal, A. (2005). "Who are Namibia's child Molesters?" And Berniece. (2004). "Outrage from Khorixas." *The Namibian Newspaper*. Available at www.nambian.com/index.php last accessed on 04 October 2011.

²¹ Case no. CR101/2006

²² Case no.: CC 11/2007.

²³ Case no.: CC 34/07.

This can be perceived as an injustice to the victims of these crimes (the equal punishment of persons convicted of stock theft and those convicted of serious crimes such as rape and murder). This brings up a concern as to the importance placed on ensuring justice in the criminal justice system through cases/sentencing and what and whose responsibility it is to address these concerns. Thus necessitates the need to do research and provide possible solutions to these concerns. But before that, this paper's objective is to clarify these concerns with the aim of ensuring that they are indeed substantial concerns.

Stating or even proving what constitutes an injustice is a challenging task. This is further also affected by the fact that there appears to be different types of justices; legal justice, distributive justice, social justice, restorative justice, retributive justice, etc. The relevant question here is; is law responsible for ensuring all these types of justices or just a particular type? Is enough being done in Namibia to ensure justice through sentencing convicted persons? What role can the public play in ensuring a just sentence?

RESEARCH METHODOLOGY

The qualitative methods of research were employed in gathering and analysing the data that was collected for this paper. The main method was desktop/library research.

LITERATURE REVIEW

There are several aspects of the Namibian criminal justice system that has been written about by different people and their main arguments will be reiterated under this topic. One aspect of the Namibian criminal justice system as to be discussed in this paper which is relating to the role of judicial officers in ensuring justice is judicial discretion. Laila Hassan wrote an article entitled "*Sentencing under the Combating of Rape Act, 2000: The misapplication of judicial discretion*,"²⁴ one of the four issues

²⁴ The article was published in the Namibia Law Journal, Volume 03 – Issue 01 January 2011, pp 29-53.

addressed in this article is whether factors invoking a minimum sentence have further aggravating quality.

Although this article's focus was on rape cases, certain arguments can be related to other fields in law, and according to this article, there are certain factors which fall within the ambit of judicial discretion in sentencing rape offenders, and all are areas where courts are failing to demonstrate a clear and consistent approach that correctly balances the 'triad' of sentencing considerations: the personal circumstances of the accused, the crime, and the interests of society.

This paper argues that these inconsistencies go beyond rape cases, sentences imposed for murder also appear to be quite inconsistent for example. These inconsistencies and minimum sentences give society the impression that justice has not been done. They leave society with endless questions as to how our courts seem to be so lenient with convicted criminals. However, there seems to be no evidence of effort from relevant stakeholders, particularly the Ministry of Justice to help educate society on these matters and perhaps create a certain assurance that 'justice for all' is still an objective of the law. The misapplication of judicial discretion certainly results in the prevalence of injustices in our system. The question as to whether harsher sentences will reduce crime rates in the country is not the central question of this paper but it argues that harsher sentences have a deterring effect on society. This is deducible from the fact that crime, especially violent crime, as according to reports, is on the increase nation-wide.

Iivula-Ithana, P. (1998) in her LLB Dissertation titled "*Victims' Rights in Namibia*"²⁵ states that the role of the judiciary, in a nutshell, is to ensure that the innocent person is not punished and yet the guilty one does not escape punishment. It is furthermore, the role of the Courts to balance the interests of the complainant and that of the accused since both have rights protected under the Constitution. The paper basically examined the balancing act of the justice delivery system of Namibia in order to determine whether in fact the procedures employed in criminal prosecutions are fair and equitable, with particular reference to the victims of crimes.

²⁵ Iivula-Ithana, P. (1998). *Victims' Rights in Namibia*. Windhoek: University of Namibia, p 7.

livula-Ithana, P. further states that the principle of 'Fair Trial' which has formed the backbone of criminal trials in many democratic systems came about as a response to what some criminologist call 'state vengeance'. The state which had assumed the place of the victim of a crime was perceived as a monster that had to be restrained in its dealings with the criminal offenders. The concern to protect the rights of defendants in the face of the State machinery is seen by many as having swung the pendulum of justice too far on the side of the offender, leaving the actual victim thereof completely unprotected.²⁶

Furthermore, it was stated that it is worthy to note that since the development of centralized political authority, victims of crime have been pushed by the wayside in criminal prosecutions.²⁷

Indeed the victims of crimes in Namibia seem to have been pushed to the side completely. The afore-said dissertation (*Victims' Rights in Namibia*) and this paper agree on the above mentioned statements and basic over view of the paper by Mrs livula-Ithana. However, the research paper by Mrs livula-Ithana seems to focus mainly and only on the victims' rights during criminal proceedings and their role during sentencing. This paper goes much further than just victims' rights and their role during sentencing. It aims at analysing the injustices in sentencing in the Namibian criminal justice system, and the issue of victims' rights comes in as an illustration of the manifestations of the injustices of our system. The victims' rights and personal circumstances should also form part of the relevant considerations in the process of sentencing to equate more proportionally the punishment of the convicted person to the crime committed.

²⁶ livula-Ithana, P. (1998). *Victims' Rights in Namibia*. Windhoek: University of Namibia, p 8.

²⁷ *ibid.*

CHAPTER TWO

WHAT CONSTITUTES JUSTICE?

To investigate whether there are indeed unjust laws and practices in the criminal justice system, it has first to be determined what it is that constitutes unjust laws and practices, or rather, to determine the meaning of justice with regard to this paper. A wide range of literature on the subject of justice offer different definitions and explanations as to the definition of justice. However, it is clear that the concept of justice cannot be completely separated from societies and their different belief systems and moral expectations.

One of the principles upon which Namibia is founded on is “justice for all”.²⁸ There are several types of justice.²⁹ One of the types of justice is referred to as Retributive or Punitive justice. This model of justice is said to be concerned with the punishment of individuals who have committed acts that our society deems crimes.³⁰ This paper contends that our justice system should focus on this type of justice, namely the retributive justice but should also have aspects of restitutive justice in the form of compensation to the victim or his/her family. This compensation would only be awarded under exceptional circumstances and these circumstances would only be decided upon after adequate and sufficient research has been carried out in this regard.

According to Hall, R. A. *et al.*³¹ the other models of justice include; Utilitarian justice, Contractarian justice and Restitutive justice.

²⁸ *ibid.*

²⁹ Hall, R. A., Dennis, C. B. & Chipman, T. L. (2000). *The Ethical Foundations of Criminal Justice*. Washington, D. C: CRC Press LLC, p. 193.

³⁰ *ibid.*

³¹ Hall, R. A., Dennis, C. B. & Chipman, T. L. (2000). *The Ethical Foundations of Criminal Justice*. Washington, D. C: CRC Press LLC, p. 193.

Villa-Vicencio, C.³² states that if the focus of formal justice systems is retributive, the focus of African traditional courts is essentially restorative. However, it would be quite wrong to castigate international law as entirely punitive and romanticise African justice as entirely restorative. Both forms of justice are important, especially in societies seeking to extricate themselves from lawlessness and disregard for rights of victims in an abusive society.

The search for an appropriate definition for the term and concept of ‘*Justice*’ reveals its deep foundation in jurisprudential legal theory, which requires some exploration in order to clearly understand the concept in its totality. “One of the central themes of *Jurisprudence* is justice. As pointed out by Lord Justice Denning one of the objectives of law is the promotion of justice. But what is justice? The concept of justice is just as complex and difficult as law itself. One way of looking at the concept is by reference to the theories of law. The oldest school of jurisprudence, natural law, stipulates that there is no separation between law and justice.”³³

That statement clearly re-states the objective of this paper, it is often said that law aims at promoting justice and that justice and law cannot be separated. However, there appears to be little evidence indicating any effort to define ‘justice’ in the Namibian context in general and the respective societies in particular.

The concept of ‘justice’ in its procedural sense is closely related to the idea of legality; it is not a concept which presupposes that the accused is not guilty, but rather one which refers to a quality of the proceedings.³⁴ This indicates that there are even different dimensions to the concept of justice, one dimension being the quality of proceedings in trial procedures, namely procedural justice. This illustrates that the concept of ‘justice’ is much broader than just to include sentences. Can it be said

³² (2009). “Transitional Justice and Human Rights in Africa.” In Bosl, A. & Diescho, J. (Eds.) *Human Rights in Africa, Legal perspectives on their Protection and Promotion*. Windhoek: Macmillan Education Namibia, p 42.

³³ Amoo, S. K. (2008). *An Introduction to Namibian Law, Materials and Cases*. Windhoek: Macmillan Education Namibia Publishers (Pty) Ltd, p. 50.

³⁴ Bekker, P. M., Geldenhys, T., Joubert, J. J., Swanepoel, J. P., Terblanche, S. S. Van der Merwe, S. E. & Van Rooyen, J. H. (1996). *Criminal Procedure Handbook*. 2nd Edition. Western Cape: Juta & Co, Ltd., p 169.

that if a law, sentence/punishment or practice is constitutional then it is just? Recently, it was declared by the Namibian Supreme Court that sentences given for stock theft were unconstitutional. In other words, this can also be said to mean that the sentences were unjust in that they were not proportional to the crime committed. Furthermore, it is often said that justice delayed is justice denied, this statement also clearly relates to the different proceedings that are involved in ensuring justice. It usually takes very long for particular cases to be decided in Namibia.

This is certainly one of the aspects that cause the public to have a perception of unjustness in the criminal justice system. The Judge President expressed similar sentiments in his press release of September 2010.³⁵ Often, as soon as the investigating officers have a suspect in relation to a particular crime, they seem to stop looking for other possible suspects and when the only suspect is cleared, it becomes clear that the real perpetrator is still out there somewhere posing a real danger to the rest of the community.

A great English judge, Lord Wright, once wrote that he was 'most firmly convinced by all [his] experience and study of and reflection upon law, that its primary purpose is the quest of justice.'³⁶ An unjust system of law can only be enforced by strong sanctions, and sooner or later rebellion will break out, upsetting the established order.³⁷ Perhaps with regards to Namibia, it cannot be argued here that the system of law is completely unjust but there are certainly aspects of it that can be argued as unjust as it was explained earlier.

Such as for example penalties which were given for stock theft³⁸ and for murder / culpable homicide, in the case of stock theft the sentences were too long even for the theft of one cow and those for murder / culpable homicide and rape are often too little, let alone the fact that most rapists get away with the crime of rape particularly in

³⁵ Damaseb, P. (2010). "Promoting access to Justice in the High Court of Namibia; First Report, the Case for Judicial Case Management." Press Release Report. Windhoek, p 2.

³⁶ Hahlo, H. R. & Kahn, E. (1968). *The South African Legal System and Its Background*. Cape Town: Juta & Co., Limited, p 29.

³⁷ *ibid.*

³⁸ They have however been declared unconstitutional recently in a court judgment.

a case where the victim is a family member of the perpetrator. It is these individual cases that give off the perception of the existence of injustices in our criminal justice system.

As it has been pointed out earlier, the fact that a rule is law does not imply that it is necessarily just. But it is to the extent that a legal system complies with the postulates of generality, reasonableness, equality and certainty that it is most likely to achieve its ends of order and formal justice.³⁹

Legal rules, if they are to find ready obedience, must be reasonable. Arbitrary, senseless and absurd rules, according to our system of values, tend to bring the law, or rather the State itself, into ridicule and disrespect.⁴⁰ The penalties that were given for stock theft could indeed be said to have been unreasonable and even ridiculous when compared to other crimes, which are considered by most to be even more serious than stock theft, crimes such as abduction and rape / murder. It is a general rule that laws cannot apply retrospectively and hence even when a law is abolished or a part thereof (e.g. penalty clause) is later declared unconstitutional; the individuals who might already have suffered injustices under the un-amended law are still at a loss.

THE LOSS OF ESTEEM IN THE CRIMINAL JUSTICE SYSTEM

In September 2010, Judge President Petrus Damaseb seemed to confirm that there is a large backlog in prosecutions when during a press conference he expressed the opinion that the system for justice delivery remains congenitally slow and woefully expensive. According to him, the situation is what it is because the procedures used to deliver justice have not kept pace with change and that the net effect of this can be witnessed in “case backlogs”, which inevitably feed the generally held belief amongst the public that justice is not speedily dispensed in Namibia.⁴¹ Clearly, very

³⁹ Hahlo, H. R. & Kahn, E. (1968). *The South African Legal System and Its Background*. Cape Town: Juta & Co., Limited, p 32.

⁴⁰ *ibid.*

⁴¹ Damaseb, P. (2010). “Promoting access to Justice in the High Court of Namibia; First Report, the Case for Judicial Case Management.” Press Release Report. Windhoek, p 2.

few people hold the justice system in high esteem. However, despite this general dissatisfaction with the system, there appears to be no evidence of effort to improve the system.

The generally held view amongst the public is that the criminal system has failed to suppress crime.⁴² Nakuta, J. & Cloete, V. further state that crime has been constantly increasing since 1990, due principally to the level of poverty in Namibia and the fact that the criminal justice system is significantly understaffed.⁴³ These may be some of the reasons why the justice system has failed to suppress crime, but generally there appears to be no effort at improving the current system and even the major players just complain about it alongside with the community.

Furthermore, Nakuta, J. & Cloete, V.⁴⁴ contend that the training of criminal justice professionals lacks depth and international benchmarking. A more in depth training for criminal justice personnel would indeed be a step in the right direction to restoring the esteem of the Nation back into the criminal justice system and such training would furthermore ensure that justice is served in the day-to-day proceeding of the justice system.

The Inspector General of the Namibian police Force, Sebastian Ndeitunga and the Prosecutor General, Martha Imalwa seem to acknowledge that the Namibian criminal justice system is dysfunctional and in a state of crisis.⁴⁵

⁴² Nakuta, J. & Cloete, V. (year). *The Justice Sector and the Rule of Law in Namibia*. Windhoek: Namibia Institute for Democracy, p 1.

⁴³ *ibid.*

⁴⁴ (Year). *The Justice Sector and the Rule of Law in Namibia*. Windhoek: Namibia Institute for Democracy, p 1.

⁴⁵ *ibid.*

THE PUBLIC'S ROLE IN ENSURING JUSTICE

In Namibia, the public does not seem to have any role in the promulgation of statutes which appears to contribute to the perception that there are injustices in the process of sentencing. "...One concept that can hardly be disputed is that the law is made for the people and therefore a law that is not just will not be obeyed by the law. The concept of justice is therefore also related to the concept of the individual's obligation to the law."⁴⁶ This statement supports the contention that justice and society (people) cannot be separated from each other.

Justice, as it was stated earlier, is of the retributive type – an eye for an eye, a tooth for a tooth – with some modernist embellishments in diction that do not succeed in completely hiding the fact that retributive justice simply means that those who upset the moral order and subvert accepted societal moral codes by their unaccepted conduct.⁴⁷ The more gross the violation – rape, murder, abduction – the more society clamours for revenge, for retribution. In Namibia, so far, the rates of mob killings or attacks are not so alarming as they are in South Africa. However, the more the society perceive that justice is not being done through the criminal process, the more likely they will be inclined to take the law into their own hands. It is the duty of the legal fraternity that it does not come to that. Legal fraternity in this sense includes legislators, police officers, judicial officers and attorneys alike.

Of the three branches of government – executive, legislative, and judicial – the first two were supposed to be the ones in which the public most actively participated.⁴⁸ People seem to obey laws for fear of punishment and not necessarily that it is a just law. The injustice of a law is not, in general, a sufficient reason for not adhering to it any more than the legal validity of legislation (as defined by existing constitution) is

⁴⁶ Amoo, S. K. (2008). *An Introduction to Namibian Law, Materials and Cases*. Windhoek: Macmillan Education Namibia Publishers (Pty) Ltd, p. 51.

⁴⁷ Ntsebeza, D. B. (2009). "Can Truth Commissions in Africa deliver Justice?" In Bosl, A. & Diescho, J. (Eds.) *Human Rights in Africa, Legal perspectives on their Protection and Promotion*. Windhoek: Macmillan Education Namibia, p 379.

⁴⁸ Garry, P. M. (1997). *A Nation of Adversaries, How the Litigation explosion is reshaping America*. New York: Plenum Press, p 89.

sufficient reason for going along with it.⁴⁹ When the basic structure of society is reasonably just, we recognise unjust laws as binding provided that they do not exceed certain limits of justice.⁵⁰ To argue here that unjust laws should not be binding upon individuals would be absurd. Not only are individuals prone to interpret what is just differently but that would imply that individuals get to choose which laws would be binding to them and which ones would not. This would defeat the whole purpose of a criminal justice system and any other legal system in fact.

Thus, it seems more appropriate and much more controllable if citizens of Namibia could get an opportunity to vote for or against certain statutes before they are promulgated. A democratic nation is said to be a nation which is ruled by the people for the people. Can it really be said that Namibia is a democratic nation if the citizens do not have a say in the laws, rules and regulations that govern them? Citizens could vote for or against a particular act of parliament in general or specific parts of the act. Necessary research would have to be done in order to determine if it is a viable option.

One area where the public can play a significant role is when it needs to be determined whether a certain convict can go out on parole. If general members of the public can not be part of the relevant boards, then perhaps, statements from victims or the family members of the victim can give their opinion / statement / testimony on the releasing of a convict on parole or at least on the conditions that come with the parole.

⁴⁹ Rawls, J. (1973). *A Theory of Justice*. Oxford: Oxford University Press, p 350

⁵⁰ *ibid.*

ENSURING JUSTICE IN NAMIBIA

The principles of justice are the result of a fair agreement or bargain.⁵¹ Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. For this reason justice denies that the loss of freedom for some is made right by a greater good shared by others.⁵²

The above statements indicate clearly that justice is arrived at through fair agreement or bargain, and preferably, the parties have equal or proportionate bargaining power. The distinctive features of justice and their special connexion with law begin to emerge if it is observed that most of the criticisms made in terms of just and unjust could almost equally well be conveyed by the words 'fair' and 'unfair'.⁵³ This is indeed also illustrated by the reference to 'unfair' effect of certain laws or the punishments.

It was explained in the beginning that convicted rape perpetrators seem to get very few years as punishment for their crime, and thus the punishment does not have a deterring effect on the rest of society. Overall, this is perceived as unfair, to the victim and to the society. It is this perceived unfairness which is also viewed as a miscarriage of justice.

As mentioned earlier, this paper does not advocate the re-instatement of the death penalty but rather alternative means (sentences / punishment) to ensure that justice is seen to be done in criminal matters / cases. One such alternative is perhaps the punishment of life imprisonment without the option of parole for serious crimes such as murder and rape. Justice will only be served if the penalty is proportionate to the crime.

The first and foremost purpose of law is to maintain peace and order in the community. Man needs to live in society if he is to achieve his full development. Society, however, cannot exist without law, for without rules of conduct there can be

⁵¹ Rawls, J. (1973). *A Theory of Justice*. Oxford: Oxford University Press, p 12.

⁵² *ibid.*

⁵³ Hart, H. L. A. (1993). *The Concept of Law*. Oxford: Oxford University Press, p 154.

no order, and without order there cannot be peace and progress.⁵⁴ This shows that generally, people rely on the law as the means of maintaining peace and order in the society and if the law fails the community, what can they rely on?

The legislators need to keep in consideration the foundation of law in their mandate of making laws. By placing restraints on man's egoism, greed and will to power, law makes it possible for individuals with conflicting interests to live peacefully side by side.

When a state of balanced power and social equilibrium have been achieved, the law will strive to protect it from serious disturbances and disruptions.⁵⁵ Voet stated that "the law ought to be just and reasonable, both in regard to the subject-matter, directing what is honourable, forbidding what is base: and as to its form, preserving equality and binding the citizens equally." It may not be possible to define positively what concrete justice is, which is what Voet is alluding to in the first part of this passage.

But it is possible to state certain criteria with which law must comply if it is not to be unjust in the formal sense of the second part of the passage.⁵⁶ The primary criterion is that law must be reasonable. From this follow the secondary criteria of generality and equality, which give rise to the criterion of certainty. In addition, the individual must be ensured fair process in disputes with other individuals and with the community itself.⁵⁷ In short, as according to Hahlo, H. R. & Kahn, E. the postulates of justice are as follows: reasonableness; generality; equality; certainty; fair Process.

The length of time it takes to prosecute suspected criminals continues to raise eyebrows and irk many people who have fallen victim to crime in Namibia. For

⁵⁴ Hahlo, H. R. & Kahn, E. (1968). *The South African Legal System and Its Background*. Cape Town: Juta & Co., Limited, p 26.

⁵⁵ *ibid.*

⁵⁶ Hahlo, H. R. & Kahn, E. (1968). *The South African Legal System and Its Background*. Cape Town: Juta & Co., Limited, p 31.

⁵⁷ *ibid.*

instance, commercial farmers, one section of the population specifically targeted by criminals, have recently voiced their concerns and frustrations concerning the long time it takes to arrest, prosecute and convict alleged criminals.⁵⁸

In this regard, the Otavi Farmer' Association expressed their displeasure with the long time it took to resolve crimes committed against its members, as well as the low conviction rate achieved in these cases. The Association reported that five of its members had been murdered since 2001.

During the past nine years (2001 – 2010) only two of the alleged criminals were convicted, and only two cases were finalised, one of which took over five years.⁵⁹ Why is the Namibian criminal justice system failing the people of this land so much? The Namibian criminal justice system is underperforming.⁶⁰ Much still needs to be done to ensure that the criminal justice system is effective, only then can we talk of justice, the rule of law and even democracy.

In 2005, the Prosecutor – General cautioned that “until we have an effective criminal justice system, we can forget about talking about democracy, the rule of law, investment and peace and stability.” The criminal justice system as she rightfully pointed out “is the core to all of this.”⁶¹

One cannot exclude the possibility that in the future there will be pressure for the introduction of compulsory sentence of life imprisonment to deal with, for example, aggravated cases of murder without extenuating circumstances or aggravated murder, rape or armed robbery defined in some other way.⁶² There is currently a movement to increase the scope of mandatory life sentences to include, without

⁵⁸ Nakuta, J. & Cloete, V. (year). *The Justice Sector and the Rule of Law in Namibia*. Windhoek: Namibia Institute for Democracy, p 8.

⁵⁹ *ibid.*

⁶⁰ Nakuta, J. & Cloete, V. (year). *The Justice Sector and the Rule of Law in Namibia*. Windhoek: Namibia Institute for Democracy, p 2.

⁶¹ *ibid.*

⁶² Van Zyl Smit, D. (1995). “Taking Life Imprisonment Seriously.” In Kahn, E. (Ed). *The Quest for Justice*. Kenwyn: Juta & Co, Ltd, p 311.

exception, all offenders who are convicted for a third time of felony involving violence.⁶³

The 'three strikes and you're out' policy has been approved by referendum in the state of Washington.⁶⁴ In his State of the Union address of 25 January 1994, President Clinton endorsed this policy as the first of his nostrums for dealing with crime:

"First, we must recognise that most violent crimes are committed by a small percentage of criminals who too often break the laws even when they are on parole. Now those who commit crimes should be punished, and those who commit repeated violent crimes should be told when they commit a third crime, you will be put away and put away for good, three strikes and you are out."⁶⁵

Taking such a bold stand on crime could see the crime rates in Namibia declining. The 'three strikes and you are out' policy should be introduced in the Namibian criminal justice system; this could induce the deterring factor of punishment for crime which our system currently lacks.

One of the concerns for life imprisonment is the doctrine of proportionality, but an interesting example of how the doctrine of proportionality could be applied to life imprisonment was given by Murphy J in the Australian High Court in the case of *Sillery v The Queen*.⁶⁶ At issue was whether Section 8 (3) of the Crimes (Hijacking of Aircraft) Act, which provided that the punishment for hijacking was imprisonment for life, meant that the life sentence was mandatory for all forms of hijacking to which the Act referred. The Response of Murphy J was clear: "Construed as mandatory the punishment of life imprisonment in relation to the less serious offences covered by

⁶³ *ibid.*

⁶⁴ 1994. "Three strikes and you are out policy, approved in Washington." *US News and World Report*, p 9.

⁶⁵ Van Zyl Smit, D. (1995). "Taking Life Imprisonment Seriously." In Kahn, E. (Ed). *The Quest for Justice*. Kenwyn: Juta & Co, Ltd, p 311.

⁶⁶ (1981) 55 ALJR 509.

the definition of hijacking would be cruel and unusual, because it is excessive and serves no valid legislative purpose.”⁶⁷

That therefore indicates that life imprisonment would not really have to be curtailed by the elements of proportionality because the adjudicators would have to apply their minds to each and every case meticulously.

⁶⁷ Van Zyl Smit, D. (1995). “Taking Life Imprisonment Seriously.” In Kahn, E. (Ed). *The Quest for Justice*. Kenwyn: Juta & Co, Ltd, p 312.

CHAPTER THREE

RIGHTS OF THE VICTIM VERSUS RIGHTS OF THE PERPETRATOR

As it has been mentioned earlier, quoting Hassan, L., the ‘triad’ of sentencing considerations are: the personal circumstances of the accused, the crime and the interest of society. It is my contention that justice will not only be done, but it will also be seen to be done if the personal circumstances and rights of the victim formally become part of the sentencing considerations. Without the consideration of the personal circumstances and rights of the victim, justice will not easily be seen to be done and especially for the victim.

Rights, borrowing from the legal philosopher Ronald Dworkin’s formulation, are the means by which justice is secured in law, to the legal imperative, demanded by law.⁶⁸ It may not always or everywhere be so – but some societies, for example Islamic societies, may organise their institutional commitment to justice around a scheme of duties, or around a faith-based identity. But now in modern legal culture (in most but not all societies) justice if achieved is achieved through recognising and then enforcing our rights.

Chapter 3 of the constitution of the Republic of Namibia contains the Bill of Rights, in which 15 fundamental human rights and 10 fundamental human freedoms are enshrined. Both the Constitution and the Ombudsman Act impose a duty on the Ombudsman to investigate allegations concerning the breach of fundamental human rights.⁶⁹ Thus, it’s clear that the Ombudsman is responsible for investigating allegations as mentioned above, but the role of the Ombudsman is not clear with regards to human rights of a victim of a crime. Perhaps the Ombudsman does not

⁶⁸ West, R. L. (2003). *Re-Imagining Justice, Progressive Interpretations of Formal Equality, Rights, and the Rule of Law*. England: Ashgate Publishing Limited, p 1 – 2.

⁶⁹ Walters, J. (1999). “The Protection and Promotion of Human Rights in Namibia: The Constitutional Mandate of the Ombudsman.” In Horn, N. & Bosl, A. *Human Rights and the Rule of Law in Namibia*, Windhoek: Macmillan Namibia, p 121.

have a role in this regard, which leaves the question; whose responsibility is it to address violations of victim's rights.

Article 12 of the Namibian Constitution outlines the rights of a criminal suspect. These rights as stated in Article 12 but articulated in case law include; the right to be presumed innocent until proven guilty, the right to legal assistance, the right to remain silent, the right to be tried in one's own language, the right to a speedy trial and the right to an impartial and competent court.

The rights of the accused and later convicted (most of the time) is all well articulated in the Constitution and case law but little or no such articulation for the victims' rights. In particular, the question is, are the victims' rights given sufficient consideration during sentencing? As mentioned earlier, the 'triad' of sentencing are said to be: the personal circumstances of the accused, the crime, and the interests of the society. However, it seems that the personal circumstances of the accused seem to weigh more during sentencing than the other two aspects, for example in the case of *S v Jacobus Coetzee*⁷⁰ in which the accused has been convicted of the murder of his brother in Keetmanshoop, the court stated that when considering an appropriate sentence the Court must look at the accused, the crime itself and the interests of society.

However, from the case it appears as though the circumstances of the accused and his family background weighed more than the crime itself and the interests of society.

Although the court stated that our society is the target everyday of violent crimes like the one the accused committed, and that the court must pass a sentence which would not only deter the accused but deter others in similar situations from committing similar deeds.⁷¹ The accused was sentenced to 15 years of which 5 years were suspended.

It is thus my contention that the victims' personal circumstances and their human rights do not get sufficient consideration by judicial officers during sentencing and

⁷⁰ Case n.: CC 29/07.

⁷¹ *S v Jacobus Coetzee* case no.: CC 29/07.

hence the argument that justice is not served in most criminal cases in Namibia. Usually, the punishment just does not appear to be proportional to the crime committed, but if the rights and circumstances of the victim were considered, it may serve as an aggravating factor and result in the court not being too lenient on convicted person or persons.

In the case of *S v Johannes Alex Roos and other*⁷² sufficient attention was given to the personal circumstances of the accused but there is no mention of factors relating to the victim which could have been used as aggravating circumstances in sentencing. It was only mentioned by the defence counsel that the injuries suffered by the complainant were not grievous and that she was known to the accused. The court did fortunately mention that the fact that the complainant was known to the accused could be regarded as an aggravating circumstance because that indicates that she did not expect the accused commit such an act on her. The fact that her physical injuries were not grievous does not take away the fact that she was violently raped and could suffer severe emotional scars/injuries.

Another issue related to the rights of victims and perpetrators is the issue of the parole system. Parole is a discretionary early release from prison before the term of imprisonment has lapsed.⁷³ Factors which meditate in favour of or against the early release are good behaviour in terms of cooperating with prison officials and meaningful change of heart. In general very few offenders serve the prison term to its last day of sentence to the prison.⁷⁴

The Minister is empowered by Section 108 of the prison Act 17 of 1998 to appoint a Release Board. This board performs the function of releasing the prisoners and other duties entrusted to it in terms of the Act.

It should be noted that victims of the different types of crimes in Namibia do not currently play any role whatsoever, either in the rehabilitation programmes of the

⁷² Supra.

⁷³ livula-Ithana, P. (1998). *Victims' Rights in Namibia*. Windhoek: University of Namibia, p 30.

⁷⁴ livula-Ithana, P. (1998: p 30).

offender or in the decision on whether or not the offender should be released on parole.

The international community took heed to the rights of victims many years ago, particularly the United Nations adopted the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power in 1985⁷⁵, and it resulted in many countries focusing on the rights of the victims. Some of the principles outlined in the Declaration were as follows:

- Victims should be treated with compassion and respect for their dignity and are entitled to prompt redress for harm caused.
- States should consider incorporating into national law norms proscribing abuses of power, including political and economic power. They should also provide remedies to victims of such abuses, including restitution and compensation.
- Victims should receive the necessary material, medical, psychological and social assistance through governmental and voluntary means.
- Police, justice, social service and other personnel concerned should receive training to sensitize them to the needs of victims.
- Offenders should, where appropriate, make restitution to victims or their families or dependants. Where public officials have violated criminal laws, victims should receive restitution from the State.
- When compensation is not fully available from the offender, States should provide compensation to victims or their families in cases of significant physical or mental injury.
- Victims should be informed of their role and the timing and progress of their cases. The views and concerns of victims should be presented and considered at appropriate stages of the process.
- Steps should be taken to minimize delay and inconvenience to victims, ensure their privacy and protect them from intimidation and retaliation.

⁷⁵ Approved by the General Assembly, 29 November 1985 (resolution 40/34), on the recommendation of the Seventh Congress.

Implementing some of these basic principles in the Namibian criminal justice system could somewhat decrease the perception of injustice in regard to giving more weight to the rights of the perpetrator as opposed to the rights of the victim. The issue of compensation to the victim could also be useful in assisting the victim to seek necessary assistance for physical or mental injuries that may have been sustained.

Specifically, this paper recommends the following principles to be enforced in Namibia. Firstly, those victims should be treated with compassion and respect for their dignity and prompt redress for harm caused. The harm caused to the victim should form a primary concern for courts in the sentencing process to at least indicate a consideration of the victims' circumstances and injuries as a factor in sentencing.

Secondly, the police, justice, social services and other personnel concerned should receive training to sensitize them to the needs of the victims. Once in a while there are unconfirmed allegations that rape victims and the accused are transported in the same police van to the women and child abuse centre for questioning. Should these allegations be true, it is an indication that police and other personnel require training to sensitize them to the needs of the victims. The manner in which a victim is treated before the trial even begins could add to the perception of justice being done if the process is handled sensitively and professionally.

Thirdly and finally, victims should be informed of their role and the timing and progress of their cases. The views and concerns of victims should be presented considered at appropriate stages of the process. Sufficient consideration should be given to the views and concerns of the victim and necessary protection should be provided for such victim if there is fear of retaliation whether from the accused or the accused' friends or associates. Often the victims do not receive updates as to their cases unless they themselves seek this updates and progress of their cases. Justice, particularly procedural justice should require that victims be kept updated about their cases at all times and their concerns to be considered at all times until the case has been finalised.

These principles therefore provide some basic guidelines to be followed in order to promote the perception of justice or at least sufficient work towards ensuring justice.

THE ROLE OF JUDGES, MAGISTRATES, PROSECUTORS, LAWYERS AND POLICE OFFICERS IN ENSURING JUSTICE

As it has been mentioned earlier in this paper, there are different types of justice and one of them is legal justice, which is the one closely related to the concerns raised in this paper, although the main focus is on retributive justice. What is meant by legal justice? What is the justice that lawyers and judges, peculiarly, are professionally committed to pursue, the virtue around which, arguably, the legal profession and the individuals within it have defined their public lives?⁷⁶

The concept of 'legal justice' requires of lawyers a commitment to – and therefore an understanding of the rule of law or as it is often said a 'government of laws rather than men.'⁷⁷ West, R. L.⁷⁸ states further that it is widely agreed among most lawyers that 'legal justice' requires adherence to some recognizable regime of individual rights. Furthermore, most lawyers agree that 'legal justice' requires a commitment to what is variously called 'horizontal equality,' 'legal equality' or 'formal equality': legal justice, for many lawyers, just is the moral mandate, binding courts and judges, to 'treat like cases alike.'⁷⁹

There are different contexts where appraisals in terms of justice or fairness are made. We speak not only of distributions or compensation as just or fair but of a judge as just or unjust; a trial as fair or unfair; and a person as justly convicted.⁸⁰ There are derivative applications of the notion of justice. It is thus the role of every judicial officer, prosecutor, lawyer and police officer to derive from the notion of justice a part that they can assume in order to ensure justice in the criminal justice system.

⁷⁶ West, R. L. (2003). *Re-Imagining Justice, Progressive Interpretations of Formal Equality, Rights, and the Rule of Law*. England: Ashgate Publishing Limited, p 1.

⁷⁷ *ibid.*

⁷⁸ 2003). *Re-Imagining Justice, Progressive Interpretations of Formal Equality, Rights, and the Rule of Law*. England: Ashgate Publishing Limited, p 1.

⁷⁹ *ibid.*

⁸⁰ Hart, H. L. A. (1993). *The Concept of Law*. Oxford: Oxford University Press, p 154 – 155.

To do legal justice means in essence, to decide cases according to rules, and to decide cases according to rules, in turn, requires that likes be treated alike, and that unlikes be re-thought until their similarity with some pre-existing pattern is identified. The virtue of legal justice, minimally, requires a judicial commitment to this moral mandate.⁸¹ In *S v Malgas*⁸², the South African Supreme Court of Appeal, the judge noted the injustices that may arise if judges are obliged to pass specified sentences “come what may”. He was referring to the ability of judges to depart from minimum sentences in substantive and compelling circumstances.

However, this argument is also relevant when considering aggravating factors, since it is well established that the appropriateness of a sentences must not only take into consideration the interests of the convicted, but also the circumstances of the crime and the interests of society.⁸³

This indicates that judicial officers play a major role in ensuring justice in Namibia through the sentences they give almost on a daily basis in the courts. Justice must be seen to be done, the only way this can be done by judicial officers is by ensuring a just trial and procedure, especially in taking into consideration all relevant factors before sentencing a convicted criminal as stated by Parker JJ in the case of *S v Mathias Simeon*⁸⁴. As Hassan L. stated, in some particular cases, i.e. rape cases, the judges tend to over look certain factors in the process of sentencing, such as perhaps the interests of society. The interest of society lies in ensuring that justice prevails, as it is illustrated by the headlines of newspaper articles under annexure A and in particular the article by Kolbe, S.⁸⁵ who expressed complete dissatisfaction with the way in which criminal cases are handled in Namibia.

⁸¹ West, R. L. (2003). *Re-Imagining Justice, Progressive Interpretations of Formal Equality, Rights, and the Rule of Law*. England: Ashgate Publishing Limited, p 2.

⁸² 2001 (3) All SA 220 (A).

⁸³ Hassan, L. (2011). “Sentences under the Combating of Rape Act, 2000: The Misapplication of Judicial discretion.” *Namibia Law Journal*, Volume 03 (Issue 01): p 32.

⁸⁴ Case no: CC 17/2007.

⁸⁵ Kolbe, S. (2005). “As Good As Dead”. *The Namibian Newspaper*. Available at www.namibian.com/index.php; last accessed on 04 October 2011.

There may be other moral commitments embedded in the ideal of legal justice as well but these three commitments: - to the rule of law, to a regime of rights, and to formal equality – seem to be sufficiently recurrent in professional incantations of the ideal justice, that makes sense to regard them as parts, whether or not the whole, of the ideal of legal justice that informs the professional identity of lawyers.⁸⁶

Clearly from statutes and precedents, judicial officers have discretion in imposing sentences to convicted individuals and perhaps that discretion is too wide and allows for perceived injustices to occur in sentencing. This appears so, despite the fact that most statutes prescribe minimum or maximum sentences to be imposed for particular crimes. Thus in ensuring justice, judicial officers play a role. Law schools seemingly applaud this motivation, and reinforce the connection between doing law as a profession and doing justice, at the points of entry and exit: Law schools engrave over their entrances that ‘Law is the means, justice the end,’ or words to that effect, and virtually all commencement addresses in some way exhort the graduating classes to labour for justice, and not just for remuneration.⁸⁷

The role of defence lawyers and prosecutors in criminal cases is said to be misunderstood by much of the public, including the well-informed public.⁸⁸ Dershowitz⁸⁹ who was the lawyer for the very controversial American case of *O.J Simpson*, states that the main role of a defence lawyer is to represent his / her client to the best of his ability and ensure justice for his or her client, and that a criminal trial is not necessarily a search for the truth because each party has its own truth. That being said, it is clear that defence lawyers work hard to ensure that their client’s position in a criminal trial is perceived in the light which is most beneficial to the client. Hence, the same should go for public / state prosecutors, they should work so

⁸⁶ Hassan, L. (2011: p 32).

⁸⁷ West, R. L. (2003). *Re-Imagining Justice, Progressive Interpretations of Formal Equality, Rights, and the Rule of Law*. England: Ashgate Publishing Limited, p 1.

⁸⁸ Dershowitz, A. M. (1996). *Reasonable Doubts*. New York: Simon & Schuster Rockefeller Center, p 157.

⁸⁹ *ibid*.

closely with the investigating police officer(s) to ensure that a suspect does not get away from the penalty of a crime just because investigations were not carried out sufficiently.

The Namibian Constitution places a high premium on human life, as per Article 6 the right to life is inalienable. But penalties for murder seem to indicate otherwise as illustrated in the case of *S v Josef Petrus Witbooi*⁹⁰ in which the accused was convicted of murder and sentenced to 18 (eighteen) years imprisonment of which 6 (six) years were suspended for 5 years on condition that the accused is not convicted of murder or a related crime in the period of suspension.

This sentence does not seem to indicate that a high premium is placed on human life, even the heavier sentence of 25 years imposed on the accused in the case of *S v Victor Mundia Musweu*⁹¹ for the murder of a lady by stabbing her several times all over her body does not satisfactorily indicate the high premium on life. As mentioned earlier, the premium that was placed on live stock valued at N\$500 or more, is 20 years which is too close to sentences for taking human life. Thus, extending a question whether there is really a high premium placed on life as Article 6 seems to indicate.

In most criminal cases, it seems to become so clear to investigating officers that a certain suspect committed the crime in question that they rule out the possibility of other suspects. It however, sometimes happens that the only suspect in an investigation is exonerated and this is when the statement '*Justice Delayed, is Justice Denied*' comes into play, because new investigations need to be commenced again. In Namibia, when a defendant gets off a crime too easily, the prosecutor is blamed by the more learned general public⁹². This was also the case in the trial of a certain Mr *Lazarus Shaduka*,⁹³ a well known businessman, who was convicted of

⁹⁰ Case no.: CC 49/07.

⁹¹ Case no.: CC 01/2007.

⁹² Nakuta, J. & Cloete, V. (year). *The Justice Sector and the Rule of Law in Namibia*. Windhoek: Namibia Institute for Democracy, p 8.

⁹³ Menges, W. (2011). "Shaduka acquittal to go on appeal." *The Namibian*, pp 1 -2.

having murdered his wife and paid a fine of approximately N\$ 27 000. The Chief Justice Peter Shivute and judges of Appeal Gerhard Maritz and Sylvester Mainga have decided to grant the State leave to appeal against the judgment and sentence with which Shaduka's trial ended in the High Court in late August 2010.

Whatever be the reason why some convicted persons get off lightly, it is clear that prosecutors and investigating police officers play a major role in ensuring justice through criminal trials. Prosecutors and investigating police officers need to ensure that investigations are carried out thoroughly and meticulously and maximum devotion to ensure that cases are proven beyond reasonable doubt.

In Namibia, the low conviction rate may also be seen to be indicative of a weak and ineffectual corps of state prosecutors having to deal with formidable defence counsels.⁹⁴ The criminal justice system will not rectify itself, the role players in the system no matter the level, need to ensure that they uphold and aim to serve justice in their day – to – day work.

Thus it can be concluded judicial officers, prosecutors, lawyers and police officers all play major roles in the Namibian criminal justice system and in particular, in ensuring justice through their respective daily activities. Namely; the judicial officers can try to be more consistent in sentencing similar crimes and try to ensure that sentences are proportional to the crime committed. They can further also be encouraged to give sufficient attention to the interest of society and not always so much only to the personal circumstances of the convicted person. Prosecutors and police officers, specifically investigating officers can work more closely together to ensure more thorough investigations. The result of this could be more convictions in courts and sufficient admissible evidence allowing judicial officers to give sentences sufficiently proportional to the crimes committed.

⁹⁴ Nakuta, J. & Cloete, V. (year). *The Justice Sector and the Rule of Law in Namibia*. Windhoek: Namibia Institute for Democracy, p 8.

In an adversarial system, the role of defence lawyers and the prosecution is said to be seen as of two adversaries, each trying to prove its case to be better than the other.

Whereas in an inquisitorial system, the whole process is said to be concerned with establishing the truth and that the promotion of justice is at its centre. It is in this regard where the questions of borrowing some methods from the inquisitorial system of fact finding and dispute resolution comes in, in particular; if adversarial lawyers and judicial officers were adapt some methods from the inquisitorial system, would this ensure more proportional sentences and a clearer promotion of justice during trials? This question is examined more closely below.

IMPLEMENTING INQUISITORIAL METHODS OF DISPUTE RESOLUTION IN THE NAMIBIAN CRIMINAL JUSTICE SYSTEM

The adversarial trial procedure – finds its symbolic roots in the early ritual of trial by battle.⁹⁵ The adversarial (accusatorial) trial has two leading features, namely, the passive role of the adjudicator and the presentation of evidence by two opposing parties.⁹⁶ The presiding officer is required to play a limited role in the questioning of witnesses.

The accusatorial theory places great emphasis on party responsibility for proof. Furthermore, in an accusatorial trial cross-examination of witnesses is essential and therefore every party has the fundamental right to cross-examine witnesses called by its opponent.⁹⁷ James P. S.⁹⁸ gives a short and clear example to demonstrate the differences between the two legal processes. The example denotes that if C undertakes to decide a quarrel between A and B, he may do so in one of two ways: either he may take the initiative and examine the parties and their evidence himself, or he may call upon them to take the initiative and present their cases to him.

⁹⁵ Garry, P. M. (1997). *A Nation of Adversaries, How the Litigation explosion is reshaping America*. New York: Plenum Press, p 4.

⁹⁶ Van der Merwe, S. E., Morkel, D. W., Paizes, A. P. & A. ST. Q. Skeen. (1983). *Evidence*. Cape Town: Juta & Co, Ltd, p 12.

⁹⁷ *ibid.*

⁹⁸ *Introduction to English Law*, 8th Ed. 1972 at p.74.

Anglo-American law has traditionally adopted the latter method of proceeding, which we may perhaps be permitted to call 'contentious' or 'adversary' method, as opposed to the former, which is 'inquisitorial'. James P. S. further states that the difference between these two methods of proceeding lies only in the degree of initiative taken by the court and provided that the court is impartial, the 'contentious' method has no great advantage over the 'inquisitorial'. He finally adds that it is, however, essential to bear in mind that most English trials represent a drama in which the parties, through their counsel, fight a forensic battle against each other: the court decides who has the better cause.

It is indeed worthwhile to question if the methods of the adversarial system contribute to the perception injustices in the Namibian criminal justice system which also utilises the adversarial (accusatorial) system.

An adversarial culture, bred by values and lessons of the litigation explosion, is taking hold in the United States. It is a culture that pushes individuals to conflict and confrontation, and to continually challenge community authority and institutions.⁹⁹ In eroding communal bonds and other traditional forms of social authority, the litigation explosion has also undermined non-judicial methods of resolving disputes.¹⁰⁰ Garry, P. M.¹⁰¹ identifies certain 'symptoms' as that of an adversarial society as follows:

- The decline in civility; conflict in the classroom; workplace warfare; the sex and gender wars; an adversarial media; an increasingly contentious politics.

In the United States, in England, in Wales, in Canada and in other common law countries such as Namibia, criminal proceedings are operated on the basis of what is sometimes referred to as an adversarial system of justice. This system is different from the inquisitorial system of justice which is employed in other legal jurisdictions in particular; many continental European jurisdictions. The adversarial model proceeds from the premise that greater approximation of the truth is possible if

⁹⁹ Garry, P. M. (1997). *A Nation of Adversaries, How the Litigation explosion is reshaping America*. New York: Plenum Press, p 4.

¹⁰⁰ *ibid.*: 8.

¹⁰¹ (1997). *A Nation of Adversaries, How the Litigation explosion is reshaping America*. New York: Plenum Press, pp 66 – 87.

litigants are allowed to present their own evidence in a process which guarantees not only cross-examination of an opponent who testifies but also all witnesses called by such opponent.¹⁰²

The justification of the adversarial system is said to rest upon two premises. The first premise is that the adversarial system will result in a more thorough and accurate investigation of the facts than the inquisitorial system.¹⁰³ Parties, motivated by self-interest, are likely to be more diligent in presenting and critically evaluating all of the relevant evidence than a disinterested official motivated only by official duty.

Cosman and Godfrey¹⁰⁴ state that the second premise is that in an adversary proceeding, the judge is more likely to reach the correct decision because, during the proceedings, he or she will *not acquire a bias* towards one conclusion or another. The judge, they contend, will be able to remain completely disinterested in the outcome until all of the proof has been elicited and complete arguments from both parties have been made. This *appearance of impartiality* of the judge, according to Cosman and Godfrey, legitimises and makes the adversarial system more acceptable to the Canadians than an inquisitorial system.

On the other hand however, the inquisitorial system procedure is a natural system of fact-finding in the sense that it dispenses with technical rules and is applied in our activities. For example, a father inquiring into a dispute between his children acts inquisitorially in the sense that he will not merely rely upon information which the 'parties' are prepared to submit; nor, for that matter, will he follow or adopt evidential rules which tell him in advance that he may not even receive certain 'evidence'.

A key feature of the French inquisitorial system in criminal justice is the function of the *juge d'instruction*.¹⁰⁵ The *juge d'instruction* is a judge given the responsibility for

¹⁰² Schwikkard, Skeen & Van der Merwe. (1997). *Principles of Evidence*, 1st ED. Cape Town: Juta & Co, Ltd, p.9.

¹⁰³ Cosman RW & Godfrey FC. (1991). "Trial and Court Procedures in Canada." Plato, C. (Ed). *Trial and Court Procedures Worldwide*. London: International Bar Association, p.213-227.

¹⁰⁴ *ibid*.

¹⁰⁵ The investigating magistrate.

conducting investigations into serious crimes or complicated inquiries. The *juge d'instruction* is independent from the political power as well as the prosecution and such a figure could prove useful in the English system, which has recently been criticised for allowing miscarriages of justice such as that experienced by the so-called Guilford Four who were released after fifteen years of imprisonment in 1989 due to concerns over the integrity of the original police investigation. An inquisitorial *juge d'instruction* could offer a useful check and balance in the process of investigation and case building which prevent prenable or dubious prosecutions being attempted.

Thus, perhaps if some of the aspects of the inquisitorial system could be introduced into our mainly adversarial system, the criminal justice system might function more effectively. For example, the more investigative role of the prosecutor in the inquisitorial system could be introduced in our adversarial / accusatorial system. However only limiting it to an investigative prosecutor and not the adjudicator, who should still remain as neutral as possible, to ensure that our system still keeps its predominantly adversarial approach. This is so because it is clear that changing the system from an adversarial one to an inquisitorial system will not automatically rectify the problems of our criminal justice system.

The inquisitorial model is judge-centred, and it proceeds from the premise that a trial is not a contest between two opposing parties but essentially an inquiry to establish the material truth.¹⁰⁶ It is generally said that the objective of the inquisitorial system is to discover the truth.

Furthermore, in an inquisitorial system, the lawyer is – for example according to the German code of legal ethics – ‘an independent organ in the administration of justice.’ Therefore, it appears that the adversarial lawyer’s concern is for his or her client; while the inquisitorial attorney’s, for justice. The inquisitorial systems, however, have largely eliminated any financial inducement to vigorous advocacy.

¹⁰⁶ Tarr, GA. (2006). *Judicial Process and Judicial Policymaking*, 4th Ed. USA: Thompson Wadsworth, p 139.

In Germany, for example, the legal fees for various types of cases are established by law. Whether one loses or wins, one receives the same fee, no matter how many hours have been devoted to case preparation. It is my contention that a similar approach as that of Germany, to the duties of lawyers in Namibia could do the criminal justice system a whole lot of justice.

Thus, perhaps the adversarial model is not completely to blame for the sentences imposed on convicts which seem to be disproportional to the crime and thus creating a perception of injustice to the victims, their families and society at large. But its mode of operation as explained above seem to contribute to some negative aspects (in terms of justice) of the Justice System such as by the attitudes it creates amongst the relevant role players such as lawyers (i.e. aiming to win the case at all cost)¹⁰⁷. It would be improve the justice system if some of the methods and practices discussed above were introduced in Namibia with the aim of promoting justice particularly in the judicial system.

¹⁰⁷ This view cannot be said to be applicable to all the adversarial system lawyers, this is just a general view from authors referenced above and supported in this paper.

CHAPTER FOUR

CONCLUSIONS

The Namibian criminal justice system is in disrepute¹⁰⁸, Nakuta, J. & Cloete, V. specifically state that the Namibian criminal justice system is underperforming¹⁰⁹. The nation seems to be, if it has not already happened, losing any esteem they might have had in the system. Convicted criminals, particularly for the crimes of rape and murder as cited in this paper, seem to get very light sentences for the actions, the sentences / punishment does not at all appear to be proportional to the crime committed.¹¹⁰

This in-proportionality of sentences for serious crimes gives the perception that justice is not the primary or even at all the concern of our courts during sentencing and that the interests of the society are not taken into consideration. Almost on a daily basis, the national newspapers are filled with complaints and comments of displeasure at aspects of the criminal justice system, yet the relevant stakeholders, such as perhaps the Minister and Ministry of Justice seem to have turned a blind eye to the cries of the community.

This paper examined the concept of justice, the theory and postulates thereof. Clearly, from all the literature, it was illustrated that it's not easy to define the term 'justice' and that there were different types, e.g. retributive justice, restorative justice, distributive justice etc. There are also different categories such as formal justice and legal justice. The several postulates of justice are as follows; reasonableness, generality, equality, certainty and fair process. This means that laws must be reasonable in the application, they must be certain and able to apply generally to

¹⁰⁸ The Namibian newspaper headlines (some of them) in Annexure A seem to indicate that much: Figure 4, 5 and 10 to be specific.

¹⁰⁹ Nakuta, J. & Cloete, V. (year). *The Justice Sector and the Rule of Law in Namibia*. Windhoek: Namibia Institute for Democracy, p 2.

¹¹⁰ E.g. *S v Johannes Alex Roos and Immanuel Claasen* (supra).

everyone which entails the element of equality and all this must be done in a fair process. This paper specifically relies on reasonableness and generality as the postulates of justice that courts should seek to adhere to in the process of sentencing. A reasonable sentence is a sentence which is proportional to the crime committed. The same sentence for the theft of live stock and the murder of another human being, is unreasonable.

The Courts have been inconsistent in the application of their discretion in sentencing offenders¹¹¹, this is quite unreasonable and this clearly affects more than one of the postulates of justice such as certainty and reasonableness. And it can even be said that the whole process becomes unfair. Consistency and treating like cases alike is one of the ways to ensure justice in our land, yet there are like cases which are treated differently and this is part of what brings our criminal justice system into disrepute.¹¹²

One rationale for the punishment of crime is deterrence, in other words, people who get convicted of crimes are punished in order to deter the rest of the community from doing the same / committing the same crime. It can therefore be argued that since crime rates have been steadily increasing, that the rationale for punishment is not sufficiently taken into consideration during the process of sentencing by adjudicators with the purpose of deterring others from committing the same crime.

As mentioned previously, the 'triad' of sentencing considerations are said to be: the personal circumstances of the accused, the crime and the interests of society.¹¹³ However, from analysis of cases in this paper, it seems there is no proper balance between these three considerations; it appears that the personal circumstances of the accused weigh much more than the other two considerations. This imbalance creates a perception of miscarriage of justice when a sentence is finally given. In order to ensure justice in Namibia, it is not enough that perpetrators of crime are

¹¹¹ Illustrated in the rape cases discussed in this paper.

¹¹² Annexure A: The Namibian newspaper headlines indicate the disrepute of the system amongst the public.

¹¹³ Hassan, L. (2011). "Sentences under the Combating of Rape Act, 2000: The Misapplication of Judicial discretion." *Namibia Law Journal*, Volume 03 (Issue 01): p 29.

convicted but that the punishment they receive should fit the crime. If adjudicators can ensure that the 'triad' of sentencing considerations are sufficiently balanced in their *ratio decidendi*, that would in turn result in a more justifiable sentence and justice might seem to be done.

There is no quick-fix to aid the criminal justice system but rather that steps should be taken by the different relevant stakeholders towards improving the criminal justice system in their respective departments. As suggested before in this paper, one possible manner in which to improve the system is by making the role of the prosecutor more investigative as it is in the inquisitorial system of justice.

A more investigative prosecutor will ensure that sufficient investigations are carried out in order to avoid losing cases due to lack of evidence and to increase the conviction rates in Namibia. Incorporating such aspects of the inquisitorial system into our predominantly adversarial system of justice could improve the current state of affairs of our criminal justice system and improve it.

RECOMMENDATIONS

In any problem, issue, conflict or what-so-ever, recommendations and suggestions are always easy to make or give. However, implementation of those suggestions and / or recommendations is not easy. Therefore, it is this paper's contention that the wrongs and ineffectiveness of the criminal justice system can only be redressed if each and every member of the legal fraternity concerns themselves with improving the system and if all the relevant stakeholders work together with one common goal.

The criminal justice system consists of so many role players who all have to work together to address the issues. But working as a team proves difficult in most instances, which would explain the general lack of interest in improving the system.

The only realistic recommendation that could be made here is that lawyers / advocates, prosecutors, judicial officers, police officers, legislators, the ombudsman and any other stake holder in the matter should make the promotion of justice their primary concern and especially in criminal matters in sentencing and ensuring effective sentences that are proportional to the crime committed.

This would include a closer working relationship between prosecutors and investigators officers to ensure thorough investigations and sufficient legally obtained evidence. Furthermore, judicial officers could assume a more inquisitive role during the trial and ensure that all relevant factors are considered in the process of sentences to ensure that justice will be seen to be done. In so doing, judicial officers ensure that the sentence is proportional to the crime and thus reasonable above all else.

The ombudsman could further also research, publicise and advocate victims' rights in the Namibian context. Finally, legislators should also take into consideration the interests and opinions of the Namibian society before promulgating statutes.

Life imprisonment being taken more seriously and the 'three strikes and you are out policy' as discussed above, are some of the suggestions in this paper that have a great potential of improving our Criminal Justice System.

More emphasis should be put on ensuring justice because lawyers and all other types of legal officers deal with individuals and their personal lives, human rights and general freedom everyday and it is only through these individual cases that the scales being held by lady justice can be balanced again.

Sentences proportional to the crime committed would also mean that imprisonment should not necessarily be the only form of sentence available. Punishment such as community service should also be implemented in the justice system for certain particular crimes and finally a system to ensure consistency in sentencing would also be recommendable in this regard.

ANNEXURE A

(All the headlines below are from The Namibian Newspaper)



FIGURE 1: 02.08.2010

Thousands march for Magdalena

By: JANA-MARI SMITH

THOUSANDS of schoolchildren marched in solidarity on Friday to protest the brutal rape and murder of Magdalena Stoffels.

FIGURE 2: 08.09.2008

Gender groups outraged over woman's stoning death by ex-lover

By: STAFF REPORTER

THE stoning of a woman in Katutura last week, apparently at the hands of an ex-boyfriend, has led to widespread condemnation from civil society and members of the public.

FIGURE 3: 26.03.2004

Outrage From Khorixas

I AM a resident of Khorixas. What happened recently concerning the rape of the two-year-old baby girl was shocking.

FIGURE 4: 04.03.2011

Horrific Rape Cases Continue Unabated

AGAIN in the past week the media have been peppered with reports of rape and gang-rape cases, women as well as young girls and boys.

FIGURE 5: 26.01.2005

Rehoboth residents outraged by woman's gruesome murder

By: CHRISTOF MALETSKY at REHOBOTH

ANGRY Rehoboth residents marched through the town's streets yesterday, demanding stiffer sentences for murderers and rapists after a young mother was hacked to death with a rake by an angry boyfriend.

FIGURE 6: 29.10.2010

Outrage at toddler's murder

By: LUQMAN CLOETE

POLICE and Namibian Defence Force members at Keetmanshoop launched a manhunt yesterday morning for a suspect who had murdered – and presumably raped – a four-year-old girl.

FIGURE 7: 05.12.2006

Man shoots son with arrow, Outapi man arrested for rape

By: STAFF REPORTER

A 13-year-old boy from a farm in the Omusati Region was nearly killed on Thursday when his father's anger over a missing garden tool allegedly led to his being shot with a bow and arrow.

FIGURE 8: 05.08.2009

Suspect admits rape, murder of Gobabis teen

By: WERNER MENGES

MURDER: Guilty Rape: Guilty. Abduction: Guilty. With these pleas from unemployed Gobabis resident Stanley Ganeb, the trial on the alleged abduction, rape and murder of a 16-year-old girl at the Omaheke Region town a little over two years ago started in the High Court in Windhoek yesterday.

FIGURE 9: 07.08.2009

Killer says anger prompted Gobabis rape and murder

By: WERNER MENGES

“I WAS caught by anger and I couldn’t control myself.” This was the only explanation Gobabis resident Stanley Ganeb could offer when Judge Sylvester Mainga asked him yesterday why he committed “such horrendous crimes” – rape, murder and abduction – at the Omaheke Region town a little over two years ago.

FIGURE 10: 04.11.2005

Editorial: Horrifying Rapes On The Increase

THE abuse of women and children continues to escalate in Namibia, and ways must be found to stem this tide of violence. Condemnatory statements are made from time to time by various leaders and civil society groups, but still we fail to make a difference in the lives of our most vulnerable.

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