

**THE ROLE OF DETERRENCE AND RETRIBUTION IN SENTENCING  
IN SOUTH AFRICAN COURTS**

by

**DAVID NTSHANGASE**

submitted in part fulfilment of the requirements for  
the degree of

**MASTER OF LAWS**

at the

**UNIVERSITY OF SOUTH AFRICA**

**SUPERVISOR: PROF S S TERBLANCHE**

**NOVEMBER 1996**

## SUMMARY

### **The role of Deterrence and Retribution in sentencing in South African Courts**

Since the early history of the existence of humanity punishment has been meted out to transgressors of the laws of society. Informal sanctions, including ostracism are imposed by members of society for social transgressions. Formal punishment is imposed by courts through a system of criminal justice.

This dissertation deals with the concept of punishment. It considers the significance of the theories of punishment in the sentencing process with particular reference to deterrence and retribution, the philosophical rationale for their use and thus their role in sentencing.

In this study the historical evolution of retribution is traced and the recognition accorded particularly to retribution and deterrence as well as reformation and prevention as penal objectives at various periods in history is examined.

Case law has been cited to determine their recognition by judicial practice in criminal courts.

The study also reflects on the criminal justice system's clients' perceptions on sentencing.

#### **KEY TERMS**

Punishment; theories of punishment;  
deterrence; retribution; penal objectives;  
sentencing; relative theory; utilitarian theory;  
criminal courts; justice

**DECLARATION**

Student Number 228-574-6

I declare that this short dissertation entitled "THE ROLE OF DETERRENCE AND RETRIBUTION IN SENTENCING IN SOUTH AFRICAN COURTS" is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.



SIGNATURE

27 NOVEMBER 1996

### **ACKNOWLEDGEMENTS**

I am grateful to many people who contributed at various stages in various ways towards the production of this work. My appreciation specially goes to **Professor S.S. Terblanche**, my supportive supervisor and to the **library staff of the University of South Africa** for their efficient responses to my needs.

## CONTENTS

	<u>PAGE</u>
Summary	(i)
Key terms	(ii)
Declaration	(iii)
Acknowledgements	(iv)
Table of figures	(vii)
1	GENERAL ORIENTATION
1.1	Introduction
1.2	Statement of problem
1.3	Content, direction of research
1.4	Research Methods used
1.4.1	Literature survey
1.4.2	Case law
1.4.3	Interviews with semi-urbanised members of a community
2.	CONCEPT OF PUNISHMENT
2.1	Definition
2.1.1	Punishment must be unpleasant for the person undergoing it
2.1.2	Punishment must be imposed for an offence
2.1.3	Punishment must be imposed on an offender
2.1.3.1	Deterministic view of criminal responsibility
2.1.3.2	Indeterministic view of criminal responsibility
2.1.4	Punishment is inflicted by authorised human agencies
2.1.5	Punishment is imposed for a specific purpose
2.2	Historical perspective

2.2.1	The Primitive Period	11
2.2.2	Classical School	11
2.2.3	Neo-classical school	12
2.2.4	Positivist School	13
3.	OBJECTIVES AND JUSTIFICATION OF PUNISHMENT	15
3.1	General review	15
3.1.1	Retribution - <i>Harsh punishment</i>	16
3.1.1.1	Retribution and just deserts	22
3.1.1.2	Retribution and vengeance	23
3.1.1.3	Retribution as an opportunity for expiation and remorse	25
3.1.1.4	Retribution and social solidarity	26
3.1.1.5	Retribution and causality	26
3.1.1.6	Retribution through the cases	27
3.1.2	The Relative theories	29
3.1.2.1	Deterrence	30
3.1.2.2	Individual deterrence	30
3.1.2.3	General deterrence	31
3.1.2.4	Deterrence in case law	35
3.1.3	The Preventive theory of punishment	37
3.1.4	Reformation theory of punishment	37
4	COMMUNITY PERCEPTIONS AND ATTITUDES ON PUNISHMENT	39
4.1	The perceived erosion of deterrence	39
4.2	A deficiency of the retributive element in sentencing	39
5	CONCLUSION	44
5.1	Findings	44
5.2	Recommendations	50
	List of sources	53

TABLE OF FIGURES

<b>FIGURE NO.</b>	<b>PAGE NO.</b>
4.1 Jubilation at death sentence upon Captain Brian Mitchell	42
4.2 View points - the page that tells you what people are thinking	43

## CHAPTER 1

### 1. GENERAL

#### 1.1 Introduction

The campaign for the abolition of the death penalty has, over the past few years, raged furiously. The efficacy of deterrent measures and the propriety of retribution in sentencing were called to question by various persons including some eminent jurists. With regard to deterrence for example Didcott J M.<sup>1</sup> observed that "(i)t postulates someone contemplating the deed, and simultaneously weighing his consequences in a rational manner. That to my mind is unrealistic." On retribution he observed : "This is unfashionable nowadays as a proclaimed goal. It tends to be equated with vengeance, and then to be viewed as barbarious, cruel and altogether offensive to civilised standards." In this he echoed a general perception shared by a number of other persons and jurists.<sup>2</sup>

Johanson<sup>3</sup> observed that "(q)uite apart from many warnings against vengeance and revenge in the New Testament, the concept of retribution for a crime calls into question the fundamental meaning of the cross of Christ..." As to deterrence he observed : "The deterrent value of capital punishment has been minutely examined and the findings are almost uniformly negative..." It appears to be a serious indictment to the efficacy of deterrence if the ultimate in punishment is said not to deter.

It is this that has deposited a desire to examine the role of deterrence and retribution in sentencing in South African courts. This work therefore essentially confines itself to the practice

---

1 "Criminal justice and penology" (1980) SACC 296

2 Kahn E "The death penalty in South Africa" (1970) 33 *THRHR* 108 at 125; Van Niekerk B "Hanged by your neck until you are dead" (1970) *SALJ* 60 at 67

3 "Capital punishment" (1971) 34 *THRHR* 350 at 358

in the criminal courts. It is essential to examine what these courts aim to achieve if they relate retribution and deterrence to their determination of sentences.

## 1.2 Statement of problem

The acceptability of the courts to the communities they serve depends, to a large measure, on their perceived effectiveness in the protection of society against crime as epitomised in their response thereto. Surveys by various instances in South Africa confirm what is common knowledge, the escalation of crime. A recent survey published in Finance Week<sup>4</sup> compares the crime rate from January 1 to 31 October 1994 with that of the same period in 1990 and reflects the following percentage increases in the various crimes:-

Armed robbery (up)	16%
Fraud	11%
Malicious damage to property	7%
Serious crime	8%
General crime	5%
Vehicle theft	36%
Hijackings - cars	38%
Hijackings - trucks	44%
Child abuse	35%

The survey observes that South Africa has an annual murder rate of 53.5 per 100 000 people compared to an international average of 5 per 100 000.

The courts have not escaped blame from certain sectors of the community who perceive the courts as failing to despatch the right messages to the crime world. In their sentencing response to crime there is perceived an erosion of the considerations of deterrence and retribution.

---

4 "National Party National Anti-crime strategy crime pays" October 26 November 1 1995 at 10.

### **1.3 Content, direction of research**

As the title indicates, this work seeks to examine the significance of the theories of deterrence and retribution, to examine the philosophical rationale for their use and thus their role in sentencing and, by way of case law study to determine their recognition by judicial practice in the criminal courts, hopefully to confirm my hypothesis that in the South African courts deterrence and retribution constitute pillar considerations in sentencing. It also seeks to reflect briefly on the general perceptions prevailing in certain sectors of the community - the clients of the service - with regard to these objectives in so far as they interpret the sentences imposed by the courts.

### **1.4 RESEARCH METHODS USED**

The research focused on the criminal justice system. The research methods involved literature survey, interviews with people from a semi-urbanised community and a case law study.

#### **1.4.1 Literature survey**

A study of published sources reflecting philosophical submissions touching on the topic of this work was undertaken. Foreign literature as well as South African sources were studied.

#### **1.4.2 Case law**

In South Africa a vast source of case law has developed in the sphere of criminal law dealing with the aspect of punishment. It was examined with particular reference to the principles of deterrence and retribution, the purpose being to determine the attitude of these courts on the principles. For purposes of this work it is primarily the decisions of the Supreme Court that have been consulted as it is the Supreme Court which has, from time immemorial, set precedents binding on inferior courts, particularly those of magistrates, through its decisions on punishment. The courts of traditional leaders, the Chiefs,

headmen and Chiefs' deputies upon which criminal jurisdiction was conferred in terms of section 20 of the Black Administration Act No.38 of 1927 have also received some attention in this study.

#### 1.4.3 Interviews with semi-urbanised members of a community

Since this study focused on items of major importance to the clients of the criminal justice system, the community, their perceptions were considered as important to survey.

The method of the interviews was informal and not structured. It was considered that a structured interview format would not have been flexible enough to capture the unexpected and to allow opinions and perspectives to flow freely and to allow for issues outside the pre-planned agenda for discussion.

An opportunity was obtained by taking advantage of a large gathering which had just concluded its business at one of its bi-monthly regional authority meetings held at Nongoma, a semi-urbanised district in KwaZulu-Natal. The gathering comprised traditional leaders, educated and professional persons, a number of whom were well known to me, who represent various interests in the community at such meetings, as well as persons from the rural expanse of that district. Short informal interviews with specific persons were also held.

## CHAPTER 2

### CONCEPT OF PUNISHMENT

#### 2.1 Definition

The role of retribution and deterrence resides in punishment. It behoves this work to discuss the concept of punishment.

Punishment may be defined from a legal, moral, religious and pedagogical perspective. Its potential exists in all situations in which an authority and subordinate relationship exists.<sup>5</sup> This work confines itself to the legal definition as that definition relates relevantly to a discussion involving the criminal justice system.

Punishment is the authoritative infliction of suffering for an offence.<sup>6</sup> Van der Merwe<sup>7</sup> aligns himself with the definition which conveys that sentencing is a public quantification of the individual offender's blameworthiness, determined according to acceptable standards of proportionality.

Primoratz<sup>8</sup> defines punishment as "an evil deliberately inflicted *qua* evil on an offender by a human agency which is authorised by the legal order whose laws the offender had violated". He explains that by offender he means a person who has offended against any positive criminal law, no matter whether that law is just or unjust, whether it is an expression of a condition of universal freedom or of a tyrant's arbitrary will, whether it is morally legitimate or not.<sup>9</sup>

---

5 Van der Merwe DP *Sentencing* (1991) at 3-8

6 Burchell *et al South African Criminal Law and Procedure I; General Principles of Criminal Law* (1983) at 66-67

7 Van der Merwe *op cit* note 5 at 3-23

8 *Justifying legal punishment* (1989) at 1

9 Primoratz *op cit* note 8 at 3

Gammage and Hemphill<sup>10</sup> view punishment as a restrictive measure imposed by the courts for breach of legal observance. It is sanctioned by the criminal law.

Flew A<sup>11</sup> views all punishment, be it formal (as enforced by the judicial system) and informal (as enforced by the church, the school, etc for example), as having the characteristics of (1) "evil" and unpleasantness to the person undergoing it; (2) it must be for an offence; (3) it must be for an offender (4) it must be by authorised human agencies and (5) it must be imposed by virtue of some special authority conferred through or by the institution against whose laws or rules the offence has been committed. To effect a penological definition Flew's elements have been adapted by addition of the element that punishment is imposed and implemented with a specific purpose.<sup>12</sup>

#### 2.1.1 Punishment must be unpleasant for the person undergoing it

Flew<sup>13</sup> particularly used the word "evil" in discussing this element. This excluded reference to pain as would be experienced in corporal punishment or physical suffering. Taking issue with the use of "evil" and "unpleasant" JD Mabott<sup>14</sup> points out that modern penology has very few punishments that involve physical or mental suffering. Modern day punishment is characterised by the withholding of something good. Imprisonment deprives the offender of his liberty and the fines, of his possessions. "Evil" does not restrict punishment to any particular form.

---

10 *Basic Criminal law* (1979) at 46-47

11 "Justification of punishment" in Acton *The Philosophy of punishment* (1969) London MacMillan at 85-87

12 Nesor JJ "'n teoreties-prinsipieële studie van sekere aspekte van die straf en behandeling van die oortreder van uit 'n penologiese perspektief" (1980) D Phil. Thesis University of South Africa Pretoria at 63

13 *op cit* note 11 at 85

14 "Professor Flew on punishment" Acton *supra* note 11 at 117

### 2.1.2 Punishment must be imposed for an offence

Punishment must be perceived as a manifestation of the society's value system. Society will institute penalties and punishments reflecting its value in respect of any particular action of which it disapproves. Some of the values are so highly regarded by society that they are enshrined in the laws of the country. The offence referred to here is one against the laws and not a "sin".<sup>15</sup> Punishment cannot be imposed if the person has been found not guilty as punishment is destined for infliction only on those who are guilty of an offence.<sup>16</sup>

### 2.1.3 Punishment must be imposed on an offender

Punishment can properly only be inflicted on the responsible offender, only on one who can be held responsible for the commission of the offence. Baier<sup>17</sup> states that the offender must be accountable, answerable and culpable. The element of accountability envisages the kind of person who can be held responsible. This excludes young children under the age of 7 years and the insane.

'Responsibility' here envisages "...first the ability (of a person) to appreciate the wrongfulness of his conduct and, secondly the ability to conduct himself in accordance with such an appreciation of the wrongfulness of his conduct".<sup>18</sup> A person is culpable if he cannot give reasons why he should not be answerable for his actions or if in the eyes of the law he may be blamed for his unlawful conduct.<sup>19</sup>

---

15 Mabott in Acton *op cit* note 14 at 118

16 Baier "Is punishment retributive" Acton *op cit* note 11 at 132

17 *op cit* note 11 at 131

18 Snyman *Criminal Law* (1995) 3rd edition Durban Butterworths at 146

19 Snyman *op cit* note 18 at 149

The debate on man's responsibility for his conduct revolves around two views, namely the deterministic and the indeterministic.

#### 2.1.3.1 **Deterministic view of criminal responsibility**

The doctrine of determinism can be defined as conveying that for every event in the universe, there is a set of conditions such that if the conditions were repeated, the event should be repeated. Hospers also submits that everything that happens has a cause.<sup>20</sup>

The strictly deterministic view holds that an individual can never choose what he wishes to do because what he does is predestined. He can therefore not be held responsible as he could not have acted differently and should be absolved from criminal liability for his behaviour as he would have no control over his actions.

There is however an argument that an offender's behaviour is detrimental to society and is a threat to its welfare. This confers a right and casts a duty upon society to take steps to counteract the threat on that basis.

The offender is held to be accountable for his conduct and is made answerable for his behaviour. Punishment is then justified as social defence.

Although the determinists reject freedom of choice, the principle of causation holds that the consequences of one's behaviour cannot be avoided. He must accept responsibility for his behaviour and its consequences. Punishment is imposed as an

---

20 *Hospers Readings in introductory philosophical analysis* (1969) London Routledge & Kegan Paul at 502

unpleasant result of crime. Positive conduct attracts pleasant results.<sup>21</sup>

The determinists concede that every individual does have a sense of responsibility, but they regard it as a product of genetic inheritance influenced by the environment in which it occurs. The criminal is accountable because he has in him the forces that cause him to be a criminal and not because he has freely chosen to be a criminal.<sup>22</sup>

#### **2.1.3.2 Indeterministic view of criminal responsibility**

The individual has freedom of choice of action. The offender therefore should be held responsible because he has insight into his behaviour, has fore knowledge of consequences of his behaviour and appreciates that his criminal action is wrong and is in a position to act in terms of this appreciation except in cases where his reasoning powers are limited or influenced in which case his responsibility will accord with the degree of curtailment of freedom of choice of action. The indeterminists hold that circumstances cannot give rise to criminal behaviour as the individual has the ability to rise above the influence of circumstances.<sup>23</sup>

#### **2.1.4 Punishment is inflicted by authorised human agencies**

For the infliction of suffering upon an offender to be regarded as punishment, the suffering must be inflicted by a human agency. Punishment is distinguishable from penalties. "Evils occurring to people as the result of misbehaviour, but not by human agency, may be called penalties but not punishments; thus unwanted

---

21 Hospers *op cit* note 20 at 107-108

22 Caldwell *Criminology* (1965) 2nd edition New York Ronald Press at 428

23 Van der Merwe *op cit* note 5 at 1-2F

children and venereal disease may be the penalties of, but not the punishment for sexual promiscuity".<sup>24</sup>

A further distinction relates to punishment for a moral transgression, a distinction which Mabott supports by reference to the fact that in punishment two parties are involved. "For a moral offence, God alone has the status necessary to punish the offender".<sup>25</sup> Any rule-making authority or its agents is competent to impose punishment.<sup>26</sup> The position in South Africa is that the rules that are drawn up by the State as well as those which constitute the common law are enforced by it and where they are infringed it sees to the apprehension of offenders. Punishment is inflicted by the State because it is its laws that have been violated. It is inflicted through the courts.

#### 2.1.5 Punishment is imposed for a specific purpose

Punishment must be implemented in such a manner that its purpose is achieved. In this regard the objectives of punishment will influence the nature of the punishment so that the appropriate sentence is imposed.<sup>27</sup> Retribution, deterrence, rehabilitation and protection of the community are the objectives referred to here.

---

24 Hospers *Human conduct : an introduction to the problems of ethics* (1963) London Hart Davis at 394

25 Mabott in Acton *op cit* note 11 at 41

26 Mabott in Acton *op cit* note 11 at 119

27 Du Toit *Straf in Suid-Afrika* (1981) Cape Town Juta & Co. at 100

## 2.2 Historical perspective

### 2.2.1 The primitive period

Primitive communities maintained, observed and enforced clearly defined customary rules of conduct.<sup>28</sup> Their breaches were visited by sanctions which included brutal extermination of the offender. During this period there was no acknowledgement that the punishment should be commensurate with the crime committed.

In this period communities existed as units related in blood. They regarded it as a religious duty to avenge wrongs to their members. Responsibility was collective. Vengeance was brought upon the whole group to which an offender belonged and not upon the offender only.<sup>29</sup>

Atonement was a major penal consideration.<sup>30</sup> It was an atonement to the gods, to protect the community against evil influences unleashed by the crime.

### 2.2.2 Classical School

During the middle ages the state gradually gained control over the administration of punishment which, at that primitive era, was characterised by blood vengeance. However under the influence of religious dogmatism and feudal tyranny the judges imposed extremely cruel punishments which bore no relation to the seriousness of the crime. The punishment was only designed to deter. Justice suffered a sharp decline. Trials merely served to extract confessions through torture, which was admissible.<sup>31</sup>

---

28 Barnes *The story of punishment : a record of man's inhumanity to man* (1972) 2nd edition revised Montclair NJ Patterson Smith at 38

29 Van der Merwe *op cit* note 5 at 2-2

30 Kahn "Crime and punishment" (1960) 1910-1960 *Acta juridica* at 191

31 Van der Merwe *op cit* note 5 at 2-2

Beccaria in Italy, and his contemporary, Bentham in England were among the most distinguished classical theorists who rebelled against this corrupt system of law. The main consideration during this era was deterrence.

The underlying philosophy was that the human will was free and could be influenced by fear - especially fear of pain.

Punishment was acceptable as the principal method of creating fear necessary to influence the will and thus to control the behaviour.<sup>32</sup>

Beccaria advocated a practice of punishment whose severity was commensurate with the seriousness of the offence.<sup>33</sup> So did Bentham.<sup>34</sup> Beccaria also argued that the purpose of punishment was the prevention of crime and not revenge, and, as to the degree of punishment, he emphasised that certainty, expedition and not severity were best to ensure deterrence.<sup>35</sup>

The classical school's propagation of deterrence as an objective of punishment and their particularisation of free will and choice have survived to constitute a basis for modern day theories of punishment.

### 2.2.3 Neo-classical School

In the 19th century, in the era of this school, the penal objectives remained the same as they were in the classical period. The developments of this school are recorded as

---

32 Van der Merwe *op cit* note 5 at 2-7

33 *Ibid*

34 Reid *Crime and Criminology* (1991) 6th edition Fort Worth : Holt Rinehart & Wintson at 92

35 Barnes *op cit* note 28 at 98

consisting of modifications to the idea of free will which resulted in it losing some ground in the realisation that an offender might, in certain circumstances not be fully responsible for his actions. The state of mind of the offender was taken into account.<sup>36</sup> Children under the age of 7 years of age would be exempt from criminal liability. Mental disease as a cause for impairment of responsibility was recognised.<sup>37</sup>

#### 2.2.4 Positivist School

Cesare Lombroso may be regarded as the first prime exponent of this school. This period experienced a shift of emphasis from the crime to the criminal and a determinist approach which viewed crime as the product of purely natural factors that left no room for free will. More attention was paid to the crime-provoking factors.<sup>38</sup>

The deterministic approach of social scientists tended to perceive the offender as a helpless victim of society with society as the villain who should actually feel guilty for causing the crime.

Sentencing patterns were influenced. With the advent of the positivist school of criminology, which emphasised rehabilitation rather than retribution, "...the judge was to be concerned not only with the crime... but with the treatment of the criminal as well...."<sup>39</sup> The positivist school therefore, virtually laid the foundations for further development of the philosophy of rehabilitation which, in modern sentencing practices has been an important factor. One of the chief results of the work of the positivists was that the offender was seen as an individual.

---

36 Van der Merwe *op cit* note at 2-8

37 Reid *op cit* note 34 at 93

38 Van der Merwe *op cit* note 5 at 2-9

39 Duffee & Fitch *An introduction to corrections : a policy and systems approach* (1976) California Goodyear at 70-71

The position of rehabilitation as a penal objective will be alluded to in the discussion of penal objectives in the present century.

## CHAPTER 3

### OBJECTIVES AND JUSTIFICATION OF PUNISHMENT

#### 3.1 General review

When a person is brought before court accused of having committed a crime, when the prosecution, the defence and the court engage in a process to determine whether he is guilty of the alleged crime or not, the ultimate object is the punishment of the accused if he is convicted of the crime.

It is essential to address the question as to why the state punishes people, particularly in the light of doubts by some people as to the propriety thereof. Various reasons are advanced for the expressed doubts, one being that the state itself directly or indirectly creates the climate for criminality. The aspect of punishment has evolved from the primitive era, through the phases which took into account the needs of society as a priority, particularly in terms of protection as well as the needs of the offender as an individual, in terms of reformation. The classical, neo-classical and positivist eras all contributed to the fashioning of the modern philosophy of punishment.

In the assessment of an appropriate sentence the courts also pay regard to what was referred to by Davis AJA as the main purposes of punishment in *R v Swanepoel*<sup>40</sup> to be deterrence, prevention, reformation and retribution.

These are generally referred to as the theories of punishment. They are classified and distinguished as the absolute theory, the relative theory and the unitary theory. The relative theories are further classified into the preventive, reformatory and deterrent theories. The latter is subdivided into general and individual deterrence. The retributive theory is the only

---

40 1945 AD 444 at 455

absolute theory.<sup>41</sup> This work will focus primarily on the role of retribution and deterrence in sentencing.

In *S v Khumalo*<sup>42</sup> the court expressed the main principle of sentencing thus : "Punishment must fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to circumstances."

The "main purposes" of punishment referred to above are in practice considered alongside the principle enunciated in *S v Khumalo supra*. In this respect in considering the criminal the court may, in the light of his personal and other circumstances pass a sentence to effect individual deterrence or one that is conducive to reformation. Reformation is of course considered by the courts mainly in the context of the interests of society, namely its protection. The interests of society are also served by imposition of sentences of general deterrent, preventive or retributive nature.

### 3.1.1 Retribution

The desire to revenge, the belief that retributive punishment is just, is to a very considerable degree entrenched in the general population.<sup>43</sup>

The earliest examples of sentencing focussed on the goal of retribution. Blood vengeance characterised the reaction to crime by primitive tribes. In its historical primitive form retribution is rooted in the right of requittal in terms whereof an individual could avenge himself or a member of his family by punishing the transgressor in like manner.<sup>44</sup> The Biblical

---

41 Snyman *op cit* note 18 at 18

42 1973(3) SA 697 (A) at 698

43 Rabie and Strauss *Punishment an introduction to principles* (1985) 4th edition Lex Patria at 47

44 Kahn "Symposium on capital punishment" 1975 *Acta juridica* 220-244 at 225

prescription that "...if there is serious injury you are to take life for a life..., eye for eye, tooth for tooth, burn for burn, wound for wound, bruise for bruise prevailed.<sup>45</sup> The reaction of society towards the offender was determined exclusively by a concern for the victim and the community. Some people grieve today that the law appears to be exclusively concerned with the rights of the offender.

The principle of inflicting suffering for its own sake was predominant.

It was only after the rise of the state in the 13th century that the state intervened and gradually assumed control of the administration of punishment that retribution emerged as what was regarded as an aim of punishment. Crime then began to be recognised as a violation of the authority of the state and as a challenge to law and order.<sup>46</sup>

Retribution enjoys prominent recognition in domestic and foreign jurisdictions. With reference to the latter, in *Harris v Alabama*,<sup>47</sup> it was acknowledged as a proper and prominent goal of sentencing. It is the case with various other jurisdictions. It has been hailed as one of the oldest and most universal motives of punishment.

Tappan<sup>48</sup> comments that through the history of civilisation it appears to have been the most prevalent and continuously persistent correctional motive.

---

<sup>45</sup> Holy Bible (1991) New International version International Bible Society Colorado Exodus 21 : 23-25

<sup>46</sup> Van der Merwe *op cit* note 5 at 2-2

<sup>47</sup> 352 So. 2d 479 (Ala.1977)

<sup>48</sup> *Crime, justice and correction* (1960) New York Mc Graw-Hill at 241

Although retribution has, in this work been lumped together with deterrence, reformation and prevention where objectives of punishment are discussed, it cannot properly be referred to as an objective. In an illuminating discussion of the nature of retribution, Terblanche<sup>49</sup> highlights the similarity of the characteristics of retribution with those of "behoorlike, konsekwente, regverdige vonnis-oplegging," and he points out that the "...ooreenstemming in kenmerke dui op so 'n sterk verband tussen vergelding en straftoemeting dat dit die argument dat vergelding en straftoemeting eintlik maar dieselfde ding is, kragtig ondersteun." He points out to "...die sinloosheid daarvan om vergelding as 'n doelwit van straf te beskryf - dit beteken dat vergelding 'n doelwit van sigself is." He points out : "Iets wat terugskouend is, word baie moeilik ook 'n doelwit of 'n oogmerk wat noodwendig vooruitskouend moet wees." Unlike the relative theories which look to the future, retribution is of a retrospective nature. This view is well taken. To the extent for instance that retribution serves to prevent that members of the community take the law into their own hands it has an objective; it is not itself the objective. It is a justified response to the commission of a crime. "Geschiedkundig beskou, het vergelding die rol van weerwraak oorgeneem hoofsaaklik as regverdiging vir die staat om te mag straf."<sup>50</sup>

Reflecting on the importance of retribution in punishment Ferreira<sup>51</sup> observes: "Trouens die wese van straf kan nie verduidelik word sonder verwysing na vergelding nie."

Rabie and Strauss<sup>52</sup> also observe that "it would appear that the criminal law cannot exist without this theory.... After all, the

---

49 "Die oogmerk van vergelding uit die oogpunt van die konstitusionele hof" 1996 (59) *THRHR* 267-276 at 272

50 *op cit* note 49 at 274

51 *Strafprosesreg in die laer hof* (1979) 2nd edition Johannesburg Juta & Co at 621

52 *op cit* note 43 at 42

essence of punishment cannot be explained without reference to retribution."

Retribution addresses society's desire for what it regards as deserved pain (not necessarily physical pain) to be suffered by the criminal because he has broken the law and hurt someone else.

Caldwell<sup>53</sup> observes that having failed in his duties every member of the community is expected to perform, the offender must pay in pain and discomfort the debt he owes to society.

Fitzgerald<sup>54</sup> states : "It is true that to prohibit an act without fixing a penalty for contravention would be an empty threat and to fail to execute the punishment fixed, would likewise reduce the law to an empty threat".

The theory is based on the premise that the commission of a crime disturbs the balance of the legal order, which will only be restored once the offender has been punished for his crime; if a rule has been contravened, the balance of the scales of justice has been disturbed and can be restored only by means of fair retribution.<sup>55</sup>

Tappan<sup>56</sup> reflects: "...an impartial administration of retributive penalties by the state does satisfy the public sense of justice and... the sadistic and aggressive impulses in the community. In the public mind the man who rapes, kidnaps, murders or steals deserves to be punished with severity, without regard to whether that treatment will make it better or worse or whether it will deter him or others from crime."

---

53 *Criminology* (1965) 2nd edition New York Ronald Press at 390

54 *Criminal law and punishment* (1962) Oxford Clarendon at 204

55 Snyman *op cit* note 18 at 19

56 *op cit* note 48 at 242

In a sense the community's feelings of revenge and hatred against the offender should be sublimated in the punishment imposed in order to prevent self-help by the aggrieved members of society.<sup>57</sup>

Gibbs<sup>58</sup> observes that to the extent that victims demand retribution, punishment of crime is something more than vengeance; it is at the same time a means of controlling vengeance. The differences between retribution and vengeance will be highlighted later in this work. Many crimes would be privately avenged if there were no prospects of legal punishment because, as Gibbs states, "even in contemporary societies, there are isolated instances where victims of a crime or the victim's surrogate assault the suspected perpetrator. Hence the question how many more crimes would be privately avenged if there were no prospects of legal punishment."

Hospers expresses the view that a state of moral imbalance and injustice would result if no retribution were exacted.<sup>59</sup> Vosloo<sup>60</sup> is of supportive view and points out that from a retributivist point of view "it is morally repugnant that a man should do an injury to another man without suffering injury himself; and that the penalty must be proportionate to the gravity of the offence."

Society's right to punish criminal violations lies in its duty to secure rights or in its duty, as an expression of the common will, to maintain itself.

Retributivism does have an answer to the utilitarian argument that it senselessly imposes misery without "counterveiling good".

---

57 Van der Merwe *op cit* note 5 at 3-12

58 *Crime punishment and deterrence* (1975) University of Arizona at 82-83

59 *op cit* note 24 at 452

60 "Symposium on capital punishment" 1975 *Acta juridica* at 225

Retribution does have something important to say about what should happen to the criminal during punishment. Retributivism requires that, consistent with the content of the no-nonsense message in each case, there is the perfect duty not to harm criminals beyond the harshness due to them and at least the imperfect duty to help them help themselves to return to society as fit members thereof - imperfect because the criminal has no enforceable right to whatever help utility may afford.<sup>61</sup>

Kant justified punishment and infliction of suffering as a categorical imperative.<sup>62</sup> He is quoted as stating that if civilization were to come to an end, e.g. if an island society decided to dissolve at once with its members spreading themselves over the rest of the earth, it would still be necessary to execute the last murderer before the dissolution of the society.<sup>63</sup> Kant insisted on punishment as an imperative of ethical justice.

The cardinal theme in the absolute theory is that punishment is appropriate because the offender has committed a crime and therefore deserves blame and condemnation.<sup>64</sup> In this regard Rabie and Strauss<sup>65</sup> state that "punishment is necessary to retain the community's respect for the criminal law in that it serves to sustain the morale of the conformists and that it is a means through which members of the community are dissuaded from taking the law into their own hands, or at least from relaxing their

---

61 Dais in Cragg *Retributivism and its critics: Canadian section of the international society for philosophy of law and social philosophy* (CR IVR) : PAPERS (1992) volume 47 at 115

62 Grosheide & van Itterzon *Christelijke Encyclopedie* (1961) VI Saadja - Zwolle Kok & Kampen at 272

63 Byrd SB 1989 *Kant's theory of punishment : Law and philosophy An international journal for jurisprudence and legal philosophy* volume 8 (1989) Kluwer Academic Publishers London at 151

64 Bean *Punishment : a philosophical and criminological inquiry* (1981) Oxford Martin Robertson at 13

65 op cit note 43 at 47

inhibitions."

The absolute theories sought justification for punishment in the criminal act. The commission of the crime itself was sufficient justification for punishment.<sup>66</sup> In this respect punishment serves as an absolute requirement.

Thus retribution through the courts serves as a vehicle conveying society's condemnation of the offender and his conduct, particularly in serious cases in the sentences imposed.

The approach of Kant starts from the criminal's rationality, and infers from it the criminal's authorization of the victim's right to do to the criminal what he has done to the victim. Hegel approached the matter from the victim's equality with the criminal, and infers from it the victim's right to do to the criminal what the criminal has done to the victim.<sup>67</sup> Morris states also that "when a rational being decides to act in a certain way toward his fellows, he implicitly authorises similar action by his fellows towards him."<sup>68</sup>

Stahl<sup>69</sup> regards punishment as a divine imperative in the light of the Biblical provisions<sup>70</sup> which convey that the governments are an "agent of wrath to bring punishment on the wrongdoer" The governments serve as agents of God in ensuring that the laws are obeyed.

### 3.1.1.1 Retribution and just deserts

The punisher can be sure that whatever else he may or may not be

---

66 Grosheide *Christelijke encyclopedie* (1956) deel v Kampen :  
kok at 272

67 Reiman in Baird and Rosenbaum *Philosophy of punishment* (1988)  
New York Prometheus at 115

68 Morris in Baird and Rosenbaum *op cit* note 67 at 114

69 Grosheide *op cit* note 66 at 272

70 Holy Bible *op cit* note 45 Romans 13:14

achieving he is at least inflicting more or less what the offender deserves. If he is a thoroughgoing retributivist he regards it as his duty to do so; he is under a moral obligation to inflict deserts.<sup>71</sup>

Once the guilt of the person has been established beyond a reasonable doubt, punishment is deserved.

Sykes<sup>72</sup> submits that in punishment the offender receives his just deserts. Retribution implies the unpleasantness or pain deserved by the offenders through their transgression of the law<sup>73</sup> They deserve punishment because they, out of their own free will, chose to commit a crime.

Retribution strives for justice rather than rehabilitation of the offender. The principle of just deserts as expressed through retribution implies imposition of punishment in relation to the seriousness of the crime or the harm caused to the community. The offender is not harmed beyond the harshness due to him.

### 3.1.1.2 Retribution and vengeance

There exists a measure of confusion about the nature of punishment and retribution. This brief discussion referring to revenge aims to salvage the term 'retribution' from the negative connotation which attaches to vengeance. Referring to retribution Morkel<sup>74</sup> states: "Losstande van die ander teorieë is dit egter 'n leë en barbaarse argaisme wat geen plek in 'n ontwikkelde strafregstelsel verdien nie, aangesien dit niks anders is as

---

71 Walker *Why punish* (1991) Oxford New York at 67

72 *The society of captives : a study of maximum society prison* (1978) Princeton, New Jersey, Princeton University Press at 66

73 Caldwell *op cit* note 22 at 420

74 1975 *De jure "Vergelding as teorie van straf"* at 49

wraak in bedekte vorm nie." Reid<sup>75</sup> refers throughout to the philosophy of revenge and retribution without distinguishing between them. A different view is expressed by the court in *S v Motsoesoana*<sup>76</sup> "...I do not see the retributive aspect of punishment as a supposed desire for revenge on the part of society but rather as an expression by society of its stern disapproval of the offender's deviation from the accepted norm of society for the protection of which common law crimes and statutory offences exist. Punishment in this sense seeks to uphold those norms."

Other authorities do distinguish between the two. Van den Haag<sup>77</sup> points out that unlike vengeance retribution is imposed by courts after a plea of guilty or a trial in which the offender is convicted. It is proportional to the gravity of the offence committed. Retribution seeks to restore an objective order rather than satisfy subjective craving for revenge.

Whereas retribution follows after a process which determines whether the act concerned constitutes a crime or not, what purports to be vengeance might simply be an attack where the act avenged would, if subjected to scrutiny by a court, have been found to constitute no crime.

In retribution the sentencing officer does not impose the sentence out of hurt, but as part of the community's reaction to a moral wrong which should be conveyed to the offender<sup>78</sup>

Critics of retribution like Menninger<sup>79</sup> pay little attention to

---

75 Reid *Crime and criminology* (1976) Hinsdale H: Dryden Press at 496-497

76 1986 (3) SA 350 (N) at 369 I-J

77 *Punishing criminals : concerning a very old and painful question* (1975) at 10-11

78 Van der Merwe *op cit* note 5 at 3-19

79 Baird and Rosenbaum *op cit* note 67 at 47

the victims of crime and regard retribution as vengeance. To the extent that victims demand retribution, punishment of crimes is something more than vengeance; it is at the same time a means of controlling vengeance, to prevent instances even if isolated, where the victim of a crime or the victim's surrogate take the law into their own hands in self-help, underlying the importance of the question: How many more crimes would be privately avenged if there were no prospects of legal punishment?<sup>80</sup> To protect society, "moet daar in gepaste gevalle vonnisse opgelê word wat dit ten doel het om persone... te ontmoedig om die reg in eie hande te neem en op ander wraak te neem".<sup>81</sup>

### **3.1.1.3 Retribution as an opportunity for expiation and remorse**

It is a further justification for retribution that through his punishment the offender is given an opportunity for expiation and remorse. By suffering he must purge his guilt. His punishment must be proportionate to his moral blameworthiness.<sup>82</sup>

Once he has paid back his debt it is made possible for him to be accepted back into society. The offender reconciles himself with the legal order by undergoing punishment.<sup>83</sup> The offender is likely to readily reconcile himself with the legal order if the punishment is deserved and proportionate to the crime. He is given a moral justification for turning over a new leaf. The punishment will also alleviate guilt feelings, within the offender which, it is assumed, are aroused by the commission of the crime.

---

80 Gibbs *op cit* note 58 at 82

81 *S v Phokela and Another* 1945 PH H22

82 Burchell *et al op cit* note 6 at 68

83 Snyman *op cit* note 18 at 19

The Viljoen Commission<sup>84</sup> equates remorse with mental suffering and observes that genuine remorse in the offender might serve to soften the victim's feelings and reduce the community's sense of outrage at the crime committed. This facilitates his re-integration and re-acceptance into the community.

#### **3.1.1.4 Retribution and social solidarity**

Caldwell<sup>85</sup> submits that the society's moral code is strengthened by the unpleasantness and suffering which visits the offender. Punishment is therefore justified and retribution fulfils an important role as it operates to enhance solidarity of the law-abiding citizens in the community. Their loyalty is captured and retained. Confidence in the legal system is retained. This presupposes that what happens to the offender by way of sentence reaches the knowledge of the community. It does not always do so.

#### **3.1.1.5 Retribution and causality**

Retribution is justified by some by its close link with the causality principle, an argument based on the school of thought that regards retribution as the inevitable result of behaviour.<sup>86</sup> With all actions being rewarded in terms of their nature, good actions are rewarded by good, bad by bad and crime by retribution in punishment. The state is under duty to exercise its power on behalf of its subjects to punish the offender with a view to protecting the community.<sup>87</sup> There need to be correlation between the criminal behaviour and the resultant punishment. It is however essential to draw a distinction between offenders, be they children, adults, mentally disturbed, etc as punishment must

---

84 *Report of the Commission of Inquiry into the penal system of the Republic of South Africa (1976)* RP 78/1976 Pretoria Government Printer at 53

85 *op cit* 22 at 421

86 Hospers *op cit* note 20 at 107-108

87 *op cit* note 43 at 21

not only fit the crime but must also fit the criminal and, in that respect, be individualised.

### 3.1.1.6 Retribution through the cases

The main purposes of punishment have been stated by the courts to be deterrent, preventive, reformative and retributive.<sup>88</sup> Of these retribution is recognised as "nog een van die onmisbare boustene... vir die regverdiging van straf."<sup>89</sup>

Retribution is not "legal vengeance" as is regarded by some to be. The courts do not recognise this as its role. "Die howe is nie hier om wraak te neem nie. Die howe sink nooit, ooit tot die peil van die misdadiger nie. Straf moet onder alle omstandighede menslik wees...."<sup>90</sup> That is the moderation which retribution infuses into the process.

Only retribution can lend balance to the sentencing process. Recognition of this role finds expression in numerous court decisions. "Te lig is net so verkeerd as swaar," thus in *S v Holder*.<sup>91</sup> It is in that regard that the court urged that the "penal element must, in serious cases of whatever nature, come to the fore and be properly considered, if punishment still has any meaning in the criminal law."<sup>92</sup> In essence the principle here was that a serious offence should attract severer punishment.

There were numerous cases in which, because of the seriousness of the offences, the South African courts considered that the adequacy of the retributive aspect was to be met by imposition of the death penalty. Various factors play a role here. The

---

<sup>88</sup> *S v Rabie* 1975 (4) SA 855 (A) 862 A; *R v Swanepoel* 1945 AD 444 at 455

<sup>89</sup> *S v Van Vuuren* 1992 (1) SACR 127 (A) 132H

<sup>90</sup> *S v Groenemeyer* 1974 (2) SA 542 (K) 544

<sup>91</sup> 1979 (2) SA 70 (A) at 80

<sup>92</sup> op cit note 91 at 81

blameworthiness of the offender as one of them (with due regard to all circumstances) is an important factor in the determination of the severity of punishment. In *S v Majozi and Others*<sup>93</sup> the court took into account the horror of the crime, the callousness of the criminal and the frequency of its occurrence as having been such that perceptions, sensibilities and interests of the community demanded that the extreme penalty be imposed. Even the factor that the accused had an unblemished record had to yield to retribution and deterrence. An offence which evokes indignation from the public attracts a severer retributive sanction.<sup>94</sup>

An important role of retribution in the courts' sentencing process is its efficacy in giving recognition to the natural indignation of interested persons and of the community at large and to counteract self-help. In *S v Karg*<sup>95</sup> the court observed: "But the element of retribution, historically important, is by no means absent from the modern approach. It is not wrong that the natural indignation of interested persons and 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 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." Retribution in the sentencing process serves the need to recognise and address the revulsion felt by the great majority of citizens for serious crime.<sup>96</sup>

Retribution is a principle for the measurement of punishment. Retribution as representing 'just deserts' should not be seen in the context of only ensuring severe sentences for serious offences but should be seen also to be the factor which calls for leniency where this is warranted. It operates in the sentencing

---

93 1991 (2) SACR 532 (A) at 541

94 *S v B* 1985 (2) SA 120 (A) 125A

95 1961 (1) SA 231 (A) 236B

96 *S v Human* 1979 (3) SA 331 (EC) 338A-B

process in the courts as a bulwark against excesses, be they undue leniency or undue severity. In *S v Maseko*,<sup>97</sup> in decrying a disproportionately severe sentence the court was, in essence, re-iterating against a departure from "just deserts." It is to be observed here that whereas in *S v Karg supra* the court admonishes against undue leniency, in *Maseko supra* the court admonishes against disproportionately severe punishment. That is true retribution.

When the courts proclaim as did the court in *S v Du Toit*,<sup>98</sup> that for punishment to be appropriate the courts ought not to view and punish the offender with a primitive spirit of vengeance, but ought to do so humanely in all cases, notwithstanding their serious nature, it is to meet the demands of retribution.

From the foregoing, the courts' recognition of the role of retribution in the sentencing process is evident. The courts acknowledge retribution as requiring that punishment bears some relation to the gravity of the offence and the blameworthiness of the offender, and that in this regard he should receive no more nor less than what he justly deserves.

### 3.1.2 The relative theories

Supporters of these theories justify punishment on account of its utilitarian function. The justification for punishment is found in the future, not, as in the case of retribution, in the past. Punishment is, in other words, justified by the value of its consequences.<sup>99</sup> The relative theories of punishment comprise deterrence, prevention and reformation.<sup>100</sup>

---

97 1982 (1) SA 99 (A) 102

98 1979 (3) SA 846 (A) 858A

99 Rabie and Strauss *op cit* note 43 at 23

100 Burchell *et al op cit* note 6 at 67

### 3.1.2.1 Deterrence

Caldwell<sup>101</sup> submits that by deterrence is meant the use of punishment to prevent the criminal and others from committing crimes. In order to accomplish this purpose, the offender is punished so that he will be held up as an example of what happens to those who violate the law, the assumption being that this will curb the criminal activities of others.

The idea of deterrence is that 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 the inhibiting effect of the threat of punishment or its imposition which causes man to think before committing a crime.<sup>102</sup>

Another assumption upon which the idea of deterrence is based is that adversity of punishment always outweighs the benefits of crime.

There can be no doubt that the fear of punishment does serve to intimidate or deter most people, a result of human responsiveness to danger that legal threats pose.<sup>103</sup>

### 3.1.2.2 Individual deterrence

Individual deterrence is the concept that the punishment will deter the offender undergoing it from committing a crime in future. Individual deterrence operates on the notion of "once bitten twice shy". It is a means of protecting society. It

---

101 *op cit* 22 at 395

102 Rabie and Strauss *op cit* note 43 at 35

103 Kahn *op cit* note 44 at 226

applies after the offender has been apprehended, prosecuted and convicted. It does not mean that the convicted offender must necessarily serve his punishment. A suspended sentence may inhibit criminal conduct at least during the period of suspension. There is a tendency to discredit this concept because of the relatively high rate of recidivism despite its expected inhibiting influence.<sup>104</sup>

Criticism against this theory has pointed to empirical evidence that as many as 50% of the offenders who had served prison sentences were recidivists and therefore individual deterrence is unsuccessful. Rabie and Strauss<sup>105</sup> counter this by pointing out that it must first be determined how many persons would have repeated their actions but for the punishment they had experienced. The empirical data reflects instances where recidivists are apprehended and convicted and provides no information as regards to the many offenders who do not again get entangled in the net of the criminal law. Van den Haag<sup>106</sup> concedes the lack of statistics and also argues that "though we have no proof of the positive deterrence of the (death) penalty, we also have no proof of zero, or negative effectiveness" and he goes on to say "our moral obligation is to risk the possible ineffectiveness of executions." He might as well have stated that our moral obligation is, in the light of his argument, to risk the use of deterrence in sentencing.

### 3.1.2.3 General deterrence

Andenaes<sup>107</sup> describes general deterrence as the restraining

---

104 Rabie and Strauss *op cit* note 43 at 25

105 *op cit* note 43 at 25-26

106 Zimring and Hawkins *Deterrence The Legal Threat in Crime Control* (1973) at 16

107 in Bailey and Peterson *Empirical perspectives Capital punishment and non-capital crimes; a test of deterrence, general prevention and system-overload arguments 1989-1990* at 683

influences emanating from the criminal law and the legal machinery. Andenaes contends that "messages" are sent to members of society, including proclamations specifying those actions that are wrong and should be avoided, the expression of social disapproval of persons who violate the law and notice of what punishment persons might expect if they were to violate the law. Here Andenaes specifically refers to these as the educational and moralizing methods which appeal to conscious and sub-conscious levels and are more important in shaping conformity than is the law's coercive function of deterrence.

General deterrence has the community as a whole as its focal point. The offender is punished severely enough to serve as an example to deter would-be-offenders from committing a similar crime for fear of similar punishment.

Underlining the importance of deterrence, Zimring and Hawkins<sup>108</sup> observes that when confronted with a crime problem, legislators often agree that the best hope of control lies in "getting tough" with criminals by increasing penalties to achieve deterrence.

One objection against punishment for deterrent purposes is that it appears to have very little to do with the offender himself. With regard to the argument that the punishment has nothing for the offender, i.e. he does not benefit from it, there is an argument that those who end up being punished do benefit from the existence of a functioning punishment system, since they too have received the benefit of enhanced security due to the deterring of some potential criminals as a result of their own punishment.<sup>109</sup> The offender benefits from the deterrent effect which arises from his own punishment because his punishment operates to deter others and serves to protect him in turn.

---

108 *op cit* note 106 at 18

109 Reiman in Baird and Rosenbaum *op cit* note 67 at 112

With regard to the exemplary nature of the sentence Kant<sup>110</sup> states: "Punishment can never be administered merely as a means for promoting another good...for one man ought never be dealt with merely as a means subservient to the purpose of another." Andenaes answers that "realistically societies often treat people in ways designed to promote the good of society at the expense of the individual concerned." As examples Andenaes quotes military conscription, the detention of enemy citizens in wartime, and other examples. If the community should gain satisfaction from punishment as an expression of retributive feeling, no joy should come from punishment in excess of that required to express collective feelings of outrage. The extra measure of punishment must be recognised as a cost, not insubstantial, to the community as a whole.<sup>111</sup>

The concern arises only where punishment imposed for deterrent purposes is disproportionately more severe than what would otherwise have been imposed in the absence of deterrent motives. The need to impose exemplary sentences does result in imposition of punishment at times grossly disproportionate to one that would normally have been imposed. These disparities will be keenly felt in cases in which the community's sense of just deserts or retributive justice creates a limit beyond which punishment seems unfair.

The question of "exemplary sentences" became pertinent in *S v Khulu*.<sup>112</sup> The court referred with approval to Asquith LJ quoted in Smith and Hogan, *Criminal Law* where it was pointed out that it is not always observed that an exemplary sentence is unjust to the precise extent that it is exemplary. It may be expedient or even imperative, but just, it is not. The guilt of the man who commits a crime when it happens to be on the increase and incurs an exemplary punishment to curb it, is no greater than that of

---

110 Kant in Zimring and Hawkins *op cit* note 106 at 36

111 Zimring and Hawkins *op cit* note 106 at 42

112 1975 (2) SA 518 (N) 521

another man who commits the same crime when it is on the wane. In that case the judge is not administering strict justice but chooses the lesser of two practical evils. He decides that a moderate injustice to the criminal is a lesser evil than the consequences to the public of a further rise in the crime-wave. Miller J observed that the sentence may be justified only where the injustice thereby done to the individual is moderate but he could not conceive of any principle which could justify, for the sake of deterrence, the imposition of a sentence grossly excessive in relation to the offender's moral reprehensibility. Such a sentence would not be fair and just. "What has to be considered is the triad consisting of the crime, the offender and the interests of society."<sup>113</sup> In *S v Mbingo*<sup>114</sup> referring to the prevalence of certain types of offences and the consequent need to impose sentences which act as deterrents, the court stated that even prevalence cannot justify a sentence which is disproportionate to the seriousness of the particular case with which the court is dealing. This represents the limit to which the courts would sanction the severity of deterrent sentences.

The deterrence justification relies on the underlying hypothesis that human behaviour can be influenced by incentives. More particularly, the deterrence theory proposes that increases in the severity of penalties or the certainty of their imposition on offenders who are detected will reduce crime by those who are not directly sanctioned, and that imposition of sanctions on detected offenders serves to discourage at least some others from engaging in similar pursuits.<sup>115</sup>

The efficacy of deterrence has been criticised from various stand points. It has been argued that the fact that recidivism occurs at a high rate points to the failure of punishment to deter. It has been argued that there is no increase in the number of

---

113 *S v Zinn* 1969 (2) SA 537 (A) 540

114 1975 (3) SA 532 (C)

115 *Thorn Retribution exclusive of deterrence an insufficient justification for capital punishment* (1983) at 200

capital crimes in those countries where the death penalty has been abolished. This argument has been criticised as failing to take cognizance of various factors which could influence the incidence of such crimes like the educational development of the present-day generation and the possible residual intimidatory effects of capital punishment. It is pointed out that statistics cannot tell how many potential criminals have refrained from taking another's life through fear of the death penalty and that the lack of evidence for deterrence is not itself evidence for the lack of deterrence. It means that deterrence had not been demonstrated statistically.<sup>116</sup> Kahn draws a parallel between the death penalty and a lighthouse which throws its beams out to sea to warn ships and states: "We hear about shipwrecks, but we do not hear about the ships the lighthouse guides to safety on their way." The death penalty, as do other forms of punishment do act as deterrents. They, like the lighthouse serve to warn and are perceived by the public whom they steer off from collisions with the law. If the death penalty as a punishment does not deter as it is argued, the same must be said of the other forms of punishment. It is not clear whether the argument then should be understood to exclude deterrence as a factor in sentencing. An argument against the abolition of the death penalty, an argument with which I agree, was that the lighthouse is not to be destroyed if no statistics of the ships it has saved can be produced; nor must the lighthouse of appropriate retributive sanctions be discarded because there is no evidence of their efficacy in the fight against crime.

#### 3.1.2.4 Deterrence in case law

The role of deterrence in sentencing has been accorded significant recognition in the courts. Punishment is meted out inter alia not only to deter others from committing the same offence but to deter the accused from committing the same offence.<sup>117</sup>

---

116 Kahn *op cit* note 44 at 226-227

117 *S v Seegers* 1970 (2) SA 506 (a) 511F

The deterrent element comes to the fore to meet various circumstances obtaining in each case. In *S v Mtinkulu*<sup>118</sup> the court confirmed the sentence of 18 months' imprisonment imposed for bag snatching although it was severe, in view of the importance of deterring people from the mean and cowardly crime that it is and in respect of which preventative measures are virtually impossible and in which it is so extremely difficult to trace the offender.

In *R v Dematema*<sup>119</sup> the court acknowledged the need for "a powerful deterrent in respect of activities involving grave social or economic implications for the community, coupled with the component elements of prevalence and difficulty of detection."

Where the nature of the offence warrants it, the courts find the need for deterrence to come to the fore. In *S v Du Toit*,<sup>120</sup> referring to the nature of the offences of which the accused was convicted (assaults and culpable homicide), the court observed that they were "van so 'n aard dat dit die gemeenskap ter plaatse en ook te lande nie anders as besonder hewig geskok kon gewees het nie..." and the court decided: "'n straf ter afskrikking moet gevolglik sterk oorweeg word."

The role of deterrence has been acknowledged also in cases involving negligence and recklessness. In *R v Bredell*<sup>121</sup> the court observed that in a case of gross negligence the deterrent purpose of punishment must be emphasised.

In *S v G*<sup>122</sup> the court considered that the prevalence of the crime served to reinforce the need to take the deterrent aspect of

---

118 1971 (4) SA 141 (T) 142C-E

119 1967 (4) SA 371 (R) 373-374

120 1979 (3) SA 486 (A) 857E

121 1960 (3) SA 558 (A) 560

122 1989 (3) SA 695 (A) 701H

punishment into account. This was the view in *S v Blank*<sup>123</sup> as well. Where this need obtains, the court observed, the element of example will inevitably feature in the sentence. This is because the sentence must demonstrate to a potential offender the consequences of violating the law.

### 3.1.3 The preventive theory of punishment

According to this theory, the purpose of punishment is to prevent crime. This theory may overlap with the deterrent and reformative theories in so far as these are perceived as methods of preventing the commission of crimes. There are forms of punishment which aim to prevent crime without also serving the aims of reformation however, e.g. capital punishment, forfeiture of a driver's licence etc. This theory interacts with retribution as, if it were to be applied in complete isolation, it would result in the imposition of too severe punishments. Its application ought to be tempered by that of the retributive theory which knows proportion. The preventive theory is not to be applied where it is evident that the crime is not likely to be repeated as was the case in *S v Hartmann*<sup>124</sup> where a doctor had administered euthenasia to his aged father who suffered from an incurable disease. He was sentenced to one year's imprisonment suspended for one year after detention until the rising of the court.

### 3.1.4 Reformation theory of punishment

The purpose of reformation is to readjust the offender to the demands of society by individualising the penalty: by fitting the punishment to the offender's personality rather than by letting the punishment fit the crime.<sup>125</sup> According to this theory an

---

123 1995 (1) SACR 62 (A) 80F

124 1975 (3) SA 532 (C)

125 Burchell *et al op cit* note 6 at 78

offender commits a crime because of some personality defect or psychological factors in his background.<sup>126</sup>

The theory commends itself by focusing on the circumstances of the offender as an individual. The purpose here is to reform the offender as a person so that he may become a normal law-abiding member of the community once again. The emphasis is placed not on the crime itself, the harm caused or the deterrent effect which punishment may have, but on the person and personality of the accused.<sup>127</sup>

In the evaluation of the various roles of theories, Van der Merwe proposes retribution to be the first choice in the aims of punishment. Rehabilitation should follow upon retribution in the scale of aims of punishment and he lists retribution as a precondition to rehabilitation and states that if retribution and rehabilitation should fail to reclaim the offender, then deterrence should next form the basic justification of punishment for the offender. Prevention should come into play at the end of the scale when it becomes clear that there is no hope of influencing the hardened offender. Here punishment like life imprisonment would be considered.

---

126 Snyman *op cit* note 18 at 23

127 Van der Merwe *op cit* note 5 at 3-14

## CHAPTER 4

### COMMUNITY PERCEPTIONS AND ATTITUDES ON PUNISHMENT

#### 4.1 The perceived erosion of deterrence

The interview with members of the community of Nongoma clearly reflected serious concern about the escalation of crime in their midst, perceived to be the result of a failure to bring culprits before court, a position perceived to have eroded the deterrent factor in the fight against crime as the effectiveness of the threat of apprehension and punishment had receded considerably to a point which, they perceived, encourages criminal conduct with anticipated impunity.

Another item of grave concern which emerged from the interview was that those criminals who could not evade detection knew that they were assured of release before serving their full term of imprisonment. Here the parole system and amnesties were singled out for condemnation. They were convinced that this too eroded deterrence.

#### 4.2 A deficiency of the retributive element in sentencing

The interview clearly indicated that this community's major experience with the courts is limited to the district courts of magistrate and the traditional courts and to the sentences that these courts impose. These are the courts in their midst. The strategic placement of these courts in each district within the community would guarantee notice by the public of any retributive and deterrent sentences they impose. From the interview it became clear that the jurisdiction of these courts enjoyed no respect. They perceived a deficiency of the retributive element in sentencing in respect of crimes of serious concern to them. They condemned this position as a simple wanton failure to impose adequate sentences. It needs to be explained that although the

---

few informed understood the reason for the limited jurisdiction to be that less serious cases are tried in these courts, the large membership of the communities apparently did not. The communities call for severer sentences which these courts are not empowered to impose.

The fines as sentences for serious crimes were perceived as a lame response by the government's courts to crime. Van der Merwe<sup>128</sup> refers to Rabie and Strauss as arguing that fines have lost the moral character of punishment and are often seen as no more than a mere disincentive or even a kind of tax.

As the interview progressed one elderly man reminisced over the history of punishment amongst the Zulu and described how the condemned people in the days of King Shaka and Dingane would be escorted to their death over a cliff called "KwaGoqanyawo" (literally translated - a place where feet are folded - a name which depicts a person's folded legs and feet frozen by death). There the condemned person would simply be clubbed to death to fall into the depths of the cliff. There is no historical verification of this, nor are the crimes known for which the punishment would be imposed. With an apparent nostalgia he pitted this treatment of offenders against what he described as "today's mockery of the practice of punishment." These hard feelings were manifest with all. They represented a strong sentiment for severe sentences which, they perceived, the crime in their midst deserved.

Mention must be made of an interview in 1994 with one young man who had been convicted for assault with intent to do grievous bodily harm at Emlazi Magistrate's court as a sequel to a brutal punishment he meted out in a "people's court." In an answer to my friendly enquiry as to the reason for what occurred in that people's court, he answered casually in Zulu : "UHulumeni

---

128 op cit note 5 at 3-19

uyabadlalisa lababantu") literally translated : The government plays (lenient) with these people (offenders in society). If that be the true reason, it signifies the potential of such perceptions for provoking serious urges of "self-help" in communities. The sentences are viewed by society as inadequate.

It appears that in the criminal justice system the public focus is primarily on the sentence the offender receives. Members of the public generally react either critically or with jubilation to sentences imposed by the courts particularly for serious crimes.<sup>129</sup> The public evaluates the sentence against the crime committed and manifests disappointment where they perceive the sentence to be too lenient in the light of the perceived seriousness of the crime. Where the sentence is perceived to have inflicted just deserts upon the offender, the public returns from the courts with a manifest feeling that justice has been done.<sup>130</sup> These reactions could be regarded as barometers to the extent that they manifest themselves on the acceptability of the courts to the communities they serve. As the courts should always, in the sentences they impose, reflect a mindfulness of their duty towards the public, it is essential that such reactions not be disregarded by the roleplayers in the criminal justice system.

---

129 See Figure 4.1

130 See Figure 4.2

THE DAILY NEWS, FRIDAY, MAY 1, 1992

# News



A JUBILANT woman celebrates outside the Pietermaritzburg Supreme Court after hearing Captain Brian Mitchell sentenced to death 11 times.

FIG. 4.1

# Viewpoints

□ The page that tells you what people are thinking



FIG. 4.2

## CHAPTER 5

### CONCLUSION

#### 5.1 Findings

Punishment has been recognised since the foundation of human society. The present theories of punishment, retribution and deterrence have evolved from primitive times when blood feud and vengeance were the forerunner of retribution. Punishment philosophies underwent changes to the point where they eventually focused on the needs of society in terms of protection from crime, and the needs of the individual who deserved to be punished, in terms of his reformation. The classical, neo-classical and positivist schools all had an impact on the modern philosophies of punishment.

The theories of punishment that have evolved are the absolute theory which embodies the concept of retribution, the relative theories which present deterrence, reformation and prevention as the aims of punishment. There is also the integrative theory which takes into account the offender, society and the interests of justice and integrates it in the consideration of appropriate sentences. The roles of retribution and deterrence have historical recognition. They are important considerations in the sentencing process.

It has become evident from the foregoing discussion however that all these theories, although presented by their protagonists as entities capable of functioning independently, need to be considered together for purposes of determining an appropriate sentence. Although the focus of this work has been on retribution and deterrence it must be stated that the other purposes of punishment also each play a role, albeit differently. It is true to say that the operations of retribution and deterrence are mutually complimentary.<sup>131</sup>

---

131 Fitzgerald *op cit* note 54 at 204

The objectives and justification of the theories are reflected in the philosophical rationales of the various commentators. They underline the role of retribution primarily to inflict punishment as deserved, i.e. proportionate to the gravity of the offence to eliminate the need for private revenge by those harmed by crime and to maintain the social order. They underline the role of deterrence on the basic premise that criminals as well as other people who may be tempted to transgress the laws can be deterred by the fear of being caught and punished.

Both these theories are subjected to attack, retribution by those who, in particular, favour rehabilitation, and who maintain that "treatment" and not punishment ought to be administered to an offender. It may here be mentioned that the Viljoen Commission<sup>132</sup> affirmed retribution as a fundamental criterion of a sentence in the South African legal system apart from its quoted affirmation by the courts. What may be considered as the best treatment for the offender may conflict with the need to deter others if rehabilitation were to be employed as the only response to crime. As to deterrence the major objections highlighted above have been that there is a lack of empirical evidence in support of the efficacy thereof and that it is unjust to punish an offender excessively as an example to deter others. To the first objection the response has been that the lack of empirical evidence of deterrence must not be regarded as proof of evidence of inefficacy of deterrence as the empirical data does not provide an answer as to what the crime rate would have been but for the deterrent measures. With regard to the latter objection, relating to exemplary sentences, the courts do recognise the propriety thereof but have placed a limitation on grossly disproportionate sentences.<sup>133</sup>

---

132 op cit note 84 at 5.1.3.2.7

133 op cit note 97 at 102

The South African courts acknowledge the role of retribution and deterrence as important objectives in sentencing as has been amply illustrated in the foregoing case law review. Not all courts appear to apply these objectives at all times correctly in sentencing as was highlighted by Terblanche<sup>134</sup> on *S v Kotze*.<sup>135</sup> This case is being quoted as an example of what does occur in courts at times in this regard.

With a view to imposing retributive sentences upon two appellants the appeal court gave notice of intention to increase their punishment imposed by the Regional Magistrate to what it envisaged to be truly retributive sentences. They had been sentenced to 1 and 2 years' imprisonment respectively. The sentences were a sequel to a robbery in which R1 000.00 was stolen from a coloured man whose wife was injured in the episode. The appeal court expressed a serious view of the crime. This court altered the sentences of each appellant to 2 and 2 1/2 years' imprisonment respectively wholly suspended conditionally, one condition of the suspension being that the appellants refund the R1 000.00 to the complainant.

What the public would witness here with regard to this sentence would be no more than an order for a refund of complainant's own money to him and the release of the accused to freedom. Proper punishment provides the accused with "...die geleentheid om boete te doen en versoening met die gemeenskap te bewerkstellig."<sup>136</sup> The disturbed juridical balance also must be restored. As Terblanche correctly indicates although the balance may be said to have been effected to some extent with complainant upon receipt of his R1 000.00, no amends to the community is apparent in this sentence. The sentence does not assist to effect a reconciliation with the community.

---

134 Die Landdros (1989) Volume 22 "Die swaard word swaarder" at 24-29

135 1986 (4) SA 241 (C)

136 Terblanche op cit note 134 at 26

The intended increase on sentence was made dependent upon the occurrence of an uncertain event, that is, the fulfilment of the conditions imposed for the suspension of the sentence. In the light of the judges' expressed intention to impose an increased retributive sentence, Terblanche properly poses the question whether the ultimate sentence reflected this intention. The answer is obviously in the negative. "Die verswaring kan tog nie afhanklik gemaak word van 'n toekomstige gebeurtenis waarvan dit onseker is of dit ooit sal plaasvind."<sup>137</sup> The public is not likely to view a sentence of this nature as adequate, sufficiently denunciatory or to represent an increased punishment and, as Terblanche correctly concludes, "(d)ie slotsom dat vergelding nie tot sy reg gekom het nie, is onafwendbaar."<sup>138</sup>

It is necessary to refer to the punitive measures conferred on district courts. The jurisdictional limitations of the district magistrates courts to twelve months' imprisonment as provided for in the Magistrates Courts Act<sup>139</sup> present a picture of inadequate competence to punish for crime. This was the perception with the members of the communities interviewed. The Government was seen to do no more than provide for sentences of a few months' imprisonment in the face of very prevalent crime in their localities.

The sentences in these courts are of course generally commensurate with the less serious nature of the crime tried in a district court. Housebreaking with intent to steal and theft as well as theft were singled out as very prevalent cases of serious concern. Members of these communities were not aware that in general, the value of the loss or damage may distinguish these cases either as serious or as less serious.

---

137 Terblanche *op cit* note 134 at 25-26

138 *op cit* note 134 at 27

139 section 92(1)(a) Act 32 of 1944

The problem here is that in the case of housebreaking with intent to steal for example, the trauma of returning to a burgled house, a house broken and left wide open and whose contents ransacking for loot had thrown into chaos, as they described the position, did not enable them to regard this crime as less serious; nor is the very prevalent theft of (admittedly) less valuable possessions regarded as less serious by members of these communities, who, with limited financial resources often toil for years to acquire their modest belongings which, to the affluent may appear to be of little value. To them the sentences are neither retributive nor deterrent.

It may be that the limited jurisdiction available to the district court provides it with little or no scope to demonstrate the difference between serious and less serious crime, a position which would not perhaps obtain if their jurisdiction were increased to accommodate some serious cases which would attract higher punitive sanctions and educate the public into a realisation of the existence of the difference. Although the Magistrates Courts are strategically placed in all districts for purposes of despatching, to the public, sentences with a greater deterrent impact, this advantage will be lost until these courts are endowed with higher jurisdiction. Here, as may have been observed, in discussing sentence, reference has constantly been made to imprisonment. This is because this discussion generally relates to serious crime and, "...the more serious the crime, the greater the possibility that imprisonment will be the only suitable sentence."<sup>140</sup>

The majority of people in rural communities are apparently largely unaware of sentences imposed on cases referred to regional courts where they attract sentences which match their serious nature. The retributive and deterrent function that would have been served by these sentences is lost to the local

---

140 *S v Blank* 1995 (1) SACR 62 (A) 76

communities of very many rural areas where the regional courts do not operate. Such cases are predominantly presently heard in urban areas where the regional courts are based.

The limited sentences passed by the district courts send wrong messages not only to the law-abiding members of communities they serve, but also to persons contemplating criminal conduct, as to the capacity of the state to hit back at crime. The same lack of meaningful jurisdiction goes for the courts of traditional leaders which, in rural areas, are represented in all communities. Their jurisdiction was, by the Black Administration Act,<sup>141</sup> limited to imposition of a maximum fine of "forty rand or two head of large stock or ten head of small stock...." The deterrent considerations cannot be adequately accommodated in such punitive measures. Because these courts have no direct powers to order imprisonment they are perceived to lack retributive and deterrent capacity.

Amnesties and parole are factors perceived to erode the efficacy of deterrence and to negate the retributive dimension. This arouses indignation. The public expects that convicted criminals shall serve the imposed sentences in full. This does not always happen.

Lack of publicity of deterrent and retributive sentences is a factor which detracts from these objectives fulfilling their role fully. The fear of criminal sanctions cannot be instilled in the public's mind unless the threats of punishment and their concrete exemplification are communicated to that public. Presently only cases which are of particular interest to the media are publicised. It is worth noting that the success of general deterrence is dependent to a large degree upon the effective promulgation of the threat of punishment because "it is publicity and not punishment which deters."<sup>142</sup>

---

141 section 20(2) Act 38 of 1927

142 *Rabie and Strauss op cit* note 43 at 35-36

Although the public would wish for more, the level of the South African courts' retributive and deterrent responses to crime in sentencing is able to contain their mood. A notable exception presently is the Constitutional Court's response which has effectively outlawed the death penalty. The deafening outcry against the declaration of the death penalty as unconstitutional in South Africa may be a manifestation of the position where the rulers in their penal reforms have failed to take cognizance of the mood and temper of the public with regard to the treatment of offenders. The outcry is a manifestation of a call for retribution. Not even the promise of life imprisonment has been able to contain the outcry.

## **5.2 Recommendations**

In the light of the foregoing findings, it would be essential to correct the perceptions of government impotence in the face of escalating crime. It would be essential to take steps that will ensure that deterrence and retribution deliver to their full capacity.

It is a fact that if the public were asked as to what the courts should impose as a sentence upon a rapist, a great number of them would, without hesitation, demand: "castrate the brute." In this example the courts could respond in one of two different ways. They could give effect to the horrendous demand and descend into disrepute in the eyes of the civilized world or ignore the expressed public expectations and suffer the courts to be unacceptable. Here, it is only a circumspect modification of the expected retributive and deterrent punishment that would be accepted as a reasonable punitive response. It would not necessarily be as demanded by the public. In this regard it is urged that society's reasonable expectations be recognised by the rulers when effecting penal reforms, particularly if they impact on retribution. Full recognition of society's expectations with regard to retribution is essential if vengeance is to be stifled.

---

"The thirst for vengeance is very real, even if it be a hideous thing, and states may not ignore it till humanity has been raised to greater heights than any that has been scaled in all the long ages of struggle and ascent."<sup>143</sup> In this regard, while it may be proper to say "...the rulers should lead, and not be swayed by popular opinion",<sup>144</sup> rulers may not ignore "popular opinion" as, inherent in this, is the danger of the development of self-help and the mushrooming of "peoples' courts." Those who effect reforms must keep in stride with the community and take full cognizance of the community's interest in the fight against crime. The courts do recognise their duty in this respect. The court in *S v Hougaard*<sup>145</sup> observed: "Maar aan die ander kant vervul die vonnis wat 'n hof oplê ook 'n ander doel, naamlik om die orde en stabiliteit in die gemeenskap te reël... Die hof, so meen ek, moet ook vir die gemeenskap aandui dat hy deur middel van die strawwe wat hy oplê steeds gedagtig is aan sy verpligtinge teenoor die publiek."

The amnesties and parole are perceived to detract against the effectiveness of deterrence and retribution. The age old prerogative of the State President which permits him to express his pleasure on particular occasions by granting amnesties should yield to a more constructive practice. The President ought to express his pleasure through some other medium than the unleashing of properly convicted and sentenced criminals upon mankind.

As has been indicated above, the courts mostly in contact with the communities are perceived to respond inadequately to escalating crime, an incorrect perception created by their limited jurisdiction. This position could be remedied either by empowering particularly the district magistrates' courts with

---

<sup>143</sup> Cardozo in *Burchell et al op cit* note 6 at 73

<sup>144</sup> Fitzgerald in *Burchell et al op cit* note 6 at 72

<sup>145</sup> 1972 (2) SA 70 (A) 72

greater jurisdiction, for example, to a maximum of 3 years' imprisonment instead of 12 months provided for in the Act or, initially, by proliferating supreme court and regional court periodical sessions in all districts, particularly in rural areas. Those traditional leaders trained in law could be granted jurisdiction over more serious offences with a commensurate increase in penal jurisdiction. It may, to a certain extent, restore respectability to these courts.

It is essential that greater publicity be given to deterrent and retributive penal measures imposed by the courts. With regard to deterrence, there is no doubt that the communication of the threat of punishment is of significant importance to its effectiveness. Consideration could be given to providing an official either on the establishment of each Magistrate's office or for a cluster of, say, 10 Magistrates' offices especially assigned the duty to provide publicity in the interests of deterrence and retribution. Then the constructive roles of deterrence and retribution will not be lost. In this regard, it is necessary that "....the public should be much more aware of what is being done in its name than is the situation at present."<sup>146</sup> This is important for the process of ensuring acceptability of the courts.

---

146 Van der Merwe op cit note 5 at 4-20

## TABLE OF CASES

*Harris v Alabama* 352 So 2d 479 (Ala. 1977)

*R v Adams* 1953 (2) PH H123 (N)

*R v Bredell* 1960 (3) SA 558 (A)

*R v Dematema* 1967 (4) SA 371 (R)

*R v Phokela and Another* 1945 PH H22(N)

*R v Swanepoel* 1945 AD 444

*S v B* 1985 (2) SA 120 (A)

*S v Du Toit* 1979 (3) SA 846 (A)

*S v G* 1989 (3) SA 695 (A)

*S v Groenemeyer* 1974 (2) SA 542 (C)

*S v Hartmann* 1975 (3) SA 532 (C)

*S v Holder* 1979 (2) SA 70 (A)

*S v Hougaard* 1972 (2) SA 70 (A)

*S v Human* 1979 (3) SA 331 (EC)

*S v Khulu* 1975 (2) SA 518 (N)

*S v Khumalo* 1973 (3) SA 677 (A)

*S v Khumalo* 1973 (3) SA 697 (A)

*S v Kotze en 'n ander* 1986 (4) SA 241 (C)

*S v Majozi and others* 1991 (2) SACR 532 (A)

*S v Maseko* 1982 (1) SA 99 (A)

*S v Mbingo* 1984 (1) SA 552 (A)

*S v Motsoesoana* 1986 (3) SA 350 (N)

*S v Mtimkulu* 1971 (4) SA 141 (T)

*S v Rabie* 1975 (4) SA 855 (A)

*S v Seegers* 1970 (2) SA 506 (A)

*S v Sikwane* 1980 (4) SA (B)

*S v Van Vuuren* 1992 (1) SACR 127 (A)

**TABLE OF STATUTES**

Black Administration Act 38 of 1927

Magistrates Courts Act 32 of 1944

## TABLE OF OTHER REFERENCES

### Texts, publications and academic papers

Acton H *The philosophy of punishment: a collection of papers* (1969) London MacMillan

Bailey WC and Peterson RD "Empirical perspectives Capital punishment and non capital crimes; a test of deterrence, general prevention and system-overload arguments" (1989-1990) Albany Law Review

Baird RM & Rosenbaum S *Philosophy of punishment* (1988) New York Prometheus

Barnes HE *The story of punishment: a record of man's inhumanity to man* (1972) 2nd edition revised Montclair NJ Patterson Smith

Bean P *Punishment: a philosophical and criminological inquiry* (1981) Oxford Martin Robertson

Burchell EM and Hunt PMA *South African Criminal Law and Procedure Vol 1 General Principles of Criminal law* (1983) 2nd edition by Burchell EM Milton JRL and Burchell JM

Caldwell R *Criminology* (1965) 2nd edition New York Ronald Press

Cragg W *Retributivism and its critics: Canadian section of the International Society for Philosophy of law and Social Philosophy (CR IVR) papers* (1992) Volume 47

Didcott JM "Criminal justice and penology" (1980) SACC 296

Duffee D, Fitch R *An introduction to corrections: a policy and systems approach* (1976) California Goodyear

Du Toit E *Straf in Suid-Afrika* (1981) Cape Town Juta & Co.

Ferreira JC *Strafprosesreg in die laer howe* (1979) 2nd edition  
Johannesburg Juta & Co

Finance Week "National Party National Anti-crime Strategy. Crime  
pays" October 26 - November 1 1995

Fitzgerald P *Criminal Law and Punishment* (1962) Oxford Clarendon

Gammage A and Hemphill C *Basic criminal law* (1979) New York  
McGraw-Hill

Gibbs JP *Crime, punishment and Deterrence* (1975) University of  
Arizona Elsevier New York

Grosheide FW and Van Itterzon *Christelijke encyclopedie* (1961) VI  
Saadja - Zwolle Kok, Kampen

*Holy Bible* (1991) New International version International Bible  
Society: Colorado

Hospers H *Readings in introductory philosophical analysis* (1969)  
London Routledge & Kegan Paul

Hospers J *Human conduct: an introduction to the problems of  
ethics* (1963) London Hart - Davis

Johanson BO "Capital punishment" 1971 *THRHR* 350-361

Kahn E "Crime and punishment 1910-1960" 1960 *Acta Juridica*

Kahn E "The death penalty in South Africa" 1970 *THRHR* 108-141

Kahn E "Symposium on capital punishment" 1975 *Acta Juridica*  
220-244

- Morkel DW "Vergelding as teorie van straf" 1975 *De Jure* 40-49
- Neser JJ "'n Teoreties-prinsipiële studie van sekere aspekte van die straf en behandeling van die oortreder van uit 'n penologiese perspektief" (1980) D Phil thesis University of South Africa Pretoria
- Primoratz I *Justifying legal punishment* (1989) London Humanities
- Rabie MA & Strauss SA *Punishment: An Introduction to Principles* (1985) 4th edition Lex Patria
- Reid ST *Crime and Criminology* (1976) Hinsdale H Dryden Press
- Reid ST *Crime and Criminology* (1991) 6th edition Fort Worth: Holt Rinehart and Winston
- Snyman CR *Criminal Law* (1995) 3rd edition Durban Butterworths
- Report of the Commission of Inquiry into the penal system of the Republic of South Africa (1976) RP 78/1976 Pretoria Government Printer
- Sykes GM *The Society of captives: a study of a maximum security prison* (1958) Princeton
- Tappan PW *Crime, justice and correction* (1960) New York McGraw-Hill
- Terblanche SS "Die swaard word swaarder" 1989 *Die Landdros* vol 22
- Terblanche SS "Die oogmerk van vergelding uit die oogpunt van die konstitusionele hof" 1996 59 *THRHR* 267-276
- Thorn CA *Retribution, exclusive of deterrence: an insufficient justification for capital punishment* (1983)

Van den Haag E *Punishing criminals: concerning a very old and painful question* (1975)

Van der Merwe DP *Sentencing* (1991) Cape Town Juta & Co.

Van Niekerk B "Hanged by your neck until you are dead" 1970 *SALJ* 60-75

Vosloo WB "Symposium on capital punishment" 1975 *Acta Juridica* 220-224

Walker N *Why punish* (1991) Oxford New York

Zimring E, Hawkins GJ *Deterrence, The Legal Threat in Crime Control* (1973)