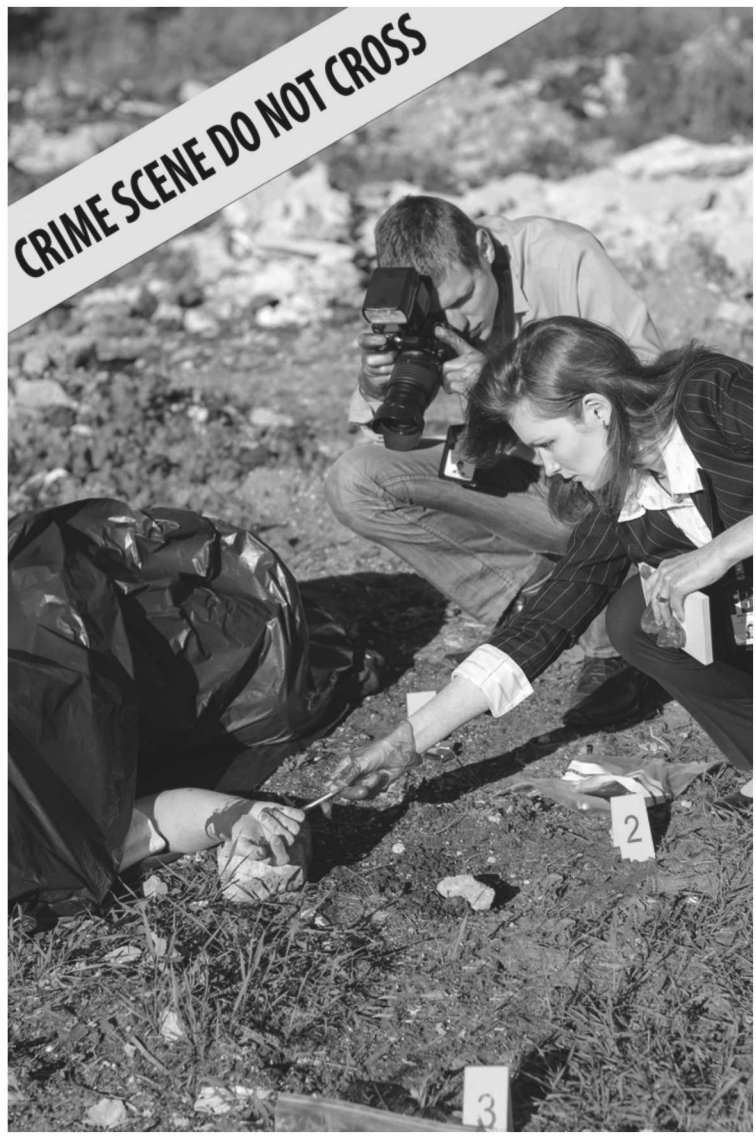
Formal reaction to crime

ONLY STUDY GUIDE FOR
CMY3704

Revised by
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DEPARTMENT OF CRIMINOLOGY AND SECURITY SCIENCE



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THEME DIAGRAM

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- STUDY UNIT 1.1: The issue of sentencing
- STUDY UNIT 1.2: The traditional triad
- STUDY UNIT 1.3: Mitigating and aggravating factors
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- STUDY UNIT 2.1: Retribution as an aim of punishment
- STUDY UNIT 2.2: Deterrence as an aim of punishment
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THEME 3: THE DISPOSITION OF OFFENDERS: A CRIMINOLOGICAL APPROACH

- STUDY UNIT 3.1 Forms of imprisonment
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- STUDY UNIT 4.1: The reintegration of offenders within the South African framework
- STUDY UNIT 4.2: The role of reintegrative shaming in the reintegration process
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Foreword

Start your studies of module CMY3704 by reading Tutorial Letter 101 for this course. You will have received this letter together with your study material and it is also available on the website for this module on myUnisa.

Welcome to the module Reactions to Crime. The study guide concentrates on many topical local, national and international matters, and we hope that you will find it interesting and informative. We wish you success with this module and hope that you will find the learning material useful in your professional field and in your everyday life. Please do not hesitate to contact us if you experience any problems arising from your studies. The contact details of the lecturers are to be found in Tutorial Letter 101.

In compiling this guide the lecturers have used two approaches, namely:

- A practical-functional or pragmatic approach to the aims of criminology in which it is accepted that a subject has an important social relevance and thus links up with the needs of a service-seeking community. The implication of this is that we make information available to you with the primary aim that you will have better insight into and understand the phenomenon of crime. The secondary aim is problem solving in your work situation or life world that arises from the application of this knowledge.
- The principles of curriculum design as outlined in the 1996 Curriculum Framework (CDWG 1996:11–16) in which it is emphasised that an outcomes-based learning plan should foster development issues such as the following:
  - learner-centredness
  - lifelong learning
  - critical and creative thinking
  - nation-building and non-discrimination
  - credibility of the higher education system
  - quality assurance

1 THE PURPOSE OF THE COURSE

Our intention is to encourage you as learners to think critically. We would like to guide you to:

- the expansion of knowledge and conceptual fields
- the forming of attitudes and values
- the acquisition of skills

In terms of the expansion of knowledge and conceptual fields, it is our intention to make you more closely acquainted with:

- the sentencing carried out by courts
- the purpose of punishment and sentencing
- dealing with offenders (forms of punishment)
- the rehabilitation and reintegration of offenders

In the process we would like to help you to think holistically about matters such as sentencing by emphasising the fact that approaches are constantly changing: in South Africa the contemporary viewpoint is that the sentencing framework cannot be applied

successfully without a partnership between the authority structures of the state, the crime victim and the community.

We would like to stimulate the formation of attitudes and values by urging you to take an active interest in the topics under study as they are reflected daily in newspapers, magazines, radio bulletins, television broadcasts and on the internet. The intention is to develop in you a concern for the reaction to crime. In addition, we would like you to demonstrate a responsible attitude to the imposition of sentences, the dispensation of offenders and their rehabilitation and reintegration through the use of criminological knowledge and related skills in your daily life. We start from the premise that, according to the principle of just deserts, criminals must be punished, and in so doing we try to establish in you the principle of the cause and effect of human actions. A respect for the basic rights of all people is strongly emphasised in the discussions on the topics under study and by focusing on the rights of both the offender and the victim in the criminal justice process.

The acquisition of skills enjoys particular attention in this course. The development of reading and study skills forms the basis for mastering the learning content. As a learner you are introduced to the basic concepts concerned with the imposition of sentences and the other study topics. You are also introduced to some of the current issues in the system, such as the overpopulation of prisons, the death penalty and the imposition of mandatory minimum sentences by the courts. Thus, you are enabled to develop the critical thinking and social skills needed to explore and discuss course-related criminological topics at local and international level. In this way we try to develop your ability to reason and thus to expand your field of experience by making conclusions and forming new opinions. We want to teach you to be able to observe (while you are reading your study guide and by being sensitive to matters concerning reactions to crime in the media and your everyday environment) and to collect information, summarise it and arrange it in a meaningful, cohesive whole (by answering the self-assessment exercises and completing the assignments).

2 OUTCOMES-DIRECTED OUTPUTS

The above summary of the purpose of the module relates to specific critical (general formative) and specific (developmental) outcomes (of learning with regard to knowledge and insight, attitudes and values and skills) that have to be attained.

3 CRITICAL LEARNING OUTCOMES

On completion of the module CMY3704 you should have attained the following critical learning outcomes:

- Identify and solve problems in which responses display that responsible decisions using critical and creative thinking have been made.
- Work effectively with others as a member of a team, group, organisation and community.
- Organise and manage oneself and one's activities responsibly and effectively.
- Collect, analyse, organise and critically evaluate information.
- Communicate effectively using visual, mathematical and/or language skills in the modes of oral and/or written presentation.
- Use science and technology effectively and critically, showing responsibility towards the environment and health of others.
- Demonstrate an understanding of the world as a set of related systems by recognising that problem-solving contexts do not exist in isolation.
- Reflect on and explore a variety of strategies to learn more effectively.

- Participate as responsible citizens in the life of local, national and global communities.
- Be culturally and aesthetically sensitive across a range of social contexts.

4 SPECIFIC LEARNING OUTCOMES

The specific learning outcomes are specified in each of the study units.

5 OVERVIEW OF THE COURSE

In the module we deal with four themes. The themes should not be seen in isolation, as they are mutually cohesive and form a whole. Here is an overview of what the course contains.

Theme 1 focuses on sentencing and the following aspects are explained:

- the issue of sentencing
- the traditional triad
- mitigating and aggravating factors
- victim impact statements
- pre-sentencing investigations and reports

Theme 2 deals with the aim of punishment and sentencing. We look at the following:

- retribution as an aim of punishment
- deterrence as an aim of punishment
- incapacitation as an aim of punishment
- rehabilitation as an aim of punishment

Theme 3 looks in detail at dealing with offenders who have been found guilty by the courts. It looks at the different sentences that courts in South Africa can impose, such as imprisonment, corrective supervision and fines.

Theme 4 introduces the process through which offenders are rehabilitated and reintegrated into society. We discuss the following:

- the reintegration process
- the rehabilitation ideal and process
- reintegrative shaming
- restorative justice as an alternative to traditional imprisonment

Nature of the study material

The study material consists of this study guide and the tutorial letters. The tutorial letters concentrate more on administrative matters and assignments. In the study guide, the learning content is divided into four sections as explained in the previous paragraph. Each of the four themes in the study guide comprises a number of study units which in each case follow a general introduction to the theme. The introduction gives you an indication of what we want to teach in the specific theme. You will notice that every study unit starts with learning outcomes. These outcomes describe what we want you to attain through the learning, and not so much the way in which the outcomes should be attained. The content of a study unit is the learning material that you have to master.

At the end of each study unit we have given you some self-assessment questions. These are included to help you to assess your progress and to achieve the stated objectives. The questions focus on things such as factual knowledge, insight and the ability to analyse and synthesise.

Assignments

Tutorial Letter 101 contains an assignment for this module. Handing in this assignment will ensure that you have admission to the examination. This assignment is designed to contribute to the development of your knowledge, insight, values and attitudes and skills.

Learning outcomes

The learning outcomes appear at the beginning of each study unit. These outcomes tell you exactly what we expect of you in terms of the teaching that you receive in a study unit. Learning outcomes therefore express pre-formulated learning results and specify what you should be able to do after you have worked through the study unit.

Let's look at the following example of a learning outcome: "You should be able to describe the concept of 'rehabilitation'."

- The key word or phrase is the concept of "rehabilitation", which is dealt with in the learning material of the particular study unit.
- The verb is "describe". With the use of the action word "describe" we mean that you should give an indication of the "what" and "how" of a specific topic, without any comment or reasoning.
- In the self-assessment exercises in the study guide you will find an instruction that is linked to this learning outcome. A learning outcome is thus linked to a performance standard in the form of a self-assessment question. We expect you to study the section of the learning content in the study unit that deals with the concept of "rehabilitation". You have to master it so that you understand the term and are able to explain it in your own words. The expected end result is that you should be able to answer the self-assessment question concerned.

In order to make sure that you know exactly what is expected of you, we have included an explanation of the meaning of certain verbs or action words. These verbs are not only applicable to learning outcomes, but also pertain to instructions in the self-assessment questions, in assignments and in the examination (with the exception of multiple-choice questions). The terms in brackets refer to a particular level of knowledge.

Complete/fill in: You have to complete the missing section of the sentence or table (knowledge).

Name (list, state, give): You have to reproduce memorised learning content, for example facts, terms and concepts, in the form of single words or short sentences (knowledge).

Indicate (show, identify): You have to recognise memorised symbols, names, concepts and so on, and reproduce your knowledge briefly (knowledge).

Describe (explain): You should give an indication of "what" and "how" a specific topic is, without elaborating or reasoning. "Describe" therefore simply entails sketching a picture. You have to show that you know what a particular phenomenon looks like or how a particular process works (knowledge).

Sketch (give an overview): An existing matter should be reproduced just as it is, without any change, comment or reasoning. Discussion takes place in the form of main points or under subsections (knowledge).

Define: This instruction entails simple knowledge reproduction. You have to memorise and be able to reproduce a concise, authoritative explanation or description of a concept (knowledge). A definition consists of three parts, namely the term, the class and the distinguishing characteristics. "Term" refers to the thing that is defined.

"Class" is the category to which the term belongs, and here you should mention the similarities between the term being defined and other terms in the same class or category. The "distinguishing characteristics" of the term are the qualities that distinguish it from other terms.

Explain (define): You have to show that you have really understood the learning content, that you know how things relate to each other, why something is so and not otherwise, and why a particular result ensues. The explanation should be illustrated with examples and you should give reasons for your statements or conclusions (understanding/insight).

Illustrate with the help of a sketch/diagram/schema (present graphically): You have to give an explanation with the help of a sketch/diagram/schema (understanding/insight).

Interpret (explain): You should respond by using the available facts and these should be illustrated with examples. With interpretation the personal processing of information should be clearly observable (understanding/insight).

Argue: You have to emphasise and explain the crux of a matter (understanding/insight).

Sum up (summarise): You have to obtain certain information by, for example, applying specific processes or methods. These summarising processes entail highlighting the main points of a greater quantity of learning material (application).

Demonstrate (show how): You have to back up information or illustrate it with reference to a suitable example (application).

Apply: You have to apply acquired knowledge and understanding by applying it to new and actual situations (application).

Deduce (make deductions): You have to indicate, with reasoning, logical consequences resulting from given information (application).

Classify (categorise): You have to place information in an existing classification system (application).

Distinguish: You have to indicate clearly the differences between certain matters that are mentioned (analysis).

Compare: You have to weigh up two or more matters against each other in terms of certain characteristics (analysis).

Indicate differences and similarities: You have to compare two or more matters with each other in order to show specific similarities and differences (analysis).

Analyse (examine critically): You have to determine the distinguishing elements (characteristics), identify the causes and effects, and determine and show the mutual relationships (analysis).

Investigate: You have to analyse the information or divide it into sections to indicate causes, effects, relationships and so on (analysis).

Design (create, develop, draw up, combine, formulate, compile, build up): You have to create or develop a new, original combination of information (synthesis).

Propose/advise: You have to give expert guidance in order to solve a problem (synthesis).

Criticise/evaluate (make judgements, justify, substantiate, take a stand on, assess): You have to make a value judgement on the basis of specific standpoints, assumptions or criteria (evaluation).

6 PLEASE NOTE

YOU SHOULD BUY A WORKBOOK FOR THE ACTIVITIES THAT HAVE TO BE COMPLETED IN EVERY STUDY UNIT. THE WORKBOOK IS NOT PART OF THE TUTORIAL MATTER PROVIDED BY UNISA. YOU ARE ALSO ENCOURAGED TO COMPILE A WORD LIST OR GLOSSARY OF KEY TERMS AND OTHER DIFFICULT CONCEPTS IN YOUR WORKBOOK AFTER EACH STUDY UNIT, AS DONE IN THE EXAMPLE THAT FOLLOWS:

> **Term**: Consistency
>
> Definition/meaning: This refers to equal treatment (consistency or uniformity) in sentencing and implies that offenders guilty of similar crimes and with similar personal circumstances have to be dealt with in a similar fashion.

PLEASE GO OVER THESE TERMS REGULARLY SO THAT YOU BECOME AND REMAIN FAMILIAR WITH THE NEW TERMS IN THE STUDY GUIDE.

We hope that your studies will be rewarding as well as enjoyable. Please do not hesitate to contact any of your lecturers if you have any questions relating to the tutorial matter.

THEME 1

SENTENCING

Study unit 1.1: The issue of sentencing

Study unit 1.2: The traditional triad

Study unit 1.3: Mitigating and aggravating factors

Study unit 1.4: The pre-sentencing investigation and report

Study unit 1.5: Victim impact statements

INTRODUCTION

You have already been introduced to reaction to crime as part of your undergraduate criminology syllabus at both first- and second-year levels. Let us refresh your memory about what you already know about reaction to crime.

In theme 1 of the study guide for the first-year module "Introduction to criminology: reaction to crime" CMY103D we focused on the informal reaction to crime. You were introduced to individual perspectives on fear of crime, informal control of crime and individual reactions to crime. Fear of crime in communities is one aspect of the informal reaction to crime. In particular we looked at the vulnerability of certain groups in society and the correlation between this vulnerability and high levels of fear. We also discussed the factors that increase the fear of crime, as well as the reduction and prevention of this phenomenon. We placed the informal control of crime under the microscope and came to the conclusion that social (informal) control can be very effective in the fight against crime, because it is based on the accepted customs, norms and values that are valid in a particular community. Collective reactions to crime were also explained further and we expanded on the significance of community crime prevention. You will remember that community crime prevention refers to a situation in which communities accept responsibility for crime prevention in their own residential areas, for example by increasing the role of local institutions such as churches in the prevention of domestic violence and child abuse.

Theme 2 in the study guide for CMY1503 dealt with the formal or official reaction to crime. In this theme we described the concept of "the law" and the relationship between the law and religious norms, and between the law and the moral standards of society. Justice as an ideal of the legal system and the concept of "legal certainty" were explained and analysed. A number of important concepts of justice (crime control, fairness, due process, rehabilitation, non-interventionist models and restorative justice) were defined. Your attention was also directed to contentious issues and developments in the criminal justice system, for example bail, overpopulated prisons, the empowerment of victims and crime prevention through developmental and restorative justice.

Theme 3 in the CMY1503 study guide focused on the aims and composition of the criminal justice process as part of the formal reaction to crime. We considered the crime control model and the due process model as ideological approaches to the goals of the

administration of criminal justice and evaluated these models against the backdrop of human rights, the manifesto of human rights and the rights of the offenders and victims of crime respectively. The different phases for the criminal justice system were also identified and explained.

Theme 4 of the CMY1503 study guide gave you an overview of the functions of every role-player in the criminal justice system. The roles of the courts, director of public prosecutions, state prosecutor and presiding official were explained briefly. The roles of the South African Police Service (SAPS), Corrective Services and Social Development were investigated and the role of the grouping of justice, crime prevention and security were explained with reference to reaction to crime.

Theme 1 of this study guide links up with the formal or official reaction to crime. If a court finds an accused not guilty, the person is discharged and the justice process comes to an end. Where an accused is found guilty, however, sentencing takes place during the trial phase of the justice process. At this stage the court is faced with the task of deciding on an appropriate sentence. Briefly, sentencing occurs as follows:

- Proof of previous convictions (if there are any). Fingerprints are analysed to determine whether the offender has a criminal record, which is then presented to the court.
- Arguments in mitigation or aggravation of punishment. The accused or the defence is given the opportunity to bring factors in mitigation of sentence to the attention of the court. The legal representative may argue on the basis of facts that are already before the court. The accused can give evidence himself or herself on, for example, personal circumstances, the motive for the crime and personal remorse experienced. Other people, such as a criminologist, can give expert evidence on the accused's background and/or personality that may help the court to determine an appropriate sentence. What is also at issue here is a pre-sentencing investigation and a pre-sentencing report, as well as a victim impact statement. The prosecutor may cross-question such witnesses. Thereafter the state is given an opportunity to highlight factors in aggravation of punishment. The state witnesses may be cross-questioned by the defence and then both the accused or his or her legal representative and the prosecutor may address the court in this regard.
- After all the evidence in mitigation and aggravation has been heard, the court must make a decision on an appropriate sentence. If the accused has been found guilty of a common-law offence, no specific sentence is prescribed and the sentencing official has wide discretion in determining an appropriate sentence. If he or she has been found guilty of a statutory crime, sentencing options are laid down by law and sentencing discretion is to an extent limited. When the court exercises discretion, it is in a certain sense bound to basic principles of sentencing such as the court's jurisdiction, the type of punishment, maximum and minimum sentences, punishment objectives, the circumstances of the offender, the nature of the crime and the interests of society. The sentencing officer must temper this discretion with mercy so that a sentence is not used to destroy an offender. The court should not decide on an appropriate punishment alone, as in many cases there is a further question of the extent of punishment.

The theme is divided into the following sections:

- the issue of sentencing
- the traditional triad
- mitigating and aggravating factors
- victim impact statements
- pre-sentencing investigation and report

STUDY UNIT 1.1

The issue of sentencing

Multiple factors	Sentencing as a human process	The methodology of sentencing	Constitutional matters

CONTENT

1.1.1 Introduction
1.1.2 Key concepts
1.1.3 Multiple factors
1.1.4 Sentencing as a human process
1.1.5 The methodology of sentencing
  1.1.5.1 The intuitive approach
  1.1.5.2 The rational approach
  1.1.5.3 The empirical approach
1.1.6 Constitutional matters
1.1.7 Summary
1.1.8 Self-assessment questions
1.1.9 Feedback on activities
1.1.10 Feedback on self-assessment questions



LEARNING OUTCOMES

At the end of the study unit you should be able to:

- Show which factors play a role in the balancing process during sentencing.
- Give an explanation of sentencing as a human process.
- Distinguish between the three approaches to the methodology of sentencing.
- Identify some constitutional matters that concern sentencing.

1.1.1 INTRODUCTION

After arguments for mitigation of sentence (mitigating factors) and for aggravation of sentence (aggravating factors) have been dealt with, the court has to make a decision on an appropriate sentence (a suitable sentence that takes all the circumstances into account) (Siegel, 2003:533). According to many experts, sentencing is one of the most difficult tasks of the court. Judge President Mogoeng WA Mogoeng remarked that sentencing is often

the most difficult facet of a court case: "I share the view that sentencing is still the most difficult task in a criminal trial for any judicial officer" (Mogoeng, 2006:1).

Garkawe (2006:3) refers to two matters that contribute to the issue of sentencing: "Such decisions must be made with objective fairness so that there is a degree of consistency in the punishment of offenders". Terblanche (2007:137) summarises this as follows:

> Before a judicial officer imposes sentence on the offender in any given case, he first has to determine which sentences may be imposed, through an interpretation of the relevant penalty clauses. The court also has to collect all the information that may be relevant to the determination of a suitable sentence. Thereafter, the court has to exercise its sentence discretion to choose the most appropriate sentence from the list of possibilities.

In this study unit we want to try to show the issues involved in imposing an appropriate sentence after someone has been convicted by a court.

For the student of criminology, the following is important in terms of sentencing:

- The court should strike a balance between multiple factors (elements, criteria, aspects).
- Sentencing is a human process.
- There are different approaches to sentencing (methodologies): There are important constitutional principles that play a role in the process.

1.1.2 KEY CONCEPTS

In this study unit you will be introduced to the following key concepts:

Sentence/punishment: It is theoretically possible to distinguish between these two terms, but for the purpose of this theme we will use them interchangeably.

A sentence is a punishment that is imposed by the court on an accused who has been found guilty of committing an offence. This therefore ends the trial process in court.

A punishment is usually also a sentence (perhaps with the exception of a warning) and the term refers to the following:

- It is something unpleasant for the offender.
- It is the result of a crime.
- It is imposed on the offender who committed the crime.
- It entails sanctions by the court which have the necessary authority.

Mitigating factors: The mitigating effect of a factor refers to the fact that it reduces the moral culpability of the accused as offender and/or the blameworthiness of the accused's deed. As a result of reduced culpability or blameworthiness, the magistrate of judge may impose a lighter sentence. Whether a factor is indeed a mitigating factor is inevitably a question that can only be judged by the trial court on the basis of all the relevant facts of the particular case.

Aggravating factors: The concept of "aggravating factors" refers to those factors that are taken into account during sentencing and act to aggravate the sentence. Aggravating factors generally result in a heavier sentence, because:

- They increase the accused's moral culpability (the moral blame, blameworthiness).
- They increase the moral culpability of the offender in the eyes of society.
- They increase the reprehensibility of the accused's deed.

Consistency: This refers to equal rights (permanence or uniformity) during sentencing and implies that offenders who commit similar crimes and with similar personal circumstances should be dealt with in the same way.

Discretion: The imposing of punishment or sentencing discretion entails a choice between different forms of punishment (except where a specific punishment is prescribed) and normally also the weight or quantity (measure) of the sentencing option the court decides on.

Goals or objectives of punishment/aims or purposes of punishment: Although a theoretical distinction can be made between these two concepts, in this theme they are used interchangeably to refer to the aims of sentencing in a particular case. The goals or aims of sentencing are very important because pointless sentences would be meaningless and unacceptable.

Criminal/offender/accused: Although there is a theoretical distinction between these concepts, for example the term "accused" is applicable to people who have not yet been found guilty by a court, they are used interchangeably in this theme.

Deterrence: The view is that people will refrain from crime because of the existence and action of punishment.

Individual deterrence is about the experience of the offender who is being punished. The underlying assumption is that someone who has been subjected to punishment once will be conditioned to avoid crime in the future.

General deterrence is based on the premise that the individual offender should be punished in such a way that it can serve as an example and prevent the potential criminal from committing a crime.

Rehabilitation: In a rehabilitation process the intention is to change the offender's disposition, attitude to life and observable behaviour and, in the case of a prison sentence, to offer support so that on release from prison the offender is able to adapt to society in a socially acceptable manner.

Retribution: The underlying idea of retribution is that the criminal deserves a form of punishment that will offset the harm and loss society suffers as a result of the crime.

The "just-deserts" principle: In terms of this principle the belief is that criminals are generally responsible people who act out of free will and can discriminate between right and wrong and therefore deserve punishment. Criminals are therefore not punished to rehabilitate them or to deter them or other people, but because they deserve it.

The principle of proportionality: This places a limit on the extent of the punishment imposed by a court in the sense that a sentence should be linked to the moral guilt (blameworthiness or culpability) and the harm or damage caused by the crime.

1.1.3 MULTIPLE FACTORS

Sentencing does not take place in a vacuum and the process is made more difficult because there are always various factors that have to be borne in mind when considering an appropriate sentence. Lovegrove (1989:9) mentions three questions that are interrelated when passing sentence:

- What are the appropriate goals of sentencing and how should they be weighed in the light of the facts of the current case?
- How can the goals of sentencing be achieved under the circumstances of the case?
- What specific sentence is justified given the facts of the case?

It is generally accepted that an appropriate sentence is based on all the circumstances of a case and that the following factors play a role when a court is considering an appropriate sentence (see South African Law Commission, 2000; Geldenhuys & Joubert, 1996:246; Terblanche, 2007:137–38):

> The traditional triad of factors (triad of Zinn), namely, the crime (the nature and seriousness of the offence), the accused (such as for example the accused's personal circumstances and income) and the interests of society (such as for example the protection of society) (Mogoeng, 2006:1).

REFLECTIVE QUESTION: Which one of the traditional triad of factors (the crime, the accused and the interests of society) in your opinion carries the most weight in sentencing?

Aggravating and mitigating factors that are present in the case: Aggravating facts are, for example, linked to the fact that the accused has previously been found guilty of a similar crime or that the crime committed is very serious. Factors in mitigation brought to the court's attention include, for example, whether the offender is a first offender and whether he or she shows genuine remorse.

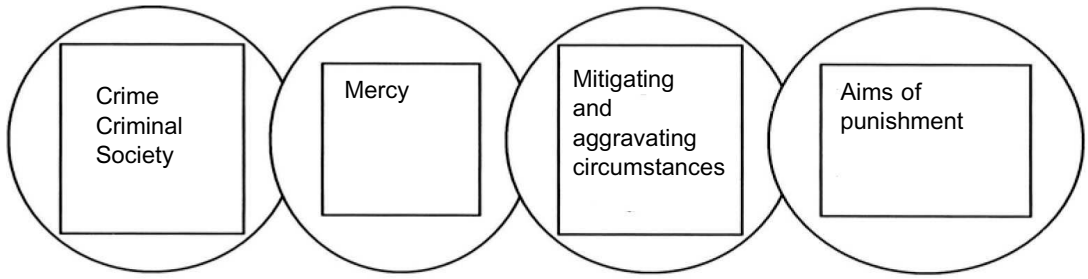
REFLECTIVE QUESTION: Can you think of a court judgment where the presiding official mentioned aggravating or mitigating factor(s) that were considered during sentencing?

The objective of punishment or the purpose that a sentence is intended to achieve: Sentencing is not an aimless or pointless procedure and every sentence has a recognised purpose that the presiding official should bear in mind and strive for in a balanced manner without overemphasising one of the objectives. Siegel (2003:535) makes mention of the following aims of punishment: retribution, deterrence, rehabilitation and prevention.

REFLECTIVE QUESTION: Do you think that our courts are often inclined to pander to criminals when handing out punishment under the guise of rehabilitation as an aim of punishment?

In order to find an appropriate punishment, sentencing decisions should be tempered by humanity or compassion. The court should therefore not sentence in order to take revenge or to destroy the offender. This degree of humanity is called mercy (South African Law Commission, 2000:36).

All the relevant facts, factors and principles should be considered equally, whilst in the balancing process the court should also strive for all the recognised aims of punishment. The balancing process can be presented schematically as follows:



An appropriate punishment should give expression to the nature and seriousness of the crime. It should also, however, take into account aggravating and mitigating factors relating to the offender. The sentence should thus reflect the blameworthiness of the offender and should relate to what the offender deserves. An appropriate punishment should also serve the interests of society; provide for the need for order and peace in society; and deter prospective criminals in order to protect society. Deterrence is regarded as the most important aim of punishment and consists of two components, namely to prevent the offender from committing a crime again and deterring potential criminals. Rehabilitation as an aim of punishment should be striven for only if the sentence actually has the potential to attain it (the rehabilitation of the criminal). In the case of very serious crimes, where long terms of imprisonment are appropriate, rehabilitation is not an important consideration. The interests of retribution in sentencing are related particularly to the principle that (the extent of) the punishment should fit (the nature and seriousness of) the crime and that there should be a proportional relationship between punishment and crime (principle of proportionality). In the balancing process attention should of course also be given to the demands of the times or the times in which the crime was committed, for example the current serious crime situation in South Africa requires consistent and strict sentencing by the courts (Terblanche, 2007:146–47). The demands of the times should, however, not be equated with the (often uninformed) demands of society. Mogoeng (2006:2) refers in this regard to the "public mindset about sentencing" which is often ruthless in nature.



ACTIVITY (1) 1.1

Why must we do this?

- Why do we have to do it?

FEEDBACK

To determine whether you understand that an appropriate sentence is based on all the circumstances of a case and the role played by multiple factors when a court considers an appropriate sentence.

Guidelines

Court judgments are reported daily in the media. Read a few of these reports and see which of the factors discussed above are mentioned in them.

1.1.4 SENTENCING AS A HUMAN PROCESS

Regoli and Hewitt (1996:526) make specific mention of the fact that sentencing is a human process. It is generally accepted that factors such as the sociopolitical orientation, character, background and general life view of the sentenced individual play an important role when exercising sentencing discretion in terms of the type and extent of the punishment that is eventually imposed. The following aspects represent the elements of sentencing as a human process:

- The sentencing official should have a specific general disposition. Former Appeal Court Judge Corbett refers as follows to the judicial balance of the presiding official:

  > A judicial officer should not approach punishment in a spirit of anger, because, being human, that will make it difficult for him to achieve that delicate balance between crime, the criminal and the interests of society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor, on the other

hand, surrender himself to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a human and compassionate understanding of human frailties and the pressures of society which contribute to criminality (*S v Rabie* 1975 4 SA 855 (A) on 866A–C).

- The sentencing official's view of humanity (offender) may influence, for example, decisions made in terms of the choice or aim of punishment. Van der Merwe (1996:1–2–1–3) discusses this issue on the basis of the deterministic and indeterministic views of human beings and human responsibility. "Determinism can be roughly defined as a view of man which negates the possibility of the exercise of a free will by man. He is driven and shaped by forces beyond his control which act upon him from the moment of birth. In other words his fate is 'determined' for him" (Van der Merwe, 1996:1–2e). According to the deterministic view, human behaviour is the product of the interaction between the individual with a particular genetic constitution and the environment. In general, people are not free in their behaviour, that is to say, people do not determine their patterns of behaviour in advance. Criminals cannot act other that circumstances allow them to and for this reason they cannot always be held responsible for their criminal behaviour. In accordance with the indeterministic view of human behaviour and responsibility, reasonable people direct their behaviour according to rational decisions and can, under normal circumstances, distinguish between right and wrong and make a rational choice. For this reason, offenders can be held accountable.

  REFLECTIVE QUESTION: Which view of humanity and human responsibility, deterministic or indeterministic, do you support?

- Sentencing officials have wide powers in terms of sentencing people after they have been found guilty. In order to determine which of these powers should be made applicable to a specific offender, the presiding official should exercise discretion. The exercising of discretion in terms of punishment or sentencing entails a choice between different forms of punishment (except where a specific punishment is laid down) and is normally also a weight or quantity (measure of punishment) of the sentencing option the court has decided on (Geldenhuys & Joubert, 1996:245).

The sentencing official's discretion is not unfettered discretion. Firstly, legislation may prescribe the possible forms or types of punishment to be imposed for a particular crime. Even then it is not always easy to make a choice from the array of sentencing options that the legislation leaves up to the presiding official, for example whether to impose a suspended sentence or a community-based sentence such as corrective supervision. Secondly, legislation can prescribe or give guidance on the measure of punishment (amount or quantum). This can be done by means of maximum fines or terms of imprisonment and even minimum sentences. Articles 51–54 of the Criminal Law Amendment Act (105 of 1997) (from here on referred to as the 1997 Amendment Act) make provision for minimum sentences of life imprisonment for certain serious crimes (such as murder, robbery and rape), except when "compelling and substantial" circumstances are found that justify a lighter sentence. These provisions came into force on 1 May 1998.



ACTIVITY (1) 1.2

Why do we have to do it?

FEEDBACK

To determine your opinion on a minimum sentence of life imprisonment.

Guidelines

Start a conversation with someone like a colleague or a friend and debate the advantages and disadvantages of a minimum sentence of life imprisonment for certain serious offences (such as murder, robbery and rape).

- The existence of sentencing discretion is a cornerstone of fair sentencing. A big advantage of broad discretion in terms of punishment is that sentencing officials can adapt sentences to make provision for differences in the personal circumstances of offenders. The disadvantage is that it sometimes does not promote the equality of punishment and two people who have committed the same crime but who appear before two different presiding officials may be given different sentences.
- Justice in sentencing consists of two elements, revenge and consistency (Garkawe, 2006:3; Kriegler, 1993:650–651). With regard to revenge, the starting point is that the sentencing official should avoid the impression of personal involvement, anger or wrath during sentencing. The sentence should be reasonable and thus related to the moral guilt of the offender and the seriousness of the offence. Consistency refers to equal rights (consistency or uniformity) in sentencing and implies that offenders with similar crimes and personal circumstances should be handled similarly (Siegel, 2003:541). In order to bring about greater consistency or uniformity in punishment, the legislator can restrict the sentencing official's broad discretion by legislation, such as in the case of limitations on declaring an offender a habitual offender. These limitations include the following:
  - Only a high court or a regional court may impose this sentence.
  - Offenders under the age of 18 are not subject to this punishment.
  - The sentencing official should be convinced that the offender commits crime out of habit and that society should be protected against such a person (Terblanche, 2007:237).

Absolute consistency or perfect equality in sentencing is unattainable. However, presiding officials should strive for the greatest degree of consistency by keeping track of the sentencing levels of their colleagues. Uniform punishments contribute to legal certainty and society's confidence in the courts.

Mogoeng (2006:1) draws attention to the fact that responsible and affordable sentencing can serve as a stabilising social structure in a South African society characterised by rapid change and high levels of crime.

Effective and affordable sentencing can promote legal certainty and help to illustrate the important educational function of effective justice to society.

1.1.5 THE METHODOLOGY OF SENTENCING

According to Van der Merwe (1996:1–14–16) this concept is "primarily concerned with the method followed by the sentencing officer in trying to come to the optimum type and quantum of punishment". He distinguishes between three methodological approaches that are generally followed in the sentencing process.

1.1.5.1 The intuitive approach

As the facts of the case are revealed to the court through evidence and cross-examination, the sentencing official develops a spontaneous understanding of an ideal or appropriate

sentence. The application of rules, guidelines and guidance on the administration of justice serves as increasing support for the hypothetical sentence. This approach is illustrated by the following quote from Judge Kaufmann in the United States Appeal Court: "the experienced judge, like any good craftsman, does the right thing without constant awareness of his motivations. He may call it a 'feeling of sentencing'" (Van der Merwe, 1996:1–14). The analogy of a "good craftsman" agrees to an extent with Klopper's (1987:16) example when he says that a sentencing official has to be a fine architect in his field and not merely a bricklayer.

1.1.5.2 The rational approach

In this more reasoned approach the sentencing official should firstly determine the "punishment frame" as laid down by the legislator as to the type and quantity of punishment. Secondly, the sentencing official construes the "guilt frame". This concept is based on the German approach, namely that the guilt of the offender should be the basis of the deliberation process during sentencing (Van der Merwe, 1982:264–266). In this way, an offender is punished according to merit in terms of guilt. Other aims of punishment such as prevention can co-determine the sentence within the limits of the "guilt frame". The sentence corresponding to the "guilt frame" may not, however, exceed the "punishment frame" for a specific crime. In the South African context, the role of the "guilt frame" can be filled by the punishment aim of retribution so that the offender is then punished according to:

- the blameworthy attitude towards legal and social prescriptions such as are manifested in the crime
- the harm done to society through the crime

Thereafter, the aims of punishment and certain factors are taken into account separately by the "punishment frame" to eventually determine an appropriate sentence.

1.1.5.3 The empirical approach

In terms of this methodology a sentence is determined on the basis of a multidisciplinary assessment. With reference to this, Kriegler (1993:650) remarks that in an appropriate case a wise sentencing official will not hesitate to ask the advice of an expert witness. Aspects such as the victim impact statement and the pre-sentencing investigation and report can also be mentioned here (Schmalleger, 1994:231–235; Welch, 1996:387–388).

1.1.6 CONSTITUTIONAL MATTERS

Constitutional norms add a new dimension to sentencing. In *S v Makwanyane* 1995 (3) SA 391 (KH) various constitutional provisions were applicable. In this case the Constitutional Court found that the death penalty is an unconstitutional form of punishment. This decision rests on the following fundamental rights, among others:

- Everyone is equal before the law and has the right to equal protection and benefit of the law. The conclusion of the court was that, in the past, unequal judgments had occurred on the basis of things such as chance (judges who supported the death penalty and others who were in favour of its abolishment), poverty and race. In this way, people were discriminated against unfairly in the final decision on life or death.
- Everyone has inherent dignity and the right to have their dignity respected and protected. The conclusion reached was that an execution obliterates human dignity and that this provision can serve as a consideration in declaring the death penalty invalid.
- Everyone has the right to freedom and security of the person. This includes the right

not to be treated or punished in a cruel, inhuman or degrading way. The conclusion of the court was that, in terms of the Constitution, the death penalty was a cruel, inhuman and degrading punishment.

REFLECTIVE QUESTION: In a case of murder, the victim also has certain rights and therefore the death penalty should not be considered an unconstitutional form of punishment. What is your opinion of this statement?

FEEDBACK

This discussion illustrates how important constitutional provisions and norms are in sentencing.

1.1.7 SUMMARY

It is obvious that sentencing is a complicated process with particular issues. The difficulty of the task lies in the fact that various issues come into play in the process and these factors often contradict each other.



ACTIVITY (1) 1.3

Why do we have to do it?

FEEDBACK

- To help you with the learning process and in preparing for the examination.
- Expand the glossary in your workbook by including the key words and other difficult concepts in this study unit, as we explained in the foreword to this study guide. Remember that one of the important ways of transferring knowledge from the short-term to the long-term memory is by calling it up regularly until you have mastered it. The more a thought pattern is "fired", the more "hard wiring" of neurons takes place. This hard wiring also happens when we discuss our new knowledge with other people, recall mind maps or summaries, and apply the knowledge in our everyday life.

1.1.8 SELF-ASSESSMENT QUESTIONS

(1) Define the four factors that are involved in the balancing process that takes place during a court's deliberations on an appropriate sentence. (15)

(2) Sentencing is a human process. Write explanatory notes on each of the following:

(a) the general disposition of the sentencing official (6)
(b) the deterministic and indeterministic views of human behaviour and responsibility (6)
(c) sentencing discretion (4)
(d) fairness in sentencing with reference to revenge and consistency and uniform punishments (4)
(e) responsible and affordable sentencing (3)

(3) Van der Merwe distinguishes between three approaches to the methodology of sentencing. Give an explanation of:

(a) the intuitive approach (4)
(b) the rational approach (10)
(c) the empirical approach (5)

(4) "Constitutional norms have added a new dimension to sentencing."
Explain this statement on the basis of the Constitutional Court's decision on the constitutionality of the death penalty. (7)

(5) Indicate which of the following factors are known as the traditional triadic factors of Zinn.

(a) the crime, the accused and the victim
(b) the prosecutor, the society and mitigating factors
(c) the presiding official, aggravating factors and mitigating factors
(d) the crime, the accused and the society
(e) the first offender, the victim and the crime

(6) Which one of the following options is NOT an aim of punishment?

(a) retribution
(b) mercy
(c) deterrence
(d) rehabilitation
(e) prevention

(7) Which of the following factors may be regarded as mitigating factors by the sentencing official?

(a) a serious offence – the accused has been found guilty of a similar offence in the past
(b) the offender shows great remorse – a serious offence
(c) the offender is a first offender – the offender shows sincere remorse
(d) the offender has already been found guilty of a similar offence – the offender is a first offender
(e) the offender shows sincere remorse – the offender has been found guilty of a similar offence in the past

(8) Sentencing is known as a human process. Which of the following options contain the elements of sentencing as a human process?

(a) judicial balance; presiding official's discretion, fair sentencing and sentencing is not without purpose
(b) sentencing official's view of humankind; consistent sentencing; humane sentencing decisions
(c) judicial balance; sentencing official's view of humankind; presiding official's discretion and consistent sentencing
(d) presiding official's discretion; consistent sentencing; fair sentencing and humane sentencing decisions
(e) judicial balance; fair sentencing; humane sentencing decisions and understanding of mitigating factors

(9) Which of the following combinations represent Van der Merwe's three approaches to sentencing?

(a) the constitutional approach, the consistent approach and the indeterministic approach
(b) the intuitive approach, the rational approach and the empirical approach

(c) the deterministic approach, the balanced approach and the hard-hearted approach
(d) the aggravating approach, the rational approach and the empirical approach
(e) the mitigating approach, the intuitive approach and the balanced approach

1.1.9 FEEDBACK ON ACTIVITIES

ACTIVITY (1) 1:1

No feedback

ACTIVITY (1) 1:2

In your discussions you can look at the following arguments in favour of minimum sentences of life imprisonment for certain very serious crimes:

- An unequivocal message should be sent out to all potential offenders, for example: "People who are found guilty of rape will be sentenced to a minimum of 15 years' imprisonment."
- One way to eliminate any leniency by the courts is to prescribe minimum sentences for violent crimes.
- Appropriate obligatory minimum sentences give society the feeling that justice is being done.
- Minimum sentences for violent crimes convey a clear message about the implications of people's involvement in any form of violence.

ACTIVITY (1) 1:3

No feedback

1.1.10 FEEDBACK ON SELF-ASESSMENT QUESTIONS

Study unit 1.1

(1) Refer to the following in your answer:

- the traditional triad of Zinn
- aggravating and mitigating factors
- aims of punishment
- compassion or mercy
- a schematic representation of the balancing process

(2) Refer to the following in your notes:

(a) Judicial balance

- approach to sentencing (spirit of wrath)
- view of punishment intensity
- misplaced compassion
- view of the human being
- pressure of society

(b) Determinism

- Behaviour is the product of the interaction between the human being and the environment.

- People are not free in the decisions they make about their behaviour.
- Criminals cannot always be held accountable.

(c) Indeterminism

- Human behaviour is directed in accordance with rational decision making.
- People can distinguish between right and wrong.
- Under normal circumstances offenders are accountable.

(d) Name the following:

- Sentencing officials have extensive powers after the offender has been found guilty.
- Sentencing officials have discretion with regard to the type of sentence.
- Sentencing officials have discretion about the quantum or measure of punishment.
- Discretion should be exercised consistently and according to the principles of fairness and justice.

(e) Revenge

- The sentencing official should avoid personal involvement, anger or wrath.
- The sentence should be in relation to the moral guilt and seriousness of the offence.

(f) Consistency or uniformity

- equality of rights
- curtailment of discretion by legislation

(g) Responsible sentencing

- can serve as a stabilising social structure
- can promote legal certainty
- can fulfil an important educational function

(3) (a) The intuitive approach

- Sentencing official develops a spontaneous understanding of the appropriate sentence.
- Rules, guidelines and previous judgments serve as support.
- Give the example of Kaufmann or Klopper.

(b) The rational approach

- punishment frame
- guilt frame
- just deserts and prevention
- sentence according to guilt frame may not exceed penalty in terms of punishment frame
- aims of punishment and factors involved

(c) The empirical approach

- use of empirical and statistical methods of criminology
- sentencing according to a multidisciplinary approach
- use of expert witnesses
- victim impact reports
- presentence investigations and reports

(4) The explanation should take into account the following factors:

(a) Everyone is equal before the law and has the right to equal protection of the law.

- unequal judgments on the basis of chance, poverty and race
- unfair discrimination

(b) Everyone has the right to respect and the protection of their dignity.

- execution eliminates human dignity

(c) Everyone has the right to freedom and security of the person.

- the death penalty is a cruel, inhuman and degrading punishment

(5) Option 4
(6) Option 2
(7) Option 3
(8) Option 3
(9) Option 2

STUDY UNIT 1.2

The traditional triad

Development of factors	The crime	The offender	Society	Mercy

CONTENTS

1.2.1 Introduction
1.2.2 Key concepts
1.2.3 The development of the principles
1.2.4 The crime
1.2.5 The offender
1.2.6 Society
1.2.7 Mercy
1.2.8 Summary
1.2.9 Self-assessment questions
1.2.10 Feedback on activities
1.2.11 Feedback on self-assessment questions



LEARNING OUTCOMES

At the end of this study unit you should know the three basic elements of the traditional triad in sentencing and the concept of compassion or mercy. You should also be able to:

- Describe the way the traditional triad has been developed by the courts over the years.
- Indicate the way in which the crime as an element of the triad is considered on sentencing.
- Explain how the personal circumstances of the wrongdoer are taken into account in the process.
- Show how the interests and feelings of society as a factor are assessed by the court.
- Show what role the aspect of mercy plays in sentencing.

1.2.1 INTRODUCTION

In section 1.1.3 you were introduced to the fact that sentencing does not take place in a vacuum and that the process is hampered by various factors that have to be kept in mind when considering an appropriate sentence. We saw that an appropriate sentence is based on all the circumstances of a case and that multiple factors play a role when a court

considers such a sentence (see South African Law Commission 2000; Conklin 2007:363–370; Terblanche 2007:137–138).

One of the criteria that should be taken into account during sentencing is the traditional triad (triad of Zinn), namely the crime (the nature and seriousness of the offence), the accused (e.g. the accused's personal circumstances and the offender's just desserts) and the interests of society (e.g. the protection of society) (Mogoeng, 2006:1).

In this study unit you will be introduced to the development of these principles by the courts and look at the triad of factors (the crime, the accused and the interests of society) and the aspect of mercy in sentencing in more detail.

1.2.2 KEY CONCEPTS

In this study unit you will be introduced to the following key concepts.

The traditional triad: Three elements that are clearly emphasised here are:

- that the punishment must be determined according to legality and fairness (by implication according to the seriousness of the crime)
- the interests of the accused
- the interests of society

Individualisation (personalisation) of punishment: In applying this balancing process (see study unit 1.1) an attempt is made to personalise or individualise sentences. The principle of individualisation in sentencing prevents punishment from being generalised (stereotyping) and is based on the attention the court gives to the individual circumstances of the offender. On the other hand, Du Toit (1981:124) warns that the emphasis on individualising punishment in balanced sentencing should not undermine the principles of consistency and uniformity.

Pre-sentencing report: In order to simplify the task of the presiding official, he or she can make use of the services of an expert witness. This expert can make certain recommendations with regard to an appropriate sentence. The expert witness will compile an extensive "profile" of the criminal in which various factors are considered. The defence can also use an expert witness to put a report before the court recommending a specific punishment.

The expert witness's task in court is therefore aimed at making a contribution to fair sentencing. In order to succeed in this task, the expert should conduct a pre-sentencing investigation, during which many factors may be considered that could have played a role in the committing of the crime. A report known as a pre-sentencing report is then drawn up and put before the presiding official in order to help him or her in sentencing the offender.

Victim impact report: A victim impact report is intended to provide the court with information on the physical, financial, emotional and psychological effects that the victim has suffered as a result of a crime, and where applicable, the effect on his or her family. The victim impact report is dealt with in more detail later in the theme.

Vigilantism: The punishment of the offender is, among other things, an acknowledgement of society's feelings of outrage and its formal repugnance to criminal behaviour. By offenders receiving their just deserts in the form of punishment, society is satisfied that its formal condemnation of criminal behaviour has been expressed and that the legal balance has been restored. If crime were to go unpunished, it would mean that it was condoned. Not only might this be in conflict with society's feelings of natural repugnance, but might also result in people taking the law into their own hands and acting against the

offender themselves. The latter phenomenon is known as vigilantism. Well-known vigilante groups in South Africa are Mapogo a Mathamaga and PAGAD (People against Gangsterism and Drugs).

> REFLECTIVE QUESTION: Can you identify with the activities of vigilante groups, especially in light of the poor functioning of the criminal justice system in South Africa?

1.2.3 THE DEVELOPMENT OF THE PRINCIPLES

The traditional triadic (Terblanche, 2007:138–146) principles of sentencing have been worked out by the courts over the years. In our courts the three criteria can be traced back to the case of Berger 1936:

> [W]hen applying punishment the public interests in particular must be considered, while not forgetting the improvement and interests of the offender. After the accused has been found guilty the judge moves into another sphere where the imposition of punishment must be accompanied by judicious mercy and humanity in accordance with the facts and circumstances of the case; this means that the judge should take cognisance of the effect of any possible punishment on the offender and then determine punishment according to justice and fairness (Hiemstra, 1987:203 [translation]).

Three elements that are clearly emphasised here are:

- the interests of society
- the interests of the offender
- that punishment must be determined according to justice and fairness (by implication, according to the seriousness of the crime)

> REFLECTIVE QUESTION: Do you think that our courts always consider the three elements of the triad of Zinn during sentencing? Can you think of a specific case reported in the media to support your answer to this question?

In the Appeal Court judgment in the case of *Zinn* 1969 (2) SA 537 (A), a single sentence gripped the imagination of sentencing officials and criminologists. This is important because the court in this case briefly explained the three most important considerations when imposing a sentence: "What has to be considered is the triad consisting of the crime, the offender and the interests of society" (Snyman, 1995:15–16). In this judgment, the court weighed up the personal circumstances of the individual offender against the nature and seriousness of the crime committed and the interests of society. It was also perhaps the use of the term "triad" that caught people's attention in the case of *Zinn*.

Kriegler (1993:651) is of the opinion that this judgment (*dictum*) has become well established in law and refers to a number of representative cases as confirmation.

- In *Sparks* 1972 (3) SA 396 (A) AR Holmes on 410H states the principles thus: "In addition to the matter of punishment, the deterrent aspect calls for a measure of emphasis, lest others think the game is worth the candle. Nevertheless, the appellants must not be visited with punishment to the point of being broken. Punishment should fit the criminal as well as the crime, be fair to the State and to the accused and be blended with a measure of mercy."

- In *Kumalo* 1973 (3) SA 697 (A) on 698A, the same appeal judge summarised as follows: "Punishment must fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances. The last of these four elements is sometimes overlooked."

Terblanche (2007:140) makes mention of the following reference to the traditional triad in the case of *S v Rabie* 1975 (4) SA 855 (A): "Punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances." According to this author (Terblanche, 2007:104–105), this briefly indicates the following:

- A sentence should fit the seriousness of the crime. Serious crime is punished more severely than a minor crime.
- A sentence should be scrupulous in taking the individual offender's personal circumstances into account. This process is known as the personalisation of punishment. It is also one of the most important reasons why sentencing officials are given such wide discretion (Geldenhuys & Joubert, 1996:246).
- A sentence should serve the interests of society.

The process by which every sentence is fitted to the offender and the crime and has to be justified to society is known as the individualisation of punishment. The most appropriate sentence for a particular offender will result from an equal measure of these three criteria tempered with a measure of mercy. The balancing process discussed in study unit 1.1 is of course relevant here.



ACTIVITY (1) 2.1

Why do we have to do it?

FEEDBACK

In order to find out whether you understand that an appropriate sentence is based on all the circumstances of a case and that the seriousness of the crime and the interests of the offender and society (the triad) play a role when a court considers an appropriate sentence.

Guidelines

Court judgments are reported every day in the media. Read some of these reports and see which of the factors that have been discussed above are mentioned in them. (Do this according to the cases *Zinn*, *Sparks* and *Kumalo* which are referred to above.)

The discussion on each of the three elements and the aspect of mercy in the following sections will perhaps overlap slightly with other study units, for example the contents of the study unit on mitigating and aggravating factors (1.3). Nevertheless the learning material is presented here for the sake of perspective and a particular context.

1.2.4 THE CRIME

The first part of the triad is the crime and this is also the criterion that the court considers first when considering and deciding on an appropriate sentence (Hiemstra, 1987:204). Factors such as the following are taken into account:

- The nature and seriousness of the crime. The court decides whether it is a crime that fills law-abiding society with horror, repugnance and indignation. Crimes against the

person and endangering the lives of a large group of people may have an aggravating effect on sentencing.

- The motive for the crime is also important. For example, if the crime was planned deviously over a long period it may be punished more severely than a crime committed in the heat of the moment under great emotional stress.
- Adler, Mueller and Laufer (1994:512) are of the opinion that "victims have tended to be 'forgotten' persons in the post-conviction stages of the criminal justice process". The court is however increasingly giving attention to the victim of crime during sentencing. The use of victim impact reports by the courts is witness to this. Schmalleger (1996:297) describes a victim impact report as "a written document which describes the losses, suffering and trauma experienced by the crime victim or by the victim's survivors. In jurisdictions where victim-impact statements are used, judges are expected to consider them in arriving at an appropriate sentence of the offender" (see Conklin, 2007:376). The impact statement can also take the form of a verbal statement to the court.
- Although public opinion often demands heavier sentences, the court should be a mirror image of the feelings of a law-abiding society. These feelings are important and courts should punish in such a way that society's feelings of repugnance are satisfied. There are differences of opinion on the importance of public opinion in the deliberation process during sentencing. The Constitutional Court expressed itself in paragraph 88 as follows in the ruling of *Makwanyane and others* 1995 (3) SA 391 (CC); 1995 (2) SASV 1 (CC): "Public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive there would be no need for constitutional adjudication."

> REFLECTIVE QUESTION: Do you think that the (apparent) public demand for the death penalty for very serious offences is sufficient for reinstating the death penalty (in other words that this form of punishment should be declared constitutional again)?

- The local pattern in terms of the incidence and extent of the crime in a particular area (Krugel & Terblanche, 1997:107). The crime pattern is peculiar to the deed and is an important consideration. Multiple incidents may justify an extreme response.

1.2.5 THE OFFENDER

The second element of the triad is the offender himself or herself. Terblanche (2007:150–152) mentions a number of examples of relevant factors with regard to the accused that should be kept in mind during sentencing:

- the age of the offender, for example whether young or elderly and in poor health
- personal details: the cultural background and physical, intellectual and emotional condition of the offender
- the presence or absence of previous convictions
- the effect that a long period of imprisonment would have on the offender

The following information on the offender should also be taken into account:

- remorse and willingness to make amends
- standing of the accused in the community
- additional disadvantages of the sentence, for example if the offender were to lose his or her driver's licence (Hiemstra, 1987:206)

In order for justice to prevail in the personalisation of punishment principle, the sentencing official must have the necessary information about the offender. This information can be obtained by the sentencing official himself or herself, the defence, or expert witnesses such as criminologists, as well as from pre-sentencing investigations and reports.

1.2.6 SOCIETY

The third element of the triad is society, and particularly the feelings and interests of society. In the case of *Zinn* (Snyman 1995:15–16) this part of the triad was discussed in two ways:

- that society should be protected against someone with no conscience towards the people to whom he owed money
- that an example should be made that would send out a warning

Terblanche (2007:152–155) discusses the feelings and interests of society in more detail: The feelings of society refer firstly to feelings of outrage about the unpleasant act that have to be expressed as a sentence. Secondly, society should get the impression that maintaining an orderly system and creating a living space in which law-abiding citizens are assured of their lives and possessions and have the freedom to strive for a happy life are a priority of the court. The interests of society include the fact that society should feel protected and nurtured, that conflict should be eliminated and that taking the law into one's own hands and vigilantism are discouraged.



ACTIVITY (1) 2.2

Why do we have to do it?

FEEDBACK

To see whether you understand what is meant by the terms "feelings of society" and "interests of society".

Guidelines

Start a conversation with a friend or fellow student and discuss the place of the interests of society in sentencing. Take a court case that has been reported recently in the media as an example for the discussion and see if you can identify references to the "feelings" and/or "interests" of society in it.

1.2.7 MERCY

In section 1.2.3 we referred to the case of *Kumalo* and *Sparks*, in which the sentencing official said that the sentence should give evidence of a measure of mercy. In *Kumalo* it is mentioned as a fourth element (after the seriousness of the crime, the interests of society and the personal circumstances of the offender) that should be taken into account during sentencing.

REFLECTIVE QUESTIONS: Do you think that the aspect of mercy deserves a place in sentencing? What are the reasons for your opinion?

The idea of "mercy" or "compassion" is summarised in *R v Rabie* on 872 D–F as follows:

(i) It is a balanced and humane state of mind.

(ii) It tempers one's approach to the factors to be considered in arriving at an appropriate sentence.

(iii) It has nothing in common with oversentimental sympathy for the accused.

(iv) It recognises that fair punishment sometimes has to be robust.

(v) It rejects insensitive disapproval in sentencing a fellow human being, and so avoids excessive anger.

(vi) The measure of mercy shown depends upon the circumstances of each case.

Hiemstra (1987:204) states unequivocally that mercy is not a fourth element or factor in the traditional triad of sentencing. It is a characteristic of justice, which ensures that the court never punishes in a spirit of anger or revenge (Klopper, 1987:19).

1.2.8 SUMMARY

Various factors play a role in sentencing. The traditional triad comes into its own when the sentencing official strives to maintain a balance between the elements of the triad. From this the sentencing official must deduce the aggravating and mitigating factors. Although this criterion or triad as stated in the *Zinn* case has been applauded, there are those who have reservations as to the merits of the traditional triad during sentencing. Van der Merwe (1982:262–263) gives some examples of such reservations:

- the three categories or aspects overlap considerably
- sentencing officials are not given any guidance on how to deal with the mutual interaction between the three aspects
- no indication is given of the sequence in which the three interests should be considered

Sentencing is not an aimless procedure, but should take place with a particular purpose in mind (the aims of sentencing are dealt with in a following theme).

Terblanche (2007:174–178) refers to the role of restorative justice in sentencing and regards it as one of the most exciting developments of the past few decades in the field of sentencing. However, he argues that restorative justice does not play a central role in the basic sentencing principles in South African courts. "There is certainly nothing indicating that it should be at the foundation of the determination of every sentence imposed by the courts" (Terblanche, 2007:177). After applying the basic triad, the sentencing official may find that imprisonment is not an appropriate sentence and that conditions linked to restorative justice can be incorporated in the conditions of corrective supervision, a suspended sentence or a remand sentence.



ACTIVITY (1) 2.3

Why do we have to do it?

- To help you with the learning process and in preparing for the exams.
- Expand the glossary in your workbook by including the key words and other difficult concepts in this study unit, as we explained in the foreword to the study guide. Remember that one of the important ways of transferring knowledge from the short-term to the long-term memory is by calling it up regularly until you have mastered it. The more a thought pattern is "fired", the more "hard wiring" of neurons takes place. This hard wiring also happens when we discuss our new knowledge with other people, recall mind maps or summaries, and apply the knowledge in our everyday life.

1.2.9 SELF-ASSESSMENT QUESTIONS

(1) What are the core aspects of the triad in the case of *Zinn*? (3)

(2) Show how the crime as an element of the triad is considered during sentencing. (10)

(3) Explain how the personal circumstances of the offender are taken into account during the sentencing deliberation process. (10)

(4) Show how the court considers the interests of society during sentencing. (6)

(5) The first part of the triad is the crime and this is also the criterion that the courts consider first when deciding on an appropriate sentence. Which of the following options are taken into account here?

(a) the nature and seriousness of the crime; standing of the accused in the community; motive for the crime; willingness of the accused to make amends; impact of the crime on the victim

(b) the local pattern of the crime; public opinion; the impact of the crime on the victim; motive for the crime; nature and seriousness of the crime

(c) presence or absence of previous convictions; feelings of repugnance for a nasty crime; public opinion; motive for the crime

(d) the motive for the crime; willingness of the accused to make amends; impact of the crime on the victim; standing of the accused in the community; society has to be protected

(e) the local pattern of crime; public opinion; the impact of the crime on the victim; the motive for the murder; presence or absence of previous convictions

(6) Which of the following options is NOT part of the third element of the triad, namely society?

(a) A feeling of repugnance for a nasty deed.

(b) Society must be protected and nurtured.

(c) Vigilantism or taking the law into one's own hands should be discouraged.

(d) Standing of the accused in the community.

(e) Conflict must be eliminated.

(7) The second element of the triad is the offender himself or herself. Which of the following factors regarding the offender should be kept in mind during sentencing?

(a) physical, intellectual and emotional condition; the presence or absence of previous convictions; the motive for the crime

(b) the effect of a long period of imprisonment; remorse and willingness to make amends; public opinion

(c) the presence or absence of previous convictions; the effect of a long period of imprisonment; physical, intellectual and emotional condition

(d) the motive for the crime; vigilantism should be discouraged; the nature and seriousness of the crime

(e) remorse and willingness to make amends; conflict should be eliminated; public opinion

(8) In order for justice to be done with regard to the principle of punishment personalisation, the sentencing official should have the necessary information on the ..... Choose one of the following options:

(a) crime

(b) crime and society

(c) offender and crime

(d) society and offender
(e) offender

(9) A victim impact report is a report aimed at providing the court with information. Which of the following options is NOT applicable to a victim impact report?

(a) physical and financial impact
(b) emotional and psychological effects
(c) impact on family
(d) profile of offender

1.2.10 FEEDBACK ON ACTIVITIES

ACTIVITY (1) 2:1

No feedback

ACTIVITY (1) 2:2

During your debate you can look at the following aspects which can serve as examples for the "feelings of society" and the "interests of society".

The feelings of society refer firstly to a feeling of repugnance for the nasty deed which should be expressed in a sentence. Secondly, society should get the impression that it is a priority of the court to maintain an orderly dispensation and to create a living space in which law-abiding citizens do not fear for their lives and have the freedom to live together happily.

The interests of society encompass the fact that society should be protected and nurtured and that vigilantism should be discouraged.

ACTIVITY (1) 2:3

No feedback

1.2.11 FEEDBACK ON SELF-ASSESSMENT QUESTIONS

(1) Mention the following:

- the seriousness of the crime
- the interests of society
- the personal circumstances of the accused

(2) The following should be taken into account:

- the nature and seriousness of the crime
- the motive for the crime
- the interests of the victim
- public opinion
- local pattern of crime

(3) Refer to:

- age
- cultural background
- physical, intellectual and emotional condition

- previous convictions
- the effect of imprisonment
- remorse
- willingness to make amends
- standing in the community
- additional disadvantages to sentence
- information about the accused must be conveyed to the court by, for example, an expert witness

(4) Mention the following:

- In the case of *Zinn* the interests of society were pertinent in two ways:
  - the protection of society against exploitation by people without conscience
  - making an example of offenders

- Mention Kriegler's view about the feelings and interests of society.

(5) Option 2
(6) Option 4
(7) Option 3
(8) Option 5
(9) Option 4

STUDY UNIT 1.3

Mitigating and aggravating factors

The concept of "mitigating factors"	Evidence in mitigation of punishment	The concept of "aggravating factors"	Evidence in aggravation of punishment

CONTENTS

1.3.1 Introduction
1.3.2 Key concepts
1.3.3 The concept of "mitigating factors"
1.3.4 Evidence in mitigation of punishment
1.3.5 The concept of "aggravating factors"
1.3.6 Evidence in aggravation of punishment
1.3.7 Summary
1.3.8 Self-assessment questions
1.3.9 Feedback on activities
1.3.10 Feedback on self-assessment questions



LEARNING OUTCOMES

After you have worked through this study unit, you should be able to:

- Show what is meant by the concept of "mitigating factors".
- Analyse the concept of "aggravating factors".
- Mention a number of factors that can aggravate sentencing.

1.3.1 INTRODUCTION

In section 1.1.1 we referred to mitigating and aggravating factors that can play a role in sentencing.

For criminologists (who act as expert witnesses in court) it is important to know about the presence of mitigating and aggravating factors, because this will influence the recommendations they make on the type of punishment that they believe should be imposed by the court when the accused is convicted.

The discussion that follows expands further on mitigating and aggravating factors because this is linked with those "factors" that are taken into account in any crime when presiding officials (magistrates or judges) have to impose an appropriate sentence after their finding.

In this study unit we will look briefly at evidence in mitigation of punishment as well as evidence in aggravation of sentence.

1.3.2 KEY CONCEPTS

In this study unit you will work mainly with the following two concepts.

Mitigating factors: The mitigating effects of a factor suggest that the moral accountability of the accused as offender is reduced and/or the blameworthiness of the accused's deed decreases. As a result of the reduced accountability or blameworthiness, the magistrate or judge may impose a lighter sentence. Whether or not a factor is a mitigating factor is of course an issue that only the trial court will be able to judge on the basis of the relevant facts of the particular case.

Aggravating factors: These are those factors that are considered during sentencing and that aggravate the sentence. Aggravating factors generally give rise to a heavier sentence, because:

- The moral accountability (the moral guilt, blameworthiness, culpability) of the accused increases.
- The moral accountability of the offender increases in the eyes of society.
- The blameworthiness of the accused's act increases.

1.3.3 THE CONCEPT OF "MITIGATING FACTORS"

Mitigating factors are all the factors or facts that are relevant in determining the moral accountability of the offender and establishing the blameworthiness of his or her act.

These factors can be objective that is, they are related to the crime and its commission or subjective which means that they are linked to the state of mind of the offender when the crime was committed. Both types can have a mitigating effect on the sentence they are thus regarded as mitigating factors.

Here are some examples of mitigating factors that may be present for the accused and that may play a role when an appropriate sentence is considered (Terblanche, 2007:195–203):

- accused is a first offender
- youth
- advanced age
- poor health
- emotional factors that can diminish accountability such as jealousy, stress and mental disorders
- the use of euthanasia
- subnormal intelligence
- remorse and a plea of guilty

> REFLECTIVE QUESTION: Do you think that an accused's use of alcohol or drugs while committing a crime should serve as a mitigating factor during sentencing?

The presentation of factors in mitigation of sentence has a twofold purpose and is regulated according to the provisions of section 112(3) of the Criminal Procedure Act 51 of 1977.

Firstly, this Act provides for who places the mitigating factors before the court and, secondly, it provides for the way in which mitigating factors are placed before the court.

The accused and/or the accused's legal representative and the state (prosecutor) can present factors in mitigation of sentence to the court. The court can also take cognisance of mitigating factors of its own accord. Mitigating factors are put before the court in the form of evidence or ex parte reports.

The mitigating effect of a factor refers to the fact that the moral culpability of the accused as offender is reduced and/or the blameworthiness of the accused's act decreases. As a result of reduced blameworthiness the magistrate or judge may hand down a lighter sentence. Whether a factor is a mitigating factor or not is a matter that only the trial court can judge on the basis of the relevant facts of the case concerned.

In the case of mitigating factors there is no question of the onus resting on the accused. There is therefore no burden of proof on the accused to show probability in proving that mitigating factors are present. As mentioned, however, it is the accused's task to show that mitigating factors exist by presenting sufficient acceptable evidence. For this purpose the accused can also make use of the services of an expert, such as a criminologist, to show that such mitigating factors are present.

1.3.4 EVIDENCE IN MITIGATION OF PUNISHMENT

The accused's legal representative (the defence) will usually indicate that he or she would like to present evidence in mitigation of sentence (Terblanche, 2007:193–210). As happens when hearing the merits of the case, the witness will enter the witness box, take the oath and give evidence to the court. After the evidence has been presented, the prosecutor will be given an opportunity to cross-examine the witness, after which re-examination by the defence is allowed (Du Toit, 1981:140). In order to speed up the matter, the expert witnesses may hand in their reports to the court before it hears the evidence viva voce (orally).

The defence can therefore present expert evidence in mitigation of sentence (such as the evidence of a criminologist). In order to carry more weight the expert evidence should be linked to the particular accused and the crime. Such evidence should not be general ungrounded evidence – this would be pointless for the court when considering a sentence. Evidence in mitigation of sentence should not only be linked to the specific accused, the accused's background and personal circumstances, but should also be linked to the facts of the case. According to Du Toit (1981:142), in order to be of value, expert witnesses should be fully acquainted with the facts of the case and their evidence should be connected to the findings of the court; the evidence in mitigation should be presented in detail without being long-winded. It should always be kept in mind that while experts can suggest the type of sentence, the (actual) sentence remains the exclusive prerogative of the trial court.

To summarise: the evidence in mitigation of sentence can be seen as evidence presented after the oath has been taken; it is presented orally and personally defended under cross-examination by an expert. The court should be able to support the mitigating factors put forward by the expert in making its decision about an appropriate, individualised sentence.

1.3.5 THE CONCEPT OF "AGGRAVATING FACTORS"

Aggravating factors are part of the deliberation process during sentencing for all crimes. The concept of "aggravating factors" is concerned with that part of the material that is

considered when sentencing and which has an aggravating effect on the sentence. Aggravating factors generally give rise to a heavier sentence, because:

- The moral culpability of the accused is increased or intensified.
- The moral culpability of the offender is increased in the eyes of society.
- The blameworthiness of the accused's act increases (Du Toit, 1981:85).

Aggravating factors are linked to the accused's state of mind at the time the crime was committed (subjective), but are also found in the objective facts of the crime itself. The aggravating effects of a factor are such that the moral culpability of the accused as an offender increases and/or the blameworthiness of the accused's crime intensifies in general.

In this regard the court has complete discretion in deciding whether a factor is aggravating or not, as well as the degree of aggravation affecting the sentence. The onus is not on the state to prove aggravating factors, but there is a burden on the state to present evidence that it regards as relevant for deciding on punishment. It is therefore the task of the state to place relevant aggravating factors on record by providing sufficient, acceptable evidence. Someone such as a criminologist (acting as an expert witness in court) can make a valuable contribution in this regard.

According to Kriegler (1993:683) (see also Terblanche, 2007:186–192) it is obvious that the following factors would have an aggravating effect on sentencing:

- The nature and seriousness of the crime, for example the extent of the violence used in committing the crime.
- Previous convictions, at least as a result of the same or a similar crime, can have a very aggravating effect on a sentence, as this would indicate that previous punishment was inadequate for bringing the offender to his or her senses. Even if just a minor misdemeanour, a repetition after the warning of an earlier sentence would justify a heavier punishment.
- A premeditated crime is punished far more severely than one that is committed unthinkingly in the heat of the moment. A crime that is repeated time and again over a long period, such as systematic fraud, may also be punished more severely.
- Endangering the lives of others in committing a crime is regarded as extremely aggravating, for example setting off a bomb. In such cases the motive for punishment during sentencing would be to deter others from committing similar crimes.
- The danger that the accused could commit a similar crime again in the future is also considered on sentencing.
- Where the offender acted in the full realisation that he or she could endanger human life, this would be counted as very aggravating. Where a life is actually lost, it would be considered aggravating even if it happened as a result of negligence.
- The motive for the crime will determine the severity of the sentence: Punishment will be more severe if people hold positions of trust and abuse this position.
- When a victim of a crime is defenceless, for example a child, an elderly person or a handicapped person, out of compassion for the victim the reaction will be one of repugnance and a heavier sentence may be imposed.

REFLECTIVE QUESTION: Do you think that the danger that an offender might commit another serious crime in the future should be considered an aggravating factor in passing sentence?

1.3.6 EVIDENCE IN AGGRAVATION OF PUNISHMENT

In appropriate cases prosecutors may present evidence in aggravation of sentence or bring the court's attention to the aggravating factors during their arguments (Terblanche, 2007:186–192). Evidence in aggravation is generally meant to place facts or factors concerned with an appropriate sentence before the court. In general this involves those factors that should lead to a heavier sentence not simply for the sake of a heavier sentence, but because such a sentence would be appropriate under the circumstances. The state may call in expert witnesses to testify to the principle and objectives of punishment and it is essential that aggravating factors that could exist should be brought to the attention of the court. As with evidence in mitigation of sentence, evidence in aggravation should be conducted under oath and presented in the same way as evidence in mitigation.

REFLECTIVE QUESTION: Do you think that a person with an Honours degree in criminology is sufficiently well trained to give expert testimony in court on mitigating or aggravating factors during sentencing?

1.3.7 SUMMARY

Factors in mitigation of punishment can be brought to the attention of the court by the accused or the accused's legal representative. This evidence may include facts that have already come to light during the court proceedings, or even new facts. This evidence may be presented to the court either by the accused himself or herself or by an expert (e.g. a criminologist) and they can be cross-examined by the state prosecutor. On the other hand, the state prosecutor can also bring facts to the court's attention that could be regarded as aggravating in terms of punishment.



ACTIVITY (1) 3.1

Why do we have to do it?

FEEDBACK

- In order to help you with the learning process and in your preparation for the examination.
- Expand the glossary in your workbook by including the key words and other difficult concepts in this study unit, as we explained in the foreword to the study guide. Remember that one of the important ways of transferring knowledge from the short-term to the long-term memory is by calling it up regularly until you have mastered it. The more a thought pattern is "fired", the more "hard wiring" of neurons takes place. This hard wiring also happens when we discuss our new knowledge with other people, recall mind maps or summaries, and apply the knowledge in our everyday life.

1.3.8 SELF-ASSESSMENT QUESTIONS

(1) Define the term "mitigating factors", which can play a role in sentencing. (4)

(2) Define the term "aggravating factors", which can play a role in sentencing. (6)

(3) Give eight examples of mitigating factors during sentencing. (16)

(4) Explain nine examples of aggravating factors during sentencing. (18)

(5) Mitigating circumstances refer to the following:

(a) The moral guilt of the offender intensifies; the blameworthiness of the accused's deed increases.
(b) The moral guilt of the offender decreases, the blameworthiness of the accused's deed decreases.
(c) The blameworthiness of the accused's deed increases; the moral guilt of the offender decreases.
(d) The blameworthiness of the accused's deed decreases, the moral guilt of the offender increases.

(6) Aggravating circumstances refer to the following:

(a) The moral guilt of the offender intensifies; the blameworthiness of the accused's deed increases.
(b) The moral guilt of the offender decreases; the blameworthiness of the accused's deed decreases.
(c) The blameworthiness of the accused's deed increases; the moral guilt of the offender decreases.
(d) The blameworthiness of the accused's deed decreases; the moral guilt of the offender increases.

(7) Which of the following options are examples of mitigating factors during sentencing?

(a) Previous convictions; planning the deed; defenceless victim.
(b) Use of violence; abuse of a position of trust; offender's motive.
(c) Advanced age; poor health; subnormal intelligence.
(d) The use of euthanasia; emotional factors such as stress; previous convictions.
(e) Poor health; subnormal intelligence; planning of crime.

(8) Which of the following options are examples of aggravating factors during sentencing?

(a) The use of euthanasia; emotional factors such as stress; previous convictions.
(b) Previous convictions; planning the crime; poor health.
(c) Use of violence when committing a crime; abuse of a position of trust; offender's motive.
(d) Advanced age; poor health; defenceless victim.
(e) Abuse of trust; offender's motive; the use of euthanasia.

(9) Aggravating factors for particular reasons generally give rise to a heavier sentence. Identify which ONE of the following reasons does NOT serve as a rationale for aggravating circumstances.

(a) The moral culpability of the accused increases or intensifies.
(b) The moral culpability of the accused increases in the eyes of society.
(c) The blameworthiness of the accused's deed increases.
(d) The moral guilt of the accused decreases.

1.3.9 FEEDBACK ON ACTIVITIES

ACTIVITY (1) 3:1

No feedback

1.3.10 FEEDBACK ON SELF-ASSESSMENT QUESTIONS

(1) Mitigating factors refer to factors that:

- reduce the moral guilt of the accused.
- reduce or decrease the blameworthiness of the accused's deed.

(2) Aggravating factors generally result in a heavier sentence, because:

- the moral culpability (the moral guilt, blameworthiness) of the accused increases or intensifies: the moral culpability of the accused increases in the eyes of society.
- the blameworthiness of the accused's deed increases.

(3) In your answer refer to the following:

- accused is a first offender
- youth
- advanced age
- poor health
- emotional factors that can reduce accountability such as jealousy, stress and mental disabilities
- euthanasia
- subnormal intelligence
- remorse and a guilty plea

(4) Your answer should include the following:

- The nature and seriousness of the crime should be considered, for example the extent of the violence used while committing the crime.
- Previous convictions, particularly for the same or similar offences, can be particularly aggravating for sentencing, as this would indicate that the previous punishment was inadequate for bringing the offender to his or her senses. Even if the crime committed were a petty crime, a repetition of it after the initial warning of an earlier sentence would justify a heavier sentence.
- A crime that is premeditated is punished far more severely than one that is committed in the heat of the moment. A crime committed repeatedly over a long period, such as systematic fraud, may also be punished more severely.
- Endangering the lives of others is extremely aggravating for sentencing, for example setting off a bomb. In such cases the motive for punishment would be to deter others from committing a similar crime.
- The danger that the accused could commit the crime again in the future is also taken into account during sentencing.
- If the offender acted in the full realisation that he or she was putting human life in danger it would be regarded as extremely aggravating; where a life was actually lost it would be regarded as aggravating even if this happened as a result of negligence.
- The motive for the crime will determine the severity of the sentence.
- If people hold positions of trust and abuse this position they will be punished more severely.
- If the victim of the crime is defenceless, for example a child, an elderly person or a handicapped person, a more severe sentence will be imposed out of compassion for the victim and repugnance for the act.

(5) Option 2
(6) Option 1
(7) Option 3
(8) Option 3
(9) Option 4

STUDY UNIT 1.4

The pre-sentencing investigation and report

Purpose and function of a pre-sentencing investigation	Purpose and function of a presentence report	Principles on which a pre-sentencing report is based	Compiling a pre-sentencing report

CONTENT

1.4.1 Introduction
1.4.2 Key concepts
1.4.3 The purpose and function of a pre-sentencing investigation
1.4.4 The purpose and function of a pre-sentencing report
1.4.5 The principles on which the pre-sentencing report is based
1.4.6 Compiling a pre-sentencing report
1.4.7 Summary
1.4.8 Self-assessment questions
1.4.9 Feedback on activities
1.4.10 Feedback on self-assessment questions

Annexure: Example of a pre-sentencing report



LEARNING OUTCOMES

After you have worked through this study unit you should be able to

- Define the purpose and function of the pre-sentencing report.
- Explain the principles on which the pre-sentencing report is based.
- Demonstrate how a pre-sentencing report is compiled.

1.4.1 INTRODUCTION

After the accused has been charged, tried and found guilty, it is the presiding official's (judge or magistrate) duty to impose an appropriate sentence (refer to the three preceding study units). The presiding official should take various factors into account, including the presence of mitigating or aggravating factors (see study unit 1.3), such as whether the accused is a first offender, and whether the accused has any previous convictions.

ACTIVITY (1) 4.1

Why do we have to do it?

To ascertain whether you still remember which mitigating and aggravating factors are considered when imposing an appropriate sentence.

Guidelines

Make a list of the mitigating and the aggravating factors that you can remember without looking at study unit 1.3.

To make the presiding official's task easier, he or she can make use of the services of an expert (e.g. a probation officer, criminologist, psychiatrist or clinical psychologist) (Terblanche, 2007:104). This expert can make certain recommendations with regard to an appropriate sentence and will then draw up a comprehensive profile of the criminal in which various factors are considered.

The defence can also put the report of such an expert before the court suggesting a specific punishment.

The expert witness's task in court is therefore to make a contribution to fair sentencing. In order to be able to do this the expert should carry out a pre-sentencing investigation during which many factors are considered that could have played a role in committing the crime. A report, known as a pre-sentencing report, is then compiled and presented to the presiding official in order to help him or her in sentencing the accused.

In this study unit we look at the purpose and function of the pre-sentencing investigation and pre-sentencing report, the principles on which the pre-sentencing report is based and the compilation of the pre-sentencing report.

1.4.2 KEY CONCEPTS

The most important new concept that you will be introduced to in this study unit is:

- **The pre-sentencing report:** In order to make the task of the presiding official easier, he or she can make use of the services of an expert who can make certain recommendations with regard to an appropriate sentence. This expert witness will then draw up a comprehensive profile of the criminal in which various factors are considered. The defence can also present such an expert report to the court proposing a specific punishment. The task of the expert witness in court is therefore aimed at making a contribution to fair sentencing. In order to be able to do this, the expert has to carry out a pre-sentencing investigation, during which many factors are considered that could have played a role in the crime committed. A report known as a pre-sentencing report is then compiled and presented to the presiding official in order to assist him or her in sentencing the accused (Van der Hoven, 2006:157–161).

An example of a pre-sentencing report compiled by Prof. Michelle Ovens of the Department of Criminology at Unisa is attached as an annexure to this study unit. This is simply for reference purposes and you do not have to study it.

1.4.3 THE PURPOSE AND FUNCTION OF A PRE-SENTENCING INVESTIGATION

A pre-sentencing investigation is aimed at assisting the court in its assessment of who the offender is and what the best action would be to take against him or her. It therefore

contains information that in general was not taken into account in determining whether the accused was guilty or not guilty. The information that is made available in this way is aimed at assisting the court in understanding the character and personality of the accused, disclosing his or her problems and needs, shedding light on his or her social environment and revealing the possible underlying causes of the crime committed. The report that results from the pre-sentencing investigation should therefore form the basis of the final decision of the court in terms of the sentence imposed.

> REFLECTIVE QUESTION: Don't you think that too much emphasis is placed on the interests of the accused during sentencing?

According to Midgley (Prinsloo, 1991:106), there are many sources of information available that the expert compiling the pre-sentencing report can consult. These sources include the offender himself or herself, his or her family, friends and acquaintances, the church, schools, employers, welfare organisations, other social organisations and so forth. In addition, the investigating officer in the case and the prosecutor may also be rewarding sources of information, because they will have built up a pretty good image of the offender.

It is essential that the expert takes a realistic approach to the offender in terms of his or her specific situation and the pre-sentencing investigation should be carried out objectively, non-judgementally and analytically. The expert witness should be prepared for the way in which the family of the offender may react, as this might range from suppressed emotions to exaggerated feelings of guilt which may be expressed in the form of projection, aggression, rejection or overprotection (Prinsloo, 1991:107).

It is also important to carefully consider the offender during the pre-sentencing investigation. He or she may, among other things, show genuine remorse, act manipulatively, make excuses, show aggression, suffer from depression or be full of self-reproach or involve themselves in other possible ill-considered adaptive mechanisms. It is the expert witness's responsibility to identify all the factors that play a role, and to place attitudes and behaviour in perspective and to analyse them (Van der Hoven, 2006:157–158).

1.4.4 THE PURPOSE AND FUNCTION OF A PRE-SENTENCING REPORT

A pre-sentencing report is the written form in which the expert witness (e.g. the criminologist) notes, organises and makes available to the court the findings of an investigation, together with certain recommendations and expert opinions, in a logical and consistent manner. (Look at the example of a pre-sentencing report given and notice how it is structured.)

Siegel (2003:536) reports as follows: "most judges consider a pre-sentencing investigation report by the probation department. This report, which is a social and personal history as well as an evaluation of the defendant, is used by the judge in making a sentencing decision."

In South Africa, a pre-sentencing investigation and report are sometimes a requirement, for example in the case of corrective supervision and when trying juvenile offenders. Corrective supervision may not be imposed as a sentence or part of a sentence without a pre-sentencing investigation and report having been carried out by a probation officer or correctional officer.

Whether a child appears in a juvenile court or any other court for that matter, a pre-sentencing investigation and a pre-sentencing report have to be done by a probation officer in all cases (Allan & Meintjies-Van der Walt, 2006:348).

The pre-sentencing report forms the core of a factual and diagnostic study of the offender which is intended to provide the sentencing official with all the relevant and available information about the offender's specific circumstances and problems. Judicial officials tasked with imposing sentences are therefore supported in their attempts to formulate an objective, rational, effective and appropriate sentence in light of the prevailing circumstances (Prinsloo 1991:105).

The purpose and function of the pre-sentencing report can be summarised as follows:

- to give the court an overall picture of the offender and his or her problems
- to assist the court in making a decision on the best action to take under the specific circumstances
- to serve as a basis for the continued treatment of the offender
- to present the content of the report in such a way that it can be used as a source of information in the preparation and planning of the offender's treatment programme

1.4.5 THE PRINCIPLES ON WHICH THE PRE-SENTENCING REPORT IS BASED

The expert witness should observe certain principles when compiling a report. The most important of these are:

- Flexibility: This principle holds that every individual and his or her circumstances are unique and that the report should be compiled in this spirit.
- Selectivity: Only that information which is relevant should be included in the report.
- Clarity: Use of language in the report should be of a high standard.
- Confidentiality: The report contains intimate and personal information about the offender. Therefore, the contents should be dealt with in confidence and only people concerned with the offender's trial should be allowed access to the contents of the report.
- Responsibility: This principle implies that the report must comply with the requirements of honesty, correctness and reliability.
- Objectivity: The contents of the report should be a true and faithful version of the offender's actual circumstances.

1.4.6 COMPILING A PRE-SENTENCING REPORT

After conducting the pre-sentencing investigation, the expert witness should compile the pre-sentencing report with great circumspection. It is generally accepted that the pre-sentencing report should cover all aspects of the individual offender's life history. In order to do this the expert witness should consider certain issues very carefully, such as who exactly the offender is as a person. The purpose of this is to examine in depth the origin, background and personal characteristics of the offender in order to be able to draw up a proper profile. Great emphasis is placed on possible factors that could have influenced the offender to commit the crime (Terblanche, 2007:105).

Information is gathered mainly by conducting interviews and studying records. In cases where the home circumstances are unknown, the expert should make a home visit for the particular purpose of gauging the influence of environmental factors.

It is the expert's responsibility to verify information obtained from various sources. Information based on hearsay must be confirmed and the expert must personally acquaint himself or herself with the facts.

As far as offenders are concerned, information is traditionally obtained by means of directed interviews, during which an unstructured questionnaire is used. At least three to four interviews are held with an offender. Offenders can also be asked to fill in a questionnaire in order to make the necessary background information available. They are also often encouraged to write their biography or life history in private which may be of great value as far as their emotions, feelings and background are concerned (Prinsloo, 1991:107).

Because the pre-sentencing report is presented to the court in the form of evidence, it is subject to stringent requirements. It must be admissible, relevant and faithful from a judicial point of view. Relevant information entails, among other things, the offender's values and attitudes, their relationships with their families and any other groups in which they are involved, their family histories, cultural and religious background, nationality and other similar factors that have influenced the offender's development (Prinsloo, 1991:107).

The approach followed by the expert witness in drawing up the pre-sentencing report rests on specialised attention given to the criminal's behaviour per se. The expert witness approaches behaviour from the perspective that society regards that behaviour as abnormal and that offenders can make a decision as to whether to participate in the abnormal behaviour or not. The basic approach is that the criminologist attempts to explain crime objectively and also tries to determine what value should be attached to the factors that could have influenced this behaviour.

In order for punishment to be individualised, the expert should, on his or her own initiative, gather specific information on the needs of a particular offender. (In other words, such a report should consider the various alternatives for sentencing which will be dealt with in theme 3.) We can thus deduce that a pre-sentencing report does not follow a rigid format, but is aimed at the personal circumstances of the offender. When drawing up a pre-sentencing report, it is important to bear the following aspects in mind:

> The trial court has to punish the accused appearing before it by taking various factors into account. For this reason specific personal factors influencing the accused are of great importance when an appropriate sentence has to be decided on. The trial court must always be made fully aware of the particular, individual factors of the offender, because a thorough knowledge of the accused's person is essential for individualised sentencing. Individualisation is impossible without consideration and knowledge of the accused's personal facts and factors, and without this sentencing would not be fair [translation of the original] (Allan & Meintjies-Van der Walt, 2006:348).

The evidence should be presented in such a way that its context and importance are clear. The presentation and evaluation of the report should conform to the principles of fairness and honesty towards the offender. It is the court's responsibility to ensure that the offender is not disadvantaged as a result of any inadmissible evidence contained in the report.

These personal factors inevitably take various forms in the accused, but all have a common characteristic, that is, they form part of the offender's particular personality. The individual circumstances that have to be examined are the following (look at the example of the pre-sentencing report again):

- the age of the accused
- the character of the accused (is he or she a first offender?)
- the state of health and the physical appearance of the accused
- the accused's responsibility towards his or her family or dependents
- the position the offender holds in the family

- professional life (if applicable)
- the general background or social status of the accused
- mental health (if any mental defects are suspected, a psychiatrist or psychologist should be called to make a diagnosis)
- use of alcohol or drugs
- the motivation that led to the criminal act
- possible provocation (what role did the victim play?)
- possible emotional conflict
- intelligence (if it is suspected that the accused has subnormal intellectual abilities, he or she should be assessed by an expert before the expert witness can present this in mitigation)
- the possibility of force or intimidation
- signs of remorse
- ignorance of the law (was the accused aware of the fact that his or her act was indeed a crime?)
- belief in witchcraft
- influence by a third party
- the accused's ability to compensate or make good the damage
- the accused's degree of participation
- the degree of predictability
- the potential for the accused to be rehabilitated
- any other relevant factors

The expert witness also looks at the influence of childhood, current family life, the use of spare time, school experiences, influence of sub-cultures or gangs, and other factors that may be of particular importance and that could have influenced the accused's behaviour and are typical of his or her personal circle.

The presiding official will use such a report to make a reasonable and balanced deliberation with regard to sentencing.

As far as the nature and extent of the crime is concerned, as well as the way in which it was committed, the expert witness should look at the following:

- the seriousness of the crime
- the specific participation of the accused
- the consequences of the crime
- the motivation (premeditated with malice or planning)

The interests of society are generally taken into account when considering an appropriate punishment. When imprisonment is at issue, it is also the expert witness's task to establish whether an alternative would not better serve the interests of society.

In this case attention should be given to the following factors during sentence evaluation:

- If imprisonment is a possibility, the positive and sustaining elements (such as the accused's job and family life) in the accused's life should be highlighted because they may play a role in preventing recidivism in the future.
- An alternative to imprisonment, or a shorter term of imprisonment, should be considered which, for whatever reason, would serve the interests of society better.
- An alternative to imprisonment, for example compulsory therapy, may solve the offender's intellectual or physical problems. This could also be to the offender's benefit as well as to the benefit of society.

1.4.7 SUMMARY

In South Africa, the training of judges and magistrates does not include any training in psychology, criminology or sociology. The support of experts who specialise in these fields is thus often necessary to help the presiding official to form a better, deeper understanding of the relevant social and psychological factors that could have played a role in the offender's behaviour. If such factors come to light, they can simplify the presiding official's task in imposing an appropriate sentence that not only has the maximum benefit for the accused but is also to the advantage of the victim and society. It is the expert witness's task to compile a report that mentions all the relevant facts.



ACTIVITY (1) 4.2

Why do we have to do it?

- In order to help you with the learning process and in preparing for the examination.
- Expand the glossary in your workbook by including the key words and other difficult concepts in this study unit, as we explained in the foreword to the study guide. Remember that one of the important ways of transferring knowledge from the short-term to the long-term memory is by calling it up regularly until you have mastered it. The more a thought pattern is "fired", the more "hard wiring" of neurons takes place. This hard wiring also happens when we discuss our new knowledge with other people, recall mind maps or summaries, and apply the knowledge in our everyday life.

1.4.8 SELF-ASSESSMENT QUESTIONS

(1) Complete the following: The task of the expert witness is aimed at making ... (2)

(2) Summarise the purpose and function of a pre-sentencing report. (8)

(3) Give the most important principles on which a pre-sentencing report is based. (6)

(4) Give 10 different aspects of the offender's life history that the expert witness should consider when compiling a pre-sentencing report. (10)

(5) Apart from the nature and extent of the crime and the way in which it was committed, the expert witness should also look at ... (4)

(6) Whose interests should be taken into account when deliberating on an appropriate sentence? (1)

(7) "This principle implies that the report must comply with the requirements of honesty, correctness and reliability." Which principle of the pre-sentencing report is referred to in this quote?

(a) flexibility
(b) selectivity
(c) clarity
(d) confidentiality
(e) responsibility

(8) Which ONE of the following options does NOT form part of the purpose and functions of the pre-sentencing report?

(a) to give the court an overall picture of the offender and his or her problems
(b) to help the court in making a decision on the desired action under the specific circumstances
(c) to serve as a basis for the continued treatment of the offender

(d) to serve as a basis for the compensation of the victim
(e) to present the content of the report in such a way that it can be used as a source of information in preparing and planning the offender's treatment programme

(9) In the pre-sentencing report the expert witness must look at certain aspects of the crime with regard to its nature and extent and the way in which it was committed. Which ONE of the following aspects should the expert witness NOT look at?

(a) the seriousness of the crime
(b) the place where the crime was committed
(c) the participation of the particular accused
(d) the results of the crime
(e) the motivation (with premeditation or planning)

(10) "These personal factors inevitably take various forms in the accused, but all have a common characteristic, that is, they form part of the offender's particular personality." Which ONE of the following options cannot be taken into account as individual circumstances in the pre-sentencing report?

(a) the age of the accused
(b) the position of the offender in the family
(c) the attitude towards the offender
(d) the offender's professional life
(e) the general social status of the accused

1.4.9 FEEDBACK ON ACTIVITIES

ACTIVITY (1) 4:1

You should mention the following in your answer:

Mitigating factors

- accused as a first offender
- youth
- advanced age
- poor health
- emotional factors that may diminish accountability such as jealousy, stress and mental disorders
- euthanasia
- subnormal intelligence
- remorse and a plea of guilty

Aggravating factors

- The nature and seriousness of the crime, for example the extent of the violence used when committing the crime.
- Any previous convictions, at least with regard to the same or a similar crime, can have an extremely aggravating effect on a sentence as this would indicate that previous punishment was inadequate in bringing him or her to their senses. Even if it was a minor crime, a repetition after the warning of a first sentence would justify a heavier sentence.

- Any premeditated crime is punished much more severely than one that is carried out in the heat of the moment. A crime committed repeatedly over a long period, such as systematic fraud, may also be punished more severely.
- Endangering the lives of others has a very aggravating effect, for example setting off a bomb. In particular, the motive for punishment in sentencing such cases would be to deter others from committing similar crimes.
- The danger that the accused might repeat a serious crime in the future is also taken into account during sentencing: Where the offender acted in the full realisation that he or she could place human life in danger, it is considered extremely aggravating; where a life is actually lost, it is considered aggravating even if it happened through negligence.
- The motive for the crime will determine the severity of the punishment.
- When people hold positions of trust in their work and abuse this position they will receive a more severe punishment.
- When the victim of the crime is defenceless, for example a child, an elderly person or a handicapped person, the punishment may be more severe out of compassion for the victim and in response to the reaction of repugnance from society.

ACTIVITY (1) 4:2

No feedback

1.4.10 FEEDBACK ON SELF-ASSESSMENT QUESTIONS

(1) In court, the task of the expert witnesses aimed at making a contribution to fair sentencing.

(2) The purpose and function of the pre-sentencing report can be summarised as follows:

- to give the court an overall picture of the offender and his or her problems
- to help the court in making a decision about what the desired action under the specific circumstances would be
- to serve as a basis for the continued treatment of the offender
- to present the content of the report in such a way that it can be used as a source of information in preparing and planning the offender's treatment programme

(3) Flexibility, selectivity, clarity, confidentiality, responsibility and objectivity

(4) Offender's age, character traits, health and physical appearance, professional life, social status, mental health and intelligence, as well as signs of remorse, influence of a third party and degree of participation by the accused

(5) The expert witness (criminologist) also looks at:

- the seriousness of the crime
- the participation of the particular accused
- the effects of the crime
- the motive for committing the crime

(6) The interests of society

(7) Option 5

(8) Option 4

(9) Option 2

(10) Option 3

ANNEXURE: Example of a pre-sentencing report

CRIMINOLOGICAL PRE-SENTENCING REPORT

compiled at the request of Mr Brendan Barry

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in the case

THE STATE VERSUS MAHLANGU & OTHERS CASE NUMBER 41/675/99

CRIMINOLOGIST: Prof. M Ovens

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....

Prof. M OVENS DATE

PURPOSE OF THE CRIMINOLOGICAL PRESENTENCING REPORT

The function of the criminologist is to individualise the accused to the court. In a criminological evaluation report, relevant factors are taken into account, such as the accused's history and personality make-up, his mental state and physical condition at the time of the event, the nature of the offence, the offender's motivation for committing the crime, his relation to and interaction with the victim, precipitating and situational factors contributing to the criminal event, and the harm suffered by both the victim and society as a whole. Personal factors concerning the accused form part of the composition of the offender's personality as a whole.

This report further focuses on the impact of the event on the individual and the measure to which the offender has been affected by his own action. It reflects his perceptions of the event and places the information derived from Edwin and the other sources into theoretical and criminological perspective. This information thus serves as a basis for recommending a suitable sentence for the offence that will not only accommodate the offender but will also be in the best interests of the community. The report wishes to reflect that the period of five years that the offender has waited to hear the outcome has had a traumatic effect and already served as measure of punishment. The experience of having to await the outcome has had both a physical and psychological impact on the offender and his family.

CRIMINOLOGICAL EVALUATION REPORT: THE STATE VERSUS EDWIN MORU

1 INTRODUCTION

The legal representative of the accused requested a pre-sentence evaluation report for Edwin Moru. The report is a reflection of information gained and placed into a criminological and penological framework.

2 SOURCES OF INFORMATION

2.1 One-and-a-half hour interview with Edwin on 13 May 2003; 35-minute interview on 29 May 2003
2.2 Thirty-minute telephonic interview with Martha Moru on 23 May 2003
2.3 Twenty-minute telephonic interview with Mr Isaac Mahapinyane, current supervisor
2.4 Telephonic interview planned with Mr Dyke Moru, brother
2.5 Telephonic interview planned with Mr Thabo Metsing, previous supervisor

Other sources of information:

- Memorandum provided by Cheadle Thompson & Haysom Inc. Attorneys outlining the nature of the charges and the background to the matter;
- Individual statements outlining each accused's personal circumstances (see attached document A);
- Main arguments for the Defence regarding sentencing;
- Video material regarding the incident on 15 July 1998 when the building of Megawatt Park, the property of ESKOM, was damaged and set alight.

3 BIOGRAPHICAL INFORMATION

Edwin is the eldest child in the Moru family. He has one brother and two sisters. He reports that generally his family were happy with the usual "ups and downs" experienced by any "normal family". His mother worked at Ellerines and his father was an employee at Vaal Triangle Transport Cooperation.

After he matriculated Edwin helped to support his brothers and sister. As the eldest child his parents were very proud of Edwin when he started working and progressed so well.

Edwin has deep regrets that his father passed away in 2000 knowing that his son was charged with a crime. Edwin is married to Martha Moru who is 40 years old. She is employed as a teacher at Dinokaneng Secondary School in Sebokeng, a post she has held since 1993. The couple have two children, Tabo aged 9 and Tshepo aged 7.

Martha describes her husband as a quiet man who talks very little. She also says that he does not talk about the incident at Megawatt Park. She left him for three months last year because he started drinking heavily and became abusive towards her. She returned to him after he promised to stop drinking and at the time of this investigation they are still living together. Martha reports that their relationship has improved and that things are going better at home.

Edwin's background is stable. He has lived at Zone 10, Sebokeng, for 11 years and has been in the employ of Eskom for 22 years. He moved to his new residence in Vanderbijlpark in December 2002. The move is temporary until he buys a new home. The

Moru couple are awaiting the outcome of the trial. Edwin supports his wife, two children and his elderly mother.

4 LIFESTYLE, HEALTH AND PRESENT SITUATION

In this report emphasis is placed on Edwin's working persona. Edwin describes himself as a "workaholic" and identifies strongly with his role as a trustworthy worker. As a Receiving and Vending Controller he is responsible for the programming of the system for selling electricity at the different centres. He is responsible for approximately ten office systems. He further is involved with negotiations with local leaders to gain permission to build offices for the electrification process in the townships.

Prior to his dismissal and because of his long working hours he had limited contact with his immediate community other than his involvement with his local Community Policing Forum. At work he believes that he was well respected for "the job I did". He could solve people's problems, such as the example given where electricity tokens were faulty. He was able to assist people who had a crisis. This contributed to his feeling of self-worth.

Edwin's co-worker substantiates Edwin's view of himself. Edwin's current supervisor, Mr Isaac Mahapinyane, reports that Edwin is a quiet, hardworking individual. He describes Edwin as "a cool guy, reliable and always did his job". Mr Mahapinyane states that he is struggling to replace Edwin at work. He hopes that Edwin is able to return to work and he is even willing to monitor him if he is allowed to return to work.

Being suspended from work has resulted in him losing this sense of value. He presently does "a woman's job" and stays at home doing household chores. He explains that his "man thing is gone". He states that he feels terribly down. "My work fulfilled me – now I am empty and no longer human – even though I am still being paid." Edwin's suspension has been a major drawback to him emotionally.

After consulting a psychologist he was referred to a Dr Jordaan, a psychiatrist who prescribed an anti-depressant for him. The medication has helped and he no longer sees the psychologist.

Edwin feels isolated from society. This isolation is more prevalent because he has moved from his community to one where people do not know him. He and his wife moved to a flat for financial reasons. People he knows are shocked at his situation and that he was found guilty of public violence. However, they do not talk directly to him about the situation.

5 OFFENDER PROFILE

Edwin's character is not typical of someone who is violent or a danger to society. Although one can never generalise about or predict what an individual is capable of, past behaviour may be used as a tool for predicting how someone may react in a situation. He is liked and respected by those persons who know him. Some years ago Edwin was found guilty of driving under the influence and received a fine. Other than this incident he has not been in trouble with the law.

In the event of mob behaviour and aggression, the group and events play a major role in the outcome or behaviour displayed by members of the group. Thus group dynamics play a major role in a participant's behaviour. In Edwin's case as senseless as his actions seem, they may be better understood when placed into theoretical perspective. Even though Edwin has the ability to think independently and make good judgements and decisions, as

he has during his 42 years, mob theories may explain his actions on the day in question. Picking up a phone and throwing it against a wall is behaviour untypical of someone of his standing in the community and of him as a diligent and conscientious worker.

His remorse regarding his involvement is also apparent and he keeps reliving his decision to "not just get onto the bus". For four years he has had to live with the consequences of his decision. His children do not know the exact details of the situation and his wife avoids talking about it. When asked about his biggest weakness, a question added to the interview to gain insight into how he feels about himself, he said he and others view him as a weakling. (This remorse shows he has insight important in recommendation for correctional supervision.)

6 THE CRIMINAL EVENT

Edwin arrived at Megawatt Park on 15 July 1998 between 8h00 and 09h00. He was present to show support for the National Union of Mineworkers (NUM). As a shop steward he was responsible for reporting on the progress of the negotiations to members of his group. Beside this duty his day was characterised by singing and dancing. Edwin states that the unruly behaviour of the group was preceded by negotiators coming out to tell the gathered crowd that they could go home as the negotiators had decided to finish up the meeting and would no longer continue with their talks.

According to the findings of the court, Edwin played the following role in the criminal event. Edwin entered the scene in front of a man who was dragging a burning chair. He bent down, picked up a phone and threw it against the wall. He then left the building. These actions, uncharacteristic of Edwin's usual behaviour, will now be placed within the context of aggression-relevant group dynamics and existing theories on group development and behaviour.

7 EVALUATION OF THE EVENT: A CRIMINOLOGICAL EXPOSITION

The main source consulted for purposes of this report is that of Goldstein (2002), a researcher and scientist with a PhD who has collated data from more than 690 sources including psychologists, sociologists, criminologists and therapists on the phenomenon of group violence. A full account of this expert's qualifications and experiences is attached.

The following account does not come from evidence of the accused but is rather the application of theory to the event, looking at the role of group dynamics.

7.1 The phenomenon of group violence

In order to understand mob phenomenon one should define a mob and look at its unique characteristics and dynamics. According to Chaplin (in Goldstein, 2002:105) when the size and intensity of a group grows it becomes a mob. This group behaviour "originates in its course of development, and depends on interstimulation among participants". Staub and Rosenthal (in Goldstein, 2002:105) define a crowd as a group of persons who share a common interest and who are easily aroused emotionally. They state that these strong emotions often lead to violence or illegal acts.

While viewing the video of the incident it is difficult to understand the senseless and aimless behaviour displayed by those screened. To analyse the emotions and feelings experienced by the mob on the day of the incident, and to show and understand the dynamics of the event, the following extract from Momboisse (in Goldstein, 2002:108) is quoted:

> Mobs are the product of a process of evolution ... the mob mutters ... the event causes a crowd to gather at the scene. Its members mill about like a herd of cattle. The gathering crowd causes more onlookers to gather. These persons usually have little if any direct knowledge of the incident which gave rise to the mob ... rumors are numerous and spread rapidly ... it proceeds to attract numbers of individuals, they are pressed together, they initiate conversations with strangers ... through the milling process the crowd excites itself more and more. Individuals will break off to warn friends, enlist recruits, pass on rumors ... and generate excitement. As the crowd grows, so too do the rumors, and through social facilitation, increasingly dangerous behaviour is encouraged ... by circular influences, stimulation and restimulation of each other, a high state of collective tension and excitement build up. As tension mounts, individuals become less and less responsive to stimulation arising outside the group and respond only to influences from within the crowd itself. This process creates among members an internal rapport, a kind of collective hypnosis, in which the individual loses his self-control and responds only to the dictates of the crowd as a whole. The individual loses critical self-conscious-ness ... for mob anonymity absolves him of individual responsibility ... As group wrath generates, symbolic behaviour becomes incapable of providing satisfactory outlet for the feeling-states of the individuals involved. Some form of overt, non-symbolic behaviour is imperative. Such overt behaviour is, of course, always violent and destructive.

Edwin's entrance onto the scene, his brief survey of his environment and then his senseless action of throwing the telephone against the wall can be seen against the background illustrated above by Momboisse. Edwin's mere presence at the scene, and his response to the stimulation of the group contributed to his internal rapport with the group and the development of a kind of collective hypnosis. This all contributed to his loss of self-control and critical self-consciousness. The mob anonymity absolved him of individual responsibility.

The latter account, from a criminological perspective, in no way, however, wishes to serve to absolve Edwin from responsibility. The illustration serves to show how Edwin, a responsible, rational person acted as he did that day. He acted uncharacteristically which indicates that the group influenced him.

7.2 The contagion theory

The contagion theory, based upon early studies by Gustave Le Bon, substantiates the dynamics displayed in the illustration above and he states that: "Via a suggestibility-driven contagious process in the mass, the individual is radically transformed, loses his or her conscious personality, and it is in the grip of 'the law of mental unity of crowds' that primitive, irrational elements emerge ... What emerges is a collective mind that makes people feel, think, and act in a uniform or homogenous way" (Le Bon in Goldstein, 2002:109).

7.3 A response to a perceived injustice

Staub (in Goldstein, 2002:112) states that reasons for participating in mob violence, which are relevant to this scenario, are frustration, desire for social and institutional change motivated by a response to a perceived injustice. In Edwin's case he believed that they were being fobbed off by management who wished to go home without resolving the issues at hand.

The following sentence recommendation is made with the above dynamics in mind.

8 SENTENCE CONSIDERATIONS

Holmes (Terblanche, 1999:158) declares: "Punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances." It is respectfully the Court's prerogative to decide on the most appropriate and just sentence. The following comments are merely suggestions to the court, based on the penological evaluation of the effect that punishment may have on the offender. Penology is the study of punishment in it totality. The aim of the report is to illustrate the punishment that would best adhere to the triad of Zinn in considering the nature and gravity of the crime; the personal circumstances of the offender and the interests of the community.

Punishment can be seen as a complex phenomenon where the ideal of a balanced punishment is where retribution, deterrence, rehabilitation, protection and prevention are seen as interdependent parts of the whole. When retribution becomes the main purpose, the risk is run of absolutising punishment. If deterrence is the sole purpose of a punishment handed down, it becomes a negative penal motive. However, by blending deterrence with positive aspects such as the protection of a society and the rehabilitation of the offender, it becomes of great punitive value. If too much emphasis is placed on the protection of society, the society is protected at the expense of the offender. Society's best protection is the rehabilitation of criminals. On the other hand, when rehabilitation becomes the sole purpose, society's interests are sacrificed.

8.1 Important factors to be considered

The following factors are important and indicate a punishment that is retributive, will allow the offender to atone for his actions and show contrition. Punishment should also set an example to society and justice should be seen to be served:

(i) Nature of the crime: the crime of public violence is a serious crime and the punishment imposed should show that society condemns violence.
(ii) Harm done to the victim: the financial cost to the victim of the crime is high.
(iii) Factors relating to society: punitive measures need to show society that such acts are not condoned.

It is, however, the prerogative of the court to show mercy and to consider the failings of Edwin as a human. There are a number of mitigating factors relating to the accused, which played a role during the criminal event:

(i) It was not a premeditated crime.
(ii) Offender as a person
(iii) Previous criminal record: offender has no previous record of violence.

The court should consider all the relevant facts, factors and circumstances of the accused. In this regard, the three factors of the triad of Zinn should be considered in conjunction with one another (Terblanche, 1999:167).

9 SENTENCE OPTIONS

9.1 Imprisonment

Imprisonment has many disadvantages, such as a lack of rehabilitation programmes, overcrowding, institutionalisation, and contamination and contact with hardened offenders. However, the interests of society should always remain a priority and if the offender is deemed a threat to the community, the community's interests should be placed ahead of those of the offender. If the only way to protect society effectively against the

accused is by means of incarceration, a term of imprisonment is recommended. In this instance it is the view that the offender is not a threat to the community and, as a responsible worker, will make a valuable contribution to society.

Thus imprisonment would merely serve a retributive purpose. Edwin's behaviour over the last five years shows that the deterrent and preventive value of imprisonment is unnecessary. He has adhered to his bail conditions and shows that he is law abiding. For this purpose correctional supervision may be a suitable option.

9.2 Correctional supervision

Section 1 of the Correctional Services Act of 1959 defines correctional supervision as a community-based punishment that is executed within the community and in cooperation with and/or to the benefit of the community. The value of correctional supervision as a punishment is advocated in the case of *S v R* where Kriegler AJA declared that:

> The legislature has unequivocally indicated by shift of emphasis which is apparent from amending the Act as a whole, that punishment, reformative but if necessary highly punitive, is not necessarily or even primarily to be achieved by incarceration.

According to Terblanche (1999:333) the advantages of correctional supervision are that it can be punishment with a highly punitive value and also that it may have the potential to promote the rehabilitation of the offender. The strict enforcement of conditions such as house arrest may indeed be punitive; the enforced incarceration in the home is a punishment which restricts his freedom. If properly enforced, it will also protect the community.

Further advantages are that the offender is not exposed to hardened criminals, he does not suffer the isolation and stigma attached to imprisonment, prison space is not taken up, and he can be employed and support himself and his family; society does not lose the skills of someone who can look after himself and finally it costs less than imprisonment.

9.2.1 Rehabilitative potential of correctional supervision

It is believed that rehabilitation has a better chance within the community than in prison. According to Terblanche (1999:334) "although rehabilitation is not the likely outcome of any punishment, the rehabilitation of the offender is a more likely outcome of correctional supervision than of imprisonment".

Correctional supervision is described as an "appreciable sentence". Thus it is suitably severe even for serious crimes and should not be seen as a soft option (Terblanche, 1999:335). The severity of correctional supervision can be further increased by combining it with another sentence or whatever measure a court may consider appropriate. In this instance the following conditions should be a prerequisite:

- house arrest
- a strict level of monitoring and supervision
- restitution to his victim

In the last instance Edwin is unable to financially compensate his direct victim (Eskom) but should still pay for the harm done and show society that correctional supervision, with its attached conditions, is an "appreciable sentence" through a community service order. Eskom has also instituted civil proceedings against NUM for an estimated R5,4 million, the amount of damage to the Conference Centre.

During sentencing in the case of serious crimes such as public violence, the interests of society come strongly to the fore and in certain circumstances this can result in the personal circumstances of the convicted person yielding to a degree to society's interests. According to Terblanche (1993) knowledge of the accused's personal circumstances is indispensable in the determination of punishment and that the over-emphasis of society's interests at the cost of the accused's personal circumstances must be guarded against.

9.2.2 House arrest

The condition of house arrest would mean that the accused would be confined to his home at specific times arranged with the correctional supervision officer, in order to restrict his movement and liberty. House arrest as a community-based detention has an advantage over a custodial sentence. Imprisonment exposes the offender to negative aspects such as drugs, violence and a wider criminal element. House arrest also removes the financial burden from the community to pay for his imprisonment.

By placing him under strict house arrest the community may see correctional supervision as a viable sentencing option. The interests of the community remain a priority, and his detention must be seen to be a punishment by this community. Edwin Moru understands the implications of house arrest.

9.2.3 Monitoring

In order for the house arrest to be successful it is necessary that the offender be strictly monitored. In *Roman v Williams* 1997 (2) SACR 754 (C) the court came to the following conclusion which states that: In order to preserve its crucial penal character and, what is equally important, to retain public respect as an effective punishment and deterrent, correctional supervision must be obviously strictly administered and constantly monitored, particularly in respect of house arrest and community service programmes.

9.2.4 Compensation

Although he is in no position to compensate the direct victim, he will contribute towards the general community through his work in the Community Policing Forum. Also see point 9.2.1 regarding civil proceedings for compensation instituted by Eskom.

9.2.5 Employment

A condition of correctional supervision is that the offender should be employed. In this instance the offender is still employed by his previous employer.

10 CORRECTIONAL SUPERVISION AND THE MOTIVES FOR PUNISHMENT

10.1 Retribution and denunciation

Denunciation is an element of retribution and functions to "proclaim, formally and solemnly, society's indignation at the commission of the crime and it has a symbolic significance as the expression of society's revulsion for the criminal and outrage for what he has done" (Terblanche, 1999:338).

10.2 Deterrence

It is possible firstly to impose a suitable sentence and secondly to serve the interests of the community by imposing a deterrent and strict sentence other than imprisonment. If all the conditions for correctional supervision are met by the individual placed under supervision,

and he is correctly monitored, correctional supervision is a strict punishment and will fulfil the penal objective of individual deterrence. However, it may be seen as a light sentence by the community and may not have value as a general deterrent. (My report is objective and I must also always keep the interests of the community in mind. I thus mention this in my report.)

10.3 Protection and prevention

Unlike imprisonment, where the offender's incarceration ensures the safety and protection of society for the prescribed period of the sentence, correctional supervision cannot make this claim. However, in Edwin's case he is not believed to be a threat to the community and thus correctional supervision would be suitable.

11 FINAL CONSIDERATIONS REGARDING CORRECTIONAL SUPERVISION

Aspects such as the nature and gravity of the offence, whether the offender will be reformed and improved by correctional supervision and whether the punishment has retributive value must be measured up. Positives in this case are that he has committed no other offences, can earn a salary, has a close family network and unconditional support.

12 RECOMMENDATION

It is the humble recommendation after examining the offender and his circumstances, as well as considering the interests of the community, and the crime committed, that Edwin Moru be placed under correctional supervision in terms of s 276(1)(h) of the Criminal Procedure Act 51 of 1977, as amended. According to this section, punishment shall only be imposed under section 276(1)0–(h)

(a) "(a) after a report of a probation officer or a correctional official has been placed before court; and
(b) for a fixed period not exceeding three years".

It is believed that Edwin will make a valuable contribution to the community. With the high level of unemployment in South Africa it is very difficult for the ex-offender to be released from prison after a period of time and find work. The longer an individual is out of the job market, the harder it is to find a job. Edwin is by all accounts an excellent worker and will make an economic contribution to both his family and society. Furthermore, at a workshop held on 30 May, Judge Bertelsmann postulated that imposing a prison sentence in South Africa today is almost like imposing a death penalty because of the high prevalence of HIV/AIDS in our prisons.

13 SOURCES

Bertelsmann, E. 2003. Talk at Forensic workshop hosted by Unisa, Department of Criminology: Expert evidence in court, requirements and expectations.

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Terblanche, SS. 1999. *The guide to sentencing in South Africa*. Durban: Butterworths.

Annexure A: Individual statements outlining each accused's personal circumstances.

Annexure B: Goldstein, AP. 2002. *The psychology of group aggression.* Chippenham, Wiltshire: John Wiley & Sons.

STUDY UNIT 1.5

Victim impact statements

Development of victim impact statements	Use in Western countries	Advantages of victim impact statements	Criticism of victim impact statements	Compiling a victim impact statement

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- 1.5.4.3 Australia
- 1.5.4.4 Canada
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1.5.5 The advantages of victim impact statements
1.5.6 Criticism of victim impact statements
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- 1.5.7.1 Personal details of the victim
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1.5.9 Self-assessment questions
1.5.10 Feedback on activities
1.5.11 Feedback on self-assessment questions

Annexure: Example of a criminological evaluation report



LEARNING OUTCOMES

After you have worked through this study unit you should be able to:

- Define the terms "victim" and "victims' rights".
- Give an overview of the development of victim impact statements.
- Describe the advantages and disadvantages of victim impact statements.
- Explain and evaluate the content of victim impact statements.

1.5.1 INTRODUCTION

There are currently a number of Western countries that use victim impact statements to bring the attention of the court to the harm that a victim has suffered as a result of a crime. It is argued that this information creates the opportunity for a more balanced sentence and at the same time involves the victim in the court proceedings.

It is interesting to note that pre-colonial societies in Africa concentrated more on the victim of the crime than on the offender. Reconciliation and restitution were regarded as crucial for making amends for the harm caused by a crime (Nsereko, 1993:21). Colonisation, however, suppressed customary law for indigenous people. European law emphasises the protection of the individual, while customary law emphasises the protection of the community.

In modern adversative legal systems, the victim plays a passive role of witness and observer, but during the past two decades more attention has been given to the victim of crime and the criminal justice system's responsibility towards the victim (Ashworth, 1993:498). The prevailing view is that the court cannot come to a considered decision on fair punishment if it only hears one side of the case. In this study unit we concentrate on the different aspects of victim impact statements as way of involving the victim in the criminal justice system.

In this study unit we would like to introduce you to certain related key concepts, the development of victim impact statements, the situation in South Africa, the advantages and disadvantages of victim impact statements and the content of such statements. You will notice that in the paragraphs that follow, victims' rights are closely bound up with the development of victim impact statements and the role of the victim, not only during sentencing, but also in the criminal justice system in general.

Please note that in section 1.5.4 "The use of victim impact statements in Western countries" you need only prepare 1.5.4.6 "The situation in South Africa" for the examination. Read the following sections: 1.5.4.1, 1.5.4.2, 1.5.4.3, 1.5.4.4 and 1.5.4.5 through carefully for background and to place the situation in South Africa (1.5.4.6) in context.

1.5.2 KEY CONCEPTS

You will be introduced to the following key concepts in this study unit:

Victims

Provision 1 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power of the United Nations (1997:15) defines "victims" as "persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those proscribing criminal abuse of power".

Provision 2 of the Declaration (1997:15) qualifies the term "victim" even further. A person can be regarded as a victim irrespective of whether the offender is identified, arrested or found guilty, and irrespective of the family relationship between the offender and the victim. The term "victim" also includes, where applicable, the immediate family of dependents of the direct victim and those persons who are injured while intervening in support of those in danger to prevent victimisation.

Victimisation

"Victimisation is the process whereby a victim, either innocently or through negligence or intentionally, is exposed to the negligent and/or intentional unlawful conduct of a criminal

which is prohibited by law. It is not limited to conduct which the victim regards as criminal, but it includes the feelings, responses and the community's attitude towards the victim" (South African Law Commission, 2000:3).

The following is a more general definition from a humanistic perspective:

Victimisation is the process whereby a person(s) suffers harm through the violations of national criminal laws or internationally recognised norms relating to human rights (NCPS Victim Empowerment Programme June, 1997:1).

We usually distinguish between primary victimisation and secondary victimisation.

In primary victimisation the primary victim is directly injured by the face-to-face attack or is threatened, or has his or her property stolen or damaged.

Secondary victimisation refers to the way in which the criminal justice system, the fringe professions such as health and welfare, and the general community can further victimise the victim by blaming him or her or ignoring his or her role in the criminal justice system, or through their insensitive actions (NCPS Victim Empowerment Programme June 1997:1).

Victim empowerment

Victim empowerment entails the way in which victims are empowered after they have been victimised by satisfactorily addressing the needs that arise from their victimisation (NCPS Victim Empowerment Programme June, 1997:1).

Victim support

Victim support is the term that is used for the empathetic person-centred support offered by an organisation or an individual after someone has been victimised (NCPS Victim Empowerment Programme June, 1997:1).

Criminal justice system

The criminal justice system in South Africa consists of three state departments:

- Department of Safety and Security (SAPS)
- Department of Justice and Constitutional Development (magistrates, judges and the prosecution authority, which functions independently from the Minister of Justice)
- Department of Correctional Services (DCS)

The victim's rights

The "victim's rights" refers to various rights and needs of victims of crime and the services provided for them, such as information on available financial and social services, notice of court proceedings, protection against harassment and intimidation, separate court waiting rooms, the speedy return of property held as evidence, revision of a prosecutor's decision not to prosecute, the right to bring the court's attention to the harm suffered by the victim as a result of the crime and to be treated sympathetically by officials involved in the criminal justice system. These rights are often entrenched in legislation or in a Manifesto of Rights for Victims (Naudé, 1995:15).

Victim impact statement

A victim impact statement is a statement that is drawn up to supply the court with information concerning the physical, financial, emotional and psychological effects that a victim has suffered as a result of a crime and, where applicable, their effect on his or her

family. A victim impact statement can be drawn up and presented in various ways (Naudé, 1995:15). Please look at the attached example of a criminological evaluation report drawn up by Prof. Michelle Ovens. A victim impact statement is a similar report.

1.5.3 THE DEVELOPMENT OF VICTIM IMPACT STATEMENTS

1.5.3.1 The role of victim movements

During the 1940s and 1950s the central theme of such movements in their campaign for victims' rights was the fact that the criminal justice system concentrated too much on the criminal's rights, while the victim's rights and needs were ignored (Brammer, 1992:275).

Over the decades since, criminal prosecutions have been mainly concerned with extending guarantees of the rights of the accused, while little attention has been given to the rights of victims. This brought about a system that was far more sympathetic to the rights and needs of offenders. The main purpose of the criminal justice system is seen as the promotion of justice by balancing the interests of the state against the interests of the accused (Douglas, 1993:283).

REFLECTIVE QUESTION: Do you agree that the accused has more rights than the victim in the trial process and during sentencing?



ACTIVITY (1) 5.1

Why do we have to do it?

To determine whether your views on the rights of the accused and the victim in the trial process change as you study this study unit.

Guidelines

Make a note of your view at this stage and your reasons for this view (the answer to this reflective question) in your workbook and see whether your point of view and the reasons for it have changed after you have studied section 1.5.4.6 that follows.

During the past decades much more attention has been given to the victims of crime and the criminal justice system's responsibility towards them (Ashworth, 1993:498). According to Erez (1994:21) this renewed interest in the victims of crime is the result of public concern over increasing crime and the establishment of various support groups for victims that demanded more effective protection and compensation for victims of crime. Research also called attention to the secondary victimisation to which all victims of crime are subjected in the criminal justice system as a result of the treatment they receive. This led to new legislation being promulgated to address victims' suffering.

REFLECTIVE QUESTION: Look at the distinction between primary victimisation and secondary victimisation again, as described in the list of key concepts above, and try to think of an example of secondary victimisation experienced by a victim during the trial of an accused.

In the 1970s there was large-scale reform with greater emphasis being placed on the needs of victims. Examples of this are psychological and emotional support services for the victims of crime, attention to the victim's immediate needs after the crime and statutory amendments such as support for victims/witnesses and protection programmes. During the 1980s, demands focused on statutory reform in the area of victims' rights by pressing for a more active role for the victim in the legal process.

Currently, the emphasis is on the reintegration of the victim into the criminal justice process. Research conducted in a number of countries has found that victims are frustrated with and alienated by the criminal justice system. Victims indicated that they would like to be more involved in the judicial decision-making process and also would like to be granted certain rights and services (Erez, 1994:22). Ashworth (1993:499) describes these rights and services as follows:

- the right to request emotional and practical support in the period directly following the crime
- the right to be kept informed and to be treated with respect and sympathy by law enforcers during the investigation
- the right to be treated with respect and understanding before and during the court proceedings
- the right to compensation for victims of criminal violence

We can also add the following:

- the right to be consulted on the issue of whether or not to prosecute
- the right to be consulted on decisions involving bail and custody
- the right to make an input during decisions on parole
- the right to bring the harm/loss suffered as a result of the crime to the attention of the court

> REFLECTIVE QUESTION: At this stage, can you think of more rights that a victim should be able to lay claim to during the trial process?

Since 1985 many Western countries have adopted legislation according to which a number of the above-mentioned rights have been granted to victims.

1.5.3.2 The role of the United Nations

In common with the rest of the world, the United Nations was far more concerned with the rights of offenders than the rights of victims. The First United Nations Congress on the Prevention of Crime and the Treatment of Offenders dealt mainly with the rights of offenders and prisoners. It was only at the Seventh Congress in Milan in 1985 that attention was focused on the victims of crime.

The United Nations' 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, which was signed by most Western countries, describes a number of rights for the victims of crime. These include access to the law, the right to be treated with compassion and respect, speedy compensation, a quick, fair and inexpensive trial, information concerning the progress of the proceedings, the right to focus the court's attention on the harm/loss the victim has suffered as a result of the crime without disadvantaging the accused, ongoing support during the judicial process, protection of their privacy and safety as well as that of their families and witnesses that appear on their behalf, restitution and compensation, informal measures for dispute resolution such as mediation and arbitration, and financial, emotional and psychological support to help them to get

over the material, medical, psychological and social disadvantages they have suffered as a result of the crime (Garkawe, 2006:1; United Nations, 1992:211ff).

1.5.4 THE USE OF VICTIM IMPACT STATEMENTS IN WESTERN COUNTRIES

1.5.4.1 The United States of America

The US is the country that has taken the lead in maintaining the rights of the victims of crime. States such as California and Maryland have used victim impact statements since the middle of the 1970s. The President's Task Force on Victims of Crime (1982) made 60 recommendations with regard to the rights of crime victims directed at the police, prosecutors and judges and, by 1986, most states had adopted legislation that reflected these recommendations (Conklin, 2007:376–377; Reid, 2003:379–383). Forty-five states gave effect to a Victims' Bill of Rights, which gave guidance on such matters as:

- information concerning available financial and social services for the victims of crime
- notice of legal action (e.g. the progress of the investigation, court proceedings, notice that bail or parole has been granted to the suspect)
- protection against harassment and intimidation
- separate court waiting rooms for the victims of crime
- speedy return of the victim's property used as evidence during the trial
- review of a prosecutor's decision not to prosecute
- legal aid for the victims of crime
- information on the government compensation fund

A motion has been adopted to request the Supreme Court to amend the US Constitution to make provision for the rights of the victim. The Bill of Rights in the South African Constitution accords various rights to the accused and prisoners but no specific rights to the victims of crime. [Do you think that our Constitution should be changed in order to make provision for the rights of victims?]

Victim impact statements are used for all federal crimes in which a person is a victim. The victim is often regarded as the best person to describe the crime through which the court is given insight into the defendant's character.

The various states differ with regard to their definitions of a victim and many define a victim as someone who has suffered harm as a result of a crime, while others define a victim more narrowly in terms of a specific crime, specifically violent crime. In New Hampshire, for example, victims are only allowed to submit a victim impact statement in cases in which attempted murder, aggravated assault, sexual assault, or alcohol- or drug-related manslaughter are involved. Hellerstein (1989:392) again argues that there are diverse victims of crime, for example a drug dealer murdered during a territory dispute, the bank teller who is psychologically affected by a crime committed against a bank or an elderly person who is robbed in a shopping centre.

The preparation and submission of victim impact statements differs from state to state and from federal court to federal court in the US. Some require a victim impact statement as part of a pre-sentencing report, provided that the victim is prepared to cooperate; others allow it only if ordered to do so by the court or at the discretion of the prosecutor; and some allow the victim to talk during the sentencing phase. There is, however, a general feeling among members of the legal profession that an emotional victim or family member can influence the sentencing judge unfairly. Coyne (1992:585) is of the opinion that the jury can be influenced but not the judge. Tame (1991:203) again maintains that an emotional victim impact statement merely balances the emotional submission that is often made on behalf of the defendant for the purpose of mitigation in sentencing. There are often various

witnesses who give evidence on the character of the defendant before the sentence is imposed without the sentencing judge being given any information on the harm/loss suffered by the victim or the family as a result of the crime. What is your opinion of this?

From the above discussion it is apparent that victim impact statements can be submitted to the court in any of the following three ways:

- in writing and attached to the pre-sentencing report prepared by the probation officer
- in writing and submitted as a separate statement by a trained expert at the sentencing hearing
- oral presentation by the victim or the victim's family

Most victim impact statements are prepared by probation officers or other experts such as psychologists and criminologists. Some states also use a standard format. There is, however, no consensus on the format or content of victim impact statements. McLeod (1987:165) examined the legislation of 42 states and found that 28 specified the inclusion of physical harm/loss, 27 specified emotional or psychological harm/loss, 33 specified financial loss and 15 specified social effects, while 16 made provision for the victim's opinion on sentence or restitution. In 88% of all cases the content of the victim impact statement was made known to the defence advocate.

1.5.4.2 New Zealand

The New Zealand Victims Offences Act (1987) defines a victim as someone who has physically or emotionally suffered harm/damage or loss or damage to property as a result of a punishable offence (regardless of whether someone has been found guilty of that offence); and, where an offence results in death, the term includes members of the immediate family of the deceased. The Act also makes provision for the treatment of victims, access to services, information on court proceedings, the return of property, victim impact statements, protection of the victim, the victim's opinion on bail in certain cases and notice of the release or escape of the offender in certain cases, provided that the victim has supplied the Secretary of Justice with a current address and telephone number.

Victim impact statements are only submitted in the case of violent or sexual crime. According to Hall (1992:151), the Act gives no indication of who is responsible for preparing the victim impact statement, by whom it should be prepared or what the content of such a statement should be. There is also no standard form that can be filled in. Most statements are prepared by the police officials responsible for the investigation. Although they have accepted this task by default, they have repeatedly emphasised that they lack the necessary expertise in this regard. One police circular merely instructs police officials to use the victim's own words where possible and warns them that they are not trained or qualified to assess any emotional harm/damage over and above the information supplied by the victim. In a court case it was, however, determined that the victim should receive guidance from the police officer when preparing a victim impact statement.

Furthermore, the Act contains no provisions on the way the victim impact statement should be used with regard to sentencing and the court has the discretion to decide what weight the content (aggravating or mitigating) should be given. The Act also makes no provision for recommendations on sentencing and in one court case it was determined that such a recommendation by a victim is inappropriate (Hall, 1992:157). There is also no legal guidance in terms of whether the offender has the right to access the victim impact statement, but court cases have established the right of the offender to see the victim impact statement and to check its accuracy. In sensitive cases such as those that deal with child abuse access may be refused.

1.5.4.3 Australia

Australian states are divided on the issue of victim impact statements and, according to Erez (1994:8), only South Australia and New South Wales have legislation in this regard.

The Criminal Law Sentencing Act (1988) in South Australia and the Crimes Sentencing Amendment Act (1987) in New South Wales make provision for a written impact statement to be submitted to the court. In South Australia, for example, the Act makes provision for the prosecutor to give the court details on the following for sentencing purposes:

- injury, loss or harm resulting from the offence
- the circumstances of the offence
- other offences that should be taken into account
- the personal circumstances of any victim of the offence

The prosecutor may withhold such details from the court if the victim so requests.

The Crown Prosecutor has the task of submitting the victim impact statement to the court. In South Australia victim impact statements are prepared by a probation officer and are only handed over to the judge or prosecutor if a pre-sentencing report is requested. This is regarded as fair because it also gives the victim a say when the offender's circumstances are explained in the pre-sentencing report. Do you think this is fair?

A victim's statement is defined as a statutory declaration of the social, financial, psychological and medical effects that the victim of crime has experienced. It forms part of the prosecutors' file which can be used at their discretion. Information gathered by the police in the initial investigation and updated before sentencing concerning the harm suffered by the victim is also used by the prosecutors.

1.5.4.4 Canada

In 1986, the Canadian Department of Justice tested various models of victim impact statement throughout the country (Giliberti, 1990:2–6) before the Federal Bill C-89, Act to Amend the Criminal Code (Victims of Crime) was put into effect.

According to Roberts (1992:1), Article 735 of the Act stipulates the following:

> For the purpose of determining the sentence to be imposed on an offender or whether the offender should be discharged pursuant to section 736 in respect of any offence, the court may consider a statement, prepared in accordance with subsection (1.2), of a victim of the offence describing the harm done to, or loss suffered, by the victim arising from the commission of the offence.

It is currently judicial policy to prepare victim impact statements as a rule for serious offences involving violence or offences against the person, although other offences are also affected by this if justified by circumstances.

Procedure for the various prosecutors' offices differ. In British Columbia, most victim impact statements are dealt with by staff from the Crown Victim Witness Services (CVWS) attached to the prosecutors' offices. Prosecutors are usually positively disposed towards victim impact statements, but some advocates for the defence are worried about their lack of objectivity, especially if such statements are prepared by victim support groups and not by (CVWS) staff.

If a victim impact statement is submitted, it is usually made known before sentencing. A dispute does not usually require the victim to be called for cross-examination, because the

prosecutor and the defence usually come to some or other agreement on what is permissible.

There is ongoing debate as to whether victim impact statements should be automatically submitted to the court, which would give the judge a systematic basis during the sentencing phase, and whether prosecutors should maintain a degree of discretion over the use of victim impact statements. Most judges are in favour of the automatic submission of victim impact statements.

1.5.4.5 Europe and the United Kingdom

The United Kingdom Standards for the Supervision of Offenders in the Community (1995:10) makes the following provision with regard to pre-sentencing reports: "... an assessment of the consequences of the offence, including the impact on the victim as set out in victim statements or other papers available from the Crown Prosecution Service or the damage otherwise done by the offence". No formal guidelines are given on what information should be included in pre-sentencing reports. The rights of the victims of crime are also set out in a Victim's Charter, which was published by the Home Office in 1990.

According to Joutsen (1994:59), victim impact statements are not used in Europe because in general criminal proceedings in Europe do not have a separate sentencing hearing in which a victim can be involved, although in theory the victim has a right to participate in the prosecution in the following manner:

- The prosecutor and the victim have a general right to institute legal proceedings; either of them can prosecute most offences.
- The victim has the right to private prosecution; this is generally reserved for certain minor offences.
- The victim has the right to secondary prosecution if the public prosecutor does not charge anyone.
- The victim has the right to serve as assistant prosecutor (this means that the victim assists the public prosecutor).

However, only a few European countries give the victim a general right to prosecute, for example, Finland, Ireland, Cyprus, England and Wales, although this right is normally limited in practice because the public prosecutor or the attorney-general usually make this decision. Private prosecutions are largely limited to minor offences in which there is no public interest. This is the case in, for example, Germany, Hungary, Norway and Poland.

The right to prosecute is seldom used, as it requires legal expertise and although the victim in some countries can or is obliged to obtain legal representation, it is an expensive process. The most general form of victim participation in the trial process is as assistant prosecutor, which allows the victim "to propose or submit evidence, to comment on any evidence submitted, and to be heard in court charges" (Joutsen, 1994:61). In theory, this allows the victim to make known his or her views or worries to the court, without the burden of prosecuting, but research indicates that this right is seldom used except in Germany.

Joutsen (1994:59), however, refers to the fact that legal systems throughout Europe are currently under review and that important reforms are expected that could possibly lead to a change of status for the victim.

1.5.4.6 The situation in South Africa

Although South Africa has signed the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985), a lack of funds has resulted in limited services being available for the victims of crime.

However, a multidepartmental coordinating committee, which included members of non-governmental organisations, was formed to make recommendations for more extensive services and rights for victims of crime. The development of a South African Victim Manifesto (under the auspices of the Department of Justice) formed part of the activities piloted by the National Victim Empowerment Programme and was managed by the Department of Social Development. Everyone involved in the criminal justice system worked together to ensure that victims are treated better. Victims who report crimes and give evidence in court play an essential role in making the criminal justice system more effective and, in exchange, the criminal justice system should treat victims with respect and ensure that their needs are provided for.

Service Charter for Victims of Crime in South Africa

The Victim's charter was approved by the Cabinet at its meeting on 1 December 2004 (South Africa info 17 January 2005).

The aim of the Victim's Charter is to empower victims, especially women and children, by informing them of their rights in the criminal justice system and about what they can expect from the staff, system and roleplayers (government and non-government). At the same time it gives guidance on the way in which a crime victim should be treated.

The Victim's Charter ensures that the emphasis is placed on the victim, the important role that a victim plays in the investigation and prosecution of a crime and the benefits for the victim if he or she is treated supportively and with understanding. The Charter aims to reduce the victim's feelings of being "out of control". This feeling is forced on the victim by the crime and is exacerbated by the manner in which he or she is treated throughout the criminal justice system. It will help the victim to regain a degree of control over his or her situation by being able to participate in the investigation and prosecution of the crime and by knowing that he or she is, for example, entitled to convey information on the way the crime has affected him or her and that he or she has the right to certain information (such as the case number, the trial date, etc.).

The way in which a victim is treated cannot compensate for what he or she has gone through, but the Charter ensures that the unpleasant effects of the crime are not exacerbated by what happens later during the investigation and prosecution of the case. The Charter ensures that a victim is treated fairly and courteously and receives good service when he or she comes into contact with the criminal justice system.

Structure

This Charter is divided into four parts. The first part sketches the rights and standard of services to which a victim is entitled. The second part briefly explains the processes that make up the criminal justice system and what will happen to a victim when he or she falls prey to a crime. Part three mentions the rights and sketches the treatment and standard of service that a victim can expect from the different roleplayers in the criminal justice system. Part four outlines the charge procedures and includes a list of addresses for the service providers involved.

Content

The Charter not only aims to incorporate the basic principles with regard to victims' rights that are internationally acknowledged, but also to deal with the needs and experiences of the South African victim of crime. The Manifesto contains the following victims' rights:

1. The right to be treated with fairness and with respect to your dignity and privacy

The aim of this right is to ensure that all service providers handle a victim with sensitivity. This ensures that all steps are taken to deal with a case as quickly as possible and to keep any unnecessary inconvenience for the victim to a minimum. The crux of this right is the assumption that service providers must ensure that secondary victimisation does not take place. It also deals with basic principles for the way service providers should address and treat a victim.

2. The right to offer information

This right deals with the issue that the victim should be allowed to convey information on the crime to the service provider (such as the investigating officer, the prosecutor, a member of the health services, etc.). It also deals with information on the procedures that should be followed when taking statements, who should be contacted if the victim is threatened by the accused, during which procedures a victim can participate, and so forth.

The type of information that a victim can present is not limited to factual versions of the crime; he or she can also include information on the effects of the crime on him or her and his or her family, details of any loss or harm he or she suffered as a result of the crime, and so on.

3. The right to receive information

This right ensures that a victim is informed about all the information to which he or she has a right and to ensure that he or she is continually informed by the service providers about the progress of the case and any additional information that may be of benefit to him or her.

This includes such information as the following:

- the case number
- the name and telephone numbers of the various officials dealing with the case
- the possibility of instituting a private prosecution
- the date of bail applications and whether the victim may attend
- decisions to withdraw the charges or to amend them considerably
- the date and results of the sentencing hearing
- copies of the victim's statements, hospital records and so forth

This right also stipulates that

- The victim must be informed about and/or referred to the available victim support services.
- Any procedures that may be unclear to the victim must be explained to him or her, and so forth.

4. The right to protection

This right deals with issues such as the general protection of a victim, specific measures for protection and the prevention of unnecessary or additional risk or trauma for a victim while the case is in progress by:

- making a statement in private
- using a separate waiting room from the accused in court
- witness protection
- being informed if the offender escapes from custody and so forth

5. The right to assistance

This right refers to information that is available to victims on the various service providers, including information on victims' rights, referral to support services and counselling, explanation of procedures and how to obtain an interpreter, and so forth. It also concerns information on specific procedures with regard to children, the victims of sexual offences, handicapped or elderly victims and so on.

6. The right to compensation

This right includes information on how and when compensation is awarded and the procedures to be followed and is based on existing legislation (section 300 of the Criminal Procedure Act.

7. The right to restitution

This right includes information on how and when restitution is allowed and the procedures to be followed in this regard.

Implementation

The Service Charter for Victims of Crime in South Africa was implemented in two phases. Phase 1 entailed the administrative implementation, which was done when the ministries involved approved the Charter. This included awareness campaigns, the distribution of the document, training of service providers with regard to the information contained in the document and the development of departmental policy in accordance with and in support of the Charter and its objectives.

Phase 2 included legislative implementation. The Charter come into effect when all the South African Law Commission's investigations into the legislation affected by the Charter was completed.

An important issue that has to be taken into account is that the Charter will not remain static. Amendments will have to be made to it such as new legislation or amendments adopted for existing legislation, for example the Child Justice Act.

The main challenges to the implementation of the Charter was the following:

- to ensure that there was an appropriate budget in all departments to increase awareness, provide training on and ensure distribution of the Charter
- to ensure that the document is widely distributed
- to ensure that all roleplayers directly or indirectly involved in the criminal justice system was informed about the document and trained in terms of the content

The various departments involved are bound to ensure that the above objectives are attained. Section 300 of the Criminal Procedure Act 51 of 1977 makes provision that compensation may be paid to the victims of crime at the request of the prosecutor or the victim, while Section 297 determines that a sentence may be suspended or deferred if the victim is compensated for harm suffered; however, research has found that compensation for the victims of crime seldom makes provision for the suspension or deferment of a sentence. The Criminal Procedure Act also makes provision for the protection of witnesses and victims in various ways, which include detainment for the duration of the trial. Bail may also be refused if there is a possibility that witnesses or the victim may be intimidated. Since 1992, witnesses have also been able to request protective custody and to be paid an allowance in lieu of loss of income during such detention (s 185A of the Act) and further improvements to the Act are currently being considered (the Witness Protection Programme Bill, 1997). Owing to a lack of funds, protective custody is only used to a limited extent.

The Law Commission recommended that legislation should be promulgated making victim impact statements part of the sentencing hearing. These statements should only be permissible with regard to particulars not yet at the court's disposal. Victims should have the choice to request the prosecutor not to put the details of injuries before the court. Victim impact statements should be signed and submitted during sentencing as a sworn statement. These statements should contain information on the actual physical, psychological, social and financial consequences of the offence for the victim, but should not contain a recommendation for sentencing. The courts should also have the discretion to reject the statement and cross-examination should be allowed.

1.5.5 THE ADVANTAGES OF VICTIM IMPACT STATEMENT

Victim impact statements provide the court with four types of information:

- the circumstances of the crime and the way in which it was committed
- the identity and character of the victim
- the effect of the crime on the victim and the victim's family
- the victim's or the victim's family's opinion of the defendant

According to research (Garkawe, 2006:2–3; Naudé, 1995:63) a victim impact statement has the following advantages:

- It can reduce victims' feelings of unequal treatment by the courts in relation to offenders.
- It can increase victims' satisfaction with the criminal justice system and thus their willingness to cooperate with the system in future.
- It gives recognition to the victim as the aggrieved party in the criminal procedure and acknowledges the dignity of the victim as an individual.
- After victims have shared their experience with the court it can help them to regain a feeling of control over their lives.
- It can form part of a psychological healing process.
- It can help victims to reconsider their relationship with offenders in cases where they know each other.

The victim impact statement has particular advantages for the criminal justice system because it can:

- increase the quality of the courts' administration of justice
- improve the effectiveness and credibility of the criminal justice system and make the system more democratic
- remind the court of the fact that behind the state there is a person with an interest in the way in which the case is decided
- help to avoid arbitrary and variable sentences
- promote victim participation and the various aims of sentencing, that is, retribution, deterrence, incapacitation and rehabilitation
- ensure that a fair and balanced sentence is imposed
- balance an emotional submission made by the offender
- help the court to make a more informed decision if both sides are heard
- be used in the rehabilitation of offenders to break them of their negative patterns
- help parole boards to decide on the release of offenders

1.5.6 CRITICISM OF VICTIM IMPACT STATEMENTS

A great deal of criticism has been levelled by experts at the victim impact statement (Garkawe, 2006:2–3; Naudé, 1995:64) and we will look briefly at some of the criticism:

- The victim impact statement may lead the court to put too much emphasis on the effect that the crime had on the victim.
- It could place an additional load on an already overloaded justice system in that it could extend the trial and make it more expensive.
- It could have a negative effect on the consistency of sentences, especially if it is not submitted in all serious cases, and it may increase the inequity and variability of sentences.
- It could emphasise the retribution and revenge aspect of punishment.
- Sentencing may be problematic in cases where the victim has suffered serious psychological effects as a result of the crime.
- Prosecutors are afraid that their control over the case will be reduced and that it will undermine the predictability of the outcome.
- Victim impact statements are problematic in cases where there are no direct victims, for example certain ecological crimes such as pollution.
- Victims may be hesitant to submit a victim impact statement if they fear revenge from the offender or the offender's family.
- The submission of a victim impact statement may create unrealistic expectations in some victims, which may lead to their becoming disillusioned with the criminal justice system if their expectations are not met.
- The submission of a victim impact statement to the court can be very traumatic for victims and their families.
- Cross-examination of the victim on the content of the victim impact statement may increase the victim's suffering.
- Victim impact statements simply acknowledge the victim's interests, while the modern role of the victim is regarded as a source of information.
- Such statements can expose the court to unacceptable public pressure.

However, it is acknowledged that, in a democratic society and in the interests of a credible criminal justice system, the wishes of the public and the victim in particular cannot be ignored. Victims also have constitutional rights and these rights should be acknowledged and respected by the criminal justice system. Research has shown 80–90% of the public is in favour of victim impact statements, and other rights for victims of crime and the victims of crime themselves support the acknowledgement of these rights even more than the general public. Research further indicates that victim impact statements do not cause unnecessary delays (Naudé, 1995:67).

1.5.7 COMPILING A VICTIM IMPACT STATEMENT

Please consult the attached example of a criminological evaluation report by Prof. Michelle Ovens.

Victim impact statements should include the following (Naudé, 1997:58):

1.5.7.1 Personal details of the victim

The victim's occupation, work status, age and sex should be included. Information on the victim's status in the community is also important, especially when showing that the offender had the intention of harming a particular victim as opposed to someone who was chosen at random.

1.5.7.2 Emotional and psychological harm/disadvantage

The following types of psychological harm suffered by the victim or the victim's family may be included in the victim impact statement:

- anxiety, depression, lack of concentration and a feeling of futility
- behavioural changes such as aggression, hostility and other forms of destructive behaviour
- disturbances in sleep and eating patterns (sleep or eat too much or too little)
- changes in lifestyle such as fear of going out after dark, fear of strangers or strange objects, inability to go shopping alone (e.g. after a break-in) or a fear of driving (after a hijacking)
- problems with work or study as a result of the crime
- problems with interpersonal relationships, for example excessive dependence on family and friends, general detachment, mistrust and suspicion, impaired communication
- information on any counselling or psychological treatment, which should be supported with written or oral evidence

1.5.7.3 Physical injuries or incapacity

This can include:

- any ongoing physical discomfort
- detailed particulars of all treatment received to date (dates and type of treatment involved) supported by medical evidence
- any treatment or medical advice that may be necessary in the future
- consequences of incapacity or injuries on future quality of life
- consequences for life expectancy

1.5.7.4 Financial or property loss resulting from the crime

This can include:

- the value of the property that was damaged, lost or destroyed
- whether the losses were insured
- medical or psychological counselling expenses including copies of receipts and accounts
- losses caused by absence from work as a result of the crime or treatment

1.5.7.5 Other changes in lifestyle resulting from the crime

Details can include matters such as:

- change of residence, work or area by the victim
- concerns about future contact with the offender or the offender's family and friends
- fear of harassment and intimidation by the offender and his or her family and friends
- any concerns over the results of the offender's release on parole or a suspended sentence; these issues are often a source of concern for victims of household violence, sexual assault or drug- or gang-related violence

1.5.8 SUMMARY

In this study unit we considered various key concepts, the development of victim impact statements in a number of countries and the advantages and disadvantages of victim impact statements, in particular with regard to the criminal justice system. We also looked at the various physical, psychological, financial and lifestyle factors that should be included in a victim impact statement.



ACTIVITY (1) 5.2

Why do we have to do it?

To help you with the learning process and in preparing for the examination.

Expand the glossary in your workbook by including the key words and other difficult concepts in this study unit, as we explained in the foreword to the study guide. Remember that one of the important ways of transferring knowledge from the short-term to the long-term memory is by calling it up regularly until you have mastered it. The more a thought pattern is "fired", the more "hard wiring" of neurons takes place. This hard wiring also happens when we discuss our new knowledge with other people, recall mind maps or summaries, and apply the knowledge in our everyday life.

This was a very long study unit. Draw up a mind map showing all the headings and sub-headings and put it on the wall or on a page of your workbook. Look at it often (every few days), discuss it and so on, until you know it. Then you don't need to go back to it so often. At the end of the semester you will know it for the exams. Compare your mind map with the one supplied at the end of the previous study unit.

1.5.9 SELF-ASSESSMENT QUESTIONS

(1) Define the terms "victim", "victims' rights" and "victim impact statements". (12)
(2) Distinguish between primary and secondary victimisation. (6)
(3) The Victims' Manifesto in South Africa is divided into four parts. Give a concise explanation of each of the four parts. (8)
(4) Give the victims' rights that are contained in the Victims' Manifesto in South Africa. (7)
(5) What are the main challenges to the implementation of the Victims' Manifesto in South Africa? (6)
(6) Evaluate the advantages and disadvantages of victim impact statements. Do you think that these statements play a positive or a negative role? (25)
(7) If you were asked to compile a victim impact statement, what aspects would you concentrate on in the content of your report? (15)
(8) Victim impact statements provide the court with four types of information. Indicate which ONE of the following options is NOT one of the four types.

    (a) the circumstances of the crime and the way in which it was committed
    (b) the effect of the crime on the community
    (c) the identity and character of the victim
    (d) the effect of the crime on the victim and the victim's family
    (e) the victim's or the victim's family's opinion of the defendant

(9) The victim impact statement has particular advantages for the criminal justice system. Identify which ONE of the following options is NOT an advantage for the criminal justice system

    (a) It can improve the quality of the courts' administration of justice.
    (b) It can prevent arbitrary and variable sentences.
    (c) It can increase the conviction rates of courts.
    (d) It can ensure that a fair and balanced sentence is imposed.
    (e) It can help parole boards to decide on the release of offenders.

1.5.10 FEEDBACK ON ACTIVITIES

ACTIVITY (1) 5:1

No feedback

ACTIVITY (1) 5:2

No feedback

1.5.11 FEEDBACK ON SELF-ASSESSMENT QUESTIONS

(1) Victim: See provisions 1 and 2 of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power in section 1.5.2.

Victims' rights: This refers to a variety of rights, needs and services for victims of crime such as information on available financial and social services, notice of court proceedings, protection from harassment and intimidation, separate court waiting rooms, the speedy return of property held as evidence, review of a prosecutor's decision not to prosecute, the right to bring to the court's attention the harm that the victim has suffered as a result of the crime and to be treated sympathetically by officials involved in the criminal justice system.

Victim impact statements: These are statements intended to provide the court with information on the physical, financial, emotional and psychological consequences suffered by a victim as a result of a crime and, where applicable, its effects on his or her family.

(2) In primary victimisation we have the primary victim who is directly injured in a face-to-face attack, or who is threatened, or whose property is stolen or damaged. Secondary victimisation refers to the way in which the criminal justice system or society, for example, may victimise the victim by blaming him or her or ignoring him or her through insensitive actions.

(3) The first part sketches the rights and the standard of service to which a victim is entitled. The second part explains briefly the processes the criminal justice system consists of and what will happen to a victim when he or she falls prey to crime. Part three mentions the rights and sketches the treatment and standard of service that victims can expect from the various roleplayers in the criminal justice system. Part four outlines the charging procedures and includes an address list of the service providers involved.

(4)
- the right to be treated fairly and respectfully and with respect for the victim's privacy
- the right to present information
- the right to receive information
- the right to protection
- the right to support
- the right to compensation
- the right to restitution

(5)
- to ensure that there is an appropriate budget available in all departments to raise awareness, to conduct training and to distribute the Manifesto
- to ensure that the document will be widely distributed
- to ensure that all roleplayers directly or indirectly involved in the criminal justice system are informed about the document and trained in terms of its content

(6) Consult sections 1.5.5 and 1.5.6 for the answer and then give your own opinion.

(7) Please note the following aspects in your report:

- personal details of the victim
- emotional or psychological harm/disadvantage
- physical injuries or incapacity
- financial and property loss
- other changes in lifestyle as a result of the crime

(8) Option 2

(9) Option 3

ANNEXURE: Example of a criminological evaluation report

CRIMINOLOGICAL EVALUATION REPORT

Compiled on request of DCS Psychological Services for AM Cornelius

CRIMINOLOGIST: PROF. M OVENS

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PROF. M OVENS DATE

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A BIOGRAPHIC SYNOPSIS

Name of offender: AM (Andries) Cornelius

Age at the time when offence was committed: 21

Present age: 43

Gender: Male

Marital status: Single

Educational level: Level 5 (Special School)

Occupation: Welder/plumber

Crime: Murder and armed robbery

B PURPOSE OF THE CRIMINOLOGICAL REPORT

The purpose and role of the criminologist is to individualise the offender for purposes of consideration for release. Relevant factors are taken into account in a criminological evaluation report, including the offender's history and personality make-up, mental state and physical condition at the time of the event, the nature of the offence, the offender's motivation for committing the crime, relationship to and interaction with the victim and the precipitating and situational factors contributing to the criminal event. All these factors, together with the offender's behaviour and attitude during incarceration, can assist in developing a prognosis for the offender's release back into society.

This report further focuses on the impact of the event on the individual and the measure to which the offender has been affected by his own action. It places the event within a theoretical and criminological perspective. This information thus serves as a base for the consideration of release on parole.

C CRIMINOLOGICAL EVALUATION REPORT

1 INTRODUCTION

The psychological services of DCS, Pretoria Management Area, approached the researcher with the request for a criminological assessment of Andries. The report, a community service, is a reflection of information gained and placed into a criminological framework.

2 SOURCES OF INFORMATION

2.1 Andries Cornelius 19 February 2007, Central Prison, 95 min; 5 March 2007, Central Prison, 120 min (completion of risk assessment form) Assessment form completed by Criminologists E Joubert, Jansen Van Vuuren)
2.2 Iza (aunt) 27 February 2007, Telephonic interview, 30 minutes
2.3 Rita Crafford (aunt) 7 March 2007, Telephonic interview, 15 minutes
2.4 Renier Cornelius (brother) 27 February 2007, Telephonic interview, 20 minutes; 28 February 2007, telephonic interview, 15 minutes
2.5 Mr Claasen (DCS) 6 March 2007, Telephonic interview, 15 minutes
2.6 Mr Sarel Wessels (uncle) 7 March 2007, Telephonic interview, 30 minutes
2.7 Consultation with psychological services of DCS, 9 February 2007, at Unisa, 120 minutes
2.8 Other sources of information

In a criminological assessment of the offender, the sentencing remarks by the presiding officer are generally taken into account. Whether the offender has met the requirements set by the magistrate is an important indicator of the offender's attitude to his punishment and whether the individual has the potential for rehabilitation and to be released back into society. Owing to the period of time since the court hearing and sentencing, the court transcript could not be obtained and it was not possible to obtain a copy of the magistrate's sentencing remarks.

Thus, in this report the following will be considered:

- offender's risk of reoffending
- abstinence from drugs

3 BIOGRAPHICAL INFORMATION

3.1 Andries is the second-born and has two brothers, Willie the eldest and Renier the last-born. Outwardly, his family appeared stable and interviews with a relative (Aunt

Iza) confirmed that the family appeared to be functional and intact. However, Andries's account, corroborated by his younger brother Renier, who at the time was in his early teens, shows that the family functioning was severely influenced by Andries's mother's secret abuse of alcohol and drugs and many premarital affairs. In an interview with Renier (Andries's brother) he said that his mother drank secretly and had secret affairs ("My ma het skelmpies gedrink en het 'n skelmpie gehad.").

3.2 As a youngster Andries felt it was his duty to try and keep the family secrets. He thought that he was the only one that was aware of his mother's affairs. In the interview he mentions that his mother had passed away, whereas his brother Willie said that his mother had committed suicide.

3.3 Andries did not really talk much about his father except to say that he was a good person. Both Andries and Willie express a great regret they put their father and mother through so much when they committed the crime for which they were incarcerated. Both Andries's parents died while he was in prison. He says he wishes he could turn back the clock so that he could change things.

3.4 Sarel Wessels (uncle) believes that Andries's father was far too strict on the boys and that their upbringing did not prepare them for the realities of urban life.

4 LIFESTYLE AT THE TIME OF THE CRIME vs PRESENT SITUATION

4.1 As a result of the number of years Andries has been in prison and the extent of the change that has taken place with regard to his outlook on life and level of maturity, it is necessary to look at his history and personality make-up, mental state and physical condition at the time of the event.

4.2 Prior to his arrest Andries led a carefree and irresponsible life. At the time of the crime he had absconded from work and was with friends who were "on the run". One friend was fleeing from the police and another had absconded from the army. Andries's behaviour was influenced to a large degree by his abuse of drugs and alcohol. He admits that his attitude was wrong and that he had little regard for other people.

4.3 He expresses remorse for his actions and the effect they have had on his victim's family as well as his own family. He appears to feel additional guilt because his action in shooting and killing the victim impacted on his brother. "It was me and not my brother who fired the shot." Throughout the interview he appeared to care greatly about his brother and his wellbeing. He looks out for him in prison.

4.4 An aspect that can be mentioned here is that when Andries was incarcerated, he had just got married and his wife was expecting their first child. When he heard that he had received a life sentence he asked his wife to divorce him and start a new life, as he did not want her to wait for him. She tried to change his mind but he stood firm on the matter. He has never seen his son (now 22 years old).

4.5 However, the nature of the offence is severe and shows that at that point he had little regard for social values. He acted recklessly and without thought for the consequences of his actions. Andries and his co-offenders had planned to rob someone at gunpoint in order to steal their vehicle, as they needed transport to go to another town with all their bags. The need to get there as fast as possible motivated their actions and influenced the mechanisms that might have made him think twice had he not been using dagga. Also the role of group cohesion probably played a large role in influencing Andries to become involved in the planning of the crime. When his accomplice ordered him to fire on the man they had hijacked, he shot him. He expresses great remorse and wishes that he could apologise to his victim's family.

4.6 When asked why he committed the crime, Andries admitted that he did not know any better.

4.7 At the time the offence was committed in 1986, the death penalty was still being

imposed and Andries truly believed that he would receive the death penalty. He was so relieved to hear that he had received a life sentence only, and that his life had been spared, that he vowed to change his life. An aunt had also once told him that he, above the other boys in the family, was her favourite and that she believed in him. This trust that she had in Andries acted as his motivation and he wanted to live up to her expectations of him.

5 CURRENT BEHAVIOUR

5.1 Early on in his prison sentence he became involved in a fight with other inmates. Correctional Services officials acted by sending him for anger management sessions. He also used dagga and LSD in the early years. However, he realised from seeing other prisoners under the influence of drugs that a person had little control over their behaviour in this state. He has completely stopped using drugs and smoking tobacco. He says this abstinence has made a big difference in his life.

5.2 Currently, he presents himself as being responsible and takes care of his appearance. He has a good level of self-management and prefers a disciplined system to one in which there is no discipline. In prison he prefers a strict level of discipline and rules so that he knows where he stands. He has insight into and understanding of the consequences of his criminal behaviour and shows true remorse for all those harmed by his actions.

5.3 In an interview with Mr Claassen (DCS Maintenance) he stated "if all prisoners were like Andries and his brother it would be nice". In 1999 Mr Claassen worked with Andries in Devon for the first time. Throughout the time he has known Andries, he says Andries has always behaved impeccably and with maturity. Mr Claassen says he has a positive attitude, behaves well and is trustworthy. Andries also helps Mr Claassen with work over weekends.

5.4 According to Mr Claasen, Andries has displayed exemplary behaviour. He has been productive during his incarceration and, in Mr Claassen's opinion, Andries has an excellent chance of successfully reintegrating into the community.

6 QUALIFICATIONS AND SELF-IMPROVEMENT COURSES

The following courses were completed:

6.1 Anger management 1 month
6.2 Investment and excellence 1999/2000
6.3 Relationships
6.4 AIDS awareness
6.5 Andries is a qualified plumber and welder and works very well.

7 EVALUATION OF THE EVENT: A CRIMINOLOGICAL EXPOSITION

7.1 Andries and his six accomplices planned to highjack a car and hold the driver up with a firearm. The car would be used to transport the six people and all their baggage. Their victim was a middle-aged black taxi driver who had picked them up while they were hiking. Andries and a friend were in the taxi and Andries fired the shot that killed the man. Willie was not with them at the time. Andries expresses remorse over the death of the man and the family that was left behind.

8 RISK FACTORS

8.1 It is the writer's opinion that three factors contributed to the crime:

- the environment in which Andries grew up (influence of mother's behaviour)

- group conformity
- substance abuse

8.2 Andries's lifestyle and attitude at the time of the crime contributed to his becoming involved in the crime. His abuse of drugs and alcohol further impeded his judgement and social values.

8.3 The following is not based on evidence obtained from Andries, but rather looks at a theoretical explanation for the dynamics involved and circumstances surrounding the event. The main source consulted for the purposes of this report is Kotulak's (1996) work, which highlights the importance of the environment, not only in the shaping and moulding of psychological processes that lead to aggression, but also the detrimental effects it has on shaping the expression of genes. In other words, "stresses caused by bad experiences can affect genes" (p. 36) and "environmental events cause molecular changes in the brain that make people more impulsive" (p. 78). Social conflict, in such a case, stems from socioenvironmental conditions that are stress-filled, aggressive and often violent. Moreover, aggression is triggered in the brain by two powerful chemicals, serotonin and noradrenalin. These chemical stimuli become hypersensitive under conditions of stress when an individual's physiological responses "keep the body in a constant state of readiness heart racing, blood pressure high, easy to startle, [and] quick to blow up" (p. 81). These are conditions which lead to increased tendencies to act before thinking. This is the case especially among children and youth, who are predisposed to "use aggressive and violent strategies to deal with life's daily challenges" (p. 81). Thus, the biochemical blueprints for violent behaviour are set when imbalances in genetically susceptible individuals take place and similar conditions may also occur under conditions of extreme environmental duress. Staub (2003) supports the notion of parents contributing to violent behaviour, but also mentions that socialising such children into prosocial behaviour can lead to social cohesion.

8.4 According to deindividuation theory (where people no longer function as individuals but rather in a group, letting the group think for them), the psychological state of deindividuation is aroused when individuals join a group. The state is characterised by diminished awareness of self and individuality. This in turn reduces an individual's self-restraint and normative regulation of behaviour. In social psychology, deindividuation is a major theory of group behaviour: it even provides an explanation for the collective behaviour of violent crowds, mindless hooligans and lynch mobs. The group behaviour and planning of the crime by Andries and his accomplices can be explained by the theory of deindividuation.

9 CRIMINOLOGICAL PROGNOSIS

9.1 Andries's prognosis for a successful release is based on the following factors:

LIFESTYLE/ATTITUDES SUBSTANCE ABUSE

SUPPORT SYSTEMS AVAILABLE/EMPLOYMENT

REMORSE SHOWN

(i) An apparent significant change in attitude and a sense of responsibility. Andries is an excellent worker and has gained the trust of correctional officers (Mr Claassen).

(ii) He has totally abstained from smoking and using dagga or any other drugs.

(iii) Most importantly, he has maintained excellent ties with his family, confirmed during various telephonic interviews with family members and has both a place

to reside with his Uncle Sarel and Aunt Irene Wessels in Richards Bay, and a firm offer of employment.

(iv) Andries expresses remorse for his criminal actions and the harm he has done to the victim's family and expresses a desire to lead a normal, law-abiding life.

10 SUPPORT SYSTEMS AVAILABLE

(i) Renier (younger brother) has had a close relationship over the last two years. Would have supported Andries and given him accommodation if uncle was not assisting. Believes Uncle Sarel Wessels will have a good influence on Andries.

Reiner is employed by KD Enterprises in Johannesburg.

(ii) Iza (aunt) Started visiting Andries when he was in prison in Cullinan and still visits him in Central Prison.

When she thought that Andries was going to be released last year she bought him new clothes. She confirms that Uncle Sarel Wessels is going to support Andries and that Renier is also going to assist financially.

(iii) Sarel Wessels – uncle in Richards Bay who is willing to provide Andries with accommodation in his home.

Has arranged with a firm to employ Andries as a welder.

Previously arranged a flat for Andries and bought furniture when he thought Andries and his brother were being released.

Realises that the brothers will experience adjustment problems.

Believes he is the most suitable family member to assist (his children are all out of the home and successful members of society).

Recently visited Andries at Central Prison.

11 CONCLUSION

Andries's attitude in prison at present and abstinence from substances are positive indicators that he will, on release, lead a crime-free lifestyle and that he will fit into society as a law-abiding citizen. He is well aware of the difficulties that people who have served long sentences encounter when they are faced with the realities of life back in society. He fortunately has a close relationship with his brother, Willie, and they will face the uncertainties of returning to the community together. The support of a large family network will further facilitate reintegration.

It is my respectful, objective opinion as a criminologist that Andries has a good prognosis for a successful reintegration into society and that he intends to lead a law-abiding life. In this case imprisonment has had a rehabilitative influence on this particular offender.

12 SOURCES

Kotulak, R. 1996. *Inside the brain: revolutionary discoveries of how the brain works*. Kansas City, MO: Andrews & McMeel.

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Theme 2

SENTENCING AND THE AIMS OF PUNISHMENT

Study unit 2.1: Retribution as an aim of punishment

Study unit 2.2: Deterrence as an aim of punishment

Study unit 2.3: Incapacitation as an aim of punishment

Study unit 2.4: Rehabilitation as an aim of punishment

INTRODUCTION

When discussing the issue of sentencing in theme 1 study unit 1.1, we saw that sentencing does not take place in a vacuum and the process is complicated by the fact that the court always has to keep various factors in mind when considering an appropriate sentence. To refresh your memory, you are encouraged to read through study unit 1.1, paragraph 1.1.3 again. The traditional triadic factors (the crime, the offender and society (which includes the offender), and restorative justice where applicable – see section in study unit 1.1), aggravating and mitigating factors and the aims of punishment are all aspects that have to be given serious consideration during sentencing. Sentencing is not an aimless procedure and for each sentence there are recognised objectives that the presiding official should bear in mind and strive for in a balanced way without placing too much emphasis on just one.

The most important aims or objectives that should be taken into account during sentencing are retribution, deterrence, rehabilitation and incapacitation (cf Brown, Esbensen & Geis, 2004:55–59). In the South African literature the terms "reform" and "prevention" are often used as synonyms for rehabilitation and incapacitation respectively (cf Terblanche, 2007:162). Writers such as Schmalleger (1994:223) and Glick (1995:463) add a fifth aim, restoration. In this study unit you will be introduced to retribution, deterrence, incapacitation and rehabilitation as aims or objectives of punishment.

The aims of punishment or the objectives of punishment can be applied in various ways as standards during sentencing and a few are mentioned below:

- In study unit 1.1 (section 1.1.2) the aims of punishment are dealt with as one of multiple factors in a balancing process to determine an appropriate punishment. The view is taken that, in the deliberation process during sentencing, the aims of punishment form an independent complex of interests together with the traditional triad (triad of *Zinn*), mercy and aggravating and mitigating factors.
- As sentencing criteria, the aims of punishment are combined with certain aspects of the triad such as in *S v Viljoen* 1971 (3) SA 483(A), which states that there should be proper consideration of the aims of sentencing, namely deterrence, prevention, reform, retribution, the applicable criminal circumstances and factors concerning the person of the individual.

- When the sentencing official applies the aims of punishment as a standard, there is still a need for further refinement (Van der Merwe, 1982:263):

  (a) Du Toit (1981:115, 116) states unequivocally that sentencing officials should strive for all the recognised aims of punishment equally and that no single sentence can be regarded as appropriate if the imposer of the sentence takes only one of the recognised aims of punishment into account. Adler et al (1996:247) refer in this regard to the concept of "mixed goals".

  (b) The aims of punishment should be applied congruently in the deliberation process in order to arrive at an appropriate sentence.

  (c) When there is conflict and the aims of punishment appear to be incongruent and irreconcilable, the difficult question arises as to which aim should take precedence.

  "Incongruities often arise among these goals, however. When should societal interest in deterrence or incapacitation take priority over just deserts?" (Brown et al, 2004:58). According to Snyman (1995:17–20) the circumstances in the case *S v B* 1985 (2) SA 120 (A) were of such a nature that the consideration of retribution and deterrence weighed more heavily than the appellant's personal circumstances and deliberations concerned with reform (rehabilitation).

  (d) Views on the aims of punishment are of a dynamic nature. Deterrence has long been regarded as the most important goal of sentencing, but in the recent verdict of the Appeal Court in the case of *Nkambule* 1993 (1) SASV 136(A) on 146 C it was pointed out that this view is an oversimplification and that the position is not static (see also Brown et al, 2004:59; Terblanche, 2007:138, 156).

In the discussion in the following study units the terms "aims of punishment" and "objectives of punishment" will be used interchangeably to mean that which is striven for or the goal one is trying to achieve with punishment. This theme consists of the following study units:

- Retribution as an aim of punishment
- Deterrence as an aim of punishment
- Incapacitation as an aim of punishment
- Rehabilitation as an aim of punishment

STUDY UNIT 2.1

Retribution as an aim of punishment

Retribution as revenge	Retribution as restoring a disturbed legal balance	Retribution as just deserts	Retribution as penance	Retribution as natural indignation

CONTENTS

2.1.1 Introduction
2.1.2 Key concepts
2.1.3 The view of various authors
2.1.4 Retribution as revenge
2.1.5 Retribution as restoring a disturbed legal balance
2.1.6 Retribution as just deserts
2.1.7 Retribution as penance
2.1.8 Retribution as natural indignation and a public condemnation of crime
2.1.9 Summary
2.1.10 Self-assessment questions
2.1.11 Feedback on activities
2.1.12 Feedback on self-assessment questions



LEARNING OUTCOMES

When you have completed this study unit you should be able to

- Draw a distinction between the terms "revenge" and retribution".
- Give an explanation for retribution as the restoring of a disturbed legal balance.
- Give an overview of retribution as just deserts.
- Indicate how retribution as penance is viewed.
- Describe retribution as natural indignation and a public condemnation of crime.

2.1.1 INTRODUCTION

What does the term "retribution" mean? One distinguishing aspect of this term is that it does not have one single meaning; in other words, interpretations of the meaning differ

from authority to authority. Even the South African sources differ in their views on what retribution actually is (Terblanche, 2007:165; Conklin, 2007: chapter 14; Reid, 2003:69–71):

- It is an expression of society's natural indignation and a public condemnation of crime.
- It is linked to the saying: "the punishment should fit the crime".
- It is sometimes used as a synonym for revenge.
- It is regarded as penance for the crime that has been committed.
- It is an aim of punishment and a fundamental element of punishment.
- It is an aspect that comes strongly to the fore in the case of serious crime.

In order to find an answer to the question: What is the meaning of the term "retribution"? we will look at the following aspects:

- the views of various authors
- retribution as revenge
- retribution as restoring a disturbed legal balance
- retribution as just deserts
- retribution as penance
- retribution as natural indignation and a public condemnation of crime

2.1.2 KEY CONCEPTS

In this study unit you will be introduced to the following key concepts:

Retribution: The idea underlying retribution is that the criminal deserves a form of punishment that can compensate for the harm caused to society by the crime, such as for example an offender who is sent to prison for house robbery in which the victim was robbed and some of his property stolen.

Revenge (retaliation): The idea of revenge in punishment comes to the fore when the aggrieved party acts against the offender in his or her own right on a private and personal basis to satisfy his or her own desire for revenge. An example here would be crimes committed by members of PAGAD without calling in the help of the criminal justice system. (Taking the law into one's own hands the "lynch mob" one often reads about in stories about the Wild West.)

Just deserts: The principle of just deserts entails the idea that punishment (by the courts) should be commensurate with the seriousness of the crime and that offenders are punished because they deserve it. The basis for this argument is that a reasonable person behaves according to rational considerations and under normal circumstances can distinguish between right and wrong. As responsible people, offenders deserve to be punished for their crimes.

A disturbed legal balance: The assumption is that the legal balance in society is disturbed when a crime is committed and that the legal order can be restored by punishing the criminal for the offence.

Penance: Punishment offers the offender an opportunity to pay for a wrong deed and to settle an account with society. Penance only has meaning and makes sense if the offender shows remorse for the crime committed and punishment is regarded as an opportunity to pay for the crime.

2.1.3 THE VIEWS OF VARIOUS AUTHORS

The meaning of the term "retribution" during sentencing should not be confused with the meaning of the term in a wider sense. Various jurists (cf Morkel, 1977:25) and

criminologists (cf Van Rensburg, 1970:4–6) refer to the fact that the term "retribution" in the wider sense of the word is not limited to the punishment of an offender, but that it is a basic principle of the law and of human behaviour in general.

Van Zyl and Van der Vyver (1982:102–103) illustrate the wider meaning of the term "retribution" on the basis of a system of legal facts. A legal fact can be defined as any event or change that has legal consequences. So, for example, a natural event (when someone dies, his or her property is inherited by heirs), a legitimate act (if someone is legally married the man and the woman owe each other marital fidelity) and an unlawful act (if a person sets fire to someone else's car, such a person can be charged with malicious damage to property and ordered to pay for the damage) all have certain legal consequences. If such legal consequences do not intervene, it creates disharmony in the legal order of society that could result in chaos to a greater or lesser extent. The function of retribution is to restore the legal order. This broad view of retribution indicates that retribution is not only present when an offence (an unlawful act) is committed but that it is also applicable in, for example, a legitimate act and a natural event. Retribution takes the form of punishment or sanction only when the legal fact is a crime. This explanation shows that retribution can be interpreted far more broadly than simply as a punishment that follows the committing of crime.

REFLECTIVE QUESTION: What do you think: Can retribution in the form of sanction restore the disturbed legal order (which arises as the result of a crime)? Illustrate your answer using an example(s).

For Van Rensburg (1970:3–4) the wider meaning of retribution is in essence the fact that every human act always has consequences and that these consequences, irrespective of their nature, are unavoidable. Experience teaches that some of the consequences of human action are pleasant, beneficial and good, while others are unpleasant, detrimental and bad for the person who acts as well as others. Retribution therefore has a positive (wide) and a negative (narrow) meaning. Retribution in the narrow negative sense refers to punishment that follows the committing of a crime. Retribution in this sense refers, for example, to an offender who has attacked someone and who is sentenced by a court to a term of imprisonment.

Terblanche (2007:169–170) mentions the twofold role of retribution in sentencing. Is retribution an aim of punishment or is it an essential element of punishment? On the one hand, the courts have given retribution the status of an aim of punishment. But is retribution indeed an aim or objective of punishment? Kriegler (1993:652) refers to the fact that retribution is retrospective in nature and focuses on the past. As will be shown later in the study unit, there are authors who broaden the content of the concept (link retribution to just deserts, as restoring a disturbed balance and penance) so that it can indeed be regarded as an aim of punishment. In the recent criminological literature the concept of retribution is dealt with consistently as an aim of punishment (cf Conklin, 2007: chapter 14; Glick, 1995:463, 488; Brown et al, 2004:57). On the other hand, it is accepted that retribution is actually a basic building block of every sentence and that the characteristics of retribution are also qualities of consistent and fair sentencing (Terblanche, 2007:170). This lends strong support to the view that retribution should be equated with punishment (see also Reid 2003:71): "Retribution is the only doctrine supporting punishment in general ...".

ACTIVITY (2) 1.1

Why do we have to do it?

In order to determine whether you agree with Terblanche's opinion that retribution can play a twofold role in sentencing.

Guidelines

With a fellow student or expert colleague or a friend, discuss Terblanche's view: that is, whether retribution is an aim of punishment and whether retribution should actually be equated with punishment. Re-evaluate your viewpoint after you have worked through the study unit.

2.1.4 RETRIBUTION AS REVENGE

The tendency to regard retribution and revenge as synonyms rests on the notion that the offender has to be punished in order to give expression to the desire for revenge by the crime victim and other members of the community who have been harmed by the crime. This is done in the form of punishment imposed by the state. In this way society's respect for the criminal justice system can be maintained and society prevented from taking the law in to its own hands to satisfy its desire for revenge. Although the equating of the concepts of retribution and revenge is understandable in everyday speech (cf The Concise Oxford Dictionary (1988) for "retribution/vengeance" and Collins English Thesaurus (1993) for "retribution/retaliation, revenge, vengeance"), the two concepts are not synonyms from a criminological point of view.

One of the basic principles for distinguishing between these concepts lies in the fact that responsibility for sentencing with the aim of retribution lies with an unbiased representative of the judicial organ of state (Conklin, 2007:398). In contrast, the revenge element of punishment comes to the fore when the aggrieved party acts against the offender in a private and personal capacity in their own right to satisfy their desire for revenge (Reid, 2003:69–71). Revenge and retribution are also distinguished by the attitude or spirit in which sentencing takes place. In order to administer punishment objectively, sentencing should be regarded as an impersonal activity. In this regard, Kriegler (1993:650) states that the sentencing official should not give the impression of anger, wrath or enthusiasm when sentencing an offender. In contrast, revenge is a personal and subjective activity (Terblanche, 2007:168).

ACTIVITY (2) 1.2

Why do we have to do it?

In order to determine whether you fully understand the difference between revenge and retribution.

Guidelines

Read section 1.2.4 carefully and then make a summary of the main differences between revenge and retribution.

2.1.5 RETRIBUTION AS RESTORING A DISTURBED LEGAL BALANCE

Various authors (Conklin, 2007:397–399; Brown et al, 2004:57; Regoli & Hewitt, 1996:513) relate retribution to the restoring of a disturbed balance in society. "It involves the punishment of past wrongdoing in order to achieve a moral balance. Retributivists contend that crime, a violation of the rights of others, requires imposition of a penalty that will remove the advantage gained by the offender and restore social equilibrium" (Brown et al, 2004:57). This comes down to the fact that the legal balance in society becomes disturbed when a crime is committed and the legal order can only be restored by punishing the criminal for the offence. Through retribution in punishment an attempt is made to replace discord with harmony and order.

According to this view the characteristics of retribution can be summarised as follows (Brown et al, 2004:57):

- The first characteristic of retribution is that it is a reaction to crime. Crime disrupts the moral balance of justice in society because the victim usually suffers harm and the offender often benefits.
- The second characteristic is that retribution restores the social equilibrium or legal balance.
- The third characteristic is that the extent of retribution is limited to restoring the imbalance: too little retribution will not restore the balance, while excessive retribution can create a new imbalance.
- Through sentencing an attempt is made to restore a disturbed legal balance and the aim is to mete out punishment in relation to the following considerations:
  - the moral blame of the offender (blameworthiness/culpability)
  - the damage or harm caused as a result of the crime committed
  - the victim's and society's formal rejection of the criminal behaviour

2.1.6 RETRIBUTION AS JUST DESERTS

In the previous section it was established that an offender should be punished in relation to his or her moral blame and the harm caused by the crime. This role of retribution in punishment is known as just deserts (Reid, 2003:71; Conklin, 2007:400–403; Brown et al, 2004:57). What are just deserts in punishment?

The principle of just deserts:

- Brown et al (2004:57) argue that offenders should be punished "because they deserve it as a consequence of their law violations".
- Siegel (2003:535) states that "[b]ecause of their heinous acts, criminals deserve to be punished".
- Schmalleger (1996:148) expresses the following opinion: "Just deserts refers to the notion that criminal offenders deserve the punishment they receive at the hands of the law, and that any punishment that is imposed should be appropriate to the type and severity of crime committed."
- Adler et al (1996:242) give the following definition: "[A] philosophy of justice that asserts that the punishment should fit the crime and the culpability of the offender."

From the above the following characteristics of just deserts can be deduced:

- It is deserved punishment, that is, because the offender has committed a crime that is prohibited by legislation or the common law and is threatened with punishment, such a person deserves the punishment.
- This places a limit on the extent of punishment in the sense that a sentence should be related to the moral blame (blameworthiness or culpability) of the offender and the

damage or harm caused by the crime – more or less punishment than the offender deserves is never just deserts (the principle of proportionality).



ACTIVITY (2) 1.3

Why do we have to do it?

In order to determine whether you understand what is meant by the concept of the principle of proportionality.

Guidelines

Make a summary of what you understand by the concept of the principle of proportionality during sentencing. Then go to a fellow student and debate the following statement in terms of the principle of proportionality: "The death sentence is the only appropriate sentence for murder that was planned over a long period."

We now explain these two aspects in detail:

- Punishment is deserved: The indeterministic view of human behaviour and responsibility serves as a basis for the idea that a reasonable person can behave according to rational considerations and under normal circumstances can distinguish between right and wrong. (This is discussed in detail in the following study unit under "Deterrence".) As responsible people, offenders deserve to be punished for their crimes. If people are punished it indicates that they have acted wrongly and that their misdeeds are condemned by society. Therefore, offenders are not punished in order to rehabilitate them or to deter them or others, but because they deserve it. Deserved punishment calls on the principle of justice in sentencing because offenders as responsible beings who have broken the law are punished as human beings – not as people who have no control over their behaviour.
- Just deserts as a limit to the extent of punishment implies that an offender should be punished in relation to the moral blame and the harm caused by the crime he or she has committed. Van der Merwe (1982:264–265) relates retribution (just deserts) to a "blame framework" during sentencing and makes the distinction between subjective and objective retribution. In terms of the principle of subjective retribution, the offender is repaid for a blameworthy attitude towards the law and the values that the law protects (the moral blame that results from the crime that is committed). In terms of the principle of objective retribution, the "blame" of the offender is judged on the basis of the harm caused by the crime to the victim and society (the nature and seriousness of the crime).

Various criminologists emphasise the fact that punishment should be in relation to the nature and seriousness of the crime. Conklin (2007:398) states that "offenders should be punished only in direct proportion to the harm they have caused" and Brown et al (2004:57) say: "The punishment must also be proportionate to the harm caused or risked, although mercy can be extended once it is acknowledged that the punishment is deserved." In the decision of the Constitutional Court on the constitutionality of the death penalty (*S v Makwanyane* 1995 (2) SASV 1 (CC)), President Chaskalson stated in his judgment (paragraph 94) that the principle of proportionality identified as a factor in the deliberation of a specific sentence is cruel and inhuman. Van Zyl Smit (1996:28–6) in turn refers to the provisions of the Canadian Constitution and a remark by Hogg (Constitutional Law of Canada, 1992:1130) stating "it is clear that the phrase (cruel and unusual) includes two classes of punishment (1) those that are barbaric in themselves, and (2) those that are

grossly disproportionate to the offence". It would therefore appear that the principle of proportionality in sentencing as embodied in just deserts enjoys international support.

The application of this principle in the courts teaches the following:

- In some crimes it is difficult to mete out punishment in relation to the harm caused by the crime. Although the courts strive to maintain this relationship during sentencing, it does not mean that every sentence succeeds in paying back in kind for the harm done. It would appear that the principle of proportionality can be best applied in crimes where, for example, the damage or harm can be quantified in monetary terms.
- Where a conflict arises between the principles of punishment in relation to moral blame and punishment in relation to harm caused, it would appear that the emphasis falls on social interests (harm done) rather than on the offender's interests (moral blame) (Burchell & Hunt, 1983:70).

REFLECTIVE QUESTION: Do you think that offenders should always be punished according to the principle of just deserts in South African courts? Base your point of view on a court case which you have recently read about in the media.

2.1.7 RETRIBUTION AS PENANCE

The basis of this view of retribution is that punishment gives the offender the opportunity to repent for a wrong deed and to settle an account with society (Terblanche, 2007:169; "Retribution involves the notion that a wrongdoer should be punished 'to pay back' ..." (Glick, 1995:488)). In this way offenders pay their debt to the victim of crime and society and the "moral slate" is wiped clean.

The primary consideration in penance is not the harm done by the crime, but rather the moral blame of the criminal (Burchell & Hunt, 1983:68) and the opportunity that punishment offers offenders to cancel out their guilt.

Penance only has meaning if remorse is present in the offender and punishment is regarded as an opportunity to pay for the crime. Without the element of voluntary remorse there can be no question of penance in the true sense of the word.

REFLECTIVE QUESTION: Do you think that penance is involved when punishing all offenders? Debate this question in light of media reports about offenders who show very little or no remorse for their misdeeds.

In line with the argument that committing a crime often creates feelings of guilt in a criminal, penance is sometimes regarded as a "right" to which the offender can lay claim. This assumption is based on the indeterministic view of the human being which is explained in detail in the following study unit dealing with deterrence. The supposition is that humans are rational beings who are free to choose their behaviour and as such are responsible for their behaviour. As a result of this free choice to commit crime, the offender can demand to be punished in order to do penance for the crime and cancel out the moral blame.

2.1.8 RETRIBUTION AS NATURAL INDIGNATION AND PUBLIC CONDEMNATION OF CRIME

This view of the meaning of retribution comes down to the fact that retribution is the recognition of society's feelings of indignation and its formal rejection of criminal behaviour (Reid, 2003:71). Reid states this as follows: "finally, society punishes because it feels it wants to or ought to; the sole purpose of retribution is to express moral outrage" (Reid, 2003:71). As offenders receive their just deserts through punishment, society is satisfied that its formal censure of criminal behaviour is expressed in the form of punishment and that the disturbed legal balance is restored (Conklin, 2007:399). If crime were allowed to go unpunished, it would mean that crime was condoned. This would not only run counter to society's feelings of natural indignation, but could also result in people taking the law into their own hands (Brown et al, 2004:57; Siegel, 2003:535).

REFLECTIVE QUESTION: As a member of society are you always satisfied with the sentences imposed on offenders? If your answer is "no", mention a court case reported in the media that supports your opinion.

2.1.9 SUMMARY

Notwithstanding the widely diverging views on the meaning of retribution, it is important to accept that this aim of punishment is fundamental to sentencing. The primary consideration lies in the fact that a crime has been committed that disturbs the legal order and that punishment in accordance with the principle of just deserts restores the equilibrium in society.



ACTIVITY (2) 1.4

Why do we have to do it?

- To help you with the learning process and in preparing for the examination.
- Expand the glossary in your workbook by including the key words and other difficult concepts in this study unit, as we explained in the foreword to the study guide. Remember that one of the important ways of transferring knowledge from the short-term to the long-term memory is by calling it up regularly until you have mastered it. The more a thought pattern is "fired", the more "hard wiring" of neurons takes place. This hard wiring also happens when we discuss our new knowledge with other people, recall mind maps or summaries, and apply the knowledge in our everyday life.

2.1.10 SELF-ASSESSMENT QUESTIONS

(1) Describe Terblanche's explanation of the twofold role of retribution in punishment. (5)
(2) Give the contemporary view of the meaning of retribution in sentencing. (5)
(3) Distinguish between the concepts of "anger" and "retribution". (3)
(4) Give an explanation for the view of retribution as restoring a disturbed balance. (8)
(5) Describe the role of retribution in punishment on the basis of the principle of just deserts. (15)
(6) Explain the view of retribution as penance. (7)

(7) Indicate the basis of the view of retribution as the result of natural indignation about and public censure of crime. (4)

(8) The underlying idea of retribution is that ...

(a) the aggrieved person himself or herself acts against the offender on a private and personal basis in their own right.
(b) the criminal deserves a form of punishment that can compensate for the harm done to society by the crime.
(c) punishment should be in proportion to the seriousness of the crime and offenders should be punished because they deserve it.
(d) the legal order in society can be restored by punishing criminals for their offences.
(e) the offender's punishment offers him/her the opportunity to wipe the "moral slate" clean.

(9) The underlying idea of revenge is that ...

(a) the aggrieved person himself or herself acts against the offender on a private and personal basis in their own right.
(b) the criminal deserves a form of punishment that can compensate for the harm done to society by the crime.
(c) punishment should be in proportion to the seriousness of the crime and offenders should be punished because they deserve it.
(d) the legal order in society can be restored by punishing criminals for their offences.
(e) the offender's punishment offers him/her the opportunity to wipe the "moral slate" clean.

(10) The underlying idea of just deserts is that ...

(a) the aggrieved person himself or herself acts against the offender on a private and personal basis in their own right.
(b) the criminal deserves a form of punishment that can compensate for the harm done to society by the crime.
(c) punishment should be in proportion to the seriousness of the crime and offenders should be punished because they deserve it.
(d) the legal order in society can be restored by punishing criminals for their offences.
(e) the offender's punishment offers him/her the opportunity to wipe the "moral slate" clean.

(11) The underlying idea of a disturbed legal balance in retribution is that ...

(a) the aggrieved person himself or herself acts against the offender on a private and personal basis in their own right.
(b) the criminal deserves a form of punishment that can compensate for the harm done to society by the crime.
(c) punishment should be in proportion to the seriousness of the crime and offenders should be punished because they deserve it.
(d) the legal order in society can be restored by punishing criminals for their offences.
(e) the offender's punishment offers him/her the opportunity to wipe the "moral slate" clean.

(12) The underlying idea of penance in retribution is that ...

(a) the aggrieved person himself or herself acts against the offender on a private and personal basis in their own right.
(b) the criminal deserves a form of punishment that can compensate for the harm done to society by the crime.
(c) punishment should be in proportion to the seriousness of the crime and offenders should be punished because they deserve it.
(d) the legal order in society can be restored by punishing criminals for their offences.
(e) the offender's punishment offers him/her the opportunity to wipe the "moral slate" clean.

2.1.11 FEEDBACK ON ACTIVITIES

ACTIVITY (2) 1:1

No feedback

ACTIVITY (2) 1:2

They are distinguished in terms of the institution that acts against them and the attitude with which sentencing takes place.

ACTIVITY (2) 1:3

The principle of proportionality is dealt with in section 1.2.6 Just deserts as a limit to the extent of punishment.

ACTIVITY (2) 1:4

No feedback

2.1.12 FEEDBACK ON SELF-ASSESSMENT QUESTIONS

(1) On the one hand: retribution is an aim of punishment

(2) On the other hand: the approach entails equating retribution with punishment

- retribution as revenge
- retribution as restoring a disturbed balance
- retribution as just deserts
- retribution as penance
- retribution as natural indignation and public censure of crime

(3) They are distinguished in terms of the institution that acts against them and the attitude with which sentencing takes place.

(4) In your answer you should refer to the following:

- In essence, crime disturbs the legal balance in society and punishment restores the legal order.
- Retribution brings harmony where there was chaos.
- The characteristics of retribution:
  - It is a reaction to crime.
  - It restores the social equilibrium.
  - It is limited to restoring the imbalance.

- Punishment should be in proportion to
  - the moral blame of the offender
  - the harm done by the crime
  - social aversion to the criminal behaviour

(5) Include the following in your discussion:

- Demarcate the concept of just deserts in punishment.
- Discuss two important issues linked to the role of retribution in the form of just deserts in punishment:
  - the indeterministic view of human behaviour
  - punishment in relation to the offender's moral blame and the harm caused by the crime
- Discuss the support that the principle of proportionality enjoys in sentencing
  - among criminologists
  - on national level
  - in the international area
- Name two important aspects demonstrated by the application of the principle in the courts.

(6) Refer to the following matters in your paragraph:

- It is an opportunity to settle a debt with society.
- Offenders repay their debt to the victim and society and
  - the "moral slate" is wiped clean.
  - criminals are reconciled with the legal order as it was before the balance was disturbed by the crime.
- The primary consideration is the moral blame of the offender.
- It is only meaningful if the offender experiences remorse.
- Mention the role of penance and the criminal's feelings of guilt.

(7) In your overview you should refer to the following:

- Retribution is the acknowledgement of society's feelings of indignation about and aversion to the criminal behaviour.
- Just deserts in punishment satisfy society.
- Unpunished offences would imply that society condones crime.
- Unpunished offences may result in people taking the law into their own hands.

(8) (2)

(9) (1)

(10) (3)

(11) (4)

(12) (5)

STUDY UNIT 2.2

Deterrence as an aim of punishment

Punishment and crime prevention	Definition of deterrence	Degrees of deterrence and differential deterrence	Assumptions on which deterrence is based	The intensity of punishment and deterrence

CONTENT

2.2.1 Introduction
2.2.2 Key concepts
2.2.3 Punishment and crime prevention
2.2.4 Definition of deterrence
2.2.5 Degrees of deterrence and the differential deterrent effect
2.2.6 Assumptions on which deterrence is based
  2.2.6.1 Beliefs about people and human behaviour
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2.2.8 Summary
2.2.9 Self-assessment questions
2.2.10 Feedback on activities
2.2.11 Feedback on self-assessment questions



LEARNING OUTCOMES

After working through this study unit you should be able to:

- Explain punishment and the causes of crime in the wider sense.
- Explain the meaning of the concept of deterrence.
- Make a distinction between the different degrees of deterrence.
- Give an explanation of deterrence according to the types of crime and types of person.
- Give an overview of the assumptions on which deterrence rests.
- Explain the link between deterrence and the intensity of punishment.

2.2.1 INTRODUCTION

The classical philosophers Beccaria and Bentham are generally regarded as the most important thinkers who advocated the application of utilitarian principles in the punishment of offenders. The basic point of departure in utilitarianism is that the greatest happiness or pleasure should be striven for by causing the least pain for the greatest number of people (Brown et al, 2004:182). The justification for punishment is therefore not to be found in retribution for crime (see study unit 2.1), but in the prevention of crime (Livingston, 1996:501). Where the punishment for one crime can lead to the prevention of another, and thus to less pain than the punishment caused, it is therefore justified.

Barlow (1990:495) explains this as follows: "whereas crime produces pleasure for its perpetrator, it produces pain for others. Punishment also brings pain, and it, too, is a bad thing. Yet if punishing the criminal prevents crime, the group as a whole is given more pleasure at the expense of those whose behavior is bad in the first place." According to the utilitarian approach, punishment is only justifiable when it is future-oriented and if it strives for something positive, such as the prevention of crime.

Three aims of punishment are linked to crime prevention or to striving for a specific goal, namely deterrence, incapacitation and rehabilitation. In this study unit we look at deterrence, which is dealt with in terms of the following aspects:

- punishment and crime prevention
- the definition of deterrence
- degrees of deterrence
- assumptions on which deterrence is based
- the intensity of punishment and deterrence

2.2.2 KEY CONCEPTS

In this study unit you will be introduced to the following key concepts:

Deterrence: This works both on an individual and a general level. Criminals have to be punished so that the individual who is punished and experiences the unpleasantness is deterred from re-offending. When potential criminals refrain from crime as a result of punishment, we talk about general deterrence. In this way crime is prevented directly and indirectly.

Individual prevention: Individual prevention is concerned with the offender who is hunted down, arrested, found guilty and punished, and who therefore experiences the effects of punishment.

General prevention: The concept of "general prevention of crime" takes the view that punishment can prevent potential criminals from offending and in this way prevents crime.

Individual deterrence: This is about the experience of punishment by the offender himself or herself. The argument goes that the unpleasantness (painful experience) or disadvantage of punishment will be a lesson to the offender, who will take it to heart and refrain from criminal behaviour in the future.

General deterrence: The principle is to punish the individual offender in such a way that it serves as an example to deter the potential offender and thus can prevent crime. General deterrence is the classical theory of general prevention. The underlying philosophy is that humans, as rational beings with free will, will avoid crime if the unpleasant consequences of criminal behaviour (i.e. punishment) are known. Law-abiding citizens, as well as potential offenders, are given the message that there is a price (pain or loss) attached to crime. When the price or loss attached to the punishment is greater that the benefits of crime, punishment will deter crime.

The deterministic and indeterministic views of human behaviour: According to the deterministic view, human behaviour is the product of the interaction between the individual, with a particular genetic constitution, and the environment. People in general are not free in terms of their behaviour, that is to say, people do not determine their behaviour patterns in advance. Criminals can only act the way circumstances allow them to and for this reason they cannot be held responsible for their criminal behaviour.

In terms of the indeterministic view of human behaviour and responsibility, reasonable people direct their behaviour according to rational considerations and can under normal circumstances distinguish between right and wrong and make rational choices. For this reason offenders are regarded as being accountable and are punished.

REFLECTIVE QUESTION: What is your opinion of the deterministic and indeterministic views of human behaviour?

Utilitarianism: Classical philosophers such as Beccaria and Bentham are regarded in general as the most important thinkers supporting the application of utilitarian principles in the punishment of offenders. The basic point of departure of utilitarianism is that one should strive for the greatest happiness or pleasure by causing the minimum pain for the greatest number of people.

REFLECTIVE QUESTION: What is your view of utilitarianism?

Hedonism: According to the hedonistic view, people are influenced in their choice of behaviour by considering what is pleasant or not, because human beings seek the pleasant and avoid the unpleasant. The underlying idea of punishment is that humans, as rational beings with free will, will avoid crime if the unpleasant consequences of criminal behaviour (namely punishment) are known. When the price or disadvantages of punishment are greater than the benefits attached to crime, punishment will act as a deterrent. This argument is known as the hedonistic calculus and assumes that humans direct their behaviour by weighing up the enjoyment (from the crime) against the pain and unpleasantness (from punishment).

REFLECTIVE QUESTION: Do you think that human behaviour is influenced by the principles of hedonism and the hedonistic calculus?

2.2.3 PUNISHMENT AND CRIME PREVENTION

How can crime be decreased or prevented? Livingston (1996:475–476) classifies the practical preventative effect of crime into three categories:

- deterrence, where the view is that people will refrain from crime as a result of the existence and action of punishment
- incapacitation, where crime is prevented by removing the offender from society (temporarily through imprisonment, house arrest etc.) (see study unit 2.3)
- rehabilitation, where the idea is to prevent crime by changing the offender's observable behaviour and attitude to life positively (see study unit 2.4)

Individual and general prevention

Terblanche (2007:156) uses a taxonomy of individual and general prevention which justifies punishment on the basis of the useful (utilitarian) results that flow from it. "Two forms of deterrence are recognized. The first one is known as general deterrence and operates against society as a whole. The second form is known as individual deterrence and operates against the offender" (Terblanche, 2007:156).

- Individual prevention is concerned with the offender who is tracked down, arrested, found guilty and punished; who thus experiences punishment. Crime on this level is prevented by the incapacitation, rehabilitation and (individual) deterrence of the criminal who is introduced to the actual consequences of punishment.
- General prevention is based on the existence of punishment. "The threat of punishment associated with violating the law is designed to prevent crimes before they occur" (Siegel, 2003:36).



ACTIVITY (2) 2.1

Why do we have to do it?

In order to determine whether you understand how the punishment imposed by the courts can prevent crime.

Guidelines

Read the paragraph above on punishment and crime prevention again and make a summary of it in your workbook.

2.2.4 DEFINITION OF DETERRENCE

Tierney (1996:48) confirms the fact that the basis of crime prevention through deterrence can be traced back to the principles of the classical thinkers in criminology. "Drawing on utilitarian philosophy, and in particular the pleasure-pain principle, the aim was to create a system where punishment proportional to the crime would act to deter would-be offenders." The philosophy underlying the classical school of criminology rested on the following assumptions: the hedonistic principle, namely that every person strives for pleasure and avoids pain; that every person has the free will to distinguish between right and wrong; and that every person is able to foresee the results of actions and is therefore responsible for them. An appropriate sentence should therefore be in proportion to the seriousness of the crime and hold a greater disadvantage (unpleasantness) for the offender than the pleasure or benefit of the crime. If the offender is punished in this way, punishment will serve the useful purpose of a deterrent. Barlow (1990:495) summarises this principle as follows: "Since people seek pleasure and avoid pain, they will tend to avoid those things that bring pain, especially if pain outweighs pleasure."



ACTIVITY (2) 2.2

Why do we have to do it?

In order to determine whether you understand the meaning of the concept of deterrence.

Guidelines

Read the paragraph above on the meaning of deterrence again and make a summary of it in your workbook.

Individual deterrence is concerned with the experience of punishment by the offender who has the punishment imposed on him or her. The underlying assumption is that someone who has been subjected to the unpleasantness of punishment once has been conditioned to avoid crime in the future (Livingston, 1996:502–503). The argument goes that the unpleasantness or disadvantages of punishment will be a lesson to the offender (Brown et al, 2004:55, 198) who will then develop the fear of punishment needed to refrain from criminal behaviour in the future. The idea of the hedonistic calculus in individual deterrence is defined as follows by Conklin (2007:381): "... individuals who are punished for a particular crime will not commit that crime again because their risk-reward calculations have been altered by the punishment. They have learned that the risk is greater than they thought, and so the rewards become relatively less attractive, leading them to avoid crime in the future."

REFLECTIVE QUESTION: Do you think that people who have been introduced to the unpleasantness of punishment will, in general, be deterred from committing a crime again in the future?

General deterrence is based on the premise that the individual offender should be punished in such a way that it can serve as an example to deter the potential criminal from committing a crime. Schmalleger (1996:146) defines general deterrence as "[a] goal of criminal sentencing which seeks to prevent others from committing crimes similar to the one for which a particular offender is being sentenced". General deterrence is the classical theory of general prevention. The underlying idea is that humans, as rational beings with free will, will avoid crime if the unpleasant results of the criminal behaviour (namely punishment) are known. Members of society are given the message that there is a price (unpleasant results) attached to crime. When the price or disadvantages of punishment are greater than the benefits attached to crime, punishment will act as a deterrent. This argument is known as the hedonistic calculus (Welch, 1996:85) and assumes that human behaviour is directed by weighing up pleasure (from the crime) against pain and unpleasantness (of punishment).

REFLECTIVE QUESTION: Do you think that potential offenders will in general be deterred from committing a crime by knowing that they could possibly be caught, convicted and punished?

2.2.5 DEGREES OF DETERRENCE AND THE DIFFERENTIAL DETERRENT EFFECT

Criminologists refer to degrees of deterrence (Conklin, 2007:382) and the differential deterrent effect of punishment (Brown et al, 2004:196–197). As far as degrees of deterrence are concerned, we distinguish between absolute, partial or limited, and marginal.

- Absolute deterrence implies the optimal preventative effect of punishment and refers to people who refrain completely from crime. The argument is however put forward that the motive for law-abiding behaviour or abstention from crime cannot necessarily be

ascribed to the existence or threat of punishment. It could also be ascribed to the fact that people have strong moral convictions and that they conform to social and legal rules, or that they fear social rejection and informal sanctions.

- The question that can now be asked is: What prevents criminal behaviour in the above situation? Is it the deterrence value of punishment, a combination of the threat of punishment and other factors, or merely the other forms of restraint? Brown et al (2004:196) come to the conclusion that it would be impossible to answer this question empirically.
- Limited or partial deterrence means that people scale down or reduce their involvement in criminal activities in order to minimise the risk of punishment. Such people are not completely deterred, but commit crime more covertly and less often in order to reduce the chances of being found out and punished.
- Marginal deterrence refers to the incidence of crime in relation to changes in the intensity of the threat of punishment. What effect does more intensive policing accompanied by a greater threat of punishment have on the nature and incidence of crime, for example?



ACTIVITY (2) 2.3

Why do we have to do it?

In order to see whether you can distinguish between the various degrees of deterrence

Guidelines

Read the above section on the different degrees of deterrence again and categorise each of the following statements in the correct section of the framework given below.

1 Law-abiding behaviour can be ascribed to the fact that people have strong moral convictions.
2 People scale down their involvement in criminal behaviour in order to decrease the risk of punishment.
3 Criminal behaviour is in proportion to changes in the intensity of the threat of punishment.
4 People commit crime more covertly in order to avoid being tracked down and punished.

Absolute deterrence	Marginal deterrence	Limited deterrence

The differential deterrent effect of punishment is dealt with on the basis of the type of crime and the type of person.

- Deterrence according to crime type. Certain types of crime are to a degree probably more subject to the deterrent effect of punishment than other types of criminal behaviour. These are distinguished on the basis of the nature of the crime or the way in which certain crimes are planned. It can be accepted that the more rational crimes (that are planned according to rational choice and hedonistic considerations) are easier to deter by punishment than the more irrational crimes that are, for example, committed in the heat of the moment.

REFLECTIVE QUESTION: Do you agree with the latter statement? Support your answer using an example and your own arguments in your workbook (approximately 150 words).

The same argument is valid for non-violent property crimes in comparison with violent crimes against the person and crime that is committed in public compared with offences that are limited to the privacy of a home, for example.

Differential deterrent effect according to crime

Characteristics of crime	Deterrence value
Rational	High
Irrational	Low
Property	High
Person	Low
Public	High
Private	Low

Source: Brown et al (2004:204)

Deterrence according to the type of person

The deterrent effect of punishment varies in accordance with people's personalities and demographic characteristics. Chambliss (Conklin, 2007:383–384) links the deterrent effect to an offender's association with a criminal lifestyle. Offenders with a serious association with a criminal career are far more difficult to deter than those with a marginal or no association with a criminal lifestyle. In the taxonomy a marginal association with crime refers to people who have no definitive tendency towards either a criminal or a law-abiding lifestyle.

Differential deterrent effect according to person

Characteristics of person	Deterrent effect
Association with a criminal lifestyle	
Low	High
High	Low
Criminal involvement	
Amateur	High
Professional	Low
Age	
Older	High
Younger	Low

Characteristics of person	Deterrent effect
Social class	
Upper class	High
Lower class	Low
Personality factors	
Future-oriented	High
Past-oriented	Low
Controlled	High
Impulsive	Low
Pessimistic	High
Optimistic	Low

Source: Adapted from Brown et al (2004:202)

2.2.6 ASSUMPTIONS ON WHICH DETERRENCE IS BASED

The assumption that punishment deters rests on certain beliefs about people, human behaviour and crime control through punishment. In classical criminology, Beccaria formulated certain principles on which the deterrent effects of punishment rest. Brown et al, (2004:184) summarise these as follows: "Assuming that people are rational, hedonistic, and that they exercise free will, it followed for him that crime control is a function of the certainty, celerity (speed), and severity of punishment."



ACTIVITY (2) 2.4

Why do we have to do it?

To see whether you can still remember the meaning of the concepts of indeterministic, hedonism and utilitarianism

Guidelines

Read section 2.2.2 dealing with the key concepts again and summarise the meaning of indeterministic, hedonism and utilitarianism in a paragraph each in your workbook.

2.2.6.1 Beliefs about people and human behaviour

According to the indeterministic view, people are regarded as rational beings that direct their behaviour according to the principles of hedonism and utilitarianism. The basic thinking in this approach rests on the following assumptions:

- Human beings have free will.
- This free will makes the individual a rational actor and, in this role, the importance of reason and intellectual abilities is emphasised (Barlow, 1990:92). This reason forms the basis of human insight and a person can distinguish values accordingly, in other words make a distinction between worth and worthlessness, good and bad, and so forth (Glick, 1995:71).
- People are free to act according to reason and insight and thus make rational decisions about their own behaviour (Brown et al, 2004:25).
- The assumption that people can distinguish values (choose between right and wrong)

implies that individuals can foresee the results of their actions. This forms the cornerstone of individual responsibility for behaviour (Van Rensburg, 1988:10–13).

- This explanation for human behaviour relies on the fact that the individual's behaviour is the result of logical and conscious or rational decision making, as well as the following two views (Schmalleger, 1996:140–141):

  The hedonistic. This teaches that human behaviour is focused on enjoyment/pleasure as the greatest need in life. People as hedonistic actors devoted to enjoyment (comfort) or pleasure make decisions and act in accordance with the pleasure/pain principle. In terms of the hedonistic calculus people give preference to behaviour that provides happiness and increases pleasure and avoids or decreases unpleasantness or discomfort (Welch, 1996:85). This supposes that weighing up pain (discomfort) and pleasure against each other directs human behaviour.

  The utilitarian. This accepts that the purpose of or criterion for human behaviour is linked to the principle of the maximum happiness or benefit for the largest possible number of people (Bartollas & Conrad, 1992:57–58). An act has a utility value if it offers benefits or avoids unpleasantness and unhappiness. Weighing up the benefits against the disadvantages is a moral calculation carried out by the individual (Glick, 1995:74–75).

In accordance with these assumptions about human beings and human behaviour, the deterrence aim of punishment rests on the belief that humans as rational beings with free will, will avoid crime if the unpleasant results of crime in the form of punishment are known. Law-abiding citizens as well as potential offenders are given the message that there is a price (disadvantage) attached to crime. If the price or disadvantage (unpleasantness) of punishment is greater that the benefit attached to the crime, punishment will have a positive deterrent effect and thus prevent crime. Applied to the offender experiencing the punishment, it is argued that the painful experience or the unpleasantness of punishment will be a lesson to the offender and thus inculcate the fear of punishment needed to prevent him or her from committing a crime again in the future. Crime is prevented to the degree that individual deterrence is effective.

Three questions on this belief are pertinent here:

- Do people think before they act?
- Are the drawbacks of punishment always greater that the benefits attached to crime?
- Does the threat of punishment always elicit fear?

The first question is linked to the following assumptions:

- Human reason is an independent, absolute ability.
- Free will is independent of influence and can direct human behaviour (people thus have control over their behaviour).
- The independent ability of reason and free will gives human beings a free choice with regard to behaviour and alternative options for behaviour.
- Free choice with regard to behaviour means that people are responsible for their own behaviour.

The classical school's assumptions about human beings and human behaviour are described by modern criminologists such as Brown et al (2004:187) as a gross oversimplification. Over and above the fact that assumptions about independent free reason, free will and freedom of choice attribute to people abilities and powers that they may not possess, it is accepted that the offender actively involved in a crime cannot always give the rational consideration that is expected in terms of punishment as a deterrent, with the result that the deterrent effect of punishment is decreased.

With regard to the second question, contemporary criminologists are of the opinion that the classical hedonistic assumptions have not withstood the test of time as a determinant of human behaviour. Human beings are not regarded as emotionless, all-knowing computers continually in search of happiness or pleasure and in the process avoiding pain or unpleasantness. The biggest gap in the thinking of the classical school is, according to Brown et al (2004:187), in particular "its total failure to consider criminals as human beings, as live, complicated variegated personalities". Recent research on the hedonistic assumptions that human decisions, in theory, are based on weighing up the potential benefits against the risks attached to certain behaviour supports the school of thought of the contemporary criminologists. In addition, the concepts of benefit/loss and pleasant/unpleasant are relatively place- and time-bound and are difficult to quantify. A punishment that may deter one person (e.g. a manager of a business) may have very little deterrent value for another (e.g. a tramp).

In the third place, whether punishment always elicits fear can be called into question. The assumption is that the human being sums up a situation rationally, which implies that potential offenders will think before they act and that the existence of punishment will engender the necessary fear in the person to refrain from crime. The individual who has already been introduced to punishment will avoid crime out of fear for the unpleasant results. For the impulsive offender who commits "crimes of passion" (Labuschagne, 1989:172) under tremendous emotional stress, or for certain mentally disturbed individuals, punishment will not engender fear.

2.2.6.2 Punishment is a certainty

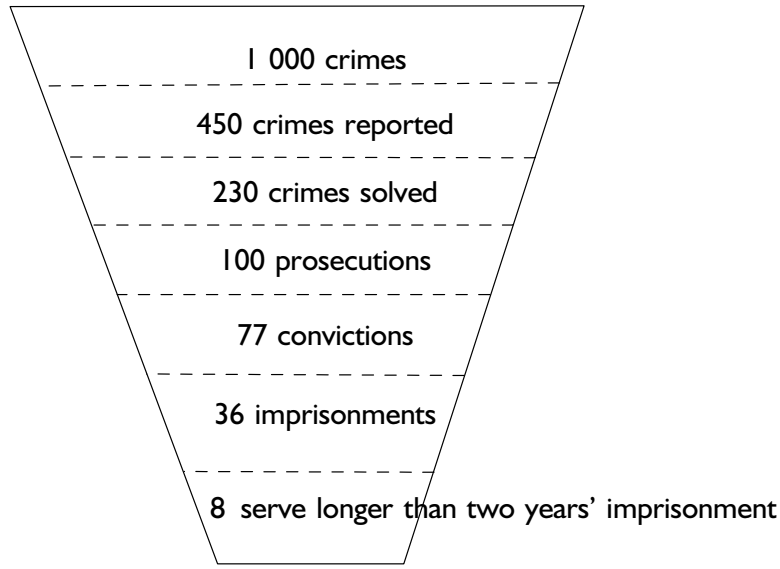
The relative certainty of punishment is directly linked to the calculation of risk, which was discussed in section 2.2.6.1. The argument goes that most people will not commit crime if they are certain that a sentence will be the consequence. The weaknesses and limitations of the deterrent effect of punishment lie mainly in this assumption. The certainty of punishment depends on a number of factors (Conklin, 2007:385–386; Brown et al, 2004:193–194):

- Behaviour that is punishable as a crime must be clearly defined and known.
- Penalties must be stated in simple terms so that they are clear and understandable to the public.
- Laws must be applied consistently.
- Crime should be reported.
- Crime should be investigated by the police.
- Criminals should be tracked down and arrested (crime clearance rate should be satisfactory).
- The trial process must be effective and there should be high levels of conviction.
- Sentences must be served. There should, for example, be certainty that a reasonable portion of a jail sentence will indeed be served.

On closer inspection, however, it would appear that the assumption that punishment is certain to follow a crime is not always valid. Not all offences come to light, while not all offenders are traced in reported cases, and not all arrested criminals are found guilty or sentenced by the courts. The flow of offenders through the criminal justice system is known as a funnelling process.

The situation in South Africa can be represented as follows:

The South African criminal justice funnel



Source: Nedcor report (1996:5).

The following trends concerning the movement of cases through the criminal justice funnel in South Africa are important (Paschke, 2001):

- The overwhelming majority of reported cases are not referred to the courts.
- In only about 6% of cases are the accused found guilty by the courts and sentenced within two years of the case being reported.
- About the same percentage (5%) of accused charged by the courts are found not guilty and discharged.
- One-tenth of cases are withdrawn by the courts.
- After two years about 4% of reported violent crime has not been finalised by the courts.

If it is further accepted that people in general weigh up the future against the current situation, it is accepted that the benefits of crime at present may be a greater factor for the potential offender than uncertain punishment in the future. In addition, it is a known fact that many criminals are gamblers and are prepared to speculate on the possibility of evading punishment (Nel, 1986:90–91).

Contemporary criminological research on the deterrent effect of punishment focuses pertinently on the issue of the certainty of punishment.

Some criminologists use the crime clearance rate (this is the percentage of crime known to the police that results in the tracking down and arrest of suspects) as a basis for expressing the certainty of punishment. Proponents of deterrence theory argue that a rise in the clearance rate for a specific crime over a period will result in a decrease in the incidence of that crime. "In fact, research has generally found an inverse correlation between the two: The higher the clearance rate, the lower the crime rate!" (Livingston, 1996:516). Where this reverse relationship exists, it is accepted that the certainty of punishment is the factor that positively influences the deterrence value of punishment in bringing about a decrease in crime. These assumptions and empirical findings are not, however, supported or confirmed by all criminological investigations. In their research, Decker and Kohfeld (1985:437–450), for example, found that the crime clearance rate had no measurable effect on the reported incidence of crime.

The following questions are also asked about the certainty of punishment and the incidence of crime:

- How certain is certain enough? (How certain do potential offenders have to be that punishment will follow to prevent them from carrying out the unlawful act?)
- What is the risk of actual punishment for crime?

According to Leggett (2003a), in 2000 there were approximately 2,6 million crimes reported to the SAPS. One out of every five reported (20%) were withdrawn in the investigation phase before they could be referred to the courts by the SAPD. Of the reported cases, the SAPS referred approximately 610 000 (24%) to the courts. Almost half (46%) of these were withdrawn in the court, while the prosecution authority decided to pursue approximately 271 000 (11%) further. A little more than 211 000 (8%) of the accused were found guilty and sentenced. Of the initial 2,6 million cases reported to the SAPS, only 8% were convicted and sentenced by the courts. Schönteich (2002a:7) points out that although the percentage of serious crimes reported during the period 1994 to 2000 rose by 24%, the number of prosecutions and convictions in the courts over the same period decreased by 23% and 19% respectively.

The conclusion is that assumptions of the certainty of punishment are not always valid and when there is no certainty it cannot make a positive contribution to the deterrence value of punishment.

2.2.6.3 Punishment is speedy

To enhance the deterrent value of punishment it is desirable for punishment to come into effect as quickly as possible after the crime has been committed. "The closer in time a negative reinforcement (or legal sanction) is to the crime, the more likely it is that the behavior that elicited the negative reinforcement will be avoided" (Conklin, 2007:386). This supposition is connected to the fact that a normal reasonable person usually sets very little store by what lies in the future. The argument goes that people are inclined to give preference to monetary benefits and not to take the disadvantages or price attached to crime (punishment) into account, especially if it lies far in the future. Regoli and Hewitt (1996:514) sum this up as follows: "the amount of time between the crime, arrest, conviction, and punishment severely limits the deterrent effect."

2.2.7 THE INTENSITY OF PUNISHMENT AND DETERRENCE

Although the principle in the classical deterrence doctrine accepts that the deterrent effect of punishment correlates with the certainty and intensity of punishment and the time that elapses between crime and punishment, there was nevertheless unanimity among classical criminologists on the fact that the intensity of punishment is a less important factor than the certainty and speedy intervention of punishment. Conklin (2007:385) quotes Beccaria as follows: "The certainty of punishment, even if it be moderate, will always make a stronger impression than the fear of another which is more terrible but combined with the hope of impunity." The maxim was that punishment should not be heavier than the minimum intensity necessary to deter. The guideline for determining the "minimum intensity" or extent of an appropriate punishment is based on the view that a sentence should be in relation to the harm done by the crime (Conklin, 2007:385–386).

Criminological research into the deterrent effect of punishment with reference to the influence of factors such as the intensity of punishment, the type of punishment, the certainty of punishment, the speedy intervention of punishment and the interaction between such variables, apparently shows a lack of methodological refinement. One such

problematic area is the issue of coincidence or the simultaneity of events (Livingston, 1996:516–517; Conklin, 2007:387) and the isolation of variables: the high certainty and intensity of punishment may reduce crime but, at the same time, the crime rate influences the certainty and intensity of punishment. The low certainty and intensity of punishment can give rise to an increased incidence of crime. At the same time, an increase in crime can contribute to the relatively weaker deterrent effect of punishment owing to the overloading of various sectors of the criminal justice system:

- The crime clearance levels decrease (tracking down and arrests).
- There are fewer effective prosecutions to deal with hearings quickly, to ensure a high incidence of convictions and to allow the distance between crime and punishment to shrink.
- Overpopulated prisons necessitate the early release of prisoners, with a negative effect on punishment intensity.

The example of coincidence or the simultaneity of events illustrates the complexity of empirical research on the link between the deterrent value of punishment and factors such as the intensity and certainty of punishment. The intensity of punishment and deterrence form a complicated, intertwined relationship that allows no space for simplistic assumptions such as that an increase in the intensity of punishment will necessarily lead to a reduction in the incidence of crime.

2.2.8 SUMMARY

It is generally accepted that the deterrent effect of punishment manifests in individual and general deterrence and in the principle of degree of deterrence. The differential deterrent effect of punishment is dealt with on the basis of different types of crime and people. The assumption that punishment deters rests on certain suppositions about human beings and human behaviour, the certainty of punishment and the distance between crime and punishment. Criminological research on the deterrent effect of punishment with reference to the influence of factors such as the intensity, type, certainty and speedy intervention of punishment, as well as the interaction between such variables, apparently shows a lack of methodological refinement. One such problem area is the issue of coincidence or the simultaneity of events (Livingston, 1996:516–517; Conklin, 2007:387) and the isolation of variables: the high certainty and intensity of punishment may reduce crime, but at the same time the crime rate influences the certainty and intensity of punishment.



ACTIVITY (2) 2.5

Why do we have to do it?

- To help you with the learning process and in preparing for the examination.
- Expand the glossary in your workbook by including the key words and other difficult concepts in this study unit, as we explained in the foreword to the study guide. Remember that one of the important ways of transferring knowledge from the short-term to the long-term memory is by calling it up regularly until you have mastered it. The more a thought pattern is "fired", the more "hard wiring" of neurons takes place. This hard wiring also happens when we discuss our new knowledge with other people, recall mind maps or summaries, and apply the knowledge in our everyday life.

2.2.9 SELF-ASSESSMENT QUESTIONS

(1) How can punishment prevent crime? (3)

(2) Give an explanation of Terblanche's taxonomy of special and general prevention.(3)
(3) Distinguish between the concepts of individual and general deterrence. (5)
(4) "According to the indeterministic paradigm, people are viewed as rational beings who direct their behaviour according to the principles of hedonism and utilitarianism." Explain these assumptions as a basis for deterrence. (15)
(5) The certainty of punishment depends on a number of factors. Name these factors. (8)
(6) Which of the following options are related to individual deterrence?

(a) Law-abiding citizens are given the message that there is a price (punishment) attached to crime.
(b) We should strive for the greatest happiness or pleasure through the least amount of pain for the greatest number of people.
(c) Punishment will deter if the disadvantage of punishment is greater than the benefits attached to crime.
(d) Human (criminal) behaviour is directed by weighing up enjoyment (from the crime) against unpleasantness (of punishment).
(e) The painful experience of punishment teaches the offender a lesson and will thus inculcate the necessary fear.

(7) Which of the following options are related to hedonism?

(a) Law-abiding citizens receive the message that there is a price (punishment) attached to crime.
(b) We should strive for the greatest happiness or pleasure through the least amount of pain for the greatest number of people.
(c) Punishment will deter if the disadvantage of punishment is greater than the benefits attached to crime.
(d) Human (criminal) behaviour is directed by weighing up enjoyment (from the crime) against the unpleasantness (of punishment).
(e) The painful experience of punishment teaches the offender a lesson and will thus inculcate the necessary fear.

(8) Which of the following options are related to utilitarianism?

(a) Law-abiding citizens receive the message that there is a price (punishment) attached to crime.
(b) We should strive for the greatest happiness or pleasure through the least amount of pain for the greatest number of people.
(c) Punishment will deter if the disadvantage of punishment is greater than the benefits attached to crime.
(d) Human (criminal) behaviour is directed by weighing up enjoyment (from the crime) against the unpleasantness (of punishment).
(e) The painful experience of punishment teaches the offender a lesson and will thus inculcate the necessary fear.

(9) Which of the following options are related to general deterrence?

(a) Law-abiding citizens receive the message that there is a price (punishment) attached to crime.
(b) We should strive for the greatest happiness or pleasure through the least amount of pain for the greatest number of people.
(c) Punishment will deter if the disadvantage of punishment is greater than the benefits attached to crime.

(d) Human (criminal) behaviour is directed by weighing up enjoyment (from the crime) against the unpleasantness (of punishment).
(e) The painful experience of punishment teaches the offender a lesson and will thus inculcate the necessary fear.

2.2.10 FEEDBACK ON ACTIVITIES

ACTIVITY (2) 2:1

No feedback

ACTIVITY (2) 2:2

In your summary you should refer to the following aspects:

- Can be traced back to the classical thinkers in criminology.
- It rests on the following assumptions: The hedonistic principle
  - Every person has free will to distinguish between right and wrong and to foresee the consequences of their actions.
  - Punishment should be in relation to the seriousness of the crime AND its unpleasantness should outweigh the pleasure or benefits of the crime for the offender.

ACTIVITY (2) 2:5

No feedback

2.2.11 FEEDBACK ON SELF-ASSESSMENT QUESTIONS

(1) Through

- deterrence
- incapacitation
- rehabilitation

(2) You should mention the following:

- Individual or special prevention:
  - It is concerned with the offender who experiences punishment.
  - Crime is prevented through incapacitation, rehabilitation and individual deterrence.
  - General prevention is based on the existence of punishment.

(3) Individual deterrence:

- This is concerned with the experience of punishment by the offender undergoing punishment.
- The offender is conditioned to avoid crime in the future.
- Punishment teaches the offender a lesson.

General deterrence:

- Punishment serves as an example to prevent the potential offender from committing a crime.

- Members of society are given the message that there is a price attached to crime.

(4) You should also include the following:

- the point of view that human beings have free will and can make rational decisions
- hedonism
- utilitarianism
- their application to crime and punishment
- three questions about the assumptions

(5) Mention the following factors:

- Misdemeanours should be clearly defined and made known.
- Penalties should be clear and understandable.
- The law should be applied consistently.
- Reporting of crime should take place spontaneously.
- The crime clearance rate should be up to scratch.
- The trial process should be effective.
- Sentences must be carried out.

(6) (5)
(7) (4)
(8) (2)
(9) (1)

STUDY UNIT 2.3

Incapacitation as an aim of punishment

The general incapacitation model	Specific approaches to incapacitation

CONTENTS

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2.3.5 Summary
2.3.6 Self-assessment questions
2.3.7 Feedback on activities
2.3.8 Feedback on self-assessment questions



LEARNING OUTCOMES

When you have completed this study unit you will be able to do the following:

- Explicate the general incapacitation model.
- Explain the specific approaches to incapacitation.

2.3.1 INTRODUCTION

In study unit 2.1 we considered retribution as an objective of punishment. In study unit 2.2 we mentioned that punishment is, according to the utilitarian approach, justifiable only if oriented towards the future and towards achieving something positive, like the prevention of crime. Three objectives of punishment can be linked to the prevention of crime or the attainment of a positive objective: deterrence, incapacitation and rehabilitation. Deterrence as an aim of punishment was examined in study unit 2.2, and we will now turn our attention to incapacitation.

Glick (1995:463) describes the aim of incapacitation as a form of punishment as "separating offenders from the community to reduce the opportunity for further crime". Other criminologists (Brown et al, 2004:56) not only emphasise the reduction of opportunities by isolation, but also refer to the elimination of the offender's capacity to commit crimes. Unlike retribution, which is a reaction to the deleterious effect of crime, and general deterrence, which seeks to prevent other people from committing crime, incapacitation focuses on the offender's ability to participate in criminal activities. Whereas retribution is naturally reactive and deterrence proactive, Fox and Stinchcomb (1995:59) believe that incapacitation fits in between the two, or is even a combination of them both. In the reactive sense of the word, incapacitation is a form of unpleasantness (punishment) which is related to the damage caused in the past by an illegal action (Terblanche, 2007:162). In the proactive sense, incapacitation is designed to prevent criminal activities.

Siegel (2003:535) provides the following comprehensive definition of incapacitation as an objective of punishment:

> By incapacitating convicted offenders in a secure facility, such as a prison, the state seeks to reduce or eliminate their opportunity to commit future crimes. In some instances, incapacitation involves supervising offenders while they remain in the community. It is hoped that close monitoring will restrict opportunities to commit future crime without the necessity of secure lockup. Incapacitation involves anticipating behavior patterns; offenders are confined not for what they have done but for what it is feared they might do in the future.

In this study unit we analyse incapacitation with reference to:

- the general incapacitation model, forms of incapacitation, its objective and the assumptions on which it is based
- specific approaches to incapacitation such as collective incapacitation, selective incapacitation and the incapacitation of career offenders

2.3.2 KEY CONCEPTS

In this study unit you will learn about the following key concepts:

- **Incapacitation** involves preventing crime by removing offenders from society. Examples are limitation of freedom by means of a prison sentence or restriction of movement in the community, for instance house arrest, in order to guarantee corrective supervision.

> REFLECTIVE QUESTION: Do you think that house arrest provides sufficient limitation on offenders' opportunities to commit crimes? Summarise your position in your workbook in about 150 words.

- **Collective incapacitation** has as its cardinal rule the idea that the more criminals have their freedom restricted, the fewer criminals will remain free and able to harm society. Its objective is to prevent crime by imposing long custodial sentences.

> REFLECTIVE QUESTION: Do you agree with this concept? Provide evidence for your answer, and summarise it in your workbook in about 150 words.

- **Selective incapacitation** is based on the assumption that most serious crimes are committed by a small minority of criminals who are arrested sooner or later. It is also

possible to identify criminals who are very much at risk of repeating a serious crime, and to incapacitate them by means of long custodial sentences. In this way crime is prevented without necessarily involving a drastic increase in the prison population.

REFLECTIVE QUESTION: Do you think that we have the skill to identify criminals with a high likelihood of repeating serious criminal activities so that they can be incapacitated by long prison sentences? Provide evidence for your opinion in a summary of about 150 words in your workbook.

- **False negative figures** refer to failure to identify an offender who later goes back to committing serious crime.
- **False positive figures** refer to the phenomenon of "overpredicting", or mistakenly identifying certain individuals as high-risk candidates for re-offending.

2.3.3 THE GENERAL INCAPACITATION MODEL

The philosophy underlying the incapacitation model is well summarised by Conklin (2007:395): "Incapacitation assumes that offenders will commit a certain number of crimes over a given time if they remain in society". Fox and Stinchcomb (1995:59) put the focus of incapacitation on the limitation of opportunities for offenders to commit further crimes.

2.3.3.1 Forms of incapacitation

In contemporary criminological literature (Brown et al, 2004:56; Reid, 2006:65–67; Welch, 1996:407; Fox & Stinchcomb, 1995:59), the following forms of incapacitation are distinguished:

- Total incapacitation or the permanent removal of offenders from society. Classic examples of incapacitation with a view to the absolute protection of society are the exile or transportation of offenders and the death penalty.

REFLECTIVE QUESTION: What is your opinion of the existence in a democratic state of the death penalty as a form of total incapacitation? In your workbook, make a list of the advantages and disadvantages of the death penalty.

- Incapacitation by means of medical intervention, such as the castration of sexual offenders (Reid, 2006:66).

REFLECTIVE QUESTION: What is your opinion of the castration of sexual offenders in order to prevent future sex offences? Summarise your opinion in your workbook in about 150 words.

- Community-based incapacitation, in which offenders remain in the community and are restricted by measures such as house arrest (as a parole condition or as a correctional supervision measure) and electronic monitoring.

REFLECTIVE QUESTION: Do you think that electronic monitoring places enough restriction on offenders in the community to prevent crime? Summarise your opinion in your workbook in about 150 words.

- Incapacitation by means of imprisonment, in which case the offender is temporarily removed from society and detained in prison (Terblanche, 2007:162). The risk of crime is not entirely eliminated, as correctional officials and fellow prisoners are still exposed to institutional victimisation. It is also possible for prisoners to escape and cause further damage in society. What is more, on completion of their sentences the prisoners have to return to their communities.

Brown et al (2004:56) conclude that "imprisonment is the primary criminal justice practice designed to achieve incapacitative goals". What do you understand by an "incapacitative goal"?

2.3.3.2 The aim of incapacitation

Contemporary criminologists provide the following reasons for incapacitation as an aim of punishment:

- elimination of the capacity to commit crime (Clear & Cole, 1990:99; Livingston, 1996:548)
- protecting innocent people against the onslaughts of crime (Terblanche, 2007:162–163)
- restricting offenders' opportunities to commit crimes (Reid, 2006:65)
- reducing the probability that offenders will re-offend (Schmalleger, 1996:156)
- protecting collective interests and the orderliness of society (social defence) (Champion, 1990:17)
- crime prevention (Terblanche, 2007:162)



ACTIVITY (2) 3.1

Why do we have to do it?

To establish whether you understand the aim of or the reasons for incapacitation as an objective of punishment

Guidelines

Read the paragraph above on the aim of incapacitation, and explain it to a friend or fellow student.

Closer analysis of the basic reasons for incapacitation as given above reveals that crime prevention is a central theme. In fact, Welch (1996:93) proposes that "incapacitation is based on the principle of crime prevention". Incapacitation by means of imprisonment therefore represents an attempt to prevent crime by the limitation of the ability of known offenders to cause harm to society.

2.3.3.3 Assumptions underlying incapacitation

Criminologists (Conklin, 2007:395–396; Clear & Cole, 1990:99) focus on certain assumptions which form the point of departure for the claim that the incapacitation of offenders in prisons results in crime prevention:

(1) Some offenders recidivate.
(2) The criminal justice system has the capacity to solve known crimes, prosecute suspects and incapacitate in prisons those who are found guilty.
(3) The place of offenders who are removed from society is not immediately and entirely filled by other offenders.
(4) The effects of incapacitation vary for different crimes as far as recidivation rates are concerned.
(5) Prisons as incapacitation measures are not criminogenic.
(6) Criminal careers are neither quickly resumed on release from prison nor practised more intensively.

Assumption 1

This assumption is correct. Cohort research by criminologists like Wolfgang (1972) and others showed at an early stage that a small minority of offenders are probably responsible for a large percentage of all crime (Bernard & Ritti, 1991:33–54). These findings caused criminologists (Wilson, 1975; Greenberg, 1975; Greene, 1977) to speculate and do research on incapacitation by means of incarceration and crime prevention. The further assumption was that:

- the small minority of offenders who are responsible for the greater percentage of crime will sooner or later be arrested, found guilty and incapacitated by means of a prison sentence.
- scientists will be in a position to predict future criminality.

The argument was that if career offenders and offenders who are at a high risk of repeating serious crimes are identified and given longer fixed terms of incarceration, crime can be prevented without a drastic increase in the prison population (Visher, 1995:526).

Assumption 2

As indicated in the previous study unit on deterrence as an objective of punishment, this assumption is not entirely valid. There is actually only a very small risk of an actual prison sentence being imposed for all serious crimes. The South Africa Law Reform Commission puts the conviction rate at less than 4%. (Report of the Open Society Foundation for South Africa 2010:21.) This sentencing inability of the criminal justice system serves to handicap the preventive effect of any incapacitation strategy, as there is a perception that crime pays.

Assumption 3

This assumption can be accepted with reference to certain crimes. In the event of market-oriented crimes like the drug trade, organised crime syndicates which operate on principles of supply and demand, and gang-related crimes, however, there is a tendency that incapacitated offenders will be replaced by others. Livingston (1996:539) points out that the volume of market-oriented crime will not diminish, even if offenders are restricted or removed from circulation by incapacitation, while the opportunity for crime and the demand in the case of crimes involving service delivery still exist.

Assumption 4

This assumption seems to be valid. The repeat offence rate for crimes like murder is very low, for instance, which seems to indicate that the preventive effect of incapacitation is minimal because there is so little likelihood that the offender will repeat the crime after being released. Generally speaking, custodial sentences only affect the occurrence of those

offences which are characterised by a high degree of recidivation. In view of this, crime prevention could be improved by removing people like drug dealers from society for a long time by means of prison sentences.

Assumption 5

This assumption is controversial. If prisoners become institution-dependent during long prison terms, or learn criminal techniques by associating with other criminals (the "schools for crime" effect), the net preventive effect of incapacitation can drop to zero or even into the negative values (Brown et al, 2004:56). Other criminologists (Conklin, 2007:395) consider that the educational effect of the prison sub-culture is overestimated, and that the disadvantages associated with it are less significant than the advantages of the incapacitation effect.

> REFLECTIVE QUESTION: What is your opinion of the "schools for crime" effect of the prison culture? Summarise your analysis in your workbook in about 150 words.

Assumption 6

The final assumption does not seem to be entirely valid either. Clear and Cole (1990:443) have for instance analysed the recidivation rates of offenders on parole, and concluded that parole failures tend to occur early in the release period.

2.3.4 SPECIFIC APPROACHES TO INCAPACITATION

Various approaches to the development of a policy on incapacitation have been proposed:

- collective incapacitation
- selective incapacitation
- incapacitation of career criminals (Conklin, 2007:396)

2.3.4.1 Collective incapacitation

In the 1970s there were radical changes to people's views on the aim of incarceration in the US (Livingston, 1996:528). Research findings, and the experience that institutional sentences could not control recidivism, led to a reduction in people's confidence that rehabilitation and deterrence were successful crime prevention measures, and they fell into disfavour.

> REFLECTIVE QUESTION: Do you feel confident about rehabilitation and deterrence as crime prevention measures? Provide a reasoned answer to this question and include examples. In your workbook, make a summary (about 150 words) of your opinion.

The growing interest in incapacitation coincided with the development of New Right realism in criminology. Its proponents argued that if prisoners cannot be rehabilitated through treatment, then at least they should be kept safely locked up in prison. The notion of collective incapacitation with the aim of reducing crime caught on. The concept was defined by Adler et al (1994:350) as the "imprisonment of many offenders for long periods". Welch (1996:93) employs the term "gross incapacitation" for the same concept.

Criminological research has tended to confirm that the application of a collective incapacitation policy has not reduced crime (granting however that many other factors are significant) and that collective incapacitation is anyway impractical. This led criminologists to understand that the focus of the principle of incapacitation is not how many people are jailed but which people are jailed.

2.3.4.2 Selective incapacitation

Instead of detaining all offenders found guilty of a specific crime like robbery in prison for a fixed period of, say, five years in order to prevent crime, the idea of selective incapacitation is to incapacitate offenders at a higher risk of committing serious crimes for longer periods (Welch, 1996:93). Penitentiary space should therefore be reserved for the small percentage of offenders who are responsible for serious crimes and who show signs of recidivating.

> REFLECTIVE QUESTION: Do you think that the principle of selective incapacitation can be applied successfully in a country with a high crime rate and relatively few community facilities for dealing with less serious, low-risk offenders? Consider this question and refer to examples. Summarise your opinion in about 150 words in your workbook.

The low-risk offenders (petty criminals) – an estimated 10%–15% of the prison population – should receive community-based sentences. If the focus is on criminals who continue to commit serious crimes, facilities in prisons can be better utilised and the prison population can be controlled better (Livingston, 1996:534). There would also probably be a decline in the crime rate if offenders with a strong likelihood of repeating serious criminal offences are identified and incapacitated at an early stage.

The theory of selective incapacitation is by implication based on two important assumptions (Conklin, 2007:395–396):

- The majority of serious crimes are committed by a small minority of offenders.
- The offenders at a high risk of repeating serious offences can be identified.



ACTIVITY (2) 3.2

Why do we have to do it?

In order to find out if you understand the two important assumptions on which the theory of selective incapacitation is based.

Guidelines

Read the paragraph above about selective incapacitation. Circle the two important assumptions on which the theory of selective incapacitation is based.

(a) Some offenders are recidivists.
(b) The majority of serious crimes are committed by a small minority of criminals.
(c) The place of offenders who are removed from society is not immediately and completely filled by other criminals.
(d) Offenders with a high risk of repeating serious crimes can be identified.

(e) Prisons are not naturally criminogenic.
(f) Criminal careers are not resumed soon after discharge from prison, and nor are they more intensively followed.

A sentencing policy aimed at selective incapacitation is therefore based, in part, on the assumption that future criminal activity can be predicted. This assumption demands a few observations:

- Scientific research aimed at developing an instrument for predicting dangerous criminal behaviour has not been very successful so far: "Even with the best scientific information (much of which would be legally excluded in court) we would still not be very good at identifying the worst criminals" (Livingston, 1996:538).
- A significant gap in existing predictive schemes is the large appearance of false negative figures (failure to identify an offender who does in fact go on to resume serious criminal behaviour) and false positive figures (the phenomenon of overpredicting, or inaccurately identifying individuals as high-risk candidates) (Adler et al, 1994:350).
- The incidence of a specific crime poses an additional problem for predictions. It is widely assumed that lower-occurrence offences such as situational crimes of violence are difficult to predict. The tendency is that the occurrence of false negative figures rises as the occurrence of this kind of crime decreases.
- Prediction instruments based on the criminal past of the offenders are not relevant to first-time offenders.

Some of the best known attempts in criminology to compile this kind of prediction instrument originate from the research of Greenwood and Abrahamse (1982). After intensive research they developed a seven-point scale for measuring the recidivation risk of offenders guilty of burglary and robbery. The following indicators were included as items on their scale (Conklin, 2007:396):

- previous convictions for crimes similar to the present one
- imprisonment for a period longer than half of the previous period
- a previous conviction (judgment and sentence) before the age of 16
- use of drugs (heroin and barbiturates) as a juvenile
- use of drugs (heroin and barbiturates) during the previous two years
- unemployment for a period longer than half of the previous period of two years

The Greenwood scale was an attempt to identify offenders with a low, medium and high risk of repeating serious crimes. If such offenders were then given long prison sentences, crime would be prevented. The researchers estimated that implementation of the scheme in courts could reduce the occurrence of robbery in California by 20%, with a concomitant increase in the state's prison population of only 2,5% (Conklin, 2007:396). Mirrane and Geerken (1991:497–518) successfully applied the Greenwood scheme in a study of self-reported crime by means of a random sample of prisoners in New Orleans.

Considerable criticism was voiced by criminologists (Conklin, 2007:396; Livingston, 1996:534–537; Welch, 1996:93) of the research on which the Greenwood scale was developed, for instance:

- The scheme is based on retrospective data from the group under investigation, and their reactions to punishment and treatment were not considered.
- The sample was not drawn up in a scientifically representative way, with the result that valid generalisations from the findings are questionable.
- The inclusion of indicators like unemployment, drug abuse and juvenile crime was

discriminatory towards certain groups, while the causative connection between these factors and recidivism was not firmly established.
- The validity of the scale is suspect because its development was based in part on data from a self-reporting investigation and the scheme was not subject to cross-validation (confirmation).
- The scale gave a high percentage of false positives.

2.3.4.3 Incapacitation of career criminals

Apart from collective and selective incapacitation, there is also a third approach: the incapacitation of career criminals. This approach is based on the crime patterns of chronic reoffenders which include such factors as:

- average crime and arrest figures
- average length of active periods of crime
- variations in the kinds of crime which these people commit over a period (Reid, 2006:296–301)

According to Brown et al (2007:153), the concept "career criminal" is associated with the term "habitual criminal" which is familiar from South African law. Section 276(1)(d) of the Criminal Procedure Act 51 of 1977 provides for declaring someone a habitual criminal as a punishment option. If the court is convinced that an offender commits crimes habitually and that society should be protected against such a person, then that person can be declared a habitual criminal. These hardened offenders can then be given an indeterminate sentence of at least seven years (Terblanche, 2007:236).

The basis of this approach is to be found in the pioneering analysis by Blumstein and Cohen (Cohen 1983) of crime patterns in a group of people charged with burglary and robbery in Washington DC. They found that the crimes were on average committed at a high rate during a relatively short period of time. Short prison sentences could potentially prevent criminal activity by these offenders during active periods of their criminal careers. The researchers calculated that a minimum sentence of two years' imprisonment for adult offenders found guilty of robbery would result in an 8% fall in the occurrence of this crime and an estimated rise of 7% in the prison population.

The incapacitation of career criminals is described as "an approach that would reduce crime by identifying and incarcerating classes of offenders who seem to be especially likely to remain active in crime" (Conklin, 1996:557). With this end in view, the offender's criminal record (criminal past) and current crime are used as criteria for sentencing. In this way it is possible to eliminate criticism about the approach of selective incapacitation, namely, that subjective and discriminatory personal data are used to predict future conduct.

This approach is closely connected to the concept of criminal careers, which assumes that criminal activities resemble the structure of other occupations, having a beginning phase, an active period and the ending of a career. Criminologists point out that "the term criminal career signifies the sequence of offending during some time period, not an assumption that an individual earns a livelihood through criminal activity" (Brown et al, 2004:443). The same authors (2004:443) refer to the criminal career paradigm, which was a dominant criminological issue in the 1990s. The debate centres chiefly on the following three positions:

a. The dualistic fallacy

This position, which Reid (2006:49) calls the dualistic fallacy, involves the assumption that criminals form a unique and identifiable group in the population as a whole, and that a clear distinction can be drawn between two groups: active criminals and law-abiding or non-criminal people (Barnett, Blumstein, Cohen & Farrington, 1992:133–140).

> REFLECTIVE QUESTION: What do you think about the statement that criminals form a unique and identifiable group in the population? Analyse the question, and summarise your answer in about 150 words in your workbook.

If this dichotomy is correct, then we must also accept the argument that crime figures will fall if the active criminals are identified and detained in prisons. Critics claim that this distinction is artificial and not always valid (Rowe et al, 1990:237–270).

b. The age-crime curve

The age-crime curve refers to the universal tendency for criminal behaviour to climax during adolescence and then decline. Sykes and Cullen (1992:111) point out that the steepest crime curve occurs for the 16–20 age group.

All over the world, involvement in criminality reaches its highest point during adolescence and levels out after that. In 1992 in South Africa, the number of convictions for young men between the ages of 18 and 20 were more than twice as high as those for adult males. For the 18–20 age group, the convictions for the Big Six (murder, rape, assault, robbery, burglary and car theft) were more than double the total for adult males (Glanz & Smit, 1995:37). What is the reason for this age-crime curve? (Some criminologists, like Regoli and Hewitt (1996:112), refer to the fall in criminal activities as people grow older as the "aging-out phenomenon".) Proponents of the criminal career paradigm find one explanation for this pattern in the fact that some juvenile offenders who become chronic criminals take stock of their lives in their thirties or early forties. This introspection is often accompanied by the realisation that:

- in the past their criminal activities have been financially and personally unproductive.
- they have failed and they are tired of being constantly on their guard in order to avoid arrest.
- a criminal career is risky and not much use.

Crime and a risky lifestyle lose the value that the person originally attached to them, and so he turns his back on his criminal career. Gottfredson and Hirschi (1990:136) are critical of this explanation, preferring to attribute the age-crime curve to a lack of self-control during adolescence.

c. Dividing a criminal career into different phases

The position here is that a criminal career can be divided into different phases according to a longitudinal sequence (Esbensen & Elliot, 1994:75–97; Barnett et al, 1992:133). These phases are:

- a start or initiation
- an active period of the duration of criminal activities at a particular frequency (lambda) which includes inactive periods as well as times when involvement in crime escalates
- a termination of the criminal career

Recent research on criminal careers (Land, 1992:149–155; Barnett et al, 1992:133–140; Nagin & Land, 1993:327–362) focuses mainly on the following:

- the accurate identification of career criminals
- the factors which play a role in the start, continuation and end of criminal careers
- the average number of crimes committed by an offender in a given period

The researchers are especially interested in predictive models and the costs associated with incapacitation compared to the damage (and therefore costs) that would have been brought about by the crimes the offenders would have committed if they had not been imprisoned for the relevant period.

Brown et al (2004:445) summarise the aim of incapacitating career criminals as follows: "The objective is to identify career offenders, incarcerate them during their periods of high offending and thus reduce crime".

2.3.5 SUMMARY

Approaches to incapacitation and sentencing are mainly debated with reference to the following issues:

- Incapacitation research involves specific methodological problems.
- It is difficult to predict future criminal behaviour with accuracy.
- Incapacitation and prediction-based approaches to sentencing focus exclusively on street crime. Corporate and white-collar crimes are excluded to a considerable extent (Welch, 1996:95).
- Some criminologists claim that the ideal of reducing the occurrence of certain crimes by means of incapacitation without a drastic increase in the prison population is nothing but a mirage (Livingston, 1996:529).

Incapacitation also involves certain moral and legal considerations. The debate centres on the fact that some offenders, in terms of the incapacitation approach, could receive longer prison sentences than others for the same crime on the basis of predictions about their future criminal conduct (Welch, 1996:93–95). People who commit similar crimes deserve similar sentences. Incapacitation is contrary to this principle, and it is also considered unjust to "punish" someone for a crime that has not yet been committed (Adler et al, 1994:350). This amounts to sacrificing justice on the altar of possible crime prevention: "A selective incapacitation policy punishes people not just for past behavior but for anticipated future behavior" (Adler et al, 1994:350).

Supporters of the incapacitation approach to sentencing argue that people found guilty of offences do not in any case always receive the same uniform sentences as a consequence of sentence individualisation. Longer terms of incarceration for people who are likely to reoffend should not be a moral obstacle. Sentencing officials in any case base their decisions on the length of a prison sentence on their own "predictions" of the future danger to the community represented by the offender. Incapacitation according to a scientifically designed system would be much more valuable for sentencing.



ACTIVITY (2) 3.3

Why do we have to do it?

- To help with your learning processes and examination preparation
- Expand the glossary in your workbook by including the key words and other difficult concepts in this study unit, as we explained in the foreword to the study guide.

Remember that one of the important ways of transferring knowledge from the short-term to the long-term memory is by calling it up regularly until you have mastered it. The more a thought pattern is "fired", the more "hard wiring" of neurons takes place. This hard wiring also happens when we discuss our new knowledge with other people, recall mind maps or summaries, and apply the knowledge in our everyday life.

2.3.6 SELF-ASSESSMENT QUESTIONS

(1) State the different kinds of incapacitation. (8)
(2) Name six assumptions on which incapacitation is based. (12)
(3) Explain the approach of selective incapacitation. (25)
(4) General incapacitation of offenders is one form of incapacitation intended to prevent crime. Which of the following options is or are associated with general incapacitation?

(a) electronic monitoring
(b) prison sentence
(c) castration
(d) exile
(e) house arrest

(5) Community-based incapacitation of offenders is one form of incapacitation intended to prevent crime. Which of the following options is or are associated with community-based incapacitation?

(a) death sentence
(b) prison sentence
(c) castration
(d) exile
(e) house arrest

(6) Medical intervention is one form of incapacitation intended to prevent crime. Which of the following options is or are associated with medical intervention in order to incapacitate?

(a) electronic monitoring
(b) prison sentence
(c) castration
(d) exile
(e) house arrest

(7) Which of the following options is regarded as the central theme presented in favour of incapacitation as an objective of punishment?

(a) eliminating the capacity to commit crime
(b) protecting innocent people against the onslaughts of crime
(c) protecting collective interests and social defence
(d) reducing the likelihood of offenders committing further crimes
(e) crime prevention

2.3.7 FEEDBACK ON ACTIVITIES

ACTIVITY (2) 3:1

Include references to:

- eliminating the capacity to commit crime
- protecting innocent people against crime
- limiting the opportunities offenders have to commit crime
- reducing the probability that offenders will re-offend
- protecting collective interests and social order
- preventing crime

ACTIVITY (2) 3:2

2 and 4 are the correct answers.

ACTIVITY (2) 3:3

No feedback

2.3.8 FEEDBACK ON SELF-ASSESSMENT QUESTIONS

(1) Your answer must include the following:

- permanent removal from society
- medical intervention
- community-based incapacitation
- incapacitation by means of prison sentences

(2) Mention the following:

- Some criminals are reoffenders.
- The criminal justice system has the ability to solve known crimes, prosecute suspects and incapacitate convicted criminals.
- The place of incapacitated offenders is not immediately and completely filled by others.
- The incapacitation effect differs for various crimes according to repeat offending rates.
- Prisons are not criminogenic.
- Criminal careers are not resumed shortly after release and more intensively practised.

(3) You should have included the following:

- Name the assumptions on which the theory of selective incapacitation is based.
- Discuss our remarks on predicting future criminal conduct.
- Mention Greenwood and Abrahamse's research and the Greenwood scale.
- Critically discuss selective incapacitation.
- Select suitable material from the summary in 2.3.4.

(4) 4
(5) 5
(6) 3
(7) 5

STUDY UNIT 2.4

Rehabilitation as an aim of punishment

Rehabilitation and punishment rehabilitation	Analysis of concept	The medical model and rehabilitation	Reaction to Martinson's position	Modern philosophy of position

CONTENTS

2.4.1 Introduction
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2.4.6 Reaction to Martinson's position
2.4.7 The modern philosophy of rehabilitation
2.4.8 Summary
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LEARNING OUTCOMES

When you have completed this study unit you will be able to do the following:

- Explain the relationship between rehabilitation and punishment.
- Define rehabilitation.
- Explain the development of the medical model and of rehabilitation by means of institutional treatment.
- Explain the medical model of institutional treatment.
- Review the reactions to Martinson's position.
- Explain the modern philosophy of rehabilitation.

2.4.1 INTRODUCTION

Retribution and deterrence were the basis of what the classic and neoclassic schools of criminology took as their philosophy of punishment, with emphasis on punishment that had to be in proportion to the nature and seriousness of the crime. The positivist school however put the spotlight on the criminal as a human being, and on the circumstances or factors which gave rise to the illegal action. This change of emphasis from the crime to the offender opened the way for the development of rehabilitation as an objective of punishment – a philosophy which until recently dominated sentencing and the treatment of offenders in the criminal justice system.

The idea of rehabilitation is to change offenders' attitude, outlook on life and observable behaviour, and in the case of a custodial sentence to give them support so that when they are released they will adjust to society in a socially acceptable way (Neser et al, 1993:31; see also Terblanche, 2007:163). The most familiar justification for rehabilitation in punishment is that it is aimed at the prevention of crime and ultimately at the protection of society.

The ideal of rehabilitation is traditionally associated with the medical model and the treatment in prison of offenders with indeterminate sentences. Reid (2006:70) observes that "[it was] based on the premise that human behaviour is the result of antecedent causes that may be known by objective analysis and that permit scientific control. The assumption was that the offender should be treated, not punished". The medical model no longer forms the central theme in modern rehabilitation philosophy, being supplemented by the principles of the adaptation model and the reintegration model (Bartollas, 1985:25–28; Neser, 1993:234–235).

In study unit 2.2 we mentioned that punishment is only justifiable in terms of the utilitarian approach if it is future-oriented and if it works to achieve something positive such as crime prevention. There are three punishment objectives that are linked to crime prevention or that have a specific aim: deterrence, incapacitation and rehabilitation. Deterrence as an objective of punishment was considered in study unit 2.2 and incapacitation in study unit 2.3; now we will consider rehabilitation.

In this study unit we will analyse rehabilitation in terms of the following aspects:

- We explain the connection between punishment and rehabilitation.
- We attempt to analyse the concept of rehabilitation in order to give you a clear definition of it.
- We explain the medical model and its development, and show how offenders are rehabilitated by institutionalised treatment.
- We show how the popularity of rehabilitation has dwindled since the 1970s, and that people came to adopt the position that institutional treatment does not rehabilitate offenders (Martinson's position).
- We review the reaction to Martinson's position on rehabilitation by means of institutional treatment.
- We explain the modern philosophy of rehabilitation and show that it consists of three models: the medical, the adaptation and the reintegration models.

2.4.2 KEY CONCEPTS

In this study unit you will get to know these key concepts.

Rehabilitation implies the following:

- Offenders discover themselves and gain insight into problems which had resulted in criminal behaviour.
- They experience a change of outlook.

- This is followed by a change of attitude.
- They adopt a new system of values.
- There is an observable change in their behaviour.

The **aetiological approach** to institutional treatment is based on the neutralisation or elimination of criminogenic circumstances. This approach presupposes a thorough knowledge of the causes of crime, and is associated with diagnostic procedures and suitable ways of changing behaviour (see also Terblanche, 2007:163; Conklin, 2007:411).

The **broad approach** to institutional treatment sees institutional treatment as a comprehensive process that focuses not only on criminogenic circumstances but also on the successful integration of prisoners into society.

The **work ethic approach** goes back to the penitentiary history of North America before the American Revolution. The belief then was that idleness and social evils like criminal behaviour went hand in hand and that only hard labour could change offenders.

The **medical model** of institutional treatment assumed that there was some similarity between criminal behaviour and a medical illness, and that certain internal factors prevented the "sick" offenders from controlling their behaviour in a normal way.

2.4.3 REHABILITATION AND PUNISHMENT

In answer to the question of the essential relationship between punishment and the rehabilitation of offenders, two broad approaches can be identified (Neser, 1980:128–129).

- Punishment itself has certain inherent qualities which can contribute to the rehabilitation of offenders. One of these qualities is that punishment makes offenders receptive to moral influences which can lead to behavioural changes. This approach links up with Sykes's (1978:493–495) opinion that punishment is a necessary pre-condition for rehabilitation, and serves the purpose of getting offenders to understand that criminal activities are wrong.

> REFLECTIVE QUESTION: Do you think that punishment really has the inherent qualities mentioned in the paragraph above? Consider the question, and summarise your opinion in your workbook in about 150 words.

- Forms of punishment, such as imprisonment and correctional supervision, which provide for developmental programmes and rehabilitation services provide an opportunity to change the offender's behaviour by means of treatment (Conklin, 2007:413).



ACTIVITY (2) 4.1

Why do we have to do it?

To find out if you can explain the connection between rehabilitation and punishment.

Guidelines

Read the paragraph above about rehabilitation and punishment, and explain it to a friend or fellow student.

2.4.4 ANALYSIS OF CONCEPTS

Criminologists differ in their views of the concept of rehabilitation. To illustrate this, we will show you the following definitions.

The concept of rehabilitation

- "Reforming an offender through treatment, education or counselling" (Regoli & Hewitt, 1996:777).
- "The restoration of criminals to a law-abiding way of life through treatment; the result of any planned intervention focused on the offender that reduces criminal activity" (Conklin, 2007:411).
- "Punishment philosophy that asserts that through proper correctional intervention, such as educational and vocational programs and psychotherapy, a criminal can be reformed into a law-abiding citizen" (Adler et al, 1994:566).
- "Providing elements that may have been lacking (education, psychological insight, etc.) in order to keep criminals from repeating their crimes" (Livingston, 1996:550).

We can deepen our understanding of the concept through further analysis and thought (Neser, 1980:129–137):

- It has an individual, human dimension which enables it to adapt to unique human needs.
- It relates to the repair or restoration of societal functioning within a particular social system.
- It involves an intensive process of behavioural change in which an individual is transformed from a socially destructive to a socially constructive person.
- It is aimed at independent functioning: helping the offenders to adjust to the various elements of the social system, and to fulfil the functions associated with their own roles.

Korn and McCorkle (quoted in Neser, 1980:133) see the essence of the concept in three dimensions:

- the aim of the sentencing official (to enable offenders to distance themselves from their criminal activities and to allow them to resume a socially acceptable lifestyle)
- methods which are applied to achieve this aim (penitentiary intervention and, eventually, reintegration into society)
- the effect on the offender of punishment and treatment – an inner change of attitude which is expressed concretely in behaviour and interactions with other people

Moberly (quoted in Neser, 1980:133–134) concludes that the rehabilitation effect of punishment can only take effect when offenders accept that their punishment is what they deserve. He also refers to three vital criteria for successful rehabilitation as an objective of punishment:

- The criminal must have the moral potential to change positively.
- The criminal must understand that the crime was wrong and accept punishment as a consequence of that crime.
- The legitimacy of the court that imposed the sentence must be above suspicion.

Neser (1980:134–137) concludes that the essence of rehabilitation is change. More specifically, it points to the offender's attitude, outlook and behaviour which have to change. There must be a realisation that the crime was wrong; this will then open the way to personal regret and remorse at the harm done to society by the crime. The change demands not only a realisation that the action (the criminal behaviour) was wrong, and remorse about it, but also a meaningful desire to be different. This forms a process in

which the offender takes on board other ideals and ambitions, and works to realise law-abiding values; this will result in the positive changes to basic behaviour patterns. Rehabilitation therefore implies the following:

- Offenders discover themselves and acquire insight into problems which have given rise to criminal behaviour.
- They experience a change of outlook.
- A change of attitude follows.
- A new system of values is followed.
- There is an observable change in behaviour.

REFLECTIVE QUESTION: Do you think that rehabilitation as described above is possible in a prison? Support your answer, and summarise it in your workbook in about 150 words.



ACTIVITY (2) 4.2

Why do we have to do it?

To establish whether you can define rehabilitation

Guidelines

Read the paragraph above on rehabilitation, and summarise the important points about it in your workbook.

2.4.5 THE MEDICAL MODEL AND REHABILITATION BY MEANS OF INSTITUTIONAL TREATMENT

2.4.5.1 Institutional treatment

The aim of institutional treatment is to make positive changes in offenders' outlook and observable behaviour so that they can adapt to society in a socially acceptable way (Conklin, 2007:411). There are two opinions about how this can be achieved (Neser, 1993:224–225):

- The aetiologically oriented approach focuses on the neutralisation or elimination of criminogenic circumstances. In this approach, institutional treatment assumes a thorough knowledge of the causes of crime and goes hand in hand with diagnostic procedures and suitable ways of changing behaviour.
- The broad approach sees institutional treatment as a comprehensive process which focuses not only on criminogenic circumstances but also on the successful reincorporation of offenders into society.

2.4.5.2 Historical overview

The development of the medical model and rehabilitation by means of treatment in prisons can best be illustrated with reference to a few periods in US penitentiary history.

Before the American Revolution, the model followed was pure punishment: "Punishment was not designed to rehabilitate offenders" (Conklin, 2007:411). In 1787 the prison reformer Benjamin Rush called for "a prison [to] be established to cure offenders, rather than simply to punish them" (Conklin, 2007:411), and proposed an institutional treatment programme which includes provision for constructive prison labour and the classification of prisoners. During the 1820s two important theories took hold, both of them based on

the assumption that "the purpose of the criminal justice system should be to rehabilitate offenders and not merely to subject them to the irrationality of aimless punishment" (Cullen & Gilbert, 1982:64). One philosophy supported hard labour and the isolation of prisoners. It argued that solitary confinement would bring prisoners to repentance, and that the wholesome effects of punishment and hard labour would stimulate this process (Quaker philosophy in Fox & Stinchcomb, 1995:111). The other approach attached great value to the effects of labour, and accepted the assumption that hard work was the key to success and the first step towards positive changes of attitude. The theory was that idleness and social evils like criminal behaviour went hand in hand, and that offenders could only be changed by means of hard labour (the work ethic approach, Neser, 1993:226).

In 1870 a declaration of principles relating to the treatment of prisoners was accepted.

Summary: Declaration of Principles (1870)

- Rehabilitation is the aim of imprisonment.
- There must be a classification system for prisoners, based on a system of points.
- Good behaviour must be rewarded.
- Fixed sentences must be replaced by a system of indefinite sentences.
- Religious care and education programmes form the foundations of rehabilitation.
- Discipline must be applied in such a way that prisoners keep their self-respect and continue to cooperate.
- The declaration calls for smaller prisons and separate institutions for different kinds of prisoner.
- Solitary confinement should be replaced by programmes for advancing social dynamics.
- Society should take responsibility for the prisoners (adapted from Clear & Cole, (1990:81)).

Cullen and Gilbert (1982:72) state that the declaration of principles had two important results: "a firm belief in the curative powers of the indeterminate sentence and a fundamental conviction that the 'supreme aim' of American criminal justice should be the reformation of criminals, not the infliction of vindictive suffering".

The Elmira prison was the first to apply the principles of the declaration (Livingston 1996:485), making provision for, among other things: (Bartollas & Conrad, 1992:86–94):

- rewarding good behaviour according to a points system
- a system of privileges based on the points system
- programmes for education and training, religious instruction and physical exercise indefinite sentences
- a parole system

The Progressive Era in the early 20th century, together with belief in the ability of social scientists to solve social problems, influenced the punishment and treatment of offenders. Conklin (2007:411) refers to the following aspects of punishment that were emphasised at this time:

- the rehabilitatory effect of indefinite sentences
- treatment of offenders in the community
- parole boards to decide on when prisoners were ready for probation
- probation (currently called in South Africa "correctional supervision") and community-based supervision of prisoners
- pre-sentencing investigation and report to sentencing officials

Individuation in sentencing

The development of the positivist approach in criminology introduced a new era with the offender and the causes of crime as its focal points (Conklin, 2007:411). The point of departure was that every social problem, including crime, had a cause and a solution, and on this basis it was accepted that it was possible to control the phenomenon of crime. Reformers were convinced that they had enough knowledge to plumb the depths of the causes of criminal behaviour. Crime was initially viewed as a social evil, and people believed that its causes were to be found in social conditions. The assumption that factors within human nature were the causes of criminal behaviour "gave rise to a medical model that saw law breaking as a kind of disease that could be diagnosed, treated and cured" (Conklin, 207:413).



ACTIVITY (2) 4.3

Why do we have to do it?

To establish whether you can explain the development of the medical model and rehabilitation by means of institutional treatment

Guidelines

Read the paragraph above about the development of the medical model and rehabilitation by means of institutional treatment, and note five important points about this developmental process in your workbook.

2.4.5.3 The medical model of institutional treatment

The starting point was that offenders were sick rather than wicked, and that the cause and the treatment of criminal behaviour were to be sought in the diseased condition. During the1930s and later, the concepts of treatment and rehabilitation became synonymous in penitentiary circles (Welch, 1996:96–98). The medical model was characterised by the strong accentuation of the interests of the offender as an individual, and the assumption that criminal behaviour could be attributed to specific and identifiable factors within the criminals themselves. The assumption was that there was a partial correspondence between criminal behaviour and a medical illness, and that certain internal factors prevented the "sick" offender from displaying normal behaviour (Bartollas & Conrad, 1992:98–101). On the basis of this analogy between criminal behaviour and a medical illness, the following assumptions were made (Neser, 1993:231):

- Abnormal conditions which give rise to criminal behaviour can be identified in offenders.
- "Sick" offenders can be cured by means of suitable treatment.
- The isolated prison environment, like the medically focused hospital milieu, is extremely well suited to the treatment of offenders.
- Therapists and counsellors can provide therapeutic services in prisons.
- Offenders can be detained by means of indefinite sentences until they have, in the opinion of professional correctional staff, been "cured" or rehabilitated (Reid, 2006:70–72).

There are several reasons for the acceptability of the medical model as an objective of punishment for sentencing offenders and as a basis for a treatment philosophy for criminologists during the first half of the 20th century:

- Punishment is not based entirely on retribution and deterrence.

- Rehabilitation is focused on individual problems (causes) rather than on vaguely defined social evils such as poverty.
- Rehabilitation is supported by professional interventions and treatment with the potential to modify people's behaviour.
- Decisions about issues such as when an offender has been "cured" or rehabilitated (and has to be paroled) are taken scientifically by professional staff.

REFLECTIVE QUESTION: Do you agree with the assumptions given above? Consider each of the statements, and summarise them in your workbook, taking about 150 words per statement.



ACTIVITY (2) 4.4

Why do we have to do it?

To establish whether you can explain the medical model of institutional treatment

Guidelines

Read the paragraph above on the medical model of institutional treatment. Your lecturer has asked you to give a brief presentation during a discussion class on the medical model and institutional treatment. Indicate in your workbook all the points you will include in your presentation.

2.4.5.4 Reduction in the popularity of the rehabilitation model

Since the 1970s various factors have contributed to a decline in the popularity of the rehabilitation model and eventually to its being discredited (Conklin, 2007:417–419; Reid, 2006:72).

- Criminologists took the position that treatment does not rehabilitate offenders. This concept was popularised by Robert Martinson's (1974) article *What works? Questions and answers about prison reform*. Experience and the findings of research began to indicate that recidivism was not being limited by institutional treatment.
- People came to realise that the medical model's points of departure were based on a simplistic view of human nature.
- It became apparent that the artificial environment of a prison with its negative sub-culture was not a suitable environment for treatment aimed at offenders' successful adjustment to society.
- It appeared that compulsory participation in treatment programmes could violate offenders' human dignity. This could happen if people who had decided to commit crime on the basis of a rational decision were treated as sick people who needed to be cured.
- The imposition of indefinite sentences (in South Africa one can be declared a habitual criminal by a court and then detained for an indefinite period) is often in contravention of the principle of passing a sentence appropriate to the crime.
- Uncertainty about when a person with an indefinite sentence will be released can also violate the offender's human dignity and might give rise to hostile feelings towards the criminal justice system.
- In the absence of clear guidelines about release, officials might abuse their discretion

when they have to decide whether someone serving an indefinite sentence should be put on parole or not.

- There are signs that the parole system is unsuccessful.

> REFLECTIVE QUESTION: Do you agree with all these factors which have contributed to a fall in the popularity of rehabilitation? Argue the pros and cons of each of the factors above, and summarise them in your workbook.

In South Africa there has also been criticism of rehabilitation as an objective of punishment. Rabie and Strauss (1994:32) state that "(i)n fact, studies of a wide variety of rehabilitative programmes have revealed their failure and have led to considerable disillusion with the rehabilitative ideal". Consider also the position taken by Prinsloo (1995:39): *"Die rehabilitasie-siening is naïef indien daar niks aan die omstandighede wat die oortreder se strafwaardige gedrag presipiteer gedoen word nie en die oortreder na vrylating weer deur dieselfde omstandighede gekonfronteer word* [the concept of rehabilitation is naive if nothing is done about the circumstances which precipitated the offender's punishable conduct and the offender is confronted once again after release by the same circumstances]".

2.4.6 REACTION TO MARTINSON'S POSITION

Martinson's position on institutional treatment and rehabilitation quickly became known as the "nothing works" idea. Bartollas and Conrad (1992:121) summarise its effects as follows:

- The article (with the research findings of Martinson and two colleagues, Lipton and Wilks, on 231 treatment programmes) was widely read and quoted by criminologists and legal experts.
- Rehabilitation as an objective of punishment has lost a lot of credibility.
- Support for counselling and treatment programmes in prisons and facilities for youth offenders has declined.
- The money spent on such programmes has been questioned.
- Indefinite sentences and the parole system have lost credibility and some US states have scrapped them.

Much of the reaction was also positive and focused on the re-establishment of institutional treatment and rehabilitation as punishment objectives. "Not everyone accepts the conclusion that rehabilitation is ineffective. Some criminologists reject the conventional wisdom that nothing works, pointing out that there is mixed evidence about the impact of treatment and that 'treatment destruction techniques' have been used to cast doubt on the positive results that some programs have had" (Conklin, 2007:418).

In 1979 Martinson retracted his original position when further research showed that some treatment programmes actually did have a positive effect on recidivism rates. He then took the position that "the critical fact seems to be the condition under which the program is delivered" (Martinson, 1979:243–258). It has been confirmed that some treatment programmes and the proper application of the parole system do have a rehabilitative effect (Livingston, 1996:490). The research findings and statements by the following criminologists have contributed to a reconsideration of the value of institutional treatment and rehabilitation as an objective of punishment.

- Gendreau and Ross (1987:349–407) identify the following reasons why some criminologists favoured the "nothing works" idea: treatment programmes were evaluated in isolation rather than in the context of other programmes and other attempts to rehabilitate offenders; the people taking part in the programmes received inadequate treatment; no liaison took place among service providers; and there was no quality control. Gendreau and Ross found that a number of deterrence programmes and rehabilitation programmes for sexual offenders which they studied over a two-year period displayed a high success rate.
- Lipsey (1991) concludes that the rehabilitation value and success of treatment programmes are definitely linked to the type of treatment; the willingness of the prisoners to take part in the programmes; the participants' openness to changing their behaviour; and the prisoners' criminal history (first offenders compared to repeat offenders).
- Andrews, Zinger & Hoge (1990a:384) found that their research shows the importance of the concepts "risk allocation", "needs analysis" and "responsivity" for the evaluation of institutional treatment (see also the discussion in Neser, 1993:234). The researchers concluded that "some rehabilitation programs are meaningfully effective" (Andrews et al, 1990b:425).
- Conklin (2007:416) mentions that the rehabilitation perspective was subjected to inflexible methodological standards when the rehabilitation effect of treatment programmes was evaluated. He points to various "treatment destruction techniques" (ways of casting suspicion on the positive results achieved by programmes) which were used to support the nothing-works mindset, for instance, suggesting possible alternative reasons for positive findings or successful treatments; suggesting that success criteria for evaluating the programmes were inadequate; and claiming that in cases where programmes showed successful outcomes, their treatment was not suitable for all offenders. Although some of these methodological criticisms may be valid, Conklin claims that "the application of such high standards means it is unlikely that any treatment program will ever be declared an unqualified success" (2007:417).
- Palmer (1991:340) refers to a sense of sanguineness about rehabilitation programmes which spread as a result of the realisation that certain kinds of offender were being successfully exposed to certain treatment programmes. He refers to this as the "something works" concept. Agreement exists about the principle that successful institutional treatment depends on a multidisciplinary approach; regular contact between therapist and prisoner; and a needs analysis to ensure that the offender is included in a suitable treatment programme.
- Welch (1996:99) points out that a treatment programme must not only provide for the successful reintegration of offenders but also acknowledge factors in society that give rise to criminal behaviour.

Reid (2006:72–74) states that since the mid-1980s a trend has developed to revisit rehabilitation as a punishment objective. This tendency is based chiefly on:

- the realisation that treatment programmes have a positive effect on behaviour in prisons and on the attitude and behavioural changes of inmates
- the fact that rehabilitation is the only aim of punishment which sanctions the state's obligation to care for the offender's needs and wellbeing
- the assumption that the philosophy of rehabilitation gives a more human character to the criminal justice system (see Cullen, 1993:69–92, who points out that the treatment of offenders demands more than just "punish and cage")

ACTIVITY (2) 4.5

Why do we have to do it?

To find out if you can describe the reactions to Martinson's position on rehabilitation.

Guidelines

Read the paragraph above on reactions to Martinson's position, and explain it to a friend or fellow student.

2.4.7 THE MODERN PHILOSOPHY OF REHABILITATION

The renewed status of rehabilitation and the development of the modern philosophy of rehabilitation during the late 1980s and 1990s originated from a reaction to Martinson's findings and the nothing-works concept. This coincided, according to Reid (2006:72–74), with issues such as overcrowding in prisons and a rising crime rate which had their origins in the conservative, get-tough sentencing policy. Lesieur and Welch (1995:205) also think that modern rehabilitation philosophy protects offenders against the severity of the conservative punishment perspective [the (neo-)utilitarian punishment model as discussed in Bartollas and Conrad (1992:125–128) and Neser (1993:243–248)] by means of understanding, tolerance and concern for the offenders' personal problems in the criminal justice system.

The aim of the modern philosophy of rehabilitation is still to change the attitude, character and observable behaviour of the offender; to reduce criminal tendencies; and to support the offender so as to achieve the objective of a socially acceptable adjustment to society (Neser, 1993:233). The points of departure of the medical model, however, no longer make up the central theme of the modern rehabilitation model. The central idea is still that the offender's behaviour can be modified through treatment, but the foundation of the medical model has been expanded by the acceptance of aspects like the following:

- The causes of criminal behaviour are not situated only in the person of the offender, but are also linked to environmental factors or a combination of both (Welch, 1996:98).
- Participation in programmes must be voluntary (Welch, 1996:99).
- Programme participants must be open to changes in their behaviour (Lipsey, 1991).
- The concepts of "risk" and "need" form an integral part of institutional treatment. One implication of this is that offenders are involved in suitable programmes according to their unique needs (Andrews et al, 1990a:384; Lab & Whitehead, 1990:405–417).
- Offenders who take part in programmes must have sufficient regular exposure to treatment (Palmer, 1991:540).
- Quality assurance is an essential element of institutional treatment (Bartollas & Conrad, 1992:122).

REFLECTIVE QUESTION: What is your opinion of the "expanded" medical model? Consider each of the aspects mentioned above, and summarise them in your workbook.

The modern philosophy of rehabilitation is further supplemented by the principles of the adaptation model. Reid (1994:90) refers to the dualistic fallacy, which amounts to an assumption that criminals are different from law-abiding people. Many of the supporters of the medical model of the 1970s were convinced that offenders made up a unique and identifiable group within the general population, but more and more supporters of the

adaptation model came to accept that criminals were responsible for their behaviour and had the ability to take law-abiding decisions (Bartollas & Conrad, 1992:123). The adaptation model assumes the following:

- Offenders are responsible for their own behaviour and have the ability to lead law-abiding lives.
- Offenders can learn alternative, law-abiding behaviour patterns.
- Relationships within the community and the offender's own social interactions are important factors for understanding the offender's behaviour.
- Offenders need help and support to satisfy the demands of society (Neser, 1993:235).

Rather than emphasising offenders' "sickness" and their "healing" by means of treatment, the idea here is that criminals do have the potential to be law-abiding and can be guided to make socially acceptable adjustments to their community.

REFLECTIVE QUESTION: What do you think about the adaptation model? Consider each of the bulleted points above, and summarise them in your workbook.

Another important dimension of the modern philosophy of rehabilitation features in the points of departure of the reintegration model (Neser, 1993:235 & 353–354). Clear and Cole (1990:87) state that "the concept of reintegration retained an emphasis on rehabilitation of offenders but rejected the medical model as its major vehicle". Supporters of rehabilitation as an objective of punishment and of institutional treatment for offenders came to realise that

- the principles of the medical model cannot be applied mutatis mutandis to the treatment of prisoners, and
- the prison environment is not the most suitable for rehabilitating offenders.

The philosophy of reintegration with the emphasis on the successful reincorporation of prisoners from prison and into society has become an important objective of institutional treatment. [See Bartollas & Conrad (1992:196), as well as Champion's (1990:19) remark: "The reintegration goal of punishment is particularly relevant for offenders who have been incarcerated for long periods".] In order to achieve this objective, the following are necessary:

- Reintegration programmes and community support systems like preparation for release, work release, temporary release for educational purposes, home furlough and halfway houses must be developed (Neser, 1993:364–368).
- There must be focus on the building and repair of firm bonds between the prisoner and society.

Supporters of the philosophy of reintegration came to realise that the point was not only the treatment of prisoners but also the attitude of society. [See Conklin (2007:419): "The important issue is the kind of community into which an offender is being reintegrated" and Reid (2006:73): "Reintegration may be defined as the process of preparing both the community and offender for the latter's return".]

Proponents of the reintegration concept call for community-based sentences for the majority of offenders, except in the case of dangerous and habitual criminals where incarceration is unavoidable in order to protect society. They claim that since many of the problems experienced by criminals in the past can be traced back to society, then society itself has the responsibility of offering offenders opportunities to develop law-abiding

behaviours. The underlying idea of rehabilitation in the community is summed up as follows by Clear and Cole (1990:87): "Rehabilitation of the offender by supervision in the community [is] undertaken in the belief that criminal behavior results from a lack of opportunity to succeed legitimately in the community, and therefore such opportunities must be made available".

REFLECTIVE QUESTION: What is your opinion about rehabilitation in the community by means of community-based sentences?



ACTIVITY (2) 4.6

Why do we have to do it?

To establish whether you understand the philosophy of modern rehabilitation.

Guidelines

Read the paragraph above about modern rehabilitation, and explain it to a friend or fellow student.

2.4.8 SUMMARY

The debate about rehabilitation as an objective of punishment still continues. Critics believe that the effectiveness of treatment has not been proved beyond all doubt, and that indefinite sentences and the ineffectiveness of treatment programmes are abused in order to extend the time during which prisoners are under the control of the criminal justice system. Terblanche (2007:165) points out that "[it] leads to unfair and inappropriate sentences if disproportionate to that deserved by the offender for his crime". Proponents of the philosophy of rehabilitation argue that some rehabilitation programmes do in fact succeed in bringing about changes in behaviour, and that this objective of punishment helps to set up a more humane approach to offenders in the system. They claim that rehabilitation can work if sufficient resources are made available. Terblanche (2007:165) also points out that rehabilitation is an important objective of punishment for juvenile offenders.

Scepticism about the acceptability of rehabilitation as an objective of punishment came to mean that:

- Sentencing officials increasingly punished offenders according to the principle of making the punishment fit the crime (McCorkle, 1993:240–252; Logan & Gaes, 1993:245–263).
- Offenders were no longer subjected to compulsory treatment programmes on the understanding that participation in programmes would not influence a prisoner's period of detention.
- Conklin (2007:421) draws the following conclusion: "Lawmakers have introduced sentencing reforms that are based on the theories of just deserts, incapacitation, and deterrence, rather than on the rehabilitative ideal."



ACTIVITY (2) 4.7

Why do we have to do it?

- To help you with your learning process and examination preparation.
- Expand your terminology list in your workbook further by adding the key terms and other difficult concepts from this study unit as explained in the Foreword to the study guide. Remember that one of the most important ways of transferring knowledge from the short-term memory to the long-term memory is by recalling it regularly until it has been mastered. The more a thought pattern is "fired", the more neurons are "hard-wired". This wiring also takes place if we discuss our new knowledge with other people, make mind maps or recall summaries, and apply our knowledge in our daily life.

2.4.9 SELF-ASSESSMENT QUESTIONS

(1) Explain the connection between punishment and rehabilitation. (5)

(2) What is central to the concept of rehabilitation? (8)

(3) Explain the medical model of institutional treatment. In your answer, show why this model was acceptable to sentencing officials and criminologists during the first half of the 20th century, and why the popularity of rehabilitation started to diminish in the 1970s. (20)

(4) Give a detailed account of the modern philosophy of rehabilitation. (25)

(5) "In this approach, institutional treatment demands a thorough knowledge of the causes of crime and is coupled with diagnostic procedures and suitable ways of modifying behaviour." Which of the following approaches does this refer to?

(a) the work ethic approach to institutional treatment
(b) the broad approach to institutional treatment
(c) the aetiological approach to institutional treatment
(d) the isolation approach to institutional treatment
(e) the medical model approach to institutional treatment

(6) "In this approach, institutional treatment is seen as a comprehensive process which does not focus on criminogenic circumstances alone but also on the successful reintegration of prisoners into the community." Which of the following approaches does this refer to?

(a) the medical model approach to institutional treatment
(b) the adaptation approach to institutional treatment
(c) the aetiological approach to institutional treatment
(d) the broad approach to institutional treatment
(e) the work ethic approach to institutional treatment

(7) "The thought was that idleness and social evils like criminal behaviour went hand in hand, and that offenders could only be changed by means of hard labour." Which of the following approaches does this refer to?

(a) the aetiological approach to institutional treatment
(b) the work ethic approach to institutional treatment
(c) the broad approach to institutional treatment
(d) the isolation approach to institutional treatment
(e) the medical model approach to institutional treatment

(8) "People assumed that internal factors were preventing 'sick' offenders from exercising normal control over their behaviour." Which of the following approaches does this refer to?

(a) the aetiological approach to institutional treatment
(b) the work ethic approach to institutional treatment
(c) the broad approach to institutional treatment

(d) the isolation approach to institutional treatment
(e) the medical model approach to institutional treatment

(9) "Offenders are thought to have the potential to be law-abiding and, with support, to adapt to society in a socially acceptable way." Which of the following options relates to this statement?

(a) the reintegration model
(b) the medical model
(c) the adaptation model
(d) the work ethic model
(e) the aetiological model

(10) "The focus was on building and repairing the close ties between the prisoner and the community." Which of the following options relates to this statement?

(a) the reintegration model
(b) the medical model
(c) the adaptation model
(d) the work ethic model
(e) the aetiological model

2.4.10 FEEDBACK ON ACTIVITIES

ACTIVITY (2) 4:1

These two aspects should feature prominently in the discussion:

- Punishment in itself has certain inherent qualities which can contribute to the rehabilitation of offenders.
- Kinds of punishment (such as prison sentences and correctional supervision) which provide for development programmes and rehabilitation services provide opportunities for offenders' behaviour to change as a result of treatment.

ACTIVITY (2) 4:2

You must include the following points in your summary:

- Offenders get to know themselves and gain insight into the problems which led to their criminal behaviour.
- Their outlook changes.
- This is followed by a change in attitude.
- They pursue a new system of values.
- There is a visible change in their behaviour.

ACTIVITY (2) 4:3

The five main points in the development process are:

- Early American history – isolation policy and work ethic approach
- The Declaration of Principles (1870)
- The developments in the Elmira prison
- The progressive era in the 20th century
- The development of the positivist approach in criminology

ACTIVITY (2) 4:4

Your presentation should include the following:

- Abnormal conditions can give rise to criminal behaviour.
- "Sick" offenders can be cured by suitable treatment.
- The isolated prison environment, like the hospital environment, is very well suited to the treatment of offenders.
- Therapists and counsellors can provide treatment services in prisons.
- Offenders can be detained by means of indefinite sentences until they have in the opinion of professional correctional staff been cured or rehabilitated.

Your presentation should also include the reasons why the medical model is or is not acceptable.

ACTIVITY (2) 4:5

Focus your explanation on both negative and positive reactions.

ACTIVITY (2) 4:6

Explain the following models:

- the (modified) medical model
- the adaptation model
- the reintegration model

ACTIVITY (2) 4:7

No feedback

2.4.11 FEEDBACK ON SELF-ASSESSMENT QUESTIONS

(1) Refer in your answer to the following:

- Punishment has inherent qualities that can contribute to the rehabilitation of offenders.
  - (a) It makes offenders open to moral influences with a view to stimulating them to change.
  - (b) It helps offenders to gain insight and understand that criminal behaviour is wrong.
- Certain kinds of punishment, such as imprisonment, create a framework for the application of development programmes and rehabilitation services.
- In this way, offenders are given an opportunity to change their behaviour by means of treatment.

(2) You should have mentioned the following:

- The whole point of the concept is change.
- This involves changes to an offender's outlook, attitude and behaviour.
- The offender must come to realise that the criminal behaviour was wrong.
- Rehabilitation and remorse must go hand in hand.
- A genuine wish to be different must develop.
- Rehabilitation is a process.
- Provide a conclusion.

(3) Refer in your essay to the following:

- points of departure, such as that offenders are "sick" rather than wicked
- the analogy between criminal behaviour and a medical illness
- reasons for the acceptability of the medical model in the first half of the 20th century
- factors that contributed to the medical model and rehabilitation becoming discredited

(4) Mention the following:

- Give the reasons why the philosophy was reaffirmed.
- Explain the objective of the modern philosophy of rehabilitation.
- Discuss the expansion of the medical model as the foundation of the theory.
- Mention the acceptance of the principles of the adaptation model.
- Name the points of departure of the reintegration model.
- Include in your answer our remarks on the rehabilitation debate from the conclusion to the study unit.

(5) Option 3
(6) Option 4
(7) Option 2
(8) Option 5
(9) Option 3
(10) Option 1

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Theme 3

THE DISPOSITION OF OFFENDERS: A CRIMINOLOGICAL APPROACH

Study unit 3.1 Forms of imprisonment

Study unit 3.2 Correctional supervision as a form of punishment

Study unit 3.3 Non-custodial forms of punishment

Study unit 3.4 Critical sentencing issues

INTRODUCTION

South Africa is plagued by crime. Therefore we are only too happy when an offender is convicted. However, the conviction is far from the end of the story, as sentencing is often one of the most difficult parts of the adjudication process. Punishment has various objectives, but ultimately we want a safer society. To obtain that, a suitable sentence must be imposed. Precisely what a suitable sentence is will be determined by various factors in each individual case. At all times, it is the specific offender who has committed the specific crime in the specific circumstances who must be punished. Each individual case must receive the sentencing official's personal attention, and the generalisation of punishment must always be avoided. To satisfy these requirements, appropriate knowledge of the individual offender, crime and circumstances is indispensable.

Since it is of paramount importance to know and understand the different forms of punishment, we investigate the disposition of offenders using a criminological approach.

We pay attention to the various forms of imprisonment, correctional supervision as a form of punishment, non-custodial forms of punishment, and relevant and related aspects like overpopulation, minimum sentencing and the death penalty.

Note that the entire sentencing process must be based on the principle of "justice"; in this way, the presiding officer arrives at an appropriate and effective sentence. As students of criminology you are required to understand the disposition of offenders from a criminological point of view. This makes it necessary to pay attention to various forms of punishment.

STUDY UNIT 3.1

Forms of imprisonment

Imprisonment as a type of sentence	Different forms of imprisonment	Advantages of imprisonment	Disadvantages of imprisonment

CONTENTS

3.1.1 Introduction
3.1.2 Key concepts
3.1.3 Imprisonment as a type of sentence
3.1.4 Different forms of imprisonment
  3.1.4.1 "Ordinary" imprisonment
  3.1.4.2 Life imprisonment
  3.1.4.3 Periodic imprisonment
  3.1.4.4 The indeterminate sentence (declaring a person a habitual criminal)
  3.1.4.5 Imprisonment where the offender is released under correctional supervision
3.1.5 Advantages of imprisonment
3.1.6 Disadvantages of imprisonment
3.1.7 Summary
3.1.8 Self-assessment questions
3.1.9 Feedback on self-assessment questions



LEARNING OUTCOMES

When you have completed this study unit you will be able to do the following:

- Discuss imprisonment as a type of sentence.
- Define and elaborate on the different forms of imprisonment.
- Explain the advantages and disadvantages related to imprisonment.

Activity

What is your view regarding imprisonment as punishment? Do you believe that offenders should be punished through imprisonment? What about fines? Do they serve a punitive purpose?

3.1.1 INTRODUCTION

Imprisonment as a form of punishment is often debated. On the one hand there are those in favour of imprisonment, believing that it is the best sentence in most cases as it serves to protect society and also to punish the offender. In contrast to this view, there are those who question the value of imprisonment, and would reserve it only for extreme cases where no other suitable punishment can be given. Thus the question remains: imprisonment or no imprisonment? This question will obviously be answered differently in each individual case. Since the Constitutional Court has found the death penalty to be unconstitutional, imprisonment is the most severe type of sentence left. Nevertheless, prisons are overfull already and prisoners are released on the basis of the "burst principle" if the prison can hold no more prisoners, it has to "burst open" and prisoners are released.

Courts have become more creative in investigating sentencing options, for instance suspending sentences of imprisonment on condition that the accused do something in restitution to the community which they harmed in the first place. The legislature has stepped in to create brand new types of punishment, such as correctional supervision, to which we shall return presently.

In view of the complexity of this type of sentence, it is necessary to understand its nature and implications, so we will discuss it in more detail.

3.1.2 KEY CONCEPTS

Imprisonment: It is a form of punishment that interferes with the individual's freedom by restricting free association with others.

Ordinary imprisonment: A person is sent to a prison by a court of law.

Suspended sentence: A person is punished with a term of imprisonment, but it is suspended under certain conditions. If the conditions are broken, the offender will go to prison.

Life imprisonment: This is imprisonment for at least 20 years. After 20 years the offender will have the opportunity to apply for parole, which will not necessarily be granted.

Periodic imprisonment: A type of imprisonment where the offenders serve their sentences over a period of time, maintaining normal work and family responsibilities; it is also known as weekend imprisonment.

Indeterminate sentence: This is a sentence imposed on hardened criminals. The length of the sentence is not determined, but it must be longer than seven years.

3.1.3 IMPRISONMENT AS A TYPE OF SENTENCE

Imprisonment is a form of punishment that interferes with the individual's freedom by restricting him or her from freely associating with people.

Byrne (in Conklin, 1995:465) quotes the words of a priest to illustrate the rationale for imprisonment: "I am concerned that people who assault human lives should be safely contained like nuclear waste so their destruction in our midst will stop". Other criminologists also indicate the elimination of the offender's capacity to commit crime. Viewed proactively, imprisonment is seen as preventing further criminal activities. Imprisonment, in this context, is based on the principle of crime prevention as its aim is ultimately to prevent further crimes and to protect society. Imprisonment therefore serves more than one punishment objective at the same time.

However, those opposed to imprisonment are of the opinion that it has little value, and they indicate that prisons do not lend themselves to the rehabilitation of offenders. They argue that once the offenders are released from prison, they will resort to a life of crime as was been no rehabilitation. Others even feel more strongly, and I am sure that you have heard people saying that imprisonment is a waste of the taxpayers' money, and prison is a university for criminals.

Activity

- What is your view on the above-mentioned arguments?
- Even in our courts there is no consensus on the path that should be followed, and the guidance given by the courts is ambivalent.



ACTIVITY (3) 1.1

Should the overcrowding in South African prisons play a role in the decision to imprison or not to imprison?

Compare the judgments of the following cases: *S v Scheepers* and *S v Holder*. In *Scheepers* the court tried to lay down some principles and pointed out the overcrowding of prisons. In the *Holder* case it indicated that the current prison population should have nothing to do with the decision to imprison or not to imprison.

3.1.4 DIFFERENT FORMS OF IMPRISONMENT

There is a wide spectrum of types of imprisonment, ranging from "detention until the rising of the court", which means that the accused will have to stay in court only until the court starts the next case, to so-called "life imprisonment". The following are the various forms of imprisonment which are provided for in terms of the South African law of criminal procedure:

- "ordinary" imprisonment
- periodic imprisonment
- the indeterminate sentence, or declaration as an habitual criminal

A discussion of the various forms of imprisonment will give you an idea of the advantages and drawbacks of the different types of imprisonment.

3.1.4.1 "Ordinary" imprisonment

The sentencing of convicted persons to ordinary imprisonment is one of the most common forms of punishment imposed in South Africa. Normally, the courts have discretion as to whether or not to impose such a sentence. The following general principles are applicable when imposing a sentence of ordinary imprisonment:

- The sentence must be permissible in terms of either legislation or the common law.
- The sentence (term of imprisonment) must not be so severe that no reasonable court would impose it.
- A sentence of imprisonment must not be imposed lightly, or without considering all the consequences.
- When imposing a sentence of imprisonment, the sentencing official must ensure that all the objectives of punishment have been carefully considered.
- The sentencing official must guard against sentencing a person to short-term imprisonment in view of its negative consequences.

- In the case of a first offender, imprisonment is not a desirable form of punishment. Instead, the court should consider an alternative form of punishment, such as a fine.
- Where possible, juvenile offenders should not be sentenced to imprisonment because of the negative effect which such a sentence can have on their future.
- When deciding whether to impose a sentence of imprisonment, the presiding officer must carefully consider the offender's health.
- The advanced age of an offender will also play a role when determining whether or not to impose a sentence of imprisonment.



NOTE

No court may impose a term of imprisonment that is shorter than four days, except where the sentence indicates that the accused is apprehended until the court rises.

For the sake of detail, it is also necessary to briefly discuss suspended sentences.

Section 297(1)(b) of the Criminal Procedure Act 51 of 1977 determines as follows:

> (1) Where a court convicts a person of any offence, other than an offence in respect of which any law prescribes a minimum punishment, the court may in its discretion – (b) pass sentence but order the operation of the whole or any part thereof to be suspended for a period not exceeding five years on any condition referred to in paragraph (a)(i) which the court may specify in the order ... .

This type of sentence serves the purpose of individual deterrence. During the five years of suspension the offenders must be aware of the sword hanging over their heads. If they break the condition of suspension, which usually comes down to another conviction for the same type of offence, they will not only receive a fresh sentence for the second offence, but will also have the suspended sentence put into operation on top of that. This is usually done at a second hearing, where the prosecutor produces evidence of the second conviction and asks the court to put the suspended sentence into operation.

Courts have the discretion to decide whether a suspended sentence should be put into operation. The courts may also use this discretion to simply leave the condition intact as it stands, to change the condition of suspension, or to further suspend the sentence for a certain period. If the latter course is followed, the meter usually starts running again from the beginning.

Another advantage of a suspended sentence, or even a postponed sentence (also dealt with in section 297), is the fact that very useful conditions may be coupled to the sentence. These can exceed the mere prohibition of a repetition of the offence, and may include more positive conditions like restitution and community service.



ACTIVITY (3) 1.2

Do you think that community service is always a positive condition of suspension?

Community service might be a positive condition of suspension, but it has sometimes been imposed in a misguided fashion. Thus, in *S v Mbele* a possessor of "Barberton", a prohibited concoction, was sentenced to six months' imprisonment, suspended on condition that she swept her yard every day for 12 months and swept her church for 26 Sundays. This sentence was set aside by the reviewing judge, since he felt that third parties involved should have been consulted as to whether these services were welcome. In *S v Bock* and *S v Ferreira*

service in a hospital was required, and this condition was deemed to be more acceptable. The writing of a composition was imposed as a condition in *S v Esterhuizen* and *S v Jones*. This type of condition was also not seen as very effective, as the judge pointed out in the latter case, since it was very difficult to set a meaningful standard for such compositions and even more difficult to ensure that the accused person had done the research and writing himself. Even more embarrassing was the case of *S v Mbola*, where the composition had to set out the "harmful effects of dagga". Kroon J, on review, scrapped this condition since he felt that such a composition might even set out to prove that dagga had no harmful effects and should be legalised! Finally, the court should also not be overambitious in framing these conditions. In *S v Bezuidenhout* a way of life was prescribed in 14 commandments which organised the life of the accused in almost every respect, from place of residence to birth control (the accused had 11 children).

Despite the stormy history of community-serving conditions of suspension, the Appellate Division has reaffirmed the validity of conditions like these. In *S v Van Vuuren*, Van den Heever JA and Corbett CJ altered a sentence of five years, of which four years had been suspended, for the theft of R73 000. Van den Heever suspended the whole sentence on condition that the accused perform community service at the "Silwer Jare Ouetehuis" in Bethal in terms of subsections 297(1)(a)(i)(cc) and 297(1)(b) of the Criminal Procedure Act.

3.1.4.2 Life imprisonment

This is the most severe form of punishment in South Africa and can only be given by a high court. It is basically an indeterminate sentence as, at the time of sentencing, it is unknown how long the sentence will be.

Despite the name, very few people actually serve the equivalent of a normal lifetime in gaol. Even though in the case of *S v Makwanyana* the Constitutional Court made much of this type of imprisonment as an equally effective deterrent as the death penalty, the constitutional status of life imprisonment itself is still in doubt.

The Criminal Procedure Act 51 of 1977 makes provision for this type of imprisonment in section 276(1)(b), which provides for:

> (b) imprisonment, including imprisonment for life or imprisonment for an indefinite period as referred to in section 286B(1)

In the case of *S v Tuhadeleni* the trial judge actually used the words "imprisonment for the rest of their natural lives", but the Appellate Division held that this was not intended to exclude the provisions of the Prisons Act 8 of 1959 dealing with the earlier release of prisoners on "parole" or "probation", even though these prisoners might be serving "life" sentences. In fact, section 64 of the Prisons Act was amended at the same time as the statutory creation of life imprisonment by an amendment to the Criminal Procedure Act. The first-mentioned amendment provides for the release of "a prisoner upon whom a life sentence has been imposed", which might be "either unconditionally or on probation or on parole as he may direct".

The result, in practice, has been that judges impose lengthy periods of imprisonment and, on multiple counts, do not let these periods run concurrently, but one after the other. In this way it is relatively easy to ensure a doubling or tripling of the period of imprisonment. Another ploy is to make a special recommendation to the prison authorities as part of the sentence that this particular accused not be released too early on parole or probation.

3.1.4.3 Periodic imprisonment

Periodic imprisonment is the second form of imprisonment which the trial court may impose. Periodic imprisonment is a competent (permissible) sentence in respect of any crime, except for crimes where a minimum sentence is prescribed by law. Offenders serve their sentences in periods of time (between 24 and 48 hours at a time), and are released after this period to resume their normal work and family responsibilities. These periods of imprisonment usually fall over weekends.

Periodic imprisonment is often referred to as "weekend imprisonment" and is often an option where professionals and high-earning workers are the offenders.

The punishment is usually expressed in hours.

The duration of periodic imprisonment to which an offender may be sentenced can vary from 100 to 2 000 hours. The sentence is served intermittently over periods of at least 24 hours, unless the work circumstances of the person so sentenced dictate that shorter periods be prescribed. The following general principles must be borne in mind when imposing a sentence of periodic imprisonment:

- A sentence of periodic imprisonment may not be linked to any other form of punishment.
- It may, however, be suspended either fully or in part, with any conditions being linked to such suspended sentence.
- The court must make detailed enquiries about the accused's personal circumstances.
- Periodic imprisonment is an appropriate sentence in cases where the accused will retain his or her job, and will therefore be able to fulfil his or her obligations towards his or her family.
- A sentence of periodic imprisonment may be carried out over weekends, even where the accused is unemployed.
- Periodic imprisonment is an appropriate punishment for first and second offenders, but must, at all times, be considered on the merits of each particular case.

As with suspended imprisonment, periodical imprisonment may not be imposed if the accused has been convicted of an offence which carries a minimum prison sentence – see section 285(1) of the Criminal Procedure Act. (This type of penal provision is usually an indication that the crime is not of a trivial nature.)

The Viljoen Commission was very positive about this form of punishment since it serves most of the purposes of punishment. The Commission (1971) put it as follows:

> The shock of having to serve a sentence of periodical imprisonment often has a very beneficial effect on the offender. It satisfies the requirement of retribution, serves as an effective deterrent in that it usually has a very sanguine deterrent effect on the offender himself and serves as a telling deterrent to others. It also serves to protect the community because while in custody during the period the offender would be inclined to commit offences, he is prevented from indulging in his inclinations.
>
> Periodic imprisonment is thus a form of punishment that has the fewest negative and disruptive effects on the work and family life of the offender. The element of deterrence is still present, but the work and family life is still intact. The offender is reminded during these periods about the consequences of his actions.

3.1.4.4 The indeterminate sentence (declaring a person a habitual criminal)

This is an umbrella term for a number of special types of imprisonment. These are determinate in that a maximum and a minimum period is laid down in the Criminal Procedure Act for each type of imprisonment, but indeterminate in the sense that the

release of the prisoner remains in the hands of the prison authorities who decided about this on the basis of his behaviour in prison. The fact that the real length of the term of imprisonment is thus decided by a branch of the administration instead of by the court itself should suit the school of social scientists who feel that one should "treat" rather than "punish" offenders.

An indeterminate sentence is imposed in the case of hardened criminals. Normally, offenders cannot be declared habitual criminals unless they have previously been warned that an indeterminate sentence will be imposed if they are found guilty of a crime in future. A person who is declared a habitual criminal is detained in prison for as long as the President of the country pleases, but this must be at least for seven years (Geldenhuys & Joubert, 1996). The following requirements must be complied with before a person can be declared a habitual criminal:

- The offender concerned must be older than 18 years.
- The offender must habitually commit crimes.
- The offender must be a person against whom the community needs to be protected.

Section 286 of the Criminal Procedure Act 51 of 1977 makes provision for declaration as a habitual criminal in lieu of other punishment if the court "is satisfied that the said person habitually commits offences and that the community should be protected against him". Section 38 of the Correctional Services Act 8 of 1959 provides that such a person may be detained "at the State President's pleasure" (which again reveals the treatment model underlying this type of sentence). The detention has to be for a minimum period of seven years.

Another type of indeterminate sentence is that of declaring the offender to be a dangerous offender. This is a comparatively recent phenomenon, created by the Criminal Matters Amendment Act 116 of 1993, which amended the Criminal Procedure Act 51 of 1977 with the insertion of sections 286A and 286B.

The first section deals with the declaration of certain persons to be dangerous criminals. This will usually happen after conviction by a regional or higher court. It will also only happen after a psychiatric examination and report (which, to my mind, shows that this article is mainly to be used in respect of psychopaths and other people with mental disorders).

The second section provides for imprisonment of these dangerous criminals for an indeterminate period. Section 286B(1)(b) provides that the court should determine a period, not exceeding its own jurisdiction, after which the accused should be brought before the court again. The court then has to determine whether he or she is still dangerous enough to pose a threat, in which case the punishment may be re-imposed. It may also be converted to correctional supervision, which is discussed in section 3.2. Finally, the court may decide to release him or her, with or without conditions attached to the release.

Obviously, the aim of prevention is paramount in this case, because the offender is so dangerous. Another advantage is that the final decision to release the prisoner is no longer in the hands of the administration, but in the hands of the judicial arm of government.

3.1.4.5 Imprisonment where the offender is released under correctional supervision

Correctional supervision has an important function, and is discussed in some depth in the next study unit. For the sake of clarity, we will just investigate here what the normal route entails in practice.

When a sentenced person arrives at the prison, it is ideal to start with the evaluation of that person as soon as possible. The parole board must advise the commissioner of correctional services as to the desirability of releasing the prisoner under correctional supervision. If someone does not comply with the parole conditions, that person can be arrested and detained to serve the remainder of the sentence.

3.1.5 ADVANTAGES OF IMPRISONMENT

Even though there is a lot of scepticism surrounding the value of imprisonment, it can be said to have certain advantages. For some people it has deterrent value, and it does serve to protect the community, as well as to punish the offender for the period of imprisonment. There are serious question marks over the reality of rehabilitation inside our South African prisons, but some people are indeed reformed. In some instances, therefore, imprisonment also has a proactive function.

3.1.6 DISADVANTAGES OF IMPRISONMENT

Imprisonment is a very expensive form of punishment and it costs the taxpayers millions of rand each year. As mentioned above, the likelihood of rehabilitation is slim. Consequently, many offenders just return to a life of crime after being released from prison.

3.1.7 SUMMARY

Imprisonment as a sentence is the subject of much criticism. However, it is necessary to impose this sentence in certain circumstances. For this reason, it is important to understand the different forms of imprisonment from a criminological perspective, as well as their advantages and disadvantages.

3.1.8 SELF-ASSESSMENT QUESTIONS

(1) Discuss imprisonment as a type of sentence. (5)
(2) Discuss the different forms of imprisonment. (25)
(3) Give your view on the value of imprisonment by referring to the advantages as well as the disadvantages of imprisonment. (10)

3.1.9 FEEDBACK ON SELF-ASSESSMENT QUESTIONS

(1) See 3.1.3
(2) See 3.1.4
(3) 3.1.5 and 3.1.6, as well as your own view

STUDY UNIT 3.2

Correctional supervision as a form of punishment

Statutory provision for correctional supervision	Correctional supervision in practice	Categories of correctional supervision	Suitable candidates for correctional supervision	Failure to comply with correctional supervision conditions	A criminological perspective on correctional supervision

CONTENTS

3.2.1 Introduction
3.2.2 Key concepts
3.2.3 Statutory provision for correctional supervision
3.2.4 Correctional supervision in practice
3.2.5 Categories of correctional supervision
3.2.6 Suitable candidates for correctional supervision
3.2.7 Failure to comply with correctional supervision conditions
3.2.8 A criminological perspective on correctional supervision
3.2.9 Summary
3.2.10 Self-assessment questions
3.2.11 Feedback on self-assessment questions



LEARNING OUTCOMES

After completing this study unit you will be able to do the following:

- Indicate the statutory provision for correctional supervision.
- Discuss correctional supervision in practice.
- Elaborate on the different categories of correctional supervision.
- Indicate who can be suitable candidates for correctional supervision.
- Discuss the consequences of failure to comply with correctional supervision conditions.
- Provide a criminological perspective on correctional supervision.

3.2.1 INTRODUCTION

Correctional supervision actually does not entail a "sentence" as such, but is rather a collective name for a wide variety of measures whose single common characteristic is that they are implemented outside the prison. The most significant aspect of correctional supervision is that it is a unique sentencing option that accomplishes punishment without imprisonment. It is a community-based punishment, in other words it is performed in the midst of the community and with the cooperation of the community. It involves a measure of deprivation of freedom, but without imprisonment.

The Department of Correctional Services has amended the Correctional Services Act, Act 8 of 1959 to "ensure that the total sentence as imposed by the court will henceforth be served by the prisoner in one form or another". This is where correctional supervision can be utilised, although it must be remembered that this type of punishment is much wider and may be imposed directly in lieu of any other sentence. Correctional supervision is truly a valuable tool in the field of sentencing, and an investigation is necessary to indicate how it can be utilised in practice. It goes with the transformation of the old Department of Prisons to the new-look Department of Correctional Services, where the work of the warder is not restricted to the confined spaces of prison, but where he or she may also be called upon to supervise the offender in the community.

3.2.2 KEY CONCEPT

Correctional supervision: This is a unique sentencing option, provided for by the Correctional Services and Supervision Matter Amendment Act 122 of 1991, which accomplishes punishment without imprisonment. Thus the sentence is served in the community.

3.2.3 STATUTORY PROVISION FOR CORRECTIONAL SUPERVISION

The Correctional Services Act 8 of 1959 was specially amended by the Correctional Services and Supervision Matter Amendment Act 122 of 1991 to make provision for this type of sentence:

> 84E Application of correctional supervision (s 84E inserted by s 28 of Act 122 of 1991)
>
> 1 In the application of correctional supervision the Commissioner may, subject to the provisions of subsection (2) and any condition determined by the court, integrate any probationer with any appropriate rehabilitation or other programme established by himself, a social welfare authority or any other body to provide for
>
> a. the observance of and supervision over probationers;
> b. the performance of community or other service by probationers;
> c. the payment of compensation to victims, with due regard to any order which the court may have issued in that regard;
> d. the reintegration of probationers with the community;
> e. the rehabilitation of probationers;
> f. the collection of funds, including the collection of costs from probationers in the execution of the punishment;
> g. any other matter which he may consider necessary or expedient.
>
> 2 When the Commissioner integrates a probationer with a programme established by any social welfare authority or other body, it shall take place with the concurrence of that authority or body, as the case may be.

3.2.4 CORRECTIONAL SUPERVISION IN PRACTICE

Terblanche (date) sets out the practical procedure to be followed in implementing this type of punishment. He distinguishes between five different types of correctional supervision:

(i) In terms of the Criminal Procedure Act 51 of 1977, the public prosecutor may, if the court has not yet reached a verdict, suspend proceedings, and have the offender "diverted" from the criminal justice process by having him or her put under correctional supervision. In order to do this the prosecutor has to have a probation or correctional officer's report; he or she has to consult with the investigating officer and the correctional officer; and he or she has to use discretion as to whether correctional supervision is the appropriate measure under the circumstances. The accused must admit his or her guilt and consent to the procedure as well as to the length of the period of supervision. This procedure is almost "pre-probation" in the sense that the accused need not even be convicted for the procedure to take effect.

(ii) In terms of section 276(1)(b) of the Criminal Procedure Act 51 of 1977, the court may, after conviction, impose a period of correctional supervision as sentence. Again the court needs a probation or correctional officer's report on the accused and must restrict the period of supervision to a maximum of three years. Terblanche feels that a period of less than six months will not do much good. This procedure would seem to equate to the old probation, especially since the court can, according to section 84E(1) of the Correctional Services Act 8 of 1959, impose conditions that are coupled with the correctional supervision.

(iii) In terms of section 276(1)(i) of the Criminal Procedure Act 51 of 1977, the court may impose imprisonment which lends the Commissioner of Correctional Services discretion to place the offender under correctional supervision later if necessary. According to s 276A(2) of the same Act, this type of imprisonment may be imposed for any crime, but may not exceed five years.

(iv) In terms of section 276A(3) of the Criminal Procedure Act 51 of 1977, the Commissioner may refer a prisoner back to the sentencing court for reconsideration of sentence, provided that the balance of imprisonment which remains to be served is less than five years. The court may simply confirm its original sentence or may change it to another competent verdict, including correctional supervision, which seems to be the whole object of the exercise.

(v) Finally, section 297(1)(a)(i)(ccA) of the Criminal Procedure Act 51 of 1977 provides that a suspended or postponed sentence may be conditional on the fact that the accused submit himself or herself to correctional supervision.

In practice, correctional supervision may be coupled with:

- Community service: Community service is service performed in the interests of the community and without any remuneration. It may comprise clearing and cleaning pavements or work in hospitals or other public institutions. Normally 16 hours' community service per month is demanded for the purposes of correctional supervision.
- House arrest: House arrest is also referred to as home detention. The offender is expected to remain at home. Exceptions are usually made to give the person under supervision opportunity to go to work, do shopping and attend religious gatherings.
- Rehabilitation programmes: It may be suggested that people who commit alcohol- or drug-related crimes take part in a rehabilitation programme.
- Victim compensation: Offenders are ordered to compensate their victims in some way.

Correctional supervision may not be imposed unless a probation officer, correctional officer or forensic criminologist's report has first been presented and considered. Such a report should set out clearly why correctional supervision is recommended, as well as the proposed programmes into which the offender is expected to be integrated. In their decision to impose correctional supervision, sentencing officials will consequently rely, to a great extent, on such reports and the programmes indicated in them. Correctional supervision may not be imposed for a period exceeding three years.

3.2.5 CATEGORIES OF CORRECTIONAL SUPERVISION

(a) Intensive correctional supervision may include house arrest; restriction of movement or the use of alcohol; participation in correctional programmes; prohibition of contact with unsuitable persons; reparation to the victim; and community service.
(b) Medium correctional supervision will contain the same programmes and conditions mentioned in the previous paragraph, but will be accompanied by more flexible monitoring and restrictions.
(c) Minimum correctional supervision will normally be the final part of the period of supervision, when the offenders would hopefully "have successfully completed their correctional programmes, have repaid the victim, display stable employment habits and give the impression that they will desist from committing further crimes in the future".

3.2.6 SUITABLE CANDIDATES FOR CORRECTIONAL SUPERVISION

The criterion applied by the courts when imposing correctional supervision as punishment is that the offender must need supervision and can benefit from it. It is also intended for cases where the offender cannot pay a substantial fine, but still does not have to be sentenced to imprisonment.

Other people for whom it may also be suitable vary from first offenders without criminal tendencies who offend once to people who repeatedly commit crime, but whose work, or domestic or other circumstances, makes them suitable candidates. Juvenile offenders also qualify, especially in cases where they cannot afford a fine.

A degree of responsibility and steadiness is expected of the offender. It is senseless to impose correctional supervision on someone who drifts around and has no stability in life. At the same time, however, someone who lives in a socially unfriendly and dangerous environment (neighbourhood) should not for that reason be deprived of the advantages that correctional supervision offers.

Crimes for which treatment or supervision is particularly suitable, such as possession of drugs, criminal activity with an immoral element and crimes for which victims have to be compensated over a period, can most appropriately be punished with correctional supervision.

3.2.7 FAILURE TO COMPLY WITH CORRECTIONAL SUPERVISION CONDITIONS

Correctional supervision is conducted by the staff of the Department of Correctional Services. These officials will therefore monitor the actions (behaviour) of the cases under supervision and determine whether they are complying with the conditions of the sentence. Should these cases fail to fulfil the conditions of their correctional supervision, action will be taken against them in one of the following ways: arrest, detention and, if necessary, appearance in court for review of their sentence.

In cases where these people are referred back to the court, the court must decide whether they are still suitable for correctional supervision. This finding must be based on

the substantiated recommendation of a parole officer, the Commissioner or a representative of the Commissioner. Should it be found that the person concerned is not suitable for correctional supervision, the sentence is reconsidered and the court may impose any other sentence.

3.2.8 A CRIMINOLOGICAL PERSPECTIVE ON CORRECTIONAL SUPERVISION

Naudé (date) is optimistic about the future of this sentencing option, since it will "bring South Africa more into line with international standards and community perceptions with regard to community based sentencing options in dealing with less serious offenders" (Naudé date: page). She also feels that it should be popular in African countries which traditionally disapprove of imprisonment (which is quite foreign to African culture), but favour sentences that involve restoration, restitution and personal reparation. (To this one might add the strong feeling of community which permeates African society, in contrast to the individualistic "every man for himself" philosophy which is one of the less attractive features of Western thought.) The system of correctional supervision hopes to address the personnel problem by considerably widening the categories of supervisor.

One way of doing this would be to make the offender's neighbour his or her keeper, involving the local community to help look after members who are not able to look after themselves. In addition, efforts are also being made to enlist the support of the community in re-assimilating the offender into the community and to make the latter co-responsible for the rehabilitation of the offender. Today, community-based sentences are receiving greater attention internationally than was the case a decade or so ago. By implementing corrective supervision as a community-based punishment, South Africa has become one of the leading countries in this sphere.

3.2.9 SUMMARY

Correctional supervision is a valuable tool in the field of punishment. In practice correctional supervision may also be coupled with community service, house arrest, rehabilitation programmes and victim compensation. Different levels of correctional supervision can be identified, and strategies need to be put in place to ensure maximum benefit from this type of sentence. It must be remembered that not everyone is suitable for correctional supervision, and candidates should be considered carefully. In spite of many challenges, it remains a positive development and a valuable tool in the field of sentencing.

3.2.10 SELF-ASSESSMENT QUESTIONS

(1) Which Act makes provision for correctional supervision? (2)
(2) Discuss the application of correctional supervision in practice. (12)
(3) Elaborate on the categories of correctional supervision. (6)
(4) Who can be regarded as suitable candidates for correctional supervision? (5)

3.2.11 FEEDBACK ON SELF-ASSESSMENT QUESTIONS

(1) See 3.2.3
(2) See 3.2.4
(3) See 3.2.5
(4) See 3.2.6

STUDY UNIT 3.3

Non-custodial forms of punishment

Fines as non-custodial punishment	General principles underlying the imposition of a fine	Warning and release	Compensation order	Community-based sentences

CONTENTS

3.3.1 Introduction
3.3.2 Key concepts
3.3.3 Fines as non-custodial punishment
3.3.4 General principles underlying the imposition of a fine
3.3.5 Warning and release
3.3.6 Compensation order
3.3.7 Community-based sentences
  3.3.7.1 How can the community benefit from this type of sentence?
  3.3.7.2 General principles underlying the imposition of community-based sentences
  3.3.7.3 Scope of community service sentences
3.3.8 Summary
3.3.9 Self-assessment questions
3.3.10 Feedback on self-assessment questions



LEARNING OUTCOMES

When you have completed this study unit you will be able to do the following:

- Define the relevant key concepts.
- Illustrate your understanding of the nature of a fine.
- Discuss the principles underlying the imposition of a fine.
- Discuss other forms of non-custodial sentences.
- Indicate how the community can benefit from non-custodial sentences.
- Discuss community-based sentences in detail.

3.3.1 INTRODUCTION

Crimes committed differ in their nature. Some are characterised by extreme violence and others are committed merely to survive. All crimes deserve punishment, but not all offenders need to go to prison: imprisonment has many negative consequences. It is in view of this that non-custodial punishment can play a valuable role, and we therefore consider various forms of non-custodial punishment.

3.3.2 KEY CONCEPTS

Fine: A fine may be defined as a monetary sanction (or loss) which the state, or a duly authorised local authority, may at its discretion impose on an accused for the commission of any offence for which he or she is responsible.

Community-based sentence: A community-based sentence may be defined as a court order directing the offender to render some or other form of service for the benefit of the community.

3.3.3 FINES AS NON-CUSTODIAL PUNISHMENT

A fine is a type of punishment that results in the loss of possessions. A fine thus entails a monetary loss for the accused, and a monetary gain for the particular authority or community. Generally, the imposition of a fine as a form of punishment enjoys considerable international acceptance, chiefly because of its benefits. In most cases, fines are easy to administer. In addition, they do not entail the negative consequences for the offender and the community that imprisonment does, and they are frequently related to retribution in that the offender is made to pay for his or her crime.

3.3.4 GENERAL PRINCIPLES UNDERLYING THE IMPOSITION OF A FINE

The following general principles are applicable to the imposition of a fine:

- Before a fine is imposed, the presiding officer must consider all relevant factors regarding the desirability or otherwise of imposing a fine.
- The ability of the offender to pay the fine must be carefully determined before such a sentence is imposed. There is no point, for instance, in sentencing a juvenile to pay a fine as it is usually the parents who end up paying it.
- The court must exercise its discretion in each particular case. This means that there should be no fixed tariff or scale for specific offences.
- In the case of a first offender, the imposition of a fine is in many cases a sound alternative to imprisonment.



NOTE

In Germany about 83% of all sentences are fines, as a result of a deliberate policy move away from short-term imprisonment.

ACTIVITY (3) 3.1

On the one hand, it might be argued that fines are not tainted with the (wrong) idea of retribution as revenge or as something which might injure a person's dignity. On the other hand, some might see the fine as too anaemic to serve as "proper" punishment in the moral sense, since it is only a kind of "tax" on transgressions. The size of a fine is seen as crucial to its success. It is no use offering the possibility of paying a fine when the amount is so high that the accused, in his or her special financial circumstances, has no chance of paying and therefore has to be imprisoned.

One of the problems is that a fine is almost invariably accompanied by an alternative of imprisonment, which involves a second problem of amount. The Viljoen Commission (1971:115) suggested that in the case of crimes of relatively small importance, there should be no alternative added, even though this might entail a risk that the fine will never be paid:

> It is not suggested that no steps be taken to recover the fines. It is suggested that only such steps as would not be feasible in terms of time and money spent should be avoided. If the small fine and the failure to enforce it should encourage offenders to offend the second time, the fine imposed on the first occasion could be recovered if they should fall into the hands of the police because of the second transgression.

At the same time, in certain rare instances both a fine and imprisonment are imposed, usually to punish an offender whose crime is so serious that a fine by itself would not be enough, but who has also profited financially to such an extent that a heavy fine is indicated.

3.3.5 WARNING AND RELEASE

The court may discharge any offender after a simple warning. This is the lightest sentence allowed by law. Although the discharge has the effect of an acquittal, it is still recorded as a previous conviction (Geldenhuys & Joubert, 1996:271).

Courts are authorised to postpone the imposition of a sentence. This may be done with or without conditions. In that case, the offenders are released, but they may be ordered to appear before the court again at a later date. The court can postpone the imposition of a sentence for a maximum period of five years and release the offender unconditionally or on one or more conditions.

3.3.6 COMPENSATION ORDER

The Criminal Procedure Act 51 of 1977 makes provision in various ways for payment of damages to the victim or the victim's family. Among other things, the Act stipulates that any convicted person, who as a result of his or her crime caused damage to or the loss of the property of another, may under certain circumstances be ordered to compensate the victim. Such an order to pay damages may only be awarded for direct loss or damage, and has the effect of a civil sentence.

3.3.7 COMMUNITY-BASED SENTENCES

Community-based sentences are sentences that are served in the community. This option has received much more attention recently than in the past, which can partly be attributed

to the fact that South Africa's prisons are overfull; it has also been realised that imprisonment is not necessarily the best option in all circumstances. When a person is sentenced to imprisonment, he or she will (in most cases) be released after the sentence has been served. At that time, he or she will have to be reintegrated into the community, after the breakage in his or her social and other relationships. This sometimes poses a great problem, as ex-offenders often find themselves isolated and in many cases they return to their life of crime. This situation is prevented by community-based sentences, as the sentence is served in the community. All the offender's relationships can remain intact, and society can also benefit from this type of sentence.

3.3.7.1 How can the community benefit from this type of sentence?

In *S v Khumalo* 1984 (4) SA 642 (W) Judge Goldstone expressed the belief that, in the appropriate circumstances, the community would most definitely be in favour of such an order, and for the following reasons:

- By means of such a sentence, the offender is kept out of prison. This enables the offender to continue with his or her daily life, and, at the same time, he or she is not exposed to the negative consequences of imprisonment.
- The offender can continue to live with his or her family, and to support it. As a result, not only the most important family ties are maintained, but the state and family members are not required to maintain dependent members of the family, which would be the case if the offender were to be imprisoned.
- The fact that the offender is required to render a service to the community free of charge for the crime which he or she committed against the community will to an extent satisfy the community that law and justice have prevailed.
- The community benefits directly from the service which is rendered by the offender.

3.3.7.2 General principles underlying the imposition of community-based sentences

The following general principles are applicable in cases where community-based sentences are imposed:

- The offender who is sentenced to community service must be 15 years of age or older.
- The community service concerned must be beneficial to the community in general; in other words, it must not be imposed for the benefit of a specific group or a specific individual.
- The conditions in terms of which the service is rendered need not always be related to the crime which has been committed.
- Community service is an appropriate alternative to imprisonment. Such a sentence may also be considered where the offender is not financially capable of paying a fine or of compensating the victim.
- A strict selection process must be employed when considering whether or not to order an offender to render community service. The mere fact that an offender expresses his or her willingness to render such service does not mean that he or she is suitable for community service.

3.3.7.3 Scope of community service sentences

The following provisions are important in the case of community service sentences:

- The minimum period of service is 50 hours per suspended or postponed sentence.
- The period of service for each offender is determined according to the gravity of the crime, the blameworthiness of the offender, the ability of the supervising institution to keep the offender busy, and the work circumstances of the offender.

- In practice, community service sentences are imposed for both serious and less serious offences.

3.3.8 SUMMARY

From the above discussion it is clear that non-custodial sentences have great value, especially against the background of the overpopulation in our prisons, as well as the negative effects of imprisonment. Apart from the factors mentioned, it is also clear that the community can benefit from non-custodial sentences, especially community services where the sentence is served in the community. This also assists with the restoration of order in the community, as the community feels that they are getting something back from the offender.

3.3.9 SELF-ASSESSEMENT QUESTIONS

(1) Define the following concepts:

- fine (2)
- community-based sentence (2)

(2) Discuss the general principles underlying the imposition of a fine. (8)
(3) Discuss community-based sentences in detail. (15)

3.3.10 FEEDBACK ON SELF-ASSESSMENT QUESTIONS

(4) See 3.3.2
(5) See 3.3.4
(6) See 3.3.7

STUDY UNIT 3.4

Critical sentencing issues

Overpopulation in the South African prisons	The death penalty	Compulsory minimum sentences

CONTENTS

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LEARNING OUTCOMES

When you have completed this study unit you will be able to do the following:

- Indicate the extent of prison overcrowding.
- Describe the factors that contribute to prison overcrowding.
- Explain the implications or effect of prison overcrowding.
- Describe strategies for solving or alleviating the problem.
- Provide an overview of the recognised academic arguments surrounding the debate on the death penalty.
- Explain the more popular sociopolitical arguments about the death penalty.
- Discuss the main arguments leading to the Constitutional Court's decision that the death penalty is unconstitutional.
- Discuss the implications and arguments surrounding minimum sentences.

3.4.1 INTRODUCTION

By this time, you will understand that the field of sentencing is very challenging, to say the least. Many principles and guidelines need to be followed to arrive at an appropriate sentence. However, other critical aspects also need to be considered before deciding on a sentence. There are many critical issues that are of importance, but we will focus our attention on three very relevant issues, namely overpopulation in our prisons, the death penalty, and minimum sentences.

3.4.2 KEY CONCEPTS

Prison overcrowding refers to the conditions that arise when the number of prisoners in a particular institution or in the prison system exceeds the capacity of the basic infrastructure. It affects the essence of a correctional institution and can hardly be better summarised than in the following statement by Godfrey, a British criminologist (1996:15):

> [A]n honest answer to the fundamental question 'What kind of business are we in?' admits that we succeed mostly in terms of custody and punishment. Reformative treatment, humanity, decency and justice remain largely unrealised ambitions, despite our Statement of Purpose and fine words about vision, goals and values. It seems that all our ambitions for improvement, and even the most basic requirement – the maintenance of order are vulnerable to the pressures arising from overcrowding.

Let us examine the statement of mission and primary objectives of Correctional Services in South Africa in the light of Godfrey's remark.

3.4.3 OVERPOPULATION IN OUR PRISONS

Prison overcrowding is regarded as a severe problem in the South African correctional environment, and the following conditions are linked to it:

- medical and health problems
- conditions that can impinge on the constitutional principle of humane detention
- The creation of a breeding ground for gang activities and violence
- Safe custody. This includes the classification of prisoners, safety and security and escapes.
- Humane detention and care. Those members of staff who deal with prisoners have to take into account their rights, the maintenance of sound discipline, the physical care of offenders, health services and nutrition.
- Developmental services. Education and training, social services, psychological services, spiritual care and labour are all developmental services.
- Resources. Prison resources include the accommodation of offenders, warder/prisoner relationships, physical facilities for training, the kitchens and hospital facilities.



ACTIVITY (3) 4.1

What do you see as the reasons for our overpopulated prisons?

3.4.3.1 Contributory factors

Criminologists ascribe the problem of prison overcrowding to one or more of the following factors:

- A long-term increase in the overall scope of crime. "One source is a long-term increase in crime rates, arrests, and commitments to prison" (Conklin, 1995:428).
- A wave of serious crime that resulted in sentencing patterns involving long terms of imprisonment (Conklin, 1995:428). In South Africa serious crimes such as rape, serious assault, robbery and car theft have increased every year. The trend continues. Offenders who are found guilty of serious crimes are usually given longer prison sentences.
- A greater focus on crime control and maintenance of law and order. This means that more crimes are solved and more prosecutions are successful, which in turn influences the number of people in prison (Clear & Cole, 1990:293–294).
- The growth in prison accommodation has not kept up with the increase in the number of prison sentences. "Thus, the growth in prison capacity did not keep pace with the increase in the number of offenders sentenced to prison, resulting in more crowded conditions" (Conklin, 1995:428).
- Public opinion is strongly opposed to crime and criminals. Welsh, in Muraskin and Roberts 1996:203, refers to "the thirst for punishment". In addition the courts follow a get-tough sentencing policy which is associated with longer terms of imprisonment and a sentencing practice of imprisoning people who have committed minor offences; moreover, there is great disapproval of early release strategies.
- Building new institutions could be counterproductive, precisely because the availability of accommodation might encourage presiding officials to imprison more offenders. Godfrey (1996:15) mentions that "American evidence seems to confirm that, in an intolerant political climate, the more prisons you build, the more you fill them".
- Demographic factors are responsible for fluctuations in the population who are at risk for committing crimes and receiving terms of imprisonment. It is accepted that increases in this population group will be reflected in the number of prisoners and that prison overcrowding will remain a problem until the risk population becomes smaller (see Conklin, 1995:428; Welsh in Muraskin & Roberts, 1996:202).
- The premise is that prison populations increase in poor economic conditions when more crimes are committed, in particular because of the associated factors such as increasing poverty and unemployment. This could be a simplistic approach to the problem if other important issues, such as demographic and social risk factors, are not taken into account (Neser, 1993:279): Conflict theorists are of the opinion that economic inequality in a community and the misuse of imprisonment by the ruling class to maintain social control could also result in many people being imprisoned (McCarthy, 1990:325–320). "Areas characterized by higher minority compositions and higher poverty also display more aggressive criminal justice responses and expenditures, including higher rates of imprisonment" (Welsh in Muraskin & Roberts, 1996:202).
- The policy on sentencing, pre-sentencing detention (bail) and paroling also influences prison populations (Neser, 1993:280). Relevant aspects here include stricter criteria for bail applications, the introduction of compulsory minimum terms of imprisonment, and the recommendation of the National Board on Correctional Services to the Minister of Correctional Services in 1996 that the minimum detention period prior to parole should be extended (two-thirds of the total sentence) (Annual Report of the Department of Correctional Services, 1996:26).



ACTIVITY (3) 4.2

Do you think a person can be rehabilitated in an overpopulated prison? Explain your answer.

3.4.3.2 Implications or effect

Sparks (1992:30–31; 1994:14–26) provides three categories of crisis that are the outcomes of prison overcrowding:

- The material crisis. The material crisis indicates a shortage of resources for providing for the needs of prisoners and maintaining standards of imprisonment. Examples include unpleasant living conditions for prisoners: a lack of privacy, high temperatures and noise levels in the cells, general irritations, and arguments about the use of limited space (Conklin, 1995:428). These conditions, in conjunction with the high social and spatial density, increase the danger of physical illnesses such as tuberculosis, AIDS, high blood pressure and mental illnesses (Bartollas & Conrad, 1992:325). Because the human dignity and other human rights of the prisoners are in jeopardy, the courts intervene with a mandate to reduce prisoner rates, or not to exceed a maximum occupation level (Welsh in Muraskin & Roberts, 1996:203–208).
- The order crisis. This refers to control of offenders and staff. Examples are the fact that prison overcrowding undermines internal social control, creates high stress levels and a potential for conflict among the prisoners and has a detrimental effect on the relationships between warders and prisoners (Welch, 1996:131). The research indicates both a direct and an indirect relation between overcrowded prison conditions and sexual assaults, murders of fellow prisoners, assaults among prisoners, unrest and rebellions, and disciplinary offences (Bartollas & Conrad, 1992:325; Reid, 1994:615–617; Adler, Mueller & Laufer, 1996:302; Regoli & Hewitt, 1996:604; Welch, 1996:131).

Overcrowding makes it more difficult for the staff to perform their tasks. It creates an unfavourable prisoner-staff relationship, because staff who are pressured feel threatened more easily. They have problems with controlling prisoners in overcrowded sections; the situation undermines healthy morale and creates high staff turnover.

- The goal crisis. This crisis relates to rendering services to realise the primary objectives of correctional institutions. Overcrowded prison conditions promote, for instance, idleness because of a lack of sufficient work programmes. The effective operation of development services such as educational and training programmes are scaled down and the safe custody of prisoners is impeded.

In view of the crises that are created by overcrowding, and bearing in mind Godfrey's comments, the question may rightly be asked whether correctional institutions can still operate their "core business" under present conditions.

3.4.3.3 Strategies for solving or alleviating the problem

Various strategies for solving the problem of prison overcrowding have been developed and they are aimed at:

- keeping offenders out of prison. The point of departure is that expensive and limited prison space must be used effectively through the selective and frugal use of imprisonment as an incapacitation measure. The direction should be away from a sentencing policy that is based on collective incapacitation; prison accommodation therefore be reserved for those criminals who have a high recidivism risk and who are responsible for the greatest number of crimes and the more serious crimes (Neser & Takoulas, 1995:142).
- providing alternatives to imprisonment
- imprisonment of offenders for as short a period as possible if imprisonment is unavoidable (see Neser, 1993:283–288; Godfrey, 1996:18–19; King & Maguire, 1994:1–13; Pease, 1994:116–130; Weiler, 1994:24–52).

- compulsory minimum imprisonment and length of terms: In addition to the fact that compulsory minimum sentences could impinge on the principle of proportionality (see study unit 1.3) and could be unconstitutional (see the discussion of Van Zyl Smit 1996:28:6–28:8), they could also promote prison overcrowding (Ashworth, 1994:844). The call on presiding officials to hand down shorter periods of imprisonment relates to two research findings, namely:
  - Longer terms of imprisonment do not necessarily prevent crime more effectively than shorter periods do (see the discussion on incapacitation with regard to criminal careers in study unit 1.5).
  - The positive results which may arise from imprisonment occur in the early stage of a sentence (Neser, 1993:286).

- alternatives to imprisonment. These involve both maximum use of the existing resources and the development of other resources in the community as community-based, alternative sentencing options for the sentencing officials. The premise is that offenders who have committed less serious offences should be handled in the community through diversion or through community-based sentences (Prison Reform Trust, 1994:56). Truly effective alternatives to imprisonment should comply with certain basic requirements, namely:
  - The options should provide concrete, credible protection to the community.
  - The measure should have the potential to develop and change the offender.
  - Supervision should be used to restrict to the minimum the opportunity to participate in criminal activities.
  - The form of punishment should be sufficiently unpleasant to persuade the offender not to commit further crimes and at the same time to deter potential offenders (Neser, 1993:284).

- Early or emergency releases: Early release, as sanctioned by the executive bodies, is seen as a short-term solution to prison overcrowding, or a temporary alleviation of the problem (O'Friel, 1994:19). It is associated with the official certification of maximum occupation levels in prisons and it is used when the number of prisoners exceeds the prison capacity. It involves the early release of low-risk prisoners who have already received a parole date, which is then advanced. The advantages and disadvantages of a strategy of early release are widely debated. King and Maguire (1994:7) reason that this measure may create the impression that matters are out of control in the criminal justice system; that it is a short-term tactical response of no strategic value; and that it cannot be reconciled with the public perception that the crime situation is deteriorating.

Godfrey (1996:10, 18) and other criminologists are of the opinion that early release is a better option than the rebellions and unrest which result from overcrowded prison conditions; that the earlier release of "selected" offenders only could soften the impact on the community; that it would be more acceptable if correctional authorities (executive state authority) were to receive sanction by way of legislation to implement early release procedures; and that the period of awaiting-trial detention could be deducted from the prisoners' sentence to effect early release.

- Population sensitive influx strategy: The idea here is that the decisions of presiding officials to pass a prison sentence or detain awaiting-trial offenders should be based on the availability of accommodation in prisons. A certain amount of accommodation could be assigned to a court or district so that prison sentences could be passed according to the available prison capacity. It all amounts to "a limit on the places provided within the prison system by which the Courts have to abide" (O'Friel, 1994:19). Godfrey (1996:19) maintains that a measure like this might call into question the independent

administration of justice and evoke a strong reaction from the community. He proposes a variation on this approach, namely that the Department of Justice (as is the case in South Africa) should become co-responsible for the budget to implement all sentences: "Judges and magistrates would then have to join the cash limited world inhabited by their colleagues in the justice system, making judgments about the relative costs and benefits of various sentences and, especially, the merits of shorter prison sentences" (Godfrey, 1996:19).

- Handling awaiting-trial prisoners: Some of the possible solutions for reducing the large number of awaiting-trial offenders in prisons are summarised briefly below (Neser & Takoulas, 1995:140–141):
  - finding better selection methods for bail and releases on the offender's own responsibility
  - keeping the intervals between arrest, finding people guilty and sentencing them as short as possible
  - creating and expanding bail hostels and other forms of community supervision for unsentenced people
  - having no pre-sentence detention before allowing the person concerned access to legal representation

The Departments of Correctional Services and Justice plan to reduce the number of those awaiting trial in prisons by: removing juveniles from prisons into the care of the Department of Welfare and Population Development; releasing those awaiting trial on less serious offences on their own recognisances (responsibility); expediting the process of prosecuting the accused; making better use of electronic monitoring; and releasing those awaiting trial who cannot pay small amounts for bail (Pelser, 2000:12).

SUMMARY

In this section we stressed the extent of prison overcrowding, certain contributory factors and the effect of overcrowded prison conditions, and explained some ideas on how to solve or alleviate the problem. This issue in the criminal justice system is a multidimensional problem which not only affects correctional institutions but also impacts on the functioning of prosecutors, presiding officials and the police.

3.4.4 THE DEATH PENALTY

Introduction

The death penalty is probably the most debated subject on both national and international platforms. The consequences of this form of punishment, as well as the significance which political groups attach to it, are cause for considerable disagreement. In South Africa, the Constitutional Court ruled that the death penalty is unconstitutional, with the result that the death sentence may no longer be imposed in this country. However, the debate concerning the death penalty continues. We will therefore briefly consider the historical development of this form of punishment, and the various ways in which it has been carried out down the centuries.

The death penalty became an inseparable part of the process of political and constitutional change in South Africa at the beginning of the 1990s (Neser & Pretorius, 1993:114). The *Star* (4 January 1990) reported as follows: "Abolition of the death penalty has the potential to be a major plank in political reform. It can bring the new South Africa an important step nearer realisation". It was also stressed that the abolition of the death penalty could contribute to political reconciliation. Devenish (1993:28) based this viewpoint on the

assumption that "many blacks view the excessive use of the death penalty in South Africa as a tool of oppression by a minority racist regime".



ACTIVITY (3) 4.3

State your opinion on the death penalty. Give reasons for your opinion.

3.4.4.1 Retention of the death penalty

The arguments in favour of retaining the death penalty are based on one or another of the following views:

- It is the only form of punishment that provides society with absolute protection by permanently removing the criminals in question from society.
- There is no suitable alternative. Life imprisonment is inappropriate for the following reasons:
  - A prisoner serving a life sentence in South Africa can be considered for parole after 20 years.
  - A person like this could still be a threat to fellow prisoners and the correctional staff.
  - Such an offender could escape.

- The death penalty operates as a unique general deterrent, and serious crime might increase should it be abolished.
- People might take the law into their own hands if the death penalty were not imposed by the state.
- Both the Bible and the Qur'an justify it on religious grounds.
- Public opinion is in favour of the death penalty.
- It is a terminal form of punishment which is essential for ensuring respect for the law.
- In some cases, the criminal does not have the opportunity to reform.
- It is the only form of punishment in which the "eye for an eye" principle is realised fully.
- Long-term detention of prisoners serving life sentences constitutes an unnecessary financial burden on the taxpayer.
- In a violent society where many people believe that crime levels are uncontrollable, the state is duty bound to perform a symbolic act (execution) to stem this tide.

3.4.4.2 Abolition of the death penalty

The arguments of those who are opposed to the death penalty are as follows:

- There is insufficient empirical evidence to prove that the death penalty is a more effective deterrent than long-term imprisonment.
- This form of punishment contributes to the cycle of violence in a society.
- Abolition of the death penalty is an international trend.
- There are religious objections to the death penalty.
- It is an irrevocable form of punishment. The irreversible finality of the death penalty should be taken into account in the light of the fallible process of law in which the death penalty is passed.
- The act of taking a human life does not create respect for life.
- The death penalty overemphasises the retribution objective at the expense of the rehabilitation and restoration objectives.
- The arbitrary and discretionary nature of this form of punishment makes it unacceptable.

- It conflicts with the constitutional right to life and debases human dignity because it is a cruel and inhuman form of punishment.
- By inflicting the death penalty, the state reduces itself to the moral level of the offender.
- Prisoners who received the death penalty usually came from the lowest socioeconomic classes and certain cultural and ethnic groups. Proportionally, black people were sentenced to execution more often than the other groups in South Africa.

3.4.4.3 Some sociopolitical arguments

Argument 1: People might have been sentenced to death for want of access to proper legal representation because of financial considerations.

People who were accused of capital crimes and who could not afford legal representation were defended pro deo: the state appointed an advocate to deal with the case. Pro deo accused were represented by relatively junior advocates. Although these young advocates may not in any way have been incompetent, their lack of experience could have played a role in certain cases. The pro deo advocates dealt with the cases without the support of an instructing attorney. An implication of this is that such advocates did not have the infrastructure at their disposal to undertake a thorough investigation, and in many instances their first consultation with the accused only occurred the day before the trial began. Seen against this background, the argument is that people accused of capital crimes lacked access to proper legal representation because of financial considerations, and consequently could have run the risk of being executed.

Argument 2: The fact that people were sentenced to death because of politically motivated crimes led to increasing opposition to the death penalty. The increase in executions, especially of people who paid the supreme penalty because of unrest-related and politically motivated crimes, gave renewed support to the movement against the death penalty. More and more trade unions, religious, anti-apartheid, human rights and other organisations in South Africa took a stand against the death penalty.

Argument 3: Because of the political circumstances in South Africa, the outside world viewed the death penalty in an unfavourable light.

Argument 4: The fact that people were executed because of politically motivated crimes indicates that the death penalty was used as a political weapon.

Argument 5: Freedom fighters who were sentenced to death should have received the status of prisoners of war.

In the hearing of Robert McBride a sociologist, Dr Fatima Meer, gave evidence to the effect that the accused regarded himself as "an ANC combatant and his guilt is no more and no less than that of any person volunteering to serve in the army of his people" (*Star* 14 October 1989). Professor John Dugard, a famous legal expert, gave evidence in the case of two Umkhonto we Sizwe members (Mncube and Nondula) (Truth & Reconciliation Commission 3/7/2000) that the accused regarded themselves as ANC soldiers who claimed the status of prisoners of war in terms of the Geneva Protocols of 1977.

Argument 6: Amnesty for people who were sentenced to death was used as a political lever for negotiating political advantages.

The view was expressed that the process of granting amnesty to people who had been sentenced to death was arbitrary, indicating that the impression was being created that the process of reprieve could develop into a political magical wand – a lever for negotiating political gain and manipulating opponents in the political arena.

Argument 7: The imposition of the death penalty for politically motivated crimes called the credibility of the legal system into question. The statement is often made that the death

penalty had become a source of political polemic in South Africa and it was suggested that the death penalty unavoidably cast doubt on the legitimacy of the criminal justice process and the legal system and undermined society's confidence in the law and its respect for the bench. The (then) General Secretary of the South African Council of Churches, Frank Chikane, expressed his opinion on the matter as follows: "We oppose the death penalty in general, but particularly in the case of political trials, because we question the very legitimacy of the apartheid regime" (Amnesty International, 1989:3).

Argument 8: Some judges became known as "hanging judges", indicating that there was an element of chance involved in the imposition of the death penalty and the eventual execution of those who were sentenced to death (Leon, 1989:42–48).

Former Judge Leon based this view on the fact that the imposition of the death penalty depended greatly on which judge heard the case. In view of his experience on the bench, he came to the conclusion that some judges were more inclined than others to find aggravating circumstances (before the Criminal Procedure Amendment Act 107 of 1990) in capital punishment trials and to impose the death penalty, and that some of his colleagues who had been on the bench for several years did not impose the death penalty in any capital crime cases whatsoever. Furthermore, the execution of the offender depended greatly on which judge was involved in the appeal against the execution, so that an element of chance was also present here. Research on the possibility that certain judges in the Cape Provincial Division of the Supreme Court sent more people to the death cells than did some of their colleagues during the period 1986 to 1988 indicated that:

- one group of three judges together condemned 36 people to death – nearly half of all the death penalties that were passed by altogether 32 judges during the same period
- a second group of three judges did not impose the death penalty in any of the capital crime trials which they heard
- a third group of three judges did impose the death penalty, but together they were responsible for passing only 12 of the death sentences in this period (Theron et al, 1991:7–8)

Facts such as these gave rise to the label of "hanging judge" being applied to some judges who passed the death penalty more frequently.

Argument 9: Blacks who were accused of capital crimes stood a greater chance of being sentenced to death because the South African legal system was controlled mainly by whites.

The National Director of Lawyers for Human Rights maintained that racial discrimination in the criminal justice process was possibly the strongest argument for abolishing the death penalty. A member of the Black Sash said in a statement that the death penalty was not always passed in fair circumstances in South Africa; she based this statement on the fact that 97% percent of the accused in capital crime cases were black and that the members of the bench at that time were all whites (*Natal Witness*, 11 November 1989). The President of the National Association of Democratic Lawyers (NADEL) expressed the opinion that there was a real perception that black people who are accused were in greater danger of receiving the death penalty than whites, and he ascribed this to a divided society and the fact that the South African system of justice was controlled mainly by whites (*Sowetan*, 13 November 1989)

3.4.5 COMPULSORY MINIMUM SENTENCES

In the history of South African administration of criminal justice law there are cases of statutory provisions that deprived the courts of their discretion in sentencing. The following examples illustrate this:

- the compulsory imposition of corporal punishment in certain circumstances (1952)
- imprisonment for the prevention of crime and for correctional training as compulsory punishment when the accused's criminal record (previous convictions) complied with certain requirements (1959)
- various compulsory sentences under Act 41 of 1971 for drug-related offences. Sections 51 to 54 of the Criminal Procedure Law Amendment Act 105 of 1997 (hereafter called the 1997 Amendment Act) made provision for compulsory minimum sentences of life imprisonment for certain serious crimes (e.g. murder, robbery and rape), unless "compelling and substantial" circumstances were found which justified a lesser sentence. These provisions became effective on 1 May 1998.

The Van den Heever Commission (South African Law Commission 2000:1) found that the rationale for compulsory minimum sentences could be traced back to a clear call from the community for heavier sentences and for offenders to serve a more realistic portion of imprisonment: "The public renewed claims for sentences which give expression to the desire for retribution and that concern for the offenders must give way to concern for the protection of the public. There is also general dissatisfaction with the leniency of sentences imposed by the courts for serious crimes". The Commission concluded that:

- A simple message should be sent out to potential offenders such as: "People found guilty of rape will be sentenced to a minimum of 15 years' imprisonment".
- One way of eliminating court leniency in sentencing is to prescribe compulsory minimum sentences for violent crimes.
- Appropriate compulsory minimum sentences give the public a feeling that law and justice are being upheld.
- Compulsory minimum sentences for violent crimes communicate a clear message about the implications of involvement in any form of violence.

The reaction to the 1997 Amendment Act has been studied and analysed in different ways. The South African Law Commission (South African Law Commission, 2000a) conducted two empirical studies in the period between June 1999 and January 2000 on:

- sentencing patterns before and after the implementation of the 1997 Amendment Act
- attitudes of key roleplayers

The investigation into sentencing patterns brought the following to light:

- There were noteworthy disparities in sentences for serious offences. The differences in sentence were significantly linked to regions, and continued after the implementation of the 1997 Amendment Act.
- Offenders charged with rape were given longer sentences after the 1997 Amendment Act.
- New patterns of sentencing with longer terms of imprisonment could have a significant impact on the prison overcrowding problem.

The attitude study revealed a wide variety of opinions on sentencing practices, such as the lack of uniformity of sentences in cases where the accused were charged with comparable offences; the limited use of sentences that included restitution and compensation for victims; and strong reactions, especially from judges, to restrictions on judicial discretion relating to compulsory minimum sentences.

The Van Zyl Smit Commission (South African Law Commission, 2000:10–19) analysed the reaction of courts to the 1997 Amendment Act in terms of four criteria, namely the sentencing jurisdiction of courts; "substantial and compelling circumstances" as grounds for deviation from compulsory minimum sentences; the constitutionality of compulsory minimum prescribed sentences; and the relationship between lifelong and other specific long-term imprisonment sentences.

- There is concern over accused who are charged in regional courts with crimes for which the 1997 Amendment Act prescribes compulsory lifelong sentences. On conviction, such cases have to be referred to the High Court since the regional court does not have sentencing jurisdiction to impose life imprisonment. Various objections to the split procedure or fragmentation of a trial (an accused is tried in a regional court and convicted, but is then referred to the Supreme Court for sentencing) have been raised, such as
  - Why not start such trials in the High Court from the start? (*Beeld*, 28 September 2000)
  - The High Court has to impose a heavy penalty such as life imprisonment on the basis of the cold court records of another court (regional court) (*Beeld*, 17 August 2000). The crux of this objection is that the magistrate (in the regional court), who hears the evidence, does not decide on the sentence. A judge (High Court), who has not had the advantage of hearing the evidence and seeing the witnesses give evidence, now has to decide on a sentence. Justice Davis touches on this issue in *S v Jansen* (1999 (2) SACR 368 (c) in 372g): "It is difficult to obtain a sufficient understanding of the matter in its entirety when only matters of sentencing are referred to this [High] Court".
  - The person charged is disadvantaged in that a long time usually elapses from when the case is referred after conviction by the regional court to the High Court for sentencing. On average, the time between referral from the regional court and sentencing in the High Court is 207 calendar days (*Beeld*, 17 August 2000).

- The stipulation in the 1997 Amendment Act that the compulsory minimum sentence should be imposed, unless the trial court finds "substantial and compelling" circumstances that justify a lesser sentence, led to different interpretations of the words "substantial and compelling" by courts. One extreme interpretation is Justice Stegman's view in *S v Mofokeng* (1999 (1) SACR 502 (W)) that these words leave the trial court virtually no discretion and actually oblige it to impose the prescribed minimum sentence. Another extreme interpretation is the view that the words "substantial and compelling" are really just a reaffirmation of the traditional principles of sentencing, and that weighing up aggravating and mitigating circumstances should still be the starting point. According to this view, the 1997 Amendment Act is just a measure to bring about greater uniformity in sentencing. In *S v Blaauw* (1999 (2) SACR 295 (W) in 305t and 306i) a middle way was taken. Justice Borchers is of the opinion that the 1997 Amendment Act does restrict the traditional discretion of courts, in that courts cannot deviate from the prescribed sentence only on the basis of "circumstances". At the same time, the legislation does not describe what is meant by "substantial and compelling" circumstances. The legislation also fails to mention any "exceptional" circumstances. To determine whether a deviation from the compulsory minimum sentence is permissible, "exceptional" circumstances should not be sought, but the cumulative effect of all the aggravating and mitigating circumstances of a case should be noted. If, in the light of this, the prescribed minimum sentence appears to be "startlingly inappropriate", the court may deviate from it. We find another interpretation in *S v Schwartz* (1999 (2) SACR 380 (c)) where Justice Davis uses the gravity of the crime as the starting point for applying the criteria of "substantial and compelling". Courts generally have difficulty in

interpreting and applying the "substantial and compelling circumstances" test as this is not clearly defined in the 1997 Amendment Act.

- The constitutionality of the provisions of the 1997 Amendment Act has been disputed on two grounds.
  - It is accepted that any legislation which leads to a court being compelled to impose sentences that are not in proportion to the seriousness of the crime (the principle of proportionality) may be unconstitutional on the grounds that such penalties are cruel, inhumane and degrading. Should the deviation clause of the 1997 Amendment Act be interpreted as an absolute restriction on the court's sentencing discretion and the presiding officer be compelled to impose the prescribed minimum sentence, there would then be the danger of such sentences conflicting with the principle of proportionality and their constitutionality could be disputed. Since, however, the 1997 Amendment Act does allow for a deviation from the compulsory minimum sentence that is prescribed (on the grounds of "substantial and compelling circumstances"), it does not seem as if its constitutionality can rightly be questioned.
  - It is argued that the statutory provisions on compulsory sentences infringe on the accused's constitutional right to a fair trial. In *S v Dzuduka* (unreported judgment in the Rand High Court on 17 May 2000) Justice Lewis found that the statutory procedure prescribing compulsory minimum sentences in the 1997 Amendment Act was unconstitutional because it infringed on an accused's constitutionally entrenched right to a fair trial. She based her finding on the fragmentation of the trial (a regional court magistrate convicts the accused and a High Court judge has to impose the sentence) and the fact that the accused is administratively disadvantaged because a long time usually elapses between conviction in the regional court and sentencing in the High Court. The Constitutional Court overruled this verdict in September 2000.

- The question of compulsory minimum sentences also had a bearing on the problem of the relationship between a lifelong sentence and a long term of imprisonment (a fixed sentence). There was uncertainty about what the longest sentence was (e.g. life imprisonment or a fixed sentence of 30 years' imprisonment) and about serving such sentences. The appeal court (*S v Siluele and others* 1999 (2) SACR 102 (SCA in 106i) confirmed that a life sentence was the longest term of imprisonment a court could impose. It stressed further that the imposition of a sentence for the purpose of dashing any hope of the offender's release from detention has no right of existence in a civilised legal system. Moreover, section 73 (6) of the Correctional Services Act 111 of 1998 stipulates that all prisoners must be considered for release after serving 25 years of a sentence including prisoners serving life imprisonment and those serving specific long-term sentences, such as 30 years.

3.4.6 SUMMARY

Sentencing is truly one of the most challenging fields in the criminal justice system, and at the same time also one of the most important. Determining what type of punishment to impose on an offender is of crucial importance and has far-reaching consequences. There are many more aspects that could fall under the heading of "critical aspects", but the aspects we have mentioned should give you insight into the complexity of properly disposing of offenders.

3.4.7 SELF-ASSESSMENT QUESTIONS

(1) Discuss the problems associated with overpopulation. (7)
(2) Provide a detailed discussion on the factors contributing to prison overcrowding. (15)
(3) Discuss the strategies for solving the problem of overpopulation. (20)
(4) Discuss the arguments for and against the death penalty.

Give your own opinion. (20)

(5) Give an overview of the implications of minimum sentencing. (20)

3.4.8 FEEDBACK ON SELF-ASSESSMENT QUESTIONS

(1) See 3.4.3
(2) See 3.4.3.1
(3) See 3.4.3.3
(4) See 3.4.4.1 and 3.4.4.2
(5) See 3.4.5

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Theme 4

REINTEGRATION PROCESS WHEREBY OFFENDERS ARE REHABILITATED AND RETURNED TO SOCIETY

Study unit 4.1: The reintegration of offenders within the South African framework

Study unit 4.2: The role of reintegrative shaming in the reintegration process

Study unit 4.3: Measures implemented in South Africa to rehabilitate and reintegrate offenders

Study unit 4.4: Alternatives towards punishment for reintegration

STUDY UNIT 4.1

The reintegration of offenders within the South African framework

Reintegration ideal	Contribution of reintegration model within reintegration process	Phase of reintegration process	Offender rehabilitation path

CONTENTS

4.1.1 Introduction
4.1.2 The reintegration ideal
4.1.3 Contribution of the reintegration model within the reintegration process
4.1.4 Phases of the reintegration process
4.1.5 The Offender Rehabilitation Path (ORP)
4.1.6 Summary
4.1.7 Self-assessment questions
4.1.8 Feedback on self-assessment questions

We punish people because we acknowledge them as human beings. By punishing people we are inflicting pain for a wrong deed in much the same way we reward good behaviour. If we do not punish, we are not accepting the rights of the individual to be treated like a human (Hegel).



LEARNING OUTCOMES

When you have completed this study unit you will be able to do the following:

- Explain the reintegration process in detail.
- Critically discuss the rehabilitation ideal and process.
- Give a detailed explanation of reintegrative shaming.
- Discuss restorative justice as an alternative to traditional forms of punishment.

4.1.1 INTRODUCTION

In this study unit we examine the reintegration of offenders within South Africa and look at different perspectives on the success rate of current efforts. Mpuang (2005), the National Programme Specialist for Offender Reintegration, is critical of the reintegration process for offenders within South Africa. He is of the opinion that offender reintegration is not a matter of national priority, nor can it be viewed as a legitimate crime reduction intervention. He states that even the National Crime Prevention Strategy pays almost no attention to offender reintegration. To achieve its mandate, Mpuang (2005) states that the Department of Correctional Services (DCS) has embarked on a process of transformation where humane custody and rehabilitation are at the centre of the core business of DCS.

The DCS's new policy shift has resulted in an Integrated Support System for offenders, which focuses on delivering programmes with non-government and community-based organisations where there is joint care for offender development and rehabilitation to meet the individual needs of the offender in the community. The White Paper also calls for families and communities to take greater responsibility for providing for the destitute and finding employment for ex-offenders. There are a limited number of programmes currently available to offenders offered by members of the DCS (Roper, 2005).

According to The South African Correctional Services Act 111 of 1998, the purpose of the correctional system is to contribute to maintaining and protecting a just, peaceful and safe society by enforcing sentences of the courts in the manner prescribed in this Act; detaining all prisoners in safe custody whilst ensuring their human dignity; and promoting the social responsibility and human development of all prisoners and persons subject to community corrections.

The Act also encourages the participation of the prisoner in designing a programme for his or her rehabilitation during incarceration. In order to make a realistic assessment of what is happening and what needs to happen with regard to offender reintegration, it is necessary to look briefly at what is happening in prisons, who the people are who are in prison and why they are there. The majority of prisoners serve short sentences of less than six months. During this short period, however, prisoners are already introduced to a prison life encircled by an inescapable life of crime and imprisonment. On average, 95% of all prisoners are ultimately released back into society: the question is, to do what exactly? They are dumped back upon society, regardless of whether any change has taken place in them for the better, with every assurance that changes have taken place within them for the worse (Menninger, 1973). With some measure of good luck a few ex-prisoners will get by but the rest will be back in prison within the first or two years after release.

Restorative justice principles have been adopted by DCS which underpin the rehabilitation process. Efforts have been made to improve prison conditions and transform them into unit management institutions to create an environment that is conducive to rehabilitation. The concept of new generation prisons has been accepted for the construction of new prisons to enhance the growth and development of offenders. Yet Mpuang (2005) states that the present reality makes it very difficult for the DCS to uphold this commitment to and mandate for rehabilitation. Factors such as overcrowding, the recruitment of staff not suited to the work and a lack of retraining of current staff (which means they are not up to date with the latest developments in correctional management and offender care), as well as the corruption and crime perpetrated by some DCS members inside prisons, all impede rehabilitation and ultimately the reintegration process. This is a very critical view of DCS and current reintegration efforts, and cannot necessarily be generalised.

In this unit you are introduced to the concept of reintegration, and should gain a better understanding of its theoretical basis. It is necessary to understand the processes involved

in reintegration in order to understand and evaluate the different measures implemented in South Africa to reintegrate offenders into society.

We will look at four aspects: the reintegration process is explained in detail; the rehabilitation ideal and process are critically discussed; reintegrative shaming is explained in detail; and restorative justice is examined as an alternative to traditional forms of punishment. We start by looking at the rehabilitation ideal and then the reintegration process.

4.1.2 THE REINTEGRATION IDEAL

According to Cullen and Gendreau a continual theme throughout the history of American corrections is the efforts made to reform offenders. The following is an extract from their paper entitled *Assessing correctional rehabilitation: policy, practice, and prospects* (Cullen & Gendreau, 2000).

> In particular, at the beginning of the 1900s, the rehabilitative ideal was enthusiastically trumpeted and helped to direct the renovation of the correctional system (e.g. implementation of indeterminate sentencing, parole, probation, a separate juvenile justice system). For the next seven decades, offender treatment reigned as the dominant correctional philosophy. Then, in the early 1970s, rehabilitation suffered a precipitous reversal of fortune. The larger disruptions in American society in this era prompted a general critique of the "state-run" criminal justice system. Rehabilitation was blamed by liberals for allowing the state to act coercively against offenders, and was blamed by conservatives for allowing the state to act leniently toward offenders. In this context, the death knell of rehabilitation was seemingly sounded by Robert Martinson's (1974b) influential 'nothing works' essay, which reported that few treatment programs reduced recidivism. This review of evaluation studies gave legitimacy to the anti-treatment sentiments of the day; it ostensibly "proved" what everyone "already knew": Rehabilitation did not work.



ACTIVITY (4) 1.1

Critically discuss your view on the "nothing works" philosophy in relation to today's recidivism rates. Does rehabilitation work in correctional systems in South African society today?

In answering to the above, first look at recidivism rates in South Africa. Do research to find the latest statistics (SAPS website). Then discuss whether you think rehabilitation efforts are indeed successful.

Cullen and Gendreau (2000) indicate that literature reviews (they do not show exactly which ones) do indeed show that many correctional treatment programmes are actually decreasing recidivism. A sophisticated quantitative synthesis or combination of evaluation studies has been scrutinised through a technique called "meta-analysis". You may ask what a meta-analysis is.

A meta-analysis is a combination of many trial results (thus the results or research findings of many different researchers). It is a method designed to increase the reliability of research by combining and analysing the results of all known trials of the same product or experiments on the same subject. Thus all studies on the success of rehabilitation efforts are combined and then analysed to determine whether any rehabilitation efforts do succeed.

Meta-analyses of existing research findings have revealed that the recidivism rate is, on average, 10 percentage points lower for the treatment group than for the control group. However, this research (Lipskey & Cullen, 2007) also points out that some correctional interventions (for example punishment-oriented programmes) have no effect on offender criminality, while other efforts achieve substantial reductions in recidivism of approximately 25%. This varied success has led to a search for those "principles" that distinguish effective treatment interventions from ineffective ones (Lipskey & Cullen, 2007:54).

The following factors have been identified as enhancing the success of rehabilitation efforts. Theoretical and empirical support exists that the rehabilitation programmes that achieve the greatest reductions in recidivism use cognitive behavioural and multisystemic treatment. Cognitive behavioural theory proposes that psychological symptoms are related to the interaction of thoughts, behaviours and emotions. In cognitive behavioural therapy, the therapist and patient work together to identify and directly change thoughts and behaviours that may be maintaining the criminal behaviour. Thus cognitive behavioural therapy will look at the thoughts, behaviours and emotions of the offender that contribute to the criminal behaviour. Multisystemic treatment entails the involvement of various experts and departments such as psychologists, social workers, probation officers, church groups and others providing support and care (Lipskey & Cullen, 2007).

4.1.3 CONTRIBUTION OF THE REINTEGRATION MODEL WITHIN THE REINTEGRATION PROCESS

Before we look at the reintegration process as one whereby offenders, thought to be rehabilitated, are moved from an institution back into society, let us first look at the reintegration model that forms the theoretical foundation for the reintegration of the offender.

Correctional facilities throughout the centuries have been run according to the prevailing model of the times. Examples are:

- the punitive model before 1870
- the medical model in the 1920s and thereafter
- the justice model
- the rehabilitation model
- the neo-utilitarian model and
- the model under discussion, the reintegration model (Neser, 1993:224).

Each of these models determines the way in which the prison is run and managed and the manner in which offenders are dealt with. The basic point of departure of the reintegration model is that the offender's problems must be solved in the community where they originated. How can this be achieved?

According to the reintegration model, society has a duty to offenders starting with initiatives to assist them to reintegrate successfully into the community. This treatment model works on the assumption that the community has a part to play in the offender's rehabilitation and reintegration process. Offenders must be given the opportunity to develop law-abiding behaviour. This implies that for reintegration to take place there must be adequate contact between the offender and the community. The offender must be given the opportunity to interact with and become involved in the activities of society. For example, prisoners can do a form of community service. In certain rural prisons the prisoners plant vegetables which they give to their local impoverished communities. Offenders who have been imprisoned for even a short period of time must be assisted with their return to society, as their contact with the prison environment negatively

impacts on the reintegration process. If you know of such an incident, you could relate it briefly.

Another dimension considered within the reintegration model is that change within the offender takes place by means of internalisation. This internalisation refers to the opportunities that are created which enable the offenders to bring about their own change. They thus internalise the new behaviours, replacing previously deviant behaviour with socially acceptable behaviour. The opportunities that can produce a change within the individual include training, further education, recreation, job opportunities and any other strategies which can be implemented as an alternative to crime. For example, by providing an offender with a life skill or trade such as plumbing, the individual can be gainfully employed upon release. Without this training the individual would be released with little chance of finding a job.



NOTE

The reintegration model therefore creates a framework which allows the offender to learn how to adapt successfully to society through a process of experimentation.



ACTIVITY (4) 1.2

Can you think of examples of how offenders can be assisted to reintegrate into society? Jot down two examples in your workbook. We discuss programmes and facilities that deal with reintegration in section 4.3 of this study unit.

An issue that impedes efforts to gauge the process or success of the reintegration model lies in human individuality. The rehabilitation process and reintegration method is unique to each individual. Not all offenders are successful all the time, but as each individual starts to adapt, attitudinal change takes place and new values are adopted. The success of the reintegration model can be determined by the extent of reintegration of the offender back into the community. A completely successful reintegration process ends with the individual's return to society as a law-abiding citizen.

Two important elements have been identified as aspects that may enhance the success of reintegration. Firstly, reintegration involves therapeutic influencing to bring about an attitudinal change in the offender. This includes both treatment programmes and educational programmes that would allow the offender to rehabilitate. This would include the process of internalisation. A second element which improves the offender's successful reintegration is the level of acceptance of the offender by the community. Crime is generally perceived as a disregard by the offender for the interests of the community. An example of the community's acceptance of the offender is community service. Community service sentences are seen as a way in which the gap between offenders and the community can be closed and may help the offender to develop a better understanding of and attitude towards the community's needs.

Now that we understand the theoretical basis of reintegration, let us look at the reintegration process.

REFLECTIVE QUESTION: Do you think Menninger's statement in 1973 regarding the fact that 95% of prisoners are back in prison after a few years after being released is still valid today, or is the situation much worse?

4.1.4 PHASES OF THE REINTEGRATION PROCESS

The reintegration process starts when the offender is processed into the correctional system by means of the implementation of an individualised reintegration programme which forms part of the offender's sentencing plan. Each offender who enters a correctional centre undergoes an assessment and is given a specific sentence plan.

According to Muntingh (1997), the need for an effective reintegration programme is apparent when we look at the number of offenders released from the correctional system annually. Muntingh (1997) indicates that between 7 000 and 9 000 prisoners are released from prison every month in South Africa, yet very little public or government interest is shown in what happens to these people when they are released back to society.

"NICRO often points out that however long a person is sentenced for, unless they effectively serve a life term, they will come out. And when they come out, they are likely to be more damaged not only from having been removed from society for so long but from the imprisonment itself" (Muntingh, 1997). The White Paper of the Department of Correctional Services endeavours to create a second chance for all offenders by introducing the Offender Rehabilitation Path (ORP).

4.1.5 THE OFFENDER REHABILITATION PATH

The ORP model assists in the rehabilitation of all offenders who enter the correctional system, with the ultimate aim of successful reintegration. The ORP is a nine-phase programme that re-engineers the offender management approach followed by the DCS. The ORP is needs-based, which means that it caters for the special needs of the offender in an individualised manner. It is structured according to the stage of incarceration of the inmate. Each stage in the process requires different interventions by both the DCS and the other roleplayers in government and society (Jacobus, 2007).

Let us take a look at the nine phases of the ORP.

Phase 1 starts at the admission of the offender to a specific correctional facility.

Phase 2 involves the assessment of the offender. This assessment includes both the orientation and the profiling of the newly incarcerated offender. In orientation the offender is informed about the way in which the correctional system functions and the prescribed rules and regulations.

Phase 3 follows with the allocation of the inmate to an incarceration unit which is in line with that individual's risk profile and classification. This risk profile is determined during the profiling process in phase 2. An individualised sentence plan is developed for the offender.

In Phase 4 interventions are instituted based upon the offender's sentence plan. These will include training, further educational programmes and personal psychological interventions such as anger management.

In Phase 5 monitoring and the evaluation of the progress made by the offender in implementing the sentence plan take place. Remedial steps can be taken to bring the offender in line with the sentence plan if necessary.

If an offender has successfully completed the sentence plan then Phase 6, the placement phase, takes place. This includes consideration of the offender for placement on either parole or correctional supervision.

Phase 7 takes place just prior to release from the prison back into society. It involves the allocation of an offender to a pre-release unit for training or final interventions before placement back into the community.

Phase 8 involves community corrections. The offender is admitted to a community corrections office and an individualised plan is devised for implementation.

In the last phase, Phase 9, focus is placed on the management of the probationers (those under correctional supervision) who are directly placed under community corrections by a court.



ACTIVITY (4) 1.3

Create a mind map of the ORP in your workbook to help you with your preparation for the examination.

Guidelines

Use a diagram similar to Diagram 1 to map out the ORP.

4.1.6 SUMMARY

Reintegration demands that the scope of the legal system be enlarged so that the future life of the offender in the community is considered, both during sentencing and in the correctional phase. Thus any measures taken in dealing with an offender must have his or her reintegration into society as the final goal. This benefits both the offender and society. The reintegration concept serves not only a social interest, by preventing recidivism (repeat offending), but also the personal life of the offender, who benefits from the opportunities of a crime-free life. Reintegration should introduce the broader social issues into the criminal justice system, creating a multidisciplinary effort including the social welfare, public health and education systems.

4.1.7 SELF-ASSESSMENT QUESTIONS

(1) Explain the technique of "meta-analysis".
(2) Define cognitive behavioural treatment.
(3) Briefly discuss multisystemic treatment.
(4) Explain the processes in the offender rehabilitation path.
(5) Illustrate, by creating a diagram, the processes in the nine phases of the offender rehabilitation path.

4.1.8 FEEDBACK ON SELF-ASSESSMENT QUESTIONS

(1) A meta-analysis is a study of various research projects and the results or research findings of many different researchers. It is a method designed to increase the reliability of research by combining and analysing the results of all known trials of the

same variables (unit of study) on the same subject. A meta-analysis on the success of rehabilitation efforts will look at the findings of all studies regarding rehabilitation success in combination and then analyse them to determine whether any rehabilitation efforts succeed.

(2) Cognitive behavioural therapy involves studying the thoughts, behaviours and emotions of the offender that contribute to the criminal behaviour, and then multisystemic treatment is undertaken.

(3) Multisystemic (also known as multidisciplinary) treatment involves various experts and departments such as psychologists, social workers, probation officers, church groups and others providing support and care.

(4) See 4.1.4.

(5) See 4.1.5.

STUDY UNIT 4.2

The role of reintegrative shaming in the reintegration process

Reintegration shaming	Concerns about putting reintegrative shaming into practice

CONTENT

4.2.1 Introduction
4.2.2 Reintegrative shaming
4.2.3 Concerns about putting reintegrative shaming into practice
4.2.4 Summary
4.2.5 Self-assessment questions
4.2.6 Feedback on self-assessment questions



LEARNING OUTCOMES

When you have completed this study unit you will be able to do the following:

- Explain the concept of reintegrative shaming and distinguish between stigmatic and reintegrative shaming.
- Explain the concerns about putting shaming into practice.

Before we discuss the role of reintegrative shaming in the reintegration process of offenders, let us stop to look at how it is defined.

4.2.1 INTRODUCTION

Braithwaite (2007) defines shaming as "all social processes of expressing disapproval which have the intention or effect of invoking remorse in the person being shamed". To Braithwaite the aspects of disapproval and remorse are more important than the shame or shaming. Braithwaite (2007) holds that the disapprover's intention and its effect on the recipient (the offender) are important in bringing about a change in attitude.

Now that we have a better idea of the concept of shaming we can look at the different forms of shaming and the concerns about putting shaming into practice.

4.2.2 REINTEGRATIVE SHAMING

Braithwaite (2007) views shame and guilt as intimately entwined, meaning that they cannot be separated, and also believes that from the offender's perspective they may be indistinguishable.

> REFLECTIVE QUESTION: Would hardened convicted murderers be capable of such emotions? Isn't there a point at which criminals can no longer experience shame?

The importance of any effective reintegration effort lies in its success in bringing about a change within the inmate in order to sensitise the person and make them more prone to feeling a measure of shame.

A distinction can be made between stigmatic shaming and reintegrative shaming. According to David Maxfield, the author of *Influencer: the power to change anything* (2008), stigmatic shaming basically contributes to the isolation of the offender. He states that through stigmatic shaming the offender receives a label and is set apart as an outcast for life; creating an outcast group only works if you have a prison colony which these ex-offenders can be sent to indefinitely.

On the other hand, reintegrative shaming allows the offender to regain the community's trust, and return to live within the community once again. As Maxfield (2008) indicates, "Eventually every offender does end up back in the community, so perhaps we should focus more on this re-integrative approach".

The distinction Braithwaite (2007) makes between stigmatic shaming and reintegrative shaming is crucial because Braithwaite is firmly opposed to stigmatic shaming and sees it as counterproductive. On the other hand, reintegrative shaming is seen as more likely to be effective in controlling crime. It means that the offence rather than the offender is condemned, and the offender is reintegrated with rather than rejected by society.



ACTIVITY (4) 2.1

Provide two actual or made-up examples of the two kinds of shaming, namely stigmatic shaming and reintegrative shaming. Identify them correctly and explain how each one fits into its category.

There is no evidence that punitive correctional programmes either reduce recidivism or produce other positive gains for offenders such as institutional adjustment and the development of human capital. In contrast, our best bet for reducing recidivism and improving the lives of those processed through the correctional system is to involve them in rehabilitation programmes that have therapeutic integrity. This means that the programmes must focus on the actual needs of the offender and prevent further misbehaviour. This approach is not simply a matter of "doing good" to offenders but also of protecting public safety. In other words, rehabilitation is a potentially important strategy for reducing recidivism and thus for preventing the victimisation of citizens.

The problem is the difficulty of putting this ideal of reintegrative shaming into practice. Braithwaite (2007) suggests that the shame which matters most is not the shame the offenders experience from contact with judges or police officers, but rather the shame we feel if we disappoint the people we most care about. The problem here again is the

difficulty of putting this into practice. Many of the examples of conferencing which have relied most heavily on Braithwaite's theory have been managed through the police.

So how can effective delivery of shaming take place? Braithwaite (2007) sees communitarian societies (close-knit communities) as more able to deliver both more effective shaming and reintegrative shaming. This is because of the sense of belonging in these communities. The problem however is that it is not clear that such conditions can be replicated in 21st-century Western societies. Braithwaite acknowledges this but still states that we also need to explore whether or not it is possible to replicate such conditions within local communities, or even within communities of care.



ACTIVITY (4) 2.2

Can you think of ways in which we can accomplish this in South Africa? How can we create communities that have a closer social solidarity and where offenders are seen as members of society and not rejected once they offend?

REFLECTIVE QUESTION: Do you think there is a point where the offender's crime is so serious that he or she will inevitably be rejected, or does this depend on the culture and the community concerned?

Some core ideas that are crucial in this process are society's belief in the potential of people to change, people's ability to make a positive contribution to society, and the basic human rights and responsibilities of every individual. The following is an extract from Hund (1999) which illustrates the reintegrative shaming process as it occurs in a conferencing situation.

CASE STUDY

A practical guide for a participatory conference

After the apprehension of a youth, they are referred or diverted to a reintegrative shaming conference. A conference can only occur if the youth chooses to acknowledge committing the incident. The victim, in most conference settings, must also choose to be a part of the reintegrative shaming conference. If both decide to participate, the conference can proceed. The victim and the youth then select members of the public to participate in the conference by serving as their supporters. The conference must be held soon after the crime was committed, and must be conducted by an independent and impartial facilitator. The facilitator directs the proceedings and the participants are seated in a circle, which allows for eye contact and establishes an appropriate distance between the victim and the youth. There should be nothing in the centre of the group, not even a table. The goal is to create a forum for open discussion.

Strang and Sherman (1997) say that "the conference begins with statements by the offenders about what they did, followed by statements by the victims about the harm the crime caused, both material and psychological". The youth should discuss their view of the incident in response to open-ended questions from the facilitator. Supporters of the victim and youth are asked open-ended questions about the incident from their point of view, its impact on them, and how it can potentially be resolved. Braithwaite and Mugford (1994) point out that "reintegrative ceremonies succeed when one side makes an early gesture of self-blame or self-deprecation ... Self-deprecating gestures from either side can facilitate reintegration, which is powerfully facilitated by exchanges". A self-deprecating gesture is a humbling experience for the youth and fosters the sociological and psychological aspects of shame.

After both sides have discussed the non-normative behaviour, the victim is consulted first for his or her input on a satisfactory resolution. Then the victim's supporters are requested to give their input. Next, the youth is asked for a proposed resolution and then the youth's supporters are asked for a potential resolution. When group consensus is achieved, according to a democratic process, the resolution is finalised. The mutual agreement must be honoured by the youth. Otherwise it will be referred back to the prosecutor for appropriate action.

Closure occurs after a democratic decision has been achieved. The facilitator then invites all participants to one location for refreshments, and in some cases for a traditional meal or potluck. This brings closure to the incident and reconnects the victim, the youth and the community. It should be noted that some conferences only focus on repairing the harm of the non-normative action. However, this approach goes beyond that and offers the youth assistance. For example, the youth could be allowed to participate in academic programmes to help him or her finish school if necessary. He or she could also be encouraged to participate in self-help programmes such as anger management, conflict resolution and/or how to get a job, or in more practical enhancements such as how to use a computer, paint, draw, write poetry and/or study sociology. If all goes smoothly, the participatory reintegrative shaming conference will result in the prevention of future non-normative behaviour.

REFLECTIVE QUESTION: Can you identify the various reintegrative processes from the example above?

4.2.3 CONCERNS ABOUT PUTTING REINTEGRATIVE SHAMING INTO PRACTICE

It is difficult to put shaming into practice. The shaming intended to be reintegrative may instead be seen in a negative (stigmatic) manner by the offender. For this reason the success of reintegrative shaming should be judged by the impact on the individual offender, and not by the intentions of the authorities.

The following factors determine the success of reintegrative shaming:

- The offender, the person to be shamed, should respect the shamer.
- The offender must at least acknowledge the legitimacy of the shamer's authority.
- The offender must experience remorse or shame.
- The offender's communities of care must support his or her return.
- The structural causes of the offending behaviour should be addressed.

4.2.4 SUMMARY

As you can see, it is extremely important to get the measure of shaming right when we punish offenders. By stigmatising the offender we merely perpetuate the cycle of crime. The more contact the offender has with the criminal justice system, the more desensitised the offender becomes and the harder it is to rehabilitate the individual.

4.2.5 SELF-ASSESSMENT QUESTIONS

(1) Distinguish between stigmatic shaming and reintegrative shaming.
(2) What factors determine the success of reintegrative shaming?
(3) Write a short explanation of how you would assist with the reintegration of an ex-offender into your community.

4.2.6 FEEDBACK ON SELF-ASSESSMENT QUESTIONS

(1) Stigmatic shaming is viewed as a negative measure with a counterproductive outcome.

On the other hand, reintegrative shaming is seen as a positive step which is more likely to be effective in controlling crime. Reintegrative shaming means that the offence, rather than the offender, is condemned and rejected and the offender is reintegrated with rather than rejected by society.

(2) The factors that determine the success of reintegrative shaming are influenced by the offender's view of his or her shamer. The offender, the person to be shamed, should respect the shamer; more importantly, the offender must at least acknowledge the legitimacy of the shamer's authority. The offender must experience remorse or shame. In the case of a sociopath or a hardened offender, the ability to feel remorse or guilt is stunted. The offender's communities of care must also support his or her return. It is most important that the causes of the offending behaviour should be addressed.

(3) First create a context for your discussion and explain why the offender was incarcerated and the factors that contributed to him or her committing the crime. Discuss the factors which will impede his or her successful reintegration and illustrate the community structure to which the ex-offender must return and the support structures available.

STUDY UNIT 4.3

Measures implemented in South Africa to rehabilitate and reintegrate offenders

NICRO	Integrated youth offender programme	Phoenix project	Nehemia Homes	Partnerships	Khulisa	Upington Community Project

CONTENT

4.3.1 Introduction
4.3.2 NICRO Offender Reintegration Project
4.3.2.1 The "Are you tough enough?" (TEP) programme
4.3.3 The Integrated Youth Offender Programme
4.3.4 The Phoenix Project
4.3.5 Khulisa
4.3.6 The Upington Community Project
4.3.7 Nehemiah Homes: a reintegration home
4.3.8 The partnership between government and civil society and interdepartmental relationship to promote effective social reintegration
4.3.9 Summary
4.3.10 Self-assessment questions
4.3.11 Feedback on self-assessment questions



LEARNING OUTCOMES

When you have completed this study unit you will be able to do the following:

- Explain the different measures implemented in South Africa to reintegrate offenders into society.
- Discuss the partnership between government and civil society and interdepartmental relationships to promote effective social reintegration.

Now that we clearly understand the concept of reintegration, have a better understanding of its theoretical basis and understand the processes involved, we can explore the different measures implemented in South Africa to reintegrate offenders into society.

4.3.1 INTRODUCTION

The following programmes all reflect how individualised the processes of offender rehabilitation and reintegration are and how available resources, both financial and human, existing social structures and support influence such efforts.

The first measure we consider is the NICRO Offender Reintegration Project.

4.3.2 NICRO OFFENDER REINTEGRATION PROJECT

NICRO initiated its offender reintegration programme in 1910. Since then the programme has changed somewhat and the latest project is known as the "Tough Enough" programme. Clearly, if any programme is to have an impact on the crime situation in South Africa, ex-offenders must take the responsibility of being community builders and not disrupt social order. This programme aims to bring a change to the ex-offenders' lives and also enables them to make a shift from being victims to being opportunity makers and takers for themselves and their families (Muntingh, 2001).

The programme is specific and places an enormous responsibility on the prisoner; however, it strives to create a supportive environment for maximum growth and participation by the prisoner, and assists him or her to choose to lead a constructive life.

4.3.2.1 The "Are you tough enough?" (TEP) programme

The TEP programme's target group is prisoners with six months or less to serve (thus they are in the pre-release phase) and those between the ages of 18–35 years. The programme also involves their families and communities.

The principles of offender reintegration involve believing in:

- the potential of people to change, be integrated, take opportunities and make choices
- people's ability to make a positive contribution to society
- the basic human rights and responsibilities of every individual
- non-violence

The objectives of the programme are to develop skills and build and improve relationships. This involves developing the potential in offenders. The non-negotiables are what will make the programme successful. These non-negotiables include accountability and responsibility, the choice to be in a programme or not, measurable impact of the programme, detailed planning, contracting (drawing up a contract between the offender and the programme coordinators) and creating and fostering an environment that will support the programme.

The programme involves an intensive nine- to 12-month programme that challenges the prisoners to take responsibility for their actions and hold themselves accountable for their own future and that of their families. The prisoner enters into a contract with NICRO which details the service, responsibilities, commitment and duration.

The programme normally starts about three months before the offender is released from prison. Upon release, the prisoner and the family are supported for a period of six to nine months, after which the service may be terminated depending on the prisoner's progress at the time. Services may also be extended and a new contract entered into. The programme allows the prisoner and the family to explore the opportunities and possibilities available to assist with reintegration into their community.

The community's role is hugely important, as it is also a challenge to provide an environment that encourages the ex-prisoner to function and contribute positively within the community. The programme has six phases.

In phase one, the recruitment and assessment stage, prisoners nominate themselves into the programme and are individually assessed by the facilitator (NICRO worker). The prisoner enters into a contract with NICRO detailing the service and duration of the programme. The prisoner identifies three primary areas that must have been changed by the end of the programme. These will be the primary focus of the intervention.

Phase two involves setting the challenge in a group-based five-day intensive phase which challenges the individual participants to look at their lives (the past and present) objectively and draft a path that they want to follow. The emphasis is on the future and how it should be different from the past. The participants take responsibility for their actions, especially the crimes they have committed, and make plans for restoration.

In phase three the offender looks at facing the challenge; this is where the actual implementation of the decisions made in the previous phase starts. At this stage other roleplayers such as family members or other support structures and victims are brought in through either Family Group Conferences or Victim Offender Mediation. During this time, the facilitator actively involves the community and encourages them to support the reintegration of the incarcerated participant.

Phase four is the most crucial stage, building on the progress made in previous stages. Here the ex-prisoner returns to the family, community, friends and other support structures. The process is rendered problematic by uncertainties around acceptance. This phase runs over a six- to nine-month period, when the ex-prisoner becomes independent and strengthens relationships with family and other people. The community needs to act as a support system for the ex-prisoner and the family during this phase.

Phase five is the "staying out" phase, which entails the offender staying out of prison and not re-offending. The success of all the previous stages determines the success of this stage. The ex-prisoner should be stable and making a positive contribution towards his or her family and the community, and if there is still a need for NICRO support, it should be minimal.

In phase six the progress, impact and success of the programme are tracked and measured. Key indicators that are considered success factors are when participants:

- have not re-offended
- are making a positive contribution to the family and community
- are stable and have a source of income
- can access and do accept support when it is required

In as early as 2002 a workshop to identify indicators for recidivism and reintegration was held by the NICRO national office. The workshop was in preparation for the impact evaluation of the Tough Enough Programme. In attendance were representatives from DCS, CCR and Southern Hemisphere (a research company). The workshop came up with very similar risk factors in terms of successful reintegration. The following were identified as risk factors:

- social and economic environment
- relationships (individual and community)
- stigma of imprisonment
- physical environment
- mental health and trauma
- individual skills and characteristics

- institutionalisation and socialisation in prison

Many prisoners have experienced a lifetime of social exclusion. Compared with the general population, prisoners are (Roper, 2005):

- 13 times as likely to have been in care as a child
- 13 times as likely to be unemployed
- 10 times as likely to have been a regular truant
- two and a half times as likely to have had a family member convicted of a criminal offence
- six times as likely to have been a young father, and 15 times as likely to be HIV-positive

4.3.3 THE INTEGRATED YOUTH OFFENDER PROGRAMME

The Integrated Youth Offender Programme, piloted in Boksburg Juvenile Correctional Centre with the "Inkanyezi yentathakusa", is a part of the NICRO programme. The NICRO intervention focused on family relationships between the offender and the family. The objectives are to enhance family involvement and contact with the offender, increase awareness of the rights and responsibilities of families during imprisonment and after release, and the involvement of families in the rehabilitation and reintegration of offenders. The programme engages group discussions, contact with family members (telephonically or personal visits), and one-on-one counselling with the offender.

The programme aims to provide continuity between what happens inside the Correctional Centre and outside. Note that this is crucial in the reintegration process. What happens in the prison and assistance given there must be followed through in the community.

Three group sessions are held with the inmate participants for about two hours each. The first session explores the family as an institution in terms of who and what a family is, the role of the family and different roles within a family structure. Activities allow participants to explore the differences between functional and dysfunctional families. This is important for the prisoner as he or she can identify factors in the family system that may have contributed to his or her own criminal behaviour. The second session explores the participant's relationship with his or her family. The third session focuses on identifying any issues or needs the participant might want to address in the family relationships. This provides insights into the nature and state of the relationships and possible areas for intervention. Thus it is crucial to the reintegration process to improve relationships between the offender and the family during imprisonment and to concentrate on developing plans for post release housing and family acceptance.

4.3.4 THE PHOENIX PROJECT

The Phoenix project in KwaZulu-Natal, established in September 2003, focuses on the rehabilitation and needs of offenders and their reintegration into society. The organisation runs rehabilitation programmes in three major prisons in the province, namely Eshowe, Mthunzini and Qalakabusha (Empangeni) prisons.

Ex-offenders, parolees and inmates awaiting release or parole are used as peer tutors. Community and church members are also involved and undergo restorative justice training. Programmes used in the project include (Skelton & Batley, 2007):

- alternative to violence project (AVP)
- violence in the shadow of a recent war (for ex-combatants in prison)
- restoration through creativity and achievement
- radio drama (in collaboration with Icora FM)

- professional development (study with accredited institutions to improve prisoners' lives)

The Phoenix project targets groups of male, female and child offenders at the post-sentence stage. A major challenge faced is the level of overcrowding in prisons in KwaZulu-Natal, which are all above the national average for overcrowding. Clients represent different racial, cultural and socioeconomic groups.

4.3.5 KHULISA

Khulisa is a South African non-profit organisation that runs crime reduction programmes that enable young people who had been in conflict with the law to turn their lives around and work towards the reduction of crime in the country. Khulisa uses these ex-offenders to project a positive image to society and show that rehabilitation can be successful (Van Selm, 2004). Khulisa runs a prison programme for a period of one year, focusing on addressing the needs of the offender related to the cause of the offence. "The programme develops emotional intelligence and positive behaviour through creative thinking, self-expression and skills development" (Van Selm, 2004). Research has shown that 80% of Khulisa's programme participants do not revert to crime, a 60% improvement on the quoted national statistics for repeat offences (Van Selm, 2004).

Khulisa's programmes include the principles of restorative justice, allowing a victim to forgive an offender once he or she has completed the sentence and for the ex-offender to show that he or she is capable of remorse and being accountable and responsible.

Khulisa not only provides in-prison support but also offers a post-release programme to rehabilitees that assists them to secure themselves self-sustaining opportunities such as jobs. Former offenders and youth programme graduates run the programmes.

4.3.6 THE UPINGTON COMMUNITY PROJECT

In 2007 the Upington community was urged to accept rehabilitated ex-offenders back into society for sustainable social reintegration and to reduce the levels of re-offending in the community (Jacobus, 2007). Correctional Services Deputy Minister Loretta Jacobus appealed to the Upington community to accept rehabilitated ex-offenders back into the community.

> Whilst we are not promoting any breaking of the law, and definitely not making excuses for crime, we want to appeal to the communities and private companies to provide job opportunities to rehabilitated ex-offenders. It is very important that they are not stigmatised and marginalised by society. We need to embrace these former inmates to ensure that they take active parts in the fight against crime (Jacobus, 2007).

This initiative was as a result of reports of high re-offending rates in the community and the constant challenge of crime in the area. The community of Khara Hais faces high unemployment rates and poverty which contribute significantly to high rates of socioeconomic crime like theft, as well as contact crimes like assault, rapes and murder, particularly against women and children.

4.3.7 NEHEMIAH HOMES: A REINTEGRATION HOME

The Nehemiah reintegration homes operate under the care of the umbrella organisation Lotsha. The projects consider the special needs of South Africans, with its diversity of

people and limited resources. The project helps men, women and children rebuild their lives after imprisonment. Problems associated with drug and alcohol abuse are addressed. The objective is to continue their rehabilitation process by building self-esteem through the teaching of practical skills and ultimately to enable them to be gainfully employed. Nehemiah Homes provide a place that allows reintegration into society, community and even family where required. Additional services such as counselling, psychology and medical (nurse or sister to visit periodically) are made available. Parolees without homes are accommodated, with the government paying a small sponsorship fee.

4.3.8 THE PARTNERSHIP BETWEEN GOVERNMENT AND CIVIL SOCIETY AND INTERDEPARTMENTAL RELATIONSHIPS TO PROMOTE EFFECTIVE SOCIAL REINTEGRATION

According to Ngwenya (2008), after the President's State of the Nation Address in the National Assembly on 12 February 2008, the DCS endorsed a partnership between government and civil society and interdepartmental relationships to promote effective social reintegration. This aims to enhance community-based programmes based on multidisciplinary approaches involving:

- effective supervision after release on parole
- community corrections and
- partnerships

Ngwenya (2008) indicates that communities and the business sector must be sensitised to accept ex-offenders with their new skills acquired from prisons with a view to becoming financially viable and law-abiding members of society (Judicial Inspectorate of Prisons, 2004). Social reintegration focuses on:

- preparing prisoners for release
- effective supervision after release on parole
- facilitating their social integration into communities

The social reintegration programme is regarded as the most relevant in the prevention of crime and the rehabilitation of offenders. It appears as an alternative to incarceration in the ANC Polokwane resolutions (Muntingh, 1997). It requires the involvement of the community to effectively integrate ex-offenders, those on early release, or parolees returning to their communities. As a consequence it requires human and financial resources as well as a good infrastructure.

Ex-offenders require a community-based support system which ANC branches support by encouraging community involvement on parole boards and corrections. ANC branches aim to mobilise the community into anti-crime structures, and promote awareness to reduce negative attitude towards the released offenders (Ngwenya, 2008).

A meta-analysis of the success rates of these initiatives and programmes would show us the ideal model to be implemented within South Africa with its multicultural and diverse communities.

From the above discussion on the various efforts to assist reintegration in South Africa, we can see that rehabilitation and reintegration efforts are not structured but are rather based upon best practice as identified by the various roleplayers. In other words each working model is selected by the organisation to best address the needs of its particular clients (the offenders) in the framework of existing resources and structures. Thus programmes are based on available funding and support within the programme as well as from the community.

4.3.9 SUMMARY

The reintegration of ex-offenders into the South African community is important. This importance is captured in various programmes and projects that were discussed in this study unit. However, this is not sufficient as many ex-offenders remain marginalised and excluded from mainstream society. Additional efforts need to be developed and applied.

4.3.10 SELF-ASSESSMENT QUESTIONS

(1) Explain the non-negotiables in the Tough Enough programme.
(2) Select three of the best programmes from the study unit above and explain why you think that they are the best models.
(3) Identify which of the above models include cognitive behavioural and multisystemic treatment.

4.3.11 FEEDBACK ON SELF-ASSESSMENT QUESTIONS

(1) The non-negotiables are what will make the programme successful, such as accountability and responsibility, a choice to be in a programme, measurable impact of the programme, detailed planning, contracting (drawing up a contract between the offender and the programme coordinators) and creating and fostering an environment that will support the programme.
(2) No answer, requires own opinion.
(3) No answer, requires individual application.

STUDY UNIT 4.4

Alternatives towards punishment for reintegration

Need for alternative	Restorative justice	Offender reintegration sentences

CONTENTS

4.4.1 Introduction
4.4.2 The need for alternative sentencing
4.4.3 The role of restorative justice in the reintegration process
4.4.4 Offender reintegration as a strategy for crime prevention
4.4.5 Conclusion: The rehabilitation ideal
4.4.6 Self-assessment questions
4.4.7 Feedback on self-assessment questions



LEARNING OUTCOMES

When you have completed this study unit you will be able to do the following:

- Discuss the need for alternative sentencing.
- Explain offender reintegration as a strategy for crime prevention.

Because traditional punishment forms are not always successful, we look at alternatives.

4.4.1 INTRODUCTION

The majority of prisoners, particularly those serving short sentences, receive little practical support either before or after release. According to Muntingh (2001), "the result can often be a piecemeal, untailored response, based on what happens to be available in that particular prison or area, rather than what the prisoner needs to tackle his or her offending behaviour". This statement really sums up the situation in South Africa.

4.4.2 THE NEED FOR ALTERNATIVE SENTENCING

Too often rehabilitation efforts are unstructured, if present at all, and depend on the resources and infrastructure of the prison. The prisoner's unique needs are not even considered. See the following case study as an example of the often frustrating experiences of an individual coming into contact with the criminal justice system.

CASE STUDY

Re: Road to return ex-prisoner
05 Mar 2007 9:45:38pm

Re: Road to return
Four Corners Forum

As a victim who took the wrong path in life, I find the prison system an extension of the abuse I felt all my life. I learnt harder defence mechanisms. Now, two and a half years after a five-year sentence, I am alone, scared and angry thanks to the lack of help in the prison system.

The offender in this case identifies himself or herself as a victim of the system. Can you see how a system, meant to punish individuals but still meant to rehabilitate and accept the person back into society, often just perpetuates the punishment of the ex-offender? Long after the sentence imposed by the court is completed by the offender, he or she is still punished by society.

4.4.3 THE ROLE OF RESTORATIVE JUSTICE IN THE REINTEGRATION PROCESS

According to Muntingh (2000), punishment must achieve two things to restore the imbalance created by a crime. It must remove the stigma attached to the crime so that both the offender and society can put it behind them so that it does not affect their further interaction; furthermore, it must ensure the commitment of the offender to be a part of the community of good citizens and act according to the principles of mutual respect and non-exploitation.

The restorative justice theory was born out of the realisation that the retributive approach to punishment is ineffective, as it does not compel the offender to take responsibility for his or her actions. The retributive approach, more often than not, ignores the rights of the victim and the interests of society, and little or no attempt is made to restore the balance in society. Retributive justice views crime as an act that breaks the law and is therefore an offence against the state and its laws. Restorative justice defines a crime as an offence against a person and a relationship. Restorative justice thus aims to restore the rights of the victim and the relationship (Muntingh, 2000).

In order to be retributive, sentencing options must consider the offenders' continued contact with the community and the need for them to retain a responsibility to contribute as constructive citizens. Sentencing options such as correctional supervision, community service and diversion will allow for these critical areas. Legislation in South Africa, such as the Criminal Procedure Act 51 of 1977 and the Correctional Services Act 8 of 1959, makes provision for the use of alternative sentencing. In addressing the factors that contribute to re-offending, correctional services often have to remedy a lifetime of combined service failure, often unaided. And when prisoners are released, agencies are far from proactive in identifying them, and indeed there is evidence that prisoners are actively deprioritised. Many experience real obstacles to re-engaging in learning or drug programmes on release; but these pale into insignificance compared with their difficulties in accessing housing and benefits (Social Exclusion Unit, 2002).

The following case study illustrates the diverse problems encountered by ex-offenders when they attempt to return to society and the view that alternatives should be sought.

CASE STUDY

Author: Rebecca
Date/Time 05 Mar 2007 9:46:31 pm
Subject Re: Road to return

In regards to this evening's programme, I concur that the state of the criminal justice system needs a shake-up. Prison is meant to deter these offenders from re-offending, but it appears further networks are created in jail much like any kind of institution as a result more violent crimes are committed, and a dependence on drugs is more evident.

The lack of support disgusts me. Watching the programme alongside other family members I heard comments such as "he'll never change", "he'll reoffend" & "there's no hope". In my opinion if these people upon release were taken from their familiar environment, and placed in a better 24-hour support network with government funding, we would see the opportunity for these people to change.

It appears that this is what these ex-offenders lives lacked freedom and opportunity.

REFLECTIVE QUESTION: Can you see that restorative justice initiatives may have benefitted the offender in the case above?

4.4.4 OFFENDER REINTEGRATION AS A STRATEGY FOR CRIME PREVENTION

According to Muntingh (2001), offender reintegration as a strategy for crime prevention should be regarded as priority in South Africa. According to Muntingh, in order to fight crime and satisfy the community, the state is looking at imposing harsher sentences instead of humane punishment. It must be kept in mind that 95% of all people sentenced to prison will come back into society. It is this eventuality that needs to be considered, and addressed, as soon as imprisonment commences.

It is crucial to remember that sentencing and punishment cannot be meted out in isolation from the eventuality of reintegration. Imprisonment, as it is experienced now, cannot fulfil the function of reintegration. South Africa must look at practical, cost-effective and relevant solutions to crime, punishment and sentencing. Sentencing options like community corrections, community service and diversion can be effective, especially for people sentenced to serve six months in prison or less. With every prison sentence there should be a life-changing programme that has high impact, high intensity and can be personalised for those offenders that want to participate in such programmes.

4.4.5 CONCLUSION: THE REHABILITATION IDEAL

If "treating offenders" does not work, and if lawbreakers cannot be changed into law-abiding citizens, then the eminently utilitarian goal of corrections is fruitless and should be abandoned. But if effective rehabilitation interventions do indeed exist, and can be delivered effectively within the correctional context, then the failure to implement rehabilitation programmes would constitute reckless and irresponsible policy.

In closing we can look at the words of Lipsey and Cullen (2007:24):

> The question we are confronted with, then, is: What future will be chosen for corrections? A century ago, the progressives, recognizing that the possibility for reform was at hand, embraced a "new penology" that had at its core the rehabilitative ideal. Their unrestrained optimism about rehabilitation undoubtedly was misplaced; they underestimated the difficulty of changing human behaviour

within the confines of corrections and with techniques that had little basis in empirical social science. Today, we are perhaps more sober about the prospects of treating offenders, but we also are better informed about how to undertake this task effectively. Like our predecessors, then, we believe that the new century offers a propitious moment to fashion a new penology albeit, with ours being more cautiously expressed and evidence based that is informed by the rehabilitative ideal. The alternative prospect to do more of the same, to argue that offenders cannot change, to get tougher and tougher seems an uninviting future to contemplate. By contrast, reaffirming rehabilitation strikes us as a wiser and, we suspect, happier course to follow.

A structured, comprehensive approach must be adopted in the rehabilitation process at all levels within the criminal justice system. We must never lose sight of the complicated problems in prisoners' lives requiring a coordinated multiagency response, within prison and within the community, which must be sustained long after release.

Rehabilitation is only complete upon the successful reintegration of offenders into the community in a manner which prevents recidivism (National Crime Prevention Strategy, 1996). Pre-release programmes are relevant and tend to promote reintegration of offenders into the family and community.

4.4.6 SELF-ASSESSMENT QUESTIONS

(1) According to Muntingh (2000), punishment must achieve two things to restore the imbalance created by a crime. What are these two factors?
(2) Discuss offender reintegration as a strategy for crime prevention.

4.4.7 FEEDBACK ON SELF-ASSESSMENT QUESTIONS

(1) Firstly, punishment must remove the stigma attached to the crime, then both the offender and society can put it behind them and it will not affect their further interaction; and secondly, it must ensure the offenders' commitment or promise to be a part of the community of good citizens (be law-abiding) and act according to the principles of mutual respect and non-exploitation (that is, not commit criminal acts).
(2) See section 4.4.4.

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