

Restorative justice: The case for a Child Justice Act¹

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One of the major dilemmas we face both as individuals and as a society is simplistic thinking – or the failure to think at all. It isn't just a problem, it is the problem ... [An] all-too-common flaw is that most believe they somehow instinctively know how to think and to communicate. In reality, they usually do neither well.

M Scott Peck, *The road less travelled and beyond* (1997:1–2)

Introduction

Juvenile justice, sometimes called *child justice*, is often perceived as the natural playground for restorative justice. Justice concerns the proper ordering of things and persons within a society. In this respect restorative justice refers to the implementation of a theory of justice that focuses on crime and wrongdoing as perpetrated against the individual or community rather than the state. The wide and deep implementation of restorative justice principles, in particular when dealing with young people, has been recognised as the 'green' way to go. This is so, because the principles of restorative justice do not, either actually or symbolically, reduce incidents otherwise recognised as offences/crimes and, which give rise to societal reaction and censure, to a bundle of predefined and pre-structured rights relations. A broader focus, which includes as the case may be the perspective of individuals, encompasses the social environment from which a conflict emerged.² In this process, in which young people are recognised as persons in formation, and where the emphasis is on reparation, also with regard to victims, the full potential for personal development is maintained.

The term is, however, an anathema in the adversarial legal process of the criminal justice system, possibly because the courtroom working group, consisting predominantly of lawyers, following the necessarily distorting and abstracting concepts of the criminal law and procedure, seeks to reduce issues between offenders and victims to only legally relevant ones, whereas it is the very nature of restorative justice to expand issues beyond

1 This paper makes use of adapted passages from a paper co-authored by Schulz and Hamutenya (2004) entitled *Juvenile justice in Namibia: Law reform towards reconciliation and restorative justice*; available at <http://www.restorativejustice.org/>; last accessed 1 November 2009.

2 See Legal Assistance Centre (2002).

those that are legally relevant.³ But whereas the law represents a particular distortion of the social world through abstraction from reality, this does not necessarily entail the exclusion of restorative justice principles, because the legal framework could make use of opening clauses, which leave normed/regulated space for the application of restorative justice. And so, the world over,⁴ where nations overhaul their criminal justice systems with regard to the ways in which these systems handle young persons (juveniles) in conflict with the law, they put forth far-reaching restorative justice principles, and often opt procedurally for a dual track, i.e. one system for adults and another system, detached from the operations of the adult system, for young persons.⁵

The situation is different in Namibia. Soon entering its 21st year of Independence, Namibia is coming of age. But this may not mean much when it comes to law reform, since Namibia still has to develop a comprehensive juvenile justice system. Namibian juveniles caught up in the criminal justice system do not have a real lobby⁶ and it is thus no wonder that almost 20 years into national Independence there are only very limited legal provisions providing for the management of young offenders, spread throughout a number of separate statutes, which often stem from the pre-Independence era.⁷ Apart from a small number of statutory provisions addressing specifically young offenders, the law applies uniformly to adult and juvenile offenders, and adults and young offenders are put through the same system, are tried by the same courts, and by the same officials.⁸

The current Namibian Criminal Justice System conforms most closely to the so-called justice model.⁹ General features include 'due process', crime control and retribution.¹⁰ The present system, as far as criminal justice is concerned, is firmly based on the notion of retributive justice. It reflects a moralising, though individualistic world view, where for purposes of coercion and conformity the deviant actor is perceived as independent author of his/her actions, endowed with a degree of free will. If a rule has been contravened, the balance of the scale of justice has been disturbed and can be restored only if the offender

3 Braithwaite (2002:249).

4 A number of international legal instruments, in particular the UN Convention on the Right of the Child, the Beijing Rules, the Riyadh Guidelines and the UN Rules for the Protection of Juveniles deprived of their liberty guide UN member and signatory states in their endeavours.

5 Winterdyk (2002).

6 Schulz (2004).

7 Criminal Procedure Act 51 of 1977; Children's Act 33 of 1960; Prison Act 17 of 1998

8 In some Magistrate's Courts administrative provisions ensure that adult courts double up as juvenile courts (e.g. Windhoek), but there is no legal division of courts into adult criminal and juvenile criminal courts. The fact that such division is not peremptory also leads to a different treatment of juveniles, depending on which Magistrate Court has jurisdiction in the specific case.

9 Schulz (2002b:357, 362).

10 Snyman (1995:24f).

is punished: “[t]he extent of punishment must ... be proportionate to the extent of the harm done or of the violation of the law”.¹¹

However, since the system makes little distinction between adult and young offenders, it ignores pivotal criminological research: Moral intellectual development theory,¹² complemented by considerations on information processing, suggests that the younger the actor, the less probable it is that the sense of right and wrong informs the actor’s behaviour. When Piaget hypothesised on moral and intellectual development, he believed that people’s reasoning processes develop in an orderly fashion, beginning at birth and continuing until they are 12 years or older.¹³ According to Kohlberg,¹⁴ people move through stages of moral development, during which their decisions and judgements on right or wrong are made for different, not always the same reasons. As children mature they are able to make use of cues from their environment in action control and become increasingly capable of handling all kind of situations in line with the normative societal expectations. Many countries, including Ghana, South Africa,¹⁵ Uganda,¹⁶ Cuba, Russia and China¹⁷ have adjusted their justice systems to meet requirements derived from an ever increasing knowledge base. The ramifications of the prevailing Namibian criminal justice system, however, do not reflect these insights in terms of distinct requirements and procedures.

11 (ibid.:20). Otherwise, the criminology of our criminal law is fairly simple. It is based on a number of utterly unsophisticated assumptions as to the cause-effect-relationship between punishment/absence of punishment and the prevalence of crimes, which comes with a number of equally limited and rather formalised corollaries regarding developmental, socio-economic and other aspects in the context of criminality. The system denies, or when it comes to the application of the law, denies largely the relevance of society with regard to the commission of crimes. A prime example for the prevailing paradigm is the Stock Theft Amendment Act, Act No 19 of 2004, where a minimum sentence of 20 (twenty) years imprisonment for a conviction on stock theft of a pecuniary value of more than N\$500 has been prescribed. How harsh sentences and retributive justice can impact prevalence and incidence of stock theft has not been shown yet. The legislator follows here as much as elsewhere, the classical conception of crime according to Bentham, that “Nature has placed mankind under the governance of two sovereign masters, pain and pleasure” (Bentham 1970 [1789]:11), without being ready to take note of the huge shift in understanding and representation of this truism since then.

12 Kohlberg (1969).

13 Piaget (1932); see also Albrecht (2002a).

14 Kohlberg (1969).

15 After about ten years of discourse and political wrangling over this law reform project, the South African Child Justice Act, 2008 (No. 8 of 2008) was finally gazetted on 11 May 2009; section 7 of the Act raises the age of criminal capacity to 10 years of age.

16 Super (1999).

17 Winterdyk (2002).

A short history of law reform on juvenile/child justice in Namibia

Under the heading 'Juvenile Justice in Limbo: Quo Vadis Namibia?' Schulz¹⁸ reasoned as follows: "The development since 2003 suggests ... that Namibia at no point in time has truly appropriated, neither the way nor the objectives of the Juvenile Justice programme ...", and further that it was high time for role players and stakeholders in the Namibian Criminal Justice System "to reinvigorate the process which had been so promising some time ago, the process towards a real system to manage young people in trouble with the law". This call for action was made three years after a workshop on juvenile justice in Namibia, which aimed at bringing the topic of "Law Reform on Juvenile Justice in Namibia back on the agenda".¹⁹

The above suggests that Law Reform on Juvenile Justice in Namibia has a lengthy history, however, without happy ending so far. Indeed, the early beginnings can be traced back to the early hours of the Republic of Namibia. But Schulz's critique may have been too much a blanket condemnation.²⁰ The efforts made since 1990 have been tremendous, and the reconfiguration of the system is a Herculean task. In September 1990, the then President of Namibia, Sam Nujoma, led the country's delegation to the World Summit for Children (New York). The World Summit adopted the Declaration on the Survival, Protection and Development of Children and a Plan of Action for its implementation. Together with the Convention on the Right of the Child, this Plan of Action formed the agenda to be achieved by the year 2000 by all countries. Following the World Summit, an Inter-ministerial Policy Committee was established, tasked to draft a National Programme of Action for the Children of Namibia, and "to consider steps to implement the Convention on the Rights of the Child".²¹ Namibia submitted its first report in January 1994 to the UN Committee on the Rights of the Child. The Committee noted the existence of "political commitment within the country to improve the situation of children".²² The Committee acknowledged the legacy of war and Apartheid in Namibia, the constraining influence of poverty, and the inherited mire of colonial legislation which is at odds with international standards. In considering Namibia's country report submitted in terms of Article 44 of the CRC, the UN Committee on the Rights of the Child concluded the following:²³

[A]s regards the system of juvenile justice in place in Namibia, the Committee is concerned as to its conformity with the Convention on the Rights of the Child, namely its Articles 37 and 40, as well as with relevant international instruments such as the Beijing Rules, the Riyadh Guidelines, and the United Nations Rules for the Protection of Juveniles Deprived of their liberty ...

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- 18 Schulz (2007).
19 Schulz (2004).
20 Schulz (2007).
21 Ministry of Women Affairs and Child Welfare (2000).
22 UN Committee on the Rights of the Child (1994).
23 (ibid.).

The Committee then recommended:²⁴

[T]he system of the administration of juvenile justice in the State Party must be guided by the provisions of Articles 37 and 40 of the CRC as well as the relevant international standards in this field, including the Beijing Rules, the Riyadh Guidelines and the United Nations Rules for the Protection of Juveniles deprived of their Liberty.

In its 2000 National Report on the Follow-up to the World Summit for Children, Namibia reported that a National Inter-ministerial Committee on Juvenile Justice (IMC) had been established in 1997, with the purpose to create a sustainable and comprehensive juveniles justice system in Namibia, and that an increasing number of juvenile offenders were being treated according to international instruments and guidelines.²⁵ Following the 2000 report, the IMC undertook substantial activities pertaining to the transformation of the juvenile justice system. A detailed plan of action was crafted, and set in motion. The programme description towards a structured and holistic juvenile justice system contained a number of project interventions, namely –

- Law Reform
- Training
- Structures
- Service Delivery System
- Evaluation and Monitoring, and
- Advocacy and Child Crime Prevention.

The authors of the programme wrote the principles of restorative justice deeply into the programme description. This spirit propelled the implementation of the programme enormously, and progress was made regarding all project interventions.²⁶ There was a common understanding that the envisaged system as a preventative and remedial tool came with its own inherent limitations, and that its instrumental value would depend in the first place on a well developed service delivery system. This in turn required a legislative structure, which would ensure that the future system would not depend anymore on the goodwill of donor organisations or countries, but become sustainable on the basis of annual budget appropriations for the legislated purpose.

It was against this background that in 2000 the IMC commissioned the drafting of the Juvenile Justice Bill. The drafter²⁷ incorporated the shared views, ideas and perceptions submitted by the various stakeholders, and the outcome was discussed at workshops and conferences for consensus-building. These consultations, together with the parallel collection of statistical data, execution of pilot studies etc, led to a stable perception

24 (ibid.).

25 Ministry of Women Affairs and Child Welfare (2000:26f).

26 The Legal Assistance Centre had started its Juvenile Justice Project in 1995, which got a boost when the IMC got operational, Juvenile Justice Forums were established, and the Austrian Development Corporation agreed to arrange for the finances of a comprehensive Juvenile Justice Programme for initially 18 months.

27 The Child Justice Bill was crafted by Adv. Bill Corbett.

of feasibility and desirability of certain legal contents, structures and procedures as appropriate. Such outcomes were integrated into the Layman's Draft Bill on Child Justice,²⁸ which the IMC received in December 2002. On 8 May 2003, the then chairperson of the IMC, Dr T Huaraka submitted the draft document to a follow-up meeting of government ministers, including five members of the Cabinet Committee of Legislation. Whereas the document drew considerable support from this meeting, it also occasioned some few but important changes.

The technical experts under the stewardship of the IMC had wrangled until the very last moment about age and criminal capacity. The common law rule, still in force today, reads as follows: "It is irrebuttably presumed that a child under the age of 7 years lacks criminal capacity". But encouraged by international tendencies to increase the age of criminal capacity, the IMC accepted a non-rebuttable assumption that criminal capacity should only begin at the age of ten years. The aforementioned meeting of ministers resolved, however, that the common law would stand as is.²⁹

The age of criminal capacity has always sparked intense arguments. Already at the 27th Deutscher Juristentag 1904, it had been pointed out that any legal practitioner would confirm having come across very young persons who warranted the proverbial phrase *malitia supplet annos*.³⁰ Some scholars held, therefore, that due to the experienced and obvious variation in maturity of different persons a fixation of age limits for criminal capacity could not be deemed appropriate. This view did not however, change the course of the law, and whereas the age of criminal capacity was initially 12 years of age, the age barrier was raised to 14 years in 1923.

The rejection of the proposed new age limit for criminal capacity by government ministers was considered as a serious setback for the law reform process. But whoever thought at the time that the development of a genuine juvenile justice system in Namibia would be unstoppable, and that a novel law, in whatever form and shape, would sooner or later emerge from the process, was seriously misguided. Notwithstanding the enthusiasm displayed by most role players there and then, when the funding of the Juvenile Justice Programme, Namibia Project D granted by Austria and facilitated through the Institut

28 In the following referred to as *Child Justice Bill* or *Bill*.

29 Already during the negotiations at technical level it appeared already that the change of the *doli incapax* rule was not palatable to everybody. In particular lawyers, and here first and foremost prosecutors did often not appreciate the raise of the age limit. One argument, which attracted some interest was, that in the past there had been cases, where young offenders (children) became authors of violence, sexual violence and even murder, who in the view of the court did in fact not lack criminal capacity, and that if the age limit for criminal capacity would be changed, such offenders could not be brought to justice anymore. It is perhaps not guessing too much, to suggest that a quasi ubiquitous reflex, connecting social order intrinsically with the existence and performance of a criminal justice system, might indicate that different views on age limits for criminal responsibility reflect different individual needs in terms of control, visibility of control, and feelings of security.

30 Albrecht (2002a).

für Internationale Zusammenarbeit (IIZ) dried up, and the Juvenile Justice Project run by the Legal Assistance Centre expired, there was a marked reduction in the volume and coordination of juvenile justice activities. More than six years later, the IMC appears to be defunct, no law reform project has found its way to Parliament, and no such project is currently on the agenda of the Namibian Law Reform Commission. One is tempted to say that the once so promising juvenile justice reform project was aborted with effect from the meeting of 8 May 2003.

But law reform may be a long-winded enterprise. Skelton and Potgieter reported at the beginning of the decade “it is envisaged that the (SA) draft bill will be debated and considered by the Parliamentary Portfolio Committees during the course of 2002”.³¹ Yet, before the South African Child Justice Bill was adopted, it had travelled a long way. Originally drafted in 2002, the Bill was withdrawn in 2003 and completely overhauled because, in the view of many, including state welfare bodies, its compilation and stated objectives were considered too narrow and did not involve sufficient consultation with the many stakeholders involved.³² The Child Justice Act³³ was eventually signed on the 7 May 2009, and gazetted on 11 May 2009.

The failed attempt to reform the Namibian system gives rise to the question about the chief factors which contributed to the demise of the IMC and the Child Justice Bill as the main part of the law reform project. At the professional and academic level, there may be misconceptions regarding the purposes of punishment and the sentencing goals, which have contributed to a weakening of the political will to change the law.³⁴

Constitutional limits for law reform on criminal justice

Namibia as a representative democracy, based on a Constitution where the rule of law strengthened by a strong bill of rights reigns, law reform has to remain within defined limits. Criminal Justice by its very nature comes with far-reaching restrictions on the exercise of rights and freedoms of offenders and others affected by its operations. In this respect, the Namibian Constitution requires the observation of specific caveats, for instance Article 21(2) regarding the Freedoms granted in Article 21(1), and directly criminal justice related, Article 7, Article 11 and Article 12, with regard to a number of specifically guaranteed Individual rights. Through constitutional jurisprudence a number

31 Skelton & Potgieter (2002:498).

32 In 2005, a second Bill with the same name was approved by Cabinet and tabled before Parliament. The newer version more broadly aligned South Africa’s criminal system with international practices and agreements in respect of children accused of committing offences; established new assessment procedures; maintained the principle that prison is the last resort for *children* as redefined; and established better cooperative systems in all state undertakings to deal with the young in order to better handle an effective child justice system.

33 No. 75 of 2008.

34 Politically, the message to remain ‘tough’ on criminals has always been a formidable weapon in many countries.

of intrinsic principles have been derived from the Namibian Constitution, of which the principle of proportionality is paramount in respect of legislation intended to impose restrictions on fundamental rights and freedoms. From this follows that the legislator in particular when dealing with criminal law and procedure has to keep its endeavours within the remits of proportionality; after all criminal punishment is the strongest invasion of liberty, which the constitutional state has to offer. At the same time, the legislator finds itself here in a peculiar situation.

When it comes to criminal justice, the legal situation is somewhat different, because it is the very Constitution which operates with concepts and notions like *criminal charge; accused; criminal cases, juvenile persons, innocent until proven guilty, cross-examination; defence; convicted; acquitted; criminal offence; penalty*.³⁵ All these concepts, the practices behind them, the notions and their interrelations have existed long before they have been translated in to positive constitutional law.³⁶

The constitutional presupposition of the criminal law, however, resulted in a complacency, which has already lasted too long. Depending on a particular and perpetuated notion of criminal justice, tacitly upheld under reference to the constitutional status of the system, social problems, in particular if it appears that their origins can be attributed to individual action, are increasingly dealt with as criminal justice matters. Although often nothing more than empty actionism as in the case of the Stock Theft Amendment Act,³⁷ futile legislative activity creates the impression that something has been done to solve a problem. But notwithstanding trite constitutional positivism regarding criminal law and procedure, the legislature, and for purposes of law reform the government at large, is held to ensure continuously that the legal order, and ancillary to it, legal practice are in line with constitutional precepts.

In this respect, there are sufficient reasons for testing at least the consequential side of the criminal law against the constitutional principle of proportionality, because it becomes more and more evident that the instruments the criminal justice system has at its disposition are not capable of achieving the objectives or meeting the intended purposes.

35 Article 12, Namibian Constitution.

36 Having taken such concepts over into the Constitution the *pouvoir constituant* constituent, i.e. the original constitutional power has accepted the existence of the criminal justice system and its operations as a historical legacy. To the extent that the above terms, ideas, notions and concepts have become positive constitutional law, they exempt the legislature, the judiciary and by logical extension anybody who is held to apply these tools from questioning their constitutionality. This is fundamentally logical, because the Constitution is the final yardstick for policy-making, and to question the wisdom entrenched in the Constitution would amount to the claim that there is an oxymoron like 'unconstitutional' constitutional law.

37 No. 19 of 2004.

Punishment and the interests of society – Proportionality issues in criminal justice

Under the constitutional principle of proportionality, the state may encroach on individual rights and freedoms only to the extent that it is indispensable for the protection of the public interest. The principle of proportionality requires a reasonable relation between a legislative act, its objectives and the domain it intends to regulate.³⁸ Article 21(2) of the Namibian Constitution presupposes the validity of this principle by stating "... so far as such law imposes reasonable restrictions on the exercise of the rights and freedoms ..., which are necessary in a democratic society and are required in the interest of ...". The fact that the Namibian Constitution presupposes the existence of the criminal justice system is a *prima facie* indication for that punishment as a legal instrument is in the interest of society. From there it takes however another step to conclude that particular operations of the system are or are not in the interest of society.

Punishment, the imposition of harm (penalty) on a person convicted of a crime following judicial proceedings during which criminal responsibility is ascertained, rests on a number of different, not always reconcilable sentencing goals and principles, namely retribution, incapacitation, deterrence, rehabilitation and restoration.³⁹ It is a historical legacy.⁴⁰ Underlying sentencing philosophies, and the justifications on which various sentencing strategies are based, are manifestly intertwined issues of religion, morals, values, and emotions. Philosophies that gained prominence at a particular point in time usually reflected more deeply held social values.

Although the ideas relating to punishment are ancient, it is intriguing to find out that their relative or absolute importance, and whether any one of these sentencing goals should find application in the law⁴¹ as purposes of punishment, has never been "decided, not even obiter".⁴² In effect, the courts have simply "taken judicial notice of these facts".⁴³ More interesting even is the fact, that hitherto no evidence has been required regarding the purposes of punishment. In particular the question, whether a sentence, the punishment meted out and eventually inflicted upon the convicted offender, has such effects, or how effective these purposes are as objectives, has not yet reached the judicial stage. From a legal perspective this may be all too understandable. As has been pointed out above, the existence of the criminal law with its definitions of crimes and offences, be it at

38 For a deeper discussion of the topic, compare De Waal et al. (2001:144ff).

39 Schmallegger (2007:403).

40 Terblanche (2007:171).

41 Terblanche (*ibid.*) refers here to the South African law. Although the Namibian law split from the South African law with the advent of Namibian Independence, the application of these principles dates back long before South Africa ended its role as Namibia's oppressor.

42 (*ibid.*:156).

43 Davis AJA in *R v Swanepoel*, 1945 AD 444: "The ends of criminal justice are four in number, and in respect of the purposes so served by it, punishment may be distinguished as (1) Deterrent, (2) Preventive, (3) Reformative, and (4) Retributive"; (*ibid.*).

common or statutory law, is a constitutional law presupposition.⁴⁴ This exonerates the judiciary legally from the duty to test lawfulness of the instruments it uses. However, the operations of the criminal justice system, as much as the application of the legal framework which constitutes it and provides its orientation, eventually the very legal provisions which are applied by the system, are not exempted from the observation of those constitutional principles, which guide any of the sectors of government otherwise. As will be set out in more detail in the following it is in particular imprisonment as the standard carrier of social censure, which misses the target.

Technically, i.e. with regard to the constitutional mechanics, the case of the criminal law requires a handling which is comparable with cases, where the legislature adopted a law which, although negatively affecting fundamental rights or freedoms, is initially justified in terms of Article 21(2) of the Namibian Constitution on the basis of a prognosis regarding the intended effects. In particular where the envisaged outcomes of a law depend on the assessment of the effect of multiple factors in the social environment, it emanates from an initial notion of democracy that the judiciary respects the legislative prerogative, and does not lightly substitute its own prognosis for the prognosis of the legislature. Testing such law against the principle of proportionality would see the application of judicial self-restraint, and content itself as the case may be, with an evidential analysis of the obvious. However, logic would have it that in the event that the prognosis turns out to be incorrect, the legislature comes under a constitutional obligation to adapt the law and adjust it to the better insights gained in the meantime. In the event that the legislature would not recognise such an emerging obligation, the courts with original jurisdiction⁴⁵ would have the power and authority to order the necessary corrective legislative measures.

Given that this paper is not on the explication of constitutional precepts, I will content myself in the following with a short discourse on some of the “purposes”⁴⁶ of punishment against the backdrop of the constitutional requirement that government’s authority to legislate is always placed under the principle of proportionality. I shall further limit the discussion of the principle of proportionality to the element of adequacy/suitability, i.e.

44 The Namibian Constitution has carried over the notion of a criminal justice system with its constituent components, i.e. Police (Article 115ff), Prisons (Article 121ff) and Judiciary (Article 78ff), without questioning the assumptions which underpin its existence.

45 In countries which have a constitutional court, e.g. South Africa, this jurisdiction would be vested in such a court; in the case of Namibia the High Court and ultimately the Supreme Court “have the power to overrule legislation where legislation is inconsistent with or *ultra vires*” the Constitution (Amoo 2008:183).

46 That is, deterrence, and although considered to be less ‘purpose’ than legitimation and measurement of punishment, retribution. The penal purposes of incapacitation, rehabilitation and restoration do not need to be scrutinised here particularly in terms of the principle of proportionality. Incapacitation/prevention is only required in particular cases where the dangerousness of the offender to society is obvious. Incapacitation/prevention is therefore no independent, no residual penal purpose which requires punishment, namely imprisonment in all cases. The same is true for rehabilitation and restoration, which are not intrinsically bound to imprisonment.

the requirement that the means the law intends to apply must be of such a nature that it may reasonably achieve, at least significantly contribute, to the achievement of the envisaged aim.⁴⁷

Purposes and principles of punishment revisited

The criminology of today's criminal law stems basically from the time when Cesare Beccaria (1738–1794) and Jeremy Bentham (1748–1832) established a new school of thought in breaking with what can be identified as a previously 'archaic', 'barbaric', 'repressive' or 'arbitrary' system of criminal law. This new school was to become known as the classical school of criminology. For thinkers like Beccaria and Bentham the question of crime was predominantly the question of punishment. Their programme was to prevent punishment from being in Beccaria's terms, "an act of violence of one or many against a private citizen"; instead it should be essentially "public, prompt, necessary, the last possible in given circumstances, proportionate to the crime, dictated by laws".⁴⁸ Classical thought on crime and criminality, inspired by the philosophical underpinnings of enlightenment, presented a model of rationality with a liberal state imposing the fair and just punishment that must result if social harm has been perpetrated. Theirs were the purposes of deterrence and retribution, and that this perspective has been handed down until our day becomes more than obvious when reading Snyman, for instance, on criminal law.⁴⁹

Since Beccaria's script,⁵⁰ *Dei delitti et delle pene* ("On crime and punishment"), published in 1764, more than 200 years have passed, and the last century covers an increasingly more intensive period of scientific exploration of human behaviour and action. This justifies a critical revision of those principles of which not only our courts have taken notice, but which have been axiomatically accepted as unquestioned and unchallenged, and therefore possibly ideological foundations of (Westernised) societies at large. The quality of the nexus between punishment and penal purposes will be scrutinised hereafter.

The instrumentality of punishment

Among the basic principles according to which sentence is imposed, Terblanche⁵¹ lists, inter alia, "[i]n the interest of society the purposes of sentencing are deterrence,

47 The principle of proportionality is based, apart from the requirements that the desired end and the intended means must be constitutional, on the two sub-principles adequacy – also discussed under the term *suitability* – and *necessity*.

48 Schulz (2006:2).

49 Snyman (2002).

50 Beccaria, then only 26 years of age, published his essay anonymously; this small monograph of approximately 100 pages has been heralded as a masterpiece and the foundation of the classical school of criminological thought.

51 Terblanche (2007:137).

prevention, and rehabilitation, and retribution".⁵² Yet, the instrumentality of sentencing – which Terblanche uses as synonymous with punishment – regarding any of these purposes is doubtful.

Deterrence

The notion of *deterrence* goes back to the already mentioned authors Beccaria and Bentham. Beccaria, perhaps more than anybody else except Bentham, is responsible for the contemporary belief that actors have control over their behaviour, and that they can be deterred by the threat of punishment, because they choose to act in the way they act.⁵³ "To prevent the happening of mischief",⁵⁴ which means to reduce crime, the pain of crime commission must outweigh the pleasure to be derived from criminal activity. Bentham's claim rested upon the belief that human beings are fundamentally rational and that criminals to be will take into account, at least intuitively, the pain of punishment against any pleasures thought likely to be derived from the commission of crime. This approach has been termed hedonistic calculus or utilitarianism because of its emphasis on the worth any action holds for an individual undertaking it. Rabie et al. set out the meaning of deterrence as follows:⁵⁵

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

From these assumptions, two forms of deterrence emanate. The first is known as general deterrence and operates against society as a whole. The second form has become known as special or individual deterrence and operates against the offender.

General deterrence

It is widely assumed that punishment will deter other potential offenders and that the higher the sentence the greater the deterrent value.⁵⁶ In the context of this paper it is of

52 In *S v Zinn*, 1969 (2) SA 537, Rumpff JA coined what can be called the 'sentencing triad': "[w]hat has to be considered is the triad consisting of the crime, the offender and the interests of society". The first two elements of the sentencing triad, i.e. the crime and the criminal are of limited interest at this point of the discourse. The offender will however come into perspective when discussing retribution (see below).

53 Bentham (1789).

54 (ibid.).

55 Rabie et al. (1994:39).

56 This is, at least partially, the underlying reason for courts often to impose heavy sentences for rather 'petty' crimes, mainly on the basis of the offender's previous convictions. *Fleming* DJP in *S v Sibeko* 1995 (1) SACR 186 (W) at 191 d–e, referred to Magistrates who often complain that crime goes unabated despite increased sentences.

interest that despite the widely held belief, that the threat of similar punishment will cause potential offenders to refrain from committing crime, this cannot be supported by research. To the contrary, there is an ever-growing body of research showing that deterrence works in ways which are quite different from what our beliefs tells us. In order to appreciate the research findings, it is necessary to have a deeper look into the demographics of offender populations.

In their study entitled *Delinquency in a birth cohort*, Wolfgang et al.⁵⁷ could demonstrate that whereas 18.7% of juveniles of the sample had more than one crime record, only about 5% of the cohort accounted for more than 50% of all delicts committed. Similar results have been produced in follow-up studies.⁵⁸ Complementary to the outcomes of these studies, Gottfredson and Hirschi revealed that the degree of criminality among offenders is highly correlated with what they have termed a “lack of self-control”, where self-control would be the ability to take note and rationally consider positive and negative, long-term and short-term consequences of one’s behaviour.⁵⁹ Since its publication in 1990, the self-control perspective has generated critical analysis⁶⁰ and a growing body of empirical studies of the theory’s central proposition that self-control is the individual level predictor of involvement in crime and analogous behaviour. The results of existing studies, beginning with Grasmick et al. in 1993,⁶¹ empirically support the central proposition that low self-control increases involvement in crime. The mechanics of self-control – the theory presupposes an action theory in form of an expectancy x utility (EU) Model⁶² – can be illustrated by means of an example which contrasts a presumed high

57 Wolfgang et al. (1972).

58 Wolfgang et al.’s (1972) study was also later replicated with a second study. Tracy et al. (1990:280) demonstrated that “7.5% of cohort members ... These chronic offenders accounted for ... 61% of all offenses”.

59 Gottfredson & Hirschi (1990).

60 Goode (2008).

61 Grasmick et al. (1993); see also Benson & Moore (1992); Brownfield & Sorenson (1993); Keane et al. (1993); Nagin & Paternoster (1993); Wood et al. (1993); Burton et al. (1994); Polakowski (1994); Gibbs & Giever (1995); Piquero & Tibbets (1996); Cochran et al. (1997); Evans et al. (1997); Avakame (1998); Burton et al. (1998); Longshore & Turner (1998); Longshore et al. (1998); LaGrange & Silverman (1999); Junger & Tremblay (1999).

62 The *expectancy x value* theory of action provides a causal explanation. Actors act according to a law of action against their subjective objectives and causal hypotheses about how to reach these objectives. In this regard the action is the variable to be explained and/or predicted, whereas evaluation and expectations are the peripheral conditions of the explanation. The theory is in a formal sense a variant of rational action theory. However, in the context of selection, i.e. framing, orientation and script selection, we do not deal with rational choice in a substantial sense. Actors do not necessarily (or even seldom) ‘consciously’ calculate, and they are not perfectly informed either. Human beings do not perceive – and in this sense rational choice theory is contra-factual – the world ‘as is’ in its complexity; instead, they dispose only of certain memorised mental representations, which are necessarily simplifications. These simplifications reflect partly the limited, the ‘bounded’ rationality of the actor. The basic assumptions of *expectancy x value* theory are as follows: (Esser 1999b:248):

- Any action represents a decision for enactment among alternatives

self-control actor and a low self-control actor with regard to quite different deviant acts, namely rape and tax evasion.

*Example*⁶³

In the following we compare Rape (A) and Tax-evasion (B) from the hypothetical perspective of first, a low and second, a high self-control actor. The example is extremely simplified since we want to consider only the utility side and, therefore, assume an expectancy term for all utilities of 1 (100%). According to self-control theory the example attends to the difference in the calculation of EU weights between high and low self-control actors. The grey marking in A and B refers to the utilities supposedly not recognised by low self-control actors. Otherwise, the example is rather self-explicatory.

A. RAPE

Perspective: Low self-control actor

DSt -1	DLt -5
ASt 2	ALt 0

DSt = Disadvantage short term: Risk of assault by victim (-1)
 DLt = Disadvantage long term: Risk of imprisonment (-5)
 ASt = Advantage short term: Domination/sexual gratification (2)
 ALt = Advantage long term: None (0)
EU weight (Rape) = ASt (2) + DSt (-1) = 1

Perspective: High self-control actor

DSt -1	DLt -5
ASt 2	ALt 0

DSt = Disadvantage short term: Risk of assault by victim (-1)
 DLt = Disadvantage long term: Risk of imprisonment (-5)
 ASt = Advantage short term: Domination/sexual gratification (2)
 ALt = Advantage long term: None (0)
EU weight (Rape) = 2 + (-2) + (-5) = -4 [sic!]

-
- Selected action always has consequences/outcomes
 - Consequences may be perceived as positive, negative, or neutral by the precise actor
 - Consequences occur with different probabilities, which the actor has stored as expectancies
 - Alternatives for action are evaluated/weighted, and
 - Actors choose and enact the alternative which offers the maximal/highest weight.

63 Example taken from Schulz (2006:209ff).

According to the *expectancy x value* model only the low self-control actor arrives at a positive EU weight for rape/sexual assault, because he will not consider the negative EU value of DLt. The high self-control actor, however, will arrive at a negative EU weight for rape/sexual assault, since he has to consider $DLt = (-5)$. The situation is, however, different if we look at the following tax-cheating case. We want to assume that the actor has rendered a service which has not been entered in the books, since it was a cash transaction without invoice. The risk of detection is virtually zero, but there is a short term and a long term positive utility. First, the saving on tax increases liquidity; second, in the long run the money saved generates more money.

B. TAX EVASION

Perspective: Low self-control actor

DSt -1	DLt 0
ASt 2	ALt 3

DSt = Disadvantage short term: Withholding the truth (-1)
 DLt = Disadvantage long term: None (0)
 ASt = Advantage short term: Improved liquidity (2)
 ALt = Advantage long term: Improved capital basis (3)
EU weight (Tax evasion) = ASt (2) + DSt (-1) = 1

Perspective: High self-control actor

DSt -1	DLt 0
ASt 2	ALt 3

DSt = Disadvantage short term: Withholding the truth (-1)
 DLt = Disadvantage long term: None (0)
 ASt = Advantage short term: Improved liquidity (2)
 ALt = Advantage long term: Improved capital basis (3)
EU weight (Tax evasion) = 2 + 3 + (-1) + (0) = 4 [sic!]

For both actors the logic of the EU weight commands the criminal act. In the case of the high self-control actor the imperative is even stronger, because he takes cognisance of the indirect advantage, whereas this presumably escapes the low self-control offender.

Self-control is the non-technical redefinition of a phenomenon otherwise known as *myopia/akrasia*, which denotes the fact that human beings are attracted in respect of their goals and attention by proximate aspects of the situation and have only limited power to withstand temptation, even if non-action or other action alternatives probably yield long-

term advantages. This phenomenon belongs to a group of anomalies/paradoxes related to the rationality of human decision making. People do not take the alternatives available to them as binding: some objectively impossible alternatives are considered, whereas other alternatives that are possible are disregarded.⁶⁴ The above provides us with insights, which point towards the necessity of revising our views on deterrence:⁶⁵

- Human beings as actors have different propensities to commit crime
- A small group with a high propensity, i.e. low self-control, is accountable for the majority of all crimes committed, and
- Propensities to commit crime are largely not informed by external factors but partially immune against the threat of punishment (self-control develops in the first 3–8 years of human development).

It is only one logical step from there to conclude that sentences and increased sentences are ineffective, because the 5–7% of chronic offenders are not susceptible to the threat of punishment. This conclusion tallies with an almost exclusively held academic position, and few people who have studied this topic have different views. Tonry states the following:⁶⁶

No one doubts that having some penalties is better than having none. What is widely doubted is the proposition that changes in penalties have any significant effect on behaviour. Most crime-control scholars are doubtful because that proposition is refuted by the clear weight of the research evidence, and because every non-partisan expert body in the United States, Canada, and England that has examined the evidence has reached that same conclusion.⁶⁷

64 Frey and Heggli (1999:196) call this phenomenon the *ipsative limits to human behaviour*: “Under many circumstances people’s actions are not constrained effectively by the objective conditions (objective possibility set OPS) but rather by the set of possibilities which they consider relevant for themselves, that is, by the ipsative possibility set (IPS).” They distinguish between underextension and overextension of the ipsative set: “The underextension of the ipsative set is not restricted to mentally disturbed people but is a common phenomenon among perfectly rational actors. It seems that most people consider only a rather small part of what is objectively possible. To an outside observer, the life of these people appears to be rather narrow and moving along a trodden path, and that obvious possibilities for improving the situation are disregarded” (ibid.:197). Their observation as to overextension is, however, of more interest in our context: “Overextension is particularly relevant when considerable uncertainty exists. In this setting, a person always finds it possible to associate him or herself with another domain so that the experience of others becomes irrelevant from his or her personal point of view. This *ipsative probability* may deviate systematically and in the long run from what is known in the literature as objective and subjective probability ...: there is a tendency to *underestimate negative events* and to *overestimate positive events*. Under some circumstances, people stubbornly refuse to learn, there is “a surprising ... failure of people to infer from lifelong experience ...”. Rather, there is a “judgmental bias: people [have a] predilection to view themselves as personally immune to hazards” (1999:207).

65 The ever-growing body of research is showing that the acceptance of deterrence is counter-factual; research supporting the opposite is virtually non-existent.

66 Tonry (1996:8).

67 And further, on the movement in England from the deterrence model to the just-desert model brought about by the Criminal Justice Act of 1991, and which was explained by the Home

The response is of course pointing towards the remaining offenders who do not demonstrate a low level of self-control, and by extension the rest of society. And this is a legitimate undertaking. Rethinking the orthodox notion of deterrence does not mean that sentencing can or should be generally abolished. But it is rather the mere existence of a criminal justice system and its visible operations which exerts a deterrent effect than the extent of punishment; the deterrent effect is already inherent in the whole process.

In fact there is a considerable deterrent value in the criminal- justice process itself, even if that process results in an acquittal. The uncertainty of the outcome of a trial, the discomfort involved in any arrest, the waste of time, and the experience of the awesome power of the court are sure to have most people thinking "I would not like to experience that again".⁶⁸

Terblanche, implicitly so, holds that the threshold level for effective deterrence regarding ordinary citizens, and even non-chronic offenders, is so low that the quantum of punishment becomes secondary. But, so it seems, to the extent the review of topical research should be convincing, our societies appear immune against better insight. And against the behaviour of our judiciary, which when taking note of the virtual absence of research which would support the belief that sentencing has (any) noticeable deterrent effect, enters a state of denial, there may be little which can offset the effects of ideological priming.⁶⁹

For those who allow themselves an open mind, there are practical examples which demonstrate impressively that raising the thresholds against punishment does not lead to significant increases in crime. One of such examples is the case of Finland. Starting from the late 1960s Finland started a set of over twenty law reforms with the overall aim of reducing the number and length of prison sentences. The reforms dealt with specific offences, specific offender group, different forms of sanctions, sentencing principles and enforcement practices. The development in the Finnish criminal justice system was radically different from other Organisation for Economic Cooperation and Development

Office (UK) as such: "Deterrence is a principle with much immediate appeal ... But much crime is committed on impulse ... by offenders who live from moment to moment; their crimes are as impulsive as the rest of their feckless, sad, or pathetic lives. It is unrealistic to construct sentencing arrangements on the assumption that most offenders will weigh up the possibilities in advance and base their conduct on rational calculation".

68 Terblanche (2007:157).

69 It appears that the judiciary contents itself with the common belief, that at least some people have to be deterred from criminal activities through the sentences imposed by the courts. The term ideological priming is not farfetched considering that the deeply ingrained belief that punishment has some deterrent effect, is a strong political weapon. Many a time governments have presented themselves to the electorate as being serious about crime by announcing additional statutory measures, despite the lack of evidence that such measures actually work. Admittedly, deterrence and retribution are mostly conjured-up in one argument, and in the USA we are thus talking about the 'just deserts era', which began around 1995 (Schmallegger 2007:496). Interestingly however, punitive attitudes among the citizenry are weaker than ideological arguments in political battles suggest.

(OECD) countries. The developments in the United States of America and Finland, and even in European comparison, serve as an example of diametrically opposite trends. Whereas between the mid 1970s and early 2000s the prisoner rates in the USA increased five-fold, Finnish prisoner rates fell to one third of their original level. By the mid-1990s Finland had the lowest figures within the European Union. What is important in the context of deterrence is, however, that research of the dynamics between imprisonment rates and crime rates revealed that the correlation between imprisonment and crime is either plain zero or a negative one.⁷⁰ In other words, the radical reduction of sentencing to imprisonment does not change the deterrence of the system.⁷¹

Individual deterrence

Deterrence with a focus on the individual, i.e. the expectation that the offender will be deterred from re-offending because he has learnt from the unpleasant experience of his punishment or he is fearful of what may happen if he re-offends, does not fare any better than general deterrence. Research on the effect of increased sentences after re-conviction brought to light that the escalation of sanctions provided on recidivists cannot be justified on account of any preventive effect.⁷²

Deterrence: Conclusion

The answer to the question whether the nature and amount of the sentence imposed in a particular case will add to the deterrence exerted inherently by the whole trial process is in the light of the above discourse at best “doubtful”. Terblanche, and I concur, holds that a very good answer to the question stems from Walker and Padfield; he quotes:⁷³

Naïve claims that deterrent policies are effective – or totally ineffective – have been replaced by the less exciting realisation that some people can be deterred in some situations from some type of conduct by some degree of likelihood that they will be penalised in some ways; but that we do not yet know enough to enable us to be very specific about the people, the situations, the conduct, or the likelihood or nature of the penalties.

If there is any ‘purpose’ of punishment, any sentencing goal which stands out from the rest, this is certainly retribution. I would even go so far as to claim that the constitutional presupposition of the criminal justice system rests foursquare on the premise of retribution.

70 Lappi-Seppälä (2008:27ff).

71 The full picture of this success story cannot be delivered here; for more detail see Mohell et al. (2004).

72 Albrecht (1982). Albrecht studied the preventive effects of day fines in comparison with imprisonment. Conceptual analysis of the data revealed that recidivism differentials could be attributed to prevalent differences in social variables between offender samples; see also Kerner (1996:6–7).

73 Terblanche (2007:161).

Retribution⁷⁴

The dictionary meaning of retribution covers repayment, vengeance and punishment. And indeed, retribution is the earliest known rationale for punishment; it is fundamentally a call for punishment based on a perceived need for vengeance;⁷⁵ it serves largely the satisfaction that the crime did not go unpunished. But in the process of the state as the central authority taking over the self-help, revenge and vengeance by the victim, vengeance became retribution. And so, even though the underlying motive for punishment may be the perceived (or ascribed) need for vengeance, retribution as objective, ordered state activity, cannot be equated with vengeance or revenge any longer.⁷⁶

Within the remit of this paper it is hardly possible to discuss the complicated and abstract issue of retribution in any detail. But this is also not necessary. It may suffice here to explicate the concept by means of reference to some views held in this regard, which can be related to the offender as criminally responsible actor:

- Du Toit puts the satisfaction of society as an important aspect of retribution, in the sense that society is satisfied that its disapproval of the offender and his offences is expressed in an appropriate sentence⁷⁷
- Van der Merwe understands retribution as a judicial expression to the offender, as a judgment of condemnation of his conduct on society's behalf, because it is done "not out of emotional reaction to hurt or wrong ..., but *to indicate to the offender that his behaviour falls below an expected standard* and cannot be tolerated by the particular society" [Emphasis added],⁷⁸ and
- The Viljoen Commission (1976) held that "[r]etribution means ... that act of requiting or paying in return for evil done. In the criminal justice system it means the act of inflicting upon the convicted person, by means of the sentence, loss, suffering as punishment".⁷⁹

Although this does not come out so clearly when reducing retribution to punishment, what all statements have in common⁸⁰ is that they hinge upon the presupposed rational,

74 The right locus of a systematic discourse on retribution might lie elsewhere, since retribution is by now largely considered the legitimation and measurement of punishment. Yet, it is still in the interest of society, which provides sufficient reason to discuss it in this context of purposes.

75 Schmallegger (2007:403).

76 As has been set out earlier, since sentencing, punishment and retribution, at least implicitly so, have been constitutionally accepted as an historic legacy, there is virtually no discourse on the compatibility of these notions with constitutional principles otherwise. This has the unfortunate effect that, any external critique against the underlying assumptions is ignored.

77 Du Toit (1981).

78 Van der Merwe (1991 [1998]).

79 Viljoen Commission (1976).

80 An additional aspect is provided in *S v Nkambule*; here Harms AJA found that retribution is a consideration which should be seen in connection with denunciation, which is condemnation of the offender.

and more importantly so, accountable actor. Terblanche puts it graphically:⁸¹

Retribution = deserved punishment.

In the words of the Viljoen Commission,⁸² this “accords well with the philosophical principle of balancing the debt which the perpetrator owes to the community with the suffering meted out to him”. It is important to note that this equation abstracts from the systematic build-up the Zinn ‘sentencing triad’ suggests, and the intricate relationship of criminal and retribution as an emanation from the last leg of the triad, the interests of society, gets lost. This abstraction may be harmless for the purposes of discussing sentencing as a criminal justice operation, because there it epitomises the notion that every sentence should be appropriate, and beyond this foundational meaning, retribution is not a matter that should concern the sentencing court. But it is important for any consideration of law reform dealing with youth in trouble with the law, namely juvenile justice because it easily becomes the basis for circular reasoning. Often overtly, and more often covertly, the argument goes along the lines that We cannot reduce the age of criminal capacity because punishment is deserved. Together with the ubiquitous claim regarding the differential in maturity of young offenders (see earlier herein), we quickly forget that law is always an abstraction from reality, and that law reform’s first duty must be to cut through these abstractions. If this was not true, societies would become eternally slaves to their laws, where the abstractions are being held to constitute the whole and the truth through the eyes of the law and philosophical or ideological spectacles becomes more important than the social reality. We will, therefore, in the following pages shed light on some realities regarding the environment in which the ontogenesis of most young persons who come into conflict with the law occurs.

Young person's debts to society and retribution

Some may consider the heading as an impossible statement, at least a provocative one. But taking an upfront stance vis-à-vis this question comes with its own prejudice, and assumptions regarding the ontogenesis of a person, and the relationship between individual and society.⁸³ Somebody who considers the statement ‘impossible’ would in all likelihood doubt that young persons may have, on balance, been able to accumulate any debt to society, and that, on the contrary, society – also represented to the young person through parents and other significant others – is rather indebted to the young person. Piaget and Kohlberg have demonstrated that the ontogenesis of the person is

81 Terblanche (2007:170).

82 Viljoen Commission (1976).

83 We are dealing here, against the backdrop of the common invocation (however doubtful in terms of logic and consistency from an academic point of view) of the need for retribution, in the case of incidents which meet the requirements for serious offences; referred to for instance in *S v Skenjana* 1985 (SA) 51 (A); and Harms AJA in *S v Mafu* 1991 (2) SACR 494 who held that in the case of horrendous crime, retribution can be the only moral justification for the sentence.

facilitated by the social environment of the person.⁸⁴ In the same vein we find Gottfredson and Hirschi's research,⁸⁵ which points towards a deficit ridden social environment being causally connected to personality trait, which is characterised essentially by short-sightedness and a risk-taking attitude.

Criminological research since Glueck and Glueck⁸⁶ has produced evidence for the fact that young persons who persistently come into conflict with the law, have huge deficits in the build-up of social capital,⁸⁷ in their personal, cognitive and intellectual development, and last not least in their moral development, which is usually stalled, lagging behind the average.

All this is ignored if one is inclined to look at the individual event only, something which is similar to looking at the balance of a particular ledger, thereby ignoring the overall balance sheet. Those who are ready to dispense with a holistic analysis of the situation and the actor, in particular the relevance of a positive facilitation of the healthy development of a person in the early ontogenetic stages,⁸⁸ are proponents of an extreme theoretical individualism, which posits the contra-factual existence of a pre-social individual. This position presumes something (the person), which is however only emergent in the social process.⁸⁹

But even if we were to accept the claim that at an individual level the young person had the legally required criminal capacity, punishment according to just-desert principles would reduce the essence of the person to this capacity, which enforced through imprisonment, would exclude most opportunities for personal development, and cut-off most of the social relations so vital for mental and moral health of the person. From a holistic perspective it must, however, be doubtful whether it should be in the interests of society to damage seriously valuable human material through long-term incarceration, in order to satisfy just-desert policies which have been established for another purpose.⁹⁰

84 Piaget (1932); Kohlberg (1969).

85 Gottfredson & Hirschi (1990)

86 Glueck & Glueck (1950).

87 Gottfredson & Hirschi (1990:272). Coleman (1994 [1994]) describes social capital in terms of social relationships, which may be seen, beyond their quality as components of social structures, also as resources for the individuals.

88 Also Sampson & Laub (1993:11ff).

89 A model to describe the genesis of social order, and importantly so, subjective reality, has been provided by Peter Berger and Thomas Luckmann in *The social construction of reality* (1991 [1966]). They posit as a prerequisite of subjective reality the becoming of a member of society. Here, the starting point is a process termed *internalisation*: the immediate apprehension of interpretation of an objective event. They further maintain that "[t]his apprehension does not result from autonomous creations of meaning by isolated individuals, but begins with the 'taking over' the world in which others already live" (ibid.:150).

90 It is interesting to notice that the higher courts have often expressed similar views even regarding adult offenders: *Nicholas JA in S v Skenjana* 1985 (SA) 51 (A) at 331F "It is the experience of prison administrators that unduly prolonged imprisonment, far from contributing towards reform, brings about the complete mental and physical deterioration of

Conclusion: Purposes of punishment

From the foregoing discussion it does not appear that protagonists of the status quo of the ways in which the law dealing with young offenders operates emerge strongly. The premises, on which the analysis is based, may be the same which have consciously or unconsciously driven the international legal documents; the challenge is, however, always to transcend the truth we feel, which is often contrasting the truth we know.

The international community – Juvenile justice in the world perspective

The international community has largely moved towards the application of restorative justice principles when dealing with young offenders. At times, it seems hard to simply follow this orientation and oblige. This may have to do with the impression of being delivered to forces far away from home, which together with the imperatives of growing world integration gives rise to unease regarding one's own identity. But against the backdrop of the first part of the discussion, there is no need to only gallantly give in to the normative pressure from CRC, the Beijing Rules, the Riyadh Guidelines and the UN Rules for the Protection of Juveniles Deprived of their Liberty. Taking into consideration and recognising the communal approach to social life as an essential feature of our cultural identity should make it easier to detach and distance the treatment of young offenders from the current criminal justice system. In local terms a person is a person because of other persons,⁹¹ a perspective which clearly mirrors the analytically derived social construction of reality approach by Berger and Luckmann.⁹²

The case for the Namibian Child Justice Bill

Some may argue that the adoption of a Bill into a Law is not necessary because by joining hands with the IMC since the mid-1990s, the Namibian government has set in motion development of a juvenile justice practice, albeit within the remits of the single track system under the CPA 51 of 1977, which has considerably improved the plight of the children in Namibia in conflict with the law. There is no doubt about an improvement following the forming of the IMC as an umbrella body for juvenile justice activities.⁹³

the prisoner"; also Harms AJA in a minority judgement *S v Mafu* 1991 (2) SACR 494 (A) at 496h–497a "The sentencing judicial officer ... is not only obliged to protect society against the accused but also to protect the accused against society".

91 In Namibia the notion *ubuntu*, which embraces the key values of group solidarity, compassion, respect and dignity, and marking a shift from confrontation to conciliation, has never become a term for our own peace-making orientation. However, the Zulu expression *Umuntu ngumuntu nagabantu* ("A person is a person because of other persons") is understandable to many. In another context, Isaak and Lombard have put forth the view that reconciliation is an underlying theme pertaining to nearly all cultural groups in Namibia (2002:93f).

92 Berger & Luckmann (1991).

93 It appears that following the comprehensive study undertaken by Super (1999), no follow-

Law reform is necessary if a restorative juvenile justice approach is to be given breathing space; without legislation peremptorily imposing the application of restorative justice principles, the application of these principles will remain haphazard, and thus provide an uneven application. Without a comprehensive legislative effort, there is no guarantee that all children in Namibia receive the same treatment. This should in itself give rise to constitutional challenges. All this could be avoided if the Namibian government would rekindle the aborted process towards a comprehensive child justice legislation. The profound Bill, which has found the approval of the IMC, is ready for tabling in Parliament. The merits of the core elements of this document will be briefly discussed now.

The Child Justice Bill

The most important provisions of the Child Justice Bill⁹⁴ (hereafter referred to as the *Bill*) pertain to age and criminal capacity, police procedures and release policies, diversion, juvenile courts and sentencing.

Section 6: Age and criminal capacity

- (1) It is conclusively presumed that a child under the age of ten years cannot commit an offence.
- (2) There is a rebuttable presumption that a child who is 10 years of age or older but not 14 years of age is incapable of committing an offence because the child does not have the capacity to distinguish between right and wrong.
- (3) Prosecution of a child referred to in subsection (2) for the alleged commission of an offence may only be conducted if the Prosecutor General, after a preliminary inquiry, has issued a certificate confirming an intention to prosecute,
- (4) If the certificate referred to in subsection (3) is not issued within 7 days after the preliminary inquiry, the charges against the child must be withdrawn.
- (5) In deciding whether or not a certificate referred to in subsection (3) should be issued the Prosecutor General must have regard to –
 - (a) a child worker's assessment report;
 - (b) the appropriateness of diversion of the child alleged to have committed an offence;
 - (c) the educational level, cognitive ability, domestic and environmental circumstances, age and maturity of the child;
 - (d) the nature and seriousness of the alleged offence;
 - (e) the impact of the alleged offence upon any victim of the offence; and
 - (f) any other relevant information.
- (6) The common law pertaining to the criminal capacity of children under the age of 14 years is repealed.

up baseline study regarding the unfolding realities on the ground has been conducted. Occasionally, the public learns through the media that a minor was held in pre-trial detention by the Police, but there is no recent systematic analysis of the situation countrywide.

94 Accessible at http://www.polytechnic.edu.na/academics/schools/comm_legal_secure/legal/research.php; last accessed 1 October 2009.

According to the proposed structure of the draft, a child who has not attained the age of ten years “cannot commit an offence”, whereas a child, at the time of the alleged commission of the offence ten years of age or more, but under the age of 14 years, would be rebuttably presumed not to “have the capacity to appreciate the difference between right and wrong” and to act in accordance with that appreciation. For any person 14 years or more the common law on age and criminal capacity is intended to remain unchanged.⁹⁵

The Bill addresses the issue that in the past the presumption of innocence of many a young offender had been practically ignored, which led in a huge number of cases to a presumably unlawful infringement on the right to fair trial.⁹⁶ There is a tendency to focus on whether the child knows the difference between right and wrong and not whether the child had the ability to act in accordance with the knowledge of that unlawfulness.⁹⁷ Through continuous training, this problem might have been corrected, but the debate about age, stage of maturity and criminal responsibility is a complex and controversial one. Whatever age is chosen will always be somewhat arbitrary. However, the decision to exempt young offenders under the age of ten from criminal liability reflected the commitment to a more sophisticated, holistic view of a ‘just’ society. This commitment embraces a broader perspective on social justice.

In this context the findings of developmental psychologists are of note. Usually, notwithstanding a cognitive comprehension of the difference between right and wrong, a young offender lacks the full appreciation of significance and impact of his/her offence. It could be shown that children at an early age (pre-primary school) acquire an understanding for moral norms with regard to their formal and universal applicability. Also, it appears that it is not only anxiety, and a conditioned reflex in connection with reward and punishment, or compassion for others’ suffering, which informs children’s behaviour. Nevertheless it became evident that this cognitive capacity did not correspond with the

95 The decision to establish a specific age limit for criminal liability is based on the consideration of a number of aspects besides the so-called crime control model. In the second half of the 20th century law Packer outlined the crime control model as one of two competing “models of the criminal process” (Packer 1993). The alternative model, known as the so-called due process model, and the crime control model, reflects the tensions of crime control in a democratic society. The crime control model’s key issues are the apprehension and punishment of offenders and punishment of criminals. In contrast, in Packer’s terms, the due process model’s assumption is that the detection and prosecution of suspects are unreliable and fraught with error. Some of these errors may manifest bias, or prejudice triggered, as the case may be, by the seriousness of the act, other errors may be honest mistakes. According to the due process model, the criminal justice system’s primary purpose must be to protect suspects from such errors. The due process model emphasises procedural justice above anything else. As Packer put it: “The Due Process Model insists on the prevention and elimination of mistakes to the extent possible; the Crime Control Model accepts the probability of mistakes up to a level at which they interfere with the goal of repressing crime” (ibid.:21–22).

96 Article 12, Namibian Constitution.

97 Super (1999:56).

ability to act accordingly. Research also revealed that access to the moral knowledge base alone is not sufficient for norm-abiding behaviour, but that a positive norm-affirmative environment that caters for the developmental needs of children, contributes, and importantly so, to the establishment of behavioural barriers against deviant behaviour. Sociological research, but also the experience of social field work, has shed light on the fact that in the overwhelming majority of cases where children come into conflict with the law, the children have been brought up in an environment of relative, and most often even absolute, economic deprivation. In such situations, where life is deprived of much meaning, many are left in dire need. This means less guidance, less control, less personal and less cultural continuity, which in accordance with Gottfredson and Hirschi's General Theory of Crime lead to low levels of self-control and subsequently to more crime.⁹⁸ The above should be compelling reasons for the raising of the age limit in comparison with the common law *doli capax/doli incapax* rules.

With the Child Justice Bill the Namibian society would align itself with Rule 5.1 of the Standard Minimum Rule for the administration of Juvenile Justice, under which the UN advocates the use of (modified) welfare models⁹⁹ because it will strengthen the role of primary crime prevention, and go hand in hand with the law reform project, which is under way with regard to the Children's Act.¹⁰⁰

Under section 6(5) of the Child Justice Bill an evaluation of the child in terms of his/her cognitive, emotional, psychological, and social development must be carried out. The intention of the drafter in this respect is clear. In practice, the presumption had been reversed, with the effect that children were held criminally liable and the absence of criminal capacity had by and large become the exception. Under the new law, the

98 Gottfredson & Hirschi (1990:89).

99 Winterdyk (2002:XXI).

100 No. 33 of 1960, hitherto the (unsatisfactory) instrument governing the administration of "children in need of care or protection", will soon be substituted by Child Care and Protection legislation; the law reform project has produced a Bill (1994), which for two years had been waiting to be introduced by the Minister of Gender Equality and Child Welfare. After extensive revision of the 1994 Bill, the Ministry may now be ready to introduce the Child Care and Protection Bill (2009). This law reform project will give child care a new basis, and a new understanding. Whereas the interventionist character of the present Children's Act caused often inadequate measures being taken, and often too late, the new framework provides for an earlier intervention, but from different perspective. Under the current dispensation the question *What is in the interest of the child?* is largely answered against the backdrop of a white middle-class, bourgeois worldview, with a strong paternalistic moment. In line with international development of a person-centred understanding of rights, in particular children's rights consistent with the UN Convention on the Rights of the Child, the envisaged Child Care and Protection Act will introduce a different notion of the best interest of the child: In order to ascertain the best interest of the child, it will be required to take a number of aspects into consideration (section 4(1) and (2), Child Care and Protection Bill). Section 5 requires that "[e]very child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration".

presumption will be effectively revived. Against the background of international experience this should exempt the majority of young offenders from the application of the child justice law. Very often a large element in the offence by young offenders is their lack of judgment, their lack of experience, their lack of forethought. But also peer pressure or the controlling influence of adults, as well the significance of a conflict situation, play a role, and in many such instances one would conclude that the child was not capable of acting in a different, law-abiding way.¹⁰¹

Eventually, the presumption of criminal capability in respect of the age group 14 and older seems to establish a low age limit too. On the other hand, in countries, for instance Germany, where the (rebuttable) presumption of lack of capacity is extended to young offenders under the age of 18 years, in practice the duty to establish criminal capacity in each and every single case has always been considered as cumbersome, superfluous and negligible. In the overwhelming majority of cases the establishment of criminal responsibility does not take place, or is a token activity, and unless there are obvious reasons for doubt, judges, prosecutors and also defence counsels, work on the assumption that the accused had the required capacity. This might not always be in line with the purpose of the law, but to follow the law to the last letter, would in the less serious cases mostly seem inappropriate. Besides, the normative acknowledgement of criminal responsibility for persons of the age group 14 and older reflects a general expectation in terms of developmental aspects of independence and participation of young persons. In this respect, the result that a young person lacks criminal capacity can even be stigmatising, and because of its symbolic nature contra-productive.¹⁰²

International comparison

With a retained minimum age of 7 years Namibia is currently amongst those countries with the lowest age requirement. Most of the developed countries define the age limit at about 13 to 14 years.¹⁰³ But there are countries like for instance Ireland, or Switzerland and the United States of America, where criminal liability may also be imputed as from the age of 7 years. And there are countries, where movements lobby for decreasing the age of criminal responsibility, for instance Germany.¹⁰⁴ On the other hand, recent legislative reform in Africa follows clearly the trend towards increasing the age of criminal capacity in line with the majority of developed countries. In the Uganda Children's Statute, the age of criminal capacity has been fixed at 12 years (Article 89); it had been 7 years previously. In Ghana, the proposals for a Children's Code recommended that "the minimum age of criminal responsibility shall be fourteen years".¹⁰⁵

101 Albrecht (2002a:53).

102 Albrecht (2002a).

103 Winterdyk (2002:xii–xiii).

104 Albrecht (2002b:173).

105 Report by the Ghana National Commission on Children 1996, Part VII, Article 1.

Namibia would do better if it were to follow countries, having established higher age limits, because it is only then that it will comply with the Beijing Rules (Rule 4), which recommend that when states establish such an age of criminal capacity, “the beginning of that age shall not be fixed at too low an age level bearing in mind the facts of emotional, mental and intellectual maturity”. That the age limit of 7 years is not in line with Rule 4, may be derived from the frequent criticism of the Committee on the Rights of the Child against countries that have established minimum age of criminal capacity as 10 years or younger.

Police procedures and release policies

The way in which the Bill addresses police procedures and release policies tackles burning issues of the current criminal justice system at large.¹⁰⁶ This refers to the problem of timeous conclusion of criminal proceedings, the problem of lengthy periods of pre-trial detention, and the manner in which pre-trial detention is carried out. Arrest and detention have been the primary methods of the current system of securing the attendance of children in court.

Section 12: Arrest of a Child

- (1) A police official may not arrest a child for offences referred to in Schedule (1) and must consider any of the alternative methods of starting a proceeding referred to in section 11.

International rules provide that children awaiting trial should be detained only as a last resort. Although Namibia is signatory to these international instruments, detention of arrested children has been the norm in Namibia. The current law also does not make provision for all arrested children to be kept separate from adults. Consequently, although there is a standing order that all arrested children are to be kept separately from adults, this only happens at some police stations, and especially not where and when police cells are overcrowded.

In the past extended periods of pre-trial detention of several months could be observed.¹⁰⁷ The adverse results of institutionalisation and the undesirability of separation of children from their families, which inhibits reintegrating of the child into society linked with long pre-trial detention periods are even reinforced with most, if not all of the police stations in the country not running any programme with the children. Under the current system police may release an accused only in terms of section 56 of the Criminal Procedure Act

106 *The Namibian* of 22 May 2009 had the following to report under the heading “Iyambo visits decrepit cells” on page 3:

Standing up to free space in their cramped cells, prisoners surged to the bars as Safety and Security Minister Nickey Iyambo ... toured the cells. ... Various reports over the last few years, including by the Office of the Ombudsman, have highlighted the issue of overcrowding and the human rights infringements of prisoners associated with it. ... Overcrowding has forced the Police to use any and all available space as holding areas.

107 Albrecht (1997).

on written notice to appear in court, or in terms of section 59 of the Act on bail. Both sections are, however, only of very limited application. A notice is primarily meant for minor offences, i.e. offences for which the court would not impose a fine in excess of N\$300, and release on bail may only be considered in respect of specific offences, in particular not with regard to offences referred to in Part II, III or IV of Schedule 2 of the Criminal Procedure Act.¹⁰⁸ Although this leaves still a considerable margin of discretion, in practice extensive use of both provision have not been made. The Bill, in line with the diversion options discussed later, tends to reverse this practice. The power of police to arrest a child has been considerably modified, if not curtailed.

The Bill provides not only for the administering of a caution to the child instead of starting a proceeding against the child. A police official may also not arrest a youth for an offence referred to in Schedule 1 of the Bill, such as assault without grievous bodily harm being inflicted, malicious injury to property, trespass, or ordinary theft, conspiracy, incitement or attempt to commit any of the offences mentioned here, anymore. Schedule 1 in particular, refers to offences, which constitute the core area of child delinquency. Even in cases where the child is suspected to have committed an offence referred to in Schedule 2, this schedule includes most of the remaining offences, but excludes murder, rape and certain cases of robbery, a police must consider alternative methods. A police may arrest the child only if s/he believes on reasonable grounds that arrest is necessary to prevent a continuation or a repetition of the offence or the commission of another offence, to prevent concealment, loss or destruction of evidence relating to the offence, or that the youth is unlikely to appear at a preliminary inquiry before a juvenile justice court in response to a summons or an attendance notice.

Should the child have been arrested, the Bill provides peremptorily, that further detention must be carried out in such a way that a child must be detained separate from adults and separate from persons of the opposite gender. However, in principle police shall release a child accused of an offence referred to in Schedule 1, before the child's appearance at a preliminary inquiry (see below), from police custody into the custody of the child's parents or an appropriate adult. In consultation with the Prosecutor General a police may also release a child from police detention, who is accused of an offence referred to in Schedule 2.

With regard to the gross violations of children's rights during detention, the Bill states authoritatively that the child must, whilst in detention have access to adequate food and water, medical treatment, reasonable visits by parents, guardians legal representatives and the like, reading and educational material, adequate exercise, and, importantly, that the child must be provided with adequate clothing, sufficient blankets and bedding.¹⁰⁹

108 No. 51 of 1977.

109 These requirements have at least at theoretical level, become common knowledge of the Police, which since 1997 form part of the curriculum of the Namibian Police Training College; absolute limits in terms of human resources, number of cells, adequate catering etc, make this however an almost impossible endeavour for any station commander.

International comparison

The Child Justice Bill places Namibia directly in line with international principles regulating police powers and duties in relation to juvenile justice. Article 37(b) of the CRC stipulates that arrest, detention and imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of time. The Bill emulates the CRC and goes even a step further because according to section 12(1) of the Child Justice Bill the police may not arrest a child for an offence referred to in Schedule 1 (see above). To the extent that, for any other case, the Bill orders that consideration be given to any alternative methods of starting proceedings at a preliminary inquiry, the envisaged law will turn around the assumption, deeply entrenched in the Namibian criminal justice system, that the alleged commission of an offence always warrants in principle the arrest of the suspect. Not only the adverse results of institutionalisation, and further step into delinquency will be averted, the constitutional presumption of innocence will eventually be taken seriously.

Diversion and preliminary inquiry

Diversion is understood as the “channelling of prima facie cases away from the criminal justice system on certain conditions”.¹¹⁰ Under the current Namibian system, no specific provision for diversion and no guidelines ensuring uniformity of diversion in Namibia exist. Although, the General Prosecutor as dominus litis in terms of section 6 of the Criminal Procedure Act is given permission for diversion in October 1997, a lack of uniformity in the way children are assessed in preparation for decisions concerning diversion led in the past to a situation where not all children in Namibia receive the same treatment, and where available, diversion options, as the case may be, were not recognised.

Section 46: Object of this Chapter

The object of this Chapter is to set up diversion options to deal with a child of 10 years or older who is alleged to have committed an offence in order to divert the child from the court’s criminal justice system.

Section 47: Purposes of Diversion

The purposes of diversion under this Part are to –

- (a) ...
- (h) facilitate dealing with unlawful behaviour of a child within the community and without government intervention or criminal proceedings.

The Bill strives to remedy most of the shortcomings of the current system. In terms of the Bill a child may be considered for diversion provided certain requirements are met. The voluntarily acknowledgement of responsibility for the alleged offence is one of the prerequisites for the child entering the diversion process. The most important aspect of the Bill, however, is that each and every child has a right that diversion must be considered, if the formal requirements are given.

110 South African Law Commission (1997:139).

Whether the child actually enters the diversion process, depends on the outcome of a preliminary enquiry, presided over by an inquiry magistrate, which has the objective to establish whether the matter is appropriate for diversion and to identify a suitable diversion option. Through the preliminary enquiry the state appropriates the process of diversion, or at least channels the itinerary in a formal way. This must not be seen as directed against diversion per se, rather to safeguard against the effect of net-widening with its possible encroachment on due process rights of the child. The envisaged procedural sequence entails that an assessment of the child precedes the preliminary inquiry. Upon apprehension of a child suspected of the commission of an offence, a police official has to notify a youth/child worker so that an assessment of the juvenile can take place as soon as possible. One of the purposes of assessment is to establish the possibility of diversion of the case. The assessment report informs, together with other data introduced into the preliminary inquiry, the basis for the decision whether the matter can be diverted. It is, however, envisaged that the inquiry magistrate may only make an order regarding an appropriate diversion option or options if the prosecution indicates that the matter can be diverted; in the final analysis the prosecutor remains *dominus litis*.

Based on the experience with diversion options available in Namibia since the permission from the Prosecutor General to implement diversion, the Bill provides a range of diversion options, set out at three levels. Different diversion options allow for an individualised process, with best prospects for success. Level one diversion options are for instance a formal caution with or without conditions, referral to counselling or therapy, the symbolic restitution, or the restitution of a specified object to the victim/s of the alleged offence. Level two diversion options include community service of some kind or other, but also the payment of compensation, the provision of some service or benefit to a specified victim, the referral to appear at a family group conference (FGC), or a victim-offender mediation (VOM). Level three diversion options are more onerous, applicable only in respect of a child 14 years and older. Here referral to programmes with a so-called residential element is also possible.

The FGC and VOM allow for inclusive ways of dealing with the matter. In both procedures, victim and offender may become involved. This allows not only the offender to be forgiven for his/her apology and repentance, but also the victim to get a better understanding of their victimisation. The FGC is an example of “reintegrative shaming”.¹¹¹ The conference serves as a reintegration ceremony. As in the case of VOM, victims and offenders are put in a central place in trying to right the wrong that has been caused by the offence.

International comparison

The significance of the UN Convention on the Rights of the Child with regard to juvenile justice is that it has elevated diversion to a legal norm,¹¹² which is binding on Namibia

111 Braithwaite (1989).

112 Article 40(3)(b), CRC.

since ratification. With the proposed Bill Namibia undertakes to introduce basically the full range of diversion options currently suggested by professionals and experts. With the introduction of the FGC model, which had been in use for some time in New Zealand, and VOM, Namibia eventually recognises that the etiological process towards deviant behaviour has its roots very often in the immediate social environment of the offender, and has to be given meaning not only in relation of the offender and the state.

The child justice court

Chapter 8 provides for the establishment of the Child Justice Court at district court level, apart from ordinary magistrate's courts, a *novum* in Namibian legal history.

Section 85: Designation and Jurisdiction of Child Justice Act

- (1) A child justice court is a court at district court level which must adjudicate on all cases referred to that court in terms of this Act,
- (2) ...
- (5) The child justice court and the presiding officer of the court must be designated by the Chief Magistrate of each magisterial district and such court must, as far as is possible, be staffed by specially selected and trained personnel.

The prerogative of the prosecution to determine the court, which shall hear the case, is curtailed under the Bill, and it is envisaged that preference must be given to referral to the child justice court. One provision of the text deserves particular attention. It is planned that child justice courts, as far as possible, be staffed by specially selected and trained personnel. In practice the provision will be rather of a programmatic nature. But the clause is commendable, because it is an acknowledgement in principle that young persons are not just little adults. Young persons have special needs in respect of communication, but also participation in the proceedings. Often such needs are not acknowledged by ordinary persons, who are not sensitised to such issues.

International comparison

A wide variety of models which establish juvenile court systems are to be found in international literature. Over the last two decades, however, most international examples of juvenile justice legislation are characterised by the creation of a separate court system for children in trouble with the law. Examples in point are Canada, India, New Zealand, and Uganda.¹¹³

Sentencing

Sentencing is linked to diversion as well as to the principles and values underlying a juvenile justice system. The draft includes restorative justice, proportionality and

113 Germany (DVJJ Juvenile Justice Reform Commission Final Report 2002:27) has experienced the advantage of the establishment of a special youth court, where in principle judges and prosecutors, specially trained in youth matters, are responsible for the youth adequate process (Roessner & Bannenberg 2002:71).

limitations on the restriction of liberty. Restorative justice has been described as a theory of reconciliation, rather than a theory of punishment. The decision for restorative justice informs the whole Chapter 10 of the draft. Apart from the necessity of a pre-sentence report, a court may impose a sentence involving a compulsory detention in a residential facility only under very narrow conditions. In section 107, the draft provides that if a restorative justice sentence fails or is not carried out, the child must “appear before court in order to impose an appropriate sentence”. The excerpt which follows here a recommendation by the South African Law Commission in respect of the South African law reform project.¹¹⁴ The advantage would be not only to encourage, but also ensure maximum consideration of alternative sentencing.

Section 103: Convicted Children to be sentenced in terms of this Chapter

Upon conviction of a child a court must impose a sentence in accordance with the provisions of this chapter.

Section 104: Pre-sentence reports required

Upon conviction of a child a court must request a pre-sentence report from a child worker or any other suitable person before imposing a sentence in terms of this Act. ... A child justice court is a court at district court level which must adjudicate on all cases referred to that court in terms of this Act ...

Section 105: Purposes of sentencing

The purposes of sentencing in terms of this Act are to -

- (a) Encourage the child to understand the implications of and be accountable for the harm caused;
- (b) Promote an individualized response which is appropriate to the child's circumstances and proportionate to the circumstances surrounding the harm caused by the offence;
- (c) Promote the reintegration of the child into the family and the community; and
- (d) Ensure that any necessary supervision, guidance, treatment or services, which form part of the sentence can assist the child in the process of reintegration.

Section 108: Sentences with a compulsory residential requirement

- (1) A sentence involving a compulsory residential requirement may not be imposed upon a child unless the presiding officer is satisfied that the sentence is justified by –
 - (a) the seriousness of the offence, the protection of the community and the severity of the impact of the offence upon any victim; or
 - (b) the previous failure of the child to respond to non-residential alternatives....

An analysis of a random selection of closed cases, which were dealt with at the Windhoek Magistrate's Court from 1995 to 1997, revealed that in many instances there was no correlation between offence committed and sentence imposed.¹¹⁵ Without normative guidance in terms of legislation there is the continuing danger that the personal

114 South African Law Commission (1997:60).

115 Super (1999:58).

circumstances of an accused young offender are often not taken into account when sentencing, and that the decision on sentencing is based on the nature and seriousness of the offence alone. This is partly due to the fact that presiding officer, prosecutor, and, if the child is legally represented, the defence lawyer, are not trained, and do not have a pedagogic background. Another factor contributing to this kind of sentencing is the fact that a pre-sentence report is not always requested, or within the time limit allocated for its compilation, not available. This means that the magistrate is not in a position to properly assess the case before him/her. For the envisaged system the Bill stipulates imperatively, that upon conviction a court may only dispense with a pre-sentence report if the conviction is for an offence mentioned in Schedule 1.

Application of the Child Justice Bill

According to the Bill the normal point of transition from the juvenile to adult justice system should occur at the age of 18. Only in respect of a person who is 18 years or more but not over the age of 21 years, and who is alleged to have committed an offence jointly with others, the majority of whom are younger than 18, may the prosecution direct that the proceedings be followed in terms of the Child Justice Bill.

Section 2: Application of this Act

- (1) This Act applies to any child in Namibia, irrespective of nationality, country of origin or immigration status, who –
 - (a) is alleged to have committed an offence; and
 - (b) was under the age of 18 years at the time of the alleged commission of the offence
- (2) The Prosecutor General or a designated prosecutor may direct that the proceedings in terms of this Act be followed in respect of a person who is over the age of 18 years but not over the age of 21 years, and who is alleged to have committed an offence jointly with others, the majority of which are children; ...

This provision is, however, purely based on procedural considerations, and is supposed to protect the interests of the young person allegedly having committed an offence jointly with an adult. Under the current system, and in the absence of a similar provision, in most cases where adults and young persons were suspected, the proceedings are conducted jointly against both adult and young offender at the same time. Amongst professionals working with young offenders, lawyers, social workers etc. there is a consensus that the transition between the envisaged juvenile system and the adult criminal justice system is too abrupt. Whether an accused is under the age of 18 years is often accidental. In particular when a group of young persons approaching the age of 18, act together, the one or other amongst them will cross the age bridge earlier than his/her peers. It appears arbitrary to apply in the one case the juvenile justice law, but not in the other depending on the age of the majority. Although the symbolic meaning of coming of age may have an impact on the maturation process of the young adult, the age barrier of 18 does not correspond with the beginning of adulthood otherwise. The law as it stands, section 1 of

the Age of Majority Act,¹¹⁶ states: "All persons, whether males or females, attain the age of majority when they attain the age of twenty-one years". Whereas this is a decisive and significant age barrier for the Namibian society, which occasions celebrations, to attain 18 years of age has no specific connotation.

Other bills currently under construction, also define a child being a person under the age of 18, but provision for flexible handling on the merit of the case is made. In terms of section 47 of the Child Care and Protection Bill (see above), orders for the benefit of persons of 18 years and older, but not older than 20, may remain in effect, or even be renewed or modified, provided that the grounds for the order, renewal or modification exist. In respect of the treatment of young offenders the view that a case by case management would be more appropriate is not necessarily shared by all stakeholders, in particular not by protagonists of a strong crime control model. This seems to be another indication that whenever society has to deal with a breach of presumably unswerving social standards, it reverts to reductive theories, and here in particular deterrence and just desert theories. If the abrupt transition from juvenile to adult justice is unsatisfactory, different solutions are thinkable:

- First, we may think of a model, which treats young adults in accordance with the legal consequences of the child justice law only, if the offender shows clear signs of maturational retardation, or the offence can be considered as typical for juveniles (section 105, Jugendgerichtsgesetz ("Youth Court Act", Germany)).¹¹⁷
- Another model might suggest the application of the legal consequences, provided with the draft, to all offenders under the age of 21 (inclusive model).
- Still another model prefers the exclusive application of child justice law to young offenders under the age of 18 years (exclusive model), but suggests the acknowledgement of young adulthood as a mitigating factor for sentencing; this model has been followed by the Greek criminal law, Article 133 of the Greek Penal Code, stipulates that the court may impose on young adults 18 years of age and older but not older than 20 years a lesser sentence than for adults.¹¹⁸

The underlying arguments for the one or other solution are different. The first grounds in the consideration that young adults are sometimes, still, subject to developmental forces which are characteristic for adolescents, who are deemed to be malleable by those interventions which the juvenile justice system provides. This, however, should not be a sufficient reason to extend the application of the child justice law to all offenders under the age of 21 years. Developmental psychology holds that the development of behavioural patterns, and their underlying motives is usually not completed with attainment of the age of majority, and that the period between 18 and 21 years does not mark the transition from youth to adulthood.¹¹⁹ From a social perspective the attainment of adulthood would coincide with economic independence, and/or founding of a family, thus incidents which

116 No. 57 of 1972.

117 Albrecht (2002b:192).

118 Chaidou (2002:195, 197).

119 Roessner & Bannenberg (2002:73).

may often only occur somewhere during the third decade of life.¹²⁰ The transitional periods, also in developing countries, have been prolonged under circumstances of modernity, and the entrance to the adult world has become more difficult for certain subgroups of juveniles.¹²¹ The second and third model take the difficulties which may arise from the application of such vague concepts like maturational retardation or typical for juveniles into consideration. To the extent that they include or exclude young adults from the application of the juvenile/child justice law, they do not only allow for a more uniform application of the law. In this respect they are more in line with constitutional requirements of the rule of law. The difference between them is, however, that the inclusive model opens the way for a more individualistic reaction. In our view this should be the preferred model. Under circumstances, where young people are largely affected by social exclusion and poverty¹²² the societal reaction needs to take into consideration the developmental impact of the offender's reality. This can only be secured if the more flexible sentencing range of the juvenile/child justice system is applicable.

Law reform in perspective: Reconciliation and restorative justice

During recent years the binary of due process guarantees given by Article 12 of the Namibian Constitution (and previously by various principles under the common law) and the CPA on the one hand, and the crime control model on the other hand, has come under strong criticism. Not only because some people believed that the balance had moved far too much in favour of due process and at the expenses of crime control. It was repeatedly held that rights of offenders and rights of victims had to be brought into balance. Whereas some held that this meant simply a shift towards the application of retributive theories on punishment (O'Linn) and a re-emphasis on crime control, others felt with Christie,¹²³ that the state who has stolen the conflict between the offender and victim, should return the conflict as much as this is possible under the circumstances of the modern state. The latter view opened the way towards an idea of restorative justice.

Restorative justice

Restorative justice programmes address important criticisms levelled against the prevalent binaries of due process and crime control, or more precisely, it refers to the functional aspects of cognitive self-regulation.¹²⁴

120 (ibid.:74).

121 Albrecht (2002b:194).

122 Mufune (2002:179ff).

123 Christie (1977).

124 This view on personality assumes that people take up goals and try to move towards them. To ensure that they are moving in the right direction, people monitor their progress. Life is a continuing flow of decisions, involving sensing, checking, and adjusting towards a network of (self-defined) goals (Carver & Scheier (2000:436ff, 497ff).

The most important components of a restorative justice system are usually life skills programmes (LSPs), community service, VOM, and FGCs. Assuming that law-breaking incidents reflect often distorted views of the offender on the cognitive triad, i.e. his/her self, the world and the future, a system of restorative justice aims at reducing cognitive distortions and resulting distress. The surface arguments for the above-mentioned components sometimes seem to be different, but a closer look reveals that they all contain an element, which allows cognitive restructuring or reframing.

LSPs address the child offender, and aim at assisting the child in making correct choices, even in difficult situations. LSP principles thus correspond strongly with the social cognitive perspective. Amongst others, these principles cover the following:

- LSPs comprise an interactive and participatory process, involving all participants
- LSPs are based on reality, i.e. they take into account the socio-economic and cultural circumstances within which the participants find themselves
- LSPs do not aim to blame or judge, but rather aim to create something positive about past events.

Community service is said to be not interchangeable with LSPs, because the primary function of community service should be “punishment by taking away leisure time”.¹²⁵ However, the integration of this measure in the social context of communities reconfirms also symbolically the ties between the individual and the social.

VOM, as one of the central planks of restorative justice, means facilitating a dialogue (talk) between the victim and the offender. In as much as the objective is to work out an agreement between victim and offender, it requires intuition and skills on the side of the mediator. The dialogue places the incriminated action in perspective for both, victim and offender. It is this contextualisation of an incident, which opens ways to mutual understanding and subsequently healing. One of the principles of VOM is to give the victim, and the offender, an opportunity to speak. To be able to talk about emotional feelings and experiences around the offence openly, allows the reintroduction of victim and offender to each other as persons in social context. The recognition of the other as a person rehabilitates victim and offender as actors, who are not powerless, but who are deemed to be capable of managing their (social) lives. This means in part restructuring/reframing in the sense mentioned above.

The same principle applies to the FGC in a more complex setting. It involves not only victim and offender but also their families and relevant community members. Disapproval of the offence is communicated, but the identity of the offender is preserved (or as the case may be restored) as good. Again, the (antisocial) act is placed in a historical, social and personal narrative, to which all participants contribute.

125 Mutingh (1994:51).

The Juvenile/Child Justice Bill – A paradigm shift

The discourse about a new juvenile justice system for Namibia has brought about a Bill, which goes along with the principles of restorative justice. The Bill makes provision for LSPs, community service, VOM, and FGCs. Therefore, once passed into law, a paradigm shift will have taken place. Admittedly, the Prosecutor General remains *dominus litis*, and without her approval diversion may not take place. This could be understood as counter-productive, because it leaves the system in the hands of the prosecution, traditionally inclined to value crime control and retribution more than restorative justice. Theoretically, the whole system could be suspended under the command of a reluctant protagonist of crime control and retribution. However, even after conviction of the child offender, the system remains foursquare within the coordinates of a restorative justice system. As was shown above, the purposes of sentencing are mainly to encourage the offender to understand the implications of and to be accountable for the harm caused, to promote an individualised response, and to reintegrate the offender into the family and/or community. Schedule 1 offences may not lead to a sentence of imprisonment, and ‘community-based sentences’ and ‘restorative justice sentences’ (see above) do not seem to require approval by the prosecution.

Conclusion and outlook

The manifest objective of the proposed Child Justice System is a sustainable reduction of child/juvenile delinquency in Namibia. The service delivery system, which needs to be put in place upon future promulgation of a Child Justice Act, will have to address pressing problems arising from the sphere of primary crime prevention. The now envisaged tabling of the Child Care and Protection Bill is reassuring in this regard. But what lies ahead for the administration of child justice depends on uncertain dimensions.¹²⁶

126 The most challenging factors seem to be adverse effects of the current demographic development and subsequent economic decline. The question to be answered will then be whether the Namibian state can afford its child justice programme. The probable increase of HIV/AIDS related death rate of the age group 15–49 would not only leave behind more orphans with devastating effects on their upbringing, but also deprive Namibia’s economy of a significant part of its workforce. The 2008 update of the UNAIDS/WHO *Epidemiological Fact Sheet on HIV/AIDS* for Namibia reported an estimated number of adults and children living with HIV/AIDS for the end of 2001 of about 150,000, and an adult rate, referring to men and women aged 15 to 45 of 14.6.5%, estimations for September 2008 about 200,000 adults and children, with an adult rate of about 15.3% (see also *The Namibian*, 27 November 2002). A persistent patriarchal and conservative culture has at least partly led to a situation where “apparently well organized health campaigns in the country ... had only partial or no impact on the spread of HIV/AIDS ...” (Fox 2002:319). Namibia will, therefore, with a high probability, face a rupture of economic structures and a steady deconstruction of the social and cultural fabric (Jackson 2002:22–36). In terms of any sociological theory that emphasises social structure, this means that society becomes a prime breeding-place for crime and deviance. Even if the negative impact of HIV and AIDS can be curbed, the new system is ambitious and requires a structural readjustment of government spending. The transformation of constitutional directions and obligations derived from international

In this paper no more than an aperçu of a new child justice system could be given. However, the discussion on diversion, juvenile courts and sentencing, contextualised the Bill against the backdrop of cutting-edge criminological and sociological knowledge, own constitutional precepts, and international obligations. The Child Justice Bill has not only borrowed from the South African law reform project on juvenile justice, but admittedly, it derived main ideas from the South African Law Commission's proposed Child Justice Bill. In as much as the Commission has been able to "consider the experiences of other countries as well as the approaches of various international instruments and initiatives adopted in the field of child/youth justice",¹²⁷ the Child Justice Bill follows suit: once adopted, the new system would satisfy internationally recognised standards.

The proposed child justice system strives for a limited autonomy from the adult judicial system. It is evident that with regard to the establishment of a performing service delivery system as a centre piece for diversion, and the provision of a shifting exit point for the conversion of a case into a children's court inquiry at any time, aid and assistance to children and families are not only considered in terms of crime prevention, but also in terms of youth welfare. The application of the suggested system offers chances under different headings:

- First, the dignity of young offenders as persons may be restored. As has been said above, under the current system, no consideration had been given to the specific circumstances informing youth delinquency. Young offenders had been treated against the backdrop of a concept of societal order and its instruments to safeguard this order, which was virtually disconnected from the life-world of young offenders. This would change with the Child Justice Bill, which would allow, and prescribe, to deal with the child offender in accordance with his/her personality, and, with such needs in terms of personal development and welfare, as indicated by the incriminated act, and identified on occasion of the said act.
- Second, the introduction of a system which departs from the tenets of classical theory, and which is based on the notion of restorative justice, revives the traditional local concepts of reconciliation and peace-making. Notwithstanding the fact, that there may be an abrupt transition from the application of the child justice system to the adult justice system at the age of 18 years, the notion may cause repercussions beyond the coordinates of the child justice system.

instruments (see above) into positive law must not be confused with a strong determination to enforce the law. A prime factor for the well functioning of the law is its manageability and the support by the institutions, which have to enforce it. It is here where the Service Delivery System is anchored. The maintenance of a variety of diversion options, and the adherence to the principles of restorative justice require more than enthusiastic youth workers. It requires dedicated, skilled, and trained professionals endowed with and backed by a corresponding infrastructure. If we only have a look at the guidelines for the application of VOM and FGC, which are both based on practical experience, it becomes obvious that the requirements for success are resource intensive. In other words, if the service delivery system does not perform, the Act becomes meaningless.

127 Skelton & Potgieter (2002:498).

The general application of the system across the country may result in a significant reduction of youth delinquency. This may be seen as contradictory in respect of the expectation that due to the impact of declining socio-economic conditions a net increase in youth crime will occur in the long run. However, the envisaged system is expected to perform better than the orthodox system under any ecological and environmental conditions. As a consequence youth crime rates may be significantly lower than under the prevailing system.

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