

Sentencing in Namibia: The main changes since independence

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ABSTRACT

Until its independence in 1990, Namibia shared the South African criminal justice system. Today, it retains the Criminal Procedure Act 51 of 1977 as main means of regulating the criminal justice system. This Act is diverging from the South African version, as it was “frozen” at independence, and has subsequently been amended by the Namibian parliament. Considerable other changes have also been effected. This article investigates the extent to which these changes have contributed to any meaningful differences in practice in Namibia since independence. It finds that the two most substantial developments have been the increase in lengths of prison sentences, and the utilisation of minimum sentences prescribed in legislation. The article concludes that the very long sentences are unlikely to have any positive effect on the Namibian criminal justice system. On the other hand, the way in which the constitutionality of disproportionate minimum sentences is dealt with by the Namibian courts has considerable value for future South African developments.

1. Introduction

Namibia gained its independence from South Africa in 1990. At the time ‘the territory’,¹ as it was usually referred to in South African legislation, was administered almost as if it were a province of South Africa.² Its criminal justice system in general, and sentencing in particular, was governed by the Criminal Procedure Act 51 of 1977, which was

* B Juris (PU for CHE) LLD (Unisa). Department of Criminal and Procedural Law. I hereby express my gratitude to Unisa for funding a research visit to Namibia in January 2013, and to the Law Society of Namibia for facilitating this visit. I had the opportunity to speak to several people, notably members of the Law Society, staff of the office of the Prosecutor-General and the Law Reform and Development Commission, academics of the Windhoek Polytechnic and members of Legal Aid Namibia. These discussions filled gaps which would otherwise have remained open.

¹ See fn 7 below.

² GJ Naldi *Constitutional Rights in Namibia: A Comparative Analysis with International Human Rights* (1995) 5.

‘frozen’³ on the date of independence, 21 March 1990.⁴ The Namibian Constitution had come into operation just prior to independence.⁵

It is now almost a quarter of a century since Namibia’s independence. The aim of this article is to investigate how sentencing (for adult offenders only) in Namibia has changed during this time. It is widely known that the legal systems of Namibia and South Africa share many features, and the respective criminal justice systems face similar challenges. It is also appropriate then, to compare some of the developments in Namibia with those in South Africa. The article closes with an attempt to assess the success of the Namibian developments and to indicate where the two countries can learn from each other.

2. Recent historical development

The history of Namibia and its recent experiences with the apartheid government in South Africa is well documented and need not be repeated here.⁶ However, it is necessary to explain why the South African Criminal Procedure Act 51 of 1977 still applies in Namibia.

³ This statement is an oversimplification (cf Legal Assistance Centre *Namlex: Index to the laws of Namibia* (1997; 2010 update) Criminal Law and Procedure-3 to -5), but it suffices for current purposes. For more detail on the complications of the administration of justice immediately before independence, see SK Amoo ‘The Constitutional Jurisprudential Development in Namibia since 1985’ in N Horn & A Bösl (eds) *Human Rights and the Rule of Law in Namibia* (2008) 39-57.

⁴ Legal Assistance Centre op cit (n3) History-4. Cf also *S v Redondo* 1993 (1) SACR 343 (NmS).

⁵ Cf SK Amoo & I Skeffers ‘The Rule of Law in Namibia’ in A Bösl & N Horn (eds) *Human Rights and the Rule of Law in Namibia* 2ed (2009) 17. See also G Erasmus ‘The Namibian Constitution and the Application of International Law’ (1990) 15 *The South African Yearbook of International Law* 81-110; M Wiechers ‘Namibia: The 1982 Constitutional Principles and Their Legal Significance’ (1990) 15 *The South African Yearbook of International Law* 1. The Namibian Constitution was approved by the Constituent Assembly in February 1990 – Naldi op cit (n2) 9, and is highly regarded: ‘It seems safe to assert that [the Namibian Constitution] is the most liberal in Africa and stands comparison with those of other liberal democracies throughout the world’ – Naldi op cit (n2) 103.

⁶ E.g. Naldi op cit (n2) 1-9; Legal Assistance Centre op cit (n3) History-4; several contributions in A Bösl et al (eds) *Constitutional Democracy in Namibia: A Critical Analysis after Two Decades* (2010), notably N Horn ‘The forerunners of the Namibian Constitution’ 63-82, T-B Gurirab ‘The genesis of the Namibian Constitution’ 109-118, G Coleman & E Schimming-Chase ‘Constitutional jurisprudence in Namibia since Independence’ 199- 214; P VonDoepp *Judicial Politics in New Democracies: Cases from Southern Africa* (2009) 117-118, 122-123; C Fenwick ‘Labour law reform in Namibia’ in T Lindsey (ed) *Law Reform in Developing and Transitional States* (2007) 317 at 319-320.

2.1 The position at independence

As intimated in the introduction, South Africa was in administrative and legislative control of Namibia before its independence.⁷ The Criminal Procedure Act itself declared that it also applied to the territory of South-West Africa,⁸ and this was the main legislation governing criminal procedure in that country. In the interest of an orderly transition after independence, the Namibian Constitution provided as follows in article 140(1):⁹

‘Subject to the provisions of this Constitution, all laws which were in force immediately before the date of Independence shall remain in force until repealed or amended by Act of Parliament or until they are declared unconstitutional by a competent Court.’

Article 66(1) contains a similar provision with regard to common law and customary law. The result is that the Criminal Procedure Act 51 of 1977 remained in place after independence. It has not yet been replaced.¹⁰

Just before independence the sentences which the courts could impose were the following: the death sentence; imprisonment; whipping (or corporal punishment); fines; and committal to a rehabilitation centre.¹¹ Imprisonment could be imposed as a determinate sentence,

⁷ The exact terms of this control and its legality in terms of international law lie outside the scope of this contribution.

⁸ Section 1 of the Criminal Procedure Act 51 of 1977.

⁹ See also Amoo & Skeffers op cit (n5)18; Coleman & Schimming-Chase op cit (n6) 200-201.

¹⁰ Cf *S v Rooi* (SA17/03) [2004] NASC 1 (1 April 2004): ‘Act 55 of 1977 is an act of the Republic of South Africa which was applied to South-West Africa and survived the Independence of Namibia by virtue of Article 140(1) of our Constitution’. Although the Namibian Parliament passed its own Criminal Procedure Act 25 of 2004, it has not yet been put into operation. Indeed, this is unlikely ever to happen. The Law Reform and Development Commission is currently investigating how the issue should be dealt with. Some of the concerns with this Act are that some of its provisions are unconstitutional (especially life imprisonment without the possibility of parole) and there are major concerns with s 371, which requires (inter alia) the state to pay an accused’s wasted costs in case of unreasonable delays. See also PJ Schwikkard ‘The evidence of sexual complainants and the demise of the 2004 Criminal Procedure Act’ (2009) 1 *Namibia Law Journal* 5 at 5, 18, 19, 25; JD Mujuzi ‘The constitutionality of different types of life imprisonment suggested in the Criminal Procedure Act, 2004’ (2010) 2 *Namibia Law Journal* 111-120.

¹¹ Section 276(1) of the Criminal Procedure Act 51 of 1977.

as periodical imprisonment¹² or following declaration as an habitual criminal.¹³ As far as penal jurisdiction was concerned, a district magistrate's court could impose up to 12 months' imprisonment and a regional court a maximum of 10 years' imprisonment.¹⁴ Mention should also be made of the community courts – traditional tribal courts where customary law was practised.¹⁵

2.2 Developments after independence

Independence had a direct influence on the sentencing powers of the courts, as the Namibian Constitution outlawed the death penalty with immediate effect.¹⁶ The Namibian Constitution also changed the court structure,¹⁷ in that the High Court became the highest court with original trial jurisdiction, while retaining its appellate functions. Interestingly, the High Court also has jurisdiction over 'cases which involve the interpretation, implementation and *upholding* of this Constitution and the fundamental rights and freedoms guaranteed thereunder.'¹⁸ The Supreme Court, as the country's highest court,

¹² Section 285 of the Criminal Procedure Act 51 of 1977. Periodical imprisonment is specifically noted in the penalty clause for failure to comply with a maintenance order (s 39(1) of the Maintenance Act 9 of 2003). However, it is rarely imposed, and then usually for the above-mentioned offence or for offences related to driving under the influence of drugs or liquor (stakeholders' communications). Its advantages were noted in *S v Amunyela* (CR 22/2011) [2011] NAHC 224 (27 July 2011) at para [11] (it is a deterrent, keeps the offender's employment unscathed). See also regulations 316-320 of the Regulations for the Administration and Control of the Namibian Prison Service, 2001 (GN No 226 dated 8 Nov 2001).

¹³ Section 286 of the Criminal Procedure Act 51 of 1977. In *S v Miller* 2002 NR 31 (HC) the court confirmed that this sentence still applies in Namibian law. However, it is rarely imposed and even in this case it was replaced with 4 years' imprisonment.

¹⁴ Sections 92(1) of the Magistrates' Courts Act 32 of 1944. Cf *S v Afrikaner* 2008 (2) 424 (HC) at para [6] (confirming that this Act still applies in Namibia).

¹⁵ See MO Hinz 'Traditional courts in Namibia – part of the judiciary? Jurisprudential challenges of traditional justice' in N Horn & A Bösl (eds) *The Independence of the Judiciary in Namibia* (2008) 149-173 for an excellent overview of these courts. See also SK Amoo 'The structure of the Namibian judicial system and its relevance for an independent judiciary' in Horn & Bösl (eds) op cit (n15) 69 at 90-92; Amoo & Skeffers op cit (n5) 25-26. 'Nobody knows how many traditional courts are currently operating in Namibia,' according to Hinz op cit (n15) 149.

¹⁶ Article 6 (no law may prescribe the death penalty and no court may impose a death sentence); cf Naldi op cit (n2) 37-38. For a useful overview of the law before its abolition, and the effect of abolition on those on death row, see *S v Alexander* 2006 (1) NR 1 (SC) at 8J-10D. See also, for recognition of this position, *S v Makwanyane* 1995 (2) SACR 1 (CC) at paras [33], [198], [386].

¹⁷ Article 78(4): The Supreme Court of South-West Africa ceased to exist with the passing of the Constitution, and its functions were taken over by two courts: the Supreme Court and the High Court.

¹⁸ Article 80(2). See also Amoo op cit (n15) 75-79.

serves as appeal court for judgments from the High Court, and must also consider cases referred to it by the Attorney-General.¹⁹ In one of the first cases so referred, the Supreme Court declared unconstitutional all sentences of corporal punishment (or whipping).²⁰

In the meantime, in South Africa, the Criminal Procedure Act was amended²¹ to introduce a new community-based sentence, called correctional supervision.²² Obviously, this amendment did not affect the law in Namibia,²³ but it contributed to the sentencing laws in the two countries diverging substantially, barely a year after Namibia's independence. By the middle of the 1990s this divergence was mitigated, as South Africa also adopted a Bill of Rights, which resulted in capital and corporal punishment²⁴ being declared unconstitutional in quick succession in South Africa, too.

2.3 Concerns about high crime rates

During the 1990s expressions of concern about crime rates, and of violent crime in particular,²⁵ became constant themes in both countries. In Namibia all three arms of government became involved in attempts to address the perceived increases in crime.

The main arrow in the legislature's arsenal was the deployment of minimum sentences. The first modern attempt at such legislation was the Stock Theft Act 12 of 1990. A number of other minimum-sentence acts and provisions followed, and the process appears to be ongoing. As one of the most important recent developments on the sentencing

¹⁹ Article 79(2). Cf *S v Paulo* (SA 85/2011) [2012] NASC 26 (30 November 2012) at para 17; Amoo op cit (n15) 71-74. About it being the highest court, see also Naldi op cit (n2) 22; Amoo op cit (n15) 69.

²⁰ In the landmark judgment, as far as Southern Africa is concerned, *Ex parte Attorney-General: In re Corporal Punishment by Organs of State* 1991 NR 178 (SC). This judgment has been described as 'one of the most lucid judgments emanating from the Supreme Court' – see Coleman & Schimming-Chase op cit (n6) at 209; also Naldi op cit (n2) 48-50. The finding also affected corporal punishment by tribal authorities (cf *S v Sipula* 1994 NR 41 (HC)), but not corporal punishment outside the criminal justice arena. Later, this judgment would also heavily influence the judgment in *S v Williams* 1995 (2) SACR 251 (CC).

²¹ See the Correctional Services and Supervision Matters Amendment Act 122 of 1991.

²² For detail on this sentence option, see SS Terblanche *A guide to sentencing in South Africa* 2ed (2007) ch 11.

²³ Cf *S v Ganes* 2005 NR 472 (HC) 477J-478A (correctional supervision does not exist in Namibia).

²⁴ These sentences were declared unconstitutional in *S v Makwanyane* supra (n16) and *S v Williams* supra (n20) respectively. However, the legislature also explicitly removed these sentences from the Criminal Procedure Act: see s 1 of the Criminal Law Amendment Act 105 of 1997.

²⁵ See, in connection with rape, also D Hubbard 'Should a minimum sentence for rape be imposed in Namibia?' 1994 *Acta Juridica* 228-230.

front, the minimum sentences are discussed in more detail below.²⁶ The legislature took further action in 1997, by increasing the sentence jurisdiction of the lower courts.²⁷ In criminal cases, ‘a magistrates’ court may impose a sentence of up to five years or a fine of up to N\$20 000, and a regional magistrates’ court may impose a sentence of up to 20 years and a fine of up to N\$100 000.’²⁸

The executive authority also became involved. For example, in 1996 president Nujoma established the *Commission of Inquiry into Legislation for the more Effective Combating of Crime in Namibia*,²⁹ under the chairmanship of Justice Bryan O’Linn. One of the main aspects that needed to be investigated by the Commission was the ‘lenient sentences [which had] the effect of causing a decline of public confidence in the criminal justice system.’³⁰ Some of the recommendations of the Commission were to extend the use of minimum sentences, and it also recommended the introduction of life imprisonment without the option of parole.³¹

The main role of the judiciary has been to express their outrage at crime and its perpetrators with increasing vehemence, and to impose increasingly long sentences.³² Two examples of this trend will suffice for now. In *S v Alexander*³³ the court said,

‘That those are crimes of gravity and of all too common occurrence are facts notoriously known to all the Courts in this country which grapple daily with the waves of crime that erode the very foundations on which we have chosen to build a just, fair and peaceful society.’

In similar vein the High Court wrote in *S v Gaoseb*,³⁴

²⁶ See 4 below.

²⁷ Through Act 9 of 1997.

²⁸ Legal Assistance Centre op cit (n3) Courts-2; Amoo op cit (n15) 87-88.

²⁹ See Proc 2/1996, GG 1285 (2 Apr 1996).

³⁰ S Nujoma ‘Statement by His Excellency President Sam Nujoma’ in C Cilliers and SK Amoo (eds) *The role of the court* (1996) 4 at 5.

³¹ I have been unable to obtain the Commission’s final report. For substantial references to the work of the Commission, see P Noa *General deterrence as a satisfactory justification for punishment* LLM (Univ of Namibia) (2005), including reference to the *Final report of The Commission of Enquiry into Legislation for the more effective Combating of Crime in Namibia* (eg, fn 21 et seq). However, further detail such as a date or official reference is not provided, and the *Final Report* is not listed in the bibliography either. Since Justice O’Linn was one of the two supervisors of the dissertation, it is safe to assume that the references to the *Final Report* are accurate. Noa op cit at 43 specifically notes the recommendation to introduce life imprisonment without parole, which has been included in the Criminal Procedure Act 25 of 2004 (see in this respect (n10) above).

³² See discussion at 3.3 below.

³³ *S v Alexander* supra (n16) at 6D-E.

³⁴ (CC 19/2010) [2011] NAHC 57 (25 February 2011) at para [13].

‘Given the grave escalation of crimes of violence committed lately against the most vulnerable in society like the elder, women and young children, the deterrent aspect of sentencing and deterrence, as one of the objectives of punishment, must be emphasised.’

Increasingly also, these expressions were accompanied by statements that sentencing courts need to send a ‘clear message’ to a variety of stakeholders. For example, the court in *S v Gaweseb*³⁵ said,³⁶

‘This Court must, however, be sensible to the prevalence of violent crime and the widespread terror and misery it causes, and must send out a clear message that punishment for such will become progressively heavier until the battle is won and the tide is turned.’

3. The current position

3.1 The general principles of sentencing

Minimum sentences only affect a small number of crimes. For the majority of crimes committed in Namibia, the courts impose sentence purely in accordance with their sentence discretion. This discretion must be ‘judicially exercised by the trial judge’.³⁷ Whether or not this was the case is usually asked only when an appeal against the trial court’s sentence is entertained.³⁸

The trial judge or magistrate, in order to impose a judicially justified sentence, has to start the process of determining an appropriate sentence by applying the general principles of sentencing. These general principles are the same as those which apply in South Africa

³⁵ (CC 30/2009) [2010] NAHC 177 (29 October 2010) at para [22]. See also *S v Jason* 2008 (1) NR 359 (HC) 367F.

³⁶ See also *S v Shinana* (CC5/06, CC05/2006) [2006] NAHC 14 (24 April 2006) at para [1]; ‘The Court must send a *clear message* that the use of knives to needlessly kill others will not be tolerated ...’; *S v Likuwa* (18/2010) [2011] NAHC 30 (2 February 2011) at para [16]; ‘A clear message must be sent to all persons who perpetrate violence against their partners that their conduct will not be tolerated’; *S v Thomson* (CC 46/2007) [2011] NAHC 1 (13 January 2011) at para [4]: the sentence ‘must also send a clear message to would be offenders out there that a breakdown of law and order will not be tolerated’; *S v Werner* (CC 22/08) [2009] NAHC 38 (31 March 2009) at para [23]; *S v Auuala (No 2)* 2008 (1) NR 240 (HC) at para [20]; *S v Shaningwa* 2006 (2) NR 552 (HC); *S v Shuudeni* (CC 09/2011) [2012] NAHC 238 (7 August 2012) at para [7]; *S v Basson* (CC 23/2010) [2011] NAHC 186 (1 July 2011) at para [10].

³⁷ *S v Jason* supra (n35) at 364B. This principle ‘is trite’ – *S v Alexander* supra (n16) at 5G-H.

³⁸ The seminal judgment on this point is *S v Tjibo* 1991 NR 361 (HC) at 366A-B, to the effect that interference on appeal is permissible in case of (1) misdirection about facts or law; (2) material irregularity during the sentence proceedings; (3) material facts were either disregarded or over-emphasized; (4) the sentence is ‘startlingly inappropriate’ or very different from the one the court of appeal would have imposed.

and this position has not changed since independence. In terms of these principles the sentencing court is required to find an appropriate sentence, incorporating ‘the fundamental triad of sentencing factors as expounded in *S v Zinn...*’,³⁹ – the crime, the criminal and the interests of society. In addition, as in South Africa, Namibian courts recognise four purposes of punishment. These are retribution, deterrence, prevention and rehabilitation.⁴⁰

3.2 The forms of sentence

Sentences are nowadays largely limited to fines and imprisonment. Fines are the standard sentences for less serious offences, although it is sometimes imposed for quite serious crimes.⁴¹ The imposition of fines is largely still the same as at the time of independence. Another approach that has not changed much since independence is the practice of suspending sentences. However, with suspension there has been a notable development. Namibian courts are not adverse to imposing very substantial sentences and then suspend part of them. For example, in *S v Moses*⁴² the court imposed 17 years’ imprisonment, of which 7 years were conditionally suspended. This trend has not been expressly acknowledged in any Namibian source, but it is now quite different from the approach followed in South Africa.⁴³

³⁹ *S v Alexander* supra (n16) at 8A-B, 4D-E. See also *S v Auala (No 2)* supra (n36) at paras [2]-[3]; *S v M* 2007 (2) NR 434 (HC); *S v Ngunovandu* 1996 NR 306 (HC); *S v Mukuwe* (CC 08/2009) [2010] NAHC 66 (12 August 2010) at para [4]; *S v Kanguro* 2011 (2) NR 616 (HC), esp paras [6]-[11], to mention only a small number of all the relevant case law.

⁴⁰ Cf *S v Van Wyk* 1992 (1) SACR 147 (NmS) at 165b; *S v Both* (CC39/2008) [2010] NAHC 198 (30 November 2010) at para [2]; *S v Kandjengo* (CC 15/2010) [2011] NAHC 208 (14 July 2011) at para [3]. Namibian courts accept that rehabilitation as a purpose takes a ‘backseat’ when the crime is really serious – cf *S v Gariseb* (CC5/2003) [2009] NAHC 71 (22 June 2009) at paras [8]-[9]; *S v Mukuwe* supra (n39) at para [9].

⁴¹ Such as assault with intent to do grievous bodily harm – see *S v Phillipus* (CR 41/2010) [2010] NAHC 93 (24 September 2010); *S v Haraeb* (CR 3/2012) [2012] NAHC 21 (7 February 2012). There is some indication of it being imposed in magistrates’ courts, even if not always considered appropriate on review, see, eg, *S v Wabengo* (CR 22/2012) [2012] NAHC 278 (26 October 2012); *S v Ucham* (CR13/2011) [2011] NAHC 136 (18 May 2011); *S v Eichab* (CR 86/2010) [2010] NAHC 180 (3 November 2010); *Valombola v S* (CR 19/2009) [2009] NAHC 63 (1 June 2009).

⁴² (SA 2/96) [1996] NASC 8; 1997 (2) SACR 322 (NmS) (11 October 1996). See also *S v Fillemon* (CA 96/2007) [2012] NAHC 12 (20 January 2012) (for murder, sentenced to 15 years’ imprisonment of which 4 years were suspended); *S v Munyama* (SA 47/2011) [2011] NASC 13 (9 December 2011) at para [21] (6 years’ imprisonment imposed, half suspended); *S v Muruti* (CC 10/2011) [2012] NAHC 15 (31 January 2012) (for murder and assault: 18 years of which 5 years were suspended).

⁴³ Cf Terblanche op cit (n22) 353-354.

3.3 Long prison sentences

It has been noted above that the courts have been imposing increasingly long sentences for some crimes. A number of questions in this connection needs answers, such as how long sentences have become and what motivation the courts use for this approach.

In the case of serious violent crime the courts' motivation for the longer sentences is relatively clear. The courts feel the need to send 'a clear message'⁴⁴ that they intend to (1) protect the public against such crime;⁴⁵ (2) remove the criminals from society;⁴⁶ (3) deter the criminal and other would-be criminals;⁴⁷ and (4) give expression to societal expectations regarding an appropriate sentence.⁴⁸

According to Namibian law, life imprisonment is the most severe sentence that may be imposed. It should, according to *S v Tcoelib*,⁴⁹ only be imposed when society needs protection against a repetition of the crime, or in case of a crime of such 'gravity as to legitimize the extreme degree of disapprobation which the community seeks to express through such a sentence'.⁵⁰ It was imposed in this case. The appellant had committed 'two vicious murders',⁵¹ when he killed family members of his employers because they had falsely accused him of stealing four wine bottles. The Supreme Court held that life imprisonment was 'not disproportionate' to the seriousness of the crimes.⁵²

⁴⁴ See (n36) above.

⁴⁵ *S v Jason* supra (n35) at 367F-G

⁴⁶ *S v Jason* supra (n35) at 367F-G

⁴⁷ *S v Jason* supra (n35) at 367F-G; *S v Gaoseb* supra (n34) at para [13].

⁴⁸ *S v Shuudeni* supra (n36) at para [7].

⁴⁹ 1999 NR 24 (SC) [1996(1) SACR 390 (NmS)]. The trial court's judgment has been reported as *S v Tcoelib* 1991 NR 263 (HC).

⁵⁰ At 38. It is a constitutional requirement that life imprisonment must leave the prisoner with hope of release; see *S v Tcoelib* 1999 NR 24 (SC). See also Naldi op cit (n2) 38 (with abolition of the death penalty, life imprisonment became 'more relevant').

⁵¹ At 26E et seq.

⁵² At 38A-C. Other examples of life imprisonment include *S v Shikunga* (SA 6/95) [1997] NASC 2 [1997 (2) SACR 470 (NmS)] (S had killed his former employer, inflicting 23 stab wounds in the process); *S v Jeremia* 1993 NR 227 (HC) (1993 (2) SACR 422 (Nm)) (J had murdered her five-year-old foster daughter, whom she had abused and tortured over some time; the crime (see details at 228E-H), was 'the most cruel and gruesome one known in the annals of our jurisprudence' (at 228D); life imprisonment was the only proper sentence (at 232G)); *S v Koopman* (SA6/00 [2001] NASC 3 (28 May 2001) (life imprisonment imposed because of the offender's propensity to commit violent crime, deduced from his record of previous convictions; the trial court thought a sentence of about 10 years' imprisonment would have been deserved for the crime itself).

Given the concern with serious crime it is somewhat surprising that life imprisonment is rarely imposed in Namibia. Even when imposed, it is often not confirmed on appeal.⁵³

Although life imprisonment is rarely imposed, the same cannot be said of very long determinate prison sentences. Many examples of very long sentences are readily available. The longest sentence I was able to find in the literature was an effective sentence of 87 years' imprisonment, imposed in *S v Aibeb*.⁵⁴ The horrific crime involved three murders, the stabbing of further victims, and arson of the home where his girlfriend was staying, which caused the death of two small children. In *S v Ngoya*⁵⁵ the High Court sentenced the offender to 60 years' imprisonment for murder. The offender had decapitated the deceased and then paraded around with this head, the motive apparently being revenge. The trial judge described these actions as barbaric. The same effective sentence was imposed in *S v Kamudulunge*,⁵⁶ for two murders, stemming from a domestic violence situation. In *S v Mukuwe*,⁵⁷ an effective sentence of 50 years' imprisonment was imposed for two murders, plus rape and housebreaking, following a domestic situation that was not to the murderer's liking. In another example, *S v Basson*,⁵⁸ the court imposed 45 years' imprisonment on the accused for murdering his life partner. She died after brutal assaults by the accused. The court said that 'very long terms of imprisonment for such crimes [of violence against the vulnerable, especially women and children] must be the norm – only to be deviated from in exceptional circumstances.'⁵⁹ An effective sentence of 39 years' imprisonment was imposed on the

⁵³ See, eg *S v Alexander* supra (n16) at 10J-11D; *S v Moses* supra (n42): M killed his own daughter with a stick, because she did not walk fast enough; the crime was '... an horrendous offence', but the Court replaced the life imprisonment imposed in the trial court with 17 years' imprisonment of which 7 years were conditionally suspended.

⁵⁴ (CC 10/2010) [2011] NAHC 338 (21 November 2011). Informally, mention has been made of sentences of 120 years' imprisonment.

⁵⁵ (CC10/06 , CC10/2006) [2006] NAHC 20 (12 May 2006). See also *S v Louw* (CC 09/2005) [2006] NAHC (24 November 2006) at para [29], quoted in Legal Assistance Centre *Rape in Namibia: an assessment of the operation of the Combating of Rape Act* (2006) 467: 65 years effective imprisonment for murder, rape and some related offences.

⁵⁶ (CC 20/2010) [2011] NAHC 326 (31 October 2011).

⁵⁷ (CC 08/2009) [2010] NAHC 66 (12 August 2010). The court 'ameliorated' the sentence with the period spent in custody before sentencing, being 3 years and 4 months (at paras [15]-[16]).

⁵⁸ (CC 23/2010) [2011] NAHC 186 (1 July 2011) at para [5].

⁵⁹ (CC 23/2010) [2011] NAHC 186 (1 July 2011) at para [5]. See also *S v Orina* (CC 12/2010) [2011] NAHC 137 (20 May 2011): 30 years' imprisonment for the murder and an additional 10 years' imprisonment for an attempt to defeat the administration of justice, by dismembering the corpse.

second appellant in *S v Jason*:⁶⁰ 20 years' imprisonment for a sadly typical 'farm murder, plus 19 years for robbery.

Very long sentences have also been imposed for rape. In *S v Kaanjuka*⁶¹ the regional magistrate imposed the maximum sentence of 20 years' imprisonment on each of 2 counts of rape: an effective sentence of 40 years' imprisonment. The victims were both only 8 years old, and one bled profusely following the rape. The High Court dismissed the appeal, specifically also with respect to the decision that the two periods had to be served consecutively. Damaseb JP said,⁶² 'Long sentences are, in my view, a categorical imperative'⁶³ for those, like the appellant, who commit rape against young children.'

The obvious question is why, since life imprisonment has been described as the most severe sentence, are such long determinate sentences regularly imposed?

The answer is probably to be found in the very liberal release policy for life prisoners. In terms of this policy, a prisoner serving life imprisonment may be considered for parole after having served only 10 years of the sentence.⁶⁴ This policy makes life imprisonment potentially a milder option than in many European countries noted for their generally much less punitive approaches.⁶⁵ Namibian prisoners who serve determinate sentences normally have to serve half their

⁶⁰ 2008 (1) NR 359 (SC). The Supreme Court described the sentence as 'robust' (at 367D) but declined to interfere.

⁶¹ 2005 NR 201 (HC).

⁶² At 207B.

⁶³ This phrase is evidently borrowed from philosophy, where it is directly related to the philosophical writing of Immanuel Kant (1724-1804), the German philosopher, whose writings are still influential when it comes to sentencing theory. A 'categorical imperative' relates to a moral obligation which is not dependant on the views or inclinations of any individual. This would also be the moral obligation which serves as foundation or source for all other moral obligations, in other words, the supreme principle of morality – SJ Kerstein *Kant's Search for the Supreme Principle of Morality* (2002) 139. See also, eg, JK Uleman *An introduction to Kant's moral philosophy* (2010) ch 6. It is submitted that it would be much more appropriate to describe the stopping or preventing of the rape of children as a categorical imperative, than to describe any sentence as such, since by then the despicable deed has already been perpetrated.

⁶⁴ See Mujuzi op cit (n10) at 112 fn 8: The minimum period of imprisonment is 20 years 'for administrative purposes' and the prisoner 'may be considered for parole ... after having served at least half ...', i.e. 10 years. This position was confirmed informally. See also *S v Koopman* supra (n52): it is generally accepted that life imprisonment amounts to a sentence of 20 years' imprisonment.

⁶⁵ Cf M Tonry 'Sentencing Reform Across National Borders' in C Clarkson and R Morgan (eds) *The Politics of Sentencing Reform* (1995) 267-282. In Germany, eg, a prisoner must serve at least 15 years before release on parole becomes a possibility – D van Zyl Smit *Taking Life Imprisonment Seriously* (2002) 150-152; SS Terblanche 'Sentencing murder and the ideal of equality' (2011) 44 *CILSA* 97 at 117.

sentences before they can be considered for parole.⁶⁶ Clearly, therefore, any determinate sentence in excess of 20 years will require longer detention than life imprisonment before parole could be considered. The inherent anomalies of this approach speak for themselves. In view of the executive's concern about serious crime, it is submitted that the policy should be amended to be more in line with Namibian approaches to appropriate sentencing – the courts should not ignore the law in order to appease the public.

3.4 Importance of consistency

Namibian courts struggle with the dichotomy of the need to individualise sentences, while at the same time striving for consistent sentences,⁶⁷ as many other jurisdictions do. Even the Supreme Court has acknowledged recently that the values encapsulated by the 'principle of consistency' are not minor values:⁶⁸

'The principle of consistency in sentencing has gained wide acceptance. Its significance lies in the fact that it strives to avert any wide divergence in the sentences imposed in similar cases and should thus appeal to any reasonable person's sense of fairness and justice. One advantage of consistency in sentencing is that it promotes legal certainty and consequently improves respect for the judicial system.'

The principle has also been linked to the ideal 'that justice must not only be done, but should manifestly be seen to be done from the viewpoints of both the accused and the public...'.⁶⁹

One way in which sentence consistency can be improved is to compare the sentences imposed in other cases involving a similar offence. A notable example was *S v Strauss*,⁷⁰ in which O'Linn J considered the facts and sentences of 19 cases involving theft of

⁶⁶ The relevant legislation on the implementation of imprisonment at the time of independence was the Prisons Act 8 of 1959, which has subsequently been replaced by the Prisons Act 17 of 1998. In terms of s 9591) of the Act, a prisoner who has been sentenced to at least three years' imprisonment may be considered for parole after having served half the sentence.

⁶⁷ Cf *S v Munyama* supra (n42) at para [12]: 'Although it is trite that sentences should be individualised, our Courts generally strive for uniformity of sentences in cases where there has been a more or less equal degree of participation in the same offence or offences by participants with roughly comparable personal circumstances.' See also *S v Auala (No 2)* supra (n36) at para [21].

⁶⁸ *S v Munyama* supra (n42) at para [12]. See also *S v Cambinda* 2006 (2) NR 550 (HC) at para 5; *S v Skrywer* 2005 NR 288 (HC) at 2891-J; *S v Van Wyk* (SA 94/2011) [2012] NASC 23 (15 November 2012) at para [17].

⁶⁹ Cf *S v Cambinda* supra (n68) at para [5].

⁷⁰ 1990 NR 71 (HC) at 77-78. The assessment in *Strauss* was still used in *S v Auala (No 2)* supra (n36), together with a number of subsequent cases.

diamonds. From this 'catalogue of similar crimes'⁷¹ a clear pattern emerged. He continued:⁷²

'The Court must obviously attach great weight to this catalogue, while at the same time balancing it against the principle of individualisation. One must look at which circumstances, personal or otherwise, can be taken as distinguishing factors in this case, which would justify a sentence which is out of line with the case to which the Court has referred.'

The main problem with this approach is, of course, that comparisons can become very difficult. In *S v Munyama*⁷³ the Supreme Court noted that sentencing is an imperfect science and that perfect equality between similarly placed offenders cannot always be expected.⁷⁴

4. Minimum sentences

4.1 An overview of Namibia's minimum sentences

Whereas South Africa passed one Act containing most of the minimum sentences,⁷⁵ Namibia passed different statutes, each with a different focus such as stock theft, rape, theft of motor vehicles, and unlawful possession of 'armament'.⁷⁶ There are no minimum sentences in Namibia for many of the crimes covered in the South African legislation, such as murder, most forms of robbery, dealing in drugs, and so on.

The minimum sentences legislation in Namibia follows a fairly standard format. It typically contains some provision defining or delimiting the crime. It then stipulates the minimum sentences, often with some differentiation for previous convictions, before including a number of exceptions. The minimum sentences might be bolstered by other provisions, such as a limitation on suspension, or order that multiple sentences be served concurrently,⁷⁷ or by permitting the regional courts to impose any of the prescribed sentences, even those in excess of the courts' normal jurisdiction.⁷⁸

⁷¹ At 79A. See also *S v Munyama* supra (n42) at para [12].

⁷² At 79A-B.

⁷³ Supra (n42) at para [12].

⁷⁴ With reference to *S v Makwanyane* supra (n16) at para [54]. For an example of how different factors can complicate the issue, see *Munyama* supra (n42) at paras [10]-[11].

⁷⁵ The Criminal Law Amendment Act 105 of 1997.

⁷⁶ See, respectively, the Stock Theft Act 12 of 1990; Combating of Rape Act 8 of 2000; Motor Vehicle Theft Act 12 of 1999; and Arms and Ammunition Act 7 of 1996.

⁷⁷ Section 14(3) of the Stock Theft Act 12 of 1990; s 15(4) of the Motor Vehicle Theft Act 12 of 1999.

⁷⁸ Cf s 15A of the Stock Theft Act 12 of 1990.

The Combating of Rape Act 8 of 2000 provides a good example of this format.⁷⁹ First, the Act defines rape.⁸⁰ It then prescribes the sentences that should be imposed. The point of departure is a sentence of at least five years' imprisonment.⁸¹ This minimum period is increased to 10 years' imprisonment⁸² when the rape has been committed under certain 'coercive circumstances', namely:

- The rape was accompanied by physical force or threats of physical force.⁸³
- The rape was committed under 'circumstances where the complainant is unlawfully detained'.⁸⁴

The minimum period increases to 15 years' imprisonment when any of the following circumstances, related either to the victim or the offender, exists:⁸⁵

- When the victim suffered 'grievous bodily or mental harm';⁸⁶ is under 13 years old or 'by reason of age exceptionally vulnerable';⁸⁷ or is under 18 years old and the perpetrator is in any position of trust or authority over him or her, such as a parent or guardian.⁸⁸
- When the rapist committed the offence knowing that he 'is infected with any serious sexually-transmitted disease';⁸⁹ is one of a group

⁷⁹ For a comprehensive report on the genesis of the Act and many other related issues, see Legal Assistance Centre *Rape in Namibia: an assessment of the operation of the Combating of Rape Act* (2006) 66 et seq. Influential organisations were not unreservedly in favour of minimum sentences for rape: cf Hubbard op cit (n25) 228-255.

⁸⁰ Rape is defined as a sexual act committed under 'coercive circumstances' (s 2(1)). More detail of these circumstances are given in s 2(2).

⁸¹ Section 3(1)(a)(i). In the case of a 'second or subsequent conviction' the minimum period doubles to 10 years' imprisonment – s 3(1)(b)(i). The minimum sentences do not apply to an offender who was a child (under the age of 18) at the time of the offence – s 3(3). District courts do not have the jurisdiction to try rape cases (s 89(1) of the Magistrates' Courts Act 32 of 1994; *S v Handukene* 2007 (2) NR 606 (HC) at para [2]).

⁸² Or double this if the offender has any previous conviction for rape – s 3(1)(b)(ii).

⁸³ Section 3(2)(a) and (b).

⁸⁴ Section 3(2)(e).

⁸⁵ In these instances, a previous conviction for rape triples the minimum sentence to 45 years' imprisonment – s 3(1)(b)(iii). See also Legal Assistance Centre op cit (n93) at 94, 442-443.

⁸⁶ Section 3(1)(a)(iii)(aa).

⁸⁷ Section 3(1)(a)(iii)(bb).

⁸⁸ Section 3(1)(a)(iii)(cc).

⁸⁹ Section 3(1)(a)(iii)(dd).

of perpetrators, in other words, there was a gang rape;⁹⁰ or used any weapon in order to facilitate the rape.⁹¹

The Act also states that no part of the minimum sentences may be suspended, unless the court imposes more than the minimum, when that part of the sentence exceeding the minimum may be partly suspended.⁹² The Act does not apply to child offenders at all.⁹³

Every act with minimum sentence provisions provides for a departure if 'substantial and compelling circumstances exist' justifying the imposition of a lesser sentence.⁹⁴ In interpreting the 'substantial and compelling circumstances' phrase, Namibian courts⁹⁵ have consistently followed the South African case of *S v Malgas*.⁹⁶ With respect to the Combating of Rape Act 8 of 2000, the Namibian High Court specifically decided in *S v Lopez*⁹⁷ that the interpretation in *Malgas* has to be followed.⁹⁸ This means that the law with respect to departure is the same in South Africa and Namibia. In essence, truly convincing reasons are required for a departure. At the same time the courts should not apply the minimum sentences mechanically, as if they have no discretion to consider what an appropriate sentence would actually be. Instead, they must consider all the factors that would normally affect a sentence.⁹⁹

⁹⁰ Section 3(1)(a)(iii)(ee).

⁹¹ Section 3(1)(a)(iii)(ff).

⁹² Section 3(4). Most of the other minimum sentence provisions ban suspension of any part of the sentence, unless the offender was a child, when partial suspension is allowed: see s 15(5) of the Motor Vehicle Theft Act 12 of 1999; s 38(4) of the Arms and Ammunition Act 7 of 1996. The Stock Theft Act 12 of 1990 (s 14(4) has a slight adaptation, in that it permits partial suspension in the case of first offenders.

⁹³ Section 3(3) of the Combating of Rape Act 8 of 2000.

⁹⁴ Section 14(2) of the Stock Theft Act 12 of 1990; s 3(2) of the Combating of Rape Act 8 of 2000; s 15(5) of the Motor Vehicle Theft Act 12 of 1999.

⁹⁵ Cf *S v Gaseb* (SA 9/99) [2000] NASC 6; 2000 (1) SACR 438 (Nms) (9 August 2000) ; See, eg *S v Mukuwe* supra (n39) at para [14] (*Malgas* is 'the established law' in this regard).

⁹⁶ 2001 (2) SA 1222 (SCA) (2001 (1) SACR 469).

⁹⁷ 2003 NR 162 (HC).

⁹⁸ Cf also *S v Kangulu* (CA 09/2007) [2012] NAHC 33 (17 February 2012) at paras [14]-[15]; *S v Khulewind* (CC 13/2010) [2012] NAHC 230 (14 August 2012) at paras [4]-[5]; *S v Simon* (CC 08/2011) [2011] NAHC 299 (3 October 2011) at para [13]; *S v Babieb* (Case No. CR 180/07) [2007] NAHC 147 (21 December 2007) at para [19]. See also Legal Assistance Centre op cit (n93) 444-448.

⁹⁹ *S v Limbare* 2006 (2) NR 505 (HC) at para [7].

Departures from the minimum sentences are as inconsistent in Namibia as they are in South Africa, and have attracted the same kind of criticism.¹⁰⁰

4.2 Constitutionality of minimum sentences

A number of minimum sentence provisions have been declared unconstitutional since independence. In each instance the constitutionality of the minimum sentences was attacked as being in breach of article 8(2)(b) of the Namibian Constitution, which prohibits any person from being 'subject to torture or to cruel, inhuman or degrading treatment or punishment'. Deciding whether any sentence is in breach of this prohibition requires a value judgment, which has to be expressed objectively and judicially by the court. This value judgment must reflect the contemporary norms of society, and may change from time to time.¹⁰¹ The courts have accepted throughout that the legislature is entitled to criminalise conduct and to prescribe punishment for such crimes, as one of the 'national institutions' that expresses society's contemporary norms.¹⁰² Courts have to take prescribed minimum sentences seriously. However, 'Parliament cannot enact penalties which will fall foul of Article 8(2)(b)'.¹⁰³ In determining whether this is the case, the courts adopted the 'grossly disproportionate to the severity of the offence' test also employed in the USA and Canada. A further refinement reads that a sentence would be grossly disproportionate if, given all the circumstances of the case, 'no reasonable man would have imposed' it.¹⁰⁴

As part of the constitutionality enquiry, Namibian courts determine whether a penalty clause (or a specific kind of punishment) is itself (or always) unconstitutional, or only within the circumstances of the specific case.¹⁰⁵ A penalty clause will only be found always to be unconstitutional when constitutional problems 'can be foreseen as likely to arise commonly'.¹⁰⁶

¹⁰⁰ See L Hassan 'Sentencing under the Combating of Rape Act, 2000: The misapplication of judicial discretion' (2011) 3 *Namibia Law Journal* 29-53 for a critical discussion of the application of the minimum sentences, increased sentences above the minima, and departures from the prescribed sentences.

¹⁰¹ See *Ex parte Attorney-General, Namibia: In re Corporal Punishment* 1991 NR 178 (SC) at 187 (1991 (3) SA 76 (NmS) at 86-87); *S v Vries* 1996 (2) SACR 638 (Nm) at 641b-c, 655b-663c.

¹⁰² *S v Vries* supra (n101) at 642c-d; *S v Likuwa* 1999 NR 151 (HC).

¹⁰³ *S v Vries* supra (n101) at 642e-f.

¹⁰⁴ *S v Vries* supra (n101) at 643-644; *S v Likuwa* supra (n119) at 154D-E.

¹⁰⁵ Cf *S v Tcoeib* 1996 (1) SACR 390 (NmS) AT 391b-i; *S v Vries* supra (n101) at 645a-e.

¹⁰⁶ Cf *S v Vries* supra (n101) at 645i-j, 646b-i; *S v Likuwa* supra (n119) at 154F-G.

The first penalty clause containing a minimum sentence which was declared unconstitutional was section 14(1)(b) of the Stock Theft Act 12 of 1990. It required a minimum of three years' imprisonment for a 'second or subsequent conviction'. The High Court in *S v Vries*¹⁰⁷ considered this penalty clause unconstitutional, mainly for following three reasons:

1. The legislation did not display regard for any lapse of time since the first conviction. In the present instance the second offence was committed 18 years after the first, and this should no longer be held against the offender.¹⁰⁸
2. The penalty clause disregarded the value of the stolen stock.¹⁰⁹
3. A sentence of six months' imprisonment would have been imposed in the circumstances of the case, which made the prescribed sentence a 'shocking' sentence.¹¹⁰

The legislature passed an amendment in 2004.¹¹¹ After this amendment, the following minimum sentences applied to stock theft:¹¹²

Value of stock	Minimum sentence (years' imprisonment)	
	First offender	With previous convictions ¹¹³
Less than N\$500	2 ¹¹⁴	30
N\$500 or more	20 ¹¹⁵	30

The High Court was called upon to consider the constitutionality of the provisions prescribing 20 and 30 years' imprisonment, in *Daniel v Attorney-General*.¹¹⁶ It had little difficulty finding that these prescriptions were unconstitutional:¹¹⁷ both these sentences

¹⁰⁷ Supra (n101).

¹⁰⁸ At 647g-648a.

¹⁰⁹ At 648b.

¹¹⁰ At 648c-d.

¹¹¹ Through the Stock Theft Amendment Act 19 of 2004.

¹¹² Section 14. For some of the other complications inherent in this legislation, see *S v Undari* 2010 (2) NR 695 (HC): for example, only a regional court had the jurisdiction to impose the sentences above the magistrates' courts' jurisdiction; cases needed to be transferred; expert testimony was required about the value of the livestock.

¹¹³ Section 14(1)(b).

¹¹⁴ Section 14(1)(a)(i).

¹¹⁵ Section 14(1)(a)(ii).

¹¹⁶ *Daniel v Attorney-General and Others; Peter v Attorney-General and Others* 2011 (1) NR 330 (HC).

¹¹⁷ Most of the parties, including the Attorney-General and the Government, agreed. The Prosecutor-General (second respondent) disagreed, based on the argument that the departure clause meant that no court was forced to impose unconstitutional sentences. This argument reflects the South African approach (see *S v Dodo* 2001 (1) SACR 594 (CC)), but was rejected based on the high level of the benchmark (*S v Daniel* supra (n116) at para [70]).

were grossly disproportionate and lacking in a proper gradation. The extreme level of the minimum sentences (the 'benchmark') was intolerable,¹¹⁸ which made it impossible for the sentencing court to have regard to the benchmark at all.¹¹⁹

The order of the court was phrased in such a way that the extreme sentences fell away. Only the minimum sentence when the value of the stock is under N\$500 remains in place.

The High Court also considered whether section 38(2)(a) of the Arms and Ammunition Act 7 of 1996 was constitutional, in *S v Likuwa*.¹²⁰ It provided for a minimum of 10 years' imprisonment for unlawful possession of 'armament'.¹²¹ The definition of armament included automatic weapons, such as an AK47 rifle.¹²² The court followed the same process of argument as in the other case. In recognition of Parliament's powers in connection with crimes and punishment, it considered the parliamentary debates to find out how the extent of the penalty clause was determined. However, it found that the 'policy or motivation underlying s 38(2)(a) was never articulated'.¹²³ The penalty clause thus covered a range of different acts,¹²⁴ without considering the offender's intention. In the present case the appellant possessed the rifle to protect his livestock, and no reasonable man would have imposed the prescribed 10 years' imprisonment.¹²⁵ Furthermore, since such cases would be quite common, the legislation had to be declared unconstitutional for all purposes.¹²⁶

5. Concluding remarks

It is clear from the foregoing discussion that the employment of minimum sentences by the legislature and the imposition of increasingly long sentences by the judiciary have been the most prominent developments in sentencing practice in Namibia since independence. The question is, of course, whether these measures are likely to reduce serious violent crime.

The first obstacle to overcome in answering this question is simply to determine the real extent of such crime in Namibia. Many of the judgments quoted in this contribution leave a vivid impression that

¹¹⁸ At para [69]. See also Amoo & Skeffers op cit (n5) at 30.

¹¹⁹ At paras [42]-[43], [68].

¹²⁰ 1999 NR 151 (HC) (1999 (2) SACR 44).

¹²¹ Section 29(1)(a).

¹²² *S v Likuwa* supra (n120) at 152H.

¹²³ At 155H-I.

¹²⁴ At 155E-F: From basic protection of livestock to insurrection.

¹²⁵ At 156C.

¹²⁶ At 156E.

crime is rampant. However, the impressions of judges and magistrates are not necessarily an accurate reflection of what is really going on. It is difficult to keep perspective when one's daily work consists of little else than trying and sentencing such violent offenders. Accurate data is notoriously difficult to find. One recent study by a trustworthy organisation had South Africa twelfth in the world on the list of murder rates (32 per 100 000 of the population, with 15 940 murders) and Namibia forty second (17 per 100 000, with 352 murders).¹²⁷ These numbers indicate that the position might well not be as desperate as first impressions indicate, even if the situation is far from ideal.

Some judgments provide part of the answer to the posed question, in that they admit that crime continues 'unabated', despite the long sentences.¹²⁸ Although the judges' frustration is palpable, they should not be surprised. After all, studies from across the world indicate that there is little connection between the severity of sentences and crime rates.¹²⁹

When it comes to long prison sentences, the position in South Africa is much to be preferred. Technically, the principle in South Africa is also that life imprisonment is the severest sentence that courts can impose,¹³⁰ but this principle is also reflected in practice: any attempt by sentencing courts to impose long determinate sentences in an attempt to get past the release policy with respect to life prisoners has consistently been rejected on review and appeal.¹³¹

However, the way in which Namibian courts have dealt with the minimum sentences legislation holds a lesson for South African treatment of its legislation. The Constitutional Court held that the minimum sentences legislation is constitutional because, owing to the departure clause, it does not force the sentencing courts to impose a sentence that would violate the constitutional restriction against cruel

¹²⁷ United Nations Office on Drugs and Crime *2011 Global Study on Homicide: Trends, contexts, data* (2011), esp at 92.

¹²⁸ Cf *S v Mukuwe* (CC 08/2009) [2010] NAHC 66 (12 August 2010) at para [9]: '...despite stern warnings issued by the courts against those responsible for this unfortunate situation [the rate of serious crime], it continues unabated'; *S v Daniel* supra (n116) at para [4]: despite the severe minimum sentences for stock theft, since 1990, 'the Prosecutor General ... still states in the year 2010 that "stock theft has escalated to unacceptable levels and erodes economic development in Namibia".' See also *S v Basson* (CC 23/2010) [2011] NAHC 186 (1 July 2011) at para [4].

¹²⁹ M Tonry 'Keynote address' in Open Society Foundation *Sentencing in South Africa: Conference report* (2006) Cape Town 4-9. See also Hubbard op cit (n25) 251: Rape is not 'the outcome of a rational decision-making process'. Therefore increased sentences will not by themselves reduce the incidence of rape.

¹³⁰ Cf *S v Bull* 2001 (2) SACR 681 (SCA) at para [21]; *S v Vilakazi* 2009 (1) SACR 552 (SCA) at para [6].

¹³¹ Terblanche op cit (n22) 223, 233.

or inhuman punishment.¹³² The Namibian courts have shown that the departure clause does not always provide an adequate answer, especially when the minimum periods are extreme, or when the legislative scheme does not provide a proper grading of punishment severity in proportion to increase crime seriousness.

¹³² Cf *S v Dodo* 2001 (1) SACR 594 (CC); *S v Dzukuda* 2000 (2) SACR 443 (CC).