

**Community Based Sentences : An Alternative to Short-Term  
Imprisonment**

**SHANTA SINGH**

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**SUPERVISOR : PROFESSOR C.H. CILLIERS**

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## **SUMMARY**

It is of paramount concern that prisons are overcrowded. The lack of sufficient alternatives to imprisonment manifests itself in this overpopulation. Innovatively acceptable and modern ways of punishing, controlling and rehabilitating offenders, rather than the traditional incarceration of short-term prisoners has been resolved. Statutory provisions that enable provision for community service, and factors that contribute to its implementation have been explored.

Recommendations are made from the knowledge and insight obtained as to the successful implementation of community based sanctions as an alternative to short-term imprisonment in South Africa. Community alternatives whether referred to as alternatives to short-term imprisonment, supervision, or punishment in the community, provide a reasonable and effective way of executing penalties. Community-based sanctions meet the criteria of deterrence and punishment.

Community Based sentences as an alternative to short-term imprisonment will definitely alleviate the pressures within the present criminal justice system in South Africa.

**KEY TERMS:** Community based, Sentencing, Alternative, Short-term imprisonment, imprisonment, prison conditions, punishment, correctional supervision, incarceration, Probation.

**"I declare that Community Based Sentences : An Alternative to Short-Term Imprisonment is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references".**

**(i) Community Based Sentences : An Alternative to Short-Term Imprisonment**

**(ii) by S. Singh**

**(iii) Degree : Master of Arts**

**(iv) Supervisor : Professor C.H. Cilliers**

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# **CHAPTER ONE**

## **GENERAL ORIENTATION**

### **1.1 INTRODUCTION**

It is of paramount concern that prisons are overcrowded. The resulting financial and human rights problems remain disquieting for correctional services in both developed and developing countries. The magnitude of the problem is by no means under-estimated and is highlighted by and can be fully appreciated by perusal of the statistics of the number of prisoners incarcerated worldwide. It is imperative to find other effective alternate means of punishment.

The World Population list *Walmsley* (2001:2), shows that over 8,5 million people are held in penal institutions throughout the world, either as pre-trial detainees or having been convicted and sentenced.

Prison populations vary considerably from place to place, region to region, country to country, and continent to continent. In Africa the median rate for Southern African countries is more than five times that in central and west Africa.

In South Africa, as in the rest of the world, there is a great concern about the growth pattern of prison populations. The imposition of a prison sentence has become standard practice over the years and is supposed to serve the penal



motives of deterrence, retribution, protection of the community and rehabilitation. However, there is little doubt that the application of imprisonment only satisfies the motives of retribution and protection of the community to a certain extent. This is due to the fact that the attempts to rehabilitate transgressors are counteracted to a great degree by the high prison population, insufficient skilled manpower and the prison subculture.

With the recent developments in the field of criminal justice most of the leading countries, throughout the world, have adopted the trend to make it possible to satisfy the community's requirement for retribution and protection. One such penal option is correctional supervision.

In South Africa short-term prisoners congest the prisons. During 1990 there was an average of 178 998 sentenced and unsentenced prisoners per day in South African prisons. Statistics revealed that in 2001 the prison population of South Africa consisted of ±320 persons per 100 000 of the population.

It is of particular note that most people currently in prison are serving terms of no more than ten years. The majority of sentences are less than six months, followed by sentences ranging from six months to two years, and sentences of two to five years. Between 1995 and 1999, only 7% were between five and ten years, while less than 5% of sentences were more than ten years. It is therefore certain that most of those incarcerated will return to the community sooner rather than later.

People will often ask if it matters if there are large prison populations. The contention is that the more criminals you lock up the less crime they can commit. It is the practical considerations that are the most powerful in demonstrating that high prison populations really do matter. The growth in prison populations invariably leads to overcrowding. This brings with it a host of other major problems: not only restricted living space, but also poorer conditions of hygiene, and sanitation arrangements. There is also less time for outdoor exercise. As a consequence health care is more difficult to administer effectively.

Overcrowding of prisons presents its own problems, such as, unrest, tension, increased violence between prisoners and violence against staff. Growth in prison numbers means that the staff prisoner ratio invariably falls. Reduced staff prisoner ratios invariably means less time for effective supervision by staff and less time to organize activities to ensure that there is a positive regimen which maximizes the chances of successful re-integration into the community.

There are also problems associated with the punishment of the offender within the judicial system. According to the Criminal Procedure Act, No 51 of 1977, short-term imprisonment is generally accepted to have little or no rehabilitative value. When imposing imprisonment, the court must bear in mind that not only the accused, but also his dependents, will be a burden on the state; whilst imprisonment would have little or no corrective effect on the accused. Imprisonment is costly. In the financial year 2001/2002 the budget

allocation for incarceration was R2 542 610 000. The unit cost per person per day is R102. Therefore a suspended sentence is preferable to a short-term imprisonment, especially in the case of a first offence. These problems could be overcome by treating the offender in the community.

The Department of Correctional Services is of the opinion that certain offenders-such as those who pose a real threat to the community and whose offences are of such a nature that imprisonment is inevitable, as well as those who are habitual criminals-should still be dealt with within the prison context. However, there are offenders in respect of whom it is believed that, in their own interest as well as that of the community, it will be best to enable them to serve their sentences within the community.

Thus, it is generally accepted in penological circles in the first world countries, that community-based sentences are the most cost-effective and efficient options having the least negative results. The imposition of imprisonment as a means of punishment is diminishing world-wide and is being replaced by community based sentences.

The researcher believes that there are better, more innovatively acceptable ways of punishing, controlling and rehabilitating offenders rather than the traditional incarceration. Community alternatives whether these are referred to as alternatives to custody, or supervision, or punishment in the community provide a reasonable and effective way of executing penalties against people who commit criminal offences. The alternatives are a more humane and

desirable approach to punishing offenders, as opposed to imprisoning them in conditions which are an affront to society.

## **1.2 CHOICE OF SUBJECT MATTER**

The considerations which influenced the choice of the subject matter are the necessity and desirability of choice, the availability of data and the involvement of the writer.

### **a) Necessity and Desirability of Choice**

The development of community service sentences for offenders can be considered an important milestone in the history of penal reform. The increasing demand for prison accommodation, on the one hand to provide for the abnormal growth and on the other hand to eliminate backlogs, has placed enormous pressure on the Treasury in addition to the current budget of the Department. The situation can only be kept within manageable limits by obtaining approval for government intervention to slow down the growth rate in the prison population. One alternative is community based sentencing.

### **b) Availability of Data**

Data on this topic is available in the *White Paper* (Department of Justice and Correctional Services), The Criminal Procedure Act of 1977, text books, criminology journals, commissions of enquiry, newspaper articles, official

documentation, Government department annual reports, decisions of the Supreme Court and academic studies like dissertations and theses.

It is important that the researcher should keep the reader constantly aware of the manner in which the literature, which is discussed, relates to the research. It is imperative to point out exactly "what" that relationship is (*Leedy 1991:93*).

### **c) Reliability of Data**

The researcher is aware that one of the major pitfalls of the documentary method is that secondary sources are indirect forms of information and there is no guarantee of their reliability *Van der Walt (1977:215)*. Secondary sources have been restricted to a minimum. An important aspect of the preparation for research consists in the use of literature. A literature review is done to familiarize the researcher with the past as well as the current state of knowledge.

## **1.3 OBJECTIVES OF THE RESEARCH PROJECT**

It is an accepted fact that the main objectives behind penological investigation generally are, amongst others, knowledge of an insight into the punishment phenomenon with a view to the application of such acquired knowledge. The major objectives of this research project can be tabulated as follows:

- acquisition of scientific knowledge obtained through collation and systemization to form a meaningful whole within the confines of the predetermined parameters;
- viewing of the subject within a penological perspective;
- contributing towards overcoming the problem by proposing possible solutions thereof.

#### **1.4 METHOD AND TECHNIQUE**

As a result of the nature of the topic and availability of sources, the choice of data collection technique was limited to literature. This documentary study entailed a wide range of literature sources, mainly those mentioned above. The bibliography and list of cases cited indicates the text books, reports of commissions of inquiry, criminological and other law journals, department of justice reports, etc.

The writer was ever mindful of the limitations of documentary study and the fact that sources must be checked and evaluated and secondary sources must be treated with caution. Its reliability and significance must also be evaluated: with this in mind, only the works of writers of sound repute were used.

#### **1.5 DELIMITATION**

The South African sentencing system, as well as those of foreign countries such as, England and the United States of America, has been researched. A

brief historical view on early development of community based sentencing is given.

Extensive reference is made to the statutory origins of and further enabling provision for community service. The Criminal Procedure Act, No. 51 of 1977 is discussed. The rationale of each provision of the Criminal Procedure Amendment Act, No. 33 of 1986, in so far as it relates to community service, is examined.

Community service as a positive condition to postponed and suspended sentences is discussed. The rationale of such a positive – condition - type is revealed as overcoming the negative consequences of imprisonment in its own unique manner by permitting the offender to remain in the community.

There is a need for research into a community service system in South Africa. Factors that contribute to the implementation of community service is researched. Conclusion and recommendations are postulated.

## **1.6 DEFINITION OF KEY CONCEPTS**

### **1.6.1 Community based Sentencing**

*Van Gass* (1981:2) describes a community service sentence as a court order in terms of which the offender is commanded to provide some or other form of service for the benefit of the community.

Thus, a community service sentence is the punishment and treatment of minor offenders who are punished or treated within the community instead of by way of the criminal justice system.

In a South African context, the researcher understands by community service: that condition to a postponed or suspended sentence as it is defined in the Criminal Procedure Amendment Act, No. 33 of 1986 and is developed therein as an extension of the concept "service to the benefit of the community" as it appeared in Section 297 (1) (a) (1) (CC) of the Criminal Procedure Act, No. 51 of 1977 and prior thereto as it could have implicitly been imposed under the words "or otherwise" as they appeared in Section 352 (1) of the Criminal Procedure Act, No. 56 of 1955 and related previous statutory provisions.

### **1.6.2 Definition of Correctional Supervision**

*Terblanche* (1999:329) says that according to section 1:

"correctional supervision means a community based punishment to which a person is subject in accordance with Chapter VIII A of the Correctional Services Act, 1959, and the regulations made under that Act if ..."

The Criminal Procedure Act, Act 51 of 1977, describes correctional supervision as a community-based sentence that is executed in consequence of the Act of Correctional Services, 8 of 1959, and its regulations.



Correctional supervision is described as community based punishment: that is, punishment and treatment of the petty offender in the community, that is, outside the judiciary system. The aim of correctional supervision is to control and rehabilitate those persons who should rather serve their sentences within the community.

The concept of correctional supervision can be compared to probation except that probation is used internationally to include all forms of supervision, surveillance or care. In contrast to probation, correctional supervision refers only to supervision by an employee of the Department of Correctional Services whereas the former refers to supervision executed by probation officers employed by welfare organizations.

### **1.6.3 Probation**

*Abadinsky* (1997: 31) contends that:

“ the term probation was applied by John Augustus to the practice of bailing offenders out of court followed by a period of supervised living in the community.”

Probation is the original alternative sentence, Klein (1997 : 67)

*Caldwell* (1956:230) says:

"As it is used in the field of criminology probation may be defined as a procedure whereby, the sentence of an offender is suspended while he is permitted to remain in the community,

subject to the control of the court and under the supervision and guidance of a probation officer."

*Elliott* (1952:535) gives the following definition:

"Probation is thus the conditional release from commitment to a penal institution, contingent upon good behaviour. The sentence is said to be "suspended" and during this period the probationer is ordinarily under the supervision of a probation officer."

#### **1.6.4 Suspended Sentence**

*Terblanche* (1999:413) defines a suspended sentence as:

"a sentence which *has been imposed* , in all the detail that is required for the proper imposition of such sentence, but of which *the operation is suspended* for a specified term, subject to the fulfilling by the offender on whom the sentence has been imposed, of the conditions on which the suspension has been based."

Thus a suspended sentence is a sentence in which the offender is sentenced to comply with specific conditions, and in the case of non-compliance is liable to an alternative punishment in the form of either a fine or imprisonment or both (in the alternative) which is imposed on him at the same time as the conditions.

### **1.7 RESUME**

Historically, confinement of an individual in a small cell behind a large wall segregated from the rest of society for the purported benefit of society was

rationalized and condoned because it satisfied a public retributive urge, compelled conformity to "social norms", deterred other potential law violators, and allowed preventative imprisonment of dangerous persons. The philosophical trend then turned away from each of these rationales, and thoughtful and humane scholars, administrators, and clinicians justified incarcerating facilities solely on their rehabilitative potential. While rehabilitation remains a meritorious goal, the impartial observer would have to be disillusioned, if not totally dissatisfied, with the ineffectiveness of institutionalization in this area.

Imprisonment as sanction remains a reality which cannot be wished away. All transgressors who pose a real threat to the community and who do not qualify for community-based sentences, for some reason or another, shall still be dealt with within the prison context. Community based sentences does however ensure that a significant number of offenders can be dealt with in a more balanced manner. This approach goes a long way to satisfy the need to limit the growth in the prison population and to provide a more affordable system which will be to the benefit of everybody in South Africa.

# **CHAPTER TWO**

## **THE RATIONALE FOR COMMUNITY-BASED SANCTIONS AS THE AVOIDANCE OF IMPRISONMENT**

### **2.1 INTRODUCTION**

Penal administrations throughout the world are looking for acceptable alternatives to imprisonment. Increasing non-custodial sanctions are being advocated as one way of dealing with the ever-increasing question of overcrowding in prisons. Apart from easing congestion in prisons, it is also a way of avoiding sending offenders with short sentences to prison. According to the Ministry of Prisons and Correctional Services (*Annual Report 2001/2002*), presently one finds a huge number of petty crimes offenders incarcerated in prisons causing congestion. It is very expensive to keep such individuals in prisons when they could usefully be utilized in community services. Such services if well administered could promote the following in prisons:

- reduction in overcrowding;
- reduction of the prison budget;
- promotion and consolidation of rehabilitation and re-integration of offenders into society.

In an address by Mr Watson Tshivhase, the acting commissioner of correctional services, on the occasion of the official opening of the community corrections office at Soshanguve (2001:1), stated:

“it is required of the Department to adhere to best practices in corrections and to always be aware of acceptable international trends in corrections that may be implemented with success in our country. This mandate to strive for effectiveness coupled with mounting pressure on the Department in terms of an ever-increasing prison population, escalating detention cost and a growing realization that, perhaps, there are people occupying prison beds who are guilty of lesser crimes and who could perhaps have been dealt with better outside prison, has led the Department to explore other options.”

*Dissel et al*, (1996:1) maintains that:

“in reality, prisons are far from comfortable institutions. South Africa’s prisons hold a daily average of about 110 000 prisoners (despite early release) in space designed for about 88 000. Most prisoners live in large overcrowded communal cells often controlled by prison gangs. Rape and other forms of violence and coercion are rife. Many prisoners spend 23 idle hours a day in these cells, and some the entire day. Very few prisoners have the opportunity to work, and to learn skills. Only the privileged receive assistance from social workers or psychologist. No formal programme exists to ‘rehabilitate’ the prison population.”

From the facts it can be seen that alternatives to imprisonment are needed.

The nature and purpose of imprisonment as a form of punishment is examined. Custodial sanctions gives rise to certain factors which are detrimental to the public interest. The rationale given for extending the use of community sanctions is based on both, costs and the effectiveness of prisons in deterring or rehabilitating individual offenders. Alternatives to imprisonment

are constantly being sought, of which the use of community-orientated punishments is an example. The historical development of the imposition of imprisonment as a sentencing option both in South Africa and in England is looked at. Sentencing options in the United States of America will also be traced briefly.

## **2.2 IMPRISONMENT AS A FORM OF PUNISHMENT**

Imprisonment has been provided for by legislation as a form of punishment, the current provision therefore being contained in Section 276 of the Criminal Procedure Act, No. 51 of 1977.

There are certain rules and regulations to which the prisoner is subjected to. In terms of Section 94 of the above Act, the State President has wide powers to make regulations there under *inter alia* as to the general government and management of prisons, the maintenance of good order and discipline therein, the acts or omissions which shall be deemed to be offences against discipline and the manner in which sentences of imprisonment are to be carried out.

For the offender imprisonment, entails loss of freedom of movement and confinement within an institution where his whole life is managed and governed. Confinement in an institution removed from society entails furthermore the loss of goods and services, the loss of heterosexual relationships and the loss of all autonomy.

## 2.3 THE CONSEQUENCES OF IMPRISONMENT

According to *Krestev, J. et al* ([S.a.] :2)

“prisons aim to cure criminals of crime. However their record has not been encouraging. Instead prisons do more harm than good. The pains of jail confinement affect all prisoners in different ways. To begin with prisoners need to withstand the entry shock by adapting quickly to prison life. Prisoners are exposed to a new culture, which is very different from their own culture.”

Despite the stated objectives of imprisonment as a form of punishment, there are certain unavoidable consequences from its implementation. These consequences, are especially relevant to the rationale of any non-custodial punishment and specifically community service because, it was precisely the very existence of these consequences that rendered it imperative to avoid imprisonment.

The Minister of Justice on 20 February 1986, in his reading of the Criminal Procedure Amendment Bill, posed a categorization of such consequences where he maintained that:

"A very positive and singular feature of the Bill is embodied in those amendments which aim at ... either restricting the term of imprisonment or creating the possibility of suspended imprisonment. The beneficial effect of these amendments is primarily the least possible exposure of ... convicted first offenders to a tough criminal milieu."

*(Republic Representatives Debates, Vol. 3, 1986, Column 744).*

The following was said by the Minister at the closing of the debate, with regard to alternatives to imprisonment:

"I did not emphasize that we wish to relieve pressure on our overcrowded prison. I do not want to make that point, however, because it is quite secondary. To me a primary objective was in particular to keep our young people and first offenders out of prison..."

*(Column 755).*

### **2.3.1. Primary consequences of imprisonment**

Social scientists today are disturbed by the adverse psychological effects of imprisonment and also the social effects of imprisonment on persons. While there are no more chain gangs, no more floggings, and no physical tortures, and although in general, material conditions have become more humane, the "pains of imprisonment", are still very acute Sykes (1971:68)

Sykes states that :

"in the Western World, material possessions are a fundamental part of the individual's self-conception, and that, depriving him of these means to attack him 'at the deepest layers of personality' A standard of living constructed in terms of so many calories per day, so many hours of recreation, so many cubic yards of space per individual, and so on, misses the central point when we are discussing the individual's feeling of deprivation".

*Krestev, J. et al* ([S.a.] :1) maintains that:

"Safe keeping of prisoners comprises of keeping inmates locked away, counted, and controlled whilst allowing for isolated



moments of welfare activities to satisfy needs through recreation, education and counseling. Unfortunately, the welfare and psychological freedom of the individual inmate does not depend on how much education, recreation, and counseling he receives but rather, on how he manages to live and relate with the other inmates who constitute his crucial and only meaningful world”

The prison community is utterly different. All aspects of prison life are managed and governed by the same authority in the same physical environment. According to *Vetter & Wright* (1974:518):

“Each phase of the inmate’s daily life takes place in the company or presence of others who are subject to the same treatment. All are expected to do the same things together. Each facet of every day follows a broad programme, the entire sequence of which is prescribed by a legal authority through a system of explicit formal decisions”.

It must also be borne in mind that offenders are drawn from society in which possessions are closely linked with concepts of personal worth by various cultural definitions. However in prison, inmates find themselves reduced to a level of living near bare subsistence. Whatever physical discomforts this deprivation may entail, it has deeper psychological significance as to the prisoner’s conception of his personal adequacy.

#### **2.3.1.1. Contamination**

*Tosh* (1982:86) postulates that:

“prisons are often the scenes of brutality, violence and stress. Prisoners are faced with incidence of violence and are always concerned for their safety. A long-term prisoner named Jack

Abbott had stated 'everyone is afraid. It is not an emotional or psychological fear. It is a practical matter. If you don't threaten someone at the very least, someone will threaten you... Many times you have to 'prey' on someone, or you will be 'preyed' on yourself.'

Although this problem is to a large extent counteracted by techniques such as classification it is unavoidable. The offender learns to fit in with the expectations of the prison environment, which are not always in keeping with those of a normal society. The offender is confronted with various anti-social norms.

The climatization to prison conditioning may have both positive or negative consequences. The positive side is expressed in efforts to influence the prisoner to be law-abiding. Negative prison conditioning consists in the assimilation of prison culture by the inmates. *Bersani* (1970:484) says that, there are other factors that heighten the risk of negative prison conditioning:

- "a) a long sentence, which means a protracted term of subjection to negative prison conditioning;
- b) any instability in the personality;
- c) a lack of positive relationships with anyone outside the prison;
- d) a readiness to be absorbed into a primary group within the prison community;
- e) a blind or literal acceptance of the morals and dogmas of such a group;
- f) the risk of being placed with other prisoners with similar orientation;
- g) a readiness to take part in deviant behavior in the prison community, for example, gambling or abnormal sexual relationships."

The overall effect of prison conditioning is to shape a personality that generally conforms to prison demands and expectations, which, on release, will be in conflict with law-abiding norms.

The Viljoen Commission cited in *Avery* (1987:92) dictates that:

“ when prisons are overcrowded with short-term prisoners there is a danger of recidivism arising from their contact with and contamination by professional criminals and the prison atmosphere generally.”

During the course of his speech reading of the Criminal Procedure Amendment Bill, 1986 in the House of Delegates, the Minister of Justice on the 18 February 1986 reiterated the necessity of avoiding contact between hardened criminals and young people (Republic Delegates Debates, Vol. 3, 1986; Column 609).

According to *Krestev, J. et al* ([S.a.]:3) an experiment conducted by *Zimbardo* in 1973 at the Stanford University, a number of case studies on the effects of prison life have indicated:

“ that imprisonment can be brutal, demeaning, and generally psychologically a devastating experience for many individuals. Psychological symptoms described in these studies, which are believed to be directly caused by imprisonment, include psychosis, severe depression, inhibiting anxiety, and complete social withdrawal. Another major stressor which the prisoner is faced with in prison is the fear of contagious and incurable diseases, such as, AIDS.”

*Zamble and Proporino* cited in (*Krestev, J. et al.* ([S.a.]:4) studied the coping strategies of inmates in several Canadian penitentiaries and discovered that:

“emotional disruption and adjustment were clearly problems for most inmates during the early stages of their sentence, resulting from the dramatic disruptions of their life caused by the many restrictions, deprivations and constraints inherent in prisons. By taking on identity, folkways, dogma, customs, and the general culture of the penitentiary, prisoners mould themselves into a state referred to as prisonization, which for the most part is a method of adaptation.”

From the above clinical studies it has been shown that prisonization can have devastating effects, and may lead to a ‘psycho-syndrome’ which includes the loss of memory, clouding of comprehension, apathy, infantile regressions, hopelessness and the appearance of various psychotic characteristics such as obsession and major depression.

*Tosh* cited in (*Krestev, J et al.* ([S.a.] :5) postulates that:

“physical victimization includes assault, homicide and homosexual rape. Physical victimization takes place due to many factors. They include inadequate supervision by staff members as well as the availability of deadly weapons. The problem is exacerbated by the housing of violent-prone prisoners in close proximity to relatively defenseless victims and the high levels of tension generated between the individuals.”

The penis becomes a weapon of control that provides prisoners with a means to assert themselves and show others that they are unassailable. This type of assault-though noted as being a maladaptive expression by psychologists- is the inmate’s legitimate way of expressing his manhood and brutal desire for power. Here again we see the detrimental effect of imprisonment. Community

sentencing would be more appropriate especially for crimes committed by minor offenders.

### **2.3.1.2. Disruption of family life**

When a crime is committed, there are victims other than the primary victim(s). These secondary victims include the families of the primary victim and another often overlooked group of victims-family members of the person who has committed the crime. The families of inmates are often overlooked in research and in designing social programs, yet many suffer devastating consequences as a result of a loved one's incarceration. *Schneller* (1976:14-15) refers in his book to a quotation from Cesare Beccaria's book *On Crime and Punishments*, that:

“while innocent people can suffer when a criminal is punished”, the “families of criminals are especially harmed by certain types of punishment which are meant only for the family head”.

*Schneller* also points out that imprisonment is the most common type of punishment used today, and the separation not only punishes the inmate, but also the family.

*Carlson et al* (1992:5) states that families of inmates have been called the “hidden victims of crime”

To majority of the prisoners, the major source of stress would include the loss of contact with family and friends outside the prison. Imprisonment of an

offender involves enforced separation from all those who are close to him-his wife, his children, his parents, his relatives and his friends. The incarceration of an individual in prison inevitably places a severe strain on his or her family relationships. *Hinds* (1981:8) believes that although there is a clear and positive correlation between the maintenance of familial ties during incarceration and the successful rehabilitation of a prisoner upon his release and return to free society, the destruction of the marriage is almost inevitable.

The Florida House of Representatives Justice Council Committee on Corrections, *Maintaining Family Contact When a Family Member Goes to Prison* (1991:4) maintains that:

“while separation from a parent can be difficult for a child under any circumstances, losing a parent to incarceration can be especially problematic, “Not only do children suffer the burdens of incarceration along with the rest of the family, but the removal of the inmate family member may even place children at a greater risk of someday becoming involved in the criminal justice system themselves.”

Statistics and reports on prisoners presented by *Ward and Kassebaum*, cited in (*Savitz and Wolfgang* 1970:463-478), indicate that there is a high likelihood that prisoners will become homosexuals. *Sykes* (1966:72), found that,

“much of the homosexual behavior in prison is not part of a life pattern existing before and after confinement, rather, it is a response to the peculiar rigors of imprisonment.”

*Hostetter et al* (1993:3) maintain the following:

“because of the feeling of social disrepute, the family is most often denied the normal social outlets for grieving the loss of a loved one from the family. The adjustment for a child with a parent in prison seems to be much harder for those who have a good relationship with a parent before incarceration. The child mourns the loss of their parent often worrying about how they are doing.”

*Carlson et al* (1991:279) note that some theorists believe that losing a loved one to prison is “even more demoralizing to wives and children than losing a loved one to death.”

The family is in fact sentenced by the incarceration of the offender. The family will do the same amount of ‘time’ as the incarcerated person, and usually harder time. In many cases, families face financial difficulties, emotional trauma, assumption of a single parent lifestyle, community ostracism and uncertainty and fear in dealing with an intimidating correctional system.

*Carlson et al* cited in (Howard, J. 1994.) says that:

“in talking with inmate families, many mention that loneliness is probably the hardest stress to deal with on a day-to-day basis. If the relationship was a close one, the wife misses being able to share the everyday happenings with her partner.”

*Carlson et al* cited in (Howard.J:1994) postulates that:

“one of the greatest stressors for both the inmate and the rest of the family to deal with is the change in the family roles. The wife now becomes the head of the household. The husbands do sometimes try to maintain control as the head of the family, but at the same time, they lose touch with day-to-day realities. This can be a frightening experience for some wives who were very dependent on their husbands. The wife becomes responsible for

daily decisions in not only the mother-role, but in the father-role as well.”

According to the United States Department of Justice, Howard, (1994) notes that 35% of the inmates stated that one of the greatest needs of their families is the need for information. Families can feel so helpless and frustrated in the first few confusing months of a loved one’s incarceration. Another major need shown in the survey was a need for temporary lodging while visiting. Families with already tight budgets and limited financial resource were paying a great deal for lodging. Some would sleep in cars and in bus stations. Although this is costly and unsafe, these conditions limit the number of times family members are able to visit.

They also maintain that the incarceration of a loved one can be a major hardship for a family. The offender may have been the main source of income,

“In addition to the lost resources upon incarceration, the family take on additional expenses in order to maintain contact: including expenses relating to visiting, accepting phone calls, providing writing materials, and funding the inmate’s institutional account.”

Compounded with financial difficulties, families may find other difficulties in attempting to maintain a relationship with the offender, or even just to keep in touch. The physical isolation of the inmate from the family means that families must make active efforts to maintain relationships.

A report by Family and Corrections Network Howard, J. (1994:5) states that:



“the experience of incarceration weakens the prisoner’s family structure which may lead to ‘increased criminality in the next generation’.”

### **2.3.1.3 Loss of employment**

When an offender is imprisoned he loses his employment and thereby his means of supporting himself and his family financially. Imprisonment of the husband and father is usually a traumatic experience for the wife and children. They are confronted with the practical problems of earning a living and child rearing .The loss of income may force the prisoner’s wife to seek employment which, in turn, may lead to neglect of the children. This can have a detrimental effect on the family when the mother is incapable of caring for the children on her own, they may have to be placed in foster-care, or into a children’s institution. The negative effects of such broken homes are tremendous. In *S v Hoffman*, 1978(4) S.A.61(A), Corbett, J.A. at 65 B commented:

“He is the family breadwinner, with a number of people dependent upon him. They also would be severely hit.” Loss of employment also negatively affects the self-image of the prisoner.

In *S v D* 1995 1 SACR 259 (A) 264e, Nicholas AJA made reference to the following:

“Even if imprisonment has no permanent detrimental effect on a prisoner, it means loss of employment, temporary, if not permanent, loss of wife and family, the risk of contamination and

impaired ability to get further employment. Small wonders then that orison has come to be regarded as the sentencer's last resort."

#### **2.3.1.4 Stigma and disgrace**

In *S v Schuttle* 1995 1 SACR 344 ( C ) 350b-c Steyn declared:

"[There] can be little doubt that the fact of incarceration and the deprivation of freedom, the awesome discipline of the prison within the impersonal institutional environment, the stigma of having been in jail and the separation from family and friends are consequences of a prison sentence which almost all accused persons... try anxiously to avoid."

The whole process of being arrested, appearing in front of a court and being sentenced to prison is a traumatic experience, especially for first offenders. It is a deeply humiliating and degrading ordeal for many. The perception of the public is that prison is a place where evil persons are kept in order to protect society. The offender who is sentenced to prison is further aware of the low status to which he has sunk. He is aware of the stigma that is attached to imprisonment, and, to a certain extent, he views himself as society sees him - as a worthless, evil being. To many offenders, being sent to prison is the ultimate rejection; which has often started in early childhood and has continued throughout a person's life. In *S v Abt*, 1975(3) S.A. 214(A), Corbett, J.A. at 219 G remarked as follows:

"To a man in his position a term of imprisonment, with all the shame and stigma which attaches thereto, can be a devastating punishment with far-reaching effects upon his future. This is not

really mitigated by the fact that it is, effectively, a short term: any term is likely to have this effect."

There are families who feel stigmatized because another family member has been incarcerated. *Hostetter et al* (1993:7) maintain that the "social stigmatization" is probably the most damaging effect on children whose parents are incarcerated. The report goes on to say that the children are often ostracized or made fun of by other children and even adults. These children often exhibit aggressive behavior or may withdraw or become very depressed.

*Holt et al* (1972) maintain involvement with the criminal justice system seems to affect the inmate's social relationships in various ways:

"Firstly each arrest and conviction brings with it a certain social stigma which would ordinarily make former friends and family less willing to become involved. The extent to which the inmate is ostracized in this way varies with the degree of stigma of the particular crime and the cumulative effect of repeated charges and convictions."

#### **2.3.1.5 Loss of freedom**

*Johnston et al* cited in *Neser* (1993:190) alleges that the loss of freedom is the greatest single deprivation experienced by the offender in prison. The prisoner is not only restricted to a given physical area, and even there restricted in his activities, but is also, against his will, cut off from his family and friends. Although his loss of status and civil rights may affect the individual greatly, one of the greatest deprivations associated with this punishment is the loss of

trust on the part of his fellow men. *Gibbs* (Johnson & Toch, 1982 : 100)

remarks :

“Even veterans of confinement and those who engage in persistent criminal activities that often result in arrest and detention have described entry as a disruptive and disorganizing experience.”

The effect of imprisonment is so overwhelming that it can sometimes lead to injury and suicide. *Neser* (1989 : 402) indicates that :

“Depriving someone of his freedom as the motive for imprisonment serves its purpose only if the loss of his freedom is made meaningful and acceptable to the prisoner. Because he has been deprived of his freedom, the prisoner is confronted with four major problem areas: the shock of admission, the loss of external interpersonal communication, stability in an apparently chaotic, abnormal environment and the loss of normal activity.”

*Bartollas* in (*Kestev, J. et al. [S.a.]:8*) suggests that the occurrence of prison suicide is evidence that prison life is stressful to many inmates. He suggests three major reasons for prison suicide, These include inmates who:

“are embarrassed by the disgrace they have brought upon their families and find their guilt and debased self-esteem intolerable; find that the sense of helplessness and lack of control over their lives is intolerable; and, those who use suicidal behavior in order to manipulate others, without the intention of actually ending their lives.”

### 2.3.1.6 Loss of autonomy

The pain of confinement includes the loss of liberty where prisoners experience a limitation of movement. Prisoners must obey rules and there are restrictions placed on what goods they may have with them and when. Prisoners are required to ask for permission to perform even some of the most basic functions such as asking to go to the toilet.

The prisoner's loss of self-determination is accompanied by an extremely limited privilege of exercising any individual choice or of making his own decisions and this does not contribute positively to the development of the offender's sense of responsibility. There is little scope for self-expression and decision-making, and the individual suffers a loss of autonomy - he feels weak, helpless, dependent and impotent. The prisoner's picture of himself as a self-determining individual may eventually disintegrate. *Dale E. Smith* cited in (*Johnson and Toch 1982:52*) asserts that:

"Among deprivations termed by Sykes the "pains of imprisonment " was the absence of autonomy that resulted from the restrictions imposed upon the inmate's daily routine...."

The prisoner has often to humble himself and to assume a servile attitude in order to gain advantages, such as change of cells or work, or a transfer to a better institution. Prisoners sometimes play the role of 'tough guy' in an attempt to conquer their feelings of impotence. There is therefore an attempt to popularize the self-image artificially.

The Viljoen Commission (1976:76) stated that:

“ Institutionalization deprives man of his sense of responsibility, initiative, drive and self-discipline. As a result he becomes a passenger, a person who floats along.”

*Bartol et al* (1994:366), states that:

“some prisoners may totally adjust to prison life. This notion is referred to as ‘institutionalization.’ The inmate loses interest in the outside world, views the prison as home, loses the ability to make independent decisions, and in general, defines him or herself totally within the institutional context.”

### **2.3.2 SECONDARY CONSEQUENCES**

In this section the cost factor associated with imprisonment and the problem of overcrowding will be discussed.

#### **2.3.2.1. The problem of overcrowding**

According to comparative statistics, (*White Paper*:1991), Extension of the mission of The Department of Correctional Services and the Implementation of Correctional Supervision as an Alternative Sentencing Option, the Republic of South Africa has one of the highest prison populations in the world. A total of 375 persons per 100 000 of the general population was in prison during November 1990 compared to other countries where figures vary from 42 in Sudan, 71 in France, 96 in England and 426 in the United States of America.

On 31 March 2001 the Department had cell accommodation for 102 048 prisoners against a total prison population of 170 959 prisoners. This constituted an average national level of overpopulation of 67.53%.

The magnitude of the South African prison population is being questioned and criticized more and more by informed and even well-meaning persons and countries (*White Paper*.1991). The lack of sufficient alternatives to imprisonment manifests itself in overpopulation of prisons with negative implications, which result in:

- a) mass handling of individual needs;
- b) a reduction in rehabilitation programmes;
- c) the earlier release of criminal elements;
- d) pressure on the Treasury for the supplementation and extension of personnel;
- e) an increase in capital expenditure for the creation of prison accommodation to eliminate backlogs;
- f) negative behavioral patterns in prison; and
- g) an increasing burden on the Treasury for the support of the families and dependents of prisoners.

The Viljoen Commission (1976:105) has observed that when prisons are filled to overcrowding with short-term prisoners, such over-population militates against proper accommodation and training of other prisoners serving medium- and long-term sentences.

The annual report of the Department of Correctional Services, 1 January 2000 to 31 March 2001, emphasizes the fact that the increase in prison population places enormous strain on the Department's available resources and this remains a real problem that handicaps the proper functioning of the Department in many respects. It is generally accepted that overpopulation has a negative impact on the humane detention of the service delivery to prisoners.

#### A) ENGLAND AND WALES

From 1945 to 1986 the population of England and Wales grew by 17% while the prison population grew by 263%.

Year	Capacity	Officials	Prison population	Prison per 100 000 population
1945	14 336	2 400	14 708	32
1950	21 044	3 477	20 474	50
1960	25 354	5 682	27 099	63
1970	32 992	11 155	39 028	81
1980	38 494	17 070	42 580	88
1985	40 000'	18 000'	46 234	92
1986	-	-	46 900	-
1996"	52 000	24 000	52 000	102

**TABLE 1**

Prison population in England and Wales : 1945 to 1996

"(Adjusted figures)(Projection)"



The average prison population of England and Wales in 2001 was 67 000. On the 26 July 2002, the prison population in England and Wales reached an all-time high of 71 723. Government figures show that by 1999 there were 24 000 more people being sent to prison than ten years before, despite no real change in the number of adults being found guilty of indictable offences. The increased population is expensive. Each prisoner costs the taxpayer approximately 27 500 pounds a year to keep in jail. Today, there are 124 prisoners for every 100 000 people in England and Wales.

One of the major reasons for the rise in the prison population under both Labour and the Conservatives has been the increase in the use of shorter sentences. In 1990, just under 14 000 adults were given sentences of six months or less. Ten years later that figure had almost tripled. Ministers say that these sentences tackle some of the worst anti-social crimes such as burglary by young men. The Halliday report stated that short sentences give the authorities little chance to tackle offending.

The largest increases in prison numbers has been seen among young offenders (15 to 20) years. By the middle of 2000, a third of young offenders were serving sentences of between 18 months and three years, mostly for burglary or theft.

*Mauer* (1994:3) is of the opinion that the international comparisons on the use of incarceration has increased in recent years:

“In recent years reports documented that the United States has become the world leader in its rates of incarceration, having surpassed South Africa and the former Soviet Union, and that the black male rate of incarceration in the U.S. is four times more than the rate of incarceration of black males in South Africa- 3 822 per 100 000 versus 851 per 100 000.”

The proportion of the population in prison has multiplied almost eight times since 1850. The overpopulation problem in the USA is not limited to federal and state prisons but also affects local jails.

## **B) SOUTH AFRICA**

According to a report of The National Prisons Project of the South African Human Rights Commission 1997, when considering the statistics of prison populations, it is clear that there is a very serious overcrowding problem and a breakdown of law, order and standards within the prison system. “This is evident in the makeshift arrangements to accommodate the large number of prisoners crowded into the cells. Where serious overcrowding exists, it follows that there is a lack of basic necessities such as toiletries, towels, blankets and sheets. In instances where it is made, it is insufficient.” In Newcastle and Eshowe Prisons for example, it was reported by the commissioners of Correctional Services that there was no privacy in the toilets and showers, no hot water and no heaters. Many cells were dirty and smelt unclean, with some toilets not working, not working properly or leaking.

The Commissioner of Correctional Services' analysis of the situation in prisons is that:

“majority of prisons are so overcrowded and in such a serious state of disrepair that they not only pose a health hazard but also contribute to the high rate of escapes. The inhumane conditions in which prisoners are accommodated contributes to a very large extent to the criminality found in the majority of prisons”

Fluctuations in accommodation are due to the closing of ‘old’ prisons, whether for demolition or modernization, and the commissioning of new, modern prisons. Decreases in over-population percentages in reporting years 1987-1988, 1989-1990 and 1990-1991 are mainly a result of amnesties.

PERIOD	ESTIMATED ACCOMMODATION	DAILY AVERAGE LOCK-UP	PERCENTAGE OVER- POPULATION
1 Jul1986-30Jun 1987	84 854	114 098	34,46 %
1 Jul1987-30Jun 1988	83 668	111 481	33,24 %
1Jul1988-30 Jun 1989	84 626	111 557	31,83%
1 Jul1989-30 Jun1990	82 286	110 191	33,91%
1 Jul1990-30Jun 1991	83 837	101 778	21,40%
29 Feb 1992	83 031	101 969	22,81%
30 Apr 1992	83 361	106 207	27,41

**TABLE2**

The daily average of sentenced and unsentenced prisoners for the period 1993 to 1997 according to the Department of Correctional Services Statistics (1997 Annual Report) is as follows:

YEAR	MALE	FEMALE	TOTAL
1993	108 284	3514	111 798
1994	108 066	2867	110 933
1995	107 539	2530	110069
1996	115 857	2874	118 731
1997	130 731	3471	134 202

**TABLE 3**

On 31 March 2001 the Department had cell accommodation for 102 048 prisoners against a total prison population of 170 959 prisoners. This situation constituted an average national level of overpopulation of 67.53%. The following is a composition of the prison population:

CATEGORY	ADULT		JUVENILE		TOTAL
	MALE	FEMALE	MALE	FEMALE	
SENTENCED	98 771	2 719	12 814	233	114 537
UNSENTENCED	41 714	1 067	13 390	251	56 422
TOTAL	140 485	3 786	26 204	484	170 959
PERCENTAGE	82.17	2.21	15.33	0.28	100

**TABLE 4**

Accommodation has been a problem all along within the South African prison system. Despite the erection of new prisons and the use of alternatives such as community corrections, South Africa could not eradicate the shortage in accommodation of inmates. The table below illustrates that the gap between available accommodation and utilization is increasing.

DATE	PRISON POPULATION	AVAILABLE ACCOMMODATION	OVERPOPULATION	%
31.03.1996	118 080	94 796	23 284	24,6%
31.03.1997	130 635	96 307	34 328	35,6%
31.03.1998	146 435	99 407	47 028	47,3%
31.03.1999	154 574	98 923	55 651	56,3%
31.3.2000	171 462	100 130	71 332	71,2%
31.3.2001	170 959	102 048	68 911	67,5%

**TABLE 5**

SENTENCE CATEGORIES	MALE	FEMALE	TOTAL
UNSENTENCED	60 515	1 435	61 950
SENTENCED			
6-12 MONTHS	6 018	561	6 579
6-12 MONTHS	6 516	321	6 837
12-24 MONTHS	5 984	201	6 185
2-3 YEARS	14 743	432	15 175
3-5 YEARS	15 897	433	16 330
5-7 YEARS	13 659	314	13 973
7-10 YEARS	18 618	298	18 916
10-15 YEARS	11 197	156	11 353
15-20 YEARS	4 945	52	4 997
20 YEARS TO LIFE	6 803	71	6 874
OTHER SENTENCED	2 678	33	2 711
TOTAL SENTENCED	107 058	2 872	109 930
GRAND TOTAL	167 573	4 307	171 880
APPROVED ACCOMMODATION	96 284	4 384	100 668
OCCUPANCY LEVELS	174.04%	98.24%	170.74%

**TABLE 6**

On 31 May 2000 according to the Department of Correctional Services there were the following offenders in custody:

From the above statistics it is evident that the number of offenders in custody for a short period is extremely high. The level of prison population compared to the available accommodation capacity clearly indicates that South African prisons are seriously overpopulated. The building of new prisons and the upgrading or extending of existing facilities alleviates overcrowding and enhances living conditions of prisoners to some extent. If alternate forms of sentencing could be used for these offenders it would reduce the overcrowding of prisons.

#### **2.3.2.2 Contributing factors to prison over-population**

*Clear et al* (1990:291-295), *Sieh* (1989:43-45), *Call et al* (1989:26-27) and *Harding* (1987:17-19) link the prison over-population problem with one or more of the following:

- a) Hard-line public opinion regarding crime and criminals is accompanied by demands for longer sentences and strong opposition to early release of prisoners.
- b) An increase in crimes of violence and in crime in general is connected with a rise in prisoner numbers. An upward tendency in crimes of violence may lead to over-population of penitentiary capacity because:

- there is a high likelihood that violent offenders will attract prison sentences; and
  - those guilty of violent crimes attract longer sentences.
- c) Demographic factors determine fluctuations in the risk population for crime and imprisonment.
- d) Various authors have expressed the opinion that prison numbers rise in poor economic circumstances.
- e) Increased state expenditure on crime control and the maintenance of law and order result *inter alia* in higher success rates for policing and prosecution.
- f) Policy changes regarding sentencing, parole systems and expeditious trial of awaiting-trial prisoners also have an effect.

Overcrowding has also arisen due to correctional institutions being forced to house far more inmates than they were designed to hold, due to the fact that prison populations are on the increase. *Paulas* (Krestev et al[S.a.]:7) completed a fifteen year study on the effects of prison crowding and discovered that:

“increasing the number of inmates in correctional facilities significantly increased negative psychological effects, such as stress, anxiety, tension, depression, hostility, feelings of helplessness, and emotional discomfort.”



### 2.3.2.3. The implications of prison overpopulation

Research has demonstrated a connection between over-populated prison conditions and the incidence of physical and mental complaints, *Neser* (1993 : 279) for example, tuberculosis, AIDS, high blood pressure, psychiatric disturbances and psychological problems. Prison over-population leads to higher cell temperatures and noise levels, poorer ventilation in cells, idleness, disagreements and irritations among the prisoners. According to *Cobb* (*Neser* 1993:280):

“overpopulation undermines internal social control, creates a high potential for conflict among prisoners and can negatively influence the relationship between staff and prisoners.”

*Flood* and *Grosfeld* (*Neser* 1993:285) point out that strategies for solutions are seldom applied in isolation and suggest three measures for controlling prison over-population:

- a) maximum use of alternatives to imprisonment, such as the release of awaiting-trial prisoners on bail and on their own recognizance, day-parole and placement under correctional supervision;
- b) ensuring that the construction of new institutions and the expansion of penitentiary capacity keep pace with increases in prisoner numbers; and
- c) establishing and specifying maximum occupancy levels and using early release mechanisms for low-risk prisoners.

#### c) 2.3.2.4 Cost factor

The costs of imprisonment are high. In most cases there are other costs to the taxpayer and the economy besides those of prison operation: where the prisoner would otherwise be working, supporting his family, paying taxes, and perhaps making reparations for his offense by paying off a fine, court costs, or restitution.

In most of the first world countries unsentenced prisoners are only detained in prison in exceptional cases. In South Africa on 30 June 1990 there were, however, 19 151 unsentenced prisoners in detention, representing 17,9% of the total prison population. In financial terms this means an annual expenditure of R13 375 million calculated at an average detention cost of R6 860,00 per prisoner per year, based on the cost structure of the 1989/1990 financial year, (*White Paper*. 1991). Projections in growth pattern of the prison population based on history and criminological formulas together with rapid urbanization dictate that the number of prisoners will increase from 110 000 in 1990 to 135 000 (with continued interventions) in the year 2000 with a manpower component of 34 000 as against the current 22 000.

A factor is mentioned by *Steyn, J.* at 787 H in *Sakabula*, 1975 (3) S.A. 784 (C) namely, the support of dependents. The judge indicated:

"These persons became a charge upon the state and in addition to meeting the costs of the incarceration of the individual offender, social services have to be provided for these dependents until such time as the offender is discharged and again re-employed."

Imprisonment as a sentence is diminishing world-wide and is making place for community based sentences. Since violent crimes however create the greatest single concern in the community, it is unavoidable that the State creates and maintains the necessary means effectively to keep violent offenders out of the community-in other words, to detain them in prison. Similarly it is also logical that less serious offenders should rather be kept out of prison in order to utilize the limited prison accommodation for those criminal elements who can, in the interests of the proper protection of the community, not be dealt with otherwise than by imprisonment.

Although a considerable spectrum of alternative sentencing options which have been implemented over the past few years already exist in South Africa, it is a fact that the further development of these options and the application thereof have become imperative.

#### **2.4. MOTIVES FOR PUNISHMENT AND THEORIES OF PUNISHMENT**

The penal theories as objectives of punishment have also served as traditional moral justifications for punishment. These theories are influenced by the culture of the group from which they emanate, i.e. by the reigning opinions, philosophies, religious beliefs, scientific theories, etc., of the group concerned.

Increasing attention is being given to the personality and background of the criminal, rather than to the mere form of the crime. Although the idea of

punishing particular crimes with a view to deterrence is still important, and although the concept of repairing injuries to the communal sense of justice cannot be ignored, punishment in the present era is directed towards the criminal himself:

- towards improving him and taking care of his future
- to a much greater extent than in the past

#### **2.4.1. The justification of punishment**

According to *Terblanche* (1999:179):

“our courts have never required evidence regarding the purposes of punishment, nor whether sentences necessarily have such effects, nor of how effective these purposes are as goals to be reached through punishment. They have, in effect, taken judicial notice of these facts. It would be a very useful exercise if the courts could follow up on the sentences they impose in order to see for themselves what purposes their sentences actually achieve.”

According to the South African Law Commission (1972:and1976) punishment is the sanction of the criminal law and there is general consensus on the two salient characteristics of punishment, namely the intentional infliction of suffering upon an offender and the expression of the community's condemnation and disapproval of the offender and his conduct. The aims of punishment describe the result that is expected to be achieved by means of punishment. In *S v Khumalo* 1984 (3) SA 327 (A) at 330 D-E. these aims are stated as follows:

“In the assessment of an appropriate sentence, regard must be had *inter alia* to the main purposes of punishment mentioned by Davies AJA in *R v Swanepoel* 1945 AD 444 at 455, namely, deterrent, preventative, reformatory and retributive.”

According to reports of the Rumpff and Viljoen Commissions (Republic of South Africa 1972:2 and 1976:53), the essence of the offender’s punishment is to be found in the following penal objectives:

- protection of the community
- deterrence of others (potential offenders)
- deterrence of the person punished
- reform of the offender
- retribution

#### **2.4.1.1. The Retributive motive**

In *S v Mafu* 1992 2 SACR 494 (A) 497 b-d, Harms AJA declared, referring to the dictionary meaning of retribution:

“ [It] may be useful to recall that retribution in this context means requital for evil done...”

The Viljoen Commission had the following view of retribution:

“Retribution means, in essence, that act of requiting or paying in return for evil. In the criminal justice system it means the act of inflicting upon the convicted person, by means of the sentence, loss or suffering as punishment.”

In terms of the absolute theory of retribution, punishment is justified because a crime was committed. This is also known as the "justice" theory, because the injustice that has been brought about by the commission of a crime is said to be wiped out by the imposition of an equivalent evil upon the offender.

Retribution is one of the oldest motives for punishment. In the penological sense of the word, retribution means that punishment is inflicted upon an individual or a group because of an offence committed by that person or group. *Caldwell* (1956:390) states that:

"retribution is the pain which a criminal deserves to suffer because he has broken the law and hurt someone else. Having failed in his duties every member of the community is expected to perform, the criminal must pay in pain and discomfort the debt he owes to society."

Punishment is imposed because it is deserved.

*Tappan* (1960:452) sums up the arguments in favour of the retributive motive as follows:

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

The Viljoen Commission, *Terblanche* (1999:197) has the following to express:

"Although this principle [of retribution] may be applied instinctively by a great number of judicial officers, it accords well with the philosophical principle of balancing the debt which the perpetrator owes to the community with the suffering meted out to him. Such balancing is, in the Commission's view, the corner stone of criminal justice, and it does not matter whether one looks at it from a point of view of a debt which the perpetrator owes to society and which he must pay by expiation or atonement, or from the point of view of his 'just deserts'."

Retribution is an essential element in sentencing and sensible community service sentences can do justice to this. Community service sentences should be used in such a way as to include justifiable penance.

#### **2.4.1.2 The Deterrent motive**

*Terblanche* (1999:185) poses the question:

"To what extent, if any, the nature and amount of the sentence which is imposed in a particular case *will add* to the deterrent factor which is already inherent in the whole trial process?"

Punishment is justified by the value of its consequences, namely the prevention of crime and crime must be prevented in order to protect society. The basic idea is that offenders should become, and citizens generally, should remain law-abiding. The relevance of this is found firstly, in individual deterrence where the offender is taught a lesson via the unpleasantness of punishment so that he will be deterred from repeating the offence and/or other offences in future, be it through incapacitation or intimidation by the threat of punishment or through his rehabilitation. Secondly, in general deterrence, the offender is punished in such a way that any would-be offender in considering

the example may be deterred from crime. People are restrained from committing crimes by the threat of punishment rather than by the imposition of punishment. The underlying idea is that people refrain from criminal activities because they know that the unpleasant consequences of punishment follow the commission of crime.

The mere fact that a particular act has been declared punishable serves as a threat and induces people to refrain from that particular offence.

*Caldwell* (1956:395) states:

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

One of the most important facets of general deterrence is that the threat and imposition of punishment fulfills an educative, socializing or moralizing function.

*Reckless* (1967: 583) and *Fritzgerald* (1962: 209) claim that deterrence is still the most widely accepted motive for punishment.



### **2.4.1.3. Protection of the community**

In *S v Scheepers* 1977 (2) SA155 (A) Viljoen JA, expressed the view that imprisonment is justified to remove the offender from society only when it is necessary for the protection of the community and where the aims of punishment cannot be achieved through the imposition of an alternative sentence.

The community may be protected by the permanent or temporary removal of the offender and by his rehabilitation. Crime poses a threat to the orderly way of life and to the very existence of society. The community is constantly being exposed to the harmful effects of crime and is compelled to impose sanctions in order to maintain orderly co-existence.

### **2.4.1.4 Rehabilitation**

In *S v Nkambule* 1993 1 SACR 136 (A) 147f the importance of rehabilitation was stressed but subject to the condition that the relevant sentence can actually achieve rehabilitation. In *Terblanche* (1999:189) it will be shown that:

“imprisonment has almost no potential of achieving the rehabilitation of the offender and despite many references in the past to rehabilitation in connection with long prison sentences, a number of important judgments have recently held that, especially in the case of really serious crime where long terms of imprisonment are imposed, rehabilitation becomes a minor consideration. Although the belief that a prison sentence can rehabilitate an offender has largely been discredited, our courts have found renewed faith in rehabilitation with the advent of correctional supervision.”

This theory envisages *inter alia* the re-orientation, re-education or reformation of an offender towards self improvement, self upliftment, better self control, more acceptance of responsibility towards self and others and if necessary, a change in personality and an altered life style so that the offender may become law abiding. The offender must find himself, discover a fresh insight, that will lead to a change in his emotional orientation and attitude accompanied by a pursuit of new values, and this will ultimately result in altered behaviour patterns or a clearly observable change of attitude

#### **2.4.1.5. Restorative Justice**

Restorative Justice can be defined as a systematic response to wrongdoing that emphasizes healing the wounds of victims, offenders and communities caused or revealed by crime. The various practices and programs reflecting restorative purposes will incorporate the following:

- identify and take steps to repair harm done
- involve all stakeholders
- transform the traditional relationship between communities and their government.

According to *Zehr* (1990:1): Viewed through a restorative justice lens:

“crime is a violation of people and relationships. It creates obligations to make things right. Justice involves the victim, the offender, and the community in a search for solutions which promote repair, reconciliation, and reassurance.”

## **2.5 THE PENOLOGICAL IMPORTANCE OF COMMUNITY SERVICE AS PUNISHMENT FORM**

Community service sentence is subject to both the positive aspects and limitations, as of Section 297 as implemented within the context of the totality of the criminal justice system.

### **2.5.1 Interrelatedness of Penal Motives**

In imposing a suspended sentence, *Ferreira* (1979:668) contends that the court, in view of the circumstances of each case, should ask:

- i) Is it in the interest of the accused?
- ii) Is it in the interest of the community in which the accused finds himself?

Translated into procedural terms this harmony is achieved by the sound utilization of the penal motives as is evident from:

In *S. v. Bock*, 1963 (3) SA 163 (GW) the court sentenced the accused, who had been convicted of culpable homicide by the negligent driving of a motor vehicle, to two years' imprisonment suspended for two years on condition that during such period he rendered at weekends service gratis in the casualty ward of a specific hospital under the supervision of a doctor. In imposing sentence the interests of the accused and the interests of society were borne

in mind. Community service contains elements material to each penal motive. Certain additional authorities are cited to illustrate this allegation.

*Van der Merwe* (1978:252) says of a properly imposed order that:

"It should have a deterrent effect, it accomplishes retribution in the good sense of the word and, finally, it facilitates the rehabilitation of the offender by keeping him away from conditions in prison that are not conducive to rehabilitation and, more importantly, by giving him a greater self-and community-awareness."

*Van der Merwe* (*Gass* 1980:121) also indicates that community sentence orders may reconcile the major penal motives. Deterrence and rehabilitation may be combined with the idea of restitution whereby the offender is required to right the wrong caused to society. The offender benefits by being assisted to grow more socially positive and the community, not only by the fruits of the offender's labour but by the addition of a socially adjusted person.

In *S v C*, 1973 (1) SA 739 (CPD) at 744C-D the court held;

"... we have settled upon a sentence which gives adequate weight to the interests of the community, the gravity of the offence and whilst punishing him - is highly unlikely to harm the accused ... we have come to the conclusion that the gravity of his offence requires him to render some service to show his contribution for his irresponsible and dangerous conduct."

In *S v Jones*, 1976 (1) SA 239 (T) at 239 G-HZ the judge remarked:

"All of us, no doubt, experience, feelings of frustration when we examine criminal records of persons prior to sentencing them and we notice how previous suspended sentences proved to be ineffectual."

Regarding deterrence *Neser* (1982:6) indicates that of the measure that an offender is successfully integrated then crime prevention is achieved. The nature of the order may cause others to think twice (that is, through the unpleasantness of punishment) before committing crime.

In considering the need for the protection of society *Neser* (1982:5) poses the question as to whether the community is not being exposed to unnecessary danger if a community service order permits the offender to remain in the community and replies in the negative. The selection and supervision of the offender should provide adequate protection. Section 297(9) provides for the offender to be referred back to the court should problems arise. The restitutory aspect and service to the benefit of the community also takes its interest into account.

According to *Neser* (1982:6) successful integration is the test to rehabilitation. Not only must the offender change but he must be accepted by the community. Crime is an anti-social phenomenon and community service may attune the offender towards social awareness. It may be therapeutic by eliciting his co-operation and improve his sense of worth. The type of community service performed must contribute both to the development of the offender and to the restoration of the community interest adversely affected by his committing the crime. Hence again the interests of offender and community must be served.

## **2.5.2 Other Considerations**

### **2.5.2.1 Economic Advantage**

*Van Gass* in (*Neser 1982:22*) estimated that the weekly cost of administering an offender for community service was as low as seven pounds. The cost factor is compounded by the estimation that in England, for example, approximately 80% of all offenders sentenced to community service perform their duties satisfactorily. A further economic advantage lies therein that not only does the offender remain self-supporting but in addition may perform a valuable service to the community.

### **2.5.2.2 Community Involvement**

According to *Van Gass (1980:11)* the community is enabled to become more directly involved with the crime problem. If offenders are permitted to work in society it could lead to a changed attitude towards offenders by the community.

## **2.6 ATTITUDE TOWARDS COMMUNITY SERVICE**

If the development of a community service structure in South Africa is to be visited with any measure of success this form of punishment must firstly find acceptance, since a favourable attitude is a pre-requisite for the necessary involvement of the community, which is a hallmark of the system.

According to the Discussion Paper 33 on Sentencing (1996), community-based alternatives to imprisonment, which have become widespread in many countries in recent years, represent one of the most important developments in sentencing in the last few decades. "Their development reflects the prison system's failure to rehabilitate offenders, the costs associated with building and maintaining prisons and changing community attitudes to sanctions."

With regard to non-custodial sentencing options the commissioner believes that they should be "sanctions in their own right, not as alternatives to imprisonment".

#### **2.6.1 Attitudes to Non-Custodial Sentences in South Africa**

In 1976 *Graser* (1976:129) commented as follows:

"Our sentencing options in this country are very limited. It is generally a matter of a fine, a suspended sentence, a whipping or a prison sentence. This initiates against individualization in sentencing, and in general, against rational sentencing. Our narrow approach to sentencing and in particular, our heavy reliance on sentences of incarceration, have given us one of the largest *per capita* prison populations in the world."

*Grazer* (1975 : 45) identified the following factors which initiate against the use of alternatives to imprisonment viz:

**a) Psycho-cultural factors**

Society still harbors a strong prejudice towards criminals. There is an almost blind faith in the effectiveness of the prison as a panacea for deterring offenders and protecting society. Generally speaking the public is hostile towards offenders which springs from fear and ignorance. These attitudes initiate against the development of a rationale sentencing policy.

**b) Misconceptions about Punishment**

- i) The heavier the punishment, the greater its deterrent value.
- ii) Imprisonment protects society.
- iii) Criminals are rehabilitated within the prison.

*Cilliers* (1979:202) was of the opinion that there were no tangible signs of ways or innovations on the South African punishment scene which related *inter alia* to an attempt successfully to integrate the offender into the community. In the following year *Van den Heever* (1980:25) maintained that although Section 297 had been on the statute book for two years she had come across very few instances where its provisions had been utilized by the courts.

*Van der Merwe* (1980:123), when referring to community service orders specifically, noted that it has not widely found recognition with judicial officers. The hesitancy of sentencing officers to impose this type of condition has



naturally been identified by authorities, for example, the Viljoen Commission (1976:12) as having a bearing upon the aspects raised. Despite this fact the recommendation of the Viljoen Commission (1976:120) made 10 years ago:

"efforts should also be made to condition the general public."

still appears to be relevant and should receive serious attention. Although a considerable spectrum of alternative sentencing options already exist in South Africa, which have been implemented over the past few years, it is a fact that the further development of these options and the application thereof have become imperative.

## **2.7. PENAL OBJECTIVES AND IMPRISONMENT**

### **2.7.1 Retribution and imprisonment**

In the past imprisonment had a very strong retributive character since the offender was sent to prison for punishment. The modern view, the offender is sentenced to imprisonment as punishment and, in certain cases, for treatment shifted the emphasis from retribution to other objectives, such as protection of the community and the rehabilitation of the offender. The aim of retribution, however, remains an underlying motive in the punishment of the offender, which also includes imprisonment. According to *Heijder* (1963: 46-47), one must bear in mind that

“a sentence of imprisonment is punishment, not therapy, not treatment, but punishment (translation) and that imprisonment is still indisputably retributive in character.”

Retribution in punishment is further justified by the fact that imprisonment provides the offender with an opportunity for atonement and repentance.

*Heijder* (1963: 51) mentions that:

"Imprisonment enables the offender to repay the state and the community for the harm that he has caused. Acceptance of imprisonment as retribution for his crime can bring the offender to the realization that he acted wrongly and awaken in him a feeling of repentance".

If psychological pain or suffering is absent from imprisonment, in other words, if imprisonment is deprived of all retribution or unpleasantness, law-abiding citizens may feel that there is no point in their obeying the laws of the land. This may even cause the community to lose faith in the legal system.

### **2.7.2 Deterrence and imprisonment**

According to *Terblanche* (1999:240):

“The major institutions of criminal punishment in the Western world – the prison and the jail- are designed and operated to restrain those under their control. All the other objectives of incarceration are ancillary to the basic structure of the modern prison and jail: incapacitation is central...[incapacitation] has been the major motive of incarceration for many decades but has received scant attention in criminology, in criminal law, or in jurisprudence”.

*Terblanche* (1999:240) postulates that imprisonment prevents crime mainly through incapacitation. The underlying philosophy in the case of deterrence is to make the effects of the wrongful deed (the punishment of or retribution for the crime) so unpleasant that the offender and potential offender will be deterred from committing a crime. As mentioned above, making the punishment as unpleasant as possible for the offender is no longer one of the considerations of imprisonment. The prisoner is therefore not sent to prison *for punishment but as punishment*.

The Viljoen Commission, (1978:108) states the following in the General Report of the international Association for Penal Law

“They nevertheless point out that the failure of deterrence derives from the attempt to remove its punitive character and also because imprisonment is not meted out more vigorously and that whenever imprisonment is enforced its deterrent impact is diluted by diversions from actual institutionalization. Thus the issue of deterrence remains very debated.”

What has therefore contributed to the reduced deterrent value of this form of punishment is not only the fact that imprisonment has been deprived of its punitive character and the fact that the offender no longer goes to prison for punishment, but also the uncertainty that the offender, as a result of the existence of a wide variety of alternatives to imprisonment, will certainly end up in prison.

Where individual deterrence the deterrence of the offender who is himself undergoing punishment is concerned, one cannot deny that the deprivation of freedom which is coupled with imprisonment is unpleasant to the prisoner.

Although this is a relative matter which depends on many factors, e.g. the

composition of the offender's personality, his social background, the length of the sentence, etc., and the amounts to the fact that imprisonment will have no deterrent value to some prisoners, such unpleasantness ought to have some deterrent effect on the average individual undergoing imprisonment.

As regards the deterrent value of imprisonment in general, it is a fact that social disapproval or the social stigma attached to it is an important factor. Where the offender has little or no part in the spiritual and material welfare of his community, imprisonment plays a less significant role.

The utility of short-term imprisonment was commented on in *S v Sakabula* 1975 3 SA 784 (C) 786 D:

“ A short term of imprisonment is sometimes necessary to denounce an offence which, whilst serious, is not so serious as to merit lengthy imprisonment. It might also be required in order to give effect to the principle of deterrence either in respect of the particular wrongdoer or as an exercise in general deterrence.”

### **2.7.3 Protection of the community and imprisonment**

Imprisonment can protect the community in several ways. Since the deprivation of freedom is a serious loss to the civilized person, it can be assumed that, imprisonment constitutes a reasonably serious deterrent at least to a large part of the community. The deterrent effect on criminals and potential criminals offers protection to the community. However, this kind of

protection is limited since not all criminals are deterred by the existence of imprisonment.

#### **2.7.4 Rehabilitation and imprisonment**

According to *Terblanche* (1999:240) Section 2(2) (b) of the Correctional Services Act, Act 8 of 1959, contains as one of the Department of Correctional Services' main functions:

“as far as practicable, to apply such treatment to convicted prisoners as may lead to their reformation and rehabilitation and to train them in habits of industry and labour.”

The aspect under consideration here is the extent to which imprisonment makes provision for the realization of rehabilitation as an objective of punishment. Within the limits of possible escapes imprisonment therefore offers physical and economic protection to the community. Imprisonment offers three kinds of opportunity for the realization of the rehabilitative objective of punishment.

In certain cases, firstly this form of punishment can help in making the offender realize that he acted wrongfully and cause him to accept punishment as the logical consequence of his act. *Hodge* (1964: 12-16) points out that

“self evaluation on the part of the offender, the cultivation of the desire in him to improve himself and the intention to pursue a different system of values are very important considerations in this process.”

Although it is realized that rehabilitation cannot take place in isolation and that it cannot be left solely to the offender himself, the quarantine concomitant with imprisonment can in many cases have a beneficial effect with respect to the rehabilitation process. What is largely of importance here is the offender's orientation after his imprisonment.

Secondly, imprisonment offers the possibility of treating the offender, and so doing contributing to his rehabilitation. However, treatment at the expense of the role the offender should play in his rehabilitation should be guarded against.

Thirdly, within the framework of imprisonment a favourable, dignified environment can be created that can help the offender to develop a positive, receptive attitude towards treatment. Two contrasting views are held concerning the possibility of reforming the offender within the framework of imprisonment.

On the one hand, there is the view that rehabilitation or reform is applicable only to offenders who have been sentenced to imprisonment *Rabie & Strauss* (1981:14). On the other, the idea is propagated that prison is not the most suitable place for the rehabilitation of offenders.

“In the past, when a greater belief in the rehabilitative value of imprisonment existed, it was believed that rehabilitation is not possible with short-term imprisonment, because reform work (which is supposed to take some time) is not possible during a short sentence” *Terblanche* (1999:242).

## 2.7 RESUME

*Terblanche* (1999:255) maintains that:

“short terms of imprisonment are generally quite critically commented on. It has been held that it has no or little purpose, that anything less than two years in prison is too short to effect rehabilitation of an offender; and that such a short term destroys the deterrent effect of imprisonment”.

In *S v Standaard* 1997 2 SACR 668 ( C ), the court reiterated the previous view that short term of imprisonment cannot be in the interests of society, as it presently offers no rehabilitative prospects, and before this situation improves first offenders (particularly young ones) should only be imprisoned in very serious cases.

Thus it can be seen that few punishment forms can claim such penological significance as community service. Imprisonment presents certain unavoidable consequences of a negative or dysfunctional nature which affect the imprisoned during his institutionalization and hamper his re-absorption into society. Imprisonment is furthermore a financial burden upon the State. In creating alternatives to this form of punishment, the legislation sought to overcome the problems associated with imprisonment.

Prison accommodation must be used effectively through the selective application of imprisonment and as an incapacitating measure. Prison should

be reserved only for the most serious of cases and should only be used as a last resort.

Although imprisonment fulfils an important social function it offers only temporary respite.

By implementation of community based sentences there is a reduction in economic cost through the decreasing use of prisons. New options provide a more humane form of punishment while still maintaining a punitive element seen as essential for public approval. The offender would be better off because, by avoiding imprisonment, he can remain in employment and maintain a normal home life at the same time it provides him with the opportunity to make some reparation to the community.

The question that is posed is whether an alternative to imprisonment would have been insufficient punishment? Imprisonment should be avoided as far as possible, due to its cost and the other negative features.



# **CHAPTER THREE**

## **COMMUNITY SERVICE SENTENCES IN SOUTH AFRICA AND A COMPARISON WITH INTERNATIONAL PERSPECTIVES**

### **3.1 INTRODUCTION**

Over the past ten years governments in various countries have realized that the use of incarceration as a means of punishment is expensive and inadequate to effect positive change in most non-violent offenders.

Community service sentences have been imposed in South Africa for some time. Despite the movement towards developing comprehensive community based correction programmes to punish and treat non-violent offenders, this development is still in its infancy.

### **3.2 EARLY DEVELOPMENTS IN COMMUNITY SERVICE SENTENCES IN SOUTH AFRICA**

According to *Van den Berg* (Van der Walt, 1973:295) the Prison and Reformatories Act (No. 13 of 1911) was the first South African law to make provision for the appointment of probation officers. Thereafter the Criminal Justice Act (No. 40 of 1914) authorized the imposition of suspended and deferred sentences on certain conditions. Important guidelines for the extension of alternatives to imprisonment were laid down in the 1947 report of

the Penal and Prison Reform Commission (The Lansdown Report). The Commission criticized the destructiveness of imprisonment and advocated community service as an alternative to short-term prison sentences. The Commission suggested that a state labour bureau be established to place offenders in jobs as an alternative to imprisonment.

This means that a large number of persons who would otherwise be compelled to serve short terms of imprisonment might be drafted into useful and profitable service. Deductions of amounts for the payment of the deferred fine would have to be made from wages owed to the offender.

The Lansdown Report,(1947:81-82) stated that:

“Effective supervision and control is an essential part of community with certain amount of accounting work, but it is not thought that this would render the working of the scheme unduly difficult; and in any case, the saving of expense to the State in imprisoning a man, and other benefits derived from his being kept out of goal, would make this well worth while.”

Eighty years later this recommendation by the Commission was embodied in section 352(1) of the Criminal Procedure Act No 56. 1955, which reads as follows:

“Whenever a person is convicted before any court of any offence other than an offence specified in the Fourth Schedule or an offence in respect of which the imposition of a prescribed punishment of the person convicted thereof is compulsory, it may in its discretion, postpone for a period not exceeding three years the passing of sentence and release the person convicted on one or more conditions.”

### 3.3 THE ROLE OF THE VILJOEN COMMISSION AND THE PERMANENT COMMITTEE ON PENAL REFORM

Prior to the appearance of the report of the Penal and Prison Reform Commission of the Republic of South Africa, community service sentences were seldom imposed (The Viljoen Commission).

*Van Gass* (1981:103-104) stated that this was ascribed to various factors of which the following are the most important:

- the lack of a well-developed probation service which could, *inter alia*, undertake the selection of offenders for community service;
- the lack of organized structures in the community responsible for making community service jobs available and for the supervision and control of offenders sentenced to community service;
- the lack of clarity as to the legal implications of a sentence to community service should, for example, problems arise from the negligence of offenders performing community service tasks;
- the use of this type of sentence is a recent development which has not yet found great acceptance among those imposing sentences.

*Van Gass* (1981:194) suggested that:

“Rather than incarcerating an offender, particularly one whose offence is minor, in a prison, he can be sentenced to provide a specific service to the community. Thus a young offender who has, for example, assaulted and robbed an elderly person, can be sentenced to serve in an old-age home for a specific period, while he is under the supervision of a probation officer (or someone appointed by the court). Having to serve the physically or mentally handicapped may develop in him a sense of remorse and sympathy with the handicapped, and at the same time a sense of responsibility.”

The Viljoen Commission (1976: 126-127), did not consider practical aspects of the implementation of a community service system in South Africa, but it nevertheless laid down valuable guidelines on this, of which the following are considered to be the most important

- The help and cooperation of Probation officers must be obtained with a view to the supervision and control of offenders sentenced to community service.
- Advocates and attorneys for the defense should mount a joint effort to recommend suitable sentences of this type to those imposing sentences. A real effort should be made to implant the idea of community service sentences in the mind of the general public.

One of the most important recommendations of the Viljoen Commission was ultimately incorporated in section 297(c) of the Criminal Procedure Act, No. 51

of 1977, which laid down that a court can sentence an offender to provide service for the benefit of the community.

In 1979 the Permanent Committee on Penal Reform began seriously to consider alternatives to imprisonment and in the process sent questionnaires to twenty-seven magistrates to determine whether the courts linked positive conditions such as service to the community to suspended sentences *Van Gass*, (1981: 196-197). The most important findings were:

- Bodies were not keen to accept offenders for community service unless the state indemnified them against possible claims arising from the offender's performance of community service tasks.
- The H.F. Verwoerd Hospital expressed grave reservations and wanted to know who would pay the, damages should an offender's negligence result in injury to a patient.
- One reason for the lack of enthusiasm about this type of sentence was the question of supervision and control of offenders.

### **3.4 THE EXPERIMENTAL COMMUNITY SERVICE PROJECT IN THE CAPE PENINSULA**

A memorandum was submitted on the 16 March 1979 to the Research Committee containing recommendations for the establishment of a community service project for offenders in the Cape Peninsula.

Various discussions and meetings were held between representatives of magistrate's courts, National Institute for Crime Prevention and the Rehabilitation of Offenders (NICRO) and the then Department of Health, Welfare and Pensions in the course of which recommendations were drawn up with a view to the implementation of the project. A summation of the most fundamental of these can be recapped as follows:

- Offenders should be carefully chosen for community service.
- In the selection process thorough use should be made of pre-sentence reports, a service which the shortage of probation officers makes it difficult to supply .
- As there appear to be limited facilities for rendering community service, there should be positive liaison on the matter with welfare and service organizations.
- Magistrates should be supplied with progress reports on every offender performing community service.
- A panel should be set up to make recommendations on the nature and circumstances of the community service tasks an offender should perform.
- The other state departments rendering welfare services to the other population groups should also be involved in the project.

A community service continuation committee was formed, which carried on the liaison work during 1980. It became apparent that the following would be necessary:

- to employ voluntary supervisors in the project;
- to supply service organizations with identifying details about the offender (in strict confidence); and
- that offenders should sign a formal agreement to perform community service.

One of the problems that had to be overcome was that of the possibility of damage to third parties. This was overcome by NICRO taking out insurance to cover fifty offenders a year against possible damage.

*Van Gass* (1981: 216) reports that in the early stage of 1980 six offenders had already been sentenced to perform community service in the magisterial districts of Cape Town and Wynberg within the framework of the experimental project.

### **3.4.1. Van Gass's recommendations as regards community service in South Africa**

The pioneer on the origin and functioning of community service sentences overseas and in South Africa was *Van Gass* (1981:228). He makes numerous recommendations as regards community service sentences in South Africa of which the following are discussed:

#### **3.4.1.1. Legislation**

There were several principles which should serve as guidelines for legislation on a community service system:

- Courts should have the jurisdiction to sentence any offender over the age of 16 to some or other form of community service.
- Before a community service order is issued, the court must be convinced that facilities for rendering such a service exist, that a specific body or bodies are prepared to accept the offender for community service and that there will actually be effective supervision and control.
- The court order must clearly stipulate the duration of the community service. This will prevent exploitation of an offender.



- Action must follow if an offender deliberately neglects to fulfill the conditions of a community service order.
- Finality must be reached on the legal position of an offender while rendering service to the community.

#### **3.4.1.2. The legal position of an offender performing community service**

Legal claims arising from the actions of an offender while performing community service tasks can be minimized by efficient selection.

#### **3.4.1.3. The role of the Prison Service, and the Department of Health and Welfare**

The ideal situation would be for both these official bodies to play a leading role in the introduction and establishment of a community service system in South Africa.

#### **3.4.1.4. Overhead Interdepartmental Planning Committee**

The planning and extension of probation services should be the responsibility of the Interdepartmental Planning Committee and a community service system and could be composed of:

- senior representatives of the various state departments charged with probation services;
- a representative of the Department of Justice or a member of the Penal Reform Committee;
- an official representative of the Prison Service; and
- a criminologist with a sound knowledge of social work.

#### **3.4.1.5. Other recommendations**

Numerous other recommendations concerned the following:

- the extension of experimental community service projects to other cities and rural areas;
- adequate financing and the provision of qualified personnel;
- a scientific analysis of the occurrence of crime and the availability of community service facilities in specific geographic areas;
- the building and extension of day training and attendance centres for offenders performing community service;
- Proper liaison between official bodies, service organizations and the community with a view to the organization of sufficient, meaningful community service tasks for offenders;
- effective control and supervision of offenders performing community service tasks;
- proper selection of offenders for community service;
- research into community service sentences.

### **3.5. THE KRUGEL COMMITTEE**

By 1981 it was acknowledged that drastic steps were necessary in order to restrict the prison population figures which had grown disproportionately world-wide. The Krügel Committee was appointed to examine overpopulation in prisons, under the guidance of the Minister of Justice. A working group, "Probationary Services and Supervision" was instituted to investigate the viability and feasibility of supervision. The availability of probation services of the various population groups of the Republic of South Africa, also had to be examined.

The results were that amendments to the law for the imposition and implementation of correctional supervision in the Criminal Procedure Act (51/1977) and the Prison Act (8/1959) were approved during the 1991 parliamentary session. The amended Correctional Services and Supervision Matters Amendment (122/1991) was approved by the State President on 14 August 1991.

### **3.6 COMMUNITY SERVICE SENTENCES IN ENGLAND**

#### **3.6.1 Introduction**

*Young* cited in *Neser* (1988:12) refers to a marked rise in British crime in the period from 1956-1966. There was a rapid increase in the prison population

and it was clear that established penal methods offered no solution to the problem

*Enoch Powell* (Young 1979: 9) ascribed this to the effect of the welfare state, while others argued that the state's socialist reform programmes should be extended still further to overcome the problem. However, there were also those who grasped that crime and its explanation represent a complex human phenomenon and that social reform should also be associated with the establishment and extension of alternatives to imprisonment.

During the early sixties, there was a new interest in the role of the volunteer in welfare work and in service bodies, for example as probation officers and supervisors. An interesting product of this was the use of offenders on various levels of welfare service.

*Hauser* (1963: 6) was one of the first persons who put forward the proposal that offenders may be rehabilitated by giving them the opportunity to perform work of value to the community. The concern about the high crime rate and the large prison population, and interest in the fate of the victims of crime as well as the role of the volunteer in welfare work, were of decisive importance in the search for alternative arrangements for the petty offender and the development of a community service system in England.

### **3.6.2. The investigation of the Advisory Council on the penal system**

The British Government ordered the Advisory Council on the Penal System in 1966 to investigate certain aspects of imprisonment. A subcommittee chaired by Lady Barbara Wootton was appointed with the primary task of tabling alternatives to imprisonment. The report of this committee, known as the Wootton Report, was released on 30 June 1970.

#### **3.6.2.1. The premises of the Wootton Report**

The recommendations with regard to a community service system were based on the following premises:

- the voluntary cooperation of community service organizations in making their facilities available is of great importance;
- that community service sentences are of particular rehabilitative value;
- that the cooperation of law-abiding citizens could have a positive influence on offenders;
- that community service should be done in an offender's free time and should not be remunerated;

- that the court should specify clearly the number of hours the offender should give to this service;
- that community service could be of particular value in the handling of juvenile offenders, but that adult offenders should not be excluded;
- that before imposing a sentence the courts should determine whether offenders are capable of and willing to render a specific service to the community;
- the selection of offenders is a vital prerequisite for imposing a community service sentence.

### **3.6.2.2 Recommendations in the implementation and organisation of a community service project**

The Wootton Report also laid down certain practical guidelines for the implementation of a community service project to accommodate community service sentences. The three main prerequisites for the organisation of community service work were said to be:

- a constant range of work opportunities for offenders in the community;
- facilities for the integration of offenders in the various service bodies;

- the machinery to ensure that court orders regarding community service sentences were executed.

The Wootton Committee envisaged community service as being able to be utilized in lieu of both custodial and non-custodial punishment (*Pease* 1978:269).

*Ritchings* (1980: 18) was of the opinion that:

“As the existing probation and after-care organisations were closely connected with the various courts in England, the Wootton Committee recommended that the organisation and control of the community service system should also be linked to the courts in this way”

### **3.6.2.3. Probation affairs and community service**

The consideration of a pre-sentence report was not considered an essential prerequisite for a community service sentence, but its use was strongly recommended.

### **3.6.2.4. Conditions of community service**

According to *Ritchings* (1980:44) provision must also be made for action against offenders who fail to meet the conditions of community service laid down by the court. The maximum period for which an offender must render

community service should not exceed 120 hours, and the committee emphasised that the conditions should be applied in a spirit of flexibility.

#### **3.6.2.5. Legislation for community service sentences**

Well defined legislation was needed to introduce a community service system for offenders, and thus the Home Office Working Group was set up to be responsible for initiating the practical planning of the project and the submission of legislation to effect it (*Pease & McWilliams 1980: 8*).

#### **3.6.2.6. Day-training centres**

The respective offenders chosen to perform community service must be linked up with day-training centres. This provided a way in which they can be properly oriented to the community service they are required to render. This also ensures that offenders are always constructively engaged, whether for therapeutic reasons or because circumstances such as bad weather prevent them from carrying out their tasks at specific times.

#### **3.6.3. Reaction to the Wootton Report**

The general reaction was favourable, and three important developments flowed from the Wootton Report.



### **3.6.3.1. Home Office Working Group**

*Pease & McWilliams* (1980:7-8) the Working Group did more work on the recommendations of the Wootton Committee and certain modifications and proposals were produced of which the most important were:

- that the community service system should be in-corporated in the existing aftercare and probation system;
- that offenders should render community service only as an alternative to imprisonment. The Wootton Committee originally recommended that community service sentences be imposed for all less serious offences and not necessarily as an alternative to imprisonment.
- that a community service sentence need not necessarily be coupled to supervision by a probation officer;
- that the court should clearly stipulate the duration of such a sentence, and that this might vary between 40 and 120 hours.

### **3.6.4. Selection criteria for community selection in England**

Well defined guidelines were laid down by the Wootton Committee, for the selection of offenders for community service. As this is one of the important

elements in the system, the major selection criteria used in some of the magisterial districts will be mentioned.

#### **3.6.4.1 London**

*Croft* (1976: 8) affirms the following norms to determine the suitability of an offender for community service which were applied in London in 1974:

- The accused must have a fixed job and a permanent place of residence.
- Community service sentences are primarily considered in cases where the court would otherwise impose not more than one year's imprisonment.
- Those guilty of aggressive and sexual crimes, alcoholics, drug addicts and the mentally disturbed do not qualify for community service sentences.
- By contrast people who are to some extent socially isolated and have not yet had an opportunity to make a positive contribution to society are considered suitable for community service.
- The probation officer's in-depth investigation and report are an important component of the selection process.

#### **3.6.4.2 Nottingham**

The various categories of accused who were not considered for community service sentences were as follows:

- accused of a limited intelligence who clearly lack all self- control;

- offenders who show unstable tendencies as a result of some or other crisis;
- psychopaths and the mentally disturbed;
- serious sexual offenders;
- those who are heavily dependent on alcohol and drugs.

### **3.6.5 Further development of the community service system in England**

The community service system was adopted by the English courts In June 1974, 853 offenders were sentenced to community service; of which a total of 11 583 recommendations for this were made by probation officers. While the community service system was establishing itself in England, there were three important developments.

#### **3.6.5.1 Administrative centres**

*Van Gass* (1981: 144-145) summarized the activities of the administrative centers. Administrative centres were set up to manage the organization of the community service system:

- Community service work is made available to offenders in cooperation with welfare organizations, statutory bodies and other bodies.

- Supervision of offenders performing community service is done by the personnel of the service organization or by full-time or part-time probation officers.
- A senior probation officer is at the head of such an administrative centre, and besides administrative staff, use is also made of auxiliary workers who are sometimes directly responsible for the supervision of community work.
- The functions of the personnel include selecting offenders for community service tasks and liaison with service organisations, probation officers and the courts.

#### **3.6.5.2 The nature of community service jobs**

Administrative centres prepare and orient offenders regarding work placement and community service tasks allotted to them on the basis of the community service order. Types of community service work which are often performed are:

- the driving of vehicles for needy people;
- administrative work;
- clearing of litter and the care and maintenance of public parks;
- helping ambulance services and hospitals;
- visiting the ill or the elderly in hospital;
- helping to care for the handicapped.

### 3.7 COMMUNITY SERVICE IN THE U.S.A

*Neser* (1982:27) alleges that:

“The successful expansion of the probation system coupled with the emphasis on rehabilitation of the re-integration model, community service sentences were given impetus in the U.S.A. Provisions differ from state to state and community service may be linked, for example to pre-trial diversionary procedures, to periodic imprisonment, to probation in lieu of fines etc.”

In the USA there are a number of independent bodies which concern themselves with the organization of community service projects including the recruiting of volunteers (*Neser* 1982:32). In the aggregate the system appears country-wide to be less well-developed than in England.

With regard to community service sentences in the USA, the following general aspects should be taken into account:

- The basic premise in the USA is that community service sentences ought to serve not only as an alternative to imprisonment, but as a fully-fledged punitive measure reconcilable with the goal of punishment.
- Sentences to community service are generally used in the case of less serious offenders. A large number of petty offenders benefit from this type of sentence. The approach to and the enforcement of community service in the USA will differ in specific aspects from other systems, such as the one used in England.

- In the USA, as in England, the implementation of community service sentences was linked to the creation and development of new resources for the management and treatment of offenders in the community.
- The services of volunteer organizations and individuals play a vital role in making community service projects available and in the supervision of offenders.

### **3.7.1 The development of community service sentences in the USA**

Dual factors especially made a major contribution to the development of community service sentences in the USA:

firstly, the expansion of the probation system and the success it achieved; secondly, to a shift in emphasis in the philosophy of rehabilitation with the acceptance of the reintegration model.

Since the early sixties the probation system has been vastly expanded by the authorities who have made millions of dollars available for the development of alternatives to imprisonment. In 1966, a probation project, known as The Special Probation Supervision Subsidy (*Perlstein, 1975: 138*) was started in California. The result of this subsidy programme was that the personnel responsible for probation services were encouraged to develop practical and economical alternatives to imprisonment, and in this manner valuable experience with offenders in the community was gained.

Towards the end of the sixties, in the USA, it was concluded that imprisonment was not a magical formula for rehabilitation and in the report of the most important investigations into the American penal system, (President's Commission on Law Enforcement and Administration of Justice of 1967), methods of dealing with offenders within the community were strongly recommended. This led to a new approach to the rehabilitation of the offender which later took shape as the so-called reintegration model.

During the seventies various American states began developing and expanding community based management programmes for offenders. In 1973 the National Advisory Council on Criminal Justice and Goals, (Harris, 1979: 1) questioned the effectiveness of imprisonment as a means of rehabilitation, and suggested that offenders should be referred to prisons only in exceptional cases.

*Van Gass* (1981:166), report of the Wisconsin Council on Criminal Justice on the rehabilitation of offenders appeared in 1975, recommending that every effort be made to strengthen the offender's ties with the community by means of the development of facilities for the treatment of offenders within the context of the community.

From this it is evident that the successful expansion of the probation system, coupled with the acceptance of the reintegration model for the treatment of offenders, were the most important factors which contributed to the development of community service sentences in the USA.

### 3.8 THE USE OF VOLUNTEERS IN THE UNITED STATES OF AMERICA

There are various bodies in the USA which plan and coordinate the services of volunteers in different areas of the welfare field (*Van Gass, 1981 : 178*). Other bodies also exist which concern themselves with the organisation of community service projects, liaison with victims and courts with a view to community service, and the recruiting of volunteers who can supervise offenders.

*Harris (1979: 24)* gives the following summary of the advantages connected with private or independent bodies which organize community service and voluntary supervisors:

“Volunteer bureau personnel running community service programs tend to consider remoteness from the criminal justice system as a distinct advantage. Criminal justice agencies are thought to carry punitive and stigmatizing elements that are best avoided.”

*Beha (1977 : 13)* agrees with *Harris* on the advantages of using organizations which make use of the services of volunteers:

“Further channeling a court's referral through an agency that handles volunteers may make the work experience a more positive one for the court-referred participant, who is treated throughout as a volunteer rather than a criminal.”



*Van Gass* (1981: 179) holds that:

“among the outstanding features of the voluntary service system are the so-called youth service bodies. These bodies were formed with the goal of extending a non-conventional helping-hand to juveniles evincing problem behaviour or experiencing crises during which they have difficulty in assimilation.”

### **3.9 CURRENT SENTENCING PRACTICES IN THE USA**

According to the South African Law Commission (2000:19), an unprecedented number of structured reforms have taken place over the past two decades in the United States of America. In all the States, where sentencing guidelines were adopted, a sentencing commission was appointed with the mandate to develop sentencing guidelines. In enabling legislation these commissions are required to meet the multiple goals of punishment, i.e. just deserts, deterrence, incapacitation and rehabilitation. Of concern is the ability to individualize sentencing and to consider a wide range of sentencing purposes.

Under the system of sentencing guidelines repeat offenders and offenders convicted of violent crimes are much more likely to be imprisoned and serve longer prison terms. Conversely, first-time offenders charged with property crimes are less likely to be imprisoned.

### **3.10 RESUME**

It is important to note that a sentence of community corrections does not provide the ultimate solution to crime and victimization. It is neither a substitute for nor a replacement of probation and incarceration, but rather to provide a bridge between the two while considerably enhancing the overall effectiveness of the criminal justice system. Community corrections programmes are usually more cost-effective and prudent punishment for non-violent offenders.

Community sentences costs less to administer and is also inexpensive in terms of human and social cost. It is flexible and can take advantage of the benefits offered by diverse cultural and ethnic groups. The offender is directly involved with community agencies and may be influenced by the example and work, thereby involving a rehabilitative element in the sentence in the sentence.

# **CHAPTER FOUR**

## **STATUTORY ORIGINS OF AND FURTHER ENABLING PROVISION FOR COMMUNITY SERVICE**

### **4.1 INTRODUCTION**

Community service was first imposed in South Africa in 1963 by the Supreme Court in *S v Bock*, 1963 (3) SA 163 (GW), as a condition to a suspended sentence by the court having recourse to the words "or otherwise" in Section 352(1) of the *Criminal Procedure Act, No. 56 of 1955*. Sentence could be suspended on certain specified conditions "or otherwise."

The principle of legality applies to community service as with all punishments because it is a "creature of statute." It owes its existence to a statutory enactment and could not during 1963 or any period prior to or subsequent thereto, have been imposed outside the framework provided for by the legislature for the conditional postponement or suspension of sentences. It has no independent status outside this context. After the implicit provision for community service under the "general expression", it was explicitly provided for by statute in 1977, that is, it was referred to as a condition by name. This is still the position today under the relevant statute currently in force.

Judges, magistrates and criminal law writers agree that sentencing is not only the most difficult part of a criminal trial, but that it is also the most important.

Cognizance must be taken of the fact that the imposition of punishment must keep abreast of the views of the community.

The *White Paper (1991:21)* states that:

“it is not so important to the community that harsh penalties are imposed, but rather that the punishment is effective and that justice prevails. It is at this stage and for this very reason necessary to place greater emphasis on and to give greater recognition to the premise that punishment must also be fair to the offender as well as being in the interests of the community”.

The South African prison population comprises approximately 110 000 prisoners per day, which compares badly with countries like Britain, Australia and the countries of Europe. These countries have already come a long way in applying community based sentences and for this reason it would appear to be expedient from a prison population point of view to propagate such sentences.

#### **4.2 THE CRIMINAL JUSTICE ADMINISTRATION ACT, NO. 40 OF 1914**

In South Africa, the first statutory provision which regulated the postponement or suspension of sentences and in which the words "or otherwise" are encountered is contained in the Criminal Justice Administration Act, No. 40 of 1914.

The justification of the Criminal Justice Administration Act, No. 40 of 1914, was twofold, namely, to enact uniform provisions relating to the postponement

or suspension of sentences and to provide measures for the avoidance of imprisonment.

After the introduction of the Criminal Justice Administration Bill 1914 in the House of Assembly on 26 May 1914, the Minister of Justice indicated that one of the objectives of the Bill was to try:

" ... and keep people out of goal ..."

*(Union Assembly Debates, 1914 : Column 2774).*

Even today, the provisions of the Criminal Justice Administration Act, No. 40 of 1914, in so far as they provided for conditional postponement or suspension of sentence, though refined through successive amendments and re-enactments since 1914, constitute in principle the law relating to these matters as it appears on our statute book.

#### **4.3 CRIMINAL PROCEDURE ACT 56 OF 1955**

One of the important milestone in the statutory development of postponed and suspended sentences was reached with the enactment of the Criminal Procedure and Evidence Amendment Act, No. 29 of 1955 which was an amending provision. The long title to this Act reads:

"To amend the laws relating to Criminal Procedure and Evidence."

*(Union Statute, 1955:140)*

Over a period of some two decades (that is between 1963 and 1977) then the courts in South Africa had recourse to the words "or otherwise" in Section 352 of the Criminal Procedure Act, No. 56 of 1955 for the imposition of community service as a condition to postponed and suspended sentences.

According to the *Union Statutes* (1955:168), it is revealed that Section 52 of the Criminal Procedure and Evidence Amendment Act, No. 29 of 1955 substituted the following section for Section 359 of the Criminal Procedure and Evidence Act, No. 31 of 1917, namely:

"359 Powers of courts to impose suspended sentences or a caution or reprimand:

Whenever a person is convicted before any court of any offence other than an offence specified in the Fourth Schedule of this Act or an offence in respect of which the imposition of a prescribed punishment on the person convicted thereof is compulsory, it may in its discretion:

- (a) postpone for a period not exceeding three years the passing of sentence and release the offender on one or more conditions (whether as to compensation, the rendering to the person aggrieved of some specific benefit or service in lieu of compensation for damage or pecuniary loss, submission to instruction or treatment, compulsory attendance at some specific centre for a specified purpose, good conduct or otherwise, which the court may order to be inserted in recognizance to appear at the expirations of that period; or
- (b) pass sentence, but order the operation of the whole or any part of the sentence to be suspended for a period not exceeding three years on such conditions as aforesaid as the court may specify in the order; or ..."

#### 4.4 THE CRIMINAL PROCEDURE ACT, NO. 51 OF 1977

The second most important "agent of legislative change" in the history of the statutory provision for suspended and postponed sentences, was the Viljoen Commission. Prior to this community service sentences were seldom imposed in South Africa. It was due to the appearance of the report on the Penal and Prison Reform Commission of the Republic of South Africa (the Viljoen Commission), that the situation changed. The Viljoen Commission (1976:1), was appointed to:

"inquire into the penal system of the Republic of South Africa and to make recommendations for its improvement. Provided that the question whether the death penalty should be retained shall not be inquired into."

The fundamental recommendations of the Viljoen Commission was ultimately incorporated in Section 297 (C) of the Criminal Procedure Act, No. 51 of 1977 which laid down that:

"a court can sentence an offender to provide some or other service of benefit to the community."

According to *Butterworth* (Issue 19:961), the long title to the Criminal Procedure Act, No. 51 of 1977 reads as follows:

"To make provision for procedures and related matters in criminal proceedings."

Provision for postponement or suspension of any sentence under the Criminal Procedure Act, No. 51 of 1977 is made in Section 297 *Butterworth* (Issue 16 and 17: 1153-4) which provides as follows:

“Conditional or unconditional postponement or suspension of sentence, and caution or reprimand.

(1) Where a court convicts a person of any offence, other than an offence in respect of which any law prescribes a minimum punishment, the court may in its discretion:

(a) postpone for a period not exceeding five years the passing of sentence and release the person concerned:

on one or more conditions, whether as to:

compensation;

(bb) the rendering to the person aggrieved of some specific benefit or service in lieu of compensation for damage or pecuniary loss;

(cc) the rendering of some service for the benefit of the community;

submission to instruction or treatment;

(ee) submission to the supervision or control (including control over the earnings or other income of the person concerned) of a probation officer as defined in the Childrens Act, 1960 (Act 33 of 1960);

(ff) the compulsory attendance or residence at some specified centre for a specified purpose;

good conduct;

(hh) any other matter, and order such person to appear before the court at the expiration of the relevant period; or

(b) pass sentence but order the operation of the whole or any part thereof to be suspended for a period not exceeding five years or any condition referred to in paragraph (a)(1) which the court may specify in the order; or ...



- (2) where a court convicts a person of an offence in respect of which any law prescribes a minimum punishment, the court may in its discretion pass sentence but order the operation of a part thereof to be suspended for a period not exceeding five years on any condition referred to in paragraph (a)(i) of subsection (1)."

The 1977 Act specifically makes provision for community service orders and the words "or otherwise" have been replaced by "any other matter."

In paragraph 1.1 of Part 2 of its report, the Viljoen Commission (1976:3) perceived the reasons for its appointment to be the following:

"While the Commission is conscious of the fact that an important motivating cause for the appointment of the commission was that our penal system could with advantage be submitted to a board investigation in the light of constantly changing circumstances and approaches and new knowledge that became available since the last comprehensive report on penal reform (and prison) reform, the Lansdown Commission report, was published as long ago as 1947, it also believes that a precipitating cause for the appointment was the alarmingly high prison population of the Republic, a matter which has evoked the concern not only of the general public but of the Government of the Republic of South Africa. For this reason the Commission will devote considerable attention to the causes of this unhealthy condition in our penal system and endeavour to find solutions therefore and to recommend steps to be taken for the amelioration and relief thereof."

The Viljoen Commission (1976:108) pointed out the importance of section 352 of the Criminal Procedure Act, 1955 within the punishment sphere since it made provision for a number of alternatives to imprisonment and provided the sentencing officer an opportunity "to exercise his inventiveness and ingenuity in devising alternative sentences."

Sections 297 (1) (a) and (b) (i) (cc) of the Criminal Procedure Act No.51 of 1977 make provision for the rendering of community service as a condition of a postponed or suspended sentence. Although the Act made provision for this sentencing option, the procedure itself was not clearly outlined. According to *Naude (Acta Criminologica Vol. 4: 1991)*

“Another important amendment to article 212 of the Criminal Procedure Act 1977 (Act 51 of 1977) now allows social workers, correctional officers, criminologists, psychologists and other behavioural scientists who play an important role in assisting the court in the sentencing process, to make recommendations for an appropriate sentence by means of a sworn statement, instead of giving oral evidence. This will be more cost-effective and prevent them wasting valuable working hours waiting to give oral evidence in court.”

During the course of 1980, a pilot project was initiated by the Crime Prevention and the Rehabilitation of Offenders (NICRO), in Cape Town and by the probation service in Durban.

#### **4.5 POST - 1977**

At the beginning of 1979, the interest of the Permanent Committee on Penal Reform in seeking alternatives to imprisonment and its involvement in researching facets of community service, also gave impetus to the implementation of this punishment form. Certain individuals, Van Gass and bodies, for example, NICRO undertook pioneer work in the field of community service.

The conviction of two accused of the statutory offence of cruelty to a horse, led a Soweto magistrate to sentence the accused to a fine of R100, 00 or six months imprisonment suspended on condition that the accused should work one day a week for twenty six weeks at the S.P.C.A. *Van der Merwe* (1982:102) comments:

"These sentences are excellent examples of community service orders which can divert offenders from custodial sentences and foster social responsibility."

The various other examples cited in *Neser* (1993:43) include the following. In Kimberly black youths who had damaged their school during riots received suspended sentences on condition that on Saturdays, under supervision, they should work to repair the school. In South West Africa a magistrate was claimed to have considerably reduced the general enthusiasm for knives by sentencing those convicted of culpable homicide by stabbing to benefit the poor municipality by digging graves for their victims.

## **4.6 PROJECTS**

### **4.6.1 Experimental Community Service Project in the Cape Peninsula**

Due to the co-ordinated efforts between magistrates, NICRO and the then Department of Health, Welfare and Pensions, a community service project was launched. *Van Gass* (1981:46) reports that:

“in the early stage of 1980 six offenders had been sentenced to perform community service in the magisterial districts of Cape Town and Wynberg within the framework of the experimental project .”

Community Service Orders (CSO) as a sentencing option were initiated at the Cape Town branch of the NICRO in 1980. Prior to that, the types of alternative sentences (i.e. sentences other than imprisonment) available to the courts were very limited. According to *Muntingh* (1996:1) research was done based on more than 1 400 cases that were assessed by NICRO, Cape Town for CSO between 1980 and 1994. He refers to the fact that:

“South African prisons have been plagued by overcrowding for many years and this problem has not been adequately addressed. Community Service Orders was introduced as a sentencing option to firstly, in some way alleviate the pressures on the already overcrowded prisons and secondly, present magistrates with another sentencing option. Magistrates are continuously frustrated with the limited sentencing options available to them, although it must be said that the relatively recent introduction of correctional supervision has made an invaluable contribution to sentencing in South Africa.”

Research that was carried out by *Muntingh* (1996:49) found that of the sample that was traced for re-offending, just below 26 per cent were convicted of at least one offence after they were sentenced to render community service. The “survival time” immediately after they were sentenced to perform community service was in the order of 30 months, which is substantially longer than the “survival time” for further convictions.

In the city of Durban, in 1980, a community service scheme was commenced and four years later eleven offenders had been involved. Nine welfare

agencies provide the offenders with a wide range of service opportunities. *Reid* (1984:13) notes that in those instances where district magistrates have imposed these orders it was upon the express recommendation of a probation officer. At the time of the article no regional magistrates had imposed such sentences.

As an initial step the Interdepartmental Working Group on Community Service was appointed in 1983 under the chairmanship of Regional Court President, Mr W F Krugel, to investigate community service as an alternative sentencing option in South African Criminal Law and to establish community service orders as a meaningful and viable sentencing option.

#### **4.7 THE CRIMINAL PROCEDURE AMENDMENT ACT, NO. 33 OF 1986**

As a consequence of the Working Group's report and recommendations, the Criminal Procedure Act, 1977 (Act 51 of 1977), was amended in 1986 to establish community service sentences as a viable sentencing option.

According to the *White Paper*(1991), latest statistics indicate that since then:

“community service sentences have increased tremendously, but that they are still not being properly utilized. This can be ascribed to a lack of real community involvement and suitable placement bodies and also possibly to the fact that it is still a new sentencing option with which presiding officers are not entirely familiar. In addition hereto the problem exists that with a community service sentence in its present form, there is insufficient control and supervision from a government point of view.”

Another supplementary problem seemed to be the fact that there was not enough state control and supervision over community service sentences which make the judiciary hesitant to impose this type of sentence widely.

The *Criminal Procedure Amendment Act, No. 33 of 1986* was an amending enactment and its 26 sections amended a wide spectrum of aspects relating to criminal proceedings.

The Krugel Working Group (1984:26-33) in paragraph 10.2 to 10.4 of its report, highlighted the fact that in the light of the Republic's overpopulated prisons, there was a need for alternatives to imprisonment and community service could be considered as such an alternative.

Pertaining to the ratio of the *Criminal Procedure Amendment Bill, 1986*, the legislator intended that community service be an alternative to short-term imprisonment. This is clearly spelled out in the memorandum containing the objects of the said Bill. In the *Criminal Procedure Amendment Bill, (1986:23)* the following objective is identified :

“In order to promote the application of such community service as an alternative for short-term imprisonment further provision is made for ...”.

Section 297 (1)(a)(cc) of the *Criminal Procedure Amendment Act No. 33 of 1986* clarified the statutory confusion and gave clear guidelines regarding community service. The most important guidelines are the following:

- a) the server must be older than 15 years of age;
- b) a minimum of 50 hours of service should be performed;
- c) the server and the placement should be informed in writing about their respective duties and obligations;
- d) it is a criminal offence for the server to report for service whilst under the influence of drugs or alcohol;
- e) it is a criminal offence for somebody else to pretend to be a person who has been sentenced to perform community service;
- f) damages resulting from the performance of community service can be claimed from the state.

As a result of developments which followed on the Krugel report regarding community service sentences and in particular, the enactment of the Probation Services Act, 1986 (Act 98 of 1986), the question of further forms of punishment such as correctional supervision and supervision came to the fore. The Minister of Justice and of Correctional Services consequently appointed the Working Group: Probation Services and Supervision under the Chairmanship of Regional Court President, Mr W.F. Krugel. The Terms of reference of this Working Group were to inquire into and report on the viability and feasibility of correctional supervision as a further sentencing option and the availability of correctional supervision services in order to make correctional supervision a viable sentencing option.

In 1990 the Minister of Justice and of Correctional Services and senior officers of the Department of Justice and Correctional Services went overseas in

order to investigate, amongst other things, ways in which correctional supervision is dealt with and addressed in other countries. As a result of the success achieved with correctional supervision as an alternative sentencing option in several countries abroad, as well as the apparent need in this regard identified by the above-mentioned Working Group in South Africa, the Government had decided that it is imperative to establish the sentencing option of correctional supervision as soon as possible in South Africa.

The *White Paper (1991)* postulates that:

“it is the Government's point of view that our courts must have the widest possible discretion in respect of punishment. In addition hereto the Legislature must, as far as sentencing is concerned, ensure that our courts keep abreast of the views of the community as well as of international trends in the penological field. This, however, does not only apply in respect of the post-sentencing stage. Alternative community based measures can likewise be used by the prosecution in the pre-sentencing stage so as to keep offenders who have committed less serious offences out of the courts by subjecting them to programmes of correctional supervision. The same programmes of correctional supervision which are used for offenders in the post-sentencing stage can be utilized in respect of offenders in a pre-sentencing stage.”

In order to achieve the said objects, it is necessary for the Criminal Procedure Act, 1977 and the Prisons Act, 1959, to be amended as well for the legislation of the social welfare authorities relating to this matter to be brought into line with the envisaged proposals.



#### **4.8 CORRECTIONAL SERVICES AND SUPERVISION MATTERS AMENDMENT BILL**

As a result of visits to the United States of America by members of the Prisons Department and after many working sessions, the Prisons Department became a separate state department, called the Department of Correctional Services. It was also entrusted with the execution of sentences other than imprisonment. This was embodied in the Correctional Services and Supervision Matters Amendment Act 1991, the amendment which introduced correctional supervision into the Criminal Procedure Act.

In the Criminal Procedure Act provision is made for the imposition of correctional supervision as an alternative sentencing option in lieu of a prosecution or at sentencing. In particular it provided:

- (a) that an attorney-general or prosecutor has the power before judgment in a criminal case to reconsider the case and to suspend the proceedings so that the accused, with his consent, and on certain conditions, can be referred for correctional supervision;
- (b) that a court can impose correctional supervision and imprisonment as penalties on a person who has been convicted of an offence which can be converted by the Commissioner of Correctional Services into correctional supervision and impose conditions for such penalties;

- (c) for the conversion by a court, on application by the said Commissioner, of imprisonment into correctional supervision or another suitable punishment and vice versa;
- (d) that, in accordance with the Beijing Rules, a correctional supervision officer or correctional officer and the parent or guardian of, a person under the age of 18 years be informed of the latter's arrest;
- (e) that an accused who is released on bail may, subject to certain conditions, be placed under the supervision of a correctional supervision officer or correctional officer;
- (f) that a juvenile offender who is in custody, instead of being released on bail or being kept in custody, may be placed under the supervision of a correctional supervision officer or correctional officer;
- (g) that a person under the age of 18 years who has been convicted of an offence, may, subject to certain conditions, be placed under the supervision of a correctional officer;
- (h) that any person who has been referred to a rehabilitation centre and appears not to be a suitable person for treatment in such a centre, may be referred back to the court for the imposition of a suitable sentence.

Furthermore, the Bill was to amend the Prisons Act, 1959, (Act 8 of 1959) so as to provide that the Department of Correctional Services, as part of the Executive, shall be entrusted with the responsibility of implementing the new sentencing option of correctional supervision.

The Bill also provides that the Minister of Justice and of Correctional Services may make regulations so as to institute pilot projects with the view to launching correctional supervision as an alternative sentencing option instead of instituting a prosecution or at sentencing, as well as to appoint advisory boards so as to advise him at the institution of such pilot projects on specific needs in the community in question, for which such board has been instituted.

The Prisons Act 1959 was renamed the Correctional Services Act and amended to enable the new Department of Correctional Services to execute community based correctional supervision imposed by the courts and to promulgate regulations enabling it to implement pilot projects to which offenders can be subjected to before or after conviction.

#### **4.9 PROBATION SERVICES BILL**

In the light of the establishment of correctional supervision as a sentencing option, it also became necessary to adjust the Probation Services Act, 1986. This Probation Services Act 1986 (Act 98 of 1986) (Administration : House of Assembly) which was only applicable to whites has been scrapped and

replaced by the Probation Services Act to include all population groups and brought into line with the UN Standard Minimum Rules for Non-custodial Measures (the Tokyo rules).

A Probation Services Bill, 1991, was consequently also prepared, wherein provision was made for the extension of probation officers' functions relating to correctional supervision as a sentencing option. In particular it is now provided that a probation officer shall be responsible for the rendering of assistance to a person under correctional supervision with the compliance of such a person's conditions so as to improve his social functioning. Not only has provision been made for a court to place a person under correctional supervision in the care of a probation officer, but also for the Commissioner of Correctional Services to be able to make use of the services of a probation officer in certain circumstances.

#### **4.10 STRATEGY AND POLICY OF THE DEPARTMENT OF CORRECTIONAL SERVICES**

Section 84 (1) is the most important provision as far as the content of correctional supervision is concerned. It reads as follows *Terblanche* (1999:331):

**"84 Treatment of probationers-** (1) Every probationer shall be subject to such monitoring, community service, house arrest, placement in employment, performance of service, payment of compensation to the victim and rehabilitation or other programmes as may be determined by the court, the Commissioner or a parole board or prescribed by or under this

Act, and to any such other form of treatment, control or supervision, including supervision by a probation officer, as the Commissioner or the parole board may determine after consultation with the social welfare authority concerned in order to realize the objects of correctional supervision."

Arising from the change of direction as it is represented in the mission and strategies of the Department of Correctional Services certain recommendations were submitted to the Government on 28 November 1990.

After discussions and consultation, the Government approved the broadening of the mission and support strategies and it was decided that the former South African Prisons Service be reinstated as a fully-fledged department to be renamed the Department of Correctional Services. It was also decided that in order to operationalize the mission and strategies of the Department the following matters should be investigated and finalized without delay:

***a) The reduction of the number of unsentenced prisoners.***

An intensive investigation into measures to restrict the number of unsentenced prisoners who are in prison during the period of the investigation is being implemented and is being conducted in consultation with other interested departments.

***b) The reduction of the number of sentenced prisoners by the introduction of a system of Correctional Supervision.***

The system of correctional supervision as part of the concept of community correction can be successfully conducted in the South African context if the following requirements are complied with:

- Control over the system must be centralized and departmental liability for the operation of the system must be established.
- Judicial officers must realize and make use of the advantages and value of such a system.
- The community must have confidence in the system and support it actively.
- The system must be effectively controlled and managed.
- It is also important that the total spectrum of welfare specialist services continue to exist.
- It is imperative that existing welfare departments continue to fulfill and extend their indispensable roles in this field and that private welfare organizations and relevant institutions actively support the running of such a system.
- Appropriate legislation should be drafted and/or adapted to make the operation of such a system possible.

Scientific projections concerning the effect of correctional supervision is difficult, but comparison with other countries revealed that in:

a) Georgia (USA)

- in 1988 there was a daily average prison population of 18 565, in comparison with a probationary population of 108 147; and

- the per capita costs per annum for those in detention were 13 450 dollars (capital outlay included) in comparison with 1 713 dollars for those under non-detention sentences (consequently 8 times cheaper ) ,and in

b) Victoria (Australia)

- the per capita costs per year for those in detention were 40 000 dollars in comparison with 1 800 dollars to provide supervisory and support facilities for those under non-detention sentences.

The application of correctional supervision as a sentencing option together with the restriction on the number of unsentenced prisoners will restrict the anticipated growth pattern in the prison population considerably. This should have positive results in so far as the growth of future budgets is concerned and will also alleviate the pressure on the demand for prison accommodation in the long term.

***c) Phasing out of the Central Release Board and the achievement of greater community involvement in the functions of Institutional Committees.***

The Central Release Board was instituted by section 5 of the Prisons Act 1959 with the basic function to make recommendations on –

- i) the release of prisoners either on probation or on parole or upon the expiration of sentence,

- ii) the period for which and the conditions on which those prisoners are released on probation or parole; and
- iii) the remission of parts of sentences imposed.

The *White Paper* (1991:) states that:

“Private persons who serve on the Central Release Board in order to represent the interests of the community have no contact with any prisoner and merely work with documents. Community involvement can best be achieved by appointing members of the community as the need arises on Institutional Committees of Prisons in their communities. The functions of the Central Release Board adjusted along these lines can then be performed more effectively on a decentralized basis by restructured Institutional Committees.”

***d) Establishment and management of the system of Strategic Management Units.***

The following strategic management units have been identified after an analysis of the complete spectrum of the Department of Correctional Services' activities;

- i) Detention and care of prisoners
- ii) Commercial Services
- iii) Management Services.

It is necessary to make structural changes at headquarter level as well as on decentralized levels (Regions/Commands/Prisons), before this management system can be implemented.



**e) Restructuring of the Department of Correctional Services.**

The result of strategic planning often results in restructuring and in this case makes provision for-

- a) economization;
- b) decentralization management according to business principles;
- c) implementation of the system of correctional supervision; and
- d) the extension of the most economical penological system.

In order to meet the demands of the extended mission and support strategies, the Department of Correctional Services was established as a fully-fledged Government department with effect from 21 December 1990 and the restructuring of the Department in its entirety is at present in progress.

The Criminal Matters Amendment Act 116 of 1993 adds section 308 A to the Criminal Procedure Act 51 of 1977, to provide that a sentence of correctional supervision is not suspended pending review, unless bail is granted.

The Correctional Services and Supervision Matters Amendment Act 122 of 1993 provides unequivocally that punishment whether it be rehabilitative or highly punitive is not necessarily attainable by means of imprisonment. *In S v R* 1993 (1) SACR 209(A) emphasis fell on rehabilitation rather than retribution. The court said of correctional supervision to section 276(1)(h) of The Criminal Procedure Act 51 of 1977:

“this is a concept representing a shift in emphasis from imprisonment to reform.”

#### **4.11 A NEW SENTENCING FRAMEWORK**

According to the South African Law Commissions new sentencing framework, 31 May 2000, the South African sentencing system faces various problems. There is a perception that like cases are not being treated alike; that sentencers do not give enough weight to certain serious offences; that imaginative South African restorative alternatives are not being provided for offenders who are being sent to prison for less serious offences; that sufficient attention is not being paid to the concerns of victims of crime; and that, largely because of unmanageable overcrowding, sentenced prisoners are being released too readily.

##### **4.11.1 The court's discretion in sentencing**

In addition to the modes of control by appellate courts, these courts also exercise control by highlighting certain principles which have to be taken into account when deciding on an appropriate sentence. In the case of imprisonment, for example, the following principles have been developed by the courts:

- the sentence must be authorized through statute or common law;
- it must be unaffected by misdirection;
- it must not be imposed lightly or without serious reflection; this is especially true where all requirements of punishment, as well as the aims thereof, can be satisfied by another form of punishment;

- for the first offender, imprisonment is usually not desirable and alternatives should be considered;
- youth is a factor against imprisonment;
- first offender ship or youth does not as a rule mean that imprisonment should not be imposed; and
- high age is usually a factor against imprisonment

Both the courts and the legislature have been criticised for the manner in which they control the sentencing discretion.

#### **4.12 PROBLEMS IN RESPECT OF THE SENTENCING PROCESS IN SOUTH AFRICA**

The following are some points of criticism as summarized by the South African Law Commission 31 May 2000

- The existence of a sentencing discretion is the source of inconsistency and disparity in sentencing practices in South Africa.
- The legislative framework for control of the sentencing discretion is too broad and it enhances inconsistency and disparity in sentencing practices.
- The principles developed by the courts to limit or control the sentencing discretion are ineffective.
- There is great uncertainty as to which sentencing aim or theory should be pursued. In some cases it is suggested that deterrence is the most

important consideration while others emphasise retribution or rehabilitation.

- There is a clear absence of a systematic approach to sentencing.
- Attempts by legislature to control the sentencing discretion by the introduction of mandatory minimum sentences elicited strong criticism. In the Viljoen Commission's report the Commission expressed its opposition to interference with the judicial discretion in the form of prescribing minimum sentences and sentences for corrective training (two to four years), prevention of crime (five to eight years) and the indeterminate sentence (nine to 15 years). It recommended that minimum sentences be abolished.
- There is a clear absence of a structured policy and sentencing guidelines.
- Most sentencers appear to approach the question of sentencing in an intuitive and unscientific manner.
- Release of convicted prisoners by the Parole Board before expiration of their sentences is severely criticized. It is regarded as interference by the Executive in the functions of the courts.
- Academics have highlighted a number of factors which, in the past, were regarded as justification for discrimination in sentencing, for example race, gender, class, economic position and political background.

#### 4.13 RESUME

If one looks at the discretion that sentencing is moving towards, it would appear to be more in the direction of rehabilitation and reform. This has led to the introduction of correctional supervision, the abolition of the death sentence in *S v Makwanyane & another* 1995(3)SA 391 (CC) and the sentiments expressed in *S v Williams & another* 1995(3) SA 635 (CC) which found corporal punishment as a form of punishment to be unconstitutional. While the four recognized ends of punishment remain prevention, retribution, deterrence and rehabilitation, penal systems have evolved towards a more enlightened and humane implementation of punishment. This has resulted in a shift of emphasis from retribution to rehabilitation.

The development and introduction of new sentencing options such as correctional supervision are not viewed as weakness, but rather as an enlightened and humane application of appropriate and effective sentencing. Punishment is excessive if it is unnecessary, and it is unnecessary if there is a significantly less severe punishment adequate to achieve the aims of punishment.

# **CHAPTER FIVE**

## **COMMUNITY SERVICE AS A POSITIVE CONDITION TO POSTPONED AND SUSPENDED SENTENCES**

### **5.1 INTRODUCTION**

In this chapter attention is focused upon the community-orientated sphere of punishment, namely, the postponed and suspended sentence to which community service may be imposed as a condition. The conditions provided for under Section 297 of the Criminal Procedure Act, No. 51 of 1977 are examined and community service, which is but one of a "package" of such conditions, is reviewed in this perspective.

### **5.2 THE PENOLOGICAL IMPORTANCE OF SECTION 297**

For many years it has been a common practice in South Africa to suspend sentences. This practice is currently statutorily provided for in section 297 of the Criminal Procedure Act. Since the making of a community service order is inexorably bound to the mechanism of Section 297 and manifests itself as part of a "package deal" thereto, it is necessary to examine that Section as a whole.

#### **5.2.1 The Inherent Value of Community-Orientated Punishment Forms**

*Terblanche* (1999:413) states that the most important part of section 297 is paragraph (1) (b) which essentially reads as follows:

"Where a court convicts a person of any offence, other than an offence in respect of which any law prescribes a minimum punishment, the court may in its discretion pass sentence but order the operation of the whole or any part thereof to be suspended for a period not exceeding five years on any condition referred to in paragraph(a) (i) which the court may specify in the order."

*Graser* (1975:65) maintains that the use of alternatives to imprisonment provides a far greater prospect for the permanent social adjustment of the offender in the community than incarceration does, and consequently also for the prevention of further crime and recidivism. At present the role of the courts in crime prevention is chiefly geared towards the removal of the offender from society for a specified period or the imposition of fines. In practice, prevention is only temporary in duration and the rising crime rate indicates not very effective. A higher success rate could be achieved by tailoring the sentence to the needs of the individual offender.

The advantages of non-custodial punishment forms are seen as being *inter alia*:

- i) A reduction in the numbers of short-term prisoners and the avoidance of the negative influences of imprisonment *Van Gass*, (1980:11); *Du Toit*, (1981:379); *Viljoen Commission*, (1976:108). These aspects are well-known and call for no further elucidation.
- ii) Offenders may continue to make their economic contribution as opposed to becoming a financial burden upon the State *Van Gass*, (1980:11); *Du Toit*, (1981:379). In the U.S.A. it costs approximately between \$25 000 to \$28 000 to construct one prison cell. *Penn* (2001:1) says that recent

estimates are that it costs \$25 000 per year to imprison one person in a maximum-security prison in the United States of America.

According to *Grazer* (1979:202) many countries are seeking more imaginative and constructive alternatives to the traditional methods of criminal justice with the emphasis being placed on community based methods.

The Viljoen Commission (1976:108) pointed out the importance of Section 352 of the Criminal Procedure Act, 1955 within the punishment sphere since it made provision for a number of alternatives to imprisonment and provided the sentencing officer an opportunity "to exercise his inventiveness and ingenuity in devising alternative sentences."

### **5.3 THE INHERENT VALUE OF POSTPONED AND SUSPENDED SENTENCES**

#### **5.3.1 Provision for Postponement and Suspended Sentences**

Pursuant to the provision of Section 297 of the 1977 Act a magistrate may postpone the passing of sentence and release the offender on one or more conditions referred to herein, subsequently order the offender to appear before court and ascertain whether the order has been complied with; if so discharge the accused and if not either discharge or punish the accused depending on the merits of the case.



Section 297 prescribes for the conditional or unconditional postponement or suspension of sentence where a court convicts a person of any offence, other than one in which any law prescribes a minimum punishment. The court may, at its discretion, postpone the passing of sentence for a period not exceeding five years and release the person convicted on one or more conditions or pass sentence but suspend it on certain conditions, such as –

- compensation
- the rendering to the person aggrieved of some specific benefit or service in lieu of compensation for damage or pecuniary loss;
- the rendering of some service for the benefit of the community.

If the conditions of suspension or postponement are not fulfilled, the offender may be arrested and made to serve the sentence. The court may also grant an order, further suspending the sentence, if the offender proves that circumstances beyond his control or any other good and sufficient reason prevented him from complying with the conditions of suspension.

It is indicated by *Labuschagne* (1978:247), that both suspended and postponed sentences are a form of punishment, but whereas in the former case the content of the "additional" punishment is already determined (the operation, of which is conditionally suspended), in the latter case the "additional" punishment is only determined if necessary in the future. In *S v Bani*, 1985 (2) SA 420 (ECD), Jennett, A.J. at 6222 B-D underlined the distinction between the two, when he indicated:

"Usually, of course, sentence is passed shortly after conviction but in the case, of a postponement of sentence an accused may be sentenced at any time up to five years after the postponement of sentence ... the effect thereof differs from a suspension of the sentence to the extent that subsequent conduct does not determine whether the sentence should be brought into operation but rather determines whether a sentence should be imposed at all."

*Ferreira* (1979:662) notes that the postponement of sentence as provided for by 297 (1) a (i) finds little application in practice since the suspension of a sentence in terms of 297 (1) (b) is usually more effective.

In *S v M* 1996 (2) SACR 127(T) in considering the sentence, the court rejected a submission by the state that correctional supervision, the suspension of a sentence, placing an accused under the supervision of a probation officer, etc, are not true punishments. The court held that all these sentencing options are forms of punishment in every sense of the word.

### **5.3.2 Nature and purpose of postponement or suspension of sentence**

One of the earliest reported judgements on the question of the purpose or effect of suspended sentences, is that by Hathorn JP in *Persad v R*:

"Ordinarily[a] suspended sentence has two beneficial effects: it prevents the offender from going to gaol ... The second effect of a suspended sentence is that there is a very strong deterrent effect."

The legislature had three basic intentions with this section, namely the mitigation of sentence, prevention and the preservation of positive characteristics. According to Section 297(b) of the Criminal Procedure Act, the first offender can

usually be prevented from repeating his criminal conduct because he has a sentence hanging over him.

In *S v Ghoor*, 1969 (2) S A 555 (A) 559 D-H, indicated that:

“others are also deterred by a suspended sentence, since the accused serves as an example to others when he refrains from committing another offence because of the suspended sentence hanging over him.”

In terms of *S v Harvey* 1977(2) SA 185 (O) 188 F-H, the juvenile can often be effectively punished by making use of the positive aspects of a postponed or suspended sentence. The preservation of family ties and positive aspects related thereto is also possible through this.

### **5.3.3 Are Postponed and Suspended Sentences Proper or Adequate Punishment?**

A relevant question is whether postponed and suspended sentences can in fact be considered to be a punishment. This is an important consideration, for if these mechanisms are not regarded as proper punishment by those involved in the administration of criminal justice and/or the public, this belief could militate against the further implementation thereof and more especially against community service orders.

*Ferreira* (1967:558) believes that two main points should be considered when there is talk of a suspended sentence:

- “whether it is in the interest of the offender that the sentence should be suspended;
- whether it is in the interest of the community in which the offender lives that the sentence should be suspended.”

According to *Ferreira* (1967:558) conditions connected with a suspended sentence may be divided into three categories namely:

- conditions calculated to compensate the victim for his injury;
- conditions intended to reform the offender; and
- other conditions such as those mentioned above.

#### **5.3.3.1 Viewpoint of the Courts**

The dispute that has to be made clear is whether postponed and suspended sentences are punishment at all. That the reply is in the affirmative, for example, appears clear from the indication of our courts that even a discharge with a caution and reprimand, provided for in Section 297 (1) (C) of the Criminal Procedure Act, No. 51 of 1977, is punishment.

There is an indication from the Supreme Court that the seriousness of an offence may be adequately reflected by the utilization of postponed and suspended sentences. In *S v Fitswana*, in paragraph 3.5.3.2, the judge at B-D dismissed the viewpoint expressed by the magistrate thus:

"I do however join issue with him on his proposition that there is no justification for suspending sentences as the immediate effect of

suspension, means that the offender is not punished at all. Divergent views have from time to time been expressed by courts as to the effect of suspended sentences but the view expressed by the magistrate is not the generally accepted one ... Suspended sentences in proper cases have a salutary effect on a wrong doer. This is recognised by courts imposing such sentences, and is also recognised by the legislative who have provided for it in Section 352 of the Criminal Code. The case of *R v Karg*, 1961 (1) SA 231 (A), states *inter alia*, that "it is not wrong that the natural indignation of interested persons and the community at large should receive some recognition in the sentences that courts impose." It does not say that such recognition requires prison sentences, it deals with the severity of sentences - not the type of sentence."

The Department of Social Affairs, United Nations, (United Nations, 1951:5)

holds the following view on the suspension of a sentence:

"This may take the form of the suspension of criminal proceedings, of formal conviction and sentence, of the imposition of sentence, or of the execution of a sentence already imposed. The main point here is that probation is not a "let off." The original offence remains punishable throughout the period of probation, and the offender is actually liable to be punished in case of a violation of the conditions of his probation order, or in case of a new offence. The actual application of punishment is suspended subject to such conditions as are considered most likely to promote the offender's rehabilitation."

*Harcourt in Avery* (1987:149), agrees and indicates that the postponement and suspension of sentence may be a proper and desirable course to adopt, even in a case of the most serious crimes, subject naturally to the due consideration of all the relevant facts of the particular case.

It is the Government's point of view that our courts must have the widest possible discretion in respect of punishment. In addition hereto the legislature

must, as far as sentencing is concerned, ensure that our courts keep abreast of the views of the community as well as of international trends in the penological field.

*Terblanche* (1999:447) states: In the case of non-compliance with suspensive conditions, the court will have the following options:

- “to put the suspended sentence into operation;
- to further suspend the sentence on the same or other conditions;
- to do nothing(make no order).”

#### **5.3.3.2 Public Opinion**

To a certain extent cognisance must be taken of the fact that the imposition of punishment must keep abreast of the views of the community. It is not so important to the community that harsh penalties are imposed, but rather that the punishment is effective and that justice prevails. Punishment must also be fair to the offender as well as being in the interests of the community.

A former Secretary of Justice, *Oberholzer* in *Avery* (1987:155) indicated that although punishment cannot be tailored to satisfy the public, the courts should nevertheless be aware of public sentiment:

“It cannot be gain such that a citizen who has suffered innocently at the hands of a transgressor looks to the court for redress and if the offender is not sufficiently punished such a person goes away with a feeling of injustice having been done to him. But it is not only the particular individual who looks to the court for redress but the whole community affected or likely to be affected by the type

of transgression ... It follows then that if the cooperation of the public towards law and order is to be retained the courts must act in such a way that those who require to be protected are in fact protected and feel a sense of security while those who are punished should also have no cause for complaint, that is, the treatment meted out to them was unduly harsh. Compare also the public pressure for heavier sentences in traffic cases. The courts must, therefore, as it were, always have their fingers on the pulse of the crime situation and the public feelings about it."

Especially in the case of community service, which is so reliant upon cooperation from the community for successful implementation, it is important that punishment should be perceived to be adequate.

#### **5.4 THE CONDITIONS OF SUSPENSION**

*Terblanche* (1999:425): states with regards to the requirements which conditions of suspension should meet is:

"[Two] principles at least should be observed in the imposition of the conditions. The first is that the condition imposed should bear at least some relationship to the circumstances of the crime which is being punished by the imposition of a suspended sentence. It need not be closely related but should be related to it in some degree at least, even though slightly related, and not divorced from it or remote from it. The second is that the condition be stated with such precision that the convicted person may understand the ambit of the condition."

The Criminal Procedure Act, No. 51 of 1977 provides for the conditions to a postponed or suspended sentence. The legislature wanted to achieve the main penal objectives with the conditions of suspension it made possible:

(a) Compensation to the victim of the offence; restoration of the status quo.

In *S v Charlie* 1976 (2) S A 596(A) it is seen that compensation is an important part of the criminal process; where it is possible to compensate the victim for the damages sustained through the criminal conduct of another, it is desirable that it should be done. It should be borne in mind that compensation usually follows a decision not to send the accused to prison and that the conditions should thus be such that the accused would not in any event serve a prison sentence.

(b) Rendering a service to the aggrieved person.

## **5.5 REFERENCE TO PENAL MOTIVES**

As it is stated in *R v Swanepoel* 1945 AD 444 and later confirmed in, amongst others, *S v Rabie* 1975 (4) SA 855 (A), the most important objects of punishment are deterrence, prevention, reformation and retribution. Incidental to these four objects of punishment is the so-called "triad" set out in *S v Zinn* 1969 (2) 537 (A) namely that the punishment must fit the offender; it must fit the crime; and it must be fair to the offender and in the interests of society.

In so far as Section 297 relates to the postponement of sentences (subsection (2)) if the offender has successfully complied with the conditions and is discharged as if he was acquitted, *Steytler* (1984:273) contends that this may assist in his reintegration into society. For example, it promotes a sounder self-image in the offender and society is more willing to accept a person without a criminal record.



It is argued by *Labuschagne* (1978:247) that, the purpose of a postponed sentence is to activate the ingrained behaviour - regulating mechanisms in an offender so as to avoid further violation of the norms of society.

With reference to suspended sentences the Viljoen Commission (1976:108) generally noted that, since a threat of imprisonment lurks in the background, a deterrent effect is achieved and whilst underlining the reprehensible character of the offence (retributive implications) the impact of the sanction may be reduced.

In *R v Hendricks* 1915 C.P.D.821, J.P. at 832/3 shed light upon the underlying rationale of the first statutory provision in South Africa regulating postponed and suspended sentences, when he remarked:

"The object of the legislature as disclosed on a study of the Criminal Justice Administration Act, No. 40 of 1914 appears to me to have been to introduce some reform administration of convicted prisoners, to save them if possible from the dangers of gaol environment, and to give them an opportunity of expiating an offence by means other than those of imprisonment and hard labour, namely, by suspending the operation of the sentence on conditions."

## **5.6 POSITIVE CONDITIONS**

Over the decades, it has been found in the penological history of the implementation of positive condition-type to postponed and suspended sentences, community service played an important role. In fact it constituted the first such type of condition to be imposed.

The Viljoen Commission (1976:108) pointed out the value of the suspended sentence which provides the means through its conditions for positive considerations. *Van den Heever* (1980:25) maintains that Section 297 provides for conditions which are positive as opposed to the negative "don't-do it-again" model.

In *S v Jones* 1976 (1) SA 239 (T), the magistrate had suspended a sentence *inter alia* subject to an essay type of condition. The remarks of the judge in *Jones* regarding the ineffectuality of suspended sentences without a positive thrust are relevant here.

At 239 G-H, the judge remarked:

"All of us, no doubt, experience feelings of frustration when we examine criminal records of persons prior to sentencing them and we notice how previous suspended sentences proved to be ineffectual. The well meant homilies, entreaties and warnings which we deliver when suspending periods of imprisonment frequently appear to have been utterly pointless. Small wonder then that a presiding magistrate should attempt to devise something which he believes to be more constructive or effective."

Positive conditions will be discussed as part of the discussion of the various conditions as discussed below:

- 1) With a postponed and suspended sentence an opportunity for positive interaction is provided with a probation officer, outside agencies, etc.
- 2) The offender's treatment needs may be specifically catered for.

- 3) Family ties may be strengthened. Reconstruction services may be undertaken where necessary. If family circumstances were a criminogenic factor, then problems may be addressed at their source.
- 4) The opportunity is provided for the offender to achieve a better integrated personality generally by undertaking something positive.
- 5) The offender is encouraged to retain employment which, for example, may be a probation condition. The economic burden is reversed to contribution.
- 6) Offenders are assisted to utilize their material resources in a socially acceptable manner, for example, compensation (finances), community service (skills).
- 7) Certain categories of offenders, for example, with psychosexual disorders may receive treatment to overcome their problem.
- 8) The maximum involvement of the offender is encouraged, thereby affording him the opportunity to accept responsibility for himself and others an important step towards rehabilitation.
- 9) From the outset of his sentence the offender is influenced towards normative adherence by being in the community.

- 10) Certain positive conditions more than others enable community involvement with punishment, thereby involving it in co-partnership.

## 5.7 NEGATIVE CONDITIONS

In *S v Malgas* 1979 3 SA 178 (A) 181 F the court decided that the ordinary (negative) conditions stand in relation to "good conduct", and that they should be worded as follows:

"Sentenced to [sentence] of which [the suspended part] is suspended for [x] years on condition that the accused is not convicted of [the crime or crimes], committed during the period of suspension."

The negative consequences stemming from imprisonment are merely avoided through the non imposition of a custodial sentence. Due to the fact that the offender remains in the community, the offender continues the lifestyle which he pursued prior to his committing the offence. There is a threat of punishment hanging over his head. Much reliance is placed upon fear of imprisonment. The offender is expected to utilize the opportunity for self-rehabilitation afforded him. Over and above this there is no intervention to address the criminogenic factors in his make-up or environment, for example, family problems. He is encouraged to be passive through the imperative-"don't".

From the above it is apparent that conditions of a positive nature overcome the dysfunctional aspects of imprisonment. It also makes use of the available

resources, including offender participation, to the maximum benefit of the offender and society.

## **5.8 POSTPONED AND SUSPENDED SENTENCES VIS-À-VIS IMPRISONMENT**

The disruptive effect of imprisonment to the offender and the State, seek to be avoided by all non-custodial forms of punishment. There are various consequences to custodial sentences:

- a) contamination and exposure to anti-social elements,
- b) lack of treatment facilities for specific needs,
- c) disruption of family life/family ties are broken or weakened,
- d) damaged self image through stigma/disgrace,
- e) loss of employment and economic burden,
- f) loss of goods and services,
- g) loss of heterosexual relationships,
- h) loss of autonomy, especially responsibility,

- i) reintegration problems,
- j) the offender is isolated from the community which is uninvolved in with his lot.

## **5.9 OTHER CONSIDERATIONS**

### **5.9.1 Flexibility**

The imposition of a fine or imprisonment, Section 297 of the Criminal Procedure Act, No. 51 of 1977 provides for the court to become further involved and intervene in the sentencing process in the following instances:

#### **5.9.1.1 Changed Circumstances**

There is provision in Section 297 *inter alia* for the further postponement or suspension of sentence if the court is satisfied that through circumstances beyond his control the accused has been unable to comply with any relevant condition. Section 297(7) of the Criminal Procedure Act, No 56 of 1955, *Butterworths*, (Issue 27:162 ), provides as follows:

“(7) A court which has -

- (a) postponed the passing of sentence under paragraph (a) (i) of subsection (1);
- (b) suspend the operation of a sentence under subsection (1) (b) or (4);...

whether differently constituted or not, or any court of equal or superior jurisdiction may, if satisfied that the person concerned has through circumstances beyond his control been unable to comply with any relevant condition, or for any other good and sufficient reason, further postpone the passing of sentence or further suspend the operation of a sentence subject to any existing condition or such further conditions as could have been imposed at the time of such postponement or suspension.”

#### **5.9.1.2 Any other Sufficient Reasons**

Section 279 (8) provides *inter alia* for the amendment or substitution of conditions on good cause shown. Before its amendment by the Criminal Procedure Act, No 33 of 1986, subsection 297(8) provided as follows :

“(8) A court which has -

- (a) postponed the passing of sentence under paragraph (a) (i) of subsection (1) or
- (b) suspend the operation of a sentence under subsection (1) (b) or under subsection (4),

on condition that the person concerned render some service on for the benefit of the community or that he submit himself to instruction or treatment or to the supervision or control of a probation officer or that he attend or reside at a specific centre for a specified purpose, may, whether or not the court is constituted differently than it was at the time of such postponement or suspension on good cause shown amend any such condition or substitute on any other component condition for such condition.”

After its amendment, the said section 297 (8) provides *inter alia* that, with relevance to a condition ordering the performance of community service, at any time during the period of postponement or suspension, the court may on good cause shown:

- amend the condition; or
- substitute any other component condition for the said condition; or
- cancel the order of postponement and impose a competent sentence; or
- cancel the order of suspension and put the suspended sentence into operation.

According to *Butterworths* (Issue 11:1157) subsection 297(9) provides as follows:

“(9) (a) If any condition imposed under this section is not complied with, the person concerned may upon the order of any court be arrested or detained and, where the condition in question-

- (i) was imposed under paragraph (a) (i) of subsection (1), be brought before the court which postponed the passing of sentence or before any court of equal or superior jurisdiction; or
- (ii) was imposed under subsection (1)(b), (4) be brought before the court which suspended the operation of the sentence or any court of equal or superior jurisdiction,

and such court, whether or not it is , in the case of a court other than a court of equal or superior jurisdiction, constituted differently than it was at the time of such postponement or suspension, may then, in the case of subparagraph (i), impose any competent sentence, which may ,where the person concerned is under the age of twenty-one years, include an order under the provisions of section 290, or, in the case of subparagraph (ii), put into operation the sentence which was suspended.”

The advantages of these measures are seen as contributing towards sound individualization in sentencing.



### **5.9.2 Diversity**

Since one or more of the conditions referred to in Section 297 (1) (a) (i) may be imposed, for example, restitution may be coupled to treatment and many combinations are possible to achieve diverse needs.

### **5.10 LIMITATIONS**

An obvious limitation presents itself in the wording of section 297(1) viz: "other than an offence in respect of which any law prescribes a minimum punishment." The impact of this provision is however reduced to some extent by subsection (4) which permits a material part (according to the authorities) of a sentence to be suspended. When one considers community service specifically as opposed to the position in Britain, for example, where such a sentence is purposefully designed to be a substitute for imprisonment, its applicability in South Africa appears to be limited to the so-called minor offender.

### **5.11 RESUME**

Sanctions that are implemented in the community have for some years been key elements in South African sentencing practice. Initially, such sentences were imposed indirectly, primarily as conditions of suspension or postponement of sentences of imprisonment. Postponed and suspended sentences not only are intended to overcome the difficulties associated with imprisonment, but in conformity with punishment generally, also to serve the interests of both

offender and society. Positive conditions specifically (of which community service is one), are subject to the basic principles of just punishment and to the objectives of punishment. Section 297 makes provision for a number of quite different options which may be taken by sentencing courts, whether before, during or after the actual sentencing of the offender.

# **CHAPTER SIX**

## **FACTORS THAT CONTRIBUTE TO THE IMPLEMENTATION OF COMMUNITY SERVICE**

### **6.1 INTRODUCTION**

Community based alternatives to imprisonment, which have become widespread in many countries in recent years, represent one of the most important developments in sentencing in the last few decades. Their development reflects the prisons system's failure to rehabilitate offenders, the costs associated with building and maintaining prisons and changing community attitudes to sanctions. In most countries the criminal justice system is overstretched. The police, courts and prisons simply cannot cope. As the numbers in prison increase, the case backlogs extend further, the police have less time to detect and investigate crime. This both impairs the quality of justice and prejudices the ordinary person's access to justice.

*Dissel* (1995:12) states that:

"For some time South Africa has had a number of non-custodial sentence options available to courts, such as fines and community service orders. The most important of these sentences, Correctional Supervision, was only introduced in 1991. Yet, there is still a large prison population. There are many more prisoners than South Africa can afford, or can accommodate. Many prisoners have been convicted of relatively minor offences and are not seriously a danger to society. Their incarceration in prison is an added cost to society. Imprisonment

often has bad effects on prisoners, and when they are released they are more likely to recommit crimes than they were when they were imprisoned. For these reasons, it is important for South Africa to try to keep as many people as possible out of prison, and to develop more non-custodial sentence options”

## **6.2 THE NEED FOR AN ORGANISED STRUCTURE**

The Viljoen Commission (1976:120) ascribed the hesitancy of judicial officers to impose this type of sentence to be "due, probably, to the difficulties occasioned by considerations of practicability" *Graser* (1976:138) pointed out that the voluntary co-operation of the offender alone (whilst of vital importance) is insufficient to guarantee the success of a community service order. Various authorities have emphasized the necessity of certain factors to the success of such a service, the absence whereof places its viability in jeopardy *Van der Heever* (1980:25) was of the opinion that the major barrier to utilizing certain of the provisions of Section 297 appeared to be the impossibility of not only pronouncing sentence but to attending to its execution as well.

*Van Gass* (1980:11) in recognising the lack of an organized structure of community service in South Africa, constituted, amongst others, the following requirements for the implementation of community service:

- The creation of facilities for community service.
- The proper selection of offenders.
- Adequate control and supervision of offenders.
- The existence of training and educational facilities for offenders.

The intervention of the legislation during 1986 signaled the commencement of a process to place the implementation of community service on a sound footing. There were four major recommendations made by the Krugel Working Group (1984:6) in paragraph 60 of its report, namely:

- that the public be motivated and educated to co-operate;
- that an infrastructure be created;
- that a manual for functionaries be compiled; and
- that amending legislation be introduced.

### **6.3 COMMUNITY SERVICE AND SELECTION**

#### **6.3.1 The Necessity of Selection**

One of the cornerstones of the community service system is the proper selection of candidates. *Van Gass* (1980:11) contends that if offenders are not screened on a selective basis more problems may arise through the making of an order than its imposition intended to solve - proper selection is hence vital. The *Viljoen Commission* (1976:120) in paragraph 5.1.6.9.5 of its report, was quite clear on this issue where it indicated that one of the main difficulties inherent in community service foreseen by many sentencing officers, was the need to ensure the acceptability of the offender to all those with whom he would come into contact. The *Viljoen Commission* continued:

"Old age home inmates may not like the offender because they fear him or are prejudiced against him ... It must be clear that the convicted person's own disposition is right and that he would make an honest and serious effort to implement the task entrusted to him. Otherwise he can do a lot of harm. He may, for instance, if he is assigned to a children's home, exert a bad influence on the children. Selection for this type of sentence is, therefore, an important consideration."

### **6.3.2 Offender Selection**

As indicated, proper selection is one of the cornerstones of the community service system. According to *Howes* (1984:133), the indiscriminate placing of an offender may:

- cause a reluctance to accept offenders for placement;
- discredit the system in the eyes of the judiciary; and
- militate against the interest of society in the sentencing process.

According to section 297 of the Criminal Procedure Act No 33 of 1986, the court may at its discretion –

a) postpone for a period not exceeding five years the passing of sentence and release the person concerned-

i) on one or more conditions, whether as to-

- compensation;

- the rendering to the person aggrieved of some specific benefit or service in lieu of compensation for damage or pecuniary loss;
- the performance without remuneration and outside the prison of some service for the benefit of the community under the supervision or control of an organization or institution which, or person who, in the opinion of the court, promotes the interests of the community;
- submission to correctional supervision.

A condition relating to the performance of community service shall only be imposed –

- i) if the person concerned is 15 years of age or older; and
- ii) for the performance of that service for a period of not less than 50 hours.

Section 297 of the Criminal Procedure Act No 33 of 1986 states:

“A court which under this section has imposed a condition according to which the person concerned is required to perform community service, to undergo instruction or treatment or to attend or reside at a specified centre for a specified purpose, shall cause to be served upon the person concerned a notice in writing directing him to report on a date and time specified in the notice or as soon as practicable thereafter, to the person specified in the notice, whether within or outside the jurisdiction of the court, in order to perform that community service, to undergo that instruction or treatment or to attend that centre or to reside thereat as the case may be.”

### **6.3.3 Selection of Candidate**

Selection may conveniently be dealt with under two headings:

#### **6.3.3.1 Selection of Offenders in England**

The following selection criteria *inter alia* have been laid down in certain magisterial districts.

##### **a) Suitability**

- a) Permanent employment and fixed assets.
- b) Socially isolated who have had no opportunity to make a positive contribution to society.
- c) Accused between 17 and 30 years.

##### **b) Non-suitability**

- a) Deviants, disturbed and aggressive offenders.
- b) Those of limited intelligence who lack self-control.
- c) Those who show a need for intensive casework.

Attention is focused on the requirement of a probation officer's report on the offender's suitability.



### 6.3.3.2 Selection in South Africa

*Howes* (1984:133) states that although it is not mandatory for a pre-sentence report to be furnished, such a report will usually be called for to assist in the screening of offenders.

According to *Howes* (1984:134/5), research indicates that the following offenders *inter alia* would be unsuitable for community service, namely, those who:

- i) have no fixed address or roots in the community;
  - ii) are addicted to drugs or alcohol;
  - iii) have committed offences involving violence or sexual deviance;
  - iv) lack the motivation to successfully execute the order;
  - v) suffer from mental disorder;
  - vi) suffer a physical handicap;
  - vii) are in need of long-term casework;
  - viii) have manifested unreliability during a previous probationary placing;
- and
- ix) have commitments which render it impossible for the offender to undertake community service within twelve months.

*Van Zyl Smit* (1983:217), contends that these requirements in the main correspond to those applied in the community service project in Cape Town.

According to the Correctional Services Act 111 of 1998:

- 1) Where a condition of community service is set as part of community corrections, it must stipulate the number of hours which the person is required to serve, which shall not be less than 16 hours per month, unless the court otherwise directed.
  
- 2) (a) The court, Correctional Supervision and Parole Board or other body which has the authority to impose community service may specify where such community service is done.
  
- (b) Such an order may not be changed without the matter being referred back to the court, Board or other body which set the condition unless it provides that the order may be changed by a Supervision Committee.
  
- (c) If such court, Board or other body does not specify where such community service should be performed, the Supervision Committee must specify the place.

#### **6.4 LIABILITY FOR PATRIMONIAL LOSS ARISING FROM THE PERFORMANCE OF COMMUNITY SERVICE**

Section 297 A of the Criminal Procedure Act of 1986 states that:

"-if patrimonial loss may be recovered from an accused on the ground of a delict committed by him in the performance of community service in

terms of this section, that loss may, subject to subsection (3), be recovered from the State.

-if any person as a result of the performance of community service in terms of the said section, has suffered patrimonial loss which cannot be recovered from the State in terms of subsection (1), the Director-General: Justice may, with the concurrence of the Treasury, as an act of grace pay such amount as he may deem reasonable to that person.”

The possible successful application and execution of community-based sanctions is dependent on strict control and management of the system. Violation of the conditions by the probationer or parolee does not necessarily lead to the evocation of correctional supervision or parole, but the offender is first given the right to be heard.

According to *Ndebele* (Purpose and Functions of Community Corrections Part 11:1996), serious violations are dealt with as follows:

“In cases where the sentence of correctional supervision was directly imposed by a court, upon violation of the conditions, such a case may be detained in a prison (by virtue of a warrant which is issued by the Commissioner or his delegate) for a period not exceeding 72 hours, within which he/she may be referred back to the court which imposed the sentence. Probationers whose sentences of imprisonment have been converted into correctional supervision by the Commissioner or his delegate, may be detained in prison in accordance with their original sentences of imprisonment to serve the remainder of the sentence of imprisonment.”

## **6.5 DISTINGUISHING OFFENDERS**

In the case of *S v R* 1993 1 SACR 209 (A), the decision that the legislature has distinguished between offenders who need to be removed from society and those who deserve punishment, but do not need to be

removed from society, Section 84 (2) of the Correctional Services Act 8 of 1959 states that:

“any probationer who is admitted to prison shall be treated as a sentenced prisoner...: Provided that a probationer who is subject to correctional supervision under section...297(1)(h) of the Criminal Procedure Act 51 of 1977... shall be treated as an unsentenced prisoner.”

According to *Kriegler AJA* , cited in *Terblanche* (1999:339) states that:

“correctional supervision is unique and that probationers differ materially from sentenced prisoners. The distinction between people who need to be removed from society and those who do not, is potentially a very useful yardstick for the imposition of both correctional supervision and imprisonment.”

In *S v Dimpane* 1996 2 SARC 165 (O) 160I the court quoted an unreported Appellate Division case, *S v Philip* (19 September 1995), where it found that the ‘dictum’ should not be taken too literally *Tereblanche* (1999:339):

“It is qualified by what follows. Courts are rightly encouraged to make use of the sentencing options now afforded them to avoid where feasible the imposition of short-term imprisonment.”

Correctional supervision is also supplementary. It has the potential to ‘add muscle’ and to reform when the retributive or remedial effect of sentence has to be boosted. According to section 276 (3)(a) of Act 51 of 1977 it can be combined with a sentence of suspended or unsuspended imprisonment. This is a precautionary measure because nothing stops a court from combining the sentence in section 276.

According to *Ndebele B* (Purpose and Functions of Community Corrections Part 11:1996):

“Community Corrections is an internationally recognized concept or method, meant for dealing with those offenders who could possibly be dealt with more effectively in the community than in prison. Therefore the prison will always be there for those offenders who are considered a danger to the safety of the community and who, during the period of incarceration, continuously show no prospects of the possibility for dealing with them effectively in the community without endangering the safety of the community.”

## **6.6 NATURE OF SERVICE**

### **6.6.1 Position Overseas**

According to *Kunz* (1994: 36), the statute book of most countries, provide for sentences between 40 and 240 hours of unpaid work for the good of the community, to be performed within a period of six to eighteen months. *Bishop* in *Kunz* (1994: 36), says that in Britain and some other countries community service is an independent principal sanction; in other nations such as the Netherlands it is imposed within the framework of a suspended or conditional sentence.

In England care is taken that the work performed does not prejudice the interests of members of the free labour force. Types of community service work performed are, for example, driving vehicles for needy people, caring for the handicapped, assisting ambulance services and hospitals, maintaining

public parks etc. In the Alamanda Country System (California) approximately 60% of offenders were engaged in projects that involved either maintenance work or clerical work.

### **6.6.2 South African Viewpoint**

Equally important as offender selection, is service selection, in that the offender must be matched against the appropriate type of service to be performed in the community if the objectives of community service are to be realized.

In order to facilitate the offender's reintegration, every conceivable effort should be made to ensure that the work experience should not just be demanding and enable him to provide satisfaction, but is also meaningful to the offender and assists him in expiating his crime and thereby contributes to his personal adjustment and development.

According to *Howes* (1984:133) consideration must also be given to the matching of the offender to available work. The employment of the offender is not intended to exploit his manpower but is designed to influence him in a positive fashion, by enabling him to participate in constructive punishment and also to provide some benefit to the community. In this regard the following aspects are mentioned:

- i) Work placement must give the offender an opportunity to use his practical skills;
- ii) The offender must see that his work is worthwhile and is contributing to society. This was the intention behind the order that he should make reparation in a useful manner; and
- iii) The work undertaken should have some bearing upon the nature of the offence, for example, in the case of cruelty to animals work at the S.P.C.A. could be undertaken.

## **6.7 EXECUTION AND SURERVISION OF SENTENCES**

In South Africa the Department of Correctional Services is to take full responsibility for all sentences imposed by the courts, custodial and non-custodial. Apart from imprisonment it will involve the collection of fines and control of all community-based correctional supervision. According to the Acta Criminologica (VOL.4 No 2 :1991):

“Community based correctional supervision should be imposed on all persons regarded as suitable for such sentences but special attention should be given to first offenders as they have a better chance of reformation in the community.”

The community should be more directly involved in the penalty phase in an organized and controlled manner which is not only cost-effective but also in line with international tendencies.

It is administered in the community, in co-operation with the community and to the benefit of the community. The community has to be involved because custodial sentences have become too costly and the re-integration of prisoners into society has become almost impossible. Correctional supervision, however, serves more than one theory of punishment. It has a deterrent effect and accomplishes retribution which is in any case not obtained if a prisoner sentenced to two years is released after two weeks because the prison is too overcrowded to accommodate him.

#### **6.7.1 Suitability of accused**

In *S v Kruger* 1995(1) SACR 27 (A) the correctional official did not find the accused suitable because he lived in a dangerous area which made monitoring difficult. On appeal the Judge remarked that this problem was not insuperable because use could be made of the neighbour's telephone.

In *S v Miners* 1992 (2) SACR 359 (C) it was held that the accused was not suitable because he was aggressive and unwilling to co-operate with the probation officer.

#### **6.7.2 Community corrections**

Community corrections is an internationally recognized concept for dealing with offenders who serve their sentences in their communities rather than in prison. The prison is utilized for offenders who are considered a danger to the



community and who, during the period of incarceration, show that they are not suitable candidates for community-based sentences.

According to the Annual Report (Department of Correctional Services : 1998), the objective of Community Corrections is to enable offenders to lead a socially responsible and crime-free life while serving their sentences in the community. Conditions are set for every offender who is incorporated in the system of Community Corrections. The main objectives of these conditions are to exercise control over the offender, to reform and rehabilitate the offender and to protect the community.

The successful application and execution of community-based sentences depends on strict control and management of the system.

The Community Corrections programme aims to exercise supervision and control over offenders and persons who have been sentenced to or placed under correctional and parole supervision in the community. According to the Annual Report (Department of Correctional Services:2001/2002), the programme comprises a sub-programme, Correctional and Parole Supervision, which is responsible for managing persons under community corrections. This comprises among other things, the managing of cases and monitoring of compliance with the conditions set for probationers, parolees, day parolees, awaiting-trial persons and prisoners on temporary leave.

“The programme policy developments on community corrections was reviewed in order to align it with the Constitution of the Republic of South Africa, 1996, the Correctional Services Act, 1998, the Batho Pele principles and other relevant legislation”.(Annual Report Correctional Services :2001/2002)

### 6.7.3 THE SUCCESS RATE OF COMMUNITY BASED SENTENCES 1998

	CORRECTION SUPERVISION	PAROLE SUPERVISION	TOTAL
NUMBER	22 251	42 664	64 915
SUCCESS PERCENTAGE	81%	71%	72%

**TABLE 7**

The success rate reflected in the above table, is measured in terms of sentences served(Annual Report :Department of Correctional Services 1998).

### COMMUNITY CORRECTIONS POPULATION AS AT 31 MARCH 2002

	Under Supervision		Absconders		
CATEGORY	MALE	FEMALE	MALE	FEMALE	TOTAL
Probationers	15 913	2 464	166	13	18 556
Parolees	26 989	959	491	11	28 450
TOTAL		42 902	3 423	657	47 006

**TABLE 8**

The success rate is measured in terms of the sentences that are actually served. These figures include fines that were paid, warrants of liberation issued and deaths.

**THE SUCCESS RATE OF COMMUNITY BASED SENTENCES 31 MARCH 2002**

	Correctional Supervision	Parole Supervision	Total
Number	18 556	28 450	47 006
Success%	86%	79%	

**Table 9**

Research was carried out by the South African Law Commission on the sentencing practices by South African courts. The following table reveal results of sentence types for the seven crimes studied given as percentage of total. Custodial sentences comprise those sentences without suspension and those with partial suspension. When the court imposed more than one type of sentence on the accused, only the most onerous was counted. Sentences in the table is ranked from the most onerous to the least. This represents sentences for adults committing crimes pre-implementation. "n" indicates the number of accused.

Sentence type		Murder %	Rape %	Robbery %	Culpable Homicide %	Fraud %	Stock- theft %	Shoplifting %
Custodial		94.4	95.2	93.1	41.6	16.2	74.6	6.7
N O N C U S T O D I A L	Committal to an institution	0	0	0	0	0	0	0.7
	Correctional supervision	2.4	0.5	0.77	22.10	14.2	0	5.2
	Community service	0	0	0	0	0	1.5	3.7
	Fine	0	0.5	1.54	5.2	37.5	8.9	49.6
	Compensation	0	0.5	0	2.6	9.2	1.5	0
	Sentence postponed	0	0	0	1.3	0.7	0	0
	Imprisonment fully suspended	3.2	2.9	4.62	27.3	13.5	11.9	8.9
	Fine fully suspended	0	0.5	0	0	8.5	1.5	23.7
	Caution and discharge	0	0	0	0	0	0	1.5
Total		100%	100%	100%	100%	100%	100%	100%
Na		164	207	130	77	141	67	135

**Table 10**

The various observations that were made from the above table are as follows:

- The serious violent crimes of murder, rape and robbery with aggravating circumstances had very high levels of custodial sentences, each in excess of 90%.
- The courts made use of correctional supervision for culpable homicide (22%) more than for any of the other crimes.
- Stock theft was treated considerably more harshly than the other two economic crimes. Three-quarters of accused convicted of stock theft went to prison although economic crime in general had fewer prison sentences.
- It is also clear that many more accused were given custodial sentences when found guilty of stock theft (74.6) compared to culpable homicide(41.6 %)
- Shoplifting and fraud had the fewest custodial sentences. For these two crime types fines and fully suspended prison sentences were common.

## **6.8 THE PRISON POPULATION**

On the 31 December 1998 the prison population stood at 146 278. This shows an overall increase of 2,72% on the same figure for 1997(Annual Report Department of Correctional Services 1998). The composition of the prison population as at 31 December 1998, as well as the percentage increase for the different categories, is reflected in the tables below.

**THE PRISON POPULATION AS AT 31 DECEMBER 1998**

	ADULTS		YOUTHS		TOTAL
	MALE	FEMALE	MALE	FEMALE	
Sentenced	79 033	1 986	10 941	197	92 157
Unsentenced	39 981	1 020	12 916	204	54 121
Total	119 014	3 006	23 857	401	146 278
Percentage	81,36	2,05	16,31	0,28	100

**TABLE 11**

**THE PERCENTAGE INCREASE IN THE PRISON POPULATION FROM 31 DECEMBER 1997 TO 31 DECEMBER 1998**

	1997	1998	Percentage change
Unsentenced male prisoners	40 260	52 897	31,39
Sentenced male prisoners	98 566	89 974	-8,72
Unsentenced female prisoners	1 175	1 224	4,17
Sentenced female prisoners	2 409	2 183	-9,38
Total	142 410	146 278	2,72

**TABLE 12**

On 31 March 2002, the Department had cell accommodation for 109 106 prisoners as opposed to a total prison population of 178 998 prisoners. (Annual Report Department of Correctional Services:2001/2002). This situation constituted an average national level of overcrowding of 64%.

### **THE COMPOSITION OF THE PRISON POPULATION AS AT 31 MARCH 2002**

CATEGORY	Adult		JuvenileU21		Total
	Male	Female	Male	Female	
Sentenced	102 664	2 761	14 224	271	119 920
APOPS(sentenced)	3 578	0	0	0	3 578
Unsentenced	40 582	1 066	13 614	238	55 500
Total	146 824	3 827	27 838	509	178 998
Percentage	82,03%	2,14%	15,55%	0,28%	100%

**TABLE 13**

Overcrowding caused by the excessive number of awaiting trial prisoners remains a major problem. Statistics shown by the table below show the percentage change in various categories of prisoners.

In order to reduce overcrowding, a marketing drive was launched to popularize correctional supervision as a sentence option with the judiciary (Annual Report Department of Correctional Services 2001/2002.) Statistics indicate an increase in the community corrections population, which may be partly due to this drive.

During January 2001 the Department implemented sections 62(f), 71 and 72 of the Criminal Procedure Act, Act 51 of 1977, countrywide. Since the

implementation of these sections, 2 408 awaiting-trial persons were placed under the system of community corrections.

**THE PERCENTAGE CHANGE IN THE PRISON POPULATION AS AT 31 MARCH 2002 COMPARED TO 31 MARCH 2001**

CATEGORY	31 MARCH 2001	31 MARCH 2002	%CHANGE
Unsentenced male prisoners	55 104	54 196	-1,65%
Sentenced male prisoners	111 585	120 466	+7,96%
Unsentenced female prisoners	1 318	1 304	-1,06%
Sentenced female prisoners	2 952	3 032	+2,71%
<b>TOTAL</b>	<b>170 959</b>	<b>178 998</b>	<b>+4,97%</b>

**TABLE 14**

It is evident that the level of the prison population compared to the available accommodation clearly indicates that South African prisons are seriously overpopulated. As it is clearly evident from the figures below the number of prisoners serving prison sentences of less than five years is extremely high. If alternative sentencing options could be used, especially for first time petty offenders, then the Department will not be faced, to an extent, with the daunting task of managing a prison system with one of the largest prisoner to population ratios in the world, as South Africa has approximately 320 prisoners to every 100 000 of the population.



**NUMBER OF PRISONERS PER SENTENCE GROUP AS AT 31 MARCH  
2002**

Sentence groups	Number of prisoners
Unsentenced	55 500
0-6 months sentence	6 335
Sentence of more than 6 months to 12 months	6 561
Sentence of more than 12 months to less than 24 months	6 272
Sentence of more than 24 months to 3 years	17 102
Sentence of more than 3 years to 5 years	16 876
Sentence of more than 5 years to 7 years	12 911
Sentence of more than 7 years to 10 years	20 889
Sentence of more than 10 years to 15 years	16 610
Sentence of more than 15 years to 20 years	7 281
Sentence of more than 20 years	7 202
Sentenced to death	206
Habitual criminal	2 142
Life sentence	2 980
Mental instability	2
Reformatory	54
Day parole	21
Ordered by court as dangerous	28
Periodic imprisonment	26
<b>TOTAL</b>	<b>178 998</b>

**TABLE 15**

This chronic overcrowding of South African prisons remains a major inhibiting factor with regards to performance. (Annual Report Correctional Services 2001/2002). Besides the consequences that overcrowding has conditions have on the physical and mental well-being of staff members and offenders, it also seriously hampers the presentation of treatment and development programmes that are aimed at effecting rehabilitation.

There has been an increase in the prison population over the past number of years placing a strain on the Department's available resources.

#### **6.9. FINANCIAL IMPLICATIONS**

According to the Annual Report (Dept of Correctional Services:1998), the budget cost in respect of the supervision of probationers and parolees for the 1998/99 year was R194 794 300, that is 4% of the Department's total budget of R 4515 581 000. Community Corrections are more cost-effective than imprisonment. During the 1998/99 financial year, the budgeted per capita cost for offenders in the community corrections system was R7,99 per day against a cost of R72,99 for prisoners.

During 1998, the daily average community corrections population was 56 484. To keep this population in prison, would have cost the Department and the taxpayer R4 122 767 per day. However, in the system of Community Corrections, the comparative cost is R451 307 per day. This results in a saving of R3 671 460 per day.

For the financial year 2001/2002 the budget allocation for community corrections was R 242 062 000 of a total budget of R6 581 454 000. The budget for incarceration was R 2 542 610 000. The daily average prison population for the financial year 2000/2001 was 166 587 and for the financial year 2001/2002 was 172 204, which represents a 3,4% increase.

Due to the fact that the cost of maintaining a prisoner in prison is extremely high, other forms of punishment have to be implemented, which will lessen the financial burden on the Department.

#### **6.10. THE REQUIREMENT AND VALUE OF A PRE-SENTENCE REPORT**

*Abadinsky* (1997:105) says that the pre-sentence investigation report has five basic purposes:

- “1. The primary purpose is to help the court make an appropriate disposition of the case;
2. It serves as the basis for a plan of probation or parole supervision and treatment;
3. The pre-sentence report assists the prison personnel in their classification and treatment programs;
4. If the defendant is sentenced to a correctional institution, the report will eventually serve to furnish parole authorities with information pertinent to release planning and consideration for parole, as well as determination of any special conditions of supervision;
5. The report can serve as a source of information for research in criminal justice.”

The consideration by the court of a pre-sentence report is not required by statute in South Africa. The Criminal Procedure Act, No. 51 of 1977 contains no specific provision relating to pre-sentence investigation. Section 274(1) of the said Act provides, however, that the court may, prior to sentence, hear such evidence as it deems necessary to inform itself concerning a suitable sentence.

Selection and trained correctional officials are available at the courts to prepare and submit pre-sentence reports, in terms of section 276 A(a) of the Criminal Procedure Act, containing sufficient information and evidence in order to enable the court to consider the feasibility of imposing correctional supervision. Staff members with qualifications in behavioural sciences or experts in behavioural/social sciences are placed at courts for the drafting of pre-sentence reports which contain basic/background information about the accused person which may assist the court in determining the suitable sentence for the person concerned. Various areas are addressed in such reports, for example:

- a) The risk posed to the community by the offender;
- b) The possibility of effective offender-control in the community;
- c) Whether the offender can earn a living or can be supported;
- d) The willingness of the offender to participate in appropriate treatment programmes.

In its report, the Viljoen Commission (1976:99-102) in paragraphs 5.1.5.1 to 5.1.5.16 devoted considerable attention to the pre-sentence investigation and emphasized the value of this measure to the court as an aid in assessing an appropriate penalty. Reliable information about the personality and background of the offender may be placed before the court via this avenue.

## **6.11 RESUME**

The current overcrowding in South African prisons has necessitated the move away from a strictly retributive approach to offending behaviour, to that of rehabilitation and restoration. Overcrowding could be reversed if the courts were more flexible and innovative when attending to cases. From the above facts it can be ascertained that there is a need for community corrections to be expanded so as to reduce overcrowding in prisons. The smaller the chance to rehabilitate prisoners, the higher the probability of recidivism. It follows that even more people will be incarcerated which in turn will necessitate the building of more prisons, a solution that has so far proven inadequate.

The researcher feels that the budget allocated to community corrections should be increased so that more could be spent on this, as well as on the rehabilitation of these offenders in the community. The policy on community corrections should be aligned with the ever- changing needs of offenders and the community. Until such time that our incarceration policy is matched with

policies of rehabilitation and restorative justice, there will never be enough prison space to accommodate offenders.

The Department of Correctional Services is charged with hosting offenders who have been, or are going, through the criminal justice system, but decisions regarding sentencing which determines how long they will be in prison rest with magistrates and judges. There seems to be little regard by the judiciary for the consequences of their decisions on prisons.

# **CHAPTER SEVEN**

## **CONCLUSIONS AND RECOMMENDATIONS**

### **7.1 INTRODUCTION**

The magnitude of the South African prison population is being questioned and criticized more and more by informed and well-meaning persons and countries. The lack of sufficient alternatives to imprisonment manifests itself in overpopulation of prisons with all its negative implications.

The Criminal Justice System should identify effective sentences, by an objective consideration of all relevant factors, so as to satisfy as best as possible, the well known purposes of punishment, namely; prevention, deterrence, retribution and rehabilitation. In order to achieve this the court endeavours to serve the interests of society, without losing sight of the fact that the offender is, and remains, a member of that same society. A sentence is only effective when it strikes a fine balance between the interests of society and that of the offender.

### **7.2 STATISTICS**

According to comparative statistics, the Republic of South Africa has one of the highest prison populations in the world. As will be described, the prison population has increased over time. A total of 320 persons per 100 000 of the

general population were in prison during November 1990 compared to other countries where figures vary from 42 in Sudan, 71 in France, 96 in England and 426 in the U.S.A. (Department of Justice and Correctional Services 1993:8).

According to *Mauer* (1992:2), the United States of America has widened its gap over South Africa in its rate of incarceration, with a rate of 455 inmates per 100 000 population compared to South Africa's rate of 311 per 100 000. The U.S.A. rate has increased by 6.8%, compared to a 6.6% decline in South Africa. In (1994:3) he documented that the United States had surpassed South Africa and the former Soviet Union to become the world leader in its rate of incarceration. In (1997:4) he reported that Russia and the United States were the world leaders in incarceration.

In most of the first world countries unsentenced prisoners are only detained in prisons in exceptional cases. In South Africa, on 30 June 1990 there were, however, 19 151 unsentenced prisoners in detention, representing 17,9% of the total prison population. This means in financial terms, an annual expenditure of R131,375 million, calculated at an average detention cost of R6 860,00 per prisoner per year, based on the cost structure of the 1989/90 financial year.

On the 31 March 2002, in South Africa, the Department of Correctional Services had an accommodation capacity for 109 106 prisoners but a prison population of 179 000 prisoners. This situation implies that our prisons are



64% overpopulated with an accommodation need for approximately 69 000 prisoners.

The prison population in England and Wales is now more than 50% higher than it was in the early 1990s, producing the second highest rate in Western Europe. This rise is attributable to public anxiety, aggravated by media reaction, and to crime in general. The use of custodial sentences rose by 40%, and sentence lengths rose by more than 10% (*Walmsley : 2001*). He contends that if steps are not taken to reduce high prison population rates and stem the growth, then the current 8,5 million in prison will soon become 10 million or more and we will be creating a world where a significant minority are locked away, at a great cost in human, as well, as financial resources.

The majority of sentences are less than six months, followed by sentences ranging from six months to two years, and sentences of two to five years. Between 1995 and 1999, only 7% of sentences were between five and ten years, while less than 5 % of sentences were more than ten years. It is, therefore, certain, that most of those incarcerated will return to the community sooner rather than later (*Sekhonyane:2002*).

### **7.3 PRESENT PRISON CONDITIONS**

In 2000 the Judicial Inspectorate reported on the conditions in prison as follows *Dissel (2002:10)*:

“Conditions in prison, more particularly for unsentenced prisoners, are ghastly and cannot wait for long term solutions. For example, one toilet is shared by more than 60 prisoners; [there is a] stench of blocked and overflowing sewage pipes; shortage of beds resulting in prisoners sleeping two on a bed whilst others sleep on the concrete floors, sometimes with a blanket only; inadequate hot water; no facilities for washing clothes; broken windows and lights; insufficient medical treatment for the contagious diseases that are rife. The list of infringements of prisoner's basic human rights caused by overcrowding is endless.”

Generally, it is accepted in penological circles in the first world countries that community based sentences are the most cost-effective and efficient options having the least negative results. Imprisonment as a sentence is diminishing world-wide and is being replaced by community based sentences. Violent offenders must obviously be detained in prisons for the protection of the community. Due to the overcrowded conditions, it is therefore preferable to keep prison space for the latter and keep less serious offenders out of prison.

There are various consequences of prison overcrowding, such as:

- mass handling of individual needs;
- a reduction in rehabilitation programmes;
- the earlier release of criminal elements;
- pressure on the Treasury for the supplementation and extension of personnel;
- an increase in capital expenditure for the creation of prison accommodation to eliminate backlogs;
- negative behavioural patterns in prisons; and

- an increasing burden on the Treasury, for the support of the families and dependants of prisoners

The present prison conditions make very little allowances for rehabilitation and reintegration of the offender. This is evident from the high levels of recidivism.

#### **7.4 ADVANTAGES OF COMMUNITY BASED SENTENCES**

A further advantage of basing programs within the community and utilizing all the additional resources available in this setting, is the considerable savings in cost to the taxpayer. If community corrections are in addition more successful in preventing recidivism the cost savings goes beyond the immediate program to the predicted savings, over many years, across the entire criminal justice system: reduced police and court activity, reduced maintenance of prisons to house these future offenders.

While incarceration results in a loss of employment and the offender's inability to support his or her dependents (resulting in additional costs for the State), correctional supervision allows, or encourages the offender to be employed. Offenders are able to make decisions and take responsibility for their lives. By the participation in rehabilitative programmes, offenders are also encouraged to take steps towards correcting their criminal behaviour.

## **7.5 "PERCEIVED DISADVANTAGES" OF COMMUNITY BASED SENTENCES**

In 1995, the Department of Correctional Services had 37 000 offenders passing through this system with 80% successfully completing the sentence. However, correctional supervision is not without its problems. Many courts are reluctant to use this option as they do not see it as a sufficient punishment. Another problem is that many of the offenders do not live in areas which can be easily monitored. They do not have fixed addresses of employment, and so do not qualify for the sentence. Certain population groups, by virtue of their wealth and greater social stability, tend to qualify more readily for this option: more middle-class white people are being sentenced to correctional supervision than to imprisonment.

## **7.6 THE SEARCH FOR ALTERNATIVE MEASURES**

Although, a considerable spectrum of alternative sentencing options, which have been implemented over the past few years, already exist in South Africa, it is a fact that the further development of these options and the application thereof have become imperative.

Alternative forms of punishment to the usual penalties such as imprisonment, fines and suspended sentences, have up until now been used on a small scale in South Africa and the community has, furthermore, not been involved in such alternative forms of punishment. However, since the beginning of the

eighties a start has been made in investigating community based forms of punishment and placing these alternative penalty options on the Statute Book.

During 1990 the Minister of Justice and of Correctional Services and senior officers of the Department went overseas to investigate, ways in which correctional supervision is dealt with and addressed in other countries. They found that the search for another form of punishment has taken place world-wide and that it has led to an international move towards community based sentences.

The implementation of such sentences is dependent on the community. It implies that the offender is subjected to various programmes over a period of time, for example, community service and correctional supervision. At the same time, it affords the offender the opportunity to enhance his self-respect by being able to do something positive for the community, by being able to continue working and maintaining family ties. This has the effect that offenders remain economically productive in such a way as to promote the ideal of cost-effectiveness and affordability in the administration of justice. The primary object of this type of sentence is, however, for the offender to maintain daily contact with the community and law-abiding citizens and not to become contaminated by hardened criminals, while, at the same time, community involvement is ensured.

## 7.7 THE NEED FOR AN INFRASTRUCTURE

Research should not concentrate solely upon the effectiveness of community service but cover every relevant facet relating thereto on an on going basis. There are various factors that influence the success of community based sanctions. A few of these, as well as the key role players in the criminal justice system, are schematically represented in the figure below:

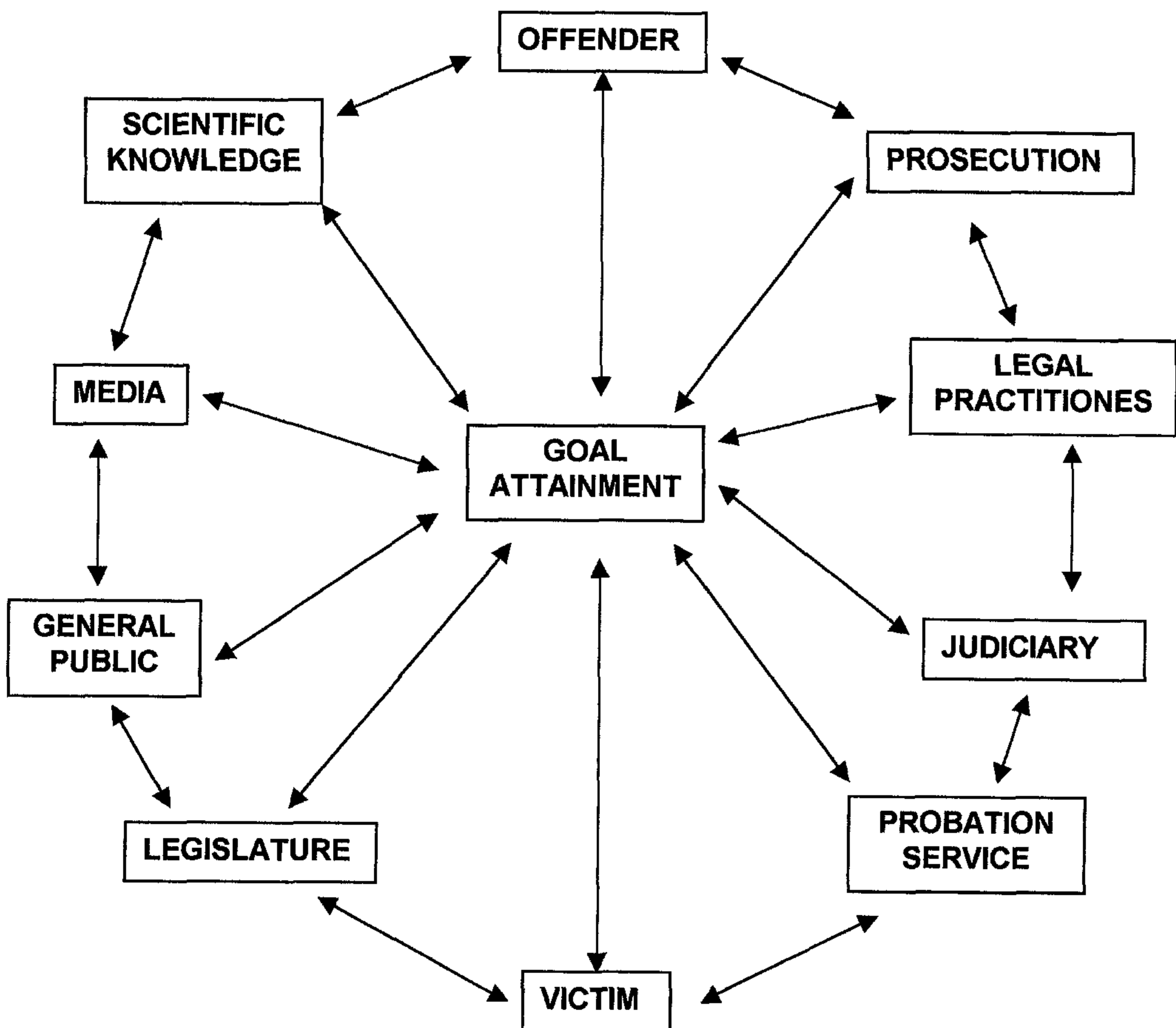


FIGURE 7.1 FACTORS INFLUENCING GOAL ATTAINMENT

These factors as indicated in Figure 7.1 are not mutually exclusive and interplay the one upon the other. They are equally important and any endeavour to promote the extension of community service, must accord due attention to all these factors. They should, therefore, also be researched within the context of their relevance to community service.

Thus, if offenders are carefully selected, this can play a key role in the successful rehabilitation of offenders. The successful implementation however, depends on a proper infra-structure.

## **7.8 RECOMMENDATIONS**

In view of the crises in corrections it is important to prioritize recommendations into aspects that should be addressed immediately to alleviate the problem in penal institutions, and measures which should be implemented to alleviate the problems.

### **7.8.1 Educative measures to be implemented**

*Van Gass* (1981:235-237) was of the opinion that the South African Prisons Service could play an important role in penal reform through the educating of the public in order to promote a more realistic comprehension of imprisonment. The researcher is of the opinion that the media, including radio, television and the press could play an educative role.

To get these measures accepted it is necessary to convince all the key players in the criminal justice system. The policy makers (including government ministers and legislators) must be convinced; so must the judiciary and also the police and prosecutors. It is vitally important to convince the media and the general public. Policy makers and legislators must be helped to understand what imprisonment can achieve, and also that it has its limitations and dangers. They must also understand, fully, the financial costs entailed by a high level of imprisonment. If they are not impressed by the arguments for greater humanity and social reintegration they will sometimes be impressed by the expense of imprisoning so many people.

The judiciary obviously has a key role to play. They must become fully aware of what imprisonment can and cannot achieve, and of the harm it can do. All judges ought to be familiar with prison conditions and well informed about the opinions of prison experts.

The police and prosecuting authorities often exercise a major filtering influence in the criminal justice system. Efforts to provide criminal justice officials with balanced information about imprisonment should certainly extend to the police and prosecuting authorities.

The public has a fear of crime and has hostility towards offenders. By providing information on the functions of punishment, on the relative effectiveness of custodial and non-custodial measures and on the reality of



prisons, their fears may be allayed. The public is not generally aware of the problems faced in prisons, nor of the dangers of the uncontrolled use of imprisonment, or of its human and financial costs. Representatives of the media who are receptive to these issues can be drawn into a debate on how criminal justice should be reported. Media coverage should be more responsible and aim to cover rural areas targeting education at school and within the community with regard to the issues of crime and its consequences. There should be debates or discussions on television, radio and in the press. All race groups and nationalities should be catered for. Discussions on how our complex criminal justice system should be developing into the 21<sup>st</sup> century and starting point should be with non-custodial options.

Greater emphasis should be placed on providing constructive approaches to punishment in the community in the spirit of reconciliation and respect for human rights contained in the constitution. Training for judges in race and gender awareness should be further developed and sentencing training could also be introduced to promote the pursuit of a consistent approach to sentencing promoted by the Sentencing Commission.

It is one thing to identify the measures that need to be taken to reduce high prison populations and to combat the growth in numbers, it is another to persuade those concerned actually to take them. Merely changing laws and creating possibilities of new non-custodial sanctions is, obviously, not enough.

### **7.8.2 Long-term social recommendations**

Another area that has to be addressed is the social causes of crime. This can be achieved by supporting families, the early identification of vulnerable children, and by promoting social cohesion and by making citizens feel that they have a stake in the welfare of their community.

Correctional Supervision strives to present a way of rehabilitation within the community, thus preserving the important links which the offender may have with his or her family or community structures. It must be recognized that, if crime is spawned in the community, it should be attacked at its source. This cannot be done by removing an offender from his own environment.

Sentencing an offender to large, geographically remote, closed institutions cuts him off from his life processes. To treat him without attending to family inadequacies and eradication of problems in his area of origin, is to treat him in a vacuum. The family, even if it is inadequate, is still "the fountainhead of an individual's emotional stability" and, as far as possible these ties should not be severed. Where interpersonal relationship skills are lacking, these should be taught not only to the offender, but to those with whom he interacts as well: family, neighbours, peers, teachers, fellow-workers – in short, his community.

### **7.8.3 Long-term legislative adjustments**

Legislation needs to be in place to ensure that there are appropriate restrictions on the circumstances in which pre-trial imprisonment can be used, so that, it is limited to cases where offences are particularly serious or where for some other reason it is clearly not in the public interest to allow the suspect to remain in the community. Secondly, when a person is held in pre-trial imprisonment the period should be as short as possible. In many countries, the investigation procedures are long and even when a decision has been taken to prosecute there are delays in arranging the court hearing because of a backlog of cases. Legislation can be introduced to shorten investigation procedures and can also be used to tackle the factors that can create the backlog.

### **7.8.4 Control measures to be implemented**

The Department recognizes the value of electronic monitoring as an important aid in the supervision of probationers and parolees but realises that a monitoring system has to be developed to suit the specific needs of the Department, taking into account the realities of South African community life. The electronic monitoring system should be effective in both the underprivileged and privileged communities. A system that will only be operational in areas that have access to electricity and telephone connections

is not acceptable. The Department of Correctional Services plans to increase their expenditure on electronic monitoring from R15,6 million in 2000/01 to R50,7 million in 2001/02.

The demands from the community to impose heavier sentences on offenders and not to release offenders with serious crimes into the community already has a definite effect on the working of both the court and parole boards. This could be seen as a decrease in the confidence level by the court in community sentencing. The introduction of electronic monitoring could restore the original level of confidence in community correction as this provides better control over offenders in the community.

It is important to increase the availability of alternatives to prison sentences. The existence of alternatives certainly does not guarantee that prison populations will not be high, but in many countries there are limited options for courts, just fines, imprisonment and sometimes suspended imprisonment. Probation and community service have been introduced in a number of countries and are planned for more. Community service is showing signs of reducing prison population totals, for example, in sub-Saharan Africa.

#### **7.8.5 Restorative Justice –a“new” option**

Restorative justice is recognized increasingly as the way forward. In a number of circumstances, not all of them involve minor offences. One must consider a measure which can be an alternative not only to the use of imprisonment but

to the use of the criminal justice system itself. Although there is no concrete evidence that restorative justice has led to the reduction of prison populations it is believed that it will play an increasing role in doing so, as it is used more and more instead of criminal justice procedures, *instead of imprisonment, and during imprisonment* as a measure which is likely to create the conditions in which earlier release becomes possible.

Restorative Justice has been identified as one of the key strategic objectives by the Department of Correctional Services. Restorative Justice seeks redress for victims, recompense by offenders and reintegration of both within the community and this can only be achieved through a co-operative effort by communities and government.

It represents a way of dealing with victims and offenders by focusing on the settlement of conflicts arising from crime and resolving the underlying problems which caused it. It is also, more widely, a way of dealing with crime generally in a rational and problem-solving way. Central to the notion of restorative justice is the recognition of the community rather than the criminal justice agencies as the prime site of crime control.

#### **7.8.6 Victim-offender mediation**

There should be improved consultation between the victim, the police and prosecutors and legislation should recognize victim impact statements see Figure 1. Procedures involving victim-offender mediation should be

introduced. Community panels should be part of the sentencing process in appropriate cases where the community has an interest in the outcome of the case. Victim-offender mediation is a delicate process and should be considered in those cases where the victim and the offender belong to the same family, neighbourhood or community.

#### **7.8.7 Main recommendations recapitulated**

It is of critical importance to reduce high prison populations and to combat its growth. If it is accepted that imprisonment should be used as sparingly as possible, then prison population totals that are not necessarily among the very highest may also need to be reduced. Even when the overall prison population in a country is not particularly high, there will often be overcrowding. High prison populations and growth in numbers are harmful to prisoners and to staff; they lead to breaches of recognized international standards and they decrease the chances of prisoners, when released, being satisfactorily re-integrated into the community.

Punishment should address victim compensation and be more in line with community oriented or community based sentences. The possibility created by sections 279; 276 (1)(h); 300 of the Criminal Procedure Act of 1977 are limitless as to what can be achieved by community sentencing. The sentence should be such as to engender respect for the courts, instead of being an inducement to members of the public to take the law into their own hands.

It has been said that prisons are “universities of crime” and imprisonment is “an expensive way of making bad people worse”. It is clear that imprisonment under conditions of growth in numbers and overcrowding is even more damaging.

There has to be a drive for developing new alternatives which are sensible and well thought through, with public safety being of paramount consideration. Non-custodial disposals provide the criminal justice system with an opportunity to both punish offending behaviour and benefit the community. Dealing with crime is about punishment and deterrence, and community-based disposals meet both these criteria.

Community sentences are not a soft option. Conditions are strict when issued, and strict when monitored. They may be alternatives to short-term imprisonment, but they are certainly, not, alternatives to punishment. The aim is to make more, and better, use of non-custodial sentences, confronting offenders with their behaviour and encouraging a law-abiding lifestyle.

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Table 1      *Prison Population in England and Wales : 1945 – 1996*. [See South Africa (SA) in bibliography].

Table 2      *Daily Average Lock-up 1987 – 1992*. [See SA].

Table 3      *Daily Average of Sentenced and Unsentenced Prisoners*. [See SA].



- Table 4      *Average National Level of Overpopulation. [See SA].*
- Table 5      *Gap between available accommodation  
and utilization. [See SA].*
- Table 6      *Offenders in Custody. [See SA].*
- Table 7      *The Success Date of Community. [See SA].  
Sentences 1998.*
- Table 8      *Community Corrections Population as at  
March 2002. [See SA].*
- Table 9      *The Success Rate of Community Based  
Sentences 31 March 2002.[ See SA].*
- Table 10     *Sentences for adults committing crimes pre-implementation.  
[See SA].*
- Table 11     *The Prison Population as at  
31 December 1998.[See SA].*
- Table 12     *The Percentage increase in the Prison  
Population from 31 December 1997 to 31 December 1998.[See  
SA].*

Table 13     *The Composition of the Prison Population  
as at 31 March 2002.[ See SA].*

Table 14     *The Percentage Change in the Prison  
Population as at 31 March 2002 compared to 31 March 2001.  
[See SA].*

Table 15     *Number of Prisoners per sentence group as at 31 March 2002.  
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