

FUNDAMENTAL PENOLOGY

ONLY STUDY GUIDE FOR PEN1014



Compiled by:

CH CILLIERS

J KRIEL

Unisa
PO Box 392, UNISA, 0003

Copyright © Unisa 2008

First edition

In terms of the **Copyright Act 98 of 1978** no part of this material may be reproduced, be stored in a retrieval system, be transmitted or used in any form or be published, redistributed or screened by any means (electronic, mechanical, photocopying, recording or otherwise) without the prior written permission of Unisa. However, permission to use in these ways any material in this work that is derived from other sources must be obtained from the original sources.

Printed in South Africa by Unisa

98142550

QuarkXPress — Florida

CONTENTS

	PAGE
FOREWORD	(v)
SCOPE OF THIS STUDY GUIDE	(v)
KEY TO ICONS	(vi)
STUDY UNIT 1: THE FIELD OF STUDY OF PENOLOGY AND ITS RELATION TO SOCIAL CONTROL AND THE LAW	1
LEARNING OUTCOMES	1
1. INTRODUCTION	1
2. PENOLOGY AS A SCIENCE	1
3. SOCIAL CONTROL	4
4. THE CONCEPT OF A RIGHT	6
5. THE NATURE OF SOUTH AFRICAN LAW	8
6. SOURCES OF SOUTH AFRICAN LAW	8
STUDY UNIT 2: CRIME AND THE CONCEPT OF PUNISHMENT	11
LEARNING OUTCOMES	11
1. THE CONCEPT OF CRIME	11
2. ELEMENTS OF THE JURIDICAL CONCEPT OF CRIME	14
3. THE CONCEPT OF PUNISHMENT	21
STUDY UNIT 3: THE HISTORICAL DEVELOPMENT OF PUNISHMENT	25
LEARNING OUTCOMES	25
1. INTRODUCTION	25
2. PUNISHMENT IN PRIMITIVE SOCIETIES	25
3. THE HISTORICAL DEVELOPMENT OF PUNISHMENT	32

STUDY UNIT 4: ELEMENTS AND THEORIES OF PUNISHMENT	47
LEARNING OUTCOMES	47
1. INTRODUCTION	47
2. THE ELEMENTS OF PUNISHMENT	47
3. PUNISHMENT THEORIES	52
STUDY UNIT 5: SENTENCING AND FORMS OF PUNISHMENT	71
LEARNING OUTCOMES	71
1. INTRODUCTION	71
2. PRINCIPLES OF SENTENCING	73
3. FORMS OF PUNISHMENT DEPRIVING THE INDIVIDUAL OF HIS OR HER LIFE: THE DEATH PENALTY	76
4. FORMS OF PUNISHMENT INTERFERING WITH THE INDIVIDUAL'S FREEDOM BY RESTRICTING HIM OR HER FORM FREELY ASSOCIATING WITH PEOPLE: IMPRISONMENT	84
5. FORMS OF PUNISHMENT RESULTING IN THE LOSS OF POSSESSIONS: FINES	87
6. FORMS OF PUNISHMENT WHICH CAUSE NO PHYSICAL SUFFERING AND WHICH ARE CARRIED OUT IN THE COMMUNITY: COMMUNITY-BASED SENTENCES	89
BIBLIOGRAPHY	91

FOREWORD

GENERAL INTRODUCTION

It is our privilege, as your Penology lecturers, to welcome you to the study of penology. We hope that you will find it a stimulating, informative and rewarding experience.

We also hope that you will enjoy using the study guide as much as we enjoyed writing it. You will notice that the study guide contains a combination of theory and practice; we did not wish to overwhelm you at first-year level with the complicated theoretical premises, but rather to emphasise the philosophical premises on the basis of practice.

SCOPE OF THIS STUDY GUIDE

The study guide consists of five study units. **Study unit 1** examines the field of study of penology. This study unit gives you a general overview of the study of penology and its relation to social control and the law. The concepts of crime and punishment are discussed in **study unit 2** so that you can put the phenomenon of punishment in a penological perspective. This discussion will make it easier for you to understand **study unit 3**, which focuses on the historical development of punishment. Here we give different definitions of punishment and put punishment in historical perspective. You might ask what the historical progression has to do with the current functioning of punishment. The answer is quite simple — we cannot understand the prevailing trends if we have not assimilated the historical course. **Study unit 4** deals with theories of punishment, which have the following objectives:

- ◆ Retribution
- ◆ Deterrence
- ◆ Rehabilitation
- ◆ Prevention

Study unit 5 discusses the whole process of sentencing. We explain the principles involved in imposing a sentence and examine the different forms of punishment that the courts can impose.

We trust that you will have an enriching and fruitful year of study.

KEY TO ICONS

The following icons are used throughout the study guide to indicate specific functions:

LEARNING OUTCOMES



Learning outcomes are like a checklist of the things you should be able to do once you have studied the unit.

ACTIVITY



This icon indicates that you are required to complete certain activities which will assist you with your studies.

EXAMPLE



Examples are given for further clarification and are indicated by this icon.

NB/TAKE NOTE



Information of particular importance is indicated by this icon.

STUDY UNIT 1

THE FIELD OF STUDY OF PENOLOGY AND ITS RELATION TO SOCIAL CONTROL AND THE LAW

LEARNING OUTCOMES

After studying this study unit, you should be able to

- ◆ identify the field of study of penology
- ◆ distinguish between the different approaches within the field of penology
- ◆ define the concept of social control
- ◆ explain the necessity for social control
- ◆ define the concept of a right
- ◆ distinguish between objective and subjective rights
- ◆ identify the nature of South African law
- ◆ make a distinction between sources of origin and sources of knowledge as sources of the law



1. INTRODUCTION

Before tackling the content of Penology as a subject, we need to briefly consider the field of penology as an area of study. It is not our intention to get involved in a serious debate on the academic justification for and discussion of the subject content. Our purpose is, rather, to introduce you to the broad principles underlying penology.

2. PENOLOGY AS A SCIENCE

Penology is already established as an independent science at various overseas and South African universities. These universities present penology as an independent field of study. The field also has its own practitioners (in theory and in practice) and researchers who work within their own **theoretical, practical and methodologically relevant system of knowledge**. There are, however, essential

differences of opinion over the formal name of the subject. The University of South Africa and most South African universities call the subject **Penology**. This approach is directed at the **phenomenon of punishment**, in terms of which the penologist approaches punishment as a human phenomenon from a **social-scientific** point of view.

At the same time there is a tendency in South Africa to refer to the subject as **Penal (Criminal) Science**. This constitutes a more juridical perspective of the concept of punishment. According to this approach, penal science (the science of punishment) can be seen as those legal rules, principles and directives in criminal law that

- ◆ control the consideration process (among other things, factors that play a role in sentencing) and the choice of punishment at the trial
- ◆ prescribe the process during the review of an appeal against sentence
- ◆ determine the way in which punishment is to be served and the purpose for which it is served
- ◆ define the powers of the authorities in respect of parole, remission of sentence and clemency

The Americans refer to the subject as **Corrections** or **Corrections Science**. This approach not only concentrates on dealing with the offender in prison but views corrections as a profession-directed science that studies all the factors that contribute to the effective treatment of offenders who end up in the corrective system via the courts.

For the purposes of this course, suffice it to say that penology is the science that studies the phenomenon of punishment in its totality, approaching it from a social-scientific perspective.

Now that you have an overview of the field of study of penology, let us look at the role social control plays in the development of criminal law. Thereafter the development of South African law is put into perspective.

TEST YOURSELF

(3 mins)



Test your knowledge by matching the corresponding concepts. Simply write the letter of the alphabet that corresponds to the correct answer next to the question number, e.g. 6(b).

- | | |
|------------------------------|----------------------------------------|
| (1) naming the subject | (a) social-scientific discipline |
| (2) penology | (b) corrections or corrections science |
| (3) human phenomenon | (c) phenomenon of punishment |
| (4) penal (criminal) science | (d) juridical concept of punishment |
| (5) America | (e) essential differences |

TEST YOURSELF

(7 mins)



We are sure you had no problems completing the above exercise. The following short questions are also related to the preceding section.

- (1) Give the juridical definition of the subject Penal (Criminal) Science. [3]
- (2) Give an explanation of the American subject Corrections or Corrections Science. [3]
- (3) Define penology as a science. [4]

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

3. SOCIAL CONTROL

Social control is a collective term for those processes, planned or unplanned, whereby individuals are taught, convinced or forced to conform to the life values of groups.

You will surely agree that, as individuals, we depend on one another in our daily lives. It is for this reason, too, that we are under pressure to conform. Can you imagine the chaos that would result if we all "did our own thing"?

In order to direct people in their daily lives, and thereby get them to conform to approved patterns of behaviour, there has to be a system of **social control**.

The culture in which we live dictates or prescribes what the right, or correct, way of acting (behaving) is. This right way of acting essentially refers to **norms**. These norms may be simple or complicated, but their purpose always remains the same: to protect the community from any form of disruption and to protect the basic structure and values of the community.

Norms are learned and upheld by means of reward and punishment. Think, for instance, of the approving look of a parent when a child has behaved properly (correctly), or of the scolding a child receives when his or her behaviour leaves much to be desired. Punishment and reward are thus integrated in the normative structure as **social sanctions**. (Social sanctions are coercive measures to ensure that decisions are carried out.) These social sanctions can **prohibit** or **dictate** behaviour. For example, we are **prohibited** from committing murder and rape, but we are **commanded** to pay tax.

While informal sanctions can maintain social control in small communities, this is not the case in society in general. People who live in rural areas or small towns know that there is very little that can be kept secret. Just knowing that they may be rejected by the community if they manifest antisocial behaviour can keep people from displaying such behaviour.

In bigger and more complex societies, however, a more formal system of social control is required. People who display deviant behaviour can escape informal sanctions simply by moving to a place where they and their behaviour are unknown. In large societies, social control is maintained by setting rules that are made known publicly and by laying down specific punishments if these rules are broken. It is these rules, then, that are ultimately embodied in the law.

Accordingly, the rules that are embodied in the law will be representative of the values that are considered important in the particular society.

TEST YOURSELF

(7 mins)



(1) Consider the following statements carefully and indicate whether you regard them as **true** or **false**. Write down only "True" or "False".

- (a) Conformity features in the process of social control.
- (b) Culture plays a role in determining what is right and wrong.
- (c) Norms are learned behaviour.
- (d) Behaviour is sanctioned by punishment and reward.
- (e) Informal sanctions can be imposed in a smaller community.
- (f) Laws represent those values that are important to a society.

[6]

(2) Answer the following questions:

- (a) Define the concept of social control. (3)
- (b) What, in your view, are the two main functions of norms? (2)
- (c) By what means are norms learned and maintained? (2)
- (d) Why would you say norms are integrated in legal rules? (2)

[9]

.....

.....

.....

.....

.....

.....

.....

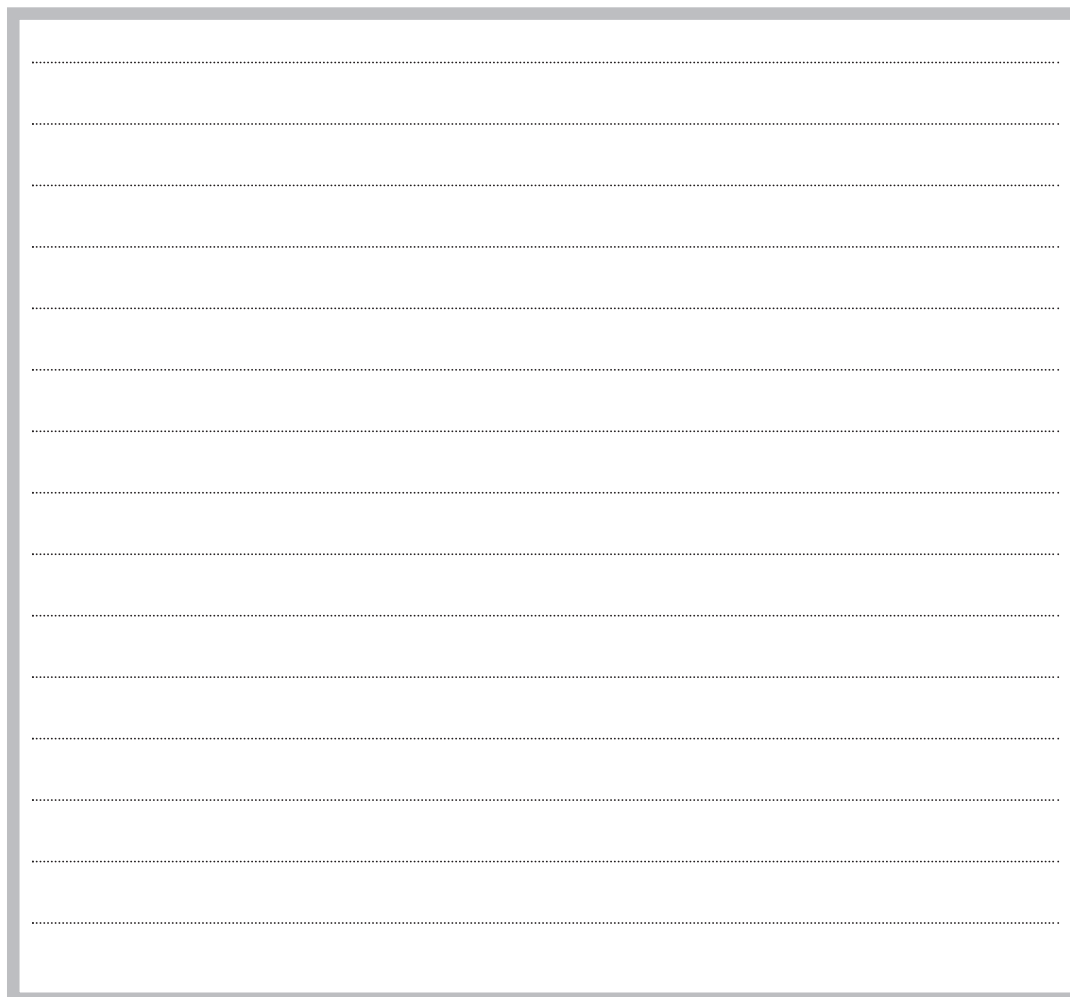
.....

.....

.....

.....

/continued ...



4. THE CONCEPT OF A RIGHT

Interpreting the concept of a right usually leads to some confusion. As a noun, the word basically has three meanings:

Firstly, it is often popularly used as a synonym for the concept of competence or power. So, for example, people frequently say that the police have the **right** to arrest a criminal. Using the word "right" in this context is wrong, of course, because the police have a definite competence to arrest the criminal.

Secondly, people speak of their **right** to certain goods of which they are the owners. Here the reference is to a person's right to property. The word "**right**" is correct in this context and refers specifically to a definite (or particular) relationship that exists between owners and their property. This particular right of the person is called a **subjective right** because it is linked to a specific person.

However, if the owners sell the goods, they lose their right to them (the property) and the buyers acquire the right to property over those goods. There are various types of subjective rights in our legal system. We also know that there must be rules that determine who has subjective rights, what the content of those subjective rights are and when they originate and cease. If there were no such rules, we would be living in a chaotic world in which all individuals decide for themselves which **rights** they have, and even how far their rights extend.

Thirdly, there is the reference to **the law** or the **objective right**. The concept of **objective right** can best be understood by means of the following example: In every community (or society) there are different types of rules by which the people in that community live and act. So, for instance, there are language rules that are followed and which make it possible for the members of the community to understand one another. Social rules are another type of rule that direct people's daily conduct. For instance, people are congratulated on special occasions and we expect people to say "**please**" and "**thank you**". In the same way, the law also has particular **rules**, which are called **legal rules**. These legal rules tell us (prescribe) what our **rights** are, but also what our **obligations** are. The legal rules differ from the behavioural rules (rules of conduct) in a community in the sense that legal rules are **binding** on members of the community, in other words people can be forced to keep the rules. Breaking, or failing to obey, the rules can result in particular detrimental consequences.

To sum up the above, you need to keep the following in mind:

The arrangement of legal rules led to a distinction between **objective** and **subjective** rights. **Objective rights**, or the law, are **legal rules** or **legal norms** that prevail in the community and are related to **social ordering**. **Subjective rights** are related to people's **right** or **claim** to something, such as the right to their property, e.g. their car or house.

So what are legal rules? Legal rules can be defined as follows:

- ◆ Legal rules are a group of binding rules.
- ◆ They order the members of a community in a peaceful way.
- ◆ They lay down what rights and obligations every member of the community has.
- ◆ They prescribe how conflicts between the members over their respective rights and obligations should be resolved.
- ◆ They prescribe the procedure whereby a law can be imposed.
- ◆ They prescribe the legal consequences in certain events (e.g. the birth of a child) and also acceptable and correct human conduct.

5. THE NATURE OF SOUTH AFRICAN LAW

South African law, like South African history, has an exceptionally rich and interesting past. The most important characteristic of South African law is its hybrid nature. By that we mean that it is multifaceted. The South African legal system originated in other legal systems, such as English, Scottish and German. For example, the legal system in South Africa corresponds in some respects with the European (Continental) legal systems in the Roman-Germanic, or civil-law, legal family; in other respects, it corresponds with systems in the Anglo-American, or common-law, legal family, especially English law.

You may be wondering what a legal family is. A comparison of the legal systems of the world cannot be done in a purely **abstract way**. For this purpose, the legal systems are divided into legal families, based on their history and certain features they have in common.

For the purposes of this course, you do not need to make a detailed study of the different levels of South African law. However, if you do want to know more about this, you can consult any of the following sources:

Du Toit, E. 1981. *Straf in Suid-Afrika*. Johannesburg: Juta.

Geldenhuis, T. 1992. *Inleiding tot die sekuriteitsreg*. Kaapstad: Juta.

Hosten, W. 1995. *Introduction to South African law and jurisprudence*.

Snyman, CR. 1995. *Criminal law*. Durban: Butterworths.

6. SOURCES OF SOUTH AFRICAN LAW

Before we can really get down to studying the concepts of crime and punishment, for the sake of continuity you need to know what the sources of the law are. This will give you a better understanding of the **process of legislation**, the **application of the law** and the **legal aspects** of dealing with the offender.

Let us start with a simplified classification: It is important to distinguish between **sources of origin** and **sources of knowledge**. When we talk about sources where the law can be found, we mean sources of knowledge; when we talk about sources from which the law originated (came), we mean sources of origin. Sources of knowledge are the laws, judicial decisions and other writings that count as authoritative interpretations of the law and from which a person can then determine the current or existing law. A source of origin, on the other hand, is every fact from which **positive law** originates, such as legislation, custom or a contract.

A large rectangular box with a solid gray border, containing 25 horizontal dotted lines for writing. The lines are evenly spaced and extend across the width of the box.

STUDY UNIT 2

CRIME AND THE CONCEPT OF PUNISHMENT

LEARNING OUTCOMES

After you have studied this study unit, you should be able to

- ◆ define the concept of crime
- ◆ discuss the elements of the juridical concept of crime
- ◆ indicate the difference between murder and culpable homicide
- ◆ define the concept of punishment
- ◆ discuss different perspectives on punishment



1. THE CONCEPT OF CRIME

The legislature of a country determines whether something is regarded as a crime or not. Although various factors, such as moral aversion to the deed and its harmfulness to the community, can play a role in the **criminalisation** of conduct, these are not ultimately definitive in determining why the deed or act is actually a crime. **Criminalisation is the process by which certain behaviour is declared criminal and punishable by law.** So the act is not a crime because it is harmful to the community; it is a crime because the **legislature regards it as harmful** to the community. Rabie and Strauss (1994:6) go even further and point out that crime does not occur just because a law has been broken. For conduct to be considered a crime, it has to meet the requirement that there is a **penal sanction** for it and that whoever decreed it a crime had the necessary power to do so.

If we were to ask you to compile a definition of crime, using the foregoing as background, you would most probably say that crime is behaviour that is punishable if the law regards it as punishable. And you would be absolutely right. This definition of the concept of crime is just one of many. Let's now consider a number of different views.

Burchell, Milton and Burchell (1983:85) maintain that breaking the law is a prerequisite for a crime to be a crime because "[w]ithout a criminal code there

would be no crime". The above authors (1983:88) define crime formally as follows:

Crime may be defined as conduct which common or statute law prohibits and expressly or impliedly subjects to a punishment which is remissible by the State alone and which the offender cannot lawfully avoid by his own act once he has been convicted.

A distinct feature of this definition is that it clearly specifies the criterion for judging whether an act qualifies as a crime, namely **the breaking of a law**.

Vetter and Silverman (1986:6) sharply criticise the use of a legal definition of crime. Their main reason for doing so is the relativity of crime — in other words, laws are not necessarily permanent because from time to time certain crimes are **decriminalised. Decriminalisation is a process by which certain behaviour that is punishable by law loses its unlawfulness**. Think, for example, of the current debate on abortion or the plea from various quarters for the legalisation of the use of dagga. So, you see, crime is not always time and place-specific.

Vetter and Silverman also maintain that a legal definition is restrictive because it limits the study of criminal behaviour, in other words a person is a criminal only if he or she meets the requirements of the legal definition. (Remember that not everyone who transgresses is traced and prosecuted.)

This criticism raises the question of where the latter group (i.e. offenders who are not traced and prosecuted) belong, since they do not go through the whole **criminal justice process. The criminal justice system is the system that gives form to prosecution, punishment and the infliction of punishment**.

In his definition, Yablonsky (1990:6) points out that to constitute a crime, the following conditions must be met:

- ◆ There must be a commission or an omission — in other words, the person must act or fail to act. A person can cause the death of another deliberately by stabbing him or her to death with a knife, for example. On the other hand, a medical doctor would be guilty of an omission if he or she failed to report the physical abuse of a child by its parents.
- ◆ The commission or omission must conflict with what the law commands or prohibits.
- ◆ There must be *mens rea* (guilt) or negligence.
- ◆ There must be a concurrence of *actus reus* (act) and *mens rea* (guilt).

(An example of this is a person who shoots and kills someone deliberately.)

For De Wet and Swanepoel (1985:69), crime is an act that is prohibited by punishment and punishment is the suffering imposed on perpetrators of crimes by the state because the perpetrators have committed the crimes. Concurring with De Wet and Swanepoel, Labuschagne (1966:25) sets the following juridical requirements for crime:

- ◆ There has to be an **act**.
- ◆ The act must be **unlawful**.
- ◆ The perpetrator of the crime must be to **blame** for committing it.
- ◆ Moreover, the perpetrator of the crime must be threatened with **punishment**.

If you were asked to compile a definition from the above information, your definition would look something like the following:

Crime is an unlawful act of human behaviour of which the perpetrator is guilty and for which there is a threat of punishment.

Despite their criticism of using a legal definition for the concept of crime, **behavioural scientists** realise that a legal definition is more meaningful and sensible than any other definition for the following reasons:

- ◆ Specific crimes can be compared only if a uniform definition, like the legal definition, is used.
- ◆ Using a term like "antisocial behaviour" is meaningless because it is vague.

It should be clear to you by now that the concept of crime has different meanings for different people.

Because of the implications this has for penological research, the exclusive legal definition, rather than the inclusive definition, is the only really practical working definition.

Before going any further, test yourself and see if you know what crime is.

TEST YOURSELF

(15 mins)



Fill in the missing word(s) in the sentences below.

- (1) Determining whether or not an act is a crime depends on the (1) (2)and the community plays a role in criminalisation. [2]
- (2) Crime does not occur just because a law has been broken, but also because there is a for it. [1]

/continued ...

- (3) Crime is behaviour that is if theregards it as punishable. [2]
- (4) The criterion by which Burchell, Milton and Burchell judge (or measure) an act to qualify as a crime is [1]
- (5) Relativity of crime means that [1]
- (6) Vetter and Silverman regard the legal definition of crime as restrictive because it [1]
- (7) The criminal justice system is the system that gives form to and 2]
- (8) A commission or omission must conflict with what the law or [2]
- (9) *Mens rea* means [1]
- (10) In a crime there must be a concurrence of and [2]
- (11) According to De Wet and Swanepoel, punishment is the imposed on the perpetrator of the crime. [2]
- (12) The juridical requirements for crime are that there must be an, the act must be, the perpetrator must be and must also be threatened with [4]
- (13) The, rather than the, definition of crime is the only really practical operational definition. [2]

Now that you have a clear idea of what a crime is, we can pay attention to the various elements of the concept of crime as set out by Labuschagne.

2. ELEMENTS OF THE JURIDICAL CONCEPT OF CRIME

The element of an act

Before we can speak of an act in the criminal justice sense, the following requirements must be met. The act (behaviour) must be

- ◆ perceptible
- ◆ wilful
- ◆ human

This is not a fixed rule (it is not absolute), however, because there may be exceptions, as you will see from the following discussion.

Behaviour

Labuschagne points out that the act must be behaviour and not a condition or state. It is also exceptional, then, for a condition or state, such as being drunk in a public place, to lead to punishment.

What form does the act take? Three forms of act can be distinguished:

- ◆ Commission of a prohibited act
- ◆ Omission of a prescribed act
- ◆ Causing a particular consequence

Let us study each of these more closely.

Commission of a prohibited act

The law states very clearly that one person may not steal another's possessions/belongings. If Steven unlawfully takes Peter's possessions, he is fulfilling the requirements laid down for an act by the law. He has therefore done what he may not do.

Omission of a prescribed act

You and I are required to fill in an income tax return every year and to pay income tax. If we do not do so, we are breaking this command (law) and fulfilling the legal requirement for an act. So in this case it is not the execution of an act, but rather the failure to act, that is wrong.

Causing a particular consequence

A further form that the element of an act can assume is the causing of a particular consequence. Think, for example, of a person who points a firearm at someone else and kills that person through a shot that is fired. That person fulfils the element of an act of murder by causing the death of another person.

Human conduct

The act that is carried out must be done by a person. In primitive societies and in the Middle Ages, inanimate objects, such as a beam that fell on someone's head, or even animals, were "tried" and "punished". In our law, as in all civilised legal systems, that does not happen anymore. However, someone who commits a crime through the agency of an animal can be punished. If, for instance, you were to incite your dog to bite someone else, you could be punished.

Wilful human acts of conduct

Behaviour is only punishable if it is wilful. By **wilful conduct (behaviour)** we mean that the person is capable of taking a decision in respect of his or her actions — and thus also in respect of deciding not to perform a prohibited act.

Wilful conduct is behaviour that is subject to the person's free will. The person is thus responsible for his or her behaviour. We could also say that behaviour is wilful if people have the ability to control their bodily movements by their will or understanding. If people's behaviour cannot be controlled by their will, it is involuntary. Think, for example, of an epileptic who suffers a seizure while driving a car and causes an accident.

Perceptible wilful human conduct

To be able to determine or establish whether the behaviour or act complies with the requirements for (definition of) an act in the criminal justice sense, it is necessary to see if there is talk of an event. Therefore, just the intent(ion) or thought is not an act in the criminal justice sense. So, to sit and dream about the murder you would very much like to commit does not establish the act.

There may be exceptions to the rule, however. Consider the following examples:

- ◆ Drunkenness in certain public places
- ◆ Attempted crime may be punishable if it is clear that the necessary intent(ion) to commit the crime was there. If a person pointed a firearm at someone else and pulled the trigger with the intention of killing that person, but the firearm misfired, the person pulling the trigger could be charged with attempted murder. The intention to perform the act had existed even though the act was incomplete.

Complicity

An accessory to a crime is not directly involved in the criminal act. However, accessories assist unlawfully and deliberately in another's crime. They identify consciously with the commission of the crime by assisting the culprit or the accomplice. Moreover, accessories may give the perpetrator or accomplice information or provide them with the opportunity or the means to commit the crime.

Favouring

Favouring means that a person identifies with the commission of the crime. This can happen by, say, rendering assistance after the crime has been committed.

Unlawfulness

An unlawful act may be described as an act that conflicts with a legal command or prohibition. For example, if a woman was in love with her neighbour and consequently murdered his wife, it would be an unlawful act. This act is clearly in keeping with the legal prohibition that you may not kill another deliberately. But what about the person who acts in self-defence? Is it an unlawful act if A attacks B with a knife and B grabs the knife and stabs and kills A? Definitely not. Remember that the law does not just consist of commands or prohibitions. There are also rules that permit certain acts that conflict with a legal command or a legal prohibition **under certain circumstances**.

In the above scenario (where B stabs and kills A in self-defence), the act is therefore not unlawful because there were grounds (of justification) for it. Well-known grounds include **civil defence** (which includes self-defence), **state of emergency, consent, official competence** (e.g. the police officer who shoots and kills a fleeing offender) and **disciplinary competence**. **Someone is acting in self-defence when, to ward off an impending unlawful attack on his or her or someone else's life, person, goods or honour, he or she injures or even kills the attacker.**

TEST YOURSELF

(15 mins)



Having read the preceding section carefully, test your knowledge and see how you fare.

- (1) Before we can talk of an act in the criminal justice sense, certain requirements have to be met. Mention them briefly. [3]
- (2) Can a condition or state lead to punishment? Give reasons for your answer. [2]
- (3) What three forms of an act can be distinguished? 3]
- (4) What do you understand by wilful conduct? [3]
- (5) When can behaviour be regarded as involuntary? [2]
- (6) What is the requirement for establishing whether an act fulfils the concept of an act in the criminal justice sense? [1]

/continued ...

Guilt

There can only be talk of guilt when it is certain that the act that was committed was unlawful.

Let us examine the concept of guilt more closely. Guilt presupposes that people have free will to make choices about their actions. They can thus decide whether or not they will commit murder. The implication of this is that they can be held responsible for their actions because they made the choice themselves. This view of responsibility is known as the **indeterministic** view.

Then there is the **deterministic** view. Contrary to the freedom of choice of the indeterministic view, proponents of determinism hold that people's behaviour is predetermined. In other words, behaviour may be the result of people's genetic and biological make-up, the milieu they grew up in or their social background.

If this view were accepted in criminal law, it would mean that people could not be blamed for their misdeeds (felonies), including crime. With regard to freedom of will, Snyman (1992:151) maintains that **the truth lies somewhere between a fully deterministic and a fully indeterministic point of departure.**

The crux of this for us is that although people are subject to influences, urges and inherited qualities, they are nevertheless capable of controlling these so that their actions are in keeping with the norms of society.

Two forms of guilt can be distinguished, namely intention (*dolus*) and negligence (*culpa*). It should be clear to you that intention and negligence are **two different** concepts. Negligence is not something less than intention, it is just different. The result of this is that intention and negligence can never overlap.

- ◆ By **intention** we mean that people are aware that the act they intend committing is unlawful. It should therefore be clear that intention involves definite malice. When someone is accused of theft, for example, it must be proved that he or she knew that the goods belonged to someone else.
- ◆ In the case of **negligence**, the act is not committed intentionally (deliberately). A person who is preoccupied, drives through a red robot and causes an accident can be said to be negligent. In other words, the person's action is the result of negligence.

With what you now know about **intention** and **negligence**, what would you say is the difference between murder and culpable homicide? You would be correct if you said that murder involves intention, whereas culpable homicide is associated with negligence.

We have now considered the two types of guilt. Note, however, that these types of guilt can be linked with people's actions (whether commission or omission) only if

these people are **accountable**. **To be accountable means that people have the necessary intellectual abilities required by law to be held accountable for their unlawful activities**. Conditions that play a role in determining whether someone is accountable or not include youth, mental disturbance, drunkenness, drug addiction, anger and provocation.

Threat of punishment

The threat of punishment is related to the **principle of legality**. In criminal justice this principle is also known as the *nullum crimen sine lege* principle, which means "no crime without the stipulation of a punishment". Let's analyse this principle and see what the implications are:

- ◆ A person can be found guilty of a crime by the court only if the act he or she committed is recognised as a crime by the law.
- ◆ The accused should be found guilty of a crime by the court only if the act that was committed was already recognised as a crime at the time it was committed.
- ◆ Crimes must be clearly defined. If there is any doubt as to whether a particular behaviour falls within the definition of crime, such doubt ought to favour (benefit) the accused. Nevertheless, it should also be clear that it is impossible to determine the detailed prerequisites for every crime. There must be a degree of flexibility, such as the requirement of negligence for culpable homicide. The court must therefore decide for itself in every case whether a reasonable person would have acted in such a way under the circumstances.
- ◆ The court should interpret the definition of crimes narrowly rather than broadly.
- ◆ After the accused has been found guilty, the above four principles must be applied with regard to sentencing.

Although various factors can play a role in the criminalisation of behaviour, they are not decisive in determining why the act is ultimately a crime. An act is thus not a crime because it is harmful to the community; it is a crime because the legislature regards it as harmful to the community.

Although crime can be described from different perspectives, it is important for you to be familiar with the judicial viewpoint. According to this view, the requirements for crime are as follows:

- ◆ There must be an act.
- ◆ The act must be unlawful.
- ◆ The perpetrator must have the necessary guilt for its commission.

- ◆ The perpetrator of the crime must, moreover, be threatened with punishment.

Punishment can be viewed from various perspectives. We will now give attention to the various points of view and then draw up a working definition. Punishment developed from the primitive criminal justice systems up to and including its present sophisticated application. Over time, there has been a definite shift in emphasis from an action-centred to a person-centred application of punishment.

Punishment is not just concerned with the nature and extent of the punishment, but also its justification. We can use the various theories of punishment as a starting point to explain the principle of justification. Theories on punishment may be divided into two main groups: **absolute** and **relative** theories, with retribution being the only absolute theory. The relative theories consist of deterrence, rehabilitation and protection of the community.

TEST YOURSELF

(5 mins)



Test your knowledge by matching the concepts. Simply write the letter of the alphabet that corresponds to the correct answer next to the question number, e.g. 9(c).

- | | |
|------------------------------|------------------------------|
| (1) Condition | (a) Incomplete act |
| (2) Non-participant | (b) Requirement of legality |
| (3) Determinism | (c) Intellectual control |
| (4) Threat of punishment | (d) Mental abilities |
| (5) Ground for justification | (e) Indeterminism |
| (6) Accountable | (f) Drunkenness |
| (7) Attempted crime | (g) Accessory after the fact |
| (8) Wilful | (h) Self-defence |

3. THE CONCEPT OF PUNISHMENT

By now it should be clear that there are various explanations for everyday penological concepts. As you will see from the discussion that follows, the definition of the concept of punishment is no exception. Besides the fact that punishment can be described from different perspectives, such as the juridical, penological and psychological, authors also have different views of what punishment comprises.

Let us look at a few definitions of punishment.

In their definition, Snarr and Wolford (1985:6) distinguish the following six basic elements:

- ◆ Punishment is accompanied by a robbing of something or by a privation.
- ◆ It is enforceable.
- ◆ It is imposed by the state.
- ◆ Punishment supposes that rules have been broken.
- ◆ Punishment is imposed on an offender.
- ◆ The punishment imposed is related to the offence committed.

Like Snarr and Wolford, Pollock-Byrne (1989:126) also gives the elements of punishment.

- ◆ Punishment implies two persons, namely the punisher and the punished.
- ◆ A certain degree of suffering is inflicted on the person who is punished.
- ◆ The action of the punisher is sanctioned by legislation.
- ◆ The [person] punished has been found guilty of a commission or an omission that is in conflict with the law.

Primoratz's (1989:1) definition is in keeping with those of the above authors. According to this definition, punishment is "an evil deliberately inflicted *qua* [as] evil on an offender by a human agency which is authorized by the legal order whose laws the offender had violated".

Let's analyse the various components of this definition:

- ◆ Punishment is pain or harm (suffering) inflicted on the offender.
- ◆ As you know, nowadays pain is no longer part of punishment. The rationale for using the word "evil" is to show that punishment should represent something that people would not like to experience (in other words, anything people do not want inflicted on them).
- ◆ The offender is a person who has committed an offence.
- ◆ Primoratz makes it clear that the offender is a person who has broken the **law**. Offence (or transgression) in this context is thus distinguished from behaviour that could be regarded as harmful or antisocial.
- ◆ Primoratz (1989:4) stresses the fact that punishment can never be self-punishment, and that it must be action by a human agent. The person being punished may also not be punished accidentally. It is thus an express requirement that it be deliberate pain.

- ◆ The last component of this view of punishment is that punishment can only be imposed by a person who has the necessary authority (or power) to do so. Think about it: If this were not so, could one not classify the action as revenge?

When we compare this definition of punishment with Benn, Flew and Hart's well-known definition (in Baird & Rosenbaum, 1988:17), there is clearly little difference between the two.

The five elements in Benn, Flew and Hart's definition are as follows:

- ◆ Punishment implies the element of pain or unpleasant consequences.
- ◆ Punishment follows the transgression (breaking) of a law.
- ◆ Punishment is applied to an offender.
- ◆ It is deliberate suffering caused by a human agent (other than the offender himself or herself).
- ◆ Punishment can only be administered by a person who has the power (authority) to do so.

If you keep in mind the various requirements for punishment, it is actually easy to compile your own definition of punishment. Do so now before going any further.

TEST YOURSELF	(13 mins)
(1) Define punishment from the facts at your disposal.	[5]
(2) What six basic elements of punishment do Snarr and Wolford distinguish?	[6]
(3) Give a summary of the various components of punishment.	[8]
(4) Name the five elements of punishment given by Benn, Flew and Hart.	[5]
<p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p>	
/continued ...	



A large rectangular box with a solid gray border, containing 25 horizontal dotted lines for writing. The lines are evenly spaced and extend across the width of the box.

STUDY UNIT 3

THE HISTORICAL DEVELOPMENT OF PUNISHMENT

LEARNING OUTCOMES

After you have studied this study unit, you should be able to

- ◆ differentiate between law in the time of primitive societies and contemporary law
- ◆ put the development of punishment, from 2000 BC up to the present, into perspective



1. INTRODUCTION

By this stage of your studies you should be familiar with the concepts of social control and crime, as well as the concept of punishment. To thoroughly master all the facets of the phenomenon of punishment, you also need to take note of the law and of customs in primitive societies, as well as the historical development of punishment. The study of primitive law is a very difficult task because legal institutions in primitive societies took on a totally different form from those in modern societies.

We will now take a closer look at punishment in primitive societies and pay particular attention to the historical development of punishment.

2. PUNISHMENT IN PRIMITIVE SOCIETIES

The various primitive legal systems

In primitive societies, the steps taken to solve legal problems differed greatly from community to community. Some communities had legal institutions that correspond (fairly) closely to those we know today, while others completely lacked any form of legal institution. The latter group did not live in anarchy, however. The question is how social **conformity** (we could also speak of uniformity or **agreement**) was achieved in societies without legal institutions.

In these societies there was a group of autonomous political units, based on blood relationship or local units (clans). The existence of such units was a right in itself in the sense that such units were not subject to any higher political authority or legal institution. In this respect, they correspond to the sovereign states of today. Infringement of the interests of a member of the group by members of another group was treated with hostility by all the members of the injured group, who then sought **compensation** and took revenge. (Compensation may also be regarded as **reparation** for or **rectification** of a particular loss.) **This taking of revenge was known as a blood feud** and differed from group to group. In some groups it took the form of a vendetta and in others the matter was considered settled when the aggrieved group, one of whose members had been injured, had taken revenge.

An important aspect of a blood feud in primitive society was that retaliation could be directed not only against the opponent, but also against any member of the group. This implies the doctrine of **collective responsibility**. (Collective responsibility is responsibility that holds for everybody, in other words a joint or community/communal responsibility.) The principle of collective responsibility applied not only to voluntary groups in different tribes, but also to different voluntary groups in the same tribe. Obviously, then, in communities where collective responsibility applied, there was less emphasis on the culpable state of mind/intellectual abilities or guilt of the perpetrator.

Where a battle resulted as part of the revenge, then, any member of the tribe, and not only the offender, could be killed or wounded, even if that person was not involved in committing the incriminating act. The act of revenge that was usually carried out by the tribe or other blood group could also apply in cases where a systematic legal system existed. In such cases the authorities did not mete out the punishment, but merely allowed the aggrieved group to go ahead with their retaliatory action.

Where systems of collective revenge or blood feud applied, it was also customary for the tribe to which the offender belonged to support him or her when revenge was taken against him or her. Such protection was determined by the **solidarity** of the tribe or group. (Solidarity may be regarded as a feeling of being one with another, thus a communal sense or esprit de corps.) The offender's group supported him or her simply because he or she belonged to that group. The only exception was if the offender continually transgressed; in that case the group often allowed revenge to be taken against the offender by the other group.

A blood feud was based on six principles:

- ◆ The injustice that was committed was regarded as a **collective injustice**. The revenge was therefore not the settlement of a personal matter — any

injustice against any member of the group was regarded as an injustice against the whole group.

- ◆ A blood feud was mainly based on **restitution** and not so much on punishment.
- ◆ Responsibility for an act was **the group's responsibility**. In other words, if the real offender could not be traced, revenge could be taken on **any** member of the group to which the offender belonged.
- ◆ The offender's **motive** for committing an act was irrelevant. It did not matter whether the act was premeditated or an accident.
- ◆ The group had no interest in **injustices to members of other groups**.
- ◆ **Restitution was also collective**. In other words, **all** the members of the group were obliged (bound) by custom to avenge an injustice to any of the group's members.

In a blood feud, the principle of *lex talionis* was usually interpreted literally. (*Lex talionis* was also part of the Mosaic law, namely an eye for an eye and a tooth for a tooth, and so on.) In other words, the offender had to suffer in the same way as he or she caused the victim to suffer.

So far the discussion has dealt with transgressions against a group, or rather by one tribe against another. The position changed, however, if one member of a tribe or group violated the interests of another member of that same tribe or group. Generally, no action was taken. Because of a feeling of tribal solidarity, the members of a tribe were reluctant to punish a fellow member, and other tribes had no interest in the matter. Such action was treated with the greatest repugnance, however, and regarded as a disgrace to the offender; often it was believed that he or she would receive supernatural punishment. Consequently, members of tribes rarely harmed one another and punishment, as we understand it today, did not follow the act.

The sanctions of social conformity

To understand why members of a tribe complied with particular demands, we need to study primitive law as part of a broader group principle that included **both positive and negative sanctions**. (A **sanction** may be regarded as a coercive measure to enforce decisions.) The reward for complying with the community's demands was just as important as the punishment for non-compliance. Therefore, we should briefly examine the rewarding of good acts (positive sanctions). Since there was no authority that enforced slavish compliance with customs, incentives had to be sought to make members meet the community's demands.

The most important **positive sanction** was **public opinion**. Public opinion was especially important in small and isolated communities where everyone knew everything about everyone else and privacy was virtually non-existent. In those circumstances people were much more concerned about the approval of the community as a whole than they would be in an impersonal urban community. Having a good reputation had both social and material advantages. Sometimes the community believed that the ancestors and other spiritual beings showed their approval for good deeds.

Public opinion also fulfilled a very significant role as a **negative sanction**. People wish to avoid earning a bad reputation just as much as they wish to earn a good reputation. The fear of public disapproval or ridicule was exceptionally strong in primitive societies. Because mutual respect was indispensable, members of the community who treated other members badly could not expect any material benefits from those members whom they treated badly, neither could they expect other members to protect or support them when they were in trouble.

The power of negative sanctions is most evident in groups where offenders would go into **voluntary exile** or commit **suicide** because they could not bear being humiliated by the group.

Another negative sanction that compelled obedience to group demands was **magical-religious belief**. Primitive people believed strongly in the existence of supernatural powers/forces. These powers took three forms in particular and their operation and appearance differed from group to group. The first form in which belief in the supernatural came to the fore was in the phenomenon of **taboos** which were not allowed to be broken. (A taboo is something which may not be touched or moved; in other words, it is forbidden or prohibited.) Secondly, there was the belief in the drastic after-effects of the wrath of the **ancestors or other supernatural spirits** and, thirdly, there was the belief in sorcery (magic), which kept people from harming others out of fear of revenge.

In cases where observing customs was difficult or contradictory to individual interests, these sanctions supported the tribal customs. Sanctions served to reinforce the many requirements of blood relations in primitive societies. The punishment for witchery and for breaking certain taboos was very heavy and cruel: the whole tribe, and sometimes even neighbouring groups, came together to eliminate the offender.

The disappearance of blood feuds

The biggest disadvantage of a blood feud was that it did not put an end to disputes. Revenge led to retaliation (reprisal) because one group did not always accept that the matter had been finally settled by punishing the first offender. Gradually, however, blood feuds diminished in intensity and amendments were

introduced until the punishment of offenders was eventually taken completely out of the hands of family members.

Right to asylum

In due course a distinction was made between **deliberate action** and **accidents**. To allow for the opportunity to determine whether the injustice had been committed deliberately or by accident, fugitives could seek **asylum** in certain holy places until the matter had been investigated. In Biblical times, the altar in the temple was such a place of peace and safety. Thus, for instance, Adonijah (1 Kings 1:50–53) and Joab (1 Kings 2:28–35) fled to the temple. The so-called free cities (cities of refuge) of Biblical times, too, offered fugitives temporary protection from blood avengers. As long as fugitives stayed in those places, blood avengers could do nothing to them.

Exemption from responsibility

A further positive step in the disappearance of blood feuds was the recognition of the **degree of responsibility**. Previously, all the offender's family members were subject to the revenge of the victim's blood relations. Gradually, however, distant family members were exonerated from the responsibility of retaliation.

Compensation

In due course the method of **compensation**, that is the principle of reparation or compensation, developed in the place of blood feuds. This meant that the offender had to pay a sum of money to the victim or the victim's family. The amount of compensation usually depended on the age, rank (or status) and gender of the injured party. A **free burgher or freeman** (a citizen who had the right to practise a free profession) carried a higher value than a slave, and a man was worth more than a woman, for instance. While it was sufficient for a free burgher to pay compensation, a blood feud was an absolute requirement if the victim was of noble descent. Furthermore, a blood feud followed if the guilty party did not have enough money to pay for his or her crime.

We find the right to compensation particularly among the ancient Hebrews and Arabic tribes and also in the old Saxon laws. So, for instance, a person who had knocked out someone's front tooth had to pay the equivalent of 80 cents in compensation to the victim, and in the case of a molar or an eyetooth, the equivalent of R1,50. The compensation was paid directly to the victim or his or her next of kin and not to the state.

The Truce of God

During the Middle Ages, when bloodshed and blood feuds were the order of the day, the Church restricted the practice of blood feuds. It was not prohibited, but certain persons, such as unarmed farmers and religious persons (i.e. monks and nuns), were protected from the raids of bloodthirsty and belligerent Germanic barons. This measure was aimed mainly at the inconstancy of the nobility. Initially the measure did not bear much fruit, but later it did play an important role in regulating law and order.

Early in the 11th century, the Church introduced laws that forbade all bloodshed, wars and disputes that arose between Saturday afternoon and Monday morning.

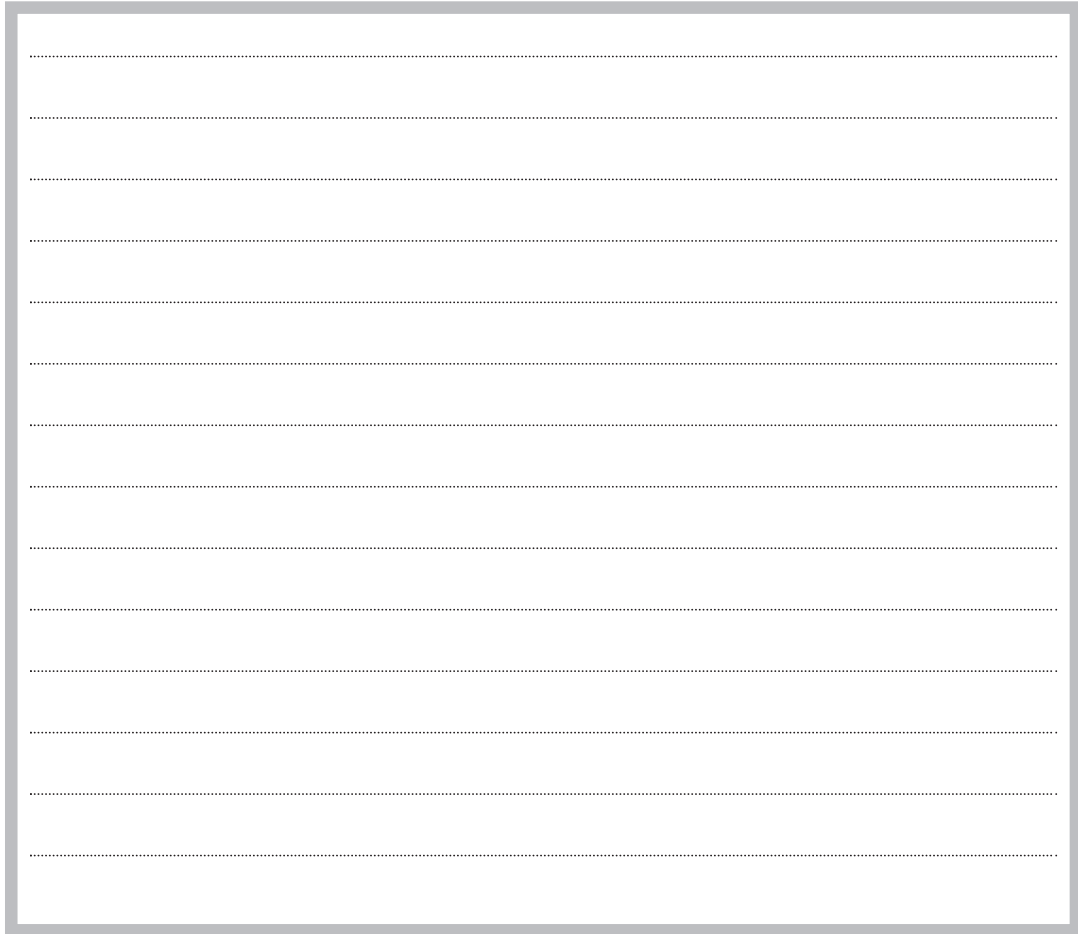
In 1041 a truce (ceasefire) was introduced between Wednesday evening and Monday morning and also during holy days (feast days). Church office-bearers were permanently safeguarded against the attacks of the nobility, and even pilgrims and women were later included in this truce. This so-called Truce of God reached a climax in the 12th century, but from the 13th century it began to diminish in importance, especially as the king's power started to increase and a strong state authority emerged.

The punishment of crime by the state

With the rise of strong central governments, blood feuds, as a method of curbing unruly elements in society, were replaced by the action of officials or organisations dealing with crime.

Although the punishment of criminals only finally passed to the state during the 13th century, there were penal codes in existence earlier than that. Among these, the best-known was that of Hammurabi of Babylon (2000 BC).

A type of criminal court had already developed before the institution of the royal court. This court, which consisted of the older members (the elders) of the community, served as a third party to whom complaints could be taken. The function of this court was not so much to impose a punishment as to bring about peace (reconciliation) between the parties. A strong central authority of the state, charged with the imposition of punishment, only emerged as the authority of the king increased. From then on crimes that had previously been subject to blood feuds became crimes against public order, as represented by the king.



3. THE HISTORICAL DEVELOPMENT OF PUNISHMENT

Hammurabi's code (circa 2130–2087 BC)

Introduction

One of the earliest written remnants of ancient penal policy directives is the code of the Babylonian king, Hammurabi. The code is one of the earliest and most systematised efforts to achieve a social and ideological objective by means of precise technical procedures. Hammurabi's code covered a broad spectrum: it contained laws; it was an instruction manual for judges, police officers and witnesses; it dealt with the rights and obligations of spouses, women and children; it was a system of regulations for wages and prices; and it was a code of conduct for government officials, merchants and doctors — throughout, clause for clause, it stipulated the specific obligation (responsibility), the particular act that was prohibited and the exact punishment to be imposed. When we speak of the code as a historical milestone, we are referring to the proactive as well as retroactive

significance it had. It brought about many reforms in existing practices and introduced numerous innovative measures.

The aims of the code

a Reinforcement of state authority

The code authorised comprehensive state intervention in the finest facets of social and economic life. The enforcement of the regulations was based on a **system of punishments which could be imposed by the state**. People's independent actions — of whatever nature — were expressly prohibited. Not only were blood feuds and revenge by the tribe prohibited (as in, say, cases of deliberate personal injustice), but any form of self-assistance in civil cases was severely punished.

Hammurabi's code thus had several political and administrative objectives and was intended to reinforce the king's power; the abolition of own (independent) action, or blood feuds, is an example of this. Another example is the punishment imposed on corruptible judges, officials and witnesses. The punishment for bribery and corruption was severe: a judge who changed his pronouncement after it had been delivered was relieved of his post and had to pay a fine twelve times that of the one he had imposed.

b Protection of the weak against the strong

This objective of Hammurabi's code was of prime importance and its implementation was regarded as the sacred duty of the king. Widows were protected against exploitation; pregnant slaves against beating by impatient masters; and subordinate officials against their superiors. The principle was that punishment would be imposed on anyone who exploited an inferior or a subordinate.

c Restoration of the relationship between offender and victim

To the Babylonians, the act was as abhorrent as the perpetrator. The deed had to be erased and matters restored as if the crime had never occurred. When this was not possible, such as when a life had been taken, the only alternative method of restoration was for the offender to be forced to suffer exactly the same loss as the victim — if a victim lost an eye, for example, the offender also had to forfeit an eye. Section 200 of the code stipulated that if a nobleman should knock out the tooth of someone of equal rank, the assailant's tooth should also be knocked out. (Note that both parties were noblemen in this case.) Were a nobleman to knock out the tooth of a subordinate, however, he only had to pay a fine of half a silver piece. According to Babylonian values, knocking out a nobleman's tooth in exchange for that of a subordinate would be a violation of the principle of equality.

Although, in principle, the relationship between the offender and the victim had to be restored, revenge was nevertheless the dominant motive in punishing serious offences. If the king or his administration's policy was threatened, deterrent reprisal followed. This was also the case for fraud and offences against the **morality** (morals) of the family. For example, if a son hit his father, his fingers were cut off and if a woman murdered her husband for the sake of another man, she was impaled on a sharp pole.

Forms of punishment

Besides fines, four other forms of punishment were imposed in Babylon: the **death penalty, mutilation, branding** (literally burning a mark into the flesh) and **banishment** — the latter was only imposed if a father was guilty of incest. The death penalty was carried out in various ways, such as by burning, drowning and impaling on a sharp pole. About thirty-seven specific crimes were punishable by death, including rape and abduction (murder is not mentioned in the code). Mutilation was the punishment for a slave's disrespect for a master or an adopted son's disrespect for his father, or for a doctor's fatal negligence.

The time of Moses (Mosaic period)

The Mosaic period, which follows that of Hammurabi chronologically, was characterised by a legal code that was considerably **less sophisticated** (less refined) than its predecessor. Social control was also approached less professionally than was the case in Hammurabi's code. Notwithstanding their obvious similarities, there was one major and basic difference between the two systems, namely a drastically changed relationship between **religious** (ecclesial) and **secular** (worldly) power.

In Babylon, religious power was subordinate to secular power — in fact, religious power was included in the secular power. Purely religious interests or transgressions were unknown to Hammurabi, but every transgression of religious interests was at the same time a transgression of a state or secular interest. In contrast with this, the Mosaic code consisted mainly of crimes against religion.

For some of these offences, an alternative punishment, the *kerith*, was imposed. This was a special ancient Hebrew sanction that combined forgiveness with a self-imposed curse. The consequence of this curse, which was pronounced by the Church authority and solemnised by God, was a slow death in exile.

Besides the death sentence and *kerith*, mutilation and scourging are also mentioned. This could also be called corporal punishment. The Mosaic code retained the right to retaliation by the victim's tribe as punishment for murder. Notwithstanding the Biblical support for the **principle of *lex talionis*** (an eye for an eye and a tooth for a tooth), the perpetrator's intention was still taken into account.

Crimes against God and against people were regarded as serious. It was believed that if a criminal were not traced and punished, the whole community, both guilty and innocent, would incur the wrath of God. Many of the Mosaic punishments were aimed at satisfying the victim and also eliminating the contamination caused by the crime. This dual purpose ensured the power of the Church authorities, especially in times of emergency. The privileged status of the priesthood led to a continual struggle between the religious and the secular authorities for political power.

TEST YOURSELF

(20 mins)



- (1) Name the main features of Hammurabi's code. [6]
- (2) Outline the objectives of Hammurabi's code. [10]
- (3) For what forms of punishment was provision made in Hammurabi's code? [4]
- (4) Compare the Mosaic period and Hammurabi's code in respect of religious and secular powers. [5]
- (5) Explain the concept of the **kerith**. [2]
- (6) For which party did Hammurabi's code and the Mosaic period make provision for the first time in the process of punishment? [1]

.....

.....

.....

.....

.....

.....

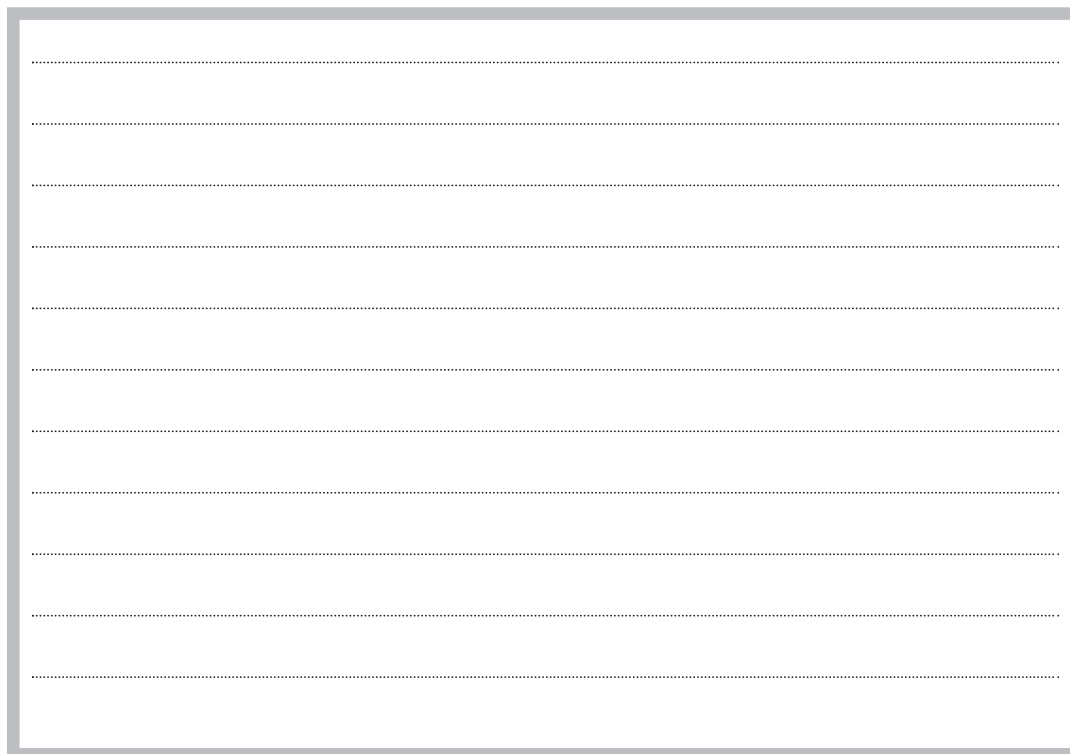
.....

.....

.....

.....

/continued ...



The Roman Empire

Introduction

During the time of the Roman Empire, the Roman state had a formal **code** (a code may also be called laws) of civil and criminal procedures, a system of legal training with state-supported law schools and a strong tradition of lawyers.

Roman law has enjoyed the longest and fullest uninterrupted supremacy in the world to date. During the era of the Roman Republic and the early Roman Empire, the criminal procedure was a quasi-private prosecution. Both parties (and later their representatives) argued their own cases in a lawsuit, and there was no need for an official prosecutor. In this way the state maintained complete impartiality.

Legal procedures in which one private party brought and argued a charge against another restricted the role of the state. The state merely provided an impartial arbitrator who settled the case and stipulated the punishment. This way of acting stood in sharp contrast to that in which the state provided not only the arbitrator but also a state prosecutor, who replaced the private prosecutor.

The latter method vested the political authorities with far greater powers, resulting in far-reaching political and social consequences. During the Roman era the transition from the former to the latter system was initially restricted to

the provinces under the absolute rule of Roman governors, but the Roman Caesars soon realised the advantages of this system and so the operation of the system was extended to foreigners and later even to Roman citizens.

Forms of punishment during the Roman period

As with many other aspects of their culture, the Romans not only learned from others but were also ingenious inventors. The Romans administered most forms of punishment that had existed previously and they also administered many different forms of punishment. Various forms of temporary or permanent humiliation were familiar, such as a lowering of status to that of a slave, branding on the forehead and having someone lead minor (less serious) offenders around, proclaiming the nature of the crime out loud. Mutilation was also commonly performed. Fines and forfeiture of property were especially popular and rulers enriched themselves at the expense of prominent people who had fallen into disfavour. Imprisonment gained prominence at times when there was a shortage of labour in the mines and on the galleys. Noblemen were often banished and strong young offenders were sentenced to be bullfighters during the Roman Games. From this it is evident that punishment was administered freely during the Roman era, although this fluctuated according to administrative and economic considerations and political **opportunism**. (Opportunism means taking advantage of favourable conditions.)

The Germanic invasion of Rome

Introduction

The laws of the Germanic invaders of Rome differed radically from the well-developed legal system of the Romans. For instance, the system of private prosecutors, which had prevailed in the early Roman Republic, was still operating amongst these tribes. Although the barbaric Germanic tribes were aware of these differences, they were determined to retain their system. Nevertheless, the system did not survive because it was only effective for **nomadic** (wandering and itinerant) people and so Roman law gradually began to reassert itself.

The rediscovery of the **codification** (which means that the various scattered laws were synthesised in one law book) of Roman law, as compiled by Justinian, was the trump card for Roman law; whereas Roman weapons had failed, Roman law eventually became dominant again. The only Germanic tribes that were not affected by Roman law were those of North Europe and Scandinavia — including the **Angles** and the **Saxons**. (They were the Germanic inhabitants of England before 1066, in other words, of English descent.) The latter groups invaded large sections of Britain, bringing a primitive Germanic legal system with them. Within 500 years, however, they had established an Anglo-Saxon legal system, which was strong enough to resist the Norman invasion.

Early Germanic legal systems

The earliest tradition of Germanic law points to the existence of a society where social control was in the process of shifting from private revenge to **group arbitration** (that is, the settlement of a dispute by an impartial person or group). In a social organisation based on blood relationships and divided into tribes, crime and punishment rested mainly with the individual. When a person's interests were violated, the victim's right to reprisal (retaliation) applied. This right was hereditary and limited to the victims and their closest blood relations. If they did not act, neither did the group to which they belonged.

The transition from private action to action by the group or community followed, not so much because of the actual limitations being placed on the practice of blood feuds, but because the times and places where blood feuds could be carried out were limited. These limitations came about through the extension of the times and places where the Truce of God was in force. At such times, all private action was strongly prohibited and the offender was safeguarded against reprisal — at least temporarily.

The earliest forms of the Truce of God applied during holy feast days. Later it was permanently extended to those places where the holy feasts were held. The earliest forms of group arbitration probably originated during the great tribal gatherings during the holy festivals. At times when the army was on the march, this truce also applied. Gradually it was extended to sowing and harvesting times. Finally the truce was extended to the homes of offenders, where they could not be attacked. Because offenders were then smoked out of their homes, the truce was extended to the ground around the house. Historically speaking, the most important form of the Truce of God was the truce surrounding the king.

With the extension of the Truce of God, it became possible for offenders to flee permanently from their pursuers. In a society where the safety of a group depended on the cohesiveness of the group, unresolved hostilities gave rise to great dangers. An alternative solution therefore had to be found. This solution was the system of paying compensation.

The amount of compensation varied according to the nature of the crime. One type of compensation was paid in the case of the death of a victim, a second type in cases where the victims did not die, and a third type was paid to the state in cases where an official acted as mediator.

Different forms of punishment

Originally the **death penalty** and **banishment** were the punishments for religious and tribal crimes. For these crimes, the priest usually acted as judge and executor of the punishment. The executions were often regarded as holy because they were intended to appease the gods and to ward off the contamination of the whole

group. In cases where not only the gods were provoked, but individuals were also harmed/prejudiced, the individuals or their families were frequently allowed to execute the punishment.

Between the decline of Germanic law and the advent of the feudal period and the Middle Ages, there was a brief period during which the Frankish king, Charles the Great, who mounted the throne in 800 AD, reigned. Charles the Great sent his envoys (or ministers) on horseback to the far ends of his kingdom to enforce law and justice. The envoys travelled in pairs and consisted of a nobleman and a priest. They followed a fixed route so that by so doing they could take the king's **decrees** (decisions or ordinances) to distant places. This system brought about a cultural as well as a judicial revival.

The feudal period

The feudal period and the Middle Ages ushered in a dark period for the law. Crime was rampant. The disintegration of kingdoms into innumerable **feudal** communities, or **feudal systems**, each with its own armed forces and taxes, produced a fertile breeding ground for anarchy. (In the feudal system, the feudal lords loaned out estates to feudal tenants or vassals.) The feudal lords were the upholders of law and order as well as the violators of the truce. Even though Germanic law was the basis of justice in the Middle Ages, the prosecutors were once again the disadvantaged, and anyone who had no blood relatives could not make use of the law.

In the Middle Ages, the judiciary tried to take the judgment of evidence out of human hands and leave it to God. To this end, **two techniques** were used, namely **judgment** (discernment) and **trial by battle**. The last method was particularly popular among the nobility because it combined force with an appeal to God. An extension of trial by battle was that parties who could not act themselves could hire someone to engage in the fight for them. Initially this privilege was reserved for women, children, the elderly and the weak, but later anyone who could afford it could make use of it.

Just as in trial by battle, in **judgment** (discernment) it was believed that divine pronouncement would reveal the guilt or innocence of the accused. The specific form of judicial judgment differed from place to place. For example, the accused would be exposed to dangerous situations, such as submersion in water ("trial by water"). In this case, the accused were bound and thrown into a river. If they survived, it would be regarded as proof of their innocence, but if they sank and drowned, it was taken as a sign of their guilt.

The Inquisition

The intellectual stagnation of the Middle Ages was followed by an intellectual revival in the 11th and 12th centuries, which soon led to opposition to the

Roman Catholic Church, prompting a reaction from various popes. This resulted in the Inquisition and the persecution of heretics in almost every city and parish (congregation). Inquisitorial action was sudden, secret and practically immune to any successful defence on the part of the accused. The rediscovery of the codification of Justinian, in which torture was approved, gave the Inquisition an appropriate legal source on which to base their methods.

The punishments worsened in each successive century of the Middle Ages. By the beginning of the Renaissance, the old lenient systems of fines and compensation of the Germanic tribes had been almost completely replaced by a bloodbath. By the 14th century, the death penalty was the most common punishment. Other well-known punishments in the Middle Ages were mutilation, humiliation, corporal punishment, banishment, forfeiture of property and, occasionally, imprisonment.




TEST YOURSELF

(20 mins)

- (1) What did the formal codes in the time of the Roman Empire make provision for? [2]
- (2) Explain the concept of quasi-private prosecution. [3]
- (3) What is the advantage of the extended role occupied by the state in the legal process? [3]
- (4) Make a list of the valid forms of punishment during the Roman Empire. [4]
- (5) Give an outline of the early Germanic legal systems. [4]
- (6) Why did the disintegration of kingdoms contribute to the anarchy of the feudal period? [3]
- (7) What is the most significant similarity between **judgment** and **trial by battle**? [1]
- (8) What led to the Inquisition? [1]

/continued ...



The Renaissance

Moving along chronologically in our study of the history of penology, we move from the Middle Ages to the **Renaissance** (the **age of enlightenment**, sometimes simply called the Enlightenment). The focus is no longer the **punishments** but the **method of trial**. The most important forms of punishment that had previously been administered remained. The centralisation of political power during the

Renaissance brought about a standardisation in the legal process, but the guilt of the offender was still accepted — all that had to be decided was the punishment. In spite of this situation, there was still an attempt to ensure a fair trial. In the course of time it was believed that final proof could be obtained only if the accused confessed (admitted) their guilt; such a **confession** was stipulated as a prerequisite for conviction. If the accused did not want to confess their guilt, they were tortured and were acquitted only if they could endure the torture. From the beginning of the 18th century, opposition to this method of trial (hearing) slowly grew until it reached a climax in 1764 with the publication of **Beccaria's essay on crime and punishment**. That opened the way for reform; shortly thereafter, the criminological and penological sciences came into being.

The classical school

The Italian legal theorist and political economist, Cesare Beccaria, took the principles laid down by Montesquieu, Voltaire and Rousseau and other 18th-century philosophers and elaborated on them in his famous treatise (essay), *Crimes and punishments* (which attacked corruption, torture and capital punishment). This work was published in 1764 and formed the theoretical foundation for the great changes that were introduced into criminal law. The methods of punishment of the 16th, 17th and 18th centuries were extremely cruel and aimed to prevent crime solely through **deterrence**. The person of the offender, the circumstances under which the crime was committed and other subjective factors were irrelevant.

In this work, Beccaria stated that the **purpose of criminal law** should be to assure **the greatest happiness to the greatest number of people**. He also accepted that Rousseau was right in his theory that the **social contract** was the basis (foundation) of society. According to this theory, all people are absolutely free and independent in their natural state, but they sacrifice (offer up) a part of that freedom when they enter into the social contract to be able to enjoy the benefits of a society. Beccaria maintained that committing crime broke the social contract and the right to punish could therefore be based on the necessity of preventing crime in order to keep the social contract intact.

According to Beccaria, it was the duty of judges only to determine whether the law had been broken, and then to act according to the stipulations (prescriptions) of the law. The scope of the punishment should be determined by the damage the crime caused to the public welfare, but the purpose of the punishment should be to deter the offender from doing further harm, and others from committing the same crime. Beccaria felt that torture should be abolished and that imprisonment should be used more often than corporal punishment, for instance; an accused must be assured of a fair trial. Before sentencing a person, the judge should be certain that punishment is necessary. Punishment must be appropriate, as

prescribed by law, and must be administered speedily and publicly. This premise of Beccaria's forms the **basis of the classical school**.

The classical school in penology upholds the following three principles:

- ◆ Firstly, the **rights and obligations** (responsibilities) of every individual must be protected (safeguarded). Since all people are equal, all criminals must be tried equally.
- ◆ Secondly, a **specific punishment must follow a specific crime**, since crime is a judicial **abstraction**. (An abstraction is a concept that originates in the mind and does not exist in concrete reality.)
- ◆ Thirdly, **punishment should be limited to what is socially necessary**. Social necessity is related to the **deterrent value** of punishment, and just enough punishment as is necessary to deter others from committing a similar crime should be administered.

These three principles conveyed the belief that everyone has a **free will**. It was also assumed that we would want to exercise our free will in such a way that we would maintain a balance between pleasure and pain in order to be able to enjoy the greatest degree (amount) of pleasure. From this it follows that a specific punishment must be attached (related) to every act in order to give people the opportunity to weigh up the pros and cons (advantages and disadvantages) of a crime and so determine whether it is to their advantage or disadvantage.

The application of the principles of the classical school resulted in an orderly procedure of **rational rules** (i.e. rules based on human reason) being established. These rules lessened the cruelty of punishments and prevented the **arbitrary** use of punishment. (Arbitrary punishment means the indiscriminate use of punishment without a specific reason.) The principles of the classical school are contained in the **French penal code** of 1791.

The above factors **promoted the legal process**. By concentrating on crime, however, the classical school drew attention away from the criminal and the investigation of causes of crime. In addition, this school **overemphasised** the role of **reason** in human behaviour and **ignored** (overlooked) the importance of **personal and social factors**.

The positivist school

The last "phase" in the historical development of punishment and the administration of punishment that we will look at is the so-called positivist, or Italian, school, which originated in the last part of the 19th century. During this period there was a great revival in the field of biological sciences, which led to the establishment of the positivist school. This revival was stimulated by Darwin's writings on evolution,

which caught the imagination of scientists everywhere. (The classical school originated before the blossoming of the biological sciences and was therefore not influenced by them.)

The positivist school was founded by the Italian criminologist, Cesare Lombroso, in about 1872. In 1876 Lombroso published his *Delinquent man* (Italian title: *L'homo delinquente*). This was followed in 1881 by Enrico Ferri's *Criminal sociology*. The positivist approach was based on Lombroso's theory of the born criminal.

Although Lombroso and his followers did not succeed in explaining the cause of crime, they did leave their mark on the history of punishment by drawing attention to the criminal as a person. The positivist school paved the way for the subsequent reform movement in the penal system, according to which the criminal was seen as a person and individual differences were acknowledged. This, then, is also the modern approach to the imposition of punishment.



TEST YOURSELF

(20 mins)

- (1) What was the most significant feature of the legal process during the Renaissance? [1]
- (2) Outline the development of the system of punishment during the Renaissance. [4]
- (3) What changes to the process of punishment indicate the progress that is characteristic of the Renaissance as a period of enlightenment or progress? [2]
- (4) Give an outline of the most important principles contained in Beccaria's famous work, *Crimes and punishments*. [8]
- (5) List the principles upheld by the classical school in penology. [3]
- (6) Explain the assumption that every person has a free will. [6]

/continued ...

A large rectangular area with a grey border, containing 25 horizontal dotted lines for writing.

STUDY UNIT 3

STUDY UNIT 4

ELEMENTS AND THEORIES OF PUNISHMENT

LEARNING OUTCOMES

After studying this study unit, you should be able to

- ◆ list the elements of punishment
- ◆ discuss the deterministic and the indeterministic view of responsibility
- ◆ explain the theories of punishment



1. INTRODUCTION

In the definition of the concept of punishment, we introduced you to the various elements of punishment. Let us take a brief look at them.

2. THE ELEMENTS OF PUNISHMENT

Punishment must be unpleasant for the person being punished

In their definition of punishment, Benn, Flew and Hart use the words "evil" and "unpleasant" and, in so doing, avoid[s] using the term "pain". The thinking here is to avoid any suggestion of corporal punishment or physical torture. Although pain is no longer an essential element of punishment today, history shows that this was in fact the case earlier. You are probably aware that in 1995 the death penalty and corporal punishment were repealed by the Constitutional Court and declared unconstitutional in South Africa. In modern penology, then, there are few punishments that involve physical pain; the concern is no longer to inflict suffering but rather to deprive the offender of something good. Consider imprisonment and fines, for example, which entail the taking away (depriving) of freedom and possessions.

In this regard, Primoratz (1989:2) says aptly:

People as a rule do not want their money to be taken away from them, or to be put in jail and made to stay there for a period of time ... therefore to inflict any of these things on someone means as a rule to inflict an evil on them.

Punishment is imposed for a transgression

Punishment can only be administered (imposed) if an offence has been committed. Punishment is therefore also the manifestation of the particular value system that is upheld by a society. When a particular act is frowned upon, punishment will be meted out in order to safeguard the values that are considered important. As you saw in our discussion of social control, these are the values upheld by the community.

Punishment is imposed on the offender who committed the act

A third requirement for an act to qualify as punishment is that the suffering that is administered must be imposed on the offender. Primoratz (1989:3) states very clearly that, for him, the offender is a person "who has offended against any positive criminal law, no matter whether that law is just or unjust, whether it is an expression of a condition of universal freedom or of a tyrant's arbitrary will, whether it is morally legitimate or not".

However, it is not enough to identify an offender as a person who committed an offence. To qualify as an offender in a penological sense, it must be possible to hold the person **responsible** for the act committed.

The concept of responsibility might mean different things to different people. To understand it in the context of responsibility for behaviour, it can be subdivided into the following three components: accountability, liability and culpability (blameworthiness). These three components are dealt with in more detail in the second-year course.

Next let us consider the **indeterministic and deterministic views of responsibility** which underlie the responsibility argument. But before we do so, go back and revise the section on the concept of guilt.

The indeterministic view of responsibility

According to the indeterministic view of responsibility, **humans are rational beings**. (This means that humans have reason or understanding and therefore can make decisions.) This rationality distinguishes humans from animals.

Since humans have the ability to be "good" — a voluntary rational decision and the action that follows it — they also have the ability to be "bad". Humans thus have an understanding or reason(ing) that enables them to understand and control perceived (observed) phenomena.

If you are certain that you understand the above paragraph, you may continue.

According to this argument, our reasonable abilities enable us to weigh up (consider) all the alternatives to each human act and thus appreciate what consequences our action could have. On the basis of this function of our

understanding, then, we can distinguish between right and wrong and are then free to make a particular choice. It is this freedom of choice together with the realisation of the consequences of our actions that give us control over our actions. Therefore we do not need to be the slaves of our circumstances. It is true, though, that not everybody has the same abilities and therefore provision is made for different degrees of freedom. This implies that someone who has normal reasoning or ability to understand is assumed to be completely **free** in his or her choice of behaviour, and hence also fully **responsible**. Diminished responsibility or degrees of freedom will therefore apply in cases where reasonable abilities are restricted or influenced.

The deterministic view of responsibility

The deterministic view of responsibility, which in turn may be divided into a **strict (hard)** and a **moderate (soft) approach**, is contrary to the indeterministic view.

First let us look at the strict deterministic view. This approach **postulates** (takes as its starting point) that **all behaviour**, whether animal or human, **is caused by forces or events that follow the laws of the universe (natural law)**. Behaviour is thus independent of direct human control or free will. Therefore, people might think that they are acting self-determinedly, but what is really happening is that their thoughts, actions and what they believe in are actually following nature's **laws of causality**. (Laws of causality are laws of cause.) "Every event has a cause, independent of the individual's wishes" (Bartol, 1991:8).

According to this view, self-control is an illusion and people, in fact, have no control over what happens to them. People therefore react in accordance with life events and stimuli (incentives, impulses). No provision is made for accidental events. If a person were to walk into a bar and fatally shoot the people inside, for example, the radical (strict) deterministic view would explain this behaviour as determined (fixed) by forces outside his or her control. Another definition of radical determinism is **that there is a set of circumstances for every event and that if these circumstances can be repeated, the event will also be repeated**.

It follows logically that a consequence of this view is that events are predictable. Just remember, though, that this **in no way** implies that determinism is the same as prediction. If an event is **predictable**, it simply means that this is possible because a similar set of circumstances is repeated. Another point of view about predictability is that it would be possible to predict with one hundred per cent accuracy if the causality of events were understood. Therefore, if events about the bar murderer were understood, it would be possible to predict his or her behaviour with one hundred per cent accuracy. But even though radical determinists believe in one hundred per cent accurate prediction, it has not been possible to achieve such accurate prediction yet because, they claim, too little is known about all the

conditions and circumstances that play a role in human life. Nevertheless, they believe that with the help of painstaking research, this will be possible (Bartol, 1991:8).

Do not read any further unless you have mastered this section.

It is further postulated that human behaviour is the result of interaction between people and their circumstances and that people are the product of their genetic composition and their initial circumstances. (In other words, people are bound by their hereditary features and their circumstances.) In terms of this view, then, someone who came from a deprived background and was only exposed to a criminal role model, for example, could not be held responsible for his or her criminal behaviour. But one cannot look at such a point of view one-sidedly; the relative freedom of the individual must also be considered. In this regard Pollock-Byrne (1989:3) says: "It is just as illegal for a rich man to steal a loaf of bread as for a poor man, but why would he want to?"

If moral accountability, and therefore responsibility, were restricted to people who had free will, it would mean that someone from a deprived background and who was guilty of a serious crime would be less accountable than someone from a better background who was guilty of a less serious crime. This would mean, then, that someone who embezzled money was more accountable than an offender with no fixed employment and income who robbed a bank. Obviously, one of the biggest problems with the deterministic view of responsibility is that it has an effect on a person's **culpability**. It could therefore be argued that because people cannot act other than the way they do, they cannot be held responsible for their actions. Bartollas (1993:104) confirms this point of view when he says, "The determinist position denies the applicability of the legal and punishment process."

The **moderate (soft) deterministic view** is more temperate (middle-of-the-road) than the hard deterministic view. This view does recognise controlling forces or events in our lives, but also makes provision for the existence of self-control, free will and responsibility. There are two schools of thought within the moderate deterministic approach. One group believes that most of our commissions and omissions are caused by external factors. The other group believes that although most of our actions are caused by external factors, people can exercise a measure of control over their behaviour and the consequences thereof. This measure of self-control, then, also limits the prediction of others' actions or behaviour.

Note: You need to master this section thoroughly. If you are not fully satisfied that you understand everything, go back and read it again carefully.

Punishment is the action of a human agent who has the necessary authority

The fourth requirement that the suffering inflicted on an offender must meet in order to be regarded as punishment in a penological sense is that it must be the action of a human agent. This does not mean that it can be the victim, a family member or friend — these people might very well avenge themselves on the offender, but that would definitely not constitute punishment. A person can be punished only by someone who has the judicial authority (power) to do so. It should be clear to you that this authority resides in the state because it is the state's laws that are transgressed when a crime is committed. The authority to punish is thus transmitted to a person such as a judge, as the representative of the state, to execute the sanction of punishment.

TEST YOURSELF

(30 mins)



- (1) Name the requirement a person has to meet to qualify as an offender in the penological sense. [1]
- (2) By what characteristics do you test a person's rationality? [5]
- (3) Outline the indeterministic view of responsibility. [12]
- (4) Discuss the deterministic view of responsibility in detail by distinguishing between radical (strict) and moderate determinism. [15]
- (5) Why does the authority to administer punishment rest with the state? [3]

.....

.....

.....

.....

.....

.....

.....

.....

.....

/continued ...



3. PUNISHMENT THEORIES

You may wonder why so much trouble is taken to trace, prosecute and finally establish the guilt or innocence of the offender. The answer is simple: The purpose of this whole process is ultimately to mete out punishment. Remember, however, that this concerns not only the nature and scope of punishment, but also its reparation (compensation). Burchell and Milton (1991:42) also say that punishment can be justified on the basis that it is deserved (absolute theory) or that it has social benefits (relative theories).

Although there are various punishment theories, they all fall into the above two categories of **absolute** and **relative theories**. There is also a third category, namely the unitary theory, but you need only note that it exists.

What would you say the difference is between the absolute and the relative theories? There is only one absolute theory, namely **compensation**. According to this theory, punishment is a **goal in itself**. The theory is retroactive and the focus is on the crime committed. When offenders are punished, therefore, it is because they committed the crime. The punisher wants to achieve nothing other than to make the offenders compensate (receive retribution) for their crimes. According to the relative theories, however, punishment is a **means to an additional goal**. What should be clear to you here is that the goal will differ according to whether the specific relative theories emphasise prevention, deterrence or reformation. Unlike the absolute theory, these theories look to the future. Now let us take a look at each of these theories in turn.

Compensation

Of all the punishment theories, compensation (retribution) is the oldest. It is based on the principle that crime disturbs the juridical balance in society. Because this disturbance cannot be permitted, the imbalance arising from the commission of a crime has to be restored. The two sides of the scale of justice must therefore be brought back into balance.

The notion (idea) of compensation should not be confused with revenge. Burchell and Milton (1991:42) make a clear distinction between these two concepts when they point out that compensation is about the principle of equivalence. Accordingly, punishment is administered in proportion (relation) to the crime committed. The same principle does not apply to revenge, where the focus is only on the crime. Another distinction between revenge and compensation is the fact that in the case of compensation, the suffering is imposed by an independent third party, in the form of the state. In revenge, on the other hand, the aggrieved (injured) party is responsible for imposing the suffering. There is also a tendency to distinguish between revenge and compensation on the ground of the disposition with which punishment is administered. The premise here is that although punishment is administered by a human agent, it is done in an impersonal way. (A premise is a tentative generalisation whose validity still has to be proved.) The judges or magistrates therefore derive no pleasure or satisfaction from the punishment that is administered. Van Rensburg (1970:9) also says that when there is a personal delight in punishment, there is a change from compensation to revenge.

Now that you understand the difference between revenge and compensation, let us consider the principles on which compensation is based.

◆ **Expiation (penance)**

The principle of punishment as expiation (or penance) originated under the influence of the Church. By theological analogy, punishment would restore the offender's moral disposition. Offenders paid their debt to society through proportional retribution (compensation).

This view is very simplistic, since expiation implies remorse on the part of the offender. We think you will agree that there are very few offenders who truly regret (feel remorse over) their crime/offence. Moreover, there are also other categories of offenders, such as the antisocial personality, who do not show regret for crimes.

◆ **Punishment as just reward**

Punishment is seen as a **moral imperative** to maintain a moral balance in society. ("Moral imperative" means that it is morally binding.) The offender deserves to be punished and punishment is therefore justified. An important prerequisite for punishment, however, is establishing the offender's guilt. "The first principle of retribution is that it is necessary that a man be guilty if he is to be punished" (Ezorsky, 1972:7). Once the offender's guilt has been established beyond any reasonable doubt, punishment can be administered in proportion (relation) to the extent of the legal violation or damage. The less the damage, the lighter the punishment ought to be. A good example of proportionality in punishment is that, as a rule, punishment is heavier for a consummated (committed) crime than for an inconsummate one. Snyman (1995:21) emphasises the important role of the just reward principle (proportionality) in administering punishment. He points out that if the compensation theory were to be rejected in favour of the relative theories, punishments that were out of proportion to the crime could be imposed.

◆ **Satisfying (appeasing) society**

Burchell and Milton (1991:43) maintain that, in sentencing, it is appropriate to take into account the indignation experienced by a community (society) over the commission of a crime. If offenders are not rewarded (punished) properly in a visible way, it could happen that the victims (the ones who suffered the injury) take the law into their own hands.

Criticism of the compensation theory

A criticism levelled against the compensation theory is that it is a reflection of primitive revenge. Another objection is that it is difficult to establish punishment that is equivalent to the crime. You may well agree with this point of criticism because how does one determine a proportionate punishment (i.e. one that fits the crime) for a person who drives a car under the influence of alcohol and causes an accident in which someone else is permanently maimed (e.g. loses

the use of limbs). We cannot possibly talk of equal suffering if the guilty person is sentenced to prison, for example.

Concluding remarks

In spite of the criticism levelled at this theory, it is still the only one that is directly linked to the crime committed and the idea of justice (fairness).

TEST YOURSELF

(60 mins)



- (1) Distinguish between the absolute punishment theory and relative punishment theories. [4]
- (2) Complete the following diagram of the punishment theories. [6]
 - Punishment theories
 - Absolute theory
 - Reformation
 - Individual deterrence
- (3) Differentiate between revenge and compensation. [6]
- (4) Discuss expiation (penance) as a principle in compensation. [4]
- (5) Outline punishment as just reward. [5]
- (6) Why is it morally binding for the offender to be punished? [2]
- (7) Is punishment administered only if the offender's guilt can be established with one hundred per cent certainty? Substantiate (give reasons for) your answer. [3]
- (8) Do you agree that it is appropriate to take society's outrage (indignation) over the commission of a crime into account when sentencing? Substantiate your answer. [4]
- (9) To what extent can the principle of equivalence be upheld in the administration of punishment? [4]

.....

.....

.....

/continued ...

A large rectangular area with a gray border, containing horizontal dotted lines for writing. The lines are evenly spaced and extend across the width of the box.

Deterrence

Introduction

Bentham is generally regarded as the chief figure and intellectual representative of deterrence as a motive for punishment. Beccaria, who argued from the same utilitarian starting point, is seen as the humanitarian representative.

Eysenck (1977:161) is of the opinion that the purpose of deterrence is, firstly, to keep (restrain) sentenced offenders from committing further crime and, secondly, to prevent potential offenders from committing crime. From this you could conclude, therefore, that deterrence may be directed at the individual who has already committed an offence and then at people in general (the general public) — which is why we distinguish between **individual** and **general deterrence**.

Let us first consider the basis of the assumption that punishment does, in fact, act as a deterrent.

Underlying premises of the assumption that punishment deters

a People will think before they act

A normal, reasonable person thinks before acting. As you saw in the discussion of indeterminism, because of our ability to make choices, we can decide whether we will commit crime or not. We will therefore first consider the advantages the crime might hold and weigh them up against the disadvantages of the punishment that will be imposed. If the advantages outweigh the disadvantages, we (or any potential offender) might decide to commit the crime. Looking at the South African situation, for example, it is fairly logical why the crime rate is so high. On the one hand, crime is so well organised that offenders know that they might never be traced. On the other hand, the imposition of punishment is so haphazard that there is no certainty that punishment will be administered, even if the offenders are tracked down. Under such circumstances, deterrence has very little effect.

Although we accept that a reasonable person thinks before acting, we must also remember that even a reasonable person can land in a situation where he or she will not even think about the punishment that may result from his or her actions. Consider the following example: Suppose Joe arrives home unexpectedly one afternoon and finds his wife in the arms of his good friend, Stephen. His shock and disappointment are so great that he takes out his firearm and shoots both of them fatally. There was definitely no time to think first of the advantages and disadvantages of committing the crime.

b Punishment inevitably (unavoidably) follows an offence

On closer examination, it seems that this assumption is not always valid. As we saw in the previous section, not all crime is uncovered and not all offenders are traced. We might also add here that not all arrested offenders are found guilty. It

should be clear to you by now that the deterrence value of punishment is in direct relation to the certainty that punishment will be administered. The ideal, even though it is highly unrealistic, would be for potential offenders to know that if they committed a specific crime, they would receive a definite punishment. Think, for example, of carjackings that are such a tremendous problem in South Africa. If carjackers knew that they would be sentenced to life imprisonment (and that they would actually remain there for the rest of their natural lives), do you not think they would be hesitant to commit the crime? We definitely think so.

c Punishment always instils fear

Experience shows that punishment does not always arouse fear. Punishment could also cause anger, which could lead to retaliation and further crime. Think of a fanatical leader of a terrorist movement, for example. If he or she were to be punished for action which we regard as an offence, but which he or she believes promotes his or her own conviction (whether ideological or religious), the effect of punishment could be inspirational rather than terrifying.

Levels at which deterrence takes place

Having noted the principles on which this punishment theory is based, we will consider the two levels at which deterrence occurs.

a Individual deterrence

The purpose of punishment is "to teach offenders a lesson" so that they do not transgress again. This lesson that has to be learned, then, is also often a justification for a suspended sentence. A person who receives a suspended sentence lives with the threat of the sentence hanging over his or her head like a sword. If that person observes the legal prescriptions, the sentence does not come into effect; if not, the sentence is imposed. Such punishment undoubtedly has a deterrent value.

b General deterrence

Together with the compensation theory, the general deterrence principle is considered one of the most important theories on punishment. This theory is based on the principle that society is deterred from committing crime by the threat of possible punishment. Unlike in individual deterrence, there is no actual imposition of punishment.

Another premise that applies in this theory is that people, as rational beings, will consider the advantages and disadvantages of a proposed action before carrying out the action. However, this view can definitely be regarded as idealistic as far as some individuals and their offences are concerned. Just think of poor Joe who found his wife in Stephen's arms. The murders he committed were the result of his emotionally provoked state; he certainly did not have time to consider the

advantages and disadvantages of his act. Snyman (1995:23) regards this as an inherent weakness in the deterrence theory.

Burchell and Milton (1991:47) also hold the view that for punishment to have deterrent value, the specific punishment for a specific crime must be known. We have already referred to this above. One could rightly say that the deterrent value of punishment on society in general is based more on belief than on actual **empirical** evidence. ("Empirical" means based on experience.) Let us explain: It is difficult to test how many people would have committed crime if there had not been a sanction of punishment — we do not have actual statistics to give us an indication of this. We simply accept that people are restrained from committing crime because they fear being punished.

The validity of the deterrence theory weakens each time an offender repeats an offence (recidivism). This leads one to conclude that punishment does not have the desired deterrence value.

Criticism of general deterrence as a punishment theory

Probably one of the most important points of criticism that has been expressed by Kant and others is that the individual is used as a means to an end (Burchell & Milton 1991:48). What Kant means by this is that one person is punished so that others will not transgress. Burchell and Milton (1991:49) defend this principle by pointing out that this is the only way a society can be protected. Cohen (in Burchell & Hunt, 1991:49) supports this view, saying "We are at all times inflicting pain on innocent people in order to promote the common good ... The fact is that the lives of individuals are not independent atoms which can be treated in isolation".

Another point of criticism is related to the premise that the advantages and disadvantages of punishment are weighed up. But the fact remains that there are crimes such as bank robbery and assassination that are clearly planned and thought out.



Rehabilitation

The origin of the rehabilitation theory

Ferri developed the modern rehabilitation argument and his premises dominated the rehabilitation debate during the mid-20th century. Although this theory is regarded as modern, it is modern only in its application. Bean (1986:53) points out that its development goes back to Plato, amongst others, who maintained the following:

- ◆ Wickedness is a mental disease disintegrating and ultimately fatal.

- ◆ The punishment of wicked acts is to be regarded as moral medicine, impalatable but wholesome.
- ◆ The state should stand for the criminal *in loco parentis* (i.e. as guardian in place of the parent).

We find the same undertones in St Thomas Aquinas's argument. To him, punishment had medicinal (healing) value because it not only had to heal sins of the past, but also had to prevent future action (Bean 1982:54). Accordingly, more must be achieved through punishment than just compensating a person for an act committed.

What is the rehabilitation theory?

Before we look at the arguments on which this theory is based, let us familiarise ourselves with what rehabilitation actually is. The essence of rehabilitation is **change**. With regard to offenders, this means that their **disposition, attitude and behaviour** have to change. They must be able to come to the realisation that their former behaviour (i.e. the crime that they committed) was wrong. As soon as they have come to this realisation, and also show remorse, there is a possibility that they can change; this entails a real desire to behave differently in future. You must realise, though, that rehabilitation is not a one-off event — it should rather be regarded as a process. Why? As soon as the offenders undergo this change of attitude and express the desire to be different, they will strive to achieve this goal. Other ideals and value systems will be pursued to improve themselves. In a nutshell, then, we can say that rehabilitation entails the following:

- ◆ Offenders must gain **insight** and an understanding of themselves.
- ◆ There must be a **change of disposition**.
- ◆ A **changed attitude** must follow.
- ◆ Another **value system** must be adopted.
- ◆ There must be an **external, perceptible change of behaviour**.

The premises of the rehabilitation theory

Now that you know what rehabilitation is, we can pay attention to the premises on which this theory is based:

- ◆ Crime is regarded as the manifestation of a social ailment. Like all theories that are based on medical grounds, the purpose must be the treatment of the "illness" or "ailment". Plato (Bean 1982:55) makes the following statement in this regard: "No punishment is inflicted by law for the sake of harm, but to make the sufferer better or to make him less bad than he would have been without it."
- ◆ Following on from this, human behaviour is regarded as the product of causes in individuals and in their environment. Accordingly, the cause of the crime

can be traced back to some or other personality defect in the offenders, or to environmental factors such as an unhappy or broken home or other harmful influences to which they were exposed at some stage of their development. A good example is the sexual offender who himself was sexually molested as a child and then, in adulthood, repeats this behaviour with children. If we accept, on the one hand, that certain categories of offenders transgress because of harmful experiences in their childhood, deficient skills to adapt successfully in an adult (mature) milieu or a defective moral development (to mention just a few possibilities), then we must also accept that change can be brought about by intervention in the offenders' lives. This brings us to the next premise.

- ◆ Offenders can be changed through the use of treatment. Snyman (1995:25) points out that the use of treatment programmes can be of value for young offenders, whereas old offenders are more set in their ways and could find it difficult to learn different behavioural patterns. However, this definitely does not mean that treatment programmes cannot be successful among adults.
- ◆ Through the use of treatment programmes, offenders must be equipped with the necessary potential for law-abiding behaviour. They must therefore learn skills that are compatible with legal norms and social expectations.

Evaluation of the rehabilitation theory

- ◆ One of the points of criticism against rehabilitation as a motive for punishment is that it (rehabilitation) impairs basic human values. It is postulated that it is not only a violation of the individual's freedom and dignity, but it is also exceptionally cruel. Here Bartollas (1985:38) singles out treatment like aversion therapy, for example.
- ◆ Snyman (1995:25) points to the problem of determining the time within which rehabilitation must take place. Since we are working with a person, it is difficult to determine when an individual has been rehabilitated.
- ◆ Rehabilitation is an ideal rather than a reality. Snyman (1995:25) explains this statement by pointing out that certain people are simply inherently unrehabilitable "evil".
- ◆ A real problem in the rehabilitation debate concerns the mutual exclusivity of punishment and rehabilitation. Although this problem is tackled in detail in later courses, we just want to bring it to your attention here.

Bernard Shaw (in Moberly, 1968:123) regards it as absurd that punishment and rehabilitation can be combined and says: "Our relatively humane twentieth century prison system is stultified by the division of purpose." In support of this view, Robin and Anson (1990:349) maintain that no matter what therapeutic ideals are pursued in prison, the offender experiences them as punishment.

From the inside of a cell, prison and punishment are synonymous. From a scientific viewpoint, the opposite of punishment is reward, not rehabilitation — and the only reward associated with imprisonment is getting out.

Apart from criticism of this punishment motive, there are also areas that can be evaluated positively:

- ◆ Rehabilitation gives an indication of how the criminal's circumstances can be improved.
- ◆ Focusing on the offender's personality and social circumstances does give expression to the ideal of the individualisation of punishment.
- ◆ According to Bartollas (1985:38), there are offenders who benefit from reform. In his opinion, an environment that is "offender friendly", together with dedicated staff, can make a difference. Given the reality of the situation in South African prisons, though, does this not sound rather idealistic?



TEST YOURSELF

(35 mins)

- (1) Define the concept of rehabilitation. [4]
- (2) Why would you say that rehabilitation can be regarded as a process? [5]
- (3) Discuss the premises on which the rehabilitation theory is based. [12]
- (4) Summarise the most important positive and negative features of the rehabilitation ideal. [8]

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

/continued ...

this into consideration. On the basis of this, the accused could then be given a long-term prison sentence to prevent him or her from transgressing again. The rationale for this is clearly the withdrawal of the person from society. There is no other motivation, such as to rehabilitate him or her during that period.

Let us now look at incapacitation (rendering harmless) as a prevention mechanism.

Incapacitation

Rendering offenders harmless (incapacitation) is an attempt to prevent them from committing further crime and thereby also protecting society. There are several forms of incapacitation, but imprisonment is still one of the most commonly used methods. Removing someone from the community (society) for a long or a short period actually deprives that person of the opportunity to threaten society further.

The focus of rendering harmless is clearly on the present — offenders are thus prevented from further crime because their freedom has been restricted. "The denial of the opportunity to engage in criminal activity is the key to the rationale of incapacitation" (Snarr & Wolford, 1985:15). Over and above partial rendering harmless or elimination, a more permanent form of rendering harmless, namely the death penalty, used to be practised in South Africa. This practice still continues in other parts of the world.

One procedure that can be used for sexual offenders is castration (i.e. removal of the testicles). Despite the fact that this appears to have the desired effect, there are so many professional-ethical objections to it that, as far as we know, it is not used in any Western country (Louw, 1989:326). However, it is logical to assume that if this procedure were a given for sexual offences, society would definitely be protected against this type of offender.

As you can see, this theory is based on the premise that someone who has committed a certain crime once will commit it again unless he or she is prevented in some way from doing so. What would you say is the biggest criticism against such an assumption? You would be absolutely correct if you said that this assumption is difficult to verify by means of empirical investigation (research). For example, do you think the young man who murders his rich aunt because he is her sole heir and he wants his inheritance will necessarily commit murder again? Nevertheless, if we analyse the behaviour of kleptomaniacs, we can predict with reasonable certainty that their behavioural pattern will be repeated. But then again, would you say that society really needs protection from this type of offender? Rabie (1979:10) cites Parker in this regard, who says, "Boldly put, the incapacitative theory is strongest for those who in retributive terms are the least deserving of punishment." A related issue would be the length of time necessary to detain a person in order to render him or her harmless.

Besides rendering people harmless, crime can also be prevented by **deterrence** and **rehabilitation**. You are familiar with these two motives for punishment now, but let us look at **how they fit in with crime prevention**.

Individual deterrence

Like all the other theories on individual prevention, individual deterrence is only concerned with offenders who have committed crime. You might ask how a person can be deterred on an individual level. The underlying premise here is that the "pain" that accompanies punishment (remember, we are not talking about physical pain) will condition the person not to commit crime again in the future. Rabie (1979:11) explains this as follows: "The offender is through punishment to be taught a lesson so that he will be deterred from criminal behaviour." Remember we pointed out that the offender need not necessarily serve the sentence; a suspended sentence, for example, could serve the same purpose of deterrence.

The criticism against individual deterrence as a way of preventing crime is based on psychological grounds. The premise here is that criminals do not necessarily reflect on the consequences of their actions. Parker (1968:40) puts it this way: "They act upon obscure impulses that they can neither account for nor control." A closer look at this criticism reveals that it is based on Bentham's hedonistic premise. In terms of this view, a choice would be made on the basis of the maximum pleasure that would result versus the minimum pain. Someone wanting to commit crime, then, will try to calculate the benefit to be gained from committing the act: "How much do I stand to gain by doing it? How much do I stand to lose if I am caught doing it? What are the chances of my getting away with it?" According to this model, the purpose of punishment is to reduce the attractiveness of crime to zero level.

Another point of criticism is related to the fact that it is not known how much higher the recidivism figure would be without the imposition of punishment. We could only assume that there would be more crime if there were no punishment for it.

Parker (1968:46) also points out the punitive and deterrent value that merely being found guilty (conviction) holds for law-abiding people. A more drastic sanction is therefore not necessary to prevent crime in the future. Research (Parker, 1968:46) also shows that people who are exposed to heavy (severe) punishment are less inclined to conform to law-abiding values. You might therefore conclude that it is the more hardened type of criminal on whom punishment makes little impression.

Rehabilitation

A punishment theory that has become more popular over the last few decades is the rehabilitation theory. There are two reasons for this popularity. First, on account of the criticism against individual deterrence and, secondly, because of the harmful effects short-term imprisonment has on individuals.

According to this theory, crime is prevented through rehabilitation because the offender's personality is changed to conform to the law. Although Parker (1968:53) speaks of a personality change, we believe that it is rather a case of a value system being changed. What is interesting here is that people are not changed for their own sake or in order to be able to lead better lives; the main concern is rather a social justification, namely that they will stop transgressing.

A problem with rehabilitation is that an offender has to be detained for a long period, which could be out of proportion to the seriousness of the crime. And afterwards there may still be no guarantee that the person has, in fact, been rehabilitated. Parker (1968:56) sums up the dilemma here very aptly when he says: **"We can use our prisons to educate the illiterate, to teach men a useful trade, and to accomplish similar benevolent purposes. The plain disheartening fact is that we have very little reason to suppose that there is a general connection between these measures and the prevention of future criminal behaviour."** It is difficult to make an argument for the restriction of a person's freedom if there is no real guarantee that that person will not commit crime again.

General prevention

Besides individual prevention (i.e. preventing individuals from committing crime), we also speak of prevention on a more general level. This has to do with people in general being restrained from committing crime — not because they experience punishment personally, but merely through the existence of the threat of punishment for committing crime.

The classical theory of general prevention is that of general deterrence. You are already familiar with the central thought here, but let us look at it again. "The idea is that man, being a rational creature, would refrain from the commission of crimes if he should know that the unpleasant consequences of punishment will follow the commission of certain acts" (Rabie, 1979:22). If this theory is to succeed at all, the punishment for a particular crime must be known. **"It is publicity and not punishment which deters."**

Although there may be merit in this theory, the fact that individuals do not necessarily think before they act has been heavily criticised. Rabie (1979:22) quite rightly mentions that human behaviour can stem from fear or greed, or can even be the result of impulses over which no control can be exercised.

One of the most important requirements for punishment to have any real deterrent value is the **certainty** of punishment rather than the **gravity** of the punishment. If a sexual offender were absolutely certain that he would be castrated if he raped a woman, he would probably think twice about doing it. Therefore, actual law enforcement and general deterrence go hand in hand. **"Neither fear of punishment nor respect for the law is likely to hold back potential offenders effectively if this (law enforcement) is known to be inadequate"** (Rabie, 1979:23).

In order to present a balanced argument, we should also add that the gravity of the punishment could play a role for people who might reflect on the consequences of their acts. However, if there is no real possibility of the person being prosecuted, the gravity of the sanction of punishment loses its meaning.

Overall, the arguments for and against the theory of general deterrence are really just hypothetical; we can generalise, but it is difficult to find real evidence.

STUDY UNIT 5

SENTENCING AND FORMS OF PUNISHMENT

LEARNING OUTCOMES

After having studied this study unit, you should be able to

- ◆ identify the principles upon which sentencing is based
- ◆ discuss the place of sentencing in the criminal justice system
- ◆ describe the historical development of the death penalty as a form of punishment
- ◆ discuss the ways in which the death penalty is carried out in modern times
- ◆ identify the different forms of imprisonment
- ◆ discuss the general principles of imprisonment
- ◆ define a fine
- ◆ discuss the general principles underlying the imposition of a fine
- ◆ define the concept of community-based sentence briefly
- ◆ discuss the general principles underlying the imposition of such a sentence



1. INTRODUCTION

In the Republic of South Africa, the procedure pertaining to sentencing is regulated mainly by the Criminal Procedure Act 51 of 1977. However, over the years, a set of supplementary rules has been developed in practice. The purpose of these rules is to facilitate and more closely define the sentencing process.

Sentencing is often the most difficult part of a criminal case. However, in practice, it is unfortunately the one aspect about which lawyers learn the least and, consequently, know the least. For the accused, the sentencing process is of

great importance — and is sometimes even the most important part of the trial — but it is often disposed of **in no time at all**. Since the sentence imposed seals the fate of the accused, sentencing must be carried out with the greatest degree of responsibility and skill. For this reason, the prudent sentencing officer will not hesitate to call in the assistance of expert witnesses in appropriate circumstances.

One of the most important principles of sentencing is that the sentence imposed must be **effective**. South Africa is currently experiencing tremendous socio-economic problems in a rapidly changing political environment. In addition, a wave of crime and violence is engulfing South African society. Consequently, considerable demands are being made on the stabilising community structure, of which the criminal justice system forms part. Responsible and affordable sentencing is now even more important than ever. International experience has taught us that crime cannot be reduced by way of callous and harsh sentences. It is not the severity of the sentence which serves as a deterrent, but the certainty thereof.

Sentencing, as a process, also fulfils an **educational function**. It must indicate to the offender, the complainant and interested persons among the general public that the way in which justice is dispensed is not only effective but also fair; in other words, sentencing must be experienced as **effective justice**. To satisfy the demands of justice as an ideal, the sentencing officer must visibly distinguish between **vengeance** (revenge) and **retribution**. (Remember in study unit 4 we explained that **retribution** is concerned with the principle of **equivalence**, whereas in the case of **vengeance**, the focus is on the **crime which has been committed**.) Since vengeance and retribution have nothing in common, the sentencing officer must never allow himself or herself to show anger or even agitation.

The sentencing officer has very wide discretion when it comes to the imposition of sentence. However, such discretion cannot be exercised **arbitrarily**. The sentencing officer must, as a point of departure, bear in mind his or her oath of office, namely to uphold and protect the Constitution and the human rights entrenched in it, and to administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law. Thus the sentencing officer is required to impose an appropriate sentence which is based on all relevant facts and factors. For this, he or she requires a specific disposition. In his authoritative work, *Straf in Suid-Afrika*, Du Toit (1981:125) expresses this as follows:

- ◆ "He or she (the presiding judicial officer who is charged with imposing sentence) must, throughout, display exceptional legal balance. As a result, he or she must consider relevant matters calmly and in a balanced way.

- ◆ Sober objectivity should be clearly apparent from his or her legal balance, and should instil confidence in all those involved.
- ◆ Throughout, he or she must consider matters relating to sentencing in an elevated manner. A court of law deals with crime and the criminal in an elevated way and does not merely avenge or commiserate on behalf of interested parties.
- ◆ While he or she exacts retribution in an elevated way, and prevents and deters with restraint, he or she also endeavours to reform or improve the offender, in the offender's own interest.
- ◆ At all times, it is the specific offender who has committed the specific crime in the specific circumstances who must be punished. Each individual case must receive the sentencing officer's personal attention and the generalisation of punishment must always be avoided. To satisfy these requirements, the necessary knowledge of the specific offender, crime and circumstances is indispensable.
- ◆ The entire sentencing process must be based on the principle of 'justice'; in this way, the presiding officer arrives at an appropriate and effective sentence."

(Lecturers' own translation)

2. PRINCIPLES OF SENTENCING

Certain principles must not be overlooked when imposing a sentence. These principles apply not only to minor offences (e.g. being under the influence of liquor in public) but also to serious crimes (e.g. murder), and are related to the **traditional triad** of motives for punishment.

The traditional triad was given concrete form in Holmes JA's judgment in *S v Rabie* 1975 (4) SA 855 (A) at 862G: "Punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances." This implies the following:

- ◆ **The sentence must fit the crime.** A serious crime is punished more severely than a minor crime.
- ◆ The sentence must take into account and reflect the particular circumstances of the **accused**.
- ◆ The sentence must serve the interests of the **community**.

Over the past few decades, mercy has seldom been expressly mentioned as a factor. The reason for this is probably that it is not a fourth factor which must be considered, but is rather a characteristic which causes the court not to exact revenge. Mercy is, in fact, a characteristic of justice itself.

Besides the triad, the **purpose of punishment** is of considerable importance in the sentencing process. As already mentioned in study unit 4, Western jurists view the principal objectives of punishment as being

- ◆ deterrence
- ◆ prevention
- ◆ rehabilitation
- ◆ retribution

Retribution, however, deals with the past (i.e. with what has already occurred), whereas the other objectives or purposes of punishment deal with the future. What must always be borne in mind, however, is that the principal objective of punishment is the promotion of the **public interest**. Punishment is imposed in an effort to prevent the criminal concerned from repeating his or her crime, and to discourage others from following his or her particular example.

Rumpff CJ stated this very clearly in *S v Du Toit* 1979 (3) SA 8436 (A) at 857D:

The interest of the community in the punishment which is imposed is all-embracing. In some cases, the interests of the community come to the fore when the community has to be protected against the conduct of a specific individual. In others, such interests merit consideration where peace and order in the community are relevant. In yet others, the interests concerned are relevant where members of the community must be deterred. (Lecturers' own translation)

Apart from the issues which have been discussed thus far, there are also a number of **general guidelines** which must be borne in mind in the sentencing process. For the purpose of this course, the following guidelines are of importance:

- ◆ **The individualisation of punishment.** This principle is also referred to as the **personalisation** of punishment. Individualisation basically means that the trial court must, in each case, consider not only the general nature of the crime, the general interests of the community and the general interests of the offender, but also the particular case and the specific offender; in other words, the individualisation of punishment entails a detailed examination by competent and expert institutions of the accused for the benefit of the court, so much so that the court eventually knows and understands him or her even better than his or her own mother does! The punishment which is meted out thereafter must provide society with adequate protection and must be designed to rehabilitate the offender.
- ◆ **The feelings of the community.** The sentence imposed must be such that the community feels that the court imposing such sentence views the maintenance of peaceful and safe living conditions as a matter of serious

concern. In addition, the sentence must give expression to the law-abiding community's feeling of indignation regarding the criminal act.

- ◆ **The interests of the community.** The most important point of departure in the broad criminal justice system is to serve the interests of the community. Sentencing constitutes an integral part of the broad criminal justice system and, consequently, has the same objective. The principal guideline here is that it is the interests of the entire community which must be served, and not merely the interests of certain people in such community. The responsibility for determining how such interests will best be served — not only immediately, but also in the long term — is exclusively that of the sentencing officer.

TEST YOURSELF**(20 mins)**

- (1) Why do you think that the sentencing process also fulfils an educational function? [2]
- (2) What specific requirements must the presiding officer satisfy when exercising his or her discretion? [8]
- (3) What is meant by the triad of motives for punishment? [4]
- (4) Discuss the general guidelines with regard to sentencing. [10]

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

/continued ...



3. FORMS OF PUNISHMENT THAT DEPRIVE THE INDIVIDUAL OF HIS OR HER LIFE: THE DEATH PENALTY

Introduction

The death penalty is probably the most debated subject on both national and international platforms. The consequences of this form of punishment, as well as the significance which political groups attach to it, are cause for considerable disagreement. In South Africa, the Constitutional Court has ruled that the death penalty is unconstitutional, with the result that such sentence may no longer be imposed in this country. However, the debate concerning the death penalty continues. Consequently, we shall briefly consider the historical development of

this form of punishment and the various ways in which it has been effected down through the centuries.

Early forms of the death penalty

Human sacrifice

In the earliest times, human beings were sacrificed alive, not only as an offering of thanksgiving to the gods, but also to obtain and retain the favour of the gods in a world of secret fears and weaknesses. The gods were an ever-threatening presence in the lives of people and it was believed that they would exact vengeance not only on the individual who was disobedient, but also on the whole tribe of which such individual was a member. The sacrifice of the offender — and sometimes even of an innocent person — was therefore a means of defending the community against a horrible and general threat. The wrath of the gods was evoked not only by human failings, but also by natural disasters. In 545 BC, for example, a baby born with a defect was placed alive in a coffin, which was subsequently nailed closed and dropped into the sea. A further example is that of Emperor Augustus who banished his daughter and granddaughter to nearby islands. When his granddaughter gave birth to a baby while in exile, the baby was forced to die of hunger because it was viewed as a *monstrum* (a bad omen).

The express prohibition of human sacrifices in the legal code of ancient Israel belies the early use thereof. In these times, it was also believed that pestilence and famine could be warded off by way of human sacrifice.

Gradually, human offerings were replaced by symbolic items such as dolls. However, prior to this, "useless" people were used as offerings, for example the aged, slaves and criminals. In time, the Romans and the inhabitants of ancient India substituted animals for people. In particular, horses — which were regarded as sacred — were used. Blood was, and is still, viewed as a liquid having special properties, therefore the blood of the offering was considered to have great powers. This primitive belief has by no means died out, and the use of offerings still exists in certain penal systems.

Breaking on the wheel

Breaking on the wheel was the punishment which was meted out to murderers in particular. The criminal was fastened to a wheel with his or her limbs stretched out along the spokes of the wheel. The wheel was then turned while the criminal's bones were broken with an iron bar. Only a new wheel with nine or ten spokes was used. The victim was left fastened to the wheel until his or her whole body had decomposed — nobody dared to deprive the gods of their property. Breaking on the wheel was a form of execution in which fate played a part: those who survived the torture, that is, who had not died after three days, were allowed to live since it was believed that the gods had rejected the offering.

Breaking on the wheel also had a distinct religious origin. The further one delves into history, the more one sees that the wheel was viewed as the symbol of the sun, for example in ancient Greece and in ancient Germany. It is therefore clear that, by breaking a person on the wheel, such person was being offered as a sacrifice to the sun god. The body was tied to a pole on the wheel so that it could be given to the sun god, who would then be placated by being able to take the person's life.

The reason why the victim's bones were broken is probably to be found in the ancient belief that life could be destroyed only by crushing the bones, including the marrow. It was believed that the power of life, procreation and resurrection resided in the marrow of a person's bones.

Crucifixion

Crucifixion, especially in its original form, was closely related to hanging. This form of the death penalty originated in Asia, although traces of it are to be found in the Roman criminal law and in religious history. The reason for its origin is probably to be found in the distinct reluctance of primitive peoples to be the active cause of a person's death. Rather, they left it to nature to take its deadly course in impeding a living organism's mechanism of escape and defence. Originally, crucifixion probably resulted in death because of exposure to the sun, or owing to thirst.

A cross was not always used; sometimes an upright pole or a crude, fork-like branch was employed. Crucifixion was, however, viewed as a particularly ghastly method of punishment, with burning and being thrown to wild animals being the only comparable punishments. Prior to being crucified, the victim was always undressed, whipped and then fastened to the cross or stake by his or her hands and feet. The long period of suffering endured by the victim is clearly apparent from the description contained in the Bible: while hanging there, Jesus had the chance to speak to the criminals being executed alongside him, to his mother and to his disciples. According to Jewish custom, the body of a crucified person had to be removed by the evening of the crucifixion and was either covered with stones or was buried.

Stoning

Stones are considered to be the first weapons used by human beings. Consequently, stoning is also one of the oldest forms of punishment and featured prominently in Greek mythology.

In ancient Mosaic law, stoning was prescribed as a punishment for all forms of crime against God which would drive away his protective hand. To ward off this threat, all were involved in stoning a criminal.

Stoning was employed by the Jews as a punishment for, among other things, breaking the Sabbath, committing adultery and for homosexuality and sodomy. Stoning was, however, unknown in Roman law. Stoning was also used sporadically in Germany and Sweden. In Norway a thief's hair was shorn off, whereafter his or her shaven head was smeared with fat and covered with feathers. Then the thief had to run between two rows of people, all of whom stoned him or her. Every citizen was legally obliged to take part in the stoning.

Stoning has disappeared as a criminal law punishment, but it has persisted as a form of punishment meted out as part of "mob justice". Indeed, it still occurs today in many riotous situations.

Drowning

Drowning as a form of execution was obviously a problem in areas where water was very scarce, for example in the highlands of Judea. In contrast, in both Rome and Greece, where water was plentiful, drowning was often used as a method of punishment.

The belief that criminals should be deprived of all life-giving elements, such as water, air and soil, resulted in victims first being encased in an airtight sack. Those who had committed patricide were first flogged with hot irons, wooden soles were bound to their feet, the uterus of a she-wolf was pulled over their heads and they were sewn up in ox skins. Thereafter, they were cast into the water. Punishment by drowning was used particularly for women, bigamists and those who ill-treated their parents.

Burning at the stake

Von Hentig states: "In the Middle Ages burning was the punishment of complete extermination drawing an impassable barrier between the perpetrator and the people. Crimes which most roused the anger of the gods — heresy, witchcraft, incest and sodomy — were expiated on the pyre."

The ashes of the victim were then scattered over water, at crossroads or even on the gallows. The purpose of this was to expunge the crime completely.

During the Middle Ages, judges equated the burning of heretics and witches with the ancient belief that fire was an element which drove away and killed all demons. This form of execution was therefore based on a mixture of new beliefs and objectives, on the one hand, and on the ancient notion of sacrificial offerings and deterrent penal measures, on the other.

Although the Jews did not resort to burning as a method of execution, certain of their dead were in fact burnt as a mark of disgrace and shame. To the Jews, it was of the utmost importance to distinguish themselves from the worshippers of Baal, who cremated their dead.

The Romans employed cremation mainly to dispose of the dead. However, in early Roman times burning was indeed used as a method of execution, but then only to punish those who had wilfully committed arson. The criminal was bound naked to a pole, which was thereafter raised upright. A fire was then lit under the criminal using pieces of wood. The Romans viewed burning as the most extreme form of punishment. The burning of Christians in Nero's time serves as an example of this type of execution.

Flaying alive

The Eastern nations often flayed convicted criminals alive. Thereafter, the victims' bodies were impaled on sharp stakes until the sun and insects relieved them of their agony. Sometimes the victim was smeared full of syrup in order to attract the insects.

Being thrown into a pit with reptiles or beasts of prey

Another form of punishment used was to cast the accused into a pit with reptiles or beasts of prey. Sometimes offenders had to defend themselves in an arena against hungry beasts of prey. The latter practice was used particularly in the time of the Roman Emperor, Nero, when it was regarded as a general pastime to watch criminals and Christians being torn apart by beasts of prey.

Crushing of the skull by an elephant

In India, the heads of convicted persons were crushed by elephants which had been specially trained for the purpose. The victim's head was first placed on a block, after which the elephant was brought closer and would crush the head of the victim with one of its forelegs.

Present-day forms of the death penalty

Beheading

Beheading has been employed as a form of punishment since the very earliest times. In early Roman times, for example, the son of Brutus was executed in this way. His hands were tied behind his back, after which he was stripped, bound to a pole and flogged. After being thrown to the ground, he was decapitated with an axe.

The modern method of decapitation using the guillotine originated in 1792 when the French legislative authority approved the use of this instrument of execution. The instrument was named after a French physician, Joseph Ignace Guillotine, who proposed the use of this technique. However, a French surgeon was responsible for the original design of the instrument.

Hanging

Hanging, as a form of execution, was unknown to the Jews and was seldom used by either the Romans or the Greeks. Hanging was, however, encountered on the borders of Europe and Asia, in Central and Northern Europe and in North America.

Criminals were hanged from an oak tree — which was regarded as sacred — or sometimes from a willow. The tree had to be leafless and withered, since it was believed that a tree from which a person was hanged, or from which he or she hanged himself or herself, would shrivel up. People believed that the crime infected the entire tree like a disease. If, therefore, the tree burst into leaf once again, this was deemed to be a sign of the deceased's innocence. It was regarded as preferable if the gallows was positioned at a crossroad. In addition, the tree used for the hanging was not allowed to be in bud, and the branches had to be unbending and not rotten. The rope itself had to be brand new.

Later the oak was replaced by an artificial tree. This was the origin of the gallows as we know it today. The gallows was made of a tree trunk with no knots or holes in it, and to which nothing could be nailed.

Originally all offenders were hanged naked. Later, however, they were dressed in a shirt before being hanged. In the beginning, all who were hanged died of exhaustion, but as hanging became more refined as a method of execution, death ensued as a result of strangulation.

In modern times, the success of execution by hanging, in the sense of it being a comparatively quick and painless death, is determined by carefully calculating the offender's weight and height, the length and breaking-strain of the rope, the placement of the noose and the distance which the offender must fall.

The electric chair

Electrocution as a means of execution was first employed on 6 August 1890 in the Auburn Prison in New York State, United States of America.

For this method of execution, the condemned person is strapped to a sturdy chair by means of straps around his or her waist, legs and wrists. One of the electrodes is attached to the criminal's clean-shaven head and is held in place by a type of helmet, whereas the other electrode is attached to the right calf. Lastly, a hood is placed over the offender's head. The entire process of execution in the execution chamber lasts approximately two minutes. An electric current of about 2 000 volts is switched on and the offender is electrocuted, at varying intervals and at different current strengths, during the two-minute period. The process is monitored by doctors and officials through a one-way screen. The condemned person apparently loses consciousness immediately. The electrode which is attached to the calf sometimes causes a minor burn, but, for the rest, the body shows no signs of mutilation.

Suffocation

More recently, suffocation has been employed as a method of execution. The place in which the execution is carried out, or the gas chamber, is equipped with two observation windows, both of which are designed for one-way observation of the execution process from outside the chamber. The observers are a medical doctor and those who are required to be present in their official capacity. When closed, the chamber is airtight in order to prevent the deadly cyanide gas from escaping. The chamber is further equipped with a wooden chair and the necessary leather straps. The condemned person is strapped to the chair around his or her waist, arms and legs. A container containing diluted sulphuric acid, with cyanide tablets suspended above the acid, is placed under the chair. At the required moment, the cyanide tablets are released into the container by means of an electrical impulse. Two small copper pipes lead from the chair to the medical doctor's observation post. A stethoscope is attached to the offender's chest and is connected to the copper pipes by means of rubber pipes. Outside the gas chamber, the earpiece of the stethoscope is connected to the copper pipes, which enables the doctor to determine when the heart stops beating.

The procedure adopted for executing the criminal is as follows: He or she is led into the chamber by the head of the prison and/or an assistant, who is/are accompanied by a chaplain. The condemned person is then strapped to the chair, a leather mask is placed over his or her face and the stethoscope is connected to the copper pipes. Thereafter, the chaplain says a prayer and the container filled with sulphuric acid is opened. The head of the prison and/or the assistant, as well as the chaplain, leave the chamber, which is then sealed. The cyanide tablets are then immersed in the diluted acid by means of an electrical impulse and cyanide gas is given off.

Lethal injection

The injection of a lethal substance into the condemned person is another method of execution which is employed in certain American states. The lethal injection is administered in a sterile environment by a medical doctor.



TEST YOURSELF

(30 mins)

(1) Describe briefly how the following forms of the death penalty were carried out:

- ◆ Human sacrifice (4)
- ◆ Breaking on the wheel (4)
- ◆ Crucifixion (4)
- ◆ Drowning (4)

[16]

(2) Describe briefly how the following forms of the death penalty are carried out in modern times:

- ◆ Hanging (4)
- ◆ The electric chair (4)
- ◆ Suffocation (4)

[12]

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

/continued ...



4. FORMS OF PUNISHMENT INTERFERING WITH THE INDIVIDUAL'S FREEDOM BY RESTRICTING HIM OR HER FROM FREELY ASSOCIATING WITH PEOPLE: IMPRISONMENT

Introduction

In South Africa, imprisonment entails the admission, confinement and detention of a person in a prescribed place. The person who is sentenced to imprisonment is taken to prison on the basis of a warrant issued by the presiding officer. There, he or she is admitted, confined and detained for the duration of his or her sentence. The following are the various forms of imprisonment which are provided for in terms of the South African law of criminal procedure:

- ◆ "Ordinary" imprisonment
- ◆ Periodic imprisonment
- ◆ The indeterminate sentence, or declaration as an habitual criminal

"Ordinary" imprisonment

The sentencing of convicted persons to ordinary imprisonment is one of the most common forms of punishment imposed in South Africa. Normally, the courts have discretion as to whether or not to impose such a sentence. The following general principles are applicable when imposing a sentence of ordinary imprisonment:

- ◆ Such a sentence must be permissible in terms of either legislation or the common law.
- ◆ The sentence (term of imprisonment) must not be so severe that no reasonable court would impose it.
- ◆ A sentence of imprisonment must not be imposed lightly, or without considering all the consequences.
- ◆ When imposing a sentence of imprisonment, the sentencing officer must ensure that all the objectives of punishment have been carefully considered.
- ◆ The sentencing officer must guard against sentencing a person to short-term imprisonment in view of the negative consequences thereof.
- ◆ In the case of a first offender, imprisonment is not a desirable form of punishment. Instead, the court should consider an alternative form of punishment, such as a fine.
- ◆ Where possible, juvenile offenders must not be sentenced to imprisonment because of the negative effect such a sentence can have on their future.
- ◆ When deciding whether to impose a sentence of imprisonment, the presiding officer must carefully consider the offender's health.
- ◆ The advanced age of an offender will also play a role when determining whether or not to impose a sentence of imprisonment.

Periodic imprisonment

Periodic imprisonment is the second form of imprisonment which the trial court may impose. Periodic imprisonment is a competent (permissible) sentence in respect of any crime, except for crimes where a minimum sentence is prescribed by law. The duration of periodic imprisonment to which an offender may be sentenced can vary from 100 to 2 000 hours. The sentence is served intermittently over periods of at least 24 hours, unless the work circumstances of the person so sentenced dictate that shorter periods be prescribed. The following general principles must be borne in mind when imposing a sentence of periodic imprisonment:

- ◆ A sentence of periodic imprisonment may not be linked to any other form of punishment. It may, however, be suspended, either fully or in part, with any conditions being linked to such suspended sentence.
- ◆ The court must make detailed enquiries about the personal circumstances of the accused.
- ◆ Periodic imprisonment is an appropriate sentence in cases where the accused will retain his or her job and will therefore be able to fulfil his or her obligations towards his or her family.
- ◆ A sentence of periodic imprisonment may be carried out over weekends, even where the accused is unemployed.
- ◆ Periodic imprisonment is an appropriate punishment for first and second offenders, but must, at all times, be considered on the merits of each particular case.

The indeterminate sentence

The indeterminate sentence, as a form of punishment, is imposed in the case of hardened criminals. Normally an offender cannot be declared a habitual criminal unless he or she has previously been warned that an indeterminate sentence will be imposed if he or she is found guilty of a crime in future. A person who is declared a habitual criminal is detained in prison for as long as the President of the country pleases. The following requirements must be complied with before a person can be declared a habitual criminal:

- ◆ The person concerned must be older than 18 years.
- ◆ Such person must habitually commit crimes.
- ◆ The offender must be a person against whom the community must be protected.



TEST YOURSELF

(20 mins)

- (1) Distinguish the different forms of imprisonment for which provision is made in the South African law of criminal procedure. [3]
- (2) Indicate the general principles which are applicable in imposing a sentence of "ordinary" imprisonment. [9]

/continued ...

- (3) Indicate the general principles which must be borne in mind when imposing a sentence of periodic imprisonment. [6]

5. FORMS OF PUNISHMENT RESULTING IN THE LOSS OF POSSESSIONS: FINES

Introduction

A fine may be defined as a monetary sanction (or loss) which the state, or a duly authorised local authority, may, in its discretion, impose on an accused for the commission of any offence for which he or she is responsible. (A fine thus entails a monetary loss for the accused and a monetary gain for the particular authority or community.) Generally, the imposition of a fine as a form of punishment enjoys considerable international acceptance, chiefly because of the

benefits thereof. In most cases, fines are easy to administer. In addition, they do not entail the same consequences — for the offender and the community — that imprisonment does, and they are frequently related to retribution in that the offender is made to pay for his or her crime.

General principles underlying the imposition of a fine

The following general principles are applicable to the imposition of a fine:

- ◆ Before a fine is imposed, the presiding officer must consider all relevant factors regarding the desirability or otherwise of imposing a fine.
- ◆ The ability of the offender to pay the fine must be carefully determined before such a sentence is imposed.
- ◆ The court must exercise its discretion in each particular case. This means that there should be no fixed tariff or scale for specific offences.
- ◆ In the case of a first offender, the imposition of a fine is often a sound alternative to imprisonment.



TEST YOURSELF

(5 mins)

What general principles are applicable in the case of the imposition of a fine? [5]

.....

.....

.....

.....

.....

.....

.....

6. FORMS OF PUNISHMENT WHICH CAUSE NO PHYSICAL SUFFERING AND WHICH ARE CARRIED OUT IN THE COMMUNITY: COMMUNITY-BASED SENTENCES

Introduction

A community-based sentence may be defined as a court order directing the offender to render some or other form of service for the benefit of the community.

The justification for imposing community-based sentences is to be found in *S v Khumalo* 1984 (4) SA 642 (W), in which Judge Goldstone expressed the belief that, in the appropriate circumstances, the community would most definitely be in favour of such an order, and for the following reasons:

- ◆ By means of such a sentence, **the offender is kept out of prison**. This enables the offender to continue with his or her daily life and, at the same time, he or she is not exposed to the negative consequences of imprisonment.
- ◆ **The offender can continue to live with his or her family and support it.** As a result, not only are the most important family ties maintained, but the state and family members are not required to maintain dependent members of the family, which would be the case if the offender were to be imprisoned.
- ◆ The fact that the offender is required to render a service to the community free of charge for the crime he or she committed against the community, to an extent **satisfies the community that law and justice have prevailed.**
- ◆ **The community benefits directly** from the service which is rendered by the offender.

General principles underlying the imposition of community-based sentences

The following general principles are applicable in cases where community-based sentences are imposed:

- ◆ The offender who is sentenced to community service must be 15 years of age or older.
- ◆ The community service concerned must be beneficial to the broad community; in other words, it must not be imposed for the benefit of a specific group or a specific individual.
- ◆ The conditions in terms of which the service is rendered need not always be related to the crime which has been committed.

- ◆ Community service is an appropriate alternative to imprisonment. Such a sentence may also be considered where the offender is not financially capable of paying a fine or of compensating the victim.
- ◆ A strict selection process must be employed when considering whether or not to order an offender to render community service. The mere fact that an offender expresses his or her willingness to render such service does not mean that he or she is suitable for community service.

Scope of community-service sentences

The following provisions are of importance in the case of community-service sentences:

- ◆ The minimum period of service is 50 hours per suspended or postponed sentence.
- ◆ The period of service for each offender is determined according to the gravity of the crime, the blameworthiness of the offender, the ability of the supervising institution to keep the offender busy, and the work circumstances of the offender.
- ◆ In practice, community-service sentences are imposed for both serious and less serious offences.

Today, community-based sentences are receiving greater attention internationally than was the case a decade or so ago. By implementing corrective supervision as a community-based punishment, South Africa has become one of the leading countries in this sphere.



TEST YOURSELF

(10 mins)

- (1) How would you justify the imposition of a community-based sentence? [8]
- (2) Indicate the general principles which are applicable to the imposition of a community-service sentence. [6]

.....

/continued ...

- Bean, P. 1982. *Punishment*. Oxford: Robertson.
- Bean, P. 1986. *Mental disorder and legal control*. Cambridge: Cambridge University Press.
- Burchell, EM, Milton, JRL & Burchell, JM. 1983. *South African criminal law and procedure*. Johannesburg: Juta.
- Carney, LP. 1980. *Corrections: treatment and philosophy*. Englewood Cliffs, NJ: Prentice-Hall.
- Cole, J. 1992. Die kind as slagoffer van ekstrasfamiliale seksuele uitbuiting met verwysing na die kenmerke en *modus operandi* van die oortreder: 'n viktimologiese ondersoek. D Phil-proefskrif, Universiteit van Pretoria, Pretoria.
- De Wet, JC & Swanepoel, HL. 1985. *Die Suid-Afrikaanse strafreg*. Durban: Butterworths.
- Du Toit, E. 1981. *Straf in Suid-Afrika*. Johannesburg: Juta.
- Etzioni, A. 1961. *A comparative analysis of complex organisations: on power, involvement and their correlates*. New York: Free Press of Glencoe.
- Eysenck, HF. 1977. *Crime and personality*. St Albans: Paladin.
- Ezorsky, G. 1972. *Philosophical perspectives on punishment*. New York: Albany State University Press.
- Flanagan, TJ. 1995. *Long-term imprisonment*. London: Sage.
- Geldenhuys, T. 1992. *Inleiding tot die sekuriteitsreg*. Durban: Butterworths.
- Glick, B. 1996. *The organisational environment*. National Institute of Corrections.
- Gresham, S. 1971. *The society of captives*. New York: Princeton University Press.
- Hlongwane, AL. 1994. Gang conflict in prison. MA dissertation, University of South Africa, Pretoria.
- Hosten, WJ. 1995. *Introduction to South African law and legal theory*. Woburn, Mass: Butterworths.
- Kriel, J. 1990. Die gevangenishoof as middelvlakbestuurder. D Litt et Phil proefskrif, Universiteit van Suid-Afrika, Pretoria.
- Louw, DA. 1989. *Suid-Afrikaanse handboek van abnormale gedrag*. Johannesburg: Southern.

- Maden, A, Swinton, M & Gunn, J. 1994. A criminological and psychiatric survey of women serving a prison sentence. *British Journal of Criminology* 34(2):172–189.
- McConkie, MC. 1975. *Management by objectives: a correctional perspective*. Washington: National Institute of Law Enforcement and Criminal Justice.
- Moberly, W. 1968. *The ethics of punishment*. London: Archon.
- Munnik, EE. 1995. Die vrouemisdadiger: 'n ondersoek na die persepsies van 'n groep inwoners van Pretoria. D.Litt et Phil proefskrif, Universiteit van Suid-Afrika, Pretoria.
- Nel, PR. 1995. Onrus en opstande in gevangenis. Artikel ter gedeeltelike voldoening aan die vereistes vir die BA-honneursgraad, Universiteit van Suid-Afrika, Pretoria.
- Nel, TM. 1996. Alternatiewe strafvorme vir die beregting van jeugdiges. Artikel ter gedeeltelike voldoening aan die vereistes vir die BA-honneursgraad, Universiteit van Suid-Afrika, Pretoria.
- Neser, JJ. 1993. *Penitentiary penology*. Johannesburg: Lexicon.
- Packer, HL. 1968. *The limits of the criminal sanction*. Stanford: Stanford University Press.
- Pollock-Byrne, JM. 1989. *Ethics in crime and justice: dilemmas and decisions*. Sacramento, Calif: Brooks/Cole.
- Primoratz, I. 1989. *Justifying legal punishment*. London: Humanities.
- Rabie, MA. 1979. *Punishment: an introduction to principles*. Johannesburg: Lex Patria.
- Rabie, MA & Strauss, SA. 1994. *Punishment: an introduction to principles*. 5th edition. Cape Town: Lex Patria.
- Reid, ST. 1990. *Crime and criminology*. New York: Holt, Rinehart & Winston.
- Robin, GD & Anson, RH. 1990. *Introduction to the criminal justice system*. New York: Harper & Row.
- Sapsford, RJ. 1983. *Life sentence prisoners: reaction, response and change*. Milton Keynes Open University Press.
- Snarr, RW & Wolford, BI. 1985. *Introduction to corrections*. Dubuque, Ia: Brown.

Snyman, CR. 1992. *Strafreg*. Durban: Butterworths.

Snyman, CR. 1995. *Criminal law*. Durban: Butterworths.

Toch, H. 1977. *Living in prison: the ecology of survival*. New York: Free Press.

Van Zyl Smit, D. 1992. *South African prison law and practice*. Cape Town: Butterworths.

Vetter, HJ & Silverman, IJ. 1986. *Criminology and crime*. New York: Harper & Row.

Yablonsky, L. 1990. *Criminology: crime and criminality*. New York: Harper & Row.