

**COMPENSATION IN MURDER CASES: OWAMBO
CUSTOMARY LAW**

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**COMPENSATION IN MURDER CASES: OWAMBO
CUSTOMARY LAW**

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ABBREVIATIONS

All ER – All England Law Reports

A J - Acting Judge

Art - Articles

CASS - Centre for Applied Social Sciences

CJS - Criminal Justice System

GL – General Law

CPA - Criminal Procedure Act

GA – General Assembly

GRN – Government of the Republic of Namibia

HP – Prentice Hall, South Africa

J - Judge

JP - Judge President

LAC – Legal Assistance Centre

NR – Namibian Law Reports

Nm (HC) – Namibian High Court

RSA – Republic of South Africa

S – Section

USA – United States of America

V – Versus

TABLE OF CASES

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S v Useb 1990 Nm (HC)

United States v Abate 359 US 187 1959

United States v Benz 1931 282 US 304

United States v. Lana (1922) 20 (b) US 377, 382

ABSTRACT

A practice developed in some communities in Namibia whereby any person who has caused the death of another person is ordered to pay compensation, irrespective of whether or not that person has been tried and convicted in the state criminal courts.

It is because of this practice therefore that there are now divergent views among members of the public that compensation paid in murder cases in terms of Owambo customary law is double punishment.

Therefore, the main objective of this study was to examine whether compensation paid in terms of Owambo customary law in cases that are triable by the state criminal courts is a punishment, and whether such payment is in conflict with Article 12 (2) of the Constitution of Namibia which prohibits a person to be tried and punished twice for the same offence.

Emphasis was placed on the payment of compensation in murder cases in terms of Owambo customary law.

In Namibia, there are two legal systems of law, these are, customary law and general law. As there are two legal systems of law, there are also two different systems of courts, these are customary law courts and the State courts.

Both systems know which crimes are affecting the society and which crimes are civil matters or simple conflicts between ordinary people.

Thus, immediately if someone commits a crime in Namibia there are automatically two remedies, that is civil remedy and criminal remedy, and that is the reason why, in terms of Owambo customary law, if someone causes the death of a human being, the relatives of the deceased take their claim to their customary law court for compensation and at the same time report the matter to the police for prosecution and punishment.

Compensation is paid to answer a civil remedy whereas punishment is there to answer a criminal remedy.

Compensation award in murder case by the Owambo customary law is just a civil remedy like all other remedies in the law of delict, and such payment does not absolve the suspect from punishment.

Therefore, it will be concluded that compensation award in murder cases in terms of Owambo customary law is not a double punishment and that it is just a civil remedy like all other remedies in the law of delict.

It will also be argued that Owambo customary law courts are civil courts in nature and have no jurisdiction to punish (the suspect and their families) in murder cases or in any case which are taken to their courts for compensation purposes.

CHAPTER ONE: INTRODUCTION

1. BACKGROUND TO THE STUDY

The aim of this study is to ascertain whether the payment of compensation in murder cases in terms of Owambo customary law is double punishment or tantamount to punishment. The thesis discusses whether the practice of compensation in Owambo customary law contravenes Article 12 (2) of the Constitution of Namibia. It goes further to investigate and ascertain which of the two legal systems, customary law and general law, has the jurisdiction to deal with murder cases in Namibia.

1.1.GENERAL INTRODUCTION

Historically, compensation is not a new wave in the history of Namibian law. It is also not a new concept in law. According to the traditional leaders who were interviewed, compensation has been a practice in customary law courts before any other laws were introduced in Namibia.¹

As the story has been told from generation to generation that there was no legal system in Namibia. If someone committed a crime, in the olden days, people in different communities have been using a method of either traditional counter killing (witchcraft) or physical killing as they call it “*an eye for an eye (eho okeho) or tooth for tooth (eye go oke yego)*” system.²

¹ Personal communication by way of an interview with Chief Herman Ipumbu of Uukwambi Community 14 May 2001.

² Ibid

An eye for an eye (eho okeho) is a proverb meaning if you take someone's eye, one of your eyes will also be taken out or if someone kills somebody, for example, the relatives of the deceased were to kill two or more people from the offender's family.

These customs and traditions have been orally passed on from generation to generation. They are not written anywhere because people in Namibia, like in many parts of the world, did not know how to write before the advent of colonialism and with it missionary and state schools along the lines of western traditions/civilisations.³

However, when it was detected that families were decimating each other through a process of traditional counter killings as they believed in the olden days or through the process of physical killing, a method of compensation was introduced.⁴

Compensation payment became more popular in all communities in the country and the practice has been regarded as a custom⁵. Such practices became a law in most, if not all communities in Namibia in the olden days and remained a practice in the traditional courts up to now in all communities in the northern part of Namibia, and that is the reason why if someone kills somebody or causes the death of a human being in the northern part of Namibia today, such a person is required to pay compensation to the deceased's family members.

1.2 DEFINITION OF THE PROBLEM

³ Ibid

⁴ Ibid

⁵ Ibid

The principle of legality means that an offender should not be punished for any action without a clear and definite legal basis.⁶ The essence of this principle is to prevent arbitrary, secret or cruel punishment.

The common law recognized, under a plea of *autrefois acquit*, or *autrefois convict* that “*a man shall not be brought into danger of his life or limb for one and the same offence more than once*”⁷

Article 12 (2) of the Constitution of Namibia also provides that: “*no persons shall be liable to be tried, convicted or punished again for any criminal offence for which they have already been convicted or acquitted according to law provided that nothing in this Sub-Article shall be construed as changing the provisions of the common law defences of "previous acquittal" and "previous conviction"*

What this means is that a person should not be tried or punished twice for the same offence.

Irrespective of the principle of legality, the common law practice for a person not to be brought into danger of his life or limb for one and the same offence more than once and even the prohibition by Article 12 (2) of the Constitution of Namibia that no person shall be tried, convicted and punished twice for any same criminal offence.

⁶ Burchell E.M, Milton J.R.L and Burchell J.M. (1983): ‘South African Criminal Law and Procedure, Volume 1: General Principles of Criminal law, Juta and CO, Ltd, Cape Town Wetton Johannesburg.

⁷ See *Ex Parte Lange* 85 US 165 (1874).

Under Owambo customary law, if someone causes the death of another human being such person has to compensate the deceased's relatives and at the same time arrested, prosecuted and if found guilty punished by the state criminal courts.

The practice of the Owambo customary law courts to order the suspect in murder cases to pay compensation attracts debate and causes divergent views among members of the public, that the award of compensation in a murder case in terms of Owambo customary law is tantamount to double punishment.

Therefore, there are now some observers and writers who seem to agree with the general public's view that the awarding of compensation in Owambo customary law courts is double punishment and suggested that: "*it would be advisable to prevent a person sentenced by a customary court from being tried again by the State courts for the criminal offence by the way of excluding such trial in the Act of customary courts.*"⁸

Paper No 47⁹ provided that "*in reality it does happen that a person, who has been sentenced by a state court, is convicted again by a customary court, sometimes even after he/she has been to prison.*"

Some writers went even to the extent of saying "*the traditional courts in Namibia heard cases of murder and sentence murderers (and their families) to pay compensation*"¹⁰

⁸ Hinz M.O. assisted by Joas S. (2000). 'Customary Law in Namibia: Development Perspective, 5 ed, Windhoek (CASS) 183

⁹ Felton S. (2000). 'Traditional Authority in the New Namibia, A Training Manual' Windhoek (CASS) 40

¹⁰ Hinz M. O (ed) in collaboration with Helgard K. Patemann (2006): 'The Shade of New Leaves Governance in Traditional Authority: A Southern Africa Perspective' LIT Verlag, Berlin , German 484

This paper attempts to investigate the question whether the payment of compensation in murder cases in terms of Owambo customary law amounts to double punishment and whether such payment contravenes Article 12 (2) of the Constitution of Namibia. The paper will also attempt to find out of when it can be said the offender is doubly punished.

It is my view that the payment of compensation in murder cases in terms of Owambo customary law is neither punishment nor double punishment. It is also not in anyway contravening Article 12 (2) of the Constitution as the observers and some writers are suggesting.

However, the author does agree with some scholars who are saying “*the compensation in customary law contains some elements of punishment.*”¹¹

In Namibia, prosecution authority is vested in the hands of the state and section 2 of the Criminal Procedure Act 51 of 1977 provides that “*the authority to institute and conduct prosecution in respect of any offence in relation to which any lower or superior court in the Republic exercises jurisdiction shall be vested in the state.*”

There are two legal systems of law in Namibia, deriving power from different source of law, both capable of dealing with the same subject within their areas of jurisdiction and

¹¹Horn N ‘Criminal or Civil Procedure? The Possibility of a Plea of Autrefois in the Namibian Community Courts Act’ in Hinz (ed) (note 10 above)196

each system has the right to determine what shall be an offence against peace and dignity of people in its area of jurisdiction.

Since the country has two legal systems of law operating side by side, it is possible for an act of a person to be a crime against both legal systems and therefore it is correct for such an act to be handled by both legal systems. Consequently, that is why in the northern parts of Namibia, if someone causes the death of another human being that person will be ordered to pay compensation and at the same time the case will be reported to the police for prosecution.

1.3 OBJECTIVES

The main objectives of this study are:

- to ascertain whether the payment of compensation in murder cases in terms of Owambo customary law is double punishment or tantamount to punishment,
- to find out whether the practice of compensation in Owambo customary law contravenes article 12 (2) of the Constitution of Namibia,
- to investigate and ascertain which of the two legal systems, customary law and general law, has the jurisdiction to deal with murder cases in Namibia, and to find an answer to the question when it can be said that an offender is doubly punished?

1.4 RESEARCH METHODOLOGY AND APPROACH

1.4.1 Qualitative Method

Data on the question of Owambo Customary Law is generally difficult to find because customary law, which the customary law courts in the northern part of Namibia apply is not written down in most, if not in all communities.

Therefore, the qualitative method was used. Qualitative research is defined as the non-numerical examination and interpretation of observations for the purpose of discovering underlying meanings and patterns of relationships.¹²

Qualitative method was utilized in this study because it allows people to tell their own stories and express their own opinion in their own words. Both primary and secondary sources were utilized. Primary sources include interview with Chiefs/Kings, Headmen, Judges, Magistrates, Police Officers, Prosecutors and both State and Private Advocates. To avoid scratching the healed wound, the relatives of the deceased and suspects or convicted offenders in murder cases were not interviewed.

Secondary sources were also utilized in this study. Secondary sources include text books, case laws, statutory laws and some dictionaries.

1.4.2 PREPARATORY STAGE

Obtaining information about customary law and the operation of the community courts as now called in the north is very difficult because traditional authorities are scattered all over the area.

¹²Dantzker M.L (2006): A Primer , Second Edition, Research Methods for Criminology and Criminal Justice (Criminal Justice Department University of Texas – Pan American Edinburg, Texas) Jones and Bartlett Publishers, 216

Therefore, the first move after deciding to write a paper about an award of compensation in murder cases by the Customary Courts was to approach the traditional leaders, judges, magistrates, police officers, prosecutors, and both State and private lawyers who are dealing with murder cases.

To avoid the constraint of availability of the prospective participants, telephonic requests were made early, at the least two months before the interviews.

Telephonic requests were done in advance in order to allow the participants enough time to make room for this in their schedules. This arrangement was however only done with proposed participants who had means of communication like, the judges, magistrates, police officers, advocates and some traditional leaders. Some traditional leaders did not have means of communication by then and letters were sent to them.

Once a participant confirmed the date, specific questions were sent to him/her. This method was not applied to the traditional leaders because there were some terminologies which are used in most cases interchangeably such as punishment compensation, fine, defendant, offender, suspect and so on which the author wanted to discuss with the traditional leaders first.

Therefore, the traditional leaders were only informed about the subject to be discussed in the letter sent to them but no questionnaires were sent to them because the author was trying to avoid misinterpretation of the subject matter.

When all traditional leaders confirmed the date, the author travelled to the north and conducted interviews with them as arranged. In some community the meeting was with a group of traditional leaders of that community, as arranged by the head of that community. In some communities, the author only met the participant who was contacted.

In the letter which the author sent to the traditional leaders, three different dates were suggested and the participants were advised to select a suitable day to them from the suggested dates.

An explanation was also sent to the traditional leaders that if the dates suggested were all not suitable to them, they were welcome to suggest their own dates.

The suggestion of the dates by the traditional leaders with guidance of the dates which were available to the author made it easy to the author because at the end of the day it was the author who happened to select dates from the dates the traditional leaders suggested according to the author's proposal and a final date was communicated back to the participant again.

The advantage in the whole research of this study was that the topic had interested a reasonable number of potential participants, and all participants approached were happy to provide the researcher with all required information, but most if not all, participants were reluctant to answer questions related to the Constitution.

While the researcher was waiting for a reply from the proposed participants, the researcher was busy going through literatures that would give guide through the research. The whole reason to go through various literatures was essential to understand what other scholars had done and to find out which information will be suitable for this study.

1.4.3 SELECTION OF THE INTERVIEWEES

Due to lack of time, the key participants, more especially the traditional leaders were not properly selected. The researcher only interviewed Chiefs/Kings from three communities whom she managed to reach. These are, Uukwambi, Ombalantu and Uukwanyama and two headmen, one headman from (Ombwalambwenge) Ondonga, and one from (Oshilemba) Ongandjela.

Therefore, the results contained here can not be claimed to represent all communities in the northern part of Namibia but they do give an indication of the areas which should be the subject of future investigations.

1.4.4 THE INTERVIEW SITUATION

The researcher went to the field and interviewed the key participants face to face. The interviews were conducted in English and Oshiwambo. A structured interview was used.

The whole reason why a structured interview was used is that it provides information, which assures the comparability of data.

At the beginning of the interview, the participants were verbally given the introduction and the purpose of the study. They were also given questions which they could answer during the interview (see Appendix 2).

Appendix 1 stated the purpose of the study, the use to which data would be put and assurances of confidentiality. The author used both closed and open-ended questions to encourage the interviewees to use their own words and also exposed the themes of what people believe, think and feel about the practice or the administration of justice by the customary law courts and or the award of compensation payment in murder cases by the customary law courts.

Permission to record participants was requested in all occasions and the reason was made clear but some participants were reluctant to be audio recorded therefore only some participants were audio-recorded. Some participants' answers were hand-recorded.

Before the interview took place, a brief time was allowed for the participants who were provided with the questions to refresh their memories. Pre-reading of the questions was also done in order to allow the participants to remember what they prepare to discuss with the author and to give the participants an idea of the area to be covered.

An attempt was made to put all questions to the participants and all participants were afforded an opportunity to question the researcher as much as they wanted. Though no time limit was set for participants, most interviews were run between forty to sixty minutes and three hours in some cases.

1.4.5 ANALYSIS OF RESULTS

Upon completion of all interviews, the audio-records were transcribed in full. The statements were placed together. Data analysis was conducted simultaneously with data interpretation and then a qualitative text was written.

1.5 LIMITATION AND SCOPE OF THE STUDY

The paper consists of the following chapters: This chapter deals with the background to the study, general introduction, definition of the problem, objectives of the study, research methodology and approach, dissertation layout and limitation.

Chapter two deals with the historical overview of the two legal systems of law in Namibia, a brief history of Namibia which explains how Namibia came to have two legal systems of law, a brief history of Namibia during the German rule, during the South African rule and the history of Namibia after Independence.

It is difficult to understand the distinction between compensation, punishment and a court fine (hereon referred to as a fine). Therefore, chapter three deals with literature review and define the main concepts utilized in this study.

The paper discusses the purpose of compensation under Owambo customary law in murder cases and gives the reason why in the northern parts of Namibia if a person causes the death of a human being that person is ordered, by Owambo customary law courts, to compensate the relatives of the deceased; and at the same time arrested by the police, taken to the state criminal courts, prosecuted and if found guilty, punished while he has already paid customary compensation in customary law courts.

In ascertaining the purpose of compensation payment in murder cases in terms of Owambo customary law, the following questions will be answered. What is paid in murder case in terms of Owambo customary law? Who pays? Who benefits from such payment? The purpose of punishment and court fine will also be discussed under this chapter. A distinction between compensation, punishment and a fine will also be discussed here as well as compensation award in Community Courts.

The paper endeavours to answer the supremely important question whether compensation is a punishment and/or if the award of compensation in murder cases by Owambo customary law courts is tantamount to double punishment. In addition, the thesis aims to discuss when it can be said a person is doubly punished.

Before, we move to the question of jurisdiction, the paper will briefly look at the position of the law. These are: the Constitution of Namibia,¹³ The Criminal Procedure Act¹⁴ and the Community Courts Act 10 of 2003.

Once we understand the position of the law, at the end of this section the study will go on and determine which legal system has criminal jurisdiction to deal with murder cases in Namibia, common law or customary law and this discussion will be followed by the conclusion.

Chapter four deals with analysis and findings, chapter five makes the necessary conclusion and recommendations.

1.6 LIMITATION OF THE STUDY

1.6.1 CHOICE OF GEOGRAPHICAL AREA

Coming from a society that is still practicing customary law up to now in Namibia, the researcher developed an interest and concern concerning the complaints and divergent views of different observers and writers of customary law in Namibia that the award of compensation in murder cases by the Owambo customary law courts is double punishment. Therefore, most of the research was conducted in the northern part of Namibia formally known as Ovamboland.¹⁵

¹³ Act 1 of 1990

¹⁴ Act 51 of 1977

¹⁵ A term "Ovamboland" refers to the area now called northern part of Namibia.

This area was selected because most complaints that compensation payment in murder cases is double punishment come up whenever an Oshiwambo¹⁶ speaking person is killed.

The area was selected to ascertain whether the payment of compensation in murder case in terms of Owambo customary law is double punishment as some observers and different writers are saying.

Some work was done in Windhoek because most Judges and most private and State advocates who are dealing with murder cases reside in Windhoek.

Due to financial constraints only three Traditional Chiefs, two headmen, two Judges, three prosecutors, (one from Oshakati and two from Windhoek), and two lawyers were interviewed.

Also interviewed were five police officers, one from Oshakati, one from Ondangwa, one from Uutapi, one from Wanahenda Police Station and one from Windhoek Police headquarters.

1.6.2 WHERE DO OVAWAMBO¹⁷ LIVE IN NAMIBIA?

When we are talking of Ovawambo, we are talking of people who live in the northern parts of Namibia previously called Ovamboland although these people are now scattered all over Namibia. The majority of them still live in the northern parts of Namibia. The

¹⁶ A term “Oshiwambo” refers to different language spoken in the northern part of Namibia.

¹⁷ A term “Ovawambo” refer to the indigenous people who live in the northern part of Namibia

2001 census recorded that over 40% of the country's population lives in the northern part of Namibia¹⁸ and due to the high population in this part of the country, this part is now divided into four regions.¹⁹

¹⁸ Population and Housing Census office Central Bureau of Statistics National planning Commission Windhoek, Namibia 7

¹⁹ These are: Oshikoto, Oshana, Omusati and Ohangwena,

CHAPTER TWO: THE HISTORICAL OVERVIEW OF THE TWO LEGAL SYSTEMS OF LAW IN NAMIBIA

2.1 Introduction

As it is already stated in the introductory chapter, in Namibia, there are two legal systems of law, that is, customary law and general law.²⁰

Customary law as a body of applicable law is difficult to describe or even encompass. Customary law by its very nature is the law that is not made by the state but a law that has developed and evolved over the years in a community.²¹ Like the laws made by the government (general law), customary laws have become a way of regulating how people live together.²²

Customary law refers to the customs of a certain community and applies only to people in that community.²³ It is mostly applied in the rural areas of Namibia.²⁴ Therefore, it is said, customary law is the first legal system of law in Namibia.²⁵

The second type of legal system is one the colonial powers brought with them, that is, general law.²⁶ General Law comes from the decisions that courts have made in the past (common law), from the laws passed by Parliament (statutes), and from international

²⁰ Becker H. and Solomon B. (1997), *Learning about Law and Family*, Windhoek, Namibia (CASS) 22.

²¹ Felton S. (note 9 above) 33.

²² *Ibid*: 33.

²³ Hubbard D. (2001), *Law for All*, 'Introduction to Namibian Law' Windhoek, Namibia (CASS) 3.

²⁴ Becker and Solomon (note 20 above) 26.

²⁵ *Ibid* 22

²⁶ *Ibid* 22.

agreements that apply to Namibia (international law)²⁷. General Law is applicable to everyone in the country.²⁸

2.1.1 A BRIEF HISTORY OF NAMIBIA

To understand why we have two legal systems of law in Namibia, we have to look briefly at the history of our country. The land which is now called Namibia was originally the home of different communities of people, each with their own leaders, customs and systems of government.²⁹

When the Germans, and later the South Africans, came to this country, they found the Namibian communities had rules governing the way people lived.³⁰

Before the colonizer came to Namibia, Namibians like other Africans, had their own ways of resolving conflicts in their communities, for example, there were rules that stipulated the consequence of wrongful conduct.³¹

There were also people who were responsible for hearing disputes (conflicts). These were chiefs (in some areas called “kings”), councilors and headmen.³²

²⁷ Hubbard (note 23above) 3

²⁸ Ibid 3

²⁹ Ibid 5

³⁰ Becker and Solomon (note 20 above) 22.

³¹ Ibid 22.

³² Ibid 22

2.1.2 NAMIBIA DURING THE GERMAN RULE

Although the Germans ruled Namibia, then called (South- West Africa) from 1884 to 1914,³³ the colonial administration was limited to permit full control of the country,³⁴ therefore different communities in the rural areas were left to practice customary law, and Ovawambo were some of the communities which were left to retain their own courts and legal system.

The Germans introduced European law but their officials also applied customary law in civil cases concerning indigenous litigants.³⁵ Although German law was introduced as the basic law of the land, various peoples were allowed to retain their courts and legal systems, which implied that they were regarded as sovereign people.³⁶

When the white traders, settlers and missionaries came to Namibia, they also brought their ideas about government from Europe but the government bodies which Germany set up in Namibia represented only the white settlers.³⁷

2.1.3 THE HISTORY OF NAMIBIA DURING THE SOUTH AFRICAN RULE

The control of Namibia was given to South Africa in 1919 after Germany was on the losing side in World War two.³⁸ When South Africa took control of Namibia, Roman – Dutch law replaced German law. The administration of justice Proclamation R21 of 1919 provided that’ *all laws within the Protectorate in conflict therewith Roman – Dutch law*

³³Bennet T. W. (1996), “Customary law and the Constitution,” Back ground and Discussion paper. The Law Reform and development commission of Namibia Windhoek 6

³⁴ Ibid 6

³⁵ Meinhof K.(1908), “The codification of Native Law in the German colonies” (Journal of the African Society 162

³⁶ Ibid 27

³⁷ Hubbard (note 23 above) 5

³⁸ Hubbard (note 23 above) 5

shall, to the extent of such conflict and subject to the provisions of this section, be repealed'.³⁹ South Africa was expected to promote the well being of the people of Namibia, but only white people were represented in the government structures set up by South African. They also set up the policy of apartheid which denied basic rights to black people in Namibia.⁴⁰

When the South Africans ruled over Namibia, they brought with them the Roman-Dutch system of law as it operated in the Cape Colony⁴¹. They also applied South African statutes in Namibia.⁴²

The South Africans made their law the general law of the land in Namibia. However, the customary legal system also remained in operation, as chiefs and headmen continued to hold court,⁴³ and this is the reason why we have two legal systems of law in Namibia today, that is, customary law and general law.

During the South African rule, customary law was left to co-exist with the Roman – Dutch law especially in the Homelands. As an example, we shall refer to Proclamation R348 of 1967, which provided that: “Tribal Chief and Headman have the right to try certain offences and concurrently prohibiting them from trying and hearing some criminal offences listed in Schedules “A”⁴⁴ and “B”⁴⁵ to the Proclamation”.

³⁹ Proclamation R21 of 1919

⁴⁰ Hubbard (note 23 above) 5

⁴¹ Becker and Solomon (note 20 above) 22 - 23

⁴² Ibid 23

⁴³ Ibid 23

⁴⁴ Schedule “A” of Proclamation R 348 of 1967

⁴⁵ Section 4 of Schedule “B” of Proclamation R 348 of 1967

Schedule “A” offences which may not be tried by a chief, headman, Chief’s deputy or headman’s deputy under Section 3 (i) (a) and (iii) are:

“treason, crimen leasae Magistrates, public violence, sedition, murder, culpable homicide, rape, robbery, assault with intent to do grievous bodily harm, assault with intent to commit murder, rape or robbery, indecent assault, arson, bigamy, crimen injuria, abortion, abduction, offences under any law relating to stock theft, sodomy, bestiality, bribery, breaking into or entering any premises with intent to commit an offence either at common law or in contravention of any statute, receiving any property knowing it has been stolen, fraud, forgery or uttering a forged document knowing it to be forged, any offence under any law relating to illicit possession of or dealing in any precious metals or precious stones, any offence under any law relating to conveyance, possession or supply of habit – forming drugs or intoxicating liquor, any offence relating to witchcraft, faction fighting, man stealing, incest, extortion, defeating or obstructing the course of justice and any conspiracy, incitement or attempt to commit any of the above – mentioned offences.

Schedule “B” offences which may not be tried in terms of Section 4 (i) (b) are:

treason, murder, rape, culpable homicide, public violence...

As it can be seen from the crimes listed in schedule A and B of the old Proclamation R348 of 1967, murder was one of the criminal offences which Tribal Chiefs or Headmen were prohibited from trying. Nevertheless Tribal Chiefs were not prohibited from ordering compensation if a plaintiff lodged a complaint in their courts.

Due to the permission granted to traditional authorities to rule their own communities during the colonial era, the practice of customary law courts to order a person who caused the death of a human being to pay compensation remains enforced in customary law courts in northern Namibia today.

2.1.4 THE HISTORY OF NAMIBIA AFTER INDEPENDENCE

On 21 March 1990, Namibia attained her independence and adopted a Constitution that is hailed as progressive and democratic.⁴⁶ The Namibian Constitution *inter alia* provides in Article 140 (1) as follows:

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

Article 66 (1) of the Namibian Constitution also provides that: *“Both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution or any other statutory law.”*

⁴⁶ The Constitution of Namibia

These provisions simply preserve a status quo. They did not change the position of customary law in the Namibian legal system.

The recognition of customary law in Namibia can also be found in the leading case of *Kaptuaza and another v Executive Committee of the Administration for the Herero and others*.⁴⁷ The court held in this case that Herero customary law is part of the law of South West Africa of which the court takes judicial notice; consequently it needs not be proved in the same manner as foreign law...

Furthermore, chapter 3 of the Constitution of Namibia contains a Bill of Fundamental Human Rights and Freedoms⁴⁸. The essence of the Fundamental Human Rights is to confer to all persons living in Namibia certain basic and fundamental human rights and to protect the rights so conferred. Some of the fundamental Human Rights protected by the Constitution are: protection of life,⁴⁹ fair trial,⁵⁰ the right to a fair trial entails amongst other that a person is presumed innocent until proven guilty⁵¹ and that no person may be tried twice for the same offence.⁵²

It is because of these constitutional provisions that there are now uncertainties concerning the rights of Owambo Traditional Authorities to administer justice in cases which are

⁴⁷ 1984 (4) 295 SWA 301

⁴⁸Naldi G. J. (1995), 'Constitutional Rights in Namibia: Comparative Analysis with International Human Rights' 28

⁴⁹ Article 6 of the Constitution of Namibia

⁵⁰ 12 (1) (a)

⁵¹ 12 (1) (d)

⁵² 12 (2)

triable by the state courts. Some of those offences are murder, rape, stock theft, theft, and common assault.

In the northern parts of Namibia, it is a practice that if someone causes the death of another person, that person is ordered to compensate the relatives of the deceased person by paying a number of heads of cattle irrespective of whether or not such a person has already been tried and convicted in the state courts.

The existence of the practice of compensating the relatives of a deceased person by the perpetrator in terms of Owambo customary law has raised a debate that such practice is a double punishment and that the practice is in conflict with the constitutional principles, more specifically with the fundamental right entrenched in Article 12 (2).

Some writers are of the view that customary law courts are punishing the offender twice because they do not draw a clear line between criminal and civil cases.⁵³

This paper aims to discuss whether customary compensation in murder case awarded by the community courts constitutes double punishment. It will also analyse the arguments for and against the award of compensation in murder cases by the Owambo customary law courts.

⁵³Felton S. (note 9 above) 39

CHAPTER THREE: LITERATURE REVIEW

3.1 INTRODUCTION

It is not easy to understand whether the payment of compensation is a form of punishment or not while one does not know what the concepts “compensation,” “punishment” and “fine” mean. Therefore, even if there is much truth in the saying that definitions are dangerous, it is imperative to define the basic concepts of our study at the beginning of this chapter. After that an attempt will be made to explain the purpose of these concepts and give the reason why compensation is payable in appropriate circumstances under Owambo law and custom.

Many people in Namibia are confusing compensation with punishment and court fines. This chapter thus endeavours to discuss and settle the dust of confusion that arises in differentiating between compensation, punishment and court fines.

Furthermore, the chapter aims to answer our problem questions in this section, these are: is compensation a punishment? When can it be said that a person is doubly punished? Is the award of compensation in murder cases by Owambo customary law courts in any way in conflict with Article 12 (2) of the Constitution of Namibia?

Before addressing the question of jurisdiction, the position of the law with regards to the award of compensation in murder cases by customary law courts will briefly be looked at. Once the position of our law is understood, then at the end of the section the study

will go on and determine which legal system has jurisdiction to deal with murder cases in Namibia.

3.2 DEFINITION OF CONCEPTS

3. 2.1 DEFINITION OF COMPENSATION

As it is already stated under point 1.1 compensation is not a new concept in law. The use of the word is almost as old as humanity. Its roots can be traced back to the time of the Old Testament (Book of Leviticus Chapter 20: 17 – 20), where in the code of Hammurabi as the law of Talion, the Lex Talionis used a style of an eye for an eye and life for life.⁵⁴

Although the term compensation is not a new concept in law as indicated above, this term is too difficult to define. People usually know what it is but find it difficult to define it.

The Oxford Concise English Dictionary⁵⁵ defines *compensation as something awarded to compensate for a loss, suffering or injury, something that compensates for an undesirable state of affairs...*

The Colliers Dictionary⁵⁶ defines compensation as: *(a) anything given as an equivalent or to make up for loss, damage..., (b) any payment for ... or a mechanism by which an*

⁵⁴ Specifically verse 20 provides that: “who takes the life of any human being shall be put to death. Whoever takes the life of an animal shall make restitution of another animal. A life for a life” Anyone who inflicts an injury on his neighbour shall receive the same in return. Limb for limb, eye for eye and tooth for tooth! The same injury that a man gives another shall be inflicted on him in return”

⁵⁵ Pearsal J.C. (1989), ‘Oxford Concise English Dictionary 10th edition’ Seiko UK, LTD 291

⁵⁶ Neufeldt V: ‘Colliers Dictionary, third edition,’ New York, Toronto Sydney 284

individual seeks to make up for a real or imagined psychological defect by developing or exaggerating a psychological strength.

Compensation is also defined as *a means that an offender has to give something to the person who has been affected by the offence.*⁵⁷

In the text of Compensation Cross-cultural Perspective, compensation is defined as "*a style of social control that has been found in many if not all cultures, it is a debt that resulted from the failure of someone to fulfil an obligation.*"⁵⁸

In *S v Mpofu*,⁵⁹ the court defined the term compensation as *a method used to induce the offender to pay even if he does not offer to do so.*

A definition given to the term compensation by Senior Headman of Uukwayama Traditional Authority is that '*compensation is a method of social control, which has been used or still being used to regulate the behaviors of the people in a given community*'.⁶⁰

Mr. Weyulu further explained that *compensation is also a method used or still being used to restore or repair the damage which the offender caused.*⁶¹

⁵⁷ Becker & Solomon (note 9 above) 37

⁵⁸ Kohrl Vivian J. (1998), Compensation – Cultural perception at 197 as cited in (Black D (1494) Discovers Legal Realism: From pure Science to Policy Science in the Sociology of law, Law & Social Inquiry 191

⁵⁹ 1985 (4) SA 322 (24) 329-11

⁶⁰ Personal Communication by way of interview with Senior Headman Efraim Weyulu of Uukwanyama Traditional Authority, 20 November 2001.

⁶¹ Ibid

From the above given definitions to the term compensation, it is understood that compensation is a payment given to the victim of crime to restore the damage caused by the offender's act.

3.2.2 DEFINITION OF PUNISHMENT

Punishment has a long history, therefore, even if an attempt is made to define the term punishment, several definitions of this concept cannot be considered here, although many are more important than the one discussed under this heading.

In fact there is no straightforward answer to the question "what is punishment?" because a question of punishment is one of peculiar difficulty. Instead, it is found that there are constantly changing ideas, perceptions and conceptions regarding what constitutes punishment.

Punishment is described in Collier's Dictionary⁶² as *a penalty imposed on an offender for a crime or wrongdoing or it is harsh or injurious treatment.*

Some writers⁶³ define the term punishment as *an official sanction calculated to interfere with the life, liberty or property of the offender.*

⁶²Kohrl Vivian (note 58 above) 284

⁶³Friedman W: (1959) 'Law in Changing Society' 177. This definition was given to the term punishment by Friedman when he was talking about the changing of law in a given society.

Punishment is also defined as *the authoritative infliction of suffering for an offence*.⁶⁴ According to Jescheck,⁶⁵ *'punishment is the balancing of a punishable infringement of the law with the infliction of the evil which is commensurate with the granting of the injustice and the mens-rea of the offender disapproval of the offender's act and thereby leads to ventilation of law'*.

It is said in the same text that *punishment is simply and cynically a way of making people do what the government wants them to do. It is further stated in the same text that punishment is something symbolically reaffirming public condemnation of a certain course of conduct*.⁶⁶

The term punishment is also defined elsewhere in strong terms such as *an evil or the experience of unpleasantness or as the deprivation of goods*.⁶⁷

Some writers define punishment as *a sanction entailing the community's condemnation and disapproval of the offender and his conduct*.⁶⁸

The same writers further stated that *punishment' is reflected in most sentences passed by criminal courts. It is the penalty for breaking the criminal law and may involve both the*

⁶⁴ Fitzgerald J.P. (1962). 'Criminal Law and Punishment' 199.

⁶⁵ Terblance S.S. (1999). The guide to sentencing in South Africa Butler Worth 212.

⁶⁶Ibid: 212.

⁶⁷ *The debate in Mabbott's contribution of punishment (1969) 115, 117 - 7*

⁶⁸ See Rabie M.A and Strauss S.A. (1985) 'Punishment: An introduction to principles' 4th edition Butler Worth. 6

*transgressor and the expression of the community's reprobation of the offender's conduct.*⁶⁹

An overview of the definition of punishment is clearly discussed in some text that the *term punishment may be used in legal, moral, religious and pedagogical contexts, and that the potential for punishment exists almost in every case where an individual or institution stands in as an authoritative relation over another individual.*⁷⁰

Punishment is also described elsewhere that it has different names.⁷¹ When imposed by English-speaking courts it is called *sentencing*, in the Christian church, it is *penance*, in schools, colleges, professional, organizations, clubs, trade unions and armed forces, its name is 'disciplining *or penalizing*.'⁷²

One of the judges interviewed defined the term punishment as *a sanction of criminal law*;⁷³ the same Judge further defined the term punishment as *the infliction of suffering to someone who has been found guilty of the commission of a crime by a court of law.*⁷⁴

Even if all the above definitions are given to the term punishments there are still more definitions which are not considered here. However, it is worth noting that in this context, we are talking of punishment in its criminal legal context, punishment which a court of law imposes on the offender following prosecution and conviction.

⁶⁹ Rabbie and Strauss (note 68 above) 6

⁷⁰ See Van der Merwe D.P. (1991), *Sentencing*. Juta & Co Ltd (1991) 3- 8. This definition was given to a term punishment by Van der Merwe when he was discussing about a difference between sentence and punishment.

⁷¹ Walker N. (1991), 'Why Punish' Oxford: Oxford University Press 1

⁷² Ibid

⁷³ Personal communication by way of interview with the Namibian High Court judge on the 12th November, 2000.

⁷⁴ Ibid

3.2.3 DEFINITION OF THE TERM “FINE”

The term fine has quite a number of advantages. In general, a fine is considered as a source of revenue to execute. It can be fixed so that it can accurately reflect the blameworthiness⁷⁵ of the offender and can be used to withdraw some of the profits which the offender may have made through his crime, more especially in economic offences.

The term “fine” means *a sum of money paid to settle a matter, especially a sum required to be paid as punishment or penalty for an offence.*⁷⁵

The Oxford Concise English Dictionary defines the term fine as *a sum of money exacted as penalty by a court of law or other authority.*⁷⁶

Some writers define the term fine as *a sentence by the court which orders the offender to pay a specific amount of money to the state*⁷⁷

In *S v Minaret and S v Kuinab*,⁷⁸ the term fine was described as “*an alternative to punishment and should be mainly used as punishment for less offences.*”

Section 1 (1 XV III) of The State Finance Act 1 of 1982 provides that “*court fines are state revenue.*”

⁷⁵Van der Merwe (note 70 above) 3-8.

⁷⁶Pearsal (note 55 above) 531

⁷⁷ See Commentary on the Criminal Procedure Act Du Toit Straff 297: on sentencing (1993) at 208

⁷⁸ 1991 NR (HC) at 336-338

From the above given definitions to our concepts by different dictionaries, different scholars, traditional leaders and judges, it is now clearly understood that compensation is a method used to control the behaviour of the people in any given society. It is also a method used to repair the damage the victim suffered as a result of the offence. In contrast, punishment is a sanction that involves a stigmatization of the offender and it can only be imposed by a criminal court following prosecution. A fine on the other hand is money which is paid in lieu of jail sentence or it is an alternative to punishment and it always goes to the state's account.

3.3 THE PURPOSE

3.3.1 THE PURPOSE OF COMPENSATION PAYMENT

Why offenders in murder cases or in any case required to pay compensation in Owambo customary law courts? What is paid? Who pays and who benefits from the compensation payment which Owambo customary law courts are awarding in murder cases? These are the questions this section aims to answer.

The traditional leaders interviewed explained that compensation is widely accepted in all Owambo Communities, therefore, the payment of compensation in murder cases in terms of Owambo customary law is seen necessary for “wiping the tears” (Okuthetapo omahodhi) of the deceased's family members.⁷⁹

⁷⁹ Communication with traditional leaders of Uukwambi Community who were invited by Chief Ipumbu to attend the meeting between me and the Chief on the 14 May 2001

“Wiping of the tears” is a proverb used by the Ovawambo⁸⁰ speaking people in the northern parts of Namibia. This proverb simply means to restore the damage caused by the offence.

During the interview with the traditional leaders it was related that the purpose of compensation payment under Owambo customary law is:

- to regulate the behaviour of people in the community,
- to repair or to restore the damage caused by the offence,
- to bind the parties together,
- to pave the way for reconciliation between the two families,
- to beg for forgiveness and lead to reconciliation,
- to prevent the victim’s family members from revenging against the offender’s family members or the offender himself in the form of traditional counter killing (Ontiko) or through physical killing,
- to wash away the blood of the deceased which the offender shed, and
- to give the victims an additional security that their losses are being compensated.⁸¹

The traditional leaders interviewed also explained that previously compensation payment played a very big role in the education of children in different families. Because people were afraid to pay compensation, children in each homestead were every night after dinner sitting around the fire at the big traditional seating place and their parents taught them how to behave when they are playing with their peers outside their home.⁸²

⁸⁰ A term “Ovawambo” refer to the indigenous people who live in the northern parts of Namibia

⁸¹Note 79 above

⁸² Traditional Leaders of Uukwambi Community (note 79 above)

The traditional leaders further explained that it was because of compensation payment that the parents had the responsibility of teaching their children to have self- respect, to respect others, to respect all adults, to respect the law, to respect other people's property and also to understand their customs, norms, tradition, beliefs and culture.⁸³

3.3.1.1 WHAT IS PAID?

What is paid in murder cases in terms of Owambo customary law and what is the significance of such payment? It was related by all traditional leaders interviewed that the following items are paid in murder cases:

- (1) Herds of cattle;
- (2) A round bowl of salt;
- (3) Three rounds of traditional necklace (Onyoka);
- (4) Hoes; and
- (5) Tobacco and tobacco pipe

(1) The herds of cattle. The research found that the payments of herds of cattle in murder cases under Owambo customary law are two fold, namely:

- (i) One herd of cattle is paid to the Chief/King. This cattle is called 'cleansing the blood' (onkomba mbizi). It was explained by the traditional leaders interviewed that the significant of this cattle is to clean away the blood of the deceased which the offender shed and, it is also paid as a sign of respect to the King by the offender, to demonstrate or show to the King, the relatives of the

⁸³ Ibid

deceased and the community at large that the offender realizes that what he/she did was wrong.

- (ii) The other herds of cattle are paid to the victim's relatives. These cattles are called 'wiping the tear' (Okuthetapo omahodhi). It was further related by the traditional leaders interviewed that the whole purpose of the payments of these herds of cattle to the deceased's relatives is to help the victim's relatives to continue with their lives as they had been as if their loved one and/or their bread winner was not killed.⁸⁴

- (2) Another payment as mentioned above is one round bowl of tradition salt (ompalo yomongwa). According to the traditional leaders, the salt symbolizes the deceased's brain was considered as replacing the deceased's brain. The meaning of salt payment was hard to anticipate but it was repeated by all traditional leaders interviewed that that one round or a bowl of salt is one of the required payment of compensation in murder cases in terms of Owambo customary law ever since and it is required always to accompany the compensation payment, that is, herds of cattle and all other above mentioned items.

- (3) Another payment is three rounds of Owambo traditional necklace (onyoka). It was explained that the necklace (onyoka) symbolizes the deceased's intestines and it was seen as replacing the deceased intestines. The meaning of the necklace payment is also hard to understand like the symbolic value of the bowl of salt above.

⁸⁴ Traditional Leaders of Uukwambi Community (note 79 above)

- (4) The other payment is that of hoes. The symbolic meaning of the hoes was explained by the traditional leaders that it aimed at paving the way for conciliation between the parties. In other words it is a sign of opening the door or paving the way forward between the two parties for reconciliation.
- (5) The last items are tobacco and tobacco pipe. The tobacco and tobacco pipe were explained that they had been used once the parties reach an agreement as a sign of reconciliation. Once the case is finalized and the parties reached an agreement, the King puts the tobacco into the tobacco pipe, smokes first and gives all the parties concerned to smoke from the same pipe. It was further explained by the traditional leaders of the Uukwambi Community that if both parties smoke from that pipe, it is said that the parties have reconciled (*etimba lyanu omakaya*) and from that point, the deceased's family will not take revenge against the offender and/ or his/her family⁸⁵.

This research found that in the past, the form of compensation required in murder cases in terms of herds of cattle differ from one community to the other.

In Ombalantu, Uukwambi, Uukwaludhi and Uukwanyama Communities, 12 herds of cattle were paid. In Ongandjera and Uukolonkadhi, 15 herds of cattle were paid while in Ondonga communities only 9 herds of cattle were paid.⁸⁶

⁸⁵ Traditional Leaders of Uukwambi community (note 79 above)

⁸⁶ Hinz (note 8 above) 122

However, it was explained by Chief Ipumbu that the payment of herds of cattle is now fixed and people in all communities now pay 10 herds of cattle.⁸⁷

Furthermore, the research found that it was agreed by sixty out of the seventy-nine delegates who attended the customary law workshop of Owambo traditional leaders at Ongwediva on 24-26 May 1993, that compensation for a murdered person should be ten herds of cattle and this is now the fixed payment for the murdered person in all Owambo communities irrespective of tribe in the northern part of Namibia.⁸⁸

The seven communities at the Ongwediva workshop have agreed to make some of their laws the same. This means that now in the northern parts of Namibia, if, for example, someone causes the death of a human being in Ondonga and is willing to pay compensation the offender pays the same amount of herds of cattle like what is paid in the neighbourhood of Uukwambi.

In addition, this research revealed that in terms of Owambo customary law, no value or quantum is determined like in state courts. The offender pays only the aforementioned ten herds of cattle regardless of the deceased's status. There is no difference even if the deceased was the breadwinner in the family, young or old, the payment is the same. The deceased's status or education level, earning capacity or age is irrelevant in Owambo customary law up to now.

⁸⁷ Chief Ipumbu (note 1 above)

⁸⁸ See The law of Ondonga (Ooveta dhoshilongo Shandonga) (1994) Oniipa (ELCIN) 4

Mr. Osvin Mukulu, Senior Headman of Ombalantu Traditional Authority explained that in terms of Owambo customary law, what is important is the life of a human being, there is no difference between a child and a person who is educated.⁸⁹

However, the research found that some traditional leaders seem to understand the importance of a young person and an old person and the difference between a person who is educated and the one who is not educated or a bread winner in the family or a child. For example, a group of traditional leaders in Uukwambi Community suggested that, in future, the number of heads of cattle paid in murder cases currently need to be considered to be meaningful to the deceased's dependant⁹⁰.

It was related by all traditional leaders interviewed that in all communities in the northern parts of Namibia up to now if someone takes a life of a human being such person must pay compensation.⁹¹

It was further explained by the traditional leaders of the Uukwambi community that under Owambo customary law, it is irrelevant whether a death was caused accidentally, intentionally or through self defence. The offender must compensate unless in a case where the chief waives the payment.⁹²

⁸⁹ Personal Communication with Senior Headman of Ombalantu Traditional Authority on the 22nd November, 2001

⁹⁰ Traditional Leaders of Uukwambi Community (note 79 above)

⁹¹ This was said by all traditional leaders interviewed by the researcher of this paper.

⁹² Traditional Leaders of Uukwambi Community (note 79 above)

The traditional leader (Chief Ipumbu of Uukwambi Community) further stated that compensation is now a custom amongst all Owambo communities and most people, if not all in different communities, understand that if your act causes, a human being's death, you are expected to pay compensation and in most cases, some people if not all are automatically offering to pay compensation.⁹³

3.3.1.2 WHO PAYS?

Ovawambo people are believers and some of them, if not all, still believe in witchcraft and as a result, killing a human being to them is a taboo.

It was explained by Mr. Peter Kauluma,⁹⁴ one of the traditional leaders interviewed, that in terms of Owambo customary law, compensation in murder cases is not paid by the offender but it is paid by the offender's uncles or family members. There is a proverb in Oshiwambo that the suspect may not pay his debt alone or by him/herself (etimba ihali iifutilwa ile etimba ihaliifutwa kwaangu eli eta).

The rationale behind this practice was aimed at preventing the deceased's relatives from taking revenge against the offender and/or his family through the process of traditional counter killing (ontiko).

The Senior Headman of Ombwalambwenge Mr. Peter Kauluma further explained that in the past before the method of compensation was introduced, people in different

⁹³ Chief Ipumbu (note 1 above)

⁹⁴ Personal Communication by way of interview with the Senior Headman of Ombwalambwenge, Ondonga traditional Authority on the 20th November, 2001

communities were using the method of “an eye for an eye”. If someone commits a crime, people either physically killed the offender or used the killing that took place through the process of traditional counter killing (ontiko), and in most circumstances it was the offender’s uncles who were killed first before the offender himself is killed.⁹⁵

Therefore, to avoid feuds, the offender’s uncles would make an offer to compensate. The offender’s uncles were not required to wait for any hearing to take place. This is because in the olden days people were killing each other once their relative was killed. As a result, compensation was made even if it was not clear how and why their relative caused the death of the deceased.

The traditional leaders interviewed further explained that consequently the practice of traditional counter killing made the offender’s uncles to take the responsibility, and to make sure that compensation is paid immediately and automatically before the deceased’s family members approached the offender’s family members or decided to take revenge against the offender and/or his/ her family members.⁹⁶

According to Mr. Osvin Mukulu⁹⁷, it is a belief amongst the Ovawambo people in the northern part of Namibia that if some one kills another, the offender will be contaminated with blood of the person he killed if he/she offender fails to compensate.

Chief Mukulu continued explaining that immediately if a finger is pointed at you that it is you who caused the death of the other person, your relatives will not wait for a hearing to

⁹⁵ Mr. Peter Kauluma (note 94 above)

⁹⁶ Ibid (note 94 above)

⁹⁷ Personal communication with Senior Headman of Ombalantu Traditional Authority on the 22/11/2001

be held, they will offer compensation immediately before the relatives of the deceased take vindictory steps to revenge against you and your family.⁹⁸

Senior Headman Mukulu of Ombalantu community further related that in the olden days according to stories as they have been told from generation to generation, the defendant's relatives in the northern part of Namibia did not wait for the offender to confess or for a hearing to be conducted because it was believed that once you kill somebody, you need to be purified immediately so that even if the deceased's family members were thinking of killing you through the process of traditional counter killing (ontiko), they will not be able to kill you or to kill any one of your family members.⁹⁹

It was further related by the traditional leaders of uukwambi Community that most people if not all in all communities in the northern parts of Namibia also believed that if a person killed someone, that person became intoxicated by blood (a kolwa ko mbizi) and that the blood of a human being which the offender shed will made him/her to be unable to control him/herself and he might end up killing more people. Consequently, the offender must be purified by means of immediate compensation.¹⁰⁰

It was further explained by the traditional leaders that there is no presumption of innocence or self-defence in Oshiwambo culture.¹⁰¹ Oshiwambo customary law disregards self-defence unless the chief waives compensation. Therefore, it is the

⁹⁸ Ibid

⁹⁹ Senior Headman of Ombalantu Mr. Osvin Mukulu (note 97 above)

¹⁰⁰ Traditional Leaders of Uukwambi Community (note 79 above)

¹⁰¹ Ibid

responsibility of the offender's uncles to pay compensation.¹⁰² The reason why it was the offender's uncles who were responsible for paying compensation in murder cases will be discussed in details under point 3.3.1.3 when the question of who benefits from the compensation paid in murder cases will be discussed.

3.3.1.3 WHO BENEFITS?

In terms of Owambo customary law, the deceased's properties were inherited by their relatives, in particular their uncles from their mother's clan (matrilineal culture). It was therefore their uncles who were responsible for payment of compensation if one of their family members commits any crime. Consequently, it was the offender's uncles who benefited from the compensation.

As mentioned under point 3.3.1.2 above, if a person caused the death of a human being in the past, the relatives of the deceased will kill two or more people from the offender's family. In most circumstances it was the offender's uncles who were killed first before the offender him/herself was killed.

Therefore, the offender's uncles who inherited everyone in the clan were the one who are responsible to compensate the victim's family.

It was however explained by Chief Iipumbu that the practice of inheritance of relatives by the uncles is no longer permissible by the traditional authority. However, such practices

¹⁰² Ibid

can still be found in some communities, especially in communities where people are not well educated.¹⁰³

Chief Ipumbu explained that the inheritance practice is no longer permissible because it gave people an opportunity to abuse the deceased's immediate relatives by disinheriting them, more specifically the wife and children in particular, if the deceased was married and if it was the husband who was killed.

Chief Ipumbu further explained that although some people are still fighting to inherit their relatives, it is agreed and all people in the communities are informed by the traditional authorities that people who are entitled to inherit from the deceased if he/she was married are the deceased's wife/ husband and children. If the deceased was not married his/her parents and if the parents are not alive, the deceased's brothers and sisters can inherit her/his properties.

Therefore, an answer to the question of who benefits from the compensation paid in murder cases in terms of Owambo customary law is that previously it was the deceased's uncles but custom has changed and now the beneficiaries are the deceased's immediate family members.

3.3.2 THE PURPOSE OF PUNISHMENT

¹⁰³ Chief Ipumbu (note 1 above)

The balance of justice in a given community or in a certain society is disturbed as soon as a crime is committed, and the rule of law can only be restored by punishing the criminal for the offence.¹⁰⁴

However, the rule of law means that every one is to be treated equally, without fear or favour in the eyes of the law.¹⁰⁵ In law, individuals are deemed to have equal capacity to reason and to act in accordance with what is rational from the point of view of their own self-interest.¹⁰⁶ Therefore, a reasonable person is expected to be punished once he commits a crime. Once the offender has been punished, then it is deemed that the community condemns his misdeeds.¹⁰⁷

The purpose of punishment therefore is to protect the community against criminal activities. Once the offender is punished and removed from the society, his removal from the society is regarded as a major purpose of punishment.

In *S v Brand and various others*¹⁰⁸ the court held that “the purpose of punishment is to deter the accused and others from committing similar crimes, to reform them if capable of being reformed and to retribute them because the society is expecting the courts to punish people who have done wrong.”

¹⁰⁴ White R. and Hennies F. (1996). ‘Crime and Criminology’ Oxford: Oxford University Press 27

¹⁰⁵ Ibid

¹⁰⁶ Ibid

¹⁰⁷ Van Der Merwe D. P: (1996) Sentencing Juta and CO Ltd (note 70 above)

¹⁰⁸ 1991 NR(HC) 365 at 357 (C)

Furthermore, in *R v Karg*,¹⁰⁹ *S v Kwanyama*¹¹⁰ and in *R v Swanepoel*¹¹¹ the courts held that "the purpose of punishment is "deterrence; preventive; reformatory; and retributive."

Deterrence is a form of punishment aimed at the offender. The sentence imposed against the offender is aimed at deterring him/her from committing the same crime or any other crimes in future and at the same time the sentence is deterring all other members of the community who were, in the opinion to commit, the same crime or any other crimes not to commit crimes in future.

According to *Snyman*¹¹² a sentence which the courts impose on the offender serves two purposes:

- (a) the first purpose is to deter the offender himself as a person not to commit that crime again (individual deterrence), and
- (b) the second purpose of deterrence is general deterrence.

The whole idea at the root of individual deterrence is to teach the individual person convicted of a crime a lesson which will deter him from committing crimes in future.

Punishment is also called a general deterrence because the whole purpose of imposing a sentence on the offender upon conviction is to send a message to other members of the

¹⁰⁹ 1961(1) SA 231 236

¹¹⁰ 1990(4) SA 735

¹¹¹ 1945 AD 444 454

¹¹² Snyman CR. (1991). 'Criminal Law' Second Edition, Durban Butterworths 20

community that if they happen to commit the same offence, they will be heavily punished in the same manner as the offender.

Reformative punishment aims at reforming the offender as a person so that he may become a normal law-abiding member of the community once again.

The emphasis of punishment is not placed on the crime itself but on the harm caused or the deterrent effect that punishment may have on the person and personality of the offender. Theory illustrates that an offender commits a crime because of some personality defect, or because of psychological factors in his background such as an unhappy or broken parental home or other undesirable influences.¹¹³

Punishment is also retributive.¹¹⁴ Retributive punishment is seen as the main purpose not only of criminal law but of law in general.¹¹⁵ Retribution is a reflection of the community's condemnation of the crime. The offence has angered the community and as a result, the community insists upon punishment of the offenders.

Failure to punish the offender is tantamount to approval of the offender's conduct and therefore may result in serious consequences by members of the community who might be immediately affected by crime to take the law into their own hands in order to avenge the misdeeds.¹¹⁶ Therefore, the entire purpose of retribution is to punish the offender by giving him a punishment equal to the offence committed.

¹¹³ Snyman CR (note 112 above) 17

¹¹⁴ Ibid 20

¹¹⁵ Ibid 17

¹¹⁶ Ibid 18

Conclusively the above discussion highlights that the purpose of punishment is collectively to deter, to reform, to prevent and to retribute the offender and to make him a law abiding citizen.

3.3.3 THE PURPOSE OF A FINE

In Namibia, the courts derive their power to impose a fine from Section 276 of the Criminal Procedure Act,¹¹⁷ and a fine is one of the natures of punishments in Namibia.

The purpose of a court fine is to keep the offender out of jail.¹¹⁸ In *S v Ncobo*¹¹⁹ the court held that the purpose of a fine is to punish the offender without sending him to prison.

Furthermore, in *S v Mynhardt and in S v Kuinab*¹²⁰ the court held that “*the purpose of a court fine is to punish the offender without incarcerating him*”. It was further held in the same cases that “*a fine which an offender pays forms part of the state revenue*”.

¹¹⁷Act 51 of 1977 (SA)

¹¹⁸ See *S v Molala* (1988) (2) SA 97(T) 98D or *R v Nhlapo* 1954 (4) SA 56 (T) 58 G-H.

¹¹⁹1988 (3) SA 954 (W) 955F.

¹²⁰ 1991 NR HC 336 at 337

Some writers are of the view that one of the major purposes of a fine is deterrence.¹²¹ However, this view was rejected by the trial magistrate in the case of *S v Seoela*¹²² when he pointed out that "*a fine is not deterred whatsoever.*"

A fine is an alternative to punishment and in petty cases it is used to keep the offender out of prison or to punish him without incarceration.

3.4 THE DISTINCTION BETWEEN COMPENSATION, PUNISHMENT AND A COURT FINE

There are divergent views amongst members of the public, observers of the Namibian law and some writers on customary law in Namibia that compensation paid in murder cases in terms of Owambo customary law is double punishment; and that an award of compensation in murder cases by the Owambo customary law courts is in conflict with Article 12 (2) of the Constitution of Namibia.

The aim of this section is to settle the dust of this confusion and draw a distinction between compensation, punishment and a court fine.

Compensation, punishment and court fine are distinct concepts. A distinction of these concepts can be drawn as follow:

¹²¹ Du Toit (note 77 above)

¹²² 1995 (2) SA CR 616 (O) 619 (D).

Punishment is a sanction against the offender and it can only be imposed by the criminal court following a successful prosecution and conviction. When an individual's behaviour violates public order, it is seen as a crime. Upon conviction, the State in its capacity as the prosecuting authority imposes a punishment on behalf of the community. The punishment can take the form of either incarceration or a fine paid to the state. In contrast, compensation is a payment made to restore or repair the damage which the offence caused and is paid directly to the complainant.

Similarly, compensation and a court fine are different concepts. A court fine is another form of punishment or is a payment done in lieu of punishment. For example, an accused in a criminal court can either be given a direct jail sentence or a sentence with an option of a fine like this one: One hundred Namibian Dollars (N\$100, 00) or Thirty (30) days imprisonment in default of such payment.¹²³ By giving an offender a sentence with an option of a fine, the court affords the offender an opportunity to pay rather than to send him directly to jail.

If the accused pays a fine, the money is paid into the State account whereas compensation payment is paid to the victim's relatives if it is a murder case and /or to the plaintiff in any other cases and such payment does not form part of State fund.

Punishment and court fine are directed to the offender and/or his/her misconduct. The rationale behind such practice is to deter the offender against wrongful conduct and also to send a message to the other members of public who are in the opinion of committing

¹²³ For an example of how sentence with option of a fine are framed, see Verwey J.F. F. (Regional Magistrate for Namibia) (April/ May 1991): 'A brief Compendium on Criminal Trials and Related Procedures in Namibia' Annexure B (General Guidelines on Sentence 8 and 9.

the same crime in future not to commit that crime. On the other hand, compensation addresses the loss suffered by the victim and it can be paid by the offender him/herself and/ or anybody who is not part and parcel of the commission of the offence.

Punishments and court fines follow prosecution. In Namibia as observed under Paragraph 1.2 above, prosecution of criminal activities are instituted by the Prosecutor General on behalf of the state and the standard of proof is attested proof beyond reasonable doubt whereas compensation is an order given by the court following a civil litigation or suit, and civil claims are lodged by the complainant/plaintiff and the standard of proof required in civil litigation is proof on the “balance of probability”.

Punishment is always directed at the offender or it only concerns the offender, it has nothing to do with the offender's relatives or anybody else. Compensation, in terms of Owambo customary law is paid by the offender and/ or his relatives or anyone who wants to assist the offender. *State v Kukunika*¹²⁴ is a classic example to support the view that punishments in the criminal court has nothing to do with the offender’s family.

In Kukunika’s case, the accused, a 14 year old boy was convicted of the offence of malicious damage to property of a government vehicle. This case was handled by the state criminal court and the accused juvenile offender was found guilty of damaging a government vehicle. The presiding officer in this case gave the offender a suspended sentence coupled with the condition that the accused’s parents pay for the damage of

¹²⁴ 1994 NR (HC) at 82

(N\$800) eight hundred Namibian dollars or repair the government of the Republic of Namibia (GRN)'s vehicle by 31 May 1991.

This case went for automatic review at the High court. On review, the High court held that “*in our law it's only the criminal alone who is responsible for his actions and no one else can be punished or be held responsible for the conduct of the accused.*”

The conviction and sentence in *Kukunika's case* was confirmed except that the reference to the word 'parents' in the conditions of suspension was deleted and substituted with the word "accused".

The position held thereafter is that punishment is a sanction against the accused. It can not include anybody else whereas compensation addresses the loss suffered by the victim and it can be paid by anyone who wants to assist the offender to repair the damage which the offender caused.

In *R v James*¹²⁵ the court held that *a fine should not be assessed on the basis of the status of the family of the accused but on the ability of the accused himself to pay it.* Furthermore, the Criminal Procedure Act¹²⁶ provides that “*compensation is not a punishment because compensation payment can accompany any other type of punishment which a court of law can impose on the offender*”.

¹²⁵ 1973 (2) HP H 154 See also S.V. Nuuyoma 1983 (2) HP H 26

¹²⁶ See Du Toit D. P: (2000) ‘Commentary on the Criminal Procedure Act (CPA)’ Juta andCo Ltd 353

Even if compensation was awarded by the customary law court and/or by the state civil or criminal law courts, that payment is equivalent to a civil remedy like all other remedies under the law of delict.

Another example to demonstrate that an award of compensation in murder cases by the Owambo customary law is not a punishment is the case where if there is no sufficient evidence to warrant a conviction in the state criminal court or, for example, in a case where the state representative fails to prove the suspect's case beyond reasonable doubt.

The criminal court which is handling the suspect's case will find the suspect not guilty and acquits him because in criminal courts, the required standard of proof is, proof beyond reasonable doubt. However, the aggrieved relatives of the deceased have right to lodge a claim against the same offender in a civil or customary law court and claim damage or loss they suffered as a result of the offender's behaviour.

If the civil court or customary law court is convinced that the loss or damage claimed by the plaintiff was caused by the offender, that court will go ahead and award compensation.

Another common example is in cases of reckless or negligent driving. If someone bumps another's vehicle on a public road, the offender will be arrested and prosecuted by the criminal court with the offence of reckless or negligent driving.

However, if the prosecutor fails to prove the case beyond reasonable doubt such an offender will be acquitted and walk free from the criminal court. But if the owner of the vehicle bumped by the suspect who was found not guilty by the criminal courts wants to claim damages to his vehicle, the owner of that vehicle has the right to lodge a civil claim in a civil court against that offender and that is the position in murder cases as well.

Even if the suspect is acquitted in a criminal courts in murder case, the relatives or dependants of the deceased or anyone who is affected by the crime has the right to lodge a complaint against the suspect, either with a civil court or with any community court and claim compensation.

In civil courts like in customary law courts the required standard of proof is proof on the balance of probability not a proof beyond reasonable doubt like in criminal courts. Therefore, there is a high possibility for an offender being found not guilty by the state criminal court but the civil court or customary law court will find that the offender was wrong.

If in the civil court or community court the presiding officer happened to be convinced that the complainant discharged the burden against the defendant on the balance of probability as required, that court will proceed and make a ruling in favour of the complainant, and order the defendant to pay the damage caused.

3.5 THE AWARD OF COMPENSATION BY THE COMMUNITY COURTS

Is an award of compensation in murder cases by the Owambo customary law courts a punishment? When can it be said a person is doubly punished? Is compensation award in murder case by the Owambo customary law courts in anyway in conflict with Article 12 (2) of the Namibian constitution?

These are the questions this section will aim to canvass. However, before going to the question of jurisdiction, the position of the Namibian law will be briefly looked at in order to establish whether an award of compensation by the community courts in Namibia amount to double punishment.

Once the position of the law is understood, then the next question will be which legal system of law is having jurisdiction to handle murder cases in Namibia?

3.5.1 IS COMPENSATION A PUNISHMENT?

As it is already pointed out under paragraph 3.3, compensation is the payment made by the offender to redress the damage the offender caused whereas punishment is an infliction of suffering on the offender to teach him a lesson not to offend in future.

Paragraph 3.4 above has clearly pointed out that compensation and punishment are distinct concepts. Punishment can only be imposed by a criminal court following prosecution and conviction. For an offender to be convicted in a criminal court, the offender should be found guilty beyond reasonable doubt. On the other hand, compensation is awarded to the plaintiff in civil suits following a dispute between two

individuals in that court proceedings and the required standard of proof in civil courts is a proof on the balance of probability. There is no strict requirement to follow the rule of evidence like in criminal courts.

Therefore, it is argued that the payment of compensation in a murder case in terms of Owambo customary law is not a punishment because Owambo Community Courts are civil courts and traditional leaders who are presiding in customary courts have no jurisdiction to punish the defendant in their courts.

A good example to support the writer's view that compensation award in Community Courts is not punishment is the case of *S v Haulondjaba*.¹²⁷

In this case a claim of attempted rape was lodged against the offender before the Ondonga Tribal Authority Court. A hearing was conducted by the Ondonga tribal court. The Ondonga Tribal Court ruled in favour of the claimant and ordered the offender to pay (N\$800) eight hundred Namibian dollars or (2) two herds of cattle and at the same time the case was reported to the police.

The suspect was arrested and prosecuted by the state court. The state prosecutor successfully proved that the accused was guilty beyond reasonable doubt. The accused was found guilty of attempted rape by the presiding magistrate at Tsumeb magistrate's court. The presiding magistrate in this case fined the offender to pay (N\$1000) one

¹²⁷ 1993 Nm (HC) at 87

thousand Namibian dollars or (12) twelve months imprisonment in default of such payment.

In addition to that the said presiding magistrate further ordered the offender to pay two herds of cattle or (N\$800) eight hundred Namibian dollars as he was ordered by Ondonga Tribal Court.

The case went for automatic review at the High Court of Namibia. The review judges found that there were irregularities in the sentence imposed by the presiding magistrate. The presiding magistrate was queried and requested by the reviewing High Court to advance reason why he coupled his sentence with the customary law court's sentence.

The presiding officer succumbed to the reviewed court's question and apologized. The reviewed court confirmed the conviction and altered the sentence and it was held in this case that "*it is not correct for the criminal court to make the customary law court order part of its sentence.*" The review court deleted the part which said the convict/ offender must pay (N\$800) eight hundred Namibian dollars or (2) two herds of cattle.

The *Haulondjamba* review judgment demonstrates that compensation is not a form of punishment. If compensation which the accused in the *Haulondjamba's* case was ordered to pay by the customary law court was punishment or if it was double punishment as some writers of Namibian customary law are suggesting, the review judges were supposed to intervene and set aside the magistrate court's conviction and

clearly indicate it to the presiding magistrate that the accused was already convicted and punished by the Ondonga Tribal Authority Court.

The magistrate court's conviction was not set aside because the Tribal Authority Court's award of compensation is not a punishment but a mere civil remedy like all other remedies in the law of delict.

It was only the last part of the Magistrate court's sentence which was deleted and the magistrate was advised by the review court that it was wrong to make the Community Court's judgment part of the criminal court sentence.

If compensation award in Ondonga customary court was a punishment, the review court was supposed to set aside both convictions and sentence of the Tsumeb magistrate and discharge the offender.

The review court (High Court of Namibia) did not interfere with the conviction of the offender by the Tsumeb Magistrate's Court simply because the High Court or the review judges knew that when the Ondonga customary law court ordered the offender to pay compensation it did so as a civil court and not as a criminal court.

Another case which supports the view that compensation is not punishment is the case of *S v Useb and others*.¹²⁸ In this case, the accused were convicted with the offence of stock

¹²⁸ 1994 Nm (HC)

theft and were sentenced to (18) eighteen months imprisonment. The sentence was suspended for (3) three years on condition that the accused person(s) is not convicted with the offence of theft of stock committed within the period of suspension, and that the accused person(s) pays compensation in terms of Section 300 of the Criminal Procedure Act 51 of 1977.

It was held that “*whereas the payment of an amount can certainly be made a condition of suspension, this should not be confused with an order in terms of Section 300 of the Criminal Procedure Act because an order in terms of Section 300 has the effect of a civil judgment*”.

The writer hereof aims to clarify the confusion that compensation paid in murder cases in terms of Owambo customary law is not punishment or that the hearing in murder cases by the customary law courts is not double trial.

If compensation is punishment or is tantamount to double punishment, the review judges in *Useb’s* case were supposed to commend that the offender can not be punished twice by the same court, because the offender was convicted, sentenced and also ordered to pay compensation for the same act.

Useb’s case was handled by the state court but it is cited here to clarify the confusion amongst the Namibian people, the observers of Namibian law and some writers of customary law in Namibia that compensation payment in murder cases or an award of

compensation by the customary law courts in Namibia is neither punishment nor double trail and that such award is not in conflict with article 12 (2) of the Constitution of Namibia because art 12 (2) of the Constitution of Namibia has nothing to do with civil litigation but it deals with criminal trials.

Although *Useb's* case was not handled by the Community Courts, this case is cited here to demonstrate that compensation is not only a practice to be found in Community Courts in Namibia but the state courts too have the jurisdiction to award compensation where an application is done by the victim through the state representative if the case is before a criminal court and the proper procedures are followed.

Compensation does not mean punishment, if an offender was ordered to pay compensation by any customary law court, it does not necessary mean the offender will not be prosecuted and punished by the state criminal court.

Compensation award in murder cases in terms of Owambo customary law needs to be viewed as compensation award in a state civil court. Claims in civil or customary law courts are lodged by the claimants and not by the State like crimes in criminal courts.

To make the readers understand that compensation is not a punishment or double punishment as some scholars are suggesting, one needs to look at the example of reckless or negligent driving given under point 3.4 above but here let it be assumed the defendant was found guilty, convicted and punished by the criminal court with the offence of either

reckless or negligent driving. If the owner of the bumped vehicle wants to be compensated for the damage to his vehicle, that owner has the right to institute a civil claim in the civil court and recover all the damage to his vehicle which was caused by negligence or reckless driving conduct of the defendant or at the end of the criminal case, if the accused is convicted, the owner of the said vehicle has two options:

(a) to instruct the state representative to plead with the court on his behalf to order the convict to pay damage he caused to his or her vehicle, or

(b) to let the criminal court to go ahead and punish the convict and after that the complainant will approach a civil court and institute a civil claim against the offender.

If it was a murder case and the claimant wants the case to be handled by the customary court, the plaintiff has a right to lodge the claim with a customary court.

3.5.2 WHEN CAN IT BE SAID AN OFFENDER IS DOUBLY PUNISHED?

An eminent commentator submits that double jeopardy (punishment) is a universal maxim that “*no man should be brought into jeopardy more than once for the same offence*”¹²⁹ What this maxim simply means is that an individual must not be prosecuted and punished twice for the same offence.

In the United Kingdom in a case of *Archer v Brown*¹³⁰ Peter Pain J. held that “*a man should not be punished twice for the same offence.*”

¹²⁹ See Blackstone Commentaries on the Laws of England Vol IV (1829) 329. See also Andrews H: (1982), Human rights in Criminal Procedure: ‘A Comparative Study’ Second ed, 85-6 and 286- 288.

¹³⁰ [1985] Q.B at 401

The question to be answered here is: when can it be said an individual is doubly punished in the Namibian context?

In Namibia, the prosecution authority is vested in the hands of the State,¹³¹ and all criminal cases are brought before court by the Prosecutor General on behalf of the State. In civil courts, like in customary law courts, complaints are lodged by a person who is having any complaint with the other individual.

Therefore, it is only in a case where a person is prosecuted and punished by two different courts with criminal jurisdiction in the same criminal conduct, that it can be said to be double punishment, but if a person is ordered to pay compensation by a customary law court or civil court and prosecuted and punished by the criminal court for the same offence, then, the punishment in the criminal court is not a double punishment.

In most cases the argument regarding double jeopardy (punishment) can only be found in countries where there are two different courts systems with jurisdiction to prosecute criminal cases arises from the same act of the offender like in the United States of America.

If a country has two different court systems, both with criminal jurisdiction, then the argument that an offender is punished twice is used in courts to protect an accused not only from prosecution, but also from multiple punishments for the same criminal conduct but not from civil litigation.

¹³¹ S 2 of Act 51 of 1977

Although there are two legal systems of law in Namibia, state criminal courts are the only ones which have jurisdiction to prosecute and punish the offender. The civil courts or customary law courts in Namibia have no criminal jurisdiction to punish the offenders.

Compensation payment can only be said is awarded twice if, for example, an offender was ordered to pay compensation by the criminal law court which handled the offender's criminal case and the same offender again ordered by either the customary law court or state civil court to compensate the same complainant for the same claim.

The offenders in Namibia are only punished if they were prosecuted and convicted, and punishments are only imposed by the courts with criminal jurisdictions following prosecution whereas compensation in civil courts or customary law courts is awarded following the dispute between the parties.

If one person happened to be ordered to pay compensation twice, in such a situation it is fair to say there is an abuse of the court system by the complainant who lodged two claims of compensation in the same case.

A good example to make the readers to understand the point that double punishment (jeopardy) protection is meant to prevent criminal prosecution but not meant for civil litigation arises from the same act of the offender who is prosecuted with a criminal case for the same conduct is the case of *United States v Benz*.¹³²

¹³² 1931 282 US 304

It was clearly explained in this case that “*double jeopardy protection is meant to protect the rule and power of the government; it does not protect individuals from private suits brought by non government parties.*”

Although this is a foreign case, the case is cited to support the view that compensation award in murder cases or in any case by Owambo customary law courts has nothing to do with criminal crimes.

As it is already stated above, in Namibia, there are two legal systems of law which are: customary law and general law. The two systems deliver power from different sources of law, capable of dealing with the same offence which resulted from the same action, and each one of these systems has jurisdiction to handle an offence which is against its peace and dignity and by doing so each system is exercising and enjoying its constitutional rights.¹³³

The complaint of double punishment (jeopardy) is very common and this is not unique to Namibia. Such complaints can also be found in developed countries like the United Kingdom, German and the United States of America.

¹³³ See Article 66 and 141 of the Namibian Constitution

In America, for example, The United State of America (USA)'s Constitution contains in its Fifth Amendment which was adopted in 1791 that: “*no person shall for the same offence ... be twice put in jeopardy of life or limb.*”¹³⁴

In America, there are two different court systems and if someone commits a crime which is denounced as a crime by both National and State courts, the offender may be punished by each court system.

Therefore, a good answer to solve the divergent view of the Namibian people, the observers of Namibian law and some scholars who are saying an award of compensation in murder cases by the Owambo customary law courts is double punishment can be found in the case of *United States v Lanza*,¹³⁵ where a question of double jeopardy was rejected by the United States Supreme Court.

Lanza was in this case convicted by the State court and at the same time was indicted in a federal court for the same offence. The defendants filed a special plea in bar, arguing that they could not be tried for the second time for the court leading to the federal indictment, and the state court at the same time. The Federal District Court overruled the state court's decision and dismissed all court's indictment.

However when the case reach the Supreme Court, the United States Supreme Court reversed the decision of the Federal Court. Chief Justice Taft held that “*We have two*

¹³⁴ Lee E.T (1987/88), New England Law Review Vol 22 at 35-36 (Ell).

¹³⁵ 1922 Vol 260 (b) US 377,382

sovereignties, deriving power from different sources, capable of dealing with the same subject matter within the same territory. Each government in determining what shall be an offence against its peace and dignity is exercising its own sovereignty, not that of the other. It follows that an act denounced, as a crime by both national and state sovereignties is an offence against the peace and dignity of both and may be punished by each”.

The Supreme Court reversed the Federal Court’s decision in *Lanza’s* case because in the United States of America, a state criminal proceeding is not regarded as a prosecution by the federal government since the units receive their power from independent sources: the states’ original power to define and punish crime was reserved to them by the tenth amendment.

In contrast, the federal government derives its authority from specific provisions of the Constitution.¹³⁶

Even if the State and Federal Courts in America are both courts with criminal jurisdiction, *Lanza’s* case is cited to demonstrate that customary law courts and state courts in Namibia derive power from different sources of law.

Lanza’s case was re-examined and re-affirmed by the Supreme Court in *Abbate v. United States*.¹³⁷ The Supreme Court emphasized that “*federal law enforcement would be*

¹³⁶ See Duke Law Journal, Volume No. 2 (1968) (April 1968) Duke University School of Law 363 - 364

¹³⁷ 359 U,S 187 (1959)

hindered if a federal prosecution for a serious federal offense were to be barred by a state adjudication under a statute imposing a nominal penalty”.

The United State Supreme Court’s remark in Abbate’s case even if this is also a foreign case, is also cited here to solve the problem of the Namibian people who seems to agree with some writers of customary law in Namibia who suggested that “*it would be advisable to prevent a person sentenced by a customary court from being tried again by the state courts for the criminal offence by way of excluding such trial in the Act of customary courts*”.¹³⁸

If this advice is followed and the State starts to prevent a person who commits a serious crime like murder, rape, stock theft not to be prosecuted and tried by the state criminal courts just simply because of the nominal compensation award in customary law court which the suspect paid, such practice will put the Namibian judicial system into big disrepute.

On the other hand, if the customary law practice to award compensation happens to be removed from the hands of the traditional leaders, such actions will create a big quarrel among the members of the community who believe or are used to this custom, that is, compensation payment.

Looking at the American Supreme Court’s decision, although the Federal Court and State courts in the American situation are both courts with criminal jurisdiction, this is a clear

¹³⁸ Hinz M.O.(note 8 above) 183

indication that if a country is having two different systems of law delivering power from different sources of law then each system is having a right to denounce crime which is against its peace and dignity and that is what is happening in Namibia today.

Therefore, it is correct in Namibia for a person who caused the death of a human being to be ordered by the customary law court to pay compensation if the suspect is able to do so and at the same time be arrested, prosecuted and if found guilty, to be punished by the state criminal court, because anyone who commits a crime against each of the legal systems in Namibia deserves to be condemned by both systems and by doing so each system is enjoying and exercising its constitutional rights.

It is from the above understanding that it is hereby restated that the award of compensation in murder cases by the Owambo customary law court is not a double punishment.

Another classic example to demonstrate that compensation award in murder case by Owambo customary law court is not a double punishment or that such award is not only a practice to be found in Owambo customary law, can be found in the landmark case of the *State v Emmanuel Munango*¹³⁹ which was finalized by the High Court of Namibia in 2005.

In this case the suspects were indicted in the High Court of Namibia with several counts of fraud. Munango and others were working for the Ministry of Defence; the state

¹³⁹ CC 36/2005 (Unreported) delivered on the 5th October 2006

alleged that they defrauded an insurance company (Sanlam) of millions of Namibian dollars. At the High Court stage Munango decided to take full responsibility of the crime alone.

The State proved the case beyond reasonable doubt against him and the claimant (Sanlam Company) in this case instructed the State Advocate to plead before sentence on its behalf for Munango to be ordered to reimburse Sanlam. The State Advocate pleaded with the court as he was instructed to do by the claimant (Sanlam) in this case and the State's application for compensation was granted.

Therefore, it is hereby restated again that the practice of ordering the offender to pay compensation can not only be found in customary law courts in Namibia but the State courts too have rights to award compensation. An offender can be indicted in the criminal court and at the same time a compensation claim can be lodged against that individual in any court with civil jurisdiction in Namibia or after conviction in the criminal court, the State Advocate has the right to plead with the presiding officer for compensation to be awarded.

An award of compensation by customary law courts is not only a practice to be found in Namibia, such practice can also be found in some other African countries notably, South Africa, Botswana, Mozambique and Zimbabwe.

According to Donzwa,¹⁴⁰ in Zimbabwe for example, the choice of law is left in the hands of the disputing parties to choose which law to be applied in their case. Zimbabwe has a dual legal system within which plural systems of law operate.¹⁴¹

Since the country's colonization in 1890, general law (Roman – Dutch, common law and statute law) has operated side by side with customary law (the various indigenous and traditional systems of law) but customary law has never been applied to criminal, Constitutional and Commercial matters in Zimbabwe.

Even if what is happening in Zimbabwe is not exactly like what is happening in Namibia. In Namibia Community courts have no jurisdiction to punish the offender at all.

Looking at Justice Taft's remarks in *Lanza's* case, the High Court of Namibia's holdings in the case of *S v Haulondjamba, S v Useb and S v Munago* cited above, it is fair to argue that 'compensation paid in murder case in terms of Owambo customary law is neither punishment nor double trial as suggested by some writers that "*traditional courts in Namibia heard cases of murder and sentence murderers and their families to pay compensation*".¹⁴²

A question whether it is double prosecution to indict an offender who paid compensation in a customary law court was put to the private Advocates during the interviews.

¹⁴⁰ Bennet T.W. and Solomon A. (1996). Customary law and the Constitution: A background and discussion paper commissioned, Law Reform Development Commission of Namibia Windhoek 127.

¹⁴¹ Ibid 127

¹⁴² Hinz M.O. (note 10 above) 484

Mr. Chris Brandt¹⁴³ responded that though customary law compensation is not regarded as punishment, Advocates are always advising the presiding judges that their client paid customary compensation or are going to be ordered by their respective customary law courts to pay compensation but the trial judges are not taking their pleas into consideration.

The High Court judges were asked whether they consider the offender's plea that in murder cases the offenders paid or they are expected to pay compensation in customary courts if they finish their sentence.

One of the judge's reaction was that the court is always taking into consideration what the offender says in mitigation before sentence but it is meaningless for a judge in the High Court to award compensation in murder cases because, in most cases, the accused has to go to jail for a long period, and in most circumstances, at the time the offender will finish his/her sentence, he will be too old to be competitive in the labour market to find a job to generate money and pay compensation, or if the offender is still young there is a high possibility that employers will not be willing to hire him because of his criminal record. In some situations, the offender is poor and has no means to compensate the victim's dependants or relatives.¹⁴⁴

¹⁴³ Personal Communication with Advocates Chris Brandt on the 22/11/02

¹⁴⁴ Personal Communication with one of the High Court judge on the 3/5/2001

The other judge responded that to award compensation in murder cases the court is expected to follow a long procedure and needs to investigate the damage suffered, the deceased's earning capacity if he was working, his age at the time he was killed, the time left before he was supposed to retire and the number of all his dependants.

The judge further reasoned that such inquiry will take long and it will end up prolonging the trial which, in most murder cases is already too long.¹⁴⁵

Finally, the judge suggested that to assist the deceased's dependant, the State needs to establish a State fund to help the deceased's dependants and relatives rather than to leave the payment of compensation in the hands of the offender.¹⁴⁶

Mr. Joel Kamati, one of the traditional leaders interviewed, was asked whether the traditional courts are aware that in murder cases or any other case like rape and stock theft, even if the offender pays compensation in customary courts, they are arrested, prosecuted and if found guilty, punished by the State courts again for the same offence.

In response to this question Mr. Kamati¹⁴⁷ stated that "yes, traditional courts are fully aware that the suspect in murder, rape, theft, assault or stock theft cases are arrested and prosecuted by the State courts even if they paid customary compensation.

¹⁴⁵ Personal Communication with another High Court judge on the 3/5/2001

¹⁴⁶ Ibid

¹⁴⁷ Personal communication by way of interview with Oshilemba (Ongandjera) Senior Headman Mr. Joel Kamati on the 21/05/2001

Mr. Kamati was further asked if he is aware that there was an allegation that the compensation payment which customary courts were awarding to the offender in the cases which were triable by the State court was double punishment and that customary law courts were not only punishing the offender but they were also punishing their family members to pay compensation.

To this question Mr. Kamati responded that customary courts were not punishing the offender but people were paying compensation voluntarily following an old custom in their communities.¹⁴⁸

Mr. Kamati further explained that customary law courts were only sitting for formality and to assist the parties to settle their differences.

Mr. Kamati further explained that, however, in cases where there were serious disputes, the King/Chief would intervene and order the wrong party to pay compensation.¹⁴⁹

It was also further explained by the traditional leaders of the Uukwambi community that traditionally, it is Ovawambo's custom, culture and tradition that anyone who causes the death of a human being must pay compensation, and all people in the communities are aware of this practice.¹⁵⁰

¹⁴⁸ Ibid

¹⁴⁹ Ibid

¹⁵⁰ This was communicated to the researcher by the group of the traditional leaders in the Uukwambi community on the 14/05/2001.

It was further related by Uukwambi traditional leaders that people in the community prefer to take their complaints to their respective customary courts because the State machineries are not considering the deceased's dependants or relatives in murder cases in their system.¹⁵¹

It was also complained by the group of traditional leaders of the Uukwambi Community that you may find the deceased's body is lying in the mortuary because the deceased's relatives have no means to buy a coffin or have no money to hire transport to transport the body to its final resting place, but the suspect is engaging the service or appointing an expensive lawyer to apply for bail on his or her behalf and the courts will proceed with the enquiry and grant bail without making any enquiry from the suspect whether he is willing to contribute anything to the deceased's funeral.¹⁵²

Reference was made to the case of *The State v Theophelus Sheehaama*.¹⁵³ In this case; the deceased was a long distance mini bus driver between Oshakati and Windhoek. The deceased (driver) was shot on the 8 June 2001 by one of his passengers in Otjiwarongo while they were on their way to Windhoek. The deceased was rushed to Windhoek hospital for treatment but he succumbed to his injuries on the 10 June 2001. The suspect was arrested but before the deceased was buried, the suspect in this case engaged an expensive lawyer and was granted bail of (N\$1000) one thousand Namibian dollars.

¹⁵¹ Ibid

¹⁵² Ibid

¹⁵³ Otjiwarongo CR 36/6/2001 (unreported)

When the accused paid bail the next day he was walking in the street freely while the deceased's body was lying in the mortuary in Windhoek with no coffin and transport to take the body to its final place of rest.

Such practices within the criminal justice system, give rise to many questions, such as: where is justice in the whole practice of criminal justice system in Namibia? What message do the police, the prosecutors and the presiding officer's conduct in the exercise of their duties send to the public? Does the treatment the victims of crime and their relatives receive from the police, the prosecutors and the courts not put the criminal justice delivery system into disrepute in Namibia?

Inspector Angula Amulungu's¹⁵⁴ response to the traditional leaders' complaint was that the police are used by the system to implement the law and their duty is simple, to arrest the suspect if there are reasonable information. The responsibility of punishment or compensation is in the hands of the courts.

The senior Public Prosecutor at Windhoek Magistrates Court Mr. Laurence Campher was asked if the State prosecutors or Advocates consider the deceased's relative in murder cases before bail is granted or after conviction.

Mr. Campher's¹⁵⁵ response was that the deceased and their relatives are considered when the case is at magistrate court level but the State representatives are not advising the victim to claim compensation at the early stage because up to the stage of bail the suspect

¹⁵⁴ Personal Communication with the spokesperson of the police at Windhoek Police Headquarters, Windhoek on the 07/07/2002

¹⁵⁵ Personal communication with the State Public Prosecutor Mr. Laurence Campher on the 4/12/2001.

is presumed innocent as required by the Constitution of Namibia¹⁵⁶ and in the State court, a person can only be ordered to pay compensation after conviction and that is the reason why bail is granted even if the deceased is not yet buried.

Magistrate Mike Nampweya was asked if the magistrates do consider the deceased's family members before they grant bail to the suspects.

The magistrate's response to the traditional leaders' complaint was that magistrates are creatures of the statute and are only doing what the law says they must do.¹⁵⁷

Mr. Nampweya further explained that in cases where they have jurisdiction, they award compensation to the victims but they have no jurisdiction to award compensation in murder cases because murder cases are only brought before the magistrate courts either for postponement while the police are finalizing their investigation, for bail application and for preliminary enquiry in terms of section 119 of the Criminal Procedure Act.¹⁵⁸

The Magistrate also related that even if the magistrates were having jurisdiction to award compensation in murder cases, in criminal court compensation can only be awarded after conviction and not at the early stage of bail application¹⁵⁹ because before a criminal court grants compensation that court needs to satisfy itself that the suspect is proven guilty beyond reasonable doubt.

¹⁵⁶ Article 12 (2) (d)

¹⁵⁷ Personal communication with the Magistrates of Ondangwa Magistrate Court on the 15/5/ 2001

¹⁵⁸ Magistrate Nampweya of Ondangwa Magistrate Court (note 156 above)

¹⁵⁹ Ibid

3.6 THE LAW

In Namibia, the right of the accused not to be tried more than once for the same offence can be found in the Namibian Constitution.¹⁶⁰ Section 2 of the Criminal Procedure Act¹⁶¹ also clearly states that *“it is only the State which has the right to institute crime against the suspect in Namibia and nobody else”*.

The Act also gives the suspect the right to plead that he has already been convicted or discharged for the offence charged,¹⁶² and the Community Courts¹⁶³ define the jurisdiction of the community courts to hear any matter relating to a claim of compensation and also prevent double jeopardy.

3.6.1 THE CONSTITUTION

Article 12 (2) of the Constitution of Namibia provides that:

“no person shall be tried, convicted or punished again for any criminal offence for which they have already been convicted or acquitted according to law provided that nothing in this sub article shall be construed as changing the provisions of the common law defenses of “previous acquittal and previous conviction.”

The wording of this section clearly indicate that an individual must not be convicted or punished again for the same criminal offence they have already been convicted or acquitted of. This section is referring to criminal offences; it has nothing to do with civil litigation.

¹⁶⁰ Article 12 (2)

¹⁶¹ The Criminal Procedure Act 51 of 1977

¹⁶² S 106 (1) (c) and (g)

¹⁶³ See S12 and 24 of Act 10 of 2003

In addition, Article 19 of the Constitution of Namibia provides that:

“Every person shall be entitled to enjoy, practice, profess, maintain and promote any culture, language, tradition or religion subject to the terms of this Constitution and further subject to the condition that the rights protected by this Article do not impinge upon the rights of others or the national interest.”

Article 25 (4) also provides that:

“the court shall include the power to award monetary compensation in respect of any damage suffered by the aggrieved persons in consequence of such unlawful denial or violation of their fundamental rights and freedom, where it considers such award to be appropriate in the circumstances of particular cases.”

What Sub- Section (4) of Article 25 of the Constitution of Namibia means is that each competent court in Namibia has the power to award compensation, in respect of any damage suffered by the aggrieved person following the commission of a crime by the offender.

Therefore, in murder or in any other case when the Owambo customary law courts order the offender who committed a crime in the area of their jurisdiction to pay compensation such community court is enjoying its constitutional right.

Another vivid example, which can take away the Namibian people's divergent views that an award of compensation in murder cases or any other case by Owambo customary law courts is not punishment and that such award is not in conflict with Article 12 (2) of the Constitution of Namibia is Justice Teek's¹⁶⁴ remark in a complaint which was lodged by one of the accused who was convicted by the High Court with the offence of murder but at the time the offender was convicted he already paid customary compensation to the deceased's relatives in the Owambo customary law court.

The accused in this case lodged his complaint with the Ombudsman's office because it is his constitutional right to approach the office of the Ombudsman for legal advice if he feels that his right has been infringed upon by the operation of the judicial system.

Article 25 (2) of the Constitution of Namibia also provides that:

“aggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled to approach a competent Court to enforce or protect such a right or freedom, and may approach the Ombudsman to provide them with such legal assistance or advice as they require, and the Ombudsman shall have the discretion in response thereto to provide such legal or other assistance as he or she may consider expedient.”

The convict/offender in the above mentioned case took his complaint to the Ombudsman's office. At that time Justice Teek was the Acting Ombudsman. When the

¹⁶⁴ As quoted in Hinz M.O assisted by Joas S. (note 8 above) 184.

acting Ombudsman received the complaint, the acting Ombudsman (Justice Teek) by then stated that:

*“Judicial considered these two practices, that is, customary law practice and criminal law practice and that these practices cannot be seen as subjecting the offender to double punishment because the customary practice could be equated with a civil claim for damage whereas the criminal proceedings are to educate the offender not to repeat what he did in future”.*¹⁶⁵

If compensation awarded by Owambo customary law court in this case was a double punishment, the offender was supposed to be advised that the customary law court’s award or the High Court’s conviction and punishment was wrong because at the time the accused took his case to the Ombudsman, the Ombudsman’s office was in the capable hands of a well known and prominent legal person in Namibia, Justice Teek by then.

The acting Ombudsman did not advise the claimant that there was something wrong in the practice of any of the two legal systems of law, that is customary law courts or community courts as these courts are now called because there was no double punishment. The offender was ordered by the Community court to fulfil his civil obligation and indicted by the criminal court to answer his criminal obligation.

3.6.2 THE CRIMINAL PROCEDURE ACT

¹⁶⁵ This comment was done by Justice Teek when he was an Acting Ombudsman in 1991 and it is quoted in Hinz M.O assisted by Joas S. (2000) (note 8 above) 184.

As it is already stated above under paragraph 1.2, the authority to institute and conduct prosecution in respect of any offence is vested in the hands of the state.¹⁶⁶ In addition to that Chapter 15 of the Criminal Procedure Act deals with the plea, and Section 106(1) (c) provides that: *“the accused in the criminal courts has the right to plead that he has already been convicted or acquitted for the same offence.”*

Section 106 (1) (g) also provides that the *“accused has the right to plead that he/ she has been discharged under the provision of section 204 from prosecution for the offence charged.”*

If the customary law courts in Namibia are prosecuting and sentencing offenders and their families as some writers submit, then, such complaints were supposed to be addressed by the High Court because in most cases or let us say ninety nine per cent of the offenders in murder, rape and stock theft cases are always represented in court by experienced legal representatives.

If customary compensation was double punishment, then the accused’s legal representatives were supposed to advise their clients in court to plead that they were already prosecuted, convicted and punished by the customary law court or that they are going to be tried by the customary law court again.

¹⁶⁶ See S. 2 of the Criminal Procedure Act 51 of 1977.

The complaint was not raised with the High Court in any case because private Advocates who are representing the accused in the State criminal courts are fully aware that customary law courts orders are not punishment.

3.6.3 THE COMMUNITY COURTS ACT ¹⁶⁷

The Community Courts Act was passed by Parliament on 13 July 2003 and was signed by the President on the 17 November 2003.

The Act makes it clear that *‘the Community court shall have jurisdiction to hear and determine any matter relating to a claim for compensation, restitution or any other claim recognized by customary law.’*¹⁶⁸

The wording of section 12 of this Act simply entails that customary law courts or community courts, as they are now called will have jurisdiction to hear and determine any matter relating to claims of compensation.

This section does not mention any thing related to criminal jurisdiction and that is a clear answer that an award of compensation in murder cases by community courts is not a double punishment.

Section 24 of the same Act also provides that *“anyone who has paid a claim in one court will not be liable for the same claim based for the same fact in another”*

¹⁶⁷ 10 of 2003

¹⁶⁸ S 12 of Community Court Act 10 of 2003.

This section is referring to civil claims and not to criminal crimes and that is another indication that customary courts are civil courts and have no jurisdiction to prosecute and punish the offenders and their families in murder cases.

3.7 JURISDICTION

Now having heard all what is stated above then, the next question is: which legal system is having jurisdiction to handle murder cases in Namibia? This is the most important question this section is attempting to answer.

It is a well know fact that when a country recognizes two different legal systems of law, conflict of laws will be inevitable. As it is pointed out under paragraph 2 that there are two legal systems of law in Namibia, there are also two different systems of courts, these are, Customary Law Courts or Community Courts as now called and State Courts.¹⁶⁹

The two systems of courts apply different laws. Customary courts apply customary law, and the State courts apply general law. In Namibia, the prosecution authority is vested in the hands of the State.¹⁷⁰

¹⁶⁹ Namibia happens to have two different systems of courts because when the colonizers came to this land. They bring with them their own law. They find the Namibian people have their own law, that is, customary law. Thus, Roman Dutch law which they brought along become a second legal system of law in Namibia and the country started to have different system of courts from that point because traditional leaders continue to hold customary courts.

¹⁷⁰ See section 2 of The Criminal Procedure Act 51 of 1977.

As it is stated in paragraph 3.5, what section 2 of the Criminal Procedure Act entails is that it is only the State which has jurisdiction to institute criminal action against any person who commits a crime in Namibia.

Thus, it is further argued that, in Namibia, criminal cases are only tried by State courts. The customary law courts have no jurisdiction to handle criminal cases and it is not correct to say the award of compensation in murder cases or any case by the customary law courts is double punishment.

It is also evident from the views of the traditional leaders who were interviewed that although hearings are being conducted in customary law courts such hearings are only done to determine the value of compensation to be awarded.¹⁷¹

The research found that the same information that customary courts have no criminal jurisdiction was also given by Chief Herman Iipumbu of Uukwambi to CoCup.¹⁷² Even during the colonial regime, customary law courts were prohibited from conducting criminal trials in their courts.¹⁷³

The Prosecutor General stated that even if it is happening in some cases particularly, in rape and stock theft cases, that the complainants are withdrawing cases in the state criminal courts and approaching the customary law courts for compensation award, rape, stock theft and murder are serious crimes and the final decision whether to prosecute or

¹⁷¹ Communication with the Traditional Leaders of Uukwambi Community (note 79 above)

¹⁷² As quoted in Hinz M.O. (2006) (note 10 above) 39

¹⁷³ See s 3 (i) and (ii) and S 4 (i) (b) of Proclamation R348 of 1967.

not rests in the office of the Prosecutor General who is instituting crimes against the suspect on behalf of the state.¹⁷⁴

The Prosecutor General further explained that regardless of the complaint laid by the victim, it is the State that has a final say whether to prosecute or not, and the case will go ahead even if compensation is already paid or it is going to be paid in customary law courts.¹⁷⁵

The Prosecutor General was asked if the prosecution of the offender who has already paid customary compensation is not double persecution.

The Prosecutor General's reaction to this question was, although prosecution in criminal courts is not double prosecution to the offender who had already paid customary compensation, the operation of customary law courts in some situation is disturbing the function of the State courts, especially in serious cases like rape and stock theft.

The Prosecutor General further explained that in some cases, the complainants are not willing to testify if the defendant paid them compensation in customary law courts.

The Prosecutor General further explained that the complainants' refusal to testify only common in stock theft and rape cases but it is not a practice in murder cases because in

¹⁷⁴ Personal communication with Prosecutor General. Advocate. Mr. Hans Heyman. 4 December 2001

¹⁷⁵ Personal Communication with Prosecutor General (note 174 above)

most murder cases, the relatives of the deceased always want the suspect to be punished.¹⁷⁶

Similarly, the Prosecutor General was asked why the State is doubly prosecuting the offenders in cases like murder, rape, and stock theft.

In response to the second question the Prosecutor General said that in Namibia the prosecution authority is only in the hands of the State. The Prosecutor General further explained that customary law courts have no jurisdiction to prosecute offenders in their courts because customary courts are civil courts and prosecution can only be done in criminal courts.¹⁷⁷

It was held in the case of *S v Tlame*¹⁷⁸ that compensation in the State criminal courts can only be awarded in the event of a conviction. It was also held in *S v Msize*¹⁷⁹ and in *R v Mkize*¹⁸⁰ that the State representative can only ask for compensation to be awarded if the complainant instructed him/her to do so.

3.8 SUMMARY

Looking at Article 12 (2) of the Constitution of Namibia, Section 2, 106 (1) (c) and (g) of the Criminal Procedure Act and Section 12 and 24 of the Community Courts Act, it is fair for one to argue that community courts in Namibia have no jurisdiction to prosecute,

¹⁷⁶ Ibid

¹⁷⁷ Communication with Prosecutor General (note 174 above)

¹⁷⁸ 1982 (4) SA 319 (B)

¹⁷⁹ 1979 (4) 473 (T)

¹⁸⁰ 1961 (5) SA 769 (D)

convict and punish the offenders in murder cases which are taken to their courts for compensation purposes.

It is very clear that section 12 (2) of the Constitution is referring to criminal crimes and has nothing with civil litigations.

Therefore, it is hereby restated again that community courts are civil courts and the award of compensation in murder cases by the community courts is just civil remedy like all other remedies in the law of delict.

CHAPTER FOUR: ANALYSIS AND FINDINGS

4. INTRODUCTION

This chapter analyses the findings of this research concerning the issue of whether the award of compensation in murder cases by the Owambo customary law courts is punishment or tantamount to double punishment or whether such award is in any way in conflict with Article 12 (2) of the Constitution of Namibia.

4.1 ANALYSIS

Under literature review section the main concepts of this study were defined, that is, compensation, punishment and court fine. The distinction and the purpose of these concepts were also discussed and the research questions were answered under point 3.3 – 3.5.2 and a lot of data was gathered during the interviews with the participants, in particular the traditional leaders, police officers, magistrates and the judges.

Some participants indicated that they do not want their names to be mentioned. Therefore in writing the analysis and findings it will be kept in mind. To protect the identity of participants no name of the participant is going to be mentioned in this section. The participants will be herein referred to traditional leaders, Police officers, Public Prosecutor, Magistrates, State or Private Advocates and judges.

However, it is expected that the originality and richness of data will be lost in the process of summarizing and keeping the anonymity of participants in this section. The issues

realized will be discussed under various heading that were looked at in the literature review and also with close reference to the suggestions made by the participants.

The literature review examined and discussed many issues such as the meaning of the study's concepts, the purpose and the distinction between these concepts, the wording of section 12 (2) of The Constitution, the Criminal Procedure Act and the Community Courts Act.

4.2 FINDINGS

4.2.1 THE CONCEPTS

Various definitions to the term, compensation, punishment and fine were given under section 3.2 - 3.2.4 by different participants. However, the research found that many people are using these terms interchangeably and that is where confusion and misunderstanding about these concepts started. Therefore it was important for the author and the participants to be sure they were talking about the same thing.

The research found that most participants had a fair understanding of the meaning of the concepts compensation, punishment and fine. The research also clearly showed that most if not all of the participants understand well the difference between a criminal trial and civil litigation.

All traditional leaders interviewed indicated that although the offender in cases which are triable by the State courts are ordered to pay compensation by the customary law Courts, it is just correct for them to be prosecuted and punished by the State courts.

The reasons given by the traditional leaders that it is correct for offenders in murder cases to pay customary compensation and to be indicted by the State criminal courts are in agreement with what is happening in countries like the United States of America which has two different systems of law.

This research found that compensation awarded in murder cases by the Community Courts is not only a practice to be found in the Owambo Community courts but the State courts too are awarding compensation in cases where the court which is handling the case is asked to do so by the state representatives.

However, it came to my attention during the literature review that some scholars seem not to have a reasonable understanding of the difference between a criminal trial and civil litigation. If they are, the problem in their writing might have caused by the language (Oshiwambo) which they do not understand well.

The research found that some writers who wrote about customary law in Namibia are foreigners and every time they where speaking with the traditional leaders, for example, in the northern parts of Namibia, they used interpreters.

It seems, therefore, that through interpretation they did not understand the explanation they were given by the traditional leaders or if they understood, they did not clearly investigate in which capacity the Community Courts in Namibia are awarding compensation in cases which are triable by the State court like murder, rape and stock theft.

The community courts are civil courts and when they are awarding compensation they are exercising their civil jurisdiction.

During the literature review it also came clear that some writers are confusing the term punishment with the term compensation, if not, then, they are using these terms wrongly.

However, the research revealed clearly that punishments, fine and compensation are different concepts and these concepts need to be kept separately to avoid confusion and misunderstanding.

A distinction was made between punishment and compensation and also between compensation and a court fine. Punishment was described as an infliction of suffering on the offender and that it is only imposed by the criminal court following a successful prosecution and a conviction. On the other hand, compensation conceived as payment given to the injured party by the offender to restore, redress or repair the damage the offence caused.

The research also found that some writers are using the term compensation and fine interchangeably but these two terms are different concepts too. A court fine is a punishment given to the offender as an alternative to direct jail sentence and it is normally given to the offender by the court in case where the court does not want to send the offender directly to jail.

It was explained by the Judges that punishment and court fine are only imposed on the offender following a prosecution whereas compensation award either in customary law courts or in State civil courts is awarded following a claim which the plaintiff lodged against the defendant.

It is because of the above mentioned misunderstanding that the purpose and distinction between the concepts compensation, punishment and court fine was given in this study under point 3.4.

It was also clearly explained by the traditional leaders that in terms of Owambo customary law, compensation in murder cases was introduced to prevent people in the communities from revenging against each other or not to use a method of traditional counter killing against the defendant's family members or the defendant as it has been a practice in the olden days.

The traditional leaders' participants further explained that the whole aim of compensation to be introduced in the olden days was to repair the damage caused by the offence and

that it was meant to help the deceased's relatives to continue their lives as if their beloved one was not killed.

4.2.2 CUSTOMARY LAW COMPENSATION PAYMENT

Some interviewees stressed the importance of compensation payment that, it is not only important because it repairs the damage caused by the offence but it also plays a very important role in the education of children in different families.

Some participants also pointed out that the payment of customary compensation places the responsibility in the hands of the parents to make sure that children are brought up properly in different families.

However, the research found that even if the customary law courts in the northern parts of Namibia are still trying to assist the deceased relatives, the payment, or the ten herds of cattle paid in murder cases that was agreed upon by all seven traditional authorities in the northern part of Namibia at a workshop in Ongwediva 1995 are too few to assist the deceased's relatives to cope with their lives in the absence of their beloved one who might have been their bread winner.

Although this payment was meaningful in the olden days, the value of ten herds of cattle now is too low and this payment needs an immediate review.

The research also revealed that there is an ox called "cleansing the blood" (Onkomba mbizi) given to the chief by the offender. These cattle attracted many people's attention

and because of these cattle one can concede with some writers like Horn¹⁸¹ that it might be true that the traditional courts are combining compensation with punishment.

However, the traditional leaders explained it several times that they do not order the offender to pay any fine but the ox is given voluntarily following the custom of the people in the northern parts of Namibia and to show remorse to the chief/king of that community, to the community and to the deceased's family members that the offender realized that what he did was wrong.

The judges were a little bit reluctant about the payment of compensation and suggested that the responsibility of compensation payment in murder cases should be taken over by the State by establishing a state fund rather than to leave such payment in the hands of the suspect.

4.3 JURISDICTION

The question asked was, which court system is having criminal jurisdiction to handle murder cases in Namibia? The research revealed that in Namibia the prosecution authority is in the hands of the State¹⁸² and crimes are instituted in criminal courts by the Prosecutor General on behalf of the State. The research on its own also found that customary law courts in Namibia has no jurisdiction to prosecute the suspect in their communities, and claims in Community Courts are lodged by the party who is alleging that the other party did something wrong to them. This finding is in agreement with

¹⁸¹ Horn N "Criminal or Civil Procedure? The Possibility of a plea of Autrefois in the Namibian Community Courts Act" in Hinz (ed) (2006) (note 10 above) 196

¹⁸² Section 2 of the Criminal Procedure Act 51 of 1977

Section 12 of the Community Courts Act which makes it clear that *'the Community Courts in Namibia are now having jurisdiction to hear and determine any matter relating to claims for compensation, restitution or any other claim recognized by customary law'*.

The research found that so far there is no law in Namibia which permits the community courts to prosecute and punish the offender in murder cases and that is a clear indication that the community courts in Namibia are civil courts and are only order the offender to pay compensation.

Therefore, it was stressed by the traditional leaders that the offenders are not prosecuted in Community Courts. The research also found that a person can only be said to be doubly punished if that person is prosecuted twice but, if the defendant was only ordered to restore the loss or damage he/she caused, such order is not a punishment or it is not tantamount to double punishment. The defendant was only ordered to fulfil his civil obligation.

The research also shows that the award of compensation in murder cases by the Owambo Community Court is not in conflict with Article 12 (2) of the Constitution of Namibia because this section is concerned with criminal cases, it has nothing to do with civil litigation. And again from the wording of section 12 of the Community Courts Act 10 of 2003, the High Court's conduct in Haulondjamba's case and even from the reaction of the Acting Ombudsman (Judge Teek) in 1991 to the complaint which was lodged by a

convict in a murder case, it can clearly be seen that the Community Courts in Namibia are not criminal courts but they are regarded as civil courts.

4.4 THE WEAKNESS OF BOTH LEGAL SYSTEMS

4.4.1 THE WEAKNESS OF COMMUNITY COURT SYSTEM

The research found that both legal systems in Namibia are having loopholes and weaknesses in practice. Even if the research found that customary law courts are assisting the victims of crime far much better than the state machineries, the research revealed that the customary law courts too are not considering the suspect's Constitutional rights when they are awarding compensation.

The research found that in some situations, compensation in Community Courts is awarded in the absence of the suspect. This practice infringes the suspect's constitutional rights as required by article 12 (1) (a) which provides that '*in the determination of their civil rights and obligations... all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal.*'

However, it was explained by the traditional leaders interviewed that compensation is only awarded in the absence of the suspect in a case where the suspect confessed to his own family members and the suspect and his family member offered to pay compensation voluntarily.

The research also found that in some cases, even if the suspect is present, the customary law courts do not consider the suspect's Constitutional rights as required by article 12 (1) (d) of the Constitution of Namibia which provides that: *“All persons charged with an offence shall be presumed innocent until proven guilty according to law, after having had the opportunity of calling witnesses and cross examining those called against them.”*

The research also found that even if community courts are assisting the deceased family members in murder cases, up to now customary courts are not able to enforce their orders. Therefore, up to now even if someone is ordered to pay compensation in customary law court if that person does not want to pay, the defendant will just keep quiet and nothing will happen to him.

However, this problem is now addressed by Community Courts Act.¹⁸³ If this Act happens to be put into operation by the community courts, then, the aggrieved person will have the right to lodge a complaint with the magistrate's court if someone failed to observe the community courts order.¹⁸⁴ In addition, anyone who is not satisfied with the decision of the community court will have rights to appeal against the courts' decision at the magistrate courts.¹⁸⁵

4.4.2 THE WEAKNESS OF THE STATE MACHINERIES

¹⁸³ Act 10 of 2003

¹⁸⁴ S 23

¹⁸⁵ S 26

The research also found that even if the State courts are observing the Constitution, the state machineries have some weaknesses too.

The research found that the State courts are only considering the suspect's Constitutional rights and neglect the victims of crime. The research revealed that even if the State courts are having jurisdiction to award compensation, the criminal justice system in Namibia is in crisis because the police, prosecutors, and the State advocates who are representing the State do not take steps to make the victim of crime to understand how the system is working and at what stage the victim of crime, like in murder cases, can claim compensation.

The research revealed that in some situations, prosecutors and State Advocates are always not willing to follow the required procedures when it comes to the question of compensation. As a result, the victim's wife/husband or dependants who had lost their bread winner in the hands of the offender receive no assistance from the State, apart from the punishment which the offender is given by the State courts.

What the deceased's family members are actually benefiting from the criminal justice system is a mere satisfaction that a person who robbed them of their breadwinner is removed from the society.

The research also revealed that in practice, the State's representatives are offering too little assistance to the victim because after conviction, they are avoiding the required

procedures of calling the victim to testify again and tell the court the damage they suffered as a result of the offender's conduct.

It was revealed by some of the participants (State representatives) that if they start to call the deceased' relatives in murder cases like what they are doing in other cases, like in economic cases, for example, they will go through the agony of a lengthy trial because the court will require them to establish all facts before compensation award is granted, that is, the amount of loss suffered by the deceased's relatives, the age of the deceased, his earning capacity if the deceases was working and so on.

With such an explanation from some of the participants the researcher started to ask the following questions that: if the State representatives are not assisting the victims of crime simply because they do not want to follow the required procedure due to the reason that they are afraid for the enquiry to prolong the already long trial in murder cases, then, where is justice in the whole practice of the criminal justice system in Namibia? What messages does the State representatives' conduct send to the public? Who can assist the poor wife/husband or dependants of the deceased who where robbed of their bread winner by the offender if the State, which is entrusted with the responsibility of representing the nation, is treating the victim of crimes like that?

CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS

5.1 CONCLUSIONS

Compensation, punishment and a fine are different concepts and these concepts need to be kept separate. In general, compensation is payment made to repair the damage caused by the offence and it is paid directly to the victim and in case of murder, to the relatives of the slain victim whereas punishment is an infliction of suffering directly to the offender.

Even if the offender pays compensation, he still deserves to be punished for the crime he committed. The punishment can either be in a form of direct jail sentence or in a form of a fine.

A court fine is an alternative to a punishment, it is paid by the offender and it is always goes to the authority's account. Compensation payment thus can accompany any direct jail sentence or any fine which the offender is given by the court with criminal jurisdiction.

Punishment and fine are only imposed on the offender following criminal prosecution whereas compensation can be awarded following a civil litigation or if it is awarded by the State criminal courts, it follows conviction and a normal plea before sentence.

In Namibia the prosecution authority is in the hands of the State, therefore, it is only the State which has the right to prosecute the suspect. The Community Courts have no jurisdiction to prosecute the suspect but they have civil jurisdiction to order the offenders to fulfil their civil obligations. A very clear answer to the question of community courts' jurisdiction can now be found in Section 12 of the Community Courts Act 10 of 2003.

What we need to bear in mind is that Namibia has two legal systems of law, that is, customary law and general law. Since the country has two legal systems of law operating side by side, it is possible for one act of a person to be a crime against both legal systems. Therefore, it is correct for one act to be handled by both legal systems, and that is the reason why in the northern parts of Namibia, up to now, if someone causes the death of a human being, there are automatically two remedies, that is, civil remedy and criminal remedy and that is the reason why in terms of Owambo customary law if someone kills somebody, the relatives of the slain victim are taking their claim to their customary law courts and claim compensation and at the same time report the matter to the police for prosecution and punishment and such practice is normal in any country with two legal systems of law.

Practically, customary law and general law systems have been working fairly well side by side in Namibia even during the colonial time. Both systems are expected to react to any crime committed within the area of their jurisdiction and fulfil their obligation by either ordering the offender to restore or repair the loss or damage the offender caused if the matter was handled by the civil or customary law court or to punish and remove the offender from society if the matter was handled by the criminal court. If a complaint is

lodged in the customary law courts and the court orders the defendant to pay compensation, the defendant is ordered to fulfil his civil obligation and such order does not absolve the offender from being prosecuted.

Therefore, it is hereby concluded that the compensation paid in murder cases in terms of Owambo customary law is not a double punishment. Customary law compensation payment is just a civil remedy like all other remedies in the law of delict.

The Owambo customary courts are civil courts and have no criminal jurisdiction to punish the defendants, therefore, it is also concluded that the award of compensation in murder cases by the Owambo customary law courts is not in anyway in conflict with Article 12 (2) of the Constitution of Namibia because Article 12 (2) is referring to the criminal offences and has nothing to do with civil claims.

Murder is a serious offence and in most cases one may find the deceased was a bread winner in his/her family. Thus, if a breadwinner happened to be killed, then compensation is needed to help the deceased's dependants to cope with their living.

All in all, compensation is needed to restore the damage caused by the offence and to help the dependants of the slain victim to continue living as if their bread winner was not killed by the offender whereas in the criminal court, punishment is needed to deter, reform, retribute and rehabilitate the offender, and to send a message to the victim's family members that the authority regards them as important and valued.

It is the duty of the criminal courts in Namibia to punish the offenders and to see to it that criminals are made responsible for their actions. Criminal courts also need to punish the offenders in order to send a clear message to the other members of the public who are in the opinion to commit crimes that, if they happen to commit the same offence they will be punished but punishment does not absolve the offender to pay compensation to repair the damage caused by the offence.

Criminal courts in any case need to punish the offenders because if crimes are left unpunished, it would show that crime does not pay in that community or society.

5.2 RECOMMENDATIONS

5.2.1 THE ROLE OF THE VICTIMS

The victims (the deceased's relatives) are the right person to address or inform the court of how much injury or damage they suffered as a result of the offender's behavior.

Therefore, it is hereby suggested that in murder cases too, the state needs to start consulting the deceased's relatives and hear their views. If the suspect is applying for bail, the victims need to be informed about the suspect's application. Murder is a serious crime and it is painful to see a person who took away the life of your beloved one moving in the street while your child, husband/wife's body is lying lifeless in the mortuary with no casket to be buried in.

The State representatives need always to consult the victim and obtain information whether the victim's relatives want the accused to be granted bail or not or if they want to be compensated and also to find out what type of sentences the victim is having in mind to be given to the offender if the accused happen to be convicted. It is a well known fact that bail is the suspect's Constitutional rights in Namibia but the State machineries have an important role in making the criminal justice system work in the interest of the victims.

Thus, it is hereby recommended that before a suspect in a murder case is granted bail, the Police officers must make sure that the victim's relatives are aware of the suspect's application.

The victim's relatives need to be told briefly of how the system works their rights and their role in the prosecution. The victim's relatives in murder cases must also be afforded a chance, like victim in theft, rape and fraud cases, to tell the court their feelings of whether the accused can be granted bail or not.

It is also suggested that once a murder case is reported, the investigating officer must obtain all the particulars of the deceased's relatives as soon as possible and their contact telephone numbers if any.

In murder cases, the police office who is dealing with the case also needs to introduce himself to the deceased's relatives and explain his role in the investigation of the crime,

by giving them (the deceased relatives) his name, rank and contact telephone number, to be able to be contacted if need be, because murder is a serious offence and it needs to be given first priority.

It is also suggested that it will be more appropriate for each murder case to be assigned to a specific prosecutor who will handle the matter at the lower courts and take care of the case until such a stage where the case will be handed to the State Advocate when it reaches the stage of going to the High Court for trial.

5.2.2 THE OFFENDERS' CONSTITUTIONAL RIGHTS IN COMMUNITY COURTS

Although compensation award in terms of customary law is supported, cases need to be treated on their own merit and the customary law courts also need to observe the provisions of the Constitution as all other court systems in the country.

Even if customary law courts are civil by nature and it is a well known fact that there is no presumption of innocence in civil courts, customary law courts need to change their practice and start to consider the offender's voice because, in some cases, it is true that when the accused caused the death of the deceased, it might be that he was acting in selfdefence or that it was not the accused who caused the deceased's death. Murder is a serious offence and it is painful to accuse a person that it was him/her who caused the death of somebody while it might not be so.

Therefore thoroughly investigation is needed to help the court to determine whether the offender was acting in self defence or in defence of his family and or his property, which is permissible by the law before a compensation order is granted.

If the traditional courts start to consider what really caused the deceased's death as it is indicated in the death certificate, such practice will reduce the problem among members of the communities that they are bewitching each other and will help people in different communities to live together peacefully.

5.2.3 PRESERVATION OF CUSTOMARY LAW COMPENSATION

Murder is a serious crime and a person's life is very important no matter if that person was a child, adult, educated or not educated, working or not working, every person is equally important to his/her relatives in all respect. Although, the State needs to establish State funds, compensation award in murder cases need to be preserved in order to continue maintaining discipline, peace and mutual respect within members of each community and also to restore the damage caused by the offence.

Murder is a serious crime and the society is expecting the State to protect all individuals in the communities for their constitutional rights not to be violated by others. People in different communities in the rural area are dependants of each other and are always expecting their traditional courts to assist them to order the offender who robbed them of their bread winner to compensate them so that the compensation, even if it will not meet

their needs as their bread winner was supposed to do, such payment will push them somewhere while they can try to find some other assistance.

Previously, people in different communities had respect for the law. Parents were also serious to educate their children to have respect for other people and the crime rate was very low because people were aware that if you behave wrongly and cause a death of a human being you will pay compensation.

Murder cases are very high now all over Namibia because our law is becoming more toothless and people are now committing crimes one after the other because they know even if they happen to be punished by the State courts, they will just go to jail and enjoy the tax payer's money in jail counting days to finish their sentence and go back and commit another crime again.

Therefore, it is hereby recommended that customary compensation needs to be preserved because the payment of compensation play a deterrent role among people in the community. People previously were behaving well because nobody wanted to pay compensation.

On the other hand, a person who commits murder needs to be punished and removed from society and properly rehabilitated before he/she returns to the same community again but that does not absolve him not to pay compensation to help the deceased's relatives to continue with their living.

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APPENDIX 1

**A. LETTER TO REQUEST ACCESS INTERVIEWEES AND BRIEF
INFORMATION ABOUT THE STUDY**

Tel: 061- 243637 (H)

P.O Box 21051

061- 3201211 (W)

Windhoek

Cell: 0812432861

Namibia

Date-----

Participant's Name

Address

Dear Sir/Madam,

Re: Request for interview

Please allow me to introduce myself. My name is Elina Nandago. I am pursuing my Master of Law (LLM) with the University of Namibia. I am a part time student. My student number is 9704744.

As part of the LLM program I am required to undertake a research, my research topic is: Compensation in murder cases: Owambo customary law.

The aims in this research are to ascertain whether compensation award in murder cases by the Owambo customary law is a double punishment and also to find out if such an award in anyway in conflict with Article 12 (2) of the Constitution of Namibia.

To obtain all the required information to this study the author need to interview people who are dealing with murder cases in particular Judges, Magistrates, Police officers, Public Prosecutors, State and Private Advocates as well as the Traditional leaders.

To enable the participants to prepare on the subject I am hereby attached specific questions which the participant needs to consider although more clarification will be required from the participant's answer during the interview or meeting. Three different dates are also suggested for the participants to select a convenient date to them.

The interview will take 45 to 60 minutes if it will be long. Please consider my request. I thank you in advance for your co-operation.

Yours sincerely,

Elina Nandago

E-mail: ehnandago@hotmail.com

B. BRIEF INFORMATION ABOUT THE PURPOSE OF THE STUDY TO THE INTERVIEWEES

The purpose of this study is to examine whether compensation paid in murder cases in terms of Owambo customary law is double punishment, and whether such payment is in conflict with article 12 (2) of the Constitution of Namibia.

The research is purely for academic purposes.

All the information you will provide me with today will be handled strictly confidential. I will be the only one who will listen to the tapes and they will be destroyed upon completion of this study.

APPENDIX 2

KEY INFORMANTS INTERVIEW SCHEDULE

(I) GENERAL QUESTIONS TO ALL PARTICIPANTS

1. Do you mind for your real name or title to be used?
2. Do you mind if I audio-record your voice during the interview?
3. What is your current position?
4. For how long have you been holding this position?
5. How were you appointed?
6. What kind of cases do you handle in your work?
7. How do those cases come to you?

(II) QUESTIONS TO POLICE OFFICERS

1. Have you ever arrested a suspect in a murder case?
2. Who are the most perpetrators of these cases?

3. What in your opinion lead to their behavior?
4. How often do you come across these cases?
5. What is the common type of weapon used in murder cases?
6. Do you consult with the victim's family before suggesting or opposing bail? Please explain.
7. Are you aware that in terms of Owambo customary law the offenders in murder cases are ordered to pay compensation even if you arrested and take them to court for prosecution?
8. Some observers of Owambo customary law are saying compensation award by the Owambo customary law courts is double punishment what are your saying.? Please explain.

(III) QUESTIONS TO PUBLIC PROSECUTORS AND STATE ADVOCATES

1. Do you deal with murder cases?
2. When, during your career, do you start dealing with murder cases?
3. Have you ever handled a murder case bail application?
4. Before opposing or proposing bail, do you consult the deceased's family, if not, why?
5. Do you inform victims about their rights to compensation, if not, why?
6. Do you advice the court to award compensation payment to the victim, if not, why?
7. Do you think the criminal courts make effective utilization of Section 297 and 300 of the criminal procedure's act in murder cases, please elaborate.
8. Are you aware that Namibia has two legal systems?

9. Which system do you think is the most competent to be used to order compensation payment in murder cases? Why do you say so?
10. Are you aware of the Owambo customary law?
11. Do you know that in certain occasions, if a person causes the death of another person in communities, that person will be required to compensate the family of the deceased in terms of the Owambo customary law and at the same time prosecuted by the state courts?
12. Some people are of the view that Owambo customary law compensation in murder cases is double punishment because the offenders in the same case will be or already prosecuted and punished by the state criminal courts. What are you saying to that?
13. There is an allegation that you are prosecuting the offenders in murder cases twice. What are you saying to this?

(IV) QUESTIONS TO TRADITIONAL LEADERS

1. Which law are you applying in your court?
2. Where did that law come from?
3. Who are the presiding officers in customary law courts?
4. What are the jurisdictions of customary law courts?
5. Which types of dispute do you think is best handled by the traditional courts?
6. If someone kills another person in your community how do you deal with such a person?
7. When an offender states that he killed the deceased in self-defence, how do you handle such a case?

8. Do you order the defendant to pay compensation in your court? If yes, in which case do you order the offender to pay compensation?’
9. Which system do you think is effective in enforcing compensation? Please justify your answer.
10. There is an allegation that compensation award in customary law court to the offender who will be prosecuted by the criminal court is a double punishment, what are you saying to this?
11. It is also alleged that when the customary courts are awarding compensation, the presiding officers are not considering the defendant’s Constitutional rights. What are you saying to this allegation?
12. What are the jurisdictions of customary law courts?

(V) QUESTIONS TO THE LAWYERS

1. Have you ever acted as a defence lawyer in a case where the defendant has already paid compensation in terms of customary law?
2. How often does that happen to you?
3. What are your feelings about your clients to be punishment by the state criminal courts in murder cases and to be ordered by the customary law courts to pay compensation in the same case?
4. Are you aware of the two legal systems of law in Namibia? Please name them?
5. Do you think customary law should continue to be used? Please justify your answer?
6. Some people believe that compensation in terms of Oshiwambo customary law in murder cases is ‘double punishment’: What are your views on that?

7. What recommendations do you have with regard to how murder cases can be handled in future?

(VI) QUESTIONS TO THE MAGISTRATES

1. Which law do you apply in your court?
2. Where does that law come from?
3. How did you learn about that law?
4. Are you dealing with bail application in murder cases in your court?
5. Before considering bail in your court are you enquiring from the State representative if the victims are aware of the offender's bail application?
6. Do you order the offender to pay compensation in your court if "no" Why not, if "yes" in which cases do you order compensation to be awarded to the victim?
7. Are you aware that customary law courts in Namibia award compensation in murder cases to the deceased's family even if the offender is already convicted and sentenced by the state criminal court?
8. Which court do you think is competent enough to award compensation in murder cases? Please justify your answers?
9. Do you know anything about compensation paid in murder case in terms of Owambo customary laws, if "yes" please explain what you know?
10. Ask for general opinion: People are saying compensation in murder cases in terms of Oshiwambo customary law is a double punishment and it's in conflict with Article 12 (1) (d) and 12 (2) of the Constitution of Namibia - what are you saying to that?

11. Is there any difference between compensation and punishment? If 'yes' what is the differences?

(VII) QUESTIONS TO THE HIGH COURT JUDGES

1. Which law do you apply in your court?
2. Where does that law come from?
3. How did you learn about that law?
4. Do you order the offender to pay compensation in murder cases in your court, "if no" Why not, if "yes" in which cases do you award compensation to the victim?
5. Do you know anything about compensation paid in murder case in terms of Owambo customary laws, if "yes" please explain what you know?
6. Which court do you think is competent enough to award compensation in murder cases? Please justify your answers.
7. Ask for general opinion: People are saying compensation in murder cases in terms of Owambo customary law is a double punishment and it's in conflict with Article 12 (2) of the Constitution of Namibia -what are your saying to that?
8. Is there any difference between compensation and punishment? If 'yes' what is the differences?
9. Is there any difference between a court fine and compensation? If yes, what is the difference?

SCHEDULE A

I Elina Nandago, declare hereby that this study is a true reflection of my own research, and that this work, or part thereof has not been submitted for a degree in any other institution of higher education.

No part of this thesis maybe reproduced, stored in any retrieval system, or transmitted in any form, or by means (for example, electronic, mechanical, photocopying, recording or otherwise) without my permission, or The University of Namibia on my behalf.

I Elina Nandago, grant The University of Namibia the right to reproduce this thesis in whole or in part, in any manner or format, which The University of Namibia may deem fir, for any person or institution requiring it for study and research, providing that The University of Namibia shall waive this right if the whole thesis has been or is being published in a manner satisfactory to the University.

Signature _____

Date _____

Elina Nandago

SCHEDULE B

“I Elina Nandago (the undersigned), hereby declare that the work contained in this dissertation for the purpose of obtaining my degree of L.L.M is my own original work and that I have not used any other sources rather than those listed in the bibliography and quoted in the references”.

Signature: _____ Date: _____