PROBLEMS OF PENAL LAW AND PRACTICE IN ZAMBIA:

PUBLIC INDIFFERENCE AND OFFICIAL NEGLECT

BY

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Dedication.

This thesis is dedicated to my elder brother, Mark, who I never saw or knew having departed from this world in infancy; elder sister, Ella, who I saw but never knew as she departed at about the age of five while I was still an infant, and George Patrick Muyawala, my brother-in- law (elder sister's late husband), whose humanity and generosity of spirit enabled me to proceed from standard 2 to standard 3 and beyond.

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I can never forget Fr Cremins, Principal of Canisius College, Chikuni, the only other boys secondary school, apart from Munali, offering form six. Judged as not form six material, Munali Secondary School did not accept me. Fr Cremins took a chance and admitted me into the form six lower class. Eternal gratitude must go to him.

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Introduction.

Crime is a much neglected area of national policy in Zambia. Yet it tends to affect the individual directly, sometimes in a dramatic way, as a victim or an offender, and, because it is costly to the state, as a tax-payer as well. This thesis hopes to make a contribution towards arousing public and government interest and concern about crime, particularly the treatment of offenders, and suggests new directions of policy towards reform.

In view of the wide gulf between the technological development of Europe and sub-Saharan Africa, the unimpeded domination of Europe over Africa at the turn of the nineteenth century in the form of colonialism was unavoidable. With colonialism came foreign civilisations and cultures, including penal systems. Post-independence writing on legal and other disciplines is characterised by specific references to, or implicit acknowledgements of, themes of conflict and dysfunction between the foreign European influences and indigenous cultures. This thesis focuses on the consequences of the imposition of a penal system from a highly industrialised society (Great Britain) on the justice system of a technologically underdeveloped society (Zambia).

Little post-independence research has been published or carried out in this area of the criminal law and practice, although themes of conflict and dysfunction are considered in the doctoral theses of Dr Mwansa on property crime (1992)[1] and Dr Simaluwani on juvenile justice (1994).[2]

I. Zambia and its people.

Zambia is a land-locked tropical country bounded by eight states: Zaire and Tanzania to the north, Malawi and Mozambique to the east, Zimbabwe, Botswana and Namibia to the south and Angola to the west. It has some 73 tribes, [3] some chiefly and others acephalous, almost all having migrated directly from present Zaire between 1200 and 1800. Life was lived at subsistence level in village communities growing crops, rearing domestic animals and fishing. [4] Because survival was precarious traditional society had close, strong and widespread kinship systems. Also, there was widespread and strong belief in the supernatural, including witchcraft. All this had a profound effect on the people's sense of justice: a hierarchy of what constituted "wrongs", adjudication procedures, evidence and penalties.

II. The coming of foreign European influence.

For geographical reasons British influence came late in Zambia, first from the south (Southern Rhodesia, now Zimbabwe) and then from the north-east (British Central Africa/Nyasaland, now Malawi). Consequently the fruits of western civilisation came comparatively late in the central African region. British influence in Zambia was first formalised in 1889 with the enactment of the Africa Order in Council 1889, [5] followed by the creation of the first jurisdiction in what was to become Zambia: Barotziland-North-Western Rhodesia[6] in the same year and North-Eastern Rhodesia in 1900, [7] both administered by a private chartered company British South Africa Company (BSA). In 1911 the two territories were merged into one, becoming the

Protectorate of Northern Rhodesia, [8] and in 1924 the administration was transferred from the BSA directly to the Colonial Office in London. [9] Shortly after the break up of the Central African Federation (1953-1963) comprising Northern Rhodesia, Southern Rhodesia and Nyasaland, independence was achieved in 1964, formal British influence having lasted 75 years, after the departing colonial administration had laid the present structure of the penal system, laws and practices. In view of the brevity of colonial rule it must be asked how much of indigenous cultures, particularly notions of justice and legal processes have survived the impact of westernisation. Furthermore, it is fair to say that pre-independence penal structures, legislation and practices continuing largely unchanged 30 years or so into independence would be a reliable indicator of the lack of innovation in penal law, policy and practices in Zambia.

III. Post-independence developments.

At independence, Zambia, led by President Kaunda, continued to practice multi-party politics, and the major industrial and commercial enterprises were in private foreign hands; but in the 1970s these features were reversed: a one-party state was established and major industrial and commercial concerns were nationalised. By coincidence there was the world oil crisis, a world recession and the price of copper, Zambia's foreign exchanger earner, plummeted.

Five of Zambia's neighbours: Angola, South West Africa (now Namibia), Bechuanaland (now Botswana), Mozambique and Southern Rhodesia (now Zimbabwe) continued as colonial dependencies long after Zambian independence. Colonial struggles in those territories inhibited Zambia's efforts to develop generally

and Zambia sheltered many refugees and freedom fighters. Southern Rhodesia, through which much of Zambia's exports route passed to the sea, declared unilateral independence in 1965 and the independence struggle continued up to 1980 with the birth of Zimbabwe.

Despite all these political problems some economic progress was made: new roads were constructed, existing ones were improved and a new railway linking Zambia and Tanzania was constructed. However, higher education was established late; the first university, the University of Zambia, was established only in 1966, two years after independence. As universities are centres for the generation of ideas, this in turn delayed the establishment of legal education. This was compounded by the lack of financial and human resources. After thirty years, still, the university has not promoted any notable penal reform. In the early 1970s and following the trend in some other African countries, notably Tanzania under President Nyerere, President Kaunda formulated the philosophy of "Zambian Humanism", which espoused African cultural values of an egalitarian and socialist society. The shallowness of this philosophy exposed Kaunda as the unenlightened dictator that he was.

IV. The courts, judiciary and sentencing of offenders.

Zambia has a four-tier system of courts, a legacy of the colonial administration: the Supreme Court, High Court, Subordinate (Magistrates') Courts and Local Courts. The magistracy is divided into professionally-qualified magistrates and professionally-unqualified (or lay) magistrates. The need for adequate judicial training, including

continuing legal education, is obvious and the higher judiciary should be keenly aware of their pioneering role as makers of sentencing policy and practice. Local Court justices are untrained because their jurisdiction is mainly confined to customary law matters, for which training is not considered necessary, although they also have limited criminal jurisdiction. As they are the only "African courts", they can be used to experiment with African notions of justice especially court procedures, evidence and penalties.

To help the judiciary in its difficult task of sentencing it may be necessary to formulate the aims of the penal system as a whole, including sentencing principles and objectives, and re-formulate theories of punishment and then adopt them in a legislative framework. It may also be necessary to establish a special sentencing body to monitor sentencing, advise the courts and report to Parliament.

V. Sentences available to the courts.

A wide range of sentences are available to the courts in Zambia; their range especially of non-custodial sentences, should be extended and non-custodial penalties fallen into disuse should be revived. There are financial, non-custodial and semi-custodial penalties. Their significance should be stressed: not only are they humanitarian but they can also be used to further policies of diversion and "crime control" (as opposed to crime prevention). However, the increased use of financial penalties may not be possible in a poor country like Zambia.

Zambia retains corporal and capital punishments against a growing abolitionist climate in the central African region. Their propriety in a modern age and their constitutionality should be questioned

Every modern society should pay particular attention to the need for an adequate response to juvenile delinquency. The nature of juvenile crime in a fast developing society like that of Zambia, with a system of strong family ties, and the place of custodial institutions for young offenders should be understood. Also, the judiciary should be properly trained to appreciate the range of sentences available to deal with juvenile offenders. In a fast urbanising country like Zambia the potential for a rapid increase in juvenile crime should be appreciated.

More and longer prison sentences have continued to be imposed since independence. The role of imprisonment with its emphasis on retribution and reform, should be re-assessed. Perhaps prisons should be seen more as contributors to the growing of food for the nation, which might mean a moratorium on the building of more closed prisons and the establishment of more prison farms with better living conditions. Large prison populations, a feature of prisons in developing countries including Zambia, should concern the general public and governments, particularly if the majority are unconvicted prisoners. Concern should be based not only on humanitarian grounds but also on the ground of cost to victims, offenders and the state through budgetary costs.

VI. Evaluative studies and the penal system.

Every properly run business or other organisation needs to evaluate the performance and cost of running it either periodically or as occasion demands; the same should be done about the Zambian penal system as a whole and its various segments. In such studies wider issues should be raised such as: whether the dominance of the received penal system should be allowed to continue unchecked, and, if not, if it is possible to reverse the dominance completely, replacing the received system with an indigenous one. If a complete reversal is neither possible nor desirable, researchers should identify the strengths of traditional justice systems with which to indigenise the received penal system. Finally and equally importantly researchers should seek to discover whether the general public, segments of the penal system and post-independence governments of Zambia are really interested and concerned about the penal system, its operation, shortcomings and future, or whether the system remains remote, the public disinterested and governments neglectful.

Research methodology.

This thesis has had a long gestation period, starting in 1983. Due to severe and unexpected printing problems it should have been submitted some twelve months earlier in very early September, 1995. The problems, which involved reprinting the thesis, had at least one unfortunate result of making the re-assembled Tables unavoidably less aesthetically appealing. Literature comes from a wide source: Zambian legislation and legislation from other African countries and abroad,

international legal literature and anthropological writings and archival material. Field work was undertaken between 1985 and 1986. Penal institutions and establishments were visited, data and information collected and officers and offenders interviewed. However, access to certain documents and places was restricted due to the general climate of fear secrecy in the one-party state. Relevant annual reports, thin and with formats virtually unchanged since independence, were collected and the reliability of the meagre information and data questioned. Despite the long gestation period of the thesis it has been impossible fully to update the statistical and other data. For example, all efforts to see recent published annual reports were unsuccessful.[10]

Abstract.

This thesis deals with the penal system as whole. It begins with an examination of the background to the system by tracing the constitutional and political history of Zambia, stressing the late establishment of European influence in the central African region and consequent late general development, notably in higher education and legal field. As a comparatively rich territory, its wealth coming from rich mineral deposits, newly independent Zambia was poised for faster development. However, two major factors stunted general development. First, Zambia was surrounded by unstable colonial dependencies fighting for independence, specially in Southern Rhodesia (Zimbabwe). Secondly, Kaunda, the first President, was an unenlightened dictator.

Traditional African society is analysed: it's material, social and political structure; concepts of "wrongs"; dispute-settlement procedures and penalties. It was

characterised by a non-confrontational approach to dispute-settlement and payment of compensation.

Internationally accepted theories of punishment are examined paying particular attention to their suitability to Zambian society. Principles of sentencing are discussed and the absence of clear legislative and judicial sentencing guidelines noted. The courts and judiciary are dealt with, paying particular attention to the inadequacy of judicial training.

Then the various sentences available to the courts are listed and examined beginning with financial penalties (fines, compensation, restitution, forfeiture and costs); their usefulness and limitations in a poor country like Zambia noted. Non-custodial and semi-custodial penalties (deportation, disqualification, police supervision, discharges, binding over, extra-mural penal employment, week-end imprisonment and suspended sentences) are examined noting their usefulness as diversionary techniques and their regrettable decline. Physical punishments (capital punishment and corporal punishment) are discussed and their abolition in some neighbouring African jurisdictions on constitutional grounds is contrasted with lack of progress in Zambia. Juvenile justice, which in practice though not in law includes probation, is dealt with; it is characterised by absence of change since independence. Imprisonment is analysed: objectives; ever increasing numbers of prisons and prisoners, especially remands; and lack of sufficient public or official concern about their numbers. Separate attention is given to the experience of imprisonment: serious material deprivation about which the public is disinterested and the government neglectful, and a prison service which is not motivated.

The penal system of Zambia is characterised by remoteness from the people, public indifference and government neglect. What is required is to generate public interest in and concern about the working of the penal system, including the cost of crime and running the system, numbers passing through it and diversionary techniques and "crime control" policies. One way of successfully generating interest is by indigenising aspects of the system through "Africanisation" of Local Courts and greater emphasis on compensation in criminal cases. In the long term it will be necessary to establish an institute of criminology to pioneer research and penal ideas.

Introduction.

Notes.

1. K. T. Mwansa, Property Crime and the Criminal Process in Lusaka Magistrates Courts, University of London, School of Oriental and African Studies Ph.D. Thesis, March, 1992.

2. E. M. Simaluwani, The Juvenile Justice System of Zambia, University of London, School of Oriental and African studies Ph.D. Thesis, July, 1994.

3. See tribal and linguistic map in Chapter 2.

4. A.I. Richards, Land, Labour and Diet in Northern Rhodesia, London, Oxford University Press, 1939, p.2; M.Gluckman, The Judicial Process among the Barotse of Northern Rhodesia, Manchester, Manchester University Press, 1955 p.5 and E Colson, Marriage and the Family among the Plateau Tonga of Northern Rhodesia, Manchester, Manchester University Press, 1958, pp.43-44.

5. Africa Order in Council 1889.

6. Barotziland-North-Western Rhodesia Order in Council 1889.

7. North Eastern-Rhodesia Order in Council 1900.

8. Northern Rhodesia Order in Council 1911.

9. Northern Rhodesia Order in Council 1924.

10. Contacts were made for this purpose with the Attorney-General, Minister of Legal Affairs and the Chief Justice, all of whom are personally known to the writer, but in vain.

Part A

The Background to the Zambian Penal System

Chapter 1

Zambia, Its People and Political History

The background to the penal system of Zambia will be divided into five sections. The first deals with the location, size, geography and population of Zambia and the degree of urbanisation in Zambia. In the second section, significant political developments will be outlined. In the third section, a brief constitutional history of the country will be traced. In section four, the constitutional and legal basis of the penal justice system of Zambia will be mentioned. Lastly, the nature of problems hampering the more effective working of the Zambian penal justice system will be mentioned.

A map of Zambia is appended for ease of reference showing it's location in the central African region (inset), neighbouring countries, location and names of provinces and main towns and cities.

Zambia
ANGOLA
ZAIRE
ZIMBABWE
MOZAMBIQUE
TANZANIA
MALAWI
WESTERN
NORTH WESTERN
SOUTHERN
COPPERBELT
CENTRAL
LUSAKA
EASTERN
NORTHERN
LUAPULA
REFERENCE
SCALE 1:4,000,000

I. Location, size, geography, population and urbanisation

Zambia gained its independence from Britain nearly thirty years ago on October 24th 1964. Before independence the country was known as Northern Rhodesia, as distinguished from Southern Rhodesia to the south (now known as Zimbabwe). It is situated in Central Africa and lies on a plateau between 10 degrees and 18 degrees latitude south of the equator. Zambia is a land-locked country surrounded by seven others: Zaire and Tanzania to the north, Malawi and Mozambique to the east, Zimbabwe, Botswana and Namibia to the south and Angola to the west.

By west and central European standards Zambia is a large country; it is about as large as France, Switzerland and Hungary combined,[1] its total area of land and water being 752,614 sq. km.[2]

Zambia is divided into nine administrative Provinces: Lusaka Province, where the capital, Lusaka, is located, Central Province, Copper belt Province, Luapula Province, Northern Province, Eastern Province, Southern Province, Western Province and North-Western Province. There are altogether fifty seven administrative Districts.

The population has more than doubled since independence. In 1963, the year before independence, the total population of the country stood at 3.5 million,[3] in 1969, it had risen to 4.1 million,[4] in 1980, to 5.7 million.[5] In 1993, the population was estimated at 8 million.[6]

Since the 1930s many years before independence copper has always been the predominant foreign exchange earner in Zambia.[7] As a result of the development of the mining industry, Zambia is the most urbanised country in Sub-Saharan Africa[8] even

though urbanisation has a comparatively short history.[9] It may be useful to distinguish urbanisation from industrialisation. A country may be industrialised without necessarily becoming urbanised. Perhaps more significantly, the rate of growth of urban dwellers is not insignificant. Table 1 shows the growth of urban populations expressed as a percentage of the total population of Zambia. The Table covers a period of twenty-five years from 1963 to 1988, inclusive.

Table 1

Urban Population Growth in Zambia, 1963-198 Pop. per '000

Year	Urban	Rural	Total	Percentage of Urban Pop to Total
1963	715	2,775	3,490	20.5
1969	1,192	2,865	4,057	29.4
1971	1,401	2,985	4,386	31.9
1974	1,656	3,039	5,302	38.3
1977	2,033	3,269	5,302	39.0
1980	2,259	3,403	6,725	44.6
1988	3,600	4,200	7,800	46.0

Source: Fourth National Development Plan 1989-1993, p.781.

Table 1 shows that there has been rapid urbanisation in Zambia. In 1963, just before independence, only 20.5% of the population lived in urban areas. Only twenty five-years later, in 1988, the figure had risen to 46.0%. The fuller significance of this rise for the many institutions and individuals who have, or could have, an impact on penal policy-making in Zambia[10] should be grasped.

Since the beginning of the industrial revolution in the eighteenth century in Britain, rapidly rising urbanisation in every country has been associated with rapidly rising crime rates, with the notable exception of Japan. The first point to note is that penal policy- makers in Zambia should realise that the causes of crime in every country which is industrialising, like Zambia, tend to be very complicated and deep-rooted in the economic and social factors underlying policies of the government and that therefore solutions to crime should be equally sophisticated; they should not depend too heavily on simplistic and legalistic approaches. Secondly, since Zambia is the most urbanised country south of the Sahara, the danger of galloping crime rates in the country should be acknowledged and appropriate penal policies worked out and put in place. It is suggested that instead of relying on a "due process" approach to crime management more emphasis should be placed on crime control through prevention and diversion from the criminal justice process. As a poor country Zambia really cannot afford the full cost of meeting all offences "head on" at the expense of investments in more direct economic development. As will be shown (in Chapter 11, the Conclusion) it is unfortunate that urbanisation has been accompanied by rapidly rising crime rates in Zambia. But this need not always be so, as the Japanese experience has shown. The

strength of social values in Japan has so far successfully withstood the impact of rapid industrialisation on crime rates.[11]

Although Zambia is the most urbanised country in Sub-Saharan Africa, the population is sparse and widely distributed. It is concentrated on the line of rail which runs from Livingstone in the south to Chililabombwe on the border with Zaire to the north. But the largest concentration of population is found in two centres: Lusaka and the Copper belt, where in 1989 the population density was forty persons per square kilometre.[12]

II. Significant general national policy developments

A. The philosophy of Zambian Humanism and penal policy

The first important development in government policy in Zambia took place in 1967, just three years after independence, when President Kaunda inaugurated the doctrine of Humanism which he outlined in Humanism in Zambia[13]

> "Humanism in Zambia is a statement of philosophical theory on the meaning of human existence. Man is central. His use as a means to any end...abrogates his humanity. Using Man as a means makes him the object of exploitation and the resulting alienation dehumanises the exploiter as well as the exploited. Thus Humanism in Zambia is a great charter for the Common Man....
>
> So the individual's worth must not be measured by such criteria as efficiency, success, merit or status. Such criteria cannot apply in a humanist context. They set men against and above each other. Humanism, however, seeks to free man from man, to allow him to find his truth as man in community. In humanist terms, common man has nothing to do with rich or poor."[14]

Clearly, Zambian Humanism has strong religious overtones and although Kaunda does not refer specifically to the traditional values of the Zambian people, he strongly suggests that his philosophy is a re-statement of those values. His background as the son of a priest and his experience of imprisonment for his pre-independence political activities[15] pre-dispose him to such views about the centrality of man in God's creation.

The ideals of equality and equal opportunity implicit in Zambian Humanism translated themselves into practical policies in the form of free education up to university level, free medical services etc. But, regrettably, ideas of a kinder and gentler society did not extend to the criminal justice system. The harsh and rigorous criminal justice system left behind by the colonial administration continued as before and in some cases was intensified. Parliament created new criminal offences, many with political overtones, existing sentences were increased significantly and the police adopted more repressive practices against suspects. With particular regard to prisons, although Kaunda wanted prisons to be places for the reform of inmates through the acquisition of new skills and moral values, in fact virtually nothing practical was done to realise the reform ideal set out in his philosophy. Instead, there was wilful neglect on the part of the government so that prison conditions deteriorated.

After ruling Zambia for twenty-seven years, Kaunda was defeated in the election of 1991 when a new government headed by President Chiluba came to power. With Kaunda's departure the philosophy of Zambian Humanism disappeared from the political scene, but to the extent that it sprang from traditional African values of a mutual-support, age-respecting and law-abiding society, Humanism has not

disappeared with Kaunda's electoral defeat. It continues to be the unspoken policy of the new Chiluba government.

B. The one party state and penal policy

The second major development in the general policy orientation of Zambia was the creation of the one-party state in the 1970s. Following the example of many Sub-Saharan African states, Zambia slid into the one-party state within less than a decade of independence. At independence the ruling party was the United National Independence Party (UNIP). Nine years later in 1973 a one party Constitution was enacted, preceded by a special constitutional commission,[16] with UNIP as the sole legal party in the country.

Predictably, Kaunda and UNIP were innovative in their efforts to retain power, but they were less innovative in other fields of national endeavour. For example, after initial improvements education, health and transport services deteriorated significantly especially towards the close of Kaunda's era. The absence of free debate in the country and the consequent onset of inertia made its mark in the field of criminal law generally and in the treatment of offenders in particular. Any improvement which might have been brought about by the relevant and positive pronouncements concerning the general welfare of offenders under Zambian Humanism was stifled by the rigidities of the one party state. The lack of any imaginative penal policies under such a system was made worse by Kaunda's personal background. By African standards President Kaunda was a sensitive leader, but he lacked the education and intellectual prowess of some

other leaders, like President Nyerere of Tanzania. His failure to articulate his views on the nature of man and the creation of a less materialistic and more caring society under his philosophy of Zambian Humanism is sufficient evidence of this.[17]

As head of the party and government Kaunda ought to have made deliberate efforts to translate his ideals of a man-centred society into practice in the field of criminal justice; after all, as a former prisoner himself, he should have appreciated the need for such an exercise. All he needed to do was seek the views of experts both local and international, like the United Nations and the Commonwealth and western governments like that of the United States and Great Britain. Had he done so he would have learnt that it is possible to make the criminal justice system less rigorous by pursuing diversionary penal policies. In particular, he would have discovered, perhaps to his surprise, that the police play a crucial role in making the criminal justice system not only more humane but also more effective by restricting the number of persons who enter the criminal justice system in the first place.

The most distinctive feature of Zambian penal policy and practice within Central and East Africa is the relative absence of innovation. There is little evidence of innovation in the criminal legislation passed by Parliament or the judgements passed by superior courts. The same lack of innovation is evident in the whole approach towards the treatment of offenders. This inertia is partly due to the absence of any genuine debate in the one-party state and partly to the intellectual limitations of President Kaunda. But as will be pointed out shortly, early European influence and the benefits of western civilisation in the Central African and East African regions came comparatively late to Zambia.

III. A brief constitutional history of Zambia

A. The people of Zambia

Zambia was carved into its present shape over a period of more than half a century. In the early colonial period there were two separate territories, each administered by a chartered company. In 1911, the two territories were merged into one which continued under British colonial rule until independence in 1964. As with many other colonial dependencies in Africa, Zambia was an artificial creation of foreign European powers.[18]

Almost all the ancestors of the inhabitants of what is now Zambia migrated into the country from the Luba Kingdom, situated in what is now Southern Zaire, north of Zambia, over periods of time between 1500 and 1850.[19] An ethnic and linguistic map of Zambia is provided in chapter 2. The many ethnic groups (or tribes) had different political systems. Some, like the Bemba and Lozi, were centralised to a marked degree,[20] at the other end of the political organisation spectrum were the acephalous Tonga.[21] All tilled the land and many, like the Ngoni and Lozi, kept cattle and other livestock which was the primary source of wealth in their communities.[22]

As with many other colonial dependencies in Africa, the modern constitutional history of Zambia started in the last century, with the promulgation of the Africa Order in Council, 1889.

B. The Africa Order in Council 1889

By this Order in Council, the British Crown declared that it had the power to administer all those territories which had already come under its control and all those territories which were to fall under British influence in the future.[23] It declared that the general law to be administered in these territories was English law.[24] The Secretary of State was authorised to vest judicial power in consuls and then turn them into consular courts[25]. When prison sentences were imposed, prisoners were to serve their prison terms in any prison directed by the Secretary of State.[26]

Although the Order in Council established colonial administration over African territories under British influence, the administration of justice between Africans was left undisturbed.[27] Yet, as elsewhere in the African colonial dependencies, this formal legislative contact between an imperial power and its subject peoples, or the reception of English law into the dependencies, marked the beginning of the decline of the indigenous customary laws of the subject peoples of Zambia.

C. The British South Africa Company

More direct and firmer administration of what was to become Zambia was undertaken, not by colonial officials appointed from London, but by a chartered company, the British South Africa Company (BSA). Its chief interest, however, was not administration, but business and profit. The moving force behind the creation of BSA was Cecil Rhodes from South Africa.

The Company received its Charter in 1889, after the promulgation of the Africa Order in Council 1889. The geographical limits of the field of operation granted to the Company were left wide open and vague: it lay to the north of what is now South Africa, into what is now Botswana, and to the west, towards what is now Mozambique.[28]

The Charter recognised that the Company wished to enter into agreements with local chiefs not only for commercial reasons, but for the nobler purposes of "promoting civilisation and good government."[29] More specifically, the hope was that:-

> "the condition of the natives inhabiting the said territories will be materially improved and their civilisation advanced, and an organisation established which will tend to the suppression of the slave trade ....and the opening up of the said territories to the migration of Europeans..."[30]

The BSA was specifically authorised to make laws and maintain law and order in the territories under its control,[31] but nothing specific was said in the charter about powers of legislation. Although the territory that was to become Zambia was not mentioned specifically in the Charter, in fact Zambia was included in the Company's field of commercial and other interests.

D. The creation of Barotziland-North-Western Rhodesia, 1889

The first jurisdiction to be created in what is now Zambia was a territory known as Barotziland-North-Western Rhodesia. It was created in 1889[32] under the powers vested in the British government by the Africa Order in Council. As its name clearly implies, it comprised a specially protected tribal area called Barotziland and the north-

western part of present Zambia.[33] The name "Rhodesia" was in honour of Cecil Rhodesia, the prime mover behind the BSA.[34]

Power to administer the territory was vested in the British High Commissioner in South Africa. He was authorised to appoint an Administrator for Barotziland-North-Western Rhodesia[35], nominated by the BSA.[36] This made the Administrator the representative of the Crown in the territory. The first Administrator was Coryndon.[37] The High Commissioner was empowered, inter alia, to legislate for the territory by Proclamation,[38] but the views of the Company had to be taken into account before any legislation was issued.[39] However, the everyday administration of the territory was undertaken by the BSA and not by the High Commissioner in South Africa.

In 1901, twelve years after the establishment of the Barotziland-North-Western Rhodesia in 1889, provision was made to set up a police force.[40] In 1908, the High Court for the territory was established.[41] The legal frame-work for the administration of penal justice in Zambia was being laid.

E. The creation of North-Eastern Rhodesia, 1900

In 1900, one year after the creation of Barotziland-North Western Rhodesia, another territory adjacent to it was defined: it was called North-Eastern Rhodesia.[42] As its name implies, it consisted of the north-eastern part of modern Zambia.[43] As in Barotziland-North-Western Rhodesia, this new territory was administered by BSA, but, unlike in the former territory, the power to administer it, including the administration of justice, was vested more directly in the Company,[44] and in the

Administrator.[45] There was no special protectorate in North Eastern Rhodesia to be nursed by the High Commissioner in South Africa. His role was more supervisory than was the case with regard to Barotziland-North-Western Rhodesia.[46] The first Administrator was Codrington.[47]

Unlike in Barotziland-North-Western Rhodesia, provision for the establishment of a High Court was made in the Order in Council which created North-Eastern Rhodesia.[48] Four years later, in 1904, the High court was established.[49] In 1908, provision was made for the establishment of prisons.[50] Native Commissioners were vested with judicial powers,[51] their courts were the fore-runners of the present Local Courts.

It will be seen that, although both Barotziland-North-Western Rhodesia and North-Eastern Rhodesia were administered by the same authority (BSA), in constitutional terms, these were two separate legal entities. Practical difficulties necessitated the creation of two separate territories: there were severe communication difficulties because the two territories were separated by mountains.[52]

F. Northern Rhodesia, 1911

In 1911, the two territories of Barotziland-North-Western Rhodesia and North-Eastern Rhodesia were merged into one single territory, the protectorate of Northern Rhodesia.[53] The BSA continued to administer the new territory[54] and Wallace was the first Administrator of Northern Rhodesia.[55] With the merger of territory came the merger of constitutions: it was provided, for example, that there was to be only one

High Court[56] and one system of Magistrates' Courts.[57] The reason for the merger was that improved communications between Barotziland-North-Western Rhodesia and North-Eastern Rhodesia had made it desirable for the two territories to be administered by one authority: the railway line from the south of Barotziland-North-Western Rhodesia had reached the north close to the border with North Eastern Rhodesia[58] and it was felt that administering the two territories as one would reduce administrative costs to the Company.[59]

European penetration came from the south from what is now Zimbabwe and from the north-east from what is now Malawi.[60] European influence came to West Africa and East Africa sooner than in Central Africa because these areas have a coast line which made it easier for European traders, explorers and missionaries to reach them.[61] European influence in Zambia came last in the central African region because it lay further in the hinterland than either Malawi or Zimbabwe. This late influence has had a more profound effect on the general development of national institutions than may be supposed.

G. The consequences for Zambia of late contact with European civilisation

The late European penetration into Zambia has meant that some of the benefits brought by colonial rule have taken longer to arrive and take root. Unfortunately, the comparative wealth of Zambia in the Central and East African region does not appear to have been sufficient to reverse the comparative underdevelopment of certain key national institutions and establishments. Of particular relevance was the late

establishment of higher education in Zambia. For example, post-school certificate (now grade twelve) education was not available in Zambia until the late 1940s. Students wishing to proceed to higher education had to go to South Africa, Southern Rhodesia (now Zimbabwe), Nyasaland, Uganda or Britain for their matriculation or "GCE" "A" levels. The first university in Zambia was not established until 1966, two years after independence. Before 1966, Zambians had to go abroad for university education to the University of Rhodesia and Nyasaland in Southern Rhodesia, Makerere University in Uganda, or Britain.[62]

The late establishment of higher education in Zambia has had an equally significant effect on legal education and the general development of the law in the country. As will become apparent later, one of the distinguishing features of Zambia in the Central and East African region is the marked absence of innovation in the whole field of crime and punishment.

H. Northern Rhodesia under direct Colonial Office rule, 1924-1964

In 1924, thirteen years after the amalgamation of Barotziland-North-Western Rhodesia and North-Eastern Rhodesia, the British South Africa Company shed its responsibilities for the administration of Northern Rhodesia. The territory now came under the direct rule of the Colonial Office in London,[63] the local administration being headed by the Governor[64]. The business of administering the country had proved to be more expensive than had been anticipated.[65] Northern Rhodesia remained under direct rule from London for a period of forty years until independence in 1964. Even before

BSA had relinquished control, many significant developments had already taken place in the territory. One in particular is worth mentioning. Contact with the new foreign and much more powerful administration had changed the traditional way of life of the people, although change was more visible in some areas than in others.[66] For example, the status of chiefs in the eyes of their people had diminished.[67]

Between 1924 and independence in 1964, all the important pieces of legislation currently in force in Zambia establishing the framework of the penal system were in place: the Penal Code (1933),[68] the Criminal Procedure Code (1933),[69] the Prisons Ordinance (1947),[70] the Probation of Offenders Ordinance (1953),[71] the Juveniles Ordinance (1956),[72] the Northern Rhodesia Court of Appeal Ordinance (1964),[73] the High Court Ordinance (1961),[74] the Subordinate Courts Ordinance (1933)[75] and the Native Courts Ordinance (1961).[76]

The significance of this 28 year period between 1933 and 1961 and the nature of the enactments should be grasped. Colonialism anywhere is not simply direct foreign rule. Much more significantly, it is the imposition of a foreign culture on existing indigenous ones. Law and law enforcement, particularly penal law, is one of the most effective tools for achieving it. This 28 year period, therefore, marks an important milestone in the cultural orientation of the indigenous people of Zambians, particularly in the field of crime and the treatment of offenders.

Firstly, the new laws emphasised obedience to the law from one central source in society thereby ensuring that the law was obeyed even more. Chanock explains:-

> "Nineteenth-century British jurisprudence emphasised that the law came from the state...; that it was the main means of control in the social order...; that the alternative was anarchy, which was not a good thing. Law was seen to be

> essentially about order and obedience, rather than about the expression of social solidarity....."[77]

Secondly and much more significantly, with the general reception of English law into Zambia and other African dependencies, the new legal and penal system introduced new notions of what is right and wrong through both procedural and substantive laws. A commission of inquiry into the administration of criminal justice in East Africa, for example, made the following pertinent observations about the received law and British justice:-

> "It is the duty of this government to civilise and to maintain peace and good order, and this can only be done by the introduction of British concepts of wrong doing."[78]

Chanock very properly notes that:-

> "In the event criminal law and court procedures generally were Anglicised...African ideas about reconciliation, restitution and compensation were given no official procedural place, nor were African ideas about which offences were most seriously punishable. The result was that colonial courts were, in African eyes, unsatisfactory and alien not simply because they punished severely, which they often did, but because they only punished, when punishment was not seen as the only or best way of proceeding, and because they treated lightly things which were deeply offensive in African eyes."[79]

An obvious area for the divergence of attitudes towards notions of right and wrong is in the personal and private lives of individuals in either society, like marriage and succession. With regard to marriage, European antipathy towards polygamy in African society is legendary as exemplified by the unmistakable attitudes of two judges in two similar post-independence bigamy cases. One case was presided over by a European judge and the other by an African judge.

In The People v Katongo[80] the complaint against the accused, a woman, was that after having married her husband under statutory law she purported to marry another man under African customary law while her first marriage was still subsisting. Mr Justice Care, a European judge, acquitted the accused on the ground that the offence of bigamy under the Penal Code[81] contemplated that both marriages are contracted under statutory law saying:-

> "I consider that section 166 [of the Penal Code] contemplates that both the first and second ceremony of marriage shall be Christian or Western type marriages[82].

As the second "marriage" was a customary law marriage and not a statutory one the accused had not committed any offence known to the law. The clear implication of Mr Justice Care's interpretation of bigamy was that in the eyes of European culture as expressed in the law of bigamy, customary law marriages which permit a multiply of wives are not marriages.

A contrasting attitude of judicial approach to potentially polygamous marriages is found in the later case of The People v Nkhoma[83] presided over by Mr Commissioner Ngulube (now Chief Justice), an African judge. In this case, the accused, a man, had first married under African customary law. He purported to marry another woman under statutory law while the first marriage was still subsisting. He was convicted; unfortunately the sentence does not appear in the report. Early in his judgement his Lordship asked himself the following question:-

> "It had exercised my mind whether it could be argued that since English law does not recognise polygamy, a potentially polygamous customary first marriage could...not be recognised as a valid subsisting marriage for the purpose of the law relating to the offence of bigamy.[84]

Answering his own question, Mr Commissioner Ngulube said:-

> "In my view, a customary marriage is equally a valid marriage for purposes of considering a second 'Marriage Act' marriage as bigamous.[85]

His obiter comments on differences in the attitudes to polygamy between African and European societies are more illuminating. In one passage he noted:-

> "A villager in some remote part of Zambia may be astonished to hear that a Zambian man was punished for marrying two women...."[86]

In another passage he made the following equally pertinent remarks:-

> "The offence of bigamy is one example of certain laws which are sometimes totally strange once transported from England to Zambia and once they are applied to indigenous Zambians."[87]

In addition to differences towards polygamy and bigamy between Europeans and Africans, there are other marked differences over inter alia homicide and witchcraft as will be seen later in chapter 3. A more dramatic impact of the new legal order on the notion of right and wrong in modern Zambian society can be found in the spectacle of lynch mobs, normally against suspected petty thieves, found in all major urban centres of Zambia.[88] In the past instant justice brigades against suspected witches were positively encouraged because of the outrage which witchcraft invariably aroused in the community.[89] The modern lynch mobs, condemned by the media[90] and law enforcement agencies alike, may be a survivor of the instant justice brigades of traditional society.[91]

While the lesson to be drawn from all this is an obvious one: that the law in any society should be in resonance with the culture of the people, the reception of English

law in Zambia, as elsewhere in former African dependencies, raises the more general but critical issue of law reform in Africa which can be split into at least three parts. The first relates to the ascertainment and re-statement of the current customary law as the general public sees it over a variety of matters including court procedures, evidence and the general sentencing approach. The second and related issue is one of resources: whether Zambia has the resources to undertake meaningful law reform projects involving extensive field-work throughout the country. The third issue which arises from law reform may sound absurd on the face of it: whether it is really necessary to engage in wholesale law reform in the field of penal law and other laws so that they fit current moods of popular opinion or whether reform should be selective and piecemeal.

I. The Federation of Rhodesia and Nyasaland, 1953-1963

During the 1920s, white settlers in Northern Rhodesia, Southern Rhodesia (now Zimbabwe) and Nyasaland (now Malawi) were calling for the amalgamation of the three territories into one.[92] The calls were prompted by the settlers' desire for self-government in their own hands, which they hoped would herald a better economic future for themselves.[93] But as the pressure for amalgamation increased, African political leaders in Northern Rhodesia and Nyasaland resisted, seeing no political or economic advantages for Africans in the proposed arrangement.[94] However, Africans in Southern Rhodesia were less antagonistic to amalgamation; having been subjected to colonial rule over a longer period of time than Africans in the other two territories,

they had learnt to live with oppression.[95] But against the strong opposition of the vast majority of Africans, Northern Rhodesia, Southern Rhodesia and Nyasaland were brought together in the Federation of Rhodesia and Nyasaland in 1953.[96]

In the new federal constitution concurrent and federal legislative lists were drawn up.[97] Prisons were included on the concurrent list.[98] A Federal Supreme Court was established in 1955.[99]

The creation of the Federation only served to increase the suspicion of African nationalists about the true purposes of the Federation. Consequently, pressure for independence under majority rule in Northern Rhodesia and Nyasaland finally forced the British Government to agree to the break-up of the Federation in 1963,[100] disbanding the Supreme Court and other Federal organs. But despite the fact that this court was associated with racism and colonialism during the fight for independence, in retrospect, the independent Government of Zambia looked favourably on some aspects of the federal experiment, in particular the high quality of the composition and impartiality of the Federal Supreme Court.[101] Its judgements continue to be respected up to the present time; they provide an element of thoroughness not always detectable in the judgements of the Supreme Court of Zambia which has succeeded it.

J. Towards independence and the attainment of independence, 1964

After the end of the Federation, and as Northern Rhodesia was approaching independence, and following constitutional conferences, a new Constitution was enacted by Order in Council. It established the main organs of state including a Court

of Appeal.[102] Independence was attained on 24th October, 1964. The independence Constitution provided for appeals to the Privy Council to continue,[103] but in 1973, the procedurally autochthonous Constitution of 1973, which established the one-party state, created a new court of appeal called the Supreme Court of Zambia which was declared to be the final court of appeal for the country.[104] The abandonment of the Privy Council as the final court of appeal for Zambia was politically understandable but its decisions continue to enjoy much respect in the Zambian courts. Chart 1 illustrates the constitutional history of Zambia from 1889 to 1964.

Chart 1

A Constitutional History of Zambia, 1889-1964

1889

↓

Barotziland-North-Western Rhodesia under BSA.

1900

↓

North-Eastern Rhodesia under BSA.

1911

↓

Barotziland-North-Western Rhodesia and North-Eastern Rhodesia merge into Northern Rhodesia under BSA.

↓

1924

↓

Northern Rhodesia comes under direct rule from the Colonial Office in London.

↓

1953-1963

↓

Northern Rhodesia in the Federation of Rhodesia and Nyasaland

↓

1964

Independence

IV. The constitutional and legal background of the Zambia penal system

As in many other former British dependencies, the penal justice system of Zambia is based partly on the Constitution, the supreme law in the country, and partly on ordinary legislation. The establishment of the judiciary is in the Constitution:-

> "(1) The judicature of the Republic shall consist of:
> (a) the Supreme Court of Zambia;
> (b) the High Court of Zambia; and
> (c) such other courts as may be prescribed by an Act of Parliament."[105]

Zambia has a Director of Public Prosecutions and like the judiciary is also a creature of the Constitution.

> "There shall be a Director of Public Prosecutions and who shall, subject to ratification by the National Assembly, be appointed by the President."[106]

In any jurisdiction the police and the Zambia prison service are very much an integral part of the penal system. But their establishment if found in ordinary legislation.[107] In view of their obvious significance in the administration of criminal justice, it is anomalous that neither the Inspector-General of Police nor the Commissioner of Prisons appears in the main body of the Constitution along with the Chief Justice and Director of Public Prosecutions.

Like many other former British African dependencies, Zambia has a chapter on fundamental human rights, including the right to a fair trial:-

> "If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."[108]

But while the Constitution concerns itself with ensuring that accused persons get a fair trial, it is remarkable that it is not at all concerned with thorough and fair police investigations conducted as humanely as possible. It should be realised that injustice, both against the state and suspected persons, is committed by the police when guilty persons are not brought to court and innocent persons are needlessly inconvenienced because, for example, the police are under-manned and ill-equipped to carry out proper investigations in individual cases. There is, therefore, a sense in which the protection of the law which the Constitution seeks to guarantee accused persons is seriously undermined by the silence in the same Constitution about the duties of the police generally and the rights of suspects when in police custody in particular.

V. Some problems in the administration of the Zambian penal justice

Like the rest of the developing countries in Africa, Zambia suffers from a constant shortage of national resources. In the field of crime and punishment this has made the administration of justice difficult. There is constant shortage of trained judicial officers, the police and prison officers. Apart from these shortages, the extensive constitutional and legislative powers given to President Kaunda in Zambia, as elsewhere in Africa, permitted him sometimes to abuse the criminal justice process. Such abuses cannot be ruled out even in the new post-Kaunda democratic politics of Zambia. Kaunda used preventive detention legislation[109] to detain his political opponents when they could easily have been dealt with by the normal criminal justice process.

In the civil case of In the Matter of Kapwepwe and In the Matter of Kaenga and An Application for a Writ of Habeas Corpus and (sic) Subjiciendum,[110] Kaunda detained his main political opponent, Kapwepwe. One of the grounds for detention was that he had conspired to commit criminal acts in the country. It was contended in the Court of Appeal that Kaunda had improperly exercised his discretion because Kapwepwe could easily have been prosecuted in the ordinary courts of the land. The court stressed the precautionary nature of preventive detention legislation and held that the President was not precluded from detaining any individual who is also suspected of committing a criminal offence.[111] In a similar but later case of In the Matter of Buitendag and In the Matter of an Application for a Writ of Habeas Corpus ad Subjiciendum,[112] the abuse of presidential power is more stark. In this case the applicant had been charged with offences under the state security legislation but

acquitted. Nonetheless, President Kaunda detained him. The grounds for detention were based on the facts which formed the basis of the criminal charges for which the applicant was acquitted. As in the Kapwepwe case above the application was rejected on similar grounds.[113]

Unfortunately, the extent of the abuse of the criminal justice process by President Kaunda is difficult to ascertain because the government did not gazette lists of all presidential detainees for any year. Nevertheless, the quality of the abuse, as opposed to the numbers involved, cannot be denied.

Conclusion

Two factors stand out about the constitutional and political history of Zambia: late European influence and consequent late development of Zambia and the unenlightened leadership of President Kaunda. Together they have led to sluggish developments in the field of crime and punishment. As will be apparent in later chapters penal policies, laws and practices left behind by the departing colonial administration have remained largely unchanged. The prison system is a good example (Chapters 9 and 10). Enlightened post-independence sentences, such as extra-mural employment and week-end imprisonment (Chapter 6), have been neglected by the courts.

Lack of innovation has extended to the courts as has just been pointed out, particularly in the ambivalent attitude of the Zambian judiciary towards the English judicial decisions. Paradoxically, even though the judicial links remain severed, the Zambian courts have continued to look to English court decisions. Despite political

independence in 1964, English decisions are held in such high esteem that they are for all practical purposes binding on the Zambian judiciary. Court decisions from other African jurisdictions have virtually been ignored. Yet the culture and political history of Zambia is much closer to central, eastern and west African countries than that of Britain. In neighbouring jurisdictions of Zimbabwe and Namibia, for example, land-mark judgements on corporal punishment have been pronounced but Zambia appears to have taken little notice of these developments. It appears that the historical and constitutional ties with Britain have so far been much stronger, certainly in the field of crime and punishment, than the geographical and cultural ties with neighbouring African jurisdictions; this is unfortunate.

Chapter 1

Notes

1. Zambia: Travel and Holiday Guide, London, Zambia High Commission. 1994.

2. Some Facts about Zambia, London, Zambia High Commission, 1994, p.1.

3. Fourth National Development Plan 1989-1993, Lusaka, Republic of Zambia, Jan., 1989, p.52.

4. Ibid.

5. Ibid.

6. Some Facts about Zambia, Loc. Cit.

7. The Economic Intelligence Unit, 1992-93 "Zambia", where it says that "foreign exchange earnings depend almost entirely on copper...", p.37, accounting, in 1990, for 84.76% of total earnings, see The Economic Intelligence Unit, No.2 1990, "Zambia" Appendix 2.

8. Fourth National Development Plan 1989-1993, Op. Cit., p.54.

9. Ibid.

10. For a list of the institutions and public officers making an impact on penal policy making in England, see Penal Policy Making in England, University of Cambridge Institute of Criminology, Papers presented to the Cropwood Round-Table Congress. Parliament, judges, the media etc. are identified. With regard to Zambia, the list should include those institutions which may not at the moment but which have the great potential of having an impact on penal policy making: The United Nations, the Commonwealth Secretariat, the special United Nations African Institute for the Prevention of Crime and Treatment of Offenders (UNAFRI), the universities, the Law Development Commission and the proposed Zambia Institute of Criminology.

11. C.B.Backer, "Social Control of Crime in Japan", Police Journal, Vl.LVI, 1983, pp.269-275; and by the same author, "Report from Japan: Causes and Controls of Crime in Japan", Journal of Criminal Justice, Vol.16, No.1, pp.425-435.

12. Fourth National Development Plan, Loc. Cit.

13. Gvt. Printer, Lusaka, 1968. But this was not an isolated venture of a philosophical kind in the region. A little earlier in Tanzania there was "Ujamaa" and in Uganda under the first Obote regime there was "The Peoples' Charter".

14. K.D.Kaunda, Humanism in Zambia, Lusaka, Gvt. Printer, 1968, p.1

15. Ibid, Zambia Shall be Free, London, Heinemann Educational, 1962, Chapter 15.

16. No.1 of 1991.

17. See P.A. Mwaipaya, the only Zambian who had the courage to criticise openly and directly Kaunda's Zambian Humanism in his book African Humanism and National Development, Washington D.C., University Press of America, 1981, et al., esp., pp.43-44.

18. With the notable exception of Ethiopia, although it was invaded by Italy in the 1930s. Ethiopia has never been colonised.

19. P.Nag, Population, Settlement and Development in Zambia, New Dehli, Concept Publishing Company, 1989, p.18. Also see R.Hall, Zambia, London Pall Mall Press Ltd., 1965, pp.14-33. But he also says that unlike the rest of the tribes of Zambia, Tonga and Ila came from the north-east of Zambia, see p.14. He produces a map showing the routes by which the main tribes migrated into Zambia and the approximate year when they did so, see p.12.

20 C.Gouldsbury and H.Sheane, The Great Plateau of Northern Rhodesia, London, Edward Arnold, 1911, p.16: regarding the Lozi, see M. Gluckman, The Judicial Process among the Barotse of Northern Rhodesia, Manchester, Manchester University Press, 1955, pp.1-2.

21. E.Colson, The Plateau Tonga, Manchester, Manchester University Press, 1962, pp.102-103.

22. W.Watson, Tribal cohesion in a Money Economy, Manchester, Manchester University Press, 1958, pp.20-21; with regard to cattle-keeping, see E.Colson, The Plateau Tonga, Manchester, Manchester University Press, 1962, p.122.

23. Africa Order in Council 1889, see Preamble.

24. Ibid., S.13.

25. Ibid., S.19.

26. Ibid., S.72.

27. Ibid. See S.12 which deals with the administration of justice in which Africans were excluded; S.3 defines "British subject" and "Native". Hannah says that the British Government itself did not regard the Africa Order in Council as authorising the colonial judicial officer to administer justice in cases involving Africans, see A.J.Hannah, Nyasaland and North Eastern Rhodesia, Oxford, Clarendon Press, 1936, p.202.

28. A.Speight (ed.), The Charter, reprinted in the "Statute Law of Southern Rhodesia from the Charter to 31st December, 1910", see second para. of the Preamble, p.1.

29. Ibid., see second para. of the Preamble, p.1. Administrative and political concerns are in para.3.

30. Ibid., see third para. of the Preamble.

31. Ibid., see fourth para. of the Preamble.

32. Barotziland-North-Western Rhodesia Order in Council 1889

33. Ibid., S.5.

34. The name "Rhodesia" was adopted in 1885, see A.J.Hannah, The Story of Rhodesias and Nyasaland, London, Faber and Faber, 1960, p.137.

35. Barotziland-North-Western Rhodesia Order in Council 1889, S.6.

36. Ibid., S,7.

37. A.J.Hannah, The Story of Rhodesias and Nyasaland, London, Faber and Faber, 1960, p.162.

38. Barotziland-North-Western Order in Council 1889, S.8.

39. Ibid., see proviso.

40. Proclamation No.19 of 1901, S.1.

41. Proclamation No.6 of 1906, S.1. A year earlier in 1905, a special superior court to cater for the special protectorate of Barotziland was established. It was called the Administrator's Court comprising of the Administrator and two magistrates, see Proclamation No.6 of 1905, S.3(1).

42. The North-Eastern Rhodesia Order in Council 1900.

43. Ibid., S.4.

44. Ibid., S.7. The power to administer justice is in S.16.

45. Ibid., S.8.

46. Ibid., S.16. All legislation had to be approved by the High Commissioner in South Africa.

47. A.J.Hannah, Op. Cit., p.60.

48. The North-Eastern Rhodesia Order in Council 1900, S.21(1).

49. High Court Regulations, No.4 of 1904, S.2. Magistrates Courts were also established in the same year, 1904. Provision was made for their establishment in the North Eastern Rhodesia Order in Council 1900, see S.29.

50. The Prisons Regulations, 1908, S.2.

51. Native Commissioners' Regulations 1908, S.6.

52. A.Wills, History of Central Africa, 2nd. ed., London, Oxford University Press, 1967, p.210.

53. Northern Rhodesia Order in Council 1911, S.4.

54. Ibid., S.7.

55. A.Wills, Introduction to History of Central Africa, 4th. ed., London, Oxford University Press, 1983, p.211.

56. Northern Rhodesia Order In Council 1911, S.21(1).

57. Ibid., S.29.

58. A.Wills, Loc. Cit.

59. A.J.Hannah Op. Cit., p.243.

60. A.Willis, Op. Cit., p.130.

61. W.E.F. Ward and L.W.White, East Africa, London, George Allen & Unwin Ltd., 1971, pp.1-6.

62. As telling proof of the late establishment of higher education in general and legal education in particular, the first African university graduate, Mr John Mwanakatwe, is still alive in his 60s; and the first African lawyer, Mr Mainza Chona, is also still alive.

63. Northern Rhodesia Order in Council 1911, S.3.

64. Ibid., S.12.

65. L.Gann, The History of Northern Rhodesia, New York, Humanities Press, 1969, pp.181-182.

66. R.Hall, Zambia, London, Longman Group Limited, 1965, p.43.

67. Ibid., pp.43-44.

68. Penal Code Ordinance, 1930, No.42 of 1930, now called simply the "Penal Code", Cap.146. For an account of how Penal Codes and Criminal Procedure Codes were

introduced in British colonial dependencies, including Northern Rhodesia, see H.F.Morris, "A History of the Adoption of Codes of Criminal Law and Procedure in British Colonial Africa", J.A.L., Vol.18, 1974, p.67.

69. Criminal Procedure Code Ordinance 1933, No.23 of 1933, now called simply the "Criminal Procedure Code", Cap. 160.

70. The Prisons Ordinance 1947, No.2 of 1947, now called the "Prisons Act", Cap.134.

71. Probation of Offenders Ordinance 1953, No.19 of 1953, now called the "Probation of Offenders Act", Cap.147.

72. The Juveniles Ordinance 1956, No.4 of 1956, now called the "Juveniles Act", Cap.217.

73. Northern Rhodesia Court of Appeal, S.I.1964/1652, S.97, a British S.I.

74. The High Court Ordinance 1960, No.22 of 1960, now called the "High Court Act", Cap.50.

75. Subordinate Courts Ordinance 1933, No.36 of 1933, now called the "Subordinate Courts Act", Cap.45.

76. Native Courts Ordinance 1961, No.14 of 1961, now called the "Local Courts Act", Cap.54.

77. M.Chanock, Law, Custom and Social Order, London, Cambridge University Press, 1985, p.219

78. Report of the Commission of Inquiry into the Administration of Justice in Kenya, Uganda and the Tanganyika Territory in Criminal Matters, London, HMSO, Cmd.4623, 1934, para.162, p.57.

79. M.Chanock, Op. Cit., p.50.

80. (1974) Z.R. 290.

81. Cap.146, S.166.

82. (1974) Z.R. 290, at p.294.

83. (1978) Z.R. 4.

84. Ibid., at p.6.

85. Ibid.

86. Ibid., at p.8.

87. Ibid., at p.5

88. For example, see Times of Zambia, 16th Nov., 1985, p.5, showing a picture of a lynch mob in Ndola beating up a suspected thief.

89. F.Coillard, On the Threshold of Central Africa, London, Hodder and Stoughton, 1897, pp.282-283.

90. Times of Zambia, Op Cit., p.1.

91. For possible reasons for the formation of lynch mobs in Zambia, see J.Hatchard, "Crime and Penal Policy in Zambia", The Journal of Modern African Studies, 23, 3, (1985), pp.449-501. He says the modern lynch mob is an abuse of the traditional idea of self help, an exasperation with lenient sentences and a reaction to great disparities in the distribution of wealth in Zambia. The last reason is unconvincing because lynch mobs are usually targeted against petty thieves and not the rich who need not indulge in petty theft.

92. A.J.Hannah, Op. Cit., pp.244-245.

93. Ibid., pp.244-246.

94. L.Gann, Op. Cit., p.407.

95. A.Willis, Op. Cit., p.326.

96. The Federation of Rhodesia and Nyasaland (Constitution) Order in Council, S.I.1953, No.1199, S.1(1).

97. Ibid., see Second Schedule to the Constitution.

98. Ibid., see Second Schedule Part II.

99. Federal Supreme Court Act 1955, No.11 of 1955, S.3. For provision authorising the establishment of the Federal Supreme Court, see The Federation of Rhodesia and Nyasaland (Constitution) Order in Council, S.I.1953, No.1199, S.46(1).

100. The Federation of Rhodesia and Nyasaland (Dissolution) Order in Council, S.I.1963/2085, S.1.

101. National Assembly Debates, 1964, p.782.

102. S.I.1964/1652, S.97.

103. Ibid., if the President so declares. But it has proved very difficult to ascertain whether the President ever made such a declaration.

104. Constitution of Zambia Act 1973, No.27 of 1973, Article 107(1).

105. Constitution of Zambia, No.1 of 1991, Article 91.

106. Ibid., Article 56(1).

107. Zambia Police Act, Cap.133 and Prisons Act, Cap.134.

108. Constitution of Zambia, No.1 of 1991, Article 18(1).

109. See The Preservation of Security Regulations, Cap.106, S.33(1).

110. (1972) Z.R. 248.

111. Ibid., at p.255.

112. (1974) Z.R. 150

113. Ibid., at p.154. Also see the latest case of Bhagvatilal Dahyabhai Rao v Attorney General [1989] LRC (Const), p.527, in which the applicant had been detained for economic crimes involving emeralds and prayed for Habeas Corpus. One of the issues before the Supreme Court was whether the alleged commission of economic crimes came within the perview of public security. In line with the previous position taken by the courts, the Supreme Court held against the applicant. But interestingly, Bweupe AJS dissented, see pp.578-585, especially on p.585. This case was decided in 1989 when Zambia was one-party state. If this case arose in the present democratic atmosphere of multi-party politics, the Supreme Court would adopt Judge Bweupe's line.

Chapter 2.

Crime and Punishment in Traditional Society.

Introduction.

The common and lasting experience of most colonised peoples everywhere, including Zambia, is the general destruction of their indigenous cultures and way of life.

Read identifies seven distinct agencies of social change that have been moulding the lives of African people since the onset of colonialism. They range from colonialism and its new legal order, to the impact which researchers into customary law invariably exert on the specific customary law under study.[1] Other factors include foreign religions, trade, education, the new and general policies of post-independence governments and finally miscellaneous other agencies. Read estimates that a mere 20% of pre-colonial legal ideas remain today.[2] If Read is right in his estimation this small proportion represents indigenous Zambian legal ideas today. But, as will be argued later, this does not necessarily mean that indigenous legal ideas are about to be extinguished. There is always an underlying tension between the received law and the customary law of the people.Although traditional processes for administering justice are fast disappearing under the weight of the ever-advancing industrialisation and commerce, it is nevertheless imperative to explore traditional African themes and practices relating to crime and punishment which have disappeared as well as those that have survived up to the present time. At least two reasons can be offered for such

an exercise. The first and most important is given by Milner. Writing on Nigerian society, and referring specifically to customary criminal law, Milner notes that:-

> "there may be much in the ideas of customary law that is admirable and that could be copied by the modern penal system. These ideas do, after all, reflect basic ideas and, though developed to meet the needs of communities far removed in nature from those of today's cities, they may on examination give some guidance in the direction of sound penal policy."[3]

Writing specifically on Zambia, Clifford alludes to the same theme when he says:-

> "In Northern Rhodesia the inroads of Christianity have doubtless modified [the general] outlook but social habit is difficult to break in a short period of 60 years [referring to the duration of colonial rule] or so and we may expect that the background to thought and behaviour will be transmitted through the generations."[4]

A study of crime and punishment in tribal communities might also reveal the kind of expectations which the people had in the past when a dispute was being settled for possible incorporation into the modern criminal justice system of Zambia.

The second reason for exploring crime and punishment in traditional society is that many of the basic social structures which produced the traditional criminal justice systems are still in place today especially in the rural areas of Zambia. This makes the study even more relevant: the ideas, expectations and practices of the pre-industrial communities in Zambia in the field of crime and punishment continue to exist in Zambia up to the present time. As noted above, even though the country is one of the most urbanised countries in Africa, about one half of the people continue to live a traditional existence in the rural areas. Patterns of dispute settlement have not changed beyond recognition.

The most fruitful way of finding out what ideas, expectations and practices in pre-literate communities can be incorporated into the modern Zambian criminal justice system is by discovering how these communities achieved social control in general and how they dealt with wrong-doers in particular. In Zambia today, the Penal Code[5] and other legislation, the police, the courts, prisons and other penal establishments are tools for achieving social control and dealing with wrongdoers. Lacking these visible and prominent tools, traditional societies had their own but equally effective ways of achieving similar results.

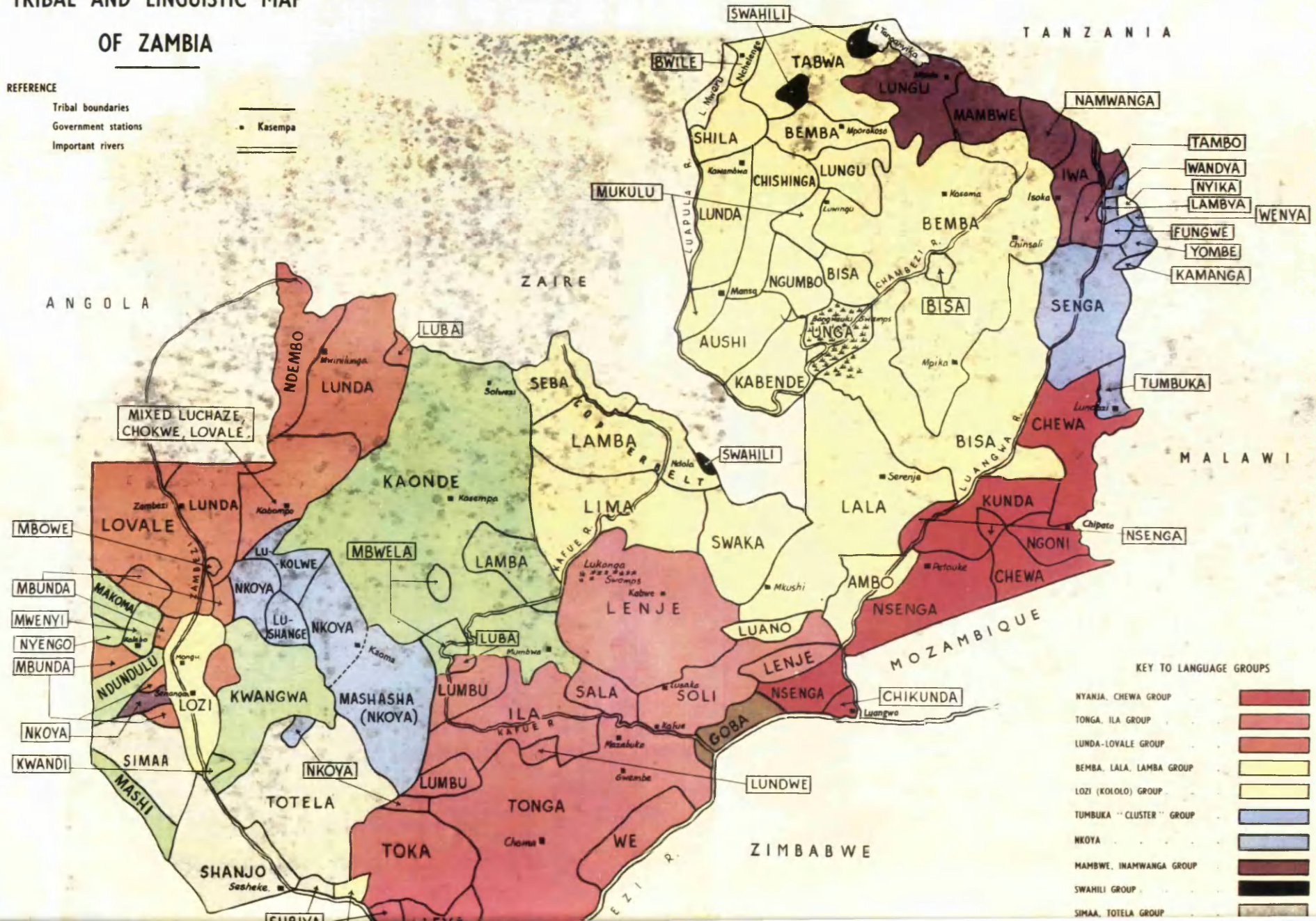
This chapter, therefore, begins with an examination of the nature of traditional society in Zambia and the kinds of pressure which were brought to bear upon it. It then proceeds to discuss notions of crime and punishment in traditional African society, and ends with a consideration of the lessons which can be drawn from the traditional systems.

I. The nature of traditional African societies.

For a proper understanding of the nature of indigenous communities in Zambia the topic is split into two sections. The first section outlines the political organisation of traditional African societies; and the second concentrates on their social organisation. A tribal and linguistic map of Zambia is provided for ease of reference.

Source: Govt Printer, Lusaka

TRIBAL AND LINGUISTIC MAP OF ZAMBIA



There are some 73 ethnic groups in Zambia, as the map shows, not all of which have been the subject of published or even unpublished research. Writers have tended to concentrate on the larger tribes, like the Bemba, Lunda, Tonga, Ila, Kaonde, Lamba, Cewa and Lozi. Explorations into tribal communities have been approached largely from an anthropological, rather than a legal viewpoint. However, although many of the different communities are unrepresented in the literature, the main features of their general outlook and customs are very similar.[6] This is not surprising because the bulk of the tribes inhabiting Zambia today all came from Luba kingdom situated in the present south of Zaire. Zambian communities were conservative, age-respecting societies in which individuals were deferential towards all authority. Unlike in western societies, dispute management was characterised by reconciliation and compensation rather than confrontation and punitive sanctions.

A. Political organisation in traditional African society.

The political organisation of traditional African society can broadly be divided into two types. The first consists of those societies with a visible centralised government, the other consists of segmentary societies without a central authority. The distinction is aptly described by Fortes and Evans-Pritchard as follows:-

> "One group, which we shall refer to as Group A, consists of those societies which have centralised authority, administrative machinery, and judicial institutions-in short, a government-and in which cleavages of wealth, privileges, and status correspond to the distribution of power and authority. This group comprises of [a number of tribes and] the Bemba [of Zambia]. The other group, which we shall refer as Group B, consist of those societies which lack centralised authority, administrative machinery, and constituted judicial institutions-in short which lack government-and in which there are no sharp divisions of rank, status, or wealth...Those who consider that a state should be

> defined by the presence of government institutions will regard the first group as primitive states and the second as stateless societies."[7]

In Zambia, typical examples of group A societies are the Bemba inhabiting northern Zambia and the Lozi of the western part of the country. Richards lists the leadership positions in the Bemba tribe after Paramount Chief Chitimukulu as follows:-

> "(a) territorial rulers (chiefs and headmen);
> (b) administrative officers and councillors;
> (c) priests, guardians of sacred shrines, and magic specialists with economic functions;
> (d) army leaders in the old days."[8]

The Lozi have been ruled by a king called the Litunga for about two hundred years. As a measure of his power, he ruled over a kingdom consisting of 25 tribes,[9] and as a measure of the high degree of centralisation of his government, he exercised power roughly equivalent of a British Prime Minister when monarchs had more political power.[10] His council had an elaborate array of groups of councillors each with its own particular function and power, the more powerful sitting on the right hand side of the throne and the less powerful sitting on the left hand side.[11]

Of Zambian societies in group B, the Tonga, who inhabit the Southern Province, were the least centralised. The colonial government had to create headmen and chiefs to help them in the task of administration. But Colson says:-

> "The authority of the headmen...is largely nominal and depends upon his personal qualities."[12]

Regarding the position of chiefs, she says:-

> "the Tonga view their chiefs not as hereditary representatives of their community but as government appointments. They call them 'government chiefs'. They treat such men with no particular reverence."[13]

The differences in the political organisation between centralised polities and acephalous societies has had a marked impact on three areas of customary law and practice. First and predictably, there was a marked difference toward offences against authority. Lacking any visible centralised political organisation, acephalous societies could have no notion of the offences of treason or sedition. But in chiefly societies offences against tribal authority were recognised. Mwansa explains:-

> "offences against tribal authority involved disobedience to the chief or headman, The chief and his sub-chief had a general right to allegiance and total obedience."[14]

Among the Lunda inhabiting northern Zambia, for instance, the notion of treason was wider than the one under the received law and efforts to deal with it were very firm. Cunnison says:-

> "the real crime against the state was slander of the king of the Lunda, or treasonable talk. Kazembe [the king] made sure of making his kapole palace servants into spies, called ntalamenso. They were sent out to parts of the country where reports of bad talk had been received. They made no secret of their presence, and even had a special dress, a form of trousers."[15]

Differences between acephalous and centralised societies showed themselves more markedly in dispute resolution mechanisms. Again predictably, stateless societies did not have permanent buildings as court-houses, or specially constituted arenas commonly known in many Zambian tribes as nsaka. In fact, court-houses as we now know them were unknown and had no jural significance to the acephalous Tonga. Colson says that "There were no courts...".[16] When Native Courts (after independence in 1966 called Local Courts) were first introduced towards the end of the 1920s, among the Tonga Colson observed that:-

> "The people....are not convinced that the court is the final authority...The authority of the court is also questioned in other ways. Some men will accept judgement in court itself and refuse to pay once they have returned home. Others refuse to accept judgement and drag their cases from court to court. Any hierarchy of justice, or jurisdiction, is foreign to their ingrained social system."[17]

In fact dispute settlement is undertaken by elders in the community. Colson says:-

> "Disputes had to be settled peacefully by elders in the community."[18]

In a perhaps more telling passage she notes that:-

> "the people of a village frequently turn to their village headman for advice. They may get him to arbitrate in disputes and only if he fails will they take the matter to a court."[19] (emphasis supplied).

In chiefly societies, on the other hand, all the major features of a modern state were present, including police forces. Among the Lunda, for instance, Cunnison says:-

> "Kazembe [the king]...had his constables (fikola) who would break up fights in the capital and bring disturbers of the peace to account for themselves. The governors may also have had.... constables."[20]

Ambo chiefs also had similar officers.[21]

Chiefly societies were better known for their association with the establishment of visible court-houses, particular court sitting arrangements and court etiquette. Perhaps the most elaborate were found among the Lozi. Describing the court-houses of senior royalty, Gluckman says:-

> "The court-houses, particularly the one at Lealui, are imposing buildings. In the centre at the back is a dais on which the king or ruling members of the royal family sits if he (or she) is present.[22]

There were normally no court-houses for use by village head-men. Instead, cases were normally heard in one particular place in the village, or in front of the village head-man's hut.[23] Even though chiefly societies had courts, this does not mean that arbitration and reconciliation were unknown. Arbitration and reconciliation featured prominently in dispute settlement in such societies.

While court-houses were probably the most visible example of legal systems in societies with strong central government, social anthropologists discerned something more. They saw the summoning of force as the most significant feature distinguishing chiefly from acephalous societies. Fortes and Evans-Pritchard explain:-

> "In our judgement, the most significant characteristic distinguishing the centralised, pyramidal, state-like forms of the.....Bemba etc., from the segmentary political systems of the Nuer [etc.] is the incidence and function of organised force in the system. In the former group [A] of societies, the principal sanction of a ruler's rights and prerogatives, and the authority exercised by his subordinate chiefs, is the command of organised force....The king and his delegates and advisers use organised force with the consent of their subjects to keep going a political system which the latter take for granted as the foundation of their social order. In societies of Group [B] there is no association, class, or segment which has a dominant place in the political structure through the command of greater organised force than is at the disposal of any of its congeners. If force is resorted to in a dispute between segments it will be met with equal force...In such a system, stability is maintained by an equilibrium at every line of cleavage and every point of divergent interests in the social structure...Whereas a constituted judicial machinery is possible and is always found in societies in Group A, since it has the backing of organised force, the jural institutions of the...Nuer rest on the right of self help."[24]

Among the acephalous Tonga, Colson notes that:-

> "There were no courts, chiefs, or disinterested parties with authority to judge claims and enforce decisions. The feud was the real sanction. Enforcement of claims ultimately rested on the solidarity of small groups of matrilineal kinsmen who would resort to force to protect their members' rights or to avenge their wrongs."[25]

Chiefly societies on the other hand had executive officers to execute court judgements and to enforce the chief's will. Writing on the chiefly Lamba tribe inhabiting the Copperbelt Province in the north of Zambia, Doke says that when mutilation was the court order, Lamba chiefs:-

> "would call a strong ichilolo [senior palace guard] to bind the accused and carry out the sentence forthwith."[26]

Regarding obedience to the chief's orders, Stefaniszyn says that among the Ambo inhabiting parts of the Eastern and Central Provinces of Zambia:-

> "Each Ambo chief had a right hand man variously called kaula or chilolo a kind of chief herald who was sent to execute the chief's orders."[27]

B. Social organisation in traditional African society.

1. The effects of the material culture and economic conditions of the people.

Tribal peoples lived a subsistence life off the land. Their material possessions consisted of the bare essentials. Among the Bemba, for example, a man had an axe, a hoe, a spear and an arrow.[28] Lozi possessions included fishing spears.[29] Pre-industrial communities of Zambia also made ornamental articles. The Lozi, for example, made baskets, mats and carvings.[30] As at present, the people lived in perishable huts made of pole and mud and thatched with grass.

Where cattle were kept, economic activity was centred around them. The Tonga, for example, had arrangements whereby cattle were distributed among fellow cattle-owners as an insurance against the risks of diseases, drought and creditors.[31]

This material deprivation had an unmistakable effect on the margins of survival of tribal peoples. Gluckman aptly summarises their fate:-

> "tribal society seems to be more exposed to the hazards of life than we [Europeans] are. The infant mortality rate is normally high and the expectation of life even for those who survive infancy is relatively short. Illnesses are frequent. Correspondingly, medical techniques are inadequate. The margin of security in productive farming is low. Drought, crop-blight, cattle disease, overturning of simple craft, all threaten supplies. Methods of storing and transporting food are poor."[32]

Such a precarious everyday existence generated in the tribesman two particular outlooks upon life generally which had a profound effect on the whole question of social control in the society. Both are again articulated by Gluckman. He explains:-

> "Since tribal peoples were faced with these hazards and have only a relatively simple technology to deal with them, it is clearly understandable that they should attempt to control chance and misfortune by invalid, but anxiety relieving, magical techniques and appeals to spirits."[33]

Gluckman here is emphasising that tribal society was preoccupied by the psychic and spiritual world.

Secondly, a precarious everyday existence led tribal society to generate tight kinship systems which were much wider in range than those in Western societies of today. Gluckman says that to maximise the chances of survival, individuals in pre-industrial communities tended to engage in economic co-operation:-

> "It is ...in this economic situation we...seek the 'origins' of the widely extended system of kinship relationship which is characteristic of primitive tribes...."[34]

This tight and wide kinship system was the other method by which social control was maintained in tribal society. All this has legal implications for the modern legal system.

2. Kinship in traditional African society .

It is well known that traditional society in Zambia, as in many other parts of black Africa, was and still is organised along three lines, namely, clans, lineages and the family.

a. Clans.

A clan was the largest kinship grouping among the Bantu-speaking peoples of Central Africa. It is an anthropological term for a particular kinship descent group. Its members assumed descent from a common ancestor who was usually unknown to members of the clan on account of the genealogical time that had lapsed.[35] Clan members were usually dispersed throughout the tribe.[36] For example, there were 55 different clans dispersed throughout the Mambwe tribe,[37] while the Ambo had 39 clans.[38]

Clan membership was acquired at birth. An individual acquired either the mother's, or the father's clan, depending on whether the tribe was matrilineal or patrilineal. The writer comes from a matrilineal tribe called Nsenga, for example, and his clan is the Mvula (Rain) clan.

Although clansmen never met together for any occasion or ritual, what was important to them was the feeling of a common identity between all clan members.[39] Clan loyalty was strong even though clansmen could not trace their origin to one common ancestor. Among the Luvale, for example, clansmen were expected to offer each other aid and hospitality.[40] Inter-clan marriages were taboo among the Ndembu,

the Bemba, the Lunda and the Tonga.[41] The Ila were also exogamous; they abhorred both regular and irregular sexual relations within a clan.[42]

A common feature of clan relationships among the Bantu of Central Africa was what social anthropologists call inter-clan joking relationships. Every Tonga clan was in a joking relationship with at least one other clan.[43] The writer's clan, the Mvula (Rain) clan, is, for example, in a joking relationship with the Ng'oma (Drum) clan to which the writer's wife, Monica, belongs. In a joking relationship, clansmen joke, curse and vilify each other.[44] The range of matters covered in this relationship included marriage and general morality.[45]

What should be noted about clans is that even though kinship between clansmen might have appeared far and distant, there was nevertheless a close personal relationship between clansmen wherever they were and whenever they happened to be in contact with each other. Not only were clansmen supposed to offer aid and hospitality to each other, but there was mutual avoidance in matters of regular and irregular sexual relations. Then there were joking relationships between different clans. Contact between individuals in any one tribe was therefore as close as it was extensive. The lack of anonymity thus made social control in the tribe effective. Disputes were settled with a minimum of friction between the disputants.

b. Lineages.

A lineage was a smaller kinship group which could trace its descent to one common ancestor.[46] Members of the same lineage tended to live in clusters of villages.[47] Among the Cewa for example, the matrilineal core of the village consisted

of the brother and sisters of the village headman, their spouses and children.[48] In the Bemba tribe, the village might have shifted from site to site, but the kinship composition of the Bemba village tended to remain the same.[49] The important point to grasp here is that because lineage members tended to cluster together in villages, dispute settlement was expected to be sought within the village lineage. Recalcitrant lineage members could be ostracised and even finally driven out of the village.[50]

c. The family.

The peculiarities of the traditional African marriage and family unit are well known. First, unlike in European societies, a marriage was really an alliance between two families, and not just between a man and a woman.[51] A spouse felt socially much closer to the relatives of the other spouse than Europeans do. Therefore, the circle of relatives through marriage in an African society was wide. This circle became much wider if a man was a polygamist. Secondly, the kinship circle defined through blood relationships was equally wide. The intricate web of kinship and the width of this circle could be bewildering to a stranger. Writing on the Ila, Smith and Dale encapsulate it all in this rather amusing description:-

> "One of the most difficult things for a new comer among the Ba-ila to understand is their system of relationship. He learns very soon that tata means 'my father', mukwesu, 'my brother', mwanangu,' my child', but those terms only seem to confuse matters, for he quickly finds that a man has many fathers, many mothers, and, although he may not be married, a host of children, and even grand-children; while as for his brothers, their name is legion. When a young man tells you that a certain woman old enough to be his mother is his child, you are baffled, and he does not make things clearer by explaining that she is his child because his great-grandfather's brother begat he father."[52]

It will therefore be seen that the social mix of the people at the level of family was as close as it was wide and, as it has already been shown, there were strong social ties at the level of clan and lineage. In such a closely knit society, social control could not be too difficult, and dispute settlement was seldom acrimonious. But what made traditional communities even more effective in maintaining social control was the fact that the people lived, as many continue to do, in villages. Family ties continue to be close, wide and strong even in the urban areas of Zambia as is constantly demonstrated at family occasions, particularly funerals, when members of the extended family are expected and normally attend.

d. Residential patterns.

Tribal communities lived in villages populated by kin who were related to the village headman. Villages were inhabited by very small numbers of people: among the Ngoni, for example, a village comprised of between 50 to 200 people only.[53] Cewa villages were about the same size.[54]

Perhaps because the people lived in small villages, the daily social life of villagers was very open. Writing on the Bemba, Richards noted that:-

> "Life is lived almost entirely in the open, on the verandas or on the ground in front of each house, and the doors were rarely closed by day. Each villager can see or hear most of what goes on next door in the community of an average size, i.e. 30 to 50 huts."[55]

Clearly, there was very little anonymity in village life. The certainty that deviance would be very easily detected pushed many into conformity rather than deviance, thus making social control that much easier. Among the Tonga, social life was organised

not only around the village but also on a larger territorial scale among various neighbourhoods. Each of these consisted of between four and eight villages, with a total population of between 400 and 800 people.[56] Certain activities were undertaken within the framework of neighbourhoods, like farming, constructing huts[57] or ritual matters.[58] Significantly, members of neighbourhoods sometimes agreed not to institute proceedings against each other, as when cattle damaged neighbours' the crops.[59]

3. The impact of economic deprivation, close kinship and residential ties on attitudes and behaviour.

A society which constantly lives at subsistence levels and in consequence develops a tight and widespread kinship system tends to be dominated by a simple philosophy of life. In traditional African society attitudes tended to be universally held and the society was fatalistic and preoccupied with the mystical, spirits and witchcraft, as Gluckman clearly suggested above. But it was also typically characterised by a large body of rules of etiquette and taboos.

a. Etiquette.

Writing on the Bemba, Goulsbury and Sheane noted that :-

> "A Wemba young man is nothing if not a polished gentleman, and well versed in matters of etiquette."[60]

The Ila were similarly disposed in matters of etiquette.[61] One of the best known rules of etiquette was to be observed when a man met his mother-in-law on the road; they

both stepped off the road.[62] Members of societies which had such strict regard for the rules of etiquette tended to be socially conservative and generally law abiding.

b. Breach of taboos.

One of the clearest manifestations of the universality of attitudes in pre-industrial society were taboos and their strict observance breach of which was thought to bring about harm to individuals concerned or to the whole community. Steiner says that taboos are concerned with ritual, obedience, danger and harm:

> "Taboo is concerned (1) with all the social mechanisms of obedience which have ritual significance; (2) with specific and restrictive behaviour in dangerous situations. One might say that taboo deals with the sociology of danger itself, for it is also concerned (3) with the protection of individuals who are in danger, and (4) with the protection of society from those endangered - and therefore dangerous - persons.[63]

Writing specifically on Zambian society, Ngulube stresses the social control function of taboos. He says that they:-

> "regulate the community's behaviour...and focuses on specific social problems in the group disobedience to which is said to aggravate the problem."[64]

Dealing specifically with the idea of pollution and therefore taboo in pre-industrial society, Mary Douglas articulates the real significance of taboos:-

> "I believe that ideas about separation, purifying, demarcating and punishing transgressors have as their main function to impose a system on an inherently untidy experience. It is only by exaggerating the difference between within and without, above and below, male and female, with and against, that semblance of order is created."[65]

Tribal society was riddled with a very wide range of taboos covering every aspect of life. Among the Ambo, when a child is born, parents were not to resume sexual relations until the child was named. If this rule was broken, it was believed that the child would die.[66] There was and still is a whole range of taboos dealing with eating habits.[67] For example, pregnant women were forbidden from eating eggs. Because an egg has no opening, it was feared that the baby might not find its way out.[68] When menstruating, women were forbidden from cooking any food. If this taboo was broken, it was believed that any male person who ate her food would fall ill with chest problems.[69]

Other taboos covered the behaviour of young people towards elders. It was taboo, for example, for a young man to stand when an elder was talking to him or her; to jump over the legs of sitting elders or to pass behind their backs while they were seated. It was also taboo for a child to enter the hut in which the parents slept.[70] Certain activities were taboo if done at night: examples were cutting hair, carrying fire, whistling, or calling anyone's name.[71]

Ngulube says that sexual relations between close relations, other than between cousins, was also taboo.[72] But he does not emphasise sufficiently the strength of revulsion felt about this particular taboo in African society. Among the Lamba, for instance, sexual relations between all persons standing within the wide degrees of prohibited relationships were regarded very seriously.[73] In the matter of funerals, mourners were supposed to go straight to the village after burial, without looking back. The fear was that if one looked back one would bring back to the village the spirit of the dead person.[74] As tools of social control, taboos in an African society were much more significant than in Western society.

c. Belief in the mystical.

Evidence of beliefs in the mystical persist up to the present time. In 1980, for example, it was reported that a person had gone to someone else's garden in Lusaka with the intention of stealing sweet potatoes. Having got to the garden, the intending thief mysteriously got stuck, unable to leave the sweet potato field. It was further reported that the intending thief had received what was described as a "telephone call" telling him not to leave until the owner had arrived. He was so stuck that the police had to physically remove him from the garden. A talisman was suspected to have been placed in the potato garden.[75]

Tribal society was very fatalistic. It strongly believed in the efficacy of charms. There were many kinds of charms to deal with the very many hopes and fears that enveloped these communities. Among the Kaonde, for example, there were charms to assist the individual to have a successful hunt,[76] or a good crop.[77] Examples of charms dealing with fear were against theft,[78] illness,[79] familiar and other evil spirits in the house.[80]

Beliefs in the efficacy of charms reflect very deep-seated feelings of uncertainty in the general well-being of a people. Like taboos, they act as an effective tool of social control. The belief that nothing good comes about without resort to charms makes individuals in the society structure their lives in a particular and ordered way.

d. Deities and ancestor worship.

Deities, but particularly ancestor spirits, were more tangible realities to tribal peoples than charms. The reality of the existence of ancestor spirits, called shades, is described by Melland. He says:-

> "These shades of the departed are the 'higher power' of the natives' religion; it is on them that they have the habitual all-pervading sense of dependence. It is the shades who guard and protect them, the shades who try to hurt them, the shades are those to whom they pray, the shades are those whom they fear and must placate. The shades are that from which they can never escape. It is the shades who control every act and thought."[81]

The Mambwe built a shrine in every village, dedicated to the dead ancestors of the living headman. In times of serious social or economic apprehension, it was the duty of the village headman to pray before the shrine for the well-being of his people. Individual villagers built their own shrines in their own huts, consisting of clay pots. Occasionally, beer was poured into these pots to appease the spirits of the dead.[82] Among the Ngoni, the spirit to whom supplication was offered for the well-being of the tribe was that of the dead paramount chief.[83]

What should be stressed about beliefs in deities and ancestor worship is that a strong sense of a pervading reality of gods and spirits of dead ancestors can only have a very strong "policing" effect on the individuals and ultimately on the whole population. Together with an adherence to rules of etiquette, the observance of taboos and beliefs in the mystical, the reality of tribal deities and spirits of dead ancestors created a pervading and rather oppressive social climate over the whole tribal society, resisting social change. Furthermore a strong belief in the reality and efficacy of witchcraft ensured that tribal society remained socially conservative.

e Witchcraft.

(i) Various aspects of witchcraft.

To outsiders, witchcraft was and still is perhaps the best known but the most condemned aspect of African life. It has been the subject of systematic investigation by European researchers; one of the best known is Evans-Pritchard, who wrote on the Azande of Sudan.[84] Missionaries and the early colonial administrators were the most vociferous but serious researchers and surprisingly the judiciary appeared to understand witchcraft and its place in African society. For example, Gelfand, a medical doctor writing on the best known person in the practice of witchcraft, the witchdoctor or ng'anga, in Rhodesia, says that the ng'anga's role is a respectable one and fulfils the role of the modern doctor in modern society.[85] It is unnecessary here to delve into great detail on this subject and will suffice if a few salient points and observations about witchcraft are presented.

Although Middleton, writing on traditional East African societies, says that the actual practice of wichcraft has never been witnessed by researchers,[86] beliefs in it continue to be strong up to the present time. In 1984, for instance, two elderly women in Lusaka, Kamocha and Yona, were each fined K90 for professing to be witches.[87] The Livingstone Museum exhibits paraphernalia used in sorcery,[88] including 55 individual pieces collected after independence from all parts of Zambia. There is the Likishi Doll, made of a coil of grass and bark cloth and believed to kill people. As it dances around the village at night, its power kills particular individuals earmarked by the witch.[89] Then there was Ndilile: this piece is made from wood and beans and is

believed to extract corpses from graves at night; when a special magical stick is struck on the grave mound, the coffin rises to the surface and the corpse is then eaten by the wizards who are present.

Secondly, it should be appreciated that sorcery was the most dreaded evil force in pre-industrial communities. Its particular dread springs from its close association with secrecy, the night and mysticism. Writing on East African tribal society, Mutungi describes sorcerers and the kind of harm they are associated with. He says:-

> "Witchcraft and its practitioners are viewed with abhorrence by tribal communities as they symbolise all that is evil and anti-social. Witches have the power to kill or injure people by means of spells; they cause illness, deformity, madness or bodily swellings; they walk naked at night; cause crops to wither and animals to die; commit incest; feed on human flesh, and use human arms to stir beer; they have cannibalistic tendencies."[90]

Thirdly, it should be appreciated that beliefs in sorcery in pre-literate communities were all-pervading. Everyone in the community believed in its existence and efficacy. Fourthly, sorcery was closely associated with the diviner and the witch-finder, who acted in the traditional sphere like modern police detectives. Their task was to find wizards. The writer remembers one general witch hunt which took place in the village in the late 1950s; a few villagers were "found" to possess evil medicines hidden in the roofs of their huts. They were proclaimed sorcerers, but nothing was done to them, other than suffering the inevitable opprobrium.

(ii). The social functions of witchcraft.

For our purposes, the much more significant aspect of sorcery was the role it played as a mechanism of social control in tribal communities. Writing on the tribal

:societies of East Africa, Mutungi says that it enabled society to deal with behaviour 'which the law could not reach. He explains:-

> "fears of being bewitched or being accused of being a witch tend to instil the moral attributes of humility and good neighbourliness. And these are matters completely outside the legal framework, yet essential for the welfare of any society."[91]

Writing on the Cewa, Marwick says that witchcraft was a socially harmonising :and galvanising force. He explains:-

> "A hypothesis often expressed or implied by those social anthropologists and psychiatrists who have written on witchcraft and sorcery is that beliefs in these phenomena serve to reinforce social norms by dramatising them. These beliefs, it is argued, buttress a society's values by providing in the person of the sorcerer or witch a symbol of all that is defined as anti-social and evil, and thus a rallying point for the forces of morality and good. The fear of being accused of mystical evil doing is, according to this view a sanction for moral conduct. A few writers suggest that it is not only the sorcerer or witch who plays a morally relevant role but also his victim. This is because his misfortune is sometimes retrospectively attributed to his own misconduct or to that of his close associates. Thus the fear of not only being accused but also being attacked by sorcery or witchcraft may be an important factor in social control."[92]

'The criminalisation of particular conduct in modern society serves a similar purpose. It ‹dramatises evil and therefore tends to galvanise society and, in the case of sorcery, the ‹drama and the galvanisation appeared to be more pronounced. Marwick also says that :sorcery was a conservative force. He explains:-

> "whichever character one examines, mystical evil doer, or victim, sorcery and witchcraft emerge as conservative social forces; and their conservative character is brought into sharp relief when they operate under conditions of social change..."[93]

Sorcery as a conservative social force is articulated by Gluckman. He says that:-

> "Witchcraft beliefs condemn the unduly prosperous: the Bemba who gets three beehives in the wood is a witch. For another aspect of witchcraft beliefs is that

> a witch is believed to be able to mysteriously filch from his fellows, so that he has better crops than they have, catches more fish, kills more game. These beliefs are related to the basic egalitarianism of the economy. The beliefs tend to maintain the standard. For he who is too prosperous will fear the envy - and the witchcraft - of his fellows while they suspect him of witchcraft."[94]

He continues:-

> "The beliefs also sanction the general code of morality, by putting pressure on individuals to control their feelings - or at least to avoid showing vicious feelings openly. For if you show anger, or hatred, or jealousy, against a man, and he then suffers a misfortune, you may be accused of bewitching him."[95]

To modern European society, belief in sorcery in their own communities is normally treated as a joke. But to tribal communities, as has just been pointed out, it was unwittingly one of the most powerful agents of social control.

The organisation of traditional African society has been outlined. It was pointed out that the material possessions of the people were very few and basic. Kinship was not only close but embraced large groups of people, through clans, lineages, families and residential patterns. A consequence of this social arrangement was that tribal society was characterised by a strict regard for rules of etiquette, a wide range of taboos, beliefs in the mystical, deities and ancestor spirits and a preoccupation with witchcraft. Consequently, social control was tight and all-pervading. In turn, this had a profound effect on the types of wrongs which were recognised in tribal society, adjudication procedures, evidence and type of punishments meted out to wrong-doers. Against the background of the received criminal justice system of Zambia, the symbols of adjudicative power and the jural processes had very low visibility in traditional African communities.

II. What is "Crime"?

A. "Crime" has no ontological existence of its own.

The search for the distinguishing attributes of those wrongs classified as "crimes" as opposed to other wrongs has exercised the minds of distinguished jurists for a long time, at least since the time of Blackstone. Modern writers on criminal law continue to attempt to define "crime".[96] Kenny summarises the many different definitions and finds them wanting in particular respects. He questions the validity of the emphasis placed by Blackstone on the idea of public law in the concept of "crime";[97] the concept of injury to the public;[98] the moral element in "crime";[99] the degree of participation by the state in criminal proceedings;[100] differences in court procedures between criminal proceedings on one hand, and civil proceedings on the other;[101] the aims of civil cases versus the aims in criminal case, e.g. that punishment is the predominant aim in criminal proceedings;[102] the idea that in civil proceedings the plaintiff is enriched;[103] and finally, authority to withdraw from proceedings or to terminate the legal process as in a pardon.[104] Kenny concludes that the power of the state to terminate private prosecutions is the only real distinguishing feature of wrongs popularly called "crimes". He says:-

> "But a real and salient difference between civil and criminal proceedings may be discovered, if we look at the respective degrees of control exercised over them by the Sovereign; not so much in respect (as we have already said) of their commencement as of their termination. Austin has established that the distinctive attribute of criminal procedure, in all countries, lies really in the fact that 'its sanctions are enforced at the discretion of the Sovereign'. This does not mean that the Sovereign's permission must be obtained before any criminal proceedings can be taken, but that he can at any time interfere so as to prevent those proceedings from being continued, and can even grant a pardon which

will release an offender from all possibility of punishment. Thus the 'sanctions', the punishments, of criminal procedure are remissible by the Crown."[105]

But whatever may have been the origins of this power, this distinguishing mark of "crime" only refers to procedures in judicial proceedings. It does not refer to a distinguishing mark in the substantial nature of this kind of wrong. Moreover, Kenny does not give reasons why the state should have this power to intervene in private prosecutions or, to pardon a criminal, other than that the state has such a power.

Under the Constitution of Zambia, the Director of Public Prosecutions is authorised not only to take over a private prosecution but to terminate it as well.[106] Also, the President has a power to pardon.[107] The grounds upon which at least the Director of Public Prosecutions may exercise this power are potentially many and varied.[108] For example, a vital witness may have disappeared in a case in which a private citizen is prosecuting a public figure. Failure to conclude a criminal prosecution on this ground might raise a public outcry. In such a situation, the Director of Public Prosecutions might wish to take over the prosecution and enter a nolle prosequi in the hope that the witness re-appears and the case can be started again. The reason for intervening in the private prosecution in such circumstances would be a technical one and not because there is insufficient evidence on paper.

Kenny's argument that the state's power to discontinue a private prosecution or terminate a criminal process is the distinguishing feature of "crime" is not really convincing. It must therefore be concluded that the supposed distinction between "crime" and other wrongs remains hazy. Any difference between the two is not likely to be found in the nature of the conduct complained of. Indeed, Fattah, writing on Canada, notes that:-

> "Acts punishable by the criminal law are by no means homogeneous. They may have nothing in common except that they are all threatened by legal sanctions."[109]

The real difference between "crime" and the rest of the wrongs is in area of procedure: "crimes" are dealt with in courts which are called criminal courts and "torts" and the rest of the other wrongs are dealt with in courts called civil courts. In certain areas involving procedure, each type of court is distinct. For example, in the higher civil courts pleadings are exchanged whereas in the criminal courts there are no such exchanges.

When courts have had occasion to pronounce on the nature of "crime", they have stressed that there is nothing peculiar in the nature of the act complained of to distinguish it from other wrongs. In the Privy Council appeal (1931) from Canada, Proprietary Articles Trade Association and Others v Attorney General for Canada and Others,[110] an anti-monopoly piece of legislation made it an offence to form combines. Authorised officers were empowered to carry out investigations, including the sending of questionnaires to suspect companies. The appellants in this case had been the subject of investigations. On appeal, they pointed out that under the Dominion Constitution of Canada, Parliament was precluded from legislating on "criminal law". They complained that the relevant provision in the anti-monopoly legislation, authorising officers to inquire into the activities of suspect companies, was legislating in the field of the "criminal law". The appeal was dismissed. But in the course of its judgement, the Privy Council commented on the nature of "crime" and said:-

> "It appears to their Lordships to be of little value to seek to confine crimes to the category of acts which by their very nature belong to the domain of 'criminal jurisprudence'; for the domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the

> state to be crimes, and the only common nature will be found to possess is that they are prohibited by the state and that those who commit them are punished."[111]

Indeed, whilst in Western jurisdictions adultery is a civil offence, in Uganda, through a post-independence amendment to the laws, it is a criminal offence and punishable in the criminal courts; a man who commits adultery is liable to be sentenced to twelve months imprisonment or a payment of compensation.[112] A married woman who commits adultery also commits a criminal offence. She is liable to be cautioned for her first offence; a subsequent offence attracts a prison term of up to six months.[113] But all this might change; adultery may be decriminalised in the future thereby turning it into a civil wrong again.

In the Zambian case of The Director of Public Prosecutions v Colin Brown[114] the Supreme Court of Zambia commented on the meaning of "offence" in the Zambian legislation. In this case, the respondent was charged with, and pleaded guilty to, working in Zambia without a valid work permit under the immigration legislation. On review in the High Court, Doyle C.J. held that the accused had been convicted of an offence unknown to the law because the "offence" with which he was charged did not specify a penalty for breach of this prohibition. Under the Interpretation and General Provisions Act[115] "offence" is defined as "any crime...for which a penalty is provided."[116] The original conviction was restored as is permitted under a post-independence amendment to the laws.[117] Commenting on the definition of "offence", the Supreme Court said:-

> "There is no magic in the word 'offence', it comes from the word offend and if one contravenes the provisions of an enactment, one offends against it."[118]

The clear suggestion here is that there is nothing in the nature of the act complained of which makes a "crime" peculiarly different from other wrongs. An offence is an offence because the law says so; and as it has just been shown, Zambian legislation provides no enduring definition of "crime".

B. Distinguishing "crime" from other wrongs in African customary law.

Despite the fact that there is no enduring definition of "crime" to distinguish it from other wrongs in English law, it is interesting to note that some writers on African customary law assert that African societies made no distinction between "crime" and other wrongs. The exception appears to be Elias. He says that this is not a peculiarity of African customary law because the lack of a marked distinction between "crime" and the rest of the wrongs is present in English law as well.[119] More interestingly, the significance, if any, of denying such a distinction is rarely explained. Clifford says that there were "no clear lines" drawn.[120] Writing in 1914/1915 on the Bemba and similar tribes, Gouldsbury noted that these tribes had:-

"not the slightest conception of the difference between a tort and a crime".[121]

Administrators made the same observations. In a 1914 Law Department Circular to all magistrates in Northern Rhodesia, the acting Legal Adviser reminded them that African society:-

"did not distinguish between crime on one hand, and tort on the other".[122]

This supposed lack of distinction is mentioned so often by writers as to suggest that it is significant for the understanding of some larger and crucial concept in African

customary law. In fact the supposed lack of distinction is not so illuminating. What all these writers appear to mean is that in African customary law adjudication procedures in cases big or small followed a similar pattern, which may be an over-simplification of the reality. What is clear is that, like any other human society, traditional African society distinguished serious wrongs from minor wrongs.[123] Serious wrongs were those which were thought to endanger the whole community. As will be seen later, wichcraft is the best example of a very serious wrong calling for special investigative and trial procedures and the death penalty. Minor wrongs were those in which the harm was thought to be restricted to the victims and their immediate families. Unlike under the received law, homicide was not so seriously regarded, attracting mainly compensation. Debate over whether tribal society distinguished "crime" from "tort" is futile. The distinction is an outgrowth of industry and commerce in European societies. Because of the technological underdevelopment of pre-literate societies it would be surprising if they made any distinction at all.

A much more fruitful inquiry is not one which tries to find out whether African customary law distinguished "crime" from "tort". What is required is an inquiry into how strongly the people themselves felt about the various wrongs in their particular society, without asking them to make the distinction between a "crime" and a "tort". Clifford is the only writer, as far as the writer is aware, who tries to explain the significance of this kind of this investigative approach. Unfortunately, his choice of key words is poor because in his explanation he appears to assume that tribal society made a distinction between "crime" and "tort". Where he uses the wrong word in the passage about to be cited, the correct one will appear in brackets. Clifford explains the

significance of finding out how strongly Africans felt about the various wrongs in their society in the following words:-

> "One of the imponderables in any study of crime in Africa is the extent to which the African regards his offence [wrong] as criminal [serious]. The African concept of crime [wrong] is however vital to our inquiry. We have to study the way he regards the different offences [wrongs] if we would understand the true meaning of any statistical, psychological or sociological information on crime which has been collected."[124]

The important point Clifford is trying to make is that criminal statistics should not fail to identify those wrongs which are regarded as most serious in any society, whether in Zambia or anywhere. Thus, although adultery in Zambia is not a criminal offence under the received law, the official statistics should nevertheless show that adultery is regarded by the people of Zambia as a serious wrong.

In 1963, just before independence, Clifford carried out a limited survey among the African population in Lusaka. He sought to discover how strongly African society felt about various wrongs. Table 2 shows how seriously modern Zambian society regards certain wrongs. It also shows the number of times a given wrong was described as serious.

Table 2.

How Strongly Africans Feel about Certain Wrongs.

"Offence"	No.of times mentioned.
Murder	17
Stealing	14
Fighting and Assault	14
Adultery	10
Rape	4
Sex crimes(other than rape)	4
Burglary and breaking	4
Robbery	2
Malicious Damage	2
Total:	71

Source: W.Clifford.[125]

Clifford commented on two specific matters in his Table. He expressed pleasant surprise at the fact that fighting and assaults were condemned to about the same degree as theft.[126] However, why is it that any society which is concerned with law and order should condemn assaults and theft to the same degree? Secondly, Clifford very properly notes that adultery is strongly condemned and that in Western jurisdictions adultery is still normally a civil wrong.[127] Unfortunately, no attempts were made to define "adultery" or "rape"; as will be seen later in this chapter "adultery" in traditional society does not carry exactly the same meaning and consequences as in western societies. It will be noticed that it comes fourth (10) on the list, only 4 points behind "fighting and assault" (14) and 7 points behind the most seriously regarded, murder(17). Yet, in contrast to the less seriously perceived offence of rape, adultery is not a criminal offence under the received criminal law of Zambia.

Other wrongs were presented to the interviewees for their emotional reaction,[128] but there were fewer instances in which they were cited as serious. Consequently, they were omitted from the list of wrongs in the Table. These other wrongs included "rudeness", "disobeying elderly people", "excessive beer drinking", "divorce" and "lying".[129] One would have expected that they would be mentioned in a greater number of instances because they are in fact serious wrongs in any modern African society. At least two factors could have produced this surprising result. The first is that the sample was very small: only 70 people were interviewed.[130] Secondly, the people interviewed were from the more urbanised communities.

Clifford made one serious omission from his list of wrongs: wichcraft. Its inclusion was going to show the true extent to which Africans, even urbanised ones,

regard it above all others and thus show the peculiarity of African society towards the concept of "wrong".

III Wrongs in traditional African society.

A. Witchcraft.

1. More on witchcraft.

The seriousness with which witchcraft was regarded in tribal communities has already been alluded to above. Further evidence of the seriousness of this wrong is to be found in murder cases tried at the beginning of this century, when beliefs in witchcraft were much stronger. In the 1909 case of Rex v Chitankwa and Others,[131] the accused were convicted of murdering a person believed to be witch. They explained to the court that they killed him because he was a sorcerer. In the 1914 case of Rex v Laulau,[132] the accused was convicted of murdering a suspected witch. The actual reason for murdering him was merely that he had imputed sorcery against the accused person.

The serious wrong of witchcraft was committed by witches, sorcerers and other persons who wished to harm their enemies or competitors. There was a wide variety of methods used to bewitch people. For example, the Kaonde bewitched through wanga wa nkatulo. In this method, the earth on which the intended victim had urinated was collected and mixed with medicines. When the victim was asleep at night, the wizard opened the door of the hut and passed the medicine round the neck of his victim. The

head came off and was taken outside. It was then tossed into the air. If the head dropped down on the ground, this meant that the medicine would work. The head was then put back. The following day, the victim fell ill and died.[133] Another method of bewitching was done through wanga wa wunshengwe. In this one, a person who wished to harm his enemy put certain medicines in incisions made around his own waist. He found an opportunity to sleep with the wife of his enemy. When the husband slept with her, he fell ill and died.[134]

Witches and sorcerers were found out through divinations and ordeals. But the two were not exactly the same. The main function of divinations was to enable a person to obtain answers "yes" or "no" to particular questions which may be raised in relation to a particular problem. For example, if a child had fallen ill in the village, the father of that child may want to know if he will die or recover from his illness.[135] But a diviner also answered questions about whether an illness was caused by sorcery or not. If the diviner said it was, then the worried individual proceeded to look for a witch-doctor to find out who the sorcerer was.[136] Diviners were and still are popularly known in many Zambian languages as ng'anga.

Ordeals, on the other hand, were more directly associated with witch- finding. There was a wide variety of ordeals. But the best known were the boiling water test and the poison test. In the 1908 case of Rex v Mumba[137] a witness described what is involved in the boiling water test. The accused was charged with and convicted of practising witchcraft, in that he conducted the boiling water test. The witness said that the accused wanted to find out who had bewitched this particular witness; he prepared a clay pot full of boiling water into which he had put some medicines. Three suspects were then made to dip their hands into it, the idea being that if the hands were scalded,

the suspect was a sorcerer, but if they were not scalded, he was innocent of witchcraft. This witness said that none of the three suspects was found to be a sorcerer by the accused.

The better known ordeal is the poison ordeal. In the vernaculars, it was known as the mwavi or mwafi test, after the name of the tree from which the poison was extracted. In this particular ordeal, the suspect was made to drink the mwavi. If he vomited, this meant that he was not a sorcerer. But if he did not vomit, then he was adjudged to be a witch.[138] The significance of this particular test is that its administration was arranged by the chief himself.[139] It is a measure of how seriously the finding of sorcerers was taken in tribal communities.

2. Traditional methods of punishing witches.

Where a death was attributed to sorcery, the normal penalty was death; what varied was the manner of execution. Among the Lozi, the sorcerer was beheaded, sometimes by the king or queen personally.[140] The Bemba put the sorcerer in a bundle of dry grass and burnt him to ashes; beat him to death with sticks; or speared him to death. But burning was the more common way of executing sorcerers.[141] Among the Kaonde, he was speared to death.[142]

One of the attributes of dispute-settlement practices in face-to- face communities was that adjudication was characterised by an absence of delays. Sorcerers were executed immediately. Chisholm says that witches among the Winamwanga and Wiwa, were liable to be executed "at once."[143] Writing on the Mambwe, Watson very clearly suggests that when the accused was found guilty of sorcery through the administration

of the poison ordeal, the execution of the death sentence was not delayed; it was immediate.[144]

If sorcery was the most heinous wrong in tribal communities, the death penalty is perhaps not entirely inappropriate. For our purposes, it is significant that death was not the only sentence in witchcraft cases. Sometimes, payment of compensation was the full and final penalty. Chisholm says of the Winamwanga and Wiwa:-

> "In rare cases, the case of witchcraft may be settled by the payment of a marriageable girl."[145]

Indeed, Dr David Livingstone, the famous missionary and explorer, actually witnessed a witchcraft case in which the full and final penalty was the seizure and the taking away of the sorcerer's kinsman.[146] What should be noted here is that unlike in the modern criminal justice system of Zambia, where the penalty for murder is a mandatory death sentence, exceptions were made to the death sentence even for witchcraft, the most heinous wrong, in tribal communities in Zambia.

3. The administrators' and judicial reaction to witchcraft.

It will be recalled that one of the objectives given for the colonisation of Africans was to civilise them (Chapter 1). Against this background the reaction of colonial administrators to witchcraft was predictable; it was an evil to be stamped out vigorously. In a 1918 case of Rex v Kapulumuna[147] the accused was convicted of murder and sentenced to death. His explanation was that the deceased had bewitched him. In his report to the High Commissioner in Pretoria, South Africa, the Administrator of Northern Rhodesia, Wallace said:-

> "In this case where this [witchcraft] plea has been put in as an excuse for murder I think mercy would be wrongly construed and would encourage others to take the same form of revenge for the same form of fancied injury....." (emphasis supplied).[148]

In another 1918 witchcraft case of Rex v Kausa and Kanjoma[149] the accused were convicted of murder and sentenced to death. The advice given by an unnamed official (signed merely "H.L.S.") to the Administrator for possible transmission to the High Commissioner in Pretoria was that:-

> "In all witchcraft cases the question arises to what extent should be made for the superstitions of uncultured savages. I think Your Excellency's view is that each case must be judged on its merits and that the degree of severity to be applied must depend partly upon the particular circumstances and partly upon such considerations of policy as are necessary for making example of by the infliction of the supreme penalty..."[150] (emphasis supplied).

Mercy in favour of the first accused was disrecommended but recommended in favour of the second accused.

The judicial attitude to witchcraft was similar to that held by colonial administrators. Unlike administrators, judicial officers ought to have been a little less intolerant because pre-industrial society genuinely believed in the existence and efficacy of witchcraft. But on the other hand when it is realised that in the early years of colonial administration members of the junior judiciary were at the same time administrators, this intolerance was to be expected. Two cases sufficiently illustrate the judicial attitude towards witchcraft.

In the 1918 case of Rex v Chipakota,[151] the accused was convicted of witchcraft in that he presided over the administration of a water boiling test, a form of divination. The detailed facts were that the accused had accused his wife of having been impregnated by another man; to prove that he was not responsible for the pregnancy,

he successfully administered the boiling water test upon himself. By way of a counter attack, his wife accused him of being a wizard. To prove his innocence as a sorcerer, he administered the test upon himself for the second time. It was argued on appeal that the legislature did not intend to make self-administration of the boiling water test an offence. The relevant provision read in part:-

> "Whoever...administers...to any person...."[152] (emphasis supplied).

On a strict interpretation of this provision, the expression "to any person" would exclude the person who administers the test to himself. But the appeal court preferred a broader interpretation and sought to deal with the mischief in the prohibition. The appeal was dismissed on the ground that:-

> "If the intention of the legislature is not followed, it would mean that mwavi and boiling ordeals would still be kept alive with impunity."[153]

In a more recent Federal Supreme Court appeal from Northern Rhodesia, Twelve and Others v R.,[154] the appellants were convicted of murder; appellant No.1 was the one who actually carried out the act; appellants Nos.2 and 3 were accomplices before the fact. In this case focus is on appellant No.3. The detailed facts were that appellant No.3 wanted his own mother killed because he thought that she was responsible for the death of his children. Co-appellant No.1 agreed to kill her by means of a special magical gun, the kalilozi gun. The idea was that merely by pointing it at the rising sun, this would kill the deceased. But instead of using the kalilozi gun, this co-appellant used an actual gun and shot the deceased dead. In dismissing the appeal in respect of appellant No.3 the court held that since his intention was unlawful, his honest belief in witchcraft could not be a reasonable one. First, Lewey F.J. asked himself:-

> "if it could be a good defence that he was acting under an honest, though mistaken, belief in relation to the shooting at the sun. But the rule as to mistake of fact is not only that the belief must be honest, but also that it must have been reasonable. Honest it may have been in this case, but can it be said to be reasonable?"[155]

After citing Archbold on honest mistake of fact Lewey F.J. said:-

> "In the present case, it seems to me that these principles can afford no good defence to the appellant; for - on his own showing - so far from having an innocent and lawful intention, he had throughout the wicked purpose of causing the death of his mother; and it was for the fulfilment of that purpose that he employed and paid No.2 as his agent."[156]

When the whole tribal society strongly believed in the existence and efficacy of witchcraft, it is not fair to dismiss it as unreasonable without proof that it is indeed so. In this case reality was ignored and the case decided on policy grounds: that witchcraft must be stamped out of African society. Witchcraft is the most striking example of a conflict between clear legislative prohibition and the culture of Africans. It is interesting to note that witchcraft legislation[157] left by the colonial government has not been repealed or amended by the independence government. Another striking example of a divergence of outlook between European and African cultures appears in infanticide and child murders

4. Infanticide and child murders.

Under the received law, the killing of babies and very young children is a very serious offence. But under tribal custom, such killing was mandatory if the birth or the development of a child was associated with sorcery or the ritual pollution of a community. In the 1908 case of Rex v Chiluvya, Mwenya and Chipasambe[158] the three

accused persons were all convicted of the murder of a child, who had been cast away into the bush. The first and second accused were the mother and grandmother of the deceased child respectively. On being asked to plead, the first and second accused pleaded guilty without any hesitation. The first accused admitted that she was the one who actually threw away her own child; the reason she gave was that the child had grown its upper teeth before the lower ones. If she had not thrown away her child, she believed that everyone in the village would have died.

In a similar case decided in 1917, Rex v Chitoka,[159] a mother was again convicted of killing her own child who had again cut its upper teeth before the lower ones. In court she explained:-

> "The people said 'you must throw away your baby, or if you don't we shall drive into the bush'. I was frightened to go into the bush... because the village is not mine, its my husband's I feared to bring trouble on to it. So I went and threw the baby into the bush in a big cleft in the rocks on the Luonde river."[160]

The cutting of upper teeth first was not the only situation in which tribal society demanded the killing of babies and very young children. Other children liable to be killed were those who defecated in the process of being born; were born with feet first; were born with teeth already cut; were born to women who had never menstruated; and those who did not begin to walk at the expected age.[161]

Judicial reaction to infanticide and child murders appears to have been more sympathetic than in witchcraft cases. Mr Justice MacDonell, in his report to the High Commissioner in South Africa in the Chikota case above, outlined the prevailing judicial view in all such cases. He said that as the people were still backward, they

probably did not realise just how seriously Europeans regarded these types of murders. He urged the High Commissioner to show mercy in this case.[162]

It is not entirely clear why the colonial administrators should have adopted a hostile attitude in witchcraft cases, while approaching these child murders with more understanding. When a person killed a sorcerer, the belief in the righteousness of his act was as honestly held as when a mother killed her own child.

B. Murder.

Because murder is such a heinous crime in English law it is always a matter of great interest to western society to discover that pre-literate communities apparently did not regard it so seriously. Tribal treatment of murder is at variance with notions of the gravity of wrongs in European society in two distinct respects. First, unlike under the received law, traditional communities did not distinguish states of mind of the wrong-doer for purposes of ascribing responsibility. Only strict liability was recognised, not only in homicide, but in all wrongs generally.[163] During the period of indirect rule,[164] for example, Chief Mukobela of the Ila drafted a rule on homicide and submitted it to colonial officials, along with other draft rules, for vetting. Draft rule 12 decreed that:-

> "If a person has killed another by accident while hunting, he will pay 11 cattle to relations of the dead person."[165]

Secondly, and of much greater interest to European writers on African customary law, was the penalty for murder in traditional African communities. Writers are agreed that

much more emphasis was placed on compensation than the death penalty. The prevailing view among the Ila, for example, was that:-

> "[It is] ridiculous to kill a person because he has killed another, why make a bigger hole in the community, let him pay compensation and be allowed to live."[166]

Apparently, the loss of life in an African society was regarded more as a loss of labour than a loss of human life as such.[167] The Ila view of murder and the death sentence is one which would be very useful to abolitionists in Zambia today.

An actual case decided in 1909 is convincing evidence of the fact that compensation was indeed given as a final penalty in murder cases. In Rex v Luwungo[168] the accused was convicted of murdering someone else's child. After quarrelling with his neighbour, the accused proceeded to batter the deceased to death. Both the accused and the mother of the deceased child admitted before the court that the accused had compensated the deceased's mother with the accused's own son and the matter concluded. The trial magistrate noted that;-

> "Had it not been for the intervention of Mrs Smith, [a local missionary] this case was never going to come to light."[169]

Among the cattle-keeping Ila, the compensation for murder was 20 oxen.[170] Referring generally to punishments among the Lamba, Doke says that the death sentence was "comparatively rare" except in witchcraft cases.[171] This observation must have included the death sentence in murder cases.

C. Adultery.

In traditional African society adultery had certain distinctive features not known in European culture: polygamy was permissible and, equally significantly, wives were regarded as the property of their husbands. Of adultery among the Ila, for example, Smith and Dale say that:-

> "it is looked upon as a breach of proprietary rights."[172]

These two factors taken together led to a distinct outlook upon adultery in tribal communities. Firstly, it should be realised that while a wife committed adultery if she had relations with another man, the husband committed adultery only if he had relations with a woman outside the circle of his wives. Secondly and arising from the fact that a husband had proprietary interests in his wives, the worst legal consequences of adultery on the part of any one of his wives was normally divorce[173] rather than punishment. Other sanctions were mystical. For example, if a married woman committed adultery during pregnancy and she suffered a miscarriage, the misfortune was attributed to her adultery.[174] Thirdly, if a man, whether married or not, had relations with a married woman, the man committed a serious wrong against the injured husband; the injured husband rather than the injured wife of the lover was seen as the victim. As a result adultery cases were normally brought against the lover of a married woman rather than against the adulterous wife. Among the Bemba, for example, the chief inflicted corporal punishment upon the lover and ordered compensation in favour of the injured husband.[175]

Going by the type of penalties imposed on adulterers, it appears that tribal society regarded adultery as a more serious wrong than does European society. But the picture is not entirely clear. Writing on the Bemba, Gouldsbury and Sheane say that a man who committed adultery was caned; in addition, he was ordered to pay compensation to the injured husband as has just been pointed out.[176] Among the Lozi, the adulterer paid compensation, but the adulteress was also fined.[177] It is this combination of corporal punishment, or a fine plus compensation, which obscures the seriousness with which tribal society regarded adultery. Pirie clearly suggests that adultery was very seriously regarded; he says that adultery was tried by the chief.[178] The punishment extended to the women culprits who were mutilated.[179]

Early colonial officials were not sure how strongly Africans themselves felt about adultery. Writing in 1916, the Legal Adviser advised the Secretary to the B.S.A administration that the normal punishment for adultery was death, mutilation or enslavement.[180] Going by this penalty test, Africans clearly felt much more strongly about this wrong than Europeans do. In 1917, in his letter to the Administrator, Mr Justice Beaufort noted that when Africans appeared before the Native Commissioner's Court (a forerunner to the Native Courts) for adultery, the practice was to charge them with contravening tribal law and custom and that the usual penalty was corporal punishment.[181] But in some cases, adulterers were only ordered to pay compensation without any additional penalty normally associated with criminal offences under the received criminal law.[182]

Two legislative attempts were made to deal with adultery using the criminal law. In 1909, the Administrator of North Eastern Rhodesia drafted legislation on adultery; male adulterers were to be sentenced to imprisonment. But, for reasons which do not

appear on the record, the High Commissioner did not authorise the enactment of this particular draft legislation.[183] Six years later in 1916, another attempt was made to criminalise adultery. The assumption was that tribal society visited it with sanctions which are normally associated with the criminal law. The preamble to the draft Proclamation, modelled on similar legislation in Southern Rhodesia, read as follows:-

> "Whereas by custom of certain of the native tribes inhabiting the territory of Northern Rhodesia, adultery is a punishable offence, and whereas it is desirable to provide statutory recognition of such custom....."[184]

The weight of evidence on adultery seems to be in favour of the view that adultery in the tribal communities of Zambia was more seriously regarded than in European society because of the type of penalties normally imposed on adulterers. This is not surprising; it will be remembered that in Clifford's survey among Lusaka Africans, adultery came fourth on the list of wrongs about which the interviewees felt most strongly. Perhaps adultery should be made a criminal offence in Zambia.

D. Wrongs against tribal authority.

Like in the modern state, treason was the most obvious serious wrong against tribal authority as has already been pointed out when dealing with political organisation and chiefly societies. Among the chiefly Lozi, disobedience to lawful orders of the chief was another serious wrong against tribal authority.[185] In an age and authority-fearing traditional African society minor wrongs included disobeying elderly people, as was revealed in Clifford's survey. It should be stressed that wrongs against tribal authority were not completely unknown in acephalous ethnic communities. Like

chiefly tribes, acephalous tribes also had tribal authorities in the form of elders and the elderly; but they were less visible than in the more chiefly tribes. As a result wrongs against tribal societies in acephalous ethnic communities were less visible and more diffuse.

E. Breach of major taboos.

Every human society has taboos of varying significance. A distinguishing feature of African traditional society was that breach of major taboos were considered serious enough to warrant formal sanctions. One reason was that major taboos were associated with the psychic and the supernatural. Secondly, tribal communities had precarious subsistence economies. Taboos helped to maintain social control in the community and the breach of major taboos threatened the social stability of the community to an extent which is not possible in a European society.

A good example of a major taboo with mystical connections is found among the Ila. Ash has mystical properties among the Ila; throwing ash on to someone else was breach of a major taboo. The culprit was "liable to be seized and held to ransom".[186] It was also a major taboo to do anything before another person which suggests that that person is dead. Examples were lifting a person and saying that he is heavy.[187] Again, the person who broke this taboo was liable to be seized and held to ransom.[188] Offering a sacrifice to the deity of another person incurred the same penalty.[189]

Major taboos which might have supernatural connections, but which had the potential for disturbing the social peace, were more common. It was a major taboo, for example, to make false claims about a relationship with another person;[190] to make

another person lie on human waste;[191] to accuse another person of having committed a wrong;[192] or to allow a child to suckle from the breasts of another woman not its mother.[193]

F. Summary of wrongs in traditional African society.

Five types of wrongs in tribal society have been identified: witchcraft, murder, adultery, wrongs against tribal authority and breaches of major taboos. All these wrongs have one thing in common. With the exception of murder, they all sprang from the nature of tribal society. Murder may not have been peculiar to traditional communities, but, as was seen, it was visited largely by peculiarly African sanctions.

The question for the penal policy-maker is to decide which of these five wrongs should be incorporated into the modern criminal justice system of Zambia. Breach of taboos of the type enumerated is clearly unsuitable for incorporation. Treason, homicide and witchcraft have already been incorporated. As regards adultery, some might argue for its inclusion as well. This has been considered in some African jurisdictions. In Zanzibar the lover of a married woman is the guilty party and commits a misdemeanour, but the adulterous wife commits no criminal offence "as an abettor".[194] Another jurisdiction where adultery is a criminal offence is Uganda.[195] Unlike in Zanzibar the married woman also commits a criminal offence but her first offence attracts only a caution while the lover is liable to a prison sentence.[196]

Turning adultery into a criminal offence should be resisted in Zambia on three grounds. First, there is the problem of definition: the precise role of the married woman in the commission of the offence and in particular whether she may have been

the prime mover in the whole matter. In either case it must be decided whether the woman should be charged with adultery or not. Secondly, by its very nature, lacking an injured party, adultery is difficult to prove. Thirdly, there is the problem of enforcement priorities. There are some offences which are of a greater concern to society than adultery. For example, offences against the person, like robbery, surely deserve greater and more urgent attention than adultery.

IV Dispute settlement in African tribal communities.

The general approach to dispute settlement in tribal communities has already been alluded to when dealing with the political and social organisation of traditional society. In chiefly ethnic communities cases were taken before the courts but in acephalous tribes, like the Tonga, people relied on tribunals and conclaves. Whatever form of dispute arrangement existed, settlement of disputes rested ultimately on force as in any other human society, modern or traditional. Writing on the acephalous Tonga, Colson explains:-

> "As in any other society, control rests eventually on the sanction of force, here applied through a resort to vengeance on the part of an organised group if it feels that this is the only way to enforce its rights."[197]

Again, whatever the political system in existence dispute settlement in traditional African society was peculiar in two areas of court procedure: informality and a much wider notion of relevance of evidence acceptable before the courts or tribunal.

A. Informality in dispute settlement: atmosphere and procedure.

Writing generally on the African courtroom experience in the modern courts in the 1930s, Orde Browne accurately describes how many Zambians who find themselves in court either as witnesses or accused persons still feel about court procedures and atmosphere. He says:-

> "To the great majority of natives, European court procedure must be bewildering in the extreme. To begin with interpreting will probably be necessary, and even if this be competent and accurate, it introduces a barrier between defendant [and witness] and the court.....The lengthy irrelevant explanations which would be expected by elders in the village is not permitted here; abrupt disconnected questions are asked, to which but the briefest answers are allowed; arguments with the witnesses, or denunciations of their mendacity, are strictly checked; the whole court is obviously hostile, and the accused settles down into a despondent lethargy, from which he rouses himself only to listen to what the interpreter has decided shall be his fate. Even when the case is one in which fellow natives are the aggrieved parties, the result satisfies noone;"[198]

As a legal practitioner and one brought up in the village in the 1950s and watched dispute settlement before the village headman (my uncle-mother's brother) the writer has watched first hand such understandable bewilderment of many witnesses in the received courts, particularly villagers.

Perhaps the most distinctive feature of dispute settlement in traditional communities was the informality in the general atmosphere and in procedures, in both chiefly and acephalous tribes. An exception was adjudication in the Lozi courts, as indicated earlier when discussing political organisation. A typical court arrangement in chiefly tribes was to be found among the Lamba. Cases were heard in the open in front of the chief's hut. There were no particular seating arrangements for the accuser, the accused or even the chief himself.[199] Witnesses were not required to remain outside

the court or away from the gathering outside the chief's hut before giving their evidence.[200] More significantly, and unlike the practice in modern courts, witnesses were allowed to speak at length, rarely being interrupted. This was important. It made it possible for both the accuser and the accused to set the parameters of the problem in wider context than would be permissible under the received law. This practice can only have had a therapeutic effect on both of them. The more informal court atmosphere was characteristic of the African experience of dispute settlement. Perhaps more significantly, the truth was more likely to emerge, admittedly at the expense of longer sitting hours.

Informality in the judicial process was to be expected because of the nature of tribal society. Large sections of the population were interlinked by kinship and residence. The chiefs and disputants were not strangers to each other. It was therefore difficult for them to adopt a fully confrontational attitude in dispute settlement proceedings.

In the time-conscious industrialised society of England and modern Zambia strict court procedures are to be expected. It is difficult to apply fully traditional procedures in Magistrates' High and Supreme Courts. However, to make the High Court and Supreme Court atmosphere less inhibiting it is suggested that judges should discard their wigs and shade some of their court dress.

B. Evidence and relevance.

The ultimate aim of all adjudication in any society in the world, whether the society is a traditional one or a more modern society, is to discover the "truth". This is

in theory only; in practice the aim is settle disputes and do justice to the parties. Under the received law strict rules of evidence have been made to enable disputes to be settled. These rules are guided by what is considered relevant. But the law relating to relevance is complicated as it is also tied up with ideas about admissibility and weight of evidence.[201] Then there is the well-known common law rule against hearsay and exceptions to the rule.[202] In England the rule against hearsay continues to evolve [203] and has undergone statutory changes. Whatever were the precise rules governing relevance, or evidence or its admissibility or weight, traditional African society applied them in a wider social context than would be acceptable under the received law.

Writing on adjudication in the Urban Courts (Native Courts in urban areas) of Northern Rhodesia and the idea of relevance, Epstein explains why this was so:-

> "Each dispute is viewed within the context of a wider system of social relationships. Accordingly, any evidence which can throw light on the behaviour of the parties within the framework of their total relationship is not merely admissible, but is deliberately sought by the courts. Viewed in the light of the judge's conception of their task, such evidence is of the most immediate relevance."[204]

He says that a good example of the general approach to the idea of relevant evidence in African customary law is to be found in matrimonial cases:-

> "The major procedural difference between English and Urban Courts appears to lie in the different concepts of relevance by which the facts are collected and assessed. For where the English system tends to stress the exclusion of evidence which is regarded as irrelevant, the African courts accept whatever testimony is presented, and then proceed to weigh it... It is in matrimonial suits that the concept finds its clearest expression, for it is to this class of case that the use of reconciliatory techniques, so frequently stressed by other writers, is now largely confined to Urban Courts e.g. if a woman claims a divorce from her husband on the ground that she was beaten by her husband, whether she was or was not beaten is of course a fact relevant to the issue. But an Urban Court will not necessarily regard this as a crucial issue; it will want to know whether it was the beating itself which gave rise to the suit; or whether it was an index of some deeper rupture in their marriage relationship. Accordingly, it

> will question the husband about his personal habits, whether he has children by his wife....Thus the question which an Urban Court poses is not 'Do the facts disclose the husband's beating' but 'what facts led to this trouble in the house?"[205]

The lesson to be drawn from the tribal experience on the question of informality of adjudication, evidence and relevance is that the received law and British justice which underpins it is foreign and still remote to large numbers of people in Zambia. What the Administrator of Northern Rhodesia reported to the High Commissioner in Cape Town in 1921 is still valid today. Dealing specifically with the taxation of Africans he said:-

> "The abstract blessings of peace and good government do not strongly appeal to the native; neither does British justice, which however carefully administered, is often unjust, according to native ideas."[206]

V. Penalties imposed for wrongdoing.

Traditional African societies had very limited ranges of penalties for imposition on wrongdoers. This was largely because tribal society was very conservative and conformist, relying heavily on psychic, supernatural and social sanctions as has already been pointed out. There were only two types of formal sanctions: physical and financial. Ordinarily, a discussion of punishments begins with the softest ending with the harshest. In view of the significance of financial penalties in traditional society they are treated last. However, this section will begin with imprisonment because of its uniqueness in the tribal justice system.

A. Imprisonment.

One of the most noticeable features of the administration of justice in tribal societies was the total absence of prisons as places for punishment. This absence is noted by many writers on traditional African society[207] and needs little elaboration here. But it should not be glamorised as another example of a humane justice system characteristic of face-to-face communities; the actual reason appears to be rooted in the technological underdevelopment of pre-literate societies everywhere. It requires considerable political and social organisation to maintain prisons as places for punishment.[208] Lacking such an infrastructure, Zambian communities were not expected to have prisons and in fact had no prisons as places for punishment. But the idea of detaining suspected wrong doers or convicted persons was known. Among the Lamba, those awaiting trial or execution were shut in a hut[209] while among the Bemba they were merely bound.[210]

Penal policy-makers in Zambia should take note of the absence of prisons in tribal society and draw the right lessons. While it is not possible in a modern society to abolish prisons entirely as places for punishment it should be possible to reduce the widespread reliance on this costly form of punishment.

B. The death penalty.

Reference has already been made to the use that traditional society in Zambia made of the death penalty in witchcraft cases and murder. Literature and records are scanty as to the precise circumstances in which it was imposed. As it has already been

pointed out, strict liability appears to have been the rule in all cases serious or minor; notions of justice paid scant attention to the state of mind of the wrongdoer for purposes of imposing the death penalty or indeed for apportioning blame. In homicides at least the absence of mens rea appeared to aggravate the wrong as exemplified in the following two cases. In the 1917 case of Rex v Mambwe[211] the accused was convicted of murder and sentenced to death. The defence of intoxication was raised at the trial. In his report to the High Commissioner in South Africa, the Administrator (name illegible) noted that crown witnesses had tried very hard to deceive the court into believing that there was no beer on the day of the murder. In a similar 1919 murder case of Rex v Mafuta[212] the defence of intoxication was again raised. In his report to the High Commissioner, the Administrator again noted that crown witnesses strenuously denied that there was beer in the village on the day the murder was committed. Such denials may have been prompted by the wish to see the accused convicted and punished. But the more plausible explanation is that committing a serious wrong in a state of intoxication aggravated the wrong and not diminished it because beer-drinking itself was seen as being more closely associated with wrong-doing than good.

Death was also imposed in circumstances other than murder or witchcraft. Among the Lozi, persistent wrongdoers were executed.[213] Where the status of the victim was high, the penalty might also be death. For example, a slave who merely assaulted his master was put to death in the Ndembu tribe.[214] The Bemba executed the person who murdered the paramount chief Chitimukulu.[215] The death sentence was also passed for high treason.[216] But it is important to remember that the death sentence was rarely imposed in traditional society as already pointed in dealing with

witchcraft and murder. This was so even in those ethnic groups with the political organisation to carry out executions. Of the chiefly Bemba, Pirie says:-

> "Murder could, under many circumstances be condoned, but sometimes punishable by death ."[217] (emphasis added).

Among the acephalous Ila, Jaspan says:-

> "In the traditional judicial system... punishments included outlawry, mutilation, death, confiscation of property and fines. Witchcraft was punished by death, but apart from this the death penalty was seldom used."[218] (emphasis added).

Under the received law, murder is the most serious wrong that can be committed and is punishable by death. But among the Bemba, for example, Gouldsbury says that:-

> "the murderer had to pay a 'blood-fine' to the relatives of the murdered."[219]

It must be said that the accuracy of such statements by early colonial officials about the infrequency of the death sentence in traditional African society must be questioned. First, there are no records to show that attempts were made to gather data on the use of capital punishment although colonial officials were in a position to do so. Secondly, tribal authorities, especially the chiefs, had few restraints upon their powers. If there was an attempted treason, actual treason, or sedition it was likely that they would indulge in killings to maintain their power and authority. The reported infrequency of death sentences in tribal society may contain an element of exaggeration. The only certainty is that murder was not visited by a mandatory death sentence as is the case in modern Zambia.

The problem of ascertainment of African customary law by early anthropologists and colonial officials may be more real than may be supposed. Referring to Malawi and Zambia specifically, Chanock says:-

> "statements which were (and are still) made about it [customary law] are not so much statements about the law in the past, as claims about what it ought to have been in the past and what it ought to be in the present. The question which faces us is not 'Are these statements true about the period of which they are being made?' but 'Why is there a need to present the past in this way?' Evidence about customary law, then, is primarily evidence about the people giving it, about the circumstances and changes with which they are grappling."[220]

The reluctance to impose the death penalty for murder may be related to the nature of social organisation of traditional African society to which reference has already been made. Collective responsibility was very strong. Wrongs tended to be seen as injuring large kinship groups rather than individual members of a group, including homicide. Of the Ila and Tonga and homicide, Jaspan says:-

> "Homicide was treated as an offence against the victim's clan.."[221]

Because the loss was not too individualised, it was not so acutely felt as to merit the ultimate penalty. A similar but more pertinent explanation is voiced by Orde Browne. Writing on traditional African society in general he says:-

> "the death of a member of the family was deplored, not so much from sympathy with the deceased, as from the recognition of the consequent weakening of the survivors. When a murder was committed, the family thereby deprived of a useful member would receive compensation from the offender's relatives if he himself could not pay. In other words, it was not the taking of human life that was penalised, but the destruction of a useful social unit."[222]

As has already been pointed out, the lesson to be drawn from the imposition of the death penalty in traditional society is that, unlike under the modern criminal justice system where the death sentence is mandatory for murder, death was not mandatory even in the most serious wrong of witchcraft.

C. Corporal punishment.

Corporal punishment, including mutilation, was apparently more common in tribal justice than the death penalty. Among the Lunda, serious wrongs against the state attracted severe physical penalties: the nose, ears and fingers were cut.[223] In fact, the king had a special officer for cutting ears called kakatamatwi (cutter of ears).[224] The Bemba cut off whole hands.[225] For theft, the Lamba cut off one or both hands.[226] Among the Lozi, a piece of heated broken clay was placed in the palm of the thief and the hand closed tightly together thereby severely burning the thief's hand and disabling it permanently.[227] Lenje men had their achilles heel cut for adultery,[228] while Bemba men had their eyes gouged out.[229] For making malicious reports against another person, the Lamba cut off the upper lip.[230]

From what has just been described a number of observations can be made about corporal punishment in traditional African society. First, corporal punishment was imposed on a wide variety of wrongs and apparently much more frequently than capital punishment. However, what has been said about the danger of painting an inaccurate picture of customary laws and practices by anthropologists and colonial officials when dealing with capital punishment is equally applicable with regard to corporal punishment. There is no real evidence that corporal punishment was prevalent

in traditional African society. Lacking any real restraints on political power, chiefs probably resorted to general brutalities against suspects during times of serious social or political unrest in their areas. Secondly, the penalty must have been carried out in an atmosphere of great brutality. Thirdly, corporal punishment was clearly meant to disable the wrong-doer permanently so that he could not repeat his wrong. Interestingly, corporal punishment serves the same aim in Islamic law; thieves have their hands cut off to stop them stealing again.

There is nothing positive that the modern criminal justice system of Zambia can copy from the tribal experience with regard to corporal punishment. If there is any lesson to learn, it is that crude and cruel punishments in general should be avoided, the perfect example of which being the death sentence.

D. Reconciliation, restitution and compensation.

1. Reconciliation.

Reconciliation, restitution and compensation have long been regarded by writers as the most characteristic attribute of the tribal justice system. Generally, tribal communities, whether chiefly or acephalous emphasised reconciliation in all disputes. Proof of this is to be found in three aspects of dispute settlement. First, the judicial process was not confrontational as shown by the informality of proceedings in dispute settlement and the wide concept of relevance in the matter of evidence. Secondly, disputes were commonly settled by compensating the wronged party. It is important to stress a subtle point made by Read about compensation; he suggests that although

compensation may be penal in effect, it is reconciliatory in intention.[231] Thirdly, the compensation, as will be shown, was paid by the wrongdoer himself and handed over to the wronged party personally.

It is interesting to note that the idea of reconciliation is now receiving more attention in western societies; efforts are being made to bring the offender and his victim together face to face. The idea is explained below when we come to deal with offenders personally handing over the compensation money to their victims under customary law.

2. Compensation and restitution.

What must have struck early researchers into African customary law was that the most heinous crime in European society, murder, could have been settled with the payment of compensation in African tribal communities. This has already been discussed but a few more examples can be given here. Among the Bemba, compensation was paid by handing over a slave to the wronged family[232] or even one's own wife, who would then be sold into slavery.[233] Among the Lamba, a sister would be handed over to the family of the deceased.[234] Handing over a relative of the wrong-doer provided not only compensation but a strong element of restitution as well. Compensation as a sanction extended not only to murder cases, but to assaults and property offences too.[235]

In considering the expectations of African society in dispute settlement, compensation is perhaps the most important benefit. Writing on the Africans of Northern Rhodesia, Epstein says:-

> "For them the award of compensation for damages suffered to the person is one of the basic and distinctive principles of customary law. Indeed among the most educated and Westernised Africans to whom I talked, the fact that compensation was so rarely awarded in a magistrate court was one of the major differences between the African and European legal systems;"[236]

He continues:-

> "it was this aspect of the latter which most puzzled them and aroused their criticism. In other words, the aims of an African court are seen as being as much redressive as penal. The judges should be as much concerned with the nature of the damage sustained as with the wrongful acts as such,..."[237]

Writing on East African tribal society, Read makes the same point about the expectations of the people but much more clearly:-

> "The scant attention given to the compensation of victims by the modern criminal laws of East Africa has come to be a source of real dissatisfaction and popular criticism; the victim or his family may feel that no justice has been done, whatever penalty is imposed on the offender, while compensation for the injury is ignored."[238]

It is interesting to note that in individualistic western societies attention is shifting from the misery of the offender to the plight of the victim. To this end, in England, a paper on reparations for victims of crime was prepared in 1970.[239] Later, a criminal injuries scheme was established in 1964. The benevolence behind this scheme is briefly but adequately summarised by Lord Denning in R. v Criminal Injuries Compensation Board ex parte Ince[240] He explained:-

> "The Criminal Injuries Compensation Scheme was promoted by the government without statutory sanction. It was done under royal prerogative. The object is to make compensation to the victim of crimes of violence. The compensation was made ex gratia out of government funds. It was to be administered by a board called the Criminal Injuries Compensation Board."[241]

If western societies can shift attention to the victim of crime by the payment of compensation, modern Zambian society with a rich history of reparations to the victims of wrong-doing should have little difficulty in at least trying to think of raising the profile of compensation in criminal proceedings.

a. Personally paying compensation to the wronged party.

One aspect of compensation is rarely emphasised by writers on African customary law. When compensation was ordered, the actual payment was made by the wrongdoer himself or one of his close relatives, and handed over to the wronged individual personally, or to a close relative or spouse of the wronged party. Among the Luvale for example, if the dispute was between co-villagers from the same lineage, the practice was for the guilty party personally to take a fowl to the wife of the wronged party. The wife prepared a chicken dish and both the accuser and the accused shared in the meal.[242] Even if there was no sharing of the chicken dish, the very fact of the wrong-doer personally taking the compensation to the accuser must surely have been a very satisfying experience to the offended person. A strong element of genuine forgiveness is promoted. The experience should be therapeutic to both accuser and accused. As already indicated above, the idea of personal contact between the offender and his victim is receiving some attention in western jurisdictions. Writing on the British criminal justice system Launay says:-

> "The modern Anglo-Saxon criminal justice system has been criticised for preventing the victim and offender involved in a criminal case from participating in the resolution of their conflict... A court procedure, it is argued, which does not allow any direct interaction between the victim and the offender leaves the victim 'outside, angry'...more frightened and more in need that [sic] ever of an explanation of criminals as non-humans'..; it leaves the

offender unaffected by the plight of his victim.. There is..one study to date [1985] which confirms that British victims wish to meet their offenders...."[243]

In the Local Courts, compensation in civil proceedings continues to be paid by the guilty party personally.[244] Under the Local Courts legislation, failure to pay compensation is a criminal offence.[245] In The People v William Mulenga,[246] the accused failed to pay the full K550.00 compensation amount as ordered in earlier civil court proceedings for which he was prosecuted. In his evidence, the complainant said that the accused had gone to his house personally to hand him the sum of K300.00 but he had not gone back to hand over the balance. The accused was convicted of contempt of court. This is an example of an actual case in which the guilty person was expected to hand over the compensation money personally to the wronged party.

Personally handing over compensation money should be promoted in the magistrates' courts and the High Court. At present the practice is that the complainant gets his money from the court officials and not from the wrong doer. There is a need to articulate and extend the idea of paying compensation more forcefully into the realm of reconciliation in criminal proceeding by following the example of the British experience described by Launay, so that victims and offenders are at least encouraged to face each other personally, whether compensation is payable or not.

b. Why compensation and restitution?

The standard explanation for the preference for compensation and restitution over punitive penalties in traditional societies is expressed by Clifford:-

"the law was dominated by the idea of compensation to counterbalance loss and restore amity in the local residential group".[247]

Referring generally to African society, Driberg makes the same point but paints too romantic a picture of the nature of African customary law:-

> "On our definition we find that African Law is positive and not negative. It does not say 'Thou shall not' but 'Thou shall'. Law does not create offences, it does not create criminals; it directs how individuals and communities should behave towards each. Its whole objective is to maintain equilibrium, and the penalties of African law are directed not against specific infractions, but the restoration of this equilibrium....A crime...consists in the disturbance of individual or communal equilibrium and the law seeks to restore the pre-existing balance."[248]

This 'equilibrium' idea has been attacked by Elias as exaggerated; his argument is that it is the function of all law in every human society to restore the equilibrium which has been disturbed by a wrong, and that African customary law is not peculiar in this particular respect:-

> "As we have said very often, the general opinion of writers is that the aim of African law is the maintenance of the social equilibrium. While this is true enough as a statement of principle, the implied suggestion that 'European' law has a different aim is not valid. What African law strives to achieve is the solidarity of all those subject to its sway by repairing, as far as possible, all breaches that tend to disturb society."[249]

This is valid point. However, the real point here is not that African customary law seeks to achieve what all other laws seek to do, but that African customary law emphasises restoration of the equilibrium to a greater extent than, say, the received English law because, as already pointed out above, African customary law is dominated by aims of reconciliation,[250] compensation and restitution.

VI. Participation in the sentencing process.

Greater participation in the sentencing process is another aspect of dispute settlement rarely emphasised by writers on African customary law. Writing on the Lamba, Doke paints a dramatic picture of a dispute settlement routine in which the chief skilfully provoked his councillors into taking part in the sentencing process in a murder case. After finding the accused guilty, the chief said to his councillors:-

> "It is my desire to put him to death!...There is silence for a space, and then one of the ifilolo [councillors] may reply, 'No Sir, to kill him would be bad. Let him bring amawoni'[property, wealth or goods](sic)..The chief will now say 'No. I intend to have him executed! 'Now the impemba [a category of councillor] will join with the ifilolo in protesting that they will go and leave the chief to carry out such a sentence by himself if he persists. The chief is of course expecting this attitude."[251]

Relatives of the murderer are then arrested and handed over to the relatives of the deceased.

There was an element of democracy in allowing councillors to participate in the sentencing process. Secondly, it was more likely than not that the sentence reached through this process was the appropriate one in all the circumstances of the case. Therefore, the sentence actually imposed was more likely to be accepted by the community as a fair one.

VII Conclusion.

It has been shown how traditional African society in Zambia organised itself both politically and socially. Some tribes, like the Bemba and Lozi, had chiefly forms of

government while others, like the Tonga and Ila, were ecephalous. The differences in the political organisation resulted in differences in outlook in three particular areas of crime and dispute settlement. First, chiefly tribes recognised wrongs against political authority, like treason and sedition. While acephalous ethnic groups also recognised such types of wrongs, the wrongs were diffuse and less visible. Secondly, dispute settlement mechanisms were much more visible in chiefly tribes than in the stateless ones, as exemplified by court houses and the equivalent of the modern police and thirdly, in chiefly groups the imposition of punishment was done by more organised authorities than in acephalous ones, and the execution of punishment carried out by specialised officers.

The main features of social organisation can be summarised. Personal relationships were closely linked, strong and intertwined through blood and wide family relationships. Then there were lineages and clans which not only cemented personal relationships but widened them even further. Family bonds were and continue to be strong. Because of the dire economic circumstances of the people, they developed particular outlooks upon life which emphasised conservative social values, typified by beliefs in witchcraft, the practice of infanticide and the strong condemnation of adultery.

Because of the close and wide intermixing of personal social relationships, dispute settlement was characterised by a marked non-confrontational approach, emphasising more positive features than negative ones: reconciliation, restitution and compensation. Unlike in the modern judicial system, the disputants, witnesses, adjudicators or arbitrators and the community were all much more closely involved in dispute settlement than is allowed under the received law. Compared with what

obtains in the modern court room the adjudication atmosphere was relaxed, procedures simple not as bewildering as those in the modern courts and proceedings concluded within short periods of time. The idea of relevance was set in a larger social context to accommodate the actual and wider concerns, if any, of the disputants. Capital punishment was rarely imposed or carried out save in witchcraft cases. Prisons as places for punishment were unknown, but corporal punishment and mutilations were widely imposed although reports may be exaggerated. Modern Zambian society can draw one general lesson from the dispute settlement approaches and practices of traditional African society.

A. A less rigorous and more humane penal justice system.

The overriding picture of dispute settlement in traditional society was that the system was non-confrontational and reconciliatory: the atmosphere at adjudications was informal; the rules of evidence were relaxed and wide, admitting what would in English law be regarded as irrelevant and hearsay; except when corporal punishment was called for and in cases of witchcraft, the penalties for wrong-doing were generally non-punitive, being characterised by compensation; capital punishment was rare except in witchcraft cases, and there were no prisons as places for punishment. The use of corporal punishment and mutilation is a lesson which should not be revived. Corporal punishment has been abolished in western jurisdictions and, as will be seen in chapter 7, it has been judicially condemned in neighbouring Zimbabwe, Namibia and lately (1995) in South Africa as inhuman and degrading and therefore unconstitutional. In

pursuit of a policy making the criminal justice system less rigorous and more humane, more attention should be paid to the place of the victim.

B. African customary law and the modern Zambian society: the extent of the suitability of the received law.

Interest in crime and punishment in traditional African society raises not only the lessons which can be drawn for possible incorporation into the modern penal justice system but the equally important issue of the suitability of the received law in an African society: to what extent is the received law suitable to the culture modern Zambian society ? Admittedly, this is part of a more general question about the compatibility of western civilisation in a modern African economic, political and social environment.

Despite the coming of colonialism and western civilisation in the nineteen century, African culture has remained largely intact up to now in the important area of the extended but still close family unit. This has important implications for respect for authority as such and obedience of the law generally, including criminal law, in the modern Zambian society. It must be asked how far customary laws have changed under the growing impact of the money economy, especially in view of the fact that Zambia is the most urbanised country in Africa after South Africa. Unfortunately no one appears to have attempted to research into this in Zambia. Whatever proportion of African customary laws remain today, there remains a tension between customary laws and the received law not only over personal law but also over criminal law, especially evidence and the criminal justice process.

In trying to answer the question about the suitability of the received law in the modern Zambian society, what is important is not so much a consideration of suitability over the whole range of laws but certain types of laws. For many people in any society around the world personal laws dealing with the family and property tends to be more significant than other laws, like criminal law. With this distinction in mind, it appears that western civilisation has had a minimal impact on the personal law of a large majority of the people in Zambia. For example, the vast majority of Zambians continue to marry under customary law and not the statute law even among the urbanised educated Zambians.

Chapter 2.

Notes.

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204. A.L.Epstein, "Judicial Techniques and the Judicial Process", Rhodes-Livingstone Papers, No.23, Manchester, Manchester University Press, 1953, p.21.

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244. Interview with Local Court Justice J. Mumba, Lusaka, 10th January, 1986.

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246. No.56 of 1985, before Local Court Grade "A", Chilenje, Lusaka, unreported.

247. W.Clifford, Op.Cit., p.241.

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250. J. Van Velsen, "Procedural Informality, Reconciliation, and False Comparisons", Ideas and Procedures in African Customary Law, G.Gluckman, (Ed.), Oxford, Oxford University Press, 1965, pp. 143-144.

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Chapter 3.

Theories of Punishment and Sentencing of Offenders.

Introduction.

The study of the penal system of Zambia raises the question of the extent to which internationally-accepted theories of punishment are relevant to an African penal system. In view of their multiplicity, not all such theories can be of equal relevance; but there may be one which is particularly applicable to Zambian society. Ideally, it should be simple and clear enough to be easily understood by the ordinary Zambian in the street or village. Theories of punishment may appear simple and clear to anyone with a secondary school education but they are in fact complex in their underlying assumptions as well as in their wider theoretical and practical implications. For example, emphasis on deterrence at the expense of reform may help to account for the growing prison population in the country. A properly trained judiciary should be alive to the complexity of punishment. Yet, as with so much else dealing with crime and punishment in Zambia, and like the rest of law enforcement agencies and academics, the Zambian judiciary appears to be unaware of debates about theories of punishment in general and the declining significance of reform in particular.

As with theories of punishment, sentencing is more-wide ranging and complex than is generally supposed. For example, sentencers should know the difference between a tariff sentence and the individualised sentence imposed after taking into account all mitigating and aggravating factors. Increasingly, sentencing theory is also concerned about disparities in sentences between regions, sentencers and similar cases and how to structure sentencing discretion. Proper structuring of sentencing discretion can point sentencing policy in the desired direction. In the popular mind sentencing is normally regarded as the exclusive function of the courts; little thought is given to the role of Parliament as the primary sentencing agency. There is little debate about or interest in sentencing in Zambia. Apparently it is not seen as a "problem" either by Parliament or academia, the courts restricting their concerns to narrow issues of tariff sentences and individualised sentences. It appears that no one has sought to place sentencing in a wider context, to examine sentencing trends or the extent to which the courts rely on imprisonment.

In the interests of clarity, this chapter will be divided into two sections: "A" will deal with theories of punishment and "B" will deal with the sentencing of offenders.

Section A.

Theories of punishment.

Legal punishment has many well known aims: retribution, denunciation, incapacitation, protection of society from offenders, protection of the offender from

unofficial retaliation, reform, treatment, rehabilitation, reparation, atonement, expiation, education and justice. Some of these aims are very similar, like retribution and denunciation; reform and rehabilitation; and expiation and atonement. They can all be comprehended within three broad aims of punishment: retribution, deterrence and reform.[1]

This treatment of theories of punishment will be divided into two sections. The first (I) will consist of past-referring punishments for which retribution is the only relevant theory. In a past-referring, the legitimacy of punishment is drawn only from the fact that the offender has done something wrong. The offender is punished because of what he has done in the past. Concern is not with improving the behaviour of the offender in the future after the punishment has been inflicted. Section II will deal with future-referring punishments: deterrence and reform are the two relevant theories. These are concerned with improving the behaviour of the offender in the future. They are less concerned with the crime which has taken him before the court, and which is now past. Future-referring punishments are sometimes termed "utilitarian" punishments.[2]

I. Past-referring Punishments.

A. Retribution.

Judging from newspaper reports and discussions on radio and television, it appears that of the three aims of punishment, retribution is the least known by the general public in

Zambia. Yet properly explained, the central message of retribution can easily be understood by the ordinary Zambian in the village or streets of Lusaka because it is very much in tune with the traditional concepts of treatment of deviants in society.

1. The central idea of retribution.

The theory of retribution is closely associated with Kant. He rejected the utilitarian view of punishment. His view was that a person must be punished simply because he has committed a crime, and for no other reason. [3] Kant's thesis of punishment is that punishment must be linked only to guilt and nothing else. [4] Of retribution Bradley says:-

> "Punishment is punishment, only when it is deserved. We pay the penalty because we owe it, and for no other reason;..." [5]

The absence of any utilitarian considerations in retribution is articulated by Walker. He says:-

> "The genuine retributivist believes that the enforcement of atonement is a proper aim of the penal system, whether or not this enforcement reduces the incidence of the offences in question, and whether or not it protects the offender from unofficial retaliation. Indeed, if he is both consistent and courageous the pure retributivist must be prepared to argue that the penal system should enforce atonement even if by doing so it increases the frequency of the offence in question...." [6]

More forceful views are cited by Honderich. He summarises the views of some writers on retribution who argue that in retribution, punishment is not discretionary, but mandatory. Honderich explains:-

"It is not said in these passages merely that we are justified in punishing an offender: that we have a moral right to do so but may, without moral failing, choose not to exercise it. Rather, we are told, we have a categorical obligation to impose a certain penalty: it would be wrong not to impose it." [7]

2. Other versions of retribution.

The theory of retribution has other elements: revenge is one of them; [8] expiation is another. [9] But one other version of retribution merits particular attention: this is called denunciation. This version has attracted much more attention than either revenge or expiation. Interest in denunciation has risen since 1953, with the publication of the Royal Commission on Capital Punishment Report in Britain. [10] Lord Denning gave evidence to this Commission and made the following now well known observations about the aims of punishment and denunciation:-

"The punishment for grave offences should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the object of punishment as being deterrent, or reform and nothing else...The ultimate justification of any punishment is not that it is a deterrent but that it is the emphatic denunciation by the community of the crime." [11]

3. Observations on retribution.

It cannot be denied that retribution is naked revenge, clothed in philosophical language. It focuses on the conduct of a person which is past. It does not seek to improve the behaviour of the offender in the future. However, retribution may not be as purposeless as might appear on the surface. It serves the practical function of helping to cement the social fabric of every society.

Durkheim discussed the division of labour in human societies, both developed and underdeveloped. In his treatment of labour, he also considered the nature of crime. In his view there is a greater degree of division of labour in developed societies than in the underdeveloped ones, where individuals are engaged in what everyone else is doing. Consequently, a marked degree of similarity appears in the general outlook upon life amongst such people. Durkheim then makes the important observation that a greater degree of social cohesion is produced than is found in the developed societies, where there is a greater division of labour. This similarity in the general outlook upon life Durkheim calls the "collective conscience";[12] according to Durkheim, a crime is conduct which "shocks the common conscience".[13]

The point about retribution and social cohesion in human communities is that retribution is a particularly suitable form of condemnation of unwanted behaviour, of the kind which "shocks the common conscience." It serves to remind the community what is approved and what is disapproved behaviour in the community. It separates the good from the bad. Any form of punishment which tends to do this serves to cement the law-abiding majority in any community against a criminal minority.

Admittedly, deterrence and reform, like retribution, also contain an element of condemnation. But unlike deterrence or reform, the message in retribution is clear and unambiguous. While deterrence and reform seek to improve the behaviour of the offender in the future, retribution does not pretend to do so.

Retribution may be of particular relevance to the Zambian social fabric. Like other societies in Africa, Zambian society is still technologically underdeveloped. Social

cohesion may still be very strong even against a background of the advancing money economy. A greater emphasis on the retributive theory of punishment might therefore assist to slow down the disintegration of social cohesion. As will be seen in chapter 10, retribution rather than deterrence or reform is back in fashion again in western penal philosophy.

4. Other attributes of retribution.

Under the utilitarian theories of deterrence or reform, it is logically possible, as will be seen, to punish a citizen even if he has not been found guilty of any offence in the criminal courts. All that is needed is that the state feels that the citizen needs to be deterred or to be reformed. [14] One attribute of retribution is that only persons who are found guilty of offences by the courts can be punished. [15] Another attribute of retribution is that it preserves the worth of the individual in society. Kant says that no individual should be used by another man as a tool in pursuit of any goal. [16] He was clearly thinking of utilitarian theories of punishment. But it must also be said that the point about the worth of the individual in society stands at a very high philosophical level of abstraction; it lacks practical significance to the ordinary Zambian in the street or village.

5. Some problems with retribution.

There are at least three problems with the theory of retribution. The first is that the idea of "deservedness" or "desert" in retribution is not clear. When a punishment is imposed because a person has committed an offence, this does not tell us why the offence should be the reason for imposing the punishment. [17] Also, to say that a punishment is deserved because a person has committed a crime is circular reasoning. [18] It is circular reasoning because there is no unchangeable definition of "offence". An "offence" is so called simply because legislation so provides. [19] These are valid complaints to make against the retributive theory of punishment. However, such criticism should be viewed in its proper context. Doubt over the meaning of deservedness or desert surely relates to minor infractions not involving moral turpitude on the part of the offender. Examples are minor traffic infractions. There can be little doubt that the sort of offences that seriously concern society deserve punishment: examples are homicides and property offences.

A second criticism of the theory of retribution is predictable. Armstrong cites Mabbott as having said that:-

> "Retributive punishment is only a polite name for revenge; it is vindictive, inhumane, barbarous, and immoral. Such an affliction of pain for pain's sake harms the person who suffers pain, the person who inflicts it, and the society which permits it." [20]

By imposing a moral right to punish the offender, the sentencer is not given latitude to show mercy. [21]

The complaint that retribution is no more than revenge is neither fair nor realistic. Human nature is such that the need for revenge is sometimes difficult to resist. Every society needs institutions which have the task of punishing offenders or "revenging" on behalf of the individual victims of crime, all in the interests of order in society. Such institutions are the courts and correctional services, notably prisons. The complaints that retribution is "vindictive", "inhumane", "barbarous" or "immoral" are exaggerated.

A third criticism of the retributive theory of punishment is again well known. It stems from the fact that retribution is not utilitarian. It is complained that it is backward looking; it does not seek to improve the behaviour of the offender in the future. But we have already argued above that retribution may not be so totally devoid of purpose in society. It was pointed out that it can be a particularly suitable theory of punishment for assisting to prevent the disintegration of the social fabric of any community, particularly in a technologically underdeveloped society like that of Zambia.

II. Future-referring theories of punishment.

A. Deterrence.

It may be useful at the outset to clarify the nature and extent of deterrence. The Canadian Sentencing Commission accurately points out that deterrence as such covers a very wide range of sanctions. It notes that:-

> "it can be claimed that any sanction has a deterrent effect." [22]

One does not have to restrict the study of deterrence to the criminal law, because individuals encounter deterrence in their everyday lives. [23] Even in the civil courts, both ordinary and exemplary damages are motivated by deterrent considerations. [24]

All this is true and is within the common experience of all normal human beings. But it might be more illuminating to think of the kinds of pressures at work in deterrence. What Radcliffe-Brown says about punishment as such in human society may be of relevance here. He points out that at its most basic, punishment is really a particular kind of reaction to particular behaviour. [25] When behaviour is disapproved, the reaction, or the sanction, is negative. [26] It is in the nature of a punishment. On the other hand, when conduct is approved, the reaction, or the sanction, is positive. [27] It is therefore important to realise that not all sanctions are negative because some sanctions are approving and encouraging.

In all successful court cases, civil or criminal, it may therefore be useful to think of deterrence as consisting of two kinds of pressures, or sanctions, acting together at one and the same time. When a finding is made against a defendant in civil proceedings, or an accused person is found guilty, the sanctions are negative against the defendant or the accused person. But at the same time, there are positive, or approving and encouraging, sanctions in favour of the winning plaintiff or the victim of the crime. Positive sanctions are therefore as significant in the concept of deterrence as negative sanctions.

1. Deterrence defined.

According to Zimring and Hawkins, what is central to the idea of deterrence is:-

> "the thesis that attaching unpleasant consequences to behaviour will reduce the tendency of people to engage in that behaviour." [28]

This proposition is an obvious one and is within the everyday experience of every normal human being. Zimring articulates the extent of the threat in deterrence. He says that:-

> "The deterrent effect of a particular threat is the total number of threatened behaviour it prevents." [29]

The clear suggestion here is that the targeted behaviour of any one sanction can be much wider than may be intended or imagined. But in his conceptualisation of the widely-spread effects of a single deterrent sanction, Zimring appears to acknowledge that deterrent threats do not always have the desired effect on the behaviour which is supposed to be suppressed.

2. Types of deterrence.

Traditionally, deterrence is split into two well known types. First, there is general deterrence: it postulates that sentencing the individual offender deters those others who may be contemplating committing offences in the future. [30] However, general deterrence

should not be confused with the similar but wider concept of general prevention, as propounded by Andeneas. Describing his idea, Andeneas says that:-

> "General prevention.... may be described as the restraining influence emanating from the criminal law and the legal machinery." [31]

Individual deterrence on the other hand, is meant to deter the particular offender actually sentenced from committing offences in the future. Sometimes, individual deterrence is called intimidation. [32]

Again, it is traditional to subdivide deterrence into absolute deterrence and marginal deterrence. Zimring and Hawkins explain the difference in the following words:-

> "The problem of absolute deterrence relates to the question, does this particular penalty deter? The problem of marginal deterrence relates to such questions as would a more severe penalty attached to this particular criminal prohibition more effectively deter?" [33]

Marginal deterrence normally features in debate over the deterrent efficacy of capital punishment. Splitting deterrence into absolute and marginal deterrence is in clear recognition that sanctions can deter different persons to varying degrees. Some may be totally deterred. At the opposite end of the deterrent scale, the sanction may not deter at all. [34]

3. Three criticisms of deterrence.

At least three lines of criticism can be levelled against the theory of deterrence. The first stems from the utilitarian nature of deterrence. It is said that, taken to its logical

conclusion, deterrence has alarming theoretical implications. The second line of criticism is that the underlying assumptions of deterrence are more tenuous than is realised. Thirdly, the theory of deterrence is criticised because deterrence does not work.

a. Irrelevance of guilt, moral repugnance and overkill.

Under the theory of deterrence, the state can logically punish an innocent citizen. Armstrong says:-

> "a deterrent will deter so long as the person on whom the pain is inflicted is believed to be guilty. It really wouldn't matter....whether he was in fact guilty or not; as long as we kept his innocence secret we would make a very effective example of him." [35]

Punishing an innocent citizen is the most unacceptable consequence of pursuing a strict deterrent policy. [36]

Although the strict application of deterrent policies can lead to serious consequences of no more than a theoretical nature, in Zambia, the relentless pursuit of general deterrent policies has, until recently, led to consequences of a much more practical nature. First, the continuing existence of lynch mobs in urban areas of Zambia to which reference has already been made in chapter 1, must surely be attributable in part to a belief that government policy is to crack down on crime and that no mercy should be shown to suspects seen committing it. Secondly, lynch mobs may reflect a belief that the government deterrent policy is not effective. Thirdly, a practical consequence of government pursuit of strict deterrent policies has led to the enactment of preventive

detention legislation[37] which has led to such court cases of In the Matter of Kapwepwe and In the Matter of Kaenga and An Application for a Writ of Habeas Corpus ad Subjiendum[38] and In the Matter of Buitendag, In the Matter of an Application for a Writ of Habeas Corpus ad Subjiciendum[39] and Bhagvatilal Dahyabhai Rao v Attorney General [40] already cited in Chapter 1.

Not only does a strict application of the deterrent policies make it possible to punish an innocent person, but it also, logically, enables the state to impose excessive punishments for trivial offences even though the state may not actually do so. Bean explains as follows:-

> "Deterrence can easily become over-consumed with social surgery or social hygiene where the demands of a social order are such that offenders are punished according to what is regarded as socially unclean. Lacking the link between guilt and punishment, it is easy for the utilitarian to be dominated by mischief and see others as capable of manipulation." [41]

If what Bean says is true, logically, an offender can be caned to death for committing a minor traffic offence, [42] if it is believed that such a severe punishment will deter other would-be minor traffic offenders. Another obvious example of cases in which sentences are in danger of being too severe is homosexual offences. [43]

b. The underlying assumptions of deterrence are tenuous.

Gibbs says that to be effective, deterrence must assume two things. First, it must be assumed that the offender is, inter alia, aware of the prohibition in question. Secondly, it

must be assumed that the offender had a choice in complying with the law, in that he was not prevented from disobeying it by physical or psychological imperatives. [44]^44 But Madden very properly points to:-

> "The neurotic roots of crime [which] dramatically points to the irrelevance of the deterrent view of punishment....."^ [45]

He further points out that some offenders commit crime when:-

> "in a rage or a deep depression, or usually against someone who bears a close personal relationship to them." [46]

Madden also says that in some other cases, individuals are pushed into committing crimes by irresistible socio-economic pressures of their total environment. He gives the theoretical example of people born in a ghetto, who grow up in the ghetto and are therefore "trapped in social injustice." [47] What is said about the constraints of the efficacy of deterrence is true in any society including Zambian society.

But the validity of the compulsive or irresistible behaviour argument has been doubted. Wasserstrom asks how strong the impulse must be before the behaviour can be said to be irresistible. [48] He also asks why:-

> "we should suppose that the apparently 'mindless' behaviour must be the product of compulsions which are less resistible than those to which we are all at times subjected." [49]

Madden's argument about irresistible behaviour and the irrelevance of deterrence should be put in their proper context. This particular argument can only refer to limited types of offences which are associated with deep and sudden emotions such as assaults against the

person generally and homicides in particular. But the bulk of crime in any modern society is property crime. Therefore the irresistible behaviour argument can only refer to a minority of offences. Writers who wish to make this particular point should also make this important clarification. Secondly, and with particular regard to homicides, in the experience of the writer at the Zambian bar, very few homicides are committed by people suffering from mental illness (for numbers, see Chapter 9). Again, an equally small number of homicides are committed as a result of severe marital on family pressures. Perhaps the extended family system in African societies helps to diffuse the enormous pressures that can be generated within the marital and family environment leading to violence against the other family members.

Regarding the earlier argument that a person must be aware of a prohibition if deterrence is to work, this particular argument is valid only in respect of minor and socially tolerable offences like minor traffic offences. With regard to the more serious offences which concern people like offences against the person or property generally, people generally know what is prohibited even if they may not be aware of the existence of the prohibition in statute law.

It must therefore be concluded that the underlying assumptions of deterrence may not be as tenuous in extent as has been advanced.

c. Deterrence does not work.

Perhaps the best known argument against deterrence as an instrument of penal policy is that it has not been shown to work. Part of the problem lies in finding the necessary research techniques which are able to show that a particular person has desisted from committing an offence primarily because he feared the severity of the sentence attached to the offence he wanted to commit. Such lack of evidence is to be found in the literature on the death sentence, at least in western jurisdictions. As far as the writer is aware no evaluative research has been done into the efficacy of deterrence with regard to the death sentence or any other penalty in Zambia or any other former British dependency. However, there may be factors in the total make up of Zambian society which might conceivably make deterrence, or even reform, a more effective tool of social policy, in which case they should be exploited so that deterrent penal policies are made more effective.

Zimring and Hawkins note that, faced with the same legal threat, individuals from different cultures may react differently from one another. [50] Andeneas makes the same point when he says that the criminal law does not operate in a vacuum. [51] Even within the same racial group, there may be significant cultural differences that may be relevant in the business of law enforcement. For example, Zimring and Hawkins report that after a visit to the United States of America in the 1930s, two leading European criminologists found that American attitudes to law and law enforcement generally were different from the

attitudes in the more tradition-bound European societies. The Austrian criminologist Giassbeger spoke of a lack of legal conscience in the European sense. What Zimring and Hawkins report about American attitudes to crime may continue to be valid even today. A proper and comprehensive research into the cultural reactions to deterrence in an African society, known for its reverence towards authority, might conceivably reveal that strict deterrence may not be as ineffective as has been made out by western writers. It should be remembered that traditional African society, like any other tribal society, was essentially a conservative society (Chapter 3).

B. Reform.

As a theory of punishment, reform is as well known to the general Zambian public as deterrence. Yet, like deterrence, the underlying assumptions behind reform remain unknown to the ordinary person in the streets of Zambia as are the theoretical implications of enforcing strict reformatory penal policies. Again like deterrence, the central meaning of "reform" is not entirely clear.

1. The meaning of "reform".

A noticeable feature of "reform" is the variety of language used in penological literature to refer to the one idea of improving the future behaviour of the offender. Words commonly used are "reform" itself, "rehabilitation", "treatment" and "training". Such a

variety of terms may be an indication that there may be no generally agreed meaning of "reform". As further evidence of this, some of these words are used in combination, like "reform and rehabilitation",[52] or "rehabilitation and treatment".[53] Sometimes the same words are used disjunctively, like "reform or rehabilitation",[54] or "treatment (or rehabilitation)".[55]

"Reform" and "rehabilitation" seem to be good substitutes for each other. But there is nevertheless a distinction between the two. "Reform" has a more obvious moral and religious content to it than "rehabilitation", which has more secular connotations and is also associated with scientific investigation, at least in the period following the second world war.[56] "Treatment" and "training" seem interchangeable; but again the two are not quite the same. The former has psychiatric connotations; it means helping the offender to understand himself a little better so that he can learn to adjust himself socially as occasion demands.[57] But sometimes "treatment" refers to acceptance by the individual offender of the values of society through what in social work is sometimes called "the significant others".[58]^58 "Training", on the other hand, has something to do with the socialisation of offenders into good work habits.[59] But sometimes it refers to the deliberate attempt to change the behaviour of the offender by example.[60]

It should therefore be realised that the idea of improving the behaviour of the offender, or "reform", can take place at two distinct levels. First, there is reform at the deep psychological level because the offender has seen the religious or moral wrongfulness of his act. Such a realisation can come about through "reform", "treatment", or "training".

Then there is reform at the more superficial level. This can happen through "rehabilitation", or again through "treatment" or "training".

It is important that penal policy-makers in Zambia are alive to the distinction between the two types of reform so that they formulate the right policies to achieve reform at either or both levels. But they should at the same time realise the immense difficulties involved in reforming offenders at the deeper psychological level. Because of the obvious difficulties of achieving reform of this kind, the realistic option is to abandon the idea. Efforts at reforming offenders in Zambia should concentrate at the more superficial but practical level by socialising offenders in good work habits and imparting industrial skills to them within the prison environment.

2. The theoretical basis of reform: the "Rehabilitative Ideal".

The idea of reform is based on what has come to be known as the "rehabilitative ideal". This ideal has a long history, stretching back to the biological determinism of Lombroso's criminology. It was a criminology which focused on the individual offender and his needs as opposed to the crime committed. [61] The offender is assumed to be sick and in need of treatment. [62]

Allen, the author of the expression "rehabilitative ideal", describes it as follows:-

> "The rehabilitative ideal is a complex idea, which, perhaps, defies a completely precise statement. The essential point, however, can be articulated. It is assumed, first that human behaviour is a product of antecedent causes. These causes can be identified as part of the physical universe, and it is the obligation of the scientist to discover and to describe them with all possible exactitude. Knowledge of the antecedents of human behaviour makes possible an approach to the scientific

> control of human behaviour. Finally, and of primary significance for the purposes at hand, it is assumed that measures employed to treat the convicted offender should serve a therapeutic function, that such measures should be designed to effect changes in behaviour of the convicted person in the interests of his own happiness, health, and satisfaction and in the interests of social defence." [63]

In Western jurisdictions, the idea of reform and with it the rehabilitative ideal have been in decline since the 1970s. One of the earliest writers who pays little attention to the idea of reform in prison and concentrates on the basic human rights of prisoners is Fogel. He says:-

> "A penal sanction [meaning prison] should only mean a temporary deprivation of liberty ...The prison is responsible for executing the sentence, not rehabilitating him." [64]

It should be noted that every reformist mood, movement, or practice, be it national or world-wide, is based on one or more of these underlying but discernible beliefs: that the human personality can be changed for the better, a scientific approach to problem-solving can successfully diagnose what went wrong with the offender and that this same scientific approach can also find him a cure. At its most basic, then, the rehabilitative ideal assumes that human nature is essentially good and not bad. If it was thought otherwise, modern criminal justice would concentrate on devising penal policies which are retributive and deterrent, but not reformatory.

It is worth pointing out that the fact that the reform ideal is in decline in Western jurisdictions does not mean that belief in the essential goodness of human nature has been abandoned. As will be shown soon, the problem appears to be that reform does not seem to work because offenders are forced to reform in harsh criminal justice environments.

3. Four lines of criticism of reform.

At least four lines of criticism can be levelled against the theory of reform. First, there is the criticism which, like deterrence, springs from the utilitarian qualities of reform. Mabbott says that a strict application of reform should entitle the state to pick on any innocent citizen if the state thought that that citizen is in need of reform. All that is necessary is that the state should consider him a "bad man".[65] In any society there are some people who would qualify as "bad" and therefore liable to be picked so that they are reformed.

A corollary criticism is that when a person has been convicted of an offence and sent to prison, the offender can logically remain in prison for a much longer period of time than is warranted by the gravity of the offence. All that is necessary is for the state to deem that the prisoner is "potentially dangerous" and therefore in need of reform.[66] This is a valid observation and the potential for the abuse of basic human rights in pursuit of the reformation of "bad" people is particularly great in developing countries like Zambia.

This criticism of reform which springs from its utilitarian qualities can be dismissed for being too theoretical. It is inconceivable that the state in Zambia, under any guise, can act so arbitrarily as to pick on persons suspected of committing offences and send them to jail simply because the government thinks that they are in need of reform. This was not so even when Zambia was a one-party state. Any government which detains people as a preventive or deterrent measure would do so primarily on deterrent grounds, and not with the aim of reforming persons deemed in need of reform.

The second line of criticism of reform is more substantial; it is said that its underlying assumptions are vague and ambiguous. Allen says that the nature of the problem to be addressed in the person to be reformed is obscure. [67] Brody points out that rehabilitation is always hampered by an inadequate understanding of human nature. [68] Hawkins complains that the medical model of crime as a sickness has produced a view of crime and punishment in wholistic and simplistic terms. [69] Human nature is indeed difficult to understand. These are very valid criticisms in any society including that of Zambia.

Thirdly, the role of the expert as an agent of reform is attacked. Lewis says that under the reform ideal, sentencing is removed from the courts which the general public is entitled to criticise. Instead, sentencing has passed into the hands of the scientific expert but the tools and methods of investigation do not involve matters of right and wrong. [70] Also, Allen questions the competence of the technical expert. [71] What these authors have in mind are prison psychologists and psychiatrists. Zambia has no such scientific experts in its prisons to deal with the general prison population. Zambian prisons hold mentally ill criminals but the prison medical staff consists of medical assistants only. Psychiatrists come from mental hospitals to treat the mentally ill in the prisons.

The last and perhaps the most serious criticism of the reform theory is that it does not work. Moberly says that reform does not work "in principle and practice".[72] Taking the narrow but deeper meaning of reform, Moberly very properly asks the following rhetorical question:-

> "How can any forcible infliction of physical or mental pain on a doer of a lawless act, transform the mental disposition which led him to do it? Is not reform, in the

shape of genuine contrition and amendment 'an inward and spiritual process which punishment inflicted by society cannot cure?'".[73]

Indeed it is too much to hope that the experience of being pushed through the criminal justice machine should induce a change of heart. It may occur in some cases but for many in any society, including Zambian society, being pushed through the criminal justice system merely creates embarrassment, bitterness, fear and resentment.

III. Conclusion on theories of punishment.

Retribution, deterrence and reform have been discussed. What lies at the core of each of them was pointed out and criticisms against them have been outlined. From this brief treatment of the three theories of punishment it is clear that their underlying assumptions are more complex than may be supposed and their application can have surprisingly serious consequences for the offender. In most countries the only group of people who show any interest in them are academicians, but in Zambia theories of punishment have hardly interested the academic community. [74] The Zambian judiciary is equally uninterested, there being no serious references to theories in court judgements, even though the sentence in individual cases is supposed to be based on such theories.

When Parliament enacts penal legislation it is very doubtful whether any serious thought is given to the theoretical basis upon which specific sentences are fixed in the legislation. [75] Parliament does not justify the fixing of specific sentences on the basis of retribution, deterrence or reform. Admittedly, when harsh penal legislation is passed the

usual theory of punishment cited is deterrence, but this is no more than parroting. Parliament in Zambia, as in many other jurisdictions, has little insight into the complexities of deterrence or indeed retribution or reform. In truth whenever Parliament sets sentencing parameters justice is the paramount consideration. Similarly, it is doubtful whether sentencers first search for the appropriate theory of punishment in the individual case before passing sentence. As with Parliament, sentencers are surely much more concerned with doing justice.

If one theory of punishment had to be given pre-eminence in Zambia, that theory would have to be denunciation, a branch of retribution stressed by Lord Denning when he gave evidence to the Royal Commission on Capital Punishment Report in Britain. However, denunciation is not without problems of its own.

Hart points to some of the consequences implicit in denunciation. First, he says that by allowing public feelings prominence in the sentences actually imposed in the individual sentence, the public is prevented from realising what the outrage may be doing to the rest of society, [76] cautioning against allowing public outrage into court judgements. The reason he gives is that this practice does not help research efforts to find a sentence that will accurately measure the precise level of public outrage triggered by specific acts of crime. [77] Also, Hart states that there is no general agreement as to what merits denunciation. Expressive judgements may be no more than a reflection of the sentencer's own moral or social values. [78]

All these are valid criticisms. Nevertheless, denunciation has one strong attribute above any of the three theories: it is a simple and straight-forward view of punishment

which can be understood not only by educated Zambians in Parliament and the courts, but by the ordinary person in the village. Denunciation has none of the intellectual complications of retribution and does not pretend to be utilitarian. It is an honest theory of punishment.

But it must be admitted that denunciation normally implies harsh penalties and, in the case of imprisonment, long and rigorous prison terms. This need not always be so. Traditional society stressed compensation. In a very real sense there is no penalty more denunciatory than compensation because of the obvious element of contrition especially if the compensation is handed over personally, as is the practice in traditional society (Chapter 2).

Section B.

The sentencing of offenders.

This part will concentrate on general sentencing principles which courts follow when sentencing individual offenders. Discussion of the proper approach when courts are dealing with specific sentences such as fines or corporal punishment will be dealt with in the relevant chapters. In determining the individualised sentence, courts routinely take any mitigating and aggravating factors into account; here only general problematical ones will be discussed. Probably because of the nature of the sentence, judicial concern with general principles of sentencing has concentrated on imprisonment.

I. The general approach.

A. The starting point: the tariff sentence.

When a court is considering sentencing an offender, the first principle is to find the tariff sentence for the offence; only when this is done should the court determine the individualised sentence. Thomas explains the tariff sentence:-

> "the central idea is that within the scope of any legal definition [of the offence] a variety of typical factual situations will recur; with each of these typical factual situations there are associated upper and lower limits within which the sentence should normally fall, in the absence of exceptional circumstances in the offence and without regard to mitigating features peculiar to the offender himself. The difference between the upper and lower limits applicable to a particular typical situation constitutes the 'range', 'bracket', 'normal level' or 'pattern of sentence' for that variation of the offence. A sentence above the upper limit will be described as 'excessive', 'out of scale', 'beyond the range', and is normally reduced. A sentence which is within the limits will not be reduced on the ground of disproportionality alone, even though it is marginally more severe than members of the court [Court of Appeal] might individually have passed." [79]

As the 'range' is not a mathematical construct, it is easier to describe it than to identify it. The Zambian judiciary prefers to refer to the tariff sentence as "the proper sentence."

In Nasilele v The People[80] the appellant was convicted of stock theft which carried a minimum prison sentence of seven years. After noting that the appellant had 14 previous convictions, the trial judge imposed a sentence of seven and half years but on appeal to the Court of Appeal the sentence was reduced to seven years. Outlining the proper basic sentencing approach, Baron J.P. said:-

> "It is trite that a bad record must not be the basis for imposing a heavier sentence than the offence itself warrants. In other words, the first decision must always be: what is the proper sentence for the offence, and ignoring at this stage the presence or absence of mitigating factors; only after deciding what is a proper sentence for the offence itself does the court proceed to consider to what degree that sentence may properly be reduced because of the presence of mitigating factors." [81]

Very similar pronouncements were made in Jordan Nkoloma v The People. [82] In this case the appellant, who had a bad record, was convicted of aggravated robbery, which carried a minimum prison sentence of fifteen years, and was sentenced to twenty five years' imprisonment. On appeal to the Supreme Court the sentence was reduced to fifteen years. Outlining the basic sentencing approach, Baron D.C.J. said:-

> "before it [the court] comes to consider whether or not to accord leniency a court must first consider what is a proper sentence for the offence itself, and only then, after having made that decision, decide whether that sentence should or should not be reduced in the light of any mitigating factors that may exist." [83]

B. When may appellate courts interfere with the original sentence?

Appellate courts should not interfere with the trial court's sentence unless there are special reasons for doing so. In Jutronich, Schutte and Lukin v The People[84] the accused were convicted of five counts of theft of goods in transit and were each sentenced to concurrent prison terms of four years. Their appeals to the Court of Appeal were dismissed and Blagden C.J. set out the circumstances in which appellate courts can interfere with the original sentence:-

> "In dealing with an appeal against sentence the appellate court should..... ask itself three questions:
>
> (1) Is the sentence wrong in principle?

(2) Is it manifestly excessive so that it induces a sense of shock?
(3) Are there any exceptional circumstances which would render it an injustice if the sentence were not reduced?

Only if one or other of these questions can be answered in the affirmative should the appellate court interfere." [85]

On the face of it this is a reasonable approach.

Reference to excessive sentences might suggest that lenient sentences should not be disturbed and the original sentence increased. In Adam Berejena v The People[86] the appellant was convicted of motor vehicle theft and sentenced to five years imprisonment plus ten strokes of the cane. On appeal to the High Court the sentence was reduced to four years, the High Court mistakenly believing that the original sentence was six years. In the Supreme Court the original sentence of five years was restored. Dealing with the power of appellate courts to interfere with sentences, Silungwe C.J. elaborated on Blagden C.J's approach and said:-

> "An appellate court may interfere with a lower court's sentence only for good cause. To constitute good cause, the sentence must be wrong in principle; or it must be manifestly excessive or so totally inadequate that it induces a sense of shock; or there must be such exceptional circumstances as to justify an interference." [87]

An example in which the original sentence was increased is The People v Masissani[88] in which the appellant, a security protection officer, found a man and his wife by the road side, forced them to have sexual intercourse in his presence and took them to the police station where he administered corporal punishment on them for which he was convicted of assault occasioning actual bodily harm and sentenced to a fine and a suspended prison sentence. On review in the High Court the sentence was found to be patently inadequate

and raised to eighteen months' imprisonment. The Supreme Court confirmed the new sentence, Baron D.C.J saying:-

> "In our view [the magistrate's sentence] was indeed totally inadequate....In our view the seriousness or otherwise of the injuries is of only minimal relevance in a case of this kind; the essential features are the abuse of authority and the infliction under colour of authority of what the courts have always regarded as a degrading form of punishment for adults [corporal punishment],...." [89]

An example of a case in which the sentence was so severe as to induce a sense of shock is Francis Chanda v The People[90] in which, following a plea of guilty, the appellant, with two previous convictions, was convicted of the theft of forty-eight batteries valued at K13.44 and sentenced to two years' imprisonment. In the Supreme Court it was held that the two-year prison term was too severe. Gardner Ag.D.C.J. said:-

> "In this case, the sentence of two years imprisonment with hard labour, for the theft of forty-eight batteries valued at K13.44, comes to us with a sense of shock. This offence itself could not possibly merit such a high sentence." [91]

and reduced it to twelve months.

The principle of not interfering with the original sentence unless the sentence is manifestly excessive or inadequate, particularly where there is no disagreement about the type of sentence imposed, is, on the face of it, a fair one, but it can easily lead to charges of inconsistency and indolence on the part of appellate courts. Adjudication necessarily means evaluating the evidence before the court and coming to a decision, whether what is in question is the guilt of the accused or the proper sentence or severity of sentence to be imposed. If an appellate court can evaluate the evidence on record and come to a decision,

it should do the same regarding, say in the case of imprisonment, the exact length of imprisonment, which may be different from the length of imprisonment imposed by the trial court. To be unwilling to interfere with the trial court's precise prison term is therefore to be inconsistent. Having disagreed with the trial court's severity in the original sentence, because it should be either increased or decreased, failure to make the required adjustment, however small, is to be indolent; the proper sentence in every individual case is one which is deserved.

II. Factors affecting the determination of sentences.

A. Criminal record.

While society is entitled to expect protection from criminals by sending them to long terms of imprisonment in appropriate cases, [92] a bad criminal record alone is not a sufficient ground for imposing a longer prison term than is warranted by the facts of the case in hand. In Nasilele (above), [93] the Supreme Court said that a heavier sentence should not imposed on the ground that the offender has a criminal record. In Jordan Nkoloma (above), [94] [94] the Supreme Court said:-

> "This court has on a number of occasions drawn attention to the fact that there is no provision in our law for the sentencing of people who in other systems are called persistent offenders or habitual criminals." [95]

The Supreme Court then cited its own unreported decision in John Kalyata v The People[96] where it said:-

"We wish to draw attention to the fact that certain procedures which exist in other countries for the sentencing of habitual criminals or persistent offenders, whatever they may be called, are not the law of Zambia; we in Zambia cannot impose a sentence heavier than that which the offence itself merits because a man has a very bad record, and we certainly cannot sentence him because he is regarded as a menace to society'." [97]

Clearly, some members of the judiciary in Zambia want persistent offenders to receive special sentencing treatment. This would very much be in line with public opinion in the country. Persistent offending in society is a problem which does not appear to have been addressed by penal policy-makers in Zambia. Perhaps crime prevention policies in cases like car thefts and burglaries are more effective in curbing persistent offending than enacting special legislation as in Nigeria[98] or Uganda.[99]

B. Taking other offences into consideration.

Taking offences into consideration (sic) is an aspect of sentencing which has received no specific attention in Zambia although the practice is well established and reported cases make occasional references to it.[100] It is a mere convention without statutory existence[101] although it has received statutory recognition in some pieces of English legislation.[102] Under this convention a convicted person can ask the court to take into account similar offences which he has committed before passing sentence. Such offences do not appear on the charge sheet and are merely read out to the court by counsel for the offender. [103] In England, Boyle and Allen note that:-

"In sentencing the offender, 'the court can... give a longer sentence than it would if it were dealing with him only on the charge mentioned in the indictment'..." [104]

In Zambia the courts take the same line, [105] but because of the nature of the practice it is less often employed because lesser numbers of offenders are legally represented. However, the practice of taking offences into consideration probably makes the courts impose more lenient sentences. White, Newark and Samuels note that:-

> "The defendant...probably receives a lesser sentence than he would have done if he had been charged separately with each offence." [106]

This practice sprung from the reformatory ideal of punishment; re-arresting and trying the offender for each and every offence committed was seen as hindering his reformation. [107] White, Newark and Samuels make the important observation that this practice:-

> "would seem to be one of the hall-marks of a crime-control model of the criminal process,..." [108] (emphasis supplied).

Other advantages are discussed: higher police clear-up rates and lighter workloads for the police and courts. [109]

The most noticeable feature of this convention is that the offences do not count as convictions and autrefois convict cannot be pleaded. [110] A number of consequences flow from this fact, including: the offender cannot be prosecuted for an offence taken into consideration as has just been pointed out; [111] because only similar offences can be taken into consideration, there may be problems of demarcation in marginal cases; [112] and courts may face particular problems if an offence taken into consideration carries a special sentence like disqualification. [113]

In Zambia, the practice of taking offences into consideration raises one sentencing problem which does not appear to have been identified. One of the orders dealt with in Chapter 5 (financial penalties) is restitution and statutory judgements, by which civil jurisdiction is conferred on criminal courts where a public officer is convicted of prescribed offences:-

> "The court before which any public officer is convicted of a prescribed offence shall enter judgement and civil jurisdiction is hereby conferred upon it for that purpose, in favour of the Attorney General for the amount of the value of the property in respect of which the offence was committed." [114]

In Stephen James Hardy v The People[115] the accused was convicted of five counts of theft by public servant, a prescribed offence, involving K2000.00 and sentenced to six months imprisonment on each count, the sentences to run consecutively. He asked for three other offences to be taken into consideration involving K800.00. Statutory judgement was entered in favour of the Attorney General covering K2000.00 and K800.00. On appeal in the High Court the propriety of entering statutory judgement in respect of K800.00 was not questioned by Baron J.; he merely referred to it in passing saying:-

> "The appellant asked the three offences committed in 1967 [covering K800.00] to be taken into consideration, and the learned magistrate referred to them in his judgement and included them in his computation of the statutory judgement." [116]

But he also acknowledged that:-

> "it is true that when other offences are taken into consideration this does not amount to a conviction...." [117]

If offences taken into consideration are not convictions, the K800.00 should not have been included in the computation for purposes of entering statutory judgement.

Because of the consequences that flow from the ambiguous status of offences taken into consideration, White, Newark and Samuels consider that:-

> "The whole matter should be placed upon a modern statutory footing, and guidelines laid down indicating the sort of circumstances in which an offence should normally be taken into consideration." [118]

The idea of guidelines is a good one but somehow turning offences taken into consideration into convictions should be resisted; the convention is a convenient diversionary penal practice.

C. Concurrent and consecutive prison sentences.

In Stephen James Hardy (1971) (above) counsel for the appellant had successfully urged the High Court on appeal to make the six months' imprisonment run concurrently and not consecutively as decided by the trial magistrate. He cited an English criminal law journal which outlined the appropriate approaches to consecutive and concurrent sentences:-

> "As a general rule, consecutive sentences even though imposed for quite separate offences should not be added together to produce an aggregate sentence which is totally out of proportion to the gravity of the individual offences, or the most serious of them. A court is entitled to reduce what would be the logical total sentence if a strictly mechanical approach were followed, if this is necessary to produce a reasonable result." [119]

This is sometimes called the "totality principle". Baron J. accepted this approach and paraphrased the above passage as follows:-

> "This passage simply means that if, for example, a man is convicted of fifteen offences an appropriate sentence for each of which, regarded individually, would have been one year's imprisonment, it would be wrong to sentence him to a total of fifteen years' imprisonment unless the total course of behaviour warrants such a sentence.....It is not the correct approach simply to add together the sentence of the individual offences regarded individually; the court must look at the total course of behaviour and impose a sentence commensurate with that course of behaviour." [120]

In Chomba v The People[121] the Supreme Court pointed out the fuller implications of making prison sentences run concurrently in deserving cases. The accused was convicted of five counts of burglary and theft and sentenced to two years' imprisonment on each count. The sentences were to run consecutively, which meant that the accused was to serve a total of ten years' imprisonment. But the Supreme Court varied the sentences and made them concurrent. It said that where an appellate court allows appeals on some counts, it may be necessary in the interests of achieving the proper overall sentence to reduce the sentence on some of the remaining counts. After citing an earlier Supreme Court decision, Baron D.J.C said:-

> "We have pointed out that although there are anomalies inherent in each of the two possible methods [concurrent or consecutive] the better course is to impose concurrent sentences in respect of all the charges, the length of each sentence being that which the court considers appropriate for the total course of conduct. This course may, though this observation does not apply to the present case, involve an appellate court reducing the sentence on the remaining counts if the appellant succeeds on appeal in having some of the convictions set aside,...." [122]

The preference for making prison terms run concurrently rather than consecutively is aptly illustrated in the case of Alfred Mulenga v The People. [123] The accused was convicted of five counts of forgery for which he received four months' imprisonment on each count, the sentences to run consecutively, making a total of twenty months. On appeal to the Supreme Court the total sentence was not varied, but the route towards the total of twenty months was changed. Silungwe C.J. said:-

> "In this case before us we consider that the aggregate sentence for the course of conduct of imprisonment for twenty months was proper, but it should have been imposed by the concurrent method. We therefore set aside the sentences imposed by the trial court in respect of each count and in substitution thereof the appellant is sentenced to imprisonment for twenty months on each of the five counts, these sentences to run concurrently. The effect, of course, is that he will still serve a term of imprisonment for twenty months." [124]

D. Minimum sentences.

There has been a firm trend in Parliament towards imposing minimum sentences in Zambia since 1969, only five years after independence, [125] when for the offence of aggravated robbery, which carried a maximum sentence of life imprisonment, a minimum prison term of fifteen years was prescribed. [126] In Parliament, the Minister of Legal Affairs and Attorney-General explained that a deterrent sentence was called for because there had been an outbreak of incidents of this particular offence. [127] The following year, in 1970, the law of stock theft, which applied to all sorts of domestic animals big and small, including goats and pigs, was amended: the previous maximum sentence of seven years imprisonment now became the minimum sentence, with a new maximum of fifteen years'

imprisonment. [128] Not all minimum sentences consisted of prison terms. Later the same year, 1970, a minimum sentence of K1,000 was prescribed for possession of obscene matter and related offences. [129]

Regarding stock theft, lawyers in Zambia considered the definition of "stock theft" too sweeping and the minimum sentence consequently too severe. It was suggested that a shorter prison term should be available for first offenders. [130] An amendment of 1974 prescribed a minimum sentence for stock theft only for second and subsequent offences. [131] The same legislation prescribed a minimum sentence for the second and subsequent offences of motor vehicle theft of seven years' imprisonment, with a maximum of fifteen years'. [132] In 1987, further amendments were made to offences of theft of stock and motor vehicles: now, only theft of larger stock, like bulls and cows, carried the minimum sentence of five years' imprisonment and a maximum of fifteen years' for first offences. [133] Subsequent offences attracted the higher minimum of seven years' and the same maximum. [134] In the case of motor vehicle theft, a first offender must be sentenced to a minimum of five years' imprisonment and a maximum of fifteen years'; a second or subsequent offence carries a minimum of seven years' and a maximum of fifteen years'. [135]

It appears that the courts were unsure, initially at least, about how to apply minimum sentences when they were first introduced. One of the early cases to state the approach to minimum sentences is Nasilele (1972)(above). [136] After stating the initial approach to sentencing generally (starting from the tariff sentence) Baron J.P. said:-

> "These principles are no less applicable when the offence is one for which Parliament has prescribed a minimum sentence; by doing so Parliament has expressed the intention that all offences of this particular type be treated more

> seriously than previously. The effect is that for the least serious offence of stock theft, or where there are mitigating factors enabling the court to exercise maximum leniency, the minimum should be imposed, while for more serious offences, and where there are insufficient mitigating factors to enable the court to exercise maximum leniency, a more severe penalty should be imposed." [137]

Very similar views were aired in Nkoloma[138] (above), where the accused was convicted of aggravated robbery and sentenced to twenty-five years' imprisonment but the Supreme Court on appeal reduced the sentence to fifteen years, the minimum prison sentence provided. Baron J.P. said:-

> "Where, as here, the legislature has laid down a minimum sentence the court must first consider whether the circumstances in which the offence were committed were such as to take it outside the spectrum of offences which should be regarded as attracting the minimum." [139]

Clearly, the tariff sentence in minimum sentences has been set at the level of the minimum sentence. It appears that, like judges everywhere the judiciary anywhere, Zambian judiciary do not like minimum sentences as they fetter their discretion. [140]

III. Sentencing trends

Table 3 shows the sentencing trends of Magistrates Courts and the High Court over a period of 12 years from 1964 to 1982, inclusive, covering four sentences: imprisonment, corporal punishment, fines and discharges (the rest are not included as their numbers are too insignificant). Because it is the most severe sentence, particular attention should be paid to imprisonment as a proportion (expressed in percentages) of all sentences imposed.

Table 3.

Sentences Passed by Magistrates' Courts and the High Court in Zambia, 1964-1982.

Year	(a) Total No. of Convictions	(b) Imprisonment	(c) Corporal Punishment	(d) Fines	(e) Discharges	(f) (b) as a % of (a)
1964	50,219	6,611	967	34,610	2,020	13.16
1965	61,071	6,047	1,136	47,530	1,337	09.90
1966	63,476	6,221	1,221	47,927	2,061	09.80
1967	57,833	5,361	933	44,180	2,390	09.26
1968	30,479	3,260	736	21,471	1,275	10.69
1969	38,465	3,283	651	30,191	1,257	08.35
1976	53,375	10,750	670	36,005	650	20.14
1977	51,977	13,882	435	32,137	2,065	26.69
1978	78,858	14,766	764	50,646	2,167	18.72

1979	78,005	11,470	457	61,226	1,730	14.70
1980	103,914	16,896	2,137	79,183	2,812	16.25
1982	113,682	12,189	1,665	90,369	824	10.72
Total:	781,354	110,736	11,772	575,475	20,588	

Source: Annual Reports of the Judiciary and Magistracy.

As expected, the most commonly imposed sentence were fines (575,475), followed by imprisonment (110,736), discharges (20,588) and corporal punishment (11,772). It should be noted that imprisonment came before discharges and corporal punishment and the lowest percentage of imprisonment stood at 08.35% in 1969 and peaked to 26.69% in 1977. It is doubtful whether the legislature, the judiciary, the government or any educated section of the society, including the media and academia, is aware of this trend with its emphasis on imprisonment and consequent calls for more penal administrators and higher national budgetary costs. Even though corporal punishment figures are the smallest, apparently no one has questioned the propriety or efficacy of this form of punishment in independent Zambia (more in Chapter 9) or urged the legislature and judiciary to impose greater proportions of financial (more in Chapter 5) and non-custodial and semi-custodial (more in Chapter 6) penalties.

IV. Guiding and structuring sentencing discretion.

A. The general picture.

Criminal records etc. are by no means the only factors which contribute to the shape and direction of judicial sentencing policy; much more is involved. In Western countries attention has focused on attempts to guide and structure sentencing discretion by a variety or combination of approaches. This does not mean that sentencing has been completely unfettered. [141] ^141 But the restrictions have tended to be minimal. For example, legislation sets maximum penalties and in a few cases minimum penalties as well, as indicated above. Sometimes an offence is split into various categories and individual sentences provided as in general theft, which carries a maximum of 5 years, [142] stealing from person (7 years) [143] and theft by servant (15 years). [144] There may be a general restriction on the imposition of particular types of sentence, such as imprisonment, as when a "young person" is found guilty. [145]

In Western jurisdictions wide sentencing discretion has led to complaints of sentencing disparities, [146] a problem which has not attracted much attention in Zambia even from the Law Association of Zambia, probably because serious research has not been undertaken. The problem of sentencing disparities needs to be put in its proper context and not emphasised unnecessarily. Fitzmaurice and Pease explain:-

> "Disparities exist, to put it at its most general, when similar offences, committed by people who are similar in relevant respects, receive different sentences. Differences

> in the use of punishment between epochs and between nations or regions tend not to excite a sense of injustice. They are not perceived as disparities..... A sense of injustice is felt keenly only when sentences can be contrasted with other sentences passed around the same time and in roughly the same place." [147]

Thus any difference in sentencing during the colonial administration and the post-independence period cannot, fairly, be complained of as disparities.

It should also be appreciated that complaints about insufficient guidance are not limited to the courts; they extend to other segments of the criminal process as well. Wide discretion at the level of police arrest has been identified as problematical. Nairn notes:-

> "the police have to exercise a large measure of discretion in deciding when to arrest and when not to arrest. They are thus more than mechanical enforcers of the laws: they must be seen as performing a judicial function." [148]

Similarly, wide prosecution discretion raises concern. Tornaritis identifies two prosecution systems:-

> "(a) The one in which the prosecution is an automatic or mechanical matter in the sense that the prosecutor is bound to institute proceedings for all cases which come to his notice,..." [149]

and cites some continental European countries, such as Italy, France and Greece, [150] and:-

> "(b) the other in which the prosecutor has a discretion to institute or not criminal proceedings." [151]

and cites common law countries. [152]

In Zambia, the Constitution states:-

> "(2) The Director of Public Prosecutions shall have in any case <u>in which he considers it desirable so to do</u>-

(a) to institute and undertake criminal proceedings against any person before the court....in respect of any offence alleged to have been committed by that person;

(b) .....

(c) .....

(3) .....

(4) .....

(5) .....

(6) In the exercise of the powers conferred on him by this Article, the Director of Public Prosecutions shall not be subject to the direction or control of any other person or authority: Provided that where the exercises of any such power in any case, in the judgement of the Director, involves general considerations of public policy, the Director shall bring the case to the notice of the Attorney-General and shall in the exercise of his powers in relation to that case, act in accordance with any directions of the Attorney-General." [153] (Emphasis supplied).

It would appear that both the Director of Public Prosecutions and the Attorney-General have a wide discretion about which no guidance of any kind is given. [154] In practice, the Director adopts an "automatic" prosecution policy, [155] opting not to exercise the discretionary powers given to him, thereby underscoring the need for some guidance regarding his wide discretionary powers.

B. Sentencing guidance and guidelines.

In recent years Western jurisdictions have embarked on a deliberate policy of establishing sentencing guidelines which are clearer and more explicit and which emphasise one or other theory of punishment. A poorly trained Zambian judiciary (Chapter 4) needs such guidance even more than the judiciary in the developed countries. More significantly, the opportunity can be taken to emphasise the compensation element

of the denunciatory theory of punishment, advocated above, over the punitive wing. There are several techniques employed in Western jurisdictions for guiding and structuring sentencing discretion which Zambia should seriously consider adopting.

1. A general statement of the purposes and principles of sentencing.

In 1984 a Sentencing Commission was appointed in Canada. It made several important recommendations about the goals and principles of sentencing so that they can be enacted. The overall purpose of sentencing was defined:-

> "the fundamental purpose of sentencing is to preserve the authority of and promote respect for the law through the imposition of just sanctions." [156]

This, perhaps with minor amendments emphasising compensation, could be equally applicable to the fundamental goal of sentencing in Zambian. Regarding the principles of sentencing, the Commission made the following points:-

"a) The paramount principle governing the determination of a sentence is that the sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender for the offence.

b) Second, the emphasis being on the accountability of the offender rather than punishment, a punishment should be the least onerous sanction appropriate in the circumstances and the maximum penalty prescribed for an offence should be imposed only in the most serious cases.

c) Subject to paragraphs (a) and (b) the court in determining the sentence to be imposed on an offender shall further consider the following:
   i) any relevant aggravating and mitigating circumstances;
   ii) a sentence should be consistent with sentences imposed on other offenders for similar offences committed in similar circumstances;
   iii) the nature and combined duration of the sentence and any other sentence imposed on the offender should not be excessive;

iv) a term of imprisonment should not be imposed, or its duration determined, solely for the purpose of rehabilitation;
v) a term of imprisonment should be imposed only:
aa) to protect the public from crimes of violence,
bb) .....
cc) .....

d) In applying the principles contained in paragraphs (a), (b), and (c), the court may give consideration to any one or more of the following:
i) denouncing blameworthy behaviour;
ii) deterring the offender and other persons from committing offences;
iii) separating offenders from society, where necessary;
iv) providing for redress for the harm done to individual victims or the community;
v) ....." [157]

Paragraphs a) to c) are well established sentencing principles in Zambia. Nonetheless, their significance needs to be stressed in a legislative framework. What is new is the call for an end to sentencing disparities, the downgrading of the reform ideal about prisons and the minimalist approach to imprisonment, where it says that it is inappropriate except in the circumstances listed. The well-known "Minnesota Guidelines" try to be informative as well, pointing to the cost of imprisonment and calling for its limited use, saying:-

> "Because the capacities of state and local correctional facilities are finite, use of incarcerative sanctions should be limited to those convicted of more serious offences...." [158]

Also, the payment of compensation is urged. To emphasise compensation in the Zambian criminal justice system these Canadian guidelines would have to be amended in paragraph b) to read:-

> "Second, the emphasis being on the accountability of the offender, the sentence should denounce the blameworthiness of the offender by legislating for compensation to identifiable victims of crime in as many circumstances as possible and the courts making compensation orders in as many cases as possible."

In Canada the proposal was to enact these sentencing goals and principles in the Criminal Code. [159] In Zambia they should be enshrined in the Constitution on the ground that the goals and principles should be addressed not only to the courts but to the legislature as well to ensure coherence and consistency in sentencing policy. Because they are not fundamental human rights they should be inserted in a new section of the Constitution.

The drawback about such declarations of sentencing goals and principles for an inadequately trained judiciary is that they may not be properly understood, but this is an insufficient reason for not framing them.

2. Legislative guidance.

In Zambia the sentences provided in the legislation are characterised by a lack of guidance to the courts as how and when to use them, leaving it to the courts to read the legislative mind and make their own sentencing policy, as has happened with regard to the courts' discretionary powers to impose fines and/or imprisonment (Chapter 5), the one notable exception being corporal punishment where the legislation adopts a minimalist approach (Chapter 7). Such lack of clear guidance is noted in relevant parts of this presentation. In the few instances when attempts have been made to guide sentencers the guidance has sometimes been confusing. For example, probation and discharge provisions are very similar and therefore confusing (Chapter 6), the same having been a problem in English legislation until probation provisions were clarified in 1991. [160]

To illustrate the sort of clear sentencing guidance needed, probation provisions in the Zambian and English legislation are contrasted. The Zambian one is amorphous, hardly informative or directory:-

> "Where a court by or before which a person is convicted of an offence, not being an offence the sentence for which is fixed by law, is of the opinion that, having regard to the youth, character, antecedents, home surroundings, health or mental condition of the offender, or to the nature of the offence, or to any extenuating circumstances in which the offence was committed, it is expedient to do so, the court may, instead of sentencing him, make an order, hereinafter in this Act referred to as a 'probation order', requiring him to be under the supervision of a probation officer for a period to be specified in the order of not less than one year nor more three years." [161]

The English provision is much clearer and directory, dealing with the target offender types and spelling out the basis for making probation orders:-

> "(1) Where a court by or before which a person of or over the age of sixteen years is convicted of an offence (not being an offence for which the sentence is fixed by law) is of the opinion that the supervision of the offender by a probation officer is desirable in the interests of:
> (a) securing the rehabilitation of the offender; or
> (b) protecting the public from harm from him or preventing the commission by him of further offences, the court may make a probation order, that is to say an order requiring him to be under the supervision of a probation officer for a period specified in the order of not less than six months nor more than three years." [162]

With regard to the important sentence of imprisonment, Zambian legislation is silent about, for example, whether the courts should limit its use or how severe it should be. English legislation (1991) on the other hand makes clear policy statements on these two points.

> "(1) This section applies where a person is convicted of an offence punishable with a custodial sentence other than one fixed by law.

(2) Subject to subsection (3) below, the court shall not pass a custodial sentence on the offender unless it is of the opinion: (a) that the offence, or a combination of the offence and one other offence associated with it, was so serious that only such a sentence can be justified for the offence; or (b) where the offence is a violent or sexual offence, that only such a sentence would be adequate to protect the public from serious harm from him." [163] (Emphasis supplied).

Regarding lengths of prison sentences:-

"(1) This section applies where a court passes a custodial sentence other than one fixed by law.
(2) The custodial sentence shall be:
(a) for such term (not exceeding the permitted maximum) as in the opinion of the court is commensurate with the seriousness of the offence, or the combination of the offence and other offences associated with it; or
(b) where the offence is a violent or sexual offence, for such longer term (not exceeding that maximum) as in the opinion of the court is necessary to protect the public from serious harm from the offender." [164]

While it is not possible to be more specific about the desired lengths of prison terms this provision clearly discourages longer prison terms, unless the offence is a sexual offence or otherwise involves violence to the person.

Constitutionally enshrined purposes and principles of sentencing or legislative sentencing guidelines, being a fetter on traditional judicial discretion, can only work effectively with the co-operation of the judiciary. It is therefore important to convince them of the worth of these efforts and this can be done at the in-service seminars and lectures proposed for all members of the judiciary, including judges, in Chapter 4.

3. Judicial guidelines.

In dealing with sentences, appellate courts tend to restrict themselves to the facts in hand and the law in question and refrain from laying down broader sentencing guidelines beyond the strict requirements of the case. In England the Court of Appeal provides guidance of several types, two of which are well established in Zambia. One deals with the right and wrong way in which to apply a sentence which Ashworth regards as a matter of "rules and principles." [165] For example, when fixing the level of fines, the capacity of the offender to pay should be taken into account as in January Gringo Nakalonga v The People[166] (Chapter 5). The other type of guidance is about what Ashworth calls "Recommended and forbidden patterns of reasoning":[167] for example, as when imposing a suspended sentence of imprisonment the initial decision should be imprisonment for a stated length before taking into account mitigating factors, as in The People v Masissani[168] (Chapter 7). Further attempts to lay down sentencing guidance generally are done in "Judicial Circulars" issued intermittently as occasion demands through the Registrar of the High Court, but they lack the authority of judgements and only a few deal directly with sentencing policy.

The English Court of Appeal has devised two techniques of sentencing guidance which the Supreme Court should adopt the first being what Ashworth calls "General policy judgements",[169] for example, Bashir Begun Bibi, [170] where the appellant was convicted of importing prohibited drugs into the United Kingdom and sentenced to three

years' imprisonment. In the Court of Appeal the sentence was reduced to six months' imprisonment and the court said:-

> "Many offenders can be dealt with equally justly and effectively by a sentence of six or nine months' imprisonment as by one of 18 months or three years." [171]

Of equal relevance to Zambia, where penal policy generally is in a state of drift, the problem of overcrowding was also addressed:-

> "this case opens up wider horizons because it is no secret that our prisons at the moment are dangerously overcrowded. So much so that sentencing courts must be particularly careful to examine each case to ensure, if an immediate custodial sentence is necessary, that the sentence is as short as possible, consistent only with the duty to protect the interests of the public and to punish and deter the criminal." [172]

The second sentencing guidance technique developed by the Court of Appeal is what Ashworth calls "Guideline judgements"[173] which consider "sentences for a whole category of offences"[174] as in John Uzu Aramah. [175] The appellant was sentenced to six years' imprisonment for importing prohibited drugs into the United Kingdom. Confirming the prison sentence, Lord Lane C.J. said:-

> "I turn to the importation of heroin, morphine and so on: large scale importation, that is where the street value of the consignment is in the order £100,000 or more, sentences of seven years and upwards are appropriate. There will be cases where the values are of the order of œ1 million or more, in which case the offence should be visited by sentences of 12 to 14 years. It will seldom be that an importer of any appreciable amount of drug will deserve less than four years. This, however, is one area in which it is particularly important that offenders should be encouraged to give information to the police, and a confession of guilt, coupled with considerable assistance to the police, can properly be marked by a substantial reduction in what would otherwise be the proper sentence." [176]

Based on the specific example of seven years for importing £100,000 worth of drugs, Ashworth constructs a table showing the lengths of prison sentences appropriate for importing varying amounts of drugs. For importing £1,000,000 worth of drugs, for example, the prison sentence is calculated at 13 years. [177] Lord Lane gave further guidance on the proper prison terms to impose when the offender is convicted of supplying[178] and possessing heroin, morphine and similar prohibited drugs. [179]

Because the High Court deals with many more criminal cases than the Supreme Court through criminal trials, appeals from magistrates courts and scrutinising statutory monthly returns from magistrates[180] it is in closer touch with sentencing practice. As the Supreme Court is the highest court in the land it should acquaint itself more with sentencing practice throughout the country not only in the High court but also magistrates courts where the bulk of criminal cases is dealt with. It is suggested that the High Court be required to submit half yearly criminal returns under three headings: trials, appeals and criminal returns from magistrates.

4. A Sentencing Council.

Sentencing goals and principles can be criticised for being too broad and difficult to formulate, legislative guidelines as being too limited in scope and rigid and the Court of Appeal as having limitations which Ashworth articulates:-

> "The Court of Appeal...lacks a wider appreciation of penal policy, and it is imperfectly informed about sentencing practices in the lower courts." [181]

What is said about the lack of a wider appreciation of penal policy of the English Court of Appeal is of particular relevance to the Supreme Court of Zambia as has just been indicated above.

Von Hirsch's criticism of the inadequacy of the English Court of Appeal as a sentencing policy-shaper is more fundamental. He complains that even when it sets a tariff sentence based on any one sentencing theory, say deterrence, the court is not in a position to know the extent to which the deterrence deters:-

> "The technique [of setting tariff sentences through appeals] might help develop some kind of tariff, say, imprisonment ordinarily recommended for this type of case, probation for that kind. What is likely to be lacking, however, is any principled resolution of sentencing policy issues." [182]

He gives the example of imprisonment as the usual sentence for perjury in the Court of Appeal and asks:-

> "What remains opaque, however, is the rationale. The Court's stated rationale is deterrence, but this brings a number of questions immediately to mind. Do we know enough about the magnitude of deterrent effects to say that routine imposition of imprisonment will deter perjury better than a more selective imprisonment policy would?" [183]

Behind the Court of Appeal should be a standing body to make available to the court sentencing policy recommendations. Ashworth proposes:-

> "a sentencing council, chaired by the Lord Chief Justice himself and producing recommendations which would be issued as practice directions with the full authority of the Lord Chief Justice." [184]

Regarding its membership, he says:-

> "Its membership should draw on persons with considerable experience of the penal system, from magistrates, to a circuit judge in second- third-tier centres, to a probation officer, a prison governor, a Home Office official and an academic." [185]

Such a Council would presumably report on the efficacy of penal correctives so that Hirsch's fundamental criticism is addressed.

The inadequacy of training of the Zambia judiciary (Chapter 5), makes the establishment of a similar body in Zambia all the more imperative and urgent: sentencing policy would to some extent be more enlightened and coherent. Membership of such a council, chaired by the Chief Justice, would include High Court judges, senior magistrates, Local Court justices (Chapter 4), a representative from the Law Association of Zambia, the police and prison service and an academic. Perhaps for the first time, the Chief Justice would be in closer and more frequent contact with Local Court justices who sit at the lowest judicial ladder. To maximise its impact it is suggested that the Council submits reports, yearly before Parliament which makes broad sentencing policy in the first place, and half-yearly to the Chief Justice and the judiciary which interprets legislation thus bringing Parliament and the judiciary closer together over sentencing policy.

Conclusion.

In the study of theories of punishment above it was suggested that in Zambia denunciation, a branch of retribution, should be stressed above retribution, deterrence or reform. In particular, it was suggested that the concept of denunciation should be

extended to include compensation because the payment of compensation is as condemnatory of disapproved behaviour as a punitive sentence like imprisonment.

Sentencing is a more complex function than is generally appreciated. In the individual case before the court it starts with the identification of the tariff sentence before proceeding to impose the individualised sentence. Well-established factors must be considered such as the convict's character and criminal record and any prescribed minimum sentence. Courts must also adopt correct sentencing approaches when faced with a choice between concurrent or consecutive sentences or taking other offences into consideration comes into question.

Both Parliament and the judiciary should note the trend towards imprisonment in sentencing practice in Zambia and appreciate the wider budgetary and other implication of this.

An important aspect of sentencing which appears to have escaped the attention of the government and judiciary is the need lay down purposes and principles of sentencing in a legislative framework and to structure sentencing discretion in order to narrow sentencing disparities and shape sentencing policy generally, for example, by promoting alternatives to imprisonment, through the construction of legislative and judicial guidelines which are clear, detailed and purposeful and supported by a new Sentencing Council.

Chapter 3.

Notes.

1. Royal Commission on Capital Punishment Report, 1949-1953, London, HMSO, 1953, Cmd.8932, para.50, p.25.

2. The classification of past-referring, and future-referring punishments was made by Mr Lynch in an LL.M. seminar in 1977 at Kings College, University of London.

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4. J.G.Murphy, Rehabilitation, Justice, and Therapy, Dordrecht, Holland, D.Reidel Publishing Company, 1979, p.82.

5. F.H.Bradley, "The Vulgar Notion of Responsibility", Philosophical Perspectives on Punishment, G.Ezorsky (Ed.), Albany, State University of New York, 1972, p.109.

6. N.Walker, Sentencing in a Rationale Society, Allen Lake, Penguin Press, 1969, p.5.

7. H.Honderich, Punishment, New York, Hercourt, Brace and World Inc., 1969, p.23. Also see D.J.Galligan, "Guidelines and Just Desert: A Critique of Recent Trends in Sentencing Reform", [1981] Crim.L.R., p.298.

8. H.L.Packer, The Limits of the Criminal Sanction, London, Oxford University Press, 1969, p.38.

9. Ibid.

10. Royal Commission on Capital Punishment Report Loc.Cit.

11. Ibid., para.53, p.16.

12. E.Durkheim, The Division of Labour in Society, translated by G.Simpson, Illinois, The Free Press of Glencoe, 1933, p.79.

13. Ibid., p.81.

14. P.Bean, Op.Cit., p.19.

15. Ibid.

16. Ibid., p.13.

17. N.Walker, Crime and Criminology, Oxford, Oxford University Press, 1987, p.111.

18. Sentencing Reform: A Canadian Approach, Report of the Canadian Sentencing Commission, Feb., 1987, para.2.4, p.141.

19. Ibid.

20. K.G.Armstrong, "The Retributivist Hits Back", The Philosophy of Punishment, H.B.Acton (Ed.), London, MacMillan Press Ltd., 1969, p.139.

21. Ibid.

22. Sentencing Reform: A Canadian Approach, Op.Cit., para.2.1, p.135.

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24. Ibid.

25. A.R.Radcliffe-Brown, Structure and Function in a Primitive Society, London, Cohen & West Ltd., 1952, p.205.

26. Ibid.

27. Ibid.

28. F.E.Zimring and G.J.Hawkins, Op.Cit., p.3.

29. F.E.Zimring, Perspectives on Deterrence, University of Chicago Law School, 1971, p.2.

30. R.Singer, Just Deserts, Cambridge, Massachusetts, Ballinger Publishing Company, 1979, p.12.

31. J.Andeneas, "The General Preventive Effects of Punishment", University of Pennsylvania L.R., Vol.114, No.7, 1966, p.949.

32. H.L.Packer, Op.Cit., p.45.

33. F.E.Zimring and G.J.Hawkins, Op. Cit., p.3.

34. D.C.Gibbs, Crime, Punishment, and Deterrence, New York, Elsevier Scientific Publishing Company, 1975, p.33.

35. K.G.Armstrong Op.Cit., p.152.

36. J.D.Mabbott, "Punishment", The Philosophy of Punishment, H.B.Acton (Ed.), MacMillan Press Ltd., 1969, p.165.

37. The Preservation of Public Security Act, Cap.106 applicable when Zambia is in a state of emergency which was the case since independence in 1964. The state of emergency lapsed when the new government came into power in 1991; see Constitution of Zambia, No.1 of 1991, Article 30(7).

38. (1972) Z.R. 248.

39. (1974) Z.R. 156.

40. [1989] LRC (Const), p.527.

41. P.Bean, Op. Cit., p.35.

42. K.G.Armstrong Op.Cit., p.152.

43. In Zambia homosexuality between females is unheard of. Homosexuality between males is normally confined to prisons.

44. D.C.Gibbs, Op.Cit., p.24.

45. E.M.Madden, Punishment for and Against, H.H.Hart (Ed.), Chicago, Chicago University Press, 1968, p.133.

46. Ibid., p.134.

47. Ibid., pp.135-136.

48. R.Wasserstrom, "Why Punish the Guilty", Philosophical Perspectives on Punishment, G.Ezorsky (Ed.), Albany, State University of New York, 1972, p.331.

49. Ibid.

50. F.E.Zimring and G.J.Hawkins, Op.Cit., p.10.

51. J.Andeneas, Op.Cit., p.959.

52. J.E.Hall Williams, The English Penal System in Transition, London, Butterworths, 1970, p.21.

53. G.Hawkins Op.Cit., p.47.

54. Ibid., p.48.

55. A.E.Bottoms, "An Introduction to 'The Coming Penal Crisis'", The Coming Penal Crisis, A.E.Bottoms and R.H.Preston (Eds.), Edinburgh, Scottish Academic Press, 1980, p.3.

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58. J.E.Hall Williams Op.Cit., p.5. The words "significant others" are not the words of the author, but my own.

59. P.Bean, Op.Cit., p.5.

60. Ibid.

61. A.E.Bottoms, Op.Cit., p.26. For an informative account of how the rehabilitative ideal emerged in Western jurisdictions, see R.Singer, Just Deserts, Cambridge, Massachusetts, Ballinger Publishing Company, 1979, p.3; and L.Orland, Prisons: Houses of Darkness, London, Collier McMillan Publishers, 1975, p.40.

62. L.Orland, Prisons: Houses of Darkness, London, Collier McMillan Publishers, 1975, p. 40

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    Yale University Press, 1981, p.4.

68. S.Brody, "Research into the Sentencing Aims and Effectiveness of Sentencing.", The Howard Journal of Penology and Crime Prevention, Vol.17, 1978, pp.135-136.

69. G.Hawkins Op.Cit., pp.19-20.

70. C.S.Lewis, "The Humanitarian Theory of Punishment", Theories of Punishment, S.E.Grupp (Ed.), London, Indiana University Press, 1971, p.303.

71. F.A.Allen, "Criminal Justice, Legal Values and the Rehabilitative Ideal", Theories of Punishment, S.E.Grupp (Ed.), London, Indiana University Press, 1971, p.257.

72. W.Moberly, The Ethics of Punishment, London, Faber and Faber, 1968, p.122.

73. Ibid.

74. The writer teaches law in the School of Law, University of Zambia.

75. The writer was D.P.P. in the 1970s. He used to be given draft penal legislation to read for his comments. In his experience, little attention was given to the theoretical basis for fixing any particular penalties in the draft penal legislation.

76. H.L.A.Hart, Punishment and Responsibility, Oxford, Oxford University Press, 1968, pp.170-171.

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80. (1972) Z.R. 197

81. Ibid., at p.198.

82. (1978) Z.R. 278.

83. Ibid., at p.281. Also see Kaambo v The People (1976) Z.R. 122.

84. (1965) Z.R. 9.

85. Ibid., at p.10.

86. (1984) Z.R. 19.

87. Ibid., at p.20.

88. (1977) Z.R. 331.

89. Ibid., at p.334.

90. (1981) Z.R. 27.

91. Ibid., at p.28. In Zambia there is a limited right of appeal by the Director of Public Prosecutions from a High Court decision in its original jurisdiction to the Supreme Court on a matter of law against conviction or sentence, see Supreme Court of Zambia (Amnd.)(No.2) Act, 1976, No.31 of 976, S3. The D.P.P. has lodged appeals against conviction in a few cases but the writer is not aware of any appeal against sentence. This can be attributed largely to the traditional disinterest by the state in the task of sentencing offenders. For an informative discussion on appeals by the state in Commonwealth countries, see A.Paliwala and J. Cottrell, Appeals by the Prosecution against Sentences and Acquittals: A Survey of the Situation in some Commonwealth Countries, London, Commonwealth Secretariat, Sept., 1982.

92. See Jonas Nkhumbwa v The People (1983) Z.R. 103, an armed robbery case. Sentencing the accused to 18 years imprisonment in the Supreme Court, D.C.J. Ngulube noted that "The robbery in this case was staged by a large group of men..... any sentence should reflect the disapproval of society of the use by bandits, of police uniform and any uniform.", p.105.

93. (1972) Z.R. 197.

94. (1978) Z.R. 278.

95 Ibid., at p.282.

96. 1972 S.J.Z. 62.

97. Ibid. Also see Kaambo v The People (1976) Z.R. 122.

98. The Prevention of Crimes Act, Cap.157.

99. The Habitual Criminals (Preventive Detention) Act, Cap.112.

100. Peter Chilufya v The Queen, (1963-1964) Z. and N.R.L.R. 95, and Stephen James Hardy v The People (1971) Z.R. 64.

101. R.D.Margrave-Jones, "Taking other Offences into Consideration- The History of the Convention", [1959] Crim.L.R., pp.18-26, at p.18.

102. Powers of the Criminal Courts Act, 1973, Cap.62, SS.35 and 39, and The Criminal Justice Act, 1982, Cap.48, S.6.

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105. Stephen James Hardy v The People (1971) Z.R. 64 at p.67.

106. S.White, M.Newwark and A Samuels, "Offences Taken into Consideration", [1970] Crim.L.R. p.311.

107. R.D. Margrave-Jones Op.Cit., p.19.

108. S.White, N.Newark and A.Samuels, Op.Cit. p.312.

109. Ibid.

110. Stephen James Hardy v The People, (1971) Z.R. 64, at p. .67.

111. S.White, M.Newark and A.Samuels, Op. Cit., pp.322-323.

112. Ibid., pp.324-325.

113. Ibid., p.325.

114. Criminal Procedure Code (Amnd) Act 1968, No.54 of 1968, S.3.

115. Stephen James Hardy v The People, (1971) Z.R. 64.

116. Ibid., at p.67.

117. Ibid.

118. S.White, M.Newark and A.Samuels Op.Cit., p.328.

119. (1972) Z.R. 64 at p.66. The criminal law journal in question is Crim.L.R., [1970], para.593.

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121. (1975) Z.R. 245.

122. Ibid., at p.248.

123. (1977) Z.R. 106.

124. Ibid., at pp.107-108.

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126. Penal Code(Amnd) Act, 1979, No.40 of 1969, S.2.

127. 1969 Parliamentary Debates, 14th Sept., 1969, p.546.

128. Penal Code (Amnd) Act, 1970, No.39 of 1970, S.2.

129. Penal Code(Amnd)(No.2) Act, 1970, No.61 of 1970, S.2.

130. Report of the Ad Hoc Committee on Legal Reforms, Lusaka, Republic of Zambia, 29th June, 1973, p.33.

131. Penal Code(Amnd) Act, 1974, No.29 of 1974, S.8.

132. Ibid., S.10.

133. Penal Code (Amnd) Act, 1987, No.2 of 1987, S.3.

134. Ibid.

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136. (1972) Z.R. 197.

137. Ibid., at p.199.

138. (1978) Z.R. 278.

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141. M.Wasik and K.Pease, "Discretion and Sentencing Reform", Sentencing Reform Guidance and Guidelines, M.Wasik and K.Pease (Eds.), Manchester, Manchester University Press, 1987, p.1.

142. Penal Code(Amnd)(No.2) Act, 1974, No.29 of 1974, S.7.

143. Penal Code, Cap.146, S.276.

144. Penal Code(Amnd)(No.2) Act, 1974, No.29 of 1974, S.9.

145. Juveniles Act, Cap.217, S.72(2).

146. R.G.Hood and S.Sparks, Key Issues in Criminology, London, Weidenfeld and Nicolson, 1970, Chapter 5.

147. C.Fitzmaurice and K.Pease, The Psychology of Judicial Sentencing, Manchester, Manchester University Press, 1986, p.10.

148. R.G.Nairn, "The Enforcement of Petty Legislation and the Decision to Arrest", 1977 R.L.J, p.61; also see A.K.Bottomley, Decisions in the Penal Process, London, Robertson, 1973, Chapter 2; also see Goldstein quoted by A.K.Bottomley on p.37.

149. C.G.Tornaritis, Modern Trends Concerning the Reduction of Prosecutions, Nicosia, Cyprus, 1984, p.1.

150. Ibid., p.2.

151. Ibid., p.1.

152. Ibid., p.2.

153. Constitution of Zambia, No.1 of 1991, Article 56.

154. Grounds for the exercise of discretion not to prosecute is that the public interest does not call for it; for meaning of "public interest in England, see G.Williams, "Discretion in Prosecuting", [1956] Crim.L.R., pp.222-231.

155 From personal experience as Director of Public Prosecutions. That is how I found the policy. No matter involving "general considerations of public policy" was, to the writer's knowledge, put before the Attorney-General. In England, where discretionary prosecution powers are well established, the D.P.P.is authorised to issue prosecution guidelines- see Prosecution of Offenders Act 1985, Cap.23, S.10.

156. Sentencing Reform: A Canadian Approach, Report of the Canadian Sentencing Commission, Feb., 1987, para.6.2, p.153.

157. Ibid., pp.154-155.

158. M.Wasik and K.Pease Op Cit. Appendix, p.183.

159. Sentencing Reform: A Canadian Approach Op.Cit., para.6.2, p.155.

160. Powers of the Criminal Courts Act 1973, Cap.62, SS.2 dealing with probation and S.7 with discharges.

161. Probation of Offenders Act, Cap.147, S.3(1).

162. Criminal Justice Act 1991, Cap.53, S.8.

163. Ibid., S.1.

164. Ibid., S.2.

165. A.Ashworth, "Techniques of Guidance on Sentencing", [1984] Crim.L.R, p.525.

166. (1981) Z.R.252.

167. A.Ashworth Op Cit.,p.526.

168. The People v Masissani (1977) Z.R. 234.

169. A.Ashworth Op Cit., p.524.

170. (1971) Crim.App.R. p.360.

171. Ibid., at p.361.

172. Ibid.

173. A.Ashworth Op.Cit., p.520.

174. Ibid., p.521.

175. (76) Crim.App.R., p.190.

176. Ibid., at p.192. Numerical guidelines is another sentencing approach which enables sentencers to lay down more exact levels of severity of sentences, see A. Von Hirsch, "Guidelines by Numbers or Words? Numerical versus Narrative Guidelines for Sentencing." Sentencing Reform, M.Wasik and K.Pease (Eds.), Manchester, Manchester University Press, 1987, p.46 at al.

177. A.Ashworth Op Cit., p.522.

178. (76) Crim.App.R., pp.192-193.

179. Ibid., at p.193.

180. Subordinate Courts Act, Cap.45, S.56.

181. A.Ashworth, A Prison System for the 80s and Beyond, London, NACRO, The Model Buxton Lectures, 1982-1983, p.13.

182. A.Ashworth, "Guidance by Numbers Words? Numerical versus Narrative Guidelines for Sentencing", Sentencing Reform: Guidance or Guidelines? M.Wasik and K.Pease (Eds.), Manchester, Manchester University Press, 1987, p.57.

183. Ibid.

184. A.Ashworth, Op.Cit., p.14.

185. Ibid.

Chapter 4.

The Courts and the Judiciary.

Introduction.

This section is divided into two sections. The first (Section A) deals with the courts in Zambia: the court hierarchy and organisation, their jurisdiction, appointment and tenure of office of judicial officers and how they perform their functions. Attention will be focused on the shortcomings of the Supreme Court and Local Courts. Section B concentrates on the training of judicial officers and their inadequate training, which will be contrasted with recent developments elsewhere in Africa.

Section A.

The judicial system of Zambia.

I. The appointing authority of judicial officers.

A. The senior judiciary: Supreme and High Court judges.

Reference has already been made to the establishment of the judicature and its composition by the Constitution in Chapter 1.[1] Supreme Court and High Court judges are all appointed by the President.[2] They have security of tenure but can nevertheless be removed from office:-

> "only for [their] inability to perform the functions of office...or [for] misbehaviour....[3]

after a special tribunal has been appointed and submitted its recommendation to the President[4] in which case the President has no choice but to dismiss the judge. [5] In addition to the Supreme and High Court judges there is provision for the appointment of Commissioners of the High Court by the President[6] :-

> "if [he] considers that the interests of the administration of justice so, requires....for such period as the President may determine."[7]

In the majority of cases, the appointees are in effect acting full-time High Court judges appointed for an indefinite period of time rather than private practitioners dealing with particular High Court sessions.

While no serious criticism can be levelled against the tenure of office of Supreme and High Court judges, the tenure of office of Commissioners needs closer attention. The idea of part-time judges in developed democracies like Britain may be working satisfactorily. But in a young democracy like Zambia the same idea is objectionable in principle on the ground that Commissioners of the High Court stand in greater danger of succumbing to political pressure than judges proper, thereby undermining the very idea of independence of the judiciary which is one of the most cherished cornerstones of democratic government everywhere. A full-time Commissioner may wish to rise to the status of "judge". Acutely aware of his insecurity of tenure he may easily succumb to political pressure to secure his elevation. Indeed, only one High Court judge, Mr Mumba, has ever been dismissed for misconduct in post-independence Zambia in 1985. But in the same year two Commissioners of the High Court, Mr Chisengalumbwe and Mr Kabamba, had their commissions terminated but no reasons were given for the termination. [8] Full-time Commissioners of the High Court should

not be part of the senior judiciary; if it becomes necessary they should be part of the junior judiciary where tenure of office is not as secure.

When the new Chiluba government came to power in 1991 following the defeat of President Kaunda's government, the new Constitution stresses judicial impartiality by distancing the appointment of members of the senior judiciary from the President. As before, the Judicial Service Commission continues to play a part in the appointment of judges. The Commission is an autonomous body established by the Constitution, [9] and its membership is dominated by senior law officers in the country and chaired by the Chief Justice. [10] Other members are the Attorney-General, [11] a judge of the Supreme Court or High Court[12] and any one senior lawyer appointed by the President. [13] The only non-lawyer on the Judicial Service Commission is the Chairman of the Public Service Commission or his representative. [14]

Under the old one-party Constitution of 1973, the relevant provisions dealing with the appointment of the Chief Justice and Supreme Court judges stated:-

> "The Chief Justice and other judges of the Supreme Court shall be appointed by the President." [15]

Under the new Constitution (1991) the Judicial Service Commission is not mentioned as before but the President is not given a completely free hand to make the appointments. For the first time, the appointment of Chief Justice and Supreme Court judges must be ratified by Parliament.

> "(1) The Chief Justice shall be appointed by the President subject to ratification by the National Assembly.
> (2) The judges of the Supreme Court shall, subject to ratification by the National Assembly, be appointed by the President." [16]

Similarly, the mode of appointment of High Court judges has been changed. The old Constitution provided that:-

> "The puisne judges shall be appointed by the President, acting in accordance with the advice of the Judicial Service Commission." [17]

Under the new Constitution, the involvement of the Commission is retained but for the first time the appointment must again be subject to ratification by Parliament.

> "The puisne judges shall, subject to ratification by the National Assembly, be appointed by the President on the advice of the Judicial Service Commission."[18]

So concerned in fact is the new government about judicial impartiality that the new Constitution specifically states that:-

> "The judges of the courts [all the presiding officers in all the courts in Zambia] shall be independent, impartial and subject only to this Constitution and the law".[19]

The democratisation of appointments of senior judges is a predictable reaction against what was widely seen as President Kaunda's preference for politically loyal judges over more competent ones. This is welcome development. The task now for penal policy-makers is to make adequate provision for the more effective training of all judicial officers in the country.

B. Junior members of the judiciary: magistrates and Local Courts justices

All magistrates and Local court justices are appointed by the Judicial Service Commission without reference to Parliament.[20] Unlike Supreme Court and High Court judges, their tenure of office is not as secure but they are disciplined by the Judicial Service Commission.[21] Chart 2 shows the hierarchy of courts in Zambia.

In the court hierarchy of Zambia, the Supreme Court is followed by the High Court, Subordinate Courts preside over by magistrates[22] and then Local Courts preside over by Local Court justices.[23]

Chart 2.

The Court Hierarchy of Zambia.

The Supreme Court

|

The High Court

|

Subordinate Courts

|

Local Courts

II. The courts.

A. The Supreme Court.

The Supreme Court is the final court of appeal in Zambia[24] in both criminal and civil cases: [25] it has no original jurisdiction even in constitutional cases. There are six judges of the Supreme Court including the Chief Justice and the Deputy Chief Justice.[26]

From the writer's experience at the Zambian bar it appears that the court is not conscious enough of its role as a key sentencing policy-maker; it is lethargic.

First, while the decisions of English courts are rightly given much respect and weight in Zambia, as was indicated in chapter 1, there is a marked reluctance to chart new directions. In the Matter of Valentine Musakanya, Edward Jack Shamwana, Godwin Yoram Mumba, Deogratias Kanyembu and Thomas Mupunga and The Attorney-General and Commissioner of Prisons[27] is a High Court case but is particularly illustrative of the tendency of the Zambian judiciary, including the Supreme Court, to follow blindly English court decisions, (we shall return to this case in Chapter 10).

Secondly, in criminal cases dissenting judgements are rare. Curiously this does not appear to be so in civil cases, e.g. the Rao case in Chapter 1. Reluctance to deliver dissenting judgements cannot be healthy for the development of the law generally and sentencing policy and practice in particular.

Thirdly, the Supreme Court is not innovative enough. For example, when courts have a choice between imposing fines and imprisonment, the court has ruled that in the absence of aggravating factors the proper type of sentence are fines (Chapter 5). One

would have expected the court to recognise the significance of compensation in traditional settlement dispute practices and make a similar ruling in cases where compensation is payable (Chapter 5). Further evidence of lethargy is the failure of the Supreme Court to end the decline in certain semi-custodial sentences: binding over, extra-mural penal employment and week-end imprisonment (Chapter 6)

Not all the blame can be laid against the Supreme Court. The lethargy is symptomatic of lethargic general development in Zambia to which reference has already been made in Chapter 1. The Zambian bar is till young and competition is still not strong enough.

One way of re-activating the court is through "cross-pollination". It is suggested that provision should be made to include suitable legal practitioners on Supreme Court panels on an ad hoc basis in cases in which important points of sentencing policy and any other points of law are actually raised or may be raised. This idea is not a new one. For example, the Zambian Chief Justice sits on the Supreme Court of the Sychelles, [28] and a former Chief Justice of Zambia, Mr Justice Doyle, still sits on the Supreme Court of Botswana. [29] It is further suggested that panels should also include local academicians specialising in crime and punishment. Perhaps a more practical idea is the inclusion of High Court judges on Supreme Court panels as is the practice in England where High Court judges sit on panels of the Court of Appeal Criminal Division as a way of ensuring that appeal court judges do not lose touch with what is happening "on the ground" in criminal cases. But this arrangement would not be particularly suitable for Zambia because the Supreme Court is in greater need of innovation in sentencing policy than "keeping in touch" with the sentencing practices of the High Court.

B. The High Court.

As already indicated in chapter 1, the High Court is established by the Constitution[30] as the original court of unlimited civil and criminal jurisdiction. [31] In practice, the High Court normally tries the more serious criminal cases like homicide and robberies. It also hears appeals from the Subordinate Courts. [32] Another function of the High Court is the review of criminal cases tried in the Subordinate Court: [33] this is done either in open court but more often in chambers (in the absence of the offender or his counsel, if any). Cases may be called up for review but more often they come to the notice of judges through monthly returns of criminal cases[34] which show scant details of every case dealt with by every magistrate throughout the country. Suspicious decisions are spotted, the case record called for, and, if the original suspicion is confirmed, the judge revises the case.

The power of review is very significant. Each judge normally deals with large volumes of monthly criminal returns: by going through them, he is in position to gauge sentencing trends and "tariff sentences" in respect of recurring patterns of criminal behaviour throughout the country and so help to re-set them. Unfortunately, the criminal returns are so numerous that it is doubtful whether judges have sufficient time to scrutinise them closely enough.

Fortunately, there has been a welcome administrative development: as from 1987, the High Court has been decentralised. Previously, it was based only in Lusaka, Ndola and Kitwe. In the rest of the country it visited provincial headquarters on circuit. Now, there is a High Court at every provincial headquarters throughout the

country.[35] Consequently, the work-load of judges should be made lighter[36] and it is to be hoped that they can more effectively supervise magistrates in their sentencing task.

C. Subordinate Courts and magistrates.

To an increasing number of young urbanised Zambians, Subordinate Courts are better known than Local Courts. They are regarded by many as the forum where poor, older generations of Zambians take their petty civil cases for settlement. Subordinate Courts, like the High Court, are modern courts based on the English judicial system. Practice and procedure are prescribed by the Criminal Procedure Code[37] and the Subordinate Courts Act[38] or rules made thereunder. Where Zambian legislation does not provide for a particular situation the relevant English law or practice on the matter is followed.[39] Subordinate Courts are also courts of appeal from decisions of Local Courts.[40]

Subordinate Courts are presided over by Magistrates who are of two types: professionally qualified lawyers and professionally unqualified judicial officers. The former, known as "Resident Magistrates", are divided into two grades; the latter, "Magistrates", are divided into three grades.[41] There is a total of forty-four Subordinate Courts spread throughout Zambia.[42] Courts presided over by the most senior magistrates, professionally qualified and unprofessionally qualified, are located in urban population centres. Junior magistrates of both categories are situated in the rest of the country thereby making criminal justice accessible to the people.

Subordinate Courts have always dealt with the bulk of criminal cases in Zambia. Table 4 shows the volume of cases disposed of by magistrates throughout Zambia, and

the number of magistrates' posts, 1980-1985 (The number of unfilled posts appears in brackets.) All criminal cases are first brought before magistrates; some minor cases are then transferred to Local Courts for trial while the more serious case are sent up to the High Court for trial after committal proceedings. The bulk of the cases are retained and dealt with by magistrates.

Table 4

The Volume of Criminal Cases Handled by Magistrates in Zambia, 1980-1985.

Year	No.of Posts	No.of Cases	No.of Cases per. Magistrate
1980	102(12)	113,325	1,111.02
1982	113(7)	119,373	1,056.39
1983	118(6)	394,475	3,343.00
1984	122(14)	116,801	957.38
1985	133(16)	100,538	755.92
Total:		1,011,090	1,719.54
Average:	117.6(11).		

Source: Annual Reports of the Judiciary and Magistracy.

At least two observations can be made about Table 4. The first relates to the figure 394,475 denoting the number of cases dealt with by magistrates in 1983. It is a sudden and high rise from the figures of the last two years. It should be pointed out here that sudden rises and falls are a recurring feature of criminal statistics in Zambia as will be seen later. Wide variations, where they occur, are difficult to explain but they can generally be attributed to sudden changes in police policy, sentencing policy or simply to a poor system of gathering data and/or compiling them. The figure of 394,475 is so out of line with the rest that it should be regarded as an error. A more accurate figure should be in the region of 1,000 like the two previous figures for 1980 and 1982. With regard to the figures of 957.38 (1984) and 755,92 (1985) dealing with the workload of magistrates, these are not so out of line from the previous figures covering 1980 and 1982 and should therefore be regarded as genuine.

The second observation which can be made about Table 4 relates to the size of the workload of magistrates and the possibility that they may be overworked. The number of cases dealt with is around 100.00. Being "overworked" or overburdened" is not s simple concept as it depends on a number of factors, including the nature of cases dealt with, pressure from various quarters, if any, put on them and the subjective views of magistrates themselves. What is clear, however, is that magistrates would welcome any reduction in their workloads.[43]

D. Local Courts and Local Courts justices.

1. The organisation and running of Local Courts.

Before independence, and for a brief period after, Local Courts were called Native Courts. Basically, and as their name implied, Native Courts were meant to administer the law in which Africans were involved,[44] in both criminal and civil matters.[45] Today, Local Courts continue to perform the same function. Their civil jurisdiction is restricted to "African customary law".[46] Their criminal jurisdiction covers a wide selection of legislation including certain provisions of the Penal Code.[47]

Local Courts, which are presided over by Local Courts justices, are divided into two grades: Grade "A" and Grade "B" Local Courts[48] Grade "A" courts have a wider jurisdiction than grade "B" courts.[49] The former are found mainly in the densely populated urban areas, whilst the latter are found mainly in the thinly populated rural areas of Zambia.[50] During the years 1982, 1983, 1984 and 1985, there were 421, 422, 423 and 427 Local Courts respectively, but there are many more Grade "B" courts than Grade "A" courts.[51] This is an inadequate number of Local Courts especially with the continuing growth of the urban population.[52]

Although Zambia has a single, integrated judicial system, Local Courts have their own distinct organisational structure, run by the Local Courts Adviser and supported by Local Courts officers.[53] The Adviser's office is located in the Supreme Court building, but the Local Courts Adviser complained of lack of interest by the Chief Justice in the working of Local Courts, the conduct of which is left largely to the Local Courts Adviser.[54] This lack of interest is regrettable. As head of the judicial

system in the country, the Chief Justice should take an active interest in the running of Local Courts[55] so that the working of Local Courts can be improved.

2. Jurisdiction and procedure.

In view of the inadequate training of Local Courts justices (discussed later) it is disturbing to discover that they are empowered to administer a wide range of penal legislation. However, when the history of Local Courts is later considered, the unsuitability of Local Courts to administer criminal justice is understandable. It was hoped that the status of Local Courts would be raised by merging them with the Subordinate Courts, but this has yet to happen.

Local Courts are empowered to try persons charged with offences under the Local Government Act[56] and with offences under legislation gazetted by the Minister.[57] Soon after the enactment of the current Local Courts Act in 1966 [58] Local Courts were empowered to try persons charged with mainly minor offences under a wide variety of legislation,[59] including the Firearms Act[60] and Public Order Act.[61] Under the Penal Code, for example, Local Courts are empowered to try persons charged with being idle and disorderly[62] and rogues and vagabonds.[63] But serious offences like theft[64] and theft by servant are also triable before Local Courts.[65] In those parts of Zambia where the work-load of magistrates is heavy, like the Copperbelt, even some of the more serious cases are transferred[66] to Local Courts for trial. For example, in The People v Webby Makela[67] before a Grade "A" court in Buchi Township, Kitwe, the accused was tried for and convicted of assault occasioning actual bodily harm and sentenced to six months' imprisonment. In areas

where the work-load of Subordinate Courts is lighter, few cases are transferred to Local Courts, as in Lusaka, Livingstone and rural areas; there criminal cases before Local courts consist largely of charges of contempt of court arising from civil proceedings, one of the most common being failure to pay compensation ordered by the court.[68]

Local Courts follow similar procedure in criminal cases to that followed by the Magistrates Courts,[69] assisted by a special booklet written in simple English, The Local Courts Handbook[70] But perhaps the most notable feature distinguishing the procedure in the Local courts is that legal representation is forbidden.[71] Because they also administer African customary law this prohibition may be understandable but it has led to unsatisfactory consequences. First, as will be seen, Local Courts have not received adequate training or guidance in the proper conduct of criminal trials. Permitting legal representation is bound to raise the standard of criminal trials in the long run. Secondly, the prohibition against legal representation is in direct conflict with the Constitution. The relevant provision in the Local Courts legislation states:-

> "No legal practitioner, other than a practitioner who is a party and acting solely on his own behalf, may appear or act before a local court on behalf of any party to any proceedings therein save in respect of a criminal charge under any of the provisions of
>
> (a) by-laws and regulations made under any provisions of the Local Government Act; or
>
> (b) any written law which such court is authorised to administer under section thirteen." [72]

which deals with, inter alia, a number of minor Penal Code offences like idle and disorderly[73] and rogue and vagabond[74] just mentioned above. The relevant constitutional provision on legal representation states:-

"(2) Every person who is charged with a criminal offence

(a) .....

(b) .....

(c) .....

(d) shall unless legal aid is granted to him in accordance with the law enacted by Parliament for such purpose be permitted to defend himself before the court in person, or by a legal representative of his own choice." (emphasis supplied).[75]

It is surprising that this clear contradiction between the Constitution and the Local Courts legislation does not appear to have been spotted and raised by anyone. Also, it is ironic that in those cases in which legal representation is permitted, there are no known instances in which accused persons have been represented by counsel; the constitutional right to representation does not appear to have been exercised.[76] This is not surprising because the type of persons who normally appear before Local Courts on a criminal charge are invariably villagers or unemployed urban dwellers, usually youths who cannot afford the services of counsel and may not qualify for legal aid assistance because of the nature of the offences alleged. Moreover, even if lawyers did appear in the Local Courts, the quality of Local Court justices is such that, initially at least, they would not really understand the complexities of evidence and court procedures to the same extent as counsel or even the police who prosecute before Local Courts. As a result the danger of miscarriages of justice in many cases would remain high. All this raises the more basic question not only about the training of justices but the status of Local Courts themselves.

3. The volume of criminal cases dealt with by Local Courts.

Table 5 shows the work-load of Local Courts in criminal cases during the four years, 1982-1985. Figures in brackets show the number of civil cases dealt with by the

same courts for comparison. It should pointed out that two or three justices sit in every court and that no justice sits alone. Unfortunately, the number of justices presiding over Local Courts is not given in the annual reports.

Table 5.

The Work-load of Local Courts, 1982-1985.

Year	No.of L/Cs.	No.of Cases	No.of Cases per Ct.
1982	421	13,517(105,483)	32.10(250.55)
1983	422	15,331(113,348)	36.32(268.85)
1984	423	15,474(110,288)	36.58(260.72)
1985	427	16,266(112,763)	38.09(264.08)
Total:	1,693	60,588(441,882)	143.09(1,044.20)
Average:	423.25	15,147(110,470.50)	35.77(261.05)

Source: Annual Reports of the Judiciary and Magistracy.

Table 5 shows that Local Courts in Zambia deal with many more civil cases than criminal cases. For example, in 1985, only 16,266 criminal cases were dealt with as compared with 112,763 civil cases. It will also be seen that each court dealt with on average 35.77 criminal cases as against an average of 261.05 civil cases. Going by numbers only, Local Courts appear to shoulder a heavier work-load than Magistrates Courts (see Table 4). In view of the unsuitability of Local Court justices to deal with criminal trials, the preponderance of civil cases over civil cases is a welcome picture. As will be seen later, the original intention of Native Courts (the forerunner of Local Courts) was that they hear only civil cases and not deal with criminal cases.

4. Appeals from Local Courts and revision.

Partly because of the comparatively small number of criminal cases dealt with by Local Courts and partly because of the kind of offenders who appear before them, the number of convicted offenders who appeal against conviction and or sentence to the Subordinate Court is negligible.[77] Any injustice occasioned by the poor handling of criminal cases by the justices therefore goes unchecked. However, in practice, this is checked by the fact that all cases, both criminal and civil, are subject to review by Provincial Local Courts Officers and Local Courts Officers as "authorised officers".[78]

From the review case records made available to the writer, and in view of their lack of formal legal training, as will soon be shown, it appears that Provincial Local Courts Officers and Local Courts Officers may not be as unequal to their tasks as one may initially suspect. For example, The People v Noah Kapaso[79] was a matrimonial case from Chilenje Local Court Grade "A", Lusaka, in which the accused was ordered

to allow his wife to return to the matrimonial home. When the accused did not do so, he was charged with contempt of court in that he had disobeyed a court order, found guilty and fined the sum of K30.00. On review, the Provincial Local Courts Officer emphasised that courts had no jurisdiction to order a spouse to accept an estranged spouse back into the matrimonial home and quashed the conviction. Nevertheless it may be doubted whether Provincial Local Courts Officers and their Local Courts Officers are as alert and competent as the Noah Kapaso case suggests. These officers are not legal practitioners neither are they trained magistrates; they acquire their judicial skills on the job. They are ordinary civil servants with a long experience in the Local Courts.[80] It must therefore be doubted whether this system of review is adequate to cure any injustices in criminal cases. Ideally, the review of all Local Courts cases should be done by trained magistrates, but the pressure of work precludes this from being done.[81] In the interests of justice, additional magistrates should be appointed.

Section B.

The training of the Zambian judiciary.

The formal training of the Zambian judiciary takes place only at the level of Magistrates. Local Court Justices do not undergo any formal training before they start to sit on the bench. Newly appointed Judges of the High Court and Supreme Court do not undergo any induction course or in-service training. However, they attend seminars, but it is doubtful whether these seminars, as they are currently organised, can provide adequate training in the specialised task of sentencing.

I. The training of magistrates.

A. Professionally-qualified magistrates.

Persons wishing to qualify as legal practitioners in Zambia and become magistrates, state advocates etc., must first obtain an LL.B. degree from the University of Zambia, or from an outside university which is recognised in Zambia. After graduation they must attend a one year post graduate course at the Law Practice Institute (LPI)in Lusaka.[82]

For our purposes, the weakness of the LL.B. degree course at the University of Zambia is the absence of criminology as a core subject; it is merely an optional subject. Secondly, the teaching of criminology is not established in the School of Law.[83] The criminology course was first offered as late as 1981, 15 years after the establishment of the University of Zambia in 1966. Seven years later, in 1988, the teaching of this course was disrupted because the lecturer left for further studies abroad. It was disrupted again in 1990 when the lecturer-in-charge left Zambia for further studies. Sentencing is taught but, as is to be expected in an academic institution, the emphasis is on theory rather than the practice.

The Law Practice Institute was established in 1968[84] to cater for the first LL.B. graduates from the University of Zambia. The LPI is intended to offer a more practical view of the working of the law. The syllabus lists 9 subjects to be taught, within the one academic year.[85] Classes are conducted only in the afternoons. In the mornings students gain practical experience by attachment to relevant legal institutions, offices (including government departments and private practitioners) and establishments in

and around Lusaka. Because classes are held only for part of the day it is very difficult to teach any one course in any depth.

Sentencing is taught at the LPI but it is not taught as one of the 9 basic subjects. It falls under the larger subject of Criminal Procedure. This can only mean that very little time may be devoted to sentencing, which in fact is the case. [86] What is more unfortunate is that teaching is based almost exclusively on relevant provisions in the Penal Code[87] and the Criminal Procedure Code.[88] Students are not offered an insight into the practical problems which sentencers may actually face on the bench. This means that if an LPI student did not take criminology in his LL.B. degree at the University of Zambia, his knowledge of sentencing is very minimal indeed at the end of his LPI course. Yet it is from this pool of students that magistrate and judges of the High Court and Supreme Court are drawn. There is no doubt that the newly professionally-qualified magistrate in Zambia has only a minimal theoretical knowledge of sentencing.

B. Professionally-unqualified magistrates.

Professionally-unqualified magistrates, or lay magistrates, are trained at the National Institute of Public Administration (NIPA) in Lusaka. The lay magistrates' course lasts one year. [89] Twenty seven subjects are taught[90] The whole course is centred around the teaching of criminal law, criminal procedure and evidence. Regarding sentencing, three subjects are taught: theories of punishment, tariff sentencing and how to go about fixing the individualised sentence.[91] But this approach is not practical enough. What is really needed is the teaching of sentencing using the

case law method. During the vacation, the students are attached to sitting magistrate so that they gain some practical experience of the work of magistrates.[92] But this type of exposure merely perpetuates prevailing sentencing attitudes, when a much more practical approach could be taken to the teaching of sentencing at NIPA. However, it must be said that as an introduction to sentencing, the course outline at NIPA appears adequate. If they are taught all that is laid down in the syllabus, there is little doubt that lay magistrates are better qualified as sentencers, at least initially, than professionally-qualified magistrates who pass through the LPI. It is ironic that this is so, as professional magistrates exercise wider criminal jurisdiction with more extensive powers.

C. How to improve the training of magistrates and judges.

There are at least four ways in which magistrates and judges can become more effective sentencers. First, the basic training should be improved. The teaching of sentencing at the LPI and at NIPA is too theoretical. A much more practical approach would be the case law method of teaching. Secondly, it is necessary for those who are about to sit on the bench for the first time to undertake an appropriate short induction course.[93] Induction courses should be undertaken by all those responsible for sentencing without exception: judges, magistrates and Local Court justices. Thirdly, it is important to hold regular sentencing seminars attended by judges, magistrates, and Local Court Justices, either separately, or preferably together. Magistrates in Zambia hold annual conferences[94] but what is usually on the agenda are matters concerning their general welfare, as well as the professional work; sometimes sentencing is not

included on the agenda.[95] Judges of the High Court and Supreme Court hold joint annual seminars together.[96] As with magistrates, judges discuss matters of common interest.[97] Sometimes, particular legal problems are placed on the agenda and outsiders are invited to present papers. In 1986, for example, the Commissioner of Social Development (formerly called Director of Social Welfare) was invited to present a paper on custodial institutions for young offenders.[98] But such annual conferences or seminars do not cure the inadequacy of the initial training offered to the judiciary in Zambia. What is needed is continuing education. Writing on the judiciary in Nigeria Mr Justice C.A.Oputa of Nigeria made the following pertinent observations on judicial training:-

> "Sir Eric Ashby once remarked that university degrees should be like passports-they should be renewed from time to time. While not advocating the Judges should retake their degrees and diploma examinations, no one will seriously doubt the wisdom of a profession which accords the Judges the opportunity of attending seminars, lectures, symposia or conferences. Continuing legal education for Judges has been recognised in Canada as part of the judicial development geared towards a more effective and independent judiciary."[99]

Inviting outsiders to speak, as happened when the Commissioner for Social Development presented a paper before the judges annual seminar in 1986, is to be encouraged. But what is needed is exposure to international ideas on sentencing and sentencing problems. This is best done by inviting experts from outside the country.

Fourthly, justices in Zambia should be encouraged to attend regional conferences and seminars on crime and sentencing. The United Nations has a policy of establishing regional criminological institutes in various regions of the world like the far east. A similar institute was established for Africa called the United Nations African

Institute for the Prevention of Crime and Treatment of Offenders (UNAFRI) in 1986 in Kampala, Uganda.[100] □ Its first seminar was held the following year in 1987 at which there was some reference to sentencing within an African context.[101]

Finally, and as a long term strategy, the most effective way of training the judiciary and contributing in other ways in the field of crime and punishment is by establishing an institute of criminology to conduct research and provide considered guidance in the field of sentencing. In fact in 1988 the government decided to establish one but the absence of qualified personnel to organise and run such an institute did not make it possible to do so.[102]

II. The training of Local Courts justices.

When a post falls vacant on the Local Courts bench, the position is advertised. For urban appointments, candidates must have suitable work experience and some education, have a good command of English and be without a criminal record. In rural areas nominations for appointment are made by local chiefs after consultation with relevant village headmen and all that is required is that the candidate is able to understand English.[103]

Local Courts justices receive no training of any kind before they start to sit on the bench. The justification offered is that the primary function of Local Courts is to administer African customary law and not the general criminal law. But to compensate for the lack of formal training, training officers make regular tours of Local Courts throughout the country instructing the justices how to do their work but no particular emphasis is placed on the task of sentencing.[104] It is evident that, whatever efforts

Local Courts officers make in training Local Courts justices in the conduct of criminal trials, their efforts are not bearing much fruit because case records reveal that Local Courts justices have not mastered the basic elements of criminal trial process or, by necessary implication, how to go about sentencing offenders.

From the scrutiny of criminal case records of Local Courts in Livingstone, Lusaka, Ndola, Kitwe and Petauke, (a rural area) it is clear that elementary mistakes in the conduct of criminal trials are commonplace, thereby impairing the quality of justice administered.

In general charges were correctly drafted by the police who conduct prosecutions but the genuineness of pleas of guilty was suspect. In the Kitwe case of The People v Dominic Matea,[105] for example, the accused was charged with being drunk and disorderly. Asked to plead, all he said was "I admit", and the plea recorded was one of "guilty". In the Subordinate Court or the High Court, a plea of this kind would have been recorded as a plea of not guilty because it is not clear what ingredient of the charge the accused is admitting to by saying "I admit". Experience has shown that such a plea can lead to the conviction of an innocent person.

Not only do Local Courts accept ambiguous pleas of guilt, but in many cases the statement of facts does not support the charge. In the Lusaka case of The People v Edward Mbewe[106] the accused pleaded guilty to a charge of using abusive language. The statement of facts read out in support of the charge consisted of no more than 11 hand-written lines, and the relevant passage which comes nearest to proving the charge read as follows:-

> "Constable Simasiku received a report from A/F Petronella Kangwa who complained that Edward Mbewe was insulting her and later beat her up on a false allegation....."

Clearly, this statement of facts did not support the charge of using abusive language.

When an actual trial takes place and evidence is heard, witnesses make very brief statements before the courts. In the Petauke case of The People v Chazingwa Sakala[107] the accused was charged with, and convicted of, assaulting Esnart Phiri. Her evidence is no longer than 14 hand-written lines. The pith of her evidence reads as follows:-

> "He pushed me and said I was stupid. I ran away to the garden to tell my mother that Chazingwa beat me without reason. My mother said we report to police...."

When accused persons are convicted following a trial, judgements tend to be very brief. In the Livingstone case of The People v Lameck Phiri and Raymond Bwalya,[108] for example, the accused were jointly charged with the theft of 13 bottles of Coca-Cola and 2 bottles of orange crush. The entire judgement consists of no more than 9 hand-written lines. Considering that two accused persons were involved, this judgement is far too brief. A very common fault with Local Court judgements is that Local Courts justices do not remind themselves where the burden of proof lies; nor do they remind themselves of the standard of proof in criminal cases.

With regard to sentencing, there is very little evidence that Local Court justices are aware of the existence of principles of sentencing. The records only show the sentences actually imposed. No attempts of any kind are made to base sentences on any one or more principles of sentencing. Some evidence of the careless approach to sentencing appears in the Lusaka case of The People v Kuyenela Sakala.[109] Passing sentence, the court said:-

"because this is your first offence of [sic] accused [sic] you are sentenced to pay K10. i/d. 1 month."

There can be no doubt that Local Courts justices are unqualified to conduct criminal trials because they are untrained. If they cannot conduct criminal trials, they cannot possibly be suitable to undertake the complicated task of sentencing offenders. Admittedly, some of them may have heard of retribution, deterrence, or reform, but they lack the proper training to understand the theories of punishment.

What is wrong with Local Courts is not simply lack of training of Local Courts Justices; the problem lies deeper in the role of Local Courts within the judicial system of Zambia as a whole. They should no longer be regarded as the continuation of Native Courts from the pre-independence times. They should be re-organised and merged with the existing Subordinate Courts. Zambia should study how the lower judiciary has been re-organised in the East African and the Central African jurisdictions (later).

III. Continuing legal education in Nigeria.

The Nigerian experience in the field of continuing legal education merits particular attention. It involves all members of the judiciary: judges, magistrates, justices who sit in Islamic courts and customary law courts as well. Nigeria has embarked on a firmly-based and far-sighted programme. The idea was first discussed in 1982.[110] Ten years later, in 1992, an induction course, lasting two weeks, for newly-appointed judges of the High Court, appeal court justices in the Islamic court of appeal and customary courts was held in Lagos.[111] Now, continuing legal education in

Nigeria has been put on a statutory basis by the creation of the National Judicial Institute[112] headed by the Chief Justice himself.[113] The functions and objectives of the Institute are to:-

> "serve as the principal focal point of judicial activities relating to the promotion of efficiency, uniformity and improvement in the quality of judicial services in the superior and inferior courts."[114]

through courses,[115] lectures, seminars, conferences etc.[116]

Initial reports suggest that continuing education programmes have been beneficial.[117] There is no obvious reason why a similar institute cannot be established in Zambia in the near future.

IV. The lower judiciary in some other African jurisdictions.

There have been very positive developments in the organisation of the lower judiciary in the East African jurisdictions of Tanzania, Kenya and Uganda. In the Central African region, there have been positive developments in Zimbabwe as well. In Malawi, very serious thought has been given to the re-organisation of the lower judiciary, but the motivation for the changes appears too political.

A. The lower judiciary in East Africa.

In the East African jurisdictions of Tanzania, Kenya and Uganda judicial systems were re-organised after independence. Instead of preserving a dual court system as in Zambia, African Local Courts have been integrated into the main judicial systems. It is

interesting to note that this exercise took place quite early after the attainment of independence.

Two years after independence in 1961, Tanganyika enacted the Magistrates Court Act 1963.[118] This Act ended the duality of the court system in Tanganyika by repealing the Local Courts Ordinance.[119] In place of Local Courts, the Act established Primary Courts;[120] apart from having jurisdiction to administer customary law and Islamic law these courts were vested with jurisdiction to try many criminal offences, including 48 offences under the Penal Code.[121]

The minimum educational qualification for appointment to Primary Courts is Form IV,[122] a high minimum standard. Of particular relevance is the training given to Primary Courts Magistrates: they undergo a course of formal training over a period of 9 months.[123] The syllabus consists of 9 subjects,[124] including Criminal Law, Criminal Procedure and Evidence.[125]

A close examination of Primary Courts in Tanganyika reveals that these courts are much closer to the courts presided over by professionally-unqualified Magistrates in Zambia than they are to the Local Courts. Clearly, Primary Courts in Tanganyika are much better equipped to dispense criminal justice than are the Local Courts in Zambia.

In Kenya, the dual court system of ended in 1967, six years after the attainment of independence in 1961.[126] Uganda integrated its court system a little earlier, in 1964, two years after independence in 1962.[127]

B. The lower judiciary in Central Africa.

1. Zimbabwe

At independence in 1980, Zimbabwe had a triple system of courts.[128] The following year, in 1981, Zimbabwe enacted the Customary Law and Primary Courts Act 1981.[129] This reduced the three-tier system of courts to two. But the main court system comprising Magistrates Courts and High Court continues. The new system of tribal courts, called Primary Courts, consists of two types of court: at the lower end are Village Courts which have no criminal jurisdiction,[130] and at the higher end are Community Courts[131] with a very restricted criminal jurisdiction. Thus, compared with the Local Courts of Zambia, the Primary Courts of Zimbabwe have very little criminal jurisdiction.

2. Malawi.

Malawi is associated with Traditional Courts. Wanda traces in great detail the origins this court. He says that the President as well as the general public were disenchanted with the main system of courts in the country. It was widely felt that court procedures and technicalities in the main court system resulted in too many undeserved acquittals. Consequently, the President felt that Malawi needed a new courts system which could appeal to the African sense of justice.[132]

The establishment of Traditional Courts began with an amendment to the existing Local Courts Ordinance in 1969. Local Courts were re-named Traditional Courts.[133] The final break with the main system of courts came the following year in

1970. An amendment to the Traditional Courts Act[134] provided that all appeals from the three different grades of Traditional Courts would lie to the National Traditional Appeals Court.[135] It was specifically provided that this was the final court of appeal in the Traditional Court system.[136] The Traditional Court arrangement is an elaborate court structure. Many serious offences are tried in the Regional Traditional Courts, including murder and treason.[137]

All Traditional Court Chairmen undergo a six-months training course before starting to sit on the bench. Subjects taught include not only customary law, but criminal law as well. For those intending to sit on the District Traditional Court, they must have a minimum educational qualification of "O" level and their course lasts for one year.[138] There is no doubt that the organisation and running of Traditional Courts in Malawi is taken very seriously.

Wanda offers three criticisms of Traditional Courts. He says that the whole idea of Traditional Courts is racist in that these courts are meant to cater mainly for the needs of Africans; Traditional Courts are not independent from the political arm of government; and there is no good reason why there should be two completely separate legal systems in one country.[139]

V. The future shape and direction of Local Courts.

Traditional Courts of Malawi would be clearly undesirable in Zambia for being too strongly motivated by political considerations while the Primary Courts of Zimbabwe have too little criminal jurisdiction. The East African arrangement, where the lower courts have been integrated, is to be preferred as a model for reform of the

judicial system of Zambia. In fact integration of Local Courts into the mainstream courts system was the original intention in Zambia.

For several years before independence, the policy of the colonial administration towards Native Courts was to phase them out. As a start, urban Native Courts were to be presided over by a professional African magistracy as a way of merging Native Courts with the main court system in the territory. Later, the policy was to withdraw criminal jurisdiction from Native Courts and vest it in Magistrates' Courts. At an opportune time, civil jurisdiction was to be withdrawn as well.[140] But the idea of integration has not been abandoned. It has not taken place so far because the customary laws of Zambia have not been codified as yet.[141] But there are no immediate plans to start the codification of customary laws because the Law Development Commission, which should carry out the exercise, has had more pressing matters to deal with.[142]

Local Courts cannot forever remain un-reorganised. In their present state, they are not equipped to try criminal cases. They should be integrated with the existing Subordinate Courts. If for any reason integration is not possible, then the criminal jurisdiction of Local Courts in Zambia should be phased out as quickly as possible.

Conclusion.

The court structure and organisation of Zambia has been outlined. It has a four-tier system: the Supreme Court, the High Court, Subordinate (or magistrates) courts and Local Courts. Members of the senior judiciary (judges of the High Court and Supreme Court) are appointed by the President. But under the new (1991) post-

Kaunda Constitution appointments must be ratified by Parliament thus democratising senior judicial appointments and ensuring their independence further. This is welcome development. The junior judiciary (magistrates and Local Court justices) continue to be appointed by the Judicial Service Commission as before.

It has been complained that the Supreme Court is lethargic: it has a tendency to needlessly follow English decisions and ignore ground-breaking decisions of courts in some neighbouring African countries with a closer cultural orientation than England; dissenting judgements in criminal cases (but not in civil cases) are rare and that this cannot be beneficial for the development of the law generally and sentencing policy and practice in particular; and the court is not innovative enough to call for, for example, the greater use of compensation in criminal cases.

With regard to Local Courts, it was noted that although they normally hear customary law cases they are also vested with jurisdiction to try a wide range of criminal cases.

It was regretted that the training of judicial officers is inadequate. Legal practitioners who may wish to become magistrates and rise to become judges of the High Court and Supreme Court must have an LL.B. degree, normally got from the University of Zambia. But criminology is not a core subject and there is a chronic shortage of teachers to teach it. Consequently, would-be professionally-qualified magistrates lack the theoretical basis of sentencing. At the LPI little sentencing is taught because of the tight syllabus. Consequently, newly qualified professional magistrates are ill equipped to sit on the bench. With regard to professionally-unqualified magistrates (or lay magistrates) it was noted their training at NIPA was

adequate, but that the teaching method ought to be more practical using the case law method.

Local Court justices receive no training at all before sitting on the bench on the ground that they deal mainly with African customary law. But it was pointed out that this has resulted in their inability to try criminal cases properly.

All judicial officers should hold regular seminars and expose themselves to outside penal ideas and practices by inviting outside experts. Continuing legal education in Nigeria is a worthwhile effort to emulate.

Local Courts were compared with similar courts in East and Central Africa. It was noted that in East Africa the equivalent of Local Courts are merged into the mainstream court systems. In central Africa developments in Zimbabwe were noted but that the motivation behind Traditional Courts in Malawi was criticised. Finally, it was suggested the East African experience is preferable and that Local Courts should be merged with magistrates courts, as was envisaged just before independence.

Chapter 4.

Notes.

1. Constitution of Zambia, No.1 of 1991, Article 91(1).

2. Ibid., Article 93(1) for C.J., Article 93(2) for Supreme Court judges and Article 95(1) for puisne judges.

3. Ibid., Article 98(2).

4. Ibid., Article 98(3) (a) and (b).

5. Ibid., Article 98(4).

6. Ibid., Article 95(2).

7. Ibid.

8. Interview with Mr Chisengalumbwe, Lusaka, 30th July, 1986. He is a personal friend.

9. Constitution of Zambia, No.1 of 1991, Article 109 (1).

10. Constitution of Zambia 1973, No.27 of 1973, Article 115(1)(a).

11. Ibid., Article 115(1)(b).

12. Ibid., Article 115(1)(d).

13. Ibid., Article 115(1)(e) and 115(2)(a).

14. Ibid., Article 115(1)(c).

15. Ibid., Article 109(1).

16. Constitution of Zambia, No.1 of 1991, Article 93.

17. Constitution of Zambia, 1973, No.27 of 1973, Article 110(1).

18. Constitution of Zambia, No.1 of 1991, Article 95(1).

19. Ibid., Article 91(2).

20. Ibid., Article 116(3)(c); for Local Courts justices, Article 116 (3)(d).

21. Judicial Service Commission Regulations, Cap.1, Regs.25-38.

22. Constitution of Zambia 1973, No.27 of 1973, Article 116(3)(c).

23. Ibid., Article 116(3)(d).

24. Constitution of Zambia, No.1 of 1991, Article 92(1).

25. Supreme Court of Zambia Act, Cap.52, S.7.

26. Constitution of Zambia, No.1 of 1991, Article 92(2).

27. 1983/HP/415, Lusaka High Court, unreported.

28. From personal knowledge.

29. Ibid.

30 Constitution of Zambia, No.1 of 1991, Article 91(1)(b).

31. Ibid., Article 94(1).

32. Criminal Procedure Code, Cap.160, S.321(1).

33. Ibid., S.337. Also the Constitution of Zambia, No.1 of 1991, Article 94(5).

34. Subordinate Courts Act, Cap.45, S.56.

35. Interview with Dr Rodger Chongwe, Minister of Legal Affairs, London, 10th July, 1992.

36. Interview with Miss Justice Chibesakunda, London, 11th Oct., 1989.

37. Cap.160.

38. Cap.45.

39. Subordinate Courts Act, Cap.45, S.12.

40. Local Courts Act, Cap.54, S.56(1).

41. Subordinate Courts Act, Cap.45, S.3.

42. Annual Report of the Judiciary, 1984, p.6.

43. Interview with the Deputy Chief Justice, as he then was, Mr Justice Ngulube, Lusaka, 23rd July, 1986.

44. Native Courts Ordinance, 1929, No.33 of 1929, S.3(3).

45. Ibid.

46. Local Courts Act, Cap.54, S.12 (1). Customary criminal law is abolished. See Constitution No.1 of 1991, Art.18(8).

47. Ibid., S.9, and Local Courts (Jurisdiction) Order, Cap.54.

48. Local Courts Rules Cap.54, Rule 3.

49. Ibid., Rule 4.

50. Interview with Mr Chilundo, the Local Courts Adviser, Lusaka, 30th December, 1985.

51. Ibid.

52. Interview with Mr Chilundo, the Local Courts Adviser, Lusaka, 30th December, 1985.

53. Ibid. But the Local Courts Act, Cap.54, does not state that the Adviser is head of Local Courts. His headship is implied in the Act.

54. Ibid.

55. The Chief Justice in question, Mr Justice Silungwe retired at the end of June, 1992.

56. Local Court Act., Cap. 54, S.12(b).

57. Ibid., S.12(c).

58. Cap.54.

59. S.I. No.257 of 1966.

60. Cap.111.

61. Cap.104.

62. Penal Code, Cap.146, S.178.

63. Ibid., S.181.

64. Ibid., S.272.

65. Ibid., S.277.

66. For powers of transfer, see Subordinate Courts Act, Cap.45, S.13(1).

67. No.46 of 1985, unreported, also see The People v George Mpamfu, No.2 of 1986 before "Main" Local Court Grade "A", Ndola, unreported.

68. Local Courts Act, Cap.54, S.47(g).

69. Local Courts Rules, Cap.54, Rule 2.

70. Local Courts Handbook, 3rd.ed., Lusaka, Government Printer, 1967.

71. Local Courts Act, Cap.54, S.15(1).

72. Ibid., S,15

73. Penal Code, Cap.146, S.178 (a)-(g).

74. Ibid., S.181(a)-(d).

75. Constitution of Zambia, No.1 of 1991, Article 18(2)(d).

76. From personal experience at the Zambian Bar.

77. Interview with Mr Chilundo, the Local Courts Adviser, Lusaka, 21st Dec., 1985. He also said that the number of appeals in civil cases is equally negligible.

78. Local Courts Act, Cap.54, S.54(1). The section does not demand that all cases be reviewed but this is the practice. Although the powers of review are also granted to magistrates, as "authorised officers"-see S.2(1), in fact they do not exercise their powers because of pressure of work.

79. Review Case No.7 of 1984.

80. Interview with the Local Courts Adviser, Mr Chilundo, Lusaka, 21st Dec., 1985.

81. Ibid.

82. Legal Practitioners Act, Cap.48, S.11A (b)(i).

83. The writer teaches in the School of Law of the University of Zambia.

84. Legal Practitioners Act, Law Practice Institute (Establishment) Order 1968, S.7 as read with S.I.267 of 1968.

85. The writer taught at the L.P.I. for two years between 1981 and 1983, inclusive.

86. The writer used to teach Criminal Procedure.

87. Cap.146.

88. Cap.160.

89. Interview with Mr Swarbrick, the Head of the Legal Section at NIPA, Lusaka, 24th July, 1986.

90. See Legal Department document Basic Magistrates Course Outline.

91. Ibid.

92. Interview with Mr Swarbrick, Lusaka, 24th July, 1986.

93. Report of the African Commonwealth Magistrates Seminar on Legal Education for Magistrates, Local, Primary, and Customary Courts, the Future of Customary Law, held in Lusaka, 27th-2nd Aug., 1980, p.142.

94. Interview with Mr Chirwa, a Resident Magistrate, Lusaka, 15th December, 1985.

95. Ibid.

96. Interview with Supreme Court Judge, Mr Justice Sakala, Lusaka, 30th December, 1985.

97. Ibid.

98. Mr F Katati, entitled The Young Offender in Zambia: The Efficacy and Adequacy of Institutions Available, dated 16th January, 1986.

99. C. A. Oputa, "The Judiciary and the Administration of Justice Critical Assessment and Recommendations" (1986) 21 Nig.B.J., p.47.

100. Report of the Seminar on Planning for Crime prevention and Justice in the Context of National Development, UNAFRI, Addis Ababa, Ethiopia, 3-12 June 1987, p.1. 101. Ibid., para.43, Recommendation (1), p.5.

102. Interview with Dr Mwansa, former lecturer in the School of Law University of Zambia, London, 3rd June, 1990. He would have been an ideal candidate to start the institute. He is now Permanent Secretary in the Ministry of Home Affairs.

103. Interview with Mr Chilundo, the Local Courts Adviser, Lusaka, 30th Dec. ,1985.

104. Ibid.

105. No.97 of 1985, before a Grade "A" Court, Buchi, unreported.

106. No.44 of 1985, before a Grade "A" Court, Chilenje, unreported.

107. No.3 of 1986, before a Grade "A" Court, Mwanjawanthu, unreported.

108. No.34 of 1986, before a Grade "A" Court, L/Stone, unreported.

109. No.75 of 1985, before a Grade "A" Court, Chilenje, unreported.

110. From Continuing Education to a National Judicial Institute, National Judicial Institute, Lagos, MIJ Professional Publishers Limited, 1993, p.7.

111. Ibid., pp.11-12.

112. National Judicial Institute Decree 1991, Decree No.28, S.1.

113. Ibid., S.2(3).

114. Ibid., S.3(1).

115. Ibid., S.3(2)(a).

116. Ibid., S.3(2)(b)-(c).

117. From Continuing Education to a National Judicial Institute, Op. Cit., p.13.

118. No.55 of 1963. Tanganyika united with Zanzibar in 1963. The new country is called Tanzania. But this Act was passed before the union.

119. Cap.217. See Sixth Schedule to the Magistrates Court Act, 1963.

120. Magistrates Court Act 1963, No.55 of 1963.

121. Ibid., S.9.

122. B. Rwelengela, "Selection and Training of Primary Courts Magistrates", Report of the African Commonwealth Magistrates on Legal Education for Magistrates, Local, Primary, and Customary Courts, and the Future of Customary Law, held in Lusaka, 27th July-2nd Aug., 1980, p.94.

123. Ibid., p.97.

124. Ibid., pp.98-99.

125. Ibid., p.99.

126. Magistrates Courts Act, 1967, No.17 of 1967. Also see J.M.Mwera, "Selection and Training of District Magistrates in the Surbodinate Courts: The Kenyan Experience" Report of the African Commonwealth Magistrates Seminar on Legal Education for Magistrates, Local, and Customary Courts, and the Future of Customary Law, held in Lusaka, 27th July-2nd Aug., 1980, p.67. He describes how African courts of Kenya integrated into the main court system of the country.

127. Magistrates Court Act 1964, No.38 of 1964. Also see C.Mutyabule, "Background Information on the Development of Courts of first Instance in Uganda", Report of the African Commonwealth Seminar on Legal Education for

Magistrates, Local, Primary and Customary, and the Future of Customary Law, held in Lusaka, 27th July-2nd Aug., 1980, p.63.

128. A. Ladley, "Changing the Courts in Zimbabwe", [1982] J.A.L, p.96.

129. No.6 of 1981.

130. Ibid., S.10, with certain exceptions.

131. Ibid., S.7(1)(b).

132. B. Wanda, Colonialism, Nationalism and Tradition: The Evolution and Development of the Legal System of Malawi, University of London, School of Oriental and African Studies Ph.D. thesis, 1979, Vol.3, p.129 ff.

133. Local Courts (Amnd) Act, 1969, No.31 of 1969, S.3

134. Cap.3:03.

135. Traditional Courts (Amnd) Act 1970, No.38 of 1970, S.3.

136. Ibid.

137. Regional Traditional Courts (Criminal Jurisdiction) Order Cap.3:03.

138. Interview, London, 1st July, 1987. The interviewee wished to remain anonymous; but he is a lawyer from Malawi.

139. B. Wanda, Op Cit., p.155.

140. J.L. Kanganja, Courts and Judges in Zambia: The Evolution of the Modern Judicial System, University of London, School of Oriental and African studies, Ph.D. thesis, 1980, p.1036.

141. Ibid., p.1076.

142. Interview with Dr Rodger Chongwe, Minister of Legal Affairs, London, 9th July, 1992.

Part B.

Sentences Available to the Courts.

Chapter 5

Financial Penalties.

Introduction.

There are five types of financial penalties available to the courts in Zambia: fines, compensation, restitution, forfeiture and costs. Of these, fines are perhaps the most challenging because they raise a fundamental problem concerning the extent of their applicability in a social and economic environment in which large sections of the population still lives on the fringes of the money economy. In an African country like Zambia, one would expect to find that penal policy places much emphasis on compensation; but unfortunately, this has not been the case. A variety of factors, many of them serious, make it very difficult to make more use of compensation in Zambia. Our treatment of compensation will include a discussion of reconciliation, a non-monetary penalty. This is because in some cases compensation is payable when the question of reconciliation arises. Regarding restitution, forfeiture and costs, these have rather limited penal significance because by their very nature they are in effect little more than legal mechanisms for retrieving in a mechanical way what the complainant had lost as a result of the criminal conduct of the offender. However, together, and properly used, financial penalties, especially fines and compensation orders, are an obvious and very useful diversionary tool.

I. Fines.

A. General legislative provisions dealing with fines.

As with other sentences, the legislative provisions dealing with the imposition of fines in the individual case are found in the relevant provisions pieces of legislation in question. However, the Penal Code sets out the following general framework on fines:-

> "Where a fine is imposed under any written law, then, in the absence of express provisions relating to such written law, the following provisions shall apply:
> (a) Where no sum is expressed to which the fine may extend, the amount of the fine which may be imposed is unlimited, but shall not be excessive.
> (b) In the case of an offence punishable with a fine or a term of imprisonment it shall be a matter for the discretion of the court."[1]

These provisions are not particularly informative nor do they provide much guidance; they are not really necessary. It is a well established sentencing principle that the severity of a sentence must be proportionate to the offence for which the offender is convicted. Giving the discretion to the court to fine or imprison an offender, where there is a choice, is not particularly informative either. However, there are other provisions dealing with imprisonment or distress in default of payment of fines (to be dealt with later) which are more informative and directory to sentencers.

B. The use and penal aims of fines: fundamental problems.

1. Fines in developed countries.

Thomas states the central penal aim of fines and outlines the way in which the courts in England should arrive at this particular sentence. He says:-

> "[Fines] are generally used in cases where a deterrent or punitive sentence is necessary, but either the inherent gravity of the offence is insufficient to justify a sentence of imprisonment, or the presence of mitigating factors justifies the sentencer in avoiding a sentence of imprisonment. The first consideration for a sentencer contemplating the imposition of a fine is whether the offender and surrounding circumstances require the imposition of a custodial sentence." [2]

On the rung of severity of type of punishment fines are not meant to be heavy deterrents although they can be so in the individual case where the fines are very large; in fact they lie very close to discharges on the scale of severity of type of punishment. Thomas says:-

> "They [fines] constitute the lower reaches on the scale of tariff sentences (discharges, absolute and conditional, may be regarded as the lowest point)..." [3]

The amount of fines to be imposed on offenders should also be fair to the rich as well as to the poor. Thomas states:-

> "When the sentencer has determined that the offence does not require a custodial sentence, and the facts of the offence considered in the abstract would justify a fine of a given amount, the next question is whether the proposed fine can be paid by the offender within a reasonable time." [4]

Thomas continues:-

> "a fine should not normally be imposed without an investigation of the offender's means and the amount appropriate to the offence considered in the abstract should be reduced, where necessary, to an amount which the offender can realistically be expected to pay." [5]

Reference to ability to pay the fine clearly suggests that in addition to deterrence, fines should be imposed fairly on the rich as well as on the poor so that offenders are not sent to prison for non-payment of fines the amount of which has been too high.

In the developed countries, the merits of fines have been aptly summarised by a group of New Zealand researchers thus:-

> "The fine is simple, uncomplicated, adaptable and popular. It involves relatively little expense to the public, no burden on the penal system, no social dislocation of the offender, and less stigma than most other criminal sanctions."[6]

2. The extent of applicability of fines in Zambia.

To what extent are fines capable of being a fair and effective form of penalty in Zambia? This is the central question about fines. The question arises because although fines may be a popular and desirable form of penal treatment, the economic and social conditions existing in Zambia are such that they have a more limited application in Zambia than in developed countries. Discussion of the applicability of fines in a poor country like Zambia will be split into two parts: the first part will deal with the problem of achieving fairness, and the second will deal with the problem of inconvenience and cost to the government of fine enforcement.

a. The problem of achieving fairness in the amounts of fines levied.

In nearly every country throughout the world, including Zambia, there are extremes of wealth and poverty. The precise details of wealth distribution vary from country to country. In developed countries like the United kingdom, the formal sector of the national economy is much larger than in the developing countries like Zambia and even those few people who are in the informal sectors, with smaller incomes than those who are in the formal sector, can afford to live a relatively normal life because of social security benefits and control. Everyday necessities are available and within easy

reach. Virtually all citizens receive some income. The size of social security benefits may be small, but even the poor are never completely out of money. Below the unemployed are the underclass consisting largely of the mentally disturbed and homeless, but their numbers have remained negligible although their plight sometimes attracts much media attention. To sum up, the wealth distribution curve in developed countries never reaches zero for any appreciable distance on the horizontal line. Even poor offenders are generally able to pay fines which can therefore provide a fair penalty for both rich and poor.

In Zambia, the distribution of wealth is very different from that found in developed countries. For a start, there is no national system of social security, which has to be found mainly in the traditional African family attitudes of caring and mutual help. The formal economic sector has always been much smaller than the informal sector and the largest employer in the formal sector has always been the government. In the urban areas, the informal sector consists largely of marketeers, cobblers, tailors, charcoal-burners and most recently drug pushers; but their levels of income are generally much smaller than those of people in the informal sector in developed countries. Their disposable incomes are very small. Moreover, the cash flow tends to be more spasmodic. Then there are villagers living on the margins of the money economy; for their every day living, cash does not play as prominent a role as it does for the town dweller. Consequently, they do not always have cash in hand at any one point in time. When the villager needs money, he sells his crops, which can only be done at harvest time, or his cattle, but not all the tribes in Zambia are cattle- keepers. In a country where a large segment of the population has hardly any income at all, let alone disposable income, the scope for imposing fines fairly on the rich and poor alike

is much more limited than in the developed countries. In Zambia fairness in the imposition of fines can be realised only when the offender in question is either a company or a rich individual.

Thus even the idea of implementing fairness in imposing fines on the rich and poor alike can cause grave financial hardship to the poor. A rich offender can afford to pay so much of his disposable income in fines and still continue to live a normal basic life, managing to pay for a bag of mealie-meal every month, eating meat and fish for relish and not relying only on vegetables, running a car and pay for school uniforms for his children while cutting down on luxuries like alcohol and general socialising. But ordering a poor offender to pay a proportion of his small income as a fine can have far more disastrous consequences for himself, his immediate family and members of his extended family. Lacking any disposable income, he is likely to be pushed "over the edge" and cut down on the size of the everyday essentials: instead of having two meals a day, he may have to have only one meal a day, for example. Instead of using public transport to take him to work or his place of business, he may be forced to walk. His quality of life is likely to fall dramatically. Concepts of minimum poverty lines or minimum wages have little practical relevance in a county where the informal sector is very large, inflation is, as will soon be seen, rocketing and the foreign debt keeps eating into foreign exchange earnings. For villagers, paying fines is almost bound to mean selling crops which may not be ready for harvest or taxing the already very limited economic resources of relatives in the village.

Apart from the inherent difficulty of achieving fairness because of the great gulf in the distribution of wealth in Zambia, there are particular problems caused by inflation and the cost of fine enforcement.

b. The impact of inflation on the economy.

Unlike in developed economies, the economy in developing countries is characterised by, inter alia, persistent levels of high inflation. Table 6 shows the inflation rates of Zambia covering a period of five years from 1980 to 1987, inclusive.

Table 6.

Inflation Rates in Zambia, 1980-1987.

Year	Rates of Inflation
1980	12%
1984	20%
1985	37%
1986	53%
1987	45%
Average:	33.40%

Source: Fourth National Development Plan, 1989-1993.

As can be seen, the inflation rate has been rising significantly over the years. In 1980 it was 12 % but six years later, in 1986, it rose to 53% although it fell to 45% in 1987. With the coming to power of a new government in 1991 and the deregulation of the economy there is little doubt that inflation has risen considerably. High rates of inflation makes those without a regular source of income, who are in the majority in Zambia, in an even worse financial position than the minority who receive regular incomes. This inherently limits the extent to which fines can be imposed fairly on the rich and poor alike in a poor country like Zambia.

When inflation rises as sharply as has been the case in Table 6, the legislature and the judiciary may be justified in wanting to raise the level of fines to match the rising inflation rates. This would make it harder for the poor and those not on regular incomes, like villagers, to pay their fines. In practice, synchronising inflation levels and fine levels is difficult to achieve and cumbersome because in developing countries rises in inflation tend to be steep and erratic, sometimes within short periods of time. Invariably, inflation levels will run ahead of fines levels. This will make it even more difficult for the poor to pay their fines. In developing countries like Zambia, therefore, not only do persistent high levels of inflation make the task of fining difficult but achieving fairness in the imposition fines for the rich and poor is made even more difficult.

c. The cost of fine enforcement.

(i) Theoretical difficulties.

When the size of the fine is very small because the offender is a poor person, trying to enforce the payment of the fine can be a much more expensive exercise in Zambia than in developed countries like the United Kingdom. If the fine defaulter cannot pay because, for example, he would rather go to prison than part with his money, the offender will have to be sent to prison. This is a cost to the country.

(ii) Practical difficulties.

Table 7 shows the number of people sent to prison for non-payment of their fines. Many do pay their fines after they are actually put inside prison. But unfortunately, there is no data showing how long their stay is before the fines are paid and the offenders released. The Table covers a period of 14 years from 1968 to 1983, inclusive.

Table 7.

No. of Fine Offenders Imprisoned for Non-payment of Fines, 1968-1983.

Year	No. of Fine Defaulters
1968	354
1969	798
1970	1,334
1971	1,099
1972	1,155
1973	1,189
1974	1,185
1975	1,105
1976	1,023
1977	1,182

1978	1,000
1979	1,096
1980	1,032
1983	731
Total:	14,283
Average:	1,020.21

Source: Annual Reports of the Prisons Department.

These are absolute figures only. The purpose is to show that fine defaulters are actually sent to prison. Later, a more accurate picture will be provided in a Table showing the numbers of offenders fined against those who were sent to prison for non-payment of their fines. Here, Table 7 shows that the number of fine defaulters sent to prison has been above 1,000 for all the years shown, except in 1968 and 1983 when the figures fell below the 1,000 mark. One thousand is a large number when one considers the economic situation of Zambia, even if many fine defaulters may not stay in prison for many weeks before they are released upon settlement of their fines.

The realisation that the enforcement of small amounts of fines can be an expensive exercise puts a further break on the extent to which fines in a poor developing country like Zambia can be an effective instrument of penal policy. Only

when the fines are in large amounts can their enforcement be justified in economic and financial terms. Again, this suggests that fines in Zambia may be much more appropriate when the offender is a company or a rich individual. Also, this financial limitation upon the collection of small amounts of fines suggests that fines as a court sentence should have a more limited application in Zambia, in theory and practice, than in developed countries like the United Kingdom.

C. How the Zambian courts determine fines and their penal aims.

Where the legislature provides for a fine without more for a particular offence created, few problems arise; the court has no choice but to pronounce a fine. Where a fine is an alternative to another sentence, that other sentence is invariably a prison term. In such a case, the court has to decide on the appropriate type of sentence in the case in hand. Where there is a choice of type of sentence, typically, penal legislation does not guide courts. As a result, the courts have been forced to create their own guidelines.

In the 1976 Supreme Court case of Musonda v The People[7] the applicant was charged with and convicted of an offence under the wildlife protection legislation, the relevant provision of which provided for a fine or a prison sentence or a combination of both fine and imprisonment. In the trial magistrate's court, the applicant was sentenced to 4 months imprisonment; a fine was not considered. On appeal the Supreme Court held that a fine would have been the appropriate sentence, but since the applicant had already served his 4 month prison term fining him now was

unnecessary. Outlining the general approach to sentencing where a court is given a choice between a fine and a prison term, Baron D.C.J. said:-

> "we have very recently in the case of Longwe v The People dealt with this particular point. We repeat what we said in that case:
>
> 'Where the legislature has seen fit to prescribe a sentence of a fine or imprisonment or both it is well established that a first offender in a case where there are no aggravating circumstances which would render a fine inappropriate should be sentenced to pay a fine with imprisonment only in default.'
>
> No aggravating circumstances emerged from the record in the present case, and consequently the applicant should have been sentenced to pay a fine." [8]

This case shows how the courts should arrive at the fine where the court is given a choice, but it also shows that fines are meant to be soft deterrents.

In another Supreme Court case of the same year, Siyauya v The People,[9] the applicant was convicted of the unlawful possession of a firearm and sentenced to a prison term of 3 years. Again, the relevant provision creating the offence gave the courts a choice between a fine and a prison term or both. But a little earlier on before this offence was committed, the maximum penalties had been raised by the legislature. Before the amendment, the maximum penalties were a fine of K500.00 or 7 years imprisonment or both. [10] Now, the maximum penalty had been raised to a fine of K7,500.00 or up to 15 years imprisonment or both. [11] The Supreme Court dismissed the application and confirmed the 3-year prison term. While acknowledging that the applicant was a first offender and that there were no aggravating circumstances, the court noted that maximum sentences for the offence for which the applicant was convicted had just been raised by the legislature. Giving its reasons for dismissing the appeal against the 3-year prison sentence, Baron D.C.J. said:-

> "This is a very severe maximum sentence [K7,5000 or 15 years imprisonment] and it is significant that it was introduced by the repeal and replacement of a section under which the maximum penalty was a fine of K500 and imprisonment for up to two years or both. It is quite clear therefore that the legislature, in the light of the conditions in the country at that time and the very marked increase in the incidence of offences involving firearms, decided to impose this very serious penalty in an effort to curb the illegal possession of firearms. The general practice is well recognised that where the legislature has prescribed a sentence of a fine or imprisonment or both it is not customary in the case of a first offender to impose a custodial sentence without the option of a fine. But the history of this legislation demonstrates that the possession of firearms is not regarded by the legislature as an ordinary case, and the courts would be failing in their duty were they not to deal severely with this particular kind of offence." [12]

The Supreme Court is guilty of false reasoning in this particular case. Granted that the legislature had raised the maximum penalties for the offence for which the applicant was convicted, and granted further that this meant the legislature had taken a more serious view of firearms offences, this was not an adequate reason for crossing the sentence divide from the fine to imprisonment. It was perhaps a reason for increasing the amount of fine to be imposed in an individual case.

Not only are fines, as a type of penalty, meant to be soft deterrents, as has already been pointed out, they are also meant to keep offenders out of prison. In The Magistrates' Handbook[13] magistrates are advised that:-

> "When a magistrate decides that a case can be properly dealt with by a fine, the effort to keep the offender out of prison will be rendered abortive unless the amount of the fine is such the accused is likely to be able to pay. A fine should be within the accused's own capacity...to pay, so that he is not saddled with a fine he cannot pay and so have to go to prison, thereby defeating the object of the fine....." [14]

In the Supreme Court case of January Gringo Nakalonga v the People[15] the appellant was convicted of a serious traffic offence and fined K500 or 12 months

imprisonment in default. As in England, the courts in Zambia should conduct a means test before fining the offender, but this was not done in the trial court. After conducting its own means test, the Supreme Court reduced the K500.00 fine to only K200.00. Dealing with the principle of capacity to pay, Cullinan said:-

> "When a court decides not to impose a custodial sentence but instead to impose a fine, the fine should not be of an amount the effect of which will send the offender to prison: a court must take into account the ability of the offender to pay the fine...." [16]

Not only is the Handbook and the case above using fines as a means of keeping offenders out of prison, they are also saying in effect that the amounts of fines levied should be fair to both the rich and the poor. But the strict implementation of the principle of equality of pain between the rich and the poor offender can result in self defeating consequences where the offender has no disposable income at all.

In the High Court case of The People v Peter Kalyombwe[17] the accused, an unemployed man, was convicted of possessing obscene matter. The penalty for this offence is a fine or a prison sentence. If the court opts for a fine, the sentence is a minimum amount of K1,000, but if a prison sentence is chosen, the court has a complete discretion in the matter and is empowered to impose a prison term of up to 5 years. Contrary to the legislative provisions, and having opted to fine the appellant, the trial magistrate imposed a fine of only K200.00. On review, Silungwe C.J. approached the problem in the following way:-

> "Whereas there is a mandatory sentence in relation to a fine, there is no corresponding minimum prison sentence. It seems to me therefore that a sentence of fine...may be imposed only upon an accused person who has, or may reasonably be expected to have, the means to pay, because if the accused is a person without means (and the intention is not to imprison him), it would be pointless to sentence him to a fine coupled with a custodial punishment in

default of payment as the effect of his being so sentenced would decidedly be to lodge him in prison"[18]

After going into the personal circumstances of the offender, including the fact that he was unemployed, his Lordship continued:-

> "I consider that in the circumstances of this case, the most appropriate thing to do would simply be to pass a prison sentence which this court is at large to do.[The sentence passed by the magistrate] is hereby set aside and in substitution of it the accused is sentenced to imprisonment with hard labour for six months. In view of the mitigating factors to which reference has been made....he should be given a chance to stay out of prison and, consequently, the entire sentence is suspended for a period of two years on condition that during that period, the accused is not convicted of an offence [involving immorality]." [19]

It should be noted that the effect of this decision was that in an effort to implement the equality of pain principle and keep the offender out of prison, he was in fact sentenced to a term of imprisonment, thereby defeating the aim of keeping him out of prison. The fact that the prison term was not to be implemented immediately but suspended has no bearing as to the changed nature of the sentence. A prison sentence is a fundamentally different kind of sentence from a fine. Moreover, the offender who receives a suspended prison sentence can actually find himself in prison should he break a condition of his sentence in the future.

The Peter Kalyombe case serves to emphasise our earlier point that the scope for using fines as a sentence of the court is a limited one in a poor developing country like Zambia. Admittedly, poor fine defaulters in the rich industrialised countries do go to prison, but the point here is that there are likely to be many more fine defaulters who will be sent to prison in Zambia than in the rich countries like the United Kingdom.

D. Number of cases in which fines are imposed.

As in many other common law jurisdictions, the fine is the most commonly imposed penalty in Zambia. Table 8 shows the number of cases in which fines were the sentences imposed in the Subordinate Court and the High Court. The Table covers 14 years over a period of 21 years, from 1964 to 1985, inclusive.

Table 8.

The Number of Cases in which Fines were Imposed, 1964-1985.

Year	(a) Total No. of Convictions	(b) Total No. of Fines.	(c) (b) as % of (a)
1964	50,219	34,610	68.91
1965	61,071	47,530	77.82
1966	63,476	47,920	75.49
1967	57,833	44,180	76.55
1968	30,479	21,471	70.44
1969	38,465	30,191	76.48
1976	53,375	36,005	67.45
1977	51,977	32,137	61.82
1978	78,858	50,646	64.22
1979	78,005	61,226	78.48

1980	103,914	78,213	75.26
1981	127,437	114,174	89.59
1982	113,682	90,369	79.49
1985	77,393	59,595	77.00%
Total:	986,184	748,267	
Averages:	70,441	53,447.64	74.21%

Source: Annual Reports of the Judiciary and Magistracy.

As can be seen, there are marked variations in the data between certain years, In 1979, for example, there were a total of 78,005 convictions but in the following three years, the figures rose significantly to 103,914 in 1980, 127,437 in 1981 and 113,682 in 1982. Annual reports in Zambia rarely explain sudden changes in a pattern of data presented; it is left to the researcher to speculate and offer possible explanations. The jump from the 1979 figure to the figures for 1980 to 1982 may have been due to sudden changes to policing and/or sentencing policies. Perhaps more crime was actually committed. However, what is more relevant here are the percentages of cases in which fines were imposed. Table 8 shows that in the 12 of the 14 years included, fines were imposed in the overwhelming majority of all criminal convictions, (from 61.82% of convictions in 1977 to 89.59% in 1981); the average percentage was

74.21%. This is welcome picture. However, as a matter of policy, the legislature and the judiciary should make greater use of this humane and non-custodial sentence.

E. Offences attracting fines and fine levels.

Minor offences generally attract fines, especially assaults, property offences and traffic offences. Table 9 shows the proportion and types of offences which normally attract fines. The data is taken from one subordinate court (Subordinate Court of the First Class, a professionally-unqualified magistrate) sitting at each of the nine Provincial Headquarters in Zambia, namely, Lusaka (Lusaka Province), Kabwe (Central Province), Ndola (Copperbelt Province), Livingstone (Southern Province), Solwezi (North Western Province), Mongu Western Province), Chipata (Eastern Province), Kasama (Northern Province) and Mansa (Luapula Province). Admission of Guilt (AG) cases, mainly consisting of minor traffic offences, and Pleas of Guilty by Letter (PGL) offences are excluded from the Table because by their very nature they attract fines. Those included in the Table are the types over which the courts have a discretion whether to impose a fine or another type of sentence. Table 9 covers the month of June, 1986.

Table 9.

Number of Offences Attracting Fines and Fine Levels, June, 1986.

Total No. of Offences	236
Total No. of Offences Attracting Fines	103
Assaults	54
Property Offences	52
Other Offences	27
Range of Fines	K30-K1,200
Total Fines	K13,218

Source: Monthly Returns of Criminal Cases.

Table 9 shows that out of a total of 236 offences 103 offences attracted fines. Of this amount, 54 were for assaults, 52 were for property offences and the rest (27) were for a variety of offences, mainly contraventions of wildlife protection legislation and customs regulations. The level of fines ranged from K30 to K1,200. Fortunately, they have not been increased despite rapidly rising rates of inflation in the country. Fines should be put to greater use by covering more offences than is the case at present.

F. The fairness of fines in Zambia: income levels and distribution.

Reference has already been made to the various problems involved in applying the principle of fairness of fines between the rich and poor in Zambia. The problems are shown by the diverse incomes of Zambians and the pattern of income distribution, which militate against realising the aim of fairness. Table 10 summarises the economic plight of the majority of Zambians in recent years. More significantly, it shows the gulf between those few with access to regular incomes and the majority of the people with no regular incomes. Table 10 shows the size of the work force in the country and compares it with the number of people who are usefully employed. Average earnings are shown. To complete the picture, the Table also includes rates of inflation already shown in Table 6. Table 10 covers 5 selected years from 1980 to 1987, inclusive.

Table 10.

Financial Differentials in Zambian Society and Earning Levels, 1980-1987.

Year	(a) Size of Labour Force	(b) Nos. Usefully Employed	(c) % of (b) Over (a)	(d) Average Earnings	(e) Inflation.
1980	2,699,000	381,500	14.13	K2,770	12%
1984	3,122,000	346,200	11.08	K2,930	20%
1985	3,243,000	360,500	11.10	K2,980	37%
1986	3,376,000	360,500	10.60	K3,040	53%
1987	3,487,000	356,600	10.22	K3,080	45%
Total:	15,931,000	1,805,300			
Av:	3,186,200	361,060	11.42	K2,960	33.40%

Source: Fourth National Development Plan, 1989-1993.

Table 10 shows that only a small proportion of the work force in Zambia is "economically active". (A work force is defined as that part of the general population, aged 12 years and above, which is capable of being "economically active". It is

immaterial whether it is fact so employed or not).[20] In 1980, out of a total work force of 2,699,000 only 381,500 people were engaged in economic activity in the country, or a mere 14.13% of the total work force. The percentage continued to fall. Seven years late, in 1987, the percentage had fallen to 10.22%. In 1987, then, 89.78% of the work force was not usefully employed. For this large group paying any amount of fine, even a small amount, would be very difficult. The fact that the average levels of yearly earnings (K2,960) for the 11.42% (on average) of those in gainful employment rose steadily increased the financial differentials between the two sets of population in the country. The rising inflation rate, rising to 53% in 1986, reduced the earning capacity of those in gainful employment over the years, so that it can be argued that the differentials have been levelled to a certain extent. However, it should not be forgotten that inflation affects everybody, whether they are in gainful employment or not. If those in formal and informal employment find it difficult to live, those with no regular incomes find it even harder to survive. Consequently, the gap between the two sets of population becomes even wider and the basic living standards of the mass of the population remain very low indeed.

With the introduction of a deregulated economy in Zambia following the election of a new government in November, 1991, inflation has risen dramatically as has already been pointed out before, thereby making those without a regular source of income, who are in the majority, in an even worse financial position than before. It must be concluded that the idea of imposing fines which are fair to both the rich and the poor in Zambia has become even harder to realise. Only a readjustment of the distribution of wealth, or poverty, in the country can make the fine a sentence which is fair to the rich and poor alike. Such a more equitable distribution of wealth or poverty

will take many decades to achieve, but this does not mean that there are no legal mechanisms in Zambia already available for ensuring that the fine has an fairer impact on offenders with varying degrees of financial power.

1. Capacity to pay.

With such low levels of income and large gaps in the wealth between the rich few and poor majority in Zambia, it is disturbing to discover that the legislature has still not provided for a legislative framework in which the courts can be forced to impose such amounts of fines as can be paid by all offenders, both rich and poor. In some European jurisdictions, steps have been taken to realise fairness in the amounts of fines to be paid in individual cases by requiring the courts to consider the financial capacity of the offender to pay his fine. In Sweden, there is the now well known "Day Fine System".[21] In England, a variant of this system was called the "Unit Fine System". It was applicable only in the magistrates' courts:-

> "(a) for a summary offence which is punishable by a fine not exceeding a level on the standard scale; or
> (b) for a statutory maximum offence, that is to say, an offence which is triable either way and which, on summary conviction, is punishable by a fine not exceeding the statutory maximum."[22]

The precise amount of fine payable in the individual case:-

> "shall be the product of-
> (a) the number of units which is determined by the court to be commensurate with the seriousness of the offence, or a combination of the offence and other offences associated with it; and
> (b) the value to be given to each of those units, that is to say, the amount which, at the same or any later time, is determined by the court in accordance with rules made by the Lord Chancellor to be the offender's disposable weekly income."[23]

The "unit fine" system was repealed after only two years, in 1993, because it was considered that it was too rigid; the courts were not given the required flexibility to impose levels of fine commensurate with the offender's culpability. But it should be noted that the idea of capacity to pay and therefore fairness behind the "unit fine" was not questioned. In the words of The Independent,

> "[The aim was to ensure that] fines rated on a scale according to their gravity had a similar impact on people of different incomes." [24]

Zambia could introduce the "unit fine" into the criminal justice system while at the same time preserving flexibility in sentencing for the courts. All that is required is to study the English experience and make sure that the judiciary, especially magistrates who hear the bulk of criminal cases in the country, understand "unit fines" by being properly trained. Introducing this system in Zambia may not be possible in the immediate future but the idea should not be discarded altogether.

The idea of assessing the financial means of the offender before imposing a fine is a long established principle of English law, the latest expression of which was found in this particular ("Unit Fine") piece of legislation. Although the idea of capacity to pay is not embodied in legislation in Zambia, the courts have nevertheless laid down that before a fine is imposed in an individual case, the offender's capacity to pay it should first be assessed by the court. Reference has already been made to the January Gringo Nakalonga case above, [25] where the Supreme Court laid down that before the court imposes a fine, the offender's capacity to pay must first be assessed. But as was pointed out in Peter Kalyombwe case[26] this requirement can lead to the opposite result

where a court can pass a prison sentence against the offender if he has no disposable income at all.

2. Time within which to pay the fines.

Giving grace periods in which offenders can pay is the second major component of the idea of fairness of fines as sentences of the court. While a rich offender may be able to pay his fine on the day the sentence is pronounced, justice demands that the poorer offender should be given adequate time within which to pay his fine. Moreover, in some cases, giving a poor offender a grace period may be an even more effective way of ensuring that he is not sent to prison than imposing a small fine on him. Unlike with capacity to pay, Zambian legislation specifically enjoins the courts to give offenders time within which to pay their fines:-

> "When a convicted person has been sentenced to a fine only and to imprisonment in default of that fine..... the court may, if it is satisfied that such fine cannot be immediately paid, allow the convicted person time to pay such fine." [27]

But this is the only statutory technique available to the courts for easing the burden of fines in Zambia. Unfortunately, there are no other statutory ways available to the courts. First, English legislation provides other means to ensure that fines remain a fair penalty for the rich and poor alike and Zambia should consider them for possible incorporation into the Zambian criminal justice system. In the Crown Courts, offenders are allowed to pay their fines in instalments. [28] The same latitude is offered to those offenders who appear before magistrates. [29] Interestingly, although there is no

provision in the Zambian legislation allowing for the payment of fines by instalments, in practice, the courts do allow offenders to do so.

In The People v James Daka Ltd. [30] the accused company was convicted of 59 counts of failure to pay statutory contributions under a social security piece of legislation and fined a total of K249,049.28. But the fine was not ordered to be paid immediately: following an application by counsel, it was ordered that the fine be paid in instalments of K10.00 per count per month. [31]

Secondly, under English legislation, offenders who find themselves unable to pay their fines within the stipulated time are allowed to return to the court to ask for an extension of time. [32] Again, although there is no similar provision in Zambia, in practice, the courts allow offenders extensions of time within which to pay fines. Thirdly, if the offender is in regular employment, provision is made for the attachment of his earnings. [33] There is no obvious reason why attachment of earnings should not work in Zambia.

G. Enforcement of fines.

There are two separate but related methods of dealing with fine defaulters. If the offender fails to pay the fine the court's first method of dealing with him is to order distress:-

> "When a court orders money to be paid by an accused person...for fine...the money may be levied on the movable and immovable property of the person ordered to pay the same, by distress and sale under warrant. If he shows sufficient moveable property to satisfy the order, his immovable property shall not be sold." [34]

If the first method of dealing with fine defaulters appears unsatisfactory the court is empowered to order imprisonment:-

> "When it appears to the court that distress and sale of property would be ruinous to the person ordered to pay [the fine] or to his family, or (by his confession or otherwise) that he has no property whereupon the distress may be levied, or other sufficient reason appears to the court, the court may, if it thinks fit, instead of or after issuing a warrant of distress, commit him to prison for a time specified in the warrant, unless the money and all the expenses of the commitment and conveyance to prison to be specified in the warrant, are sooner paid."[35]

Under the Criminal Procedure Code[36] distress followed by imprisonment would be the expected sequence of penalties available to the court against fine defaulters because, for many offenders, distress is preferable as it is a less drastic method of forcing the payment of fines. But under the Penal Code this sequence appears to be reversed, at least confusing:-

> "In the case of an offence punishable with imprisonment as well as a fine in which the offender is sentenced to a fine with or without imprisonment, and in every case of an offence punishable with fine only in which the offender is sentenced to a fine, the court passing sentence may, in its discretion-
> (i) direct by its sentence that, in default of payment of the fine, the offender shall suffer imprisonment for a certain term, imprisonment shall be in addition to any other imprisonment to which he may be liable under commutation of sentence; and also
> (ii) issue a warrant for the levy of the amount on the immovable and movable property of the offender by distress and sale under warrant:.."[37] (emphasis supplied).

What is confusing about the above provision is the use of contradictory words "discretion" with "and also". If instead of "and also" the word "or" was used, the confusion would not arise. However, it appears that the draftsman meant to give the courts discretion to order imprisonment or distress. It is unlikely that the legislature would have wished to see the courts to order imprisonment as well as order distress

simply for failure to pay fines. But this does not dispose of the problem of working out the proper sequence of methods of dealing with fine defaulters by the courts: whether the courts' first method is imprisonment and then distress or whether they have a completely free hand in the matter. As will be shown in the section dealing with fine enforcement in Lusaka and Petauke, it appears that the courts consider that imprisonment comes before distress. To guide the courts as to the severity of prison terms which may be imposed for non-payment of fines a scale of maximum prison terms is provided in Table 11:-

Table 11.

Prison Terms for Non-payment of Fines.

Amount	Maximum Prison Terms
K1 and over	14 days
Over K1-K10	1 month
Over K2-K10	3 months
Over K10-K40	4 months
Over K40-K100	6 months
Over K100	9 months

Source: Penal Code Cap.146, S.28(d).

Distress rather than imprisonment should be first move against fine defaulters. However, the scope for realising seizure and sale in a developing country like Zambia is limited because such a move can have very serious economic and financial consequences for many offenders. In the urban areas, chattels normally consist of kitchen utensils, basic furniture like chairs, tables, beds and mattresses and perhaps a radio set. Luxuries, like television sets, washing machines or dish-washers are hardly known by the ordinary persons. Selling off household chattels means that fine defaulters may be left with virtually nothing. The situation in the villages is worse. Chattels normally consist of hoes, axes and food stored away granaries; seizing these and selling them off can only result in fine defaulters relying entirely on relatives for their very survival for long periods of time while they try to get organised again. Then there is the financial cost involved in seizing and selling off these sorts of chattels which are of very small financial value. In many cases this must be very uneconomic for the government.

Regarding the sale of land, houses and other types of buildings, there are serious practical problems too. In the urban areas of Zambia, accommodation in the official residential areas consists largely of houses belonging to the central government, local councils or parastatals. Selling such types of accommodation is unreasonable; it means selling government property to pay the government. In the unregulated residential areas situated on the periphery of towns and cities, selling real property raises serious legal problems of a technical nature. These residential areas sit on one piece of land owned by one or more landlords. The people do not have individual title to their houses registered in the lands and deeds registry. As far as the government is concerned, transactions over land in these areas are unofficial. It is therefore

technically impossible for the government to sell houses or other property in unofficial compounds because the deed of sale should be registered in the lands and deeds registry but they are not. Moreover, the cost to the government of effecting the sale of shanty houses to enforce the payment of fines would be unreasonable.

Trying to sell land and houses in the village is more problematic. Not only do villagers normally not hold individual title to land in the reserves and trust lands, the financial value of their houses is normally very small, making seizure and sale financially expensive to the government.

All these problems point to the limited scope for fine enforcement in a poor country like Zambia. While fine enforcement can be problematical in the rich developed countries too, the problem is much bigger in poor countries. Table 12 shows the correlation between the number of fines imposed by the courts and the number of fine defaulters actually sent to prison, which will be called "Rate". The accuracy of the "Rate" should, however, be approached with caution because the data in the Table are taken from two sources and not one; the number of fines is taken from judicial reports but the data on the number of fine defaulters sent to prison are taken from the prison service reports. Figures from these two surveys may therefore not be entirely comparable. Table 12 covers a period of 9 years from 1964 to 1980, inclusive.

Table 12.

Proportions of Fine Defaulters Sent to Prison, 1964-1983.

Year	(a) No. of Fines	(b) No. Imprisoned for Default	(c) Rate of (b) to (a)
1964	34,610	2,261	15.30
1966	47,927	832	57.59
1968	21,471	354	60.65
1969	30,191	798	37.83
1975	90.743	1,105	82.12
1976	36,005	1,113	32.34
1977	37,137	1,182	31.41
1978	50,646	1,000	50.64
1980	79,183	1,032	76.72
Total:	421,936	9,677	
Average:	46,881	1,075	49.40

Source: Annual Reports of the Judiciary and Magistracy Annual Reports of the Prisons Department.

It will be noticed that, on average, for every 49.40 fines imposed, one fine defaulter is sent to prison. By any standards, too many fine defaulters are sent to prison in Zambia especially when it is recalled that fines are the most commonly imposed penalty in the country. The most favourable rate appeared in 1975 and stood at 82.12, or for every 82.12 fines imposed one fine defaulter was sent to prison. It may be significant that the worst rate appears in 1964, when one fine defaulter was sent to prison in every 15.30 fines imposed by the courts; this high rate may be related to the harsh sentencing policies associated with the remaining members of the colonial judiciary. Regarding the low rates covering 1975 (82.12) and 1980 (76.72) this may be attributable to financially better types of offenders fined by the courts or perhaps the fines imposed were unusually low. The general high rates of imprisonment may be due to the courts' practice of ordering imprisonment rather than distress in default of payment.

H. The practice of enforcement.

The task of how the payment of fines is enforced will be shown in two different types of areas of Zambia; one urban and one rural. As will be seen the experiences are very different but enforcement also differs as between fines imposed in magistrates courts and fines imposed by the High Court.

1. The practice of enforcement in Lusaka.

It has already been pointed out that courts tend to order imprisonment and not distress in default of payment. This is because courts assume that offenders generally

do not have property which can be seized and sold to satisfy the fines. [38] As soon as the grace period has expired, a commitment warrant is prepared for the relevant magistrate to sign. The signed commitment warrant is then sent to the relevant police station in the area where the fine defaulter had given his address. It is for the police now to find the fine defaulter, serve him with the commitment warrant and then take him away. At this point, those who can find the money normally pay their fines, usually with contributions from friends and relatives. [39]

The warrant of commitment to prison in default of payment of fine requires that the fine defaulter be taken straight to prison without a court appearance. [40] But instead, the practice is that the police take him to the clerk of court with his money, if indeed he has secured the required amount. At the Subordinate Court the fine is surrendered to the clerk of court, the offender is then released and the warrant of commitment is cancelled. [41] By not taking the fine defaulter straight to prison, both the police and the clerk of court disregard the strict requirements of the law. But all this is done in the better interests of everybody concerned. The accused is spared the embarrassment of entering prison; prison staff are spared the trouble of receiving him in prison; the police do not have to make that extra journey to the prison; and relatives of the fine defaulter are spared the inconvenience and expense of possible visits to the prison.

The most serious problem with fine enforcement in Lusaka is that fine defaulters are not easily located by the police. They tend to leave the given residential addresses after the last court appearance to avoid being traced and thus avoid payment. Some offenders give false addresses when they come into contact with the police for the very first time. [42]

In the estimation of the clerk of court, one half of all those offenders who are fined and are given a grace period in which to pay, do in fact pay their fines. Unfortunately, the precise figures were not available. He estimated that of the other 50% who do not pay, only one third are located by the police; of the two thirds who are not located, it appears that the majority live in unauthorised townships. [43] Clearly, there are serious practical problems in the enforcement of fine payments in urban areas such as Lusaka. Unfortunately they are the sort which cannot easily be solved. If fine defaulters cannot be found easily, the answer may lie in increasing the size of police detachments to track them down.

But in contrast with the situation in the Subordinate Court, there are no major operational problems with regard to fines imposed in the Lusaka High Court. Compared to the situation in the Subordinate Courts, fines are imposed in few cases, notably in serious traffic offences; such offenders usually pay their fines. [44] They are the higher wage earners in the Zambian society, and so can afford to pay their fines. Also, their higher social status restrains them from giving false addresses to the police or the courts, or running away from their homes. [45]

2. The practice of fine enforcement in Petauke, a rural area.

Fine enforcement in the rural areas of Zambia is less problematic than in the urban areas. In Petauke, a rural District, offenders pay their fines well within the time given by the court. [46] This very high collection rate can be attributed largely to the nature of rural life. With little anonymity, anyone who leaves his village trying to avoid payment of a fine is noticed and may easily be traced. [47]

While fine enforcement does not appear to be a problem in the rural areas, fine collection in the country as a whole is likely to prove difficult in the future. The reason is that Zambia is already the most urbanised country in Africa south of the Sahara. Continuing rates of urbanisation can only make fine enforcement more difficult. There is therefore a need to think of more practical ways of collecting fines. Failure to collect a sufficient number of fines can only bring the law into disrepute.

Fortunately, there are already in place two arrangements by which persons who are fined are enabled to pay with much less difficulty. The first is what is called the Admission of Guilt System, and the other is called Plea of Guilty by Letter System. These two arrangements are convenient not only for offenders, but for the courts as well. The convenience lies in two factors. First, the payment of fines is done without requiring the accused to personally appear before the court. Secondly, the fines are comparatively small. This second factor has the added advantage that more offenders are able to pay, thereby making it possible for a greater number of offenders to avoid going to prison. The scope for the greater use of fines in Zambia lies in fines imposed under these two systems, rather than fines imposed on offenders following a criminal trial. The reason is that these two systems impose small fines without the personal appearance of offenders before trial courts as just indicated.

I. Fining offenders through "Admission of Guilt" procedure.

The key provision on the "Admission of Guilt" (AG.) procedure states as follows:-

> "When any person is summoned to appear before a subordinate court or is arrested or informed by a police officer that proceedings will be instituted against him, then-

(a) if the offence in respect of which the summons is issued, the arrest made or proceedings are to be instituted is punishable by-

(i) a fine not exceeding fifty kwacha or imprisonment in default of payment of such fine; or

(ii) a fine not exceeding fifty kwacha or imprisonment not exceeding six months; or

(iii) a fine not exceeding fifty kwacha or imprisonment not exceeding six months, or both such fine and imprisonment;

or is an offence specified by the Chief Justice, by statutory notice as being an offence to which the provisions of this section shall apply;" [48]

and detailed facts of the case are furnished to the suspect, then:-

"such person may, before appearing in court to answer the charge against him, sign and deliver to the prescribed officer a document, in such form as may be prescribed by the Chief Justice (in this section called an 'An Admission of Guilt Form') admitting that he is guilty of the offence charged; and

(c) if such person forthwith-

(i) deposits with the prescribed officer the maximum amount of the fine which may be imposed by the court or such lesser sum as may be fixed by such officer; or

(ii) furnishes to the prescribed officer such security, by way of deposit of property, as may be approved by such officer for the payment within one month of any fine which may be imposed by the court;

such person shall not be required to appear in court to answer the charge against him unless the court, for reasons to be recorded in writing, shall otherwise order." [49]

But it is specifically stated that the AG. procedure should not apply to juveniles, [50] because of the obvious pressure from prescribed officers to which they might be subjected. A "prescribed officer" is defined as a police officer of and above the Sub-Inspector rank. [51]

The maximum penalties prescribed indicates that this procedure is restricted to minor offences. In practice it is used in minor public order offences, such as offences of being idle and disorderly persons attracting a maximum prison term of only 1 month, or a fine of no more than K4, or both fine and imprisonment. [52] Other

examples of relevant public order offences are offences of rogues and vagabonds attracting a maximum prison term of 3 months for a first offence, and 6 months if repeated. [53] The Chief Justice has made a list of AG. offences dominated by minor traffic offences. [54]

1. Fixing levels of deposit.

Table 13 shows the levels of deposit actually fixed in respect of particular AG. cases in one particular town on the Copperbelt, Chingola. The AG. fine levels shown are representative of all AG. fines in respect of the offences covered in the Table throughout the country.

Table 13.

Examples of Levels of Fine Deposits Actually Imposed.

Offence	Amount of Deposit
Selling Foodstuffs Outside Permitted Area	K10.00
Affray	K08.00
Conduct Likely to Cause Breach of the Peace	K12.00
No Mud Flaps on Vehicle	K08.00
No Fuel Tank Cover	K04.00
Defective Tyre	K04.00
Defective Break Light	K02.00

Source: Admission of Guilt Monthly Report from Chingola Subordinate Court, Chingola, for March, 1986.

The above fines are not maximum fines provided in the legislation. For example, the maximum fine for affray is K50[55] but the deposit required is only K8.00. K25 is the maximum fine for driving a motor vehicle without mud flaps[56] but again only K8.00 is imposed as a deposit. No authority could be discovered to explain how these

particular levels of deposits were fixed; senior police officers who should know did not know. What is known is that the present levels of deposit were set at the time of independence in 1964.[57] At current inflation levels in Zambia, the amounts of deposits shown in Table 13 are derisory.

2. How the police actually operate the AG. system.

As will be illustrated in Table 15, the AG. system in Zambia is used almost exclusively in road traffic offences. As a motorist, and as a legal practitioner in Zambia, the writer is familiar with the way the AG. actually operates on the ground. When the police discover a motoring offence, usually at road blocks, the offender is asked to sign the Admission of Guilt Form.[58] Both the accused and the vehicle are detained at the road block. When a sufficient number of vehicles have been netted, all are driven to the police station. Vehicles remain at the station until AG. deposits are paid. In respect of motoring offences at least, virtually all deposit fines are paid because of the police practice of impounding the vehicle when a traffic offence is suspected. But even if vehicles were not detained, payment would still be ensured because of the fear of being caught again by the police at road blocks. Public transport in Zambia is unreliable. Those with private transport tend to use it constantly. Towns and cities in Zambia are small. One cannot therefore evade police road blocks for long periods of time.

3. How the courts deal with AG. cases.

When the police collect the deposit fines from traffic offenders, they hand over the money and accompanying documents to the Subordinate Court. The practice is that if there are several Magistrates at the station, the task of dealing with AG. cases is assigned to one of them. [59] It is rare for a magistrate to increase or decrease the amount of deposit paid by the offender under the AG. system. First, the workload of Magistrates is very heavy; there is no time to scrutinise every amount paid to ensure that justice is done in the individual case. Secondly, it is unlikely that an offender will raise any query abut the amount of deposit paid to the police because the amounts are small. [60] This means that the deposit is in practice the actual and final amount of fine paid for various offences covered under the AG. arrangement.

4. More use should be made of the AG. arrangement.

In view of the advantages of the AG. system, more use should be made of this system of dealing with offenders who have committed minor offences. In Table 14 is shown the extent to which the AG. facility has been used by the police in Zambia. The Table covers a period of 13 years, between 1964 and 1982, inclusive.

Table 14.

Extent of Use of AG. Facility, 1964-1982.

Year	(a) Total No. of Fines	(b) Total No.of AG. Cases	(c) (b) as a % of (a)
1964	34,610	27,559	79.62
1965	47,530	37,025	77.90
1966	47,920	37,851	78.98
1967	44,180	34,081	77.14
1968	21,471	16,317	75.99
1969	30,191	18,617	61.66
1976	36,005	25,687	71.34
1977	32,137	20,600	64.10
1978	50,646	42,476	83.86
1979	61,226	47,569	77.69

1980	78,213	69,008	88.23
1981	114,174	101,602	88.98
1982	95,113	90,602	95.05
Total:	693,416	568,798	
Average per year:	53,339.69	43,753.69	78.50

Source: Annual Reports of the Judiciary and Magistracy.
Note: After 1982, the number of AG cases ceased to be shown in the annual reports.

It is clear that a very large proportion of fines in Zambia is imposed on "Admission of Guilt". In 1982, for example, it appears that 95.05% of all fines were AG. fines (although the accuracy of this figure is suspect). On average, out of all the fines imposed in Zambia for the 13 years shown in Table 14, 78.50% were imposed on "Admission of Guilt", a large percentage indeed. This is a welcome picture. However, it is less satisfactory when it is realised that a large proportion of offenders who have benefited from the AG. facility have been motorists, and that other types of offenders are in a rather small minority. Table 15 shows the proportion of traffic offences which were settled through the AG. arrangement. The Table covers the same period of 13 years from 1964 to 1982, inclusive.

Table 15.

No. of Traffic Cases Settled under AG. System, 1964-1982.

Year	(a) Total No. of AG. Cases	(b) No. of Traffic Cases	(c) (b) as a % of (a)
1964	27,559	16,278	59.06
1965	37,027	26,274	70.95
1966	37,851	24,379	64.40
1967	34,081	24,675	72.40
1968	16,317	11,099	68.02
1969	18,617	10,130	54.41
1976	25,687	18,851	73.38
1977	20,600	5,461	26.50
1978	42,476	31,103	73.22
1979	47,569	38,912	81.80

	1980	69,008	56,653	82.09
	1981	101,602	54,834	53.96
	1982	90,406	53,000	58.62
Total:		568,798	203,411	
Average:		53,339.69	50,852.75	64.52

Source: Annual Reports of the Judiciary and Magistracy.

Table 15 shows on average, 64.52% of all AG. cases were traffic offences. In view of the large numbers of minor traffic offences committed in Zambia, as elsewhere, the use of special procedures to deal with them is only to be expected. Penal policy makers in Zambia should now turn their attention to making more use of the AG. facility. This is to be achieved by adding other types of offences to the list of offences which can be dealt with in this way. Obvious examples are all those offences in which reconciliation in the Subordinate Courts is possible; more will be said about it shortly. Such offences include assaults, and "other offences of a private and personal nature."[61]

J. Plea of Guilty by Letter system.

The idea behind the Plea of Guilty by Letter (PGL) arrangement is very similar to that of the AG. system. In both systems, the personal attendance of the accused at court is not immediately required. The main difference between the two is that in the latter arrangement the police are not directly or immediately involved in the actual collection of the fine imposed. The key provision in the PGL arrangement reads as follows:-

> "Whenever a summons is issued in respect of any offence other than a felony, a magistrate may, if he sees reason to do so, and shall, when the offence with which he is charged is punishable only by a fine or only by fine and/or imprisonment not exceeding three months, dispense with the personal attendance of the accused, if he pleads guilty in writing or appears by an advocate." [62]

It is clear from the above provision that as in the AG. system, the PGL arrangement covers minor offences carrying fines only and/or prison terms of no longer than three months are covered. In all such cases, the accused is not required to appear personally before the court if he pleads guilty by letter. The potential for the wider use of the PGL facility should therefore be appreciated because there are many technical offences in a variety of subsidiary legislation which attract small amounts of fines or short prison terms, for example, legislation dealing with markets or building construction.

Although legislation, like in the AG. system, allows the PGL facility to cover a wide range of minor traffic offences, in practice, it is used almost exclusively to deal with the rest of the minor, non-traffic contraventions. [63] Unfortunately, neither published nor unpublished data is available on the extent of use of the PGL

arrangement. Typically, however, the system is used to deal with contraventions under local government regulations, like breach of market rules; or contraventions by employers under social security legislation. [64] In fact, the PGL system has always been used in this way. [65]

The PGL arrangement starts with the court issuing a summons accompanied by the charge sheet and a "Plea of Guilty by Letter" form. But this form has no statutory basis. It is rare for accused persons to plead not guilty because the offences are usually minor and invariably "strict liability" offences. [66] When the form, signed in admission of guilt, is returned, it is passed on to the relevant magistrate who then fixes the fine, and the sentence is then communicated to the offender. [67] The default rate is very low because offenders are usually companies or people in business, big or small; they can easily pay their fines. [68]

K. The place of the AG. and PGL arrangements in the penal justice system of Zambia.

Four observations can be made about the AG. procedure and the PGL arrangement. The first is that they appear to work: the collection rates appear to be high. Secondly, and much more importantly, they show that the criminal justice system in Zambia has aspects which are soft and humane. Coming into contact with the criminal justice system as a suspect or accused person need not always be a rigorous and humiliating experience. Thirdly, they are a significant technique for diversion from the courts and prisons; offenders are prevented from proceeding further into the criminal justice process. Fourthly, they are working examples of the principle of minimal involvement of the criminal law in deviant conduct in individual cases.

Modern penal policy needs to restrain the state from meeting every infraction with the full force of criminal sanctions. For all these reasons, the Admission of Guilt and Plea of Guilty by Letter procedures should be more widely used in Zambia. This is best done by increasing the range of offences attracting these two procedures, and then encouraging the police and the courts to make maximum use of them. They would all be appropriate for the types of offences in which magistrates are encouraged to promote reconciliation between the accused and the complainant.

L. Fines as mild deterrents, for avoiding prison and as a fair penalty.

Trying to assess the effectiveness of deterrent penal measures is one of the most vexing problems in criminology; the problem is not really one of perception but of technique, as efforts to assess the deterrence of capital punishment in the developed countries constantly show: the evidence tends to be inconclusive. However, what can be measured is the effectiveness of fines as a way of avoiding sending offenders to prison. In Table 12 it was shown that the proportion of fine defaulters sent to prison is not insignificant; on average, one person is sent to prison for every 49.40 fines imposed by the courts in Zambia. With regard to the use of fines as a way of achieving equality of pain between the rich and poor alike, the problem has been explained and demonstrated clearly enough. In a poor developing country like Zambia, the use of fines in this way has inherently severe restrictions.

II. Compensation.

Like imprisonment, the fine is a well known sentence of the court to the general public in Zambia. Unfortunately, the same cannot be said with regard to compensation. In chapter 2, it was shown how prominent compensation was in the administration of justice in traditional African communities. Perhaps the most noticeable feature of compensation in modern Zambian society is that it plays a very minimal role in the administration of criminal justice. While more should be done to make use of fines, much more effort is now needed to ensure that more victims of crime are compensated more substantially; this would very much be in line with the expectations of the people.

A. Compensation for loss and injury.

The key provision on compensation states:-

> "When an accused person is convicted by any court of any offence not punishable with death and it appears from the evidence that some other person, whether or not he is the prosecutor or a witness in the case, has suffered material loss or personal injury in consequence of the offence committed and that substantial compensation is, in the opinion of the court, recoverable by that person by civil suit, such court may, in its discretion and in addition to any other lawful punishment, order the convicted person to pay to that other person such compensation, in kind or in money, as the court deems fair and reasonable:..." [69]

It will be noticed that the scope for awarding compensation in criminal cases is wide. Not only can compensation be ordered if a witness (other than the complainant named in the charge sheet) suffers loss or injury, it can also be ordered in serious cases such as manslaughter. Regrettably, compensation may be ordered not as a full and final penalty in itself but only as an additional sentence. It should be noted also that

compensation need not be restricted to money; it can be paid in kind as well. Because of this, and despite certain limitations against the greater use of compensation in criminal cases in a poor developing country like Zambia, as will soon be shown, nevertheless, the scope for ordering compensation in criminal cases is still very wide.

B. The aims of and justification for compensation.

There are five strong reasons why compensation should be awarded in criminal proceedings. First, compensation should be awarded because it has "an intrinsic value of its own." [70] Secondly, it aims to strip the offender of the benefits he acquired from the crime. [71] Thirdly, compensation acts as a deterrent; [72] but fourthly, at the same time it is supposed to induce reformation in the individual offender by heightening his realisation that the crime he has committed has actually injured his victim. [73] The fifth and strongest reason why compensation should be awarded in criminal cases is that the payment of compensation satisfies the victim and heals the wound inflicted by the offence.

There is a less theoretical and more immediate reason for awarding compensation in criminal cases, which may be relevant to a poor country like Zambia. In Regina v Evaristo[74] a case from Nyasaland (now Malawi), the accused was convicted of house-breaking and theft and sentenced to 18 months imprisonment. In addition, he was fined the equivalent in value to the stolen property. The whole fine amount was ordered to be paid to the complainant as compensation. On appeal to the High Court, the prison term was confirmed but the fine was reduced on the ground that the accused did not have the means to pay the larger amount imposed by the

Magistrate below. In the course of the judgement, reference was made to the provision for compensation in the Nyasaland legislation which is in exactly the same terms as the Zambian provision above:-

> "Where an accused person has been convicted by any court of any offence not punishable with death and it appears from the evidence that [the victim or any other person] has suffered material loss or personal injury....and that compensation is in the opinion of the court, recoverable by that person by civil suit, such court may, in its discretion and in addition to any other lawful punishment, order the convicted person to pay...such compensation, in kind or in money, as the court deems fair and reasonable." [75]

Commenting on the aim of this provision, Spencer-Wilkinson C.J. said:-

> "I have little doubt that the main purpose of this provision was to facilitate the recovery of compensation by the poorer members of the community in what is a substantially an agricultural country, particularly in view of the difficulties of instituting civil actions...."[76]

If criminal compensation orders are meant for the convenience of the poorer victims of crime, then those victims who can afford to institute civil proceedings on their own should not be allowed to use the criminal process. Republic v Patel and Chiputula[77] is a Malawian case in which Air Malawi had been defrauded by the accused. The accused were convicted and fined. Part of the fine was ordered to be paid to Air Malawi as compensation. After approvingly citing Evaristo (above), it was ruled that criminal compensation orders were not meant to assist those victims of crime who can afford to institute civil proceedings on their own and the compensation order in favour of Air Malawi was cancelled. Chatsika Ag. C.J. explained:-

> "In this case the complainant is a statutory corporation which can obtain legal representation. They are therefore presumed to be fully aware of their rights and if they have suffered any loss arising from the activities of the accused persons, they will no doubt take the necessary action if they are so minded to do so. I do not think, therefore, that this case provided an example of the type

of case for which recourse should be made to the [relevant] provisions of the Criminal Procedure and Evidence Code." [78]

Unfortunately, the writer has not succeeded in finding any Zambian case, reported or unreported, dealing with this particular aim of compensation. But it must be said that the idea that compensation orders are meant to assist only the poorer members of society is no more than speculative. Spencer-Wilkinson C.J. does not cite any Parliamentary debate or any other source to support his view. The section as it stands does not restrict the award of compensation to poor victims only neither should it do so. Under the above provision, therefore, compensation should be awarded to any victim of crime, whether he is rich or poor. Another reason for the desirability of awarding compensation to all victims of crime is that not allowing rich victims to be compensated only multiplies the volume of litigation in the country. If compensation can in fact be awarded in one type of court, it seems unreasonable not to do so only on the ground that the victim is in a position to institute his own private civil proceedings in another court. The pronouncements of the Chief Justice in Evaristo (above), and the decision and reasoning of the Judge in Patel and Chiputula should therefore not be followed in Zambia.

C. Paying compensation out of fines.

Compensation may be paid out of fines in the following circumstances:-

"Whenever any court imposes a fine,...the court may, when passing judgement, order the whole or any part of the fine recovered to be applied-

(a) defraying expenses properly incurred in the prosecution;
(b) in the payment to any person of compensation for any loss or injury caused by the offence, when substantial compensation is, in the opinion of the court, recoverable by civil suit." [79]

The above provision has raised a delicate problem involving sentencing principles. This is that courts must not confuse the purpose of fines with the idea of compensation in criminal proceedings.

In Kalenga v The People[80] the accused was convicted of theft by servant involving the sum of K82.00 from the Ministry of Education. He was fined K82.00; but the whole amount was ordered to be given to the Ministry of Education as compensation. On appeal to the High Court, Evans J. said that the sentence was based on wrong principles. The accused was sentenced to a custodial sentence and fined K50.00. He explained:-

> "Criminal courts should not act as debt collectors; government should be left to its civil remedies... A court should determine the proper sentence for the crime committed irrespective of the question of compensation."[81]

This was a 1968 case. However, the validity of these pronouncements was seriously questioned shortly afterwards. Later on in the same year, 1968, Parliament introduced "statutory judgements" in criminal proceedings[82] which, strictly, are not a form of compensation but are an aspect of restitution. Under the "statutory judgement" arrangement, civil judgement is entered in favour of the state and against public officers only covering the value of the item stolen or otherwise dealt with without authority, permitting the state to apply for a fifa in the civil courts should the amount remain unpaid. If statutory judgements can be made in favour of the state, there should be no reason why, in principle, the same cannot be done when the complainant is a private individual. Evans J. was wrong in declaring that criminal courts should, as a matter of principle, not be used as debt collectors.

D. Compensation and reconciliation in magistrates courts.

Legislation encourages magistrates to promote reconciliation in criminal proceedings in certain circumstances. In all such cases, the question of compensation is raised. This is how reconciliation appears in a section dealing with compensation. As Zambia is an African country, the combination of reconciliation with compensation is particularly appropriate as being in line with the traditional attitudes of the people. The relevant section reads as follows:-

> "In criminal cases, a subordinate court may promote reconciliation, and encourage and facilitate the settlement in an amicable way, of proceedings for assault, or for any other offence of a personal or private nature, not amounting to felony and not aggravated in degree, in terms of payment of compensation or other terms approved by such court, and may, thereupon, order the proceedings to be stayed." [83]

What should be noted here is that, on the face of it, the above section covers a wide range of offences because there must surely be many types of offences which are targeted by this provision. Apart from assaults, any theft suffered by an individual as opposed to a company can be said to be an offence of a "personal or private nature". Burglaries would be included on the list as well. Thefts and burglaries constitute a large proportion of offences committed in Zambia.

Unfortunately, the exclusion of felonies restricts the range of cases in which the courts can promote reconciliation. While it might be arguable as to whether or not an offence contains aggravating factors, there can be no doubt about the meaning of "felony". A "felony" is an offence which is declared to be a felony by the section creating the offence. If no such declaration is made, a felony is any offence punishable by a prison sentence of three years and over. [84] The problem is that many offences of a

"private or personal nature" and which can be subject of reconciliation, like plain theft, are felonies. Many such offences carry prison sentences of more than three years. For example, plain theft carries a prison sentence of up to five years imprisonment. [85] Clearly, if the courts are going to make maximum use of the above reconciliation section, the restriction with regard to felonies should be eased substantially. Either the minimum length of the prison term should be raised, or the whole idea of excluding felonies at all should be abandoned completely. In practice, the courts promote reconciliation almost exclusively for the offence of assault occasioning actual bodily harm. [86]

Initial moves towards reconciliation are normally made, not by magistrates, but by police prosecutors. In an effort to reduce workloads, police prosecutors approach the complainant. [87] If he is agreeable, the magistrate is informed, the case is adjourned if necessary, and the magistrate confirms with the parties that a reconciliation has been reached on condition that the accused pays the complainant compensation. [88] When the money is available, the parties are invited towards the bench, the agreed amount of money is handed over to the complainant, and in true African tradition the two parties shake hands and leave the court room. [89]

E. Compensation and reconciliation in Local Courts.

While the Subordinate Courts are explicitly empowered to promote reconciliation, there does not appear to be any similar provision in respect of the Local Courts. In view of the fact that Local Courts are more closely associated with traditional dispute settlement practices in the minds of the general public, the omission is surprising.

Nonetheless, it appears that while reconciliation is not promoted by Local Court justices, in practice, it takes place between the parties privately. Before the "Main" grade "A" Local Court in Ndola for example, a total of 22 cases of assault were withdrawn during 1985. Court records reveal that two sets of reasons were advanced by complainants for asking the court to drop cases. In one group complainants are recorded as saying that they stood in special relationships with the accused persons. In the other group of cases, the reason given was that the complainant could not be found. [90] While the two sets of reasons may be true in each and every individual case, it is likely that the true reason for withdrawal was that compensation had in fact been paid, or at least promised. Legislation should be amended to encourage Local Courts to promote reconciliation in criminal cases in Zambia, as in the Subordinate Courts. The present situation is anomalous.

Three points can be made about the practice of paying compensation in reconciliation efforts in both the Subordinate Courts and the Local Courts. The first point is that this is a very desirable if not practical way of promoting amity between disputants not only in Zambian society but in any human society. Secondly, it is a traditional way of settling disputes in African society; there are therefore strong and legitimate grounds for calling on both the legislature and the judiciary to make more use of this particular penal measure in modern Zambia. Thirdly, the payment of compensation as part of reconciliation efforts helps to divert offenders from the road to imprisonment.

F. Enforcement of compensation orders.

As with fine defaulters and others sentenced to monetary penalties, offenders who fail to pay the compensation ordered expose their property to seizure and sale, imprisonment being the last resort. [91] The relevant section dealing specifically with costs and compensation only provides:-

> "in default of payment of ...compensation or of distress...the person in default shall be liable to imprisonment...for a term not exceeding three months unless...compensation shall be sooner paid." [92]

The major issues and problems raised when the state tries to execute distress orders discussed with respect to fines also arise with regard to the enforcement of compensation orders. However, in the urban areas the enforcement of compensation orders does not appear to raise practical problems largely on account of the comparatively small numbers of offenders ordered to pay compensation. [93]

As with fines, Zambian legislation is silent on the question of assessing the offender's capacity to pay compensation. There appears to be no reported or unreported case on the point. However, one reported case from Nyasaland may be instructive. In Regina v Kapitao s/o Chabula[94] the accused was charged with and convicted of assault. In addition to a custodial sentence, he was ordered to pay the sum of ú18-15-0d compensation to the complainant. There was nothing on the record to show that the trial magistrate had inquired into the offender's capacity to pay the money. On review in the High Court, Rigby A.J. said:-

> "It is of little or no use in a case of this kind when dealing with a person of the type and quality of the accused, to impose a heavy term of imprisonment and then expect him to pay a sum of compensation, or further imprisonment in

default of payment. It is likely to amount to no more than an additional term of imprisonment." [95]

If the Courts in Zambia were to take a similar line in compensation orders, a serious difficulty might arise. Imposing a fine which is commensurate with the offender's ability to pay is an acceptable sentencing principle. But it is not always acceptable when what is being paid is compensation. The reason is that the complainant should feel that he is indeed being compensated to the full, regardless of the means of the offender, just as in civil cases. A lesser amount of money, on the ground that the offender cannot pay a larger sum, or on any other ground, is rightly unacceptable in principle. Permitting the payment of lesser amounts of compensation could bring the whole compensation idea in criminal cases into serious disrepute; therefore the ability to pay in compensation orders should not be a matter that concerns the court. If the whole compensation amount cannot be paid in cash, the balance should be payable in kind. Legal provision already exists for such forms of payment, as already noted above. [96]

Regarding the question of time within which to pay compensation or paying it in instalments, the legislation is again silent on the point. However, as with fines, offenders are always given time to pay. Since the amounts are normally small, courts usually order that the amount is paid in one lump sum, and not in instalments. [97]

G. Limitations on compensation.

As will be shown in Table 16 below, minimal use has been made of the power to order compensation in criminal cases in Zambia, unfortunately. There are four reasons why the courts do not order compensation in a greater number of cases.

1. Legislative restrictions.

As noted in paragraph D above, there are undue restrictions on the award of compensation by Subordinate Courts when reconciliation is being promoted. It will be recalled that reconciliation is not to be promoted when the offence alleged to have been committed is a felony, or is aggravated in degree. The exclusion of felonies is too restrictive: it excludes too many offences which should attract reconciliation efforts.

A second legislative restriction on the making of compensation orders is that the maximum amount which may be ordered is only K50.00. [98] At the current exchange rate of around 1,000 to 1, K50 comes to only ú0.05 or only 5 pence. This low limit discourages the courts from making compensation orders because complainants regard this amount as derisory. [99] With inflation rising very steeply with the deregulation of the national economy from January, the K50.00 maximum should now be even more insignificant.

2. Compensation is essentially a civil matter.

Although legislation permits the award of compensation in criminal proceedings, some magistrates consider that such awards should ideally be made in the civil courts; [100] a view which the police seem to share. When minor criminal cases are reported to the police for investigation and possible prosecution, complainants are routinely advised to take them before Local Courts as civil cases. The reason for giving this advice is that complainants stand a better chance of gaining compensation before Local Courts than if the matter remains a criminal case, because while the accused may be punished for his offence, the complainant usually receives nothing for himself out of

the whole exercise. [101] There is merit in the view that compensation is essentially a civil matter, but this should not discourage the courts from awarding compensation in appropriate cases. They must remember that instituting civil proceedings, especially in the High Court, is too expensive for the ordinary complainant.

3. Victims of crime may be ignorant of their rights to compensation.

Although the idea of compensation in criminal proceedings is a commendable one, it should realised that many victims of crime may not be alive to their rights. Where the complainant is represented by counsel, the question of compensation may be raised; but it is very rare for complainants to be represented. Normally, it is the accused person who has counsel, and not the complainant. If the court does not raise the question of compensation, the complainant is unlikely to do so. Like offenders themselves, complainants tend to be poor people with little education. Perhaps both magistrates and Local Court justices should advise all complainants of their rights to ask for compensation in all appropriate cases.

4. The poverty of many offenders.

Perhaps the most serious limitation on the greater use of compensation orders is of a more practical nature. The majority of offenders in Zambia, as elsewhere in the world, have little money or property with which to compensate their victims; they tend to come from the lower levels of the socio-economic system. Many live in unauthorised compounds with little prospect of employment, a situation which tends to push them into committing violent and acquisitive crime in the first place. As with

compensation, the poverty of many offenders largely explains why courts should not impose larger amounts of fines more often.

H. The extent to which the courts actually make compensation orders.

Compensation cannot be ordered in every kind of offence as already noted. Ideally, it should be ordered in all those offences in which courts are expected to promote reconciliation, namely those "of a personal or private nature".[102] Table 16 shows the extent to which the courts make use of the power to make compensation orders in criminal proceedings. The Table covers four magistrates courts in Lusaka, all sitting in the same area in 1985. Only assaults: assault occasioning bodily harm, unlawful wounding, and causing grievous harm; and thefts: plain theft, theft from the person, theft by servant and theft by public servant are shown in the Table.

Table 16.

How Courts Make Use of Compensation Orders: Lusaka Magistrate's Court 1985.

Type of Offence	Total No.of Sentences	No.of Fines	Fines + Compensation	Reconciliation + Compensation.
Assaults	213	67	23	65
Thefts	193	17	0	0
Total:	406	84	23	65

Source: Register of Criminal Cases, Lusaka Magistrates Courts, 1985.

Table 16 shows that compensation is restricted exclusively to assaults. Out of a total of 213 sentences passed compensation was orders in 23 cases (paid out of fines); in 65 cases it was paid because the parties had been reconciled. It is encouraging to note that compensation was paid in more cases when there was a reconciliation (65) than when fines were imposed(23). Magistrates should increase the frequency of compensation when fines are ordered.

With regard to theft, Table 16 shows that out of a total of 193 sentences imposed, fines were imposed in only 17 cases but no compensation orders were made in any of them. Yet legislation does not forbid it when "material loss" is suffered. [103] There is therefore no reason why compensation should not be ordered in appropriate theft cases. No compensation was ordered in reconciliation efforts because theft is a felony, and legislation forbids courts from engaging in reconciliation efforts and the payment of compensation. [104] But as was argued above, the definition of "felony" should be amended so that a greater number of offences, including theft, can be the subject of reconciliation efforts.

III. Restitution.

As an instrument of social policy, restitution is much less significant than either fines or compensation. The reason for this is that in restitution what is being done is no more than a retrieval of something or its equivalent in value which had previously been taken away unlawfully.

There are four provisions dealing with restitution in the Zambian legislation. One provision deals with returning to the rightful owner property which is found on the

person of the accused person at the time of his arrest. [105] A second provision deals with the return of exhibits produced before the court to the rightful owner. [106] Thirdly, in property offences falling under particular chapters of the Penal Code, like theft, false pretences and burglaries, it is provided that such property which is unlawfully obtained should be returned to the owner. [107] Fourthly, there is provision for the entering of "statutory judgement" against public officers who are convicted of certain scheduled property offences, as already indicated above when discussing compensation. Statutory judgement is a novel, cheap and convenient legal technique for effective restitution in a poor country like Zambia. The key provision, enacted in 1968, reads as follows:-

> "The court before which any public officer is convicted of a prescribed offence shall enter judgement, and civil jurisdiction is hereby conferred upon it for that purpose, in favour of the Attorney-General for the amount of the value of the property in respect of which the offence was committed." [108]

As if to confirm that statutory judgements are a way of effecting restitution and no more, it is further provided that:-

> "Execution may be levied under a statutory judgement against all or any public officers jointly charged with and convicted of a prescribed offence but the total amount levied shall not exceed the amount for which the statutory judgement was entered." [109] (emphasis supplied).

"Prescribed offences" are offences involving government property, or property which comes into the possession of the accused because he is a civil servant. [110] When it is realised that the government has always been the largest single employer in Zambia, it will be seen that the number of potential offenders covered by the statutory judgement provisions is very large. In 1974, the definition of "public officer" was

widened to include officers in parastatal organisations, [111] thereby increasing the number affected even further.

Statutory judgements are one of the few post-independence sentencing novelties. Predictably, not all magistrates understood the nature of this new order, at least initially. In the High Court review case of The People v John Ibenkwu and Anor. [112] the accused were jointly convicted of theft by public servant involving the sum of K347.70 and statutory judgement was entered against them. The order read:-

> "Each accused is ordered to refund K178.80 through civil remedy as empowered by the Attorney-General under section....of the Criminal Procedure Code." [113]

Quashing the order, the High Court said that statutory judgements can only be made against both accused jointly and not individually (quite apart from the arithmetical error made with regard to the halving K178.80). A new and proper order was made against both offenders jointly. Baron J. said:-

> "individual judgements cannot be entered; the statutory judgement must be entered against the accused jointly for the full amount involved. (It follows that the writ of execution must issue against the accused jointly; separate writs are irregular:...)." [114]

In the later 1974 High Court appeal case of Kumoyo v The People[115] the appellant was convicted of theft by public servant involving the sum of K106.10. When it came to making the statutory judgement order the trial magistrate said:-

> "Statutory judgement is hereby granted to the Government of the Republic of Zambia to recover the sum of K106.10 from the accused person by seizure and sale of the accused's property under distress in default of distress 2 month's simple imprisonment until the sum of K106.10 shall sooner be paid."[116]

Cullinan J. pointed out that the power of the court is restricted to pronouncing statutory judgement only and does not include the method by which the judgement debt is to be enforced:-

> "The court has merely power to enter such judgement in favour of the Attorney-General (not the government), no more than that. Thereafter it is a matter for the Attorney-General as to how he will seek to execute such judgement..." [117]

The judge then proceeded to make the correct statutory judgement order.

IV. Forfeiture.

Like restitution, forfeiture has little significance as a tool for promoting social policy, but it is more significant than restitution. It can be used to achieve at least one penal aim: forfeiture aims at disabling offenders from repeating their crimes in the future. [118] Typically, forfeiture provisions are found in legislation dealing with customs duties, firearms and wildlife protection. A prominent theme regarding forfeiture is the proper circumstances in which it may be ordered by the court.

In those cases where courts have discretion to order forfeiture, [119] the courts have adopted a flexible approach to the whole matter. In the case of The People v Mamady Saccoh [120] the Court of Appeal of Zambia laid down the general guidelines for use in all cases in which the question of forfeiture arises.

The accused in this case had been convicted of the possession of diamonds without a permit. In the trial Magistrates Court below, it was ordered that the diamonds in question be forfeited to the state. In the judgement of the court on the question of forfeiture read by Doyle C.J., the following guidelines were laid:-

> "When one comes to consider whether an order of forfeiture should be made, it seems to me that the criterion is, can one reasonably say that the diamonds were in the ordinary sense honestly in the possession of the person found guilty of illegal possession within the meaning of s.228a of the Penal Code. A person may have purchased diamonds lawfully, but may have unwittingly omitted to obtain the Government Mining Engineer's permission to possess them. In such a case he commits an offence against s.288A; but such a case would clearly be one where an order of forfeiture should not be made. Where, however, there are suspicions that the diamonds have been stolen or obtained illegally, it seems to me an order of forfeiture should take place." [121]

Knobwe v Republic[122] is a Malawian case. The accused was convicted of possession of an unlicensed gun and the gun was forfeited to the state. But the accused pleaded with the court that he was a poor man in poor health. The court said that a gun can properly be forfeited to the state if the gun was:-

> "no longer of service to the offender or was so old, weak or damaged as to be a danger to the user or that for security reasons it was better that the owner should not possess a firearm." [123]

It was held that in the particular circumstances of this case, the gun need not have been forfeited at all and the forfeiture order was consequently quashed.

The guidelines in the Malawi case are fair and reasonable. A gun which is dangerous and poses a danger to security or is not needed should not continue to be in the hands of the offender. But in the Zambian case of Saccoh, the guidelines may be reasonable to the state but not fair to the offender. It will be noticed that the Court of Appeal says that forfeiture may be ordered if it is suspected that the item concerned, in this case diamonds, was obtained illegally. The point to make here is that it should not be sufficient to order forfeiture on the mere suspicion that an item was obtained illegally. This is sentencing a person on mere suspicion that he committed an offence. What is needed is actual proof.

Courts are keen to order forfeiture where it is permissible to do so. In The People v Shimunza, [124] for example, the accused was convicted of an offence under the wildlife protection legislation and the trial magistrate ordered the gun used in the commission of the offence to be forfeited to the state. On appeal, which centred on the appellability of forfeiture orders, Mr. Acting Justice Mallon agreed with the trial magistrate's approach to the forfeiture order saying:-

> "I have come to the conclusion that the order of forfeiture made in this case was a proper one. As the learned magistrate pointed out, offences of this kind are difficult to detect, and it is obviously desirable in the public interest that the means of committing this type of offence should be removed." [125]

But they are equally determined to ensure that if the item to be forfeited does not belong to the offender, the true owner must first be given the opportunity to be heard before forfeiture is pronounced. In The People v Mwalilanda[126] the accused was convicted of a firearms offence. But while the ammunition was his, the firearm itself belonged to someone else. The trial Magistrate ordered the forfeiture of the firearm without first giving the owner of the gun to be heard. Silungwe, Acting J., held that the forfeiture order in respect of the firearm:-

> "was improper since the owner [of the firearm] was not given a right to be heard before it [the order] was made." [127]

and quashed it.

Justice demands that this should be so. For example, the offender could have stolen the firearm in question from the true owner. It would be unfair to him to lose it in such circumstances. In the case of R. v Benjamin Jacobs Vesigi[128] the accused was convicted of offences under the wildlife protection legislation and the two lorries used

in the commission of the offence were ordered to be forfeited to the state by the trial Magistrate. The two lorries did not belong to the accused person but the true owner was not given an opportunity to oppose any forfeiture order which might be made. On appeal, and citing general English law principles on deprivations of property, Mr Justice Evans quashed the order saying:-

> "What the magistrate failed to realise is that a statute is not to be construed so as to deprive a man of his property without his having an opportunity of being heard, unless it clearly appears that that was intended." [129]

But requiring the courts to hear from the true owner of the item in question may not be as libertarian as it might appear in practice. For the true owner to benefit from this general English law principle, it must be shown that he was not actively involved in the commission of the offence which brought about the forfeiture order. In fact, in the majority of cases in which the question of forfeiture arises, the true owner is not an innocent party. [130] Unless he is totally innocent, the owner is unlikely to come forward and claim his item.

V. Costs.

Costs in criminal proceedings are an even less significant instrument of penal policy than restitution. Like forfeiture, they are essentially an inescapable incident of the criminal justice process. Costs can be awarded against the prosecution or against the accused. The relevant provision dealing with costs against the prosecution reads as follows:-

> "It shall be lawful for a Judge or a Magistrate who acquits or discharges a person accused of an offence to order that such reasonable costs...be paid to such person and such costs shall be paid... Provided that no such order shall be

made if the Judge or magistrate shall consider that there were reasonable grounds for making the complaint." [131]

A recurring question with regard to costs against the prosecution has been whether the state had reasonable grounds for instituting the prosecution.

In The People v Upton[132] the complainant went to the police to report that he had been verbally abused by the accused. The accused was then charged with the offence of using abusive language against the complainant. He was cross examined so effectively by the defence counsel that the state had to withdraw the case against the accused, whereupon the accused successfully applied for costs against the complainant. Charles J. agreed with the general approach to costs in the Magistrate's Court below and said:-

> "I see no reason for impeaching the conclusion which the magistrate must have reached....to make an award of costs in favour of the accused, namely that the complaint was without reasonable grounds." [133]

The magistrate's order against the complainant was substituted for an order against the state and Charles J. then said:-

> "the accused is to be paid 50 guineas from and out of revenues of the Republic, and the same are to be charged accordingly." [134]

In The People v Msichili[135] the accused was charged with contravening the liquor licensing laws in that he allowed customers to drink from his off-licence premises. No evidence was heard because the police prosecutor in court was unable to proceed with the case. Furthermore, he was unable to tell the court the nature of the evidence against the accused. He had not read the docket because he had no time in which to read it. The accused was acquitted. Following the acquittal, the defence counsel again

successfully applied for costs against the state but the state appealed against the magistrate's order. Gardner J. requested the state, by filing an affidavit, to indicate the nature of the evidence which should have been presented before the trial court below so that he could make up his own mind about the quality of the evidence against the accused. After reading the affidavit, the Judge agreed with the decision of the magistrate, dismissed the appeal by the state and said that:-

> "In this case on the evidence which was available to the prosecution, it was quite clear that the prosecution was completely unable to prove that the drinking of beer on the steps of the bottle store was with the licensee's knowledge and consent....In these circumstances therefore even had the prosecutor before the magistrate exercised his right to address the court on the question of costs he would have been unable, in the words of the proviso...of the Criminal Procedure Code, to persuade the magistrate that he should, 'consider that there were reasonable grounds for making the complaint.'"[136]

The section dealing with costs against the accused reads as follows:-

> "It shall be lawful for a Judge or a magistrate to order any person convicted before him of an offence to pay such reasonable costs, as the Judge or magistrate may seem fit, in addition to any other penalty...." [137]

Accused persons are inclined to apply for costs against the prosecution, as has just been indicated but the reverse is not the practice in Zambia. It is felt that the nature of criminal penalties is such that it is wrong in principle to ask a person who is convicted of a criminal offence, and regardless of the nature of the penalty actually imposed, to pay costs to the state. It is like asking a condemned man to pay the full cost of engaging the services of the executioner. Secondly, the state does not engage the services of private prosecutors in Zambia in criminal cases. All prosecutors are either police officers or State Advocates. The need to recoup expenses is therefore not compelling. [138]

Conclusion.

In this chapter, four financial penalties were considered: fines, compensation, restitution, forfeiture and costs. As major instruments of penal policy the last three have comparatively little significance, which is why fines and compensation were more fully discussed.

Fines were seen to serve at least two penal aims: first, they serve as a mild deterrent. But perhaps much more significantly, they help keep offenders out of prison. It was also noted that fines are the most commonly imposed penalty in Zambia as in many other jurisdiction but unfortunately, the legislation gives inadequate general guidance as to how they should be used. Fortunately, this task has been taken up by the courts.

Discussion of fines was dominated by one major theme: that fines may be working reasonably satisfactorily in the developed countries, like England, but their application in a poor country like Zambia is severely limited. Two reasons were advanced. The first was that large sections of the Zambia population are on very low incomes, with little or no real disposable incomes; the second was that there are very marked disparities in incomes and wealth between different town dwellers, and between town dwellers as a group and people living in rural areas.

One of the great attributes of fines as sentences of the court is that they have a great potential for the realisation of fair distribution of pain in punishment between the rich and poor alike in a society. But because of the poverty among large sections of the Zambian people many of whom lack any appreciable levels of disposable income, even a comparatively small fine tends to be a heavy burden in absolute terms.

Secondly, because of the wide gulf between the rich and poor, income related fines imposed on the poor are still too heavy for them to bear while the rich are much better able to pay them. Consequently, it becomes very difficult to realise the idea of fairness of fines as a sentence of the court in a poor country like Zambia. Clearly, trying to achieve significant levels of fairness in the imposition of fines can only come about when more and more Zambians are drawn deeper into the money economy, but this will not come about in the near future.

Both the legislature and the courts should be made alive to the inherent limitations on the greater use of fines in Zambia so that more realistic maximum fine levels are prescribed by the legislature and the courts take greater care to ensure that more realistic fines are imposed in individual cases. In a poor country, fines are more appropriate sentences when the offenders are rich or are a companies. The use of fines in a poor but emerging country is a good example of a received penal idea which finds it difficult to take root.

However, there are certain types of fines which are better suited to Zambian conditions. These are fines imposed under the Admission of Guilt (AG.) system and the Plea of Guilty by Letter (PGL) arrangement. The sums involved are generally small and their imposition and collection do not always have to involve the courts. These two systems have the added advantage that they help to de-congest the criminal process and because they minimise direct and immediate contact with the courts they help to soften the criminal justice process and therefore promote humanity in the enforcement of criminal justice. Clearly, the potential for the greater use of fines in Zambia lies in the expansion of the AG. system and the PGL facility.

With regard to fine enforcement, it was noted that in the rural areas the state does not appear to experience serious problems but the same cannot be said about urban areas. In the urban areas of Zambia, fine defaulters tend to run away by providing the authorities with false residential addresses. Secondly, when distress is contemplated, many do not have either personal or real property worth seizing and selling off. In contrast with fine enforcement involving normal fines, it is significant that with regard to fines imposed under the AG. and PGL facilities, it appears that the state does not encounter any serious problems. But even here the very poor fine defaulter may still find it difficult to pay his fine.

Compensation is a particularly suitable penalty in Zambian society because traditional African society placed much emphasis on it. But the courts make minimal use of this penalty although the courts are not solely to blame for this because there were several factors which militate against the greater use of this sentence. Legislation provides for a very low maximum amount of compensation; many victims of crime may be unaware of their entitlement to compensation; the courts appear to regard compensation primarily as a civil matter; and many offenders are too poor to pay compensation. Penal policy makers must find ways of surmounting some of these problems. There is no good reason, for example, why the maximum amount of compensation should be limited to only K50 (£0.05); why victims of crime should not routinely be advised of their right to be compensated; or why the courts cannot be persuaded not to think of compensation as essentially a civil matter. It must be appreciated that continued minimal use of compensation in criminal cases in an African country can have the effect of making the people lose confidence in the whole criminal justice system. Serious research should be undertaken into this area of sentencing.

They may be surprised to discover that the greater use of compensation in criminal is more popular than was originally thought. As a general approach to dealing with transgressors, which person in any human society can reject compensation completely in any proceedings, civil or criminal, and prefer a more impersonal punishment like imprisonment? Moreover, the payment of compensation in kind rather than cash makes it easier to make greater use of this sentence in a poor country like Zambia. For example, offenders can be made to pay compensation in radio sets, television sets or motor vehicles. In the villages compensation can be made in domestic animals, crops or bicycles. What is important is giving away of some personal items as a mark of contrition for loss or damage done to the victim of a crime; this should surely be more satisfying to the victim than for example, fining offenders and sending the money away to an impersonal authority, the government. The greater use of compensation might help to revolutionise criminal justice in the minds of the people. All that is required is political will.

Of the rest of the financial penalties, namely, forfeiture, restitution and costs, the more interesting is restitution because of the availability of statutory judgements. It is a less costly and very convenient method to the state of retrieving stolen property or property fraudulently dealt with by civil servants or those working in parastatals. It is anomalous that statutory judgements are restricted to public servants only because there is no compelling reason, in principle, why they should not be extended to cases in which both parties are private individuals or private companies or a mixture of the two.

With regard to costs, while the idea of costs against the state is entirely acceptable, the idea of awarding costs against offenders and in favour of the state in

Zambia is disagreeable in principle; it is like punishing the offender twice in an unequal fight. In any case many offenders are too poor to pay them and if they are sent to prison their difficulties can get even worse. Although the legislation permits the award of costs against offenders, the Director of Public Prosecutions should continue to refrain from asking the courts to impose them.

Chapter 5.

Notes.

1. Penal Code, Cap.146, S.28.

2. D.A. Thomas, Principles of Sentencing, 2nd ed.London., Heinemann, 1979, p.318.

3. Ibid.

4. Ibid.,p.320,

5. Ibid.

6. R. Brown, et. al. An Evaluation of Fines Enforcement, Wellington, New Zealand, Department of Justice, Planning and Development Division, Study series 15, April, 1985, para.1.1, p.1.

7. (1976) Z.R. 215.

8. Ibid., at p.217. The case of Longwe v The People, is not reported in the Zambia Law Reports (Z.R.) and unfortunately, the writer has not succeeded in finding it.

9. (1976) Z.R. 253.

10. Firearms Act, Cap.111, S.10(2).

11. Firearms (Amnd) Act 1975, No.12 of 1975, S.3.

12. Siyauka v The People (1976) Z.R. 254.

13. Magistrates' Handbook, 5th (1968) ed., by L.K.Young, Republic of Zambia, Gvt. Printer, Lusaka, 1968.

14. Ibid., para.117, pp.47-48.

15. (1981) Z.R. 252.

16. Ibid., at p.257.

17. (1978) Z.R. 293.

18. Ibid., at p.294.

19. Ibid., at pp.294-295.

20. Fourth National Development Plan 1989-1993, Lusaka, Republic of Zambia, National Commission for Development Planning, Jan., 1989, para.4,p.60.

21. Non-Custodial and Semi-Custodial Penalties, Home Office, Report of the Advisory Council on the Treatment of Offenders, London, HMSO, 1970. See Appendix B, pp.74-77.

22. Criminal Justice Act 1991, Cap.53, S.18(1).

23. Ibid., S.18(2).

24. The Independent, 14th May, 1993, p.1.

25. (1981) Z.R. 252.

26. (1978) Z.R. 293.

27. Criminal Procedure Code, Cap.160, S.310(1).

28. Powers of the Criminal Court Act 1973, Cap.62, S.3(1)(b).

29. Magistrates Courts Act 1980, Cap.43, S.75(1).

30. No.S.P.129 of 1984, Lusaka Magistrate's Court, unreported.

31. Also see the very similar case of The People v Zambia Agricultural Development Ltd., No.S.P.68 of 1985, Lusaka Magistrate's Court, unreported, in which the accused company was fined K1,093.93 on a number of counts for failing to make statutory contributions under social security legislation. The accused company was ordered to pay the fine in instalments of K10 per count per month.

32. Magistrates Courts Act 1980, Cap.43, S.75(2).

33. Ibid. There are other ways, e.g., placing the offender under a supervision order so that he can be enabled to pay his fine.

34. Criminal Procedure Code, Cap.160, S.308(1).

35. Ibid., S.301(1).

36. Ibid., S.312.

37. Ibid., S.28(b).

38. Interview with Mr Chirwa, Resident Magistrate, Lusaka, 10th Dec., 1985.

39. Interview with Mr Joseph Phiri, the Clerk of Court, Lusaka Magistrates Court, Lusaka, 9th Dec., 1985.

40. Criminal Procedure Code, Cap.160. See Form 31 entitled "Warrant of Commitment (on Default of Distress or payment)".

41. Interview with Mr Joseph Phiri, the Clerk of Court, Lusaka Magistrates Court, Lusaka, 9th Dec., 1985.

42. Ibid.

43. Ibid.

44. Interview with Mr Hamuduulu, Assistant Registrar of the High Court, Lusaka, 12th Dec., 1985. He is in charge of collection of fines in the High Court.

45. Ibid.

46. Interview with Mrs Lwenje, a clerical officer at Petauke Magistrate Court, Petauke, 14th June, 1986. She said that in the 6 years that she has been in her job, she had never known of any case in which an offender has failed to pay his fine.

47. Ibid.

48. Criminal Procedure Code Cap.160, S.221(i).

49. Ibid. In England, there is a rough equivalent of the AG system: "Fixed Penalty" system, see Criminal Justice Act 1982, Cap.48, Part III.

50. Ibid.

51. Ibid., S.221 (10)(a).

52. Penal Code Cap.146, S.178.

53. Ibid., S.181.

54. S.I.No.1 of 1967.

55. Penal Code Cap.146, S.88.

56. Roads and Road Traffic Act, Cap 766, S.94(1).

57. Interview with the Senior Superintendent in charge of all police prosecutions in the country, Mr Hanamwinga, Lusaka, 28th July, 1986.

58. Criminal Procedure Code, Cap. 160, Form 1, p.171.

59. Interview with Senior Resident Magistrate, Mr Peter Chitengi, Lusaka, 20th December, 1985.

60. Ibid.

61. Criminal Procedure Code, Cap.160,S.8.

62. Ibid.,S.99(1). But the accused can be ordered to appear in person before the court. See S.99(2).

63. Interview with Mr Joseph Phiri, the Clerk of Court, Lusaka Magistrates Court, Lusaka, 9th December, 1985.

64. Ibid.

65. Interview with Mr Peter Chulu, now a Magistrate, Lusaka, 15th July, 1986. He was a Clerk of Court for many years in Lusaka and other places in Zambia.

66. Interview with Mr Joseph Phiri, the Clerk of Court, Magistrates Court Lusaka, Lusaka, 9th December, 1985.

67. Ibid.

68. Ibid.

69. Criminal Procedure Code, Cap.160, S.175 (1).

70. Reparation by Offender, Home Office Report of the Advisory Council on the Penal System, London, HMSO, 1970, p.12.

71. Ibid.

72. Penal Practice in a Changing Society, Home Office, London, HMSO,1959, para.25, p.35.

73. Ibid

74. 1958 R. & N. 929.

75. Criminal Procedure Code, Cap.160, S.175(1). There is another provision empowering the courts to award compensation to accused persons if the charge is dismissed for being "frivolous or vexatious", see S.174. For a definition of a "frivolous or vexatious" charge, see the Kenyan case of Republic v Dunn [1965] E.A., 567.

76. Regina v Evaristo 1958 R.& N. 929 at p.931.

77. 7 M.L.R., p.288.

78. Ibid., at p.291.

79. Criminal Procedure Code, Cap.160, S.177(1).

80. (1968) Z.R. 165

81. Ibid., at p.166.

82. Criminal Procedure Code (Amnd) Act, 1968, No.54 of 1968, S.3.

83. Criminal Procedure Code, Cap.160, S.8.

84. Penal Code, Cap.146, S.4, being the definition section.

85. Criminal Procedure Code (Amnd) Act, 1974, No.12 of 1974.

86. Monthly Criminal Returns from Magistrates Courts throughout the country show it. Later, a Table from four magistrates courts in Lusaka will be produced.

87. Interview with police prosecutor, Mr Zulu, Lusaka, 8th July, 1986.

88. Interview with Mr Peter Chulu, Magistrate, Lusaka, 9th July, 1986.

89. Interview with Mrs Sitali, Magistrate, Lusaka, 9th July, 1986.

90. Register of Criminal Cases of "Main" Local Court Grade "A", Ndola.

91. Criminal Procedure Code, Cap. 160, SS. 308, 311 and 312.

92. Ibid., S.176.

93. Interview with Mr Joseph Phiri, the Clerk of Court, Lusaka Magistrates Court, Lusaka, 9th December, 1985. In rural areas, the enforcement of all types of monetary penalties does not appear to be a problem - Interview with Mrs.Lwenje, the clerical officer at Petauke Magistrate's Court in charge of enforcement of all monetary penalties, Petauke, 19th June, 1986.

94. 6 N.L.R. 200.

95. Ibid.

96. Criminal Procedure Code, Cap.160, S.175(1).

97. Interview with Mr Peter Chulu, magistrate, Lusaka, 9th July, 1986.

98. Criminal Procedure Code, Cap.160, S.175(1).

99. Interview with magistrates Mr Chirwa and Mrs Sitali, Lusaka, 9th July, 1986.

100. Interview with magistrates Mr Chirwa and Mrs Shansonga, Lusaka, 9th July, 1986.

101. Interview with Mr Nkole, District Prosecutions Officer for Lusaka District, Lusaka, 27th July, 1986.

102. Criminal Procedure Code, Cap.160, S.8.

103. Ibid., S.175(1).

104. Ibid., S.8.

105. Ibid., S.179.

106. Ibid., S.355(3).

107. Ibid., S.180(1).

108. Ibid., S.171(1).

109. Ibid., S.171(4).

110. Ibid., S.171(6).

111. Penal Code (Amnd)(No.2) Act 1974, No.29 of 1974, S.2.

112. (1971) Z.R. 162.

113. Ibid.

114. Ibid., at p.163.

115. (1974) Z.R. 50.

116. Ibid., at p.51.

117. Ibid.

118. See The People v Shimunza (1967) Z.R. 172, a firearms case. The gun in question was forfeited to the state. Also see the Southern Rhodesian case of R. v Chamangwani, 1962 R.& N. 66, another firearms case in which similar views were expressed.

119. Under the National Parks and Wildlife Act, Cap 326, S.145(1), for example, forfeiture is mandatory if the prosecutor asks for it.

120. (1971) Z.R. 175.

121. Ibid., at p.180.

122. 1966-1968 A.L.R.Mal. 108.

123. Ibid., at p.110.

124. (1967) Z.R. 172.

125. Ibid.

126. (1971) Z.R. 166.

127. Ibid., at p.167.

128. (1963-1964) Z. and N.R.L.R. 140.

129. Ibid.

130. From personal experience as a legal practitioner at the Zambian Bar.

131. Criminal Procedure Code, Cap.160, S.172(1).

132. (1965) Z.R. 70.

133. Ibid., at p.71.

134. Ibid., at p.72.

135. (1970) Z.R. 90.

136. Criminal Procedure Code, Cap.160, S.172(1).

137. The People v Msichili (1970) Z.R. 90, at p.92.

138. Criminal Procedure Code, Cap.160, S.172(1).

Chapter 6.

Non-Custodial and Semi-Custodial Penalties.

Introduction.

Zambian courts have a wide range of non-custodial and semi-custodial sentences which they can impose in appropriate cases. Unfortunately, the proper circumstances in which they should be imposed have not been sufficiently clarified by the courts. Secondly, they are seldom used. Yet, like financial penalties, their significance as techniques of diversion and examples of humane penalties are obvious. This chapter explores the following sentences: deportation, disqualification, police supervision, discharges, binding over, extra-mural penal employment, weekend imprisonment and finally suspended sentences.[1]

I. Deportation.

There are in theory two types of deportation in the Zambian criminal process but in practice one has virtually disappeared. One is deportation within Zambia, from one part of the country to another, and the other is deportation of alien offenders outside the country.

A. Deportation within Zambia.

The relevant section reads:-

> "When a person is convicted before the High Court of a felony, the High Court may, in addition to or in lieu of any other punishment to which he is liable,

> recommend to the President that he be deported to such part of Zambia as the President may direct." [2]

Clearly intra-territorial deportation can be recommended only on conviction of a serious offence, one which has been tried by the High Court.

However, internal deportation has virtually disappeared in independent Zambia; the idea was that persistent offenders living in urban centres were to be prevented from continuing to contaminate urban populations by being sent back to their villages. [3] It was "rustication" within the confines of the village, rather than detention. [4] The difficulties in enforcing it were recognised. It was then decided that rustication should be extended to the geographical limits of particular Native Authorities. [5] However, it was not clear whether this new arrangement actually worked in practice although it must have been difficult to prevent deportees from escaping to adjacent Native Authority areas. What may have been effective was preventing internal deportees from moving from rural areas back to urban centres because the colonial administration effectively restricted the migration of populations from villages to urban centres. [6]

Internal deportation of offenders in independent Zambia should be abandoned and the relevant provisions deleted on three grounds. The first is that while it may be possible to enforce rustication orders by requiring the offender to report regularly to the police as in police supervision orders, [7] this sentence may arguably be contrary to the fundamental constitutional right of freedom of movement[8] even though there is a saving provision permitting the state to enact legislation:

> "requiring that person [the one who is rusticated] to remain within a specified area within Zambia..." [9]

It is not entirely clear whether this exception allows legislation permitting any authority to order the restriction of offenders, as opposed to non-offenders, to a particular area of Zambia.

Secondly, internal deportation should be abandoned because the rapid urbanisation of post independence Zambia has rendered the contamination argument invalid. Independence has brought about unrestricted freedom of movement of people inside the country. Thirdly, the courts no longer use this particular sentence surely because of the realisation that rustication hardly contains crime.

B. Deportation beyond Zambia.

Of greater importance because of its recurrent use, is deportation of aliens. Because of the favourable economic and political environment in Zambia, and the absence of many natural borders with neighbouring countries referred to in chapter 1, a significant proportion of the people in the country are aliens. Some are engaged in economic activity, like business, mining and a little farming. The majority are probably unemployed while others are refugees.

Following the 1972 amendments to the Penal Code[10] and the immigration legislation, [11] aliens who have committed serious offences are liable to be deported from Zambia. The combined effect of the amendments is that each and every non-citizen of Zambia who is sentenced to a term of imprisonment for a non-traffic offence should automatically be deported. The Penal Code provision reads as follows:-

> "Any court which sentences to a term of imprisonment any person-
> (a) who is not a citizen of Zambia; and
> (b) who has been convicted of an offence under this Code, or under any written law other than an offence relating to the driving of a motor vehicle set out in the Roads and Road Traffic Act or in any regulations

> for the time being in force made thereunder; shall forthwith, in addition to such sentence, forward to the Minister responsible for the administration of the Immigration and Deportation Act the particulars of the conviction and sentence and all other particulars specified in the Appendix hereto." [12]

The relevant section of the Immigration and Deportation Act states:-

> "After receiving the particulars under section thirty three of the Penal Code [above] in respect of a person who is not a citizen, the Minister (unless the term of imprisonment is set aside on appeal) shall at the expiration of the sentence, pursuant to a warrant under his hand deport such person from Zambia." [13] (Emphasis supplied).

Because no latitude is given to the minister, the above sections dealing with the deportation of aliens outside Zambia are far reaching and indiscriminate, even if deportation arises only when a prison sentence is involved. They may also prove to be unjust in certain circumstances. For example, a non-citizen may be an established resident, or he may be married to a Zambian citizen. In the later case, if he is convicted of a criminal offence and deported, the family may have to split up permanently, leaving the wife and children behind in Zambia. Also, it may be unjust that no account is to be taken of an alien who enters Zambia in very difficult circumstances. He may be a refugee, or a stateless person. Not only is it unjust to deport any persons of the above types, it may also be unreasonable. Zambia is a developing country; it regularly depends on experts in many fields of national endeavour. Some of them are aliens working in key sectors of national life. To have to deport them would be totally counter-productive. Not only can these provisions prove to be unjust and unreasonable in certain circumstances, they may even be said to be contrary to the constitutional protection against "inhuman.....treatment." [14]

The deportation provisions are far reaching in another sense. Strictly, an alien need not actually serve the prison term for him to be deported. All that is required is that he is sentenced to a prison term as has been shown above. The whole term may be suspended. If the legislature had intended the question of deportation to arise only when the prison sentence is actually served, it should have referred to "at the expiry of the sentence actually served", and not "at the expiration of the sentence".[15]

In contrast with the sweeping Zambian provisions for deportation, English legislation is flexible and accommodating. Deportation is not automatic. Courts are given the discretion to recommend the deportation of non-nationals. [16] In Ivy Ndethi Tshuma[17] the applicant had set fire to the house where her lover was living, for which she was given a custodial sentence. The court recommended deportation, but the recommendation was not accepted on the ground that she had committed the offence whilst under great emotional stress, and that she was unlikely to repeat her offence. In Naggeb Mahmoud Alkawel[18] the applicant was a student; he was convicted of obtaining a student grant fraudulently, amounting to over £1,000, and deportation was recommended. Again the recommendation was not accepted on the ground that the applicant had been in the United Kingdom for a long period of time and that his record was otherwise clean. [19]

As the Zambian deportation provisions are so draconian and indiscriminate, and as the size of the alien population in Zambia is large, one expects to find large numbers of alien offenders regularly deported outside Zambia. But statistics tell a different story. Table 17 shows the number of aliens who were actually deported for having committed criminal offences for which prison terms we imposed. The Table covers a period of 10 years between 1973, and 1982, inclusive.

Table 17.

Deportations of Convicted Alien Offenders, 1973-1982.

Year	No. of Deportees
1973	0
1974	0
1975	9
1976	15
1977	0
1978	0
1979	2
1980	0
1981	3
1982	7
Total:	36

Source: Annual Reports of the Judiciary and Magistracy.

The picture was going to be more complete if the number of convicted aliens but not subject to deportation was also shown. Unfortunately, statistics are silent on this type of offender. Table 17 shows that only 36 aliens were deported from Zambia between 1973 and 1982 following conviction and sentences of imprisonment. In 1973, 1974, 1976, 1977, 1978 and 1980, for example, no aliens were deported at all. Perhaps too few aliens are caught, successfully prosecuted and sentenced to prison terms. On the other hand, the statistics may be unreliable. It may also be that many are serving very long prison sentences longer than the 10 years covered in the Table so that many deportations were not due until after 1982; but this is not plausible. The most plausible reason for the surprisingly small number of deportations is that the statistics are unreliable, a distinct feature of criminal statistics in Zambia.

Although it was complained at the beginning of this chapter that courts make minimal use of semi-custodial and non-custodial sentences, deportations are an exception. Courts should make even less use of deportation beyond Zambia and abolish completely the rustication of offenders within the country.

II. Disqualifications.

A. Disqualification generally.

Disqualification disables an offender: its penal aim is to prevent him from committing similar offences in the future and to act as a deterrent.

Disqualification provisions are usually found in legislation dealing mainly or partly with permissions to engage in certain types of activities. For example, under liquor licensing legislation, it is an offence to sell intoxicating liquor outside the

licensed premises. As well as a fine, a second and any subsequent conviction attracts a mandatory loss of the associated liquor licence. [20] Legislation dealing with the practice and regulation of professions, like law, also contain disqualification provisions. In In the Matter of Bernard Mbalala Munungu, a Practitioner and in the matter of the Legal Practitioners Act[21] respondent was a house lawyer for a parastatal organisation. He was charged with, and convicted of, theft by public servant and sent to prison. The Law Association of Zambia successfully applied to the Chief Justice to strike him off the roll under the Legal Practitioners Act. [22] Occasionally, legislation stipulates that upon the conviction of a person for a criminal offence, that person is disqualified from exercising or enjoying his civil rights. The disqualification is automatic. Under the Constitution of Zambia, for example, a person who is sentenced to a prison term is disqualified from being nominated or appointed to the National Assembly. [23] Likewise, under the Corrupt Practices Act, a public officer who is convicted of corruption is disqualified from being appointed, elected, or continuing to hold "any office" for a period of five years. [24] However, here, focus will be on disqualifications under the road traffic legislation because the bulk of all disqualifications in Zambia are ordered for breaches of these laws.

B. Disqualification under the Roads and Road Traffic Act.

1. Legislative provisions.

The Roads and Road Traffic Act states:-

> "Any court before which a person is convicted of an offence under this Act-
> (a) may where so permitted by the Second Schedule, and unless the court for special reasons thinks fit to order otherwise shall where so required by the said Schedule, if the person convicted holds a driving licence

> granted in Zambia, or a driving licence or its equivalent granted in any other country and which is valid in Zambia, suspend such licence or its equivalent, for such time as court thinks fit, or cancel such licence or its equivalent and declare the person convicted disqualified from obtaining another licence in Zambia for a stated period;" [25]

Where the offender has no driving licence, courts are empowered to order that he does not obtain one for a specified period of time. [26]

Also, the courts:-

> "may where so permitted by the Second Schedule, and shall where so required by the Second Schedule, order that particulars of the conviction and of any suspension or cancellation of his driving licence and any disqualification to which such person has become subject shall be endorsed on the licence or its equivalent held by such person; [27]

Whether or not a driving licence will be suspended, cancelled, or endorsed therefore depends on the provisions of the Second Schedule.

The Second Schedule shows that suspensions, cancellations and endorsements apply in a total of 18 traffic offences. Generally, they apply in the most serious cases, such as causing death by dangerous driving, [28] drunken driving, [29] careless driving [30] and driving without a licence. [31] It is right that disqualifications should be confined largely to the most serious traffic offences. A close examination of the Second Schedule also reveals that Parliament has generally been reluctant to make cancellations and suspensions obligatory or even permissible. A notable exception is in the two most serious offences of drunken driving and causing death by dangerous driving in which the suspension of driving licences is mandatory. But cancellation is not demanded even for subsequent offences; the courts are merely given the discretion to cancel or not to cancel the driving licence. The Second Schedule further reveals that

virtually all the 18 offences attract endorsement. It can therefore be safely concluded that Zambian traffic legislation appears to be "soft" on traffic offenders. Evidence of this is to be found in the fact that disqualification periods are not very long. Some guidance is to be found under "remarks" in the Second

Schedule. The "remark" says "minimum period-twelve months". Unfortunately, there is no published data showing the duration of disqualifications in Zambia. But in practice, courts seem to set the disqualification period at around twelve months. [32] No special provision is made for repeaters. [33]

Even though road traffic costs lives as elsewhere in any part of the world, perhaps proportionally more in developing countries than in developed ones, it is right that the law is not too hard on road traffic offenders in Zambia. Unlike in the developed countries, transport in developing countries, both public and private, is scarce despite the rush hour traffic jams in the two major cities of Kitwe and Lusaka. Stricter enforcement of road traffic legislation would make the transport problem worse.

2. Exercising discretion and "special reasons".

The meaning of "special reasons" was considered in the Supreme Court case of Mwelwa v The People. [34] In this case, the accused was convicted in the High Court of causing death by dangerous driving. In addition to a custodial sentence, his driving licence was cancelled as permitted by the Second Schedule but was not suspended as demanded by the schedule. At his trial, the accused said in mitigation that he was a driver by profession, and that this was his first conviction in fourteen years. The

Supreme Court then considered whether there were any "special reasons" why the licence should not have been suspended. Reliance was placed on the general approach in the 1946 English drunken driving case of Whittall v Kirby, [35] in which Lord Goddard C.J. cited with approval the meaning given to "special reasons" in the 1939 Northern Ireland case of R. v Crossman. [36]

> "A 'special reason'...is special to the facts of the particular case, that is special to the facts which constitute the offence. It is in other words a mitigating or extenuating circumstance, not amounting in law to a defence of the charge, yet directly connected with the commission of the offence, and one which the court ought properly to take into consideration when imposing punishment. A circumstance peculiar to the offender as distinguished from the offence is not a 'special reason'". [37]

The respondent offender in Kirby above was convicted of driving offences and the licence endorsed, but the court refrained from ordering a disqualification because there were "special reasons", in that a heavy fine had been imposed on him; he earned his livelihood on driving; and that he was a first offender. It was held that none of these were special reasons within the definition pronounced in Crossman. The Supreme Court held that the fact that the accused was a first offender and earned his living from driving were no special reasons, and that therefore the High Court should have suspended the accused's driving licence as demanded in the Second Schedule. [38]

The rule that "special reasons" do not refer to the personal circumstances of the offender, but only to the facts of the case, is a fair and reasonable one when serious traffic offences are involved, like drunken driving and causing death by dangerous driving, and a disqualification is ordered. It is not fair when the offence involved is not serious, like driving a motor vehicle without a test certificate or failing to stop and assist when an accident occurs. [39] The economic situation in Zambia continues to

deteriorate. Disqualifying professional drivers for minor traffic offences can have devastating consequences for their livelihood. In any case, it is advisable that before the court suspends or cancels a driving licence, the accused should be asked to show cause why the court should not do so. In the Tanzanian case of Mihambo v The Republic[40] the accused pleaded guilty to causing death by dangerous driving. He was disqualified from holding a driving licence for a period of three years. But because the plea was not unequivocal, the High Court sent back the case for re-hearing. Regarding the disqualification order made by the trial magistrate, Acting Judge Msiska said:-

> "in such cases as the one under query, more particularly where the a person is undefended, it is the duty of the trial magistrate to make sure that an accused person...understands the risk of forfeiting his driving licence for some time unless he advances special reasons."[41]

Zambian courts do not ask the accused to show cause why an order should not be made; they should do so in the interests of natural justice.

III. Police supervision.

A. Legislative provisions.

Police supervision tries to deal with one of the most intractable problems in criminology: persistent offenders. In England efforts to deal with persistent offenders have a long history beginning in the 1820s with legislation on transportation or imprisonment for persons who repeated serious offences.[42]

Basically, a police supervision order is a form of police surveillance. The key section reads as follows:-

> "When any person, having been convicted of any offence punishable with imprisonment for a term of three years or more, is again convicted of any offence punishable with imprisonment for a term of three years or more, the court may, if it thinks fit, at the time of passing sentence of imprisonment on such person, also order that he shall be subject to police supervision, as hereinafter provided, for a term not exceeding five years from the date of his release from prison." [43]

The reference to offences punishable with imprisonment for three years or more clearly indicates that police supervision orders apply only in the more serious cases. The fact that these orders may be made only when the offender has at least one previous conviction would suggest that the legislature may have had recidivists in mind. It should be noted that a police supervision order is not mandatory in every case; courts have a discretion to make them in appropriate cases.

This provision is unsatisfactory on two grounds. First, legislative guidance given to the courts as to when they should exercise their discretion to make police supervision orders is not clear enough. Unfortunately, there are no Zambian cases to provide clear guidance either. In R. v Wilson Chazwe[44] the accused was convicted of theft and a police supervision order was made; the trial magistrate also ordered him to report to the police once every seven days. The High Court held that courts have no power to determine how often the accused should report to the police. In Kamfute v The People[45] the accused was convicted of cheating, and a police supervision order was made; the magistrate further ordered him to report to the police three times a week. Again, it was held that the police, and not the courts, determine how frequently the offender should report to the police. In neither case was any pronouncement made about what police supervision tries to achieve or when it should be imposed. There has

been no judicial circular on this order either. The Magistrates Handbook merely reminds magistrates of their power to make police supervision orders. [46]

A more fruitful approach to sentencing guidelines is to be found in the Nyasaland case of Seneki v R. [47] The accused was convicted of store breaking and theft and a police supervision order was made based on one previous conviction in South Africa. On review in the High Court, that conviction was disregarded; consequently, there was no basis on which the order could be made. But in the course of his judgement, Spencer-Wilkinson C.J. commented on when police supervision orders should be made. He said:-

> "Apart altogether from the question of jurisdiction, I am of opinion that police supervision should not normally be imposed on a convicted person who has only one previous conviction...Section 310 permits this [as in Zambia], but it is a section which should be used with caution, and I think the cases are rare in which police supervision is necessary in respect of an offender who has only one previous conviction." [48]

Here is a case in which a superior court went out of its way to make useful remarks on how a sentence is to be used by the courts. The superior courts in Zambia should try to do the same.

The second difficulty with the legislative provision on police supervision orders is that it is not entirely clear whether or not the section tries to deal with one of the most intractable problems in penology: recidivism. The problem arises because police supervision orders may be made if the accused has only one previous conviction, which alone does not confirm that one is a recidivist. The picture would be clearer if police supervision orders required at least two previous convictions which would indicate more that the offender was a recidivist. If police supervision is meant to deal

with persistent offenders, special provisions or separate legislation is required to deal with them.

Zimbabwe has special provisions for persistent offenders in legislation; they are declared habitual criminals. [49] The effect is that they are subjected to stricter monitoring of their progress by a special board[50] whilst serving their prison terms. [51] Recommendations for possible early release are then sent to the minister. [52] In making its recommendations, the "safety and interests" of the public must be taken into account. [53] Unlike in Zimbabwe, there is a special legislation dealing with persistent offenders in Uganda. [54] This states that a preventive detention order against a habitual offender may be made when it is necessary to protect the public for a long period of time. [55]

The Zambian judiciary needs new powers to deal with recidivists. In Kamba v The People, [56] for example, the accused was convicted of house breaking and theft. Before pronouncing sentence, the trial magistrate noted that the accused had "been pursuing a life of crime since 1956", and that therefore "society should be protected against him"; he was sentenced to five years' imprisonment. But on appeal, the High Court said that the sentence was based on wrong principles in that the offender's record was used against him. The sentence was reduced to only two years. [57] There is little doubt that the general Zambian public would welcome special legislative treatment of recidivists by making more use of custodial sentences. Treatment in the community, such as police supervision is, however, to be preferred.

B. Police supervision in practice.

Before leaving prison, every supervisee must inform the prison authorities of his intended residential address. [58] On his release the prison authorities must issue him with an identity book[59] which, inter alia, names the police station where the supervisee is to report. [60] Immediately after his release from prison, he must report to the relevant police station; reporting times are as directed by the police. [61] Any intended change of residential address must be notified to the police. [62] Failure to comply with any of these rules is an offence carrying a prison sentence of up to six months. [63]

At the start of the supervision, supervisees are told to keep away from bad company and to avoid going to undesirable places like bars and taverns. [64] If found in any such place, they are ordered by the supervising officer to return to their homes immediately; but the matter is not normally reported to senior officers at the station. [65] It is interesting to note that even if this particular kind of "breach" is reported, the law does not specifically recognise it. Perhaps it should because being in bad company or being in undesirable public places does not normally assist offenders to keep away from crime. If the supervisee reports himself regularly as directed by the police, the reporting schedule is staggered progressively. [66] If supervisees abide by their reporting requirements, as they normally do, no reports are made to the court which convicted them. [67]

It should also be realised that in addition to enforcing police supervision ordered by the courts, the police throughout the country check on known recidivists in their areas as a matter of normal police routine. [68] This means that court-ordered

supervision is supplemented by normal police checks by officers of the criminal investigations department (C.I.D.).

There are no published data on how much use the courts make of police supervision orders. No study has ever been made to assess their effectiveness. It is therefore very difficult to assess whether they help to reduce recidivism, if at all. However, the monthly reports of criminal cases sent by all magistrates throughout the country to the High Court show that magistrates hardly make use of police supervision orders. This clearly suggests that this form of punishment is in decline. This trend is not surprising: police supervision calls for resources and police manpower is in constant short supply. In 1993, for example, the total police strength was only 11,000. [69] Also, the working of the police transport system which is necessary to maintain contact with supervisees is largely deficient. In the same year, 1993, for example, there were only 158 vehicles in the whole police force. [70] The number of orders imposed by the courts have continued to decline significantly over the years. [71] Unfortunately, it is difficult to identify the reasons for this continued trend other than that the courts have continued to make less use of this type of sentence.

IV. Discharges.

A. Legal provisions.

As in English law, Zambian courts are empowered to discharge convicted offenders in appropriate cases. The basic provision on discharges reads:-

> "When a court by or before which a person is convicted of an offence, not being an offence which is fixed the sentence for by law, is of opinion, having regard to the circumstances including the nature of the offence and the character of the offender, that it is inexpedient to inflict punishment and that a

> probation order under the Probation of Offenders Act is not appropriate, the court may make an order discharging him absolutely or subject to the condition that he commits no offence during such period, not exceeding twelve months from the date of the order, as may be specified therein." [72]

Perhaps the most noticeable aspect of a discharge is that it is not regarded as punishment. Clearly, a case which merits a discharge should be one which is laden with weighty mitigatory factors.

There are two types of discharges: absolute and conditional. As with police supervision orders, the courts are not guided as to when to order a discharge. The Magistrates' Handbook is unhelpful; it merely restates the above provision, offering no hint about when to order a discharge. There are two judicial circulars on discharges but they are not concerned with policy issues; they are typical of judicial circulars in Zambia, merely reminding magistrates that in a conditional discharge, the condition is that the offender is not convicted of any offence of whatever kind, and that any other condition is inappropriate. [73]

What should make it more difficult for magistrates to know when to order a discharge is the fact that the basic provisions on discharges are very close to those on probation. The basic section on probation reads as follows:-

> "Where a court by or before which a person is convicted of an offence, not being an offence the sentence for which is fixed by law, is of the opinion that, having regard to the youth, character, antecedents, home surroundings, health or mental condition of the offender, or to the nature of the offence, or to any extenuating circumstances in which the offence was committed, it is expedient to do so, the court may, instead of sentencing him, make an order [a probation order]." [74]

It will be seen that the factors which must be present before making a probation order are virtually the same as the ones which must be present before the court orders a

discharge. Only the words used are different. It must be wondered whether the sort of training offered to professionally-unqualified as well as professionally-unqualified magistrates in Zambia is good enough to assist them to know when to order a discharge and when to order probation.

B. When to order an absolute discharge as opposed to a conditional discharge.

An absolute discharge is obviously a less severe sentence than a conditional discharge. Nonetheless sentencers must be clear about the distinction between the two. According to Current Sentencing Practice an absolute discharge may be ordered:-

> "When a person is convicted of an offence in circumstances in which no moral blame attaches to him." [75]

R. v O'Toole[76] is an English road traffic case in which the Court of Appeal discharged the defendant absolutely. The defendant was a driver driving his ambulance; the siren was on and the lights were flashing when a car driven by a lady driver approached from a side road. There was a collision for which both the defendant and the lady driver were convicted, fined and disqualified from driving. [77] The Court of Appeal quashed the sentence. In its place the defendant was discharged absolutely on the ground that he no moral blame could be attached to his conduct. [78]

Knowing when to order an absolute discharge should be clear enough because one is dealing with the least serious case. It may be more difficult to know when to order a conditional discharge. There are three categories of cases which should attract conditional discharges. The first comprises those cases in which the offence is one of "some degree of seriousness", but because of weighty mitigating circumstances

surrounding the offence the appropriate sentence should be a non-custodial one, but one which does not call for the supervision of the offender. [79] In the second category, offences should be of "minimal gravity" calling for a fine but the defendant is not in a position to pay. [80] The third category includes all those offences which are of "modest gravity", warranting a prison sentence, but with weighty mitigating factors which justify a sentence which is less punitive than a fine. [81] Unfortunately, the guidance cannot be more specific; clearly, it is not easy knowing when to order a conditional discharge.

C. How the courts make use of discharges.

Table 18 shows how the courts in Zambia made use of discharges during the period of four years between 1979 and 1982, inclusive.

Table 18.

Discharges Granted by the Courts in Zambia, 1979-1982.

Year	(a) Total No.of convictions	(b) No.of Discharges	(c) Discharges as % of (b) over (a)
1979	78,005	1,730	2.21%
1980	103,914	2,812	2.70%
1981	127,437	583	0.44%
1982	113,682	824	0.72%
Total:	423,038	5,929	6.07%

Source: Annual Reports of the Judiciary and Magistracy.

Admittedly, it is not possible to know the facts of any of the cases in which discharges were pronounced. Nonetheless, it appears that the judiciary made very little use of them. In 1979, for instance, only 2.21% of all sentences were discharges. Three years later, in 1982, the percentage had fallen to only 0.72% of all sentences passed by the courts. In view of the obvious humanity associated with discharges and their diversionary significance, research is needed to ascertain how the courts actually make use of this sentence with a view to making greater use of it.

D. Conditional discharges and compensation.

As already noted, when the court decides to discharge the accused conditionally, the only condition which can be attached to the discharge is that he commits no further offence during the following year. This "no offence" condition is too sweeping; in certain circumstances it can turn the conditional discharge into a punitive sentence all too readily. If, for instance, having earlier been sentenced to a prison term which is suspended, he subsequently commits a minor traffic offence during the year he may be sentenced for the original offence. [82] Had the condition been, say, that the offender should not commit "the same or similar" offence in the future, the accused could escape being sent to prison after breaching a minor traffic regulation. Better still, a condition that he pays compensation to his victim, if any, is to be much preferred.

V. Binding over.

A. A brief English history of binding overs.

Central to the idea of binding over is the recognizance, better known as a bond. The person to be bound over enters into his own recognizance, with or without surety, to keep the peace and/or be of good behaviour and signs the recognizance form. [83] The form states that if he fails keep his side of the agreement and breaches the peace and/or misbehaves, he will forfeit the amount of money ordered by the court.

The origins of binding over in English law can be traced to the common law, the Justices of the Peace Act, 1361, and the commission given to the Justices of the Peace in the Act. [84] The Act states:-

> "in every county of England shall be assigned for the keeping of the peace, one lord, and with him three or four of the most worthy in the country with some learned in the law, and they shall have power to restrain the offenders, rioters, and all other barators and pursue, arrest, take, and chastise them according to their trespass or offence; and to cause them to be imprisoned and duly punished according to the law and customs of the realm,.... and to take and arrest all those that may find by indictment, or by suspicion, and to put them in prison; and to take of all them that be [not] of good fame, where they shall be found, sufficient surety and main prise of their good behaviour towards the King and his people,...." [85]

Reference to the idea of restraining offenders etc., clearly suggests that the lord and his assistants were empowered to take preventive action. Additionally, they were authorised to require surety for good behaviour from persons of ill repute in the community. [86]

B. Binding over under Zambian legislation.

Under Zambian legislation there are two types of binding over: one is preventive, and the other can be described as punitive. The former comes into play to prevent a person from actually committing an offence involving public order and tranquillity. [87] Here, concern is with the latter because the binding over comes into play following a conviction for a criminal offence:-

> "A person convicted of an offence not punishable with death may, instead of or in addition to any punishment to which he is liable, be ordered to enter into his own recognizance, with or without sureties, in such amount as the court thinks fit, conditioned that he shall keep the peace and be of good behaviour for a time to be fixed by the court, and may be ordered to be imprisoned until such recognizance... is entered into;..." [88]

Failure to sign the bond empowers the court to send the offender to prison for up to one year. [89] It should be noted that unlike punitive bind over, preventive binding over refers only to "good behaviour"[90]

A few observations can be made about the above quoted provision on punitive binding over. First, it should be realised that it can be substituted for a heavier sentence, like imprisonment. Its potential for use is therefore wide, particularly as an alternative to imprisonment. Secondly, as in police supervision and discharges, courts are not really guided as to when to use binding over. However, reference to keeping the peace would suggest that binding over is meant to be used mainly in cases involving violence or threats of violence to the person. If this is so, the law should have said so. Thirdly, it is odd that the idea of a bond in binding over should not involve an element of free will on the part of the offender; as has just been pointed out, courts are empowered to force offenders to agree to be bound over.

C. Making use of the power to bind over.

The courts in Zambia hardly make any use of the power to bind over offenders; binding overs seem to have simply fallen into disuse. In the one reported case of The People v Chigariro[91] the accused was charged with assault occasioning actual bodily harm, but the trial did not proceed because the magistrate effected a reconciliation. As part of the reconciliation package, it was ordered that the accused be bound over to be of good behaviour. On review in the High Court, it was held that magistrates had no power to make such an order where a reconciliation has been achieved. In this particular case the trial magistrate had made an elementary mistake; it goes to show

how unfamiliar the Zambian courts are with binding over. Table 19 shows the number of binding over orders were made by the courts in Zambia over a period of four years between 1979 and 1982, inclusive.

Table 19.

Binding over Orders in the Courts of Zambia, 1979-1982.

Year	(a) Total No.of convictions	(b) No of binding overs	(c) (b) as % of (a)
1979	78,005	157	0.20%
1980	103,914	106	0.10%
1981	127,437	45	0.03%
1982	113,682	46	0.04%
Total:	423,038	354	0.37%

Source: Annual Reports of the Judiciary and Magistracy.

Table 19 clearly shows that from 1979 to 1982, the total percentage of binding over orders came to no more than 0.37% of all sentences passed by the courts in Zambia, a negligible proportion. Yet more use could surely be made of this particular

type of sentence. Reported cases from West African jurisdictions suggest that binding over is more widely used than in Zambia as various aspects of this sentence have been the subject of judicial attention and comment.

D. Binding over - the West African experience.

In two Nigerian cases, one of the matters which has received judicial attention is the confusion in the minds of magistrates between "keep the peace" and "good behaviour, a matter which can easily confuse any magistrate in Zambia. In both cases the bind over was preventive and not punitive and like in Zambia, the requirement was that the suspects be of "good behaviour" only without the additional requirement of "keep the peace".[92] In Akanni and Olabnero v The State and the Chief Magistrate, Obbomoro (No.2)[93] the applicants were witnesses in a land dispute in which violence had been employed. They were bound over to keep the peace and be of good behaviour, when the relevant provision referred only to "good behaviour". The applicants applied for certiorari to quash the magistrate's order on the ground, inter alia, that the trial magistrate had wrongly combined "keep the peace" with "good behaviour". The application was granted on other grounds, but with regard to the misjoinder of the two phrases, Ibidapo-Obe J. said that the idea of "good behaviour" is wider than the idea of "keep the peace", and therefore "keep the peace" came within the meaning of "good behaviour". It was held that the misjoinder was wrong but not fatal. This was surely right: the idea of good behaviour is wider than keeping the peace. In Nwankwo and Nwoja v Commissioner of Police[94] the appellants were acquitted, inter alia, of assault but the trial magistrate ordered that they be bound over

to keep the peace and be of good behaviour, again when the relevant section referred only to "good behaviour". The two expressions were again compared, and Adimora J. came to the same conclusion that "good behaviour" is a wider concept than "keep the peace", and that therefore, the misjoinder was not fatal.

The confusion is not entirely unexpected. It is anomalous that preventive bind over should refer to "good behaviour" when the suspect has not been convicted of any offence; "keep the peace" would be more appropriate while retaining the present format with regard to punitive bind over.

The second aspect of bind over which has received judicial attention in West African cases is more significant. It concerns the question when is bind over appropriate following conviction? In Fofie v The Republic[95] a case from Ghana, the accused, a fifty-year-old woman, was convicted of assault, for which she was sentenced to three months imprisonment. In addition, she was bound over to be of good behaviour for two years. She appealed against the severity of the sentence which was reduced. Unlike the practice in Zambia, Mensah Boison J. departed from the narrow issues actually raised in the case to make broader pertinent observations about the whole sentence in question before the court. First, he made an observation about how often courts in Ghana use this particular type of sentence:-

> "the order [binding over] is frequently used by trial magistrates as a matter of course, where a defendant is convicted of an offence pertaining to breaches of the peace, and at times in cases of other offences."[96]

He then turned to consider how the courts should go about making binding over orders. He said that an order can be made:-

> "if there is ground to believe that despite the present conviction, the defendant will persevere in the course complained of or persist in that offence or behaviour." [97]

In this case, his Lordship found that there was no evidence to show that this fifty-year-old woman would repeat her offence in the next two years, the duration period of the order, which was therefore reduced to six months only. In Commissioner of Police v Nwogu and Five Others[98] from Nigeria the respondents were charged with and convicted of conspiracy, conduct likely to cause a breach of the peace, being armed in public and assault and fined. Some of them were convicted of conduct likely to cause a breach of the peace and assault. In addition to fines, some of the respondents were bound over to be of good behaviour. The appeal was against both conviction and sentence. One of the grounds of appeal was that the trial magistrate ought not to have made binding over orders. More specifically, it was argued that there must first be evidence to show that the offenders will continue to commit the offences in the future for which they were convicted. Secondly, it was argued that natural justice demands that the offenders should have been asked to show cause why binding overs should not be imposed before ordering them. Onwuamaegbu J. agreed with the appellants' first argument:-

> "the trial magistrate....should apprehend breach of the peace or threatened beach of the peace if the accused were not bound over." [99]

Regarding the second argument about natural justice, the judge said that it is not always necessary to ask the accused to show cause why they should not be bound over; it all depends on whether they have given evidence in the trial or not. If they have not given evidence, they should be asked to say why they should not be bound

over. It was held that there were no grounds for believing that the accused in this case would continue to commit the offences for which they were convicted and the appeal was allowed.

E. Binding over in Zambia.

These four cases from West African jurisdictions clearly suggest that binding over is regularly used by the courts there. Secondly, they show that they are used mainly in cases involving violence. These are appropriate circumstances in which this particular sentence should be used. However, the view that before making binding over orders there must first be evidence that the offender will continue committing the same offence in the future is rather presumptuous.

Recidivism is one of the most intractable problems in the whole discipline of penology. Researchers find it difficult to predict the future criminal behaviour of offenders. If researchers can find this task difficult, it is too much to expect that the courts can be in a better position to do what researchers fail to achieve. The area of concern for courts in Zambia should be more realistic; instead of being called upon to predict the future criminal conduct of offenders before making the order, the courts should simply bind over offenders to keep the peace, without first indulging in predictions. The part about good behaviour should be dropped. As has been shown in the first two West African cases, it merely causes confusion.

The conditions of binding over should relate only to the non-commission of offences involving actual or threatened violence; because offences involving violence to the person are the most dreaded types of offences in any society. Limiting the ambit

of binding over to violent offences would distinguish them from conditional discharges, where at present the condition is that the offender commits no offence at all in the future. Another condition could be added to binding overs: because they should be associated only with offences involving violence, the other condition should be that if the person bound over commits the same or a similar offence against the same complainant, he should pay compensation to his victim in respect of the second offence. This would be ideal in those cases in which the parties are already known to each other, as husband and wife or neighbours.

VI. Extra-mural penal employment.

A. The introduction of extra-mural penal employment in Zambia.

The sentence of extra-mural penal employment, or penal labour, is one of only three post-independence innovations in sentencing; the other two are youth corrective orders and weekend imprisonment. This is a telling testimony to the inertia in the whole field of penal policy-making in Zambia. Penal labour was introduced in 1965, one year after independence. In what was then Tanganyika, this form of punishment was introduced many years before in 1934. Tanganyika copied the idea from Palestine. [100]

The basic law on extra-mural penal employment provides:-

> "Where in any declared area a male prisoner is-
> (a) sentenced to imprisonment for a period not exceeding three months; or
> (b) committed to imprisonment for non-payment of any fine, compensation, costs or other sum adjudged to be paid under any written law;
> the court so sentencing or committing that person may, with his consent, order that he shall perform public work, in accordance with this Part, outside prison for the duration of such imprisonment." [101]

Four observations can be made about the above provision. First, it is clear that penal employment is meant to cover minor offences only. The second observation is that nevertheless this sentence is not as light as might be imagined. This is because of the element of exposure to the general community that comes with working in public. Perhaps it is the element of exposure which persuaded the legislature to exclude women from being sentenced to penal labour. Thirdly, the sentence of extra-mural penal employment is intended as an alternative to imprisonment. Fourthly, the choice given to the offender to accept or reject the sentence of penal labour is not as realistic as it might appear: a normal offender is unlikely to reject the opportunity to serve his prison sentence doing public work, and prefer to serve a continuous term in a closed prison, even when penal labour involves ridicule and exposure to the public.

When the Minister of Home Affairs, Mr Chona, introduced the bill to provide for extra-mural penal employment, he pointed out that it had worked well not only in Malaya and in the West Indies but nearer home in Kenya and Tanzania. [102] Four reasons were given in support of the measure. First, the Minister said that prisons in Zambia were overcrowded; short sentence prisoners contributed to the overcrowding. By penal labour, the number of short-term prisoners would fall and prisons would be de-congested. [103] Secondly, with smaller numbers of short-term prisoners, the contamination normally associated with long-term prisoners would be reduced. [104] Thirdly, Chona said that the sort of work to be done under penal labour schemes involved working in the community, so that this sentence would help towards the general development of the country. [105] The sort of work envisaged included bricklaying, railway construction, clearing drains and rood works. [106] Significantly, the minister felt it necessary to assure the National Assembly that the implementation of

penal labour schemes would not deprive law-abiding citizens of work in the community. [107] Lastly, Chona said that the extra-mural penal employment was justified on the ground of cost. He explained that it cost the government K5.00 per month per to maintain one prisoner; he estimated the cost of penal employment at only K2.00 per month per prisoner. [108] Clearly, the minister was very enthusiastic for this new penal measure.

A further justification for introducing the sentence of extra-mural penal employment was given by the Registrar of the High Court six years later, in 1971. In a circular to all magistrates in the country, he pointed out that this was not only a cost-saving sentence but had the added advantage that an offender serves his sentence in the community, without severely disrupting his family life. [109] There can be no doubt that the advantages of extra-mural penal employment were clear and compelling. They are as relevant today as they were when this sentence was introduced over twenty years ago.

B. Organising penal labour.

A penal labour employment order requires the offender to report to an "authorised officer" in the magisterial district covered by the sentencing court. [110] "Authorised officers" are appointed by the minister; [111] a long list of authorised officers, gazetted for the first time three years after the enactment, shows that appointments were made not by name, but by position; all the appointments were middle-ranking civil servants. [112] The list covered seventeen districts, [113] many of which had more than one

authorised officer. [114] This indicates expectation that the courts would make maximum use of this new sentence.

Declared areas were gazetted and these coincided with administrative districts. [115] Authorised officers in declared areas were of various kinds, even within the same district. The kind of work done by them was a pointer to the sort of work which offenders under the penal labour schemes were expected to do. In Kabwe District alone, for example, authorised officers included the Provincial Officer-in-Charge of Public Works and the Secretary of Kabwe Hospital. [116] Offenders engaged in penal labour in Kabwe District were therefore expected, inter alia, to repair roads and to help clean the hospital. To encourage magistrates to make extra-mural employment orders, the Registrar of the High Court reminded them to keep in touch with all the authorised officers in their magisterial districts. [117]

C. Running penal employment schemes.

Although the reasons underlying penal labour are cogent and compelling, and although officers are available to run penal labour schemes, the courts in Zambia have made very little use of this particular sentence. Court statistics do not include data on extra-mural penal employment, but magistrates interviewed do not remember using it at all. This is not a recent development. In 1970, two years after the appointment of authorised officers, the Registrar of the High Court issued a circular to all magistrates pointing out that:-

> "Statistics reveal that only ten prisoners were ordered by the Courts to perform public works, as an alternative to imprisonment, during the year 1969 whereas in the same year apparently about 6,000 persons were sentenced to imprisonment for three months or less. Of the 6,000 persons so sentenced over 50% were first offenders." [118]

Another circular followed in 1971: in it, the Registrar again noted that minimum use was made of the penal labour provisions by magistrates. He complained that some were not aware that their particular districts were declared areas. Even though the aims of extra-mural penal employment are obvious they were nevertheless repeated.[119]

D. Extra-mural Penal Employment in Malawi.

Unlike Zambia, Malawi has a special Penal Labour Act and subsidiary legislation[120] which appears to be working well. A legal practitioner in Malawi and a senior officer in Traditional Courts system confirmed that offenders in Malawi do work on many national projects: road- making and mending are popular penal labour schemes. [121] Penal labour legislation had been working for many years even before independence, as indicated by reported cases in Nyasaland. [122]

E. Conclusion: Zambia must re-activate penal labour.

Extra-mural penal employment is akin to community service orders in England. The community service order was first conceived and discussed in a report on non-custodial and semi-custodial sentences published in 1970. It was based on voluntary service rooted in the social fabric of the British society. [123] It sprung from noble motives and was advocated with obvious enthusiasm. The hopes for community service appear to have been largely realised over the years. Table 20 shows how the courts in England made use of this sentence in 1988.

Table 20.

Community Service Orders in England, 1988.

Offence	Nos.in Crown Courts	Nos.in Magistrates Courts
Theft and Handling	3,423	8,313
Burglary	2,602	3,518
Violence	1,514	2,164
Fraud	510	1,189
Motoring offences	539	3,363

Source: The Sentence of the Court[124]

Table 20 shows that the numbers of community service orders made by Crown Courts and magistrates courts in 1983 were substantial. Zambia can learn two important lessons from the English experience with community service. The first is that the range of offences in which the orders were made is apparently wide; they were described in the report as the main offences. Also, it should be noted that orders were made in traffic cases as well. Perhaps the more important lesson is that the sentence covers serious offences like theft, burglary, offences involving violence and even fraud.

The courts in Zambia must re-activate the sentence of extra-mural penal employment. Apart from Malawi, this sentence appears to be working satisfactorily in Tanzania as well, at least initially. The penal labour scheme expanded between 1944 and 1961. But since 1961, the courts have not made much use of this sentence. [125] The danger is that this sentence may be seen by the general public as too soft an option and even trivialised. The public should be educated about the real benefits of extra-mural penal employment. In some cases it should be possible to make use of the convicted person's special skills or talents. For example, in 1989, American heavy weight boxer, Michael Tyson, was convicted of over speeding in New York; he was fined, but, in addition, he was ordered to give boxing lessons to poor children of New York. [126]

Two difficulties prevent the greater use of extra-mural penal employment in Zambia. It is undoubtedly a relatively soft sentence when the legislature and courts seem to prefer more punitive ones, like imprisonment (Chapter 3). The second and related reason for the minimal use of penal labour was voiced by Deputy Chief Justice Ngulube. He very properly pointed out that this sentence was found, not in the Penal Code where many other the sentences are found, but in the Prisons Act, [127] a piece of legislation rarely used in ordinary litigation, whether civil or criminal. Consequently, it has almost disappeared from view. [128] The sentence of extra-mural penal employment should be transferred from the Prisons Act[129] to the Penal Code, [130] where it can be more visible to the courts.

VII. Weekend imprisonment.

A. Background.

Weekend imprisonment is only one manifestation of the wider concept of intermittent custody. However, it should not be confused with the very different idea of work releases, in which a convicted prisoner is permitted to leave the prison on a daily basis to earn money in employment outside prison. Work releases are not available in Zambia and apparently have never been considered.

Intermittent custody is known in several jurisdictions around the world, e.g. in Western Europe, some states in America, Australia, New Zealand and Canada. [131] In Central Africa, Zimbabwe is the only other country, apart from Zambia, with a sentence of intermittent custody. [132] This form of sentence is known by various names in different jurisdictions: e.g. as weekend excursion, periodic detention, weekend arrest, semi-detention, fractioning, split sentencing, semi-liberty and suspended execution. [133]

As the name intermittent custody clearly implies, the central idea behind this sentence is that the offender is detained in prison for one period in a day, or a week, or is even detained at irregular times. For the rest of the time, he is at liberty to lead a normal life outside prison. Thus in Belgium, the offender continues to work during the day, if employed, but spends his nights in prison. [134] In New Zealand, offenders are detained in prison at weekends, and in weekday evenings. [135]

B. The advantages of periodic custody.

Periodic detention has at least four advantages. First, the offender is at liberty for a substantial portion of his working life, so that the ill effects of continuing detention on the offender are minimised. [136] Also, the offender's home and family life is less seriously disrupted. [137] Secondly, this sentence helps to reduce prison populations at least for limited periods of time. Thirdly, the accused does not always have to lose his job, if he has one. Not only does the offender continue to contribute to the national output, but he also continues to pay his taxes. [138] Jebson says that intermittent custody should result in a saving in national budgets, as during periods of liberty, the offender is not dependent upon state care. [139]

However, Primrose appears to doubt the size of savings that can be made. His first argument is that to maintain normal services for people who are not in continuous residence is to run the prison inefficiently; by necessary implication, it is costly to the state. [140] Primrose's second argument is that periodic imprisonment is cheaper only in those cases in which the offender would normally have been sent to prison. Imposing a sentence of periodic detention in cases which call for non-custodial sentences, like fines, or probation, is not to make much saving. [141] Primrose's counter arguments about the supposed advantages of intermittent custody are valid. The economic case for periodic custody may not be that strong after all; penal administrators should always be alive to the danger of making false economies.

A fourth argument in support of the idea of periodic detention is that it is a particularly attractive form of deterrence. The deterrence lies in the fact that the offender is given a taste of prison each time he is inside the prison walls. At the same

time, he may avoid being fully socialised into the prison culture. [142] The one obvious disadvantage is that some sections of the general public, certainly in Zambia, may see this sentence as too soft.

Intermittent custody has undoubted advantages in any society. The argument about minimal disruption of family life is particularly relevant in Zambian society as the social and economic role of the family in African society is much wider than it is in European society. Consequently, the continuous absence of key members of an African family can be very widely felt. Secondly, it should also be appreciated that, despite the high level of industrialisation in Zambia, people in rural areas continue to live off the land either as peasant farmers or commercial farmers. A sentence of intermittent custody is therefore appropriate for them, enabling them to continue to till the land without total interruption.

C. Periodic custody in Zambia.

1. Legal provisions.

Intermittent custody in Zambia takes the form of weekend imprisonment. However, this sentence is restricted to the offence of drunken driving only, having been introduced into the penal system in 1971, following President Kaunda's persistent complaints about drunkenness and road accidents. On one memorable occasion, he publicly threatened to resign if drunkenness did not abate. Before the introduction of weekend imprisonment, the sentence for drunken driving was a fine of up to K1,000, or a prison sentence of up to five years or both fine and imprisonment. [143] The new provisions provide:-

"(1) Any person who, when driving or attempting to drive a motor vehicle on a road, is under the influence of liquor or drugs to such an extent as to be incapable of having proper control of such vehicle shall be guilty of an offence and shall upon conviction be sentenced to either:

(a) imprisonment for a period of not less than six months nor more than five years; or

(b) imprisonment to be served during a number of consecutive weekends not being less than thirty nor more than fifty two, in this section referred to as weekend imprisonment; and may in addition be sentenced to a fine not exceeding one thousand Kwacha.

(2) .....

(c) he shall surrender himself to the prison at 6.30. p.m. each Friday and be released at 6.30 p.m. each Sunday during the continuance of his sentence.

(3) .....

(4) When considering whether to pass a sentence of weekend imprisonment, the court shall ask the person about to be sentenced whether he has any objection to such course being taken and shall record the reasons given for any objection which may be raised." [144]

2. How the courts make use of weekend imprisonment.

Table 21 shows the number of persons sentenced to weekend imprisonment in Zambia over a period of nine years between 1972, the year following the introduction of this sentence, and 1980, inclusive.

Table 21.

Sentences of Weekend Imprisonment Imposed by the Courts in Zambia, 1972-1980.

Year	No. of Persons Sentenced to Weekend Imprisonment
1972	56
1973	80
1974	108
1975	72
1976	46
1977	27
1978	15
1979	07
1980	0
Total:	411

Source: Annual Reports of the Prisons Department.

Because of the nature of the offence of drunken driving and the difficulty of proving it in a court of law, the number of drunken drivers convicted is not expected to be large. Nevertheless, considering the drinking reputation of Zambians, at least in the neighbouring countries, it is unlikely that this offence is as rare as the figures suggest. In 1980, for example, no one was convicted of drunken driving in Zambia. Not only were the numbers small, but they were also in decline: in 1974, for example, 107 people were convicted, but five years later in 1978, only seven people were convicted.

Normally, drunken drivers are sentenced to serve thirty weekends, the minimum number prescribed. [145] It should be recalled that before pronouncement of sentence the accused is given a choice between serving his prison sentence continuously and serving it at weekends. This element of choice was repeated in the High Court review case of The People v Kalunga. [146] Following his conviction for drunken driving, the accused was sentenced to a period of continuous imprisonment of six months, the minimum permissible, but the trial magistrate did not ask the accused before pronouncing sentence whether he had any objection to serving his prison sentence over weekends as demanded by the law. The High Court reminded the trial magistrate that he should have done so and remitted the case back to the magistrate for sentencing.

Although the idea of choice is laudable, it is not as significant to the accused person as it may sound; there is no real choice. First, no offender would really wish to serve his prison sentence continuously, rejecting weekends. Secondly, the choice is not real in another sense: for the choice to be realistic the court contemplating weekend imprisonment should first put side by side to the convicted person the length of the continuous prison term on one hand, and the number of weekends on the other which

the court considers appropriate in the case. If the court does not lay the two sentences side by side, the accused is asked to make his choice in the dark.

Not only is the convicted person not given any real choice, but it is also very difficult for the court to work out a fair choice in arithmetical terms. For purposes of illustrating the difficulty, periods of imprisonment will be calculated in hours. Six months minimum continuous imprisonment comes to 4,320 hours, while 5 years maximum comes to 43,200. Regarding weekend imprisonment, the 32 minimum weekends (remembering that each spell consists of 48 hours) amount to 1,536 while the maximum of 52 weekends are 2,496. Table 22 illustrates the point. The top figures represent continuous imprisonment while the bottom figures refer to weekend imprisonment. Figures in brackets are percentages of minimum and maximum lengths of imprisonment covering continuous imprisonment and weekend imprisonment, respectively.

Table 22.

Minimum and Maximum Periods of Imprisonment Served in Hours.

Minimum	Maximum	Total
4,320(9.08%)	43,200(90.81%)	47,570
1,536(38.09%)	2,496(61.90%)	4,032

Source: Roads and Road Traffic Act, Cap.766.

Table 22 shows that the minimum number of hours to which the offender can be sentenced, in the case of continuous imprisonment, is 4,320, and the maximum is 43,200; regarding weekend imprisonment, the hours are 1,536 and 2,496. The Table also shows that the split between minimum and maximum in respect of continuous imprisonment in percentage terms is 9.08% and 90.81%; regarding weekend imprisonment, it is 38.09% and 61.90%. Clearly, the proportions do not correlate; either the split should be 9.08% to 90.81% covering both types of imprisonment, or 38.09% and 61.90%. It will therefore be seen that it is very difficult for the courts to make fair arithmetical calculations when the choice of sentence is put to the accused. The most practical solution to the whole problem of choice is to abandon it altogether leaving the courts with only one sentence: weekend imprisonment.

3. The experience of weekend imprisonment.

The writer did not succeed in finding any prison officer with direct information on how people serving a sentence of weekend imprisonment actually serve their sentence. In view of the small numbers of persons convicted of drunken driving this is not surprising. However, this category of prison does not appear to cause special administrative or disciplinary problems. [147] Two factors would account for this. First, prisoners in Zambia sleep in dormitories; cell accommodation is rare. This means that no special cells are arranged for occupation over weekends only. Secondly, apparently, the number of weekend prisoners has always been small.

Regarding the experiences of weekend prisoners themselves, two people who had actually served weekend imprisonment were interviewed. One had served his

sentence in Lusaka Central Prison. He worked for a large international oil company and said that his employers were very understanding. Although his job entailed much travelling on inspections of depots throughout the country, his work schedule was re-arranged to fit with the requirement that he be in prison at weekends. [148] The other served his sentence in Livingstone Prison. He is a middle-ranking civil servant and like the first offender, his work again entailed making inspections of border posts throughout the country. However, his job was not put in jeopardy, nor was he in any way inconvenienced, in performing his duties. [149] These two cases confirm the advantages of weekend imprisonment over continuous custody, especially regarding the continuance of employment.

4. Periodic detention should be extended to weekdays.

Imprisonment at weekends does not suit everyone. Those who work in essential services, like hospitals, or essential industries, like mines, might find serving a periodic sentence more convenient during weekdays. Besides, for non-essential workers being away from home serving a prison sentence during weekdays might have the advantage that the embarrassment that comes with imprisonment might not come to the notice of friends and relatives who would expect the offender to be at home during weekends.

In Zimbabwe, legislation does not confine intermittent custody to any particular part of the week; the period is left open for the courts to determine. [150] Likewise, Canadian legislation does not restrict periodic detention to any particular part of the week. Dombek and Chitra quote four different passages from Canadian judgements in which judges have laid down the periods when offenders may be detained in prison

under Canadian intermittent custody legislation. In one case, the offender was ordered to be in prison at any time including weekends when he was not fully employed "at the discretion of the Gaol Governor".[151] In another case, the accused was to be in prison when it suited him as long as he notified the Governor in advance. [152] In the third case, the offender was to be in prison when he had his regular days off from work, or during his holiday time, or when there was a strike. [153] Fourthly, the court ordered that an offender was to be incarcerated:-

"according to a work schedule to be prepared by his employer." [154]

Zambia should learn from the Zimbabwean and Canadian arrangements by not restricting periodic imprisonment only to weekends, but extending it to any day or night which is suitable to the offender. This should not be too much of an inconvenience to prison officers because their service, like hospitals or the fire brigade, is on permanent duty.

5. Intermittent custody should be extended to more offences and offenders.

Periodic detention is such a useful sentencing device that its provisions should not be confined only to the one offence of drunken driving; it should be extended to more offences.

In Zimbabwe, intermittent imprisonment is not restricted only to persons convicted of drunken driving, [155] but extends to cases where an ex-spouse is found guilty of failure to make periodic payments to the other party or to children of the marriage. [156] In Canada, no specific offence is mentioned[157] but there are some restrictions, as in Belgium. [158]

As in Canada, there should be no undue restriction on the type of offence for which periodic imprisonment is imposed except in very serious offences, like robbery and homicide, mainly on electoral grounds. The general public is unlikely to accept that a person who has committed a very serious offence should be allowed to leave prison periodically.

Intermittent custody would also be appropriate in those cases in which the courts are currently empowered or should be empowered to order compensation. It should be made a penalty for non-payment of compensation so that offenders can be encouraged to pay. The numbers of defaulters should be small, but even if this turned out not to be so, the nature of periodic detention is such that it would not add significantly to overall prison numbers.

Intermittent custody should concentrate not so much on the type of offence committed as the sort of offender who can benefit the most from this type of sentence. Basically, it should be extended to all those persons who are unlikely to abscond, whatever offence they are convicted of. Such persons would include those in regular employment: civil servants, those working for parastatal bodies and companies and those who are employed by reputable private companies. Others are villagers and other people living in rural areas: because of the general absence of anonymity in rural areas, they are unlikely to abscond.

VIII. The suspended sentence.

A. A brief history.

In England the idea of suspending the whole or a part of a sentence of imprisonment was not fully accepted until recently, as late as 1967, with the passing of the Criminal Justice Act. [159] In Zambia, it was introduced into the penal system eight years earlier, in 1959, by amending the Criminal Procedure Code. [160] The late acceptance in England of the suspended sentence was not because the legal establishment was unaware of its existence in some other jurisdictions, it was on account of what were considered to be serious drawbacks in this type of sentence.

The idea of introducing the suspended sentence in Northern Rhodesia was first raised in 1947 by the Provincial Commissioner of Barotseland at a conference of all Provincial Commissioners and heads of social services in the territory. First of all, he complained about the problem with the binding over provision in the Criminal Procedure Code. His complaint was that:-

> "The convicted person leaves the court not knowing how serious the magistrate's views are of the case, and the offender feels that he has been dealt with leniently by the magistrate." [161]

He felt that there is little deterrence in this arrangement. Instead, he proposed that the law should be amended so that magistrates can be empowered to impose a sentence and then suspend the whole sentence or only a portion of it. In this way, the offender would be deterred from committing another crime as he knows the precise severity of sentence that he would suffer if he committed another offence. [162] After a brief

discussion, the conference recommended that the government should introduce the suspended sentence into the penal system of Northern Rhodesia. [163]

Following upon this recommendation, the Executive Council was asked to consider the merits of the recommendation and whether the sentence should be given a trial run. To assist the Executive Council make a decision, the Crown Counsel was asked for his views on the matter. He made two reports. At the same time the Registrar of the High Court of Southern Rhodesia was requested to provide an account of how the suspended sentence worked in Southern Rhodesia. The Registrar made his report which was submitted to the Executive Council. [164] Between 1947, when the idea of the suspended sentence was first raised, and the introduction of the sentence in 1959, an informed debate was conducted over the merits and demerits of the suspended sentence in Northern Rhodesia. The arguments advanced, for and against, were as valid now as they were valid then.

The Crown Counsel opposed the idea of the suspended sentence on two grounds. First, he said that if this sentence was introduced, trial magistrates would be inclined to impose longer prison sentences than were warranted, in order to maintain the same level of deterrence which would be perceived as lost or diminished by the suspension. [165] The second argument advanced by the Crown Counsel was that:-

> "The character of the offender can be assessed much more accurately if a man who was bound over offends a second time and comes up again before a Magistrate. Then the Magistrate at the second appearance has much fuller information as to the character, and can assess with greater precision the punishment which should be awarded for the first offence on which the prisoner has been bound over to come up for sentence when called upon." [166]

The criticism is a valid one because when the first offence is being activated because the offender has broken a condition of the suspension of sentence, no account is to be taken of any changed circumstances of the offender; the suspended sentence must be imposed. If his personal circumstances have meanwhile deteriorated, the original sentence announced has nevertheless to be imposed; this would be unjust.

The report on suspended sentences in Southern Rhodesia was full of praise. The Assistant Registrar reported:-

> "the passing of suspended sentences has had excellent results in that it avoids an otherwise severe hardship on the spouse and children." [167]

Avoidance of prison, then, is one of the attributes of the suspended sentence of imprisonment if the whole prison term is suspended, but the Executive Council rejected the whole idea on the ground that binding over was working satisfactorily. [168] Not everyone believed in the efficacy of binding-over, however. Many years back in 1926 Judge McDonell, for instance, said that they were "useless".[169] Also, at the 1947 conference of Provincial Commissioners and heads of social services, the District Commissioner for Fort Jameson District said that binding-over was not working because this sentence was "not always understood by the African." [170]

Morgan, as member of the Executive Council and Attorney-General, was opposed to the suspended sentence arguing:-

> "We are being asked to introduce a system of punishment which is novel to us and in the U.K., but which is practiced in Southern Rhodesia and South Africa. The problem with the suspended sentence is that even if the convict has tried to be a good person, the long sentence hangs over him. The question is whether this is a good thing. The discharge and keeping the peace are better;" [171]

Morgan's point about the suspended sentence hanging over the offender is a well recognised objection against this type of sentence. But the significance of this point should not be exaggerated. Binding-over and conditional discharges are sentences which can also be said to be hanging over offenders. The obvious difference is that, in the suspended sentence, the threat is perhaps more keenly felt by the offender and therefore probably a more potent threat.

When in 1959 the Bill to introduce suspended sentence was presented in the Legislative Council, Doyle, the Minister of Legal Affairs, justified this sentence mainly on deterrent grounds. He explained:-

> "It has been argued that to enable the courts to pass sentences of imprisonment and suspend them might have a deterrent effect in a large number of cases..." [172]

and that the government had accepted this particular point of view. [173]

The suspension of a portion of the sentence is supposed to be a particularly effective form of deterrence. In Mbanga v The People[174] the accused was convicted of seven counts of espionage and given two years' imprisonment on each count, the sentences running consecutively, making a total of fourteen years, but four years were suspended. The offender's appeal against sentence was dismissed by the Court of Appeal for Zambia, which in its judgement commented on how the suspension of sentences is to be approached. It was observed that the normal thing to do is to suspend the whole sentence, but that:-

> "there may well be cases in which a short sharp sentence of imprisonment may bring home to a person what he is laying himself open to and may well induce him not to commit fairly common place offences in the future." [175]

But it is not advisable to suspend a small portion of a long prison term. [176]

B. The legal provisions.

The basic legal provisions on suspended sentences are as follows:-

> "Whenever a person is convicted before any court for any offence other than an offence specified in the Fifth Schedule, the court may, in its discretion, pass sentence but order the operation of the whole or any part of the sentence to be suspended for a period not exceeding three years on such conditions, relating to compensation to be made by the offender for damage or pecuniary loss, or to good conduct, or to any other matter whatsoever, as the court may specify in the order." [177]

The suspended sentence is not to be activated if the offender does not breach any of the conditions laid down. [178] But if he breaches one:-

> "the court may direct that the sentence, or part thereof shall be executed forthwith or, in the case of imprisonment, after the expiration of any other sentence of imprisonment which such offender is liable to serve:" [179]

But activation is not automatic because the court:-

> "may, in its discretion, if it is proved to its satisfaction by the offender that he has been unable through circumstances beyond his control to perform any condition of such suspension, grant an order further suspending the operation of the sentence subject to such conditions as might have been imposed at the time of the passing of the sentence." [180]

It will be noticed that while some guidance is given as to when courts may further extend the operation of the suspended sentence, the question of suspension is left entirely to the discretion of the sentencer. No attempt whatsoever is made to guide the sentencer in the initial task of suspending the sentence. The Magistrates' Handbook is

completely silent on the point. [181] Failure to guide the sentencer in this initial task is very unsatisfactory.

However, in a 1977 Judicial Circular to all magistrates, Baron, Deputy C.J., said:-

> "the main reason for the suspension of a sentence, either in whole or in part, is to give the convicted person an incentive to behave himself in the future." [182]

It will be noticed that this is the same reason for imposing binding over and conditional discharges, or even police supervision. This is an unsatisfactory explanation. Some guidance may be gleaned elsewhere from the sort of offences (exceptions) mentioned in the Fifth Schedule, which are all serious offences. They include offences carrying the death sentence, arson and robbery. [183] The clear suggestion is that suspended sentences are to be imposed in cases of medium seriousness. Unfortunately, there is neither published data or information on the nature of offences which normally attract suspended sentences nor on the extent of use of this particular sentence. But in practice, suspended sentences are imposed only in sentences of imprisonment. Yet the legal provisions above do not restrict the power to suspend sentences only to prison terms. Courts should note that they have the power to suspend fines, orders of deportation, or disqualifications etc.

1. Reasoning towards the suspended sentence: the English case of O'Keefe and the Zambian case of Masissani.

What is sought to be highlighted here is the proper sequence of reasoning which should be followed by the courts when contemplating the imposition of a suspended sentence of imprisonment. The current guidelines on the matter are deficient.

In the English case of O'Keefe[184] the defendant was convicted of various offences. He was sentenced to imprisonment for a total of eighteen months, the whole period being suspended for three years. Later, he appeared before another court in respect of new offences. His counsel urged the court to impose a suspended sentence again, but this was dismissed. In the course of its judgement the Court of Appeal outlined how the sentencer ought to reason his way to a suspended sentence of imprisonment. Parker C.J. said:-

> "it seems to this court that before one gets a suspended sentence at all, the court must go through the process of eliminating other possible courses such as absolute discharge, conditional discharge, probation, fines, and then say to itself: this is a case of imprisonment, and the final question, it being a case of imprisonment, should be: is immediate imprisonment required, or can a suspended sentence be given?" [185]

Similar reasoning was adopted in the Zambian case of The People v Masissani. [186] In this case the accused was a police officer in the protective unit. Apparently as a practical joke, he forced the complainant to have sexual intercourse with the complainant's own wife in the presence of the accused. He then took the couple to the police station where he administered corporal punishment to the complainant. He was charged with assault and given a six months prison sentence, the whole period being suspended for three years. On review, Silungwe J., as he then was, increased the

sentence to eighteen months without suspending any part of it. In his judgement, he outlined how the courts should reason their way to the suspended sentence of imprisonment. He said:-

> "If it is necessary for the court to impose a custodial sentence, it will fix the term of imprisonment that matches the gravity of the offence and then decide whether the case is one in which the prison sentence can properly be suspended." [187]

The reasoning in the O'Keefe case, and by necessary implication in the Masissani case as well, has been criticised on the ground that in reasoning its way to the suspended sentence of imprisonment, the court counts mitigating factors twice. Cross points out:-

> "if the court has taken full account of mitigating factors in calculating the appropriate length of the prison sentence, then there will be, so to speak, no mitigation left to be taken into account when deciding whether or not to suspend." [188] (Emphasis supplied).

Bottoms also says:-

> "in the nature of things, at least in the vast majority of cases the court will, before it reaches the decision to suspend, have already taken every relevant consideration into account. For example, the Court of Appeal has endorsed as reasons for suspending a sentence such matters as a good work record, a good previous character, and genuine remorse-but all these matters are routinely taken into account by sentencers in the initial decision as between custodial and non- custodial measures. To take double account of previous good character and the like is objectionable from the standpoint of classical jurisprudence." [189]

The double count criticism is a valid one. If after the court takes into account everything in the case the proper sentence must be a custodial sentence of particular duration it is not possible, logically, to proceed and argue for suspending it. This is

where the faulty reasoning lies. The proper approach should be more holistic: whether the circumstances of the case merits a suspended sentence of imprisonment.

2. Conditions of suspension of sentence and compensation.

When a suspended sentence is contemplated, the court has a wide range of conditions available to it from which to choose for attachment to the suspended sentence. It may impose a condition relating to good conduct or any other condition at all. The courts have a completely free hand. In practice, however, the courts in Zambia use only one condition, namely that the offender does not commit another offence within the three year grace period. Noticeably, the condition relating to the payment of compensation is not used. It appears that the judiciary in Zambia have simply forgotten about compensation as a condition of suspending prison sentences. In Malawi and Zimbabwe, however, it has not been forgotten.

Republic v Sande[190] is a Malawian case in which the accused was convicted of unlawful wounding. He was sentenced to a twelve months suspended term of imprisonment; a condition attached to the suspension was that he paid compensation to his victim in the sum of K20.00. [191] The State v Zumbika[192] is a Zimbabwean case in which the offender was convicted of the equivalent in Zambia of the offence of theft of money by a bailee or agent and sentenced to fifteen months imprisonment of which eight months were suspended, one of the conditions being that he repaid the money he had converted to his own use. This may seem more like restitution than compensation, but the principle of attaching monetary conditions to a suspended sentence was applied. [193] Courts in Zambia should emulate the Malawian and Zimbabwean example.

3 Activating the suspended sentence.

There appears to be no reported Zambian cases dealing with the circumstances in which the courts can activate suspended sentences. In the few cases dealing with activation, the complaint has been that activation is ordered too early, before the expiry of the suspension period. [194] However, the Southern Rhodesian case of S v Jussab[195] is instructive.

In this case, the accused was an undischarged bankrupt. He was convicted of changing his address without first notifying the trustees in bankruptcy and sentenced to one month's imprisonment, which was suspended. Before the period of suspension expired, the accused repeated the offence. The second court activated the first sentence of one month's imprisonment. After citing a South African case, the High Court laid down the proper approach to take when a court is faced with the possible activation of a suspended sentence. The High Court said that all the circumstances in both the first and the second cases must be taken together: an earlier dormant sentence should be revived and the offender sentenced if the whole conduct of the accused induces a sense of shock. It was noted that the accused had repeated the same offence for which he had first been sentenced. This was inexcusable conduct on his part, and the High Court held that the circumstances in this particular case justified the revival of the first sentence of imprisonment. [196]

Conclusion.

Discussion of non-custodial and semi-custodial penalties has raised three major points. The most obvious is that courts have made minimal use of these penalties

against international calls for the greater use of this type of penalties. In 1980, for example, the United Nations called on member states to make more use of existing alternatives to custodial sentences and create new ones, where possible. [197] It was pointed out, in some cases through tables, how the courts in Zambia make minimum use of police supervision orders, discharges, binding over orders, extra-mural penal employment, and weekend imprisonment. However, the minimal use of deportation of alien criminals outside Zambia was welcomed. Non-custodial and semi-custodial penalties should be revived because their significance as humane punishments and techniques of diversion are obvious.

At least two related explanations account for the decline of non-custodial penalties in Zambia. The first is that the general public has been calling for stiffer sentences in the country. [198] Secondly, and consequently, they have disappeared from view. [199] No one in the country, including academicians, advocates their greater use.

The second major point which emerges from the discussion of non-custodial and semi-custodial sentences is that they are not easy to use. There is a multiplicity of similar penalties, like police supervision, binding over, discharges, and the suspended sentence, all clearly designed to ensure that the offender does not offend again in the future. Such a multiplicity of similar sentences can lead to at least two consequences. In the English experience, Ashworth is quoted as having observed that:-

> "The sheer number of options in non-custodial sentencing, combined with the virtual absence of appellate guidance, leaves courts with difficult choices and inevitably leads to disparities." [200]

This is particularly true in Zambia where the training of the judiciary is very inadequate. The other consequence is that instead of using these non-custodial and

semi-custodial penalties as alternatives to imprisonment, the courts in Zambia may be using them as substitutes for other non-custodial sentences. No research into the use of non-custodial sentences has been undertaken in Zambia. However, the English experience may be instructive. The introduction of the suspended sentence in England in 1967 appears to have been used eventually as an alternative to other non-custodial penalties, and not as alternatives to imprisonment; it was used as an alternative to probation, [201] and as alternative to the fine and probation. [202]

The third major point which arises from our discussion of non-custodial and semi-custodial sentences in Zambia is that there has been an obvious lack of sufficient guidance, and, in some case, a complete absence of guidance, as to when to use them. Neither the legislature nor the courts has been helpful. Judicial circulars and The Magistrates' Handbook are hardly helpful either. This absence of guidance makes it imperative that magistrates and judges in Zambia are trained properly and adequately before they actually begin to sit on the bench. If there is any one type of sentence which highlights this need, it is certainly non-custodial and semi-custodial penalties.

Chapter 6.

Notes.

1. Probation is not included in this list but is dealt with in Chapter 8, on juvenile justice.

2. Penal Code, Cap.146, S.34(1).

3. R. v Salubilo and Mushasho, 1920 case, BS 3/98; and the 1958 case of R. v Paison Chungu N.R.L.R., Vol.5, 651. In both cases the accused were persistent offenders. It was recommended that they be deported back to their villages.

4. Judicial Circular No.2 of 1937, in L.R.N.R., Vol.5 651

5. Ibid.

6. The writer has personal experience of this.

7. During the colonial times, using the police to enforce internal deportation orders was found to be ineffective. See Judicial Circular No.4 of 1935, in L.R.N.R., Vol.V 230.

8. Constitution of Zambia, No.1 of 1991, Article 22(1).

9. Ibid., Article 22(3)(b).

10. Cap.146.

11. Cap.122.

12. Penal Code (Amnd)(No.2) Act, 1972, No.32 of 1972, S.2.

13. Immigration and Deportation (Amnd) Act, 1972, No.31 of 1972, S.2.

14. Constitution of Zambia, No.1 of 1991, Article 15.

15. Immigration and Deportation Act, Cap.122, S.26(1).

16. Immigration Act 1971, Cap.77, SS.3(6) and 6(1).

17. (1981) Cr.App.R.(s), 97.

18. (1981) Cr.App.R.(s), 281.

19. Also see Miller v Lenton (1981) 3 Cr.App.R.(s), 71; and Theresa Theoby and Ryszard Krowczyk (1979) 1 Cr.App.R.(s), 28.

20. Liquor Licencing Act, Cap.240, S.40(3). The actual word used is "forfeit".

21. (1983) Z.R. 48.

22. Legal Practitioners Act, Cap.48, SS.4, 22, and 52.

23. Constitution of Zambia, No.1 of 1991, Article 65(1)(c).

24. Corrupt Practices Act, 1980, No.14 of 1980, S.41.

25. Roads and Road Traffic Act, Cap.766, S.122(1)(a).

26. Ibid., see proviso.

27. Ibid., S.122(1)(b).

28. Ibid., S.199.

29. Ibid., S.198.

30. Ibid., S.195.

31. Ibid., S,110. Unfortunately, no data is available on disqualifications.

32. See Saimon Lungu v The People (1977) Z.R. 205 in which the period of suspension was set at 12 months; and the case of January Gringo Nakalonga v The People (1981) Z.R. 252 where the period was 18 months.

33. In Zimbabwe, a person with two or more drunken driving offences must be banned from driving any class of vehicle for life, Roads and Road Traffic Act, Cap.263, S.91(5).

34. (1975) Z.R., 166.

35. [1946] 2 All E.R. 552.

36. [1939] 1 N.I. 106.

37. Ibid., at pp.112-113; on p.555 in Whittall v Kirby case.

38. Also see the 1957 Ugandan case of Kosolo v Reginam, 8 U.L.R., 141. The accused was convicted of a road traffic offence. He was a professional driver and a first offender. The High Court adopted the reasoning in Whittall v Kirby case and found that there were no special reasons for not disqualifying him from holding a driving licence.

39. See Second Schedule to the Roads and Road Traffic Act, Cap.766.

40. 1976 L.R.T., No.38, 148.

41. Ibid., at p.152.

42. Sentences of Imprisonment: A Review of Maximum Penalties, London, HMSO, 1978, Chapter 5; also see W.H.Hammond and E.Clayen, Persistent Criminals, London, HMSO, 1963, Chapter 1 and J.E.Hall Williams, The English Penal System in Transition, London, Butterworths, 1970, Chapter 14.

43. Criminal Procedure Code, Cap.160, S.317(1).

44. L.R.N.R. Vol.V, 458.

45. (1975) Z.R. 8.

46. The Magistrates' Handbook, Fifth (1968) Ed., Lusaka, Gvt. Printer, para.145, p.58.

47. 1923-60 A.L.R., Mal., 639.

48. Ibid., at p.642.

49. Criminal Procedure and Evidence Act, Cap.59, S.322(1)(a)-(b).

50. G.N.RGN No.637 of 1972, S.185(1).

51 Criminal Procedure and Evidence Act, Cap.59, S.322(2).

52. Ibid., S.185(2).

53. Ibid., S.185(3).

54. Habitual Criminals (Preventive) Act, Cap.112.

55. Ibid., S.2(1).

56. (1972) Z.R. 175.

57. Also see Kalyata v The People, 1972 S.J.Z., No.62, 64; Mwenya v The People (1973) Z.R. 6, and Kabwe v The People (1973) Z.R. 7. In all the three cases, the trial magistrates noted bad records before pronouncing sentence.

58. Criminal Procedure Code (Police Supervision) Rules, Cap 160, Rule 2.

59. Ibid., Rule 3.

60. Ibid., Rule 3(b).

61. Ibid., Rule 4(a).

62. Ibid., Rule 5.

63. Ibid., Rule 6.

64. Criminal Procedure Code, Cap.160, S.319.

65. Interview with Chief Inspector Kalumba, Kabwe, 4th April, 1986.

66. Ibid.

67. Interview with Senior Superintendent Hanamwinga, Lusaka, 28th July, 1986.

68. Interview with Chief Inspector Kalumba, Kabwe, 4th April, 1986.

69. Zambia Daily Mail, 3rd December, 1993, p.1

70. Ibid., 25th November, 1993, p.1.

71. Senior Superintendent Kaitisha. In his letter to the writer dated 6th December, 1991, ref.no.FH/103/49/16. It had been reported that police supervision orders were abolished in Zambia. The writer had written to confirm.

72. Penal Code, Cap.146, S.41(1).

73. Judicial Circular No.2 of 1966, and Judicial Circular No.6 of 1972.

74. Probation of Offenders Act, Cap.147, S.3(1).

75. D.A.Thomas, Current Sentencing Practice, Release No.12, London, Sweet and Maxwell, 1982, para.D1.3.

76. [1971] 55 Cr.App.R., 206.

77. Although it is not entirely clear from the report why the defendant in this case was taken to court or convicted at all.

78. Also see R v Smith 2 Q.B. 164, another traffic case involving an ambulance driver.

79. D.Thomas, Principles of Sentencing, 2nd.ed., London, Heinemann, 1979, p.277.

80. Ibid.

81. Ibid, p.278.

82. Penal Code, Cap.146, S.41(3).

83. Criminal Procedure Code, Cap.160, Form 22, p.157.

84. Non-Custodial and Semi-Custodial Penalties, London, HMSO, 1970, para.64, p.23.

85. Copied from B.Harris, (Ed.) The Criminal Jurisdiction of Magistrates, 10th ed., Chichester, Barry Rose, 1984, p.646.

86. See E.A.Jones, "Binding Over on Complaint and Otherwise", [1955] Crim.L.R., p.484.

87. Criminal Procedure Code, Cap.160, SS.40(1) and 43.

88. Penal Code, Cap 146, S.31.

89. Ibid.

90. Criminal Procedure Code, Cap.160, SS.40(1) and 43.

91. (1974) Z.R. 208.

92. Criminal Procedure Act 1958, Cap.43, S.300.

93. 1980 (2) N.C.R., 383.

94. 1980 (2) N.C.R., 259.

95. [1978] 1 G.L.R., 199.

96. Ibid., at p.204.

97. Ibid.

98. 1980 (2) N.C.R., 109.

99. Ibid., at p.116.

100. J.S.Read, Kenya, Tanzania and Uganda, off print from African Penal Systems, A.Milner (Ed.), London, Routledge & Kegan Paul, 1969, p.148.

101. Prisons Act, Cap.134, S.135 (1).

102. National Assembly Debates, 1965, 24th August, p.1192.

103. Ibid.

104. Ibid.

105. Ibid., p.1193.

106. Ibid.

107. Ibid.

108. Ibid.

109. Judicial Circular No.3 of 1971, dated 5th May, 1971.

110. Prisons Act, Cap.134, S.75(2).

111. Ibid., S.135(2).

112. Gazette Notice No.127 of 1968.

113. Ibid.

114. Ibid.

115. Ibid.

116. Ibid. Later the same year, 1968, another Gazette Notice No.1593 of 1968 declared that all District Secretaries and all Assistant District Secretaries in all the 17 Districts were authorised officers where they were not already gazetted. Additionally, all District Secretaries and Assistant District Secretaries in charge of Districts were declared authorised officers as well.

117. Judicial circular No.3 of 1971, dated 5th May, 1971.

118. Judicial Circular No.4 of 1970, dated 1st June, 1970.

119. Judicial Circular No.3 of 1971, dated 5th May, 1971.

120. The Convicted Persons (Employment on Public Works) Act and Rules, Cap.9:03.

121. Interview, London, 1st August, 1987. He begged not to be named.

122. See Rex v Simon, 1923-60, A.L.R., Mal., 194; Regina v Watson s/o Soda and Jason s/o Mbenga 1961-1963 A.L.R., Mal., 94; and Regina v Gillian 1961-1963 A.L.R. Mal., 129. All these cases were concerned with offences of not performing public work satisfactorily.

123. Non-Custodial and Semi-Custodial Penalties Op Cit., paras.32-34, pp.12-13.

124. The Sentence of the Court, London, HMSO, 1990, para.7.6, p.45.

125. G.H.Boehringer, "Aspects of Penal Policy in Africa with Special Reference to Tanzania", [1971] J.A.L, Vol.15, No.2, p.201.

126. The Sun [of England], 9th. August, 1989, p.3.

127. Cap.134.

128. Interview, Lusaka, 17th December, 1985.

129. Cap.134.

130. Cap.146.

131. C.F.Dombek and M.W.Chitra, "Intermittent Sentences in Canada - The Law and its Problems", Canadian Journal of Criminology, Jan., 1984, Vol.12, No.1, p.44.

132. Criminal Procedure and Evidence Act, Cap.59, S.321.

133. C.F.Dombek and M.W.Chitra Op.Cit., p.44.

134. Non-Custodial and Semi-Custodial Penalties Op.Cit., para.151, p.15.

135. Ibid.

136. Ibid., para 151, p.15

137. C.F.Dombek and M.W.Chitra Op.Cit,. p.45.

138. P.Primrose, "Periodic Detention: A Critical Examination", Aust. & N.Z. Journal of Criminology, Sept., 1973, para.2.2, p.150.

139. K.B.Jebson, "Work Release: A Case for Intermittent Custody", The Criminal Law Quarterly, Vol.10, 1967-68, p.333.

140. P.Primrose Op.Cit., p.151.

141. Ibid.

142. Aust. & N.Z. Journal of Criminology, Dec. 1970, Vol.3. See article "The Current Comment", p.238. The name of the author does not appear. Presumably it is written by the editor(s).

143. Roads and Road Traffic Act, Cap. 766, S.198(1).

144. Roads and Road Traffic (Amnd.) Act, 1971, No.13 of 1971.

145. For example, in Musonda v The People (1972) Z.R. 274 and Lambwe v The People (1976) Z.R. 48.

146. (1973) Z.R. 286.

147. Interview with Mr Shamuzumba, Officer in Charge of Lusaka Central Prison, Lusaka, 17th Jan., 1986, and Mr Chidaunkwa, Officer in Charge of Livingstone Prison, Livingstone, 29th Jan., 1986.

148. Interview with Mr Kapema, Lusaka, 1981.

149. Interview, Livingstone, 31st January, 1986. He begged not to reveal his name.

150. Criminal Procedure and Evidence Act, Cap.59, S.231(2)(b).

151. C.F.Dombek and M.W.Chitra Op.Cit., p.50.

152. Ibid., p.51.

153. Ibid., p.52.

154. Ibid.

155. Criminal Procedure and Evidence Act, Cap.59, see 4th Schedule to the Act. The Schedule refers to S.91 of the Roads and Road Traffic Act, Cap.36.

156. Ibid. See 4th Schedule. The Schedule refers to S.231 of the Maintenance Act, Cap.35.

157. Criminal Law Amendment Act S.C., 1972, Cap.13, S.58(c).

158. Non-Custodial and Semi-Custodial Penalties Op.Cit., Appendix D., para.6, p.89.

159. Cap.80, S.7.

160. Criminal Procedure (Amnd) Ordinance, 1959, No.16 of 1959 S.2

161. Extracts from the Administrative Conference of Provincial Commissioners and Heads of the Social Service Department sitting between 8th-12th September, 1947. SEC 1/1186.

162. Ibid.

163. Ibid.

164. Note for Executive Council, dated 25th September, 1947. SEC 1/1181 SEC 1/1181 Vol.1.

165. Ibid.

166. Ibid.

167. Ibid.

168. Extract from Minutes of the Meeting of the Executive Council sitting on 3rd January, 1948. SEC 1/1286.

169. He was writing to his Registrar on some of the problems encountered in interpreting the Punishment Proclamation, 1915, S.3 dealing with binding overs. The minute is dated 22nd April, 1926. RC/632.

170. Extract from the Administrative Conference of Provincial Commissioners and Head of the Social Service Department sitting between 8th-12th. September, 1947. SEC 1/1186.

171. Extracts from Minutes of the Meeting of the Executive Council sitting on 3rd January, 1948. SEC 1/1286.

172. Northern Rhodesia Legislative Council Minutes, 1959, Vol.3, p.1122.

173. Ibid. The amending Ordinance was the Criminal Procedure Code (Amnd) Ordinance 1959, No.16 of 1959, S.2.

174. (1973) Z.R. 186.

175. Ibid., at p.187.

176. Ibid.

177. Criminal Procedure Code, Cap.160, S.16(1).

178. Ibid., S.16(2).

179. Ibid., S.16(3).

180. Ibid., see proviso.

181. The Magistrates' Handbook Op.Cit.

182. Judicial Circular No.2 of 1977, dated 22nd August, 1977.

183. Criminal Procedure Code, Cap.160, see Fifth Schedule.

184. [1969] 2 Q.B., p.29.

185. Ibid., at p.32.

186. (1977) Z.R. 234.

187. Ibid., at p.239.

188. R.Cross and A.Ashford, The English Sentencing System, 3rd.ed., London, Butterworths, 1981, p.57.

189. A.E.Bottoms, The Suspended Sentence after Ten Years: A Review and Assessment, University of Leeds Occasional Paper No.2, 1977, p.17.

190. 1968-1970, A.L.R. Mal., 199.

191. A good conduct condition was attached as well.

192. 1978 R.L.R., 196.

193. Also the other Zimbabwean case of The State v Katevera, 1979 Z.L.R., 12 in which a similar condition was attached to the suspended sentence of imprisonment.

194. See The People v Chishika (1970) Z.R. 181; and The People v Sikazwe (1979) Z.R. 285.

195. 1970 (1) R.L.R., 181.

196. Also see the Zimbabwean case of The A.G. v Matambo, 1982(2) Z.L.R. 165 in which the principle in the Jussab case was followed. An earlier prison sentence was revived.

197. Sixth U.N. Congress on the Prevention of Crime and Treatment of Offenders, New York, 1980, Resolution 8, "Alternatives to Imprisonment", p.45.

198. Interview with the Deputy Chief Justice, Ngulube J., Lusaka, 27th July, 1986.

199. Ibid. Also interview with Mrs Justice Florence Mumba, Lusaka, 12th July, 1986.

200. NACRO, Intermittent Custody, London, Cmnd.928, 1984, para.26, p.9.

201. E.Dell, "Suspended Justice", New Society, 13th January, 1972, p.8.

202. S.Saeed, "Suspended Sentences", Current Legal Problems, 1970, p.76.

Chapter 7.

Physical Penalties.

Introduction.

Unlike the developed Western jurisdictions, Zambia, along with many other developing countries, continues to retain the two physical penalties of capital and corporal punishments. This type of sentence engaged the close attention of the colonial administration in Northern Rhodesia. In those countries where these punishments have been subjects of public concern, debate has often been passionate centring on the question whether these punishments should be retained or abolished. Typically, and in contrast with developments in the central and southern African regions, including South Africa, they have not engaged the attention of post-independence governments of Zambia to the extent that they should have. However, as will be seen, official mood now seems to be turning against capital punishment; unfortunately, the same cannot be said about corporal punishment, attempts to abolish it appear to be half-hearted and attract little support.

I. Capital punishment.

Capital punishment was introduced by the colonial office in London, along with the rest of the received English law, in 1889 with the enactment of the Africa Order in Council 1889,[1] and appeared in the Penal Code in 1930.[2] In accordance with its English origin execution is by hanging.[3]

A. Offences carrying capital punishment.

There are four offences carrying the death sentence in Zambia: murder, treason, armed robbery and piracy. The last offence is not defined in the Zambian legislation, the law on it being that which is applicable in England.[4] However, even though Zambia has two large lakes, Tanganyika and Bangweulu, the offence of piracy is unheard of. In English criminal law the idea of piracy has no technical meaning and is understood only in the popular sense of plunder of property on the high seas.[5] For piracy with violence, the sentence is death.[6] Clearly, the sentence of death for this offence is inappropriate and should be abolished in Zambia.

The position of juveniles and pregnant women need to be mentioned here. It is forbidden to pronounce the sentence of death on a pregnant woman, instead she must be sentenced to life imprisonment.[7] Juveniles are detained at the President's pleasure.[8]

1. Murder

Since the imposition of colonial rule, the death sentence has always been the mandatory penalty for murder. However, significant amendments to the law were enacted in 1990. Death is no longer the mandatory sentence upon conviction for murder for the law provides for the possible recognition of "extenuating circumstances" which allow a court to impose any other sentence. An extenuating circumstance is defined as:-

> "(a) any fact associated with the offence which diminish morally the degree of the convicted person's guilt;

(b) in deciding whether or not there are any extenuating circumstances, the court shall consider the standard of behaviour of an ordinary person of a class of the community to which the convicted person belongs."[9]

If there are no extenuating circumstances, the punishment for murder is unchanged: the death sentence remains mandatory and the courts given no other discretion.[10]

The concept of "extenuating circumstances" was probably borrowed from Zimbabwe[11] and possibly South Africa where it is a well established idea in murder cases. There are no reported cases so far in which the Zambian courts have had occasion to define "extenuating circumstances". However, a law reform report on capital punishment in Zimbabwe referred to cases dealing with such circumstances and summarised the general judicial approach;[12] it refers to the moral blame worthiness of the offender,[13] an idea specifically mentioned in the new Zambian provision. It is a significant pointer to the future of capital punishment in Zambia that "extenuating circumstances" is the third special case in which the death sentence cannot be pronounced, apart from when the offender is a pregnant woman or a juvenile.

2. Treason.

Treason anywhere is an offence with unmistakable political overtones. Its English origins are based on a breach of allegiance to the sovereign[14] and death by hanging is the penalty.[15] Upon attainment of independence in 1964, the new nationalist government revised the law to relate to the changed republican circumstances of the country.[16] In the new provisions, introduced in 1965, the idea of treason focused on the stability of the state and government and included not only the unlawful attempted

overthrow of the legally constituted government[17] but also the change by force of laws and government policies,[18] attempts to secede from Zambia[19] and inciting persons to invade Zambia.[20] No amendments have been effected since 1965. Some of the provisions, like the one on forced change of laws and government policies, have a distinct anti-democratic flavour in the new multi-party politics of Zambia.

Since independence, there have been about 4 celebrated treason cases, the latest happening in 1980, and involving a group of prominent personalities. Unlike in cases of murder and armed robbery, none of the persons convicted of treason have been executed.[21] Because treason is essentially a political offence the death sentence is inappropriate in a democratic society except, perhaps, when the offence takes the form of an invasion of Zambia or assistance has been given to the enemy in time of war. Also, as no one has been executed for treason this is a good enough reason for abolishing it.

3. Armed robbery.

The first serious attempts to deal firmly with serious robberies were initiated in 1969 when a minimum prison sentence of fifteen years was provided for aggravated robbery.[22] Five years later, in 1974, a resolution of the National Council of the ruling United National Independence Party (UNIP) noted an alarming increase in violent crimes in the country, especially those involving armed robberies, and decided to provide capital punishment for armed robbery.[23] The law was amended accordingly. Capital punishment is, however, not peculiar to Zambia; Kenya has similar provisions

too.[24] Typically, it is found in jurisdictions run by military governments, like Nigeria.[25] The relevant Zambian provision reads as follows:-

> "the penalty for the felony of aggravated robbery...shall be death:-
>
> (a) where the offensive weapon or instrument is a firearm, unless the court is satisfied by the evidence in the case that the accused person was not armed with a firearm and
> (i) that he was not aware that any of the other persons involved was so armed; or
> (ii) that he disassociated himself from the offence immediately on becoming so aware;
> or;
> (b) where the offensive weapon or instrument is not a firearm and grievous bodily harm is done to any person in the course of the offence, unless the court is satisfied by the evidence in the case that the accused person neither contemplated nor could reasonably have contemplated that grievous harm might be inflicted in the course of the offence."[26]

Several points should be noted. The first is that the death sentence is to be imposed in cases involving the use of firearms, and secondly and more significantly, capital punishment is to be imposed in other cases not involving firearms where grievous bodily harm is caused. There is a presumption of maximum involvement on the part of the accused person who must show that he disassociated himself from the use of a firearm, and did not contemplate that such injury might be inflicted.[27] If the accused is unable to rebut the presumption of maximum involvement, the court is not given any latitude as to the sentence: the accused must be sentenced to death.

As expected, academic interest in these new provisions has been meagre,[28] and surprisingly, they have not attracted the degree of judicial attention expected,[29] particularly, the propriety of capital punishment for armed robbery. This silence can be contrasted with the condemnatory remarks of the Supreme Court with regard to the

propriety of corporal punishment in the modern Zambian society in Adam Berejena v The People[30] to which we shall return towards our treatment of corporal punishment. It is rather harsh for the legislature to create a presumption of guilt where the sentence involved is the death sentence. It appears that the first executions for armed robbery took place in 1978,[31] three years after the introduction of the death sentence for armed robbery.

B. The incidence of capital punishment.

Published annual reports recording the death sentences passed do not show the offences for which capital punishment was imposed. However, murder has always been the most commonly committed capital offence, followed by armed robbery and then treason. Table 23 shows the number of death sentences imposed in Zambia, the number of offenders who were executed and those whose death sentences were commuted. The Table covers the first seventeen years of independence from 1964 to 1982, inclusive.

Table 23

No. of Death Sentences Imposed, 1964-1982.

Year	(a) No. executed	(b) Commuted	(c) Total	(d) % of (a) over (c)
1964	7	35	42	16.66
1966	7	10	17	41.17
1968	8	10	18	44.44
1969	3	16	19	15.78
1970	3	Not shown	N/A	
1971	5	11	16	31.25
1972	7	6	13	53.84
1973	0	10	10	
1974	5	0	5	100.00

1975	6	3	9	66.66
1976	0	5	5	
1977	4	5	9	44.44
1978	5	1	6	83.33
1979	2	5	7	28.57
1980	0	2	2	
1981	4	not shown	4	
1982	0	not shown		
Total:	66	125	191	
Average:	3.88			

Source: 1964-1980, Prisons Department Annual Reports.
1981-1982, Annual Reports of the Judiciary and Magistracy.

Two points can be made about Table 23. The first is that the majority of death sentences have been commuted. Out of a total of 191 prisoners, 125 had their sentences commuted and only 66 were actually executed, or 34.45%. This is a welcome picture, but more encouraging is the fact that the numbers of people

sentenced to death has been falling. At independence in 1964, 42 people stood convicted of murder and sentenced to death. The death sentence was commuted in respect of 35 prisoner. Only seven were actually executed. Fifteen years later, in 1980, only two people stood convicted of capital offences, and none was executed. This is a very significant drop in the numbers. Yet the total numbers of people committing capital offences, especially murder, could not surely have been falling over this period, particularly in view of the introduction of the death sentence for armed robbery in 1974.

Two possible factors could account for the downward trend in the number of death sentences in Zambia. The first is that the kinds of murders committed have probably changed over the years. The earliest years of independence were marked by inter-party violence, mainly between the United National Independence Party (UNIP), the ruling party, and the opposition African National Congress, and later, another opposition party called the United Party. Politically motivated murders probably accounted for the large number of death sentences between 1964 (42) and 1969 (18). Secondly, there may have been fewer numbers of offenders who were convicted of murder. Poor police investigation may be one explanation for fewer convictions. But the more plausible explanation is that Judges have been more and more reluctant to convict because of the enormity of the sentence for murder. Whatever may be the true reason for the decreasing numbers of death sentences, assuming the reliability of the data, the trend is in the right direction.

C. The prerogative of mercy.

Although the need for the prerogative of mercy, exercised by the highest executive authority, is almost universal and is taken for granted,[32] arguments have been advanced against it. The most basic criticism is that it is an interference with the normal flow of the judicial process.[33] Another criticism is that when the death sentence is commuted, the denunciation which capital punishment represents is denuded.[34]

The constitutional basis for the prerogative of mercy provides:-

> "The President may:-
> (a) grant to any person convicted of any offence a pardon, either free or subject to lawful conditions;
> (b) grant to any person a respite, either indefinite or for a specified period, of the execution of any punishment imposed on that person for any offence;
> (c) substitute a less severe form of sentence for any punishment imposed on any person for any offence; and
> (d) remit the whole or part of any punishment imposed on any person for any offence....."[35]

The prerogative power applies generally to all offences and punishments; the death sentence is not mentioned specifically but when the President commutes it he does so under paragraph (c).

To assist the President in his task, he receives advice from a special Advisory Committee on the Prerogative of Mercy. The Constitution provides:-

> "(1) There shall be an advisory committee on the prerogative of mercy which shall consist of such persons as may be appointed by the President.
> (2) The President may appoint different persons to the advisory committee for the purposes of advising him in relation to persons convicted by courts-martial and for purposes of advising him in relation to persons convicted by other courts.

(3) A member of the advisory committee shall hold office at the pleasure of the President.
(4) Where any person has been sentenced to death for any offence the President shall cause the question of the exercise in relation to that person of the powers conferred by Article 59 [immediately above] to be considered at a meeting of the advisory committee.
(5) Subject to the provisions of clause (4), the President may refer to the advisory committee any questions as to the exercise of the powers conferred upon him by Article 59.
(6) The President, if present, shall preside at any meeting of the advisory committee.
(7) The President may determine the procedure of the advisory committee."[36]

The activity of this committee and even its members is cloaked in secrecy. However, an informant said that it consists of senior cabinet ministers, although he was prepared to identify only two, namely, the Minister of Legal Affairs and the Minister of Home Affairs.[37] Unlike in Zambia, in Kenya, the Constitution is more specific about who may sit on the committee: the Attorney-General,[38] and a group of up to five members who must include at least one cabinet minister[39] and one doctor.[40] This is a more desirable arrangement because it indicates more clearly than in the Zambian provision the type of persons the legislature had in mind as members of the advisory committee: mature, sober and responsible individuals. That the advisory committee is composed of senior cabinet ministers is to be commended, but it is not enough. In poor developing countries, where political loyalty tends to count more than competence or honesty, it is unsafe to leave critical advice on a matter of life and death entirely in the hands of politicians. It is therefore suggested that the advisory committee should include non-politicians such as academicians and criminologists. Similar advisory committees are established in some other Commonwealth countries, requiring the membership of at least the Attorney-General.[41]

The Ministry of Legal Affairs is the ministry which services the advisory committee. Petitions for clemency from the condemned men and their lawyers are received and processed by this Ministry[42] but officials must independently and additionally gather relevant background facts and information about the individual prisoner. Letters are written to the relevant District Secretaries in the home District from where the prisoner comes. The District Secretaries then locate the prisoner's family, relatives, friends and acquaintances so that they can provide detailed background facts and information. Where the prisoner is not a citizen of Zambia, his background must still be obtained by writing to the relevant embassy in Zambia, if any, or direct to his home government.[43] All this requires much time to complete, especially if the prisoner is not a citizen of Zambia. Delays can take up to 12 months.[44]

The docket of the case is composed of not only facts and information on the individual prisoner, but also the record of his trial. This is a statutory requirement. The court is required to send a copy of the case record, together with its recommendations on the question of confirmation or commutation, to the President.[45] Such recommendations are sometimes made openly by the trial judge. In The People v Esta Mwiimbe[46] the accused was convicted of murdering her own husband by pouring boiling oil on his body. There were children of the marriage, some of whom gave evidence for the prosecution. In the body of the judgement itself, Sakala J. urged the President to show mercy.

The power to commute death sentences remains entirely within the President's discretion; no guidelines of any kind are provided either in the Constitution itself or in any other legislation. It is inconceivable that the President does not in fact have some guidelines to assist him in his difficult and lonely task, but the contents thereof

remain unpublished and unknown. However, in 1937, the Chief Secretary, at the request of the Governor, wrote a personal letter to his counterpart in Tanganyika. In it, he asked for guidelines on the subject of confirmations of death sentences in Tanganyika.[47] The guidelines arrived marked "Confidential Circular No. 1 of 1936." and headed "Consideration of Death Sentences by the Governor in Council." The bulk of the contents of this circular consists of extracts from a book entitled The Home Office written by Sir Edward Troup, a former Permanent under-secretary in the British Home Office. In it, the basic approach to confirmations and commutations of death sentences is outlined, and specific examples given. The guidelines said in part:-

> "It would be neither desirable nor possible to lay down hard and fast rules as to the exercise of the prerogative of mercy. Numerous considerations the motive the degree of premeditation or deliberation, the amount of provocation, the state of mind of the prisoner, his physical condition, his character and antecedents, the recommendation or absence of recommendation from the jury, and many others have to be taken into account in every case; and the decision depends on a full view of a complex combination of circumstances, and very often on the careful balancing of conflicting considerations. As Sir William Harcourt said...'it is a question of policy and judgement in each case and in my opinion a capital execution which in its circumstances creates horror and compassion for the culprit rather than a sense of indignation at his crime is a great evil'"[48]

What this circular says can be summed up by saying that the President must be alive to every factor in the individual case when he is considering confirmations and commutations of death sentences. This is a reasonable and fair approach. It is to be hoped that these guidelines continue to be in use today.

Apart from the composition of the Advisory Council another worrying aspect of the operation of the committee is that it meets infrequently, when there are a sufficient number of cases to warrant a meeting.[49] While this arrangement is administratively

convenient to the committee this may not be fair on the condemned prisoners because of the element of comparison between the cases; the committee may be too harsh on what are judged to be "very bad" cases. Worse, perhaps, infrequent meetings cause delays, which may have significant constitutional implications for the legality of carrying out the death sentence as will be argued later.

Because it is virtually impossible for a researcher to discover how the advisory committee on the prerogative of mercy, or the President actually approaches the question of commutation of death sentences generally, a brief exploration of the colonial approach to confirmations and commutations may be instructive.

D. Problems in the imposition of capital punishment during the colonial period.

It appears that comparatively more people were executed during the colonial period than after independence in 1964. Table 24 shows the number of prisoners executed in Northern Rhodesia over a period of fifteen years between 1929 and 1943, inclusive. Unfortunately, the number of commutations is not shown because the available source had no figures on commutations.

Table 24

The Incidence of Capital Punishment in Northern Rhodesia, 1939-1943.

Year	No. Executed
1929	3
1930	3
1931	3
1932	5
1933	2
1934	3
1935	7
1936	6
1937	6
1938	4

1939	6
1940	6
1941	5
1942	9
1943	4
Total:	72
Average:	4.80

Source: 1929-1938, Northern Rhodesia Colonial Reports.
1939-1943, Returns of Death Sentences from Governor to Secretary of State in London. BS 3/102.

Table 24 shows that the average number of executions over this five year period was 4.80. But Table 23 shows that in the period following independence, the figure was only 3.88. This figure covering the colonial period should be put in context and its significance appreciated. The population then was small, estimated between 1,280,000 in 1929 and 1,630,000 in 1943,[50] but the average number of executions was higher (4.80). A larger number of executions during the colonial period would not be entirely unexpected because the prisoners, invariably Africans, were a colonised people. The relatively large number of executions did not, however, mean that the colonial administration paid insufficient attention to humanitarian concerns. Indeed the few

cases available clearly suggest that the colonial administration in Northern Rhodesia was not insensitive as might be feared. When considering commutations the colonial administration faced two types of problems: procedural and substantive.

In Rex v Ngobora (1919)[51] a delay of only three months after sentence of death was passed was considered weighty enough to raise humanitarian issues and to make the officer exercising the prerogative of mercy, namely, the High Commissioner in South Africa, decide against the execution of the prisoner and commute the death sentence. Upon receipt of the papers from the Administrator of Northern Rhodesia the High Commissioner wrote back and said:-

> "Between the trial and the execution of Ngobora, an interval of three months will have lapsed. This delay is in my opinion serious; and while delay appears in part to be due to distance, it is also partly due to the manner in which the case has been submitted to me."[52]

The prisoner's death sentence was commuted to life imprisonment.[53] It has been shown how long it takes to prepare dockets of condemned prisoners who petition for clemency in Zambia. On its own, a delay, as such, should not be a reason for commuting the sentence of death; but where there has been a particularly long delay and one which has been caused by the executive itself, this should be a good and sufficient reason for commuting the sentence. The lesson for the President of Zambia from the Ngobora case above is that petitions for clemency should be processed as quickly as possible to minimise the duration of the anguish endured by condemned prisoners and that in principle, undue delays should be a good and sufficient reason for commuting the death sentence. In Rex v Katota (1919)[54] the death sentence was confirmed and the prisoner had to be walked for six weeks from Kasama in the north

of the territory to Livingstone in the south to be executed. In his despatch to the Administrator of Northern Rhodesia the High Commissioner in South Africa, the confirming authority, referred to the six weeks "delay".[55]

Regarding substantive problems which faced colonial officials relating to the exercise of the prerogative of mercy, their views on murders arising from allegations and suspicions of witchcraft have already been noted in chapter 2; they took an understanding view of such murders. It would be surprising if President Chiluba, reputed to be a "born again" Christian, ignored the significance of witchcraft and the supernatural in murder cases and refused to commute the death sentences. Against the background of the Tanganyika guidelines, commutations would be justified on the ground that the motive for the murders was understandable in an African society.

In those cases where either the guilt of the prisoner was in doubt or a critical aspect of the case was unresolved, understandably, the colonial administration appeared to agonise over such cases. In Rex v Newman (1917)[56] the accused had drunk some beer but was not intoxicated at the time he committed the murder. The death sentence was commuted to twenty years imprisonment. In Rex v Milambo (1918)[57] the accused had murdered his wife but no motive could be found. The prisoner was executed.[58] However, in the similar case of Rex v Kakole[59] the death sentence was commuted to life imprisonment.

The case of Rex v Muroshya (1918)[60] was a particularly difficult one because the guilt of the prisoner was thought to be in doubt yet he was convicted of murder. In convicting him, the court relied on the eye witness account of three women. In his report to the High Commissioner, Judge MacDonell said that after reading through the evidence several times he was doubtful whether the evidence of the three eye

witnesses could be believed. He advised against the execution of the prisoner, but he was also doubtful over the propriety of continuing to hold him in prison at all. He summarised his predicament in the following words:-

> "I am aware that I am laying myself open to the same objection that was brought against the Secretary of State for his treatment of the Oscar Slater case: if you are so doubtful as to commute the sentence, then your doubt goes to the correctness of the conviction and the prisoner should be released."[61]

In his own report to the High Commissioner, the Administrator described the case as being of "unusual difficulty".[62] He doubted the propriety of continuing to hold the prisoner in prison at all if his guilt was in doubt. But against the advice of the Judge and that of the Administrator, the High Commissioner did not release him from prison. Instead, he merely commuted the death sentence to life imprisonment.[63] If the President of Zambia was faced with case like the Muroshya case, where the guilt of the prisoner was in doubt, justice would demand that he should be pardoned. Merely commuting the death sentence would leave a lingering injustice. In all the cases in which serious doubt is entertained, whether over the guilt of the offender or merely some aspect of the case, the tone in the Tanganyika guidelines appears to call for clemency rather than confirmation of the death sentence.

E. Arguments for and against capital punishment.

Arguments over the retention or abolition of the death sentence have been presented in academic and professional literature in Western jurisdictions for a very long period of time. Serious debate continues in America, where capital punishment is still available in the states. The advantages and disadvantages of the death penalty are

well know. Here, they will merely be summarised. As expected, there has been a complete absence of any considered or persistent arguments for or against the death sentence in Zambia; the discernible predominant public mood has been one of indifference.

1. Arguments in favour of capital punishment.

The strongest and most persistent argument in favour of the retention of the death sentence is and has always been that it is not just a strong deterrent, but is a unique deterrent. The Royal Commission on the Death Penalty in Britain noted that:-

> "Supporters of capital punishment commonly mention that it has a uniquely deterrent force, which no other form of punishment has or could have."[64]

The point about capital punishment being a unique deterrent is supported by two limbs. First, there is the common-sense argument which is closely associated with Sir James Fitzgerald Stephens. He is quoted as having observed that the whole human experience has shown that the death penalty is the supreme deterrent.[65] But supporting capital punishment on the basis of human experience has rightly been attacked by Fattah at least with respect to murders. He makes several points. His basic point is that too much is made of the factor of fear in capital punishment.[66] He points to the "impulsive character of many murders"[67] and cites authors who point to the many murders committed when the offender is in a quarrel, or under duress. He also cites other authors who point out that many murders are committed within family relationships, or between acquaintances[68] But Fattah's real point is that the murderer does not really have the opportunity to contemplate the legal and other consequences

of his actions.[69] He makes a further but related point about the inherent inefficatiousness of deterrence in capital punishment. Fattah says that the actual execution of condemned prisoners is a much rarer event than is commonly imagined and that this makes the death sentence much less of a deterrent.[70]

Arguments about the inherent ineffectiveness of the deterrence of capital punishment are also valid in the Zambian situation. No data is available on the motives of murderers, for example. However, in the writer's experience at the Zambian bar, the single most common factor in homicide cases in Zambia is alcohol. This is particularly so when the killing is committed in the shanty compounds in the urban areas, and within the village scene in the rural areas. When the rainy season is over, around March, and harvesting is ended, around May, there comes a period of rest before the next planting season begins. Much beer is brewed and consumed during this period in the year and fights and killings take place. In the shanty compounds homicides tend to be committed between acquaintances. In the villages, homicides tend to be committed within the family circle especially between spouses. Except in robberies, the murder of a complete stranger is rare in Zambia. It must therefore be concluded that the underlying assumptions behind the common-sense argument in support of the deterrent effect of the death penalty appears to be shaky.

The second limb on which deterrence in capital punishment is based rests on statistical evidence. But the statistical evidence gathered in America is inconclusive.[71] No empirical studies have been carried out in Zambia about the deterrent efficacy of the death sentence or any other penal measure. Measuring the efficacy of penal measures is one of the most intractable problems in penology. Harding and Koffman note, for example, that:-

> "Measurement of 'effectiveness' is particularly problematic due to the fact that sentences reflect a variety of aims and functions."[72]

In view of the inherent nature of the difficulties in measuring deterrence it would be surprising if research on Zambian society showed that capital punishment is a unique deterrent.

A second argument in support of capital punishment is a religious one. For example, in the Book of Genesis, it says:-

> "Man was made by God, so whoever murders a man will himself be killed by his fellow-man."[73]

The significance of religion in support of the death penalty should not be underestimated. Unlike in Western society, Christianity is still new to Zambian society. Biblical text is still a source of respect and inspiration. Besides, fundamentalism appears to be on the increase in Zambia, President Chiluba himself being reputed to be a self confessed "born again" Christian, as has already been indicated above.

It has also been argued that as compared to the death sentence, a long prison term is inhuman[74] and increases administrative costs.[75] Furthermore, it helps to protect the police who have to investigate murderers and prison officers who hold them in prison. The argument here is that if capital punishment is abolished or is not re-introduced, police and prison officers are exposed to greater risks of being killed. None of these arguments are very convincing, particularly in the Zambian context where the murder of police or prison officers is rare.

2. Arguments against the death sentence.

Arguments against the retention or the re-introduction of the death penalty are more weighty. The strongest and most persistent one is that the sentence of death is fundamentally immoral. Wootton says:-

> "Fundamentally, my personal objection to capital punishment is moral. To deprive another human being of life, is, in my opinion, an inherently immoral action."[76]

Capital punishment rejects the notion of sanctity of life and is therefore immoral.[77] Occasionally, some Zambians have also been concerned with the moral aspects of the death penalty, describing it as "immoral"[78]

Secondly, it has been argued that the death penalty discriminates against the poor and ethnic minorities.[79] But this is not a peculiarity of the death sentence. Discrimination covers many aspects of life in any society and extends to the law and law enforcement and the penalties available to the courts in any jurisdiction, be it in America, Zambia or anywhere else. Thirdly, it has been pointed out that the possibility of a mistaken conviction makes the sentence of death a particularly undesirable form of punishment. In England, one of the most recent cases in which the consequences of mistake could have led the prisoners to hang was in the so called "Guildford Four." Conlon, Richardson, Armstrong and Hill were convicted of terrorist murder and sentenced to life imprisonment. The gist of the evidence against them were confessions which were later found to have been fabrications. If the death penalty had been available in England, the "Guildford Four" might have been executed. But again, the possibility of mistake is not peculiar to the death sentence. The danger of punishing an

innocent person extends to all offences in any jurisdiction, whether he is convicted of a capital offence or not. However, the death penalty poses a unique problem because once the sentence has been carried out the mistake cannot be corrected. In poor developing countries like Zambia the possibility of mistake is greater because of the general lack of resources in the criminal justice system and the country generally and, in particular, on account of the infancy of the Zambian bar and the inadequate training of the judiciary as has been indicated in chapter 4.

A more substantial argument in support of the abolition of capital punishment is that it has a brutalising effect upon the general population. It is said that sometimes the offender feels pushed into killing potential witnesses in an effort to eliminate potential evidence.[80] Sometimes, the brutalising of society takes the form of arousing the darker instincts of human nature.[81] Some other persons might feel suicidal; instead of committing suicide they may commit violent acts against other people.[82] These particular reactions to the death sentence and executions remain unexplored in the Zambian society. But the idea of state ordered killing of a fellow human being is likely to promote and not suppress brutal human instincts in any society.

One of the strongest arguments against the retention of the death sentence in Zambia is a historical and cultural one. It has been shown how in traditional communities capital punishment was largely confined to cases involving witchcraft (Chapter 2). In homicides not involving witchcraft, the normal penalty was compensation. Sometimes, relatives of the offender were given to the relatives of the deceased as a form of compensation. Capital punishment as such, and for murder, treason and armed robbery, is therefore out of accord with the cultural norms of the people in Zambia. Surprisingly, President Kaunda, in his philosophy of Zambian

Humanism, was silent on the whole question of capital punishment. If he strongly believed in traditional African culture, on which Zambian Humanism is based, he should have moved Parliament to abolish it.

F. Possible illegality of the death sentence.

Although legislation permits courts to impose capital punishment for murder, treason and armed robbery, the imposition of the death sentence may be unconstitutional, it being too severe in three distinct but related aspects: first, the sentence of death is disproportionate to the offences of murder, treason and armed robbery, secondly, the pain of capital punishment is torture, and thirdly, where there is a delay in the execution of prisoners it has resulted in torture. Two constitutional provisions raise serious doubt about the legality of capital punishment. The first deals with the fundamental right to life:-

> "No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under the law in force in Zambia of which he has been convicted."[83]

The second deals with the prohibition against harsh punishment or treatment:-

> "No person shall be subjected to torture or to inhuman or degrading punishment or other treatment."[84]

1. Disproportionality of capital punishment to murder, treason and armed robbery.

Nwabueze, who was once Dean of the School of Law of the University of Zambia, considers the constitutionality of capital punishment under the last civilian

Constitution of Nigeria. The fundamental right to life, and the freedom from inhuman or degrading punishment under the Nigerian Constitution are very similar to the guarantees in the Zambian Constitution. Therefore, his views may be relevant to the question of the constitutionality of capital punishment in Zambia. First of all, he makes the very important general point that the right to life and the freedom from inhuman or degrading punishment are both concerned with preserving the dignity of the individual as a human being.[85] He then asks two key but related questions:-

> "is it constitutionally permissible for the state to prescribe death for any criminal offence that it likes? And is death a permissible punishment at all for any criminal offence?"[86] (Emphasis supplied).

Nwabueze provides four yardsticks by which to measure the constitutionality of a law permitting the courts to impose the death sentence. But first, he outlines the governing principle in all cases concerning the constitutionality of not only capital punishment but all the other punishments available to the courts. He says:-

> "the general principle is that a punishment that denies a person status as a human being or which degrades his personality as a human being is inhuman. All other principles are derived from this basic one."[87]

Indeed, this can only be a general principle because it can rightly be said that every court appearance, let alone punishment, subtracts something from the dignity of the human person. The first yardstick is whether the punishment can properly be described as barbarous, like death by burning or through crucifixion, or one involving very great mental suffering or pain.[88] The second test is whether the punishment is excessive:-

> "in the sense of being, by its length or severity, disproportionate or unnecessarily harsh in relation to the offence for which it is prescribed."[89]

The same test of disproportinality is pronounced in the Zimbabwe Supreme Court case of Ncube and Others v The State[90] a case about the constitutionality of corporal punishment. Reading the unanimous decision of the court, and referring to the Zimbabwe constitutional provision about protection from inhuman or degrading punishment, Gubbay J.A. said:-

> "But section 15(1) is not confined to punishments which are in their nature inhuman or degrading. It also extends to punishments which are grossly disproportionate'; those which are inhuman or degrading in their disproportionality to the seriousness of the offence, in that no one could possibly have thought that the particular offence would have attracted such a penalty-the punishment being so excessive as to shock or outrage contemporary standards of decency."[91]

Nwabueze cites an American case in which the defendant was sentenced to fifteen years imprisonment and, inter alia, loss of certain civil rights for the offence of falsifying documents, as an example of an excessive sentence.[92] Another example covers cases in which punishment is provided for conditions in which no punishment should be provided at all, like being punished for suffering from a sexually transmitted disease.[93] Thirdly, Nwabueze says:-

> "a punishment may be regarded as not comporting with human dignity if it is unacceptable to contemporary society."[94]

Although this is presented as a set of circumstances in which human dignity can be said to be violated, and therefore unconstitutional, in fact, it is no more than a test of whether the punishment in question is disproportionate to the offence committed. Lastly, Nwabueze says that a sentence may be said to violate human dignity if the law is applied selectively against particular groups of people in society.[95] All these tests are valid and useful tests by which to measure the constitutionality or otherwise of a

particular form of punishment. Out of the four tests the clearest is the one about disproportionality of the punishment to the offence. It should now be considered whether the death sentence for murder, treason and armed robbery respectively can be said to be excessive.

a. Murder.

The crime of murder is committed if the accused causes death with malice aforethought:-

> "Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:
> (a) an intention to cause the death of or to do grievous bodily harm to any person, whether such person is the person killed or not;
> (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
> (c) an intention to commit a felony;
> (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."[96]

Paragraph (a) refers to express malice. Where the killing is done with express malice, one can ague with some justification, that capital punishment is not excessive. Paragraphs (b) to (d) refer to forms of constructive malice. The question to be asked is whether where a person has committed murder with constructive malice, the death sentence is or is not disproportionate. It would appear that where the malice is constructive capital punishment is disproportionate to the murder. It cannot surely be right that, for example, the offender should suffer death because he was reckless as to

what he was doing (para.(b)) or that the "felony" (para.(c)) (widely defined, see chapter 5) committed, however minor, should result in the imposition of the death sentence. In either case, it can rightly be complained that the capital punishment was disproportionate because "it is unnecessarily harsh", or "no one could have thought that the particular offence [or set of circumstances] would have attracted such a penalty.." It would therefore appear that providing capital punishment where malice is constructive is unconstitutional and therefore illegal.

b. Treason.

The relevant provisions on treason read as follows:-

"A person is guilty of treason and shall be liable to suffer death who:-
(a) prepares or endeavours to overthrow by unlawful means the Government as by law established; or
(b) prepares or endeavours to procure by force any alteration of the law or policies of the Government; or
(c) prepares or endeavours to procure by force the setting up of an independent state in any part of Zambia or the secession of any part of Zambia from the Republic; or
(d) prepares or endeavours to carry out by force any enterprise which usurps the executive power of the State in any matter of both a public and general nature; or
(e) incites or assists any person to invade Zambia with armed force or unlawfully to submit any part of Zambia to attack by land, water or air, to assist in preparation of any such invasion or attack; or
(f) in time of war and with intent to give assistance to the enemy, does any act which is likely to give such assistance."[97]

Reference has already been made to the offence of treason. It was pointed out that it is essentially a political offence and incompatible with the new multi-party democracy in Zambia. Therefore providing capital punishment for treason is "unnecessarily harsh" and "no one could have thought that the particular offence

would have attracted such a penalty..", the exception being where the treason consists of an invasion of Zambia or assisting the enemy in time of war. The very fact that no one has ever been executed since independence clearly suggests that capital punishment for treason is probably regarded by the President as disproportionate to the offence.

c. Armed robbery.

As has already seen above, the offence of armed robbery is composed of two strands. There is armed robbery when a firearm is used; and armed robbery when any other weapon or instrument is employed. The use of a firearm or employing any other type of weapon cannot justify the imposition of the death sentence; it is too severe. Providing for capital punishment for any offence not involving a death is therefore difficult to justify. It diminishes human dignity needlessly. It cannot easily pass the test of proportionality and would almost certainly be unconstitutional. Of the three offences of murder, treason and armed robbery, then, the constitutionality of the death sentence can be supported only in respect of murder when express malice is involved and in no other case. However, capital punishment for murder can also be condemned on the ground that it involves too much anguish which amounts to inhuman punishment or treatment.

2. The inherent cruelty of capital punishment.

In the well-know U.S. Supreme Court case Furman v Georgia[98] the defendant was an Afro-American. He and two fellow Afro-Americans were convicted of murder and sentenced to death. It was held that capital punishment in Georgia was unconstitutional because it was applied selectively against blacks and other disadvantaged minorities. In the course of the judgement the court dealt with what has become known as the "death row phenomenon". Brennan J. observed:-

> "Death is....an unusually severe punishment, unusual in its pain, in its finality and in its enormity. No other existing punishment is comparable to death in terms of the physical and mental suffering."[99]

All this is certainly true. The writer glimpsed the mental anguish suffered by persons in the condemned section of Kabwe Maximum Security Prison, in Kabwe, where all the executions in Zambia are carried out.

Certain days of the week are set aside for particular types of prisoners to lodge their complaints with the reception officers in the reception office. Unlike other prisoners, those under sentence of death frequently disregard the rules relating to complaints procedures. They stood too close to the officers and were far too assertive. More significantly, while talking to officers, their language was laced with too frequent references to the fact that "No one lives forever; we are all going to die."[100] The anxiety was unmistakable. Tuesdays are the worst days; these are the days when confirmations of death sentences are normally communicated to those whose appeals for clemency have been rejected. Shortly after lock-up time at 17 hours and as prisoners are in their cells, officers come, call out the names of those who have lost

their appeals for clemency and lead them to the Officer-in-Charge where they are told of the President's decision. Mr Lungu, whose death sentence was commuted to life imprisonment, said that at such moments he could not find the words to describe the mood in the condemned section and the anguish felt by all prisoners.[101] Those due to be executed spend two nights in a specially secluded part of the prison. On the night before the morning of the execution, normally Thursdays, they sing hymns throughout the night as priests come and go.[102]

Like in England, execution is by hanging.[103] There are several well-known methods of execution adopted in various jurisdictions around the world, the United States perhaps having the widest variety: electrocution, death by lethal injection and asphyxiation by lethal gas.[104] Each of these various methods of execution has its advantages and disadvantages, the test being whether the methods meets the three tests of "humanity", "certainty" and "decency".[105] Compared with electrocution, lethal injection, death by asphyxiation or shooting, there is something indecent about hanging because, by its very nature, the body of the prisoner hangs in the pit and left to dangle for over thirty minutes before it is hauled up for certification of death by a doctor.[106] Besides, it is not always as bloodless as may be supposed. In some cases it appears that the acute anxiety induced by the imminence of the drop, as the prisoner stands on the flaps, makes him stick out his tongue and, as he is dropped, cuts his tongue producing blood.[107] Death by hanging may be much more inhuman than some of the methods of execution, like shooting.

3. Delays in executions.

In recent years, the constitutionality of capital punishment has successfully been attacked when there has been a delay in the execution of condemned prisoners. The argument is that delays add needlessly to the "deathrow phenomenon" and that this amounts to "inhuman...punishment or treatment". This is a different argument from the one about the constitutionality of capital punishment as such. Two cases, one from Zimbabwe and the other a Privy Council case from Jamaica, deal with delay; in both cases the court's decision was unanimous. What makes these cases particularly relevant to Zambia is that the human rights provisions prohibiting "inhuman...punishment or treatment" are exactly the same as in Zimbabwe and Jamaica.

a. Delays in Zimbabwe and Jamaica.

In Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General, Zimbabwe, and Others[108] four prisoners, two of whom were jointly charged, were due to be executed for murder when the applicant, a human rights organisation, intervened and petitioned the Supreme Court. While not challenging the constitutionality of the death sentence as such, the applicants complained that by the time the prisoners were due for execution, there was going to be a long delay and the resulting anguish suffered by the prisoners amounted to "inhuman or degrading punishment or treatment", which is prohibited under the Zimbabwe Constitution. In the case of one prisoner the delay was 52 months and the rest was 72 months between the date on

which the sentence of death was passed and the date set for execution. The government explained saying that there was a period when the government was considering abolishing capital punishment and that during this period considerations of all mercy applications were suspended.

Gubbay C.J., reading the judgement of the court, referred to the physical and mental torture suffered by prisoners on death row at the hands of prison officers and their pain and anguish. Every prisoner was locked up for at least 21 hours and 40 minutes everyday in a small cell with tiny windows and an electric light that was never switched off day and night; at night they were made to sleep naked; communication with ordinary prisoners was forbidden and periodic family visits were restricted to only ten minutes. The gallows were so close to the death row that the sounds of execution could be heard. After a lengthy survey of judicial views and academic literature on the death row phenomenon in the United States of America, India and elsewhere, the court proceeded to survey the judicial attitude to delays and the anguish suffered by prisoners on death row in some Commonwealth jurisdictions, the United States, Zimbabwe, including The European Court of Human Rights and the United Nations Human Rights Committee. After accepting that the four prisoners suffered anguish as a result of the delay, the court held that in calculating the period of delay, the relevant period is between the pronouncement of the death sentence by the trial court and the date set for execution.

The court proceeded to ask itself the following question:-

> "Accepting that fear, despair and mental torment are the inevitable concomitant of sentences of death, the question is whether the delay of 52 months and 72 months, with which this Court is concerned, go beyond what is constitutionally permissible."[109]

After noting that the average period of delay in Zimbabwe over a period of 11 years was 17.2 months, the court then said:-

> "Making all reasonable allowances for the time necessary for appeal and the consideration of reprieve, these delays are inordinate. As such they create a serious obstacle in the dispensation and administration of justice.... It is my earnest belief that the sensitivities of fair-minded Zimbabweans would be much disturbed, if not shocked, by the unduly long lapse of time during which these four condemned prisoners have suffered the agony and torment of the inexorably approaching death while in demeaning conditions of confinement."[110]

The application was allowed, the death sentence was set aside and in its place the court imposed life imprisonment. Finally, the government was urged to speed up all appeals and considerations of clemency petitions.

Shortly after the Catholic Commission for Peace and Justice in Zimbabwe case, the Privy Council was faced with the problem of delay in Pratt and another v Attorney General for Jamaica and Another.[111] In this case the appellants were convicted of murder and sentenced to death. Here, the delay was caused largely by the failure of the Jamaican Court of Appeal to give reasons for dismissing the appeal; the delay was for 45 months. Also, the Jamaican Privy Council, which was responsible for advising the Governor-General on the exercise of the prerogative of mercy, delayed doing so for 18 months. Petitions to the Inter-American Commission on Human Rights and the United Nations Human Rights Committee were further factors causing the delay. In all 12 years had elapsed between the imposition of the death sentence and the application to the Supreme Court for Jamaica for a declaration that the delay was so long that it amounted to "inhuman...punishment or other treatment."

After noting that death sentences in England are carried out expeditiously, within weeks or months, after sentence is passed, Lord Griffiths explained why this should be so:-

> "There is an instinctive revulsion against the prospect of hanging a man after he has been held under sentence of death for many years. What gives rise to this instinctive revulsion? The answer can only be our humanity: we regard it as inhuman act to keep a man facing the agony of execution over a long extended period of time.[112]

Because delays can be caused by the state as well as the prisoner, typically when pursuing appeals or lodging petitions, apportionment of blame must be addressed in all cases. On this important point, the Privy Council said that:-

> "before their Lordships condemn the act of execution as 'inhuman or degrading punishment or treatment' within the meaning of s...there are a number of factors that have to be balanced in weighing the delay. If delay is entirely due to the fault of the accused such as an escape from custody or frivolous and time wasting resort to legal procedures which amount to an abuse of process the accused cannot be allowed to take advantage of that delay for to do so would permit the accused to use illegitimate means to escape the punishment inflicted upon him in the interests of protecting society against crime."[113]

The Privy Council found that the appellants did not pursue frivolous procedures and that the delay was not their fault. Offering general guidance to the Jamaican authorities, the court said that if delay is more than five years, it must be assumed that the delay is unjustifiable and that the prisoner is suffering "inhuman or degrading punishment or treatment;" appeals should be heard within 12 months and the whole process of appeals, petitions for clemency and the decision should take 2 years to complete.

b. Delays in Zambia.

As has already been shown, the colonial administration was concerned with delays in capital cases. Unfortunately, it appears that this issue has never been raised in the courts neither has there been any academic interest in it. Reference has already been made to the "death row phenomenon" in Kabwe Maximum Security Prison where executions are carried out. Here, it will suffice to add that prisoners sleep in very small single cells with very small windows, although they are allowed outside their cells for long periods of time during the day to relax, and prison officers did no appear to be unduly harsh. Although request to see the execution chamber was refused, it is located in the same area as the condemned section of the prison, close to the main prison gate. Even though sounds coming from the chamber cannot probably be heard by prisoners on death row, the knowledge that the chamber is not far away should be unsettling to them. As expected, some have nightmares and want to change cells hoping for luck.[114] In 1967, for example, a condemned prisoner committed suicide,[115] presumably, as a direct result of the mental pressure of being on death row.

There is no published data or information on time scales between conviction and execution or commutation of death sentences. Unfortunately, the relevant registers on condemned prisoners at Kabwe Maximum Security Prison are not well kept; consequently, it has been possible to extract only very few items. Table 25 shows 9 cases in which prisoners were executed, covering a period of 9 years from 1971 and 1978, inclusive. The number of cases covered, however, may be misleading because the first two prisoners (9th March, 1971) were probably jointly charged as were the

three convicted on 20th October, 1975.[116] The Table shows periods between conviction and execution in months and days.

Table 25

Time Lapse Between Conviction and Execution, 1971-1978.

Date of Conviction	Date of Execution	Time Lapse
09.03.71	01.08.72	17ms 06dys
09.03.71	01.08.72	17ms 06dys
14.03.73	31.11.75	44ms 18dys
15.03.73	31.11.75	44ms 17dys
20.10.75	14.07.78	32ms 24dys
20.10.75	14.07.78	32ms 24dys
20.10.75	14.07.78	32ms 24dys
28.11.75	31.08.84	72ms 03dys
26.07.78	30.03.84	60ms 04dys
Average:		39.35ms

Source: Capital Register, Kabwe Maximum Security Prison.

Table 25 shows that a period of 17 months and 6 days had elapsed between conviction and execution in respect of the first two prisoners. With regard to the next two prisoners the period lengthened to 44 months and 18 days and 44 months and 17 days, respectively. After a fall covering the next three prisoners convicted on 20th October, 1975, the time lapse covering the last two prisoners widened again to 72 months and 3 days and 60 months and 4 days, respectively. The average time lapse between conviction and execution is 39.35 months.

The Table reveals a general upward trend in the periods between conviction and execution but the factors which caused the time lapses in the individual cases are not known. Using the time scale suggested in the Pratt case, 60 months, it can be assumed that the 72 months and 3 days, and the 60 months and 4 days time lapses in respect of the last two prisoners were unreasonable and therefore constituted delay amounting to "inhuman... punishment or treatment." and that the two prisoners should not have been executed but sentenced to lesser punishments.

The judiciary, the advisory committee on the prerogative of mercy and the President should be advised to be alive to the need to speed up all capital cases. In this regard, one practice, which has already been referred to, can be improved upon: the practice of waiting for an accumulation of cases before considering them should be stopped; every case should be considered as soon as it comes up. Evidence of this practice is to be found in the fact that executions tend to be carried out in batches. For example, in 1984, 6 prisoners were executed on the same day,[117] as were another 6 the following year, in 1985[118]

4. Capital punishment should be abolished.

Although the constitutionality of capital punishment has not been tested in the Zambian courts, academic literature and the tide of judicial opinion cited above would make it difficult for the Zambian courts to resist declaring capital punishment unconstitutional. Moreover, the new government is already seriously thinking of abolishing it. To this end, the matter has been submitted to the Law Development Commission for its considered opinion.[119] Perhaps more significantly, the new President, Mr Chiluba, has not signed any execution warrants since coming to power three years ago in 1991.[120]

The total abolition of the death sentence in Zambia would be in line with current trends throughout the world, America[121] and China being the most noticeable exceptions.[122] Much more recently, June, 1995, in South Africa, the Constitutional Court has held capital punishment unconstitutional for being a cruel, inhuman and degrading punishment in The State v Themba Makwanyane and Movusu Mchunu.[123] In a 1989 publication about the death sentence in the world, Amnesty International showed that more and more countries are turning away from this form of punishment. Cambodia, a third world country, was the latest.[124] Even in Sub-Saharan Africa some jurisdictions are turning away from capital punishment. For example, the death sentence has been abolished for ordinary crimes in the Seychelles.[125] In some other African jurisdictions, the abolition has not been de jure, but de facto. Six African countries are listed as having abolished the death penalty de facto: Ivory Coast, Djibuoti, Madagascar, Niger, Senegal and Togo.[126] Unfortunately, no English-

speaking African country is on the list as having abolished capital punishment either de jure or de facto.

II. Corporal punishment.

A. Pertinent questions about corporal punishment.

While both capital punishment and corporal punishment raise the same basic question of retention or abolition, the latter raises particular questions about its use in the penal system of Zambia: how it was introduced into the colonial criminal justice system and whether it should be retained given the fact that arguments over its abolition or retention are not as passionately held as capital punishment.

As with the death penalty, corporal punishment raises the question of constitutionality, especially in the light of recent authoritative decisions in neighbouring states. It will be recalled that the Constitution of Zambia forbids "inhuman or degrading punishment..."[127] Corporal punishment may not strictly be inhuman, but may be degrading. Like the death penalty, it diminishes human dignity but perhaps, in a more subtle way, to a greater degree than the sentence of death. First, it contains an element of ridicule which is not associated with capital punishment. Secondly, because he remains alive the culprit must continue to endure the ridicule and loss of dignity. But in death sentences, if the prisoner is actually executed, ridicule and diminution of human dignity end with his execution. Thirdly, in an age-respecting African society, the impact of corporal punishment when inflicted on adults may have a greater psychological impact than in European society, particularly

if the offender has a wife and children. The reason for this is that African society tends to accord greater deference to authority generally and older people are a great source of authority. If a man with a wife and children is caned, in the eyes of his wife and children, the loss of face is therefore greater. The possible unconstitutionality of corporal punishment has never been raised in Zambia, either in academic or professional literature or in the courts. But as will be seen later in the chapter, some neighbouring African jurisdictions have considered the question and come to very interesting conclusions.

B. Legislative provisions.

The basic legislative approach to corporal punishment is very welcome; it appears that Parliament is anxious that this sentence is not abused by the courts, because the very first provision states:-

> "No Person shall be sentenced to undergo corporal punishment for any offence except as provided in subsections (2),(3),(4) and (5)."[128] (Emphasis supplied)

Furthermore, the judiciary approaches this sentence with a little more caution than even the legislature.

C. Offences attracting corporal punishment.

1. Burglary, housebreaking and theft.

Courts may impose corporal punishment on an accused convicted of burglary, housebreaking or theft;[129] but only if the commission of any one of these offences is done in:-

> "circumstances where it is expedient in the interests of the community to order caning,..."[130]

Unlike with some other forms of sentence discussed in Chapters 5 and 6, legislation appears to give sufficient guidance to the sentencer as to when a caning order can be made. A close reading of the guide reveals that courts are permitted to order caning in offences which are as prevalent in the community as they are distressing to the victim. In the Court of Appeal case of Alakazamu v The People[131] the appellant was convicted of entry and theft and sentenced to a two year prison term, plus four strokes of the cane. He had a bad criminal record. It was noted that it was for this reason and the fact that he was a prohibited immigrant to Zambia that the caning order was made. The Court of Appeal said that the caning order was made on wrong principles, and proceeded to consider the meaning of the above provision. The court said that it referred to circumstances:-

> "Where the offence is so prevalent that the other forms of punishment have ceased to have a sufficient deterrent effect on members of the community."[132]

or where there were "exceptional outbreaks of crime."[133] It is difficult to escape the underlying legislative feeling here. One detects anger and rage against people who commit burglary etc.

2. Scheduled offences.

Corporal punishment may also be imposed when the offender is convicted of a scheduled offence. The list consists of a wide range of serious crimes against the person, from rape and related offences to assaults and robbery.[134] The offences can be broken down into two broad categories. One category is composed of crimes involving sexual morality, and the other is composed of crimes of violence against the person and/or property. But one factor runs through both categories. This is that all the scheduled crimes arouse much moral outrage and/or fear in the community. Providing corporal punishment for such kinds of offences reveals instinctive legislative anger, and possibly a wish for revenge as well against persons who commit sexual offences and offences involving violence to the person or property. Three cases appear to confirm the true legislative intentions. In all of them, the courts have said that corporal punishment may be ordered if the commission of the offence is accompanied by brutality; mere brutishness is not enough.

In the very first reported case of Rex v Kasengele Sondashi[135] the accused was convicted of two counts of defilement of two girls. He was given eighteen months imprisonment. In addition to the custodial sentence, the trial court imposed three lashes in respect of each count. In his review judgement, Cox C.J., made pertinent

comments about when the courts can make caning orders. With specific reference to sexual offences, he said:-

> "Generally speaking,...lashes are appropriate only as punishment for extreme brutality...'Brutality' is not to be confused with 'brutishness'. If a man treated small girls as the accused was alleged to have treated these children, his conduct would be brutish, but it would not be brutal unless he had severely injured them, taking his pleasure at the cost of gross injuries to their bodies."[136]

Rex v Subulwa[137] was another defilement case decided in the same year in which similar remarks were made. Of particular interest here is the fact that although the legislature empowers the courts to make caning orders in sexual offences, the courts do not appear to be too keen to do so. This is a welcome stance to take. The courts insist that there must be evidence of brutality; mere brutishness being insufficient. A more recent post-independence case is that of Nsondo v The People.[138] The offence was indecent assault, Subulwa was cited, and the element of brutality as opposed to mere brutishness was emphasised.

D. How courts make use of corporal punishment.

Table 26 shows the number of adults and juveniles sentenced to corporal punishment in Zambia over a period of sixteen years from 1964 to 1980, inclusive.

Table 26.

Sentences of Corporal Punishment Imposed by the Courts of Zambia, 1964-1980.

Year	Adults	Juveniles
1964	110	1,241
1966	92	1,251
1967	44	1,389
1968	116	1,451
1969	27	1,261
1970	64	1,609
1971	15	1,959
1972	212	1,840
1973	284	1,946
1974	318	1,712

1975	356	2,070
1976	271	2,098
1977	270	2,338
1978	281	2,120
1979	334	2,146
1980	269	1,662
Total:	3,063	28,093

Source: Annual Reports of the Prisons Department.

Table 26 shows that many more juveniles (28,093) were caned than adults (3,063), a ratio of 1 adult to 9.17 juveniles. Pronouncements on the undesirability of caning adults (below) appears to have been heeded by magistrates. The figures might suggest that more juveniles than adults commit crimes that attract corporal punishment, but this does not appear to be the case because in Zambia, going by records of convictions, juvenile crime has always been much less than that committed by adults.

It is not enough to know the numbers of offenders who are caned. It is equally important to know more precisely their ages, the number of strokes commonly

imposed and the ranges of strokes. Data in Table 27 is taken from Kansenshi Prison on the Copperbelt, the industrial and commercial hub of the country, and shows the number of offenders who were actually caned, their ages, the average number of strokes actually inflicted and their range. Published annual reports of the prisons service give no such data. The Table covers a period from 10th October 1980, to 17th May 1986, a period of just under five years from the first and last entry in the corporal punishment book available for inspection.

Table 27.

Corporal Punishment: Kansenshi Prison, Oct. 1980-May 1986.

Ages of offenders, No. of Offenders, Average No.of Strokes and Range.

No. of Offenders	Age	Average No. of Strokes and range.
2	11	4.50 (3 and 6)
4	12	4.00 (3-6)
8	13	5.00 (3-6)
12	14	5.00 (3-8)
24	15	5.62 (2-12)
47	16	5.85 (3-10)
38	17	6.15 (6-8)
22	18	7.09 (6-12)
5	19	7.00 (4-12)

1	20	6.00
1	21	4.00
1	24	8.00
Total:	165	68.21
Average:		5.68

Source: Punishment Register, Kansenshi Prison, Ndola.

Like Table 26 above, Table 27 shows that far more juveniles (under the age of nineteen) were caned than adults (8) (5+1+1+1). Secondly, corporal punishment was most commonly imposed on juveniles aged between 15 and 18 years, inclusive (a total of 131). These are the ages when delinquency is normally at its height. It will also be noticed that the largest average number of strokes was ordered against roughly this same age range. For those aged 15 years, the average number of strokes was 5.62, and the range of strokes was between 2 and 12. For those aged 18, the average number of strokes was 7.09, and the range was between 6 and 12.

E. Corporal punishment during the colonial period: breach of master and servant contracts.

Although corporal punishment, sometimes in the form of mutilation and its incidence probably exaggerated, was one of the established punishments in traditional African society, it appears that its prominent place in the modern penal justice system of Zambia was assured largely because it was one of the most visible instruments of a colonial strategy to oppress indigenous Africans regarded as inferior. In his circular of 1915 to the judiciary, Judge Beaufort outlined the advantages of corporal punishment thus:-

> "It affords every latitude between light correction and severity, it punishes only the offender, it is not costly and it prevents contamination of prison habitues."[139]

These continue to be the advantages of corporal punishment up to the present time. But at the same time and more significantly, in the same circular, the Judge noted that it:-

> "serves and bears a kind of testimony to the personal power and superiority of the official who administers it."[140]

Here, the criminalisation of breaches of what were in England normal civil labour contracts is chosen to highlight the significance of corporal punishment in colonial Zambia. Typical labour offences against servants were desertion, abstention from work[141] or misusing money advanced to employee.[142] An attempt will then be made to draw some lessons from this colonial experience.

It was acknowledged that normally, relations between master and servant are of a civil and not a criminal nature. In his despatch to the Deputy Administrator of Northern Rhodesia over the question of labour laws, the Administrator of the British South Africa Company in Southern Rhodesia acknowledged that:-

> "most of the offences committed under master and servant legislation are really of a civil nature amounting to breaches of contract...."[143]

Yet corporal punishment was felt suitable against Africans because, as the Assistant Legal Officer remarked to the Secretary of the British South Africa Company:-

> "After all, natives [Africans] are in many cases very like children and should, within reason, be treated as such and I am a great believer (from personal experience) in the maxim 'spare the rod spoil the child'".[144]

Despite reservations about the suitability of this form of punishment in master and servant legislation, the courts made frequent use of it, for the High Commissioner in South Africa was concerned enough to write the Administrator that after studying "whipping returns" from Northern Rhodesia:-

> "I should be glad to have the benefit of your observations on the increase in the number of cases of corporal punishment under master and servant law."[145]

Later the Administrator wrote the Acting Legal Adviser expressing his anxiety about public opinion even in England:-

> "I have come to the conclusion that there would be considerable difficulty in defending to the High Commissioner or indeed to public opinion in England, the constant recourse to corporal punishment in some of the districts notably (Ft. Jameson [now called Chipata]) in regard to what may be called 'labour offences'."[146]

Frequent resort to corporal punishment in breaches of master and servant legislation was all the more telling because the legislation itself, while providing for fines and/or imprisonment, made no specific provision for corporal punishment. A general punishment Proclamation provided that persons guilty of offences attracting a term exceeding three months could, instead, be sentenced to corporal punishment.[147] It was by such a circuitous route that the courts imposed corporal punishment.

The courts made much greater use of corporal punishment as a court sentence, using a whip as well as the "cat",[148] not only in master and servant cases but for a variety of other offences as well; examples were property offences, especially larceny, arson, escape from custody, and even rogue and vagabond[149] none of which are associated with physical violence. By 1924, the Colonial Office was so concerned that a despatch was sent to the Governor:-

> "The number of cases of flogging in Northern Rhodesia is unduly high as compared with figures given in returns from other African dependencies."[150]

But it appears that the courts in the territory did not take sufficient notice of the advice of the Colonial Office. Table 28 shows the number of sentences of corporal punishment imposed by the courts in Northern Rhodesia over a period of five years from 1933 to 1937, inclusive.

Table 28.

Sentences of Corporal Punishment Imposed, 1933-1937.

Year	Adults	Juveniles	Total
1933	40	148	188
1934	32	107	139
1935	52	222	274
1936	123	176	299
1937	102	114	206
Total:	349	767	1,116

Source: These figures were provided by an official whose name or designation is illegible, in an internal minute to "A.S", on file no.JUS/D/1/1 dated 21st February, 1939. SEC 1/1170.

Set against the total number of persons caned in Table 26, the numbers in Table 28 are small. But it should be realised that the African population in the 1930s was significantly smaller, estimated at 1,310,000 in 1930, and 1,480,000 in 1939,[151] than in 1963, just before independence (1964), when the figure was 3,406,900.[152] The number of adults and juveniles caned in Table 28 is still large.

Following the publication of a committee report on corporal punishment in the United Kingdom in 1938, popularly known as the Cadogan Committee Report, in which it was recommended that corporal punishment as a sentence of the court should be abolished,[153] Colonial Secretary MacDonald sent out a circular to all officers administering colonial dependencies, including the Governor of Northern Rhodesia. He informed them that the United Kingdom Government had accepted the recommendation of this report and enclosed a copy of the report. MacDonald then asked officers administering dependencies to consider enacting legislation abolishing this form of punishment in the territories under their jurisdictions. In urging the abolition of corporal punishment, MacDonald cited the Bushe Report on East Africa in which the idea of caning adult offenders was emphatically discouraged.[154] The Bushe Report concluded that:-

> "We are unable to subscribe to the view that caning should be made legal as a punishment for adults, whether generally or for natives only, for any but the most serious crimes. Such form of punishment must be damaging to self respect, particularly to those Africans who have advanced to a certain stage of civilisation, and may even tend to brutalise its victims. Any extension of the use of corporal punishment we consider a retrograde step which we must oppose."[155]

Kenya responded cautiously;[156] but Zanzibar was less cautious and reaffirmed its belief in the deterrent efficacy of corporal punishment both against adults and juveniles.[157] In Northern Rhodesia, the immediate response was to establish a special committee of officers to consider the proposal from the Colonial Office, composed of the Acting Chief Justice, three officials, three unofficial members and six members of the Legislative Council.[158] As in Kenya, this committee reacted with caution and recommended the government to:-

> "abolish as an aim but after adequate alternative sanctions have been provided."[159]

If the colonial administration in Northern Rhodesia had accepted and implemented the policy of minimal use of corporal punishment as a sentence of the court, perhaps both Parliament and the courts of an independent Zambia might have followed the example set by the departing colonial administration. The reason is that corporal punishment is associated with colonialism and subjugation, as has already been pointed out.

F. Who may be caned.

Along with many other jurisdictions around the world, the caning of females is forbidden.[160] While assuming that males may be caned, special mention is made of juveniles:-

> "Where any person under the age of twenty-one years is convicted of any offence punishable by imprisonment for a term of or exceeding three months, a court may, in its discretion, order him to be caned in addition to or in substitution for such imprisonment."[161]

The legislature appears to encourage the courts to make maximum use of this sentence against juvenile offenders; a similar guideline is not made when offenders are adults. Courts appear to endorse the minimal use of this sentence against adults. In all the three cases cited above, the courts have said that corporal punishment is unsuitable in cases involving adults. For example, in Kasengele Sondashi, Cox C.J. said:-

> "Generally speaking, a canning is appropriate only for juveniles, and lashes are appropriate only as punishment for extreme brutality by adults."[162]

In the later post-independence case of A.Banda v The People[163] the appellant was convicted of attempted rape and sentenced to eight strokes of the cane on top of a custodial sentence. Finding no evidence of brutality in the case, the Supreme Court made the same remarks about avoiding caning adult offenders which were made by Cox C.J. above.[164]

It may be noticed that the remarks of Cox C.J. in Kasengele Sondashi did not state why caning adults is not to be encouraged. The Bushe Report makes it clear that caning adult offenders damages self respect. The time has now come to abolish the corporal punishment of adult offenders completely in Zambia.

With regard to the appropriateness of making corporal punishment orders against juvenile offenders, at least one penal aim lies behind this sentence. As is clearly contemplated in the special provision about caning juveniles, the aim is to divert them from prison rather than making corporal punishment as additional penalty. It should be noted that, when used as a substitute for a prison term, corporal punishment is to be used in place of middle range offences carrying short prison terms of up to three months. In Rex v Sabenzu[165] the accused was an eighteen year old juvenile convicted of rape. On top of a prison term, he was sentenced to 12 strokes of the cane. On review, the conviction was quashed but the court observed that the combination of the two types of sentences had been too severe in this case and that imprisonment would have been enough. Regarding the appropriateness of corporal punishment, the court observed that caning:-

> "Would have been to the point only if the magistrate had imposed it in order to avoid sending this youth to prison."[166]

This is a 1946 pre-independence case. It is to be regretted that similar judicial views on corporal punishment and juvenile offenders have not been heard in post-independence Zambia. If the courts were more alive to the need to divert juvenile offenders from prison, perhaps more could have been done to ensure that no juvenile who is to be caned passes the prison gates and spends a night in prison. Unfortunately some juveniles do spend nights in prison before they are caned. Table 29 shows the number of juvenile offenders who were in prison awaiting corporal punishment and the periods of detention (in days) in two prisons: Kabwe Medium Security Prison and Mazabuka District Prison. There were a total of 511 juveniles in Kabwe Medium Prison, between 3rd February, 1982 and 27th March, 1986 and 188 juveniles in Mazabuka District Prison between 10th October, 1978, and 16th July, 1983, inclusive. Records containing earlier entries in Kabwe Medium Security Prison and later entries in Mazabuka District Prison were not immediately available.

Table 29.

No. of Juveniles in Prison Awaiting Corporal Punishment.

(a) Kabwe Medium Security Prison 3rd March, 1982-27th Oct., 1986.

	No. of Juveniles	No.of Nights in Prison	Percentage.
	5	0	0.97%
	174	1	34.05%
	251	2 or 3	49.11%
	81	More than 3	15.85%
Total	511		99.98%

(b) Mazabuka District Prison, 10th Oct., 1978-16th July, 1983.

	34	0	18.03%
	60	1	31.91%
	65	2 or 3	34.57%
	29	More than 3	15.42%
Total:	188		99.98%

Source: Punishment Registers of Kabwe Medium Security Prison and Mazabuka District Prison.

Table 29 clearly shows that only a small percentage of juveniles sent to prison to be caned did not spend a night inside prison walls. In Kabwe Medium Security Prison only 5 out of 511, or just under 1%, did not spend a night in this prison while in Mazabuka District Prison the figure stood at 34 out of a total of 188, or 18.03%. The rest had to spend at least one night inside the prison walls. In Kabwe, the highest figure was in respect of juveniles who spent 2 or 3 nights in prison; the figure stood at 251, or 49.11% out of the total number of 511 juvenile offenders. As in Kabwe prison, the highest figure in Mazabuka was in respect of those who spent 2 or three nights, the figure standing at 65 out of a total number of 188, or 43.57%. What all this means is that for a majority of juveniles who are to be caned, at least in the Kabwe area and Mazabuka area, they spent at least one night inside prison walls, thereby defeating the whole purpose of corporal punishment in cases involving juveniles. It should be appreciated that for young persons, spending a night in prison is bound to be a traumatic experience, even for those who have been in prison before. Two factors make it difficult to avoid holding juvenile offenders in custody for caning.

As elsewhere, every person to be caned must first be certified as medically fit to undergo the sentence.[167] But unfortunately, it is not always possible to medically examine every offender on the day the sentence of corporal punishment is passed because of the shortage of doctors in the country.[168] The problem is a technical one because the examination must be done only by doctors.[169] Yet all that is looked for are sores on the offenders' buttocks and blood pressure.[170] If this is so, the examination of offenders can surely be carried out by medical assistants who are more numerous than doctors and the clinics they mann are found wherever there is a magistrate's court throughout Zambia. Doctors need not be involved in every case.

The law requiring doctors, as opposed to medical assistants and any others, to examine offenders to be caned should be amended to allow medical assistants to do the examination. Then the medical examination can be done on the day the caning order is made so that the offender is caned the same day.

The second factor which makes it difficult for juvenile offenders to avoid having to spend a night in prison is the practice of caning all offenders inside the prison walls. There is no statutory provision which requires that corporal punishment for non-prison offences should be carried out within prison walls. Caning is done inside prison only because it is convenient. There is no reason, for example, why juvenile offenders cannot be caned at police stations. There are historical precedents to support the use of police stations. In 1949, the Governor, in the corporal punishment return for that year, informed the Secretary of State that the corporal punishment of juvenile offenders in Northern Rhodesia was carried out at police stations or in the offices of District Commissioners.[171]

G. Other legislative aspects of corporal punishment.

The rest of the provisions on corporal punishment are couched in the same regulatory and restrictive tone. Courts are required to state the number of strokes when the accused is sentenced to corporal punishment.[172] If the offender is under the age of nineteen, the maximum number of strokes is twelve;[173] but if he is older, the maximum is twenty four.[174] The number of strokes, 12 and 24, is too high, making an intrinsically brutal punishment even more brutal.

The type of cane to be used must be approved by the minister.[175] If possible every caning should be carried out in the presence of a doctor,[176] although he is rarely present in practice.[177] But if the number of strokes exceeds twelve, he must be present.[178] It is forbidden to carry out corporal punishment in instalments.[179] To avoid this, it is also provided that if there are two or more sentences of corporal punishment against the same offender at one sitting, the sentences must be carried out at the same time and not at different times.[180]

H. The infliction of corporal punishment.

In Zambia, the instrument used in the infliction of corporal punishment is a cane taken from one particular plant which grows mainly in the North Western Province of Zambia.[181] Each prison keeps three canes of different sizes.[182] At Mazabuka prison, for example, the largest cane was 93 cm. long (3.02 feet) and about 2 cm. (0.78 inches) thick at its widest; the second cane was 83 cm. (2.69 feet) long, and 1.5 cm. (0.58 inches) thick; and the third cane was 66 cm. (2.14 feet) long, and 0.5 cm. (0.19 inches) thick. The biggest cane is used on adults; the smallest for juveniles; and the middle-sized one is a spare cane.[183] But they are all heavy enough to cause much pain to any person, young or adult. Unfortunately, no prison officer knew whether the canes were of the type approved by the Minister,[184] nor does the writer. However, under prison legislation, the type of cane to be used when prison offences are committed is described; it must be a rattan cane, three feet (100 cm.) long, and three-eighth of an inch (0.95 cm.) thick if the offender is under nineteen years old;[185] when the offender is older, the rattan cane should be four feet long (121.9 cm.), and half an

inch (0.95 cm.) thick.[186] These are large sizes. Perhaps these are the sizes of canes which have been approved by the minister when corporal punishment is ordered by the court. But there is no provision under the prison legislation for three canes. When the offender is a juvenile, the potential for abuse is obvious.

The Penal Code does not specify the details of how caning is to be carried out under court sentences.[187] However, the Prisons Rules specify how corporal punishment is to be imposed on a prisoner sentenced to caning after conviction of a prison offence:-

> "(i) a blanket or similar form of protection shall be placed across the small of the prisoner's back above the buttocks;
> (ii) a small square of thin calico shall be dipped in water, wrung out and tied over the prisoner's buttocks;
> (iii) strokes shall be administered from one side upon the buttocks of the prisoner and on no account on the back."[188]

It was confirmed by a Reception Officer at Livingstone Prison that although caning for prison offences has now fallen into disuse, this is how caning as a punishment for court sentences is actually carried out in practice.[189]

Although these provisions do not make it clear, in practice, the offender is stripped before a blanket is placed on his buttocks. There can be no doubt that the whole procedure is extremely demeaning, stripping away from the person much of his human dignity.

Actual caning is not confined to one prison officer. There is a select group of officers from whom one is chosen to cane on any one particular occasion.[190] In such an arrangement, the severity of the blows in even one prison is bound to be uneven. Besides, nothing is said in the legislation about the thickness of the blanket that is to be

placed on the offender's buttocks. The writer saw the blanket used in Livingstone Prison; it was worn and noticeably thin. On one occasion when a caning was in progress, screams could be heard from the caning room several meters away in the Reception Office.[191]

I. Abolition.

It has been argued that corporal punishment is a brutal and degrading punishment, particularly when imposed on adults; but the punishment is rarely imposed on them in practice. The one significant advantage of keeping juveniles away from entering prison is not realised in practice as the majority of them spend not less than two nights before they are caned. Corporal punishment should be abolished in Zambia. Land-mark judgements from Botswana, Zimbabwe and Namibia suggest that corporal punishment might be unconstitutional as well.

J. Corporal punishment judgements in Botswana, Zimbabwe, Namibia and South Africa.

1. Corporal punishment in Botswana and Zimbabwe.

a. The State v Petrus and Another.

The State v Petrus and Another[192] from Botswana is one of the earliest cases to question the constitutionality of corporal punishment in the Southern Africa region. In

this case, Parliament had amended the law to provide that where an offender is sentenced to a prison term and corporal punishment, the infliction of corporal punishment was to be repeated and delayed, at the beginning of the prison term and towards the end. The respondents were convicted of housebreaking and theft and sentenced to prison terms and corporal punishment was to be inflicted at the beginning of their prison terms and towards the end, as required by the new legislation.

Instead of attacking the constitutionality of corporal punishment as such, the complaint was that providing for repeated and delayed infliction of corporal punishment was an inhuman and degrading punishment, contrary to the Constitution of Botswana forbidding inhuman or degrading punishment or treatment. In a unanimous decision, the Court of Appeal, after pointing out that relevant legislation in South Africa, West African and Central African jurisdictions, including Zambia, did not provide for delayed and repeated infliction of corporal punishment held, per Maisels, P., that:-

> "Because of the factors of repetition and delay it [corporal punishment] is inhuman and degrading."[193]

The legislation was declared null and void.

In Zimbabwe two Supreme Court cases of 1988 and 1989 were truly ground-breaking.

b. Ncube and Others v The State.

Ncube and Others v The State[194] from Zimbabwe was concerned with the constitutionality of corporal punishment of adult offenders. Ncube and two other adult

appellants were convicted of the rape of young girls in separate trials. As well as custodial sentences, each appellant was sentenced to six strokes of the cane. In the Supreme Court, it was contended that under the Constitution of Zimbabwe, a sentence of corporal punishment was unconstitutional as an inhuman or degrading punishment or treatment. As in Zambia, the Constitution of Zimbabwe provides, in section 15(1):-

> "no person shall be subjected to torture or to inhuman or degrading punishment or other such treatment."[195]

The novelty of the challenge was fully acknowledged by the court at the beginning of the judgement.[196] In arriving at its decision, the Supreme Court first of all made a comprehensive review of corporal punishment legislation, literature and decided cases, not only in Zimbabwe but in Commonwealth jurisdictions outside Africa as well.

Reviewing the law of corporal punishment in Zimbabwe, the court noted that legislation provided for this sentence for certain common law offences.[197] In addition, six statutes permitted the imposition of this sentence. But it was noted that since independence in 1980, corporal punishment has been deleted from certain legislation in Zimbabwe.[198] The Supreme Court then proceeded to list nine important principles which have been established by the courts in Zimbabwe over the years. In effect, they all called for the restricted use of this sentence and not its expansion. For example, courts should not impose corporal punishment on adult first offenders except where the circumstances of the case were serious.[199] It was observed that there had been too few cases in which the "nature of the punishment itself" has been considered by the courts.[200] The court then turned to the position in South Africa. It was noted with

surprise that although there are no guaranteed fundamental rights under the South African Constitution,:-

> "the judges have been outspoken in their condemnation of it as a brutal form of punishment."[201]

Since this form of sentence was applied almost exclusively against Africans, the views of a white South African judiciary were even more remarkable.

Turning to the position in the United Kingdom, the Supreme Court cited the recommendations of two well-known committees on corporal punishment: the Cadogan Report,[202] and the Barry Report.[203] In both reports corporal punishment was condemned as brutal and degrading. The positions in Canada,[204] Australia,[205] and America[206] were also reviewed.

After reviewing court decisions and comments and other material condemning this form of sentence in Zimbabwe and elsewhere, the Supreme Court then turned to the procedures leading to the execution of this sentence and the actual whipping of offenders. The relevant provisions were virtually the same as those found under the prison legislation of Zambia: the court noted that the offender was actually stripped naked and then tied down to a bench before being whipped.[207]

Interpreting the relevant constitutional provision, Gubbay J.A. said:-

> "On its face section 15(1) is aimed primarily at the quality or nature of punishment. Certain types of punishment are acknowledged to be inherently inhuman and degrading. Those involving the rack, the thumb screw, the pillory, burning alive or at the stake, prolonged periods of solitary confinement and starvation, fall unquestionably into this category."[208]

It was also pointed out that section 15 (1) of the Constitution of Zimbabwe referred to sentences which were "grossly disproportionate" to the seriousness of the

crime committed.[209] It was admitted that in considering whether corporal punishment per se was inhuman or degrading, the court resorted to value judgements.[210] Gubbay J.A. continued:-

> "I am firmly of the opinion, reached, I must confess, with little hesitation, that the whipping each appellant was ordered to receive breaches section 15(1) of the Constitution of Zimbabwe as constituting a punishment which is by its very nature both inhuman and degrading."[211]

The appeal against the order of corporal punished was quashed. The grounds upon which this decision was reached are that current views of both academicians and jurists are against corporal punishment: this form of sentence has been abolished in many jurisdictions; where corporal punishment is not unconstitutional, the courts have restricted it to the most serious cases; and the decreasing use of corporal punishment in Zimbabwe.[212] But greater emphasis was placed on other grounds, four in number:-

> "1. The manner in which it is administered, as I have described it, is somewhat reminiscent of flogging at the post, a barbaric occurrence particularly prevalent a century or so past. It is a punishment not only inherently brutal and cruel, for its infliction is attended by acute pain and much physical suffering, but one which strips the recipient of all dignity and self respect. It is relentless in its severity and is contrary to the traditional humanity practised by almost the whole of the civilised world, being incompatible with the evolving standards of decency.
> 2. By its very nature it treats members of the human race as non-humans. Irrespective of the offence he has committed, the vilest criminal remains a human being possessed of common human dignity. Whipping does not accord him human status.
> 3. No matter the extent of regulatory safeguards, it is a procedure easily subject to abuse in the hands of a sadistic and unscrupulous prison officer who is called upon to administer it.
> 4. It is degrading to both the punished and the punisher alike. It causes the executioner, and through him society, to stoop to the level of the criminal. It is likely to generate hatred against the prison regime in particular and the system of justice in general."[213]

The significance of this decision regarding the constitutionality of corporal punishment in Zimbabwe should not be lost. First, it was a unanimous decision of the Supreme Court. Secondly, the decision was reached after a thorough review of the relevant academic literature and the decisions of courts in Zimbabwe and outside Zimbabwe. Thirdly, it was emphatic in its condemnation of corporal punishment. Perhaps more significantly for Zambia, the reasons given for this decision are of equal relevance to the situation in Zambia. Therefore, the Zambian courts should accord maximum weight to Ncube and Others. However, one notices an unusually high degree of enthusiasm and emotion in the judgement. This may be a well understood over-reaction to the fact that Zimbabwe experienced a particularly brutal colonial regime because of the need to protect entrenched white settler interests in that territory. But this does not take away the significance of the judgement regarding the abhorrence of corporal punishment in Zimbabwe as well as in Zambia.

It should be pointed out that the judiciary in Zambia have not been completely silent over the suitability of corporal punishment in the country. In Adam Berejena v The People[214] the appellant was convicted of car theft, given a custodial sentence and ordered to be caned. On appeal the Supreme Court quashed the sentence of corporal punishment, holding that it was wrong in principle because there was no evidence that the commission of the offence had been accompanied by brutality. The supreme Court seized the opportunity to voice its concerns about the suitability of this type of punishment. Reading the judgement of the court, Silungwe C.J. said:-

> "As corporal punishment is a form of inhuman or degrading punishment, it is our considered view that it should be imposed very sparingly;...We think that in this modern day and age, this form of punishment should be discouraged in Zambia."[215]

It will be noticed that no doubts were raised over the possible unconstitutionality of corporal punishment in Zambia. It is to be hoped that counsel will soon raise it at the earliest opportunity.

c. A Juvenile v The State.

A Juvenile v The State [216] is the second case from Zimbabwe which deals with the constitutionality of corporal punishment. In this case, the appellant was not an adult but a juvenile. The question for decision here was whether corporal punishment is constitutional when applied to juveniles. Under the legislation juvenile offenders receive "moderate correction of whipping..."[217] The facts of this case were that the juvenile, together with three adults, was convicted of assault with intent to cause grievous bodily harm. He was sentenced to six strokes of the whip.

As in, and quoting, Ncube and Others, the Supreme Court, in a majority decision, held that corporal punishment against juvenile offenders was unconstitutional. Dumbutshena C.J., said that the fact that the whipping of juveniles should be moderate and not severe, using a smaller sized whip, did not make corporal punishment any less inhuman or degrading. He went on make obiter observations about the constitutionality of corporal punishment in schools and when done by parents against their own children in the home. Dumbutshena said that corporal punishment in schools is unconstitutional as it is when a parent uses excessive force against his or her own child, causing injury. The Supreme Court was right. Corporal punishment is an inhuman as well as a degrading form of punishment, whether the offender is a juvenile or an adult. It all goes to show the strength of revulsion felt by some members of the

Zimbabwe judiciary over corporal punishment. But others on the Supreme Court bench are not so opposed when the offender is a juvenile, believing that young persons are malleable[218] and corporal punishment is preferable to imprisoning them.[219] Clearly siding with the dissenting judgement, Parliament amended the Constitution permitting corporal punishment on juveniles,[220] a retrospective move.

The fact that the Chief Justice of the Supreme Court of Zimbabwe was prepared to consider the constitutionality of corporal punishment in schools, an issue not raised specifically by counsel for the appellant, shows how strongly he and the majority judges felt about corporal punishment in Zimbabwe. It is to be hoped that counsel will raise the constitutionality of corporal punishment for juveniles in the Zambian courts at the earliest opportunity and that the court will follow this decision and declare this form of punishment unconstitutional.

2. Corporal punishment in Namibia and South Africa.

a. Ex Parte Attorney-General, Namibia: In Re Corporal Punishment by Organs of the State.[221]

This is a more recent case from Namibia. The Attorney-General requested the Supreme Court for its opinion on the constitutionality of corporal punishment in any piece of legislation which permits a government agent to cane any one, whether he be on offender or a pupil in school. Before arriving at its decision, the court referred to the constitutional provisions dealing with fundamental human rights in Namibia, which

are similar to those in Zimbabwe and Zambia, except that they are more elaborate. They refer specifically to the maintenance of human dignity:-

> "(1) The dignity of all persons shall be inviolable.
> (2) (a) In any judicial proceedings or other proceedings before any organ of the State, and during the enforcement of a penalty, respect for human dignity shall be guaranteed.
> (b) No person shall be subject to torture or to cruel, inhuman or degrading treatment or punishment."[222]

Then the court reviewed all the pieces of Namibian legislation which permit whipping.

After citing Ncube and Others and A Juvenile and many other foreign cases, it held that corporal punishment of adults was an inhuman and degrading sentence and therefore contrary to the Constitution of Namibia.[223] It was also unconstitutional if applied to juvenile offenders.[224] Regarding the constitutionality of corporal punishment in government schools, it was also held to be in violation of the Constitution as well.[225] As in Ncube and Others, but unlike in the A Juvenile case, the decision of the court was unanimous. Like Zimbabwe, the colonial regime in Namibia was vicious. Mahomed AJA noted that:-

> "It is not surprising that a deep revulsion in respect of such treatment, including corporal punishment, has developed, which ultimately became articulated in a Bill of Fundamental Human Rights in the Constitution, and in particular in art 8 thereof, which protects absolutely the dignity of every person...."[226]

Such a decision may be an over-reaction against a bitter colonial experience. Nevertheless, the inhumanity and the degradation of corporal punishment cannot be denied.

b. The State v Henry Williams, Jonathan Koopman, Tommy Mampa, Gareth Papier, Jacobus Goliath and Samuel Witbooth.[227]

This is the latest case from South Africa decided this year, June, 1995. It was referred to and decided by the Constitutional Court of South Africa. In this case six juveniles were convicted of offences which do not appear in the record and sentenced to corporal punishment. Counsel on both sided were agreed that corporal punishment against adults was unconstitutional, the question for the court was whether it was so when applied against juvenile offenders under the post-apartheid democratic Constitution of 1993 for being, inter alia, cruel, inhuman and degrading punishment. After reviewing international literature and decided cases from Zimbabwe, Namibia and abroad, the saving provisions, based on the deterrent value of this type of sentence, were held to be inapplicable in this case. In a unanimous judgement, Langa J. said:-

> "it cannot be doubted that the institutionalised use of violence by the state on juvenile offenders as authorised by section 294 of the Act [Criminal Procedure Act No. 51 of 1977 (as amended)] is a cruel, inhuman and degrading punishment."[228]

and declared the offending provision invalid and of no force. As with the death sentence, this was an expected development in view of the country's long experience of apartheid.

The Supreme Courts of two neighbouring countries: Zimbabwe and Namibia, and now South Africa, have thus condemned the idea and the practice of corporal

punishment in very strong terms. Zambia should follow these decisions and abolish this form of punishment as a sentence of the court by legislative amendment.

Conclusion.

There is one central issue covering both capital punishment and corporal punishment: their abolition or retention. In considering whether to retain or abolish them, the big issue is whether they are constitutional or not, although the issue has not been raised in the courts as yet. In considering this constitutional matter, the question is whether capital punishment and corporal punishment violate human dignity implicit in the basic human rights provisions prohibiting inhuman or degrading punishment or treatment. To this end, academic literature and important judgements from some neighbouring African countries have been cited.

Three offences attract capital punishment in Zambia: murder, treason and armed robbery. It was pointed out that, except in a few specific instances covering murder and treason, capital punishment for these three offences was excessive and so violated human dignity in three senses. First, the death sentence is disproportionate to the offences; secondly, the mental pain and anguish suffered by offenders sentenced to death is so great as to amount to inhuman punishment or treatment; and thirdly, long delays in the execution of condemned prisoners, where they occur, add to the anguish and that this amounts to inhuman punishment or treatment. It was concluded that capital punishment in Zambia might be unconstitutional. Moreover, it is not in accord with ideas on punishment in traditional African society and superior courts in some African jurisdictions and in England have held it to be unconstitutional. It was also

pointed out that the government is seriously considering the desirability of retaining it and that to this end the retention of capital punishment has been referred to the Law Development Commission. More significantly, since the new President, Mr Chiluba, came to power three years ago, in 1991, there have been no executions. Capital punishment appears to have a limited life in the penal justice system of Zambia.

With regard to corporal punishment, it was shown that it is much more used against juvenile offenders than adults. But the supposed advantage it has of keeping juveniles offenders out of prison does not seem to have been realised to any great extent. Generally, courts use it cautiously and its significance in the penal justice system is doubtful.

Corporal punishment is a brutal sentence and might be unconstitutional in Zambia if the issue was raised. Land-mark judgements from neighbouring countries, Zimbabwe and Namibia and now South Africa have condemned it and declared it unconstitutional for being an inhuman and degrading punishment. Its prominent place in the criminal justice system of Zambia has its roots in the colonial administration of criminal justice which assumed the racial inferiority of indigenous Africans. It is surprising that the new independent government did not see it in this light and abolish it, or at least severely restrict its use by legislative amendment. While capital punishment has a limited life, it appears that corporal punishment is not heading for abolition soon; it should.

Lastly, it should be noted that although both capital and corporal punishments are harsh penalties, no attempts have been made in Zambia to empirically assess the extent of their supposed deterrent efficacy.

Chapter 7.

Notes.

1. Africa Order in Council 1889, S.3.
2. Penal Code Ordinance 1930, No.42 of 1930.
3. Penal Code, Cap.146, S.25(1).
4. Ibid., S.73.
5. Halsbury's Laws of England, 4th.ed., Vol.43, London, Butterworths, 1983, para 458, p.293.
6. Ibid., 4th. ed., Vol. 11(1), London, Butterworths, 1990, para. 1199, p.1009.
7. Penal Code Cap.146, S.25(4)
8. Ibid., S.25(2)
9. Penal Code (Amnd) Act, 1990, No.3 of 1990, S.11.
10. Ibid., S.201 (2).
11. Criminal Procedure and Evidence Act, Cap.59, S.314(1)(a).
12. Aspects of Capital Punishment, Harare, Advisory Committee on Law Reform, Working Paper No.2, Dec. 1981, pp.4-7.
13. Ibid., p.4.
14. Halsbury's Laws of England, 4th.ed., Reissue, Vol. 11(1), London, Butterworths, 1990, paras. 76-82, pp.69-72, see esp. paras. 76-77, pp.69-70.
15. Ibid., para. 76, p.70.
16. National Assembly Debates, 1964-5, Vols. 1-3, see the Minister of Legal Affairs and Attorney-General's speech introducing the Penal Code (Amnd) Bill 1964, pp.16-17.
17. Penal Code, Cap.146, S.43(1)(a).
18. Ibid., S.43(1)(b)
19. Ibid., S.43(1)(c).
20. Ibid., S.43(1)(e).

21. From personal experience as a citizen and a State Advocate.

22. Penal Code (Amnd) Act, No.4, 1969, S.2, now S.294 of the Penal Code, Cap.146

23. 7th National Council Meeting at Mulungushi Hall, Lusaka, 20th to 25th April, 1974, Resolution 10(a).

24. Called Robbery with Violence, see The Criminal Law Amendment Act, 1971, No.25 of 1971, S.3.

25. Robbery and Firearm (Special Provisions) Decree 1970, S.1 (2)(b) where, apart from hanging, offenders can be executed by firing squad, see Sub. (3).

26. Penal Code (Amnd)(No.2) Act, 1974, No.29 of 1974, S.12.

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28. K.T.Mwansa, "Aggravated Robbery and the Death Penalty in Zambia: an Examination of the 1974 Penal Code Amendment Act (No.2)", Zambia Law Journal, Vol.16,1984, p.69, in which he discusses the efficacy and desirability of capital punishment in Zambia; and in the same journal and volume, his other article, "The Definition of 'Firearm' in Armed Robbery: John Timothy and Feston Mwamba v The People," p.85, in which he discusses the nature of the threat in armed robberies where the 'firearm' is not a real gun but an imitation firearm.

29. See two cases in which the Supreme Court dealt with the nature of the threat in aggravated robbery cases and, by necessary implication, in armed robbery cases: Mwape v The People (1976) Z.R. 160 in which it was held that violence per se is not enough, additionally, the event must create fear; and Jordan Nkoloma v The People (1978) Z.R. 278 where an imitation firearm was used but the court held that what was important was the objective reality of the threat.

30. Adam Berejena v The People (1984) Z.R. 19.

31. Capital Cases Register, Kabwe Maximum Security Prison, Kabwe. Two Kenyans and a Zambian were executed.

32. For origins of the idea of prerogative of mercy, see L.Radzinowcz, A History of the English Law, London, Stevens and Son, 1948, Vol. 1, in chapter 4, especially pp.108-109.

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34. Ibid.

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39. Ibid., Article 28(1)(b).

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43. Ibid.

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55. Ibid.

56. Also see Rex v Mwila (1919). BS 2/282 Vol.1.

57. Copy of letter from Administrator to High Commissioner in South Africa, No.357/18, dated 12th July, 1918. BS 2/281 Vol.3.

58. Ibid. The decision to execute is recorded at the back of the Judge's report.

59. Judge's report sent to High Commissioner through Administrator, Ref.No.2030/19. BS 2/282 Vol.1.

60. Facts and problems on it appear in Judge's report to High Commissioner, dated 29th Nov., 1918. BS 2/282 Vol.2.

61. Ibid.

62. The Administrator's report is dated 11th December, 1918. BS 2/282 Vol.1.

63. High Commissioner's Despatch is No. 1139/11, dated 26th May, 1919, to Mr Justice MacDonell. BS 2/282 Vol.1.

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102. Interview with an officer who did not want to be named, Kabwe, 17th April, 1986.

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131. (1973) Z.R. 31.

132. Ibid., at p.35.

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163. (1977) Z.R. 4.

164. Also see the even later case of Adam Berejena v The People (1984) Z.R. 19.

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168. Interview with Mr Mungole, the Reception Officer at Livingstone Prison, Livingstone, 3rd February, 1986.

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171. Copy of Governor's Despatch is dated 5th February, 1949. SEC 1/1147.

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177. Interview with Mr Mungole, Livingstone, 3rd February, 1986.

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Part C

Juvenile Justice.

Chapter 8

Juvenile Justice.

Introduction.

The provision of appropriate treatment for juvenile offenders is one of the most difficult problems in penology: what to do with young people who commit offences. Juvenile criminal justice in many jurisdictions is marked by legislative uncertainty over what precisely should be done with young offenders. In Zambia the uncertainty appears to extend to the judiciary which is equally unsure and almost certainly misunderstands key aspects of it. Indeed the very purpose of the special treatments reserved for young offenders appears to be in doubt. No section of criminal justice in Zambia shows greater confusion, uncertainty, indifference and drift than juvenile justice.

A United Nations Conference has clarified the general approach to be taken when the offender is a juvenile. In its view, society should minimise the need to take young persons to court. To this end, the family, schools etc. are asked to play their part:-

> "Sufficient attention should be given to positive measures that involve the full mobilisation of all possible resources, including the family, volunteers, and other community groups, as well as schools and other community institutions, for the purpose of promoting the well being of the juvenile, with a view to reducing the need for intervention under the law....."[1]

The aim of diverting young offenders from the courts is commendable and corresponds with the traditional African approach to juvenile delinquency. But the means of achieving this aim in the modern world are problematic. A central question about juvenile offenders is the relevance of the penal treatments available in view of the fact that in traditional Zambian societies juvenile delinquents were not recognised as a separate category of offenders: juvenile delinquency was treated within the family and, as already noted in chapter 2, the concept of imprisonment for adults or juveniles was absent.

This chapter considers those sentences which are peculiar to juvenile offenders: probation orders, approved school orders, reformatory school orders and youth corrective centre orders. But first, it is necessary to discuss briefly three relevant preliminary concepts. In the interests of clarity, this chapter will be divided into two: section A will deal with a variety of themes relating to juveniles, and section B will concentrate on the two custodial institutions of Nakambala Approved School and Katombora Reformatory School.

Section A.

Themes pertaining to juvenile justice, including probation.

I. "Juvenile Delinquency".

Serious discussion of crime and punishment involving young people must deal with the definition of "juvenile delinquency". Every society decides which wrong should attract the formal sanctions of the law and which should not. "Juvenile delinquency" is about wrongs committed by young people. But wrongs are not confined to criminal offences or civil cases; they include non-justiciable infractions as well. In any modern society juvenile delinquency more than adult criminality is associated with particular appearances, attitudes and behaviour. Writing on British society, Anne Campbell explains how different people in Britain would recognise a "juvenile delinquent" or a "delinquent". She says:-

> "If you walked out into the street today, stopped ten people at random and asked them, 'What is a delinquent?', almost certainly you would get ten different replies. The problem seems to arise because people look for different things as the defining features of delinquency. Some people believe it can be assessed simply by appearances- delinquent kids are those who wear braces or big boots or sport tattoos; others believe that it is to do with the attitudes they hold- anti-disciplinarian or anarchists....or their lifestyles-...[like those who] go to punk clubs...." [2]

Just as popular ideas of juvenile delinquency in British society are rooted in that society, notions of juvenile delinquency in the modern Zambian communities are also rooted in the traditional values of the people of Zambia. It will be recalled (Chapter 2) that in traditional Zambian communities, wrongs included breach of etiquette and

taboos. Juvenile delinquency in the modern Zambian society should therefore be seen in this wider frame. But it should be noted that modern penal legislation does not take full account of this. Here, juvenile delinquency will be confined to the commission of criminal offences by young people.

II. The age of criminal responsibility.

In Zambia, the age of criminal responsibility is set at under eight years:-

> "A person under the age of eight is not criminally responsible for any act or omission." [3]

Even if it can be shown that he knew that what he was doing was wrong, the bar is absolute. In Uganda, [4] Malawi [5] and Nigeria [6] it is under 7 years. In England, the age of criminal responsibility was 8 years in 1933 [7] but was raised to the present level of under ten, set in 1963, [8] in apparent recognition that children are maturing later rather than earlier. It is difficult to see any problems arising from the above provision other than the need to establish the age of young accused persons in borderline cases. [9]

Young persons aged between 8 years and 12 years are criminally responsible if it can be proved that they were sufficiently mature:-

> "A person under the age of twelve years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make omission. [10]

Trying to prove that at the time the offence was committed the juvenile could distinguish right from wrong can be difficult precisely because the accused is a young

person. In the Ugandan case of Uganda v. Yowasi Birundi [11] the accused, aged about 10 years, pleaded guilty to theft of a hen but the trial magistrate made no inquiry into the accused's capacity to distinguish right from wrong. On review, the conviction was quashed in this ground. Had an inquiry been conducted it might not been easy proving the accused's capacity to make the distinction because of the nature of and the apparently open circumstances in which the offence was committed. In the Malawian case of Regina v Harawa[12] the juvenile, aged about 10 years, broke a window and stole food and school items; he was charged with house breaking and theft and bound over. No inquiry into his capacity was conducted. On review, however, the High Court noted that the circumstances of the offence were such that they clearly indicated that the juvenile had the capacity to distinguish right from wrong. Cram J. said:-

> "the facts admitted were that the child broke a window and entered a house at a school, and that he stole food, pens and pencils. It is not unreasonable to infer that a child with the ability to commit these acts was well aware that they were wrong in law." [13]

With regard to the age of responsibility in rape cases, the minimum age limit is twelve but the bar against criminal prosecution is not absolute.

> "A male person under the age of twelve is presumed to be incapable of having carnal knowledge." [14]

These ages reflect the current law on the age of criminal responsibility in England in 1930 when the Penal Code was introduced into Northern Rhodesia. [15] For over 60 years, no review has been undertaken to assess the suitability of these age ranges of criminal responsibility to take account of first, the African cultural environment, and

secondly, any changed social views about the proper limits of criminal responsibility in Zambia.

III. Who is a "juvenile"? The question of "maturity" in an African environment.

A. Categories of juvenile offenders.

Although in common parlance the expression "juvenile offenders" refers to all young offenders as a group legislation is more discriminating and groups young offenders in several categories for different forms of treatment.

In Zambia, a "child" is defined as one aged below 16 years. [16] In Kenya and Malawi, the corresponding age limit is lower (14 years) [17] and in Tanzania even lower (12 years). [18] A "juvenile" in Zambia is a young person aged below 19 years and includes a "child" and a "young person".[19] Malawian legislation is similarly worded[20] but in Tanzania, there is no specific reference to "juvenile" but only to a "juvenile court" which is defined as a District Court which tries a "child" or a "young person".[21] In Zambia, a "young person" is one aged 16 years or more but under 19 years. [22] In Malawi, the age range of a "young person" is lower at 14 years or more but below 18 years. [23] In Tanzania, this age range is even lower 12 years or over but under 16 years. [24] The oldest category of young offenders recognised under Zambian legislation is that of "juvenile adult",[25] aged at least 19 years but under 21 years. [26] There is a second definition of "juvenile adult" as an older person aged 21 years or more but under 25 years, if the minister deems it fit to classify such an older individual for purposes of

special penal treatment. [27] Neither Tanzania nor Malawi has a similar category of young offender.

Thus even within one region of Africa there are no universally agreed definitions of juvenile offenders. Each jurisdiction categorises juvenile offenders differently for the purpose of grouping them into appropriate classes for particular forms of treatment. This assumes that maturity is reached by different stages. Yet clearly, there is an element of arbitrariness in categorising juvenile offenders in each of more ways.

B. Proving age in African countries.

For no other class of offenders is legislation so pre-occupied with the exact ages of the criminal as when the offender is a juvenile or is thought to be one. For example, the special jurisdiction of the courts to deal with young offenders at all depends on the exact age of the individual before the court. Also, the length of stay of a juvenile offender either at the Approved School or the Reformatory School depends on the age of the juvenile at the time when the order is made. But reference to the precise ages of juveniles appearing before the courts raises serious problems of proof in Zambia and elsewhere in Africa because the registration of births and deaths is unreliable. [28]

Women living in the towns and District centres normally give birth in the nearest hospitals or clinics, notices of births are routinely completed and sent to the Registrar-General in Lusaka[29] so that certificates of birth can be prepared[30] if it required for any reason. But not all women give birth in the nearest hospital or clinic. Others prefer to deliver in their homes in the traditional way. As a general rule, women living in the rural areas, who are far from medical centres, give birth in their homes. As a result,

births are not reported. Besides, villagers, even those who are literate, are hardly aware of the legal requirement to register all births and deaths.

The difficulty of proving the precise ages of offenders in African countries is widely recognised. The juvenile legislation for Kenya, for example, provides "age": "Where actual age is not known, means apparent age." [31] The Ugandan legislation dealing with reformatories provides:-

> "Before ordering any youthful offender to be sent to a reformatory school under section 5, section 6 or section 7 of this Act the court or magistrate shall inquire into the question of his age and, after taking such evidence, if any, as may be deemed necessary, shall record a finding thereon, stating his age as nearly as may be." [32] (Emphasis supplied).

The equivalent Zambian provision reads as follows:-

> "Where a person, whether charged with an offence or not, is brought before any court otherwise than for the purpose of giving evidence, and it appears to the court that he is a juvenile, the court shall make an inquiry as to the age of that person, and for that purpose shall take such evidence as may be forthcoming at the hearing of the case,....." [33]

Where there is doubt as to whether the accused is a juvenile, medical evidence is routinely called, but it cannot be so precise as to enable the court in doubtful cases to distinguish a "child" from a "juvenile"; a "juvenile" from a "young person", and a "young person" from a "juvenile adult." Only parents and close relatives of the juvenile, or his birth certificate, can provide accurate details of his age.

Predictably, the courts have commented on the need for precise findings as to the ages of accused persons. In the Northern Rhodesia case of Rex v Kenan Moses[34] the accused was convicted of house breaking and theft. The trial magistrate noted that

the "accused appears to be about 16 years old."[35] On review, Cox C.J. explained why it is necessary to be precise over the age of the accused:-

> "Now, whether the accused is or is not of or about the age of 16 is most important because of the provisions of....the Juvenile Offenders Ordinance...which provides a child.... or a young person may be sent to a juvenile reformatory and be there detained for a period of not less than two years and not more than four years: 'Provided that the period for which a child or young person is so detained in a juvenile reformatory shall expire at the date on which or before he attains the age of eighteen years.' As the period during which the child or young person may be detained must not be less than two years and must expire not later than when the child or young person attains the age of 18, it is essential for a magistrate to be sure that a young person has not attained the age of 16 when he makes an order requiring the offender to be detained in a juvenile reformatory."[36]

When the accused was medically examined later to determine his age, he was found to be 16 years old. The juvenile reformatory order was quashed and in its place a juvenile adult reformatory was made. In the Nyasaland case of Regina v Kandambe[37] the accused was convicted of burglary and theft and sent to an Approved School. The order was confirmed by the High Court and in the course of his judgement, Spencer-Wilkinson C.J. noted that:-

> "it is notoriously difficult to ascertain the exact age of an African youth, either by medical examination or by observation by the court."[38]

C. Juvenile as a category of offenders and maturity

But despite the trouble taken by both the legislation and the courts to know the precise age of juveniles or persons thought to be juveniles, all this may be only marginally relevant to the proper treatment of young offenders in an African society. First, African society does not appear to have recognised juvenile delinquency as a

distinct problem different and apart from crime committed by adults. Clifford refers to the precarious existence lived by traditional African societies and notes that social, political and moral problems tended to be seen together in one lump and that therefore:-

> "It would be unrealistic to pretend that in these circumstances juvenile delinquency had very much meaning as a distinct and separate problem."[39]

This must surely be true. Even in the more modern African society of today, the misdeeds of young people are not seen as distinct problems requiring special attention and needing special treatment in the way practised by the received law. The tendency is to ignore or chastise children rather than to punish them. Clifford further says:-

> "instances of juvenile misbehaviour which arise do not reach the proportions of a problem and are generally effectively dealt with within the family or the family group."[40]

This continues to be true in Zambian society today. For example, when a child injures another child or an adult, or steals from another family, formal proceedings against him are not normally uppermost in the mind of the injured party particularly in the villages. The normal and often only reaction is to talk to the parents or guardian of the young delinquent and stress to them the need to discipline their child.

The second reason why it may be unnecessary to determine the exact age of juvenile offenders is that African society did not divide the young population and place them in different categories, making a distinction between, say, a "child" from a "juvenile". An individual was either a juvenile or an adult; there was no middle category of young offender. Thirdly, it must be appreciated that the rates of progression of maturity of juveniles assumed under the received law do not always

coincide with those accepted in African society. A United Nations conference United Nations conference on juvenile crime very properly observed that:-

> "a juvenile's development varied according to his environment and the way of life in his country. As an illustration, it was pointed out [at the conference] that in certain tropical countries the de facto majority was reached at a lower age than in most European countries." [41]

An equally fundamental point made by this United Nations conference was that:-

> "a juvenile matures, in a sense, at the rate desired by the society in which he grows up. It is a well know fact that in some societies, particularly those in the so-called less developed regions, children are given responsibilities, such as looking after younger siblings or helping the parents in fields or farms, at an early age. The social environment would, therefore, be conducive to early maturity." [42]

All this continues to be true in Zambian society. In girls, maturity is well marked and comes at the age of puberty. In virtually all the tribes, puberty is marked by holding a cisungu ceremony at which the girl is initiated into adulthood by outlining her duties to her family and her future husband. In some other tribes, notably the Luvale of the North-Western Province, boys are initiated into adulthood in a ceremony which includes circumcision. The point to note is that the chronological age of the young person does not determine the point at which childhood ends and maturity begins in traditional African society. All this has led Clifford to make the following observation:-

> "A 'juvenile' by statute may not only be difficult to identify without a birth certificate-he may also be an adult in his tribe if he has passed through the requisite ceremony of initiation. Even if he is living in the town or was born in the town he is affected by this traditional concept of the stages of growth." [43]

After reaching the age of puberty, a girl of say 14 or 15 may get married. In no sense can she be regarded as a juvenile; first, she will have reached puberty and secondly she is a married person. Yet under the received law, she is still a "child" as she is under 16 years of age. Similarly, an 18 year old boy may get married. Like the "child" bride, he cannot be regarded still as a juvenile even if he is under 19 years of age and a "juvenile" under the received law.

To the extent that maturity depends on the social responsibility given to young people in a particular society, a distinction can be made between the onset of maturity and rates of maturity in urban areas on one hand and rural areas on the other. Youths in rural areas tend to mature earlier because they are given social responsibilities earlier than their urban counterparts. [44] Paradoxically, the introduction of schools in a tribal society had the effect of delaying the onset of maturity and rate at which the youth matured in both rural and urban areas. Because the young had to go school, it was not possible for them to shoulder the normal range of social responsibility expected of them until later. Their full responsibilities were carried later on in life, thus delaying the rate at which the youth matured. Delayed rates of maturity are more evident in urban areas where the social responsibilities of the youth are carried a little later on in life because the money economy is stronger than in rural areas. All this has lead Mrs Chisense and Mrs Simoya, both senior Social Development Officers, to argue for the raising of the upper limit of the definition of "juvenile" from just below 19 years to 25 years on the ground that material progress in the country since independence has allowed the young to mature later in life than was the case before. [45] However, they saw serious political problems ahead. They noted that at independence the minimum voting age was 21 years, [46] but it was lowered to 18 in 1973 when a new Constitution

was enacted. [47] They very properly pointed out that raising the minimum voting age again, this time to 25, would be politically difficult to achieve because the voting age had been reduced from 21 years at independence[48] to 18 in 1973. But on the other hand, the truth is that the youth in Zambia today are much more knowledgeable about economic and political events than before with the advance and spread of education in the country. They may be socially immature, but mature in economic and political matters. It would be unrealistic to raise the minimum voting age above 18 years.

IV. The number of juvenile offenders and the offences they commit.

Table 30 shows the number of juvenile offenders found guilty of criminal offences in Zambia per age of offender, from 10 years to 18 years. Unfortunately, the more informative "crimes reported to police" data covering juveniles only is not available. The Table covers a period of 14 years from 1964 to 1986, inclusive.

Table 30.

Convicted Juvenile Offenders by Ages in Selected Years, 1964-1986.

Year	Ages									Total
	10	11	12	13	14	15	16	17	18	
1964	20	59	106	139	240	276	326	329	352	1,847
1965	45	59	121	150	209	264	263	297	373	1,781
1967	27	27	103	145	213	282	326	296	317	1,736
1968	26	52	96	138	205	296	304	283	340	1,740
1970	0	10	17	44	40	133	249	616	737	1,846
1971	22	50	66	131	199	397	538	497	718	2,618
1972	27	39	81	139	277	422	564	668	915	3,132
1973	14	38	79	87	189	403	430	669	731	2,640
1974	35	77	138	170	247	411	539	619	909	3,145

1975	5	10	26	151	191	340	492	574	823	2,612
1976	3	25	69	112	173	269	481	503	1,015	2,650
1978	0	0	0	66	135	161	437	796	1,342	2,937
1983	32	26	59	123	114	281	642	1,020	959	3,256
1986	0	2	8	26	45	85	203	206	399	974
Total:	256	474	969	1,621	2,477	4,020	5,794	7,373	9,930	32,914

Source: Zambia Police Annual Reports.

The wide variations in the numbers of juvenile offenders between some years can be partly explained by changes in the crime enforcement policies pursued by the police.

Predictably, Table 30 shows that conviction rates generally rise with age, but this does not mean that penal policy should focus on older juveniles at the expense of younger ones. Failure to deal properly with the younger delinquents can fail to discourage budding criminal careers. There is marked divide between juvenile offenders under 15 years of age and those aged 15 and over, a divide most clearly marked in the 6 years 1970, 1971, 1973, 1975, 1976 and 1983 and reflected in the totals: at the age of 14 years, the total number stood at 2,477, at 15, 4,020, a rise by 1,543; at age 18, the total was 9,930. Perhaps prosecution policy is different for

suspects aged 15 years and above. The more plausible explanation is that older juveniles are school drop outs who fail to proceed to secondary school.

In government schools, primary education in Zambia starts at the age of 7 years and lasts for 7 years, ending in grade 7 examinations leading to secondary school education from grade 8. A child sitting grade 7 examinations is about 14 or 15 years old. Unfortunately, the number of places in grade 8 is severely restricted. Consequently, only about 1/4 of all grade 7 pupils find places in secondary schools in grade 8, a small proportion of the total primary school population. For the vast majority of parents and guardians in Zambia, the "grade 7 problem" has been a source of much anguish since the early 1970s when the national economy dramatically fell into decline. At 14 or 15 years and hardly educated, the young school leaver is unable to find a job or to undertake training. If he is a boy, he is in no position to marry and settle down. He has a problem and has nothing to occupy his time usefully. Clearly, the grade 7 problem would be alleviated to a significant extent if national education policies enabled children to leave school at a later age with higher academic qualifications than at present. Deficiencies in the national education system seem to contribute to juvenile delinquency in Zambia.

However much crime is committed by juveniles in Zambia, the total numbers of convicted juveniles remain small, although the proportion of young people in the general population is much higher in Zambia and many other developing countries than it is in the developed western countries like the United Kingdom, where much crime is committed by juveniles. Even in 1983, the year when the largest number of juvenile convictions was recorded in the Table, the total was only 3,256.

Therefore there appears to be little juvenile delinquency in Zambia and perhaps more significantly, the general Zambian public does not see it as a "problem". Juvenile delinquency, let alone juvenile "crime", is hardly discussed in the media. Family bonds and traditional attitudes of respect for authority may be much stronger than is generally realised. However, although juvenile delinquency may not be seen as a problem today it may become so in the future with the intensification of urbanisation.

Table 31 shows the numbers and types of offences committed by juvenile offenders aged between 8 years and 18 years. The offences covered in the Table are theft, burglary, house-breaking (House/B), other breakings (Other/B) (e.g.) store-breaking, assault occasioning actual bodily harm (Assault OABH) and public order offences like affray and being drunk and disorderly. They are chosen because they are the sort which young people tend to commit, especially in urbanised areas of societies around the world. Because Table 31 shows offences for which the juveniles were convicted and not "crimes reported to the police", the number of offences actually committed must be larger. The Table covers a period of 14 years from 1964 to 1986, inclusive.

Table 31

Convicted Juvenile Offenders by Offences in Selected Years, 1964-1986.

Year	Offences Committed						Total
	Theft	Burglary	House/B	Other/B	Assault OABH	Public Order Offences	
1964	540	98	122	279	37	242	1,318
1965	578	103	125	324	54	40	1,224
1967	598	109	130	217	139	0	1,193
1968	536	82	112	161	151	130	1,172
1970	609	121	105	156	181	105	1,277
1971	656	131	144	174	253	171	1,529
1972	1,080	167	154	185	234	237	2,057
1973	812	130	141	215	353	158	1,809

1974	771	140	126	169	410	351	1,967
1975	987	142	153	161	295	0	1,738
1976	840	153	134	171	438	201	1,937
1978	746	174	173	145	406	234	1,878
1983	714	216	143	157	477	130	1,837
1986	97	202	88	82	96	24	589
Total:	9,564	1,968	1,850	2,596	3,524	2,023	21,525

Source: Zambia Police Annual Reports.

Zambia Police Annual Reports confirm the assumption that the offences shown in Table 31, as a group, are the sort of offences most commonly committed by juvenile offenders in Zambia. Predictably, theft (9,965) is the single most common offence followed after a wide margin by assaults occasioning actual bodily harm (3,524). The figures representing offences against property are, burglary (1,968), house-breaking (1,850) and other breakings (2,596). Some of these offences, like assaults and public order offences, can be dealt with by introducing the formal police caution, as in England, and thus diverting juveniles from court as advocated by the United Nations.

V. The range of penalties available against juvenile offenders.

A wide range of penalties is available to the courts in all cases involving juveniles. It is provided that:-

> "Where a juvenile charged with any offence is tried by any court, and the court is satisfied of his guilt, the court shall take into consideration the manner in which, under the provisions of this and any other written law, the case should be dealt with, namely:
>
> (a) by dismissing the charge;
> (b) by making a probation order;
> (c) by sending the offender to an approved school;
> (d) by sending the offender to a reformatory;
> (e) by ordering the offender to be caned;
> (f) by ordering the offender to pay a fine damages or costs;
> (g) by ordering the parent or guardian of the offender to pay a fine, damages or costs;
> (h) by ordering the parent or guardian of the offender to give security for the good behaviour of the offender;
> (i) where the offender is a young person, by sentencing him to imprisonment;
> (j) by dealing with the case in any other manner in which it may legally be dealt with." [49]

Four out of these ten ways of dealing with juveniles are also available to the courts when the offender is an adult: dismissing the charge, probation, corporal punishment and imprisonment; the rest are peculiar to juveniles. Table 32 shows the types of orders made by the courts (imprisonment, reformatory school orders, approved school orders, caning, probation, fines and discharges) against juvenile offenders in Zambia over a period of 13 years from 1970 to 1983, inclusive (earlier data was unobtainable).

Table 32

Disposal of Cases Against Juvenile Offenders, 1970-1983.

Year	Disposals						
	Imprisonment	Ref. Sch.	Appr. Sch.	Caning	Probation	Fines	Discharges
970	0	4	6	37	13	1	7
1971	27	55	51	606	180	32	118
1972	35	39	56	487	184	21	140
973	41	33	65	410	250	38	157
1974	20	72	89	505	253	29	605
975	40	59	69	584	210	46	86
1976	70	54	47	595	245	100	155
978	20	51	67	475	109	42	98
1979	32	21	34	475	137	38	112
980	36	37	51	361	99	35	104
1981	26	35	39	404	130	23	87
1982	51	33	27	330	139	19	88
983	21	27	38	247	104	26	46
tal	399	520	639	5,516	2,053	450	2,130

Source: Annual Reports of the Social Welfare Department and Commission for Social Development.

One of the most noticeable aspects about Table 32 is the variations in the figures between 1970 and 1971. For example, in 1970, no juveniles were imprisoned, but in 1971, 27 were imprisoned. Perhaps there was a dramatic change in policing policy towards juveniles in 1971. It will also be noticed that some of the orders available to the courts do not appear in the Table at all: this is because they were rarely imposed. Thus in 1971, one extra-mural penal employment order was made; in 1979, charges were dismissed in 9 cases; in the following year, 1980, 7 more cases (16) were dismissed; in 1982, the parents of juvenile offenders were ordered to give security for good behaviour in five cases; in 1983, two discharge orders were made. None of these types of orders can be described as harsh; they are all "soft options."

Table 32 shows that the order most commonly imposed was corporal punishment (5,516), followed far behind by discharges (2,130) and followed closely by probation (2,053). Approved school orders (639) were very closely followed by reformatory school orders (520) and then by fines (450); but imprisonment does not fall far behind, standing at 399. It should be noted that what some might regard as the harsh inhuman and degrading sentence of corporal punishment (see Chapter 7) is followed immediately by the soft penalty of discharge which is followed by the slightly more severe sentence of probation. The heavy custodial sentences of approved school orders and reformatory school orders were followed closely by softer sentences of fines which were followed by the harshest sentence of all, imprisonment.

There does not appear to be any pattern to the sentencing of juvenile offenders in Zambia. One would have expected a sentencing pattern whereby the harshest penalty, imprisonment, was followed immediately by either corporal punishment or custodial orders and finally by discharges. Ideally, the sequence should be reversed, so

that the most common award would be a discharge and the least frequent imprisonment. This absence of a logical sentencing pattern would suggest that the relevant provisions on the various penalties do not give clear enough guidance as to their use. An additional but more plausible explanation is that the judiciary in Zambia is not well trained to deal with the special problems of juvenile offenders. The training of magistrates and judges should pay particular attention to this class of offender.

VI. Probation.

A. Probation in practice.

Although probation is available for adult as well as juvenile offenders, it is discussed in this chapter because in practice it is confined almost exclusively to juveniles; very few adults are put on probation. In 1972, for example, the Registrar of the High Court sent out a judicial circular to all magistrates in the country pointing out that:-

> "Probation orders are not confined to juvenile offenders only, a court may in appropriate cases make Probation Orders in respect of adult offenders." [50]

During field work in 1985/1986, there was only one adult on probation in the whole country and he was a 72-year-old man. [51] He was put on probation at the prompting of the offender himself. The relevant passage in the record of the Kabwe Subordinate Court which made the probation order in this case of the (then) 71-year-old Samson Kalikiti reads as follows:-

Offender: "I ask for leniency. There are so many ways of punishing an offender. I have been in and out of prison. I am now tired and have no strength."
Court: "Would you agree to be put on probation?"
Offender: "Yes, that would help me."
Court: "I order that you be put on probation under a probation officer for 2 years." [52]

In contrast, probation is widely used for adults in Kenya where, in 1981, for example, 3,313 probation orders were made in respect of male and female adult offenders but only 1,354 orders in respect of juveniles. [53]

B .Legal provisions for probation and the number of probation orders.

Probation in Zambia falls directly under the Commissioner for Social Development (formerly the Director of Social Welfare) in the Ministry of Labour and Social Services. The core legal provision reads as follows:-

"Where a court by or before which a person is convicted of an offence, not being an offence the sentence for which is fixed by law, is of opinion that, having regard to the youth, character, antecedents, home surroundings, health or mental condition of the offender or to the nature of the offence, or to any extenuating circumstances in which the offence was committed, it is expedient to do so, the court may, instead of sentencing him, make an order, hereinafter in this Act referred to as a 'probation order', requiring him to be under supervision of a probation officer for a period to be specified in the order of not less than one year nor more than three years." [54]

The normal duration of probation orders in Zambia is two years. [55] But there is provision for their early termination if the probationer shows unusually good progress. [56] To ensure that the offender understands the nature of the probation order, it is provided that:-

> "Before making the order, the court shall satisfy itself that the offender understands the effects of the order, including any additional requirements proposed to be to be inserted therein under subsections....and that if he fails to comply therewith or commits another offence during the probation period he will be liable to be sentenced for the original offence; and if the offender is not less than nineteen years of age the court shall not make an order unless he expresses his willingness to comply with the requirements thereof." [57]

These provisions are not informative enough to guide a sentencer contemplating making an probation order. This is perhaps the most unfortunate feature of penal provisions in Zambian legislation; in this case all that is said in effect is no more than that every factor in the case must be looked into before making a probation order. But this is what all sentencers are expected to do before imposing any sentence, be it imprisonment, discharge or any other type of sentence. The core provision above is very similar to the main provision on discharges referred to in chapter 6; yet that provision confusingly states that a discharge is appropriate if a probation order is inappropriate in the first place. [58] The conditions for probation orders should emphasise the need for continuous supervision and the readiness of the probationer to respond to it. As the so-called Morison Report of 1961-1962 said:-

> "the offender must need continuos attention, since, otherwise....a fine or discharge will suffice; [and additionally] the offender must be capable of responding to this attention while he is at liberty." [59]

Table 33 shows the number of probation orders made in Zambia in 15 years between 1964 and 1985, inclusive.

Table 33.

No. of Probation Orders Made by the Courts, 1964-1985.

Year	No. of Probation Orders
1964	216
1965	298
1966	220
1967	213
1968	97
1969	79
1975	69
1976	52
1977	95
1978	165

1980	77
1981	60
1982	110
1983	362
1985	35
Total:	2,148

Source: Annual Reports of the Judiciary and Magistracy.

It is impossible to explain the wide variations in the number of probation orders made annually by the courts in Zambia. A striking contrast appears between the years 1967 and 1968. The number of probation orders dropped from a very high plateau of 200 plus in 1967 to below 100 from 1968 until 1978, when the figure rose to 165; after 1981 (60 orders), there were sharp rises in 1982 (110) and 1983 (362) probation orders. The possibility of errors in compiling these official figures should not be dismissed because it is not uncommon to find that data covering the same subject differs depending on the source, for example, between police sources and court sources, and between court sources and prisons department sources.

Apart from the wide differentials in the number of probation orders shown in Table 33, the other noticeable feature is that the number of orders appears to be

roughly steady from 1964 to 1967 and then from 1968 to 1985, admittedly with hiccups in some years after 1967. If this is so, the implication is that the courts in Zambia are not very keen to use this obviously desirable sentence. When approved and reformatory schools come to be considered a similar picture will emerge. However, the apparent disinterest in probation raises a deeper issue. The courts do not appear to treat probation as a particularly relevant penalty with regard to adults, although the idea of supervising the young, part and parcel of parentage and child-rearing in every human society, is especially strong in African communities.

C. Compiling social welfare reports, the decision of the court and supervision.

As in England, social welfare reports (called social inquiry reports in England) are needed in cases involving juveniles. A particular format is used to complete them for use by the courts. In the case of The People v Godfrey Shimoko[60] the report in respect of this 18-year-old juvenile found guilty of theft, had the following headings: personal details, family composition, personal history, attitude towards the offence, home conditions, health, hobbies, friends, future plans and finally, recommendations of the probation officer. In the case of 14-year-old Joseph Phiri in The People v Joseph Phiri[61] it included his school report. The juvenile was found guilty of house breaking and theft. In both cases the juvenile offenders were put on probation.

Social welfare reports presented to the courts have limited value. Probation officers face serious and persistent transport problems. Information included in the reports is normally obtained from the juvenile himself and his parents or guardian in the office of the probation officer. It is very difficult for the probation officer to go out

and counter-check the information given to him[62]. The transport problem is greater in the rural areas of Zambia because of the distances between the boma where the offices are located and outlying villages.[63]

Magistrates usually accept recommendations made by probation officers in social welfare reports. Predictably, when the magistrate does not take the advice of the probation officer, the reason is that some of the information is patently incorrect. It is customary for the magistrate to ask the parents or guardian of the juvenile what they feel should be done with their child before passing sentence. There have been cases when the views of the parents have been at variance with the recommendation of the probation officer. In such cases parents usually complain of exasperation with the behaviour of their child and ask for a custodial sentence, while the probation officer strongly recommends probation.[64]

The value of social welfare reports may be doubtful on another count. Magistrates do not give them the required attention before pronouncing sentence. What happens is that the report is handed over to the magistrate as he sits on the bench; he reads through it, and immediately, without adjourning the case, imposes sentence. Probation is valuable if the juvenile needs constant supervision and is capable of benefiting from it. Putting a juvenile or indeed an adult on probation requires close attention to all the matters contained in the social welfare report. Magistrates should adjourn cases to study the reports more closely before making probation orders.

In supervising probationers, probation officers are expected to make regular and irregular visits to probationers to check on their progress. But again, this is difficult because of the serious transport problems faced by probation officers throughout the country.[65] When supervision starts, the practice is that quarterly progress reports are

made; the original goes to the magistrate for his comments and any directions he may wish to give and a copy is sent to the Commissioner for Social Development for his information. [66] But magistrates rarely make any useful comments, the usual one being "no comment"[67] and then send it back to the probation officer in charge of the juvenile. On the quarterly report of Nolase Zulu (not her real name), for instance, the magistrate made no comment simply signing and returning the report. [68] This attitude reveals at least disinterest in the supervision, which perhaps springs from lack of proper training in juvenile justice. All this puts the value of supervision in probation in serious doubt.

D. The workload and training of probation officers.

The probation service is seriously under-staffed, although the precise numbers of probation officers in post at particular times were not available. [69] However, some indication of the numbers of probation officers and their caseload can be gained from the following Table 34. "Caseload" includes probationers and those on licence after leaving the approved school and the reformatory school; they are all supervised by probation officers.

Table 34.

No. of Probation Officers and their Caseload, 1975-1979.

Year	(a) No. of P.Os	(b) No.of Probationers	(c) No.of Licencees	(b)&(c) Total	(d) No.of Cases per P.O.
1975	51	578	152	730	14.31
1976	51	511	166	677	13.27
1977	58	493	103	596	10.27
1978	58	422	26	448	7.72
1979	52	480	80	560	10.76
Total:	270	2,504	527	3,011	56.33

Source: Extracts from File No. SWD/5/17/1 Office of the Commissioner for Social Development by Mr Chileshe, in his University of Zambia LL.B Obligatory Essay, 1982, entitled Children and the Law; Juvenile Courts and the Social Treatment of Young Offenders in Zambia, p.38.

There has been no sustained increase in the number of probation officers in the Table. For the first two years, 1975 and 1976, the number stood at 51. In the following two years, 1977 and 1978, there was a slight increase to 58 and then a slight

drop to 52 the following year, in 1979. There was a general decline in the number of probationers from 578 in 1975 to only 422 in 1978, with a rise to 480 in 1979. The trend in the caseload was similar: in 1975, there were 14.31 probationers per probation officer, but in 1978 the figure fell to only 7.72, rising slightly to 10.76 in 1979. Supervising these numbers of probationers is a very taxing experience, even without transport difficulties. Unlike in England, probation officers are also social workers dealing with a wide range of responsibilities such as counselling, adoption of infants and relief of destitution. [70] The quality of supervision of probationers in Zambia must therefore be seriously diminished.

However, the workload of probation officers should be lightened considerably from 1982. In this year, the formerly autonomous Department of Community Development was merged with the Department of Social Welfare into the new Commission for Social Development. Some of the more promising members of the former Department of Community Development were appointed as probation officers. [71] But it appears that the appointing authorities were rather cautious in their appointments because, for example, two years after the merger, in 1985, the total number of probation officers rose to only 64. [72]

With regard to training, there are three types of probation officers in Zambia. The first consists of university-trained officers with diplomas or degrees in social work; they are very few in number and then are quickly promoted to supervisory positions at the department headquarters in Lusaka. The university course includes sociology, statistics and an introduction to the sentences available to the courts in Zambia. [73] The vast majority of probation officers do not receive any formal training; they are trained on the job. [74] Without formal training, they cannot expect significant

career developments; perhaps more seriously they can have only a stunted view of the theory of probation. The third category of probation officers consists of former members of the Department of Community Development; for them there is an on-going re-training course in Kitwe. [75]

More university-trained probation officers are needed to undertake probation, supervision and compile and present social welfare reports in court; they are better placed than other officers not only to press for innovations in the presentation of social welfare reports but, perhaps more importantly, to assess whether probation is working at all.

E. Residential probation at Insakwe Probation Hostel, Ndola.

When a court has resolved to make a probation order, it has the choice to order the probationer to reside in an institution during the whole but shorter probation period. The relevant provision reads as follows:-

> "(3) ... a probation order may include requirements relating to the residence of the probationer: Provided that-
> (i) before making an order containing any such requirements, the court shall consider the home surroundings of the offender; and
> (ii) where the order requires the probationer to reside in an institution...[the] period shall not extend beyond twelve months from the date of the order." [76]

Clearly, residential probation is appropriate where the home conditions of the probationer are unsuitable for the probationer's reform or rehabilitation. In the case of Brown Mbewe (not his real name), for example, the social welfare report successfully recommended residential probation. It said in part:-

> "The home conditions are not conducive and he will always try to misbehave in order to get some attention from the parents. It is with the above in view that I strongly recommend that the lad resides in an institution where I feel that during the period that the lad will be away from home, I shall be able to work with his family to prepare the home for the boy's eventual return." [77]

There is only one institution to house juvenile probationers in Zambia; it is a probation hostel called Insakwe (meaning "a place of temporary rest" in Bemba) Probation Hostel in Ndola on the Copperbelt. There is no probation hostel for young female delinquents. A respite care hostel originally for European delinquent girls opened in Kabwe before independence, but did not re re-open after closing a few years after independence. [78]

The use to which Insakwe Probation Hostel has been put is a good example of a well-meant penal idea which has been allowed to slide into near-terminal decline in Zambia. The most striking aspect of Insakwe is that the whole building complex is run down and dilapidated. About one half of the rooms are left unused. A more telling aspect is that the number of juveniles at Insakwe has remained small for many years, averaging 15. [79] The capacity of the hostel is 36, [80] but when the writer inspected the institution, in 1986, there were only 9 boys in residence. Such small numbers in a large institution may be said to be uneconomical use of a scarce national resource. But this development is to be welcomed as custodial institutions are, in principle, not to be encouraged.

The probationers are supposed to be trained in industrial skills, like carpentry, but no such training has been available for many years. The only regular occupation is gardening. For those in need of schooling, the supervisor is expected to find school places in Ndola; but this has not been possible for many years, partly because of the

prejudice of head teachers towards juvenile offenders. [81] Yet end-of-year reports paint glowing pictures of success. A typical one for Jasi Sakala (not his real name), for example, says in part:-

> "Jasi was discharged from the hostel on 29th February, 1985, after having successfully completed his one year residential supervision....He has benefited a lot from his supervision in that he can distinguish sense from nonsense. His concentration on Bible studies has been very much helped to change his anti-social behaviour...." [82]

From the general appearance of and atmosphere at Insakwe Probation Hostel, it is very difficult to believe any claims of success. Indeed, the supervising officer of Insakwe admitted that many terminal reports tend to paint an exaggerated picture of success and that such claims spring from the need to justify the continued employment of staff at Insakwe. [83]

If the government cannot find the resources with which to improve Insakwe Probation Hostel, then it should be closed altogether because it does not seem to serve any purpose; juvenile offenders are simply kept there until the time for their release arrives. It can rightly be said that residential probation is hardly distinguishable from an open prison for adult offenders.

F. Assessment: the success and failure of probation.

Under the probation legislation of Zambia, the courts are given a wide discretion to impose any conditions deemed fit:-

> "A probation order may require the probationer to comply during the whole part or part of the probation period with such requirements as the court, having regard to the circumstances of the case, considers necessary for securing the

good conduct of the offender or for the preventing a repetition by him of the same offence or the commission of other offences:" [84]

Conditions of probation are that the probationer notifies his probation officer of any change of residential address in advance or any change in employment, [85] does not lose touch with the supervising probation officer[86] and keeps away from bad company and leads an honest and industrious life. [87]

As with the rest of penal measures, re-conviction or lack of it is the most reliable indication of the failure or success of probation. But this may not be a definitive test. A report on the probation service in the United Kingdom very properly noted:-

> "The probationer who commits further offences very early in the probation period is not a failure of probation as a method of treatment since there has been no time for the effect of the treatment (that is, the probation officer's supervision) to be felt. At most, the reconviction raises the question whether the court was right to make the probation order, although failure, early or late, cannot itself condemn a court for a recourse to a method in which, because the offender is at liberty, the risk of reconviction is inherent." [88]

The report then proceeded to point out the factors which determine success and failure, and related problems:-

> "The rate of success achieved by the probation system depends on one hand on the nature of the offenders with whom the court ask the probation service to deal, and on the other, on the efficiency of the 'supervision' which probation officers provide. Accordingly, generalisations about the 'failure' of probationers prompt, first, the question whether the courts are selecting for probation the offenders who are likely to respond to it; and, secondly the whether the organisation and techniques of the service are satisfactory." [89]

What is said here is not restricted to probation only but extends to every other penal measure which seeks to reform the offender. Such other penal measures include not only conditional discharges and police supervision, but imprisonment as well.

Table 35 shows the number of successful and unsuccessful probation orders. The Table covers 3 years between 1975 and 1983, inclusive. In the Table, "normal" means that the probationer was supervised up to the end of the probation period set by the court, "discharged" means that probation was ended prematurely because the probationer had made very good progress. "Sentenced" and "Absconded" are self-explanatory.

Table 35.

Success and Failure of Probation in Zambia, 1975-1983.

Year.	Satisfactory		Unsatisfactory	
	Normal	Discharged	Sentenced	Absconded
1975	158	15	25	114
1981	93	6	5	58
1983	107	0	5	6
Total:	358	21	35	178

Source: Annual Reports of the Social Welfare Department and Commission for Social Development.

It will be seen that the largest single category of juvenile offenders consisted of successful probationers, those who had been supervised up to the end of their allotted time, totalling 358. However, the accuracy of this figure should be doubted because of the insufficient resources available in the probation department: the numbers of probation officers are small, their quality poor while facing transport difficulties. For these same reasons, the accuracy of the number of discharged probationers (21) must also be doubted. The fact that a probationer commits an offence ("sentenced") during his supervision period (35) should, on the face of it, be a serious failure of probation. But the more telling failure lies in the fact that a probationer absconds because absconding is, unlike re-conviction, a complete rejection of probation as such. What makes absconding an even greater failure of probation is that there were more probationers who absconded (178) than were re-convicted of criminal offences (35). It must be concluded that very little value should be placed on the claims of success of probation as presented in the official statistics; the figures for failure are more reliable.

More resources should be made available to make probation a greater success because probation is the most appropriate sentence for young offenders in any society. The reason is that, unlike with adults, being supervised is part of the experience of growing up.

To raise the levels of success of probation, it may be necessary to return to traditional practices and involve traditional authorities and others in the supervision of juvenile delinquents, in addition to increasing the number of probation officers in the country. Such a suggestion is not new: it was mooted by the colonial authorities before independence. As far back as 1939, for example, acting Chief Justice Robinson

was discussing the implementation of the new Juveniles Ordinance with the Governor and said:-

> "Every magistrate is aware of the Juveniles Offenders Ordinance and that all cases in which the juveniles are the offenders are tried under it. A village headman is not infrequently appointed as a probation Officer by the court under S.7(3)(c) to act in a particular case....The reason why village headmen have been appointed as Probation Officers is because as yet no Probation Officers have been appointed by Y.E. [Your Excellency] under S.7 of the Ordinance." [90]

Many years later, a few years into independence, in 1969, Clifford made a similar suggestion:-

> "With trained staff coming forward only slowly....it might be wise at this stage to consider the appointment of village headmen, chiefs and teachers as ad hoc probation officers. It was, after all, through responsible volunteers that probation and after care was extended in England and the United States....." [91]

In the rural areas, village headmen and chiefs would be particularly suitable. With the coming of independence in Zambia and elsewhere in Africa, deference has tended to shift away from traditional authorities to new central governments and local authorities. Making chiefs and village headmen probation officers would restore some of their lost authority; they would almost certainly welcome such a development. However, it would be more appropriate if village headmen rather than chiefs were appointed as probation officers. Firstly, headmen would be closer to the individual juvenile offender to be supervised. Secondly, for headmen and chiefs to undertake similar tasks of supervising juvenile offenders would be seen by the people as equating the authority of chiefs with that of their subordinate headmen and this would be unacceptable confusion of their respective traditional authority. As there are no traditional authorities to look up to in urban areas, serious consideration should be

given to asking the many churches operating in urban areas, especially the less well established ones who may welcome the chance to establish themselves, to supplement the efforts of probation officers. They should welcome this added responsibility.

Section B.

Custodial institutions.

I. Historical developments.

Before discussing the many problems besetting the special custodial institutions for young offenders in Zambia, it may be useful, first, to outline briefly their history in England as well as Zambia.

A. Origins of youth custodial institutions in England.

In England, special custodial institutions for juvenile offenders emerged in the form of reformatory schools and industrial schools in that order. They had their genesis in the industrial revolution and the consequent deplorable social conditions it produced. The industrial revolution increased demands for labour, including child labour. As time went on, the spectacle of children enduring harsh working conditions attracted the attention and sympathy of society as a whole. Such sympathy extended to the welfare of children as offenders for whom special institutions were eventually established, at first by philanthropic organisations[92] rather than government.

Reformatory schools, intended to accommodate and train young offenders, [93] were first established under legislation of 1854. [94] The training was provided for offenders aged under 16 years upon completion of their sentences. [95] Industrial schools, on the other hand, were born out of "ragged schools", to provide some education for children from the poorest families; initially, these schools had nothing to do with young offenders. They were first associated with the training of the younger juvenile offenders in 1861. [96] A child aged under 12 years who had committed a series of offences was liable to be sent to an industrial school. [97] Eventually, reformatory schools became borstals and industrial schools became approved schools.

B. Beginnings of youth custodial institutions in Zambia.

As already indicated, there are two special custodial establishments for juvenile offenders in Zambia. One is an approved school, Nakambala Approved School, situated at Mazabuka in the Southern Province, and the other is a reformatory school, Katombora Reformatory School, situated several kilometres from Livingstone, again in the Southern Province.

The birth of the approved school and the reformatory school followed a long gestation period. This was mainly because in the colonial period, despite pronouncements to the contrary, the need for them was not recognised until very late. Even when they were eventually established, it appears that the need for them was not overwhelming and that the whole process was undertaken rather reluctantly under the pressure of events. The persistently small numbers of juveniles held in both institutions, but especially in the reformatory school, as will be seen, suggests that,

unlike the imprisonment of adults, the idea of custodial treatment of juvenile offenders has not been fully accepted in Zambia, even when account is taken of the low rate of juvenile crime. The minimal use made of Nakambala and Katombora probably reflects a cultural rejection of custodial treatment of young offenders.

Before the establishment of special institutions for juvenile offenders in Northern Rhodesia, all juvenile offenders found guilty of serious offences calling for custodial sentences were sent to prison. However, in 1921, the government of Northern Rhodesia entered into an agreement with the government of South Africa allowing juvenile offenders from Northern Rhodesia to be sent for training in South Africa, where facilities were available. [98] Unfortunately, figures are not available; however, the numbers appear to have been modest. As this arrangement was coming to an end, between 1943 and 1947, 25 juvenile offenders, for example, were held in Livingstone Prison. All of them would have been sent to South Africa but for the fact that at this time, there was a nascent reformatory at Ibwe Munyama in Northern Rhodesia to which African juvenile offenders were being sent. [99] Before juveniles were actually sent to South Africa, they were detained in Livingstone prison, then the main prison in Northern Rhodesia, where they were strictly segregated from adult offenders. [100] They stayed in prison for an average period of 88 days, or about three months. [101]

It appears that the need to establish special custodial institutions for young offenders in Northern Rhodesia was voiced for the first time in the 1920s. In 1928, Mr Justice Logan wrote to the Governor:-

> "I am anxious to bring to Y.E [Your Excellency] the urgent necessity for making some provision for juvenile offenders. It is very undesirable to send young boys to prison but the only method of punishing them is by ordering them to be whipped. This is not always a suitable punishment. It has been tried

before and has failed to deter the young offender from continuing in his evil ways." [102]

There were no immediate or significant developments in this direction for several years until 1940, when the government approached the Salvation Army at Ibwe Munyama in Mazabuka District of the Southern Province to hold and train juvenile offenders in the territory; the Salvation Army accepted immediately. The legal arrangement to authorise this was by first placing juvenile offenders on probation, with the condition that the offender went to Ibwe Munyama for a stated period of time for his training. [103] The first batch consisted of 5 juvenile offenders. [104] As in England, the church rather than the government was initially involved in the training of juvenile offenders. This would suggest that reform from the heart rather than the imparting of industrial skills was uppermost in the mind of the colonial administration. But even in later years, not every juvenile was sent to Ibwe Munyama because of limited space; some continued to be sent to South Africa. In 1943, three years after the Salvation Army had accepted training juvenile offenders, for example, 9 were sent to Ibwe Munyama, 3 were sent to South Africa and 4 remained in Livingstone Prison. [105] It was then suggested that Ibwe Munyama be made an approved school or a reformatory school. [106]

An unexpected incident in South Africa was to stimulate the establishment of special custodial institutions for juvenile offenders in Northern Rhodesia. In 1942, in a "Letter to the Editor" in the Rand Daily Mail, a member of the public wrote:-

"On Monday, passers-by were horrified to see an African child aged about 10 years standing handcuffed to a policeman in a Johannesburg Street .....Trade union officials learnt that this unfortunate boy came from Livingstone in Northern Rhodesia. Not only was that child handcuffed, but the policeman also had worn manacles to be fastened to the child's legs. This boy was convicted at

> Livingstone for a sexual crime and sentenced to 4 years detention in a reformatory. He was sent to be detained for 4 years, 1,000 miles away from his home and his people." [107]

When the story reached London, there was an uproar in the House of Commons from back benchers. The Secretary of State explained that the Governor of Northern Rhodesia had promised to end the system of sending juvenile offenders outside the territory.[108] Despite this incident, developments continued to be slow. The establishment of an approved school or a reformatory was resisted by some officials on the ground that the numbers of juvenile offenders requiring custodial sentences in special juvenile institutions were too small. In 1943, one official wrote to another:-

> "I agree with (347) [folio number] that the number of juvenile offenders would not justify the establishment of an approved school by gvt. It would appear that the estimates of 50 juvenile offenders you give in (346/1) [folio number] cannot be correct." [109]

A little later the same year, similar sentiments were aired with respect to the establishment of reformatories in the territory. [110]

Finally, some twenty years later, an approved school was established at Ndola on the Copperbelt in 1960; [111] but it was moved to another site in Ndola the following year, 1961. [112] The approved school moved to its present site in Mazabuka in 1963, the one year before independence, [113] because more land was available there on which juvenile offenders could be taught farming. [114]

Siting both the approved school and the reformatory on the Copperbelt was the obvious thing to do because the bulk of juvenile crime in Zambia is committed there, where there is the greatest concentration of urban population. It will be seen that by the time Nakambala was established, the approved school was already taking root.

With regard to the reformatory, attempts were made to site in Lusaka, [115] and then Ndola. [116] As with the approved school, Katombora is sited where it is because of the availability of land on which juvenile offenders could be taught farming techniques. [117] The Southern Province has some of the most fertile land in the country. Katombora Reformatory School was gazetted earlier, in 1953, than the approved school. [118] 118 Before it was gazetted, juveniles were held at the present site at Katombora for 3 years pending its formal recognition as a reformatory. In 1950, when it held its first juveniles, there were 5 inmates; in 1951, 17 and in 1952, 35. In 1953, the number fell slightly to 32. [119] It appears that by then, training schemes were well established and running well. Juvenile offenders were taught carpentry, building and tailoring. Unfortunately, Katombora has not been satisfactorily maintained since then; by 1986, when the writer inspected it, the institution had seriously deteriorated. Clearly, very minimal resources have been invested in Katombora over the years. Fortunately, Nakambala has deteriorated less than Katombora.

II. Nakambala Approved School.

A. Running Nakambala Approved School.

Even though both Nakambala Approved School and Katombora Reformatory School are juvenile institutions, Nakambala is run by the Commissioner for Social Development in the Ministry of Labour and Social Development, while Katombora is run by the Prisons Department in the Ministry of Home Affairs. As will be shown, this separation in the management of similar institutions has resulted in significant

differences in the way they are managed. This arrangement is unnatural; the mistake was made just before independence by Kaunda (later to become President of Zambia) as Minister of Local Government in the nationalist-dominated pre-independence government. When the Federation of Rhodesia and Nyasaland was being dissolved in 1963, and federal functions were being returned to the constituent territories, an amendment to the juveniles legislation was successfully proposed which, inter alia, sought to transfer prisons and reformatories to the Prisons Department of Northern Rhodesia. A member of Parliament, Stanley, wondered whether the Department of Social Welfare was not the more appropriate department to run reformatories. Going straight to heart of the matter, he said:-

> "I reformatories under the Prisons Department] raises a point whether one should look at reformatories as a sort of prison for juveniles, or some think it [placing place where young people are reformed and not subjected to the penal system." [120]

Kaunda replied:-

> "Whether the Commissioner of Prisons should be in charge of reformatories is a question of detail." [121]

The truth is that whether reformatories should fall under the Prisons Department or not is not a matter of detail but a matter of significant penal policy as Stanley clearly implied.

B. The nature and objectives of the approved school order.

Apart from the need to avoid the contamination of young offenders by adult criminals, the aims of the approved school orders may be well known, but they are not clearly laid out in the legislation for sentencers to study them. This is not merely a small matter of drafting; failure to list the objectives of the approved school may be partly responsible for the apparent misunderstanding by the senior Zambian judiciary of the nature of the approved school order, the key provision of which reads as follows:-

> "The Minister may, by statutory notice, establish approved schools for the reception, maintenance and training of juveniles sent thereto...." [122] (Emphasis supplied).

Approved schools, then, are established for the training of juvenile offenders. Secondly, and reflecting the origins of special custodial institutions for young offenders in England, the legislation provides that the religious preferences of juveniles should be respected before making an order. [123] Since, and unlike Malawi which has two approved schools, [124] Zambia has only one approved school, and the country is predominantly Christian, this provision has little practical relevance to the Zambian situation. Juveniles are sent to the approved school, then, to, where necessary, be acquainted with religion or to ensure that their religious beliefs do not wane. The third objective of approved schools is offering schooling. It is provided that:-

> "Lower primary education shall be provided to all pupils in a school and further education may be provided for individual pupils according to their age, aptitude and capability." [125]

Providing educational facilities is a very important part of the rehabilitation of young offenders. The fourth objective of approved schools is to instil a greater sense of discipline in the juvenile offenders. Implicit in any custodial penalty involving juvenile offenders is the assumption that the juvenile concerned may be in need of discipline to some extent. Naturally, the legislation provides for discipline at the approved school, but it seeks to establish a light and flexible disciplinary system:-

> "(1) The principal may introduce any system approved by the Commissioner [of Social Development] which will encourage good conduct and industry and will facilitates the reformative treatment of the pupils.
> (2) When punishment is necessary for the maintenance of discipline, the Principal, in his discretion may adopt the following sanctions:
> (a) the forfeiture of privileges under rule 11:
> (b) separation from other pupils: Provided that.....
> (i) .....
> (ii) .....
> (iii) .....
> (iv) .....
> (v) .....
> (3) Corporal punishment. Every effort shall be made to enforce discipline without resort to corporal punishment... [126]

These, then, are the four grounds on which an approved school order may be made. It is important to appreciate that an approved school order is a very special order and is not to be regarded as a punishment like imprisonment of adult offenders, but a facility for reforming or rehabilitating juvenile delinquents. The nature of the order is revealed in the Nyasaland case of Regina V. Filiati, [127] where an approved school order was made against a juvenile found guilty of house-breaking and theft. Earlier, two approved school orders had been made against him and made to run concurrently. The latest, third order, was also made to run concurrently. Spencer-Wilkinson C.J. said:-

> "I have some doubt....as to whether it is possible to make more than one approved school order against the same boy to run concurrently. An approved school order is not a sentence of imprisonment and I doubt whether the provisions of the law relating to concurrent sentences of imprisonment apply to approved school orders....I have ascertained the views of the Attorney-General, who is in agreement with the opinions I have expressed above...." [128]

The two previous findings of guilty were quashed and the trial magistrate was ordered to make only one fresh approved school order.

C. Possible judicial misunderstanding of the nature of the approved school order.

In Zambia, it appears that the judiciary does not understand the nature of the approved school order but treats it like an ordinary sentence against an adult, reached after taking into account any mitigating and aggravating circumstances. In The People v Zimba Nkhoma[129] the juvenile was found guilty of burglary and theft and the trial magistrate made an approved school order. When the case went to the High Court for confirmation of the order, as is required by the legislation, [130] Moodley J. did not confirm it; instead, he made a probation order, explaining:-

> "The juvenile has had three previous findings of guilt involving dishonesty and in normal circumstances an approved school order would have been appropriate. However, it is to be observed that this juvenile has a stable family background and his parents have expressed a willingness to have him trained for suitable occupation. The welfare officer pleads for the offender to be given another chance, but surprisingly, and for reasons not stated, he does not recommend probation." [131]

What the judge was saying in effect was that this juvenile deserved a heavy penalty but for the presence of mitigatory factors. Instead, he should have been pre-occupied with the question of whether the juvenile needed training, schooling or some discipline.

The erroneous approach to the approved school order is more clearly revealed in the case of The People v Soloshi Ilinanga, [132] where an order was made in respect of a juvenile found guilty of house-breaking and theft. Like Moodley J. above, Muwo J. did not confirm the order; instead, he put the juvenile on probation, saying:-

> "Although the offence is a serious one, nonetheless, the juvenile was a first offender who pleaded guilty. I do not see that the approved school order was necessary." [133]

Reference to the plea of guilty and the fact that he was a first offender very clearly suggests that the judge regarded this case like any ordinary case involving an adult criminal in which aggravating and mitigatory factors play a crucial role in arriving at a proper sentence. Again, no reference was made to the training, schooling or disciplinary needs of the juvenile.

But the clearest example of judicial misunderstanding of the nature of the approved school order is to found in the case of The People v Tenthani Mwale, [134] where the juvenile was found guilty of theft and the trial magistrate made an approved school order. When the case went up to the High Court for confirmation of the order, Cullinan J. discharged the juvenile absolutely. He explained:-

> "The juvenile is a first offender. He is sixteen years of age and can fend for himself. He may benefit from schooling in an approved school. Nonetheless, such detention carries with it a stigma. I cannot see that an approved school order is necessary for a boy who steals a pair of shoes valued at K2.50 because he has none to wear." [135]

The judge's casual reference to the possibility that the juvenile may benefit from schooling at Nakambala suggests that he regarded the schooling needs of juvenile

offenders as peripheral to the proper sentence, when the legislation enjoins him to consider it specifically when contemplating making an approved school order.

What is revealed and particularly unfortunate in the three cases cited above is that the misunderstanding about the nature of the approved school order is entertained, not by trial magistrates below, but by judges of the High Court itself. All this points to the inadequacy of judicial training in Zambia (Chapter 4). However, one should have some sympathy for the judges because the criteria for sending juveniles to the approved school are not as clearly spelt out in the legislation as they should be.

D. The number and ages of juveniles at Nakambala.

Table 36 shows the number of admissions to Nakambala over a period of 11 years from 1975 to 1985, inclusive. Nakambala can accommodate up to 75 pupils. [136] For a clearer picture, the Table should also show the daily averages, but unfortunately the figures are not available.

Table 36.

No. of Admissions to Nakambala Approved School, 1975-1985.

Year	No.of Admissions.
1975	50
1976	35
1977	48
1978	57
1979	44
1980	59
1981	38
1982	21
1983	37
1984	42
1985	36
Total:	467

Source: Annual Reports of the Department of Social Welfare. From 1982, Annual reports of the Commission for Social Development.

Even though the admissions in any one year may not appear large, there are many more juvenile offenders held at Nakambala at any one time because of the fact that they stay at the school for several months before they are released. However, the school has never been full to capacity. [137] Despite annual fluctuations there has been a general decline in admissions, particularly after 1980 when admissions were under 40 annually except in 1984 (42 admissions). It will be recalled that admissions to Insakwe Probation Hostel have also declined.

While over-crowding is to be condemned, the under-use of a penal institution is costly. Three reasons can be offered to explain the declining admissions at Nakambala (as well as at Insakwe Probation Hostel). First, judges may misunderstand the nature of the approved school order as indicated above. Secondly, juvenile crime may not be seen as a problem, as suggested earlier in this chapter. Thirdly, following the last point, sentencing attitudes may unconsciously be dominated by the very soft traditional African approach to juvenile delinquency, as noted at the beginning of this chapter. But at the same time small admission numbers are to be welcomed because the establishment of any custodial institution is, in principle, not to be encouraged.

Regarding the age of juvenile offenders sent to Nakambala, unfortunately the legislation does not clearly indicate whether the approved school is to take younger as well as older offenders. However, some indication of the legislative intention over this point is to be found in the provision which prohibits sending a "child" (under 16) to a reformatory unless it is necessary to do so. [138] Table 37 shows the average ages of juvenile offenders on admission to Nakambala. The Table covers a period of 3 years from 1983 to 1985, inclusive. The average ages of juveniles sent to Katombora are also provided, by way of contrast.

Table 37.

The Average Ages of Juvenile Offenders at Nakambala Approved School and Katombora Reformatory School, 1983-1985.

Year	Average Age of Nakambala Juveniles	Average Age of Katombora Juveniles
1983	15.8	16.8
1984	15.5	16.7
1985	15.1	17.0

Source: Admission Register of Nakambala Approved School.
Admission Register of Katombora Reformatory School.

The most noticeable feature of Table 37 is the smallness of the differences between the ages of Nakambala juveniles and Katombora juveniles. In 1983 and 1984, for example, the gap is only one year. What the Table reveals is that younger offenders are sent to the approved school, older offenders to the reformatory school. But the narrowness of the age gap raises a more fundamental question: why are the two institutions not run by the same government department?

E. Confirmation of approved school orders by the High Court.

Before an approved school order is carried out by admitting the juvenile to Nakambala, the High Court must first confirm the magistrate's order, [139] as already indicated above. While it is desirable to ensure that only deserving juveniles should

suffer the stigma of a custodial penalty in an approved school, the statutory requirement that all approved school orders be confirmed has created serious operational problems which should have been foreseen when the legislation was enacted in 1956. [140] These problems have resulted in negative consequences of a penal, legal and constitutional nature. Recognising the likely problems involved in getting approved school orders confirmed quickly, the legislation provides for the making of temporary orders by magistrates while the High Court deals with confirmations:-

> "Pending the confirmation of an approved school order by the High Court... the court making the order may make a temporary order committing the juvenile to the care of a fit person to whose care he might be committed under the Act, or to a place of safety, and, subject as hereinafter provided, such temporary order shall have effect until he is sent to an approved school.....
>
> Provided that a temporary order as aforesaid shall not remain in force for more than twenty-eight days, but if at the expiration of that period the court considers it expedient so to do, it may make a further temporary order." [141]

Magistrates routinely make temporary orders whenever an approved school order has been made.

A "place of safety" is widely interpreted to include a hospital or a police station; [142] and a "fit person" means a specially appointed individual, [143] an approved society, [144] or the Commissioner for Juvenile Welfare, [145] who is also the Commissioner for Social Development. The Commissioner for Social Development runs a remand home, Chilenje Remand Home, in Chilenje Township, Lusaka. All Nakambala-bound juvenile offenders from all magistrates courts throughout the country are sent to this remand home. [146]

Unfortunately, a slow postal system, chronic shortages of typists in the judicial department and pressure of work borne by judges have together resulted in persistent

delays in confirming approved school orders by the High Court. In 1985, for example, the Officer in Charge of Chilenje Remand Home, Mr Mwila, wrote the Social Development Officer in Luanshya, where a juvenile was found guilty:-

> "This boy [name withheld] has been ordered to go to Nakambala by the court in Luanshya on 15th February, 1983, and has been detained here for over one year and ten months without the confirmation order to enable him to proceed to Nakambala." [147]

In the same year, complaining specifically about the failure to renew an expired temporary order, Mr Mwila wrote to the Clerk of Court in Chipata, where the juvenile was found guilty, and said:-

> "What is actually causing the delay in furnishing me with the new residential order? You are well aware that this boy's approved school order expired, and it puzzles me as to why you cannot furnish me with a fresh order. The letter I wrote ....was reminding you about the same but so far, there has been no reply from that end. Please expedite action." [148]

Table 38 shows the number of Nakambala-bound juvenile offenders set against periods of time (in days) spent at Chilenje Remand Home. The periods shown are from the date of the making of the order by magistrates to the time when the orders are either confirmed or not confirmed by the High Court, excluding cases where the High Court had made no decision one way or the other. The Table covers a period of 5 years from 1980 to 1984, inclusive. The admission book for 1985 was not available. Focus should be on (c) showing the number of juveniles for each year. Particular attention should be paid to the number in brackets; it represents the number of juveniles who were in Chilenje Remand Home for over 28 days. The percentage in (d) refers to this figure.

Table 38.

No. of Chilenje Remand Home Offenders and Awaiting Time in Days.

Year	Upto 28 days	29-50	51-100	101-150	151-200	201-250	251-300	301-350	351-400	401-450	451-500	501-550	Total No. of Boys	No. of Boys over-stayed	% of over-stays
1980	6	10	7	8	6	2	1	2	0	0	0	0	42	36	85.71
1981	3	7	4	1	3	1	3	3	1	2	0	0	28	25	89.28
1982	2	4	0	1	1	1	0	0	4	4	0	0	17	15	88.23
1983	0	6	4	2	2	4	3	1	2	4	0	1	29	29	100
1984	1	5	7	8	2	1	1	1	0	1	0	1	28	27	96.42
Total No. of Boys	12	32	22	20	14	9	8	7	7	11	0	1	144	132	

Table 38 shows that the proportion of cases in which the High Court confirmed or did not confirm approved school orders within the maximum period of 28 days period is very small. Over 80% of all juvenile overstayed at Chilenje Remand Home. In 1980, out of 42 juveniles, 36 (85.71%) had been in the remand home for over 28 days, in 1981, 25 out of 28 (89.28%), in 1982, 15 out of 17 (88.23%), in 1983, 29 out of 29 (100%) and in 1984, 27 out of 28 (96.42%). Shortages of court record typists, heavy workloads of judges, slow mail and the vastness of the country would together account for the delays.

Delays in confirming approved school orders have resulted in three types of problems and difficulties in the administration of juvenile justice. First, any overstay for whatever reason not covered by a temporary order, or a renewed temporary order, is illegal. Every juvenile not covered is entitled to walk away from Chilenje Remand Home as soon as the order expires. The forceful and continued detention of any such juvenile would entitle him to sue the Attorney-General for false imprisonment. Secondly, any unlawful overstay causes an unconstitutional expenditure of public funds without Parliamentary authority. The other constitutional problem is that unlawfully and forcefully holding a juvenile at Chilenje would violate the constitutional provision about freedom of movement. [149] Thirdly, any overstay defeats the very purpose of the approved school order, in that the juvenile has to spend less time at Nakambala. In The People v Tekete Mumba[150] the juvenile was convicted of assault occasioning actual bodily harm and an approved school order made against him. When the case came before Mr Justice Care for confirmation of the order, he noticed that the magistrate had delayed sending the case record but nevertheless confirmed the order. Regarding the delay, he said:-

> "The delay in sending this case for confirmation defeats the whole object of dealing with juvenile justice and should never be allowed to re-occur. An explanation of the delay is required by the court in weeks." [151]

All these problems can be ended simply by deleting the relevant provision in the legislation requiring confirmation of approved school orders by the High Court before juveniles are sent to Nakambala. This requirement serves no real purpose. Like approved school orders, reformatory school orders must first be confirmed by the High Court, [152] and the juvenile taken immediately to a "receiving centre" while waiting for the confirmation. [153] "Receiving centres" are gazetted, and Katombora Reformatory School itself is one of them. [154] In practice, this means that Katombora-bound juvenile offenders go straight to the reformatory, without waiting for confirmation by the High Court in some other institution. This albeit technically circuitous route is unnecessary even in the case of reformatory school-bound juvenile offenders.

F. The approved school experience.

The first impression of Nakambala Approved School is that of an ordinary medium-sized boarding school for boys, and not a custodial institution for young offenders. Boys wear ordinary uniform and sleep in dormitories; the perimeter fence is made of ordinary wire and the gate is not permanently manned; the general atmosphere is relaxed.

1. Training.

At Nakambala, juvenile are taught carpentry, bricklaying and metal work. [155] For the only institution of its kind, designed to hold as many as 75 juveniles, the range of training courses is rather narrow. Electrical engineering and motor mechanics would almost certainly be very welcome additions as they are in line with what boys anywhere would normally like to learn. The practice is that once a boy is put on a particular training course, he remains there up to the end of his stay at Nakambala. The idea is that he advances to the point where he is good enough to take a trade test at Magagari Trades Training Institute in Choma, about 60 kilometres away. [156] The numbers of juvenile assigned to particular courses varies from time to time, as is to be expected in any penal institution. When the writer inspected the training schemes at Nakambala, 8 boys were doing carpentry, 9 were doing metal work and 16 were assigned to the brickwork section; the remaining 21 were engaged in farming. [157]

The training of juvenile offenders at Nakambala Approved School is beset by three kinds of problems. Although members of staff are professionally qualified to teach, the school experiences chronic shortages of instructors. [158] Sometimes, it becomes necessary to employ expatriates. For example, in 1983, two Norwegian volunteers taught various courses at Nakambala. [159] Secondly, teaching material, like cement and wood, is in chronically short supply. [160] Thirdly, for a certain class of juvenile offenders training is inherently inadequate. The problem arises because some are on full-time training but others are on part-time training. This is so because some juveniles go to school in the mornings and train in the afternoons. But those who are not in school, usually because they are too old to go school, train in the morning and

continue in the afternoons. [161] This can only mean that school-going juveniles are inherently less likely to progress sufficiently to sit for a trade test than their counterparts who are on full-time training. Should any of the part-time trainees perform unsatisfactorily in school, their stay at the approved school is bound to be even less rewarding. Unfortunately, relevant annual reports on juvenile offenders do not normally contain detailed enough information on the success or failure rates of training schemes at Nakambala. However, in the 1978 report, it is stated that 7 boys sat for their trade tests and 6 obtained grade 9 trade certificates in bricklaying and plastering. [162]

With regard to farming, every juvenile, whether on full-time or part-time training, is given a plot of land on which to grow vegetables during the vegetable season, from April to October. During the rainy season, from November to March, those who are not training are engaged in agriculture, mainly growing maize, the staple food stuff of Zambians. The maize is consumed by the juveniles themselves. Mr Mpongosa, the principal, claimed that in some years, so much is grown that the school becomes self-sufficient in maize for a whole year. [163] This claim may be an exaggeration because Nakambala sits on only 7.5 hectares of land and such a small piece of land cannot feed a whole approved school population for a whole year. There is nothing surprising about such claims of success; people in positions of authority tend to present the most favourable impression of their organisation to the outside world. In view of the fact that the approved school was moved from the Copperbelt to Mazabuka because more fertile land was needed, it is a little disappointing that insufficient emphasis appears to be placed on agricultural training at Nakambala. It is significant that no theoretical training is offered; the juveniles merely farm the land.

Contrary to official claims, it appears that the land is used largely to keep the juvenile offenders occupied while waiting for their final dates of release.

2. Schooling.

As already indicated above, in Zambia, school starts at the age of 7 in government schools and primary education lasts for 7 years up to grade 7. At Nakambala, only grades 4, 5 and 6 are offered because it is assumed that every juvenile coming to the approved school has had at least three years of primary school education. Grade 7 is not offered either because it is thought that the preparation for the crucial grade seven qualifying examinations for admission into grade 8 should not be offered in a penal environment, like an approved school. [164] The assumption that all the juveniles coming to Nakambala have had at least 3 years of primary school education has been proved incorrect. Some of them are completely illiterate, while others are barely literate, [165] which is only to be expected because the lives of some juvenile offenders sent to the approved school have been greatly disrupted.

There is a block of classrooms on the premises for grades 4, 5 and 6. Text books and stationery are available and issued on time because they are supplied by the Ministry of Education in Lusaka through the local Ministry of Education office in Mazabuka. Despite the availability of grades 4, 5 and 6 on the premises, there is a policy of encouraging pupils to join any local primary school in town as a way of trying to integrate young offenders into the normal community outside the approved school. Any juvenile in need of a place in secondary school can go to the only local secondary school in town.

Schooling at Nakambala is attended by three kinds of problems. The first is common to all custodial institutions, including prisons. Newly arrived offenders may arrive in the middle of the school calendar or towards the end of the term, in which case it is impractical to start school immediately. Secondly and predictably, the general public in Mazabuka is prejudiced against all approved school boys and this extends to head teachers of local schools in Mazabuka. That is why the name plate of the approved school was changed in the 1970s from "Nakambala Approved School" to "Nakambala Training School", to soften the image. Consequently, not only is it generally difficult for normal children to find school places in Zambia, but the approved school boy faces the added problem of prejudice on the part of the local head teachers in town and other parents. It is undesirable to send a child to a school where the authorities know that he faces such prejudice. Finding school places for approved school boys is therefore particularly difficult in Mazabuka. [166] The third type of problem with regard to schooling is that different pupils with different educational attainments are usually placed in one class. The problem arises because of insufficient number of grades available on the premises of Nakambala Approved School. As has already been pointed out, some of the juvenile offenders sent to Nakambala are illiterate while others are barely literate. When such pupils have to start or continue with school, the only class they can be put in is either grade 4 or grade 5, with others who do deserve to be in grade 4 or 5 as the case may be. [167] Fortunately, classes tend to be small. When the classes were inspected in February, 1986, there were 13 boys in grade 4, and 9 boys in grade 6. But such small classes do not cure the initial problem of mixed classes consisting of pupils with widely varying degrees of educational attainments. Obviously, teaching such a mixture of pupils is very difficult. It is very

doubtful whether any pupils do benefit from the school experience to any great extent at Nakambala. The whole problem of schooling can be alleviated simply by introducing grades 1 to 7 on the premises of Nakambala so that juvenile offenders are placed in their proper grades.

3. Discipline and religious activities.

Formal discipline at Nakambala is minimal because the school does not regard the behaviour of the juveniles generally as too serious or disruptive. [168] Boys engage in a few fights and thefts of minor food items. [169] Perhaps the lax discipline contributes significantly to the less than expected disruptive behaviour of the juveniles. If so, a softer punishment regime is to be encouraged. It will be recalled that under the legislation, punishment consists of separation of erring juveniles, loss of privileges and corporal punishment. In practice, the first two are very rarely imposed on the ground that they may have lasting psychological consequences on young minds. [170] A survey of Nakambala boys on punishment preferences which courts may impose on juvenile offenders in Zambia appears to bear this out. [171] Invariably, and contrary to the express wishes of the legislature, corporal punishment was the first choice penalty. To off set the pain and embarrassment of corporal punishment, instead of whipping the boys on the buttocks, as is permitted under the legislation, [172] the principal whips the hands, [173] and within the privacy of his office. [174]

With regard to religious activities, all the juveniles are encouraged to attend church services every Sunday in town. There are several church denominations in

Mazabuka. Approved school juveniles regularly attend church services, [175] no doubt partly to break the monotony of the daily routine of the school.

It can be concluded that the Nakambala Approved School atmosphere and experience is predominantly humane, although improvements can certainly be made with regard to training and schooling.

G. Annual releases as a measure of the success and failure of the approved school order.

Juvenile offenders are scheduled to stay at the approved school for about 3 years from the date of the making of the order; the calculation is made from the age of the juvenile at the time the approved school order is made:-

> "An approved school order shall be an authority for the detention of the person named therein in an approved school-
> (a) if at the date of the order he has not attained the age of fourteen years, until the expiration of a period of three years or the expiration of four months after he attains the age of fifteen years, whichever is the later;
> (b) if at the date of the order he has attained the age of fourteen years but has not attained the age of sixteen years, until the expiration of a period of three years from the date of the order; and
> (c) if at the date of the order he has attained the age of sixteen years, until he attains the age nineteen years." [176]

In view of the long delays at Chilenje Remand Home, amounting in some cases to 12 months, it is clear that some of the juvenile offenders do not stay for more than 2 years at Nakambala. When they are released because they have reached the end of their scheduled period, they are said to be "discharged" (contrast it with "discharge" in probation above). But there is a provision empowering the authorities to release juvenile offenders from the approved school prematurely:-

> "At any time during the period of a person's detention in an approved school....., the Commissioner for Juvenile Welfare may, by a licence in writing, permitting him to live at his home or elsewhere....." [177]

This is taken to mean that the Commissioner may order a pre-mature release if a juvenile has made exceptional progress at Nakambala. [178] Table 39 shows the number of juvenile offenders at Nakambala who were discharged on licence over a period of 11 years from 1975 to 1985, inclusive.

Table 39.

No.of Juvenile Offenders Released on Licence and Discharged, 1975-1985.

Year	No.Released on Licence	No.Discharged.
1975	28	5
1976	19	6
1977	20	4
1978	26	2
1979	47	6
1980	34	5
1981	36	5
1982	29	1
1983	13	5
1984	23	4
1985	22	8
Total:	297	51
Average:	27	4.60

Source: Annual Reports of the Commissioner for Social Development.

It will be noticed that in each and every year shown in the Table, many more juveniles were prematurely released than those who were discharged after serving their full scheduled terms at Nakambala: the clearest example was in 1982, when 29 were released on licence, but only one was discharged. It is very difficult to believe that there are many more juveniles who make exceptional progress other than those who progress at the normal and expected pace. First, the majority of approved school boys are delayed at Chilenje Remand Home. If the trend in Table 39 is correct, this means that within the shorter periods of time available to the juveniles, perhaps on account of the shorter periods, many more juveniles make exceptional progress, and therefore released prematurely, than those who make normal progress. Secondly, the validity of grounds upon which premature releases are recommended by the principal of Nakambala and accepted by the Commissioner for Juvenile Welfare are suspect. In one typical example, the principal made the following recommendation for the early release of Jeke Juma (not his real name), which it will be assumed was accepted by the Commissioner:-

> "Since coming back from hospital for epilepsy, he has been a completely different person in character. He prefers to do his own 'thing'. There is no problem with him but he is rather absent minded. The brick- works instructor has remarked positively about him. He likes football although these days he has indicated signs of withdrawal from the front line of the game. I am certain he would toe the line where crime is concerned if released." [179]

None of the matters mentioned in this report would remotely suggest that the juvenile offender had made exceptional progress warranting an early release. On the contrary, the picture is that of an ordinary boy progressing at the expected pace who should remain at Nakambala up to the end of his scheduled period of time.

As with claims of success with probation orders, claims of success of approved school orders as presented in the annual reports are doubtful. They are designed to give the impression that penal administrators are achieving the desired results so that they can justify their positions. It must therefore be concluded that no one knows whether the probation order or the approved school order is working properly in Zambia.

III. Katombora Reformatory School.

A. Legislative provisions on reformatory school orders.

The legislation prescribes the appropriate circumstances for the making of a reformatory school order more clearly than it does with regard to an approved school order:-

> "Whenever a juvenile is found guilty of an offence for which, but for the provisions of this Act, a sentence of imprisonment would have been passed, the court by which the juvenile is found guilty may, instead of passing such sentence of imprisonment, order him to be detained in a reformatory." [180]

for a period of up to four years. [181] Four observations can be made about the above provision. First, reference to imprisonment confirms the earlier suggestion that reformatories are meant to hold the older juvenile offender and not the younger juvenile offender. Secondly, the fact that a reformatory school order may be made in cases warranting imprisonment clearly suggests that the legislature wants these orders to be made in serious cases rather than minor ones. Thirdly, reference to imprisonment would suggest that reformatory schools should be more closely associated with

prisons than approved schools. Therefore, before the sentencer makes a reformatory school order, the first question he must ask himself is whether the case calls for a prison sentence or not, having regard to all the circumstances of the case. As will be seen, the courts in Zambia do not appear to ask themselves this very first question before making reformatory school orders.

B. The penal aims of the reformatory school order.

As with the approved school order, the penal aims of the reformatory school order are not clearly stated in the legislation but implied. First, reformatories are meant to train juvenile offenders. For example, one section states that:-

> "Reformatories shall be classified according to... the training required by the persons detained therein." [182]

Training is an over-ambitious and unrealistic objective. As was argued in Chapter 3 and will be repeated in Chapter 10, like schooling and discipline, training should be regarded primarily an unavoidable incidence of custody to fill the time and offer industrial skills.

The second objective is education. But unlike on training, the relevant provision is clearer and more specific:-

> "Provision shall be made for educational classes for the benefit of the inmates and every inmate shall attend such classes as may be directed by the superintendent." [183]

It is right that reformatory school inmates should be obliged to attend school as a matter of sound social policy, but it will be recalled that there is no corresponding

provision for approved school juveniles, although primary school facilities must be provided for them. [184] This is anomalous, even though in practice Nakambala juveniles have no choice but to attend school. The existence of admittedly slight differences in the legal provisions on education between similar institutions is a further argument, apart from the small average age differences between Nakambala and Katombora juveniles, for bringing Nakambala and Katombora under one department.

The third objective of reformatories in Zambia is to discipline the inmates. Apart from age and the legal provision on education just noted, discipline is the other major feature which distinguishes reformatories from approved schools. In fact it is the most distinguishing legal feature. Some of the disciplinary offences which can be committed by juveniles in the reformatory are the same as those which can be committed by adult offenders in prisons. For example, it is provided that:-

"An inmate who-

(a) disobeys any order of the superintendent or of any other officer or any institution rule;
(b) is careless, idle or negligent at work or refuses to work;
(c) is indecent in language, act or gesture;
(d) escapes from the institution or from lawful custody;
(e) mutinies or incites other inmates to mutiny;
(f) commits an assault on any other inmate;
(g) commits personal violence against any officer or servant of the institution;
(h) leaves his room or dormitory or place of work or appointed place without permission;
(i) wilfully disfigures or damages any part of the institution or any property which is not his own;
(j) has in his possession any unauthorised articles, or attempts to obtain such articles;
(k) gives to or receives from any person any unauthorised articles;
(l) makes repeated and groundless complaints;
(m) in any way offends against good order and discipline;
(n) attempts to do any of the foregoing things;
(o) aids and abets the doing of any of the foregoing things; Shall be guilty of an institution offence." [185]

These are minor offences; there are also major offences, like:-

> "gross personal violence to any officer or servant of the institution or any other inmates;[186]

For committing a minor disciplinary offence, the penalties are:-

> "(a) Removal from house to penal grade;
> (b) Deprivation of any of the following privileges for a period not exceeding one month:
> (i) Association.
> (ii) Recreation and games.
> (iii) Earnings.
> (c) Extra work or fatigues outside normal labour hours for not more than two hours a day and for a period of not exceeding one month.
> (d) A fine not exceeding the equivalent of one month's earnings.
> (e) Reduction in stage or delay in promotion to a higher stage or reduction in earnings grade for a period not exceeding three months.
> (f) Confinement to a room for a period not exceeding three days.
> (g) Restricted diet, as laid down in the First Schedule, for a period not exceeding three days." [187]

More serious offences generally attract a higher degree of the same types of punishments for minor offences, but including:-

> "Whipping with a light cane not exceeding ten strokes." [188]

As the legal provisions on discipline in the reformatories is similar to those provided for adults in the prisons, as will be seen in chapter 10, it must be asked whether it is reasonable as a matter of principle to treat young offenders like adults. Clearly, behind such stringent disciplinary provisions is the assumption that older juvenile offenders are in need of this degree of discipline: a more disciplined juvenile is less likely to repeat his offence or commit more offences when he is released. Ordinary crime in any society, like theft, burglary or robbery has always been associated with

material deprivation rather than indiscipline. To emphasise discipline for purposes of keeping order in any penal institution is one thing; but to emphasise discipline in the belief that it is a significant positive input for the reformation of an offender is unwarranted. The reformatory in Zambia does not call for such stringent statutory discipline. It will be recalled that disciplinary provisions in approved schools are amorphous and discipline at Nakambala lax. If Nakambala and Katombora were run by the same government department, such divergence of approach would probably be noted and disciplinary provisions in the two institutions reconciled.

The fourth and final objective of reformatories is to maintain any religious commitments of the juvenile offenders. The legislation is slightly more pre-occupied with religion in reformatories than in approved schools because, having provided that:-

> "Adequate arrangements shall be made for the provision of religious ministration or instruction to inmates, according to their religious beliefs." [189]

Penal administrators are instructed to ensure that:-

> "Every inmate shall, from the beginning of his training, be furnished with such religious books as are recognised for the faith to which he belongs, and are obtainable." [190] (Emphasis supplied).

The provision of religious books is not mandatory in approved schools, but there is nothing unreasonable about this: the juveniles may not be mature enough for such types of books.

C. Judicial perceptions of the nature of the reformatory school order.

In examining the approved school, it was noted that the courts appear to misunderstand the nature of the approved school order. Predictably, they do not appear to understand the nature of the reformatory school order either, approaching it as if it was an ordinary prison sentence involving adult offenders. In The People v Paul Chileshe[191] the accused was found guilty of theft, a felony, and the trial magistrate made a reformatory school order. When the case came before the High Court for confirmation of the order, as required by the legislation, [192] it was quashed as excessive. Cullinan J. sent the case back to the trial magistrate for a lighter sentence; saying:-

> "The juvenile offender was a first offender who pleaded guilty. A reformatory order came to me with a sense of shock." [193]

While this particular offender may have deserved leniency, nevertheless, the judge's approach was fundamentally wrong because he failed to ask himself the prescribed question, namely whether the case warranted a prison sentence or not. As it turned put, he may have drifted to the right answer, but this does not cure the fundamentally flawed approach to the making of reformatory school orders. If the judge concluded that the case deserved a prison sentence, he should then have proceeded to consider whether the juvenile offender was in need of training, schooling or discipline. In The People v Lackson Mundia[194] the juvenile was found guilty of theft by servant, a felony, and a reformatory school order made against him. But in the

High Court, the order was quashed as being too harsh; in its place, the juvenile offender was discharged conditionally. Giving his reasons, Bruce-Lyle J. said:-

> "In view of the nature of the offence, and also of the fact that the juvenile offender was ordered to receive strokes of the cane for the last offence, I consider the learned trial magistrate's order on the severe side." [195]

Again, the judge failed to ask himself the first question about the propriety of a prison sentence in this particular case before proceeding to ask the second, namely, whether the juvenile offender was in need of training, schooling or discipline.

Even the Supreme Court itself appears to misunderstand the nature of the reformatory school order. In Gedion Musonda and Chisha Chimimba v The People[196] the juvenile offenders were found guilty of burglary and theft, felonies. In the Supreme Court, a probation order was made in place of the reformatory order made by the trial magistrate below. Reading the judgement of the court, Cullinan A.J.S. said:-

> "The juvenile offenders were first offenders. They pleaded guilty. The stolen property valued at K97.40 was recovered. We do not appreciate why in the circumstances the learned trial magistrate did not...make a probation order." [197]

As in the two previous cases, the court did not consciously ask itself whether a prison sentence was deserved, nor was the question of the training and other needs of the juveniles addressed.

If the reformatory school order was better understood by the courts, perhaps more orders would be made. However, for reasons already given when discussing approved schools, the establishment of more reformatory schools should be resisted.

D. The numbers of reformatory school inmates.

Table 40 shows the number of juvenile offenders admitted to Katombora Reformatory School in 20 years between 1964 and 1985, inclusive. For a better picture, daily averages of the inmate population are shown, where data is available.

Table 40

No.of Admissions to Katombora Reformatory School, 1964-1985.

Year	No.of Admissions	Daily Averages
1964	56	N/A
1965	87	N/A
1966	84	131
1967	58	N/A
1968	27	139
1969	24	N/A
1970	36	62
1971	43	58
1972	38	65
1973	57	N/A

1974	79	137
1975	63	115
1976	46	104
1977	56	99
1978	53	104
1979	40	87
1980	49	81
1983	33	42
1984	40	N/A
1985	41	N/A
Total:	1,010	

Source: 1964-1980: Annual Reports of the Prisons Department.
1983-1985: Admission Register at Katombora Reformatory School.

Admissions rose quickly after independence to peaks of 87 and 84 in 1965 and 1966 respectively, and declined to 24 in 1969 before rising again to 79 in 1974; there

was then a general decline in admissions from 1974 to 1985 when the figure stood at only 41. In contrast, in the borstals of Kenya, which are the equivalents of reformatories in Zambia, the trend is less erratic. Table 41 shows the number of admissions to borstals in Kenya over an admittedly shorter period of only six years, from 1975 to 1980, inclusive. For a clearer picture the national population is included in the Table.

Table 41

No.of Admissions to Borstals in Kenya, 1975-1980.

Year	No.of Admissions	Total National Population
1975	479	13,688,000
1976	303	13,738,000
1977	387	14,225,000
1978	433	14,712,000
1979	440	15,199,000
1980	425	15,688,000
Total:	2,467	

Source: Annual Report of the Administration of Prisons in Kenya 1980.
U.N. Population Studies, Nos.61-62, 1978-9, p.170.

Against a bigger steadily rising national population, Table 41 shows the number of admissions, especially in the last 3 years, to have been steady. It would appear that Kenya was making maximum use of its borstals over the years. The 1980 annual report of the Kenya prison service reported that:-

> "There was still a lack of adequate accommodation for inmates resulting in overcrowded conditions in the dormitories,..." [198]

While maximising the use of a penal institution may be justified on financial grounds, perhaps Kenya is too keen to send young offenders to borstals and that it could emulate the minimalist approach of the Zambian judiciary.

When considering the approved school, three reasons were advanced to explain the declining admissions at Nakambala: misunderstanding by the courts of the nature of the approved school order; juvenile crime not being seen as a "problem"; and the soft traditional African attitudes to juvenile delinquency. All are equally relevant to explain declining admissions to Katombora. However, there is a fourth reason applicable to both Katombora and Nakambala: judges find it difficult to get to either institution and see for themselves how they are actually run. Only by inspecting them often enough can judges monitor how they are run generally, and note admission trends. Unfortunately, the nearest judge to either institution is based in Livingstone. Although Katombora is in Livingstone, it is isolated, some 40 kilometres away from Livingstone town due south towards the border with Botswana. Anyone wishing to go Katombora, including the judge, must make a special effort to get there. As for Nakambala, it is not so isolated but is still about 100 kilometres away from Livingstone, due north.

E. The reformatory school experience.

1. General.

The first and abiding impression of Katombora Reformatory School is that of an institution which is run down and dilapidated; as already indicated, Nakambala is better maintained. If these two special custodial institutions for young offenders were run by the same government department, preferably by the Commissioner for Social Development, instead of two separate departments in two different government ministries, Katombora would be unlikely to be as run down as it is today. Even the general atmosphere is not near normal as is found at Nakambala. A contributing factor to this depressing atmosphere may be that Katombora is sited only about 100 meters away from Maluka Prison, albeit an open prison. As will be seen in chapter 10, prisons in Zambia have been deteriorating very considerably over the years since independence, largely through wilful neglect. Although the perimeter fence is suitably made of wire, and not bricks, the wire is rotting away and the front gate is hardly distinguishable. Ironically, a rotting wire fence and an indistinguishable front gate help to project a picture of an open institution, but it is also evidence of an establishment in decay.

Katombora is physically divided into two sections, for juniors and seniors, respectively. There are 6 dormitories on either side. But on the senior side two of the dormitories were in a serious state of disrepair and unoccupied. On the junior side, three dormitories were dilapidated and unoccupied. It is a measure of the general decline of Katombora that about one half of all the dormitories remained dilapidated

and unoccupied. The kitchen is very old, and although there is a dining hall for the use of the boys, the food is very poorly prepared and is served on twisted old enamel plates.

The isolation of Katombora from Livingstone town has brought about predictable misery and inconvenience for both inmates and staff alike. For example, the boys are rarely visited by their parents and relatives. [199] For members of staff, essential commodities, like mealie-meal and cooking oil, have to be bought and brought to Katombora all the way from Livingstone. Unfortunately, the official transport of the reformatory is unreliable as it keeps breaking down but is not repaired quickly enough because of chronic shortage of funds. [200]

2. Training.

When the writer inspected Katombora Reformatory School, in 1986, four courses were being taught: carpentry, tailoring, plumbing and building. All these courses have been available since at least 1976. [201] Predictably, the range of courses has declined since independence. In 1964, training courses included basket-making, shoe-repairing, painting and decorating. [202] In contrast to the small range of training courses at Katombora, borstals in Kenya have a more comprehensive range of courses: including in 1979 and 1980, for example, masonry, sign-writing and painting. [203]

All instructors are professionally qualified to teach in their chosen fields but, as at Nakambala, they complained of chronic shortages of teaching materials caused by inadequate funding. In the carpentry section, timber and planes were in short supply and benches were too few for the usual number of trainees. [204] In the tailoring section,

cloth material, drawing paper, hard board, text books and note books were all hard to obtain. Sewing machines were manually operated when the trend is towards electrically-powered machines. [205] The picture was similar in both the plumbing and building sections. [206] Unlike the practice in carpentry and tailoring, plumbing and building courses consisted almost exclusively of repairing and not installation[207]. The quality of training in these two fields at least must be restricted considerably.

It is very difficult to assess the effectiveness of training courses at Katombora. Information and data from the annual reports on trade tests, which should be most reliable measure of the success of training courses, are meagre. However, in view of the chronic shortages of training materials, it would be surprising if a significant number of inmates at Katombora make sufficient progress to enable them to sit for trade tests at Livingstone Trades Training Institute.

In addition to the industrial training courses available to the juveniles of Katombora Reformatory School, they engage in farming. The school has a large piece of land on which crops are grown and animals are kept, thus fulfilling the primary reason for siting the reformatory where it is. In fact the majority of boys are engaged in farming at any one time. Agriculture, rather than industrial training should be emphasised because that is where the future economic lifeline of the country and most of its people lies. Land is still available in Zambia and agriculture does not normally require much initial outlay. But it is important to note that theoretical training is not offered; the juveniles are used merely to produce crops and rear animals. Their introduction to agriculture is unfortunately very limited.

3. Education: a "school" without a school.

Unlike at Nakambala, there is no school within the grounds of Katombora Reformatory School itself, although the legislation requires that educational classes must be provided for inmates. The state therefore fails to fulfil the legislative requirement and an aggrieved pupil could pray for mandamus in the High Court. The absence of a school within the grounds of Katombora is further evidence of the neglect of Katombora by the government. However, many of the boys attend classes at an ordinary government primary school nearby, Kazonde Primary School. [208] Fortunately, and unlike Nakambala, the regular pupils are taught in the mornings and Katombora pupils in the afternoons, so that they do not mix. The same teachers teach both kinds of pupils. [209] Reformatory pupils do not have to endure face-to-face hostility or ridicule from ordinary pupils or their parents, but the separation of classes has produced one predictable result: Reformatory School pupils tend to be very disruptive both in and outside classes. As a result a prison officer is posted at the school to keep order. [210] Perhaps the policy of integration found at Nakambala is more appropriate. Again, if Nakambala and Katombora were run by the same department, this variation of practice would probably be avoided.

Another disparity between the two institutions is that at Kazonde, text books and stationery invariably arrive well after the start of the school year[211] thus weakening the educational programme. Text books and stationery come straight from the prison headquarters in Kabwe, and not from the local branch of the Ministry of Education as is the case at Nakambala. At Nakambala there is no problem with late deliveries. If both institutions were run by the same government department, such

disparities would easily be avoided. A third problem is that inmates attend classes for only two hours in the day, from 2 p.m. to 4 p.m., and not for five hours as is the case with normal pupils who attend classes in the morning. The tight Reformatory School schedule does not permit of longer classroom hours, [212] a revealing official attitude to the educational welfare of inmates.

4. Discipline and religious observance.

Discipline at Katombora will be discussed as part of the experience of imprisonment in chapter 10 because prisons and the reformatory are run by the same government department, prisons department. The approach to discipline is similar in both types of institutions except that the Reformatory School authorities are a little softer towards juveniles than they are towards adult prisoners, for example, separate confinement and corporal punishment are no longer imposed on the ground that they are too harsh for young offenders. [213] An isolated disused building near the front gate of the reformatory was formerly used to hold juveniles sentenced to separate confinement. The punishment register shows that the commonest disciplinary offence committed by juveniles at Katombora is possession of unauthorised articles, usually food or small amounts of cash, and the commonest punishment is reduction in stage from a higher one to a lower stage.

With regard to religious practices, Katombora juveniles are not as fortunate as their counterparts at Nakambala. Because Katombora is isolated, priests have to come all the way from Livingstone. Consequently, inmates are ministered to less often than at Nakambala.

It can be concluded that Katombora Reformatory School inmates live a more miserable life than their counterparts at Nakambala. This would not be so if the two institutions were administered by the same government department. Katombora Reformatory School is in much greater and more urgent need of improvement than Nakambala Approved School, and the government should find the funds to meet this need.

F. Measuring the success and failure of reformatory school orders.

1. Measuring success.

The success of the reformatory school order is best measured through premature releases on licence. Although the reformatory school order lasts up to 4 years, [214] the Chief Inspector of Reformatories, who is also the Commissioner of Prisons, is empowered to release an inmate prematurely after he has served a minimum of 9 months:-

> "An inmate shall be eligible for release on licence after he has served not less than nine months of his term of detention. If the superintendent, in consultation with the After Care Committee, is of the opinion that there is a reasonable possibility that an inmate will lead a useful and industrious life and abstain from crime, he shall submit his recommendation to the Chief Inspector, who, if he thinks fit, may thereupon order that he be discharged from the institution on licence." [215]

This provision can be criticised on the ground that it is over-optimistic. First, behaviour, the willingness and ability to learn industrial skills within the confines of a penal institution cannot be a reliable basis for believing that any juvenile offender (or

indeed any adult) will lead a more useful life and refrain from crime in the future. This is because penal institutions are artificial environments where people tend to behave artificially. Secondly, Katombora has insufficient resources to enable it to predict the future behaviour[216] of inmates after release, premature or not; predicting criminality is one of the most difficult problems in criminology. [217] In a few cases, the authorities may rightly come to the conclusion that an inmate will lead an industrious life, but predicting that he will refrain from crime is far more difficult. It is therefore suggested that the power to order premature releases should be based on progress in acquiring industrial skills and perhaps schooling, and not on predictions as to the future behaviour of inmates.

Apart from the difficulties in making predictions, unfortunately, the grounds upon which early releases are recommended are highly suspect. More unfortunate, perhaps, is the fact that the recommendations made by the reformatory authorities are invariably accepted. [218] As with the authorities at Nakambala, it appears that in an effort to keep their jobs, the Officer in Charge and staff at Katombora are too anxious to show that the juvenile offenders under their care are making very good progress, when the actual facts do not warrant early releases. The following recommendations by the reformatory authorities are typical.

In the case of Paul Chimfwembe (not his real name), the Headmaster of Kazonde Primary School reported:-

"He was in grade 5 last year. Progress was poor due to lack of interest." [219]

The housemaster reported:-

"He has not benefited from the reformatory training. His conduct has not improved for the better. But he likes football and might play for Zambia one day." [220]

He proceeded to say:-

"I recommend him for release pending receipt of tie-up report." [by the boy's field probation officer on the juvenile's home circumstances] [221]

The Officer in Charge was similarly negative. He wrote:-

"He has a negative attitude towards his training. He is now 22 years old and the chances of reforming him are very slim." [222]

Indeed a juvenile who, for example, is aged just under 19 years, and who is detained for, say, three years, a year short of the maximum detention period of four years, can, at 22 years, be too old to be in a reformatory. Despite the disrecommendation so clearly implied in his own report, the Officer in Charge concluded:-

"I recommend him for release to his parents in Luanshya pending a tie-up report." [223]

Clearly, there is no basis on which this particular juvenile offender could have been recommended for release on licence. The reports of the Headmaster and the Officer in Charge are particularly disturbing; having reported negatively on the juvenile's progress, they proceeded to recommend his early release.

In the case of Pawi Sakala (not his real name), his instructor reported:-

"He is lazy but quiet. Finds it very difficult to catch up." [224]

According to the Headmaster of Kazonde Primary School:-

"The boy was in grade V, but there is no good progress due to lack of interest as he believes that he is too old to go for lessons." [225]

Similar negative views were expressed by his housemaster:-

"He has not benefited from his training due to his negative response to the training progress. Otherwise, he is polite." [226]

But continued "I recommend his release." [227] Finally, the Officer in Charge wrote:-

"The lad will not change his behaviour even if he were detained longer in the school." [228]

But strangely, like the housemaster, he concluded "I recommend that he be released." [229] Despite some of the more favourable things said about Pawi Sakala, there are nonetheless no grounds on which an early release could have been recommended.

Table 42 shows the number of inmates prematurely released from Katombora over a period of 13 years from 1966 to 1983, inclusive. Daily averages are included to show the proportion, in percentages, of early releases to the average annual inmate population.

Table 42.

No.of Premature Releases from Katombora Reformatory School, 1966-1983.

Year	(a) Daily Average Pop.	(b) No.of Premature Releases	(c) (b) as % of (a)
1966	131	69	52.67
1968	139	45	32.37
1970	62	32	51.61
1971	58	26	44.82
1972	65	30	46.15
1974	137	32	23.35
1975	115	16	13.91
1976	104	44	42.30
1977	99	30	30.30
1978	104	29	27.88
1979	87	33	37.93
1980	81	35	43.20
1983	42	31	73.80
Total:		452	
Average:			40.02

Source: Annual Reports of the Prisons Department.

Figures on the daily average inmate populations vary significantly as do those on premature releases. But it will be seen that the average percentage of premature releases stands at 40.02%. In view of the many problems besetting the administration of Katombora it is difficult to believe that such a large percentage of inmates had progressed so well as to warrant early releases. Only a properly resourced Reformatory School and a properly motivated staff could be in a better position to determine whether a juvenile offender has progressed sufficiently to warrant premature release.

2. Measuring failure.

Every released inmate is subject to post-detention supervision in the community by the Officer in Charge for certain periods of time depending on the age of the inmate at the time of the making of the order. [230] In practice the supervision is carried out by field probation officers. [231]

The failure of reformatory school orders can be measured by the number of revocations of licences issued to juveniles who have been prematurely released under the supervision of field probation officers before the expiry of the 4 year maximum period of detention provided for in the legislation.

> "If the Chief Inspector is satisfied that an inmate who has been released on licence has escaped from supervision of the person under whose care he has been placed, or who has been guilty of a serious and wilful breach of the conditions of his licence, and that the case cannot be dealt with by admonition and warning, he may revoke the licence." [232]

After revocation the school authorities are empowered to detain him in stricter living conditions for a reasonable period of time;[233] no maximum period of time is specified, although the courts are not involved in the decision to revoke the licence. Because revocation and the consequences thereof is a big step, this should be the responsibility of the convicting court and not left to the administrative whims of the Officer in Charge.

When a juvenile has served his full term and not been prematurely released under licence he may be recalled by the authorities:-

> "The Chief Inspector of Reformatories may, by notice, in writing, recall to the reformatory any person under the age of twenty-three years who is under supervision of an officer in charge of a reformatory:
>
> Provided that-
>
> (i) a person shall not be recalled unless, in the opinion of the Chief Inspector of Reformatories, it is necessary in the interests of such person to recall him;"[234]

Unfortunately, the grounds upon which the Chief Inspector may recall a juvenile offender are not stated in the legislation. However, in practice recalls are ordered on the same grounds on which licences can be revoked.[235]

Table 43 shows the number of reformatory school juvenile offenders who had their licences revoked, were recalled and had escaped from Katombora. Data on daily average inmate populations, where available, is also shown for a clearer picture. The Table covers a period of 14 yeas between 1966 and 1983, inclusive.

Table 43.

Revocations, Recalls and Escapes, 1966-1983.

Year	Daily Averages	Revocations	Recalls	Escapes
1966	131	1	1	19
1968	139	10	9	21
1970	62	N/A	12	N/A
1971	58	21	10	N/A
1972	65	N/A	3	N/A
1973	N/A	7	6	13
1974	137	7	6	6
1975	115	3	3	32
1976	104	4	3	26
1977	99	9	1	23

1978	104	1	5	59
1979	87	0	6	44
1980	81	8	1	33
1983	42	0	2	19
Total:		71	68	295

Source: Annual Reports of the Prisons Department.

The single largest figure in Table 43 represents escapes (295), followed far behind by revocations (71) and closely followed by recalls (68). Apart from the large numbers escapes are a much more telling form of failure than revocations or recalls because of the element of rejection of the whole reformatory experience. It cannot therefore be claimed that Katombora Reformatory School is a success.

IV. Youth Corrective Centres: the death of an idea in embryo.

No Youth Corrective Centres have ever been established in Zambia, although legal provision for their establishment still exists. The failure to establish even a single one is perhaps the most eloquent testimony to the indifference and drift of penal policy in general in Zambia and of juvenile justice in particular. Typically, Youth Corrective Centres were hailed as a particularly effective method of dealing with juvenile

offenders in Zambia. But everything has come to nought. In Kenya, on the other hand, one Youth Corrective Centre, which caters for older juveniles between 17 and 21 years of age, appears to be working satisfactorily. [236]

When the present prison legislation was being formulated in 1965, the idea of Youth Corrective Centres was included in the Bill. Introducing the Bill, the then Minister of Legal Affairs and Attorney-General, Mr Chona, said:-

> "The object of these centres is to provide an additional method of punishment for delinquent youths between 16-20 who do not require prolonged and expensive training in an approved school or reformatory. Such youths will probably have had one or more previous convictions, a caning or probation order or some other form of punishment that has proved to be ineffective. What they require and what the Youth Corrective Centres will be designed to provide is a short, sharp punishment which will make them realise the gravity of their offence and what imprisonment really means.... I need hardly add that there is a great need, especially on the Copperbelt, for a separate penal institution of this kind.....I am convinced that these centres will do much t curb the growing rate of juvenile crime in the urban areas." (Emphasis supplied). [237]

The idea of a "short, sharp punishment" is very similar to the idea of detention centres in England in the 1960s. A 1969 Home Office publication explained:-

> "Detention centres provide a means of treating young offenders for whom a long period of residential training away from home is not yet necessary or justified by their offences, but who cannot be taught respect for the law by such non-custodial measures as fines or probation." [238]

This is what became known as the "short, sharp shock" treatment of juvenile offenders. [239]

Mr Chona then outlined a tough daily routine for inmates, beginning with physical training followed by hard work. [240] In anticipation of the establishment of Youth Corrective centres in the country, the Prisons Department Standing Orders were soon amended accordingly. [241]

The key statutory provision on Youth Corrective Centres reads as follows:-

> "(1) Where a person who has attained the age of sixteen years but has not attained the apparent age of twenty-one years, is found guilty or convicted of an offence not punishable with death, the court may order or sentence such person to undergo corrective training in a youth corrective centre for a period of six months:
>
> Provided that-
>
> (i) no person shall be ordered or sentenced to undergo corrective training in a youth corrective centre-
>
> (a) if he has previously been detained in prison, an approved school or reformatory; or
>
> (b) if he has previously been sentenced to undergo corrective training at a youth corrective centre;" [242]

It appears that this particular provision must have been taken from the Kenyan prison legislation. [243] The fact that a youth corrective order is a flat period of only six months, and that the juvenile should not have previously tasted a custodial sentence underlines the primacy of deterrence in such orders.

Ominously, construction of a youth corrective centre started in 1971, six years after the idea of corrective centres was explained in Parliament. The centre was sited a few kilometres from Kamfinsa Prison in Kitwe on the Copperbelt. By the end of the year, the building stood at slab level. It was to be built cheaply using prison labour. [244] But three years later, in 1974, construction stopped:-

> "because there were no funds allocated for this project." [245]

In the following year, 1975, it was reported that:-

> "funds were made available and it is hoped that by the end of 1976, the construction of the Centre will be completed." [246]

Two years later in 1977, it was reported that the Youth Corrective Centre at Kamfinsa was "completed".[247]

When the writer inspected the building in April, 1986, a block consisting of single cells was standing. But many of the cells were unused; there were neither doors nor windows in place. The few cells in use were used to house female prisoners found not guilty by reason of insanity. Asked about the non-completion of the Youth Corrective Centre, the Commissioner of Prisons, Mr Mutwale, admitted that everyone had forgotten all about the idea.[248] The Youth Corrective centre idea had truly died in midstream. However, in retrospect, in view of the undesirability of custodial institutions, in principle, the absence of any youth corrective centre in Zambia should not be regretted.

Conclusion.

This chapter began with a discussion of juvenile delinquency in traditional African society, showing that it had certain very distinct features which are unrecognised under the received law. Juvenile delinquency as a category of offenders was unknown. The idea of maturity did not always coincide with the idea of maturity under the received law. For example, a person may be a juvenile under statutory law but considered an adult under customary law. Because of the generally oppressive cultural climate of tribal society, very little serious crime was committed by young people; the little crime committed consisted largely of breaches of taboos. Juvenile misdemeanours were dealt with within the family and not taken to an impersonal forum like a court.

Compared with juvenile crime in the developed western countries, it juvenile crime in African countries, including Zambia, is a novel development. It is not seen as a "problem" even up to the present time; family bonds continue to be strong, dissuading juveniles from serious crime like robberies, and this would account largely for the small size of juvenile crime in Zambia. But this does not mean that it will not be a problem in the future as urbanisation intensifies and family bonds loosen. Penal policy should also look to the courts as a supplementary agent of social control. It would be idle to rely too much on the family.

When considering probation, it was pointed out that although legislation does not say so, in practice, it is restricted almost exclusively to young offenders only; adult offenders are hardly put on probation in Zambia.

It was noted that the key provision on probation is vague and can easily be confused with the key provision on discharges. There are practical difficulties in compiling social welfare reports: too few probation officers and a chronic problem of transport, especially in the rural areas, making the compilation of social welfare reports and actual supervision of probationers particularly difficult. Probation officers are not formally trained before taking up their appointments. Only those who have been to university have some training, but their numbers are small and they soon rise to supervisory positions in the probation service. For the vast majority of probation officers, they are trained on the job. Consequently, in view of this diversity of problems in the service, the value of social welfare reports regularly submitted before the courts by probation officers must be doubted. In turn, the quality of court decisions placing juveniles on probation must also be doubted. What is required is better training of probation officers before they embark on their duties. Meanwhile,

their numbers can be supplemented by recruiting village headmen in rural areas, and clerics and teachers in urban areas. Penal policy must revive probation, especially in cases involving juveniles, as supervision is very much a part of their growing up.

Annual reports on the probation service regularly publish rates of success and failure. But in view of the difficulties faced by probation officers in the compilation of social welfare reports and the supervision of probationers, claims of success must be seriously doubted. One does not really know how well or how badly probation is working in the country.

Section 2 dealt with the special custodial institutions of Nakambala Approved School and Katombora Reformatory School. In many ways they are similar, the main difference being that younger offenders are sent to Nakambala while the older ones are sent to Katombora. Also, the legislative provisions on discipline are much more elaborate with regard to the reformatory but less elaborate with regard to the approved school. In view of the similarities between these two establishments in the legal provisions governing their operations and how they are actually run, they should be run by one government department and not two as at present. Since the Commission for Social Development has traditionally dealt with young people generally, these two institutions should come under it, rather than under the Prisons Department. The many differences noted between the administration of Nakambala and Katombora would be ironed out. For example, Katombora is almost derelict while Nakambala appears well maintained. Then there are marked differences on the schooling policy; Nakambala is integrationist, but Katombora pursues a separatist school policy. Thirdly, Nakambala-bound boys have to wait at Chilenje Remand Home before proceeding to the approved school, resulting in a number of serious

constitutional, legal and penal policy consequences. But Katombora-bound juveniles do not face similar problems.

There is, however, an initial and bigger problem in the administration of Nakambala and Katombora. It appears the courts do not understand the nature of approved school orders and reformatory school orders. A number of decided cases were cited in which the High Court and Supreme Court of Zambia approached these orders as if they were ordinary custodial sentences for adult offenders and not special orders reserved for juvenile delinquents. The seriousness of such a misapprehension cannot be over emphasised because the courts at fault are not subordinate courts but the High Court and the Supreme Court itself, where sentencing policy is supposed to be interpreted, formulated and generated. It is imperative that the judiciary is properly trained in sentencing in general and in juvenile justice in particular.

In the relevant annual reports, both Nakambala and Katombora publish data showing the success as well as the failure of approved school orders and reformatory school orders. In either institution, the data shows that inmates make rapid progress to the point warranting early releases. But there is little basis for releasing them prematurely and the data cannot be relied upon as reflecting the reality. The school authorities exaggerate claims of success. No-one really knows whether Nakambala or Katombora is succeeding or failing. However, what is undisputed is that the Youth Corrective Centre experiment never took off. The failure of this particular experiment is the most telling example of indifference and drift in penal policy in Zambia since independence in 1964.

Since there are so many problems in the administration of juvenile justice in Zambia, it is suggested that a committee of inquiry on the lines of the Child Review

Committee in Uganda be set up to review the working of the entire juvenile justice system and make appropriate recommendations. This committee was set up in 1990 and reported in 1992. The fundamental principles were outlined:-

> "(1) The best interests of the child shall be paramount.
> (2) The primary responsibility for a child is with the parents, then with the extended family and the community and with the state only as a last resort.
> (3) .....
> (4) Children should have 'first call' on natural resource allocation; basic needs like shelter, clothing, education, health care and protection/ security should be guaranteed.
> (5) Institutionalisation of children should be the last resort and, where unavoidable, for the shortest possible time.
> (6) .....
> (7) .....
> (8) Customary practices beneficial to children should be incorporated into the law.....
> (9) .....
> (10) ....." [249]

This was a serious and comprehensive attempt to address and articulate the rights and needs of children in society, a novel exercise in an African country. As Read very properly notes:-

> "The Ugandan Child Law Review Committee has charted a practical new course for the laws of tomorrow, and one which could serve as a basis for reform urgently needed in other African Commonwealth states." [250]

In Zambia, particular note should be taken of the principles about the paramouncy of the welfare of the child, dealing with errant children within the family setting thus calling for diversion from the courts and discouraging the institutionalisation of child offenders.

Chapter 8.

Notes

1. U.N. Standard Minimum Rules for the Administration of Juvenile Justice Dpt. of Public Information, New York, 1986, popularly known as the "Beijing Rules", para.1, sub para.1.3, p.3

2. A. Campbell, Girl Delinquents, Blackwell, Oxford, 1981, pp.1-2.

3. Penal Code, Cap.146, S.14(1). Age eight has remained unchanged since the Penal Code was first introduced into Northern Rhodesia, see Penal Code Ordinance 1930, No 42 of 1930, S.15.

4. Penal Code, Cap.106, S.14(1).

5. Penal Code, Cap.7:01, S.14.

6. Criminal Code, Cap.42, S.30.

7. Children and Young Persons Act 1933, Cap.12, S.50

8. Children and Young Persons Act 1963, Cap.37 S.16(1).

9. Juveniles Act, Cap 217, S.118(1), and see Chipendeka v The People (1969) Z.R. 82, The People v Kangwa Mwaba (1979) Z.R. 193 and Davies Mwape v The People (1979) Z.R. 55.

10. Ibid., S.14(2).

11. [1973] I U.L.R. 47

12. 1964-1966 ALR Mal., 324.

13. Ibid., at p.326.

14. Penal Code, Cap.146, S.14(3).

15. Penal Code Ordinance 1930, No.42 of 1930, S.15

16. Juveniles Act, Cap.217, S.2(1).

17. Children and Young Persons Act, Cap.141, S.2; for Malawi, Children and Young Persons Act, Cap.26:03, S.2.

18. Children and Young Persons Act, Cap.13, S.2.

19. Juveniles Act, Cap.217, S.2(1).

20. Children and Young Persons Act, Cap.26:03, S.2.

21. Children and Young Persons Act, Cap.13, S.2.

22. Juveniles Act, Cap.217, S.2(1).

23. Children and Young Persons Act, Cap.26:03, S.2.

24. Children and Young Persons Act, Cap.13, S.2.

25. Juveniles Act, Cap.217, S.2(1)(a).

26. Ibid.

27. Ibid., S.2(1)(b).

28. See Births and Deaths Registration Act, Cap.210, SS.5 and 14, and also see the Births and Deaths Registration (General) Rules, Cap. 210.

29. Ibid., S.7.

30 See Births and Deaths Registration (General) Rules, Cap.210, Reg-Gen. Forms 16-19.

31. Children and Young Persons Act, Cap.141, S.2.

32. Reformatory Schools Act, Cap.111, S.8(1); also see the Malawi Children and Young Persons Act, Cap.26:03, S.2.

33. Juveniles Act, Cap.217, S.18(1).

34. N.R.L.R., Vol.IV, 89.

35. Ibid.

36. Ibid., at pp.89-90.

37. 1958 R & N 219.

38. Ibid., at pp.219-220.

39. W.Clifford, "The Evaluation of Methods used for the Prevention and Treatment of Juvenile Delinquency in Africa South of the Sahara.", U.N. International Review of Criminal Policy, No.21, 1963, p.18.

40. Ibid.

41. U.N. International Review of Criminal Policy, Nos.7-8, Jan.,-July, 1955, "Fundamental considerations for the formulation of a policy for the prevention of juvenile delinquency.", p.11.

42. Ibid., p.16.

43. W.Clifford, Op.Cit., p.18.

44. Interview with Mrs Chisense and Mrs Simoya, both senior Social Development Officers, Lusaka, 3rd Dec., 1985.

45. Ibid.

46. The Zambia Independence Order, S.I.1964/1652, S.66.

47. Constitution of Zambia Act 1973, No.27 of 1973, S.72(1).

48. Interview with Mrs Chisense and Mrs Simoya, Lusaka, 3rd Dec., 1985.

49. Penal Code, Cap.146, S.14(1). Ages 8 and 9 are not shown on account of shortage of typing space. But in any case, the number of crimes committed by juveniles in this age range has always been insignificant.

50. Judicial Circular No.4 of 1972, dated 20th June, 1972.

51. Interview with Mr Chitunami, Deputy Commissioner for Social Development, Lusaka, 18th Nov., 1985.

52. Kabwe magistrate's court case record No.3B/30/84, unreported.

53. Probation Service Annual Report, 1981, pp.20-21.

54. Probation of Offenders Act, Cap.147, S.3(1).

55. From personal experience at the Zambian Bar.

56. Probation of Offenders Act, Cap.147, S.12(1).

57. Ibid., S.3(2).

58. Penal Code, Cap.146, S.41(1).

59. Report of the Departmental Committee on the Probation Service, London, HMSO, Cmd.1650, 1961-1962, para.15, p.4.

60. 2P 64/85, before a Lusaka magistrate's court, unreported.

61. IKE/808/85, before the Katete magistrate's court, unreported.

62. Interview with Mrs Mwenda, a senior probation officer, Lusaka, 19th Nov., 1985.

63. Interview with Mr Tembo, the probation officer at Petauke boma, Petauke, 9th June, 1986.

64. From personal experience at the Zambian Bar. Also interview with Mr Ndhlovu, a former Senior Resident Magistrate, Lusaka, 28th July 1986.

65. Interview with Mr Chitunami, the Deputy Commissioner for Social Development, Lusaka, 19th Nov., 1985.

66. Interview with Mrs Shakumbira, a senior probation officer, Livingstone, 5th Feb., 1986.

67. Ibid., also interview with Miss Njovu, a probation officer, Mazabuka, 24th Feb., 1986.

68. Kabwe Social Development file No. SD/K/33/84.

69. Interview with Mr Chitunami, Deputy Commissioner for Social Development, Lusaka, 19th Nov., 1986.

70. Interview with Mr Chitunami, the Deputy Commissioner for Social Development, Lusaka, 19th Nov., 1985.

71. Ibid.

72. Law Directory and Legal Calendar, 1985, Gvt. Printer, Lusaka,

73. Interview with Mr Chitunami, the deputy commissioner for social development, Lusaka, 19th Nov., 1985.

74. Ibid.

75. Ibid.

76. Probation of Offenders Act, Cap.147, S.5.

77. File No.SD/CHI/83, from Chingola on the Copperbelt.

78. Interview with Mrs Chisense, a senior probation officer, Lusaka, 19th Nov., 1985.

79. Interview with the supervisor of Insakwe Probation Hostel, Mr Samulunga, Ndola, 20th May, 1986.

80. Ibid.

81. Ibid. With regard to failure to find school places, there has been an acute shortage of school places throughout the country, especially in the urban areas.

82. Copy of report from file No.SD/NDO/91/85, dated 6th May, 1985 to the Principal Probation officer, Lusaka.

83. Name of interviewee withheld, Ndola, 20th May, 1986.

84. Probation of Offenders Act, Cap.147, S.4(2).

85. Ibid., P.O.Form 1.

86. Ibid.

87. From personal experience at the Zambian Bar.

88. Report of the Departmental Committee on the Probation Service, Op.Cit., para.20, p.7.

89. Ibid.

90. Letter from acting C.J., Robinson, to Governor, dated 15th Aug., 1939, ref.no.G.25/1636. SEC 1/1147.

91. W.Clifford, "Zambia", African Penal Systems, A. Milner (Ed.), London, Routledge & Kegan Paul, 1969, p.255.

92. A.Morris and M.McIsaac, Juvenile Justice?, London, Heinemann Educational, 1978, pp.1-3

93. House of Commons Debates, 12th Feb., 1932, p.1179. Under-Secretary of State for the Home Dept., Stanley, was introducing the Children and Young Persons Bill.

94. Reformatory Schools Act, 1854 Cap.86.

95. Ibid., S.2.

96. Industrial Schools Act, 1861 Cap.113.

97. Ibid., S.9(3). Other young people who could be sent to these schools were the disturbed but not offenders, see S.9(1), (2) and (4).

98. Prisons and Reformatory Act, No.46 of 1920, S.14.

99. Extract of a written reply to a question asked by a member of the Legislative Council, Mr Wellensky, 31st January, 1948. SEC 1/1144.

100. Extract from Hansard, No.56, 31st Jan., 1947, column 471-473. A member of the Legislative Council had asked acting A.G. Unsworth about the arrangements in Northern Rhodesia before juvenile offenders were sent to South Africa. SEC 1/1143.

101. Ibid.

102. Letter from Mr. Justice Logan to Governor, dated 12th Sept., 1928. SEC 1/1143.

103. See minute of Deputy Governor Stokes to Chief Secretary, dated 14th Oct., 1942. SEC 1/1146. See a copy of the probation order in respect of Mukwami Petro. SEC 1/1146.

104. Despatch from Governor to Secretary of State in London, MacDonald, dated 31st March, 1940, ref.No.JUS/D/3/1, Vol.III. SEC 1/1145.

105. Letter from Commissioner of Prisons Worseley to Chief Secretary, dated 18th April, 1943, ref.No.72. SEC 1/1145.

106. Internal memo from an official whose name or designation are illegible to another official whose name or designation is again illegible.

107. Extract from the Rand Daily Mail, for 17th June, 1942. SEC 1/1145.

108. Extract from official report of proceedings in the House of Commons, dated 16th December, 1942. SEC 1/1145.

109. The name and designation of the writer or those of the addressee are illegible, but the entry is dated 4th May, 1943. SEC 1/1146.

110. The name and designation of the writer or those of the addressee are illegible, but the entry is dated 30th Oct., 1943.

111. Gvt. Notice No.280 of 1960.

112. Gvt. Notice No.240 of 1961.

113. Gvt. Notice No.363 of 1963.

114. Annual Report of Social Welfare, 1963, p.17.

115. Letter from Chief Secretary to the Director of Public Works, dated 13th Sept., 1929. SEC 1/1144.

116. Record of Interview granted by the Governor to the Ndola National Welfare association, Jan., 1933. SEC 1/1144.

117. Annual Report of Social welfare, 1953, p.17.

118. Gvt. Notice No.1644 of 1953.

119. Annual Report of Social Welfare, 1953, p.17.

120. Parliamentary Debates, 1963, 6th Nov., 1963, p.116.

121. Ibid.

122. Juveniles Act, Cap.217, S.75(1).

123. Ibid., S.76.

124. Children and Young Persons Act, Cap.26:03, S.31(1).

125. Approved Schools Rules, Cap.217, Rule 8(1).

126. Ibid., Rule 12.

127. 1923-60 A.L.R Mal., 728.

128. Ibid., at p.729.

129. HNR/340 of 1974, Ndola High Court, unreported.

130. Juveniles Act, Cap.217, S.79(1).

131. HHR/340 of 1974, Ndola High Court, unreported.

132. HPR/190 of 1976, Lusaka High Court, unreported.

133. Ibid.

134. HNR/393 of 1976, unreported.

135. Ibid.

136. Interview with the Principal of Nakambala, Mr Mpongosa, Mazabuka, 11th Feb., 1986.

137. Ibid.

138. Juveniles Act, Cap.217, S.72(3).

139. Ibid., S.79(1)

140. Juveniles Ordinance 1956, No.4 of 1956.

141. Juveniles Act, Cap.217, S,79(2).

142. Ibid., S.2.

143. Ibid., S.4(c).

144. Ibid., S.4(b).

145. Ibid., S.4(a).

146. It has a capacity of 56 places.

147. Copy of the minute is dated 18th March, 1985, ref.no.CRH/J/09/83.

148. Copy of the minute to Clerk of Court, Chipata, is dated 7th Oct., 1985, ref.no.CRH/J/16/85.

149. Constitution of Zambia, No.1 of 1991, Article 22(1).

150. HNR/437 of 1985, Ndola High Court, unreported.

151. Ibid.

152. Juveniles Act, Cap.217, S.94(1).

153. Ibid., S.94(2).

154. Ibid., S.91 a.r.w.Gvt. Notice No.267 of 1957.

155. Interview with the principal, Mr Mpongosa, Mazabuka, 19th Feb. ,1986.

156. Ibid.

157. In Feb., 1986.

158. Interview with the principal, Mr Mpongosa, Mazabuka, 19th Feb., 1986.

159. Annual Report of the Ministry of Labour and Social Development, 1983, para.141, p.16.

160. Interview with the principal, Mr Mpongosa, Mazabuka, 19th Feb., 1986.

161. Ibid.

162. Annual Report of the Dpt. of Social Welfare, 1978, para.58, p.8.

163. Interview with the principal, Mr Mpongosa, Mazabuka, 19th Feb., 1986.

164. Ibid.

165. Ibid. Also see the Annual Report of the Dpt. of Social Welfare 1972, para.34, p.7.

166. Ibid.

167. Ibid.

168. Ibid.

169. Ibid.

170. Ibid.

171. For logistical reasons, the survey was carried out through the principal, Mr Mpongosa, Mazabuka, 23rd Feb., 1986. The choice given to the juveniles were the approved school order, the reformatory school order, probation and corporal punishment.

172. Approved School Rules, Cap.217, Rule 12 (3)(e), the maximum number being 6 for juveniles under 15 years, and 8 for those over 15 years.

173. Interview with the principal, Mr Mpongosa, Mazabuka, 19th Feb., 1986. The relevant provision permitting whipping the hands is found in the Approved School Rules, Cap.217, Rule 12 (3)(b), the maximum number of strokes being 3 on each hand.

174. Ibid.

175. Ibid.

176. Juveniles Act, Cap.217, S.78.

177. Ibid., S.87.

178. Interview with the principal, Mr Mpongosa, Mazabuka, 19th Feb., Feb., 1986.

179. Copy of minutes of the Visiting Committee meeting held at Nakambala Approved School on 25th Sept., 1985.

180. Juveniles Act, Cap.217, S.73(2).

181. Ibid., 93

182. Ibid., S.98(1). Other provisions are S.102, and under the Reformatory Schools Rules, Cap.217, Rules 37 and 65.

183. Reformatory Schools Rules, Cap.217, Rule 38(1).

184. Approved Schools Rules, Cap.217, Rule 8(1).

185. Reformatory Schools Rules, Cap.217, Rule 47.

186. Ibid., Rule 33(1). Another example is "serious and repeated offences against discipline."-Rule 53(iv).

187. Ibid., Rule 52(2).

188. Ibid., Rule 53(h).

189. Ibid., Rule 36.

190. Ibid., Rule 37.

191.HPR/191 of 1975, Lusaka High Court, unreported.

192. Juveniles Act, Cap.217, S.94(1).

193. HPR/191 of 1975, Lusaka High Court, unreported, p.1.

194. HNA/393 of 1978, Ndola High Court, unreported.

195. Ibid.

196. (1979) Z.R. 53.

197. Ibid., at p.54.

198 Annual report of the Administration of Prisons in Kenya 1980, p.16.

199. Interview with the Deputy Officer in Charge, Mr Zulu, Livingstone, 1st Feb., 1986.

200. Ibid.

201. Annual Report of the Prisons Department 1976, para.22, p.6.

202. Annual Report of the Prisons Department 1964, para.66, p.11.

203. Annual Report on the Administration of Prisons in Kenya 1979, para.5(1), p.15; for 1980, para.5(1), p.12.

204. Interview with the carpentry instructor, Mr Ng'andu, Livingstone, 1st Feb., 1986.

205. Interview with the tailoring instructor, Mr Chibalani, Livingstone, 1st Feb., 1986.

206. Interview with the plumbing instructor, Mr Chikola, and the building instructor, Mr Samatete, Livingstone, 1st Feb., 1986.

207. Ibid.

208. Interview with the education supervisor of Katombora Reformatory School, Mr Lungu, Livingstone, 1st Feb., 1986.

209. Ibid.

210. Ibid.

211. Ibid.

212. Ibid.

213. Interview with the Deputy Officer in Charge, Mr Lungu, Livingstone, 1st Feb., 1986.

214. Juveniles Act, Cap.217, SS.93 and 103.

215. Reformatory Schools Rules, Cap.217, Rule 67 (1).

216. For prediction of future behaviour and the difficulties in achieving it, see H.Manheim and L.T.Wilkins, Prediction Methods in Relation to Borstal Training, London, HMSO, 1955, esp. Chapter 1; and N.Walker, Crime, Courts and Figures, Harmondworth, Middlesex, Penguin Books Ltd., 1971, Chapters 12-13.

217. R.G.Hood and R.Sparks, Key Issues in Criminology, London, Weidenfeld & Nicolson, 1970, esp. Chapter 6, also see P.Nookes, "The Evaluation of Penal Systems", Progress in Penal Reform, L.Blom-Cooper (Ed.), Oxford, Clarendon Press, 1974, Chapter 5 and S.Brody, "Research into the Aims and Effectiveness of Sentencing", Howard Journal of Penology and Crime Prevention, Vol.17, 1978, pp.133-145.

218. Interview with Mr Chiyabi, the Commander of the Southern Region Prison Command, Livingstone, 1st Feb., 1986.

219. Copy of minutes of the Institutional Report to the After Care Committee meeting held on 21st Feb., 1986.

220. Ibid.

221. Ibid.

222. Ibid.

223. Ibid.

224. Copy of minutes of the Institutional Report to the After Care Committee meeting held on 20th March, 1986.

225. Ibid.

226. Ibid.

227. Ibid.

228. Ibid.

229. Ibid.

230. Juveniles Act, Cap.217, S.105(1).

231. Interview with Mr Zulu, Deputy Officer in Charge, Livingstone, 1st Feb., 1986.

232. Reformatory Schools Rules, Cap.217, Rule 67(3).

233. Ibid., Rule 67 (4).

234. Juveniles Act, Cap.217, S.105(2).

235. Interview with Mr Zulu, Deputy Officer in Charge, Livingstone, 1st Feb., 1986.

236. Annual Report on the Administration of Prisons in Kenya, para. (ii), p.16.

237. Parliamentary Debates 1965, 24th Aug., 1965, pp. 1191-1192.

238. The Sentence of the Court, London, HMSO, 1969, para.99.

239. Young Adult Offenders, Report of the Advisory Council on the Penal System, London, HMSO, 1974, para.169, p.59.

240. Parliamentary Debates 1965, 24th Aug., 1965, p.1192.

241. Prisons Dept. Standing Orders, paras.717-724.

242. Prisons Act, Cap.134, S.134.

243. Prisons Act, Cap.90, S.67.

244. Annual Report of the Prisons Department, 1971, para.10, p.2.

245. Annual Report of the Prisons Department, 1975, para.19, p.6.

246. Ibid.

247. Annual Report of the Prisons Department,, 1977, para.XII, p.8.

248. Interview with Mr Mutwale, Lusaka, 4th Aug., 1986.

249. J.S.Read, quoting the Committee's principles, "Protecting Uganda's children: a new model for an African state?", Journal of Child Law, Vol.5, No.4, 1993, pp.173-174.

250. Ibid., p.177.

Part D.

Prisons and Prisoners .

Chapter 9 .

Prisons and Prisoners .

Introduction .

As the title of the Chapter clearly indicates, this Chapter is divided into two sections: prisons and prisoners. The first section is further divided into prisons, using the criteria of custody and control, and special prisons. Focus is on prison farms because it appears that it is the only post-independence innovation in prison policy. Regarding prisoners, the prison population is divided into convict prisoners and non-convict prisoners. One of the biggest concerns and issues in any democratic society is the proper size of the prison population. Specific and general proposals will be advanced to reduce it. But first the evolution of prisons in Zambia is traced.

Section A .

Prisons .

I .The evolution of prisons in Zambia .

It is worth recalling that prisons as places for punishment were alien to traditional African society. They came with the establishment of the received criminal justice system.

Provision for the establishment of the first prisons in what was to become Northern Rhodesia was contained in the Africa Order in Council 1889. This order authorised Consular Courts to set aside by warrant or order a place or building as a prison, either for a particular case or time, or generally. Consular Courts were also authorised to appoint officers to manage the prisons.[1] Unfortunately, the precise details regarding the establishment of the earliest prisons generally, or any one particular prison, remain clouded. What is clear, however, is their physical appearance, at least in the outlying stations. They were made of mud and pole and thatched with grass just like the normal village hut of today. [2] So insecure were these early prisons that Rangeley, a colonial judicial official, once pointed out that:-

> "there is no prison [in Barotziland-North-Western Rhodesia] in which a prisoner could properly undergo a sentence of long duration;.....". [3]

and suggested that prisoners serving prison terms above one year be sent to neighbouring Southern Rhodesia to finish off the remainder of their sentences. [4] Predictably, sanitary arrangements were very rudimentary. For instance, in 1904, the Magistrate at Kalomo, then the headquarters of Barotziland-North-Western Rhodesia, requisitioned two buckets for sanitary use in Kalomo prison. [5] Interestingly, prisons built of pole and roofed with grass with rudimentary sanitation are still in existence today as will be shown later on in this chapter and in chapter 10

Such rudimentary and insecure prison buildings were only to be expected in a new territory. But what is more interesting to note relates not to the physical appearance of the structures but to the organisation and running of the prisons as institutions. It will be recalled that for the first thirty four years of its existence,

Northern Rhodesia was administered by a private chartered company, the British South Africa Company (BSA). This means that the organisation and management of the earliest prisons in Zambia was in the hands of a private company, a re-run of the English experience. The-day-to day running of early prisons in England was in the hands of private individuals. [6] There is a sense in which it can be said that the earliest prisons in England and Zambia were privatised. It is interesting to see the return of privatisation of at least parts of the prison systems in some western jurisdictions, notably in America[7] and England. [8] If privatisation of prisons becomes entrenched in the criminal justice systems of western jurisdictions, developing countries like Zambia might follow in due course because it will be fashionable to do so.

Regarding the dates when particular prisons in Northern Rhodesia were constructed and established, again, the details are sketchy. Neither archival records nor annual reports of the prison service are very informative. Unfortunately, not even senior prison staff have the detailed knowledge. Part of the explanation for the dearth of information about the dates may lie in the fact that, in some cases at least, prison sites were shifted. For example, the first Livingstone Prison was built of temporary material in 1914 and was sited due South on a different site from the present location. In 1925, a new prison was built, this time of bricks. It was sited very close to the centre of town where it stands today. [9] Again Petauke District Prison used to stand on one particular site but was shifted to another site shortly after independence. [10] Between 1935 and 1943, concerted efforts were being made to shift Lusaka Central Prison from its present site to another location where there was more land for cultivation. [11] What is clear about the dates when individual prisons in Zambia were established is that virtually all the existing prisons made of permanent material in

Zambia today, both large and small, were built before independence in 1964. [12] Kabwe Maximum Security Prison, for instance, the only maximum security prison in Zambia, was opened in 1960. [13] The only post-independence prisons made of bricks are three District (or local) prisons, namely, Mazabuka, in 1964, [14] Mwinilunga again in 1964, [15] Mufulira, in 1966[16] and Lundazi, in 1970. [17] The only regional (or central) prison built after independence is Kansenshi Prison in Ndola in 1972. [18] But as will be shown soon, the decision in the 1970s to use prisons as producers of food for the nation has lead to an unexpected boom in the number of prisons in the country.

II. Number of prisons in Zambia .

By the end of 1985, there was a total of 54 prisons, big and small, located throughout the country. This figure was provided by the Commissioner of Prisons. [19] Although every new prison and very prison which is closed must be gazetted, [20] no annual list is published. However, occasionally, a list is gazetted, e.g. in 1987 when 30 prisons were listed. It is not clear why the 30 prisons were published. The only factor which links the listed prisons is that they are all engaged in farming. The list was published under the provision of the prison legislation which requires the Minister to gazette every new prison. [21] Yet, some of the listed prisons are old and well established prison farms, like Mwembeshi in Lusaka and Chondwe in Ndola, thereby adding to the confusion as to why the 30 prisons were gazetted in the first place.

The position in neighbouring Tanzania is different. Although there is a similar provision on the gazetting of new prisons and the closure of others, [22] all the 53 prisons in Tanzania are listed in the subsidiary legislation. [23] In Malawi, all the 19

prisons are similarly listed. [24] Like in Tanzania and Malawi, all the prisons in Zambia should be gazetted annually for public information.

III. Types of prison and prison architecture .

Unlike in some neigbouring jurisdictions, there is no legislative framework in Zambia within which prisons, as opposed to prisoners, can be classified. In Malawi, for instance, legislation distinguishes between maximum and medium security prisons. [25] Each of these in turn is classified into four categories, using the length of sentences as the criteria. Class I prisons hold any type of prisoner serving any length of term; [26] class II are for prisoners serving up to 2 years' imprisonment; [27] class III are for those serving sentences up to 6 months; [28] and class IV are reserved for inmates serving up to 3 months' imprisonment. [29] It will be seen that, at its most basic, the criteria for the classification of prisons in Malawi is security and control. In Tanzania, prisons are classified into only three categories, [30] again using the length of sentence as the criteria. As in Malawi, there is a general class of prison in which any prisoner may be held. These are first class prisons. [31] Second class prisons hold inmates serving sentences of up to 3 years; [32] and third class prisons hold inmates serving up to 6 months only. [33] Each of the 53 prisons in Tanzania is allotted a class. [34] The Malawi provisions are preferable because they are a little more discriminating: they make the significant distinction between high security and medium security prisons, recognising, for instance, that some short term prisoners may be very high security risks, while some long term prisoners may be low security risks.

As has just been indicated above, in Zambia the classification of prisons is a matter of administrative arrangement only. There is no particular disadvantage in Zambia in not classifying prisons by legislative fiat because, as will be seen in chapter 10, the prison legislation divides prisoners into 20 categories and requires that, as much as possible, each category shall be segregated from the others.

Prisons in Zambia are normally distinguished using two basic criteria: security and control and whether it is special or not. In dealing with each type of prison, opportunity is taken briefly to describe the architecture and prevailing atmosphere of these institutions.

A. Using the security and control criteria .

Using the security and control criteria there are three types of prisons beginning with district prisons, medium security prisons and then maximum security prisons.

1. District prisons .

Unfortunately, it was not possible to obtain any sketch plan of any type of prison, including district prisons, due to the prevailing oppressive political atmosphere in the country under the one party state. [35] District prisons are located at all district administrative headquarters in the rural and urban areas throughout the country. However, as a general rule there are no district prisons at provincial administrative headquarters which are also district administrative headquarters. Thus, Ndola is the provincial administrative headquarters for the Copperbelt Province and although Ndola is also a district, there is no Ndola district prison. District prisons hold offenders

serving prison terms of up to 2 years. [36] Like all prisons of the same type, they are not all of the same size; nor do they hold the same numbers of inmates. For example, in 1984, Petauke Prison, located in a rural area, had a total of 240 admissions, [37] and Mazabuka prison, located on the line of rail, had a total of 327. [38]

Unlike prisons in England, the basic structures of all prisons in Zambia, large and small, consist of single storey blocks of dormitories. Single cells are rare; the notable exception is to be found in the section reserved for condemned prisoners at Kabwe Maximum Security Prison. In a hot tropical climate like that of Zambia, dormitories are preferable to single cells, but they have one obvious disadvantage: lack of privacy. The Woolf Report in England preferred single cell accommodation; [39] dormitory accommodation was not recommended. [40] Although the reason for this is not stated, privacy is the obvious reason. However, lack of privacy in Zambian prisons is compensated for by the advantages of dormitories over single cells: allowing more contact between inmates and for longer periods of time thus helping to relieve the stress of incarceration.

District prisons are bounded, not by brick walls but by wire fences. These make them look less forbidding than walled prisons. Short sentence minor offenders predominate in district prisons where the atmosphere is generally relaxed.

2. Regional prisons .

The nine regional prisons are medium security prisons, located at provincial administrative headquarters throughout the country. They hold prisoners serving prison terms of between 3 years and 6 years. [41] Unlike district prisons, regional prisons

are bounded by thick brick walls. The gates are similarly forbidding, but unlike English prisons, and with the exception of Lusaka Central Prison, the gates of Zambian prisons are plain and devoid of any architectural decorations. Serious offenders are held in the regional prisons and because of this, the atmosphere in these prisons is more sombre than in the smaller district prisons.

3. Maximum security prisons .

There is only one maximum security prison in Zambia, Kabwe Maximum Security Prison, popularly known as "Mukobeko" after the name of the area in Kabwe in which it is located. It holds on average about 400 inmates. [42] This prison is located where it is because Kabwe is the geographical centre of Zambia and thus is regarded as an added security precaution. [43] Kabwe Maximum Security Prison is unique in several respects. Unlike any other prison visited, it is located at the outer edge of a town. Although all regional prisons have outer security lights, Kabwe has more of them. The perimeter fence combines wire and a very thick forbidding brick wall. As an added security measure, the strip of land abutting the outer security fence is always kept clear. The general atmosphere at Mukobeko is much more sombre that at any other prison in Zambia.

Apart from condemned prisoners Mukobeko holds prisoners serving prison terms of 7 years or more, and a wide variety of other offenders who require maximum security; including criminals serving life sentences for murder or armed robbery, persons convicted of stock theft, those serving several short but consecutive sentences

and minor offenders who are considered a serious security risk. Sometimes remand prisoners charged with offences involving state security are also held at this prison. [44]

B. Special prisons .

There are 5 special types of prisons: temporary prisons, open prisons, female prisons remand prisons and prison farms. Prison farms are listed last for a special reason which will become apparent shortly.

1. Temporary prisons .

The Commissioner of Prisons is empowered to establish temporary prisons if he deems it necessary to ease congestion in any particular prison and when it is not convenient to transfer the excess inmate population to another prison; [45] no temporary prisons have ever been required. [46] This indicates that overcrowding in any prison in the country has never been considered serious enough to warrant the establishment of temporary prisons.

The Commissioner may also establish temporary prisons if he deems it necessary to split a particular prison community in order to contain an outbreak of a contagious disease which has broken out in that community. [47] In addition, he may establish temporary prisons for any other good reason. [48] Properly and wisely used, this last power should enable the Commissioner to help reduce the persistent problem of overcrowding in the prisons of Zambia; yet he has not seen fit to invoke this power.

2. Open prisons .

The existence of open prisons in any jurisdiction is a healthy sign that enlightened penal policies generally are being pursued by the government(s). The advantages of open prisons over closed prisons are well known, yet Zambia has only four open prisons. These small numbers clearly point to the marginal value placed by the government on this type of prison. Open prisons in Zambia are used largely as pre-release penal establishments for long sentence prisoners. [49] The four open prisons are: Maluka Open Prison, located next to Katombora Reformatory School in Livingstone, Southern Province (in 1984 there were 135 admissions and in 1985 the number dropped to 127); Choma Open Prison in the Southern Province; Mutwe-Wa-Nsofu (Elephant's Head) in Kabwe, Central Province and Mpika Open Prison in the Northern Province.

The writer inspected Maluka and Mutwe-Wa-Nsofu and found that they were indeed open prisons. Security was very lax; the gates are used more as markers than barriers and no guards are posted at the gates. A telling feature of the openness of open prisons is to be found at Mutwe-Wa-Nsofu, where the prison is located next to a tavern. The perimeter fence is made of thin wire which is rotting in many places. With regard to the main activities in open prisons, the emphasis is on agriculture. At Maluka, for example, inmates grow maize and raise livestock. In this regard, open prisons are like prison farms.

3. Female prisons .

There is only one exclusively female prison in Zambia, Kabwe Female Prison. Originally, it was administered as the female wing of Kabwe Medium Security Prison nearby. Kabwe Female Prison is the equivalent of Kabwe Maximum Security Prison; it holds the most serious female offenders and minor offenders regarded as serious security risks. But the security arrangements are not as tight as those found at Mukobeko. In fact, it has the security arrangements of a medium security prison. Predictably, the inmate population has remained small; in 1984, there were 25 admissions and in 1985 the figure dropped to only 17. [50] As for the general atmosphere, Kabwe Female Prison is probably the most relaxed prison in the country, more relaxed even than open prisons. One finds inmates sitting in clusters, some with babies, chatting and gossiping. Even the female staff look very relaxed.

The number of inmates at Kabwe Female Prison has remained small because many female prisoners are held in the district and regional prisons dotted throughout the country. Prisons of both types have a female wing: e.g. Petauke Prison and Lusaka Central Prison. Normally, the female offender is held in the nearest prison to the court dealing with her case and to her home and family. Because their numbers remain very small, at some times only one inmate is held in a female wing, female prisoners enjoy a degree of privacy which their male counterparts do not enjoy. But at the same time they feel much more lonely, but since they are normally held in the nearest prisons to their homes, it is better that they remain there and not be moved to Kabwe Female Prison possibly far from their homes.

4. Remand prisons .

Throughout the country, accused persons held on remand are normally held in the remand sections of the nearest prison to the court which remands them. Only two prisons are set aside to hold remand prisoners: Lusaka and Ndola Remand Prisons. It appears that there is a trend towards limiting the number of remand prisons in the country. In 1979, for example, Kasama Remand Prison in the Northern Province was closed; [51] Kabwe Remand Prison in Central Province was closed earlier in the same year; [52] the following year, (1980), Kitwe Remand Prison on the Copperbelt was also closed. [53] The reason for such closures is not entirely clear. It would appear that since it is cheaper to run one large institution than several small ones, financial cost may have been the actual reason for the policy of closing remand prisons.

5. Prison farms .

a. The general picture .

Prison farms is the only significant post-independence prison policy novelty in Zambia. In 1973 the government announced that it aims at establishing at least one prison farm in each and every district in Zambia. [54] Following this announcement the first prison farm, Chondwe prison farm in Ndola, was established in 1974. [55] By August 1986 there were slightly more than ten prison farms throughout the country. [56] However, using prisoners as agricultural labour is not as novel a prison policy as might seem. When the colonial administration was considering moving Lusaka Central Prison

from its present site in the 1940s it was suggested that it be located on farm land, approximately 600 acres, the idea being:-

> "to carry out extensive agricultural operations and market gardening." [57]

At about the same time, the government was thinking of acquiring private farm land adjacent to an existing government farm. The Commissioner of Prisons wrote to the Chief Secretary submitting tentative proposals for its use and noted that inter alia :-

> "A reformatory camp for older boys was built on the farm land and 20-30 boys from the camp worked on the farm. The fact that theirs was a farm under the agricultural department gave prisoners far greater training in modern methods of farming than could be attained by working on a purely prison farm; and it also gave the government a supply of labour, which lessened to a considerable extent the cost of running the farm." [58]

Prison farms, then, can be used to train prisoners in agricultural methods and reduce their running costs. This policy continued into independence. For example in 1970:-

> "Considerable progress was made in 1970 in the expansion of prison farms and gardens." [59]

Towards the middle of the 1970s, with the onset of the world oil crisis and depression, the government formulated a national policy of self-reliance in all government establishments, including penal institutions and schools, by growing their own food and thus help reduce running costs. [60] It was within this context, then, that the establishment of prison farms should be seen. It will therefore be seen that using prison labour to produce food for the nation was not a specific policy confined to prisons only, it was part of a general policy which extended to other government institutions. Secondly, this policy sprung not from any conscious considerations of

penal policy but was part of a general response to a national economic need. The novelty of prison farms therefore consisted in the intensification of existing policy of using prison labour to grow food for the nation. Seen in this light the "novelty" may not be that great after all. Nevertheless the intensification of agriculture has become an increasingly prominent feature of prisons in Zambia.

Prison farms have no specific legal existence of their own; like every other prison in Zambia, they are designated simply as prisons. A variety of crops, such as maize and fruits, are grown and livestock, such as cattle and pigs, are kept. [61] The bulk is sold on the open market and a small proportion consumed by inmates. [62]

b. Types of prison farms .

In the interests of clarity it may be useful to divide prison farms into four types. The first type consists of strips of land abutting normal closed prisons, usually larger ones in built up areas, fenced with brickwalls or wire. Examples are Lusaka Central Prison and Livingstone Prison where the land is used to grow mainly vegetables. Then there are prison farms, bounded by wire fences, located away from built up areas and abutting large tracks of land. Examples are Kalonga Prison Farm, 160 hectares, farmed by inmates of Kabwe Medium Security Prison[63] and Maluka Prison Farm run by inmates of Maluka Open Prison in Livingstone. [64] It appears that originally these two types of prison farms were meant to be "normal" prisons and not prison farms; the acquisition of farmland appears to have been an afterthought.

The third type of prison farm consists of prisons sited deliberately away from built up areas. A good example is Chondwe Prison Farm, 405 hectares, [65] bounded by

a wire fence and located about fifty kilometres from Ndola on the Copperbelt. The latest and fourth addition to prison farms consists of prison camps, again sited away from built up areas, and distinguished by the fact that office and prison accommodation is made of perishable materials of grass and poles. When funds are available offices and accommodation will be built of more permanent materials. [66] An example of such prison camps is Musanzala in Petauke District, 10 hectares, [67] opened in 1986, with two cells and an office.

With the exception of the first type of prisons, the largest group of inmates on prison farms on any working day is assigned to farming. For example, at Maluka Open Prison, out of a total of 104 inmates on the 27th May, 1986, 22 were assigned to the prison farm[68] or 21.15%; and at Chondwe, out of a total of 192 inmates on 11th January, 1986, 67, or 34.89%, were assigned to farming. [69]

c. Prison routine.

In all the prisons, like Lusaka Central Prison or Kabwe Medium Security Prison, the daily routine (detailed routine to be outlined in Chapter 10), is that prisoners work in the morning and engage in other activities, like education or washing, in the afternoons. In "prison farms" proper, like Chondwe and Musanzala, the routine is flexible, some inmates work even in the afternoons if necessary. [70] Apart from the distinguishing feature of extent of agricultural production, prison farms of the Chondwe and Musanzala type are distinguished by the generally relaxed atmosphere in these establishments. At Chondwe, for instance, the perimeter fence is made of wire which is rotting; a determined inmate can easily scale it and escape. At Musanzala the

atmosphere is even more relaxed. There is no perimeter fence of any kind and the cells are locked from inside and not the outside as one might expect. After lock up time at 17 hours, in effect no more than a roll call, inmates are free to come out of their cells and relax outside. At weekends, they are free to go wherever they want and do whatever they want and some go fishing in the river nearby. [71] Cell captain Lyson Lungu said that he much preferred Musanzala prison to Petauke, a closed district prison. [72]

d. Farm produce and prison industries .

Maize, the main staple food of indigenous Zambians, is the single largest crop grown on prison farms. Table 44 shows the volume of maize grown (in bags) on prison farms over a period of 12 years from 1968 and 1980, inclusive.

Table 44 .

Bags of Maize Produced on Prison Farms, 1968-1980.

Year.	No. of Bags .
1968	1,386
1969	1,781
1970	2,145
1971	3,679
1972	7,696
1974	8,769
1975	12,461
1976	17,380
1977	24,352
1978	18,638
1979	14,856
1980	17,800
Total :	130,943

Source : Annual Reports of the Prisons Department.

The most noticeable feature of Table 44 is the sudden increase in the number of bags from 8,789 bags in 1974 to 12,461 in 1975 and after, clearly reflecting the new policy of greater food production through the increased establishment of prison farms.

Prison farms operate in the wider prison policy of prison industries designed to integrate them into the national economy. To place prison industries on a firmer footing, President Kaunda ordered the establishment of a prison service revolving fund in 1973[73] with a starting capital of K175,000.[74] By 1980 K902,630.66 was raised from the sell of farm produce and K166,683.00 from prison industries.[75] The aim was that when the amount was considered sufficient, some of it would be ploughed back. But by 1986, the revolving fund was not considered large enough to warrant the start of the plough-back scheme.[76]

e. Observations on prison farms .

A poor developing country like Zambia should make maximum use of scarce resourses, including prison labour. Government policy of using prison labour to produce food for the nation through the establishment of as many prison farms as possible throughout the country is to be welcomed. Locking of prison farms into the national economy is to be encouraged. Moreover, farm work may be hard but prison farms, particularly of the Musanzala Prison Farm type, are more humane than ordinary closed prisons. Prison policy should put more emphasis on the idea of prison farms. Unfortunately, since the inauguration of this novel prison policy, no section of Zambian society, including the prison service itself, appears to have shown any serious interest in its development.

Section B .

Prisoners .

I. Total prison populations .

A. Yearly Admissions and Daily Averages .

Table 45 shows the total number of yearly admissions to the prisons of Zambia over a period of 20 years from 1964 to 1983, inclusive, covering all inmates, both convict and non-convict.

Table 45 .

Annual Prison Population of Zambia, 1964-1980 .

Year	Total No. of Admissions	Daily Average .
1964	37,523	4,017
1965	39,812	4,337
1966	42,265	4,401
1967	41,761	4,506
1968	46,289	4,463
1969	55,386	4,739
1970	49,183	5,428
1971	43,887	5,686
1972	48,190	6,393
1973	51,349	6,564
1974	50,143	7,030

1975	52,532	7,240
1976	53,075	7,783
1977	50,151	8,473
1978	59,299	9,031
1979	53,491	8,616
1980	55,742	9,141
1981	48,450	9,732
1982	46,502	9,855
1983	49,091	9,632
Total :	974,121	
Average :	48,706.05	6,853.35

Source : Annual Reports of the Prisons Department.

It is clear from Table 45 that there has been a steady rise in the daily average population in Zambia: from 4,017 in 1964 it more than doubled to 8,473 in 1977, reaching a peak of 9,885 in 1982.

Prison populations rarely decline anywhere. Table 46 shows the prison populations in Kenya over a short period of 6 years from 1975 and 1980, inclusive.

Table 46 .

The Yearly Prison Population of Kenya, 1975-1980 .

Year	Total No. of Admissions	Daily Average.
1975	138,653	24,274
1976	146,089	26,232
1977	129,765	23,899
1978	111,303	24,421
1979	118,400	24,234
1980	132,408	24,931
Total:	776,618	

Source : Annual Report on the Administration of Prisons in Kenya 1980.

B. Daily Averages of prison population per general population .

A more informative measure of the level of imprisonment in any jurisdiction may be seen by setting the daily average prison population against the crude total population. Table 47 shows the daily average prison population per 100,000 of general population in Zambia over the same period of 20 years (1964 to 1983), inclusive.

Table 47.

Daily Average Prison Population per 100,000 of General Population of Zambia 1964-1983.

Year	Total National Population.	Daily Average Prison Population.	Daily Average Prison Pop. per 100,000 .
1964	3,601,000	4,017	111.55
1965	3,712,000	4,337	116.84
1966	3,800,000	4,401	115.82
1967	4,016,000	4,506	112.20
1968	4,008,000	4,463	111.33
1969	4,001,000	4,739	118.45
1970	4,366,000	5,428	124.32
1971	4,396,000	5,686	129.34
1972	4,515,000	6,393	141.59
1973	4,618,000	6,564	142.14
1974	4,751,000	7,030	147.97
1975	4,900,000	7,240	147.76

1976	5,059,000	7,783	153.84
1977	5,181,000	8,473	163.54
1978	5,303,000	9,031	170.30
1979	5,600,000	8,616	151.71
1980	5,679,000	9,141	160.96
1981	5,900,000	9,732	164.94
1982	6,100,000	9,859	161.62
1983	6,300,000	9,632	152.88
Average :	4,425,015.7	6,853.55	139.95

Source : National Development Plans, Yearly Economic Reports, National Census of Statistics and Monthly Digest of Statistics.

Source : Prison figures from Annual Reports of the Prisons Department.

Note : There have been three censuses of population in recent years. The first, in 1963, was confined to Africans only; the other two were in 1969 and 1980.

The trend in Table 47 is clear enough. There has been a steady upward trend in the daily prison population per 100,000 of the general population in Zambia over the 20 year period covered in the Table, but the increase was much less steep than the rise in the daily average prison numbers, because of population growth.

Table 48 shows the daily average prison population per 100,000 of the general population in the United States of America, Colombia, El Salvador, Kenya and the United Kingdom in 1975 only.

Table 48 .

Daily Average Prison Population of U.S.A, Colombia, El Salvador, Kenya and the U.K.in 1975 per 100,000 of General Population.

Country.	Daily Average Prison Pop . per.100,000 .
U.S.A.	189
Colombia	186
El Salvador	175
Kenya	165
U.K.	82

Source : U.N.Congress on Crime, 1975, quoted by I.Clegg, P.Harding and J.Whetton, "Crime, Criminal Justice and Magistrates' Courts in Zambia and Kenya.", Commonwealth Judicial Journal , Vol.7, No.2, Dec., 1987, p.5.

High levels of imprisonment appear to be features of developing countries everywhere, including South America. The figure for Kenya, 165, was a little higher

than the figure for Zambia in 1975 (147). The United Kingdom has one of the highest levels of imprisonment in Western Europe; yet there were only 82 prisoners for every 100,000 of the general population. The United States is a special case because of the uniquely high levels of crime. It is ironic that poor countries with less resources have higher rates of imprisonment than richer countries.

II. Convict prisoners .

A. Number and lengths of prison terms imposed on offenders in Zambia .

It will be useful to know the pattern of prison sentences imposed on offenders in Zambia as it has an impact on the size of the convict population. Table 49 shows the number and lengths of prison terms imposed by the courts of Zambia over a period of 19 years from 1964 to 1983, inclusive. It will be seen that prison terms are grouped into 4 separate sections, beginning with prison terms under 1 month, and ending with those of 18 months and over; this is how the statistics are presented in the prisons service annual reports. It is unfortunate that the final category (18 months) is not further subdivided; for example, to identify sentences from 7 years and up to 15 years (this being the sentence range for the offence of stock theft, an offence which carries the minimum sentence of 7 years). It might then be possible to gauge the impact of minimum sentences (Chapter 4) on the total prison population in the country. In this section, the analysis of prisoner types will be accompanied by suggested ways of reducing their numbers, where possible.

When considering the significance of tables like this one, it is usual to distinguish between short and long prison sentences, but there is no universally agreed definition

of "short sentences". In some jurisdictions, short sentences run up to 12 months. [77] In Zambia, legislation stipulates that it runs up to 6 months. [78]

Table 49.

No. and Lengths of Prison Terms Imposed on Offenders in Zambia, 1964-1983.

Year	Under 1 month		1 – Under 3 months		3 – Under 6 months		6 – Under 12 months		12 – Under 18 months		18 months and over		Total No.	Total %
	No	%	No	%	No	%	No	%	No	%	No	%		
64	1,050	12.56	1,888	22.38	1,675	20.03	1,459	17.45	722	8.64	1,567	18.74	8,361	99.80
65	5,486	39.19	2,858	20.42	2,494	17.82	1,540	11.00	666	4.78	951	6.79	13,995	100
66	4,376	33.75	2,838	22.32	2,414	18.96	1,635	12.85	602	4.83	915	7.29	12,780	100
67	2,796	26.90	2,343	22.55	2,307	22.20	1,634	12.85	564	5.42	748	7.20	10,392	99.82
68	2,376	22.19	1,928	18.00	2,647	24.72	1,916	17.89	968	9.04	874	8.16	10,709	100
69	2,814	22.06	2,165	16.96	3,267	25.61	2,375	18.62	883	6.92	1,254	9.83	12,758	100
70	2,651	21.29	1,648	13.24	2,857	22.95	2,933	23.59	1,038	8.33	1,322	10.60	12,449	100
71	1,806	16.50	1,410	12.54	2,755	24.92	2,998	25.70	1,076	9.46	1,230	10.91	11,275	100
72	1,827	14.53	1,500	12.12	2,916	23.44	3,385	29.56	1,192	8.54	1,422	11.35	12,238	99.94
73	1,625	12.40	1,623	12.30	2,913	22.23	3,902	30.87	1,292	8.81	1,669	12.78	13,024	99.99
74	1,242	10.07	1,406	11.40	2,671	22.66	3,915	31.74	1,240	10.05	1,751	14.20	12,225	99.92
75	1,276	10.55	1,502	12.42	2,376	19.65	3,828	31.61	1,323	10.94	1,714	14.18	12,019	99.85
76	1,260	9.43	1,271	10.50	2,329	18.49	3,627	21.09	1,599	13.02	2,479	21.11	12,565	99.89
77	1,128	8.91	1,082	8.54	2,321	18.32	4,153	32.79	1,836	14.49	2,120	16.74	12,640	99.89
78	847	6.77	1,128	9.02	2,526	20.19	3,884	31.03	1,595	12.75	2,518	20.12	12,498	99.88
79	720	6.03	1,081	9.05	2,347	19.64	2,988	33.37	1,551	12.98	2,255	18.87	10,942	99.94
80	615	5.47	861	7.20	1,976	16.51	N/A	N/A	1,847	15.44	2,979	24.90	8,278	69.52
81	457	4.15	739	6.71	1,601	14.54	2,995	27.19	1,980	17.98	3,239	29.41	11,011	99.98
82	584	5.60	745	7.15	1,533	14.71	2,931	28.13	1,849	17.74	2,775	26.63	10,417	99.96
83	916	7.76	1,107	9.33	1,661	14.007	3,086	20.13	1,861	15.76	3,173	26.88	11,804	93.98

Source: Annual Reports of the Prisons Department

There is one unmistakable feature about Table 49: the percentage of short-term sentences has been falling over the years; but at the same time, the percentage of long sentences has been rising. The fall is most marked in prison sentences of under 1 month and those in the 1 to 3 months range. In 1965, for example, the year after independence, 39.19% of all prison sentences passed were under 1 month. But 17 years later, in 1981, the figure had dropped steeply to only 4.15% although there is a slight rise afterwards. With regard to prison terms between 3 months and under 6 months, the decrease is slightly more gradual.

The proportion of long prison sentences has consistently been higher than shorter prison terms. The sharpest rise in the percentage of long prison terms is to be found in the 6 months to under 12 months bracket: between 1964 and 1969 there was a steady rise; a high plateau was then reached between 1970 (23.59%) and 1983 (20.13%). The peak was reached in 1979 when the figure stood at 33.37%. Public pressure on Parliament and the judiciary would largely account for more offenders receiving longer prison sentences. But no voices urging for more and shorter prison terms or their substitution with non-custodial penalties have been heard, not even from the Law Association of Zambia, Prisoners Aid Society (Chapter 10) or academia.

B. The short sentence prisoner .

Although the number of short prison terms has been in decline since independence this does not mean that nothing can or should be done to reduce the numbers further as part of the overall scheme to reduce the total size of the inmate population in the country.

The United Nations has long been interested in the position of the short sentence offender in the prison systems of member countries. Its position is that short prison sentences are undesirable for two reasons: while it is difficult to train them, at the same time, they are contaminated by mixing with hardened criminals in prison. [79] But it is also recognised that in appropriate cases short prison sentences are necessary in the interests of justice. [80]

One way of trying to reduce the numbers of short term offenders is by identifying the sort of offences which are commonly committed by this category of prisoner. But, unfortunately, the annual reports of the prison service are completely silent on this particular matter. Table 50 shows the number of short sentence prisoners held in Kamfinsa Prison in Kitwe over a period of 3 years from 1983 to 1985 inclusive. Kamfinsa has been chosen because it is located on the Copper Belt, the industrial hub of the country, where much crime is committed. The most commonly committed offences for which the inmates received short prison terms in Table 50 were affray, [81] being idle and disorderly, [82] drunk and incapable[83] or rogue and vagabond. [84]

Table 50 .

No.of Short Sentence Prisoners at Kamfinsa Prison, 1983-1985.

Year	(a) Total No of Admissions .	(b) No.of Short Sentence Prisoners .	(c) Percentage of (b) over (a)
1983	1,287	362	28.12
1984	1,708	510	29.85
1985	1,521	401	26.36
Total :	4,516	1,273	
Average :	1,505.33	424.33	28.11

Source : Admission Register at Kamfinsa Prison.

Table 50 shows that at this one prison, an average of 28.11% of all admissions in the 3 years shown in the Table consisted of short sentence prisoners; this is just over one quarter of all admissions, a significant proportion. There are 2 significant facts about this percentage which must be noted. First, the offences of affray, being idle and disorderly, drunk and incapable and rogue and vagabond are all minor offences. More significantly, they are all "Admission of Guilt" offences (Chapter 5), minor offences, which can be disposed of without requiring the accused to appear personally in court.

There is now general agreement about how to reduce the numbers of short sentence prisoners by replacing short prison terms with non-custodial penalties, like the suspended sentence, probation, discharges and fines. [85] But there is an additional and perhaps more effective way of achieving the same aim: the introduction of a system of formal cautioning by the police, as in England.

C. The long sentence prisoner .

1. The numbers

As with short sentence prisoners, the size of this category of prisoners is not shown in the statistics. But as the trend has been towards more long prison terms over the years, the numbers of long sentence prisoners must have been rising correspondingly.

2. Legislative provisions for early releases .

Apparently, legislation is anxious to releases long sentence prisoners as soon as possible because the Commissioner of Prisons is required to file progress reports on inmates who:-

> "(1)(a) in the case of prisoners to be detained during the President's pleasure and those sentenced to imprisonment for life, completed two years' imprisonment from the date of their admission, and thereafter at intervals of one year from the date of sentence;
> (b) in the case of all other prisoners sentenced to imprisonment for a period of or exceeding seven years, completed four years' imprisonment from the date of sentence and at intervals of two years thereafter;
> (c) completed seven or more years of his sentence and has attained, or is believed to have attained, the age of sixty years." [86]

and:-

"(2) Each report shall include:-
(a) a statement by the Officer in Charge on work and conduct of each prisoner; and
(b) a statement by the medical officer on the mental and bodily condition of each prisoner, with particular reference to the effect of imprisonment on his health." [87]

Progress reports in respect of those detained during the President's pleasure are submitted to the President, [88] and in the other cases to the Minister. [89]

Reports are thus to be submitted, after stated minimum periods of imprisonment and at the stated times thereafter, in respect of four types of inmate: the criminally insane (to be dealt with more fully later); those serving life sentences; those serving prison terms of 7 years and more; and older prisoners aged at least 60 years having served 7 years or more. The clear suggestion here is that apart from those whose health has deteriorated or are very old, prisoners who have made sufficient progress may be released before their scheduled maximum period of incarceration. To give some idea of the types and numbers of long sentence prisoners envisaged in the legislation, Table 51 shows the numbers and types of long sentence prisoners admitted to Kabwe Maximum Security Prison (where they are normally held) from 1981 to 1985, inclusive. The four categories of prisoners shown are: those serving life sentences, those serving prison terms of 7 years and above, prisoners aged 60 years and more and who have are into their seventh or more years in prison and, by way of contrast, those prisoners serving prison terms of under 7 years.

Table 51 .

No.of Prisoners Serving Long Prison Terms at Kabwe Maximum Security Prison, 1981-1985 .

Year	Lifers	Serving 7 and over	Old Prisoners	Serving under 7 Years .
1981	0	115	1	62
1982	4	124	5	48
1983	3	127	8	49
1984	2	79	2	30
1985	2	112	17	64
Total:	11	557	33	243

Source :Admission Register at Kabwe Maximum Security Prison.

It will be seen that in each of the 5 years shown in Table 51, by far the largest number of admissions comprised prisoners serving prison terms of 7 years and over. This is the most significant aspect of the Table. There were altogether 557 admissions, the longest prison sentence was 60 years, imposed in 1982 and consisted of several consecutive prison terms for aggravated robbery against a 29 year old prisoner, Isaac

Bwalya. [90] The next biggest category of long sentence prisoner consisted of inmates serving prison terms of under 7 years; the figure standing at only 253. Then came old prisoners at 33; and lastly those serving life sentences at 11.

3. Early releases in practice .

Long sentences of imprisonment tend to add significantly to the total prison population in any country, even if the number of yearly admissions may be small. The few scattered progress reports available on long sentence prisoners at Kabwe Maximum Security Prison suggest that the Commissioner of Prisons is reluctant to recommend the early release of this category of offender even when sufficient progress has been made to warrant an early release. The progress reports seen by the writer appear in a small note book in which the Commissioner and the Minister record their views. Unfortunately, the full prison history of long sentence prisoners is very sketchy.

In the case of Rabson Ilinanga (not his real name), the death sentence was commuted to 30 years imprisonment. In one of his progress reports, the Commissioner of Prisons wrote:-

> "Well behaved and good work, but I do not make any recommendation for his early release." [91]

The Minister agreed. [92] Unfortunately, records do not reveal how long the prisoner had been in prison when this particular report was made. If Rabson Ilinanga was indeed well behaved and working satisfactorily, there is no apparent reason why the Commissioner should not have recommended his early release from prison; or why the

Minister should not have agreed with him, even if this was the prisoner's very first progress report.

The reason why an apparently deserving case was not favourably reviewed is revealed in the case of Jonas Chileshe (not his real name). Chileshe was serving a 23 year prison sentence for aggravated robbery. In one of his reports, the Commissioner wrote in 1981:-

> "A young man of good understanding, but the nature of offence committed is far too grave." [93]

Again, the Minister agreed. [94] Two years later in 1983, the Commissioner reported to the Minister:-

> "The crime committed by this prisoner is very grave. I do not make any recommendation for early release." [95]

and the Minister agreed yet again.

Accurately predicting the future behaviour of anyone is an inherently difficult exercise and predicting the future conduct of offenders by reference to any "progress" made in the artificial environment of a prison is even more difficult. Nonetheless, the Commissioner of Prisons and the Minister should take a more liberal attitude towards early releases of long sentence prisoners in recognition of the wider problem of a large prison population which should as much as possible be reduced.

Apart from adopting a more liberal attitude to early releases, the number of long sentence prisoners can be reduced by adopting a system of parole.; there is no such system at present. Writing specifically on Zambia, Hatchard advocates the:-

> "introduction of a parole system, whereby prisoners become eligible to be released on licence after serving, say, one third of their sentence." [96]

He cites the advantage of parole over remission of sentence and suggests how it might be introduced:-

> "Unlike remission,... the grant of parole is discretionary and thus strict control can be kept as to which offenders are released. This type of scheme would be particularly useful in Zambia because it would not only ease the overcrowding in prisons but also permit the authorities to release at an early stage many of the petty offenders who are no real danger to the public. The implementation of such a scheme would require a modest increase in manpower as the normal condition for release would be supervision by a probation officer. However, a small project could be started soon- and later expanded as more resources become available-...."[97]

There is great merit in introducing parole in Zambia as an effective method of reducing the convict population in the prisons. But as Hatchard very correctly notes, parole calls for resources; and the best way of going about it would not be by attempting to cover the whole country with the parole scheme, but by introducing small pilot schemes of parole in selected parts of the country. It is suggested, however, that instead of starting with petty offenders as Hatchard suggests, the scheme should start with long sentence prisoners as the trend is towards longer and longer sentences.

D. Convict female prisoners .

The small numbers of female prisoners in Zambia reflect the small numbers of female offenders in Zambia as elsewhere in the world (although, as elsewhere, women outnumber men in the population of Zambia). The admission register at Kabwe Female Prison reveals that the most common types of offences for which women were sentenced to imprisonment were offences involving violence to the person, like assault occasioning actual bodily harm and unlawful wounding. Women commit fewer offences involving property than men. But predictably, some women are imprisoned

for typical female offences like abortion, infanticide and child stealing. But unlike male prisons of the same control and security status, Kabwe Female Prison has a sizeable number of inmates convicted of very minor offences, like contempt of court in a Local Court, affray, offences under the price control legislation and failure to pay fines. As for the lengths of prison terms, the register shows that many serve between 3 and 12 months. Table 52 shows the numbers of females serving prison terms in Zambia over a period of 18 years between 1964 and 1983, inclusive.

Table 52

No. of Female Convict Prisoners in Zambia, 1964-1983.

Year.	No. of Female Convict Prisoners
1964	950
1965	896
1966	500
1967	373
1968	255
1969	354
1970	365
1971	387
1972	392
1973	413

1974	421
1975	475
1976	456
1977	410
1978	372
1979	431
1980	374
1983	293
Total :	8,117

Source : Annual Reports of the Prisons Department.

The female convict prisoner population in Zambia has indeed remained small and in decline since its peak in 1964 (950) against a background of a rising general population. More should be done to ensure that fewer women are sent to prison for minor offences and that even for serious offences prison sentences are suspended. Secondly, sufficient weight should be given to the fact that in an African society

women are not just carers but providers as well; in many cases, they have heavier social responsibilities to shoulder than men. They should be sent to prison only when it is absolutely necessary to do so.

E. Juvenile offenders

Table 53 shows the numbers of juvenile offenders sentenced to imprisonment in Zambia over 18 years from 1964 and 1983 inclusive.

Table 53 .

No.of Juvenile Offenders Held in Prisons, 1964-1983 .

Year .	No.of Juvenile Offenders.
1964	189
1965	151
1966	60
1967	71
1968	60
1969	40
1970	72
1971	59
1972	23
1973	31

1974	27
1975	94
1976	0
1977	0
1978	0
1979	1
1980	0
1983	0
Total :	878

Source: Annual Reports of the Prisons Department.

The numbers in Table 53 speak for themselves: fewer and fewer juvenile offenders in Zambia have been sent to prison. Between 1976 and 1983, only one juvenile was sent to prison. The reason(s) for the effective elimination of imprisonment of juveniles is not entirely clear. It will be recalled that the trend in the admission figures to Nakambala Approved School and Katombora Reformatory School (Chapter 7) is

similar. It would appear that unlike in the industrialised Western societies, Zambian society does not appear to regard juvenile delinquency as a big "problem" and that juvenile delinquency is largely dealt with outside the criminal justice system. Whatever may be the true explanation, the effective elimination of imprisonment for juvenile offenders is a welcome trend.

F. The criminally insane .

1. Legislative provisions .

In the interests of clarity, a distinction should be made between persons adjudged unfit to plead because they are insane, and those who are found to be insane at the time of committing the offence. In either case the sentence is the same: detention at the Presidents' pleasure.

> "Where on the trial of a person charged with an offence punishable with death or imprisonment the question arises, at the instance of the defence or otherwise, whether the accused is, by reason of unsoundness of mind or of any other disability incapable of making a proper defence, the court shall inquire into and determine such question as soon as it arises." [98]

If the court finds the accused incapable of making a proper defence, a plea of not guilty must be entered even if he has already pleaded guilty. [99] In practice, where the accused is represented, such as in all homicides, the question of fitness to plead is normally raised at the plea stage in the High Court, and, without requiring the accused to undergo psychiatric examination, the unfitness to plead claim is normally accepted. [100]

If a plea of not guilty is entered, it is nevertheless provided that the court:-

"hear the evidence for the prosecution and (if any) for the defence." [101]

If there is sufficient evidence to:-

> "justify a conviction, or a special finding [not guilty by reason of insanity][the court] shall order the accused to be detained during the President's pleasure." [102]

Where there is insufficient evidence, the accused must be acquitted. [103]

When the President, on medical advice, determines that the accused is well enough to plead, the accused must be taken back to court so that the question of his fitness to plead is investigated. [104] If the court finds that he is fit to plead the trial must "commence de novo ." [105]

Regarding accused persons who claim insanity at the time of committing the offence and they are convicted, the court:-

> "shall make a special finding to the effect that the accused was not found guilty by reason of insanity." [106]

in which case the court must:-

> "order the person to whom such finding relates to be detained during the President's pleasure." [107]

2. Where they are held and the numbers .

All persons found "not guilty by reason of insanity" and ordered to be detained during the President's pleasure are initially sent to Chainama East Hospital, Lusaka, a special wing of the main psychiatric hospital in the country, Chainama Hills Hospital. The most seriously ill are kept in this wing; less serious cases are sent to two ordinary prisons (males to Livingstone Prison females to Kamfinsa Prison in Kitwe). [108] At

Livingstone Prison, the criminally insane are kept in a special wing of the prison, while they receive medical treatment. At Kamfinsa Prison, the female criminally insane are held in the half-completed building originally meant for juvenile offenders sentenced to undergo youth corrective training.

When a criminal patient is cured sufficiently and released on the orders of the President, the President normally orders his repatriation to his home village. [109] Table 54 shows the numbers of the criminally insane admitted to Chainama East Hospital over a period of 6 years from 1980 to 1985, inclusive. The Table also shows how the cases were disposed of.

Table 54.

No. of Criminally Insane Admitted to Chainama East Hospital, 1980-1985

Year	(a) Total No.of Admissions	(b) Sent to Prison	(c) Sent Home	(d) Remaining at Hospital
1980	37	20	1	16
1981	58	18	3	37
1982	58	29	1	28
1983	57	27	6	24
1984	31	8	3	20
1985	22	11	1	12
Total:	263	111	15	137

Source : Register of Criminal Patients at Chainama East Hospital, Lusaka.

It should be noted that out of a total of 263 mental patients received at Chainama East Hospital, 111 or 42.20% were transferred to Livingstone and Kamfinsa Prisons, a large proportion indeed. As it normally takes many years to cure the mentally ill, the criminally insane may be held in prison for many years before they are released. Long

stays have the effect of swelling numbers considerably. When the writer visited Livingstone Prison in 1986, for instance, the number of criminally insane inmates stood at 76; at Kamfinsa, the number was 9. Moreover the environment of a prison is hardly conducive to the care and treatment of the mentally impaired, who should be held in special hospitals.

3. Non-criminal mentally disordered persons .

This group relates to persons who are not tried for or convicted of any criminal offence; they are included here in the interests of completeness. It consists of persons who are mentally impaired and in need of psychiatric attention and supervision under the Mental Disorders Act. [110] When a person is suspected to be mentally ill, a report may be made to the Subordinate Court; if the court is satisfied of the mental impairment of the person under inquiry, an adjudication order can be made. [111] Then the court proceeds to make a control order "for the control, care or detention" of that particular individual. [112] The order directs that he be held in a "prescribed place",[113] defined as a hospital or a prison. [114]

Although the courts have a choice as to where to order the detention of mentally impaired persons, in practice, the less violent ones are sent to prison and not the hospital, because there is no hospital accommodation for them in the country. [115] While in prison, such persons receive medical treatment at the nearest hospital or clinic available until they have improved significantly. If there is little improvement, the patient is sent to the main psychiatric hospital in Lusaka (Chainama Hills Hospital). [116] A few stay in prison for short periods of time, about 30 days only. [117] Table 55 shows

the number of mentally impaired persons admitted to the prisons of Zambia over a period of 16 years between 1964 and 1983, inclusive.

Table 55.

No. of Mentally Impaired Persons Held in Prison, 1964-1980.

Year.	No. of Mentally Impaired Persons.
1964	172
1966	990
1968	930
1969	1,078
1970	875
1971	724
1972	494
1973	378
1974	409
1975	408

1976	399
1977	227
1978	253
1979	203
1980	139
1983	46
Total:	7,725

Source: Annual Reports of the Prisons Department.

Table 55 clearly shows that the number of mentally disturbed persons held in the prisons of Zambia has steadily declined from a peak of 1,078 in 1969 to only 46 in 1983. Mentally disoriented persons who have not been convicted of any offence before the courts of law should not be detained in prison at all; their proper places are psychiatric hospitals. Indeed the Zambia Prison Service has long objected, in principle, to holding mental patients in prison instead of caring for them in psychiatric hospitals. [118] Clearly, more beds should be found for this type of mental patient; alternatively, a special hospital should be built.

G. How to reduce numbers of convict prisoners .

Apart from stricter sentencing guidelines (Chapter 4), the total numbers of convict prisoners can be reduced by a more imaginative use of amnesties involving large numbers of inmates. Rutherford reports that:-

> "Amnesties are used fairly regularly to regulate the prison population size in France, Israel, and elsewhere. While the amnesty provides reductions in prison population only over the short term, it is a useful tool for avoiding overcrowding." [119]

In Tanzania, the beginning of every new Presidential term of office is marked by an amnesty of large numbers of prisoners. [120] But in Zambia, this legal device is rarely used. Under the Constitution, the President is empowered to remit prison sentences. [121] For example, in a Gazette Notice dated 14th October, 1988, the President announced that he had exercised his constitutional powers and remitted the sentences of 170 prisoners and ordered their immediate release. [122] The reason for this particular amnesty involving this large number of prisoners was not clear. However, as Zambia's independence day falls on 24th October, this particular amnesty might have been declared to mark Zambia's national day. A more imaginative use of amnesty would permit the President to order the release of convicted prisoners, particularly short-sentence prisoners, on occasions other than independence anniversaries such as Christmas time.

III. Non-convict prisoners.

A. Criminal remands.

1. The numbers.

Table 56 shows the numbers of unconvicted prisoners admitted to prisons, most of them awaiting trials, compared with the numbers of convicted offenders admitted to prison, over a period of 20 years from 1964 to 1983, inclusive. The "unconvicted" numbers include political detainees, civil debtors as well as remand prisoners. But their numbers are so small that they do not seriously distort the basic picture of criminal remands in Zambia.

Table 56 .

Number of Criminal Remands, 1964-1980.

Year	Total No.of Prison Population.	No.of Convict Prisoners.	No.of Criminal Remands.
1964	37,523	11,719	25,632
1965	39,812	13,995	25,817
1966	42,265	12,780	29,295
1967	41,764	10,329	31,435
1968	46,289	10,709	34,650
1969	55,386	12,758	41,550
1970	49,183	12,449	35,859
1971	43,887	11,275	31,888
1972	46,190	12,298	33,398
1973	51,343	15,334	34,163

1974	50,143	12,781	35,815
1975	52,532	12,581	37,081
1976	53,075	12,509	40,167
1977	50,151	12,667	37,207
1978	59,299	12,513	46,533
1979	55,491	11,949	38,609
1980	55,742	11,966	38,907
1981	48,450	11,014	37,436
1982	46,502	10,418	36,084
1983	49,091	11,806	33,003
Total:	972,118	243,850	704,529
Average:	48,605.9	12,192.5	35,226.45

Source: Annual Reports of the Prisons Department.

There are three unmistakable trends shown in Table 56. First, there have been more remand than convict prisoners in each and every year shown in the Table. Secondly, the differences in the numbers between the two kinds of inmate population is very large: in 1964, when there was the smallest number of criminal remands (25,804) only 11,719 persons were admitted as convict prisoners; remand prisoners formed the large proportion of 72.47% of the total prison population. In 1978 the number of remands reached the peak of 46,533, 78.47% of the total inmate population. Thirdly, Table 56 shows that the numbers of criminal remands have been increased steadily over the years while the numbers of convicted prisoners have remained steady (with an occasional drop e.g.1973). After rising from 25,632, in 1964, as high as 46,533 in 1978, the number of remand prisoners fell to 33,003 in 1983 - still nearly 30% higher than in 1964. The Table also shows that the growth of the total prison population in Zambia during the 20 year period was entirely due to increases in the number of criminal remands. It is as surprising as it is regrettable that this trend in the growth of the criminal remand prison population has apparently not caught the attention of the government or researchers in the country. However, the preponderance of remands over convicts may not be peculiar to Zambia. Table 57 shows the number of remands in Kenya over a period of 6 years from 1975 to 1980, inclusive. (As in Zambia, figures for remands include other non-criminal prison population, namely, mental patients, civil debtors and persons described as "vagrants").

Table 57.

Number of Criminal Remands in Kenya, 1975-1980.

Year	Total No. of Prison Population	No.of Convict Prisoners	No.of Criminal Remands
1975	139,246	59,381	79,865
1976	147,132	68,672	78,460
1977	140,524	75,700	64,824
1978	116,683	57,197	59,486
1979	118,648	56,733	61,915
1980	132,390	68,539	63,851
Total:	794,623	386,222	408,401

Source: Annual Report of the Administration of Prisons in Kenya 1980.

As in Zambia, the total number of remands exceeds that of convict prisoners. Table 57 shows that there were a total of 408,401 suspects held in the prisons of Kenya awaiting trial, as against 386, 222 offenders found guilty of criminal offences and imprisoned. But unlike in Zambia, there were years in which the number of

convicts exceeded the number of remands. In 1977, for example, there were only 64,824 remands against 75,700 convicts; the picture is similar for the following year, 1980. In fact the difference between the overall numbers of remands and convicts is smaller in Kenya than it is in Zambia, admittedly over a shorter period of time.

2. How to reduce the numbers of criminal remands .

Two general approaches can and should be adopted to help reduce the large size of criminal remands in Zambia. The first is by stricter adherence to the constitutional right to speedy trials:-

> "If any person is charge with a criminal offence, then, unless the charge is withdrawn, the case must be afforded a fair hearing within a reasonable time ....." [123] (Emphasis supplied).

Unlike in Western countries, there has been apparently no concerted, persistent or serious concern about delays in the criminal or civil trials, or delays generally in the criminal justice process from any quarter of the Zambian society including the Law Association of Zambia.

The second approach is considering much more seriously the notion of bail pending trial more as a right than a privilege. There is the constitutional presumption of innocence in criminal cases:-

> "(2) Every person who is charged with a criminal offence -
> (a) shall be presumed innocent until he is proved or has pleaded guilty;....." [124]

What is required is the logical extension of this principle when the question of bail is raised; there should be general presumption of the right to bail. In Tanzania the right

to bail pending appears to be emphasised. In In the Matter of an Application for Bail: Republic v.Paulo Kiluwa and Another[125] the two applicants were charged with causing loss to a parastatal organisation. Bail pending trial was refused in the District Court. After noting that the basic question is whether the accused will return to court for trial if he is granted bail, bail was granted. Mfalila J. made the following pertinent remarks about the general approach to bail pending trial:-

> "aside of murder and treason, in all other cases accused persons are entitled to bail as of right unless clear circumstances are shown that to afford this right to the accused public interest would be injured..." [126] (Emphasis supplied).

A presumption in favour of the right to bail should be noted, a position not enunciated by Zambian courts. Writing on Tanzania, Itemba asks whether bail is a right or privilege and says:-

> "Bail and especially bail pending trial is a right of an accused person and not a privilege. As a right, bail should not be refused without sufficient reason." [127]

Failure of the Zambian judiciary to pronounce on the right to bail may be due primarily to the legal provisions which are equivocal:-

> "When any person, other than a person accused of murder or treason....appears before or is brought before a court, he may,....at any stage of the proceedings before such court, be admitted to bail upon providing a surety or sureties sufficient, in the opinion of such...court, to secure his appearance,....." [128]

In The People v Mweemba[129] the accused, an assistant District Secretary, was convicted of false assumption of authority. A blind man had appeared before a Local Court and ordered to pay compensation which he failed to do. The accused sent him back to the Local Court and suggested that instead of paying compensation, the blind

man should be sentenced to a suspended prison term. Bail was requested but refused by the trial magistrate. In the High Court the appeal was allowed and the judge made the following observations about bail:-

> "It is true that a magistrate has a discretion in the matter of bail but that discretion should be exercised judicially and there is no good or apparent reason why bail should not have been granted.....when it was requested. The accused was an established civil servant in the Government and there could have been no fear that he could not have turned up for his trial..." [130]

It will be noticed that the question of presumption of the right to bail was not considered.

Regarding the amount of bail, the law is equally unhelpful:-

> "The amount of bail shall, in every case, be fixed with due regard to the circumstances of the case, but shall not be excessive." [131]

In England there is a general statutory presumption of the right to bail:-

> "(1) A person to whom this section applies shall be granted bail except as provided in Schedule 1.
> (2) This section applies to a person who is accused of an offence when
> (a) he appears or is brought before a magistrates' court or the Crown Court in the course of or in connection with proceedings for the offence, or
> (b) he applies to a court for bail in connection with the proceedings." [132]

Even if there was a legislative presumption in favour of the grant of bail, the enjoyment of this right would, as is the case at present, be hampered by two factors. First, accused persons generally, coming from deprived backgrounds and with little education, are not sufficiently aware of the right to apply for bail. Worse, magistrates,

as a general rule, do not inform accused persons of their right to apply for bail. [133] Applications are normally made if the accused is represented.

The second factor hampering the greater enjoyment of the right to apply for bail is the requirement of suitable sureties (accused persons are normally not required to deposit cash bail). Whether represented or not accused persons find it difficult to find suitable sureties in regular and stable employment. [134] In a poor country like Zambia, the requirement of sufficient sureties should not be over-emphasised. Use should be made of the continuing strength of family ties in an African society by permitting close family members to stand as sufficient surety, whether they are in regular employment or not.

B. Prohibited immigrants .

1. The legal provisions .

Prohibited immigrants awaiting deportation represent a remarkably high proportion of prison inmates in Zambia. Prohibited immigrants are non-nationals whose presence in Zambia has been formally declared to be prohibited under immigration legislation. Unlike deportations discussed in chapter 6 above, the order to leave is not in consequence of a conviction for a criminal offence punishable with imprisonment:-

> "Any person who belongs to a class set out in the Second Schedule shall be a prohibited immigrant in relation to Zambia." [135]

Examples are persons whose visas have expired and those who fail to report their presence to the immigration officer upon entry into Zambia. Another category of

prohibited immigrant consists of persons whose presence in Zambia has been declared by the Minister to be inimical to the interests of Zambia. [136]

Regarding places of detention awaiting deportation, it is stated that:-

> "(1) An immigration officer who detains any person.....may by warrant under his hand cause such person to be detained in a place in subsection (2).
> (2) The public officer in charge of any place specially provided for the detention of persons for the purposes of this Act, any prison or any other place where facilities exist for the detention of persons, shall receive into his custody any person with respect to whom a warrant [for detention] has been issued...
> (3) Any person detained under this Act....shall be treated as a person awaiting trial...." [137]

It will be noticed that illegal immigrants awaiting deportation need not be put in prison; they can be detained in a special place. In Zambia prohibited immigrants have always been put in prison; apparently no one has thought of detaining them in special detention centres. Special detention centres should be built for them like in England and thus help reduce the total inmate population of Zambia.

2. The numbers of prohibited immigrants .

Data on prohibited immigrants in the annual reports of the prison service is sparse. Table 58 shows the number of prohibited immigrants admitted to the prisons of Zambia over a short period of 6 years, from 1973 to 1983, inclusive.

Table 58 .

Nos.of Prohibited Immigrants in Prison in Selected Years, 1973-1983 .

Years	No. of P.Is
1973	1,468
1974	1,138
1975	2,462
1979	2,730
1980	4,730
1983	4,236
Total:	16,966

Source: Annual Reports of the Prisons Department.

Table 58 shows the rapid growth in the number of prohibited immigrants admitted to Zambian prisons, especially from 1979 to 1980. The reason for such large numbers has something to do with the comparative prosperity and political stability of Zambia in the region which make it relatively attractive to immigrants, particularly

from Zaire, Mozambique and Angola which have had serious economic and political difficulties for very many years. Zimbabwe, and, until a few years ago, South Africa had very serious political problems as well. Unfortunately, the geography of Zambia makes it very difficult to keep illegal immigrants out. Zambia is a land-locked country surrounded by no less than 8 countries. What is more, there are no natural physical barriers between five of her neighbours: Angola, Zaire, Tanzania, Malawi and Mozambique.

Ideally, the most obvious and effective way of reducing the number of prohibited immigrants in Zambia is to ensure that there are no illegal immigrants in the country. But this is hardly practical as has just been just indicated above. It is difficult to envisage any piece of legislation which would ensure that as many illegal immigrants as possible are kept out of the country. The only realistic way of reducing their numbers is by deporting them out of the country as quickly as possible so that they remain in prison for as brief a period as possible. But, unfortunately, deportation takes long periods of time to achieve because of serious administrative difficulties. Before an illegal immigrant is actually deported, the Chief Immigration Officer in Lusaka must contact the home government of the illegal immigrant waiting to be deported for purposes of confirmation of his nationality; besides, he may not want to return to his home country in which case another country willing to accept him must first be found. It normally takes many months, in some cases years, to conclude the negotiations, even with neighbouring countries like Zaire. [138]

C. Political detainees .

In more recent years, Zambia has had very few political prisoners; their numbers are therefore no longer a problem. At independence in 1964, Zambia inherited a state of emergency which had been declared by the out-going Governor; this empowered him (after independence the President) to detain any person deemed to be a danger to security of the territory. [139] President Kaunda used this power to detain his political opponents, [140] two of the most notable being Mr Kapwepwe, Kaunda's childhood friend and the current President of Zambia, Mr Chiluba, then a prominent trade unionist. Although the Constitution required the name of every Presidential detainee to be gazetted[141] it did not require that a full list of all persons detained in the year be gazetted as well. As a result, the actual number of persons detained in any one year, or indeed over any period of time, was difficult to ascertain, but the general impression was that there were many Presidential detainees held in the prisons of Zambia. In truth, however, there were nearly always few detainees at any one time.

As the pressure for multi-party politics mounted in the country, the number of political detainees dwindled considerably. Just before the election of 1991 in which President Kaunda was defeated, the Constitution was replaced. Before the replacement, the state of emergency ran indefinitely. Under the new Constitution, it lapsed with the election of a new President; [142] any new state of emergency runs for only seven days. [143] In 1993, some members of the parliamentary opposition party were suspected of planning a coup de tat and five were detained but they were soon released from prison. [144] Some of the problems involved in the administration of penal justice whereby persons suspected of committing criminal offences, albeit of a political

nature, are instead detained (Chapter 1) have not disappeared completely with the re-introduction of democracy.

D. Civil debtors .

All annual reports of the prison service show that the numbers of civil debtors held in prison are negligible. For example, in 1980, only 2 persons were sent to prison for failure to settle their debts. [145]

IV. Strategies for reducing prison populations in general.

The general prison population can be reduced by putting a moratorium on the building of more prisons. Writing on the English penal system, Rutherford outlines the accepted expansionist theory of prisons:-

> "Most contemporary prison systems are expanding through a combination of drift and design. Criminal justice administrators perpetuate the myth that the prison system is swept along by forces beyond their control or influence. The convenient conclusion is announced that given increased rates of reported crime and court work- loads, it inevitably follows that there is no alternative other than for the prison system to expand further." [146]

Such drift in prison policy is of particular relevance to Zambia which lacks the financial and human resources to monitor the direction or performance of the penal system. Rutherford suggests, inter alia , that:-

> "The Physical Capacity of the Prison System should be Substantially Reduced"[147]

through "A freeze on new prison construction." [148] , "A phased programme of prison closures..." [149] , and

> "A refurbishment programme carried out in remaining prisons which will further reduce capacity." [150]

The hope is that a reduced prison capacity will send appropriate messages to Parliament and the judiciary about overcrowding. But it takes a lot of political will to implement a policy of prison closures in any democratic society, including Zambian society. What is feasible is putting a moratorium on the construction of new prisons. If the moratorium refers to the "normal" closed prisons with high brick perimeter fences, it may be accepted reluctantly by the general Zambian public. Open prison farms should not be included in the moratorium. Refurbishing existing prisons may not be immediately feasible because Zambian prisons are not furbished. What is feasible and desirable is reducing prison capacity by cutting up dormitories into single cells. Almost all prisoners in Zambia sleep in dormitories and not cells. In an open African society and a hot climate, dormitories may be preferable to cells. Nevertheless dormitories should be cut up into single cells not only for some privacy but to reduce prison capacity. The climatic needs of a hot Zambian climate can be accommodated by making the cell walls low and not high up to the roof so that the air can circulate freely.

Conclusion .

Using the custody and control criteria, Zambian prisons can be divided into three: District Prisons, Regional Prisons and Maximum Security Prisons. District Prisons,

normally bounded by a wire perimeter fence and located in district administrative centres throughout the country, hold minor offenders; and Regional Prisons, bounded by a brick security outer wall and located in provincial administrative centres, hold serious offenders. There is only one Maximum Security Prison, Kabwe Maximum Security Prison, Kabwe, located in the geographical centre of Zambia as an added security precaution. It holds the most serious offenders, including those convicted of minor offences and remands but regarded as serious security risks.

There are four special prisons: temporary prisons, open prisons, female prisons, remand prisons and prison farms. Although legislation permits the Commissioner of Prisons to establish temporary prisons, inter alia , to release congestion in a neighbouring prison, he has not seen it necessary to do so. There are only four open prisons. The advantages of open prison are obvious; more should be built. There is only one exclusive female prison, Kabwe Female Prison. It serves as a maximum security Prison. Other female prisoners are held in female sections of existing male prisons throughout the country. There are only two remand prisons: Lusaka Remand Prison and Ndola Remand Prison. The rest of remand prisoners are held in remand sections of convict prisons.

Prison farms are the only post-independence prison policy innovation in Zambia. However, it may not be as innovative as may seem because using prisons to produce food for the nation started during the colonial administration. At independence the government continued with the policy and later intensified it by a policy of establishing at least one prison farm in every district throughout the country. Moreover, the greater use of prison labour to produce food for the nation was merely part of a wider effort, including in national educational institutions, and a general response to worsening

national economic circumstances. What started as a response to looming national economic difficulties has changed the character of Zambian prisons into centres for food production. The policy of establishing prison farms is a more realistic and economic use of scarce national resources and should be encouraged.

More and more offenders have been sentenced to longer and longer sentences. The daily average total prison population of Zambia has more than doubled from 4,000 at independence to 9,000 in the 1980s. Over the same period, the daily average prison population per 100,000 of the general population has increased by about 50% from 111 at independence to 152 in the 1980s. Yet no one appears to have noticed these trends or shown any serious concern. Large prison populations in any country have administrative budgetary and humanitarian implications. It is ironic that many developed countries have smaller prison populations.

The convict population is divided into short-sentence prisoners, long-sentence prisoners, female offenders, juveniles and the criminally insane. Unfortunately, published prison data has no information about the size of short-sentence prisoners or long-sentence prisoners; such information might form the basis for proposals for reductions in their numbers. Whatever offences they commit, the number of short-term prisoners can be reduced by making greater use of financial (Chapter 5) and semi-custodial and non-custodial penalties (Chapter 6). Long-term prisoner numbers can be reduced by adopting a more liberal approach to early releases.

Although the numbers of female prisoners and juveniles have remained small, more can and should be done to reduce their numbers. The role of females as mothers and providers in an African society should be acknowledged and imprisonment should be reserved for the most serious offenders. Similarly, juveniles should be imprisoned

only in exceptional circumstances. Regarding the criminally insane (as well as the mentally disoriented), prison is obviously not the proper institution. Special secure mental establishments should be provided.

Apart from stricter guidelines dealing with restrictions on imprisonment (Chapter 4), one other general way of reducing convict prison populations is through amnesties. The President of Zambia should be made to realise the significance of his powers to declare amnesties, especially in favour of short-sentence prisoners, many of whom need not be in prison in the first place.

The non-convict population consists of criminal remands, illegal immigrants and civil debtors. There have been more criminal remands in the prisons of Zambia than convicts since independence. It is anomalous that any prison population should be balanced in this way. Yet, no one seems to shown any interest in this imbalance with its administrative, budgetary, libertarian and constitutional implications. The most basic approach to reducing the large remand population is to regard bail as a right and not a privilege. In this regard the Tanzanian courts are innovative. The constitutional provision about the accused being innocent unless proved guilty is the basis for this approach. Also, the stricter enforcement of the constitutional right to a speedy trial should help reduce the numbers. But the more direct method of dealing with the size of the remand population is to enact a general presumption in favour of the grant of bail pending trial as has been done in England. Regarding illegal immigrants, legislation does not require that illegal immigrants awaiting deportation must be held in prison; they can be held in special detention centres. Special detention centres should be built to hold them.

The prison population, convict and non- convict, can be reduced by a policy of reducing the capacity of prisons through phased prison closures, a moratorium on prison construction and refurbishment of existing prisons. By reducing capacity the courts are supposed to send less offenders to prison. In Zambia, where inmates sleep in dormitories, the more realistic way is by turning dormitories into single cells while taking account of the tropical climate. Any moratorium on prison buildings should be confined to closed prisons and not open prison farms whose desirability and usefulness is obvious.

Chapter 9 .

Notes .

1. Africa Order in Council 1889, Article 73.

2. Report of the Visiting Commissioner to Mankoya Prison, 1918, dated 29th May, 1918. BS 3/81. Mankoya District continues to lie in a rural area of Zambia.

3. I.Graham, "A History of the Northern Rhodesia Prison Service.", Northern Rhodesia Journal , 1962-64, Vol.5, p.549.

4. Ibid.

5. Copy of a letter to the District Commissioner, dated 3rd Nov., 1904. BS 2/169, Vol.1.

6. See, for example, R.B. Pugh, Imprisonment in Medieval England , Cambridge, U.P., 1968, Chapter VIII.

7. See for example S.Borna, "Free Enterprise Goes to Prison.", B.J.C , 1986, Vol.26, No.4, pp.31-334.

8. D.Saunders-Wilson, "Privatisation", Prisons Service Journal , No. 62, New Series, 1988, pp.7-9 in which he opposes the idea of privatisation.

9. A written welcome to the writer on the eve of his visit to Livingstone Prison, written by Regional Commanding Officer Mr G.Chiyabi, dated 23rd Jan., 1986, p.3.

10. From personal knowledge. The writer comes from Petauke.

11. See various correspondence between officials. SEC 1/1158.

12. Northern Rhodesia Colonial Reports , London, HMSO, between 1952 and 1962. Also interviewed the Commissioner of Prisons, Mr Mutwale, Lusaka, 4th Aug., 1986.

13. Interview with Officer in Charge, Kabwe Maximum Security Prison, Mr Njunga, Kabwe, 22nd April, 1986.

14. Annual Report of the Prisons Department, 1964, para. II, sub.para. 38, p.5.

15. Ibid., p.6.

16. Annual Report of the Prisons Department, 1966, para.III, sub.para. 21, p.3.

17. Annual Report of the Prisons Department, 1970, para.II, sub.para. 14, p.2.

18. Interview with Commissioner of Prisons, Mr Mutwale, Lusaka, 4th Aug., 1986.

19. Ibid.

20. Prisons Act, Cap.134, S.3(1), e.g. Choma Prison Farm was gazetted in 1979, see Gazette Notice No. 167 of 1979.

21. Ibid., e.g. Feira Prison was closed in 1972, see Gazette Notice No.547 of 1972. Three others were closed later in 1980, see Gazette Notice No.1336 of 1980.

22. Prisons Ordinance, Cap., S.3.

23. Prisons (Declaration and Classification) Order, Cap.58, Order 2.

24. Prisons Act, Cap.9:02, S.3, and Establishment of Prisons Notice No.88 of 1971.

25. Prisons Regulations, Cap.9:02, Reg.2(1).

26. Ibid., Reg.62(1)(a).

27. Ibid., Reg.62(1)(b).

28. Ibid., Reg.62(1)(c).

29. Ibid., Reg.62(1)(d).

30. Prisons Ordinance, Cap.58, S.3.

31. The Prisons (Declaration and Classification) Order, Cap.58, Order 2(a).

32. Ibid., Order 2(b).

33. Ibid., Order 2(c).

34. Ibid., see Schedule.

35. A friend sent to obtain the plans of certain prisons from the Buildings Branch in Lusaka was arrested on suspicion of espionage but released soon afterwards.

36. Admission Registers.

37. Admission Registers.

38. Admission Registers.

39. Report of an Inquiry: Prison Disturbances , London, HMSO, 1991, C.1456, para.11.81, p.275.

40. Ibid., para.11.82, p.275.

41. Interview with Mr Chiyabi, Regional Commander of Southern Region of the Zambia Prison Service, Livingstone, 4th Feb., 1986.

42. See Admission Register for 1984 showing a total of 453 admissions and for 1985 showing a total of 412 admissions.

43. Interview with Officer in Charge of Kabwe Maximum Security Prison, Mr Njunga, Kabwe, 3rd April, 1986.

44. Ibid.

45. Prisons Act, Cap.134, S.4(1)(a).

46. Interview with Commissioner of Prisons, Mr Mutwale, Lusaka, 4th Aug., 1986.

47. Prisons Act, Cap.134, S.4(1)(b).

48. Ibid.

49. Interview with Mr Chiyabi, Regional Commander of Southern Region of the Zambia Prison Service, Livingstone, 4th Feb., 1986.

50. Admission Registers.

51. Gazette Notice No.1619 of 1975.

52. Gazette Notice No.80 of 1975.

53. Gazette Notice No.1334 of 1980.

54. Interview with Mr Mutwale, Commissioner of Prisons, Lusaka, 4th Aug., 1986. Also see UNIP National Policies for the Decade 1974-1984 , p.62.

55. Prisons Department Annual Report, 1974, p.1.

56. Interview with Commissioner of Prisons, Mr Mutwale, Lusaka, 4th Aug., 1986.

57. Letter from Commissioner of Prisons, Worseley, to Conservator of Forests, dated 15th March, 1943. SEC 1/1158.

58. Letter from Commissioner of Prisons, Worseley to Chief Secretary, No.42, dated 20th April, 1943. SEC 1/1158.

59. Annual Report of the Prisons Department, 1970, p.7.

60. The writer inspected many prisons, 1985-1986.

61. Interview with the Officer in Charge, Mr Mumbi, Chondwe Prison Farm, 13th May, 1985.

62. Interview with Deputy farm Manager, Mr Bulaya, Kabwe, 10th April, 1986,

63. Inspected in 1986.

64. Ibid.

65. Interview with Chondwe Officer in Charge, Mr Mumbi, Chondwe Prison Farm, 13th May, 1986, and Commandant of Musanzala Prison Farm, Mr Lunda, Musanzala Prison Farm, 6th June, 1986.

66. Interview with Mr Lunda, the Commandant of Musanzala Prison Farm, Musanzala Prison Farm, 6th June, 1986.

67. Ibid.

68. Labour Muster.

69. Labour Muster.

70. Interview with Mr Lunda, Commandant of Musanzala Prison Farm, Musanzala Prison Farm, 6th June, 1986.

71. Ibid.

72. Ibid.

73. Interview with the Commissioner of Prisons, Mr Mutwale, Lusaka, 4th Aug., 1986.

74. Annual Report of the Prisons Department, 1973, p.7.

75. Annual Report of the Prisons Department, 1980, p.17.

76. Interview with the Commissioner of Prisons, Mr Mutwale, Lusaka, 4th Aug., 1986.

77. For example, in the Philippines and some jurisdictions in South America; see Second U.N. Congress on the Prevention of Crime and Treatment of Offenders, New York, 1960, para.227, p.29.

78. Prisons Rules, Cap.134, Rule 2, the definition section.

79. Second U.N.Congress on the Prevention of Crime and Treatment of Offenders, Op.Cit., p.63.

80. Ibid.

81. Penal Code, Cap.146, S.88.

82. Ibid., S.178, paras. (a)-(g).

83. Ibid., S.180.

84. Ibid., S.181, paras. (a)-(d).

85. Second U.N.Congress on the Prevention of Crime and Treatment of Offenders, Loc.Cit.

86. Prisons Act, Cap.134, S.119.

87. Ibid.

88. Ibid., S.119(3).

89. Ibid., S.119(4).

90. See Admission Register, entry for 11th April, 1982.

91. Prison Form No.17, entitled "Review of Sentence Form", entry for 13th Oct., 1981.

92. Ibid., entry for 27th Nov., 1981.

93. Prison Form No.17 , entitled "Review of Sentence Form", entry for 22nd Nov., 1980.

94. Ibid.

95. Ibid., entry for 3rd Feb., 1983.

96. J.Hatchard, "Crime and Penal Policy in Zambia," The Journal of Modern African Studies , 23, 3(1985), p.505.

97. Ibid.

98. Criminal Procedure Code, Cap.160, S.160.

99. Ibid., S.161(1).

100. From personal experience at the Zambian bar.

101. Criminal Procedure Code, Cap.160, S.161(2).

102. Ibid., S.161(2)(b).

103. Ibid., S.161(2)(a).

104. Ibid., S.165(1).

105. Ibid., S.165(2).

106. Ibid., S.167(1).

107. Ibid., S.167(2).

108. Interview with Mr Njovu, Controller of Chainama East Hospital, Lusaka, 11th Jan., 1986.

109. e.g., see a copy of a minute written by the acting Commissioner of Prisons addressed to Officer in Charge, Lusaka Central Prison and copied to the Senior Superintendent, Chainama Hills Hospital. The minute says that mental patient G.Mwila (not his real name) is to be released into the joint care of Mr Wilson Choongo and Miss Jane Mudenda of Monze. Pri/100/Pha/Vol.IV/15 dated 9th Jan., 1986.

110. Cap.539.

111. Ibid., S.10.

112. Ibid., S.11.

113. Ibid., S.13(1).

114. Ibid., S.13(1)(a).

115. Interview with Mr Shamuzumba, Officer in Charge, Lusaka Central Prison, Lusaka, 7th Jan., 1986.

116. Ibid.

117. Interview with Mr Musonda, acting Officer in Charge, Mazabuka Prison, Mazabuka, 25th Feb., 1986.

118. See Annual Reports of the Prisons Department for 1968, para.61, p.9, and para.62, p.9; also annual report for 1969, para.68, p. 10.

119. A.Rutherford, Prisons and the Process of Justice , Oxford, Oxford University Press, 1986, p.179.

120. The writer is familiar with the criminal justice system of Tanzania having studied there towards the end of 1960s.

121. Constitution of Zambia, No.1 of 1991, Article 59(d).

122. Gazette Notice No.1094 of 1988, dated 4th Oct., 1988.

123. Constitution of Zambia, No.1 of 1991, Article 18(1).

124. Ibid.,Article 18(2)(a).

125. 1977 LRT n.21, 74.

126. Ibid., at p.77.

127. J.M.Itemba, The Law Relating to Bail in Tanzania , Dar es Salaam University Press, 1991, p.3.

128. (1972) Z.R. 292.

129. Ibid., at p.294.

130. Criminal Procedure Code, Cap. 160, S.123(1).

131. Ibid., S.126(1).

132. Bail Act 1976, Cap.63, S.4.

133. From personal experience at the Zambian bar.

134. Ibid.

135. Immigration and Deportation Act, Cap.122, S.22(1).

136. Ibid., S.22(2).

137. Ibid., S.36.

138. Interview with Mr Mungole, the Chief Reception Officer at Livingstone Prison, Livingstone, 24th Jan., 1986.

139. The Emergency Regulations, Cap.155, Reg.23.

140. See Preservation of Security Regulations, Cap.529, Reg.33(1).

141. Constitution, Cap.1 (pre-1973 Constitution), Article 53(5).

142. Constitution, No.1 of 1991, Article 30(7).

143. Ibid., Article 30(2).

144. Times of Zambia , 4th April, 1993.

145. Prisons Department Annual Report, 1980, p.5.

146. A Rutherford, Op.Cit., p.171.

147. Ibid., p.196.

148. Ibid.

149. Ibid.

150. Ibid., pp. 176-177.

Chapter 10.

The Experience of Imprisonment.

Introduction.

What impact does the experience of imprisonment have on offenders in Zambia? In particular, to what extent does imprisonment achieve any of the aims of punishment discussed in Chapter 3 above? Furthermore, how far does the prison experience in Zambia denude prisoners of their basic human rights? Examining pertinent aspects of prison life in Zambia reveals that the purposes of imprisonment remain unreviewed and prisons are supported by very meagre resources; all the energy goes into carrying on the prison system as before. The onset of the world recession at the beginning of the 1970s, from which Zambia has not recovered, began to diminish the already scarce national resources even further. Because there are no votes in prison reform, prisons have remained at the bottom of the list of priorities in Zambia. But perhaps even more inexcusable is the fact that the management of prisons and the treatment of prisoners in Zambia are characterised by a combination of drift and indifference. New themes in prison policy, like "positive custody", do not appear to have been heard of.

Borrowing from Sykes, Hawkins correctly refers to prison officers as "The Other Prisoners".[1] Their experiences should be examined as well. Also, for inmates, the experience of imprisonment does not end with their release; it continues after release. It is therefore imperative to examine, briefly, what after-care is available to them. But first it is necessary, in the interests of clarity, to articulate the purposes of imprisonment.

I. The purposes of imprisonment.

A. International approaches and views.

There is no consensus among eminent writers and commentators on the purposes of imprisonment in Western jurisdictions. The difficulties in searching for them are adequately highlighted by Hawkins in the following passage:-

> "What is prison for can be answered in terms of intention of its originators or later administrators; its actual or supposed purpose, role, or function in society; its distinctive or 'essential' nature as opposed to the accidental or contingent function it may fulfil; its historical identity; the form in which it ought to exist and be preserved; and the moral justification for its use." [2]

Although this is a general and useful way of searching for the purposes of any institution, whether it is prison or any other establishment, it is nonetheless particularly relevant with regard to imprisonment, with its long and turbulent history. But the aims of prisons can also be sought from a narrower base of the particular stand-points of various persons or groups: penologists, judges, prison officials, police, politicians, members of the public and even actual and potential victims of crime. [3]

A better known way of looking at the purposes of imprisonment is adopted by Walker. He lists nine purposes: to hold suspects pending trial; [4] to force compliance with other court orders, like payment of fines; [5] to act as a special deterrent; [6] to act as a general deterrent; [7] to act as a denunciatory sentence[8] and to act as a retributive sentence. [9] Walker also says that imprisonment protects offenders who may be at risk from suffering revenge at the hands of one or more members of the public; [10] protects the public by taking offenders out of circulation; [11] and reforms those offenders who are sent to prison. [12] Walker's list is accurately condensed in a 1979 report on the

prison service in England and Wales. It observed that the expectations of the public are that prisons should "contain, punish, deter and rehabilitate".[13] But as expected, criticism have been levelled against some of these aims and pertinent observations can be made.

One criticism relates to the often cited aim of securing the custody of prisoners. Hawkins very properly exposes the tautology behind this particular purpose. His simple point is that prison is custody and that therefore it cannot logically be argued that the purpose of prison is to confine prisoners. [14] The first observation about the objectives of prison is an obvious one. There is an irreconcilable contradiction between reform on one hand and retribution on the other. Hall Williams makes a similar point about contradictions in the purposes of prison, one which can all too easily be forgotten. He points out that while the courts send offenders to prison, prison authorities are not answerable to them; they are answerable to Parliament. [15]

B. The Zambian perspective.

In Zambia, the purposes of imprisonment can be extracted from two sources: legislative material and political pronouncements, especially those of President Kaunda.

Legislative provisions dealing with approaches and objectives of imprisonment are to be found in the Prisons Rules. These stipulate that the treatment of all prisoners, both convict and non-convict, must accord with the following guidelines:-

"(a) due regard and allowance shall be made for the difference in character and respect of various classes of prisoners;
(b) discipline and order shall be maintained with fairness, and with not more restriction than is required for safe custody of prisoners and to ensure a well ordered community life;

(c) in the control of prisoners, prison officers shall seek to influence them through their own example and leadership, so as to enlist their willing co-operation; and
(d) at all times the treatment of prisoners shall be such as to encourage their self respect and a sense of personal responsibility, so as to rebuild their morale, to inculcate in them habits of good citizenship and hard work, to encourage them to lead a good and useful life on discharge and to fit them to do so." [16]

Paragraph (d) is the most important because it encapsulates the hoped for moral reformation and good citizenship which lie at the core of imprisonment. Prison legislation in Kenya is similarly worded. [17] But surprisingly for ex-British colonial dependencies Tanzania and Malawi have no such guiding principles in their respective prison legislation. [18]

Three points can be drawn from the Zambian prison provisions above. The first is that prison is meant to reform. Secondly, it has a slightly wider aim of rehabilitation in that prison is expected to enable the prisoner to sustain himself upon leaving the prison gate. Paragraph (d) makes these two aims sufficiently clear. Thirdly, and perhaps more importantly for our purposes, in the process of reforming and rehabilitating the prisoner, prison administrators must do so in a humane way, a directive not often realised by the general public or sufficiently appreciated by prison administrators themselves.

Under the philosophy of humanism, Kaunda has something specific to say about the task of the prison service. Although Kaunda is no longer in office, his views on prisons and the prison service have so far not been repudiated by the new government either directly or indirectly; his pronouncements must therefore be taken to continue to be relevant. But the more significant point is that the administration of prisons and

prison conditions today were developed under Kaunda and the new Chiluba government has not set out any new prison policies or practices.

Kaunda repeats the basic message of reform carried in the prison legislation. In the most telling passage, he says:-

> "What use are prisons if they are not going to help prisoners change their attitude towards society? What use are they if they do not teach inmates useful skills which they can use once they have been freed? We want these people to become good citizens; every citizen who makes a mistake must helped to reform. This is the primary responsibility of our prison services:" [19]

In a humanist society:-

> "there would be no criminals; everybody would 'do unto others as he would have them do unto him.'"[20]

The idea of retribution is specifically rejected:-

> "We do not believe in punishing people for the sake of punishing them; we believe in reforming them." [21]

It will be seen that under the philosophy of humanism, the idea of reform is wider than that outlined and implied in the prison legislation. Kaunda's view of reform embraced not only change through labour and socialisation, but it has clear religious overtones as well. While reform of a religious nature is very much to be welcomed, it must be said that this is an over-optimistic view of the reformatory aim of prison in any society, including that of Zambia. As already indicated in Chapter 3, it is very doubtful whether the reform ideal within the artificial and oppressive environment of prisons, whether through the cultivation of good work habits and particularly from the heart, is really efficacious. Other penal aims must therefore take precedence over reform.

Towards the end of this chapter humane containment will be suggested as a better pre-eminent objective of imprisonment.

II Classification, segregation and prisonisation.

A. The supposed evil of contamination.

One of the supposed evils of imprisonment which John Howard tried to highlight and overcome was the contamination of the inexperienced criminal by the hardened recidivist. The Paterson Report on prisons in East Africa and Aden described the hard recidivist prisoner as a "leper" and as being "contagious".[22] Many years earlier, at the turn of the century, the Gladstone Committee Report in England condemned the habitual criminal in prison as a "most undesirable element".[23] Flynn, the Director of Prisons from neighbouring Southern Rhodesia who conducted an inquiry into the state of the prisons in Northern Rhodesia in the 1930s, condemned dormitory accommodation in the prisons:-

> "which are conducive to breeding vice and contamination of inmates..."[24]

Hawkins explains that the fear of contamination in prisons is what first led to the idea of classification and segregation.[25] However, there is the additional, more immediate and obvious aim of preventing bullying in prison.

In this section, observations will be made on the extent to which classification and segregation in the prisons of Zambia protect inexperienced inmates from being contaminated by the more experienced criminals. The theory is that a prisoner who,

having been reformed by the prison experience, leaves prison uncontaminated will not offend again in the future after.

B. The classification of prisoners.

The central approach to classification recognises that not all prisoners are alike. [26] Warren recognises that classification can be done on may different levels, [27] and that it need not be adequate for all purposes. [28] The treatment function of classification is fulfilled if classification is worked out according to the perceived causes of crime on one hand, and the personal characteristics of the individual on the other. [29] Under Zambian legislation, prisoners must be classified by sex into "convicted" and "unconvicted" prisoners. [30] Convicted and unconvicted male and female prisoners respectively are then subdivided into the following five categories: young offenders; [31] adult offenders; [32] first offenders; [33] offenders with a criminal record; [34] prisoners of unsound mind; [35] and any other classification which the Commissioner may deem appropriate. [36] What emerges is that the whole prison population, convict and non-convict, is classified into at least 20 groups, a large number indeed.

C. The segregation of prisoners.

In Zambia complete segregation of prisoners all the various groups envisaged is not possible. There has always been a shortage of prison accommodation in the country since the colonial period. In 1942, for example, the Commissioner of Prisons, Worseley, wrote to the Chief Secretary complaining of overcrowding in the prisons of Northern Rhodesia. He produced figures showing that the three largest prisons in the

territory were overcrowded. Livingstone Prison had an excess prison population of 59, Lusaka 73 and Broken Hill (now called Kabwe) 90. [37] Apart from separating males from females and convicts from criminal remands, every effort is made to separate juveniles from adults but this is not always possible. [38] For example, the writer saw juvenile remandees sharing a dormitory with convicted adults at Petauke prison. [39] Again it is not always possible to effect the all-important segregation of first offenders from recidivists. [40]

Concern about contamination in the prisons of Zambia is very real. [41] This appears to be the only matter about prison administration which concerns prison administrators. Every prison in the country has a crime prevention officer; his duty is to monitor information of a criminal nature between inmates. [42] But as first offenders are not segregated from confirmed recidivists, contamination cannot be prevented. Contamination has generated sufficient interest in western jurisdictions that writers have tried to study this phenomenon in some detail. One of the earliest prominent writers on this process is Clemmer: he called it "prisonisation".

D. "Prisonisation".

Of the expression "prisonisation", Clemmer says:-

> "we may use the term 'prisonisation' to indicate the taking on in greater or less degree of the folkways, mores, customs, and general culture of the penitentiary." [43]

Clemmer admits that "prisonisation" is similar to the ordinary assimilation by one person or a group of persons of another culture. [44] However, his main interest is finding out those factors in prison which tend to speed up or deepen criminality, or

anti-social behaviour, thereby making prison culture a distinctive culture. [45] But his real interest is in finding out why some inmates are "prisonised" while others are not. [46] Clemmer clearly implies that inmates who are the least prisonised have the best chance of being reformed. [47]

Not unexpectedly, several writers have commented on Clemmer's findings and pronouncements on prisonisation. In the particular circumstances of African culture, Boerhinger makes a pertinent observation. Writing specifically on Tanzania, Boerhinger very properly cautions that prisonisation theories developed in Western culture may not be valid when set in an African cultural context. However, he proceeds to indicate that Tanner's studies in East African prisons and his tentative findings show that prisonisation theories developed in western culture can be validly applied to prisons of East Africa. [48]

Morris takes up the theme of deprivation which tries to explain how and why inmates are sometimes prisonised. He appears to caution against exaggerating the significance of deprivation in each and every human society. He considers that deprivation is likely to be felt the most in materialistic countries like America with a high standard of living. [49] Morris's doubt about the significance of deprivation as contributing to the prisonisation of inmates is of particular relevance to a poor African country like Zambia.

Hawkins also notes that the theory of prisonisation is under serious attack and cites a number of empirical studies on the subject. He cites a number of studies which cast doubt on Clemmer's view that the length of the prison term is directly related to the degree of prisonisation. He concludes that these studies show a U-shaped curve; this means that the degree of prisonisation reaches its peak in the middle of the prison

term; as the prisoner nears the end of his sentence, he returns to his original state when he entered prison: uncontaminated. [50]

Hawkins cites other authors who say that prison culture is a mirror of life outside the prison walls, because prison culture is brought into the prison from the outside by ordinary people who happen to be sent to prison. [51] Allen makes the same point. [52] The predominance of a criminal culture over the culture of newly-arrived offenders is denied by Hawkins. [53] He doubts the validity of the claim that prisons manufacture crime. [54]

E. Prisonisation in Zambia.

Clearly, debate over the validity of the theory of prisonisation in Western jurisdictions continues. In Zambia, the supposed reality of prisonisation is merely assumed and not questioned. Neither theoretical nor empirical studies have ever been undertaken to validate the suppositions one way or the other. However, it seems inherently unrealistic to suppose that just because certain persons have been forced to live together, whether they are convicted criminals or not, a majority of those persons should assimilate whatever non-conformist culture exists in that particular establishment.

It must be concluded that while classification and segregation may be a valuable legal and administrative tool for effective control of prison populations, its usefulness in helping to reduce criminality by reducing levels of contamination is highly doubtful. A corollary point is that if indeed prison hardly prisonises, the institution of prison in Zambia probably does not induce reform either. If this is so, serious consideration

should be given to abandoning the reform ethic of prison. Classification and segregation is an example of useful idea in the field of crime and punishment which, in practice, does not seem to work.

III. The daily routine.

This section examines significant prison routines when inmates enter prison, roughly in the order in which they are experienced: reception; prison clothing, food, sleeping arrangements and early lock up. Other experiences are personal hygiene and recreation. Under the normal daily timetable inmates rise at 6 a.m. After breakfast, at 7 a.m., they engage in whatever main activity they are assigned to do. After lunch, at 1 p.m., inmates attend to their more personal concerns like education, recreation, prison visits and letter writing. After dinner, they are locked up at 5 p.m. and lights are switched of at 8 p.m.

A. Reception.

It has often been observed that the real impact of imprisonment for the individual offender is felt when he first enters prison. What strikes him the most is the reality of the loss of his freedom and all the pains, inconveniences and humiliations that flow from it.

In Zambia, the loss of liberty is not reflected in any moves to resist authority, but in the total passivity of the newly admitted inmate as the administrative formalities are undertaken. [55] The inmate is weighed and his height taken. Then uniforms and blankets are issued. Significantly, the prison uniform in the case of males is put on in the

reception office in full view of everybody present. At the end of clerical formalities, the reception officer delivers a brief homily, delivered dispassionately, about the serious consequences of committing crime in society. The prisoner is then informed of his rights to visits and correspondence and that he has the right to lodge complaints about any aspect of life during his stay in prison. He is asked if he has any questions to ask. But the domineering manner in which the newly arrived prisoner is talked to is such that he is not expected to speak.

The trauma and humiliation is clear. Female prisoners probably suffer more. On two separate occasions at Livingstone prison, the female prison officer who came to take new prisoners to their quarters made specific sexual references about how much they were going to miss male company whilst in prison. This was said in the reception office and within the hearing of everybody present. However, the full impact of imprisonment is reached after reception. Like any bad experience, it is reached the following morning when the experience has had time to sink in. A delegate to a United Nations conference on crime made the following perceptive comment:-

> "the best time to release a man would..... be on the second morning, when he had realised what loss of liberty meant and what it was like to be an outcast." [56]

This observation is particularly relevant to Zambian prisoners whose living conditions are very uncomfortable even when seen against the poverty of a developing country.

B. Prison clothing.

Male prisoners are issued with two pairs of uniforms: white short-sleeved collarless shirts and pairs of short trousers. Women are issued with white featureless

dresses. The style for both male and female prisoners is clearly meant to degrade. Prison uniforms are white to make it easier for prison officers and the public to spot a runaway prisoner, but dirt shows much more easily on white clothing so that prisoners look particularly dirty. Bright blue might be better: it would be bright enough to enable a runaway prisoner to be easily spotted but dark enough not to make the uniform look particularly soiled. Not only is the style of uniforms degrading, many are worn out and torn as well. [57] Because only two pairs of uniformed are issued, the uniform is washed less often than would be the case outside prison out in the community. The practice in all the prisons visited is that inmates wash one pair over the weekend (one dress in respect of women) while wearing the other pair. A whole week of wearing the same pair of shorts and shirt is a long period of time. As for female prisoners, their need to wear clean clothes is even greater.

Prisoners are not issued with under-wear, neither are they allowed to wear their own, as a security measure; this is not a legal prohibition, but an administrative one only. [58] It is not a minor prohibition because it violates basic rules of propriety and human decency. Nor are shoes permitted to be worn either; in a hot climate shoes may not be strictly necessary other than for hygienic reasons, but urban dwellers wear shoes. The prohibition is another example of an unnecessary administrative prohibition which only goes to reveal an indifferent attitude of prison administrators towards their wards. Any inmate who wants to wear shoes must make an application. For example, one Alick Nkonde of Kabwe Maximum Security Prison in 1985 applied to the Officer-in-Charge:-

> "I need canvas [shoes made of cloth, most probably meaning sleepers made of plastic]. Too much water in the toilet." [59]

The answer read "Give him".[60]

C. Prison food.

Perhaps the most telling example of the indifference, drift and neglect in the way prisons are run and inmates are treated in Zambia is to be found in the food consumed in the prisons, in particular in the way it is prepared. With some justification, society is entitled to be prejudiced against people who have committed serious offences. Admittedly, Zambia is a poor developing country with few national resources. The provision of material necessities must therefore be seen against the poverty of the country. But there is a limit to the pain and degradation which even serious offenders should be made to endure.

Punishment registers for all the prisons visited reveal that theft of food-stuffs is a common offence. Despite the assurances that inmates are given sufficient amounts of food,[61] the punishment registers show that some inmates at least do not get sufficient amounts of food. It is important to appreciate that in the closed world of prison, insufficiency of food assumes greater significance than outside prison.

In all the prisons visited, the kitchens are very old and dilapidated. Cooking utensils have clearly not been replaced for many years. Plates are made of aluminium; they are very old and battered.

Breakfast consists of roughly pounded maize meal called musoya in Tonga language. It is a kind of porridge to which sugar is not added. Sugar ceased to be provided in the prisons in the 1970s with the onset of the world oil crisis.[62] The significance of an apparently simple problem of sugar in musoya should not be lost; it

shows that when there is a national problem involving diminished resources, the first group of persons to suffer in the country are prisoners.

For lunch and dinner, inmates are served with nsima, a thick porridge made from maize meal, the staple food-stuff of indigenous Zambians. Nsima is never eaten on its own because it is almost tasteless, like Irish potatoes; it is always accompanied by relish consisting of meat, fish, beans and/or vegetables. In prison meat is very rarely provided. For most meals relish consists of beans or vegetables. [63] Young children in prison with their mothers are given extra food in the form of milk and eggs. [64] But this necessary extra provision is offered only to children whose mothers are serving their sentences at the main female prison, Kabwe Female Prison. Unfortunately, milk and eggs are not offered to young children in other prisons because of the cost involved. [65]

The most telling aspect of food preparation in the prisons of Zambia is that only salt is added to the relish; nothing else is added. Every prison in the country grows tomatoes and onions at least, but these are never added to the relish. Instead, they are sold on the open market as part of the prisons production effort and the revolving fund (Chapter 9). [66] Regarding cooking oil, again this ceased to be provided in the 1970s with the onset of the world recession. Tea, coffee and bread ceased to be provided at the same time. [67] Clearly, the preparation of food in the prisons of Zambia is so poor that it amounts to a serious diminution of basic human rights.

Reference has already been made to In Matter of Valentine Musakanya, Edward Jack Shamwana, Godwin Yoram Mumba, Deogratias Symba, Laurent Kanyembu and Thomas Mupunga Mulenga and The Attorney-General and Commissioner of Prisons[68] in Chapter 4 in which a group of condemned prisoners petitioned the High Court complaining that their constitutional rights not to be subjected to torture or inhuman

treatment were being violated. Several specific complaints were alleged; but for our purposes, the petitioners complained firstly that they were given insufficient food in accordance with minimum scales as provided in the prison legislation. Secondly, they complained that the plastic plates (unlike ordinary inmates, condemned prisoners are given plastic plates as a security precaution) on which prison food was served were so dilapidated that "even a dog cannot eat there from sic."

In her judgement, Mrs Justice Florence Mumba adopted a familiar but now changing "hands off" English approach to complaints by prisoners against the prison administration (to which we shall return).

In Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General, Zimbabwe, and Others[69] (1993) from Zimbabwe (Chapter 7) the court declared that basic human rights continue to be recognised in prison, Gubbay C.J. for the entire court declaring:-

> "It cannot be doubted that prison walls do not keep out fundamental rights and protections. Prisoners are not by mere reason of a conviction, denuded of all the rights they otherwise possess. No matter the magnitude of the crime, they are not reduced to non-persons. They retain all basic rights, save those inevitably removed from them by law, expressly or by implication." [70]

D. Sleeping arrangements.

Sleeping arrangements for inmates is the second telling example of drift and wilful neglect in the administration of prisons and the treatment of prisoners in Zambia. Upon admission, each prisoner should be given two blankets, one for sleeping on and the other for covering the body. But the two blankets are not always available. [71] During a prison visit to Livingstone Prison by a High Court Judge in 1985, for example, some

prisoners complained that they were not given the standard number of two blankets. [72] In the tropical climate of Zambia, the lack of blankets for inmates may be excused; but what cannot be excused is the fact that prisoners do not sleep on beds or mattresses but on the bare cement floor. Again, this is not a legal imperative; it is an administrative arrangement only. A few beds, but without mattresses, are, however, available in some of the larger prisons like Kabwe Maximum Security Prison. But these are reserved for special grade prisoners who are entitled to preferential treatment in respect of, inter alia, accommodation under prison legislation. [73]

Even though Zambia is a poor developing country, people no longer sleep on the bare floor, even in the villages. Those villagers who cannot afford to buy beds, make themselves fixed beds by sinking poles into the ground in the hut. [74] The only people who sleep on the bare floor, whether in urban or rural areas, and are expected to do so if beds are not available, are older children. Making mature people, many with wives and mature children, sleep on bare cement floors is as painful as it is demeaning. There can be no doubt that if the government decided that inmates in Zambian prisons should sleep on beds and mattresses, this could be done within a few years because prison industries make furniture as well as mattresses. But instead of giving inmates beds and mattresses to sleep on, the Commissioner of Prisons sells them on the open market to increase the size of the revolving fund. [75]

E. Early lock up.

Dinner is served at 4 p.m., which is only 3 hours after lunch. Lock up time is 5 p.m. [76] Early lock ups are necessary in the interests of security. Five o'clock is about

the right time of day because in the tropics, the length of daylight and darkness are about even. Darkness starts to descend at about this time. What may be difficult to defend is the time when lights are switched off. This is done at 8 p.m. and inmates are expected to stay silent and fall asleep.[77] For any adult, 8 p.m. is far too early to go to sleep. It would be more humane if "lights out" time was extended by 2 hours to 10 p.m if not longer thus providing study or sporting opportunities. Inmates are already locked in; there is no useful purpose in switching off the lights so early into the night.

It will be seen that the prison routine is one long experience of deprivation and degradation. The question of basic human rights in the prisons is not seriously addressed by anyone, including the Law Association of Zambia or Prisoners Aid Society.

F. Personal hygiene and ablutions.

One of the most persistent inconveniences in the prisons of Zambia is lack of soap, both for washing and bathing. All the Application Books in all the prisons visited show it. Warm water for bathing is not provided. Zambia may be a hot country, but in winter (April to July) it can get cold. Adults bath in warm water in winter even in villages. But the most disturbing lack of hygiene in Zambian prisons is in respect of toilets, which are sometimes blocked. Dormitories have inside toilets for night use; these also get blocked. What is particularly degrading is that some of the inside toilets have no doors, not even a curtain. This is totally unacceptable as degrading and inhuman. Unlike in jurisdictions where prisoners sleep in cells, the stench is endured by all the inmates in the dormitory. "Slopping out" in English prisons is less distasteful

because only the individual prisoner in the cell is affected the most. The picture is more distressing in the new upcoming prison farms which are built initially of pole, mud and grass, like Msanzala Prison Farm in Petauke, in the Eastern Province. At night, the sanitary bucket is placed in the middle of the dormitory. [78]

G. Recreation.

Of interest here is not what is unavailable so much as what that reveals of the indifferent, if not punitive, attitude of society and the prison administration towards prisoners. The range of recreational activities is unnecessarily narrow; football is the one game played in all convict prisons (netball at Kabwe female prison). Nsolo, a traditional game played with small stones in holes into the ground, is found only in the larger prisons, like Livingstone Prison and Kabwe Maximum Security Prison. Television is not provided at all; it should be available in the larger prisons, where inmates are serving long prison terms, especially at Kabwe Maximum Security Prison. Admittedly, television sets are very expensive in Zambia, but it is not beyond the administrative will of prison administrators to secure one for long sentence prisoners. Less excusable is the fact that even radio sets are not provided. All that is needed is one set in each prison; speakers could then be installed in convenient areas of the prison compound. The provision of radio sets could lead to the establishment of a radio repair training course, which is not offered in any prison. But the most telling deprivation of communication suffered by inmates is the non-provision of newspapers. No real cost is involved here: members of staff regularly buy their own newspapers

which they later discard. There is no good reason why such discarded papers cannot be turned over to the prisoners.

Prisoners in Zambia are therefore deprived of basic information on events in the outside world. The opportunity to know what is happening outside, in this age, even for prisoners, should surely be a basic human right. The denial of access to public information is therefore a serious deprivation, inhibiting rehabilitation and readjustment of offenders.

IV. Prison labour and training.

A. In general.

Prison labour serves several purposes. Obviously, it counters the boredom of imprisonment by helping to fill time. Further, it aims at socialising inmates into good and regular work habits. [79] A 1933 committee on the employment of prisoners in England said that what is crucial about work in prison is not the type of work performed, but the spirit in which it is performed. It also said that work should aim at inducing a spirit of accomplishment in a spirit of service. [80] When Paterson reported on the state of the prisons in East Africa and Aden, he made similar remarks:-

> "it does not....matter so much how many hours a day a prisoner may work, as how much work he does per day. Wherever possible therefore, a gang should be given a daily task, and should be marched back when the task is completed." [81]

But it must be said that all this may be too hopeful. Prisoners everywhere are not really interested in the philosophical implications of the work they are made to perform in prison. As King and Morgan properly point out:-

"Prisoners have always known that prisons are not really about training, they are really about captivity. There seems little point in pretending otherwise." [82]

This must be true; it is only human. In the prisons of Zambia, as will soon be indicated, dormitories are used as classrooms. On virtually all the blackboards in the prisons visited is constructed a calendar, clearly indicating that leaving prison is the one matter which is uppermost in the minds of inmates.

B. Training.

1. General.

A rather limited range of industrial skills is offered in Zambian prisons. The following industrial skills are taught: carpentry and joinery, cutting and tailoring, upholstery, building and plumbing, shoe repairing, blacksmithing and, to much lesser extent, soap making, printing and decorating; the last three are taught only at Kabwe Maximum Security Prison. It will be noticed that popular skills in the field of electrical engineering or motor mechanics are not offered. But all prisons, large and small, engage in agriculture. As a general rule, the larger prisons have a wider range of industrial training courses than the smaller prisons; the widest range is found at Kabwe Maximum Security Prison.

Training programmes are beset by at least three types of problems. The first is that some classes, like carpentry and joinery, are too big. [83] At Livingstone Prison, for example, instructors are forced to use those prisoners who have some knowledge of carpentry and joinery to teach the others. [84] The second problem is that teaching materials, for example, in the building and plumbing section, are in chronic short

supply. [85] Thirdly, machines and machine tools remain unrepaired for long periods of time, as in the cutting and tailoring section, due to severe shortages of funds. [86] Besides, the machines available are old models. New models are needed to keep pace with the more modern machines in use outside. [87] All these are operational problems which are not unexpected in any developing country. But working conditions of civilian prison instructors may be peculiar to Zambia.

First, civilian prison instructors complain that although they are well qualified in their chosen fields, they are placed in the lower pay scales. This is their most serious complaint. Consequently, they feel frustrated in their work. [88] Secondly, they complain that instructors who are also prison officers are given a special allowance simply on account of their status as prison officers. Civilian instructors feel that their counter-parts should not receive this special allowance or that they should also receive it. Because of this financial disparity, civilian instructors feel their contribution to training in prison is not really appreciated by the Commissioner of Prisons. [89] Thirdly, they complain that when in-service training places are available, preference is given to uniformed prison instructors above civilian instructors. Again, they feel frustrated. [90]

The Commissioner of Prisons said that he was as concerned about the lower pay scales complained of, which concerned ununiformed instructors the most, as the civilian instructors were. But he denied that they were placed in the lower pay scale. His explanation was that they are simply mistaken. [91] It was impossible to reconcile these divergent views. But even if the civilian instructors are wrong in their assumptions, the point is that they are unhappy over their pay and promotion prospects in the Zambia Prison Service. It should be realised that this comes on top of the other problems relating to shortages of staff, shortages of teaching materials and

unrepaired machines. Something must be done to improve the working conditions of ununiformed instructors. Perhaps sympathetic consideration of their pay scales would be the most practical step that could be taken.

2. Female prison labour.

Prison labour performed by female inmates is distinct enough in some ways to merit specific mention. In the female annexes to the many prisons scattered all over the country, female prisoners are engaged in light sanitary work and horticulture. Industrial skills are offered only in the four largest prisons, namely Livingstone Prison, Lusaka Central Prison, Kansenshi Prison, Kamfinsa Prison and Kabwe Female Prison. At Kamfinsa Prison, for example, inmates are taught how to make baskets, doormats and table cloths. [92] But they are disinterested in their training. This lack of interest is attributable largely to the low standard of educational attainment reached by the majority of prisoners sent to Kamfinsa Prison. [93]

At Kabwe Female Prison, inmates are taught tailoring in addition to what is offered at Kamfinsa. [94] But unlike in the male prisons, there are no shortages of instructors or teaching materials. The complaint is that there too few female prisoners at any one time. [95] As a result, not only do the inmates lose interest in their training, but the instructor feels bored in her work. [96] Very little can be done about raising interest. Perhaps what is needed is to widen the range of courses offered by adding typing courses. At independence in 1964, typing instruction was offered to inmates of Kabwe Female Prison. [97]

3. Agriculture.

Special mention must be made of the teaching of agriculture in Zambian prisons. Although no formal training courses are offered leading to qualifications, more emphasis must be placed on this field of prison labour. Zambia is a large country with a small population but with large tracts of unfarmed fertile land. Unfortunately, the country has been suffering from food shortages since independence due largely to political mismanagement of the country. Farming skills taught to prisoners should enable some of them to take farming seriously following their release. Zambia has a new government with an open-door economic policy. Agriculture should now be a more profitable activity. Already, all the subsidies on maize have been lifted and the producer price has risen dramatically.

4. Concluding observations on prison labour and training.

Despite the interest in and emphasis on prison labour and industrial training in prisons, their impact on the inmates should not be overrated. Firstly, as in English prisons,[98] only a small proportion of prisoners do in fact receive industrial training at any one time; the rest simply engage in sanitary and other necessary house-keeping work.

Table 59 shows the number of prisoners engaged in prison industries at Kamfinsa Prison on a typical day (Tuesday, 22nd April, 1986).

Table 59.

Allocation of Labour at Kamfinsa Prison, 1986.

Type of Skill	No. of prisoners engaged.
Carpentry	43
Tailoring	9
Bricklaying	34
Shoe Repairing	10
Total:	96

Source: Labour Muster at Kamfinsa Prison.

On this day there was a total of 331 prisoners doing various jobs. Those not engaged in industrial training were assigned to work at the following places/tasks: prison farm (34), prison garden (20), cleaning junior officers' quarters (20), inside cleaning (19), cleaning mobile unit (19), cleaning senior officers' quarters (18), prison garden (17), kitchen (14), firewood (11), cleaning cells (10), office cleaners (9), laundry (8), cleaning junior officers' club (7), cleaning senior officers' club (6), at agricultural show grounds (6), cleaning penal blocks (5), sanitation (5), car cleaners (3), library (2) and finally road block (2). It will be seen that out of a total of 331

prisoners on this day only 96 (29%) were engaged in prison industries. The remaining 435 (71%) were assigned to duties not involving the acquisition of industrial skills.

The second observation which can be made about prison labour and industrial training in particular is that training may not be that significant as a technique for reducing crime in society. When discussing problems of reform in chapter 3 above, its efficacy was doubted. King and Morgan repeat the same point in the following words:-

> "There is....no evidence to suggest that the reason why criminals are incarcerated in the first place is because they have previously lacked the programme of treatment and training that prisons provide. There is no reason, therefore, to believe that the provision of such programmes should have a beneficial result in the prevention of criminality." [99]

Prisons in Zambia should be regarded primarily as places of confinement with humanity rather than places where training programmes offered somehow help to reduce criminality to any perceptible degree.

V. Education.

Apart from poor food and sleeping arrangements, the lack of provision of education further reveals the extent of wilful neglect of the interests of prisoners generally in Zambia.

Education is offered in all the prisons of Zambia. [100] But unlike in Kenya[101] it is not a statutory requirement. Yet education is supposed to be one of the more obvious reformatory experiences in prison. Educational classes start with basic literacy classes. [102] At this basic level, students are taught only two subjects: English and arithmetic. Primary and secondary school education is offered only in the larger regional prisons. [103] All lessons run for two hours between 2 p.m and 4 p.m. [104] Unlike with food and

sleeping arrangements, the one feature that stands out about education in the prisons is that it is beset by problems which are inherent in the very fact of imprisonment, but some of which need not arise at all.

A. Problems in the running of educational classes.

The inherent problems with education in any custodial institution have already been alluded to when discussing schooling at Nakambala Approved School and Katombora Reformatory School (Chapter 8). Education in prisons has peculiar problems which must be mentioned.

Firstly, there are problems in recruiting teachers at the basic literacy level as well as at primary and secondary school levels. The teaching of basic literacy, whether inside prison or outside, calls for special training; only specially trained persons can conduct basic literacy classes. [105] The actual teaching is supposed to be done by specially trained community development officers, but there are chronic shortages of such teachers in the community. As a result, the practice is that community development teachers teach specially selected prison officers to conduct basic literacy classes. Where there is an insufficient number of prison officers, specially selected prisoners are drafted in to do the teaching. [106] Primary and secondary school classes are taught by qualified Ministry of Education teachers on part time-basis. But again, there are constant shortage of teachers. As a result, primary and secondary school classes are often disrupted. [107] The shortage of teachers in the prison service, as in any government ministry or department, can best be cured by improving their conditions of service.

The second problem in education in the prisons is more revealing of the drift and wilful neglect over the welfare of convict prisoners. In all the prison visited, no special rooms are set aside as classrooms; all the teaching is done in the dormitories. Worse is the fact that neither tables nor chairs are provided; students have to sit on the bare floor. Most telling perhaps is the classroom arrangement at Kamfinsa Prison, with the largest prison population in the country: desks are provided, but not chairs. Yet desks and chairs could easily be made by prison industries and then distributed throughout all the prisons in the country.

B. Education and the female prisoner.

Female prisoners receive much less education than their male counterparts primarily because prison administrators have misread the law on the segregation of the sexes in prison:-

> "Male and female prisoners shall be kept apart and confined in separate prisons, or in separate parts of the same prison in such a manner as to prevent, as far as practicable, their seeing or communicating with each other." [108]

This has been interpreted too widely to mean that female prisoners should not come into contact with male teachers as well. [109] Unfortunately, the prison authorities find it difficult to recruit female teachers because they are pre-occupied with family chores and responsibilities. [110]

Then there is the problem of teaching small numbers of female prisoners held in annexes of male prisons scattered throughout the country. Because of their small numbers it is uneconomical to employ a female teacher or indeed a male teacher to teach very few inmates; such inmates receive no education at all. In fact education is

given only to those in Kabwe female Prison. [111] The law should be clarified so that male teachers can teach female prisoners.

C. Examination results.

Predictably, the school examination results of prisoners are poor. Table 60 shows the results of grade 9 (formerly called form II) examinations sat for in 1984 at Kabwe Maximum Security Prison. It is very typical.

Table 60.

Grade 8 External Examination Results, 1984, at Kabwe Max. Sec. Prison.

Name of Subject.	No.of students-pass.	Failed.	Total.
English	2	22	24
Maths	1	23	24
Civics	2	22	24
History	2	22	24
Geography	2	22	24
Health Science	3	21	24
Vernacular	7	17	24
Religious Knowledge	4	20	24

Source: Students Register Book, Kabwe Maximum Security Prison.

It will be seen that the highest number of students who passed in any one subject was 7, and that was in vernacular. In mathematics only one student passed the course. Clearly, the educational classes hardly ameliorate or enhance the general welfare of inmates. Yet much more can and should be done to raise the standard of education for those prisoners who want to start or continue with their education.

VI. Religious faith.

With the exception of the Watchtower Society, [112] all religious denominations in the country are actively encouraged to enter prisons and minister to the spiritual needs of inmates, with the Bible being by far the most common book in the prisons. At Lusaka Central Prison, for instance, there is a long roster of Christian denominations allowed to enter the prison and minister. At Kabwe Female Prison, Wednesday afternoons are set aside for visits from the many churches based in Kabwe town. [113] But Sunday services are not held every Sunday in the prisons visited, because priests concentrate on ministering to the ordinary churchgoers outside. [114]

The churches not only organise prayers but act as counsellors and social workers at the same time. Sister Bernard, a Catholic nun, is well known for her practical assistance to the prisoners at Kabwe female Prison. But although Zambia is predominantly a Christian country, there are no churches or chapels built on prison grounds, unlike in England where the prison chapel has been part of prison architecture for a very long period of time. Only at Kabwe Maximum Security Prison is there a church built inside the prison grounds, but it is very small and hardly used[115] Instead, and as elsewhere, prayers are held in dormitories.

Former President Kaunda is known internationally for his adherence to Christianity. It is therefore surprising to discover that more was not done for prisoners in Zambia in the spiritual field. As in England, full-time prison chaplains could have been introduced into the prisons of Zambia to give inmates easy and ready access to priests. The many Christian churches in the country would willingly provide full-time prison chaplains at their own expense.

If there is any aspect of prison life which can be said to have a positive bearing on the general welfare of prisoners in Zambia, it is the conduct of religious services. Unfortunately, the same cannot be said about discipline and human rights.

VII. Discipline and prisoners' rights.

A. In general.

Discipline in any institution or establishment cannot be divorced from the question of basic human rights of individuals living or working in that particular institution or establishment. The Constitution states:-

> "No person shall be subjected to torture, or to inhuman or degrading punishment or other like treatment." [116] (Emphasis supplied).

In Zambia prison legislation purports to safeguard the basic human rights of inmates, both convict and non-convict. But it is neither specific nor detailed enough to safeguard them effectively. Consequently, the good intentions of the legislation tend to be wrecked by the way it is operated in practice. As a result, prisoners in Zambia are denied basic human rights against inhuman treatment enshrined in the Constitution. Unfortunately, this denial of basic rights is compounded by the failure on the part of

prisoners themselves to challenge the disciplinary provisions in the prison legislation and the way those provisions are enforced before the normal courts of the land (In the Matter of Valentine Musakanya, Edward Jack Shamwana, Godwin Yoram Mumba, Deogratias Symba, Laurent Kanyembu and Thomas Mupunga Mulenga and The Attorney-General and Commissioner of Prisons).

There are at least three good reasons why the rights of prisoners need specific attention. First, although concern for the protection of their rights can be seen merely as an extension of the wider issue of basic human rights in any society, [117] it should also be realised that by protecting their rights, inmates can be socialised into respecting the law generally and introduced to the whole notion of justice in society. [118] The more specific reason is that inmates are in a particularly vulnerable position and are much more likely to suffer general deprivation of their basic human rights than are free men; [119] the precise circumstances of their vulnerability being that they are "out of sight". They have little credibility or sympathy in the eyes of the public which feels that they deserve to suffer pain and inconvenience while in prison. [120] But there is a third and more fundamental reason for wanting to study the rights of prisoners. The prison community is only one type of society living close together in large numbers, like in boarding schools or training colleges. Inmates are therefore entitled to enjoy basic civil rights accorded to persons living in the free community. Against the background of the many practical problems and difficulties faced by inmates, Zellick asks a central question:-

> "The real question regarding prisoners' rights is whether the prisoner is really in a different position from that of the person outside prison so that he should be treated differently." [121]

As has just been indicated the answer is that offenders carry their Constitutional human rights into prison.

B. Disciplinary offences, procedures and awards.

1. Disciplinary offences provided in prison legislation.

There are two types of prison offences. The first type are called minor offences, [122] like disobedience to orders, [123] using improper or threatening language, [124] or possession of prohibited article. [125] There are altogether 20 paragraphs itemising minor prison offences. Then there are what are called major prison offences[126] listed in ten paragraphs. Examples are assaulting a prison officer, [127] insubordination, [128] and aiding and abetting the commission of a major prison offence. [129]

Four observations can be made about disciplinary offences by prisoners. The first is that some offences are so similar in definition that it is very difficult to know what the draftsman had in mind. For instance, there is the offence of:-

> "disobeying any order of the officer in charge or of any other prison officer or rule or order made under this Act;" [130]

But inmates are at the same time forbidden from "committing an act of insubordination;". [131] Admittedly, disobedience is not necessarily insubordination, but the difference is so small that separating the two amounts to hair splitting which is incompatible with notions of justice because of the confusion involved. Secondly, some of the offences are wide, vague and "porous". For example, there is the offence of:-

"doing any act calculated to create unnecessary alarm among prison officers or prisoners." [132]

or the offence of:-

"offending in any way against good order and discipline." [133]

Zellick, who has written considerably about prisoners' rights in England, very rightly points out that these two offences, which are also found in English prison legislation, are examples of the type of all-encompassing rules to be found in military discipline. They are not in accord with the principle of legality. [134] Thirdly, some prison offences are as vague as they are vindictive. A good example is a rule which forbids prisoners from "making repeated and groundless complaints...." [135] and another one which states as an offence:-

"wilfully bringing a false accusation against any prison officer or other prisoner;" [136]

Because confusing, vaguely worded, wide, all-encompassing and vindictive penal provisions are all against the principle of legality they create a potential for abuse and therefore not suitable instruments with which to socialise law breakers and turn them into law-abiding citizens.

2. Disciplinary offences actually committed.

Annual reports of the prison service give data on the number of inmates punished for breaches of discipline, but they provide no data or information about the sort of offences actually committed by inmates. However, a representative sample of figures was collected in the course of this research. Table 61 shows the kinds of offences

committed by inmates in 5 different prisons: Kabwe Maximum Security Prison, Livingstone Prison, Petauke Prison, Maluka Open Prison and Kabwe Female Prison. Each of these prisons is unique in its own way. Kabwe Maximum Security Prison is the only maximum security prison in the country, Livingstone Prison is a large regional prison, Petauke Prison is a rural District Prison, Maluka Prison is an open Prison and Kabwe Female Prison is the only female prison in the country. The data is taken from different months in different years. The data from Kabwe Maximum Security prison is taken from January, 1985; Livingstone Prison from December, 1983; Petauke Prison from June, 1984; Maluka Prison from August, 1982, and the data for Kabwe Female Prison from October, 1982. The offences appearing in the Table were chosen because they are typical of offences committed in closed penal institutions. Ideally average daily populations in each of the prisons shown would have been more informative. Unfortunately, such data is not shown in prison service annual reports or admission registers, neither is it possible to deduce it from available data. However, annual reports show "the highest and lowest number of prisoners held in prison during the year." The latest available prisons service annual report is for 1983 and at Kabwe Maximum Security Prison the highest number was 486 and the lowest was 416, and for Livingstone Prison the highest was 410 and the lowest was 330.

Table 61.

A Sample of Prison Offences Actually Committed in Five Prisons.

Disciplinary offence.	Name of Prison					Total
	Kabwe Max. Sec. Prison.	L/stone.	Petauke.	Maluka.	Kabwe F.	
Possession of prohibited article.	36	48	35	49	5	173
Assaults	22	14	10	5	8	59
Disfiguring property	5	4	16	4	4	0
Threatening violence	4	3	5	0	0	0
Indecent language	0	0	0	0	10	10
Insubordination	0	1	0	0	0	1
Disobedience	1	1	1	0	4	7
Refusing to work	9	10	5	5	1	15
Homosexuality	3	5	4	0	0	12
Total:	80	86	76	59	31	322

Source: Punishment Registers.

Table 61 shows that the commonest disciplinary offence in the 5 prisons was the possession of prohibited articles (173), reflecting the extent of material deprivation in prisons. This figure is 104 higher than the next nearest figure of 59 assaults.

3. Penalties provided in prison legislation.

Prison legislation provides for a variety of familiar penalties for breaches of discipline. Guilty inmates can be sentenced, inter alia, to separate confinement, [137] reduced diet, [138] extra work, [139] or loss of remission. [140] For more serious offences, the sentence may include corporal punishment. [141]

4. Adjudication.

a. Adjudication authorities in prison.

There are three adjudication authorities in prison: Subordinate courts, Visiting Justices and Officers-in Charge, each with their own maximum sentencing powers. For purposes of adjudication, Officers in Charge are divided into senior officers and junior officers. Subordinate Courts are empowered to hear both major and minor prison offences. When the offence is a minor one, for example, the guilty inmate may be sentenced, inter alia, to imprisonment for up to 6 months,[142] and/or separate confinement for up to 14 days,[143] and/or loss of remission of up to 30 days.[144] A Visiting Justice has the same jurisdiction as when a Subordinate Court is hearing a minor prison offence. [145] The same level of jurisdiction is vested in a senior Officer in Charge when he is trying a minor offence. [146] If he is trying a major offence, the senior Officer in Charge is additionally authorised to order corporal punishment. [147] A Junior

Officer in Charge is not authorised to impose a prison sentence or order corporal punishment, but may impose all the other awards which Subordinate Courts and Visiting Justices may impose, but to a lesser maximum severity.[148]

Although Subordinate Courts and Visiting Justices are empowered to enter prison and hear disciplinary charges against inmates, in fact they seldom do so. Pressure of work in their own courts makes it impossible to assume the extra burden of trying offences in the prisons.[149] In practice only Officers in Charge adjudicate. These are understandable circumstances. But the unavailability of trained magistrates to try prison offences has had one very significant consequence for justice in prison: standards of adjudication have fallen.

What is worse is that prison legislation is silent on the whole question of redress through appeals or review. But this does not mean that inmates are completely without redress in practice. Prisons Rules require that Officers in Charge send monthly punishment returns to the Commissioner of Prisons. [150] But there is nothing specific in the Rules that requires the Commissioner to call for case records and review convictions or sentences. In practice, however, he reviews cases. [151] For example, in a 1985 minute to the Officer in Charge of Kabwe Female Prison, the Commissioner referred to the case of Belita Ngawa Kabanda (not her real name) convicted of offending against good order and discipline and reprimanded. No substantive penalty was imposed. Reviewing the case, the Commissioner of Prisons wrote:-

> "I have to advise you that under the law, there is no punishment known as a reprimand. In view of this punishment on this prisoner, the punishment is reviewed and substituted with the following 3 days loss of remission." [152]

As a mater of principle, redress either through appeals or review should be enshrined in the legislation itself. Crucial aspects of prison justice like appeals and review should not be left to the good intentions of prison administrators or any other administrative authority.

b. An example of an actual trial.

One of the best known fundamental rights in the Constitution is the right to a fair trial of persons charged with criminal offences:-

> "If any person is charged with a criminal offence,....the case shall be afforded a fair hearing...." [153]

"Criminal offence" is widely interpreted to mean:-

> "a criminal offence under the law in force in Zambia." [154]

"Criminal offence" includes prison offences.

Officers in Charge of principal prisons asserted that inmates charged with prison offences get a fair hearing and that procedures are the same as those followed in the ordinary courts outside. [155] But the case records seen by the writer contradict this assertion. [156] A typical case tried in prison is that of Mrs Lisimba (not her real name), a political detainee. She was tried for and convicted of assaulting a convicted prisoner in Lusaka Central Prison in 1984. She pleaded not guilty. The whole of the case record reads as follows:-

> "Charge understood: Agreed.
> Accused Pleads: Not guilty.
> Adj.Officer: What made you fight your fellow prisoner, Mrs Lisimba on 23.8.85.

Acc: What happened is that when we entered the cell, convicted prisoner said that they were ready to collect firewood when Janet [not her real name] said that only those should go and collect firewood.
Summary: Pushing each other or fighting is not a good thing and I order you to stop it.
Finding: Find you guilty as charged.
Punishment: 14 days no visitors as per Reg. para c." [157]

The very size of the case record raises very serious doubts about claims of fair trial. All the elementary rules regarding procedure in the normal courts were absent. Despite the fact that the accused pleaded not guilty, the complainant was not called to give evidence. She was therefore denied her constitutional right to cross examine the complainant[158] There is nothing on the record to show that the accused was informed of her right to call witnesses in her defence. Following the finding of guilt, she was not called upon to say anything in mitigation before sentence. There is no judgement as would be given in the ordinary courts. It is clear from the record that the Officer in Charge assumed that the accused was guilty, contrary to the clear and specific constitutional direction regarding presumptions in criminal cases. [159] There was no basis at all on which the conviction of the accused in this case can be supported. The whole "trial" was a parody of what obtains in the normal courts outside. It may well be that the trial was properly conducted but that the recording of it was poorly done. In view of the extreme brevity of the case record, this seems unlikely.

Perhaps such trials would be better conducted if the prison legislation was not totally silent on the question of adjudication. It merely provides:-

"Every offence against prison discipline committed by a prisoner which comes to the notice of a prison officer shall be reported to the Officer in Charge and the Officer in Charge shall investigate such a report not later than the following day..... [160]

What is required is a provision which outlines trial procedures. If what is wanted is procedure which is broadly in line with what obtains in the normal courts, with or without modifications, then the legislation should say so specifically. Ideally, inmates should be allowed counsel to appear on their behalf. But at the present level of general development of the country, this is not a realistic proposition. Prisoners, especially convict prisoners, are much too poor to pay for the services of a lawyer. Hoping for legal representation from the Government Legal Aid Department is again unrealistic because the department cannot hope to assist the great numbers of inmates who are regularly charged with disciplinary offences.

With an oppressive trial procedure such as the one cited above, it is no wonder that the punishment registers scrutinised in all the prisons visited show that only a tiny proportion of the number of inmates accused of disciplinary offences are acquitted. Prisoners in Zambia hardly get a fair hearing. Clearly, the Constitutional right to a fair trial is disregarded. To remedy the injustice, and as it is not possible for magistrates to hear all disciplinary cases, there should be statutory provision for judicial review by magistrates of all decisions reached by Officers-in-Charge.

5. Punishments actually imposed.

Table 62 shows the numbers of inmates, both convict and non-convict, sentenced to separate confinement and reduced diet (S.C & R.D.), loss of remission (Loss of Rem.), forfeiture of earnings (Forf.of Es.) and extra work over a period of 16 years from 1964 to 1983, inclusive. These four sentences are chosen because they are the four awards most commonly imposed in the prisons for disciplinary offences.

Table 62.

No.of Prisoners Sentenced for Prison Offences.

Year	Type of Penalty			
	S.C & R.D.	Loss of Rem.	Forf.of Es.	Extra Work.
1964	129	234	0	161
1966	91	146	0	137
1968	113	453	95	573
1969	91	415	0	395
1970	78	489	0	349
1971	56	428	132	328
1972	78	308	114	498
1973	63	353	120	365
1974	24	490	41	312

1975	62	575	91	127
1976	16	479	42	286
1977	2	660	71	412
1978	32	483	54	318
1979	17	583	16	230
1980	7	560	12	200
1983	4	488	4	96
Total:	863	7,144	792	4,787

Source: Annual Reports of the Prisons Department.

Table 62 clearly shows that the most commonly imposed penalty for prison offence is loss of remission (7,144), followed by extra work (4,787), then separate confinement and penal diet (863) and finally forfeiture of earnings (788). Annual reports of the prison service also reveal that only 9 inmates were caned during the whole 15 year period, between 1964 and 1980. The last time was in 1974, when only one was caned. The Commissioner of Prisons, Mr Mutwale, said that although corporal punishment is provided for in the prison legislation, his department decided to

end the practice imposing this form of penalty on the ground that it is too severe and barbaric. [161]

The award of separate confinement and penal diet is both a heavy and a brutal penalty which should be imposed only when the offender is recalcitrant. But it is less severe than loss of remission. There are two very serious problems with loss of remission as a sentence for a prison offence. The first is that it is in fact an extra prison sentence. When the adjudicator is a senior Officer in Charge, and the offender is found guilty of committing a major prison offence, he is empowered to order up to 60 days loss of remission, [162] that is 2 months' imprisonment. If the offence committed is a minor prison offence, the maximum period is 30 days, [163] or 1 month's imprisonment. When the offence committed is a minor prison offence and the adjudicator is a junior Officer in Charge, the maximum number of days of remission is 3 days. [164] Punishment registers scrutinised in all the prisons visited reveal that loss of remission days range between 3 days and 30 days.

It has just been shown that Officers in Charge in the prisons of Zambia do not hold proper trials. Since loss of remission is the sentence most commonly imposed and the heaviest sentence available, many inmates are sentenced to further imprisonment when there is no basis for doing so. The relevant provisions on remission read:-

> "(1) Convicted criminal prisoners sentenced to imprisonment.....may by industry and good conduct earn a remission of one third of their sentence..." [165]

and

> "(3) For the purposes of giving effect to the provisions of subsection (1), each prisoner, on admission, shall be credited with the full amount of

> remission to which he would be entitled at the end of his sentence if he lost no remission of sentence." [166]

Because prisoners are credited with the full amount of remission, loss of remission is in effect a new sentence of imprisonment. Clearly, a great injustice is being perpetrated against prisoners in Zambia. For this reason, loss of remission as a sentence for breach of prison discipline should be abolished. If it must remain, this penalty should be subject to confirmation by magistrates.

The second and corollary problem with loss of remission is much more serious because it raises possible constitutional problems; only the courts are vested with judicial power to sentence persons to imprisonment. Referring to English legislation and practice, Blom-Cooper observes that:-

> "This 1/3 [remission]...is only a marginal encroachment upon judicial sentencing." [167]

If it is indeed an encroachment on judicial power, it cannot be "only a marginal" encroachment in any qualitative sense. In fact it is an unacceptable encroachment simply because it is unconstitutional. For this second reason, loss of remission should be abolished as a penalty for breach of prison discipline.

Prison legislation should provide for a warning as a full and complete penalty in its own right. It should also provide for special disciplinary treatment for unconvicted prisoners. Being liable to the same penalties as convicted inmates (except as to the sentence of loss of remission) is wrong in principle. A particularly inappropriate penalty for unconvicted prisoners is that of separate confinement and penal diet. At

present, unconvicted prisoners are not required to work, other than housekeeping work. [168] The most appropriate sentence for them is being put to work.

VIII. Other rights.

A. Complaints and applications.

The importance to the individual inmate of being able to reach prison authorities to lodge a complaint or make an application is real indeed. Unlike free citizens outside in the community, the prisoner is dependent on other people to solve his many problems and meet his needs. What may be a matter of minor concern to the free citizen outside can be a big problem for a person in custody, like trying to send an extra letter. [169] The right to lodge complaints and make applications before the Officer in Charge is a statutory one. [170] To this end, all prisons in Zambia have complaints and application books. Officers go round dormitories after lock up time to record whatever is troubling prisoners. [171] The Officer in Charge records his response against the specific complaint or application lodged.

Prisoners make a wide variety of complaints and applications. This is a good indication that inmates fully exercise their rights to lay their concerns before the prison authorities. They complain, inter alia, about property left behind with the police during investigations; wrong release dates ; poor diet and wanting to be transferred to a prison nearest home. But the most common application is for the withdrawal of money earned in the earnings scheme so that inmates can buy foodstuffs, especially sugar and soap. At Kabwe Female Prison, for instance, a common application reflects typical female concerns over children. Many apply to withdraw money so that they can feed

or clothe their children living with them in the prison, or those left behind with relatives. Significantly, complaints of ill treatment against individual prison officers or aspects of adjudication are rare. But this does not necessarily mean that inmates do not feel that injustices are not done against them.

The response of Officers in Charge to the many and varies complaints and applications is generally sympathetic. There is very little indifference or hostility in their responses. But on the other hand, the significance of this generally positive attitude should not be exaggerated because, as we have already seen above, the really important aspects of prison life, like food and bedding, remain unaddressed.

B. Correspondence and visits.

The value to prisoners of engaging in correspondence or receiving visits is an obvious one. For example, former President Kaunda recalls that when he was serving a prison sentence for a political offence during the fight for independence he found the experience of receiving mail from friends "priceless".[172] Any serious discussion of correspondence and visits in prison is centred on censorship of mail and restrictions on visits.

There are two legal grounds on which mail may be censored. A letter may be stopped either because the contents are "objectionable", or if the letter is unduly long.[173] Although "objectionable" and what is an unduly long letter are not defined, prison authorities rarely stop in-coming or out-going mail. On the few occasions it is stopped, it contains information likely to upset the inmate to the extent that he may wish to escape from prison to solve his problem outside. A typical example of such

information comes from a wife or girlfriend of the prisoner in which she brags about her new relationship with another man. [174] Prisoners in Zambia do not encounter serious difficulties in the matter of correspondence as laid down in the legislation. But unfortunately, the same cannot be said about visits.

As in many other countries, prison visits are not conducted in private. In Zambia the basic rule states that visits must be "in the sight of and hearing of a prison officer." [175] However, unlike in English prisons, visits tend to be isolated affairs and are conducted in reception offices. Consequently, no part of the conversation can escape the attention of the supervising prison officer. There is therefore less privacy in prison visits in Zambia than in English prisons.

While the fears behind unrestricted correspondence and visits are well know and understandable, it must be appreciated at the same time that the main purpose of allowing correspondence and visits is to ameliorate the pain and suffering of prison life. Unless there is rampant trafficking in drugs and incessant plans to escape from prison, prison policy should allow the maximum enjoyment of the rights to correspondence and visits. In the prisons of Zambia, the problem of drug trafficking remains small; and unlike in English prisons, there have been no spectacular escapes from prison. The present levels of restriction on visits and correspondence are therefore unjustified.

C. Access to lawyers and the courts.

Although there is no legislative provision barring or restricting inmates from seeking legal services or laying their complaints before the courts, in fact it is very

difficult for them to do so. First, there are inherent practical problems faced by prisoners anywhere. Inmates tend to come from deprived backgrounds and many are hardly aware of their basic human, and less still their legal, rights. If they are not aware of their rights, they are unlikely to seek the services of a lawyer. This is particularly so in a developing country like Zambia. But even if they are aware of their rights and seek the services of counsel, being poor makes it difficult for them to do so. Regarding their rights under prison legislation, it is provided that:-

> "Every prisoner shall, on admission to a prison, be provided with full information about so much of these Rules [Prison Rules] as concern the treatment of prisoners in his class, earnings and privileges, the proper method of submitting petitions and of making complaints, food, clothing bedding and other necessities and the disciplinary requirements of the prison." [176]

Relevant excerpts of these Rules regarded as important are required to be placed in prominent areas of each prison where inmates can read them; [177] they are to be translated into the four main languages of Zambia: Bemba, Nyanja, Tonga and Lozi. [178] But in most of the many prisons visited no excerpts of the relevant Prison Rules were displayed anywhere in the prison compound; the sole exception was Livingstone Prison, where the Rules are displayed in the reception office. But even there, no translations were displayed in any of the vernacular.

The fuller enjoyment of civil rights by prisoners in Zambia is hampered not only by the inherent difficulties facing inmates anywhere, but also by the negative "hands off" attitude of the courts toward the rights of inmates. In this, the courts have followed early English cases. But unfortunately it appears that the Zambian courts are unaware of the later and more positive judicial attitudes of English courts towards the rights of prisoners.

In England, the courts have ruled that breach of prison rules by a prison administration is not justiciable. Arbor v Anderson and Others, De Laessoe v Anderson and Others (1943) [179] was the first modern English case on the question of justiciability of breach of prison rules. In this case, the two plaintiffs sued the Home Secretary and Governors of several prisons in which they had been detained under war regulations. As prisoners, their treatment was outlined in an administrative command paper. It was complained by the plaintiffs that the defendants had breached a duty to treat them properly as was outlined in the command paper. Action in this case was also based on a breach of prison rules which stipulated the proper way to treat prisoners in the position of the two plaintiffs.

Lord Goddard found that on the facts of this case, the defendants had not breached the relevant prison rules. But he went further and made the following important observations:-

> "[Prison rules] do not confer rights on prisoners which can be enforced by action." [180]

His Lordship declined jurisdiction because:-

> "It would be fatal to all the discipline in prison if governors and warders had to perform their duty always with the fear of an action before their eyes if they in any way deviated from the rules." [181]

It was suggested that aggrieved prisoners could seek redress from the governor, Visiting Committee, or Secretary of State. Becker v Home Office and Another (1972) [182] which dealt with the justiciability of a breach of a prison rule on separate confinement followed the Arbor case above. But in the Court of Appeal case of R v Board of Visitors of Hull Prison, Ex parte St.Germain and Others, and Regina v Board

of Visitors of Wandsworth Prison, Ex Parte Rosa (1979) [183] decided in 1979, the previous "hands off" approach was reversed. The facts of this case were that there had been a disturbance in Hull Prison and the applicants were tried for breach of discipline by the board of visitors and found guilty. In the High Court, the applicants prayed for certiorari to quash the proceedings on the ground that certain rules of natural justice were not followed in that the applicants were not allowed to cross-examine prosecution witnesses or call their own witnesses in defence. The High Court dismissed the application on the ground that it had no jurisdiction to interfere with the internal disciplinary workings of prisons, but the Court of Appeal held that the courts cannot decline jurisdiction when the liberty of the subject is threatened even when the alleged breach of natural justice takes place in disciplinary proceedings against prisoners for breach of prison rules. Shaw L.J. articulated the court's arguments:-

> "Now the rights of a citizen, however circumscribed by a penal sentence or otherwise, must always be the concern of the courts unless their jurisdiction is clearly excluded by some statutory provision. The courts are the ultimate custodians of the rights and liberties of the subject whatever his status and however attenuated those rights and liberties may be as a result of some punitive or other process. Although rule 7(1) impliedly enables a prisoner to petition the Secretary of State in respect of some grievance or deprivation, there is nowhere in the Act of 1952 or the Rules made under it any indication that such rights, however attenuated, as he may still possess are not recognised in a court of law.... Neither principle nor policy would serve to deprive the courts of jurisdiction to supervise the conduct of proceedings of a judicial or quasi-judicial character the outcome of which might affect the rights or liberties or status of a subject." [184]

In the Valentine Shula Musakanya (1983) case[185] Mrs Justice Mumba followed the Arbor case and declined jurisdiction saying:-

> "Prisons are one sector of our society where ordinary legal rights cannot be enforced for the good administration of prisons where discipline must be firm. It is common sense that he who has broken the law, and has been found guilty

should not be seen to challenge those who are empowered to enforce his punishment in any way." [186]

The court's approach was mistaken as the complaint was not based on breach of prison rules as such but on a violation of the Constitution, but the decision still stands and is the law in Zambia.

There are at least two other cases which deal with breach of prison rules, where the complaints took the form not of civil proceedings, but of criminal prosecutions before the Subordinate Court. In The People v Kamanga and Nyirenda (1983) [187] the accused were charged with putting leg irons on prisoners, Valentine Musakanya and others, contrary to a specific prohibition in the Prisons Rules. They were convicted and bound over. In The People v Chimfumpa (1986) [188] the complainant, Shamwana, a condemned prisoner, took out a private prosecution against the accused, the Officer Commanding the Lusaka Region of the Zambia Prison Service. It was alleged that he had failed to supply the complainant with all the necessary rations due to him under prison legislation. The case ended in a reconciliation. What these two criminal cases show is that the range of legal avenues available to prisoners who wish to enforce their rights is wider than may be imagined. Yet applications for the prerogative writs of certiorari and mandamus appear to be rarely resorted to. It would appear that some inmates manage to gain access to the courts, but for the majority, without financial or other resources, it must be difficult. However, for those who gain access, the courts are unhelpful.

IX. The pains of imprisonment and the relevance of prison in an African society.

No discussion of the prison experience can be complete without reference to the pains of imprisonment endured by prisoners. A senior prison officer, Likando, did a survey of the feelings of inmates in Zambia about their prison experiences. Unfortunately, the survey was restricted to inmates held in Lusaka Central Prison only and the findings are presented in percentages without providing the raw figures. Because of possible research methodological errors, his findings should be treated with some caution. But this is the only known survey of its kind carried out in the prisons of Zambia. Table 63 reveals the prison experiences of inmates held in Lusaka Central Prison in the early 1980s.

Table 63

The Pains of Imprisonment in Lusaka Central Prison in the 1980s.

Complaints and Assertions.	Percentages.
Separation from wife and children	40
Work in prison is too hard	35
No sex	27
Living and sleeping with too many people	33
Bad treatment by prison officers	13
No alcohol	5
Others	5
Nothing bad	5

Source: Mr. K.Likando's University of Zambia M.A. dissertation Rehabilitation Programmes and Recidivism in the Zambian Prison System, 1983, p.64.

The feelings shown in Table 63, particularly the order in which they appear, are the sort which would be expected in any society, be it in Zambia, Europe, or indeed

anywhere else in the world. The enforced separation from the immediate family is surely the most painful aspect of the prison experience (40). But it is a little surprising to see that deprivation of sex (27) is less painful than hard work in prison (35). It is also surprising that 5% of all interviewees said that they had no particular complaint to make about their prison experiences. They may simply have been reticent about it, perhaps a pointer to a possibly faulty research methodology adopted in this survey.

Judging from media reports, especially the press, the general Zambian population seems to have accepted prison as a penal establishment which has come to stay. Possible rejection of prison is raised because this form of punishment is relatively new to African society as was pointed out in Chapter 2 above. Concern seems to be with regard to living conditions in prison rather than objectives of imprisonment or the relevance of prison in an African society. Examples of newspaper headlines on prisons are as follows- "Prisons need better deal;" [189] "The plight of remand prisoners";[190] "Improve prison conditions";[191] "Warders abuse prisoners' human rights";[192] "Prisoners should feel the pinch";[193] "Prisoners need reforming";[194] and "How PFAZ [Prison Fellowship of Zambia] helps reform ex-convicts." [195] The tone may sometimes be sympathetic, but the approach and treatment tend to be factual, superficial and spasmodic rather than informed or regular.

The question to be asked is not whether prisons have been accepted in African society, rather it is whether present attitudes towards prison as a form of punishment can in fact be reversed in view of the fact that prisons were unknown in traditional African society. It is not possible to do away with prisons completely in any modern state. What may be feasible is to persuade Zambians to make minimal use of prison as a form of punishment. There is a real possibility that this is achievable precisely

because prison, like much else in Zambia, is a new and foreign innovation. What is required is the political will. Deep down, every victim of a crime in any society or country wants first of all to be compensated for damage done or loss suffered. Imprisonment is a thought that comes later and regarded as an additional penalty. The case for the greater use of compensation in offences normally attracting imprisonment, like grievously bodily harm, is a strong one.

X. The Zambia Prison Service.

Two themes will be considered here: the evolution of the Zambia prison service (as opposed to prisons as such - Chapter 9) and the problems which hinder the better performance of the service; a poorly run prison service cannot ameliorate the emotional and material degradation experienced by prisoners anywhere. Officers are likely to be much more concerned with their own welfare than with keeping inmates in humane custody.

A. The evolution of the Zambia Prison Service.

A separate prison service was not established in Northern Rhodesia until 1942, more than fifty years after the creation of Barotziland- North-Western Rhodesia in 1889. Before 1942, prisons and police were the responsibility of one government department. [196]

The first prisons in the protectorate were run by the Barotse Native Police[197] established in 1901. [198] African police warders were sometimes supplemented by African civilian warders recruited and drilled by European officers. The constabulary

was controlled and supervised by the Law Department headed by the magistrate, and in that capacity was responsible for the management of prisons in the territory. [199] In view of the obvious rudimentary nature of the prison service at this time, it is unlikely that the humanitarian concerns of prisoners were considered important.

The first significant year in the evolution of the Zambia prison service was in 1923 when a Prisons Board, an administrative arrangement without statutory existence, was formed comprised of the Commandant of the Northern Rhodesia Police, the Treasurer, the Secretary for Native Affairs and the Attorney-General. [200] It laid down the basis for the modern prison system, for example, recommending the introduction of industrial skills in prisons and phasing out civilian warders. [201]

In 1927 direct supervision and control of prisons was shifted from the Law Department to the Commissioner of Police[202] who was also appointed Chief Inspector of Prisons[203] thus placing police and prisons under one public officer for the first time. All African police officers were trained by the military company of the Northern Rhodesia Police. [204]

Following three separate inquiries into the police, [205] the financial situation in the territory[206] and prisons, [207] all conducted in the same year, 1937, a separate prisons department was urged. Its creation was delayed by the outbreak of the second world war. The department was finally created in 1942 with Worseley, the Commissioner of Police, appointed as the first Commissioner of Prisons. [208] Following his appointment he carried out an extensive survey of prisons in the territory with a view to their re-organisation. His efforts resulted in the enactment of a new Prisons Ordinance in 1947, the basis of the current Prisons Act and of the modern prison service:-

"There shall be established in the territory a prison service to be known as the Northern Rhodesia Prison Service." [209]

The service comprised two levels of officers: senior prison officers and junior prison officers. [210]

B. Problems hindering the better performance of the Zambia Prison Service.

For prison officers, particularly junior officers, officially categorised into junior officers and subordinate officers, but henceforth referred to here as junior ranks or officers, working in prison is a depressing experience, characterised by problems of chronic staff shortages, poor training, indiscipline and a poor self-image.

1. Chronic staff shortages.

Surprisingly few annual reports of the prisons department give details of its numerical strength. But total numbers in themselves without more are meaningless unless compared with the inmate populations showing the staff-prisoner ratio. Table 64 shows the total number of prison officers set against the daily average inmate population between 1978 and 1983, inclusive. Because the prisons department also runs Katombora Reformatory School, the inmate population includes Katombora juveniles as well. As warders constitute the largest segment of staff, their numbers and the prisoner-warder ratio are shown in brackets. The ideal staff-prisoner ratio is 1:5.[211]

Table 64

Staff-Prisoner Ratio in Zambian Prisons, 1978-1983.

Year	Total Staff Nos.	Daily Av. Prison Nos.	No. of Inmates to 1 Prison Officer.
1978	1,569(1,334)	7,685	4.89(5.76)
1979	1,570(1,334)	7,782	4,95(5.83)
1980	1,790(1,534)	9,791	5.46(6.63)
1981	1,790(1,534)	9,732	5.43(6.34)
1982	1,790(1,534)	9,859	5.50(6.42)
1983	1,790(1,534)	9,632	5.38(6.27)
Average:	1,716.50(1,467.33)	9,080.16	5.26(6.20)

Source: Annual Reports of the Prisons Department.

Table 64 shows that the ideal staff-prisoner ratio of 1:5 is almost met, the average standing slightly below it at 1:5.26. When staff numbers are restricted to the warder staff only the ratio rises slightly to 1:6.20. However, even though this later

ratio is still close to the ideal of 1:5, it masks the reality of supervising prisoners in Zambia. Whereas inmates in rich jurisdictions like the United Kingdom or United States of America tend to be restricted to their cells for most of the working day, the position in Zambia is different, as was indicated in Chapter 9. By and large, prisoners in Zambia are allowed to move freely and socialise within the prison compound. Such a prison policy invariably requires larger numbers of warders to supervise and control inmates. It is no wonder that there have been persistent calls for more prison staff. [212]

The problem of persistent staff shortages is due more to the small staff establishment than to ineffective recruitment drives or natural wastage, and to rises in prison population unmatched by rises in staff numbers. For example, in 1980, the government ruled that the size of the civil service, including the prison service, should be frozen as part of a cost-saving budgetary measure; the steady numbers of prison officers in the Table show it. This remained the position up to 1986. [213] The trend towards a smaller civil service is likely to continue under the new government of President Chiluba as international lender and donor countries continue to pressure African governments to limit their budgets. Since the inmate population continues to rise (Chapter 9) while the officers' numbers remain limited this means that the staff-prisoner ratio rises instead of decreasing. Ideally what is required are small staff numbers serving small prison populations.

Not only are there chronic staff shortages but the role of prison warders in Zambia, who, like everywhere else form the largest category of prison officers, is unsatisfactory. It may be useful to explore and assess their significance in prison administration.

a. The significance of prison warders in western jurisdictions.

Sykes points out the significance of custodial staff in western prisons:-

> "the official in the lowest ranks of the custodial bureaucracy- the guard in the cellblock, the industrial shop, or the recreation yard- is the pivotal figure on which the custodial bureaucracy turns. It is he who must supervise and control the inmate population in concrete and detailed terms. It is he who must see to the translation of the custodial regime from blueprint to reality and to engage in the specific battles for conformity." [214]

Similar views of an American report on corrections are quoted by Hawkins:-

> 'They [custodial staff] may be the most influential persons in institutions simply by virtue of their numbers and their daily intimate contact with offenders. It is a mistake to define them as persons responsible only for control and maintenance. They can, by their attitudes and understanding, reinforce or destroy the effectiveness of almost any correctional program. They can act as effective intermediaries or become insurmountable barriers between the inmates' world and the institution's administrative and treatment personnel.'"[215]

The Council of Europe report on crime problems (1967) stresses the importance of skills communication with inmates, and the skills of warder staff in making observations; but regrets that such skills are unlikely to be acquired to a high degree.[216]

b. The significance of prison warders in Zambian prisons.

As in western countries, the Zambian prison service is acutely aware of the pivotal role prison warders play in the running of prisons, and, in particular, their influence on the prisoners. From the time of independence the Commissioner of Prisons noted:-

> "The subordinate staff is the first and chief agent in the rehabilitation of the prisoner and it is imperative from all points of view that recruits and serving

> warders should be properly trained in the duties and become something more than guards performing negative supervisory duties." [217]

The potential of warders to influence prisoners positively continues to be recognised. Echoing the views of Sykes and the American report on corrections, the Commander of Lusaka region, Mr Chifumpa, said:-

> "Warders are the most important prison officers in the prisons because it is they who are constantly in personal touch with prisoners." [218]

Unfortunately, this potential is wrecked by entrenched negative attitudes to prisoners fostered during training. Likando, a senior prison officer, noted that at the training school:-

> "Staff are told that a prisoner is a snake who cannot be trusted." [219]

Reference to "snake" is significant. Perhaps in response to these negative stereotypes of prisoners, inmates themselves harbour similar attitudes towards warders. Mr Chifumpa, the Commander of Lusaka prison service region, observed that:-

> "Warders are resented. When prisoners congregate during leisure time and they see a warder approaching, inmates dissipate saying 'a polisi awela'." [220]

meaning "the police have come" in Lusaka Nyanja. The training of prison officers in Zambia encourages hostility towards inmates and discourages better human relations with them, thereby creating a generally depressing prison atmosphere.

2. Inadequate training.

Prison officers are trained at the Staff Training School, Kabwe. Previously, the minimum educational entry qualification was grade 7 (up to primary school) but from 1986 it was raised to grade 9 (formerly form 3), and the training period raised from 6 months to 9. [221] Apart from drilling and an introduction to prison legislation, recruits are taught "human relations" to facilitate better communication between inmates and the outside world, but "counselling" is not taught. [222] Clearly, recruits are not introduced to deeper emotional and psychological problems associated with imprisonment; they are merely introduced to social work. Such lack of counselling education tends to emphasise custody and control at the expense of better officer-prisoner relationships.

The teaching staff is ill equipped to instruct recruits, particularly in personal relationships. Not only are their academic qualifications low, many hold no teaching certificates. Of the six instructors on the staff list in 1986, one completed primary education, standard six (equivalent to grade 7), two completed junior secondary school education, form two (equivalent to grade 9) and the rest (3) completed senior secondary school, grade 12 (old form 5). Only one had a teaching certificate. [223] Such quality of teachers are unlikely to have heard of new prison policies like "positive custody". Regular in-service training is undertaken by middle management officers at the training school. Occasionally the more senior ranks are sent abroad, normally to Wakefield in England. [224]

3. Discipline.

Disciplinary proceedings can be instituted against any prison officer, senior or junior officer. However, proceedings against senior officers, superintendents and above, [225] are rare and information and data difficult to find. This section, therefore, deals with disciplinary proceedings against junior ranks only, which must be instituted by the Commissioner of Prisons. [226] Junior officers can be disciplined for a wide variety of offences against discipline such as absence from duty, [227] being late for duty, [228] sleeping on duty, [229] disobedience[230] or drunkenness[231] etc.

There are three disciplinary authorities: the Police and Prison Service Commission, [232] the Permanent Secretary of the Ministry of Home Affairs[233] and the Commissioner of Prisons. [234] All decisions made by the Commissioner of Prisons must be submitted to the Permanent Secretary for confirmation, [235] and those of the Permanent Secretary to the Police and Prison Service Commission.[236] In the end, the Commission decides all cases, which is a heavy workload. [237]

A wide range of punishments is available to each disciplinary authority such as reduction in rank, salary or seniority; deferment or stoppage of increment; fines or reprimand. [238] Elaborate adjudication procedures are laid down to ensure that the accused officer is given every opportunity to defend himself. [239] The most commonly imposed penalties for breaches of discipline are small fines, normally between K3 and K10. [240]

Table 65 shows disciplinary offences committed by junior ranks of the prison service, normally warder staff, for which they were found guilty and punishments imposed in 5 different prisons: Kabwe Maximum Security Prison, Kamfinsa Prison,

Livingstone Prison, Petauke Prison and Kabwe Female Prison, all chosen because they are either distinct or representative of types of prisons. Kabwe Maximum Security Prison is chosen because it is the only maximum security Prison in Zambia; Kamfinsa Prison is chosen because it has the largest prison population; Livingstone Prison because it is a regional prison and perhaps the best run out of the five; Petauke Prison because it is a rural District Prison and Kabwe Female Prison because it is the only female prison in the country. Five offences have been chosen because they are the types normally associated with discipline in a militaristic establishment: being absent from duty, late for duty, sleeping on duty, disobedience to orders and drunkenness. The data is picked from various periods of time shown in the staff punishment registers available to the writer; from Kabwe Maximum Security Prison, 251 entries, from 2nd October, 1981 to 26th December, 1985; Kamfinsa Prison, 345 entries, from 7th April, 1981 to 19th December, 1985; Livingstone Prison, 431 entries, from 15th March, 1975 to 27th November, 1985; Petauke Prison, 146 entries, from 29th July, 1966 to 3rd May, 1986 and Kabwe Female Prison, 48 entries, from 11th September, 1982 to 31st March, 1986. Because there is no uniformity between the five prisons with regard to the number of offences committed or to the periods covered, percentages, rather than raw figures, assume greater significance.

Table 65.

Disciplinary Offences Committed by Junior Ranks in Five Prisons.

Absent from Duty		Late for Duty		Sleeping on Duty.		Disobedience		Drunkenness.	
(a) Kabwe Maximum Security Prison (Total 251)									
No.	%	No.	%	No.	%	No.	%	No.	%
75	29.88	46	18.32	12	4.78	25	9.96	1	0.39
(b) Kamfinsa Prison (Total 345).									
105	30.43	19	5.50	17	4.92	27	7.82	10	2.89
(c) Livingstone Prison (Total 431).									
113	25.94	51	11.61	52	11.82	16	3.64	7	1.59
(d) Petauke Prison (Total 146).									
30	20.54	19	13.01	1	0.60	9	6.16	4	2.73
(e) Kabwe Female Prison (Total 48).									
12	25.00	5	10.41	2	4.16	4	6.16	1	2.08
Total.									
335		140		84		81		23	
Averages.									
67	26.35	28	11.77	16.80	5.20	16.20	6.74	4.60	1.93

Source: Punishment Registers.

Table 65 shows that absence from duty is the most commonly committed offence against discipline in Zambian prisons, the average percentage standing at 26.35% or just over one quarter of all offences committed. Being late for duty is second (11.77%), followed by disobedience (6.74%), sleeping on duty (5.20%) and drunkenness (1.93%).

The disciplinary significance of 26.35% for absence from duty should be grasped. It is a qualitatively more serious offence than being late for duty because the former is a complete rejection of responsibility. It reflects poorly not only on erring officers themselves but on their supervisors as well. But perhaps the most telling factor about the offence of absence from duty is the absence of credible excuses. Junior ranks are traditionally housed around prisons; there are, therefore, no excuses about distance to work or transport difficulties. The Commissioner of Prisons, Mr Mutwale, blamed the establishment of the Police and Prison Service Commission formed at the instigation of junior prison officers who gave evidence before a special commission of inquiry into the establishment of the one party-state in 1973 (Chapter 1); final disciplinary powers were removed from the Commissioner of Prisons and vested in the new Police and Prison Service Commission. [241] An additional explanation for the poor discipline might lie in the poor professional self-image of the prison service when compared to that of the police force.

4. Prison service: poor self image.

Although the police force and prison service perform essential tasks of investigation and punishment, respectively, the prison service harbours feelings of

professional inferiority which spring initially from public perceptions of the very nature of the service. Police officers are seen as active, in pursuit of elusive and dangerous criminals; prison officers on the other hand are seen as sedentary, guarding a captive criminal population. It appears that prison officers harbour similar negative perceptions about themselves and their service. This has been fostered partly by the way the service evolved (above), and partly by the feeling that the independence governments have regarded the prison service as subservient to the police and deserving less attention.

It will be recalled that the prison service was born out of the police force in 1942. Even after the split prison officers and police officers trained together in the same classes in Livingstone until 1953: since then the police have been trained at Lilayi, near Lusaka, and prison officers at Kabwe. Significantly for the self-image of the prison service, the brighter students were appointed police officers while the less able ones were appointed as prison officers. [242]

After independence, prison officers complained of pay differentials with the police officers. In his annual report (1972), the Commissioner of Prisons said:-

> "the disparity between senior prison officers' salaries and senior police officers' is causing great concern in the department." [243]

Pay differentials were not synchronised until 1979. [244] But feelings of being ignored continued. For example, in 1985 a very senior prison officer complained that certain police divisions in the country were headed by very senior police officers but the same divisions ("regions" in the prison service) were headed by junior prison officers, giving the specific example of Copperbelt Division which is headed by a Senior Assistant

Commissioner of Police while the same division is headed by a prison superintendent.[245]

As if to acknowledge the feelings of injustice suffered by the prison service, in 1987 the names of three prison posts were changed to those in use in the police force, from Assistant Superintendent to Chief Inspector of Prisons, Chief Prison Officer to Inspector of Prisons and Prison Officer to Sub-Inspector of Prisons, [246] although "Chief Inspector" may be misleading as it might easily denote the head of the prison service above the Commissioner of Prisons.

XI. After-Care.

When offenders are released from prison, little material assistance is offered to them either through statutory or compulsory after-care or voluntary after-care by the Prisoners Aid Society of Zambia to resettle in the community. Yet the material and emotional needs of discharged prisoners are many and varied; in Britain, the National Association for the Care and Resettlement of Prisoners (NACRO) identifies some of the more obvious needs:-

> "While they [are] in prison they may have lost their home, lost their job, and lost contact with their family and friends. On release they come up against so many barriers that they feel they now have no prospect of rebuilding their lives." [247]

Much of what is said about discharged prisoners in Britain is also true in Zambia, loss of family and friends perhaps being the exception because of the continuing strength of the Zambian family. On their discharge, therefore, offenders continue to suffer, especially material deprivation.

A. Statutory after-care.

The key statutory provision on after-care states:-

"(1) The Commissioner-

(a) shall, in the case of a prisoner who having been sentenced to imprisonment on not less than two previous occasions, is serving a sentence of imprisonment for a period of or exceeding three years; and

(b) may, in the case of any other prisoner where he considers necessary or desirable in the interests of rehabilitation of that prisoner so to do;

make an order, to be known as a 'compulsory After Care Order', providing for the compulsory care of the prisoner for a period not exceeding one year after his discharge from prison." [248]

It should be noted that, potentially, the Commissioner can make many orders in a year because of the large numbers of prisoners who fall under paragraph (a) and perhaps an equal number who fall under paragraph (b). It will be noticed that compulsory after-care is very much like police supervision orders, the main difference being that the latter apply to prisoners who have been sent to prison only once before. Both types of orders are intended to deal with the problem of persistent offending.

Against the large numbers of prisoners who qualify for compulsory after-care the Commissioner of Prisons has made surprisingly few orders. Table 66 shows the number of orders made by the Commissioner over a period of 11 years from 1971 to 1983, inclusive.

Table 66.

No of After-Care Orders made, 1971-1983.

Year	No. of Orders
1971	8
1972	15
1973	16
1974	11
1975	12
1976	14
1977	1
1978	1
1979	0
1980	0
1983	0
Total:	78

Source: Annual Reports of the Prisons Department. Note: Data before 1971 is not shown in Annual Reports.

Clearly, the small number of after-care orders recorded, especially from 1979 to 1983 when none were made, shows that the Commissioner of Prisons did not carry out his statutory duties.

B. Voluntary after-care and the Prisoners Aid Society of Zambia.

The Prisoners Aid Society of Zambia is the main voluntary organisation concerned with prisoners but is unable to offer meaningful practical assistance to discharged prisoners. Assistance offered by the Livingstone Branch, for example, is limited to providing transport money, when it is available, to discharged prisoners living a short distance from Livingstone Prison, [249] while the Lusaka Branch appears to be more interested in assisting serving prisoners by buying uniforms, if money is available, for their school children. [250]

Two problems beset the more effective operation of the Prisoners Aid Society of Zambia: chronically severe shortage of funds and public apathy among indigenous Zambians. At independence the Society was run largely by expatriates but when they left indigenous Zambians showed little interest. [251] Three reasons account for the apathy: a general indifference to the plight of prisoners expected in any country, the financial cost involved in joining any voluntary organisation and the absence of a tradition of organised private benevolence outside family circles in a society which is already a mutual support society.

Conclusion.

The overall experience of imprisonment for inmates in Zambia is very clear: serious material deprivation and by necessary implication emotional deprivation as well, despite the fact that key national leaders, President Chiluba and former President Kaunda, both experienced imprisonment themselves for politically motivated activities. Apparently, Kaunda's philosophy of Zambian Humanism was not implemented with regard to prison conditions and there is no sign yet that Chiluba's prison experience will be used as a basis for improving prison conditions either. The objectives of imprisonment, reform in particular, remain unreviewed.

On reception, convict prisoners are given poor inadequate uniforms fashioned to degrade them; the diet for all inmates (convict and non-convict) is bad even by the standards of a poor country; they sleep on bare floors without mattresses and lock-up time is too early (5 p.m.) as is "lights out" time (8 p.m.). Efforts at offering education are half-hearted. Minimal recreational facilities are offered, access to newspapers and radio is denied.

The authorities appear to concentrate on putting prisoners to work by providing industrial training, such as carpentry and at Kabwe female Prison sewing, and working on farms and gardens. But the proportion of those engaged in industrial training is small, the majority working on house-keeping duties and sanitary work.

Prisoners' rights are largely ignored. When inmates are charged with disciplinary offences "trials" are a travesty. One of the commonly imposed penalties is loss of remission which is in effect an additional prison term as prisoners are credited with the full remission at the beginning of their sentences. In view of the poor conduct of trials

and the seriousness of loss of remission, this penalty should either be abolished or must be confirmed by magistrates before it takes effect.

Restricted rights to correspondence and visits are kept limited in practice. Although inmates have the right of access to lawyers and the courts, their ignorance and poverty restricts the majority from exercising this right. When inmates manage to gain access to civil courts, the courts are unhelpful, preferring a "hands off" approach to prison administration.

For prison officers their working environment is equally depressing, characterised by a chronic shortage of staff, inadequate training, indiscipline among the junior ranks and a poor self-image as compared to the police.

A negligible number of prisoners are put on statutory after-care by the Commissioner of Prisons. Hardly any after-care is offered to discharged prisoners by the Prisoners Aid Society of Zambia, the main voluntary after-care organisation in Zambia, due to a chronic shortage of funds and apathy among indigenous Zambians.

The prison experience for inmates, prison officers and discharged prisoners could be improved significantly if there was a re-evaluation of the purposes of imprisonment. In western countries the prominence of the reform ideal, particularly through training and treatment, has been in decline over the years and is being replaced by the idea of better, more humane living conditions for prisoners. In England and ;Wales this idea first surfaced in government literature in 1969 with the publication of a White Paper which said, under a section headed "Living Conditions", that:-

> "The first task of the service, [is] 'humane containment'[252] although "it cannot be the sole task of the prison service." [253]

Ten years later in 1979, an inquiry into the United Kingdom prison service, popularly known as the May Committee after its chairman, broadly endorsed the prominence of the humane containment idea and downgraded training and treatment saying:-

> "We think that the rhetoric of 'treatment and training' has had its day and should be replaced." [254]

Two witnesses, King and Morgan, also urged for the humane containment idea and their view were summarised by the May Committee as follows:-

> "They argued that, since the 'treatment' model has been shown as invalid, the only proper replacement is a system devoted to secure and humane containment based on three principles, minimum use of custody, minimum use of security, and the 'normalisation' of the prison." [255]

But the May Committee criticised humane containment because:-

> "as one group of witnesses pointed out to us, 'humane containment' suffers from the fatal defect that it is a means without an end. Our opinion is that it can only result in making prisons into human warehouses- for inmates and staff. It is not, therefore, a fit rule for hopeful life or responsible management." [256]

For their part King and Morgan insist that there is little difference between 'humane containment' and 'positive custody':-

> "the Committee [May Committee] seemed unaware that the rhetoric of 'positive custody' is susceptible to exactly the same interpretation as the 'treatment and training' model it was intended to replace." [257]

Whatever language is used, the purposes of imprisonment in Zambia should be re-considered to emphasise humanity and human rights in prison. This would be in line

with the softer justice system of traditional society, which had no prisons as places of punishment. Consequently, prison officers may work in a less confrontational environment and the need for after-care could be reduced. With such a change of emphasis, the government, the general public, the media, the Prisoners Aid Society of Zambia etc. might take more notice, if not interest, in the running of prisons in Zambia, and in the impact of imprisonment on other segments of the penal system and other national policies.

Chapter 10.

Notes.

1. G.Hawkins, Prison: Policy and Practice, Chicago, University of Chicago Press, 1976, p.81.

2. Ibid., p.31.

3. L.W.Fox, The English Prison and Borstal Systems, London, Routledge and Kegan Paul Limited, 1972, pp.4-5.

4. N.Walker, Sentencing, Theory, Law and Practice, London, Butterworths, 1975, para.9.2, p.125.

5. Ibid.

6. Ibid., para.9.2, p.126.

7. Ibid.

8. Ibid.

9. Ibid.

10. Ibid., para.9.2, p.125.

11. Ibid.

12. Ibid.

13. Committee of Inquiry into the United Kingdom Prison Service Report, Cmnd.7673, 1979, para.4.3., p.61.

14. G.Hawkins, Op.Cit., p.34. Another attack comes from a Canadian report on the sentencing problems of that country. It points out that the idea of protecting the public can also mean incapacitating the offender. But it also refers to the wider

and overall sentencing aim of the entire legal system trying to prevent the commission of offences. Seen in this light, prison is not the only mechanism for protecting the public. The police can be said to be in the business of protecting the public to a greater extent than prisons. See Sentencing Reform: A Canadian Approach, Canadian Sentencing Commission, Feb., 1987, para.3.1, p.146.

15. J.E.Hall Williams, The English Penal System in Transition, London, Butterworths, 1970, pp.21-22.

16. Prisons Rules, Cap.134, Rule 3(2).

17. Prisons Rules, Cap.90, para.3(c).

18. Prisons Act of Tanzania, Cap.58, and Prisons Act of Malawi, Cap.9:02.

19. K.D.Kaunda, Humanism in Zambia and a Guide to its Implementation, Part II, 1970, p.27.

20. Ibid., p.28.

21. Ibid., p.27.

22. Report on a Visit to the Prisons of Kenya, Uganda, Tanganyika, Zanzibar, Aden and Somaliland, 1939, p.13.

23. Report from the Departmental Committee on Prisons, 1895, Cmnd. 7702, para.85, p.31.

24. Report on the Prison System of Northern Rhodesia and Recommendations for Re-Organisation, Lusaka, Gvt. Printer, 1938, p.3.

25. G.Hawkins Op.Cit., p.58.

26. M.Q.Warren, "Classification of Offenders as an Aid to Effective Management and Effective Treatment", Jo.Crim., Crm'on and Pol. Sc., 1971, Vol.62, No.2, p.239.

27. Ibid., p.243.

28. Ibid., p.242.

29. Ibid., p.246.

30. Prisons Act, Cap.134, S.60(2).

31. Ibid., S.60(2)(a).

32. Ibid., S.60(2)(b).

33. Ibid., S.60(2)(c).

34. Ibid., S.60(2)(d).

35. Ibid., S.60(2)(e).

36. Ibid., S.60(2)(f). However, the Commissioner of Prisons is authorised to establish temporary prisons if he deems it necessary to ease congestion in any one particular prison, but feels that it is not convenient to transfer the excess population to another prison- Prisons Act, Cap.134, S.4(1)(a); or to contain a contagious disease- Prisons Act, Cap.134, S.4(1)(b); or for any other reason- Prisons Act, Cap.134, S.4(1)(c). None of this is for training or treating offenders.

37. Minute to the Chief Secretary, dated 27th April, 1942. SEC 1/1158.

38. Interview with Commissioner of Prisons, Mr Mutwale, Lusaka, 4th Aug., 1986.

39. 11th June, 1986.

40. Interview with Commissioner of Prisons, Mr Mutwale, Lusaka, 4th Aug., 1986.

41. See various Annual Reports of the Prisons Department, e.g. for 1971, para.12, p.7.

42. Interview with Mr Mwanza of Petauke Prison, Petauke, 12th June, 1986.

43. D.Clemmer, The Prison Community, London, Holt, Rinehart and Winston, 1966, p.299.

44. Ibid.

45. Ibid., p.300.

46. Ibid., pp.300-301.

47. Ibid., p.300.

48. G.H.Boerhinger, "Developments in Criminology in Tanzania", University of East Africa Social Sciences Council Conference, 1968/69, Makerere Institute of Social Research, 1966, Law Papers, p.62.

49. T. and P.Morris, "The Experience of Imprisonment", B.J.C, Vol.1, 1960-61, p.234.

50. G.Hawkins Op.Cit., p.64. Other authors are cited who do not confirm this U-shaped curve.

51. Ibid., pp.67-68.

52. F.Allen, The Decline of the Rehabilitative Ideal, New Haven, Yale University Press, 1981, p.75.

53. G.Hawkins, Op.Cit., pp.67-69.

54. Ibid., p.76.

55. Interview with Mr Mbewe, a senior prison officer, Kabwe Medium Security Prison, Kabwe, 31st March, 1986.

56. Second United Nations Congress on the Prevention of Crime and Treatment of Offenders, New York, 1960, para.231, p.30.

57. Interview with Commissioner of Prisons, Mr Mutwale, Lusaka, 4th Aug., 1986.

58. Interview with Officer in Charge of Kabwe Maximum Security Prison, Mr Njuga, 2nd April, 1986.

59. Application Book, entry dated 4th January, 1985.

60. Ibid.

61. Interview with Officer in Charge, Kabwe Maximum Security Prison, Mr Njunga, Kabwe, 2nd April, 1986.

62. Interview with Mr Akakamanyando, Officer in Charge of Mutwe wa Nsofu Open Prison, Kabwe, 8th March, 1986.

63. Interview with Officer in Charge of Kabwe Maximum Security Prison, Mr Njuga, Kabwe, 3rd April, 1986.

64. Interview with Officer in Charge of Kabwe Female Prison, Miss Hamanzuka, Kabwe, 21st April, 1986.

65. Interview with Miss Lungu of Kamfinsa Prison, Kitwe, 4th May, 1986.

66. Interview with Commissioner of Prisons, Mr Mutwale, Lusaka, 4th Aug., 1986.

67. Ibid. Only condemned prisoners in Kabwe Maximum Security Prison are provided with tea, coffee and bread.

68. 1983/HP/415. Lusaka High Court, unreported.

69. 1993 (4) SA 228.

70. Ibid., at p.247.

71. Interview with Mr Njunga, Officer in Charge, Kabwe Maximum Security Prison, Kabwe, 2nd April, 1986.

72. Prison Visits Book. Entry dated 2nd December, 1985, name of Judge is illegible.

73. Interview with Officer in Charge, Kabwe Maximum Security Prison, Mr Njuga, Kabwe, 11th April, 1986. The relevant prison legislation is Prison Rule 124(d)(ii).

74. The writer used to sleep on such beds in the village in the 1950s.

75. Interview with Commissioner of Prisons, Mr Mutwale, Lusaka, 4th Aug., 1986.

76. Interview with Officer in Charge of Lusaka Central Prison, Mr Shamuzumba, Lusaka, 9th January, 1986.

77. Ibid.

78. Interview with recently discharged prisoner, Mr Martin Nyambe, a prisoner who once spent several months at Nyimba Prison, a new prison farm in Petauke District, Eastern Province, Lusaka, 16th Nov., 1985.

79. Annual Report of the Prisons Department, 1964, para.99, p.16. Also see G.H.Boerhinger, "Developments in Criminology in Tanzania", University of East Africa Social Sciences Council Conference, 1968/69, Makerere Institute of Social Research, 1966, Law Papers, and V.N.Pillai, U.N.Review of Criminal Policy, No.14, April, 1959, p.3.

80. Report of the Departmental Committee on the Employment of Prisoners, Cmd.4462, 1933, chaired by Salmon, para.128, p.55.

81. Report on a Visit to the Prisons of Kenya, Uganda, Tanganyika, Zanzibar, Aden and Somaliland, Op.Cit., 1939, p.18.

82. R.D.King and R.Morgan, The Future of the Prison System, London, Gower Publishing Co.Ltd., 1980, p.16.

83. Interview with Mr Sanika, Carpentry Supervisor at Livingstone Prison, Livingstone, 3rd February, 1986; Mr Hananzabala, Chief Instructor at Kabwe Maximum Security Prison, Kabwe, 9th March, 1986.

84. Ibid.

85. Interview with Mr Musuku, Buildings Instructor at Kamfinsa Prison in Kitwe, Kitwe, 7th May, 1986; Mr Kangwanda, instructor in carpentry at Kansenshi Prison in Ndola, Ndola, 11th May, 1986.

86. Interview with Mr Mushika, Tailoring Supervisor at Lusaka Central Prison, Lusaka, 8th January, 1986; Mr Phiri, the Purchasing Officer for all sewing machines in the prisons based at Kabwe Maximum Security Prison, Kabwe, 13th April, 1986.

87. Ibid.

88. Interview with Mr Sanika, Carpentry Supervisor at Livingstone Prison, Livingstone, 3rd February, 1986; Mr.Musuku, the Buildings Instructor at Kamfinsa Prison in Kitwe, Kitwe, 9th May, 1986; Mr Kangwanda of Kansenshi prison in Ndola, Ndola, 19th May, 1986; and Miss Mwaba, the Instructor at Kabwe Female Prison, Kabwe, 23rd April, 1986.

89. Interview with Mr Mushika of Lusaka Central Prison, Lusaka, 8th January, 1986; Mr Hananzabala, the Chief Instructor at Kabwe Maximum Security Prison, Kabwe, 9th March, 1986; and Miss Mwaba, the Instructor at Kabwe Female prison, Kabwe, 23rd April, 1986.

90. Ibid.

91. Interview, Lusaka, 4th August, 1986.

92. Interview with Miss Ilinanga, Instructor at Kamfinsa Prison in Kitwe, Kitwe, 2nd May, 1986.

93. Ibid.

94. Interview with Miss Mwaba, Instructor at Kabwe Female Prison, Kabwe, 23rd April, 1986.

95. Ibid. Indeed when the writer visited the prison, there were only four inmates being taught tailoring.

96. Ibid. But remembering that she is dissatisfied with her pay scale.

97. Annual Report of the Prisons Department, 1964, para.7, p.18. But Kabwe Female Prison was not a separate establishment at the time. It was being administered from the neighbouring Kabwe Medium Security Prison.

98. R.D.King and R.Morgan Op.Cit., p.15.

99. Ibid., at p.16.

100. Interview with Commissioner of Prisons, Mr Mutwale, Lusaka, 4th Aug., 1986.

101. Prisons Act, Cap.90, S.61(1).

102. Interview with Mr Akakandelwa, Officer in Charge of Education in the Central Region of the Zambia Prison Service Kabwe, Kabwe, 20th April., 1986.

103. Ibid.

104. Ibid.

105. Ibid.

106. Ibid.

107. Ibid.

108. Prisons Act, Cap.134, S.60(1).

109. Interview with Officer in Charge, Kabwe Female Prison, Miss Hamanzuka, Kabwe, 17th April, 1986.

110. Ibid

111. Ibid

112. Interview with Mr Shamuzumba, Officer in Charge, Lusaka Central Prison, Lusaka, 8th Jan., 1986. The exclusion is expected. The then ruling United

National Independence Party (UNIP) fought the Watchtower church during the fight for independence.

113. Interview with Miss Hamanzuka, Officer in Charge of Kabwe Female Prison, Kabwe, 17th April, 1986.

114. Ibid.

115. Interview with Mr Njunga, Officer in Charge of Kabwe Maximum Security Prison, Kabwe, 5th April, 1986.

116. Constitution of Zambia Act, 1991, No.1 of 1991, Article 15.

117. G.Hawkins, Prisoners Rights: A Study of Human Rights and Commonwealth Prisoners, Canberra, Australia Publishing Service, Occasional Paper No.12, 1986, p.7.

118. Ibid., p.8.

119. G.Hawkins, Op.Cit., p.7.

120. Ibid. Hawkins quotes two authors who make these three points.

121. LL.M. Seminar in the Institute of Advanced Legal Studies, University of London, 29th February, 1984.

122. Prisons Act, Cap.134, S.90, see marginal note.

123. Ibid., S.90(i).

124. Ibid., S.90(ix).

125. Ibid., S.90(xi).

126. Ibid., S.91, see marginal note.

127. Ibid., S.91(iii).

128. Ibid., S.91(vii).

129. Ibid., S.91(x).

130. Ibid., S.90(i).

131. Ibid., S.90(xvi).

132. Ibid., S.909(xv).

133. Ibid., S.90(xviii).

134. G.Zellick, "Prisoners' Rights in England", (1974) 24 University of Toronto Law Journal, p.32.

135. Prisons Act, Cap.134, S.90(xii).

136. Ibid., S.90(xiv).

137. Ibid., S.95(a).

138. Ibid., S.95(c).

139. Ibid., S.95(e).

140. Ibid., S.95(d).

141. Prisons Rules, Cap.134, Rule 53(h).

142. Prisons Act, Cap.134, S.94(1)(a).

143. Ibid., S.97(1)(a).

144. Ibid., S.97(1)(d).

145. Ibid., S.97(1).

146. Ibid.

147. Ibid., S.98(h).

148. Ibid., S.95 (a)-(e).

149. Interview with Mr Justice Ngulube, Deputy Chief Justice, as he was then. Now he is C.J., Lusaka, 12th December, 1985.

150. Prisons Rules, Cap.134, Rules 175 and 176.

151. Interview with Commissioner of Prisons, Mr Mutwale, Lusaka, 4th Aug., 1986.

152. Minute is RET/101 FEM-KBW/2, dated 12th January, 1985 and signed by Mr Sakafunya.

153. Constitution of Zambia, No.1 of 1991, Article 18(1).

154. Ibid., Article 18(15).

155. Interview with Mr Shamuzumba, Officer in Charge of Lusaka Central Prison, Lusaka, 8th January, 1986; and with Mr Chiundaukwa, Officer in Charge of Livingstone Prison, Livingstone, 29th January, 1986.

156. The writer was denied access to case records. However, he managed to find a few by chance.

157. Case No.LUS.3/85, and heard on 24th August, 1984, at Lusaka Central Prison.

158. Constitution of Zambia, No.1 of 1991, Article 18(2)(a).

159. Ibid., Article 20(2)(a).

160. Prisons Rules, Cap.134, Rule 169.

161. Interview, Lusaka, 4th August, 1986.

162. Prisons Act, Cap.134, S.98(d).

163. Ibid., S.97(1)(d).

164. Ibid., S.95(d).

165. Prisons Act, Cap.134, S.109.

166. Ibid.

167. L.Blom-Cooper, "The Constitutional Framework of the English Penal System", Progress in Penal Reform, L.Blom-Cooper (Ed.), Oxford, Clarendon Press, 1974,p.52.

168. Prisons Rules, Cap.134, Rule 141(1).

169. J.Ditchfield and C.Austin Grievance Procedures in Prisons, Home Office Research Study No.91, 1986, p.1.

170. Prisons Rules, Cap.134, Rule 141(1).

171. Interview with Mr Mbewe, prison officer at Kabwe Medium Security Prison, Kabwe, 26th April, 1986.

172. K.D.Kaunda, Zambia Shall be Free, London, Heinemann Educational, 1962, p.131.

173. Prisons Rules, Cap.134, Rule 134(3).

174. Interview with reception officer at Livingstone Prison, Mr Jere, Livingstone, 29th January, 1986.

175. Prisons Rules, Cap.134, Rule 110(1).

176. Ibid., Rule 132(2).

177. Ibid., Rule 110(2).

178. Ibid.

179. [1943] 1 K.B., 252.

180. Ibid., at p.254.

181. Ibid.

182. [1972] 2 All ER., 678.

183. [1979] 2 W.L.R., 42.

184. Ibid., at p.61. Also see Williams v. Home Office (No.2) [1982] 2 All ER., 564 in the Court of Appeal in which the Judges were similarly inclined. The case was concerned with the justiciability of an alleged breach of a prison rule dealing with separate confinement in prison.

185. 1983/HP/415, Lusaka High Court, unreported.

186. Ibid., at p.3.

187. No.2B/519 of 1983, before the Subordinate Court, Kabwe, unreported.

188. No.SP/72 of 1986, before the Subordinate Court, Lusaka, unreported.

189. Sunday Times of Zambia, 30th June, 1985, p.5

190. Zambia Daily Mail, 30th Sept., 1985, p.4.

191. The Weekly Post, Jan.22-28, 1992, p.10.

192. The Weekly Post, Jan.22-28, 1993, p.11.

193. Zambia Daily Mail, 7th June, 1988, p.4.

194. Zambia Daily Mail, 27th May, 1986, p.5.

195. Times of Zambia, 10th June, 1990, p. 3.

196. This administrative arrangement was not peculiar to Northern Rhodesia; it appears to have been the general arrangement in other British colonial dependencies. In Southern Nigeria the police and prisons were run by one government department until 1920, see D.Killingray, Punishment to Fit the Crime?: Penal Policy and Practice in British Colonial Africa, a paper presented before a joint seminar at Centre for African Studies and African History, University of London, 15th May, 1985, p.3; and in Tanganyika, see Tanganyika Colonial Report, No.46,p.32.

197. I.Graham, "A History of the Northern Rhodesia Prison Service." Northern Rhodesia Journal, Vol.5, 1962-64, p.549.

198. Proclamation No.19 of 1901, S.1.

199. Minute from Magistrate, Kalomo, to the Civil Commissioner, Livingstone, dated 6th Feb., 1906. BS/167, Vol.III.

200. This information is found in a letter written by Gordon-Smith to the Attorney-General, dated 6th April, 1925. BS/167, Vol.III.

201. I.Graham, Op.Cit., p.550.

202. This fact appears in a letter written by Commissioner of Police to the Chief Secretary, dated 8th Nov., 1938, ref.no.2252/5/73. SEC. 1/1145.

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204. Letter written by Commissioner of Police to the Chief Secretary, dated 8th Nov., 1938, ref.no.2252/5/73. SEC. 1/1145.

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Chapter 11.

Conclusion.

Introduction.

This chapter is divided into three sections: section A reviews the contents of the thesis; section B outlines the main characteristics of the Zambian penal system and section C considers prospects for the future, advancing proposals for reform so that public indifference towards, and official neglect of, penal law and practice can end.

Section A.

A review of the thesis.

I. The historical context.

A. The nature of traditional African society and concepts of justice.

Like everywhere else in Africa, the indigenous ethnic communities of pre-colonial Zambia had their own systems of law and order with their own dispute settlement practices. The technological advancement of the people was pre-industrial and this had a profound effect on their general outlook upon life. Life was precarious and communities socially conservative. The people were fatalistic, with strong and widespread beliefs in the supernatural, and practiced a strict observance of social norms and etiquette. This in turn had a profound effect on the people's sense of justice.

First, the most seriously regarded wrongs were those which were regarded as endangering the social cohesion of society, the supreme example being witchcraft

because its practice was shrouded in secrecy and mysticism and the harm done was great. While the received law regarded the witchfinder (and still does) as a manifestation of the general backwardness of African society, the people regarded him as their protector and a foreteller of the future. In addition, because the witchdoctor was looked to by the people, the colonial administration regarded him as a threat to their authority. Unlike under the received law, homicide was not regarded as socially disruptive meriting the severest punishment. Also, certain events regarded by the received law as deserving serious condemnation were seen very differently by the indigenous ethnic communities of Zambia. Because of the fatalistic and superstitious nature of pre-industrial society, abnormal births or development of children, for example, were regarded as harbingers of calamities in the society. If a child was born with feet first, or cut its upper teeth first the parents were required to kill it; yet under the received law this would be either murder or infanticide.

Secondly, concepts of justice in indigenous communities were dominated not by punitive penalties like imprisonment (which did not exist as a method of punishment) but by compensation, witchcraft being the notable exception; it was normally punishable with death. The incidence of corporal punishment and mutilation referred to by colonial officials and writers may be exaggerated. In sharp contrast with the received law, homicide was normally punishable with compensation. Perhaps more significantly, compensation was paid personally to the wronged party by the wrong-doer himself or herself. Adultery was punished with either corporal punishment or compensation.

Thirdly, the concept of justice emphasised reconciliation in adjudication procedures. Adjudicators or arbitrators sought to find the underlying cause of the

conflict and did not restrict their attention to the matters actually raised by the parties. To this end, and unlike in the modern courts, there were no strict rules of evidence or procedure and the atmosphere in the judicial forums was more relaxed. More significantly, the victim and other witnesses were given latitude to present their stories without undue interruption. Such latitude tended to have a therapeutic effect on the victim and his kin.

Fourthly, indigenous communities generally lacked visible law enforcement agencies, like police, court-houses, or penal institutions, like prisons, even in chiefly societies. Dispute settlement tended to be concentrated at the local level, the nuclear and extended family level. This was an accepted part of system of justice.

Lastly traditional African society made no distinction between "tort" and "crime", as the received legal system does with civil and criminal courts. Cases were dealt with by the same, or same type of, judicial forums following the same judicial procedures. However, more serious cases attracted special procedure, as in witchcraft cases where ordeals were employed.

To sum up, justice was conducted largely in a non-confrontational way, wrong-doers were not dealt with harshly and victims had a significant role in adjudication proceedings.

B. The impact of colonial rule on indigenous communities.

Zambia was penetrated last in the central African region, later than neighbouring Zimbabwe and Malawi; colonial influence came from the south (Zimbabwe) and north-east (Malawi). Because of this, the benefits of European civilisation came last; general development started late and the rate of development was slow.

This unpromising start should have been compensated for by the rich mineral resources discovered on the Copperbelt, which brought much wealth beginning from the 1930 up to independence and for a few years thereafter. Copper brought about industrialisation and urbanisation so that by independence in 1964 Zambia was the most urbanised country south of the Sahara.

With the coming of colonialism the received justice system was superimposed on the existing indigenous justice system, creating a hybrid Zambian system mainly based on an English model which in England itself has subsequently undergone great changes in penal ideas, directions, laws, arrangements, institutions, establishments and practices, including sentences. With the new justice system came new cultural values and new concepts of justice. Writing on Malawi and Zambia Chanock notes:-

> "Many early British accounts stressed the absence of a moral sense in the African population and depicted society in which the entire social fabric had been held together only by the severest of deterrent punishment for infractions. (From this it follows of course that British justice if it were to be understood and effective had to be severe.)."[1]

Reference has already been made to differences over witchcraft, homicide and adultery, and approaches to dispute settlement between the received law and African customary law. Even after independence differences over bigamy, for example, are still apparent between the two societies : European judges condemning it while African judges see nothing wrong with it (Chapter 1).

As the fruits of Western civilisation, such as education and commerce, took root traditional values and practices were in retreat. But the strength of the family appears to survive largely intact.

C. Political and other developments.

Northern Rhodesia was a partner in the Federation of Rhodesia and Nyasaland comprising Northern Rhodesia, Southern Rhodesia and Nyasaland. It lasted for ten years (1953-1963) but had no immediate or lasting impact on the penal system of Northern Rhodesia. After independence in 1964, a combination of factors stunted the process of general development of the country. First, Zambia was surrounded by unstable colonial territories seeking independence (Angola, Mozambique, Bechuanaland (later Botswana), South West Africa (later Namibia) and Southern Rhodesia (Zimbabwe), where a particularly difficult problem arose when the ruling minority regime there announced a unilateral declaration of Independence (U.D.I.) in 1965. Kaunda's government felt that U.D.I, coming so soon after her own independence, was an affront to African nationalism and that it had no choice but to confront the challenge. The Rhodesian problem, which lasted 15 years, was very costly in terms of general economic development as Zambia's trade and trade routes to the sea were seriously affected.

Secondly, after nine years of independence with a multi-party system, Kaunda established the one-party system of government which seriously stifled freedom of expression. He was not the only African leader to establish the one-party system of politics: Nyerere in Tanzania, for example, had done it earlier. The loss of freedom of expression was exacerbated by Kaunda's unenlightened socialist dictatorship leading to a general lethargy in the country.

Particularly regrettable was the late introduction and slow rate of development of higher education in Zambia: for example, the first African in Zambia to graduate from university is still alive. It was not until 1966, two years after independence, that

the first university (University of Zambia) was established. This late development of higher education has had a very significant impact on the development of the law generally and legal education in particular. For example, the first African from Zambia to qualify as a lawyer is still alive. More significant is the fact that criminology was first taught in the School of Law of the University of Zambia as late as in 1981 due to lack of teachers; teaching was discontinued after two years (1983) when the expatriate teacher left. Democracy and a more enlightened political leadership would have quickened the pace of higher education.

All the main features of the Zambian penal justice system: legislation, like the Penal Code and Juveniles Act, the courts and law enforcement agencies, like the police and Zambia prison service, were established during the colonial administration and are almost exclusively based on the alien model of English institutions, with virtually no concessions to Zambian conditions, resulting in a penal system which is in operation but not fully accepted by the people. Neither Kaunda's Zambian Humanism nor the country's Christian traditions, neither one-party rule nor the democratisation of the political system has made any perceptible impact on penal law or practice.

II. Theories of punishment and sentencing of offenders.

There are several theories of punishment which are normally grouped into three: retribution, deterrence and reform. They are more complicated than they appear on the surface, involving questions relating not only to their utilitarian values but also to their underlying assumptions and logical consequences. Recent debates have focused on doubts about the efficacy of reform, which has been the dominant theory of

punishment in western countries and in Zambia for a long time, leading to a renewed interest in retribution and deterrence.

In Zambia denunciation, a branch of retribution, should be given much greater prominence because its central message, denunciation of criminal conduct, is clear and simple enough to be understood by the ordinary Zambian in the street or village. Although denunciation as presently understood may be difficult to articulate into rungs of severity of sentence, it should be expanded to include the notion of compensation, the nature of which is about as denunciatory as punitive sentences like imprisonment.

Sentencing is not only one of the most difficult tasks for courts to perform but also the only one which really matters to offenders. The sentencing process begins with the identification of the tariff sentence (Chapter 3), which may be easier to describe than identify, before proceeding to impose the individualised sentence after taking into account any mitigating and aggravating factors (Chapter 3). Several factors which influence sentencing discretion have received particular judicial attention: a good or bad criminal record determines whether leniency should be shown or not; where the offender is convicted of more than one offence, courts should decide whether the sentences should be concurrent or consecutive; and if the offence carries a minimum sentence, the minimum sentence should be imposed unless there are aggravating factors. Unfortunately the convention of taking other offences into consideration has received very little attention. But whatever sentence is imposed, an appellate court should not substitute its own view of the sentence for that of the trial court if the original sentence was right in principle.

Sentencing disparities do not appear to have seriously concerned the judiciary in Zambia or any other section of Zambian society, including the public. No one appears

to have suggested ways of structuring sentencing discretion to guide sentencers. There are no general statements about the purposes or principles of sentencing (Chapter 3) which could be inserted into the section of the Constitution on fundamental rights dealing with the protection of the law; existing penal legislation tends to be wide and amorphous and sometimes confusing as in provisions on probation and discharges (Chapter 6); and appellate courts (High Court and Supreme Court) have done very little to issue clear and well-thought-out sentencing guidelines, as is currently the practice in England. Judgements tend to be narrow and limited to the law and facts in the case. Appellate courts should be encouraged to make more general observations on sentencing direction and policy as happened in the Adam Berejena case in which the Supreme Court condemned corporal punishment as barbaric (Chapter 7). What is required is a Sentencing Council to monitor sentencing trends and practices and report to Parliament and advise the judiciary accordingly.

III. The courts and the judiciary of Zambia.

The judicial system of Zambia is comprised of a four-tier system of courts: the Supreme Court, High Court, Subordinate Courts (or Magistrates Courts) and Local Courts. There are two types of magistrates: professionally-qualified and professionally-unqualified. Local Court justices do not receive training of any kind before sitting on the bench, on the basis that they deal mainly with customary law which needs no formal study, although short spasmodic in-service training is given. There is an unfortunate tendency on the part of the Zambian courts to blindly follow English court decisions.

One major problem area stands out regarding the Zambian judiciary: inadequate training. As has just been pointed out Local Court justices receive no training of any kind. They should receive some training to deal with the complex task of sentencing offenders. When feasible, they should be merged with magistrates courts as envisaged by the colonial administration just before independence. Students at University of Zambia should be offered courses on criminology and the syllabus at the Law Practice Institute (L.P.I.) should be re-arranged so that more time is given to the sentencing course, for it should be remembered that High Court and Supreme court judges, who are major sentencing policy-makers, are drawn from the ranks of L.P.I.-trained lawyers. The lack of innovation associated with the Zambia judiciary, e.g. in capital and corporal punishment cases (Chapter 7), can partly be attributable to inadequate training. A special judicial training college modelled on the Nigerian institute should be established to offer induction courses and in-service training to Local Court justices, magistrates and judges of the High Court and Supreme Court.

IV. Financial, non-custodial and semi-custodial penalties.

Five financial penalties are available to the courts: fines, compensation, costs, restitution and forfeiture, the first two being the more significant.

The attributes of fines are well known. Apart from permitting the courts to impose and collect fines without requiring offenders to appear in person before the courts, through the Admission of Guilt procedure (AG) and Plea of Guilty by Letter (PGL) arrangement, fines enable the courts to impose fair penalties on both the rich and poor alike by imposing amounts which offenders can afford to pay. However, achieving fairness in a poor country like Zambia is hampered by sharp differences in

incomes between the rich and poor and by the fact that many people do not receive regular incomes so that even small amounts of fines have a disproportionate negative impact on them. Also, in the urban areas, particularly unauthorised townships, certain practical difficulties hamper the enforcement of fines.

The courts make little use of compensation orders: the maximum amount which can be awarded is very small (K50.00 (£0.05)), consequently the courts are reluctant to impose compensation orders on many offenders who are poor people. Making compensation orders against offenders has several problems, all stemming largely from the fact that many offenders come from low social-economic strata. However, it should be remembered that compensation is one of the defining characteristics of the traditional justice system. The legislature should be urged to provide for the greater use of compensation in criminal proceedings and the courts persuaded to make more compensation orders.

The idea of restitution has been extended to empower the courts to make statutory judgements in criminal proceedings thereby turning criminal proceedings into civil ones and enabling the Attorney General to enforce judgement in civil courts. This is a novel and exciting idea which, with a little ingenuity, can be expanded into new areas of criminal justice.

The following comprise non-custodial and semi-custodial penalties: deportation of alien offenders convicted of imprisonable offences, police supervision orders, discharges, binding over, extra-mural penal employment, weekend imprisonment and suspended sentences (probation is dealt with under juvenile justice). With the exception of the suspended sentence, about which data is not available, little use is made of these sentences. Yet, like financial penalties, and apart from their association

with humane punishments, are obvious tools of diversion from the criminal justice system.

V. Physical punishments.

Capital punishment and corporal punishment are the two physical punishments available to the courts in Zambia. In western countries debates have centred on their retention or abolition. Apart from purely humanitarian concerns about their suitability, in some jurisdictions outside Zambia, including neighbouring Zimbabwe and Namibia and lately (1995) from South Africa, they have been condemned on constitutional grounds as inhuman or degrading punishments (Chapter 7). With regard to the death penalty the latest constitutional argument is that undue delays constitute inhuman or degrading treatment, a matter which does not seem to have concerned either the Law Association of Zambia or any other sector of Zambian society. Although no serious attention has been given to the suitability of physical penalties in Zambia, there are signs that capital punishment may be abolished in the near future; since he came to power in 1991, President Chiluba has not signed any execution orders. But there are no signs that corporal punishment will be abolished in the near future. One of the areas of penal law and practice in which Parliamentary and judicial lethargy shows itself most clearly is in the field of physical punishments, but even more so in juvenile justice.

VI. Juvenile justice.

The real problem with juvenile justice in Zambia is that it lacks policy direction to a particularly marked degree. Consequently no aspect of penal justice is ridden with as

many problems as juvenile justice in Zambia. The following are the major defects: differences between customary law and the general law as to who is a juvenile; the courts do not appear to understand the nature of approved school orders and reformatory school orders; approved school-bound juveniles regularly over-stay at Chilenje Remand Home apparently without serious or persistent queries being raised by the courts, thereby creating a number of legal, administrative and policy problems; the collection and compilation of social welfare reports when courts are contemplating ordering probation and other orders is hampered by shortages of staff and transport; although Nakambala Approved School and Katombora Reformatory School are similar establishments they are run by different government departments in different ministries, resulting in needless differences in their administration such as education, for example, while the buildings appear to be well maintained at Nakambala, run by the Commissioner for Social Development, Katombora, run by the Prisons Department, is dilapidated.

The proposed Youth Corrective Centre falling under the Prisons Department did not materialise and the half-built building is used by female offenders found not guilty by reason of insanity. Failure to complete the centre, coming on top of judicial misunderstanding of approved school orders and reformatory school orders and the general administration of Nakambala and Katombora, best exemplifies the indifference and drift in penal law and practice in Zambia.

Measurements of the success and failure of probation, approved school orders and reformatory school orders show exaggerated rates of success.

The possible role of the family in the administration of juvenile justice has not been addressed. Admittedly, juvenile crime is not regarded as a big "problem" in

Zambia at present. But with increasing urbanisation and stagnant educational and job opportunities for young people, the potential for a rapid increase in juvenile crime in the future is considerable but is not acknowledged.

VII. Prisons, prisoners and the prison experience.

Using the custody and control criteria, Zambia has district prisons, regional prisons and one maximum security prison (Chapter 9). Then there are special prisons: open prisons, female prisons and prison farms. Prison farms represent the only post-independence innovation in prison policy, although the extent of innovation may be exaggerated as the idea of using prison labour to grow food for the country was initiated during the colonial administration.

The total prison population has increased steadily since independence. Yet the problem of large prison populations, which has been one of the most topical and difficult penal questions in developed countries, involving as it does congestion, sometimes constitutional issues and almost certainly budgetary questions, does not appear to have seriously concerned governments or the public in Zambia.

The convict population can be divided into short-sentence prisoners, long-sentence prisoners, juveniles, female prisoners and the criminally insane; the non-convict population can be divided into criminal remands the mentally disoriented, illegal immigrants, and political detainees. The non-convict prison population, consisting mainly of criminal remands, is bigger than the convict population. In view of the constitutional presumption that a person is innocent unless he admits the offence or pleads guilty, it is ironic that the largest category of unconvicted prisoners consists of criminal remands, but no one appears to have been seriously concerned about this. In

Chapter 9 suggestions have been made to reduce the total level of prison populations as well as the numbers of each category of inmates.

Imprisonment in Zambia is a degrading experience: the physical environment, sleeping arrangements food etc. are very poor and adjudication procedures weighted against inmates. Access to the courts is in theory unrestricted but in practice unavailable to many, partly because the poverty of prisoners as a class of people makes it difficult to hire counsel and partly because when access is gained the courts are unhelpful. Prison conditions have received no serious attention from the government or private associations like the Law Association of Zambia. Worse, the aims of imprisonment remain unrevised: reform continues to be the pre-eminent aim of imprisonment at the expense of other objectives although the instruments of reform - education, training and employment - are deficient. In western countries, for example, there have been moves to make positive containment the pre-eminent objective, which permits the greater enjoyment of human rights by inmates (Chapter 10).

Section B.

Characteristics of the Zambian penal justice system.

Three things stand out most clearly about the Zambian penal justice system: its remoteness from the people, the general public indifference to its problems and a continuing drift in penal policy-making by governments.

I. The remoteness of the penal justice system.

The criminal justice system of Zambia is remote from the people at three stages of the criminal process: the police, the courts and the treatment of offenders.

For the maintenance of law and order Western society relies on the immediate availability of law enforcement agencies: the police, the courts and penal administrators even in remote areas. If, say, there is a burglary or an assault in a Yorkshire village, the police may be telephoned, the offence investigated, the suspect arrested, convicted and sent to prison. Despite the general unavailability of such facilities, how has village society in Zambia continued to function without chaos? Of course this question is equally relevant to other rural areas of Africa.

European penetration and influence in what was to become Zambia was first formalised 96 years ago in 1899, with the establishment of Barotziland-North-Western Rhodesia, followed by North-Eastern Rhodesia in 1900 and their combination in Northern Rhodesia in 1911 (Chapter 1). Since then substantive, procedural and evidential laws have been enacted and law enforcement agencies put in place, including courts. It would be surprising if all the traditional beliefs, attitudes and notions of justice were to be completely enveloped by foreign European influence within this relatively short period of time.

When villagers commit offences against the person, like assault occasioning bodily harm, or against property, like theft of crops or arson, the offender may be reported to the village headman but is not likely to be reported to the police except in cases of homicide. The strong likelihood is that the matter will be settled between the parties themselves by the payment of compensation.[2] Even if a police officer, based at the Boma several kilometres away, is available, the aggrieved party is unlikely to be keen to report the case to the police who are generally regarded as hostile and "government people."[3] Writing on East African society, Kakooza notes:-

> "The attitude of hostility, which prevents co-operation between police and public, is mainly due to the manner in which the police carry out their duties.

> They give the impression to the public that they are there to find faults with them rather than protect them. The behaviour of traffic police, outside town areas, hiding on the side roads waiting for offending drivers, is an example here."[4]

Another telling example of deep public distrust of the police in Zambia is their reluctance to report the finding of dead bodies, the fear being that the reporter will be the first suspect to be interrogated at the police station.[5]

Reference has already been made to the contrast between the informal relaxed atmosphere, procedures and evidence at adjudication proceedings in customary law and the sombre atmosphere, rule-ridden procedures and formal evidence in the courts where witnesses and accused persons are cross-examined and re-examined and often feel that they are prevented from giving their side of the full story to the court (Chapter 3). Judges' robes and wigs are also unsettling. The remoteness of the justice system is perhaps epitomised by the need to use court interpreters in the majority of cases. Lynch mobs in the urban areas of Zambia and elsewhere in Sub-Saharan Africa is further indication of the remoteness of the penal system from the general Zambian public (Chapter 1).

To the ordinary Zambian certain sentences or the way they are implemented seem strange and foreign. While they are resigned to imprisonment and the death sentence for homicide, the impersonal government-appointed agencies which implement some semi-custodial sentences, such as extra-mural penal employment, probation and police supervision, are accepted with misgivings. Where there is an identifiable victim, it may seem strange that instead of making compensation orders the court imposes fines.

II. General public indifference to the suitability and operation of the penal justice system.

There is a general lack of concern with the suitability or operation of the penal justice system in Zambia; neither the government, the media, academia, the general public or any other section of Zambian society, nor even those specially concerned - the police, the judiciary, prison officers or any other law enforcement agents - have shown any serious or continuous interest in basic questions. It is significant that the format of annual reports, when available, of the police, the judiciary, prisons department and those covering juvenile offenders has remained largely unchanged since independence, over thirty years ago.

In contrast with such indifference, other aspects of national endeavours have attracted much attention, especially in the constitutional and political field (Chapter 1). The economy has changed too; at independence key sectors were in foreign hands, later they were nationalised and now they are in the process of being privatised. Even though higher education came late to Zambia, there has been a marked expansion of primary school places since independence, although demand continues to be unsatisfied.

No one, including the police themselves, appears to have seriously considered the role of the police as obvious penal policy-makers. For example, the well-known crucial role of the police as gate-keepers to the whole criminal justice process does not appear to have been raised or debated. Public and press concern about the police tends to be restricted to their role as public officers doing their allotted tasks of investigation and prosecution, usually in ways judged to be unsatisfactory. Government concern

appears to be restricted to the conditions of service of the police along with those of other civil servants.

Interest and concern in the working of the judicial system is equally minimal: the only notable innovation has been the decentralisation of the High Court in 1987 to establish High Court centres at additional provincial administrative headquarters. The judiciary does not appear to regard itself as a major penal policy-maker; there is a marked reluctance to raise issues or make innovative judgements, say, on the death sentence or corporal punishment, as the superior courts of Zimbabwe or Namibia or lately South Africa have done. One of the few occasions when some innovation was shown was over corporal punishment in the case of Adam Berejena v The People,[6] when the Supreme Court remarked that it is an inhuman and degrading sentence unsuitable to Zambian society (Chapter 7). One of the most regrettable features about the Zambian judiciary is the cursory interest shown in the proper training of judicial officers, [7] in contrast to the advances made in Nigeria, where in-service training is established within a legislative framework (Chapter 4). Interest in the suitability of Local Courts to deal with criminal trials or in the future structure and role of these courts is not discernible.

Sentences passed hardly ever attract serious interest or concern by the government itself, the press, the general public or in academic circles: whether financial penalties (fines, compensation, restitution, forfeiture and costs), non-custodial and semi-custodial penalties (deportation, discharges, binding over, police supervision, extra-mural penal employment, weekend imprisonment and suspended sentences), or probation, approved school orders and reformatory school orders. Many have fallen into disuse. Indeed it is doubtful if many Zambian graduates or Members of Parliament

have even heard of sentences like police supervision or penal labour. Yet binding over in West Africa and extra-mural penal employment in Malawi are still used.

Interest in the prisons is also limited. Apparently no one, including the Zambia prison service itself, has tried to review the objects of imprisonment including the long-standing pre-eminence of the reform ideal, or noticed that in some western countries positive custody is gaining pre-eminence. The continuing growth of the prison population, especially the fact that there have always been more criminal remands than convict prisoners, with all the administrative, human rights and budgetary implications and congestion, has escaped the attention of everyone. When concern about prison conditions is shown by the public or press it tends to be casual, feeble and intermittent. Judges and magistrates, who regularly make prison inspections, sometimes note unsatisfactory diet, ablution or sleeping facilities but their concerns hardly enter the general public arena.

III. The drift in penal policy-making.

There may be a general indifference to the working of the penal justice system but it is the task of the government to address the indifference and stop the drift. It appears that apart from raising maximum penalties, notably by providing minimum sentences for some offences (Chapter 3), and establishing prison farms, penal policy in Zambia has been drifting since independence. The very fact that no interest or concern is shown in the penal justice system in any of the areas indicated above is telling proof of the drift. More specific examples are the introduction of post-independence sentences of extra-mural penal employment and week-end imprisonment which have fallen into disuse, and in particular the abandonment in embryo of the Youth

Corrective Centre at Kamfinsa, Kitwe (Chapter 8). The following three examples provide further evidence of drift.

First, every properly run organisation takes stock of its performance either regularly or as occasion arises. Since independence there has been no official inquiry into the organisation or running of the penal system or any segment of it and, apparently, nothing significant has happened to prompt the establishment of one, not even the failure of the proposed Youth Corrective Centre at Kitwe (Chapter 8). In contrast, President Kaunda set up a Commission of Inquiry to consider the constitution of the one-party state in the 1970s and the current President, Mr Chiluba, has established one to identify weaknesses and problems in the existing 1991 post-Kaunda Constitution. [8] In view of the many and varied unaddressed problems in the administration of juvenile justice a commission of inquiry is proposed (Chapter 8). In 1990 in Uganda The Child Law Review Committee made a comprehensive inquiry into the place of the Child in Ugandan society, including the area of criminal justice and made appropriate recommendations (Chapter 8). Inquiries should also be undertaken into the organisation and running of the police, the courts, prisons and the probation service.

Secondly, a properly run organisation makes evaluative studies of its own performance. It will be recalled that annual reports dealing with juvenile justice have tables showing the effectiveness of probation orders, approved school orders and reformatory school orders; they are presented as if they are implemented effectively but, as was noted, the successes were exaggerated (Chapter 8). No similar attempts are made in the annual reports of the police, the courts or prisons. Evaluative studies are needed into, first of all, the collection, compilation and presentation of criminal

statistics (more in section C)[9] and a variety of other aspects of penal justice such as police clear-up rates, the work-load of personnel in all the sectors of the criminal process, the training of judicial personnel, the suitability of Local Courts to deal with criminal trials, acquittal rates and the division of responsibility between the police, the Director of Public Prosecutions and the courts. Delays in the criminal process and their causes[10] should be examined as well. Over all these particular issues, and underlying the whole penal system, is the over-riding question: to what extent does the current penal system satisfy the needs of the people of Zambia, including their sense of justice? What practical reforms in the institutions, procedures or treatment of offenders should contribute to a more satisfactory and effective system?

Probably the most telling evidence of drift in penal policy-making in any jurisdiction is a failure to assess the cost of crime and of attempts to deal with it. Trying to quantify cost is an exercise of surprising complexity involving, inter alia, the definition of "crime", "cost" (both financial and emotional) and "victim" (including the cost of crime to the offender himself as well as to the society at large).[11] Then there is the budgetary cost of crime and deciding what government department or ministry to include and exclude in the calculations; a similar exercise may have to be carried out even within the same department. Table 67 shows the budgetary cost of crime, in millions of Kwacha, of running the police, the courts and prisons, together with a share, expressed in percentages, of the total national budget. The Table covers a period of 20 years from 1970 to 1990 (Table 67 does not start earlier because of significant changes in the details and presentation of budgets after 1970). It is common for Parliament to vote supplementary and excess budgets. These are included, as are capital expenditures.

Table 67.

The Budgetary Cost of Police, Courts and Prisons in Zambia,

1970-1990.

Year.	(a) National Budget in K.m.	(b) Police Budget in K.m.	(c) (b) as a % of (a)	(d) Courts Budget in K.m.	(e) (d) as a % of (a)	(f) Prisons Budget in K.m.	(g) (f) as a % of (a)
1970	262	13	4.96	1	0.38	2	0.76
1971	330	13	3.93	2	0.60	2	0.60
1972	240	15	6.25	2	0.83	2	0.83
1973	690	17	2.46	2	0.28	3	0.45
1974	530	24	4.52	3	0.56	3	0.56
1975	708	29	4.09	3	0.42	3	0.42
1976	742	29	3.90	3	0.40	4	0.53
1977	610	35	5.73	4	0.65	5	0.81
1978	581	30	5.16	4	0.68	5	0.86
1979	670	28	4.17	5	0.74	4	0.59
1980	1,292	34	2.63	5	0.38	6	0.46
1981	1,005	37	3.68	6	0.59	7	0.69

1982	1,345	57	4.23	7	0.52	9	0.66
1983	1,179	59	5.00	6	0.50	12	1.01
1984	1,207	53	4.39	9	0.74	10	0.82
1985	1,568	75	4.78	10	0.63	15	0.95
1986	3,551	89	2.50	20	0.56	22	0.61
1987	3,951	101	2.55	21	0.53	19	0.48
1988	6,081	180	2.96	27	0.44	35	0.57
1990	35,837	1,063	2.96	129	0.35	321	0.89

Source: Relevant annual Appropriation Acts.

The total amounts spent are less informative than the percentages spent on the police, courts and prisons, because of sharp increases in the inflation rates in Zambia from 1980. It will be seen that a greater proportion of the national budget has consistently been spent on the police (the least 2.46% in 1973, peaking to 5.73% in 1977) than on either the courts or prisons, whose respective shares have almost always been well below 1%. Over the years the police share rose, peaked and then declined; the pattern for the courts and prisons was uneven. The government should ask itself whether this budgetary balance between the police, courts and prisons is the desired one. Such a question cannot be satisfactorily answered unless there is a government inquiry into the organisation and running of the penal system and more detailed costs

(other than budgetary costs) of the system and all its component parts made, a difficult but necessary exercise.

Section C.

Proposals for reform.

I. Policies of reform.

On the basis of the material collected and discussed in this study, proposals for reform of the penal system of Zambia can be offered in eight related areas. First, the whole system should be seen as one unified system which, like any other organisation, should be properly run. Every attempt should be made to reduce the clientele of the system and thus improve efficiency and effectiveness: this can be done by placing more emphasis on diversionary and crime control policies (more in section paragraph II B below). Principally, this means establishing a new system of police cautions on a firmer basis and making more use of financial and non-custodial and semi-custodial penalties.

Secondly, both Parliament and the appellate courts should consider and pronounce more explicit wide sentencing guidelines and a Sentencing Council should be established to assist in this task.Thirdly, customary law should be seen as a resource with which to enrich the received law and thus make it less remote from the people, invoking the continuing strength of the Zambian family and values of the humane traditional justice systems, characterised by a non-confrontational approach to dispute settlement and the payment of compensation as an effective sanction. Apart from the payment of compensation, a customary law-oriented penal system would place more emphasis on compensatory sentences such as restitution, extra-mural and penal

employment, and significantly change the organisation and management of prisons by preferring open prisons and prison farms to closed prisons, with a general improvement in prison conditions.

Fourthly, more emphasis than at present should be given to the denunciatory aspect of sentencing. It should be re-conceptualised to include not only punitive sentences like imprisonment as at present but also compensatory penalties, particularly compensation, for what can be more condemnatory than the payment of compensation with the implicit acceptance of contrition, especially if it is paid in person?

Fifthly, judicial officers should be better trained. Criminology should be a core subject in the School of Law of the University of Zambia, so that graduates from whom private practitioners, judges of the High Court and Supreme Court are drawn, can acquire a better theoretical understanding of sentencing and penal policy and practice. Teaching at the Law Practice Institute (L.P.I.) for prospective legal practitioners, and at the National Institute of Public Administration (NIPA) for lay magistrates should stress a better practical understanding of the problems of sentencing by adopting the case law method of teaching. An in-service judicial training institute on the Nigerian model is needed so that magistrates and judges can undergo induction courses and continuing legal education. Local Courts should be merged with magistrates' courts as in Tanzania.

Sixth, the large prison population, convict and non-convict, particularly criminal remands, should be restricted, including the numbers of juvenile offenders at Nakambala Approved School and Katombora Reformatory School. The government should be more aware of the budgetary implications of large prison populations and resist building more closed prisons. Any new prisons should be prison farms. The

reform ideal as the pre-eminent objective of imprisonment should be replaced by positive containment, so that prison conditions can be improved and the pain of imprisonment alleviated.

Seventh, juvenile justice needs particular attention. Western countries, like Great Britain, have made great strides in this field. Now a fellow African country, Uganda, is beginning to take an active interest in the general welfare of juveniles, including juvenile offenders.

Lastly, corporal punishment and the death sentence should be abolished for being unsuitable in the modern age, not in accord with the traditional notions of justice and unconstitutional as well.

II. Implementation of reforms.

A. Arousing immediate concern about the penal system and its future.

To command immediate and sufficient attention about the penal system of Zambia, the way it works, its advantages, problems, shortcomings and its future, it is necessary to marshal information about Zambia, its history and people, the coming of colonialism and the introduction of the English system of justice. When this is done, key issues should be framed. Discussions should then be held with appropriate persons and organisations in the country and the government persuaded to study the conclusions reached and recommendations made. At all such meetings and discussions it should be stressed that the Zambian penal system is remote from the people, the public is indifferent to it and the government has neglected it. The following are the matters which should be put before the proposed conference and the government.

1. The nature of African society.

Before the penetration of European civilisation and colonialism, the level of technological development of the people was very low: the people lived off the land growing crops and rearing animals; the people lived in small communities in the villages; kinship was close, wide and strong; society was conservative and egalitarian and pre-occupied with order through close and wide kinship systems and a belief in the supernatural. All this led to particular notions of justice: non-confrontational and lacking visible law enforcement agencies, police, court houses or prisons, even in chiefly societies. Adjudication was done in local communities and because of the close and wide kinship systems dispute settlement procedures were, by modern judicial standards, informal and non-confrontational. Adjudication was conducted by the same or similar dispute-settlement forums employing the same procedures (except in witchcraft cases) with no distinction being made between civil courts and criminal courts. The concept of relevance of evidence was wider, adjudicators tending to seek the root cause of the dispute and hearing evidence of the sort which under the received law may easily be rejected as hearsay. Unlike in the modern criminal justice system, and because disputants lived in local communities and were either related or known to each other, punishments were characterised by reconciliation, restitution and compensation even in cases of homicide, the exception being witchcraft, which was considered the most socially disruptive offence and was consequently normally visited by the death sentence. The much written about corporal punishments and mutilations in early ethnological and colonial literature may have been exaggerated.

2. The coming of colonialism and the introduction of English Law.

With colonialism came the English justice system and its underlying moral undertones and practices. The colonial justice system was therefore an imposition upon a long-standing indigenous one. Formalisation of British influence in what was to become Northern Rhodesia occurred in 1889 with the enactment of the Africa Order in Council[12] This means that at independence in 1964 formal colonial influence had lasted 75 years, too short a time for westernisation to substantially change, alter or extinguish African culture or key traditional notions of justice and legal practices.

3. Developments after independence.

There have been many developments on various national fronts since independence. There has been a big, albeit inadequate, expansion in primary school education and although higher education has lagged far behind, Zambia has two universities (University of Zambia and Copperbelt University). At independence major commercial and industrial enterprises were in private and foreign hands; they were later nationalised but are now in the process of being privatised. A new railway (the "Tazama Railway" linking Zambia and Tanzania) was built and another one ("Mchinji Railway") linking Zambia with Malawi is being constructed. Although the national airline "Zambia Airways" collapsed in 1995 moves are already afoot to replace it with a private one.

On the political and constitutional front multi-party politics were replaced with the one-party state in 1973 (Chapter 1) and in 1991 multi-party politics returned. Just before this change there was a constitutional commission (called the Mvunga Commission), [13] and now another one (called the Mwanakatwe Commission) [14] has

gathered views and is about to present its findings and make recommendations. Major changes have taken place in land law; in 1975 freehold was abolished and replaced with 100 year leases[15] and in the 1980s land shortages in the Southern Province led to the appointment of a special commission (The Sakala Commission). Indeed developments in constitutional and land matters have been mirrored in academic interest with many doctoral degrees in the field of constitutional and land laws. Public and press interest has been dominated by political, constitutional and land questions.

Yet hardly any interest has been shown in criminological questions by any section of Zambian society: e.g. the suitability of the penal system, how it works or how much it costs to run. Neither court procedure, evidence, sentencing policy or practice has attracted discernible public or press interest. Academic interest has been equally lacking. Articles in the The Zambia Law Journal are dominated by constitutional law, international law and land law questions. Some interest in criminal law, usually the substantive law rather than evidence or criminal procedure, is shown in brief "Comments" and, criminological articles, written by only two teachers so far, Mr Hatchard and Dr Mwansa, number no more than 5. It is equally significant that of the three books on criminal justice, the first two are casebooks, one on criminal law and the other evidence. [16]

England, from which the penal system of Zambia was derived, has made major changes to many aspects of its penal system, especially the treatment of offenders; a summary of the current position is found in The Sentence of the Court. [17] Even fellow African countries have made significant changes to their penal systems by legislative action, as in the continuing education of the judiciary in Nigeria, the abolition of the death sentence in Namibia, or through innovative judicial decisions as in Zimbabwe,

Namibia and South Africa where corporal punishment of adults and/or juveniles has been declared unconstitutional. Moreover, unlike in Zambia, some desirable sentences, like binding over in Ghana and Nigeria, and extra-mural penal employment in Malawi, have not been forgotten by the judges of those countries. Other non-custodial penalties, like probation, police supervision and week-end imprisonment have fallen into disuse.

The penal system is remote from most Zambians and attracts little attention from them even from those employed in the system (the police, courts, probation service and prison service) or government; it is a system which does not command the confidence of the people and cannot be defended by even law enforcement agencies themselves, other than by professing a belief that the penal system maintains law and order and punishes criminals. Evidence of remoteness and public indifference is to be found in the fact that in the villages property offences like burglaries and thefts and violent offences like assaults continue to be settled largely without the intervention of the police; Local Courts business continues to be dominated by civil cases rather than criminal cases (Chapter 4); lynch mobs continue to be a feature of normal urban life (Chapter 2) and accused persons and witnesses alike are bewildered by court trials, conducted usually through an interpreter, with strict rules of evidence and rules about examination-in-chief, cross-examination and re-examination.

4. A distinctly African input into criminal justice.

After less than 100 years of colonialism, however undesirable it might be, the received penal system has taken firm root to the extent that it is inconceivable that the whole system could now be discarded and replaced with a more traditional system of

justice. The Zambian penal system should and could, however, be reconstructed to make it recognisably African in at least two specific areas: justice in the Local Courts and making the payment of compensation a central theme of criminal justice not only in Local Courts but also in the received courts as well. But first the deficiencies of the present system of criminal justice should be pointed out, resting as it does on deterrence, whose efficacy has been doubted (Chapter 3), and tending to provoke minimal co-operation with law enforcement officers and usually a confrontational attitude from offenders.

For practical purposes what really distinguishes criminal law from civil law is the labelling of the former: the drama of the arrest, the parading of the accused before the court by a public officer (prosecutor) before, in the higher courts, a bewigged judge in colourful and intimidating attire; being examined-in-chief, cross-examined, sometimes accompanied by ridicule, and re-examined, and finally sentenced to a punitive custodial sentence or the death penalty. Such a process and spectacle attract both publicity and opprobrium. Consequently the suspect or accused is tempted to run away and deny the accusation which otherwise he would not do if the "crime" was dealt with in a less dramatic and confrontational way. Take homicide, for example. In the criminal court the case is normally accompanied by drama and publicity, but in a civil case for damages less publicity would be expected. By its very nature the criminal law and its processes create and provoke a confrontational justice system.

Local courts should and can be used to experiment with softer traditional adjudication procedures; the greater emphasis on compensation called for could be used to soften the harsh climate of retribution associated with the received criminal

law. The total effect would be to make criminal justice more relevant to the people and less remote from them.

a. Local Courts.

Local courts have already been discussed (Chapter 4). It was pointed out that Local Court justices receive no training in criminal law, procedure, evidence or sentencing and that therefore they are unqualified to deal with criminal cases. It was suggested that they be merged with magistrates courts as a long term policy. However, Local Courts should be preserved, at least for the time being, and used as forums for experimenting with traditional adjudication ideas as has just been suggested.

Already Local Courts have a wide criminal jurisdiction to try serious cases, many in the Penal Code, including property offences such as theft (carrying a maximum of 5 years), theft from the person (up to 7 years), theft by public servant (15 years), theft by servant (7 years), and offences against the person such as assault (1 year) and assault occasioning actual bodily harm (5 years). [18] It will be noticed that common to all these offences is that they have an identifiable victim. Under the proposed scheme, and remembering that "crime" has no ontological existence of its own (Chapter 2), the single major change proposed is to turn the criminal adjudication procedures and practices in Local Courts, in which the Police prosecute, into civil ones. Such a step is not unknown in Zambia: when dealing with restitution (Chapter 5), "statutory judgements" were discussed, by which when public officers are convicted of scheduled offences, courts must enter statutory judgements against them, permitting the Attorney-General to enforce them by civil process.

Under the proposed changes the role of the police should be reduced so that after an arrest, if there is one (not all criminal proceedings start with an arrest, some start with summonses), the nature of proceedings changes allowing the complainant to initiate civil process by applying for summonses, [19] in many Zambian languages referred to as "kusita saimoni" (buying summons), before the Clerk of Court, [20] for a small fee of K0.20 (£0.02) [21] It is important that the summonses are applied for and issued as soon as possible after police arrest, and the accused, if in custody, released unless special circumstances exist. With the nature of proceedings dramatically changed, the accused would now be turned into a defendant thereby "cooling" the general atmosphere about the case. Temptations to run away could be lessened, and if the defendant has a job he would keep it as normally happens when a person is a defendant in civil proceedings.

The hearing would follow the usual traditional adjudication procedures (Chapter 2): the complainant and his witnesses, if any, would give their evidence and the court would question them to clarify any points which arise, rather than cross-examine them. Unlike under English law and practice the defendant and his witnesses, if any, would then give evidence during which the defendant could rebut any allegations made by the plaintiff. If there are any matters which need clarification the court would ask them appropriate questions. Because the nature of proceedings will have changed, findings of "no case to answer" and acquittals which, apart from cross-examination and re-examination, are aspects of criminal court procedure which baffle many Zambian witnesses, would not arise.

In Local Courts, as was the case in traditional adjudication procedures, delays in civil cases are minimal, with few adjournments and the hearing of evidence and

delivery of judgements normally done all in one day. Under the new arrangements, therefore, any increase in the number of new cases would be compensated for by the expeditious disposal of cases. The standard of proof would be on a balance of probabilities, even though the test applied by the police is whether the evidence would suffice to satisfy the standard of proof in a criminal case.

For many people anywhere certainty of the vindication of rights by apportionment of blame on a balance of probabilities and payment of small sums of money as compensation would be more significant than high risk proceedings requiring high levels of proof in which the amounts of compensation may be large but likelihood of vindication of rights small. It is vital, therefore, that before compensation orders are made the defendants' capacity to pay is taken into account, thereby making default less likely. Aggrieved parties would continue to have the right of appeal to magistrates courts as at present. If this new scheme is judged successful, more serious offences can be added to the criminal jurisdiction of Local Courts.

To ensure success the details of the proposed arrangement should be worked out and the scheme initiated and monitored by a special body headed by the Chief Justice and comprising the Local Courts Adviser, Director of Public Prosecutions, Inspector-General of Police, Commissioner of Prisons, a representative of the Law Association of Zambia and Chiefs.

Civil justice dispensed in Local Courts, and by necessary implication under the proposed scheme, may be much more in tune with ordinary Zambian ideas than justice now administered in the received courts. Although it could be argued that the parties who normally appear before Local Courts are poor, uneducated and unaware of their rights, it is remarkable that appeals, both criminal and civil, to magistrates are rare;

second appeals to the High Court are unheard of. The apparent success of Local Courts may be partly due to the kind of justices who preside in them. They are probably seen as representing tribal authority and therefore command greater respect. It is significant that, unlike those who sit in urban Local Courts, rural justices must first be nominated by local chiefs after consultation with relevant village headmen (Chapter 4). It is suggested that a similar practice should apply to applicants wishing to sit on urban Local Courts as far as practicable.

b. Compensation orders in courts.

The Zambian penal system should be further "indigonised" by penal laws, policies and practices which emphasise compensation in criminal proceedings in the magistrates courts and the High Court, where there is an identifiable victim, usually in offences against the person and property, such as serious assaults, minor robberies and burglaries. These are the sort of offences which normally arouse most public concern.

The first and abiding wish of anyone who suffers loss or injury through a wrongful act, be it criminal or civil, is to right the wrong by restitution, repairing the damage or compensation. Normally there is the added wish to see the culprit punished in the criminal courts but the first wish is normally the stronger.

Under the proposed arrangement, the Constitution should be amended to require Parliament and the courts to provide for and order compensation in criminal cases more frequently as a full and final penalty in cases where there is an identifiable victim, details of which should be worked out by a special panel composed of senior law enforcement officers and chaired by the Chief Justice. Parliamentarians should not be included on this panel because of their tendency to bow to electoral pressures in

criminal matters. (As to the more effective enforcement of compensation orders, this could be done under proposals in sub-paragraph 3 of sub-paragraph d of paragraph B below).

c. Changing public attitudes.

The key to the indigenisation of the Zambian penal system lies in changing the public perception of the role of the criminal law and process in society which, we must be reminded, is merely a human construct and not an immovable rock. For example, capital punishment was rarely imposed in traditional society but with the introduction of English law, it was extended. Abolishing it would be a logical step. Furthermore, for consistency homicide would be punished in many cases not with capital punishment or imprisonment but by compensation. It is possible to change the public perception of homicide and the death sentence. Regarding imprisonment, the tax-paying public should be reminded that part of their tax goes to maintain the offender who caused loss or injury, while they (the tax-payers) get little or no recompense from the offenders (even if they pay compensation). Likewise Parliament can be persuaded to legislate, turning criminal cases into civil ones in the Local Courts and providing for compensation orders in more criminal cases. What is required is imagination and the political will to change public perceptions about the treatment of offenders.

5. Other aspects of the penal system in need of attention.

Apart from indigenisation of the penal system, other aspects of criminal justice need attention. The purpose of the whole penal justice system needs to be reviewed by seeing it as one process, requiring proper management. This can be done principally by

reducing the clientele through diversion and crime control policies and practices (above and later). It is desirable to sharpen the aims of sentencing by stressing and expanding the notion of denunciation to include compensation and reducing sentencing disparities by better and clearer legislative sentencing guidelines and appellate court decisions and the establishment of a sentencing council. The judiciary needs to be better trained, starting with making criminology in the School of Law of the University of Zambia a compulsory subject, and re-arranging courses at the Law Practice Institute (LPI) to give more time to the sentencing course. Continuing legal education on the Nigerian model is imperative.

It is also imperative that the performance of the whole penal system and its components (police, the Director of Public Prosecutions, the courts, probation service and prison service) should be under constant review: training, establishment, workloads etc. Delay in the criminal process is one obvious area for investigation. In 1980 a review of delays in Commonwealth countries was published, Delays in the Administration of Criminal Justice.[22]

Zambia should calculate the cost of crime to the victim: fear of crime, pain and inconvenience, financial losses: earnings, insurance etc.; to the offender himself, through loss of earnings and support for his family etc., and to the state through annual budgets for law enforcement agencies: the police, courts etc.

Sentencing trends have leaned towards imprisonment: more and longer prison terms, while non-custodial and semi-custodial penalties, like extra-mural penal employment and week-end imprisonment, have been in decline; it must doubted whether these are desirable trends. Juvenile justice should be reviewed, perhaps on the lines of Child Law Review Committee of Uganda, and more should and could be done

to divert juvenile crime away from courts through formal police cautions, financial penalties and non-custodial and semi-custodial penalties. The capacity of youth custodial institutions (Nakambala Approved School and Katombora Reformatory School) should remain limited and not be expanded.

There has been a marked re-orientation of the role of imprisonment in western countries, stressing positive custody over training; Zambia should follow this example. However, although total prison capacity accommodation should not be increased, if any increase is necessary it should take the form of prison farms, which are relatively open and humane and contribute to the food output for the nation. The prison population has continued to grow but it is disturbing to discover that there are more remand prisoners than convict prisoners. It is not just that so many unconvicted prisoners should be kept in prison it is also a waste of public resources.

There are signs that capital punishment might be abolished in Zambia but little sign that corporal punishment will be abolished at all by legislative action as in Namibia.

Finally it should be noted that while penal law, policy and practices remain stagnant in Zambia, interesting international developments have been taking place in many fields of penal law in Europe as well as parts of Africa.

6. A conference to raise concern about penal law and practice.

With the reintroduction of democratic politics advantage should be taken to raise immediate and lasting interest and concern about penal law and practice in Zambia. It is highly desirable to hold an informal conference involving a wide range of persons, public officers and representatives of non-governmental organisations. The conference

should be informal to maximise personal involvement in the proceedings. Conference invitees should include the Chief Justice or his representative, Attorney-General, Director of Public Prosecutions, Local Courts Adviser, Inspector-General of Police, Commissioner of Prisons and Commissioner for Social Development. Non-governmental representatives should come from and include the Law Association of Zambia, the Magistrates Association of Zambia, chiefs, the press, the churches, the Prisoners Aid Society and the Red Cross.

Another meeting should then be arranged with Ministers of Legal Affairs and Home Affairs. They should be reminded of the central concerns about the penal system in the country and ask them to ensure that they are put on the cabinet agenda as soon as possible. It should be stressed to them that as the government of the day it is their task to generate and promote public interest in the suitability, organisation, running, problems, difficulties, shortcomings, costs etc. of the penal system.

However, as politicians everywhere tend to respond quickly only when there is great public pressure, raising public awareness should not be left entirely to them. What is required are nation-wide public campaigns spearheaded by a non-governmental body like the Law association of Zambia or the School of Law of the University of Zambia. Advantage should be taken of the new democratic politics by persuading the many political parties (not less than 10) to discuss relevant aspects of the penal system. A programme of public meetings should be drawn up at which key aspects of the penal system are raised and debated. Special weeks should be set aside on the one government television station and radio stations. Every opportunity should be taken to address scheduled meetings of voluntary organisations such as Rotary Clubs, Jaycees, the Red Cross, or professional bodies such as the Magistrates

Association. The message which is likely to appeal the most to the general public is the desirability of payment of compensation in more criminal cases. The public should then be reminded that under present law and practice, in many cases, although the offender may be punished severely by say imprisonment, any loss suffered or damage done is normally not recompensed.

7. Evaluative studies of the penal system.

It is vital for any progress in reforming the penal system that the need is first recognised for the publication of relevant and reliable statistics as the basis for further research to produce evaluative studies of key aspects of penal justice, such as the organisation, training, numbers, work-loads etc. of the police force, the courts and prisons. Not to do any of these is to step into the dark with probable waste of resources.

B. Long term reforms.

1. Improved management of the penal justice system.

Moxon states the importance of managing criminal justice:-

> "The way that the criminal justice system is managed affects all of us both as potential and sometimes actual-victims of crime, and because the system makes substantial demands on the nation's resources." [23]

This is as true in England as it is in any democratic country like Zambia.

a. Treating the penal justice system as a whole.

Improving the management of the penal system starts with the realisation that it is necessary to treat it as a whole, like a large commercial conglomerate. A participant at a European criminological conference, Mr Steenhuis, observed:-

> "The [penal] system has been deliberately structured in such a way as to prevent any part of it from getting too much power in the area of crime control." [24]

but that:-

> "This fragmentation may...be desirable as far as the protection of the rights of the individual offender are concerned." [25]

Rutherford also refers to the fragmented nature of the criminal justice system but points to efforts to treat it as a whole:-

> "the chaos and inhumanity which often characterises criminal justice is the result of the fragmented way with which it is regarded by many policy- makers and practitioners. In recent years attempts have been made to draw attention to the inter dependent nature of criminal justice activities, and in particular to emphasise the significance that decisions taken within one agency have for other agencies." [26]

Pullinger says that researchers are better placed to see criminal justice as a whole:-

> "The CJS is a complex system of interacting systems. The actions of one part of the system will usually have effects on other parts. However, it is difficult for those people with day to day responsibilities within the CJS to view the system as a whole; they will naturally tend to place more emphasis on their particular sub-system or a part thereof. It is perhaps easier for researchers, freed from operational concerns, to consider the CJS from an overall perspective and to study the complete system.... [27]

All this has obvious implications for the allocation of resources and distribution of discretionary powers within the system. [28]

b. Defining the objectives of the penal system.

After recognising that the penal system should be treated as a whole but that the segments comprising it are interdependent the second step should be to define its objectives. Pullinger quotes an unnamed source as having said that:-

> "A plausible overall objective might be 'to contain and respond to crime in a just manner.'"[29]

This seems to place the control of crime (in the wide sense including crime prevention) before strict adherence to legalities. But Moxon quotes a 1984 Home Office paper as implying a reversal of priorities:-

> "The central objective [of criminal justice] is to sustain the rule of law:
> (a) by preventing crime wherever possible;
> (b) when crimes are committed, by detecting the culprit;
> (c) by convicting the guilty and acquitting the innocent;
> (d) by dealing adequately and appropriately with those who are guilty and by giving proper effect to the sentences or orders which are imposed."[30]

As sentencing principles and objectives should be included in the fundamental right to the protection of the law (above), and as criminal justice forms a prominent part of government, the objectives of criminal justice should also be inserted in the same part of the Constitution.

c. The penal system is overburdened.

In managing any criminal justice system, including that of Zambia, the central practical problem common to many justice systems, criminal or civil, must be

recognised, as was noted at a European criminological conference by Steenhuis from Netherlands:-

> "This system is now overburdened and cannot function efficiently. It is therefore necessary to find solutions securing an adequate functioning of this system while safeguarding individual rights." [31]

Table 68 shows the number of cases reported to the police in Zambia per 100,000 of the crude population in 19 years between 1964 and 1986, inclusive; this is a more reliable indicator of the size of the crime problem than convictions.

Table 68.

No.of Crimes Reported to the Police, 1964-1986.

Year	Total National Population	No.of Cases	Rate per 100,000 of Population.
1964	3,601,000	46,967	1,304.27
1965	3,712,000	58,712	1,581.68
1966	3,800,000	60,670	1,596.57
1967	4,016,000	64,220	1,599.10
1968	4,008,000	75,766	1,890.36
1969	4,001,000	86,306	2,157.11
1970	4,366,000	86,810	1,988.31
1971	4,396,000	88,406	2,011.05
1972	4,515,000	83,321	1,845.42
1973	4,618,000	89,062	1,928.58
1974	4,751,000	101,641	2,139.36
1975	4,900,000	97,069	1,981.00
1976	5,059,000	100,882	1,994.10
1977	5,181,000	103,687	2,001.29

1978	5,303,000	107,785	2,032.52
1979	5,600,000	128,330	2,291.60
1980	5,679,000	122,921	2,164.48
1981	5,900,000	131,349	2,226.25
1986	6,100,000	132,447	2,171.26

Source: Zambia Police Annual Reports, National Census of Statistics, National Development Plans, Yearly Economic Reports and Monthly Digest of Statistics.

Table 68 shows that there has been an overall increase in the rates of crime over these years; following a steady rise between 1964 and 1968 the annual figure has remained either just about or just below 2,000 per 100,000 population. More should be done to lighten this crime load and the central approach is to intervene at appropriate stages of the criminal process, as Steenhuis pointed out:-

> "A criminal justice system which is making proper use of its resources should preferably decide in advance whether it wants to intervene, and if so, what kind of intervention is appropriate. Thus non-judicial intervention need no longer be perceived as a shortcoming of the system which possibly should be prevented, but as an intervention in its own right,..." [32]

Echoing the views of Steenhuis, the delegate from the United Kingdom, Rutherford, referred more specifically to the need to reduce the overall size of the criminal justice system and pointed out the:-

> "need to restrict the number of cases entering and proceeding through the criminal process. The perennial questions here include, (a) what are the determinants of the capacity of the apparatus of criminal justice? (b) how can the number of cases be kept to a manageable level? (c) how can the criminal process be used more selectively as between trivial and serious offences?".. [33]

d. Diversion and crime control.

Improved management of the penal system of Zambia can be achieved by implementing policies of diversion and crime control.

(i). Diversion.

Diversion is a well known and established concept. It is often compared to a train which drops off passengers at as many stations as possible, so that by the time it reaches its final destination only a few passengers remain while making the whole journey as comfortable as possible. Diversion starts with the avoidance of a court appearance, as in the decriminalisation of homosexuality between consenting adults in private in England or raising the age of criminal responsibility. One of the most effective diversionary tools from the courts is the formal police caution in England. The system has been explained as follows:-

> "The formal police caution has its roots in the discretion of the police whether or not to initiate criminal proceedings when an offence is disclosed and is generally regarded as an alternative course to prosecution. The caution usually consists of formal reprimand and warning against future breaches of the law delivered by a police officer in uniform, although in some cases a caution may be administered in more informal circumstances, perhaps in the recipient's home. There is no statutory definition of caution. Although most police forces have extended the use of cautioning, to a greater or lesser extent, to adults, especially the elderly, the great majority of cautions are administered to juveniles." [34]

There must be sufficient evidence, the juvenile (or any other offender) must admit the offence and the parent must agree to the caution before being administered. [35]

In Zambia the police routinely and informally caution minor traffic offenders and offenders involved in domestic disputes. [36] The formal police caution should be

introduced in Zambia and an administrative and policy mechanism for its implementation and monitoring put in place. What is required is the establishment of a panel of officers, comprising members of the proposed Sentencing Council (Chapter 3) to decide which type of offences and offenders should be covered by the caution which should be set in a statutory framework. Apart from juveniles, formal cautions should be administered in minor personal injury cases in which the parties are known to each other and compensation is payable (Chapter 5).

Admission of Guilt (AG) and Plea of Guilty by Letter (PGL) arrangements (Chapter 5) should also be seen as pre-trial diversion. In some American jurisdictions NACRO says that diversion can be initiated even after a court appearance but before the hearing of the evidence:-

> "'halting or suspending proceedings against a person who has violated a statute in favour of processing through a non-criminal disposition." [37]

The Director of Public Prosecutions follows a strict prosecution policy (Chapter 3); if he did not do so and exercised more discretion, some offenders would routinely be diverted from prosecution, and, using his powers of Nolle Prosequi, would ensure that those cases already taken to court by police prosecutors in lower courts were discontinued. Proposals to turn criminal cases into civil ones in Local Courts, if successful (above, this Section), would be a major new additional diversionary technique away from the criminal process while cases remain in court.

At the sentencing stage financial (Chapter 5) and non-custodial and semi-custodial (Chapter 6) penalties should be seen as diversion from imprisonment. To increase the scope for diversion the decline in the use of certain sentences (probation,

binding over, extra-mural penal employment and week-end imprisonment) should be reversed and these sentences regularly imposed (Chapter 5).

Because a criminal record can be the source of much embarrassment and diminish the chances of finding a job, some jurisdictions have legislation expunging them, as in England[38] and Canada. [39] This is a form of retrospective diversion, this time from the whole criminal process, after the formal end of the process. The idea of expunging criminal records should be adopted in Zambia.

(ii). Crime control.

Unlike diversion, "crime control" in its more technical meaning, is less well known. The starting point of "crime control" policies and their implementation is the same as diversion: a recognition of the crime problem and the wish to deal purposefully with it, but by different methods. Diversion tries to deal with crime by lightening the crime load beginning at the court appearance stage. "Crime control" seeks to suppress crime with strict enforcement policies. "Crime control" is closely associated with Packer and is normally distinguished from the "due process" approach to crime management. He explains what crime control policies are, and what prompts them:-

> "The failure of law enforcement to bring criminal conduct under tight control is viewed as leading to the breakdown of public order and thence to the disappearance of an important condition of human freedom. If the laws go unenforced- which is to say, if it is perceived that there is a high percentage of failure to apprehend and convict in the criminal process - a general disregard for legal controls tends to develop. The law-abiding citizen then becomes the victim of all sorts of unjustifiable invasion of his interests. His security of person and property is sharply diminished, and, therefore, so is his liberty to function as a member of society. The claim ultimately is that the criminal process is a positive guarantor of social freedom." [40]

Paraphrasing Packer's thesis, Barlow says:-

> "To support this ideology the crime control model pays the most attention to the capacity of the criminal justice system to catch, prosecute, convict, and dispose of a high proportion of criminal offenders. With its emphasis on a high rate of apprehension and conviction, and given limited resources, the crime control model places a premium on speed and finality. Speed is enhanced when cases can be processed informally and when procedure is uniform or standardised; finality is secured when the occasions for challenge are minimised." [41]

"Due process" on the other hand emphasises legality and justice in the criminal process. Barlow explains:-

> "The due process model sees the crime control function as subordinate to the ideals of justice. This model emphasises ensuring that the facts about the accused are subjected to formal scrutiny; ensuring that the accused is afforded an impartial hearing under adversary procedures; ensuring that coercive and stigmatising powers are not abused by those in an official position to exercise them; maintaining the presumption of innocence until guilt is legally proven; ensuring that all defendants are given equal protection under the law, including the chance to defend themselves adequately; and ensuring that suspects and convicted offenders are accorded the kind of treatment that supports their dignity and autonomy as human beings. The emphasis, then, is on justice first." [42]

This includes justice in prison administration. [43]

The idea of doing everything possible to suppress crime by aggressive police detection and arrest, vigorous and strict prosecution policies and harsh penalties is electorally appealing in any society. It may be achievable in the rich industrialised countries like America but is unlikely to be achieved in a poor country like Zambia. Secondly, a deliberate policy of crime control at the expense of due process is unappealing: already due process is not strictly observed, especially at police levels; under strict crime control the observance of basic human rights would be disregarded even further, which would be unacceptable.

As a method of managing the penal system, therefore, crime control policies (as opposed to crime prevention policies) is unsuitable to Zambia. However, there are two aspects of it which are relevant and appealing: informality and speed (Barlow) at the formal police caution level and in the new Local Courts.

2. Greater exposure to outside penal influences.

Any progressive penal or other system needs maximum exposure to outside influences. Because of the various factors mentioned in Section A above Zambia does not appear to have been sufficiently exposed to outside penal ideas, trends or practices, partly explaining the drift in penal policy. The country can expose itself to various outside sources. First, there is the United Nations and its regular Congresses for the Prevention of Crime and Treatment of Offenders. Secondly, there is the special U.N. regional body: The United Nations African Institute for the Prevention of Crime and the Treatment of Offenders (UNAFRI), established in 1986[44] at Kampala, Uganda, the first topic dealt with, in 1987, being crime in national development planning.[45] Thirdly, the Council of Europe holds criminology seminars, reports of which are very informative and useful. Some of the ideas and views expressed have been cited when dealing with the establishment of the Zambia Institute of Criminology (below). Fourthly, Commonwealth law ministers meet regularly at three-yearly intervals; this provides an opportunity for exchange of information and promotion of mutual co-operation on penal policies.

3. Reduction of convict prison populations.

A novel and specific technique in Zambia for reducing the numbers of convict prisoners is by re-conceptualising the use made of financial penalties and prisons. It will be recalled that prisons were introduced to Zambia by the colonial administration; Zambian societies had no prisons as places for punishment. Tanner notes:-

> "This trend towards a high proportion of imprisoned criminals started in colonial times, and has continued after independence. Prison sentences were always given more heavily, and for lighter offences, than in comparable British courts. Imprisonment for a month for minor tax and liquor offences has been very common....This may have originally occurred because Africans and their way of life were seen as less complex than Europeans and western society. Therefore it would not matter so much if they were imprisoned;....." [46]

At present, the payment of fines and compensation is enforced by the threat of imprisonment (Chapter 5). Under the current legal arrangements, if an accused person is fined X Kwacha the court must announce the prison term in default of payment, say, Y years. Why not reverse the sequence? Why not create a sentencing arrangement which permits a court to send an accused person to a term of imprisonment redeemable by payment of a fixed sum of money? Apparently the idea of paying one's way out of prison is an established practice in Greece. Under the caption "Freedom bought", The Times of London reports that:-

> "A Greek ferry captain, found to be carrying almost double his legal load of passengers, was allowed to buy his way out of a five-month prison term at the rate of 5,000 drachmas (£14) a day....." [47]

Great care will have to be taken about the sort of cases which would benefit from this sentencing arrangement. Because it may be difficult to predict how it might work in practice, it would be wise to start with a pilot scheme involving certain types of

offenders, like women (because of the small numbers), and certain offences which carry prison terms, like burglary and house breaking (because of their prevalence).

Two criticisms might be raised about the feasibility and desirability of the new scheme. It might be argued that the rate of fine-defaulters sent to prison is already high (see Table 12, Chapter 5), the average being one in every 49.40 fined. To this, it should be pointed out that neither the types of offences for which they were sent to prison nor the types of offenders are known. More significantly, the duration of prison stays is not known; neither annual reports nor admission registers show it. Unfortunately discharge dates of inmates, including fine defaulters, are not shown in the registers either. Unlike ordinary prisoners, persons sent to prison for non-payment of financial penalties are unheard of even though their small numbers are recorded in prison service annual reports. The writer, for example, in his capacity as a private citizen and as legal practitioner, has never met one. It would therefore appear that although the rates of fine defaulters sent to prison appears high, prison stays are very short, perhaps in days and weeks rather than months. What all this suggests is that fine defaulters pay their fines quickly, very soon after going to prison, relatives and friends no doubt making significant contributions. A sentencing policy which permits courts to impose prison terms redeemable by the payment of financial penalties is a practical possibility. Moreover, the satisfactory application of this new scheme would make the payment of compensation, urged throughout in this thesis, all the more feasible and desirable.

The second possible criticism of this new scheme might be that the degree of pressure put on friends and relatives to pay and free the offender would be unconscionable. There are few areas in penal law and practice where the choices are

easy or cost-free. Imprisonment, for example, particularly long prison terms, creates much embarrassment and financial and other inconvenience to friends and relatives and is even costly to the state (this Chapter). Providing for redeemable prison terms would be making use of the continuing strength of the African family to achieve desirable penal objectives. All this should, at least in theory, turn the family into a strong policing unit against re-offending.

4. Dealing with the anticipated rapid increases in juvenile crime.

At present juvenile crime is not regarded as a "problem" in Zambia (Chapter 8). However, a rapid increase can easily occur in the near future, perhaps in as soon as 10 years time, and Zambia should have strategies for dealing with it. In common with many other developing countries, the ratio of the youthful population continues to rise. A Zambian economic report (1987) states:-

> "demographic trends contributed to the country's continued and increasing youthful population which was concentrated in the age group 0-19 years who comprised about 59.7 percent of the total population...." [48]

At the same time the rate of urbanisation continues to grow, in 1986, standing at 46.60% as compared to 40.00% in 1980. [49] With the liberalisation of the economy, an initial consequence is greater unemployment falling largely on young people with no skills.

While primary education has expanded greatly since independence there has been no matching increase in the number of secondary school places, one of the biggest "headaches" for parents and the government, with less than one half of all primary school leavers proceeding to secondary school each year since the 1970s

following the onset of the world recession. Lack of sufficient secondary school places and the consequent reduced opportunities in life are reflected in the size of the inmate population with up to primary school education only. Table 69 shows educational attainments of convict prisoners set against their numbers. The data is from Kabwe Medium Security Prison, the only prison visited where such data is recorded. The Table covers a period of three years from 11th August, 1983 to 28th March, 1986. In Zambia government primary school education starts at 7 years, lasts seven years ending in grade seven, and secondary school starts in grade 8 (formerly form 1) going up to grade 12 (former form five) and on to college and university.

Table 69.

Educational Attainments of Prisoners at Kabwe Medium Security Prison.

Grade	No. of Prisoners	Percentage.
Illiterate	67	5.71
1	1	0.08
2	31	2.64
3	25	2.13
4	89	7.59
5	68	5.80
6	73	6.22
7	432	36.86
8 (old Form 1)	39	3.32
9	106	9.04
10	189	16.12
11	24	2.04
12	27	2.30
University Graduate	1	0.08
Total:	1,172	

Source: Admission Register.

Table 69 shows that the largest category of prisoners (432) is comprised of people with primary school education only (grade 7), the percentage being 36.86%. With few skills and clearly disadvantaged, they are more disposed to criminality and vulnerable to apprehension by the police than those with better education.

Against all these odds, the Zambian family has so far remained strong enough to contain most of them and to prevent juvenile crime from increasing rapidly; but it is bound to rise sharply when family cohesion weakens under the pressure of increasing modernisation. As long as family cohesion remains strong, juvenile crime policy should not only encourage more financial (Chapter 5) and non-custodial and semi-custodial penalties (Chapter 6), including probation, but divert them from the courts by the introduction of the formal police caution (Section C).

In the long run when juvenile crime has increased and is seen as a big problem, as has happened in the developed western countries, the pressure to incarcerate juvenile offenders will be strong. This should be resisted, keeping incarceration in approved schools and reformatory schools to a minimum. In Uganda it has been proposed that all youth custodial establishments, approved schools etc., should be closed and juveniles housed in one establishment with better living conditions. [50] In Zambia, unless it is possible strictly to segregate age groups and so prevent bullying, the present arrangement of Nakambala and Katombora should continue but the two institutions should be administered not by two government departments as at present (Chapter 8) but only one, preferably the Commission for Social Development rather than the Prisons Department, so that their regimes can be harmonised.

5. The Zambia Institute of Criminology.

In the medium and long term, to make criminal justice more relevant to the people, generate interest and debate in the country, halt the drift in penal policy-making and generally pioneer change in penal policy and practice, including sentencing and judicial training, the first step should be the establishment of an institute of criminology.

Like many other African Commonwealth countries (e.g. Nigeria, Ghana, Kenya, Tanzania, Uganda and Zimbabwe) [51] Zambia has an official Law Reform body, the Law Development Commission, [52] headed by a Director and a Council of Commissioners, "the policy-making body",[53] whose function is to:-

> "Take and keep under review all the law with a view to its systematic development and reform..." [54]

Because its field of operation embraces all the laws, the Law Development Commission cannot give the concentration needed to pioneer reform in penal law, policy or practice. Apart from the problem of chronic staff shortages, [55] none of the Commissioners has ever been a qualified criminologist. Moreover, the original intention of focusing on major social problems and suggesting reform has not been followed; instead it has been pre-occupied with reforms of "lawyers' law".[56] A model for a specialised Zambian institution may be the Cambridge Institute of Criminology established in 1959 to:-

> "raise the status of criminology and through teaching and research to extend its influence in the universities and in government." [57]

The proposed Zambia Institute of Criminology should be properly staffed and well funded and undertake research into fundamental questions and issues.

Walker examines the aims of the criminal law in a sociological context and identifies 13 issues including:-

> "(11) the enforcement of compulsory benevolence (For example, the offence of failing to send one's child to school);
> (12) the protection of social institutions such as marriage or Christian worship (for example, by prohibiting bigamy or blasphemy);" [58]

In the Zambian context, a wider question is: what aspects of customary law and practices should be incorporated into the modern Zambian penal system; for example, adjudication practices and compensation in criminal cases.

Equally wide and fundamental questions of research and planning should be addressed. Dealing with the problems of planning resource allocation in the European Union, the British delegate to a criminology colloquium, Mr Clarke, said:-

> "research [should] provide answers to such questions as:
> (a) Does the measure deter from crime others who have not directly experienced it?
> (b) Does it satisfy public notions of justice and due process?
> (c) .....
> (d) Does it serve a purpose in usefully extending the range of disposals open to the courts?
> (e) Is it economical in terms of the human and other resources to implement it?" [59]

In view of the non-availability of qualified and well-trained staff (even if funds were available), the impact of the Zambia Institute of Criminology on the direction, shape and performance of criminal justice is unlikely to be felt for several years; but a start should be made as soon as possible.

Chapter 11.

Notes.

1. M. Chanock, Law, Custom and Social Order, London, Cambridge University Press, 1985, p.125.

2. The writer was brought up in the village in the 1950s and his uncle (mother's brother) was the village headman.

3. Ibid.

4. J.M.N.Kakooza, "Some Problems in the Law Enforcement and Administration of Justice" University of East Africa Social Sciences Council Conference, Law Papers, 1968/69, Makerere Institute of Social Research, p.109.

5. From experience at the Zambian bar and as a citizen.

6. (1984) Z.R. 19 at p.21.

7. See S. Dayal, "Dynamics of Development: Legal Education and Developing Countries, Law in Zambia, M.Ndulo (Ed.), Nairobi, East African Publishing House, 1984, Chapter 4, and M.L.N.Mbao, "Some Reflections on Legal Education in Zambia", Zambia Law Journal, Vol.15, 1983, pp.1-15.

8. Interview with Dr Kabanje, the Secretary of the constitutional commission, London, 27th March, 1994.

9. Report of the Departmental Committee on Criminal Statistics, London, HMSO, Cmnd.3448, 1967, esp. p.6.

10. J.A.Osborne, Delays in the Administration of Criminal Justice, Commonwealth Secretariat, London, 1980.

11. J.P.Martin, "The Cost of Crime: Some Research Problems", U.N. International Review of Criminal Policy, No.23 of 1965, pp.57-63, and Home Office Standing Committee on Crime Prevention, Report of the Working Group on Costs of Crime, 6th Dec., 1988, p.21.

12. Africa Order in Council 1889.

13. Mvunga Commission: Summary of Submissions, Lusaka, Republic of Zambia, Oct., 1990.

14. Interview with the Secretary of the commission, Dr Kabanje, London, 11th March, 1995.

15. Land (Conversion of Titles) Act 1975, No.12 of 1975. The writer was Commissioner of Lands at the time.

16. J. Hatchard and M. Ndulo, A Case Book on Criminal Law, Lusaka, Gvt. Printer, 1983, and J.Hatchard and M.Ndulo, The Law of Evidence in Zambia, Lusaka, Multimedia Publications, 1991. The latest, but not a case book, is by the same authors, Readings in Criminal Law and Criminology, Lusaka, Multimedia Publications, 1994.

17. The Sentence of the Court, London, HMSO, 1990.

18. Local Courts (Jurisdiction Order), Cap.54.

19. Local Courts Act, Cap.54 S.17(1)(b).

20. Local Courts Rules, Cap.54, Rule 19(a).

21. Ibid., First Schedule.

22. J. A. Osborne, Delays in the Administration of Criminal Justice, London, Commonwealth Secretariat, Nov., 1980.

23. D.Moxon, "Introduction", Managing Criminal Justice, D.Moxon (Ed.), Home Office Research and Planning Unit, London HMSO, 1985, p. 1.

24. D.Steenhuis, 17th Criminological Research Conference entitled "Interaction within the Criminal Justice System", Strasbourg, 24th-27th Nov., 1986, p.21.

25. Ibid

26. Ibid., p.6.

27. H.Pullinger, The Criminal Justice Model: The Flow Model, London, Home Office Research and Planning Unit Paper No.36, 1985, p.3.

28. A. R. Rutherford, 17th Criminological Research Conference entitled "Interaction within the Criminal Justice System", Strasbourg, 24th-27th Nov., 1986, p.99.

29. M. Pullinger, Op.Cit., p.8.

30. D. Moxon, "Introduction", Managing Criminal Justice, D.Moxon (Ed.), London, HMSO, 1985, p.1.

31. D.Steenhuis, Op.Cit., p.10.

32. Ibid., p.27.

33. A. R. Rutherford, Op.Cit., p.45.

34. Cautioning by the Police, London, Home Office, June, 1984, para. 2.1.

35. Ibid., para. 2.3.

36. From personal experience as a citizen and as D.P.P.

37. Diversion from the Criminal Justice in an English Context, London, NACRO, 1975, p.1.

38. Rehabilitation of Offenders Act 1974, Cap.53.

39. Criminal Records Act 1970, Cap.40. Also see in England Living it Down, Committee Report by Justice, The Howard League for Penal Reform, The National Association for the Care and Resettlement of Offenders, chaired by Lord Gardiner, a Stevens Publication, London; and in New Zealand, Living Down a Criminal Record: Problems and Proposals, a Discussion Paper, Law Reform Division, Department of Justice, Nov., 1985.

40. H. L. Packer, The Limits of the Criminal Sanction, Stanford (Calif.) Stanford U.P., 1969, p.158.

41. H. D. Barlow, Introduction to Criminology, 5th ed., New York, Harper Collins Publishers, 1993, p.544.

42. Ibid., p.545.

43. D. Fogel, "The Justice Model for Corrections", Prisons Past and Future, J.C.Freeman (Ed.), London, Heinmann Educational, 1978, Chapter 14.

44. Report of the Seminar on Planning for Crime Prevention and Criminal Justice in the Context of National Development, UNAFRI, Addis Ababa, Ethiopia, 3-12th June,1987, p.1. Similar regional bodies are established for Asia and the Far East (UNAFEI) based in Japan, and from Latin America (ILUNUD) based in Costa Rica; see U.N. Economic and Social Council Statute of African Institute for the Prevention of Crime and Treatment of Offenders, No.641 (XXXIII), Annex, p.1.

45. Ibid.

46. R. E. S. Tanner, "Penal Practice in Africa- Some Restrictions on the Possibility of Reform", The Journal of Modern African Studies, 10, 3(1972), pp.451-452, also see A.Coyle, Governor of Brixton Prison, South London, "Prisons in Africa", West Africa, 1-7 Nov., 1977, p.12, in which he makes the same point.

47. The Times of London, 18th April, 1995, p.8.

48. Economic Report 1987, Republic of Zambia, Commission for Development Planning, Lusaka, p.52.

49. Ibid

50. E. W. Simaluwani, The Juvenile Justice System of Zambia, University of London, School of Oriental and African Studies Ph.D. Thesis, 1994, p.569.

51. Interview with the Director of the Law Development Commission, Dr Kabanje, London, 27th March, 1994.

52. The Law Development Commission and Institute of Legislative Drafting Act, 1974, No.6 of 1974.

53. Ibid., S.4(1).

54. Ibid., S.7(1).

55. Interview with the Director of the Law Development Commission, Dr Kabanje, London, 27th March, 1994.

56. Memorandum on the Function and Operation of the Law Development Commission, Lusaka, Dec., 1983, p.2.

57. L. Radzinowcz, The Cambridge Institute of Criminology, London, HMSO, 1988, p.v.

58. N. Walker, Punishment, Danger and Stigma, Oxford, Basil Blackwell, 1980, pp.2-3.

59. First Criminological Colloquium, "Methods of Evaluation and Planning in the Field of Crime", Council of Europe, Strasbourg, 28-30 Nov., 1973, p.32.

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