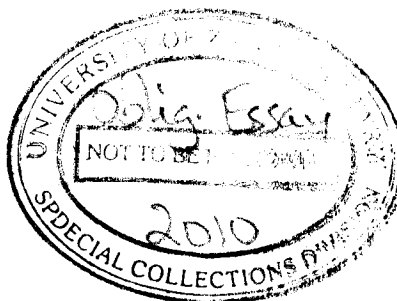


A CRITICAL ANALYSIS OF THE PRISON SYSTEM IN ZAMBIA. DOES SERVEING  
ONES SENTENCE IN A ZAMBIAN PRISON ACHIEVE ITS INTENDED PURPOSE?

BY



MWELWA MWALULA CHANDA

UNZA

2010

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**BY**

**MWELWA MWALULA CHANDA**

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**DIRECTED RESEARCH PAPER PRESENTED TO THE UNIVERSITY OF ZAMBIA LAW  
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**P.O BOX 32379**

**LUSAKA.**

**SUPERVISOR: JUDGE K. CHANDA (RTD)**

**MARCH 2010.**

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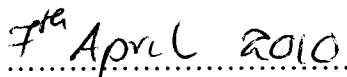
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## **ABSTRACT.**

Prisons in Zambia, have been a topic of concern from time in memorial. Due to poor economic conditions that exist in the country, there has been a continuous decrease in the facilities where prisoners are kept. Though money has been allocated to prisons in the national budget each and every year, nothing much has happened to improve the situation. Zambia has ratified the following conventions which establish international and regional human rights standards with regard to prisoners: The International Convention on the Elimination of all Forms of Discrimination against Women (1979) .The Convention on Civil and Political Rights (1984). The Convention on Economic, Social and Cultural Rights. The African Charter on Human and Peoples' Rights (1984). The First Optional Protocol to the International Covenant on Civil and Political Rights (1984).

However, a review of most Zambian prisons shows that the situation is far from what the country has ratified or become a party to because the standards of upholding human rights in prisons is almost none existent. The research was conducted through desk work the Permanent Secretary refused to authorise permission to visit the prisons or interview the secretary of prisons. However, through deskwork and interviews from people who are knowledgeable, the author was able to come up with some of the major problems that are faced in prisons.

The recommendations that have been suggested include, allowing the private sector to take active participation in the running of prisons at different levels, educating of prison wardens and police officers, taking serious measures in ensuring that the rights of prisoners are upheld, making use of the parole board that has been put in place and encouraging of presidential pardons as a way of decongesting the prisons.

## **DEDICATION**

To my late mother, HILDA KAMANGU CHANDA, who unfortunately did not have the opportunity of seeing her eldest daughter graduate. You are and always will be my number one.

To my father, SELISHO SHULA CHANDA, who I love with all my heart and who has always made me believe that the sky is not the limit. I thank you very much.

To my younger sister and brothers, KABWE, SELISHO and MULENGA CHANDA who cannot wait to see me graduate, get a job and share my salary, guys, its coming soon.

To my older brother SHULA CHANDA who has always been there for me and been my best friend at all times and enabled me to finish my LLB both emotionally and financially, I thank you and ask the Lord to continue blessing you.

## **ACKNOWLEDGEMENTS**

First and foremost, I would like to thank my God for being good to me all the time and brining me this far.

Secondly, I would also like to thank my supervisor, the RTD Judge K Chanda for supervising my work patiently, mindfully and understandingly. To him I owe a lot.

Thirdly, I also extend my heartfelt gratitude to Shupekile Njodvu Kapota and Kiesta Kapota for all the financial support they showed me during my LLB studies.

To Mwenda Hammanyati, Nakasamba Banda and Grace Kumwenda who unselfishly availed their laptops for my use in typing this essay, I cannot thank you enough because without the three of you, I would never have been able to type my chapters on time. I thank you and may God bless you.

To my friends who have been there for me through out the period I have been at the University and during my dissertation Namboo Katundu, Yiluna Kapelembi, Mwaba Mumba, Tina Sambooko, Chibuye Mbesuma Ngulube, Nancy Mulenga Mulungu, Edgar Xhosa, James Shawa and many more to numerous to mention. You guys have been amazing and may the good Lord Almighty continue blessing you.

**Table of statutes**

The Constitution ,chapter one of the laws of Zambia

The Penal Code, Cap 87 of the Laws of Zambia.

The Criminal Procedure Code

The Community Services Act of Uganda

The Correctional Services Act of South Africa.

The Criminal Justice Act of England 1948.

The Prevention of Crime Act of England 1908.

**Table of cases.**

Musonda Mofya v The People, 1(995) ZR

Patrick Mainza, George Mudenda and Lameck Kamanga v The People, (1991) ZR

RE Rupiah Banda and Steven Moyo (1993) ZR



**List of abbreviations**

BCC Bloemfontein Correctional Centre

CPC Criminal Procedure Code

CSA Correctional Services Act

DCFM Design, Construction, Finance and Management.

DCS Department of Correctional Services

HRC Human Rights Commission

ICCPR International Convention on Civil and Political Rights

NGO Non Governmental Organisations

PC Penal Code

ZR Zambia Report

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## **CHAPTER ONE**

### **UNDERSTANDING PRISONS AND THEIR IMPORTANCE.**

#### **1.1 Statement of the problem.**

Imprisonment has been used successfully in other countries as a means of deterring, rehabilitating and reforming people who are convicted of criminal activities.

The main problem that has existed in Zambia has been the failure to run these institutions to help convicted people off the streets in order to keep the general public safe. The problem has not been the institutions but the negligence on the part of the people who are in charge of and run these institutions. What is needed is to improve and build more prisons. Allowing the creation of private prisons is one of the possible solutions to helping some of the problems that are faced by government when it comes to managing and maintaining prisons. A country cannot do without a prison system, but it is not just any prison system that is needed but a good, effective prison system that will help people get reformed, rehabilitated and deterred.

#### **1.2 Rationale and Utility**

The rationale and justification of this study is to show that despite the alarming situations that occur in prisons in Zambia, prisons are still needed in each and every society and country.

Instead of condemning and blaming the Government for not doing anything to improve the prison systems in the country, the private sector has the power and capacity to run these institutions and can help in their management. Not only should the private sector and Non Governmental Organizations' condemn the Government but they can help to lobby for aid

from other countries or organizations specifically meant to help with improving the already existing prisons in the country and also build other prisons and correctional facilities for both adults and juveniles.

The social and economic problems that Zambia faces cannot be used as an excuse to allow the situation to continue deteriorating.

The people who will benefit from this study are the general public, because as long as offenders are left in the public with other people, there will be no sense of security, crime levels will increase and where people feel threatened, they are likely to take matters into their own hands, which is likely to bring about more problems and not solutions, but where people know that they have a sufficient and efficient prison system in the country, they are more secure and feel safer.

The prisoners will benefit from this study because it will look at how their lives can be improved while they are in prison and how they can continue to live after they are released from prison. It has come to this writer's knowledge that some prisoners, upon being released from prison, deliberately commit crimes in order to be sent back to prisons because they do not know how to live their lives normally after being in confinement for a long time. They do not acquire any skills that can help them while in prison and upon release, do not know what to do to earn a living, or how to fit into society, thus resorting to committing crimes in order to be sent back to prisons where they are sure to get a meal and a roof over their head.

This paper will also look at how such prisoners can be helped. It will also show that giving lighter sentences will only encourage people to commit more crimes as they will take advantage of the system. Such has been the case in South Africa.

### **1.3 Research questions**

- 1) To what extent do the prisons participate in keeping society safe?
- 2) How have other countries managed to maintain and continue expanding their prisons?
- 3) What is the effect and effectiveness of the parole board that has been introduced in Zambia?
- 4) What should be the role of the private sector in helping the Zambian Government to maintain and increase the prisons in Zambia?
- 5) To what extent should alternatives to prisons be allowed in the country and what criteria should be used to determine these alternatives?

### **1.4 Methodology**

Much of the research consists of desk work.

#### **Chapter outline.**

Chapter one focuses on the introduction of prisons and their history. It looks at the theories of punishment and the general history of punishment in Zambia during colonialism and after.

Chapter two focuses on specific problems that are faced in prisons and makes a comparative analysis with other countries which are Zimbabwe and South Africa.

Chapter three gives an insight on how private prisons developed. It also shows the stages at which the private sector may be involved in the running of private prisons. It further elaborates the advantages of private prisons as opposed to public prisons. It further analyses

some private prisons in the United States of America, Britain and South Africa. It also brings to light The Correctional Services Act of South Africa.

Chapter four brings to light some of the possible disadvantages of private prisons. It looks at their legality and their legal framework. It also highlights other alternatives to imprisonment which include fines, forfeiture and community service. It also looks at parole as a way of decongesting prisons.

Finally, chapter five concludes the paper and gives recommendations.

## **INTRODUCTION**

A life of imprisonment brings with it many challenges. This is both to the prisoner and the people who are in charge of looking after prisoners. It is bad enough being confined to a small space, but the situation is worse when one has to share that small space with fifty or more other people. When one has to be subjected to dirty environments where there is hardly any food to eat and where the meals are anything but inadequate. Unfortunately, these are the conditions that many African prisoners live under and Zambia has not been spared from this equation. Since independence, the prison conditions in Zambia have been deteriorating and will continue to do if nothing is done to improve the situation. Whether or not people who have to prison have been changed for the better is a question that brings about a lot of controversy. However, other countries have been able to come up with lasting solutions and Zambia can do the same.

## **1.5 Theories of punishment.**

Punishment has been in existence and applied to people who have committed prohibited acts for a very long time. It has been enforced in different ways by different societies. The theories of punishment developed in society and became part of the English law that emerged.

There are various different theories about the nature and purpose of punishment and these can have quite different implications for sentencing and for penal policy in general. The provisions of the English legal system reflect four main approaches to the issue of punishment based on the ideas of retribution, deterrence, incapacitation and rehabilitation.<sup>1</sup>

## **1.6 The Utilitarian and Retributive Theories**

The theories of punishment can be divided into two general philosophies: utilitarian and retributive. The utilitarian theory of punishment seeks to punish offenders to discourage, or deter, future wrongdoing. The retributive theory seeks to punish offenders because they deserve to be punished.

The utilitarian theory is "consequentialism" in nature. It recognizes that punishment has consequences for both the offender and society and holds that the total good produced by the punishment should exceed the total evil. The good and evil are linked to pleasure and pain and the task of law is to serve the good and avoid the evil that is to serve the utility.<sup>2</sup> In other words, punishment should not be unlimited. One illustration of consequentialism in punishment is the release of a prison inmate suffering from a debilitating illness. If the

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<sup>1</sup> A. Elizabeth. Oxford Dictionary of Law. (University Press 2006) 429

<sup>2</sup> W. Freidman. The Legal Theory. (UK Sweet and Maxwell Ltd 1967) 313



prisoner's death is imminent, society is not served by his continued confinement because he is no longer capable of committing crimes.

Under the utilitarian philosophy, laws that specify punishment for criminal conduct should be designed to deter future criminal conduct. Deterrence operates on a specific and a general level. General deterrence means that the punishment should prevent other people from committing criminal acts. The punishment serves as an example to the rest of society, and it puts others on notice that criminal behaviour will be punished.<sup>3</sup>

Specific deterrence means that the punishment should prevent the same person from committing crimes. Specific deterrence works in two ways. First, an offender may be put in jail or prison to physically prevent him or her from committing another crime for a specified period. Second, this incapacitation is designed to be so unpleasant that it will discourage the offender from repeating his or her criminal behaviour.<sup>4</sup>

This is where the importance of prisons comes in. Prisons serve an important role in society because they are used to keep people deterred.

### **1.7 General history on prisons.**

Prison is just one of a number of sanctions available to the courts to deal with those who commit criminal offences. Imprisonment today is the harshest sanction available, but this has not always been the case.

From the 16<sup>th</sup> and 17<sup>th</sup> century under English law, sanctions for criminal behaviour tended to be public events which were designed to shame the person and deter others; these included

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<sup>3</sup> <http://law.jrank.org/Punishment.9576>

<sup>4</sup> *ibid.*

the ducking stool, the pillory, whipping, branding and the stocks. At the time the sentence for many other offences was death.<sup>5</sup>

Prison tended to be a place where people were held before their trial or while awaiting punishment. It was very rarely used as a punishment in its own right. Men and women, boys and girls, debtors and murderers were all held together in local prisons.<sup>6</sup>

The first half of the 19<sup>th</sup> century represented a watershed in the history of state punishment. Capital punishment was now regarded as an inappropriate sanction for many crimes. The shaming sanctions, like the stocks, were regarded as outdated. By mid-century, imprisonment had replaced capital punishment for most serious offences - except for that of murder. Ideas relating to penal reform were becoming increasingly popular thanks to the work of a few energetic reformers. Many of these ideas were related to the rehabilitation of offenders.

### **1.8 Punishment during Colonialism**

When the British colonised Northern Rhodesia, they came with their laws and the idea of prisons came with them. Before the coming of the settlers into Northern Rhodesia, most indigenous African tribes enforced their customary law through their own courts. In cases involving the safety of the community for instance, in the cases of witchcraft and persistent offenders, death or exile was the usual penalty. Prisons were unheard of and cases of murder, assault and battery and property, damage was redressed as compensation and only provoked penal sanctions when their effects threatened the stability of the community as a whole.<sup>7</sup>

The British South African Company brought with it penal sanctions when it came to administer Northern Rhodesia until 1924 when the British government took over the

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<sup>5</sup> [Law.jrank.org/punishment-theories.html](http://Law.jrank.org/punishment-theories.html)

<sup>6</sup> Howard League for Penal Reform Charity case number 251926.(2006)

<sup>7</sup> W. Clifford. The Penal System in Zambia. (1960) 2

administration of the territory. A Governor was appointed and Northern Rhodesia became colonial territory with laws and sanctions modelled upon those in England.<sup>8</sup>

During the colonial period, the deterrent theory of punishment was employed. The reformatory theory was adhered to in cases of children of tender years and in some cases juveniles who were first offenders<sup>9</sup>

However it is important to understand that the types of prisons that were built in colonial days were not meant to reform but to hold offenders. What this meant was that they were built for custodial reasons and there was not much reformation that occurred. It must be alluded to that, classifications or segregation facilities did not exist at all even though the prison ordinance of 1946 provided for such facilities.<sup>10</sup>

There has been a transition in the prison system since the colonial era both in Zambia and Britain. The number of prisoners has also increased, hence the need for the growth of the prisons.

### **1.9 Further developments in Britain during the 19<sup>th</sup> century.**

The development of the prison system continues. In Britain, at the end of the 19<sup>th</sup> century there was recognition that young people should have separate prison establishments thus the borstal system was introduced in the Prevention of Crime Act 1908.<sup>11</sup> Borstal training involved a regime based on hard physical work, technical and educational instruction and a strong moral atmosphere. A young person in borstal would work through a series of grades, based on privileges, until release.<sup>12</sup>

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<sup>8</sup> J. Hara. Imprisonment as a means of rehabilitation in Zambia. Obligatory essay. (1984/85.) 2.

<sup>9</sup> C. Kumwenda. Theories of punishment and the Zambian legal order. Obligatory essay. (1977/78). 28

<sup>10</sup> J. Hara. Imprisonment as a means of rehabilitation in Zambia. Obligatory essay. (1984/85). 4

<sup>11</sup> Repealed Act in England.

<sup>12</sup> Howard League for Penal Reform. Charity case number 251926 (2006)

In 1933, the first open prison was built at New Hall Camp near Wakefield. The theory behind the open prison is summed up in the words of one penal reformer, Sir Alex Paterson: "You cannot train a man for freedom under conditions of captivity".<sup>13</sup>

The Criminal Justice Act 1948<sup>14</sup> abolished penal servitude, hard labour and flogging. It also presented a comprehensive system for the punishment and treatment of offenders. Prison was still at the centre of the system, but the institutions took many different forms including remand centres, detention centres and borstal institutions.

In April 1993 the Prison Service became an Agency of government. This new status allows for greater autonomy in operational matters, while the government retains overall policy direction.

The 1990s have also seen the introduction of prisons which are designed, financed, built and run by private companies. Supporters of privatisation argue that it will lead to cheaper, more innovative prisons, while organisations like the Howard League argue that private prisons are flawed both in principle and in practice.<sup>15</sup>

There are currently 139 prisons holding men, women and children in England and Wales. The supremacy of imprisonment as a way of dealing with offending behaviour shows no signs of abating.

Further new prisons are being planned. These like all new prisons will be part of the PFI programmes and managed by the private sector. There are currently 11 privately managed prisons; however two prisons which began life managed by the private sector have been brought back into public management.

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<sup>13</sup> Howard League for Penal Reform. Charity case number 251926 (2006)

<sup>14</sup> Repealed Act in England

<sup>15</sup> Howard League for Penal Reform Charity case number 251926 (2006)

## **Conclusion**

Having alluded to a brief history of how prisons emerged and how they developed over time, one must note that in Zambia and indeed many other African countries, the prisons have not served much of their reformatory purpose but have almost gone back to their custodial nature as in the colonial period. In Zambia, the prison Act Cap 97 governs prisons and how they are to operate. Children's correctional facilities have also been established to cater for juvenile delinquents. However, despite the measures that the government has put in place, the situations in the Zambian prisons and some of the correctional facilities still leave much to be desired. They are still overcrowded, most of the prisoners are abused and some of the children are also physically abused. What then could be the possible solutions to this problem? How are other countries overcoming this problem?

## **Chapter Two.**

### **2.0 Specific problems faced in prisons.**

#### **2.1 Introduction.**

The problem of overcrowding and deteriorating facilities in prisons is not only faced in Zambia but in many countries especially those in Africa. Zimbabwe and South Africa are examples of two of these countries. These problems have been in existence for most of these countries due to the high crime rates that have occurred since attainment of independence and abolition of colonialism. Most people in Africa live in absolute poverty and have resorted to crime as a means of survival to sustain themselves. However, this has also led to most of the people being prosecuted and detained in prisons, before, during and after trials for most of them. This has led to an increase in prison population.

#### **2.2 Zambia.**

The human Rights Commission of Zambia, is mandated *inter alia*, to visit prisons and other places of detention or related facilities with the view to assessing and inspecting conditions of persons held in such places and make recommendations to redress existing problems. In doing its work, the commission is guided by the national laws that promote the human rights of detained persons and also by the 1955 United Nations Standard Minimum Rules for the Treatment of Prisoners (SMR), the 1988 Body of Principles for the Protection of all Persons

under any Form of Detention or Imprisonment and the 1990 Basic Principles for the Treatment of Prisoners.<sup>16</sup>

According to a report by the HRC<sup>17</sup>, the problems associated with prisons in Zambia include poor state of infrastructure, congestion, poor diet, poor health care, poor sanitation and water supply and a general lack of rehabilitation facilities. Prisons have a large average population which stands at 145,000 inmates, a figure that cannot be sustained by the current prison infrastructure. The commission also found that there was inhumane and degrading treatment and torture in some prisons.

The commission undertook a tour of Southern Province and as the case with the rest of Zambia, most of the prison facilities in Southern Province were built decades ago and the increasing inmate population has outstripped their holding capacity. Though not all the prisons were found to be congested by the Human Rights Commission when it made its visit, most facilities were found to hold more than twice their intended capacity.

For instance, Choma state prison built in 1952 with a capacity of 120 inmates was found to have a population of 196 inmates. Mazabuka state prison, meant to house 65 inmates, was found to be extremely congested with 202 inmates. Namwala state prison built in 1968 had 164 inmates instead of the 120 recommended inmates.<sup>18</sup>

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<sup>16</sup> Human Rights Commission. Annual Report. (2006) 13

<sup>17</sup> Zambia's 1<sup>st</sup> National Report on The Universal Periodic Review Under the United Nations Human Rights Council. (May 2008.) 11

<sup>18</sup> Human Rights Commission, Annual Report (2006) 14

The National report also alluded to the fact that K2 billion had been set aside in the 2007 national budget and a further K26 billion was in the 2008 national budget allocated to prisons.<sup>19</sup>

However, despite these amounts of money being allocated to the prisons, the conditions in the prisons are still very bad. An interview conducted with two paralegals Mr Martin Mulenga and Mr Mwenya Malambo<sup>20</sup> from the legal resource centre, who work with prisoners constantly revealed that there was no improvement in either the infrastructure or diet or lively hood of the prisoners. The only renovation, if one can call it that, they had come across was the repainting of one cell with water paint which did not do much to better the condition of the prisoners. The two men said that the prisons were so congested with men who were such that they were parked like sardines. As the situation stands, there is no exercise meant to rehabilitate the prisoners. When an inmate enters into prison, he is asked what his trade is and sometimes, for those who are considered lucky, they are allowed to work in the carpentry section.

Another reason that can be attributed to congestion in prisons is that those who are on remand spend years in prison like those who are convicted. This leads to overcrowding because, cases take long to be heard and those who cannot afford bail also have to wait in prisons while there cases are before the court. In the case of *Patrick Mainza, George Mudenda and Lameck Kamanga v The People*<sup>21</sup>, the court held that detention pending trial is justifiable only if a prisoner is brought to trial as quickly as possible and the principle of habeas corpus requires

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<sup>19</sup> ibid 11.

<sup>20</sup> Oral interview conducted at Main office of the Legal Resource Foundation. 15<sup>th</sup> September 2009

<sup>21</sup> (1991) ZR 146



that an accused person should not be held in detention for unlimited time without trial and without a remedy.

The two paralegals also stated that they had not come across any prisoners who complained about being sexually assaulted, in the last three years that they have worked with the prisoners. They attributed this to the fact that most prisons are so congested such that it is physically impossible to actually sexually assault another inmate. However, they alluded to the fact that some prisoners were tortured while in prison by the prison warders. Others complained of being tortured by the policemen even before being sent to prison. This seems to be the trend with police officers and some case law supports this view, where the courts have had to award damages to people whose rights have been violated by the police. In the case of *Musonda Mofya v the Attorney General*<sup>22</sup> the applicant had been wrongly suspected of stealing a motor vehicle. He was arrested, detained and badly tortured by the police officers from Kabwata police station which resulted in him sustaining extensive bruising and other permanent injuries. The Supreme Court awarded him 2 million kwacha for false imprisonment and torture.

Sometimes, some of these detentions are based on political grounds and are usually without merit but vexatious or malicious. In *Re Rupiah Banda and Steven Moyo*<sup>23</sup> The dual were arrested and detained on suspicion of being party to a plot by the opposition UNIP to overthrow the government. They were alleged to have prepared and disseminated to UNIP members a document titled zero option containing details of how to overthrow the government. They petitioned the court for a declaration that the acts of the state resulting in their continuous detention without charges on trials were unlawful and were a violation of their right to personal liberty. The court released them and held that there was no regulation

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<sup>22</sup> (1995) ZR

<sup>23</sup> (1993) ZR

upon which they could be detained lawfully since parliament did not ratify any regulation for the detentions.

According to a report by the Institute Security Studies,<sup>24</sup> prisoners are sometimes beaten and treated cruelly. However, these incidents are not reported to higher authorities or where incidents are in fact reported, no action is taken. Some of these incidents are as follows,

Paul Kaputu was sentenced to 18 months' imprisonment at Milima Prison, Kasama. On the first day he was tortured by a prison officer after being accused of attempting to escape and was whipped with a shambok. The prisoner sustained a fractured knee and had to be transferred from Kasama to Lusaka for specialist treatment at the University Teaching Hospital.

In 2004 prisoner Mbita, in the company of other inmates, was taken to Mungulube open air prison. He reminded the warder that he needed treatment at Mansa hospital. The warder refused to grant Mbita permission to receive treatment and they quarreled. The warder then beat Mbita with a steel hoe handle so that he sustained a fractured backbone. The warder had to pay Mbita compensation of K1 million.

A prison warder named Moffat Chifwele from Chondwe open air prison in Ndola appeared in the Ndola magistrate's court after being charged with grievous bodily harm for beating Davies Nyirenda, a convict. Chifwele used a stone to pummel Nyirenda to the extent that the latter who was accused of attempting to escape from custody is now confined to a wheelchair. Nyirenda was released from prison by presidential pardon.

On 12 June 2007 the chairperson of the Human Rights Commission reported that prisoners were being tortured at Mufulira Prison in the Copper belt. In one case a prisoner had been beaten with a hoe handle and dirty water was poured over him. The prisons authorities denied that the incident occurred and accused the Human Rights Commission of misrepresentation.<sup>25</sup>

The above examples show the devastating situation of what transpires in some prisons in Zambia.

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<sup>24</sup> The Institute of Security Studies, Chapter 7, *The Criminal Justice System in Zambia. Enhancing the delivery of Security in Africa Monograph No 159 (April 2009)*

<sup>25</sup> *ibid*

Another aspect of concern for prisoners is their diet. The diet of the prisoners includes kapenta which is not properly cooked or beans. Sometimes the prisoners received maize, popularly known as samp, for breakfast. Despite the prisoners being involved in gardening, they were not given any vegetables with their meals. It has been discovered that, the proceeds of their farming were sold by the prison warders for their own gains.

### **2.3 Zimbabwe**

The conditions in some prisons in Zimbabwe is equally terrible, where a report by the Foreign Prisons Support services indicated that the prison conditions were far worse than those in Zambia. They indicated sexual offences, brutal treatment of prisoners including those who were ill, lack of food for days and some of those with contagious diseases were put in the same cells as those who were not sick.

Sexual offences were also reported to be very high in the prisons. A former inmate, a Mr Kedah Adams who served at Mazowe prison for house breaking, gave a statement, in which he stated that,

“Once you are in there, you cannot resist it. (Sexual activity) It is part of entertainment and we used to enjoy it a lot. First offenders and the youth are more vulnerable to old timers.”

In 2005, there was a spread of meningitis and at least 12 prisoners died. The ministry of Health was forced to vaccinate all the prisoners at Chikurumbi Maximum prison, Harare central and Bundura prisons, where the disease had gone out of hand.<sup>26</sup>

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<sup>26</sup> Foreign Prisons Support Services. May Report (2006).

With the conditions in such a poor state, it was incumbent upon government to put up measures to safeguard the prisoners, but, when confronted with the poor conditions, the Attorney General for Zimbabwe's response was that,

“A prison by its nature is not supposed to be a cosy place. It should not in a way bear resemblance of a hotel other wise, we will be like boarding schools. Those places should at least teach offenders that committing a crime can burn their fingers”<sup>27</sup>

## **2.4 South Africa**

The conditions in the South African prisons can be said to be similar to the Zambian and Zimbabwean prisons. The average prison in South Africa is forced to accommodate up to twice its intended capacity. In the larger prisons, many of the cells intended for 18 are crowded with 50 to 60 inmates. Often, there are not enough beds or blankets and new arrivals must soon learn to align themselves with powerful gang members in order to obtain the basic necessities.<sup>28</sup>

The food provided is also substandard. Usually, a prisoner in South Africa is given breakfast of mealie pap and then dinner and lunch are combined into an afternoon meal at 15:00 hours. This meal usually consists of ground fish meal and several slices of bread. Meat, fruit, and vegetables are scarce, and the food that does arrive at the prison is often smuggled and stolen so that it can be sold to the highest bidder.

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<sup>27</sup> Foreign Prisons Support Services. May Report (2006).

<sup>28</sup> Private prisons in South Africa. Issues, challenges and opportunities. Published in Monograph No 64,(September 2001)

Most prisoners are poor and so the medium of exchange becomes sexual favours. This results in victimisation, if not outright assaults, between prisoners and the situation is only made worse by increasing overcrowding and decreasing availability of basic provisions.<sup>29</sup>

## **2.5 Possible Solutions.**

In Zambia, as a way to help reduce the prison population, in particular in relation to judicial reforms, it was reported that the Criminal Code Amendment Act provides for community service as one of the penalties that could be meted out on convicted persons. However, in practice, community service has been difficult to implement due to the lack of a clearly defined supervisory mechanism for convicts sentenced to community service. By the year 2004, the Prisons amendment Act No. 16 of 2004, provided for parole for prisoners if they satisfied certain conditions that were put in place.<sup>30</sup>

In South Africa, The Department of Correctional Services is aware of the problems and challenges faced by the prison system. The department has recognized that the rehabilitation of offenders should be a primary function, but also remains aware that this goal is difficult, if not impossible, to attain given the current situation of overcrowding. The department has adopted several strategies to attempt to deal with overcrowding, including the construction of more prisons. However, the government is also aware that it is impossible to build itself out of the overcrowding problem.

In addition to providing more and better facilities, the Department of Correctional Services is exploring options such as electronic monitoring and early release of those sentenced for petty

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<sup>29</sup> Private prisons in South Africa. Issues, challenges and opportunities. Published in Monograph No 64,(September 2001)

<sup>30</sup> Zambia's 1<sup>st</sup> National Report on the Universal Periodic Review under the United Nations Human Rights Council. (May 2008) 25.

offences.<sup>31</sup>

Given the enormous demand for public services, most notably health and education, it is understandable that the DCS is not likely to receive the necessary infusion of capital to reform and refurbish its operations and facilities. For these reasons, the DCS began to explore the option of involving the private sector.<sup>32</sup>

In 1997, then Minister of Correctional Services, Dr. Siphosizwe Mzimela visited the United States and the United Kingdom in order to learn more about their prison systems. After his trip, Mzimela concluded that wherever the private sector got involved, they have delivered a better service and have done it at a less cost to the tax payer.<sup>33</sup>

In order to overcome these problems, the South African government has gone so far as to introduce legislation that provides for private prisons and this is provided for under legislation where terms and conditions of creating and operating private prisons are laid out.

## **Conclusion**

The problems that have been faced in prisons are common in most countries. Prisoners are regarded as lesser people and hence most prison warders and even policemen feel little remorse when it comes to the mistreatment of these convicted people.

They are used to farm and yet, they are subjected to very poor diets. Sometimes, they are used to dig graves or clear very large areas, where, they are physically abused should they fail

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<sup>31</sup> Private prisons in South Africa. Issue, challenges and opportunities. Published in Monograph No 64,( September 2001)

<sup>32</sup> *ibid*

<sup>33</sup> *ibid*

to perform these duties. When they are released from prisons, they are usually rejected by their communities and some end up committing crimes in order to go back to prison.

In countries like Zimbabwe, where the economy has declined, the conditions are worse and call for immediate intervention if lives are to be saved. The introduction of the parole system, which allows for prisoners to be released early if certain conditions are met, private prisons, where the private sector is allowed to create and run prison facilities but not to participate in the administration of the prisons could be some of the possible solutions to improving the lives of prisoners. It has been observed that private prisons have helped to better the living conditions of prisoners. There have been more reports of rehabilitation of most offenders. Others have benefited from educational programmes that are put in place and run effectively.

What are these private prisons and how do they operate? What makes them better or more effective than public prisons? What is the parole system and how does it operate?

## **Chapter Three**

### **3.0 Private prisons.**

#### **3.1 Introduction.**

Prison Privatization is a broadly defined term for the privatization of prisons and prison-related services. In some cases, this may include transferring control of existing public sector prisons to private companies. However, more commonly private companies are contracted to design, build, and operate new prisons and jails by federal, state, and local governments. In still other instances, private companies may be contracted to provide things such as medical care, counselling, food services, and maintenance within publicly run prisons and jails.<sup>34</sup>

#### **3.2 Involvement of the private sector**

The main aim of allowing the private sector to have an active participation in providing prisons and detention facilities is to enable the government or states of particular countries to put up proper infrastructure in which to detain people at a much quicker rate than it would if left to build these infrastructures on its own. This is because most of the countries especially those in least developed and developing countries do not have economies that can allow for the immediate improvement of prisons. Most of the prisons found in these countries are prisons that were created in the colonial era and most of them are in need in renovations and expansions. This has led to overcrowding in prisons and prisoners living in inhumane conditions. This usually amounts to a violation of human rights. Most of the countries in the world today, including Zambia, have adopted human rights treaties and ratified some conventions like The International Convention on Civil and Political Rights ( ICCPR ).

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<sup>34</sup> Z .Mathew. Prison privatisation. Past and Present (2003) 4



This covenant guarantees a large number of now well known individual civil and political rights. The Covenant details the right to life, the prohibition of torture, the prohibition of arbitrary arrest or detention, the prohibition of imprisonment for failure to fulfill a contractual obligation, the right to a fair trial and the prohibition of retroactive criminal measures... apart from defining and circumscribing a variety of rights and freedoms, the ICCPR, imposes an absolute and immediate obligation on each state party to respect and ensure these rights to all individuals within its territory and subject to its jurisdiction and to adopt necessary legislative and other measures.<sup>35</sup>

Simply put, what this means is that every state has the obligation of ensuring that the civil and political rights of its citizens are protected and this includes prisoners.

The rapid growth in the jail and prison populations in recent years has generated tremendous opportunities for entrepreneurs to build, own and operate prisons.<sup>36</sup> What the private sector provides is the infrastructure and maintenance of the prisons and not the conditions under which the prisoners are taken to prison. However, though these prisons are built, owned and operated by the private sector, the government still has an active role to play in order to safeguard the interests of the prisoners.

### **3.03 Types of prison privatisation**

Prison privatisation comes in a number of different types and stages. Just as privatisation in general can mean a number of things, prison privatisation is used to refer to varying types and degrees of private sector involvement. In any type of prison privatisation, the general format

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<sup>35</sup> A. Carlson. Introduction to Human Rights and International Humanitarian Law. (UNZA Press 2004) 36

<sup>36</sup> D. Scott. Private prisons in the United States.. An assessment of the growth, performance, custody standards and training requirements. (1999) 1.

is that the state pays for the costs of incarceration and the private sector provides various services.

### **3.4 Contracting.**

The most limited form of privatisation is contracting, where a private entity is hired to perform specific services. The prison system can use contracts with the private sector to provide ancillary services such as catering, health care, laundry and janitorial services. It is not uncommon for many government departments to hire private companies to provide these non-core functions. Private companies can also be hired to provide correctional services, such as drug rehabilitation and job training. Sometimes these services are provided by NGO's.<sup>37</sup>

### **3.5 Management by the private sector**

The next level of privatisation is contracting private entities to provide management services, such as staffing, administration, and security. Just as a bank might hire a security company to guard its assets, the prison service hires a company to staff, train, and manage the personnel who work at the prison. Operational privatisation refers to a private company being contracted to run an entire prison, including both core and non core functions. The government still makes the policy for the prison, and is expected to monitor the performance of the contractor, but the day to day business of running the prison is left to the private company.<sup>38</sup>

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<sup>37</sup> Private prisons in South Africa. Issues, challenges and opportunities Published in Monograph No 64,( September 2001)

<sup>38</sup> D. Scott. Private prisons in the United States.. An assessment of the growth, performance, custody standards and training requirements. (1999) 3

### **3.6 Designing and building by the private sector**

Private companies can also be hired to design and build a prison. Building a prison is a huge undertaking, and the government will normally contract out a great portion of the construction to private companies. Alternatively, the government can simply hire a prison construction company which will design the prison, manage the subcontractors, and completely oversee the entire project. The advantages of this type of privatisation are that private contractors have much less red tape and bureaucracy to deal with when hiring subcontractors, making procurement simpler, faster, easier, and cheaper. The state is only involved with negotiating one fee with the primary contractor, and the rest of the responsibility and coordination is left to the private companies involved.<sup>39</sup>

### **3.7 Project finance by the private sector.**

In addition to the construction and design of a new prison, private companies can be involved in the financing of the project. Rather than borrow money to build a new prison, the private company which builds the prison pays for it and then rents the facility to the government. It is often helpful for cash-strapped governments to pay annual rent amounts rather than find the capital to purchase a facility. The state does not own the prison but only pays for its use.<sup>40</sup>

There is no such thing as a fully privatised prison. Unlike an airline, the prison service cannot be entirely turned over to the private sector. The provision of law and order is a basic service provided by government, and cannot be entirely relinquished to the private sector. The prison

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<sup>39</sup> Private prisons in South Africa .Issues, challenges and opportunities Published in Monograph No 64,( September 2001)

<sup>40</sup> ibid

is part of the justice system, which is how the government protects the rule of law.<sup>41</sup>

### **3.8 Design, construction, finance and management by the private sector.**

The fullest extent of private sector involvement in the prison system is when the state contracts out the design, construction, finance, and management (DCFM). Proponents of the DCFM prison often use the term 'contract managed prisons' because fully privatised prisons do not exist; the ultimate responsibility for prisons still rests with the state.<sup>42</sup>

The main difference between private prisons and public prisons is that, in private prisons, the facilities are better. Infrastructure is improved, there are better diets provided and meals are frequent, more beds and blankets, better recreation facilities and much more are given to the prisoners.

### **3.9 Advantages of private prisons.**

Some of the priorities that are to be found in private prisons include, keeping prisoners in custody. Maintaining order, control, discipline, and providing a safe environment. To provide decent conditions and meet prisoner needs. To provide a structured day programme which the prisoners are to follow. To prepare prisoners for their return to the community, deliver prison services and community involvement.<sup>43</sup>

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<sup>41</sup> D. Scott. Private prisons in the United States.. An assessment of the growth, performance, custody standards and training requirements. (1999) 3

<sup>42</sup> *ibid*

<sup>43</sup> Private prisons in South Africa Issues, challenges and opportunities Published in Monograph No 64,(September 2001)

One advantage that the private prisons have is that they are able to employ full time qualified people to help them carry out their tasks and do not have to rely on well wishers. For example, they are able to employ councilors who can work with the prisoners. They are in a position to provide better medical care by employing full time doctors and nurses to work with the inmates, unlike in public prisons where reliance is on public hospitals. Another advantage of private prisons is that they can employ people who have a better understanding and respect of human rights. For example, at the Bloemfontein Correctional Center, (BCC) some of the services that have been put in place and are to be provided are,

- a) Psychological/mental well being: services to be provided include counseling and support groups.
- b) Social services: the services include social workers who have been trained in therapy skills.
- c) Religious care: the program has already recognized the need for 31 different denominations and will link and organise with other religious leaders in the community.
- d) Education: the services to be provided at BCC make it truly exceptional, as it is registered as an adult education centre with a private adult training services provider. High school courses will be offered through to metric, and other courses offered will range from basic skills to financial management and entrepreneurial training. The vocational skills programs are all geared towards a goal of encouraging self-sufficiency so that upon release the former prisoner will

not need to search for a job but will have the knowledge and ability to start his own enterprise.<sup>44</sup>

These facilities are meant to prepare the inmates to blend into the community after release from prisons. Most prisoners do not serve life sentences hence the need to improve their lives and prepare them for society. In this way, they can find jobs in society, those who are illiterate learn how to read whilst in prison, others are able to finish their studies while others are able to acquire new skills.

### **3. 10 Private Prisons in the United States of America.**

Surprisingly, private prisons are nothing new in United States history. In the mid 1800s, penny pinching state legislatures awarded contracts to private entrepreneurs to operate and manage Louisiana's first state prison, New York's Auburn and Sing Sing penitentiaries, and others. These institutions became models for entire sections of the nation where privatized prisons were the norm later in the century. These prisons were supposed to turn a profit for the state, or at least pay for themselves. Typically, privatization was limited: The state leased or contracted convict labour to private companies.<sup>45</sup>

But as the twentieth century stumbles to an end, the hard lessons of a hundred years ago have been drowned out by the clamour of free market ideologues. Again, privatization is encroaching ever further on what had been state responsibilities and prison systems are the target of private interests. The shift to privatization coalesced in the mid-1980s when three trends converged: The ideological imperatives of the free market; the huge increase in the

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<sup>44</sup> Private prisons in South Africa. Issues , challenges and opportunities Published in Monograph No 64,( September 2001)

<sup>45</sup> S. Phill. Private Prisons, profits of crime? Issue of Covert Action Quarterly .(1993) 1

number of prisoners; and the concomitant increase in imprisonment costs. In the giddy atmosphere of the Reagan years, the argument for the superiority of free enterprise resonated profoundly. Only the fire departments seemed safe, as everything from municipal garbage services to Third World state enterprises went on sale. Proponents of privatized prisons put forward a simple case: The private sector can do it cheaper and more efficiently. This assortment of entrepreneurs, free market ideologues, cash-strapped public officials, and academics promised design and management innovations without reducing costs or sacrificing "quality of service." In any case, they noted correctly, public sector corrections systems are in a state of chronic failure by any measure, and no other politically or economically feasible solution is on the table.<sup>46</sup>

### **3.11 Analysis of private prisons in the United States of America.**

In the year 1999, a research was carried out in which, comparisons were made between private prisons and public prisons and the results showed that the private prisons operated within the confinement of the contracts that they had entered into with their respective states.

The responses of the survey showed that the private sector's standards and policies were typically a reflection of the jurisdiction governing the contract. The public sector maintained responsibility for routine and intensive formal reviews of custody practices but often did these reviews in conjunction with the private sector. The training and custody sections of the survey demonstrate that the training and custody policies and standards of the privately-operated prisons were a reflection of the same standards and policies of the public jurisdiction responsible for those contracts.<sup>47</sup>

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<sup>46</sup> S. Phill. Private Prisons, profits of crime? Issue of Covert Action Quarterly .(1993) 2

<sup>47</sup> D. Scott, Private prisons in the United States. An assessment of the growth, performance, custody standards and training requirements.( 1999) 7

Modern prison privatization is vastly different from the systems employed by past generations. Now state and local governments pay strictly regulated private companies to house and care for prisoners humanely in privately run prisons, and provide high quality services within public prisons. These companies provide much needed relief for overcrowded public prison systems and are often an attractive alternative to building new public prisons.

For example, one company advertises 20 to 30% cost savings on new prison construction. Additionally, projects are completed in less time one to one and a half years compared with three to five years for a comparable government project. Finally, with fixed price contracts it's the contractor, not the client, who loses out if a construction project goes over budget.

However, the savings don't stop when construction is completed. The same company advertises ten to twenty percent cost savings on facility management. Meanwhile, the growth of private prisons has the indirect effect of holding down the rising costs of running public prisons through competition. Finally, unlike public prisons, private prisons pay both sales and property taxes. It is not uncommon for a privately owned correctional facility to be the largest single source of local property tax payments.<sup>48</sup>

The impetus for the use of private prisons in the United States was the promise of lower costs and the need for additional capacity. In Australia and the United Kingdom, the motivation to privatise was driven by these factors but was also propelled by prison reforms. In fact, some have proposed that private prisons are places for experimentation, a test-bed for new approaches to programming, management, and staffing. The competition that arises from the

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<sup>48</sup> Z. Matthew, Prison privatisation, Past and Present.( 2003) 8



contrasting approaches between the public and private sectors, according to this proposition, will promote innovation and cross fertilization of ideas and practices.<sup>49</sup>

### **3.12 Similarities of private and public prisons.**

While there is emphasis on the difference between prison systems and private companies that operate prisons, there are still some commonalities between them. Both must be capable of hiring and training staff to meet the demands of an increasing population. Both must be capable of activating new facilities with a relatively immature workforce. Both must make prudent decisions about using limited funds to best meet the needs of the inmate population, while protecting staff and citizens. To the extent there is a corporate approach, or perhaps even to the extent there is a corporate ethos in meeting these requirements, private companies can be said to be corporate prison systems.<sup>50</sup>

It can be said that in most developed countries, privatization of prisons has had a huge positive impact on the well being of prisoners.

### **3.13 The Situation in South Africa.**

To help alleviate overcrowding in prisons, which was due to the prison services increasingly being used to house prisoners awaiting trial and those serving their sentences, the department of correctional services signed contracts in the year 2000 for two prisons to be constructed, financed and managed by a consortium of companies.<sup>51</sup> The first prison opened in

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<sup>49</sup> D. Scott, Private prisons in the United States. An assessment of the growth, performance, custody standards and training requirements.( 1999) 9

<sup>50</sup> *ibid* 3.

<sup>51</sup> A price worth paying? The cost of South African Private prisons. Published in Ned bank Isis crime index volume 5 ( number 6. November and December, 2001.)

Bloemfontein in July 2001. The second was scheduled to open in Louis Trichardt in early 2002.

In order to avoid any lacunas in the agreements between the government and the contractors of the private prisons, the Government of South Africa came up with an Act, which outlined the extent to which the private sector would be involved in the running of the private prisons. This Act is known as The Correctional Services Act number 111 of 1998.

### **3.14 The Correctional Services Act of 1998<sup>52</sup>**

The Correctional Services Act of 1998 (CSA 1998) contained a section which specifically authorized the government to contract out prison services to the private sector. Chapter XIV, "Joint Venture Prisons", Section 103(1) provides that:

"The Minister may, subject to any law governing the award of contracts by the State, with the concurrence of the Minister of Finance and the Minister of Public Works, enter into a contract with any party to design, construct, finance and operate any prison or part of a prison established or to be established..."

The CSA 1998 goes on to list very specific conditions and requirements for private prison contracts. The legislation states that:

- a) Contracts cannot exceed 25 years.
- b) The contractor must "contribute to maintaining and protecting a just, peaceful, and safe society".

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<sup>52</sup> Act 111 of 1998.

- c) The contractor is responsible for enforcing the sentences of the courts, detaining prisoners in safe custody, ensuring the prisoners' human dignity, and promoting the human development of all prisoners.
- d) The contractor is explicitly prohibited from taking disciplinary action against prisoners or from involvement in determining the computation of sentences, deciding at which prison any prisoner will be detained, deciding on the placement or release of a prisoner, or grant temporary leave.<sup>53</sup>

The latter safeguards are important to include in legislation, and not just in a prison contract, because this adds an authority and independence which assists in enforcement and monitoring. Also, the CSA 1998 does a great deal to ensure that the responsibility for punishment rests with the state and that only the services are delegated to the contractor.

One interesting component of the CSA 1998 is that it explicitly forbids private contractors from becoming "involved in the implementation of community corrections." Community-based corrections refers to an effort to build or rebuild social ties and a connection to the community in order to prevent future violations. This usually includes obtaining employment or education and assisting the offender with adapting to the routine functioning of society.<sup>54</sup>

With the Act in place, the private sector know what their specific duties are in relation to the private prisons. One advantage of the twenty five years as the maximum time is that it gives the government an opportunity to change contractors if they are not pleased with the work. However, this does not suffice to say that the government cannot change contractors should a breach occur. As in the normal terms of a contract, both parties will have obligations to fulfil and should a fundamental breach occur, the party in breach can be made to pay accordingly.

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<sup>53</sup> Correctional Service Act number 111 of 1998.

<sup>54</sup> Private prisons in South Africa. Issues, challenges and opportunities Published in Monograph No 64, (September 2001)

advantages in having a private prison than a public one. This is because there are better facilities provided. The government still plays an active role in overseeing that the prisoners serve their sentences and the government is put at an advantage where they can either choose to buy the prison at a latter stage on much flexible conditions or to continue renting it. Private prisons have also been seen to safeguard and protect human rights of prisoners better than public prisons. Seeing that other countries have been able to come up with the involvement of the private sector to protect the best interest of prisoners, the question lies in whether Zambia is ready to also embrace the involvement of the private sector to improve and safeguard the *interests of its prisoners.*

## **Conclusion.**

Having looked at what private prisons are and how they operate, one sees that there are more

## **Chapter four**

### **4.0 Introduction**

Having looked at private prisons and the advantages that they have over public run prisons, it is important to take a look at some of the arguments that have been put across that are not in favour of private prisons. Some critics have argued that private prisons are not as good and as effective as they are portrayed to be.

### **4.1 Criticisms of private prisons.**

Critics of the private prison industry have come forward in recent years with wide range of concerns over prison privatization. In the United States of America, some of the concerns that have been put across include,

i) One of the main concerns relating to prison privatization is that private corrections companies will cut costs by reducing the quality of programs and services in private prisons and public prisons which rely on some privatized services. However, most states place legal requirements in their contracts that corrections management firms must offer programs and services that are at least equivalent to those provided by government agencies, as well as offer cost savings to taxpayers. By doing so, these states set standards ensuring a high quality product. Breach of these standards can result in contractual sanctions, including termination.

ii) Additionally, private corrections companies, themselves, have an economic interest in providing quality services. For example, providing high quality food to prisoners is important because it helps prevent costly prison riots. Meanwhile, offering competitive pay to employees helps limit turnover and the cost of training new

employees. Finally, private prison companies are often judged by the quality of their offender rehabilitation programs. These programs are often a major selling point with clients and not something a private prison company can afford to skimp on.

iii) Another concern relating to prison privatization is the question of how private prisons will be monitored to ensure compliance with contract terms. Most private prison contracts provide for an on-site public sector monitor who has complete and unrestricted access, at all times, to all facility employees, offenders, records, and information. Unfortunately, this type of oversight can be very expensive, an expense not included in the cost of the contract.<sup>55</sup>

Many organizations have called for a moratorium on construction of private prisons, or for their outright abolition. Several religious denominations have also joined the call, including Catholic, Episcopal, Methodist, United Church of Christ and Presbyterian. Proponents of privately run prisons contend that cost-savings and efficiency of operation place private prisons at an advantage over public prisons and support the argument for privatization, but some research casts doubt on the validity of these arguments, as evidence has shown that private prisons are neither demonstrably more cost-effective, nor more efficient than public prisons. An evaluation of 24 different studies on cost-effectiveness revealed that, at best, results of the question are inconclusive and, at worst, there is no difference in cost-effectiveness.<sup>56</sup>

A report from the British Broadcasting, also revealed that there were some private run prisons in Britain that had also come under criticism and had to be closed down.

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<sup>55</sup> Z. Mathew, Prison Privatisation. Past and Present. (2003) 15

<sup>56</sup> J Maahs. & Pratt, T. Are Private Prisons More Cost-Effective Than Public Prisons? A Meta-Analysis of Evaluation Research Studies. (1999)3

Not all private prisons in the United Kingdom have been successful. Ashfield prison opened in 1999 and was the first private prison in the UK to house young offenders. The prison was soon mired in controversy after repeated riots and reports of poor management. Conditions at the prison became so bad in 2003 that the Youth Justice Board withdrew prisoners from Ashfield, and threatened to recommend that the prison should be taken over by the public sector. Conditions at the prison improved however and the jail remained privately managed. Buckley Hall Prison was originally opened as a privately managed prison in 1994, but after a competitive tendering process in 2000, management of the prison was transferred to Her Majesty's Prison Service. Buckley Hall is therefore (so far) the only private prison in the UK to be permanently taken into the public sector<sup>57</sup>

#### **4.2 Legality of private prisons**

One of the criticisms that have been put across include the argument that the delegation of the duty to take care of detained people to the private sector might not be legal, however, some arguments have been put across supporting the notion of the legality of private prisons.

One of these arguments is that, unless a government has absolutely no persuasive statutory authority for entering into private prison contracts, courts will be extremely reluctant to invalidate privatization arrangements strictly on delegation grounds. More generally, privatization is usually viewed merely as a delegation of certain administrative functions related to incarceration. Accordingly, only delegated rulemaking and adjudication functions that directly purport to exercise a government power are deemed to require special constitutional due process safeguards and to be subject to heightened judicial scrutiny.<sup>58</sup>

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<sup>57</sup> <http://news.bbc.co.uk>

<sup>58</sup> M Douglas. Private Prisons in the USA. An assessment of current practice. (Cambridge Massachusetts 1998)<sup>57</sup>



Can prisoners' rights including those established under the Constitution, be adequately protected in a private correctional context? Does the delegation of day-to-day responsibility for facility management to a private contractor yield lower potential liability exposure for government correctional authorities? And does correctional privatization result in a lower litigation price tag for the government? The answer appears to be a qualified "yes" to the first and second questions and a "maybe" to the third. As to the matter of safeguarding inmate rights, it is generally accepted that private prisons will be treated as "state actors" for purposes of civil rights suits, so that all relevant constitutional requirements will apply with equal force to private as well as public correctional facilities. Moreover, private prison employees will not be covered by the "qualified immunity" that shields from liability public correctional authorities who reasonably believe that their discretionary actions are lawful.<sup>93</sup> Finally, private prisons and officials will not be protected by other governmental immunities that may otherwise limit the monetary damages available to inmates suing over prison conditions.<sup>59</sup>

#### **4.3 Legal framework on alternatives to imprisonment.**

The United Nations Congress on the Prevention of Crime and Treatment of Offenders 1980 resolved that, "Member states should examine their legislation with a view to removing obstacles to utilising alternatives to prison sentences that could be implemented without due risk to public safety, encourage wider community participation in the implementation of alternatives to imprisonment and make efforts to inform the public of the advantages of alternatives to imprisonment and to encourage the public to acceptance of these measures"<sup>60</sup>.

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<sup>59</sup> M Douglas, *Private Prisons In the United States of America. An Assessment of Current Practice* (Cambridge Massachusetts 1998)

<sup>60</sup> United Nations Standard Minimum Rules for Non Custodial Measures. The Tokyo Rules Adopted by General Assembly Resolution 45/110 of 14 December 1990.

Some of the alternatives to imprisonment may include community service, suspended sentences or fines. The importance of having alternatives to prisons cannot be over emphasised especially in developing countries and third world countries. This is because of the poor conditions that are found in these prisons. It has been suggested that in order to help lessen these poor conditions certain people who commit less serious offences can be made to offer community services in place of serving sentences.

It has been discovered that once a person is sent to prison, be it for a crime they have committed or while awaiting trial, prisoners are treated the same way. This includes mistreatment, degrading inhumane treatment, abuse and in some instances, torture. The terms cruel and inhumane treatment describe the same type of treatment and there is no meaningful distinction between the two. Furthermore, there appears to be a fine line between what constitutes torture and cruel and inhumane treatment.<sup>61</sup>

Norwick<sup>62</sup> suggests that these latter two terms,

“ Include all forms of imposition of severe suffering that are unable to be qualified as torture for lack of one of its essential elements... they also cover those practices imposing suffering that does not reach the necessary intensity.”

Degrading treatment on the other hand arises where the victim has been subjected to particularly humiliating treatment. It seems to require the lowest threshold of suffering. The humiliation itself or the affront of the victim's dignity is the primary consideration regardless of whether this is in the eyes of others or of the victim himself or herself and thus may have

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<sup>61</sup> S Joseph, K Mitchell. A Handbook on The Individual Complaints. Procedures of the United Nations Treaty Bodies, seeking Remedies for torture victims. (2006) OMCT, Geneva, Switzerland.

<sup>62</sup> ibid 160.

both an objective or subjective element. Treatment which might seem to be degrading in one circumstance may not be seen to be so where the circumstances are different.<sup>63</sup>

This has been found to be the case in most Zambian prisons where most prisoners have reported being subjected to degrading, cruel and inhumane treatment. This was confirmed in a report by the Human Rights Commission after having paid several visits to prisons in the country.

For example, the cells in the Livingstone Central Police Stations and posts lacked basic amenities such as toilets and running water. Inmates had to make do with buckets or other containers to answer the call of nature. Even where a toilet was available, there was no privacy for the inmates to relieve themselves. The sewer system in practically all the places visited were broken, except for a few like Namwala and Itzhi Tezhi which boasted running water, functional toilets and shower facilities... Except for one or two places, most facilities visited had no separate holding cells for female and juvenile suspects. These people were either kept in an office or outside in a yard before being taken to the nearest remand prison or bigger police station... Some suspects complained of torture and other forms of ill-treatment. In fact, the Commission witnessed firsthand a case of torture at Livingstone Central Police Station. Two police officers ushered in four suspects straight from the torture chambers with fresh wounds even as the commission entourage was interviewing some inmates.<sup>64</sup>

This is regardless of the fact that Zambia acceded to the Convention against torture and other cruel, inhumane or degrading treatment or punishment (CAT) in 1998. Article 15 of the Constitution of Zambia prohibits torture and other inhumane and degrading treatment or punishment in absolute terms. The Constitutional prohibition of torture is not yet supported

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<sup>63</sup> S. Joseph, A Handbook on individual Complaints, 161

<sup>64</sup> Human Rights Commission, (2006 ) Annual report. 18

by the creation of a specific offence of torture under the country's criminal law. However some provisions in the Penal Code can, and have been, used to punish acts that can cause harm on a person. In this regard, assault occasioning actual bodily harm, grievous harm, attempting to injure by explosive substances, maliciously administering poison with intent to harm and common assault are punishable in criminal legislation.<sup>65</sup>

The treatment that prisoners and detained people get is in direct contradiction of the Standard Minimum Rules for the Treatment of Prisoners which was adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders.<sup>66</sup>

Section 8. The different categories of prisoners shall be kept in separate institutions or parts of institutions taking account of their sex, age, criminal record, the legal reason for their detention and the necessities of their treatment. Thus,

8 a) Men and women shall so far as possible be detained in separate institutions, in an institution which receives both men and women the whole of the premises allocated to women shall be entirely separate.

b) Untried prisoners shall be kept separate from convicted prisoners

d) Young prisoners shall be kept separate from adults.

It can be argued that although these standards that are set out cannot be met by all countries all the time due to the differences in the social economic and geographical conditions of the world, the government of the republic of Zambia cannot totally rely on this excuse because

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<sup>65</sup> Zambia's first National Report on the Universal Periodic Review under the United Nations Human Rights Council. (2008) 11

<sup>66</sup> First United National Congress on the Prevention of Offenders held at Geneva in 1955 and approved by the Economic and Social Council by its resolutions 663 (XXIV) of 31 July 1957 and 2076 (LXII) of May 1977

every year billions of kwacha are allocated to the prisons in the country but the results are not seen. This might be because of mismanagement of the allocated money or poor administration. For instance, in the year 2007 K2 billion kwacha was allocated to prisons. A further K26 billion kwacha was allocated to prisons in 2008. However, an attempt to get an account of how this money was spent by the Ministry of Home Affairs proved to be futile and no reason was given for this.

An extract from the 2010 National budget shows that yet more money has been allocated to maintain law and order in the republic of Zambia.

**131.** “Mr. Speaker, maintaining law and order through a professional police service and a strong legal system is critical to attracting investment, thereby creating job opportunities for our people. In 2010, I have increased the allocation towards the maintenance of public order and safety by 26.3 percent to K771.5 billion. Of this amount, K37.7 billion will go toward the construction of courthouses in all nine provinces, while K36.7 billion has been provided for the construction of police houses and expansion of infrastructure at Mwembeshi Prison. Furthermore, resources have been provided for the continued recruitment of police officers in 2010.”<sup>67</sup>

#### **4.4 Other Alternatives to imprisonment.**

These can be in the form of fines or forfeiture. However, in other circumstances community service or parole may be granted where a convict has served some of his or her sentence and is found to be eligible for either. This can help a lot when it comes to decongesting prisons.

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<sup>67</sup> 2010 Budget address by Dr Situmbeko Musokotwane, MP Honourable Minister of Finance and National Planning. Delivered to the National Assembly on Friday 9 October 2009.

## 4.5 Fines

A fine is defined as, a sum of money that an offender is ordered to pay on conviction.<sup>68</sup> Among the most reported cases that occur in Zambia, civil cases comprise of at least half these cases. Most of the time, offenders or the guilty party need not go to prison when found guilty of breach of contract. However, in Zambia, some people are detained simply for breach of contract and this contributes to the increase in the number of detained people. In certain instances, fines may be imposed for minor offences.

In countries like Mozambique, there has been advocacy for the introduction of alternatives to imprisonment. For example, Mozambican Justice Minister Benvinda Levy urged judges to reduce the number of people in the country's jails by sentencing people convicted of minor offences to penalties other than imprisonment. Speaking after a ceremony in which 31 newly trained judges and prosecutors were sworn into office, Levy pointed out that, for a variety of crimes, the Mozambican penal code allows courts to hand down punishments that are alternatives to jail sentences - but for years judges have neglected this possibility. Where the offence carries a maximum sentence of two years imprisonment, the judge has the discretion to convert the jail sentence into a fine, or can suspend the sentence. But judges tend not to do this. "Many people are going to prison to serve short sentences", said Levy. "About 40 per cent of our prison population are serving sentences of up to six months". If alternative punishments were used, the number of people in jail would fall, thus reducing the severe problem of overcrowding in Mozambican prisons.<sup>69</sup>

In Zambia, the Penal Code also provides that the following punishments may be inflicted by a Court

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<sup>68</sup> Martin and Law, Oxford dictionary of Law. Oxford University Press, (2006) 224

<sup>69</sup> All Africa.com. Justice Minister Urges Alternatives to Prisons. (April 5<sup>th</sup> 2009)

## Section 24 b) imprisonment or an order for community service

- d) fine
- e) forfeiture
- f) payment of compensation

Section 28 b) in the case of an offence punishable with a fine or a term of imprisonment, the imposition of a fine or a term of imprisonment shall be a matter for discretion of the court.<sup>70</sup>

### 4.6 Forfeiture

Forfeiture is the loss of property or a right as a consequence of an offence or of the breach of an undertaking. There are four main situations in which the courts may order forfeiture of property. Where property is illegally possessed, it is subject to forfeiture. Any property relating to an offence under the Drug Trafficking Offences Act or property that is legally possessed but used to commit a crime.<sup>71</sup>

### 4.7 Community service

What is a community service order? Community Service Order is a non-custodial punishment by which after conviction, the court with the consent of the offender makes an order for the offender to serve the community rather than undergo imprisonment. Community Service (CS) order, as a court sentence is to operate as an alternative to custodial (imprisonment) sentence. When serving community service order, the offender does the work personally. This means

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<sup>70</sup> The Penal Code, Chapter 87 of the Laws of Zambia.

<sup>71</sup> Martin and Law, Oxford Dictionary of Law. 229

that the offender (Convict) cannot delegate the work to his servant nor can he hire someone else to serve the punishment on his or her behalf.<sup>72</sup>

Before issuing out a CS Order, the convicting Court will consider the pre-sentence report, which will have been compiled by the investigating officer on Police Form 103. This form is usually attached in the Police File and contains very useful information about the offender, which assists the Court to determine whether the offender is a suitable candidate for CS Order, or not. Before passing CS Order, the Court carefully considers the circumstances, character and antecedent of the offender and asks him or her whether he or she consents to the order (S.3 (2) CS Act 2000)<sup>73</sup>. The Court is further obliged to explain to the offender in the language he or she understands, the effect of the order and that if he or she fails in any respect to comply with it, he or she may be liable to be sentenced to such term of imprisonment as the court could have imposed in respect of the offence. The Community Service Order shall be performed for a period of not more than Six months, and the offender shall not work for more than eight hours a day (S.4 (i) CS Act). Community Service Order can only be issued by the court in respect to a minor offence i.e. an offence for which the court may pass a sentence of not more than 2 years imprisonment.<sup>74</sup>

The Criminal Procedure Code also states that a Court may make an order for the community service where in the case of an adult, the offence is a misdemeanour and is punishable with imprisonment.<sup>75</sup>

Mr Charles Mulenga, the executive director of Amnesty International Zambia was quoted as having said that as socio-economic indicators point to poverty, crime levels inevitably rises. This in some way led to the congestion of prisons countrywide, a scenario that has raised a lot of concerns from interested parties as this was considered an infringement on human rights. Among other

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<sup>72</sup> V.Okwanga. Director of Public Prosecution Uganda. Community Services.(2002- 2007)

<sup>73</sup> Community Service Act of Uganda of 2000

<sup>74</sup> V.Okwanga. Director of Public Prosecution Uganda. Community Services.(2002- 2007)

<sup>75</sup> The Criminal Procedure Code, Chapter 88 of the Laws of Zambia.



reasons for the prison fill ups, have been prolonged or dragging cases in the courts of law while in some instances, lack of transport to court houses has been cited as contributing to the delays that subsequently lead to congested cells. "According to international prescriptions for prisoners, there is supposed to be adequate space for them but in Zambia, there was a time when prisons were congested, more than space could take. "I am glad that Government is taking steps to decongest our prisons. As Amnesty, we commend Government for the move. 2007 saw a lot of prisons decongested," he said. Mr Mulenga also noted that the de-congestion process and expediting of court cases should be encouraged, as it remains the only other option in meeting set international prison accommodating standards. He said, "We hope the decongestion process goes on because certain cases don't warrant imprisonment but they can provide community services."<sup>76</sup>

Some of the prisoners have come to realise and suggest that community service for lesser offences is a solution to decongesting the prisons.

According to the majority of the inmates they had no problem speaking to their lawyers but courts delayed their cases on appeal or even at the trial stage. Some inmates felt that inmates who committed minor offences such as shoplifting should be sentenced to community service or non-custodial sentences. In their view this would help decongest prisons.<sup>77</sup>

In Zimbabwe, where a community service scheme was developed on this basis in the early 1990s, the cost of supervising an offender per month was estimated to be about one third of that of keeping a person in prison and undoubtedly provided an avenue for social reintegration of the offender.<sup>78</sup>

#### **4.8 Parole.**

What is parole? Put simply, it is the supervised release of a prisoner who has served less than the maximum sentence. In the U.S., the date of possible parole is laid out upon sentencing for the crime. The judge will, for instance, levy a sentence of 10 to 15 years. The prisoner would

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<sup>76</sup> Times of Zambia, 22 January 2008.

<sup>77</sup> Institute for Security Studies, Chapter 7, Monograph number 159, April 2009.

<sup>78</sup> United Nations office on drugs and crime. Custodial and Non Custodial Measures . Alternatives to incarceration Criminal Justice Assessment Tool Kit.(2006) 2

be eligible for parole at the 10-year mark. When considered for parole, a prisoner must satisfy certain conditions. These include being a model prisoner, agreeing to the conditions set out by the parole board, and making a convincing case for release. Parole is rarely granted automatically. A prisoner must go before the parole board and make his or her case for release. This hearing is also open to testimony from the prisoner's friends, as well as to the victims of the crime, who may wish to argue against early release.<sup>79</sup>

Parole eligibility is established by statute and regulation. Those convicted as violent offenders, must serve 85 percent of their sentence before becoming eligible for parole. Many convicted of being a persistent felony offender are not eligible for parole until they have serve at least ten years of their sentence. Convicted sex offenders do not become eligible for parole until they have completed a sex offender treatment program administered by the Department of Corrections. All other incarcerated felons become eligible for parole after serving 20 percent of their sentence.<sup>80</sup>

It is important to understand that parole is not the conclusion of a prisoner's sentence. The prisoner is still considered as such, even after being granted parole. Certain conditions must be met, such as meeting regularly with a parole officer. During these meetings, the parolee must demonstrate that he is meeting the requirements of his release. This may include finding gainful employment, staying off drugs, and any number of other conditions particular to the case. If they are found to be in violation of their parole terms, they may be sent back to prison to serve out the remainder of their sentence.<sup>81</sup>

Parole can function as an obstacle, which can prevent those who have been labelled a deviant from returning to a normal life. Sometimes parole, due to the system or the former inmate,

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<sup>79</sup> Parole system, hoe does it work?

<sup>80</sup> Kentucky Parole Board, commonwealth of Kentucky.(2009)

<sup>81</sup> Parole system, how does it work?

provides a revolving door that criminals tend to go through within the criminal justice system. However, parole can correct some sentence inequities by allowing prisoners to be released after serving a reasonable length of time. Just like any other man-made system, the parole system within the criminal justice correctional system is not perfect, some inmates are released and continue to commit crimes, while others are released and completely change their lifestyle. The parole board has a huge responsibility in figuring out what inmate should be released and which one shouldn't is very difficult. There should always be a constant focus on improving the system and looking at what works and what doesn't work.<sup>82</sup>

## **Conclusion**

Having looked at the alternatives that are available to the courts, one can say that not every person who is sent to prison must be sent there. This is because, as the situation is in Zambia most of the prisons are already holding more than their intended capacity. However, if people with minor offences can be subjected to fines, community service and forfeiture, this can greatly help to reduce the number of prisoners and detained people. In other countries like Zimbabwe and Mozambique, other measures other than imprisonment are employed and used in order to reduce the number of prisoners and to decongest the prisons. It has also been found that the supervision of people who carry out community service is cheaper than putting them in prison. This in the long run may be looked at as a way of saving on costs and this money saved may be channelled to improving the conditions of those who need to serve longer terms in prisons.

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<sup>82</sup> S. Laura. Does the parole system work? (2006)

## **Chapter five**

### **5.0 Conclusion and Recommendations.**

#### **5.1 introduction**

The study of prisons is somewhat enormous and complex. A study such as this cannot claim to be conclusive but at best it can only make a modest contribution to a better understanding of the issues that are concerned with the subject. Many have written on the subject and others are yet to continue adding their opinions and research to the subject.

#### **5.2 Conclusion and recommendations**

Although prisons started more of a colonial imposition than out of choice, it has by now become apparent that they are now an important part of society and of great importance . there is need to maintain them and ensure that they are not a ground of disease growth, inhumane and degrading treatment, torture or human rights violations in general. They are meant to rehabilitate and deter offenders who more often than not, end up being a part of society. Prisons are supposed to be places where people can be changed for the better and made to be able to get back into society and live normal lives with others

The Prison Service currently faces challenges ranging from overcrowded prison accommodation, shortages of manpower and a lack of advanced training (especially in management and human rights) to insufficient food, health facilities, transport for prisoners and in some cases staff clothing and security for prison buildings. Facilities for women and juveniles are also inadequate.

1. At the moment in Zambia, a lot of money is allocated to prisons every year in the national budget but the problem is that what it is used for or how it is used in relation to prisons is not seen. Prisoners continue to have poor diets and live in filthy cells with tattered mattresses.

The recommendation on how to solve this problem is to have accountability on the part of the authorities in charge of these prisons. There is not much accountability that goes on and the ministry of home affairs does not willingly release the information relating to how these billions of kwacha are used. The ministry must be able to release periodic reports of what they do with the money that they receive, in order to show how it is used.

2. The situation on the ground is that government is fully in control of running prisons. As it can be clearly seen, they are failing and the condition is not getting any better. The recommendation is that they allow the private sector to slowly and gradually start playing an active role in the running of prisons. The need for a gradual allowance of participation is to monitor and observe how the private sector can progressively help. This can be done by government following in South Africa's footsteps and coming up with an Act that will govern the involvement and conditions under which the private sector may be involved. The Act must state and specify the limits of the private sector's involvement.

3. The prison Act that is in use is too old and it is highly doubted that it is enforced or used at all to run the prisons. The recommendation is that there is need to amend the Prisons Act that is currently in use. Some of the provisions are too old and irrelevant and cannot be applied to the prisoners. One of the main objectives of the penitentiary should be reformation and rehabilitation of the offender and so far as this goes, the Prison Act should be amended where necessary to bring it in line with the preceding Act.

4 Currently there has been some sensitisation of prison warders and police officers to respect the rights of prisoners, but, this has not stopped them from abusing, torturing and using corporal punishment on the offenders and suspects. The recommendation is that police officers and prison warders who violate any of the prisoners' rights must be dealt with severely and made examples of in order to show the seriousness of their offences. Disciplinary action must be exercised on them. There must also be continued sensitisation of police officers and wardens on their duties and powers and privileges and limitations.

5 There has been an argument put across that community service is not easy to apply in Zambia because of lack of adequate supervisors. This cannot be an excuse not to allow people to perform community service in place of being sent to prison. The recommendation is that the government must put across measures that will ensure that there is sufficient supervision for those who are granted community service. Community service and other non custodial sentences must be awarded more especially for petty offences.

6. In August 2007, the former President Levey Manawasa pardoned 823 prisoners. This pardon reflected well on the promise President Manawasa made when touring the Mwembeshi prison farms, namely that he would take revolutionary measures to deal with the problem of overcrowding in prisons.<sup>83</sup> It is recommended that the new President Mr Rhupia Banda, also use his powers under article 59 of the Constitution to pardon deserving prisoners as a way of decongesting prisons.

7. Since it has been reported that most of the prisoners farming is sold and the money from these proceeds is used or taken by prison warders, it is recommended that the agricultural endeavours of the Prison Service be encouraged and financially supported by government and donors in order to grow more maize, vegetables and other crops for inmates. Over the years

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<sup>83</sup> Institute for Security Studies, Chapter 7, Monograph number 159, April 2009.

the Prison Service has been able to increase its yields in agricultural production. Even higher yields would enable the service to provide three meals a day with good nutritional value, which would be to the benefit of particularly HIV infected prisoners.

The prison ranches and fish ponds could be used to improve the protein intake of prisoners. The right of prisoners to adequate food and a balanced diet would thus be greatly enhanced. If the Prison Service was able to feed itself it would save the state about K12 billion that is currently spent on prisoners' rations.<sup>84</sup>

However, though there may be different views as to how prisoners are to be treated, some of which include letting the prisoners live in filthy and deteriorating conditions, what must be known by each and every sane adult human being is that, we are all potential offenders and there lies a very thin line between being on the outside and being locked up in prison. Some have unfortunately have had to find this out in a very hard way. Prominent figures have had to spend time in prisons or detention facilities to appreciate what happens in these institutions. People like, the first republican president Dr Kenneth Kaunda, Mr Richard Sakala, Dr Dean Mu'Ngomba, the current republican president, Mr Rhupia Bwezani Banda, the former vice president Brigadier general Godfrey Miyanda and a lot more. Although prisons are not meant to be holiday resort areas, nor are they expected to be places of comfort, they still hold people who have rights vested in them by the virtue of being born human and these rights are entrenched in the Constitution of Zambia and Human Rights Declarations and Charters of the world. These rights are to be respected to the highest degree and upheld regardless of whether one has their freedom or it is taken away.

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<sup>84</sup> Institute for Security Studies, Chapter 7, Monograph number 159, April 2009.

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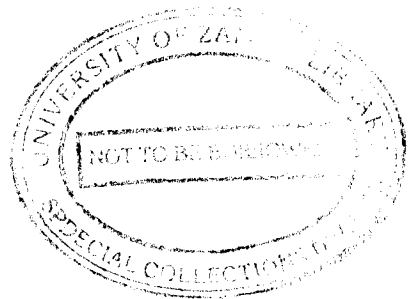
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